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WGEA Review Team - Consultation
Department of the Prime Minister and Cabinet
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Review of Workplace Gender Equality Act 2012

Australian Lawyers for Human Rights (**ALHR**) is grateful for the opportunity to provide this submission to the Department of the Prime Minister and Cabinet (the **Department**) in respect of its review (the **Review**) into the *Workplace Gender Equality Act 2012* (the **Act**), with particular focus on the effectiveness of the Workplace Gender Equality Agency (the **WGEA**).

ALHR commends the Department for its commitment to advancing the rights of women in the workplace and welcomes the Review.

About ALHR

ALHR was established in 1993 and is a national association of Australian solicitors, barristers, academics, judicial officers and law students who practise and promote international human rights law in Australia. ALHR has active and engaged National, State and Territory committees and specialist thematic committees. Through advocacy, media engagement, education, networking, research and training, ALHR promotes, practices and protects universally accepted standards of human rights throughout Australia and overseas.

1. Summary of Recommendations

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| Q. 1 | The WGEA should expand its efforts with outreach to ‘at-risk’ sectors, including the small business sector, and this should be a focus of WGEA moving forward. |
| Q. 2 | <p>(a) The WGEA should promote and enforce the undertaking of gender pay gap audits by requiring all relevant employers to regularly undertake gender pay gap audits and WGEA be granted appropriate powers to enforce this requirement.</p> <p>(b) The WGEA should increase its focus on areas which have consistently had the largest disparity between genders by promoting best practice and assisting organisations in the following sectors to improve their gender equity practices: health care and social assistance, construction, education and training, agriculture and retail trade.</p> <p>(c) The WGEA should adopt a focus on addressing intersectionality as one of its primary areas of concern. Such a focus should include ensuring that women from disadvantaged or marginalised communities (such as women from CALD communities, women refugees and migrants, women of colour, LGBTQ+ women, First Nations women, women living with disability, women experiencing domestic violence, previously incarcerated women, women from lower socio-economic backgrounds, women carers) are also able to experience the reduction of the gender equality gap. ALHR submits that, to this end, WGEA engages in a series of studies that explore the intersecting discrimination experienced by these disadvantaged or marginalised groups of women to determine what the barriers to gender equality are and how these barriers might be overcome.</p> <p>(d) The WGEA should promote and advocate for greater participation by women in the formulation of economic policies and programs.</p> <p>(e) The WGEA should promote and advocate for greater harmonisation of work and family responsibilities for men and women and should play a key role in advocating for high-quality, flexible and affordable childcare, and elder and dependent care services that take into account the needs of working men and women.</p> <p>(f) The WGEA should undertake advocacy work on superannuation legislation reform to ensure better protection for women, particularly those from</p> |

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| | <p>disadvantaged or marginalised communities who have been a primary carer, have experienced domestic violence or have immigrated with a working spouse and have not been able to build significant super.</p> <p>(g) WGEA data should be utilised to build better curricula focused on encouraging women and girls into higher paying professions and trades where they are more often underrepresented.</p> |
| <p>Q. 3</p> | <p>(a) Mandatory public sector reporting should be expanded to include state and territory public sectors so that similar leadership on gender equality can be demonstrated at a state and territory level.</p> <p>(b) Coverage of the Act should be expanded to require all government contractors, regardless of size, to report, with assistance given (or a simplified reporting mechanism developed) for those with less than 100 employees.</p> <p>(c) The Department should consider whether smaller organisations with high annual revenue should also fall within the scope of the Act.</p> <p>(d) The WGEA should create a mentoring program for women owned entities, particularly those which are owned and/or run by disadvantaged or marginalised groups such as First Nations, women from CALD communities, and women living with disabilities .</p> |
| <p>Q.4</p> | <p>(a) Schedule 1, cl 1 of the WGE Instrument should be amended to include a requirement to report, in addition to attrition rates, on the following: <i>the number and proportion of employees who have voluntarily changed their employment status, by gender, employment status and manager/non-manager.</i></p> <p>(b) Schedule 1, cls 3.4 and 3.5 of the WGE Instrument be amended to require relevant employers to undertake regular gender pay gap audits.</p> <p>(c) The WGEA should undertake analysis of the seniority of workplaces, correlated against both promotion rates and attrition rates and publish its findings for use by employers.</p> <p>(d) To the extent it is possible or reasonable to collect data on succession planning, the GEIs should include a requirement to report on the existence</p> |

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| | <p>of a policy or strategy that supports gender equality in relation to the replacement of leadership roles at every level of the organisation including at a governing body level and manager level.</p> |
| <p>Q.5</p> | <p>(a) In accordance with the Platform for Action, the Australian Government should:</p> <p><i>Implement and monitor positive public- and private-sector employment, equity and positive action programmes to address systemic discrimination against women in the labour force, in particular women [living] with disabilities and women belonging to other disadvantaged groups, with respect to hiring, retention and promotion, and vocational training of women in all sectors.¹</i></p> <p>(b) The WGEA should collect data on additional diversity and inclusion grounds directly from employees in order to both track overall trends in the workplace and assist in developing initiatives that address intersectionality whilst also maintaining the privacy rights and most importantly, the safety of disadvantaged and marginalised groups.</p> <p>(c) ALHR recommends the creation of an independent and anonymised platform of data collection to be managed and maintained securely by WGEA. Employers would be encouraged to direct employees, annually, to complete anonymous, online employee surveys that address the following criteria:</p> <ul style="list-style-type: none"> a) Cultural and linguistic diversity b) Persons who identify as First Nations c) Persons living with disability d) Age e) Persons who identify as LGBTQ+ f) Location of primary workplace. |

¹ Platform for Action (n 17) 76 [178(f)].

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| | <p>(d) The results of employee surveys should only be available to WGEA.</p> <p>(e) The WGEA should then publish guidelines on best practice including relevant case studies on successful diversity and inclusion programs that would allow other employers to replicate similar practices in their own workplaces.</p> <p>(f) The WGEA should also collect general data on the use of subcontractors and consultants by relevant employers in order to establish whether efforts are being made to incorporate diversity and inclusion initiatives into procurement processes.</p> |
| Q.6 | <p>(a) Remuneration data be collected and published by WGEA in order to assist women to become better informed about their employment options and their ability to negotiate better pay.</p> <p>(b) The WGEA should advocate against the use of non-disclosure clauses in relation to remuneration in employment contracts as well as the common practice of requiring job applicants to disclose their current/previous salary.</p> |
| Q.7 | <p>Any changes to the Act made to reduce the regulatory burden on relevant employers, allowing for the sharing of data between government agencies, should be limited only to that which is specifically required to be disclosed by employers. A general sharing of data across agencies is not supported.</p> <p>Such changes should be reexamined on a continual basis, firstly, to ensure that the sharing of information between agencies is still necessary and secondly, given the ever-evolving nature of technology, to ensure that relevant data only needs to be input once.</p> |
| Q.8 | <p>(a) In order to demonstrate compliance, employers with more than 500 employees should be required to develop policies or strategies that support all four of the GEIs listed in the minimum standards.</p> <p>(b) Relevant employers with between 100-499 employees should be required to meet at least one of the GEIs listed in the minimum standards in their first year, along with supporting evidence to show a commitment to progressively implementing policies and strategies that support the remaining GEIs in successive years.</p> |

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| | <p>(c) Noting that employers with less than 100 employees may face resource constraints in some sectors, the WGEA should provide such employers with technical guidance on how to develop formal policies and/or strategies to support gender equality, particularly in relation to the GEIs on gender composition of the workplace and equal remuneration, including by developing and distributing sample policies, programs and case studies. Such assistance may encourage more employers to voluntarily meet the minimum standards.</p> <p>(d) The minimum standards should require all employers, regardless of their size, to have formal policies and/or strategies in place to combat sex-based harassment and discrimination in the workplace. In order to assist smaller employers to comply with this requirement, the WGEA should distribute a sample policy and procedure, like the Fair Work Information Statement.</p> <p>(e) In relation to the GEI concerning flexible work arrangements, the WGEA should seek further information on whether companies have policies or strategies to support employees who are returning to work after a period of caring, and those who are experiencing or recovering from domestic violence.</p> |
| <p>Q.9</p> | <p>Formal audit powers, including adequate resourcing to conduct audits and publish results, and/or agreements to enact certain policies or programs and/or sanctions for non-compliance might act as greater incentives to employers to improve gender equality within their workplace than the compliance mechanisms currently in place. This, in turn, would assist WGEA to effectively fulfil its mandate.</p> |
| <p>Q.10</p> | <p>(a) Future WGEA advocacy efforts should focus on the full implementation of the Respect@Work recommendations.</p> <p>(b) Based on the data it receives, and its own commentary on best practices, the WGEA should encourage the government to change parental leave policies to remove the distinction between 'primary' and 'secondary' carer.</p> |

2. Introduction

- 2.1. Globally, women make 77 cents for every dollar earned by men.² For marginalised groups of women including women of colour, women refugees and migrants, LGBTQ+ women, rural women and women with disabilities, that figure is even lower.³
- 2.2. In recent decades in Australia, significant progress has been made by women towards equality with men.⁴ Since WGEA began tracking gender equality in 2014, the gender pay gap has dropped from 24.7% to 14.2% in May 2021.⁵ However even if this rate of decline remains constant, gender pay equality for women will not be achieved for 26 years.⁶ Sadly, it is important to note that already the decrease in the gender pay gap has not been steady and with the gap widening by 0.8% between November 2020 and May 2021, increasing from 13.4% to 14.2% respectively.⁷ At the same time, perhaps due to a focus on COVID-19 related matters, companies have decreased their efforts to self-audit and apathy towards further change seems to have set in.⁸ This indicates that the gains achieved are tenuous and that if work in this regard is not constant, and if focus continues to be lost, then we are liable to see further backsliding.
- 2.3. There is now considerable evidence that points to the enormous contributions to economies that women make. Achieving gender equality not only benefits women but benefits us all. For example, BCEC and WGEA's Gender Equity Insights 2020 report showed definitively that with an increase in women's participation on Boards, comes a

² UN Women, *Equal Pay for Work of Equal Value* (Web Page) <<https://www.unwomen.org/en/news/in-focus/csw61/equal-pay>>.

³ Ibid; and United Nations, 'Equal Pay Essential to Build a World of Dignity and Justice for All, UN says, Commemorating First International Equal Pay Day', *Global Perspective Human Stories* (Web Page, 18 September 2020) <<https://news.un.org/en/story/2020/09/1072722>>.

⁴ Australian Human Rights Commission, 'Face the Facts: Gender Equality 2018', *Education* (Factsheet, 2018) 2 <https://humanrights.gov.au/sites/default/files/2018_Face_the_Facts_Gender_Equality.pdf?_ga=2.160072189.1901585102.1637386255-1717624503.1636965476>.

⁵ Rebecca Cassells and Alan Duncan, *Gender Equity Insights 2021: Making it a Priority* (BCEC/WGEA Gender Equity Series No. 6, March 2021) 14 <<https://www.wgea.gov.au/sites/default/files/documents/BCEC%20WGEA%20Gender%20Equity%20Insights%202021%20Report.pdf>>.

⁶ Ibid.

⁷ Workplace Gender Equality Agency, *Australia's Gender Pay Gap Statistics* (Factsheet, 27 August 2021) 3 <<https://www.wgea.gov.au/publications/australias-gender-pay-gap-statistics>>.

⁸ Cassells and Duncan (n 4) 8.

corresponding increase in company performance, profitability and productivity.⁹ Likewise, in a study by McKinsey, it was found that by advancing women's equality, the economies of Asia-Pacific could increase their collective annual GDP by \$4.5 trillion a year by 2025.¹⁰ As a leader within our region on the advancement of human rights, Australia needs to ensure that our policies and programmes, particularly those associated with our recovery efforts in the wake of the COVID-19 pandemic, focus on creating more equal and diverse societies through the promotion and advancement of gender equality.

3. International Human Rights Law and Workplace Gender Equality

- 3.1. At an international level, gender equality is recognised as a fundamental human right. This applies to all aspects of a woman's life, including and in particular, economic empowerment.
- 3.2. Articles 2, 3, 5, 8, 10, 11, 13 and 14 of the *Convention on the Elimination of All Forms of Discrimination against Women (CEDAW)*¹¹ require States parties to take positive measures to advance women's economic, social and cultural rights to participate in the workplace.
- 3.3. CEDAW defines discrimination against women as:

*any distinction, exclusion or restriction made on the basis of sex which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women, irrespective of their marital status, on a basis of equality of men and women, of human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field.*¹²

⁹ Ibid 20.

¹⁰ McKinsey Global Institute, *The Power of Parity: Advancing Women's Equality in Asia Pacific* (Report, April 2018) 1.

¹¹ *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').

¹² Ibid Article 1.

3.4. In signing CEDAW on 17 August 1983 Australia committed itself to taking:

*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.*¹³

3.5. Australia's CEDAW obligations therefore commit the Australian Government to promoting policies, laws, organisations, structures and attitudes that ensure women are guaranteed the same rights as men.

3.6. Similarly, the advancement of gender equality falls within the mandate of the International Labour Organisation (the **ILO**), which is enshrined in its Constitution and reflected in relevant international labour standards including four key ILO conventions - the *Equal Remuneration Convention*,¹⁴ the *Discrimination (Employment and Occupation) Convention*,¹⁵ the *Workers with Family Responsibilities Convention*,¹⁶ and the *Maternity Protection Convention*.¹⁷ Australia has not yet ratified the *Maternity Protection Convention* but is a signatory to the other three ILO Conventions (collectively **ILO Gender Equality Conventions**).

3.7. During the Fourth World Conference on Women in Beijing in September 1995, representatives of 189 governments, including those from Australia, made historic and critically important commitments to promote and progress the rights of women towards equality with men. These commitments were documented in the Beijing Declaration and Platform for Action¹⁸ (the **Platform for Action**), a defining framework for change

¹³ Ibid Article 3.

¹⁴ *ILO Equal Remuneration Convention (No. 100)*, opened for signature 29 June 1951 (entered into force 23 May 1953).

¹⁵ *ILO Convention concerning Discrimination in Respect of Employment and Occupation (No. 111)*, opened for signature 25 June 1958 (entered into force 15 June 1960).

¹⁶ *ILO Convention concerning Equal Opportunities and Equal Treatment for Men and Women Workers: Workers with Family Responsibilities (No. 156)*, opened for signature 23 June 1981 (entered into force 11 August 1983).

¹⁷ *ILO Convention concerning the revision of the Maternity Protection (No. 183)*, opened for signature 15 June 2000 (entered into force 7 February 2002).

¹⁸ *Beijing Declaration and Platform for Action*, adopted 15 September 1995 <<https://www.un.org/womenwatch/daw/beijing/pdf/BDPfA%20E.pdf>>.

that covers twelve critical areas of concern. Part IV(F) of the Platform for Action specifically relates to women and the economy.

- 3.8. The Platform for Action is the most progressive blueprint we have for advancing women's rights. As UN Women note, it is a powerful source of guidance and inspiration that should be used by governments to inform policy measures adopted in relation to gender equality issues.¹⁹
- 3.9. In Australia, the *Workplace Gender Equality Act 2012*,²⁰ the *Fair Work Act 2009*²¹ and the *Sex Discrimination Act 1984*²² give effect to our international human rights obligations under CEDAW, the ILO Gender Equality Conventions and to some extent, the Platform for Action, to promote equality between women and men within the workplace.
- 3.10. ALHR applauds the efforts of WGEA to date as critical to achieving gender equality in Australia and supports the expansion of WGEA's remit to accelerate this necessary change.
- 3.11. However, ALHR respectfully submits that despite the gains made in achieving gender equality within the workplace in Australia, there is still much more to be done to ensure the effective implementation of Australia's international legal obligations and commitments, particularly those contained in the Platform for Action, and as such, provides the following responses to the Review questions posed.

¹⁹ UN Women, 'The Beijing Platform for Action: Inspiration then and now', *The Beijing Platform for Action Turns 20* (Web Page) < <https://beijing20.unwomen.org/en/about>>.

²⁰ *Workplace Gender Equality Act 2012 (Cth)*

²¹ *Fair Work Act 2009 (Cth)*

²² *Sex Discrimination Act 1984 (Cth)*

4. Responses to Consultation Paper

Question 1

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?

- 4.1. ALHR considers the functions and powers of WGEA in so far as they require relevant employers to focus on the issues of gender equality in a granular way, to be effective in promoting its objective. It encourages and allows employers to track their success (or lack of success) in closing pay gaps within their organisations that may not otherwise be visible without that kind of analysis. It is true that some employers may recognise the need to do this work themselves, but others may not consider it a priority and fail to devote the necessary resources without the WGEA requirements.
- 4.2. ALHR is however concerned that the sectors where more marginalised women may work – for example, employers with less than 100 workers, independent shops, retail, not-for-profit and the casual, gig and subcontracting economy - may not be able to take advantage of this work and would find the reporting mechanisms overly burdensome.
- 4.3. **ALHR therefore submits that, having well established its work with larger organisations, WGEA should expand its efforts with outreach to the small business sector and this should be a focus of WGEA moving forward.**

Question 2

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?

- 4.4. As highlighted above, ALHR is a national association of Australian solicitors, barristers, academics, judicial officers and law students who practise and promote international human rights law in Australia. It is not therefore an employer covered by WGEA. However, as an organisation with a mandate of protecting human rights and promoting gender equality, and taking inspiration from the Platform for Action, ALHR submits that efforts focused on the following areas may be effective in improving gender equality in Australia:

a) Promote and enforce the undertaking of gender pay gap audits

Research shows that ‘businesses who pay close attention to their own data, and who consistently scrutinise and apply their workplace policies, are the ones that have seen the most effective gender equality outcomes’.²³ However, WGEA’s most recent dataset demonstrates the inconsistency with which businesses in Australia are undertaking gender pay gap audits.²⁴ According to BCEC and WGEA’s Gender Equity Insights 2021 report, almost 54% of relevant employers who reported during the 2019-2020 reporting period did not undertake a regular pay gap analysis. As noted by the Director of WGEA, ‘this report proves again that a gender pay gap analysis is essential for every organisation’.²⁵ **Accordingly, ALHR recommends that all relevant employers be required to regularly undertake gender pay gap audits and WGEA be granted appropriate powers to enforce this requirement.**

²³ Cassells and Duncan (n 4) 6.

²⁴ Ibid.

²⁵ Ibid.

b) Increased focus on areas which have consistently had the largest disparity between genders

Longitudinal research demonstrates that sectors/organisations, which consistently implement policies, strategies and practices to improve gender equity, are also the sectors/organisations in which the gender pay gap shrinks the most over time.²⁶ Surprisingly however, the findings of the BCEC and WGEA's Gender Equity Insights 2021 report suggest that there is a significant level of complacency and inaction within sectors that have a higher concentration of women.²⁷ For example, organisations in the education and training and agriculture sectors are half as likely to be following best practice in gender equity policies and processes compared to the average across all industries. Similarly, organisations in the healthcare and social assistance sector are only a quarter as likely to adhere to best practice.²⁸ **ALHR recommends that WGEA focus some of its advocacy efforts on promoting best practices and assisting organisations in the following sectors to improve their gender equity practices: health care and social assistance, construction, education and training, agriculture and retail trade.**

c) Focus on intersectionality

ALHR submits that in order to fulfil its mandate of promoting and improving gender equality, WGEA should adopt a focus on addressing intersectionality as one of its primary areas of concern. For women from disadvantaged and marginalised communities (such as women from CALD communities, women refugees and migrants, women of colour, LGBTQ+ women, First Nations women, women living with disability, women experiencing domestic violence, previously incarcerated women, women from lower socio-economic backgrounds, women carers) the barriers to economic empowerment are exacerbated by their experiences of intersecting discrimination.

²⁶ Ibid 39.

²⁷ Ibid 37.

²⁸ Ibid 34.

ALHR sees the work of WGEA as critical in addressing the disproportionate workplace inequalities that these particular groups of women experience. ALHR therefore recommends that WGEA focus on ensuring that women from disadvantaged or marginalised communities are also able to enjoy the full realisation of their rights at work by experiencing a reduction in the gender equality gap through secure and stable work conditions such as access to leave and other entitlements, fair and equal pay and access to a healthy and safe work environment.

ALHR submits that, to this end, WGEA engages in a series of studies that explore the intersecting discrimination experienced by these disadvantaged or marginalised groups of women to determine what the barriers to gender equality are and how these barriers might be overcome.

d) Promote and advocate for greater participation by women in the formulation of economic policy

As at 31 March 2021, women accounted for just 38% of the Australian parliament.

²⁹ This means women are poorly represented in economic decision-making processes and their contributions, interests and concerns are often ignored or overlooked. As a result, economic policies and programmes may continue to contribute to, or even exacerbate, existing inequalities between women and men.

As noted by the Platform for Action:

Since it is often within the framework of such policies that individual men and women make their decisions, inter alia, on how to divide their time between remunerated and unremunerated work, the actual development of these economic structures and policies has a direct impact on women's and men's access to economic resources, their economic power and consequently the extent of equality between them at the individual and family levels as well as in society as a whole.³⁰

²⁹ Antoun Issa, 'Gender Breakdown in Parliament: Australia Beats UK, US, Canada in Female Representation', *The Guardian* (31 March 2021) <<https://www.theguardian.com/australia-news/australia-datablog/2021/mar/31/drilling-down-into-the-gender-balance-in-australias-parliament>>.

³⁰ *Platform for Action* (n 17) 65 [150].

Given the need for women to be heard on matters that affect them, ALHR recommends that WGEA promote and advocate for greater participation by women in the formulation of economic policies and programmes.

e) Promote and advocate for greater harmonisation of work and family responsibilities for men and women

There are still a number of interrelated work, family and societal factors that influence gender disparity in the workplace. Perhaps, the most influential factor, and arguably the most difficult to erase, is the stereotypes that persist in relation to the different roles of men and women in society and the types of work or sectors that each should engage in. **ALHR submits that WGEA has an opportunity, through its advocacy efforts, to change these harmful and discriminatory attitudes by promoting and advocating for greater harmonisation of work and family responsibilities for men and women.** This might, for example, include providing greater support and guidance to businesses on how to effectively design policies and strategies that promote and encourage male employees to access parental leave, carer's leave and flexible work arrangements. At the centre of these policies and strategies should be a focus on building stronger corporate cultures where taking advantage of such arrangements is considered the norm.

ALHR further submits that WGEA should play a key role in advocating for high-quality, flexible and affordable childcare, elder and dependent care services that take into account the needs of working men and women.

Without such services women are forced to choose between a career and the care of loved ones.

f) Advocacy on Superannuation legislation reform

According to a report by the Senate Inquiry into Women's Economic Security in Retirement, women on average retire with just half the accumulated

superannuation of men. Even more shocking is the finding that one in three women will retire with no superannuation at all.³¹ The disparity in retirement savings between men and women is the result of a combination of interrelated factors which include: the gender pay gap, time taken out of paid employment by women to care for children or other family members, and differences in the employment status and working hours of women compared to men.³²

ALHR recommends that WGEA undertake advocacy work on superannuation legislation reform to ensure better protection for women, particularly those from disadvantaged or marginalised communities who have been a primary carer, have experienced domestic violence or have immigrated with a working spouse and have not been able to build significant super.

g) Effective use of WGEA data collection

ALHR recommends using WGEA data to build better curricula focused on encouraging women and girls into higher paying professions and trades where they are more often underrepresented.

Question 3

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?

4.5. ALHR welcomes the Government’s announcement that it will amend the Act to ‘require public sector organisations to report to WGEA on gender equality initiatives’.³³ In ALHR’s view, it is important that the government is seen to be taking the lead on this

³¹ Senate Inquiry into Women’s Economic Security in Retirement, *A Husband is Not a Retirement Plan: Achieving Economic Security for Women in Retirement* (Report, 29 April 2016).

³² *Ibid* [2.18].

³³ Senator Marise Payne, *Women’s Budget Statement 2021-22* (Budget, 11 May 2021) 31.

issue given the sector employs more than 2 million people and total public sector cash wages and salaries in 2019-20 was \$174,139.5 million.³⁴

4.6. ALHR therefore submits that:

- (a) mandatory public sector reporting should also be expanded to include state and territory public sectors so that similar leadership on gender equality can be demonstrated at a state and territory level.**

- (b) Coverage of the Act should be expanded to require all government contractors, regardless of size, to report, with assistance given (or a simplified reporting mechanism developed) for those with less than 100 employees.** This is to ensure that taxpayer funds are not perpetuating inequity and will also encourage a broad range of employers to focus on gender equity.

- (c) The Department should consider whether smaller organisations with high annual revenue should also fall within the scope of the Act.** Such organisations are increasingly gaining greater power and influence within our societies and may have a key role to play in changing existing prejudices and harmful stereotypes on the roles of men and women that prevent women from enjoying the full realisation of their rights. ALHR contends that should the Department agree on this position, it should consider implementing a simplified reporting mechanism that would make it easier for those with less than 100 employees to comply with their reporting obligations.

- (d) ALHR also recommends that WGEA create a mentoring program for women owned entities, particularly those which are owned and/or run by disadvantaged or marginalised groups such as First Nations, women from CALD communities, and women living with disabilities.**

³⁴ [paa.org.au/latest-abs-public-sector-employment-figures-now available](http://paa.org.au/latest-abs-public-sector-employment-figures-now-available)

Question 4

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?

4.7. ALHR considers the gender equality indicators (the **GEIs**) in the Act and the data collected with respect to the GEIs as set out in Schedule 1 of the *Workplace Gender Equality (Matters in relation to Gender Equality Indicators) Instrument 2013 (No. 1)* (the **WGE Instrument**) to be effective means by which to promote and advance the rights of women in the workplace. However, ALHR contends that the following improvements could be made to further increase effectiveness in achieving gender equality:

a) Collection of data on changes in employment status

Pursuant to Schedule 1, clause 1 of the WGE Instrument, each relevant employer is required to report on the gender composition of its workforce. Schedule 1, clause 1.5 provides that each relevant employer is required to report on 'the number and proportion of employees who have resigned, by gender, employment status and manager/non-manager'.³⁵

Research conducted over the last two years shows that women have been disproportionately affected by the COVID-19 pandemic. Women, in general, have taken on a greater share of the increasing familial responsibilities, including housework, care of children and homeschooling. The burden of these responsibilities has created a crucial barrier to the ability of women to engage in paid employment and has resulted in many reducing their hours of work or even stepping out of the workplace altogether.³⁶

With respect to measuring both the impact of COVID-19 on women in the workforce and what employers have done to effectively mitigate that impact, ALHR

³⁵ *Workplace Gender Equality (Matters in relation to Gender Equality Indicators) Instrument 2013 (No. 1) (Cth)* sch 1, cl 1.5.

³⁶ See eg Andrea Carson, Leah Ruppanner and Shaun Ratcliff, *Worsening of Australian Women's Experiences Under COVID-19: A Crisis for Victoria's Future* (29 September 2020) 21 <https://arts.unimelb.edu.au/__data/assets/pdf_file/0003/3512757/Worsening-Gender-Equality-Report1.pdf>.

contends that both the attrition rates of women as well as the number of women who have opted to move from full-time to part-time or casual work is relevant.

As such, ALHR submits that sch 1, cl 1 of the WGE Instrument should be amended to include a requirement to report, in addition to attrition rates, on the following:

the number and proportion of employees who have voluntarily changed their employment status, by gender, employment status and manager/non-manager.

b) Requirement to undertake gender pay gap audits

As submitted in paragraph 4.4(a) above, **ALHR recommends that sch 1, cls 3.4 and 3.5 of the WGE Instrument be amended to *require* relevant employers to undertake regular gender pay gap audits.**

c) Cross referencing data sets

ALHR considers that analysis of the seniority of workplaces, correlated against both promotion rates and attrition rates, could be useful information for employers and employees regarding whether internal measures, education and opportunities are successful in promoting women. **ALHR submits that WGEA undertakes this analysis and publishes its findings for use by employers.**

d) Collection of data on succession planning

To the extent it is possible or reasonable to collect data on succession planning, **ALHR submits that the GEIs should include a requirement to report on the existence of a policy or strategy that supports gender equality in relation to the replacement of leadership roles at every level of the organisation including at a governing body level and manager level.**

Question 5

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?

4.8. Pursuant to the Platform for Action, the Australian Government should:

Implement and monitor positive public- and private-sector employment, equity and positive action programmes to address systemic discrimination against women in the labour force, in particular women [living] with disabilities and women belonging to other disadvantaged groups, with respect to hiring, retention and promotion, and vocational training of women in all sectors.³⁷

4.9. ALHR is of the opinion that data collected on additional diversity and inclusion grounds is critical to determining the full picture of gender equality in Australia. As mentioned earlier in our response to question 2, at paragraph 4.4(c), the barriers to economic empowerment for women from disadvantaged and marginalised communities are exacerbated by their experiences of intersecting discrimination. The collection of data related to these intersecting factors would provide useful insights into overall trends in the workplace and would assist in developing initiatives that address the discrimination experienced by these particular groups. Most employers do not have the means to collect and analyse this nuanced data and there currently exists no standardised way of doing so.

4.10. Despite recognising the importance of collecting such data, ALHR is concerned that data collection of this nature, by employers, may have the indirect effect of further exacerbating existing inequalities for disadvantaged and marginalised groups.

³⁷ Platform for Action (n 17) 76 [178(f)].

- 4.11. In ALHR's view, the collection of data on additional diversity and inclusion criteria must be done in such a way as to maintain the privacy rights and most importantly, the safety, of these groups. In order to mitigate the risk of further discrimination, **ALHR recommends that WGEA collect this data directly from employees.**
- 4.12. **ALHR thus recommends the creation of an independent and anonymised platform of data collection. The platform would be managed and maintained by WGEA and employers would be encouraged to direct employees, annually, to complete anonymous, online employee surveys that address the following criteria:**
- a) **Cultural and linguistic diversity**
 - b) **Persons who identify as First Nations**
 - c) **Persons living with disability**
 - d) **Age**
 - e) **Persons who identify as LGBTQ+**
 - f) **Location of primary workplace.**
- 4.13. **The results of such employee surveys would only be available to WGEA.**
- 4.14. **ALHR recommends that WGEA then publish guidelines on best practice including relevant case studies on successful diversity and inclusion programs that would allow other employers to replicate similar practices in their own workplaces.**
- 4.15. In addition and where practicable, **ALHR recommends WGEA also collect general data on the use of subcontractors and consultants by relevant employers in order to establish whether efforts are being made to incorporate diversity and inclusion initiatives into procurement processes.** The opportunities and benefits gained from such initiatives could again be highlighted through the production and publication of guidelines on best practice and the use of positive case studies.

Question 6

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?

- 4.16. ALHR contends that increased pay transparency as well as clear promotion criteria may provide women with more opportunities to ensure they are paid fairly. Crowd-sourced resources such as Glassdoor provide general information on employee experiences but such information may also be incomplete or inaccurate and misleading.
- 4.17. ALHR therefore recommends that remuneration data be collected and published by WGEA in order to assist women to become better informed about their employment options and their ability to negotiate better pay.**
- 4.18. As noted in the response to the above question, the handling and collection of such data must ensure that the privacy and safety of individuals is maintained. This means that any system designed by WGEA to collect such information would need to take into consideration and mitigate the potential of identifying the remuneration received by particular individuals.
- 4.19. ALHR further contends that as part of its efforts to promote and increase gender equality, **WGEA should advocate against the use of non-disclosure clauses in relation to remuneration in employment contracts as well as the common practice of requiring job applicants to disclose their current/previous salary.** Such practices can result in the perpetuation of differences across various industries and can exacerbate discrimination by allowing employers to justify existing inequalities.
- 4.20. Guidance on this matter can be found under section 1197.5(k)(1) of the *California Equal Pay Act*, which provides that:

An employer shall not prohibit an employee from disclosing the employee's own wages, discussing the wages of others, inquiring about another employee's wages, or aiding or encouraging any other employee to exercise his or her rights under this section. Nothing in this section creates an obligation to disclose wages.³⁸

- 4.21. Similarly, section 432.3 of the *California Equal Pay Act* prohibits employers from seeking applicants' salary history information and requires employers to supply pay scales upon the request of an applicant,³⁹ while sections 1197.5(a)(4) and 1197.5(b)(4) prohibit employers from relying on an employee's prior salary to justify the sex-, race-, or ethnicity- based pay difference.⁴⁰

Question 7

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?

- 4.22. **ALHR supports, in principle, changes to the Act that would reduce the regulatory burden on businesses so far as this relates to the double handling of the same information by two or more government agencies.** Such changes may allow for more employers to participate in the data collection process. However, **ALHR submits that** changes of this nature, allowing for the sharing of data between government agencies, should be limited only to that which is specifically required to be disclosed by employers. ALHR does not support nor recommend the general sharing of data across agencies, in particular the sharing of sensitive data collected by WGEA with other government agencies for purposes other than promoting and improving gender equality.

³⁸ *California Equal Pay Act 1949*, Cal Lab Code §1197.5.

³⁹ *Ibid* §432.3.

⁴⁰ *Ibid* §1197.5(a)(4) and §1197.5(b)(4).

4.23. ALHR submits that changes of this kind should be reexamined on a continual basis, firstly, to ensure that the sharing of information between agencies is still necessary and secondly, given the ever-evolving nature of technology, to ensure that relevant data only needs to be input once.

Question 8

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

4.24. The *Workplace Gender Equality (Minimum Standards) Instrument 2014* (the **Minimum Standards Instrument**) sets out the minimum standards which apply to relevant employers with 500 or more employees.

4.25. Section 5(3) of the Minimum Standards Instrument provides that relevant employers with 500 or more employees must have policies or strategies in place to support one or more of the following GEIs:

- (a) Gender composition of the workforce
- (b) Equal remuneration between women and men
- (c) Flexible working arrangements, and
- (d) Sex-based harrassment and discrimination (the **Minimum Standards**).

4.26. ALHR is concerned that the minimum standards, in their current form, set an extremely low bar for compliance. This is evidenced by the fact that 100% of relevant employers with 500 or more employees comply with the minimum standards along with 99.2% of employers with 100-499 employees.⁴¹ It is hoped that all employers with 500 or more employees would already have policies or strategies in place to support all four of the GEIs listed in the minimum standards.

⁴¹ Department of the Prime Minister and Cabinet, 'Review of the Workplace Gender Equality Act 2012', *WGEA Review* (Consultation Paper, October 2021) 7.

4.27. Accordingly, **ALHR** recommends that:

- (a) In order to demonstrate compliance, employers with more than 500 employees should be required to develop policies or strategies that support all four of the GEIs listed in the minimum standards.**
- (b) In relation to relevant employers with between 100-499 employees, ALHR submits that such employers could realistically be required to meet at least one of the GEIs listed in the minimum standards in their first year, along with supporting evidence to show a commitment to progressively implementing policies and strategies that support the remaining GEIs in successive years.**
- (c) With respect to employers with less than 100 employees, noting that it may be difficult for smaller companies to resource support in some sectors, ALHR recommends that WGEA provide technical guidance on how to develop formal policies and/or strategies to support gender equality, particularly in relation to the GEIs on gender composition of the workplace and equal remuneration, including by developing and distributing sample policies, programs and case studies. Such assistance may encourage more employers to voluntarily meet the minimum standards.**
- (d) In addition, ALHR submits that the minimum standards should require all employers, regardless of their size, to have formal policies and/or strategies in place to combat sex-based harassment and discrimination in the workplace. In order to assist smaller employers to comply with this requirement, ALHR recommends that WGEA distribute a sample policy and procedure, like the Fair Work Information Statement.**
- (e) In relation to the GEI concerning flexible work arrangements, ALHR recommends that WGEA seek further information on whether companies have policies or strategies to support employees who are returning to work after a**

period of caring, and those who are experiencing or recovering from domestic violence.

Question 9

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?

4.28. ALHR is concerned that current compliance under the Act is reliant on employer self-reporting. There is now clear evidence that the effectiveness of corporate mandatory reporting obligations largely depends on the strength of the accompanying monitoring and enforcement mechanisms. While the powers granted to WGEA include reviewing reports of relevant employers and ‘deal[ing] with those reports in accordance with this Act’, **ALHR submits that formal audit powers, including adequate resourcing to conduct audits and publish results, and/or agreements to enact certain policies or programs and/or sanctions for non-compliance might act as greater incentives to employers to improve gender equality within their workplace than the compliance mechanisms currently in place. This, in turn, would assist WGEA to effectively fulfil its mandate.**

Question 10

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?

4.29. Noting that a representative of WGEA sits on the Respect@Work Council, ALHR considers WGEA to be best placed to advocate strongly for the implementation of the full range of recommendations put forward by the Sex Discrimination Commissioner in the Respect@Work report. These recommendations, when read together, are designed to change community attitudes; improve workplace culture/safety and provide appropriate service support responses for breaches; establish appropriate complaint mechanisms; impose positive duties on employers to act to prevent sexual

harassment in the workplace; grant enforcement and inquiry powers to the Australian Human Rights Commission; and impose penalties for non-compliance. As outlined in our previous submission to the Senate Standing Committee on Education and Employment, ALHR endorses the view of the Australian Human Rights Commission that additional amendments are required to the *Sex Discrimination Act 1984*, the *Australian Human Rights Commission Act 1986* and the *Fair Work Act 2009* in order to strengthen, simplify and streamline the laws relating to sexual harassment in the workplace. **ALHR thus recommends that part of WGEA's advocacy efforts moving forward should focus on the full implementation of the Respect@Work recommendations.**

4.30. According to a report published by the Australian Small Business and Family Enterprise Ombudsman in July 2019, 'small businesses account for 35% of Australia's gross domestic profit and employ 44% of Australia's workforce. Of the 877,744 total employing businesses, 823,551 are small businesses (93.8%), and of those businesses, 627,932 are businesses that employ only 1-4 people, known as micro businesses (76.2%)'.⁴² This excerpt reinforces ALHR's earlier position and recommendation that **WGEA increase its advocacy efforts in the small business sector**. While extensive reporting may be beyond the capacity of these smaller businesses, some minimal reporting (perhaps based on reporting already required by the ATO) and technical assistance provided by WGEA in the form of consulting, policies and case studies, could increase equity across this sector.

4.31. Lastly, **ALHR submits that based on the data it receives, and its own commentary on best practices, WGEA should encourage the government to change parental leave policies to remove the distinction between 'primary' and 'secondary' carer.**

⁴² Australian Small Business and Family Enterprise Ombudsman, *Small Business Counts: Small Business in the Australian Economy* (Report, July 2019) 5.

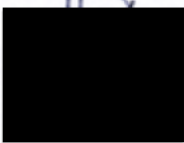


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Thank you for the opportunity to provide a submission. If you would like to discuss any aspect of this submission, please email me at: [REDACTED].

Yours faithfully

Kerry Weste



President

Australian Lawyers for Human Rights

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