Law Council
OF AUSTRALIA

Review of the Workplace Gender Equality Act 2012

Department of Prime Minister and Cabinet

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Table of Contents

About the Law Council of Australia **3**
Acknowledgement **4**
Executive Summary **5**
Context **9**
Review – Purpose and Objectives **11**
Consultation Question 1 – Functions and Powers **12**
Consultation Question 2 – What Works **13**
Consultation Question 3 – Coverage of the Act **14**
Consultation Question 4 – Gender Equality Indicators **16**
Consultation Question 5 – Other Diversity Data **21**
Consultation Question 6 – Data Collection and Use **23**
Consultation Question 7 – Reducing the Regulatory Burden **23**
Consultation Question 8 – Minimum Standards **23**
Gender Segregation 26
Increased Minimum Standards Requirements 27
Increased Minimum Standards Application 29
Consultation Question 9 – Compliance Mechanisms **29**
Public Reporting 30
Possible Procurement Ineligibility 31
Employers Who Fail to Meet Minimum Standards 32
Other Possible Compliance Mechanisms 33
Consultation Question 10 – Miscellaneous **34**
Appendix **35**

About the Law Council of Australia

The Law Council of Australia exists to represent the legal profession at the national level, to speak on behalf of its Constituent Bodies on national issues, and to promote 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 16 Australian State and Territory law societies and bar associations and Law Firms Australia, which are known collectively as the Council's Constituent Bodies. The Law Council's Constituent Bodies are:

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

Through this representation, the Law Council effectively acts on behalf of more than 60,000 lawyers across Australia.

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 the meetings of Directors, policies and governance responsibility for the Law Council is exercised by the elected Executive members, led by the President who normally serves a 12 month term. The Council's six Executive members are nominated and elected by the board of Directors.

Members of the 2021 Executive as at 1 January 2021 are:

- Dr Jacoba Brasch QC, President
- Mr Tass Liveris, President-Elect
- Mr Ross Drinnan, Treasurer
- Mr Luke Murphy, Executive Member
- Mr Greg McIntyre SC, Executive Member
- Ms Caroline Counsel, Executive Member

The Chief Executive Officer of the Law Council is Mr Michael Tidball. The Secretariat serves the Law Council nationally and is based in Canberra.

Acknowledgement

The Law Council of Australia is grateful for the assistance of the New South Wales Bar Association, Law Firms Australia, its National Human Rights Committee, and its Equal Opportunity Committee, in the preparation of this submission.

Executive Summary

1. The Law Council of Australia (**the Law Council**) appreciates the opportunity to provide a submission to the Department of the Prime Minister and Cabinet (**the Department**) in relation to its review of the *Workplace Gender Equality Act 2012* (Cth) (**the Workplace Gender Equality Act**), including the functions and powers of the Workplace Gender Equality Agency (**WGEA**) established under the Act.

2. The Law Council's submission addresses the questions set out in the Department's *Review of the Workplace Gender Equality Act 2012* Consultation Paper[1] (**Consultation Paper**), as well as raising a number of broader points.

3. The Law Council notes that the WGEA has made a number of detailed recommendations for reform to the Workplace Gender Equality Act in its submission to the current inquiry[2] **(the WGEA submission**). This submission has been more recently circulated to a number of stakeholders for consideration by the Department**,** subsequent to the Consultation Paper. Its recommendations are set out in the **Appendix** to this submission**.**

4. In the short timeframe for the current consultation, the Law Council has not been able to obtain a comprehensive picture of the views of its constituent bodies, sections and expert committees on the questions posed in the Consultation Paper. Nor is it able to provide detailed feedback on the specific WGEA submission recommendations.

5. The Law Council would be pleased to assist the Department further, should a longer consultation period be afforded and greater detail provided on proposed reforms. It makes the following observations on a preliminary basis.

General points

- Any reforms to the Workplace Gender Equality Act should have regard to Australia's obligations to respect, protect and fulfil its international human rights law obligations, with respect to the rights to equality and discrimination, and the rights to work. These include that Australia must take all appropriate measures, to ensure the full development and advancement of women, including in the economic field.
- While there have been improvements, Australia's national gender pay gap remains persistent, and much remains to be done in this area. Any reforms pursued should work in concert to respond to critical issues.
- The Consultation Paper is open-ended in its questions to stakeholders. While this may be appropriate as a first step, the Law Council suggests that more detailed information and analysis is needed to assist further stakeholder responses, as part of the next step of consultation process. This might address:
  - the current national picture regarding gender equity in the workplace – where progress is being made, and for which groups of women. It would have particular regard to:
    - women in particular sectors and/or industries;
    - women across diverse groups, including rural, regional and remote women, Aboriginal and Torres Strait Islander women, women with disability, older/younger women, migrant women; and

[1] Department of the Prime Minister and Cabinet, *Review of the Workplace Gender Equality Act 2021*, Consultation Paper, October 2021.
[2] WGEA, *Submission to the Review of the Workplace Gender Equality Act 2012* (November 2021).

        - workforce gender segregation as a contributor.
    - the links between the Workplace Gender Equality Act and broader relevant national strategies and where policy/program gaps lie.
    - the Australian Government's objectives in reforming the Workplace Gender Equality Act, and position on the detailed recommendations which have been identified by the WGEA; and
    - how information reported under the Workplace Gender Equality Act drives not only employer changes, but informs policy reform measures.

Question 1 – Functions and Powers of WGEA

- Greater clarity on detailed reform proposals would assist the Law Council's suggestions on how WGEA's functions and powers may be improved.
- At this stage, it suggests that amendments could focus on WGEA's role in:
    - addressing the 'action gap' identified by WGEA, which exists between many employers having policies and strategies in place and taking action to address issues;
    - ensuring that the diverse experiences of intersectional groups of women in the workplace are better understood and acted upon;
    - informing policy reforms at the national level on gender equity issues; and
    - compliance, having regard to any improvements taken forward in this area.

Question 2 – What Works to Improve Gender Equality in the Workplace

- The Law Council defers to employers and employees on 'what works' in specific workplaces.
- At the peak body level, it considers that improvements can be made by:
    - having an expert committee which is dedicated to equal opportunity, to drive changes across the profession;
    - investing in data collection, such as through the Law Council's National Attrition and Re-engagement Study (**NARS**), which provides baseline data to inform action; and
    - specific initiatives tailored to the profession, such as the Law Council's Equitable Briefing Policy, which has resulted in increased briefing to women barristers over time.
- Further consultation could occur by WGEA with peak bodies representing different professions, industries and sectors, to ensure information exchange about best practice, and to maximise the leadership that they can bring on achieving progress in gender equity in the workplace.

Question 3 – Coverage of the Act

- The Law Council supports the Australian Government's extension of the Workplace Gender Equity Act to the Australian Public Sector, and would further support its extension to the state and territory public sectors.

Question 4 – Gender Equality Indicators

- The Law Council would need to consult its constituent bodies on specific improvements to the Gender Equality Indicators (**GEIs**), including the WGEA recommendations on data collection and partnerships. It is open to these recommendations, and would appreciate the opportunity to consult on them.

- Its preliminary observations are that the GEIs may be improved and revised to take greater account of the following matters:
  - the steps taken by employers to provide a gender-sensitive organisational culture– eg, policies and guidelines on how sexist and misogynistic behaviour is responded to in the workplace (NSW Bar);
  - equality of opportunity for consideration of candidates for appointments to the workforce, and internal promotion (NSW Bar);
  - more inclusive, informed and best practice data collection with respect to sex and gender information, including for non-binary persons;
  - better capture of intersectional disadvantage regarding gender and age in the workplace, as well as rural, regional and remote (**RRR**) status;
  - stronger collection/use of data with respect to industry and occupational gender segregation, recognising that international treaty bodies have placed particular emphasis on overcoming this driver of disadvantage;
  - more detailed information on redundancies, drawing on the lessons of the COVID-19 pandemic, which has disproportionately affected key groups of women;
  - responding to the Australian Human Rights Commission's Respect@Work recommendations for improved good practice indicators for measuring and monitoring sexual harassment prevalence, prevention and response.

Question 5 – Diversity and Inclusion Data

- The Law Council supports achieving a stronger national platform of information and awareness on diversity and inclusion in the workplace.
- It considers that the Workplace Gender Equality Act's specific focus on women is justified and should be retained, given that women across a range of diverse groups in Australia are economically worse off than men in Australia.
- However, it also supports dedicated attention to better capture, and drive responses to, the intersectional disadvantage experienced by groups of women, such as:
  - Indigenous women, with an employment rate of just 54 per cent;
  - women with disability, with an employment rate of just 45.9 per cent; and
  - women who are recent migrants and temporary residents, with an unemployment rate of 8.3 per cent.
- By comparison, the employment rate of women is around 72.0 per cent and women's unemployment rate is around 4.7 per cent. This indicates that a generalised picture for women masks a diversity of outcomes.
- However, the views and perspectives of diverse groups of women should be sought prior to any reforms being pursued, noting that not all women may wish to disclose their status to employers.

Question 6 – Data Collection and Use

- The Law Council supports further consultation with relevant employers from the legal profession on specific categories of data collection, to ensure that they are appropriate and fit for purpose.
- It understands that certain categories tend to result in women in distinct roles, such as senior associate and senior business manager, being classified together. This is likely to undermine the value of the reporting information gained.

- The Law Council has not received views on whether there should be some form of pay transparency with respect to remuneration data. It would be pleased to further consult on issue.

Question 7 – Reducing the Regulatory Burden

- The Law Council supports reducing the regulatory burden on employers while continuing to enable WGEA to promote and improve gender equality.

Question 8 - Minimum Standards

- The Law Council considers that the current minimum standards, which are met by 100 per cent of organisations subject to them, provide a low bar.
- It recognises that the minimum standards may present a means of addressing the 'action gap' between having policies/strategies in place, and real progress. It may be helpful to reframe the minimum standards to support greater action. Should consideration be given to employers setting targets, these would need to be framed in a meaningful way to ensure genuine and achievable progress.
- The minimum standards could also prompt employers to consider the relevance of occupational and industrial gender segregation, by reference to how eg, average earnings compare to other industries and occupations.
- Given the current low bar set by the minimum standards to have a policy or strategy in place to support only one GEI, it would seem appropriate to consider the proposal that employers have a policy or strategy in place to support all four of the GEIs currently specified in the relevant minimum standards instrument.
- Consideration should be given to whether the minimum standards should include all six of the GEIs recognised in the Workplace Gender Equality Act (including gender composition of governing bodies, and gender equity consultation with employees).
- The Law Council would need to consult further on the question of whether the minimum standards should be applied to all relevant employers, particularly if their reporting requirements also expanded significantly, as this would increase the regulatory burden.

Question 9 – Compliance

- The Law Council recognises that the current compliance mechanisms under the Workplace Gender Equality Act are limited.
- The NSW Bar recommends that consideration be given to other possible compliance measures, such as regular spot audits of the data provided by employers and the consideration of financial penalties for employers who misrepresent or misreport data. The Law Council has not been able to seek the broader profession's views on these proposals.
- In general, the Law Council supports an evidence-based approach to achieving compliance. It would be interested in further information as to how often the current compliance mechanisms are utilised, and their effectiveness in achieving stronger outcomes.
- Minor inconsistencies or errors should not attract heavy-handed approaches, which should be reserved for serious or persistent non-compliance.
- It would seem prima facie reasonable to ensure that the approach under the Principles to the procurement threshold for non-corporate Commonwealth entities and corporate Commonwealth entities is consistent.

- However, the Law Council recommends that the inquiry process be extended to undertake closer consultation on compliance mechanisms, to ensure that outcomes in this area are meaningful, effective and appropriate.

Question 10 – Miscellaneous

- The Law Council considers that questions of reform to the Workplace Gender Equality Act should be linked to the Australian Government's wider policy agenda regarding women, including its national strategy to support women's workforce participation. While this strategy gives some regard to gender pay equity, a more comprehensive current national policy framework on this issue should be considered.
- The *Modern Slavery Act 2018* (Cth) includes reporting obligations, requiring reporting entities to identify the risks of modern slavery in their supply chains, and actions taken to address these risks. While the context is different, the lessons learned to date may inform the current reform process on addressing the 'action gap'.

Context

6. The Law Council approaches this inquiry mindful that:

- Australia is a party to core human rights treaties[3] containing rights which Australia must respect, protect and fulfil and which are highly relevant to questions of gender equity in the workplace. These include the rights to equality and non-discrimination,[4] and the rights to work;[5]
- these latter rights encompass the right to decent work, providing an income that allows the worker to support themselves and their family, the right not to be unfairly deprived of work, ensuring that the labour market is free to everyone without discrimination, and the right to just and favourable conditions of work.[6] Australia has an obligation both to avoid backwards steps which might affect the right to work, and to ensure that the right is made available in a non-discriminatory way. It also has an obligation to take reasonable measures within its available resources to progressively secure broader enjoyment of the right. The right to work includes remuneration that provides all workers with a decent living, and equal remuneration for equal work of equal value without distinction of any kind, in particular women being guaranteed conditions of work not inferior to those enjoyed by men, with equal pay for equal work;[7]
- under article 2 of the United Nations Convention on the Elimination of All Forms of Discrimination Against Women (**CEDAW**), Australia has agreed to pursue by all appropriate means and without delay a policy of eliminating discrimination against women. This encompasses taking all appropriate measures:
  - to eliminate discrimination against women by any person, organisation or enterprise; and

[3] *International Covenant on Economic, Social and Cultural Rights*, opened for signature 16 December 1966, 993 UNTS 3 (entered into force 3 January 1976) (**ICESCR**), which Australia ratified in 1975; *Convention on the Elimination of All Forms of Discrimination Against Women*, opened for signature 18 December 1979, 1249 UNTS 13 (entered into force 3 September 1981) (**CEDAW**), which Australia ratified in 1983.
[4] ICESCR, arts 2 and 3; CEDAW, arts 2 and 3.
[5] ICESCR, arts 6, 7, 8.
[6] Parliamentary Joint Committee on Human Rights, *Guide to Human Rights,* June 2015, 51-52 (Right to work).
[7] Ibid. See also Committee on Economic, Social and Cultural Rights, General Comment No 23 (2016) on the right to just and favourable conditions of work (article 7 of the International Covenant on Economic, Social and Cultural Rights) Obligations of States, UN Doc E/C.12/GC/23 (27 April 2016).

- including through legislation, modify or abolish existing customs and practices which constitute discrimination against women;

- under article 3 of CEDAW, Australia must take in all fields, in particular the political, social, economic and cultural fields, all appropriate measures, including legislation, to ensure the full development and advancement of women, for the purpose of guaranteeing them the exercise and enjoyment of human rights and fundamental freedoms on a basis of equality with men;
- the International Labour Organization's (**ILO's**) Equal Remuneration Convention[8] requires States parties to ensure the application to all workers of the principle of equal remuneration for men and women workers for work of equal value. The term remuneration is broadly defined to include the ordinary, basic or minimum wage or salary and any additional emoluments payable directly or indirectly, whether in cash or in kind, by the employer to the worker and arising out of the worker's employment;
- the ILO's Discrimination (Employment and Occupation) Convention[9] requires States parties to declare and pursue a national policy designed to promote, by methods appropriate to national conditions and practice, equality of opportunity and treatment in respect of employment and occupation, with a view to eliminating any discrimination in these fields. This includes discrimination in relation to access to vocational training, access to employment and to particular occupations, and terms and conditions of employment; and
- relevant treaty bodies have drawn concerns to Australia's gender pay gap in their concluding observations on its compliance with the above treaties. These concerns are discussed, where relevant, below.

7. The Law Council also set out, in its recent submission regarding Australia's Universal Periodic Review, its concerns that there is a persistent gender pay gap in Australia, and that on present indications, Australia would not reach gender pay equity until 2060.[10] This submission further elaborated that:

> *Economic inequality has consequences for women. Older women are the fastest growing group of people experiencing homelessness, with an increase of 30 per cent in the period between 2011 and 2016.*[11]

8. As such, the Law Council called upon Australia to implement measures to bridge the gender pay gap, combat gender discrimination and address older women's homelessness.[12] In its submission concerning the Australian Human Rights Commission's (**AHRC's**) National Inquiry into Sexual Harassment in Australian Workplaces, it highlighted gender inequality as a key driver of sexual harassment.[13]

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[8] International Labour Organization, Equal Remuneration Convention 1951 (No 100), which Australia ratified on 10 December 1974.
[9] International Labour Organization, Discrimination (Employment and Occupation) Convention 1958 (No. 111), which Australia ratified on 15 June 1973.
[10] Law Council of Australia, Submission to the Office of the United Nations High Commissioner for Human Rights, *Third Universal Periodic Review of Australia* (8 July 2020) <https://www.lawcouncil.asn.au/resources/submissions/universal-periodic-review-of-australia-3rd-cycle> 4, citing WGEA, *Five Years of Workplace Gender Equality Agency Data: the Key Trends* (2018).
[11] Ibid, citing AHRC, *Older Women's Risk of Homelessness* (Background paper, April 2019) <https://www.humanrights.gov.au/sites/default/files/document/publication/ahrc_ow_homelessness2019.pdf>.
[12] Ibid.
[13] Law Council of Australia, Submission to the Australian Human Rights Commission, *National Inquiry into Sexual Harassment in Australian Workplaces* (26 February 2019) <https://www.lawcouncil.asn.au/resources/submissions/national-inquiry-into-sexual-harassment-in-australian-workplaces> 62.

9. Current figures confirm that there remains much to be done in this area. Australia's national gender pay gap is now 14.2 per cent.[14] This gap has hovered between 13 per cent and 19 per cent for the past two decades. The full-time total earnings gender pay gap, including overtime payments, is 16.8 per cent.[15]

10. There is also a WGEA data gender pay gap, based on the collection of pay data annually from non-public sector organisations with 100 or more employees. This data indicates that:

    - in 2019-20, the full-time remuneration pay gap was 20.1 per cent, down from 24.7 per cent in 2013-14, and the base salary pay gap was 15 per cent,[16] down from 19.9 per cent in 2013-14;
    - every manager category and non-manager occupation shows a gender pay gap for full-time employees favouring men. Pay gaps are generally wider in senior leadership: in 2019-20, the total remuneration gap was 23.2 per cent for manager employees and 19.2 per cent for non-manager employees; and
    - all industries have a gender pay gap in favour of men. Financial and Insurance Services remains the industry with the highest full-time total remuneration gender pay gap at 27.5 per cent.

11. Based on the WGEA's dataset, the Law Council also recognises that the full-time gender pay gap in the legal sector is 23.8 per cent.[17] This demonstrates that the legal profession has a part to play in overcoming a lack of gender equity in Australian workplaces.

Review – Purpose and Objectives

12. The Law Council highlights that the Consultation Paper's discussion of the issues and consultation questions are open-ended. It would appreciate a stronger understanding of the Australian Government's overarching purpose and objectives in undertaking this Review of the Workplace Gender Equality Act.

13. While the WGEA's submission to the Review has since been circulated to stakeholders and includes a detailed list of recommendations against the consultation questions, the Law Council would appreciate information about whether the Australian Government intends to pursue these specific recommendations. If it does, the Law Council would be pleased to provide specific feedback following a further timeframe for consultation with its constituent bodies.

14. At this preliminary stage, the Law Council makes the high-level observation that it is important the Australian Government considers the purpose of the Workplace Gender Equality Act relevant to its wider policy framework, with a keen view and understanding that to make improvements in gender equality across Australian workplaces, multiple recommendations working in concert will need to be pursued.

15. Within such a discussion of the Australian Government's purpose and objectives regarding gender equity, and the role of the Workplace Gender Equality Act to this

[14] This is calculated by WGEA using data from the ABS. It refers to women's average weekly ordinary full-time earnings across all industries and occupations compared to men's.
[15] WGEA, 'Australia's Gender Pay Gap Statistics', 27 August 2021.
[16] WGEA, *Submission to the Review of the Workplace Gender Equality Act 2012* (November 2021), 40.
[17] WGEA, *WGEA Data Explorer*, 'Comparing Legal Services and Lega Services' (website, undated) <https://data.wgea.gov.au/comparison/?id1=115&id2=115>.

picture, the Law Council suggests the following factors might be taken into consideration:

(a) the development of a national policy framework to achieve gender pay equity, which the Law Council touches upon under Consultation Question 10;

(b) the articulation of the core gender equity issues facing women across Australian workplaces, as well as whether and how these differ depending on industry, occupation, employer size, location, and the intersectionality of issues facing women as employees; and

(c) the purpose of the data collection, and what it is to be used for in terms of progressing the Australian Government's policy agenda.

Consultation Question 1 – Functions and Powers

Are the functions and powers of WGEA appropriate for promoting and improving gender equality in the workplace? How effective is WGEA in achieving its functions to promote and improve gender equality in the workplace including by enabling relevant employers to report on the gender equality indicators, developing benchmarks and reports, undertaking research, education and leading practice programs and contributing to the public discussion on gender equality?

16. The current functions and powers of WGEA as set out in section 10 of the Workplace Gender Equality Act are:

(a) advising and assisting employers in promoting and improving gender equality in the workplace;

(b) developing, in consultation with relevant employers and employee organisations, benchmarks in relation to gender equality indicators;

(c) issuing guidelines to assist relevant employers to achieve the purposes of the Act;

(d) reviewing compliance with the Act by relevant employers, reviewing public reports lodged by relevant employers, and dealing with those reports;

(e) collecting and analysing information provided by relevant employers under the Act to assist the WGEA to advise the Minister;

(f) undertaking research, educational programs and other programs for the purpose of promoting and improving gender equality in the workplace;

(g) working with employers to maximise the effectiveness of administration of the Act including by minimising the regulatory burden on employers;

(h) promoting and contributing to understanding and acceptance, and public discussion, of gender equality in the workplace;

(i) reviewing the effectiveness of the Act in its purposes; and

(j) reporting to the Minister on such matters in relation to gender equality as the WGEA thinks fit.

17. These are all important and appropriate functions. Further consideration could, in the Law Council's view, be given to how the WGEA's functions might be defined to address the 'action gap' identified following its 2019-2020 dataset.[18] This gap means that organisations have policies and strategies in place but are not necessarily taking action to implement them. For example, over 45 per cent of employers who conducted a pay gap analysis took no action as a result of the analysis.[19]

18. How this may be framed as a WGEA function is likely to depend on whether there are changes to the requirements of relevant employers in the Workplace Gender Equality Act, for example, if they are required to report on their actions and progress against key objectives, rather than whether they have strategies in place. Further consultation would be required on the detail of any measures proposed.

19. Having regard to the points discussed under Consultation Question 5, the WGEA's functions should be amended to ensure that the diverse experiences of intersectional groups of women in the workplace are better understood and acted upon.

20. Greater clarity could also be provided on how WGEA data informs policy development at the national level on gender equity issues affecting all Australian women in the workplace.

21. Should the WGEA's compliance functions be altered through changes to the Workplace Gender Equality Act, its functions may also need to be aligned accordingly. However, as noted in its introductory remarks above, the Law Council would be better placed to respond to this Consultation Question by having a more detailed and precise understanding of what the Australian Government is intending to achieve through the WGEA reform process.

Consultation Question 2 – What Works

What is your experience of what works to improve gender equality in your workplace? How do you currently engage with WGEA and use the reporting process and their resources to improve gender equality? What changes, if any, would you like to see in the areas of future focus for WGEA to further promote and improve gender equality over the next ten years?

22. The Law Council recognises that this question is primarily directed towards employers.

23. As the peak body representing the national legal profession, however, the Law Council notes its following key initiatives which have been, and continue to be, pursued in recent years, under the leadership of its expert Equal Opportunity Committee, to order to improve gender equality in the legal profession. It also recognises and welcomes the efforts of its constituent bodies in this regard.

24. In 2016, the Law Council released its Equitable Briefing Policy,[20] which is intended to drive cultural change within the legal profession, support the progression and retention of women barristers, and address the significant pay gap and underrepresentation of women in the superior courts. The Policy asks all persons or

[18] WGEA, *Progress Report 2019-2020* (2021), 3, 5.
[19] Although not all of these organisations identified a pay gap as a result of conducting this pay gap analysis, and in those cases no action would be required: Ibid.
[20] Law Council of Australia, *Equitable Briefing Policy* (June 2016) <https://www.lawcouncil.asn.au/files/pdf/policy-guideline/National_Model_Gender_Equitable_Briefing_Policy_updatedversion.pdf>.

entities who brief or select barristers in Australia to commit to making all reasonable efforts to brief female barristers with relevant seniority, experience, expertise or interest in the relevant practice area. Adoptees are asked to report annually on their success in meeting related targets. In September 2020, the Law Council noted that there had been a rise in the number of female barristers being briefed on matters over the past three years, and the profession was on track to meet one of the key targets, for women barristers to be briefed in at least 30 per cent of all matters. However, more needed to be done to improve the gender pay gap between female barristers and their male counterparts.

25. In December 2020, the Law Council released its National Action Plan to Reduce Sexual Harassment in the Australian Legal Profession,[21] noting that eliminating sexual harassment in the legal profession was part of its longstanding commitment to inclusion and diversity in the profession. This included both specific law reform proposals and measures that the legal profession can implement to drive cultural change.

26. In 2014, the Law Council's NARS[22] identified key drivers for the attrition of women from the legal profession, including:

- differing experiences of career development and opportunities;
- barriers to women progressing in a profession with a male-dominated culture;
- assuming the male experience;
- unconscious bias; and
- discrimination and sexual harassment.

27. The results of this study have prompted a range of subsequent Law Council initiatives including those described above.

28. The Law Council suggests that further direct engagement and consultation could occur by WGEA with peak bodies representing different professions, industries and sectors, to ensure that their role in leading their relative professions, drawing on WGEA data about their relative sectors, is maximised. It could also give consideration to facilitating a peak bodies forum in which bodies can exchange views and ideas on 'what works' to improve gender equality.

Consultation Question 3 – Coverage of the Act

Should the coverage of the Workplace Gender Equality Act be further changed? Specifically, should the definition of 'relevant employer' be expanded? If so, would additional considerations need to be factored in for new reporting employers?

29. Under section 3 of the Workplace Gender Equality Act, a 'relevant employer' means:

    (i) a registered higher education provider that is an employer; or

[21] Law Council of Australia, *National Action Plan to Reduce Sexual Harassment in the Australian Legal Profession* (23 December 2020) <https://www.lawcouncil.asn.au/files/media-releases/National%20Action%20Plan%20to%20Reduce%20Sexual%20Harassment%20in%20the%20Australian%20Legal%20Profession_FINAL.pdf>.
[22] Law Council of Australia, *National Attrition and Re-engagement Study (NARS) Report* (2014) <https://www.lawcouncil.asn.au/publicassets/8cf309de-8a1d-e711-80d2-005056be66b1/NARS%20Report.pdf>.

(ii) a natural person, or a body or association (whether incorporated or not), being the employer of 100 or more employees in Australia;

but does not include the Commonwealth, a State, a Territory or an authority.

30. As discussed below, relevant employers have particular reporting obligations under the Workplace Gender Equality Act.

31. The Law Council notes that the above consultation question relates to Recommendation 43(a) of the AHRC's Respect@Work: National Inquiry into Sexual Harassment in Australian Workplaces report (**Respect@Work Report**),[23] which was released on 5 March 2020. This recommendation was that the Australian Government should:

- amend the WGEA to require public sector organisations to report to the WGEA on its gender equality indicators; and
- fund the Workplace Gender Equality Agency adequately to meet these expanded reporting obligations.

32. Since the issue of the Respect@Work Report, in April 2021, the Australian Government has announced its intention to amend the WGEA to require public sector organisations to report to WGEA on gender equality initiatives, with the Australian Public Service starting reporting from 2022-2023.[24]

33. The Law Council supports this announcement. It would further support an extension to state and territory public sectors, as canvassed in the Consultation Paper, noting that with this extension, the WGEA's data would be expanded to cover around 60 per cent of Australian employees.[25]

34. In that context, it notes that the United Nations Committee on Economic Social and Cultural Rights (**CESCR**), in its General Comment No 23 on the right to just and favourable conditions of work (as set out under article 7 of the ICESCR) has commented that:

> *To help assess the enjoyment of the right to just and favourable conditions of work, States parties should establish obligatory notification schemes in the event of occupational accidents and disease, as well as mechanisms to assess systematically the level of the minimum wage, fair wages and the gender pay gap between men and women within organizations in the public and private sectors, including in high-level posts.*[26]

35. The Law Council also supports the AHRC's Recommendation 43(b) in its Respect@Work Report, that the WGEA be adequately funded to meet its expanded reporting obligations. It notes that the Women's Budget Statement 2021-22 refers to additional funding being made available to WGEA to assist the work of the Respect@Work Council and the current review of the Workplace Gender Equality Act.[27] It is unclear whether this funding extends to the expanded reporting obligations

[23] Australian Human Rights Commission, *Respect@Work: National Inquiry into Sexual Harassment in Australian Workplaces report* (2020).
[24] Ibid, 17.
[25] Department of the Prime Minister and Cabinet, *Review of the Workplace Gender Equality Act 2012* (Consultation Paper, October 2021) 5 <https://www.pmc.gov.au/office-women/workplace-gender-equality/consultation-review-workplace-gender-equality-act-2012-how-make-submission>.
[26] Committee on Economic, Social and Cultural Rights, *General Comment No 23 on the right to just and favourable conditions of work (article 7 of the International Covenant on Economic, Social and Cultural Rights)*, 44th sess, UN Doc E/C.12/GC/23 (7 April 2016).
[27] Australian Government, *Budget 2021-22, Women's Budget Statement*, 11 May 2021.

as envisaged in Recommendation 43(b) and the Law Council would appreciate clarification on this issue.

Consultation Question 4 – Gender Equality Indicators

Are the gender equality indicators (GEIs) in the Workplace Gender Equality Act, and the data collected with respect to the GEIs, appropriate to promote and improve gender equality? How could they be improved?

36. Section 13 of the Workplace Gender Equality Act requires relevant employers to prepare public reports containing information relating to the employer and to Gender Equality Indicators (**GEIs**) for each reporting period. The Gender Equality Indicators under the Workplace Gender Equality Act are, under subsection 3(1):

    (a) gender composition of the workforce (**GEI1)**;

    (b) gender composition of governing bodies of relevant employers (**GEI2**);

    (c) equal remuneration between women and men (**GEI3**) (as noted in the Consultation Paper, the CEO is excluded from reporting remuneration);

    (d) availability and utility of employment terms, conditions and practices relating to flexible working arrangements for employees and to working arrangements supporting employees with family or caring responsibilities (**GEI4**);

    (e) consultation with employees on issues concerning gender equality in the workplace (**GEI5**);

    (f) any other matters specified in an instrument under subsection (1A).

37. The *Workplace Gender Equality (Matters in relation to the Gender Equality Indicators) Instrument 2013 (No 1)* (**the Instrument**) further prescribes sex-based harassment and discrimination as an additional GEI (**GEI6**). It also prescribes the matters which must be included in relevant employers' reports against each of the GEIs.

38. The Law Council notes that the WGEA has made a number of detailed recommendations regarding GEIs in its submission to the current inquiry.[28] These include both recommendations which are designed to streamline and alleviate the reporting burden on employers, and recommendations for additional matters to be reported. They are, as noted, set out in the **Appendix** to this submission.

39. The Law Council supports the twin objectives of these recommendations, which are (as relevant) to achieve gender equality and to reduce red tape. It is also open to discussing these recommendations, including those which would expand reporting obligations and those which have particular resonance for the legal profession, such as additional reporting obligations with respect to partners.

40. It would, however, appreciate more time to consult its constituent bodies, sections and committees on these detailed recommendations, including to draw out what systems or definitional improvements would need to be made to overcome current reporting errors.

[28] WGEA, *Submission to the Review of the Workplace Gender Equality Act 2012* (November 2021).

41. The Law Council has received specific recommendations from the New South Wales Bar Association (**NSW Bar**) as to how the GEIs may be improved, which are set out below. It has not, in the time available, been able to consult further on these.

42. A number of preliminary observations are also made about relevant matters which should, in the Law Council's view, be taken into account with respect to how the GEIs, and the matters to be reported under them, may be improved. While, with some exceptions, it has generally refrained from making recommendations on the specific wording of any legislative improvements, it would, as noted, be pleased to respond to detailed proposals which are pursued and reflect the matters discussed.

Preliminary Remarks

Sexism and misogyny

43. The NSW Bar proposes that the GEIs could be improved by including indicators concerned with steps taken to provide a gender-sensitive organisational culture, free from sexism and misogyny. The data could capture:

- the manner in which sexist and misogynist behaviour is dealt with, including employee policies and guidelines and other initiatives; and
- the way such behaviour is taken into account in promotion, reward and advancement decisions.

Appointments and internal promotion opportunities

44. The NSW Bar recommends that a further GEI should be included to require employers to report on the gender composition and employment status of candidates considered for: (a) appointments to the workforce; and (b) internal promotion opportunities. The data would allow an analysis of employers' approaches to improving the gender balance of the workforce and to monitoring the advancement of equal opportunities within the organisation.

45. It notes that this is an important indicator to better understand whether there is equality of opportunity for appointments and promotions. It could also allow an analysis of the extent to which employers consider candidates requiring various employment terms and conditions, such as including flexible hours of work, part-time work and job-sharing arrangements.

46. Currently, under the Instrument, GEI1 relevantly refers to:

- 1.3 – the composition of applicants *appointed* to positions by gender and by manager/non-manager.[29] It does not refer to applicants considered or with reference to their broader employment status as described above.
- 1.4 – the number and proportion of employees *awarded* promotions by gender, employment status and manager/non-manager.[30] Again, it does not refer to employees who are considered for such promotions, or with reference to their broader employment status.

Non-binary persons and gender definitions

47. The Law Council has previously supported an inclusive, informed and best practice approach to the collection and handling of sex and gender information by

[29] *Workplace Gender Equality (Matters in relation to Gender Equality Indicators) Instrument 2013 (No 1)*.
[30] Ibid.

governments, welcoming the Australian Government's Guidelines on the Recognition of Sex and Gender.[31] It also supported the introduction of new provisions in the *Sex Discrimination Act 1984* (Cth) to prohibit discrimination on the basis of sexual orientation, gender identity and intersex status.[32] It considers that careful attention should be given to how the Workplace Gender Equality Act requires the reporting of such information by relevant employers.

Gender and age

48. The Law Council considers that understanding the intersection of gender and age in the workplace is important in promoting gender equality.

49. In this context, the Law Council refers to the AHRC's *Willing to Work*[33] inquiry of 2016. Its findings included that Australians aged 50 years and over who were looking for paid work being more likely to experience discrimination because of their age when compared to those who worked for a wage or salary or those who were self-employed. Older women were particularly likely to be negatively impacted by such discrimination, and 'more likely than older men to be perceived as having outdated skills, being too slow to learn new things or as someone who would deliver an unsatisfactory job'.[34]

50. The Law Council also refers to the findings of its Justice Project, its own 2017-2018 national inquiry into access to justice, particularly as it is experienced by a range of diverse and marginalised groups.[35] The Justice Project's final report include an Older Persons chapter, which also drew attention to the vulnerability of older women who have taken time out of the workforce to perform family or carer duties, and the risks for their financial security, particularly with respect to superannuation.[36] It notes the importance of encouraging superannuation to be paid by employers, given that women in Australia require with significantly lower superannuation savings than men,[37] and are more likely to experience poverty and homelessness in older age.[38]

51. At the same time, it has been reported that younger women have lost the highest percentage of jobs during the coronavirus recession in Australia.[39] As such, achieving equity in the workplace is highly relevant for this specific group.

Gender equity in RRR Australia

52. The Law Council also supports better understanding the differences between urban and rural, regional and remote (**RRR**) Australia on questions of gender equity.

53. Its recent Justice Project chapter on RRR Australians reflected that women in these areas may be at increased risk of workplace sexual harassment and discrimination,

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[31] Law Council of Australia, Submission to the Attorney-General's Department, *Australian Government Guidelines on the Recognition of Sex and Gender* (24 April 2013).
[32] Law Council of Australia, Submission to the Senate Committee on Legal and Constitutional Affairs, *Exposure Draft of the Human Rights and Anti-Discrimination Bill 2012* (24 December 2012).
[33] AHRC, *Willing to Work: National Inquiry into Employment Discrimination Against Older Australians and Australians with Disability* (2016) <https://humanrights.gov.au/our-work/disability-rights/publications/willing-work-national-inquiry-employment-discrimination>.
[34] Ibid, 60.
[35] For more information, see Law Council of Australia, *The Justice Project*, <https://www.lawcouncil.asn.au/justice-project>.
[36] Law Council of Australia, *Justice Project – Final Report* (August 2018), Older Persons Chapter, 6.
[37] Ibid.
[38] Ibid.
[39] David Taylor, 'Women were let go in greater numbers during COVID, now they face being offered lower-paid roles to return to work', *ABC* (online, 12 February 2021).

as well as poverty. For instance, it highlighted recent research findings that 73 per cent of rural women interviewed reported having experienced unwelcome, sexualised behaviour in the workplace.[40]

54. This chapter also found that RRR Australians, generally, had more limited awareness of their legal rights, less access to legal assistance to resolve their legal problems and compounded barriers in accessing such assistance – including distance, technology and poverty. An overarching message was the issues of justice and equality needed to be better understood as they were experienced in RRR Australia.

Industrial and occupational segregation

55. The Law Council considers that there should be a greater focus on the collection and use of data with respect to industrial and occupational segregation by sex, and a concentration of WGEA efforts on industries and occupations which are most lagging behind in terms of gender segregation.

56. The United Nations Committee on the Elimination of Discrimination Against Women (**CEDAW Committee**), in its 2018 Concluding Observations on Australia's eighth periodic report of Australia drew particular attention to its concerns that industrial and occupational segregation together account for 30 per cent of the 15.3 per cent gender pay gap.[41] As such, it recommended that Australia reinforce measures to address industrial and occupational segregation and establish a national policy framework to implement the principle of equal pay for work of equal value with a defined target date for pay equity.[42]

57. The United Nations CESCR's Concluding Observations on Australia in 2017 similarly highlighted its concerns about Australia's limited progress achieved in closing the gender wage gap, which it attributed to persistent industrial and occupational segregation by sex, and the concentration of women in low-paid sectors and in part-time work.[43] It recommended that Australia redouble its efforts to reduce the gender wage gap by taking effective measures to enable women to access traditionally male-dominated sectors, including by promoting opportunities for both men and women to reconcile their professional and family responsibilities.[44]

58. Further relevant material about industrial and occupational segregation is included below under Minimum Standards.

Redundancies

59. The Law Council notes that it has been reported that women, particularly university educated women, have been much more likely to be made redundant as a result of the pandemic, and that they are likely to face lower-paid jobs on their return.[45]

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[40] Law Council of Australia, *Justice Project – Final Report* (August 2018), RRR Australians Chapter, 10, citing Skye Saunders, *Whispers from the Bush: The Workplace Sexual Harassment of Australian Rural Women* (Federation Press, 2015) 2-3.
[41] Committee on the Elimination of Discrimination against Women, *Concluding observations on the eighth periodic report of Australia*, 1602nd and 1603rd mtg, UN Doc CEDAW/C/AUS/CO/8 (25 July 2018) 12.
[42] Ibid.
[43] CESCR, *Concluding Observations on the fifth periodic report of Australia*, UN Doc E/C.12/AUS/CO/5 (11 July 2017), [25].
[44] Ibid, [26].
[45] David Taylor, 'Women were let go in greater numbers during COVID, now they face being offered lower-paid roles to return to work', *ABC* (online, 12 February 2021).

60. It considers that it is important to understand this phenomenon in order to better prevent against gender discrimination, including as crises and economic downturns occur.

Partners and CEOs

61. The WGEA has recently put forward various recommendations for reporting requirements concerning:

    (a) the promotions and resignations of partners;[46]

    (b) composition and equity status of partners in firms with partnership structures;[47] and

    (c) remuneration data for CEOs or the equivalent;[48] and

    (d) remuneration data on partners in partnership structures.[49]

62. The WGEA also emphasises that partners in partnership structures are more highly paid, more often men, and that their absence from aspects of Australia's gender equality reporting (unless they are, as non-equity partners, employees) means that statistics related to the gender pay gap are incomplete.

63. The Law Council recognises that these recommendations are highly relevant to the legal profession. As noted, it is willing to engage with these proposals and would appreciate further time to consult on their detail if they are likely to be pursued.

'Action gap'

64. As noted above, the Law Council is concerned that there is an 'action gap' on gender equality issues generally, whereby employers have policies and strategies in place but action and progress are slow. Further consideration could be given to how GEI reporting requirements might assist in addressing the 'action gap' identified following its 2019-2020 dataset.[50]

65. This would need to be the subject of careful consultation and detailed discussion with relevant employers, including to ensure that the content of any new reporting requirement was clearly defined and understood.

Sex-based harassment and discrimination

66. The Law Council supports the following Respect@Work report recommendations:

- Recommendation 42: The WGEA work with the Workplace Sexual Harassment Council to consider how good practice indicators for measuring and monitoring sexual harassment prevalence, prevention and response may apply to reporting in relation to sexual harassment under the *Workplace Gender Equality Act 2012*.
- Recommendation 46: The AHRC in consultation with the Workplace Sexual Harassment Council [now the Respect@Work Council] develop a set of good practice indicators and methods for measuring and monitoring sexual harassment prevalence, prevention and response.

[46] WGEA, *Submission to the Review of the Workplace Gender Equality Act 2012* (November 2021), 17.
[47] Ibid, 18.
[48] Ibid, 19.
[49] Ibid.
[50] WGEA, *Progress Report 2019-2020* (2021).

67. These may require additional detail in the GEI6, which is currently high level as described in the Instrument, and focuses on:

- the existence of a sex-based harassment and discrimination prevention strategy or policy;
- the inclusion of a grievance process in any sex-based harassment and discrimination prevention policy;
- workplace training, if any, for managers on sex-based harassment and discrimination; and
- the frequency of workplace training about sex-based harassment and discrimination.

68. The Law Council notes in this context the operation of section 13C, requiring that personal information not be published in the WGEA's public reports. However, also suggests that consideration should be given to avoiding reporting requirements on sex-based harassment and discrimination which are likely to result in large quantities of personal information being provided to WGEA by employers.

Consultation Question 5 – Other Diversity Data

In addition to gender, should WGEA collect other data on diversity and inclusion criteria on a mandatory basis, to enable a more nuanced analysis of men and women's experiences in the workplace? If yes, please specify criteria (eg cultural and linguistic diversity, disability, age, location of primary workplace). If not, why not?

69. The Law Council supports a stronger national platform of information and awareness on diversity and inclusion, which in turn is likely to drive more equitable outcomes across the private and public sectors. It is keenly aware that insufficient information is known about, for example, the employment of Aboriginal and Torres Strait Islander persons, persons with disability or migrants, and older persons in different sectors and workplaces, including in legal workplaces, and that all of these groups face higher levels of discrimination in Australia, including in workplaces.[51]

70. At the same time, the Law Council is also aware that the right of everyone to the enjoyment of just and favourable conditions of work is recognised under international law as having a particular dimension for women. For example, article 7 of the ICESCR refers to:

> (a) Remuneration which provides all workers, as a minimum, with:
>
> > (i) fair wages and equal remuneration for work of equal value without distinction of any kind, **in particular women being guaranteed conditions of work not inferior to those enjoyed by men**, with equal pay for equal work.

71. In this regard, the national gender pay gap, which captures outcomes for all women, is a continuing and persistent concern. Across each of the above-named areas of diversity – Aboriginal and Torres Strait Islander persons, persons with disability or migrants, and older persons – women are economically worse off than men. They are uniquely disadvantaged on this basis. Women as a diverse group and their experiences of discrimination do vary enormously, particularly in light of their intersectional identity. However, they also share common and specific workplace

[51] See Law Council of Australia, *Justice Project – Final Report* (August 2018), Aboriginal and Torres Strait Islander Peoples, People with Disability, Recent Arrivals, and Older Persons Chapters.

barriers, including those which are related to family and caring responsibilities, sexual harassment and family violence. Without overlooking the very substantial discrimination experienced by particular groups of men, public workplaces have traditionally been the domain of men in Australia.

72. As such, the Law Council suggests that at this time, the Workplace Gender Equality Act's continued focus on women is justified, and should be retained. However, the Law Council strongly supports achieving a better picture of the intersectional discrimination experienced by women in the workplace. Any national collection of data should ultimately be geared towards the creation of policies and programs by employers and governments to facilitate greater equity in the workplace amongst diverse groups of women.

73. With respect to Indigenous women, the Law Council refers to its commitments to:

    (a) recognise that Indigenous Australians have been subject to significant dispossession, marginalisation and discrimination, and continue to experience widespread disadvantage, including in the area of employment;

    (b) promote the economic and social empowerment of Indigenous Australians to overcome the economic and social disadvantages to which they have been, and continue to be, subject and supporting them to participate fully in the broader community, where so they choose; and

    (c) promote substantive equality for Indigenous Australians before the law, including effective measures to ensure continuing improvement of their economic and social conditions.[52]

74. It therefore draws attention to its particular concerns about economic outcomes for Indigenous women in Australia. For example, according to a recent snapshot of Indigenous employment by the Australian Institute of Health and Welfare, in 2018-2019, employment rates for Indigenous Australians differed markedly by sex. Indigenous women had an employment rate of just 45 per cent, compared to Indigenous men who had an employment rate of 54 per cent.[53]

75. More generally, the Law Council has undertaken to promote substantive equality before the law for all Australians. This includes advocacy:

    (a) for the human rights of persons who are non-citizens, including asylum seekers, refugees and persons on temporary visas working in Australia; and

    (b) directed to overcoming policies and practices which involve discrimination on multiple grounds, including sex, race, colour, language, religion, social origin, disability or the exercise of protected employment rights, or otherwise impede equality before the law.

76. In this context, it further highlights that:

    (a) in 2018, just 45.9 per cent of women with disability were employed;[54] and

[52] Law Council of Australia, *Policy Statement: Indigenous Australians and the Legal Profession* (2010).
[53] Australian Institute of Health and Welfare, *Indigenous Employment*, Snapshot, 16 September 2021.
[54] Australian institute of Health and Welfare, , People with Disability in Australia, 2 October 2020, citing Australian Bureau of Statistics (**ABS**), *Microdata: disability, ageing and carers*, Australia 2018.

(b) in 2019, female recent migrants and temporary residents had an unemployment rate of 8.3 per cent, compared to 3.9 per cent of males.[55]

77. As a general comparison, the employment rate of women overall in Australia in May 2021 was 72.0 per cent, compared to 79.1 per cent for men.[56] Women's unemployment rate was 4.7 per cent in May 2021, compared to 5.4 per cent for men.[57] This indicates that a generalised picture for women masks a diversity of outcomes.

78. The above data would seem to provide a strong impetus for a stronger focus on the intersectional experiences of women. The Law Council notes, however, that some women may not wish to disclose their broader status to their employer – for example, as noted by the WGEA in its submission,[58] some women with disability may be reluctant to disclose this for fear of subsequent discrimination. Careful consultation should occur with diverse groups of women, as well as employers, prior to any new requirements being incorporated.

Consultation Question 6 – Data Collection and Use

How could data be better collected and/or used by WGEA to promote and improve gender equality? Should there be some form of pay transparency – should remuneration data in some form be public?

79. The Law Council strongly supports further consultation with relevant employers from the legal profession on specific categories of data collection, to ensure that they are appropriate and fit for purpose. For example, it understands that certain categories as labelled tend to result in women in distinct roles, such as those of senior associate and senior business manager, being classified in the same group. This is likely to undermine the value of reporting information to the WGEA and the profession.

80. The Law Council, to date, has not received any views on whether there should be some form of pay transparency with respect to remuneration data. It would be pleased to further consult with its constituent bodies on this basis to assist the Department.

Consultation Question 7 – Reducing the Regulatory Burden

Are there changes that could be made to the Workplace Gender Equality Act that would help reduce the regulatory burden on relevant employers while continuing to enable WGEA to promote and improve gender equality? Should other data sources, such as Single Touch Payroll data, be used by WGEA instead of employers providing the same data to two Government agencies?

81. In principle, the Law Council is highly supportive of reducing the regulatory burden on relevant employers while continuing to enable the WGEA to promote and improve gender equality.

Consultation Question 8 – Minimum Standards

Could the minimum standards be expanded to improve the way they drive practical gender equality outcomes in workplaces? What would employers need to do to

[55] ABS, 'Characteristics of recent migrants' online statement (2020).
[56] AIHW, 'Employment and unemployment', Snapshot (online), 16 September 2021, citing ABS 2021, Labour Force Australia. July 2021. Canberra: ABS.
[57] Ibid.
[58] WGEA, *Submission to the Review of the Workplace Gender Equality Act 2012* (November 2021), 27.

implement these changes in their workplace? Should Minimum Standards apply to all reporting employers, not just those with 500 or more employees?

82. The minimum standards are currently applied to only a subgroup of relevant employers. Subsection 19(1) of the Workplace Gender Equality Act allows the Minister to specify via legislative instrument the relevant employers that the minimum standards will affect. The legislative instrument currently in force in relation to this subsection is the *Workplace Gender Equality (Minimum Standards) Instrument 2014* (Cth). Section 5 of this legislative instrument provides that the minimum standards apply to an 'employer'.[59] Section 4 defines 'employer' to mean 'a relevant employer that is the employer of 500 or more employees in Australia'.[60] This means that, although the Workplace Gender Equality Act ostensibly engages relevant employers with 100 or more employees,[61] only those with 500 or more employees (**Minimum Standards Employers**) have their compliance with the minimum standards monitored under the terms of the Workplace Gender Equality Act.[62]

83. This same instrument sets out the specifics of the minimum standards at subsection 5(3) as follows:[63]

> *(3) For subsection 19(1) of the Act, the following minimum standards are set:*
>
> *(a) Employers must have in place policies or strategies to support one or more of the gender equality indicators specified in column 1 of the following table; and*
>
> *(b) the policies or strategies put in place for paragraph 3(a) must aim to achieve the particular objective for a gender equality indicator specified in the corresponding column 2 of the table.*

Item	***Column 1*** ***Gender equality indicator***	***Column 2*** ***Objective***
1	*Gender composition of the workforce*	*Supporting gender equality in the Employer's workplace*
2	*Equal remuneration between women and men*	*In relation to employees of the Employer, equal remuneration between women and men*
3	*Availability and utility of employment terms, conditions and practices relating to flexible working arrangements for employees and to working arrangements supporting employees*	*Flexible working arrangements for employees of the Employer with caring responsibilities*

[59] *Workplace Gender Equality (Minimum Standards) Instrument 2014* (Cth), s 5(1).
[60] Ibid, s 4 (definition of 'employer').
[61] *Workplace Gender Equality Act 2012* (Cth), s 3 (definition of 'relevant employer').
[62] Ibid, ss 19-19E.
[63] *Workplace Gender Equality (Minimum Standards) Instrument 2014* (Cth), s 5(3).

	with family or caring responsibilities	
4	*Sex-based harassment and discrimination*	*Sex-based harassment and discrimination prevention in the Employer's workplace*

84. The requirement that a Minimum Standards Employer need, first, only consider one of four of the GEIs, and, second, only action the creation of policies or strategies in pursuit of this GEI and its relevant objective, appears, in the Law Council's view, to be a low bar. To this point, the Law Council highlights the WGEA's finding that:

> *The minimum standards in their current form are not effective at making progress towards gender equality in the workplace. Almost all relevant employers, regardless of employee size, meet them easily.*[64]

85. The WGEA's dataset shows that 100 per cent of employers with 500 or more employees met the minimum standards for the 2019-2020 reporting period.[65] Similarly, 'most organisations (99.2%) with less than 500 employees are already meeting the minimum standards'.[66]

86. Through analysis of its dataset, the WGEA, has, as noted above, 'identified an "action gap", meaning that organisations have policies and strategies in place but are not necessarily taking action to implement them'.[67] Its submission provides the following further assessment:

> *Despite high compliance with the minimum standards among employers, the gender pay gap persists, rates of sexual harassment and discrimination remain high, and women remain underrepresented in senior leadership. In short, the current minimum standards are of little value to improving the state of gender equality in Australian workplaces and need to be amended. It is clear that the requirement to have a policy or strategy in place to address gender equality objectives, while necessary, is not sufficient to achieve change.*[68]

87. In addition, the WGEA's dataset shows that compliance with the minimum standards is being driven predominantly through the existence of policies or strategies to prevent sex-based harassment and discrimination (with 99.6 per cent of employers with 500 or more employees meeting this standard).[69] This is closely followed by policies or strategies to support gender equality (with 95.5 per cent of Minimum Standards Employers meeting this standard).[70] The other GEIs, related to equal remuneration and flexible working arrangements, lag significantly, met by only 74.2 per cent and 76.7 per cent of Minimum Standards Employers respectively.[71]

88. The Law Council suggests this difference may further reflect the aforementioned 'action gap'. It notes that sexual harassment and sex discrimination are prohibited in certain circumstances, including in the context of employment, under law in

[64] WGEA, *Submission to the Review of the Workplace Gender Equality Act 2012* (November 2021) 31.
[65] Ibid, 31 and 33.
[66] Ibid, 31.
[67] Ibid, 6.
[68] Ibid, 32.
[69] Ibid, 31 and 33.
[70] Ibid, 33.
[71] Ibid.

Australia.[72] Accordingly, developing policies or strategies to prevent such acts cannot reasonably be characterised as an additional requirement on Minimum Standards Employers. It is likely that these employers would already have such policies or strategies in place, whether or not the minimum standards existed under the Workplace Gender Equality Act. Similarly, 'supporting gender equality' is perhaps the GEI objective that would produce the least concrete considerations or actions, given its reference to a broad aspiration, rather than a specific outcome.

89. The Law Council notes with interest the WGEA's recommendations and discussions relating to amending the minimum standards, which are set out in the **Appendix** and elaborated upon in its submission:

> *The Agency recommends amendments to the minimum standards that will encourage employer engagement and outcomes for gender equality. In the Agency's view, this includes, at a minimum, reporting to the board/governing body the Executive Summary and Industry Benchmark reports provided to employers by the Agency that reflect their workplace data submitted to WGEA. Leadership commitment and ownership is integral to the success of a gender equality strategy within the workplace, and is a consistent feature of best practice in workplace gender equality. The Agency's engagement with industry bodies and employers reinforces the importance of leadership.*[73]

90. Along with this 'at minimum' recommendation, the WGEA proposes:

> *That it is funded to work closely with employers to understand and achieve the new action and progress based minimum standards as well as other changes to the Act;*
>
> *That Item 2 in the minimum standards, addressing equal remuneration between women and men, be strengthened by articulating its objective as closing the gender pay gap.*[74]

91. While it would need further time to consult on the detail of these proposals, the Law Council recognises, as set out above, that there is an action gap to be addressed, and that improvements to the minimum standards may be an important means of achieving this.

Gender Segregation

92. The Law Council suggests that including a specific emphasis on closing the gender pay gap may be particularly appropriate, as it would encourage consideration to be given to the issue of gender segregation. It refers to the concerns of the CEDAW Committee, as set out above, 'that industrial and occupational segregation together account for 30 per cent of the 15.3 per cent gender pay gap'.[75] The CEDAW Committee further recommended that Australia implement the recommendations of the Senate Finance and Public Administration References Committee's final report on *Gender segregation in the workplace and its impact on women's economic equality*,

[72] *Sex Discrimination Act 1984* (Cth).
[73] WGEA, *Submission to the Review of the Workplace Gender Equality Act 2012* (November 2021) 32.
[74] Ibid, 5, rec 27-29.
[75] Committee on the Elimination of Discrimination against Women, *Concluding observations on the eighth periodic report of Australia*, 1602nd and 1603rd mtg, UN Doc CEDAW/C/AUS/CO/8 (25 July 2018) 12.

which was published in June 2017 (**Senate Committee Report on Gender Segregation**).[76]

93. Gender segregation is explained in this report as the 'unequal distribution of women and men' in Australian workplaces in two main ways. First, in certain occupations or industries, which is often referred to as 'horizontal segregation' or 'industrial and occupational segregation'. Second, in organisational hierarchies, which is often referred to as 'vertical segregation' and relates to 'the under-representation of women in senior positions'.[77]

94. Regarding how horizontal segregation impacts the gender pay gap, the Senate Committee Report on Gender Segregation notes:

> *Taken together, occupational and industrial gender segregation are the second most significant contributors to the pay gap between men and women, after sex discrimination.*
>
> *As the ratio of male to female employees in an industry increases so, too, does the average wage. KPMG found that, for every 10 per cent increase in the ratio of men to women in an industry, the average wage increases by 1.9 per cent. For every 10 per cent increase in this ratio in an occupation, the average wage increases by 0.8 per cent.*
>
> *A woman working in a female-dominated industry would on average, earn almost $40,000 less at total remuneration than the average full-time remuneration of a man in a male-dominated industry.*[78]

95. Accordingly, a focus in the minimum standards on closing the gender pay gap, might begin to foster consideration of gender segregation, encouraging, for example, Australian industry leaders to begin to turn their minds to how Minimum Standards Employers might consider not merely the average earnings of the women in their organisation in comparison to the men,[79] but how these average earnings compare to other industries and occupations.[80] The Law Council understands that departure from traditional understandings as to how work is valued is relatively new ground in Australia, but guidance can be drawn from emerging scholarship and practice.[81] Further in this regard, the WGEA might begin to consider whether the Benchmark report it provides to employers could in the future provide the data necessary to make these comparisons across industries and occupations.

Increased Minimum Standards Requirements

96. The WGEA has also broached the possibility, following a consultation process, of further amendments to the structure of the minimum standards, such as requiring that Minimum Standards Employers must have a policy or strategy in place to support all

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[76] Ibid, 12, referencing Senate Finance and Public Administration References Committee, *Gender segregation in the workplace and its impact on women's economic equality* (Final Report, June 2017).
[77] Senate Finance and Public Administration References Committee, *Gender segregation in the workplace and its impact on women's economic equality* (Final Report, June 2017) 4 and 7.
[78] Ibid, xv-xvi.
[79] WGEA, *Submission to the Review of the Workplace Gender Equality Act 2012* (November 2021) 34.
[80] Senate Finance and Public Administration References Committee, *Gender segregation in the workplace and its impact on women's economic equality* (Final Report, June 2017).
[81] See, eg, ibid, as well as the following pay equity cases: *Crown Librarians, Library Officers and Archivists Award Proceedings – Applications under the Equal Remuneration Principle* (2002) 111 IR 48; *Liquor Hospitality and Miscellaneous Union (Queensland Branch) v Australian Dental Association (Qld Branch)* (2005) 180 QGIG 187; *Liquor Hospitality and Miscellaneous Union, Queensland Branch, Union of Employees v Children's Services Employers Association* (2006) 182 QGIG 318.

four of the GEIs; that Minimum Standards Employers must set one target against each GEI in the minimum standards and report progress against each target; and that all relevant employers must meet the minimum standards. It notes, regarding the importance of further consultation, that:

> *The move towards action-based minimum standards that deliver outcomes for gender equality is not straightforward and the evidence base is emerging. Recent research recommends an outcomes-based minimum standard that relates to reducing the gender pay gap for Australia. In France, employers have to demonstrate results against an Index for measuring and correcting pay inequity.*
>
> *In preparation for this submission, the Agency has not held the necessary consultation and details conversations required in order to recommend minimum standards that can guarantee effectiveness and genuine employer action for gender equality. The Agency does, however, detail the [abovementioned suggestions] as elements for consideration in order to both utilise the current infrastructure of the minimum standards and encourage increased employer action.*[82]

97. The Law Council echoes the WGEA's position that further close consultation on the details of any proposed amendments to the minimum standards is important, and adds that this should occur with stakeholders across industries. It also highlights that should the minimum standards' requirements be expanded significantly, this may in turn affect the consideration of how far the range of relevant employers should be expanded which are required to comply with them.

98. Given the low bar highlighted by the Law Council above, it would seem appropriate to carefully consider the proposal that Minimum Standards Employers should be required to have a policy or strategy in place to support all four of the GEIs specified in the instrument, rather than only one.

99. It also queries whether the Minister should amend the legislative instrument in order that it specifies all six of the GEIs set out in the Workplace Gender Equality Act. Currently, the legislative instrument does not specify GEI2 (gender composition of governing bodies of relevant employers) or GEI5 (consultation with employees on issues concerning gender equality in the workplace) as relevant to the minimum standards. Consideration should be given to whether Minimum Standards Employers should be required to have a policy or strategy in place to support this full complement of GEIs.

100. It notes that it does not consider current governance practice to be a barrier to the creation of policy or strategy. For example, where Minimum Standards Employers have governance rules that include certain voting processes or eligibility criteria for the composition of their governing bodies, this does not preclude a policy or strategy, but may be worked into its terms, such as, in the immediate term, committing to providing mentoring and networking opportunities for women to ensure they have the highest chance of being considered for and voted into these governing roles, or, in the longer term, a gender equity review of the governance rules.[83]

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[82] WGEA, *Submission to the Review of the Workplace Gender Equality Act 2012* (November 2021) 32.

[83] Note in respect of the importance of networking, Katarzyna Burzynska and Gabriele Contreras, *Affirmative Action Programs and Network Benefits in the Number of Board Positions* (2020) <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3582425>: 'Whereas governments are increasingly considering affirmative action programs to increase corporate board diversity, the effect of such programs can

101. The Law Council further suggests that this proposition recognises the fact that certain GEIs and objectives are mutually reinforcing, where progress on one might support progress on another. The Senate Committee Report on Gender Segregation, for example, emphasised the inherent link between efforts to close the gender pay gap and the provision of flexible working arrangements. It noted that, because unpaid care remains heavily gendered in Australian society as a predominantly female responsibility, women are pushed into part-time work and into industries and occupations where employers offer flexible working arrangements.[84] More granular understandings of the drivers of gender inequalities, including examples such as this, lend credence to the proposition that Minimum Standards Employers should be required under the minimum standards to pursue all GEIs, rather than one.

Increased Minimum Standards Application

102. Should any proposal to apply the minimum standards to all relevant employers be pursued – not merely those with 500 or more employees – the Law Council would need time to consult further, particularly if the minimum standards were expanded to refer to all six GEIs, as this would inevitably increase the regulatory burden on employers.

103. With regard to the possibility of introducing targets – specifically that Minimum Standards Employers must set one target against each GEI in the minimum standards and report progress against each target – the Law Council would again need to consult further on the issue before being able to offer a firm position. Again, it recognises the concerning evidence of the 'action gap' between the existence and execution of policies. However, it also notes the main limitations, as identified by the WGEA, in Minimum Standards Employers setting or focusing on targets, 'such as employers setting low targets that are easily achievable, or masking progress through restructuring the way management categories are reported'.[85] Should consideration be given to employers setting targets, these would need to be framed in a meaningful way to ensure that progress is both genuine and achievable.

Consultation Question 9 – Compliance Mechanisms

Are the compliance mechanisms in the Workplace Gender Equality Act, and consequences for non-compliance, effective to promote and improve gender equality? If not, how could they be improved?

104. At present, compliance with the Workplace Gender Equality Act is pursued through three mechanisms:

- public reporting, operating on the assumption that employers will not wish to risk the reputational damage that may come from a failure to take or to comply with efforts to advance workplace gender equality;
- possible ineligibility to compete for Commonwealth grants or other financial assistance and government contracts under the Commonwealth and some state procurement frameworks; and
- the provision of advice and assistance to employers who fail to meet minimum standards.

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be superficial as they do not address the underlying problem, which is women's access to and inclusion in relevant corporate networks.'

[84] Senate Finance and Public Administration References Committee, *Gender segregation in the workplace and its impact on women's economic equality* (Final Report, June 2017) 14-16.

[85] WGEA, *Submission to the Review of the Workplace Gender Equality Act 2012* (November 2021) 33.

105. The Law Council notes that these compliance mechanisms are limited. It notes in this respect that the WGEA has stated it 'sees scope for clearer articulation and strengthening of the consequences for non-compliance with the Workplace Gender Equality Act'.[86]

Public Reporting

106. The public reporting mechanism operates at two levels. First is the requirement to lodge a public report containing the information specified under the Workplace Gender Equality Act and its related instruments. Second is the risk of being publicly reported upon for a failure to comply with certain requirements under the Workplace Gender Equality Act.

107. Under sections 13 and 13A of the Workplace Gender Equality Act, all relevant employers must prepare and lodge public reports containing information relating to the GEIs, including details of the matters specified in the relevant instrument.

108. Lodgement of the public report opens the relevant employer to public scrutiny, which is the first level motivating compliance with the Workplace Gender Equality Act. Shareholders, members and employees of the relevant employer will also receive access to a copy of the public report, this being required under section 16 of the Workplace Gender Equality Act. The WGEA may publish a public report, or a part of a public report, by electronic or other means, in accordance with paragraph 15(1)(a) of the Workplace Gender Equality Act. Currently, this is undertaken through publication of aggregated data pertaining to, and searchable by entering the name of, an individual organisation on the WGEA's website (with higher level aggregations of the data, such as by industry, also available).[87] The Law Council notes that the WGEA's publication mechanism is less transparent than comparable publication mechanisms, such as the Australian Government's Modern Slavery Statement Register, which provides members of the public with full access to the complete statements lodged by reporting entities, rather than aggregated data.[88] If this were replicated within the WGEA's publication mechanism, amendments to the Workplace Gender Equality Act would be required to ensure personal information is adequately protected.

109. In certain circumstances, including where a relevant employer fails to submit a report, submits information in its report that is false or misleading, fails to provide access to its report to its shareholders, members or employees, or, where the minimum standards are applicable to the employer, fails to meet the requirements of the process set out under section 19C of the Workplace Gender Equality Act, it will be considered as having failed to comply with the Act.

110. Subsection 19D(1) of the Workplace Gender Equality Act provides that such a failure to comply with the Act will only enliven subsections 19D(2)-(3) (consequences of non-compliance) if the relevant employer is 'without reasonable excuse' for their failure to comply. There is no further guidance in the Workplace Gender Equality Act as to what might constitute a reasonable excuse. In addition, before the Agency can apply subsections 19D(2)-(3), it must, in accordance with subsections 19D(4)-(5), give the relevant employer notice and reasons as to why it is proposing to apply the

[86] Ibid, 35.
[87] WGEA, *WGEA Data Explorer* (website, undated) <https://data.wgea.gov.au/home>.
[88] See, eg, Australian Government, *Modern Slavery Register*, 'Published Statement #2021-670' (website, 23 April 2021) <https://modernslaveryregister.gov.au/statements/2311/>.

consequences of non-compliance, and invite and have regard to written representations from the relevant employer concerning this proposition.

111. Both subsection 19D(2) and 19D(3) are voluntary, in that the WGEA may choose to apply them – it is not obligated to do so. These subsections provide the second level of public reporting motivating compliance with the Workplace Gender Equality Act. In full, these subsections state:

> *Naming employer in Agency report*
>
> *(2) The Agency may name the employer as having failed to comply with this Act, and set out details of the noncompliance, in a report under:*
>
> *(a) subsection 12(2); or*
>
> *(b) section 46 of the Public Governance, Performance and Accountability Act 2013.*
>
> *Naming employer in other ways*
>
> *(3) The Agency may, by electronic or other means, name the employer as having failed to comply with this Act and set out details of the non-compliance.*

112. A report under subsection 12(2) of the Workplace Gender Equality Act means a report to the Minister, which must be tabled in Parliament. With regard to electronic reporting, the WGEA currently publishes on its website a 'Non-Compliant Organisations List', which provides the ABN, legal name, business or trading name, and the ultimate parent, of non-compliant relevant employers.[89] The Law Council notes that this list does not currently 'set out the details of the non-compliance', as would be allowed under subsection 19D(3).

Possible Procurement Ineligibility

113. The Workplace Gender Equality Procurement Principles provide that to be considered for Australian Government procurement contracts valued at or above the 'relevant procurement thresholds', all 'relevant employers' must be able to demonstrate they are compliant with the Workplace Gender Equality Act by supplying a letter of compliance, which can be obtained through the WGEA.[90]

114. The Law Council notes with interest the WGEA's discussion and recommendations relating to the efficacy of the procurement principles as a compliance mechanism, including as follows:

> *There are known instances where non-compliant organisations have received Government contracts because the contracted amount was below the related procurement threshold or the entity is not subject to the Commonwealth Procurement Rules. …*
>
> *The Principles provide a strong framework by which to encourage compliance with the Act. However, the principles could be strengthened.*

[89] WGEA, *Non-Compliant Organisations List* (website, 16 April 2021) <https://www.wgea.gov.au/what-we-do/compliance-reporting/non-compliant-list>.
[90] Australian Government, Department of Prime Minister and Cabinet, *Workplace Gender Equality Procurement Principles and User Guide* <https://www.wgea.gov.au/sites/default/files/documents/PMC-WGE-Procurement-Principles.pdf> 2.

> *The Agency recommends that there be a review of the Procurement Principles which gives consideration to treating non-corporate and corporate Commonwealth entities equally and that a mechanism is created that would extend the coverage of the Principles to all Commonwealth entities and companies. This means that the procurement threshold for all Commonwealth entities and companies, other than for procurements of construction services, should be $80,000 and the Principles would apply to a broader range of Government contracts.*
>
> *More transparency is also required on whether recipients of Government grants or other financial assistance are compliant with the Act. A review of the Procurement Principles should consider how they apply with the Commonwealth Grants Rules and Guidelines and require grantees to be compliant with the Act.*[91]

115. The Law Council notes that if the value of a supplier's contract falls below a related procurement threshold, the Principles do not apply. The current thresholds are as follows:

    (a) For non-corporate Commonwealth entities, other than for procurements of construction services, the procurement threshold is $80,000.

    (b) For prescribed corporate Commonwealth entities, other than for procurements of construction services, the procurement threshold is $400,000.

    (c) For procurements of construction services, the procurement threshold is $7.5 million.

116. It would seem prima facie reasonable to ensure that the approach under the Principles to the procurement threshold for non-corporate Commonwealth entities and corporate Commonwealth entities was consistent.

117. The Law Council also notes with interest WGEA's suggestion that more transparency is required on whether recipients of Government grants or other financial assistance are compliant with the Act. It has proposed that a review of the Procurement Principles should consider how they are with the Commonwealth Grants Rules and Guidelines and require grantees to be compliant with the Act. The Law Council notes that the while billions of dollars annually are expended on grants to benefit the public, the Commonwealth Grants Rules and Guidelines 201792 do not incorporate similar gender equity objectives to the Procurement Principles. It also notes that the appropriate parameters would need to be drawn carefully, should such objectives be incorporated, and would be pleased to consider this issue further.

Employers Who Fail to Meet Minimum Standards

118. Section 19E of the Workplace Gender Equality Act provides that where employers fail to meet the minimum standards, the WGEA must offer to provide the employer with advice and assistance in relation to improving the employer's performance against that standard.

119. As noted above, employers who fail to meet the minimum standards may also be considered as having failed to comply with the Workplace Gender Equality Act and be subject to the application of subsections 19D(2)-(3) (consequences of non-compliance), provided they also fail the process set out under section 19C of the Act.

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[91] WGEA, *Submission to the Review of the Workplace Gender Equality Act 2012* (November 2021) 35-36.
[92] Australian Government Department of Finance, Commonwealth Grants Rules and Guidelines 2017.

The Law Council queries whether this process sets such a low threshold for employers to meet that it renders public reporting as a compliance mechanism for the minimum standards near meaningless. Section 19C requires that the first reporting period where an employer fails to meet the minimum standards be taken as the 'base period'. The following reporting period is the 'comparison period'. It is only if the employer has failed at the end of the comparison period to improve from their performance at the end of their base period that the employer is taken to have failed to comply with the Workplace Gender Equality Act. That is, section 19C does not require the employer to meet the minimum standard at the end of the comparison period – only to have improved against their previous performance. The Law Council would be interested in data as to how many employers fail the process set out under section 19C, as it anticipates these numbers would be very low.

Other Possible Compliance Mechanisms

120. The NSW Bar has emphasised to the Law Council that the Workplace Gender Equality Act plays a vitally important role in facilitating the collection of data on gender equality in Australian workplaces, and views it as crucial that the data collected is reliable and comprehensive in order to ensure that there is accountability and that the impact of policies can be monitored. It is concerned that without adequate compliance mechanisms, the data which is collected and used by the Workplace Gender Equality Act will not achieve this purpose. On this basis, the NSW Bar recommends that consideration be given to other possible compliance measures, such as regular spot audits of the data provided by employers and the consideration of financial penalties for employers who misrepresent or misreport data.

121. The Law Council notes, however, that the views of barristers' peak bodies may differ from those of solicitors' peak bodies in this space. The Law Societies, for example, represent lawyers of different sized law firms, including small and medium firms with fewer resources. Given the relatively short timeframe of the consultation, the majority of the Law Council's constituent bodies have been unable to provide the Law Council with their views for inclusion in this submission.

122. In general, the Law Council supports an evidence-based approach to achieving compliance. In this regard, it would be interested in further information as to how often the current compliance mechanisms are utilised, and their effectiveness in achieving stronger outcomes. This could then be compared against broader international frameworks in place, and information about their broader take-up and effectiveness in achieving change.

123. The Law Council also notes that there are likely to be many relevant employers who are in good faith attempting to comply with the Workplace Gender Equality Act, and that minor inconsistencies or errors should not be subject to heavy-handed compliance approaches. Where this occurs, advice and assistance should be the first line of response, with other approaches reserved for more serious or persistent non-compliance. Consultation is also needed on an ongoing basis to ensure that any requirements under the Workplace Gender Equality Act are clearly expressed and understood.

124. On this basis, as stated above, the Law Council would encourage the Department to engage in further close consultation on the details of the review across industries, including with affected law firms, to ensure that outcomes are as meaningful, effective and appropriate as possible for all stakeholders. The Law Council recommends an extension of the period and scope of the consultation process in order to undertake this work.

Consultation Question 10 – Miscellaneous

Are there any other matters you want to comment on in relation to the Workplace Gender Equality Act and improving and promoting gender equality in the workplace in Australia?

125. The Law Council suggests that questions of reform to the Workplace Gender Equality Act should also be linked to the Australian Government's wider policy agenda regarding women, and both in turn, linked to broader national recommendations where action has been supported – with an understanding of the purpose and objectives of such action in terms of what is most effective to properly identify and address the drivers of inequality.

126. For example, the Australian Government introduced in 2017 a strategy to support women's workforce participation, in the context of its commitment 'to reduce the gender participation gap between men and women'.[93]

127. Yet such as strategy to increase women's participation in the workforce does not appear to go far enough in light of other concerns and recommendations. The goal must be to increase women's full and equal participation in the workforce, which involves consideration of the gender pay gap.[94] The Australian Government's strategy appeared to consider the gender pay gap an isolated issue, mentioning it once as follows:

> *The Government's efforts to close the gender pay gap also play a key role in increasing women's economic security. The WGEA works with the private sector and provides a number of resources to assist employers to close the gender pay gap.*[95]

128. The strategy considered the concept of gender segregation, but in a relatively limited way, and in the context of participation rather than pay, focusing on the need to increase the participation of women in higher paid industries such as Science, Technology, Engineering and Maths (**STEM**) industries, or the participation of men in underpaid industries such as the care industry, rather than considering the widespread undervaluation of work predominantly undertaken by women.[96]

129. In contrast, the Senate Committee Report on Gender Segregation, referred to above, stated in the same year that 'without deliberate action, neither the consequences of gender segregation nor its causes are likely to ease in the future'.[97] It made a number of concrete and widescale recommendations, including, under Recommendation 1 (which the CEDAW Committee subsequently endorsed[98]) that:

> *The Office for Women in the Department of the Prime Minister and Cabinet lead the development and implementation of a national policy*

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[93] Australian Government, 'Towards 2025: An Australian Government Strategy to Boost Women's Workforce Participation' (2017) <https://womensworkforceparticipation.pmc.gov.au/sites/default/files/towards-2025-strategy.pdf>.
[94] WGEA, *The Gender Pay Gap* (website, undated) <https://www.wgea.gov.au/the-gender-pay-gap>.
[95] Australian Government, 'Towards 2025: An Australian Government Strategy to Boost Women's Workforce Participation' (2017) <https://womensworkforceparticipation.pmc.gov.au/sites/default/files/towards-2025-strategy.pdf> 22.
[96] Ibid 18.
[97] Senate Finance and Public Administration References Committee, *Gender segregation in the workplace and its impact on women's economic equality* (Final Report, June 2017) 13.
[98] Committee on the Elimination of Discrimination against Women, *Concluding observations on the eighth periodic report of Australia*, 1602nd and 1603rd mtg, UN Doc CEDAW/C/AUS/CO/8 (25 July 2018) 12.

> *framework to achieve gender pay equity in Australia. The framework should set a pay equity target date, provide an advisory structure to guide implementation, provide a roadmap for achieving pay equity in Australia, address segregation in Australian workplaces, and draw on measures in Australia's public and private sectors and in comparable overseas jurisdictions.*
>
> *The national policy framework to achieve pay equity should coordinate efforts across agencies of government to address the factors that adversely affect women's workforce participation and gender segregation …*[99]

130. Other areas of data collection and reporting are also ripe for sharing lessons learned. The Australian Government's unfolding work, and the experience to date of employers who are reporting entities, in the area of modern slavery might also provide guidance on the process of amending the Workplace Gender Equality Act and its related instruments to enhance action. Under the *Modern Slavery Act 2018* (Cth), reporting entities are required to lodge annual modern slavery statements identifying and describing the risks of modern slavery in their operations and supply chains. The statements must also include information about actions taken to address those risks. This proactive risk identification and management approach suggests a possible path forward to strengthen reporting against gender equality indicators and minimum standards.

Appendix

131. In its submission to the review, the WGEA recommends:[100]

- (1) that its functions include to "drive change by working with employers to achieve their targets for gender equality and to meet the minimum standards of the Act";
- (2) that Federal, State, Territory and Local Government public sector agencies with 20 or more employees are required to report to it;
- (3) that, with the introduction of Single Touch Payroll (STP) data, there be consideration for expanding the definition of 'relevant employer' to include non-public sector employers with 50 or more employees;
- (4) that the *Workplace Gender Equality (Matters in relation to Gender Equality Indicators) Instrument 2013 (No. 1) (Legislative Instrument)* specifies the type of data collected by the Agency as opposed to specifying data points or data calculation;
- (5) that employers are required to provide data on the relative position of women, men, and non-binary people in their workplaces. In addition, the Agency recommends that definitions related to gender in the Act should reflect best practice;
- (6) making the collection of data on employee age (year of birth) mandatory;
- (7) making the collection of an employee's primary workplace location mandatory;
- (8) that collecting data on occupations and jobs at Australian and New Zealand Standard Classification of Occupations (ANZSCO) level 4 for non-managers is made mandatory;

[99] Senate Finance and Public Administration References Committee, *Gender segregation in the workplace and its impact on women's economic equality* (Final Report, June 2017) xi.
[100] WGEA, *Submission to the Review of the Workplace Gender Equality Act 2012* (November 2021) 3-5.

- (9) that employers report on the number of employees who have involuntarily exited the organisation, by gender, employment status and manager/non-manager category;
- (10) that employers report on the number of employees, disaggregated by gender, employment status and manager/non-manager category, who were made redundant;
- (11) collecting data on promotions and resignations of partners;
- (12) making mandatory the collection of disaggregated data on the composition and equity status of partners in firms with partnership structures;
- (13) making the collection of remuneration data for Chief Executive Officers (CEOs) or the equivalent mandatory;
- (14) that the Act require employers to report remuneration data on partners in partnership structures;
- (15) that employers no longer provide full-time equivalent annual earnings for part-time and casual employees, but report on the actual earnings of part-time and casual employees as well as the number of hours employees are engaged;
- (16) that information be collected on employees, disaggregated by gender, employment status, and manager/non-manager category, who have access to employer-funded paid parental leave for primary carers and secondary carers and the eligibility period for access;
- (17) that employers report whether they pay superannuation when an employee is on paid, unpaid, employer-funded and/or government-funded parental leave;
- (18) collecting data on partners who cease employment during, or at the end of, a period of parental leave;
- (19) that employers report on the action taken as a result of employee consultation;
- (20) that employers report on the provision and frequency of workplace training on sex-based harassment and discrimination prevention for the whole workforce;
- (21) that sex-based harassment and discrimination is specified as GEI 6. Following from this, the Agency recommends that additional data is collected with respect to this GEI as specified by the Respect@Work Council. The Agency also recommends that an additional GEI (GEI 7) be added to account for other matters specified by the Minister;
- (22) mandatory data collection on gender and intersecting forms of diversity, including employee age (year of birth), primary work location, Aboriginal and/or Torres Strait Islander background, cultural background, and disability;
- (23) that data on individual organisations gender pay gaps (base salary and total remuneration), in percentages and dollar figures and by gender pay gap and workforce composition quartiles, be included in its public dataset;
- (24) that relevant employers report against one ‘snapshot’ date in order to improve comparability of the data;
- (25) that it be able to specify the mechanism which employers must use for reporting to the Agency;
- (26) where possible, using Single Touch Payroll (STP) data to enhance gender equality statistics and reduce employer reporting burden;
- (27) that the Workplace Gender Equality (Minimum Standards) Instrument 2014 (Minimum Standards) require employer action and progress on gender equality. This includes reporting to the Board/Governing Body on the Executive Summary report and Industry Benchmark report provided to employers by the Agency;

- (28) that it is funded to work closely with employers to understand and achieve the new action and progress based minimum standards as well as other changes to the Act;
- (29) that Item 2 in the minimum standards, addressing equal remuneration between women and men, be strengthened by articulating its objective as closing the gender pay gap;
- (30) reviewing the Workplace Gender Equality Procurement Principles, including considering extending the coverage to all Commonwealth entities and companies, with the procurement threshold of $80,000 (other than for procurements of construction services), and to apply the Principles within the Commonwealth Grants Rules and Guidelines;
- (31) that the title of the Director of the Agency be changed to CEO.