



AUSTRALIAN HUMAN RIGHTS COMMISSION

SEX DISCRIMINATION ACT 1984 (Cth), Section 44(2)

NOTICE OF DECISION ON APPLICATION FOR TEMPORARY EXEMPTION:  
AUSTRALIAN BUREAU OF STATISTICS

By this instrument, under section 44(2) of the Sex Discrimination Act 1984 (Cth) (SDA), the Australian Human Rights Commission (Commission) grants a temporary exemption to the Australian Bureau of Statistics (ABS), from the operation of ss 14 and 26 of the SDA, in the terms set out below.

1 THE APPLICATION

- 1.1 In 2019, the ABS applied to the Commission for an exemption from the SDA to use only female interviewers to conduct face-to-face interviews with female respondents as part of its 2020 Personal Safety Survey (PSS) (the 2019 Application). The ABS had planned to conduct its fourth iteration of the PSS in 2020.
- 1.2 On 9 November 2019, the Commission granted the ABS an exemption from the operation of ss 14 and 26 of the SDA on certain conditions until 31 December 2020 (the 2020 Exemption).
- 1.3 On 8 September 2020, the ABS made a further application to the Commission seeking a further exemption to use only female interviewers to conduct face-to-face interviews with female respondents as part of its PSS for the period from 31 December 2020 until June 2022 (Current Application).
- 1.4 In its Current Application, the ABS states that due to the COVID-19 pandemic outbreak, enumeration of the 2020 PSS was postponed after two weeks in the field. Due to uncertainties regarding the current national environment, the ABS is not able to fix a resumption date for the survey, however, current strategies are planning for some time in 2021, at the earliest.
- 1.5 The original reasons why the ABS is seeking an exemption remain unchanged, and the ABS relies upon the 2019 Application.
- 1.6 The use by the ABS of only female interviewers for interviews with female respondents may be inconsistent with provisions of the SDA, including ss 14(1) and (2) and 26(1).
- 1.7 Sections 14(1) and (2) and 26(1) of the SDA provide:

## **Section 14 Discrimination in employment or superannuation**

- (1) It is unlawful for an employer to discriminate against a person on the ground of the person's sex ... :
  - (a) in the arrangements made for the purpose of determining who should be offered employment;
  - (b) in determining who should be offered employment; or
  - (c) in the terms or conditions on which employment is offered.
- (2) It is unlawful for an employer to discriminate against an employee on the ground of the employee's sex ... :
  - ...
  - (b) by denying the employee access, or limiting the employee's access, to opportunities for promotion, transfer or training, or to any other benefits associated with employment; or
  - ...
  - (d) by subjecting the employee to any other detriment.

## **Section 26 Administration of Commonwealth laws and programs**

- (1) It is unlawful for a person who performs any function or exercises any power under a Commonwealth law or for the purposes of a Commonwealth program, or has any other responsibility for the administration of a Commonwealth law or the conduct of a Commonwealth program, to discriminate against another person, on the ground of the other person's sex, marital status, pregnancy or potential pregnancy, in the performance of that function, the exercise of that power or the fulfilment of that responsibility.

## **2 DECISION OF THE COMMISSION**

- 2.1 The Commission has decided to grant the ABS a further exemption to ss 14 and 26 of the SDA on specified conditions from 31 December 2020 until 30 June 2022.

## **3 CONSIDERATION AND REASONS**

- 3.1 In reaching its decision, the Commission considered the following:
  - 3.1.1 the Current Application by the ABS,
  - 3.1.2 the 2019 Application by the ABS, and
  - 3.1.3 submissions from other interested parties.
- 3.2 In reaching its decision, the Commission had regard to the terms and objects of the SDA and the Commission Guidelines: Temporary Exemptions under the Sex Discrimination Act (2009).
- 3.3 The history of the application and the reasons for the Commission's decision are set out below.

## **4 THE COMMISSION'S PROCESS**

- 4.1 On 8 September 2020, the ABS submitted the Current Application to the Commission seeking a further exemption to the SDA to use only female interviewers to conduct face-to-face interviews with female respondents as part of its PSS. The ABS rely on the same grounds set out in the 2019 Application and asks that the further exemption be granted subject to the same conditions under which the 2020 Exemption was granted. The ABS is seeking the further exemption from 31 December 2020 until June 2022.
- 4.2 Following receipt of the Current Application, the Commission notified the State and Territory Anti-Discrimination Boards and Equal Opportunity Commissions of the exemption application and invited their comment. The Equal Opportunity Commission of South Australia had no objection to the application. No further responses were received.
- 4.3 The Commission also prepared a consultation notice seeking the views of ABS employees. This was posted by the ABS on behalf of the Commission to a database that interviewers frequently log onto. No responses were received.
- 4.4 Additionally, the Commission provided a copy of the application to the Community and Public Sector Union to seek its views. No response was received.
- 4.5 Consistent with the fundamental principles of procedural fairness, the Commission considers that the process outlined above has provided the applicant, interested parties and affected persons with an adequate opportunity to comment on this application for a further exemption.

## **5 RELEVANT LAW AND THE COMMISSION'S POWER TO GRANT EXEMPTIONS**

- 5.1 The Commission may grant an exemption from the operation of a provision of Division 1 or 2 of Part II of the SDA.<sup>1</sup> An exemption may be granted subject to terms and conditions specified in the instrument, and may be expressed to apply only in circumstances, or in relation to particular activities, as specified in the instrument.<sup>2</sup> If an exemption has been granted, the Commission may grant a further exemption, if an application for a further exemption is made before the expiration of the period for which the initial exemption was granted.<sup>3</sup> Exemptions are to be granted for a specified period not exceeding five years.<sup>4</sup> It is not unlawful for a person to act in accordance with an exemption.<sup>5</sup>
- 5.2 Pursuant to s 14 of the SDA, it is unlawful to discriminate on the ground of sex in employment, and pursuant to s 26, on the ground of sex in the administration of a Commonwealth law or program. These provisions are located in Divisions 1 and 2 of Part II of the SDA. Therefore, the Commission may grant the ABS an exemption from the operation of ss 14 and 26 of the SDA.

## **6 DECISION AND REASONS**

- 6.1 The PSS is a survey that collects sensitive information about a person's experience of violence, including family, domestic and sexual violence.
- 6.2 The survey will be conducted by personal interviews of around 23,000 adults (aged 18 years or over) across Australia (excluding very remote areas). It is proposed that approximately 300 interviewers nation-wide will be used.
- 6.3 The ABS advise that as of November 2020 there are 392 interviewers on its panel, of whom 129 are male. Approximately 300 interviewers will be required to enumerate the PSS. The PSS interviewer panel will be comprised of interviewers who voluntarily choose to work on the survey. The ABS will continue to allocate a minimum of 30 hours work per month to all interviewers throughout the PSS enumeration period, as required under the terms of the ABS Interviewers Enterprise Agreement 2017.
- 6.4 The ABS submits that using female interviewers for female respondents is necessary for achieving high quality data, in order to “build the evidence base on the nature, extent and characteristics of violence in Australia and to monitor and evaluate governments’ success in achieving priority actions and strategic outcomes of the National Plan to Reduce Violence against Women and their Children 2010-2022”. In support of its application, the ABS relied on:
- Information gathered by the ABS from respondents in the 2016 survey on their preferences regarding the sex of the interviewer. As discussed below, these results showed that female respondents, especially women who have experienced violence in their lifetime, have a stronger preference for female interviewers
  - Learnings from previous iterations of the PSS (in 2005, 2012 and 2016) and the 1996 Women’s Safety Survey. In developing the PSS methodology, the ABS has drawn on the experience gained from conducting—and successfully collecting sensitive information from those who participated in—the earlier surveys
  - Advice received from the PSS Advisory Group,<sup>6</sup> that due to the sensitivity of the topics, male interviewers may inhibit the willingness of female respondents to disclose their experiences of violence, and
  - International best practice guidelines developed by the United Nations for collecting statistics on violence against women, which states:

the most important personal characteristic to be considered when choosing interviewers for a survey on violence against women is their sex: the interviewer must be female. Utilizing female interviewers increases the disclosure of sensitive information, particularly that relating to experiences involving sexual victimization and violence perpetrated by male partners. Female interviewers improve the disclosure of these events ... (UNOCD and UNECE, 2010).


- 6.5 At the conclusion of the 2016 PSS, on a voluntary basis, the ABS asked survey participants about their preferences regarding the sex of the interviewer. Responses were received from almost 5,000 respondents. Approximately 42% of those who completed the sensitive component of the survey with the assistance of the interviewer (as opposed to completing it by themselves using the interviewer's laptop) indicated a preference for a female interviewer. For those who had experienced abuse before the age of 15, or violence since the age of 15, the proportion was considerably higher (63% and 57%).
- 6.6 The Equal Opportunity Commission of South Australia made a submission stating that it had no objection to the Current Application. No submissions were received opposing the grant of a further exemption.
- 6.7 The Commission notes that none of the permanent exemptions to the SDA apply to the use by the ABS of only female interviewers for female PSS respondents (see sections 30 to 43), and the PSS is not within the 'special measures' provision of s 7D of the SDA.
- 6.8 In deciding whether to grant this exemption, the Commission has weighed up the nature and extent of the discriminatory effect against the reasons advanced in favour of the exemption.
- 6.9 The Commission accepts the importance of the PSS and the data that it collects about the male and female experiences of violence. The PSS is an important source of information to assist in developing prevention strategies as well as informing and supporting services for those experiencing violence.
- 6.10 The Commission also accepts that many men may have the requisite skills and experience to professionally and capably conduct surveys that collect sensitive information. The Commission welcomes the ABS decision to use both male and female interviewers to interview male respondents given the findings on (lack of) preference from male respondents in the 2016 survey.
- 6.11 The Commission notes, however, the preferences of those who completed the 2016 survey, the advice of the PSS Survey Advisory Group and the United Nations best practice guidelines. The Commission accepts, on the basis of this evidence, that female respondents are more likely to disclose sensitive information to a female interviewer.
- 6.12 While the sole use of female interviewers to conduct interviews with female respondents as part of the PSS is discriminatory, the Commission considers that the success of the PSS in collecting high quality data, and mitigating or preventing adverse reactions by female respondents are significant factors weighing in favour of the grant of the exemption.
- 6.13 The Commission also notes that male interviewers who opt-in and are selected for the PSS panel will be allocated to conduct interviews with male respondents (and with any female respondents who specifically request this),

and that the guaranteed level of work required under the terms of the ABS enterprise agreement will apply to interviewers not working on the PSS.<sup>7</sup>

- 6.14 The ABS has sought a further exemption from 31 December 2020 to 30 June 2022, a period of 1.5 years. The ABS states that due to uncertainties regarding the current national environment, it is not able to fix a resumption date for work on the 2020 survey to continue. Any start date will be contingent on state and territory government's COVID-19 restriction policies and/or ABS assessments of respondent and interviewer safety. The ABS submit that it expects to have completed the 2020 survey prior to June 2022, however, as a contingency to a prolonged pandemic, it feels this timing is warranted. The Commission accepts this submission and is of the view that granting a further exemption for this time period to allow the ABS to complete its 2020 survey is appropriate.
- 6.15 Accordingly, pursuant to section 44(2) of the SDA, the Commission grants a further exemption to ss 14 and 26 of the SDA to the ABS with effect from 31 December 2020 until 30 June 2022 to use only female interviewers for the conduct of interviews with female PSS respondents.
- 6.16 This exemption is granted on the condition that the ABS continues to collect data from respondents about their preferences regarding the sex of the interviewer, and report this data to the Commission at the end of the survey.

## 7 REVIEW OF DECISION

- 7.1 Subject to the Administrative Appeals Tribunal Act 1975 (Cth), any person whose interests are affected by this decision may apply to the Administrative Appeals Tribunal for a review of the decision.



Signed by the President, Emeritus Professor Rosalind Croucher AM, on behalf of the Commission.

18 December 2020

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<sup>1</sup> SDA, s 44(1) and (2).

<sup>2</sup> SDA, s 44(3)(a) and (b).

<sup>3</sup> SDA, s 44(2).

<sup>4</sup> SDA, s 44(3)(c).

<sup>5</sup> SDA, s 47.

<sup>6</sup> Comprised of representatives from Commonwealth and State and Territory governments, and experts in the field of crime, violence and domestic violence research and support services

<sup>7</sup> The ABS stated that: Workloads for those [interviewers not working on the PSS survey] will be made up of survey work for the numerous other household surveys the ABS expects to run during the time

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the PSS is in the field. Other surveys conducted by the ABS have also been delayed in 2020 due to the COVID-19 pandemic, and the ABS expects an increased amount of work in 2021/2022.