

# **Attorney-General's Department Submission - Review of the Workplace Gender Equality Act 2012**

## **Introduction**

In the 2021-22 Women's Budget Statement (WBS), the Australian Government committed a \$3.4 billion investment to improve outcomes for women's safety, economic security and leadership, and health and wellbeing.

As part of the WBS the government also announced a targeted review (the Review) of the *Workplace Gender Equality Act 2012* (the WGE Act) to consider the current legislation and gender indicators, along with ongoing employer reporting obligations.

The Attorney-General's Department (the department) welcomes the opportunity to make this submission to the Review. In making this submission, the department has considered the Workplace Gender Equality Agency's (WGEA) role in the government's broader approach to boost women's economic security and safety. The submission provides the Department of the Prime Minister and Cabinet with information the department considers useful to the Review, including current Australian Bureau of Statistics data on women's workforce participation and the gender pay gap, the relationship between the WGEA reporting framework with other Commonwealth policy frameworks and considerations of both the expansion and enhancement of WGEA's data collection and usage.

## **Context**

### **ABS data on women's workforce participation and the gender pay gap**

Women's workforce participation has been steadily trending up since 1978 and is currently sitting at 60 per cent in October 2021, up from 43.5 per cent in February 1978. The gap between male and female workforce participation has also been steadily closing over time and is currently sitting at 9.5 percentage points in October 2021, compared to 36.0 percentage points in February 1978:

- The recent impact of COVID-19 sharply decreased participation for females from 61.2 per cent in March 2020 (pre COVID-19) to 57.5 per cent in May 2020 (the recent trough in participation) but has since rebounded to 60.0 per cent in October 2021.
- While COVID-19 initially increased the gap in participation between male and female workers from 9.5 percentage points in March 2020 to 10.5 percentage points in May 2020, the gap has since reduced to 9.5 percentage points in October 2021.

The weekly full-time gender pay gap has steadily decreased to 14.2 per cent in May 2021 from a recent peak of 18.7 per cent in November 2014.

Despite these gains, there are persistent challenges. The gender pay gap is complex and influenced by a number of interrelated factors including: the number of hours worked (men working full-time on average work more hours than women working full-time); labour market gender segregation (industrial, occupational); the impact of women's greater unpaid caring responsibilities; differences in education, work experience and seniority; discrimination; and other unexplained factors.

Gender segregation across industries and occupations continues to drive the disparity between men and women's experience of equal opportunity and equal recognition in employment:

- Latest data from August 2020, shows around 60 per cent of males are employed in occupations paying above the average weekly earnings, compared to 45.6 per cent for females; and
- 63.5 per cent of male workers are employed in industries that pay above average weekly earnings, compared to 35.2 per cent for women.

Some industries and occupations that are dominated by female workers also have high gender pay gaps:

- Latest data shows that in May 2021, the gender pay gap in the Health Care and Social Assistance industry was 20.7 per cent with 77.0 per cent female dominated workforce;
- However, in the Education and Training industry, also female dominated at 71.8 per cent, the gender pay gap is lower than the overall gender pay gap at 11.4 per cent in May 2021;
- The latest data for occupation, August 2020, shows the gender pay gap in the Community and Personal Care Workers occupation is 30.6 per cent with 69.8 per cent female dominated workforce;
- However, for Clerical and Administrative workers, also female dominated at 73.0 per cent, the gender pay gap is lower than the overall gender pay gap at 11.1 per cent in May 2021.

## **The Workplace Gender Equality Act and other policy frameworks**

### *The Industrial Relations framework*

The Industrial Relations framework is underpinned by the *Fair Work Act 2009* (Fair Work Act) and the *Workplace Health and Safety Act 2011* (WHS Act). Both are relevant to addressing workplace safety and inequality.

The Fair Work Act regulates employment in Australia for up to nine million people<sup>1</sup> employed under the national system. It provides a safety net of minimum standards through the National Employment Standards (NES), several of which comprise rights that promote gender equality.

Specifically, the NES include a right for eligible employees to request flexible working arrangements, paid and unpaid leave entitlements and return to a pre-parental leave position. These important protections are intended to address gender inequality in the workplace. Employers are free to offer entitlements above the minimum standards and many choose to do so.

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<sup>1</sup> Source: ABS Employees Earnings and Hours (May 2018) custom data request.

The Fair Work Act also allows the Fair Work Commission to make Equal Remuneration Orders to ensure that there will be equal remuneration for men and women workers for work of equal or comparable value.

More recently, changes to the Fair Work Act have included:

- Five days' unpaid family and domestic violence leave (*Fair Work Amendment (Family and Domestic Violence Leave) Act 2018*).
- Improved access to unpaid parental leave for parents experiencing the trauma of stillbirth, premature birth or death of a child within the first 24 months of life (*Fair Work Amendment (Improving Unpaid Parental Leave for Parents of Stillborn Babies and Other Measures) Act 2020*).
- Flexible unpaid parental leave (*Fair Work Amendment (Improving Unpaid Parental Leave for Parents of Stillborn Babies and Other Measures) Act 2020*).
- A statutory pathway for eligible casual employees to convert to permanent employment (*Fair Work Amendment (Supporting Australia's Jobs and Economic Recovery) Act 2021*).

The recent passage of the *Sex Discrimination and Fair Work (Respect at Work) Amendment Act 2021* implements the government's response to a number of recommendations in the Sex Discrimination Commissioner's Respect@Work Report. The legislation makes important changes to the *Sex Discrimination Act 1984*, the *Australian Human Rights Commission Act 1986*, and the Fair Work Act to ensure Australia's legal and regulatory frameworks that deal with sexual harassment are effective in preventing and responding to sexual harassment. Industrial relations related measures include those that:

- strengthen the anti-discrimination and industrial relations frameworks to address sexual harassment and other forms of sex discrimination in the workplace, and
- support women who suffer a miscarriage by expanding the definition of 'permissible occasion' in the Fair Work Act compassionate leave provision to include miscarriage.

### *The Work Health and Safety (WHS) framework*

The Commonwealth, states and territories are each responsible for regulating and enforcing WHS laws in their respective jurisdictions. All jurisdictions except Victoria have adopted the model WHS laws. Western Australia has passed a new WHS Act, which is expected to commence in 2022, based on the model WHS Act. The model WHS Act provides a framework to protect the health and safety of all employees at work and other people who might be affected by that work.

Sexual harassment in the workplace is recognised as a hazard and risk to health and safety which can be physical and/or psychological. Under the model WHS laws, 'persons who conduct a business or undertaking' are required to eliminate or otherwise minimise health and safety risks so far as is reasonably practicable. Workers and other persons at a workplace also have a duty to ensure their acts and omissions do not adversely affect the health and safety of other persons while at work. This includes not subjecting others to sexual harassment.

Since the Respect@Work Report was released, there has been a focus by the government and its agencies on further improving the WHS framework and its implementation. Most significantly, Safe Work Australia is progressing work to amend the model WHS Regulations to deal with how to identify psychological risks, including sexual harassment, associated with psychological injury. When the amendments to the regulations are implemented, the WHS framework for preventing sexual harassment will consist of three important tiers:

- a broad primary duty of care in the WHS Act, which includes a positive duty to prevent sexual harassment
- specific psychosocial regulations which provide detail about how the general duty must be met, and
- a code of practice which provides even greater detail about what is known about the hazard and risks and how best to manage them.

### *The WGEA framework*

The functions and responsibilities of WGEA form part of the government's broader multifaceted approach to achieving progress in workplace gender equality.

Under the WGE Act, WGEA administers the workplace gender reporting program that requires private sector employers with 100 or more staff to report annually on gender pay gaps and other key gender equality indicators in their organisations. Collection and analysis of employer-reported data enables WGEA to provide a diagnostic service to employers through gender equality benchmarks and qualitative reporting through its annual scorecard. WGEA has a range of functions under the WGE Act, including to advise and assist employers in promoting and improving gender equality in the workplace

WGEA's reporting program is mandatory for private sector 'relevant employers' with 100 or more staff, with additional compliance obligations for employers with 500 or more staff. The resulting dataset captures over 4 million employees, which accounts for less than 50 per cent of the Australian workforce.

Under the 2021-22 Budget, the government announced it will amend the WGE Act to require public sector organisations to report on gender equality indicators.

## **WGEA's data collection and reporting**

WGEA collects and reports on remuneration data to calculate a gender pay gap measurement based on the average yearly full-time earnings (FTE) remuneration of private sector employers (100+ employees). For the reporting period 1 April 2019 to 31 March 2020, WGEA reported a gender pay gap of 20.1 per cent based on full-time total remuneration.

The gender pay gap can be measured in a number of ways using different data sets published by the Australian Bureau of Statistics (ABS). These are detailed in Attachment A. In summary:

- The most common measure of the gender pay gap quoted in the media uses ABS Average Weekly Ordinary Time Earnings (AWE) data (published every six months) to

compare the pay of full-time adult employees. In May 2021, the gender pay gap based on AWE was 14.2 per cent.

- The ABS Employee Earnings and Hours survey (EEH) data (published every two years) provides gender pay gap figures based on hourly rates of pay, and also looks at total cash earnings (i.e. it includes overtime), allows for analysis of a number of factors (e.g. pay gaps by industry, occupation, managerial status) and includes data on pay rates for part-time employees. In May 2018, the gender pay gap based on EEH was 10.9 per cent for full-time non-managerial employees.
- The ABS Characteristics of Employment (COE) provides a gender pay gap based on median weekly total gross earnings for full-time employees and owner managers of incorporated enterprises in main jobs. In August 2020, the gender pay gap based on COE was 10.5 per cent.

WGEA's data is less representative at the national level due to its limited coverage, however by collecting data on base/total remuneration by managerial and non-managerial categories, it confirms that the gender pay gap is generally larger among the higher paid.

## **Considerations on the expansion of data collection and usage**

### **WGEA's compliance reporting mechanisms**

The WGE Act requires 'relevant employers' to report on the GEIs against information specified in the *Workplace Gender Equality (Matters in relation to Gender Equality Indicators) Instrument 2013 (No. 1)*. Under WGEA's compliance reporting framework, employers provide this information to WGEA through:

- 1) Reporting Questionnaire - 62 page survey on workplace policies including the availability of family and domestic violence leave, carer's leave, parental leave etc.
- 2) Workforce Management Statistics - Excel spreadsheet data on employee movements, including appointment, promotions, resignations and parental leave.
- 3) Workplace Profile - data on workplace salaries, composition and remuneration.

The government amended the reporting requirements in 2015 to reduce the complexity of reporting while collecting key data to allow employers to identify and address gaps in gender equality in their workplace and to benchmark against like organisations. Under the changes, employers are no longer required to provide data on:

- remuneration of Chief Executive Officers or equivalent, key management personnel above the Chief Executive Officer and managers employed on a casual basis,
- workers engaged on a contract for services basis (e.g. independent contractors who run their own business and negotiate their own fees),
- annualised average full-time components of total remuneration,
- information on the number of applications received and interviews conducted, and
- the number of requests made, and approvals granted, for extensions to parental leave.

Since the establishment of WGEA compliance reporting framework, there have been developments in whole-of-government data and digitisation. For example, Single Touch Payroll has streamlined the Australian Taxation Office's pay roll data collection and created

new channels for sharing subsets of data with Services Australia to assist with administering the welfare system and minimising duplication in data reporting to multiple government agencies.

WGEA's compliance reporting may benefit from these new channels for data sharing to reduce duplication in employer reporting and contribute to more effective digital government services and the government's broader digital transformation agenda.

### **Span of WGEA's data collection**

Collecting data at the enterprise level provides WGEA with detailed information that is difficult to gather from other sources, such as through surveys from the Australian Bureau of Statistics. For example, WGEA's compliance reporting collects data on the use of flexible work arrangements, the incidence of paid parental leave, and support for workers experiencing family and domestic violence.

The information WGEA collects enables it to provide education and support services to employers to help them identify and address gender equality gaps in their workplaces and benchmark against like organisations. WGEA does this through a number of forums, including:

- The annual customised and confidential Competitor Analysis Benchmark Report which uses reporting period data made available to compliant reporting organisations, and
- WGEA's interactive Data Explorer (which attracted 19,173 unique users between 1 July 2019 and 30 June 2020.<sup>2</sup>)

As WGEA's compliance reporting data provides a detailed picture of workplace practices on gender related issues that enable an analysis of how Australian workplaces are progressing towards gender equity, it can help inform evidence-based policy making.

However, while WGEA data is unique and holds some statistical value, a cost-benefit analysis of WGEA's current reporting mechanisms may provide useful insights about the value of the data for employer education and broader policy development against any regulatory burden the reporting mechanism is seen to place on employers.

### *Sexual harassment data collection*

As part of the Roadmap for Respect, the government accepted Recommendation 46 of the Respect@Work report and committed to developing a set of best practice indicators for workplaces in relation to sexual harassment, acknowledging the clear connection between gender inequality and sexual harassment. The department is responsible for the development of these indicators and notes that this will take the form of guidance material rather than additional indicators for WGEA's mandatory reporting purposes.

The department considers data collected by WGEA under the existing Gender Equality Indicators (GEIs), and subsequent analysis by both WGEA and reporting organisations, to

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<sup>2</sup> 2020, The Workplace Gender Equality Agency Annual Report 2019-2020, p.22

have significant value in enabling analysis of Australian workplaces' progress towards gender equality.

Any expansion to WGEA's reporting framework to include additional data relating to sexual harassment in the workplace would need to consider the intersection with:

- reporting on prevalence already undertaken by the AHRC, including through the National Sexual Harassment Survey;
- reporting to agencies that handle workplace sexual harassment matters, and
- work underway as part of Recommendation 3 of the Respect@Work Report for those agencies to collect an agreed de-identified data set relating to workplace sexual harassment enquiries, complaints, claims and settlement outcomes to contribute to a coordinated system of annual reporting on workplace sexual harassment metrics.

### **Enhancing the value of WGEA's data collection**

Any cost-benefit analysis of WGEA data collection could also explore ways to enhance the usage and value of its data, such as through data linkage and data sharing. In 2016, the then Department of Employment (Employment) and WGEA established a pilot to examine if a linked dataset combining data from the Workplace Agreements Database (WAD) and WGEA could provide new insights into enterprise bargaining and gender equity outcomes.

The project linked gender pay gap data collected by WGEA with data collected by Employment in the WAD, a census of every federally registered enterprise agreement made since the commencement of formal enterprise bargaining in 1991.

Although resourcing restraints at the time prevented the project from being publicly disseminated, the project demonstrated that WGEA data can be used across a range of contexts to further improve policies and research into gender equity in Australia.

The project found that reasonably high data matching in these two sources and linked information could significantly enhance the existing evidence base. For example, a range of econometric modelling could be performed on the linked datasets that would provide new evidence on the effectiveness of different workplace practices to improve gender equity.

### **Privacy**

The *Privacy Act 1988* (Privacy Act) contains 13 Australian Privacy Principles (APPs) which regulate the collection, use, disclosure and security of personal information held government agencies and certain private sector organisations.

WGEA's privacy policy provides an overview of how WGEA handles personal information in compliance with its obligations under the Privacy Act and in particular the APP. The policy also provides information on the collection of personal information, sensitive information and indirect personal information.

Any expansion to the WGE Act or initiatives by WGEA to collect new and additional information, enhance or merge data sets, or share or disclose information, must therefore ensure compliance with the requirements of the Privacy Act and WGEA's privacy policy.

## **Conclusion**

WGEA is one part of the Australian Government's broader multi-faceted approach to boosting women's economic security and safety. WGEA's main legislative remit is to administer the WGE Act and promote and improve workplace gender equality through its compliance and reporting framework. While WGEA's data is not representative at a national level, it enables WGEA to provide assistance at the workplace level through employer education, advice and assistance. Consideration could be given to better understanding the costs and benefits of WGEA's data collection through its current compliance reporting framework and harnessing opportunities through data digitisation to reform its reporting mechanisms to reduce regulatory burden on employers.



## Gender Pay Gap measurements

	ABS Employee Earnings and Hours (EEH)	ABS Average Weekly Earnings (AWE)	ABS Characteristics of Employment (COE)	Workplace Gender Equality Agency (WGEA)
Type of gap	Average <b>hourly</b> total cash earnings (includes overtime)	Average <b>weekly</b> ordinary time earnings	Median <b>weekly</b> total gross earnings in main job	Average <b>yearly</b> FTE remuneration (private sector companies with 100+ employees)
What is the gap?	<b>May 2018</b> For FT <b>non-managerial</b> employees: <b>10.9%</b> . For FT & PT <b>non-managerial</b> employees: <b>12.7%</b> . For <b>all</b> employees ( <b>FT &amp; PT, managerial &amp; non-managerial</b> ): <b>14.1%</b> .	For FT <b>adult</b> employees (seasonally adjusted): <b>14.2%</b> .	For FT employees and owner managers of incorporated enterprises (OMIEs) in main jobs: <b>10.5%</b> .	For FT <b>total</b> remuneration (preferred reporting figure): <b>20.1%</b> For FT <b>base</b> salary: <b>15.0%</b> For FT, PT & Casual <b>total</b> remuneration: <b>23.3%</b> For FT, PT & Casual <b>base</b> salary: <b>18.8%</b>
Reporting period	May 2018	May 2021	August 2020	1 April 2019 to 31 March 2020
Reporting frequency	Every two years	Every 6 months	Every year	Every year
Next data release	January 2022 (2021 EEH data release has been delayed due to the COVID-19 pandemic)	February 2022	December 2021	November 2021
Survey type	Employer survey	Employer survey	Household survey	Private sector employer (100+ employees) census
Cohort represented	National workforce	National workforce	National workforce	Employees of most private sector companies with 100 or more employees (approximately 40% of Australian employees). Full-time figures represent approximately 20% of all Australian employees.
When is this measurement used?	For an hourly measure of the pay gap.	For a weekly measure of the FT adult pay gap.	OECD often use this source for international comparisons, although there have been variations in the methodology used resulting in slightly different pay gaps.	For a yearly measure of the pay gap. For the pay gap in large private sector organisations.
What is included in data source?	<ul style="list-style-type: none"> <li>Composition and distribution of employee earnings, hours paid for, and methods used to set employees' pay.</li> <li>Information is collected about characteristics of employers (e.g. industry</li> </ul>	<ul style="list-style-type: none"> <li>Data on the level of average earnings in Australia at a point in time.</li> <li>Estimates of average weekly earnings and changes in average</li> </ul>	<ul style="list-style-type: none"> <li>Information on employed persons according to their status of employment.</li> <li>The COE survey replaced the Employee Earnings,</li> </ul>	<ul style="list-style-type: none"> <li>Base/total remuneration by managerial and non-managerial categories and by industry, workforce composition by gender and employment status, gender composition of managerial categories, governing bodies</li> </ul>

	ABS Employee Earnings and Hours (EEH)	ABS Average Weekly Earnings (AWE)	ABS Characteristics of Employment (COE)	Workplace Gender Equality Agency (WGEA)
	and sector) and employees (e.g. occupation and employee type).	weekly earnings are produced each six month cycle.	Benefits and Trade Union Membership Survey which was conducted annually from 1999-2013.	and non-managerial occupations and industry gender segregation. <ul style="list-style-type: none"> <li>Information is collected about other gender equality indicators such as incidence of paid parental leave, support for workers with caring responsibilities and availability of flexible working arrangements.</li> </ul>
<b>Benefits</b>	<ul style="list-style-type: none"> <li>Allows for comparison of earnings by hour and average hours worked, which permits an understanding of how many more hours men work per week compared with women: In May 2018, non-managerial men were paid for an average total number of weekly hours of 34.9 compared with 28.1 for non-managerial women (includes overtime hours worked).</li> <li>The ABS uses EEH hourly earnings data to express the gender pay gap as a ratio of female to male rate ratio of earnings in its six monthly ABS Gender Indicators publication.</li> <li>Includes a range of variables on individual and employment characteristics that enable a deeper understanding of the gender pay gap (remuneration data by age, method of setting pay, industry, state and territory).</li> </ul>	<ul style="list-style-type: none"> <li>Well known measure of average earnings used for a variety of purposes (i.e. government payments such as the age pension)</li> <li>Released every six months so allows for most frequent reporting on the gap.</li> <li>It can be used to show trends over time.</li> </ul>	<ul style="list-style-type: none"> <li>The gender pay gap can be examined by a range of variables including state, age, industry, occupation, sector and country of birth.</li> <li>Enables calculation of a gender pay gap using both average and median earnings.</li> <li>Released every year so allows for more regular reporting than the EEH – <b>however, see note below.</b></li> <li>Allows for better international comparisons.</li> </ul>	<ul style="list-style-type: none"> <li>Data is collected for full-time, part-time, and casual employees. The part-time and casual gender pay gaps are calculated on a full-time equivalent (FTE) basis.</li> <li>Allows a more detailed understanding of the gender pay gap in different categories of managers and between managers and non-managers: In 2017-18 the average annual gender pay gap for <u>managers</u> was 21.3% (full-time base salary) and 25.7% (full-time total remuneration) compared with 13.7% (full-time base salary) and 19.0% (full-time total remuneration) for <u>non-managers</u>.</li> <li>Released every year so allows for more regular reporting than the EEH.</li> <li>Collects additional data on organisations that have conducted a remuneration gap analysis and actions taken as a result.</li> </ul>
<b>Limitations</b>	<ul style="list-style-type: none"> <li>ABS does not endorse use of EEH as a time series.</li> <li>Released every two years so does not allow</li> </ul>	<ul style="list-style-type: none"> <li>ABS states that AWE data is <u>not</u> designed to compare male and female rates of pay.</li> </ul>	<ul style="list-style-type: none"> <li>Data on earnings are collected from a survey of households and are generally considered less robust than data</li> </ul>	<ul style="list-style-type: none"> <li>Less representative of the broader workforce (approx. 40%) as it does not include data for public sector organisations and smaller private sector employers.</li> </ul>

	<b>ABS Employee Earnings and Hours (EEH)</b>	<b>ABS Average Weekly Earnings (AWE)</b>	<b>ABS Characteristics of Employment (COE)</b>	<b>Workplace Gender Equality Agency (WGEA)</b>
	for more regular reporting.	<ul style="list-style-type: none"> <li>• Does not account for differences in ordinary time hours worked by full-time men and women.</li> <li>• Does not account for the large proportion of women who work part-time.</li> <li>• Limited variables do not allow for more refined understanding of factors affecting the gap.</li> <li>• More frequent reporting leads to greater volatility in measurement of the gap.</li> </ul>	<p>collected from employers as they are reliant on respondents accurately recalling their pre-tax earnings.</p> <ul style="list-style-type: none"> <li>• Earnings cannot be disaggregated.</li> <li>• NOTE: ABS has revised all of their historical data for the period 2004-2018 to reflect the latest benchmarks and ensure time-series data are on a consistent basis. Accordingly, the current figure cannot be compared to figures from previous years.</li> </ul>	<ul style="list-style-type: none"> <li>• Does not factor in the difference in hours worked by men and women.</li> <li>• Does not give the difference in total earnings over the entire year, remuneration is FTE.</li> <li>• Limited use as a time series, as data exists only since 2013-14.</li> </ul>