



Law Council
OF AUSTRALIA

Workplace Gender Equality Amendment (Setting Gender Equality Targets) Bill 2024

Senate Finance and Public Administration Legislation Committee

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About the Law Council of Australia

The Law Council of Australia represents the legal profession at the national level; speaks on behalf of its Constituent Bodies on federal, national, and international issues; promotes and defends the rule of law; and promotes the administration of justice, access to justice and general improvement of the law.

The Law Council advises governments, courts, and federal agencies on ways in which the law and the justice system can be improved for the benefit of the community. The Law Council also represents the Australian legal profession overseas, and maintains close relationships with legal professional bodies throughout the world. The Law Council was established in 1933, and represents its Constituent Bodies: 16 Australian State and Territory law societies and bar associations, and Law Firms Australia. The Law Council's Constituent Bodies are:

- Australian Capital Territory Bar Association
- Law Society of the Australian Capital Territory
- New South Wales Bar Association
- Law Society of New South Wales
- Northern Territory Bar Association
- Law Society Northern Territory
- Bar Association of Queensland
- Queensland Law Society
- South Australian Bar Association
- Law Society of South Australia
- Tasmanian Bar
- Law Society of Tasmania
- The Victorian Bar Incorporated
- Law Institute of Victoria
- Western Australian Bar Association
- Law Society of Western Australia
- Law Firms Australia

Through this representation, the Law Council acts on behalf of more than 104,000 Australian lawyers.

The Law Council is governed by a Board of 23 Directors: one from each of the Constituent Bodies, and six elected Executive members. The Directors meet quarterly to set objectives, policy, and priorities for the Law Council. Between Directors' meetings, responsibility for the policies and governance of the Law Council is exercised by the Executive members, led by the President who normally serves a one-year term. The Board of Directors elects the Executive members.

The members of the Law Council Executive for 2024 are:

- Mr Greg McIntyre SC, President
- Ms Juliana Warner, President-elect
- Ms Tania Wolff, Treasurer
- Ms Elizabeth Carroll, Executive Member
- Ms Elizabeth Shearer, Executive Member
- Mr Lachlan Molesworth, Executive Member

The Chief Executive Officer of the Law Council is Dr James Popple. The Secretariat serves the Law Council nationally and is based in Canberra.

The Law Council's website is www.lawcouncil.au.

Acknowledgements

The Law Council would like to thank its Equal Opportunity Committee, as well as Law Firms Australia, the Law Society of South Australia, and the Law Society of New South Wales, for their input to this submission.

Executive summary

1. The Law Council is broadly supportive of the Workplace Gender Equality Amendment (Setting Gender Equality Targets) Bill 2024 (the **2024 Bill**), given that it is designed to implement a recommendation of the review of the *Workplace Gender Equality Act 2012* (Cth) by the Department of Prime Minister and Cabinet in November 2021 (**PM&C Review**).¹
2. We acknowledge that targets are accepted as an effective measure to combat gender discrimination, and that only 34 per cent of employers with more than 500 employees have adopted three or more relevant targets (as would be required under this Bill) voluntarily.²
3. In terms of impact on legal practitioners and their clients, we are pleased to see that no new reporting requirements are being imposed, and that a more achievable threshold of ‘demonstrating improvement’ against targets—rather than simply meeting targets—is proposed.³
4. However, the Law Council and its Constituent Bodies do have some recommendations for change that would clarify some aspects of the 2024 Bill and facilitate employers’ compliance in practice, as set out below.
5. We appreciate the detailed impact analysis attached to the Explanatory Memorandum for this Bill, and the fact that this analysis reflects an appropriate level of consultation with relevant employers. Nevertheless, given the timing of this inquiry, the Law Council has been unable to obtain detailed input from all of its relevant Constituent Bodies and advisory committees. As a consequence, many of the recommendations in this submission should be considered to reflect the preliminary views of the profession, subject to change.
6. As requiring businesses to commit to gender targets would be a world-first measure, the Law Council recommends that the operation of the proposed regime be reviewed after a suitable period—ideally, two years after commencement.

¹ Law Council, *Review of the Workplace Gender Equality Act 2012* (Submission, 24 November 2021): <<https://lawcouncil.au/resources/submissions/review-of-the-workplace-gender-equality-act-2012>>.

² WGEA/Office for Women briefing on the 2024 Bill, 5 December 2024.

³ Workplace Gender Equality Amendment (Setting Gender Equality Targets) Bill 2024, proposed s 17C(b).

Commentary

7. The Law Council thanks the Senate Finance and Public Administration Legislation Committee for the opportunity to comment on the 2024 Bill.

Background

The Workplace Gender Equality Act

8. The *Workplace Gender Equality Act 2012* (Cth) (**WGE Act**), in summary, aims to promote gender equality in the workforce (including equal pay for equal work).⁴ It also establishes a regime overseen by the Workplace Gender Equality Agency (**WGEA**) to advise and assist employers to comply with the reporting requirements of the WGE Act.⁵

2021 Review of the WGE Act

9. In November 2021, the Law Council made a submission to the PM&C Review (**2021 Submission**). In its 2021 submission, the Law Council stated that:
- reforms to the WGE Act should be consistent with Australia's international human rights obligations;
 - the national gender pay gap remains persistent and measures to improve it are generally welcome;
 - we defer to employers and employees on 'what works' in specific workplaces and are mindful of compliance costs;
 - the work of the WGEA in encouraging reporting and gathering data is valuable; and
 - we support an evidence-based approach to compliance (which has been an ongoing issue).
10. The PM&C Review Report was published in December 2021.⁶ It concluded that gender inequality in Australian workplaces remained persistent; that further action was needed to encourage employers to meet targets, and that the 'regulatory burden' of WGEA reporting needed to be reduced. It made 10 recommendations to address these issues.⁷

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

11. In March 2023, the Law Council made a submission to this Committee on the provisions of the Workplace Gender Equality Amendment (Closing the Gender Pay Gap) Bill 2023 (**2023 Bill**).⁸

⁴ *Workplace Gender Equality Act 2012* (Cth), s 2A.

⁵ *Ibid*, ss 8A and 10.

⁶ 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>.

⁷ *Ibid*, 4-11.

⁸ Law Council, *Submission to Senate Finance & Public Administration Committee on the provisions of the Workplace Gender Equality Amendment (Closing the Gender Pay Gap) Bill 2023*: <<https://lawcouncil.au/resources/submissions/workplace-gender-equality-amendment-closing-the-gender-pay-gap-bill-2023>>.

12. The 2023 Bill implemented (at least in part) Recommendations 2, 3, 5 and 9 of the PM&C Review.⁹ Briefly stated, it:
 - required the WGEA to publish aggregate information on employers to demonstrate progress (or lack thereof);
 - provided for 'Industry Benchmark Reports' against which employers would be assessed;
 - aligned the WGE Act better with the *Sex Discrimination Act 1984* (Cth); and
 - renamed the role of WGEA Director to WGEA CEO.
13. The Law Council observed in its submission on the 2023 Bill that the 2023 Bill did not address other recommendations of the PM&C Review, including Recommendation 7.2 on the collection of data about non-binary people, or Recommendation 8 on requiring compliance with WGEA reporting requirements as a precondition of eligibility for Commonwealth grants and procurement rounds.¹⁰
14. We are pleased to see that the 2024 Bill currently under consideration would effectively implement Recommendation 8 of the PM&C Review.¹¹

The 2024 Setting Gender Equality Targets Bill

15. One of the PM&C Review Report's recommendations was:

Recommendation 3.1. Bridge the 'action gap' to strengthen the existing minimum standards ... to:

*a. add a new minimum standard to require relevant employers with 500 or more employees to commit to, achieve and report to WGEA on measurable genuine targets against three of the six gender equality indicators.*¹²

16. Recommendation 3.1 specifically mentioned amending the Workplace Gender Equality (Minimum Standards) Instrument 2014. However, the 2024 Bill would support this recommendation by underpinning a proposed 'gender equality targets scheme' in the Minimum Standards Instrument.¹³
17. The 2024 Bill provides, under proposed sections 17A and 17C, that large employers (with 500 or more employees)¹⁴ will effectively have three years (or two years after an initial report) to show progress towards a relevant target and will be deemed non-compliant if they cannot show such progress. Unless they have a 'reasonable excuse,' they may be publicly named as non-compliant by the WGEA and be refused a 'certificate of compliance' which could affect their chances of securing Government procurement contracts.¹⁵

⁹ Ibid, [11].

¹⁰ Ibid, [34]-[39].

¹¹ 2024 Bill, *Explanatory Memorandum*, [26].

¹² Department of Prime Minister and Cabinet, *Review of the Workplace Gender Equality Act 2012* (Report, December 2021), 13.

¹³ 2024 Bill, *Explanatory Memorandum*, [2].

¹⁴ As defined in proposed s 4A; see also section 6 of the Workplace Gender Equality (Gender Equality Standards) Instrument 2023 (GES Instrument).

¹⁵ Ibid, [22]-[25].

18. The new target setting provisions in the 2024 Bill appear to support the following statements made in the WGEA's *Scorecard 2023–24*:

*Gendered patterns of remuneration at a national level and differences in workforce composition and remuneration between industries are two key drivers fuelling the size of Australia's gender pay gap ... Evidence shows the actions employers are taking, particularly in relation to target setting, will drive improved results in future years.*¹⁶

19. We note further that additional reporting requirements would not be imposed by the 2024 Bill; targets would be linked to data that is already part of the annual workplace gender equality reporting requirements.¹⁷

20. The Explanatory Memorandum for the 2024 Bill notes:¹⁸

The gender equality targets scheme would be the first of its kind globally. Australia would pioneer the path to accelerate gender equality through a targets scheme that seeks to motivate action and embed systemic cultural change in large employers.

21. The Law Council generally welcomes initiatives that lead the way in promoting and fulfilling Australia's international human rights obligations, including non-discrimination obligations.

22. However, we are also mindful of compliance burdens on members and their clients and, in our view, there are some issues with discrete aspects of the 2024 Bill that require clarification and/or further investigation.

Definition of 'Designated Relevant Employer'

23. There has been some discussion amongst practitioners about whether the threshold in proposed section 4A (of 500 employees) remains appropriate. However, in the time available, we have not been able to form a view on this.

24. The Law Society of South Australia has also raised the question of whether, given the recent 'same job, same pay' amendments to the Fair Work regime made by the *Fair Work Legislation Amendment (Closing Loopholes) Act 2023* (Cth),¹⁹ labour hire employees should be counted in the thresholds in section 4 and proposed section 4A.

25. We also note that such an inclusion would require clarity on the expression in proposed paragraph 4(3)(a) as to what 'employs a person' means. Specifically, the 2024 Bill would need to be amended to make clear whether 'employs' includes 'engages contractors, consultants and persons who are not 'employees' in the usual sense of a direct employment relationship'.

¹⁶ Workplace Gender Equality Agency, 'WGEA Gender Equality Scorecard 2023-24' (22 November 2024): <<https://www.wgea.gov.au/publications/australias-gender-equality-scorecard>>.

¹⁷ 2024 Bill, *Explanatory Memorandum*, [23]. Also, WGEA/Office for Women briefing on the 2024 Bill, 5 December 2024.

¹⁸ 2024 Bill, *Explanatory Memorandum*, [3].

¹⁹ See *Fair Work Legislation Amendment (Closing Loopholes) Act 2023* (Cth), Sch1, Part 6.

Recommendation

- **The Committee should consider whether labour hire employees should be included in the relevant definitions in section 4 and proposed section 4A, given that such employees are to be treated equally under the *Fair Work Act 2009* (Cth).**

New Ministerial Powers to Set Targets

26. Proposed section 17B would give the Minister the power (by means of legislative instrument) to set targets in relation to specific gender equality indicators and specified target cycles.
27. The Minister could also (in consultation with the WGEA) specify rules for the selection of targets by 'designated relevant employers'. The WGEA has described this function as allowing employers to 'select from a target menu'.²⁰
28. The Law Council reserves the right to comment further on this power once targets have been set, since they will be key to the operation of the proposed scheme.

Non-compliance and 'Reasonable Excuse'

29. The Explanatory Memorandum states:²¹

It is noted that there is no review mechanism provided for employers under the WGE legislative scheme. Under the current scheme, a review mechanism has not been necessary because employers are not publicly named if they provide a reasonable excuse for the non-compliance and are also given 28 days to make representations to the Agency if it proposes to name them.

Under the new targets scheme, it is not proposed to establish a review mechanism. The primary reason is that whilst the Act does not currently contain an internal review mechanism it does provide for procedural fairness in the opportunity to provide a reasonable excuse for non-compliance and the opportunity to make representations as to why naming should not occur, in the event a reasonable excuse is not accepted. To be compliant under the targets scheme, employers are, at a minimum, required to demonstrate improvement against their baseline data. They are not required to fully meet their selected target to be found compliant. Given the generous scope for employers to demonstrate compliance and provide a reasonable excuse, if relevant, the establishment of a review mechanism is not proportional with the outcomes of a finding of non-compliance.

30. Generally, the Law Council prefers to see safeguards such as review mechanisms implemented in proportion to penalties applicable under a regime such as that established by the WGE Act. The consequences of public naming as non-compliant could have significant adverse effects on a business so named. On a more positive note, it is good that there is provision in the WGE Act for procedural fairness to be accorded to reporting entities.

²⁰ WGEA/Office for Women briefing on the 2024 Bill, 5 December 2024.

²¹ Ibid, [28]-[29].

Recommendation

- **A review mechanism should be provided for employers deemed non-compliant by the WGEA as an additional safeguard before public naming.**

31. The Law Society of NSW observes that there is no definition of ‘reasonable excuse’ in the 2024 Bill, and this is likely to create uncertainty among employers as to what will constitute a ‘reasonable excuse’ for this purpose. We suggest, to give effect to the aims of the legislation, that the 2024 Bill should incorporate specific guidance for employers, through a non-exhaustive list of factors that may be considered by the WGEA in forming a view on whether an excuse offered by an employer is reasonable and should be accepted. Further, if the 2024 Bill passes, we suggest that the WGEA publish additional guidance in the form of practical examples of what could be acceptable for these purposes.

Recommendation

- **A definition of ‘reasonable excuse’, including a non-exhaustive list of factors to be considered by the WGEA in evaluating such excuses, should be included in the 2024 Bill to guide employers in complying with the new target regime.**

Review after Suitable Period

32. Given that—as acknowledged in the Explanatory Memorandum—the gender equality targets scheme would be the first of its kind globally,²² there may be unanticipated consequences of its implementation.
33. It would be desirable to review the operation of this scheme independently within the first few years of its commencement so that its effectiveness can be assessed against its impact—a kind of ‘cost-benefit analysis’ to determine whether the scheme remains appropriate.

Recommendation

- **The 2024 Bill should be amended to include a requirement for the proposed regime to be reviewed after a suitable period—ideally, two years after commencement.**

²² 2024 Bill, Explanatory Memorandum, [3].