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Department of the Prime Minister and Cabinet

Review of the Workplace Gender Equality Act 2012

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Authorisation

This submission has been authorised by the NFAW Board

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Review of the Workplace Gender Equality Act 2012

This submission is being made by The National Foundation for Australian Women (NFAW).

NFAW is dedicated to promoting and protecting the interests of Australian women, including intellectual, cultural, political, social, economic, legal, industrial and domestic spheres, and ensuring that the aims and ideals of the women's movement and its collective wisdom are handed on to new generations of women. NFAW is a feminist organisation, independent of party politics and working in partnership with other women's organisations.

In the course of our submission, we make some remarks critical of two key recommendations from the Workplace Gender Equality Agency (WGEA) submission. The burden of our concern is the deregulatory approach underpinning both of these recommendations, which would

- remove any legislative requirement for employers to provide specified workplace numbers, and replace that requirement with a list of broad data types, leaving the Agency with the discretion to change, add or delete any of the current data points at any time (WGEA recommendation 4)

- make action against minimum standards a matter for individual employer discretion, with no specified floor for achievement and no specified timeframe for action (WGEA recommendation 27).

Taken together, these proposals would return the Agency to the 'action plans' and weak compliance mandate which characterised the regime of the *Affirmative Action Act 1986* Act thirty-five years ago.

While NFAW has a history of supporting the work of the Agency and the Workplace Gender Equality Act (WGE Act), we are concerned by these proposals. The background and rationale underpinning these concerns are set out at length in our discussion of questions 4 and 8 in the Consultation Paper.

Our own recommendations in relation to these and other issues raised through the Consultation Paper are as follows.

Recommendations

1. NFAW recommends that the Australian Government step up the level of ambition on gender equality.

2. NFAW broadly endorses the WGEA recommendation that the functions of the Act under section 10 should be amended to include "to work with employers to drive change in their workplaces".

3. NFAW recommends that the audit function included in section 19A be made more explicit in section 10 to give it greater priority as a function of the Agency to encourage progress (see recommendation 28).

4. WGEA needs to be assured of adequate funding into the future to enable it to progress all its functions as a package. New functions added through this review should carry with them additional resources.

5. The WGE Act should be amended to enable WGEA to report pay equity gaps at the organisational level, rather than at the industry or sector level as is currently the case.

6. Legislation should enable better sharing of information between the Australian Human Rights Commission and WGEA. In particular, the Director of the Agency should be enabled to notify the Sex Discrimination Commissioner of concerns around discrimination and harassment in particular sectors or industries, and the AHRC should be enabled to investigate such referrals on its own initiative.

7. If The Single Touch Payroll system can be utilised in reporting, and it if results in likely significant alleviation of the reporting burden, reporting should be extended to all sized businesses. If the efficiencies of STP fail to materialise and the reporting burden remains too burdensome for smaller business, the Agency should be funded to draw from other sources (such as ABS, HILDA and administrative data sets) to ensure that it can provide accurate and meaningful insights into the state of the entire workforce for women to fulfil its full range of functions (see recommendations 18 and 21).

8. All public sector agencies (including those covered under the *Equal Employment Opportunity (Commonwealth Authorities) Act* 1987) – including those with fewer than 20 employees – should have reporting aligned to that required by relevant employers under the WGE Act, in a way that does not in any way diminish the quality of data already collected from the sector.

9. NFAW strongly opposes the WGEA proposal to remove specific data items from the Instrument and the dataset. While we endorse WGEA's recommendation 13 on removing the collection of data on reporting levels to the CEO, our recommendation is that otherwise changes to the *Workplace Gender Equality (Matters in relation to Gender Equality Indicators) Instrument 2013 (No. 1)* should only be made by addition.

10. NFAW strongly supports WGEA's proposal that recommends data collection and reporting on non-manager occupations and jobs at ANZSCO level four be made mandatory from 2022.

11. *The Workplace Gender Equality (Matters in relation to Gender Equality Indicators) Instrument* 2013 (No. 1) should be amended to include a requirement under Gender Equality Indicator 6—sex-based harassment and discrimination -- to report on the incidence of sexual and sex-based harassment complaints in the employer's organisation.

12. NFAW considers that the *Workplace Gender Equality (Matters in relation to Gender Equality Indicators) Instrument 2013 (No. 1)* should be amended to ask, on a yes/no basis, whether employers have consulted employees in the preparation of their WGEA report, and whether they consulted employees after the public version of the previous year's report was made accessible to them. Employers should also be asked to supply the dates and mechanism of consultations.

13. With regard to the Gender Equality Indicators, and the datapoints relating to those indicators, NFAW supports:
    - requiring information on the date employers select their employee data
    - removing the collection of data on reporting levels to the CEO
    - collecting data on the number of hours part-time employees are engaged.

14. NFAW broadly supports the collection of data on employer payment of superannuation for employees on paid parental leave and on intersectionality. However:

    - WGEA must be vigilant to ensure data on employer-paid superannuation cannot be presented as representative of the workforce as a whole, or used to fuel a second 'double-dipping' campaign to undermine the case for government-paid super as part of the paid parental leave package

    - We recommend that relevant employers noy be immediately required to report against demographic characteristics beyond sex. Data on intersectionality should only be collected where WGEA can be confident that such a reporting responsibility will not be used to compel employees to self-identify in a hostile environment. An employee should be entitled to refuse the collection of their sensitive information and should be informed of this.

15. WGEA should further examine the practical risks and opportunities associated with collecting demographic information from staff in consultation with good practice employers.

16. Employees should immediately be given the option of reporting against "female", "male" and "Other/Not specified" categories if they wish, but this option must be clearly specified to be voluntary.

17. NFAW is concerned that WGEA data is being inappropriately used or cited by researchers to give a much rosier picture of the situation of women in the Australian workforce than is actually the case. While we would support increased access by authorised researchers to the WGEA dataset, we recommend that the authorisation process include training to ensure all data is appropriately understood and cited.

18. The situation of women in the Australian workforce would be more accurately represented if WGEA were resourced to work more closely with ABS, HILDA and other administrative datasets to build a more comprehensive picture of terms and conditions across all employer sizes. The development of such a representative dataset could also

serve as an alternative to extending the reporting requirements of the Act to smaller employers (see recommendation 7).

19. Remuneration data expressed as a gender pay gap percentage should be included in employers' public reports. Given the considerable variation between the gender pay gaps specific to different industries, the public employer reports published by the Agency should include industry-specific benchmarks as well as organisational percentage.

20. There should be sufficient budget allocation to enable WGEA to invest in digital solutions to reduce the employer reporting burden.

21. NFAW recommends that a scoping report to immediately identify the potential alignment of STP reporting, other ATO datasets and WGEA reporting be prepared, including the agreement of a timeframe for implementation between the ATO and WGEA. Budgetary allocation for implementation of the alignment should occur through either MYEFO 2022-23 or Budget 2023-24.

22. There should be greater equality in funding for digital solutions for gender equality reporting. Government should urgently support private sector solutions to WGEA reporting:
    - Either through incentives to the market and using its digital service provider engagement model to stimulate or incentivise development of a STP add-on for WGEA reporting, or
    - or by directing the Department of Finance to develop an in-house solution for APS reporting entities with an intention that it easily replicated for private sector reporting entities and allow for public/private sector human resource benchmarking.

23. *The Workplace Gender Equality (Minimum Standards) Instrument 2014* should be amended, so that:

    - relevant employers would be required to have policies/strategies in place to support three of the GEIs as recommended by WGEA'

    - for each of these GEIs, relevant employers would have to meet industry ***minimum outcome standards based on industry benchmark data.*** **These minimum standards could target poor performers by setting a floor.** Employers whose performance does not meet the minimum standard would have two years under the Act to show improvement before being non-compliant. The Agency could advise the minister on different minimum outcome standards for different industries following consultations based on current performance

    - the new minimum standards be phased in over all relevant employers over three years beginning with employers of 1000+, then 500+, and finally all remaining relevant employers.

24. Because of its broad relevance to and direct impact on gender equality, remuneration data expressed as a gender pay gap percentage should be used to set a public industry-specific minimum equal pay standard phased in over three years beginning with employers of 1000+, then 500+, and finally all remaining reporting employers.

25. The Minimum standards should include a provision making terms in modern awards, agreements (including individual flexibility agreements), employment contracts or directions prohibiting an employee from disclosing their pay or earnings a breach of the equal remuneration minimum standard.

26. Annual WGEA reporting instruments should include a question asking employers to confirm whether such gag clauses are used or relied on in their organisations, and their responses should be featured prominently on the employer's public report. Employers who are non-compliant with this feature of the minimum standard should have the ground of non-compliance included in any list of named organisations.

27. Resources should be provided to the Agency to conduct research to enable it to identify as many of the remaining non-reporting relevant organisations as possible.

28. NFAW recommends that:
    - relevant employers who have met the criteria for being named for two years should be subject to a mandatory compliance assessment by WGEA or another government agency trained and authorised by the Agency which carries appropriate powers to enter workplaces, access information and issue enforceable compliance notices. This would include relevant employers who have not made themselves known to the Agency unless they voluntarily come forward

    - implementation of this recommendation be considered as part of broader discussions following from *Respect@Work* around enabling the Australian Human Rights Commission to conduct workplace assessments and enter into enforceable agreements in regard to the proposed positive duty to take reasonable and proportionate measures to eliminate sex discrimination, sexual harassment and victimisation, as far as possible

    - affected organisations be able to contact WGEA for any support and assistance they might require in complying with compliance notices.

29. While the principal sanction for non-compliance—naming in the Parliament—should be retained, WGEA should also make use of its existing power to publicly specify the ground for naming as part of its report to minister and any other publication.

30. The Workplace Gender Equality Procurement Principles should be reviewed and updated, including specifying different thresholds to that of the Commonwealth Procurement Rules and exploring ways in which all Commonwealth entities could align their procurement processes to include compliance with the Act.

31. The application of the *Principles* should be promoted for both non-corporate Commonwealth entities and prescribed corporate Commonwealth entities.

32. There should be a review as to how the Workplace Gender Equality Procurement Principles can apply within the Commonwealth Grants Rules and Guidelines to improve transparency on whether grantees are compliant with the Act where appropriate.

Discussion

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?

The Australian Government has been encouraging larger private sector employers to step up on gender equality since 1986 with the establishment of the third arm of Australia's national Women's Machinery,[1] the Affirmative Action Agency.

The *Affirmative Action Act 1986* was reviewed and reformed to become the *Equal Opportunity for Women in the Workplace Act 1999*. It was reviewed again between 2009 and 2012 and the Workplace Gender Equality Agency was established with the passage of the *Workplace Gender Equality Act 2012* (WGE Act). For the first time, the Agency was able to focus on the metrics of gender equality, recognising that 'what we value we measure'.

For 35 years, governments have recognised the vital importance of encouraging the private sector to deliver on gender equality in the workplace, recognising organisations with over 100 employees in the private sector cover over 40 per cent of employed people in Australia.[2] The dataset is now based on 4,943 reports covering over 4.3 million employees across Australia.[3]

Nine years since the passage of the WGE Act, we now have a world leading data set on gender equality in Australia's largest corporations extending for nearly a decade. This is a treasure that should not be squandered. As far as possible it should be continued with as few amendments as possible so that we can continue to benefit from this longitudinal

[1] Along with the Australian Government Office for Women and the Sex Discrimination Act and Commissioner.
2 Workplace Gender Equality Agency Progress Report 2019-20, p 7.
https://www.wgea.gov.au/sites/default/files/documents/WGEA%20Progress%20Report%202019-20.pdf
3 Workplace Gender Equality Agency Progress Report 2019-2020, p 5.
https://www.wgea.gov.au/sites/default/files/documents/WGEA%20Progress%20Report%202019-20.pdf

dataset. It enables us to dive into the data and understand industry and sector progress and drivers of change.

The WGE Act data-driven approach is something that is attracting increasing interest internationally.

WGEA is well established as a light touch regulator and contributor to promoting gender equality across corporate Australia. While of course a proportion of relevant employers fail to comply or complains about the reporting burden, most organisations manage the reporting requirements. Over time most employers have been able to align their data collection to the reporting requirements. Leading employers for gender equality recognise the benefits of being able to benchmark themselves against their sectors and industries on gender equality and to position themselves as employers of choice and safe investments.

Yet despite this commendable long-standing commitment to workplace gender equality, Australia is languishing in the global league tables.

If we only look at the progress of Australia over time towards gender equality, we can lose sight of the fact at other nations taking gender equality more seriously are surging ahead of Australia on international rankings. We have foundered, and other countries are overtaking us. We are just not doing enough to advance what the Australian Government has consistently described as a national priority. It is time for us to take the next steps to accelerate our ambitions and identify the next reforms that will fuel progress towards equity.

WGEA notes that:

> "[u]nfortunately, our data also identifies some key problems. Foremost amongst them is the 'action gap.' Organisations have policies and strategies in place but little or no action is taken to implement them across their workplaces."[4]

It notes there are particularly concerns in relation to progress on

> "…the gender balance of the workforce, the gender composition of appointments and promotions, the representation of women on boards, and levels of consultation with employees on issues concerning gender equality. Almost half of employers (45.5 per cent) who conducted a pay gap analysis took no action as a result of this analysis, although not all of these organisations identified a gap."[5]

Now that relevant employers[6] are accustomed to reporting to the Agency, it is time to take steps to further institutionalise this dataset, step up ambition and increase transparency and accountability.

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[4] Workplace Gender Equality Agency *Progress Report 2019-2020*, p 3. https://www.wgea.gov.au/sites/default/files/documents/WGEA%20Progress%20Report%202019-20.pdf

[5] Workplace Gender Equality Agency *Progress Report 2019-2020*, p 5. https://www.wgea.gov.au/sites/default/files/documents/WGEA%20Progress%20Report%202019-20.pdf

[6] Identified in s. 3(1) of the WGE Act as those required to report under the Act.

Major steps towards gender equality come with significant successful litigation, increased regulation or the realistic prospect of increased regulation. For example, ahead of the legislation for the original Affirmative Action Agency, business took considerable steps, including establishing the Diversity Council of Australia, to generate progress towards removing discrimination in private sector organisations to avoid the threat of legislation. The prospect of legislation for quotas for leadership spurred the ASX and major organisations to increase women's representation in leadership. Without continued pressure, however, and even in the face of irrefutable evidence that greater indices of gender equality are good for business, organisations lose focus and commitment.

This submission includes a range of recommendations for taking the next necessary steps towards a more equal future for Australia's workplaces, recognising that greater equality benefits us all.

While the functions of WGEA in section10 of the WGE Act present a package of roles to support progress, NFAW recommends a number of amendments to strengthen these functions and powers to accelerate progress.

In its submission to this inquiry, WGEA concludes that the Government should introduce "…reporting requirements which reflect an action and progress-oriented approach and by ensuring that the Agency's functions assist companies to achieve this".[7] It suggests that the functions and powers of the Agency should be amended to empower it to "to work with employers to drive change in their workplaces".[8]

NFAW agrees with these conclusions and reiterates the Agency recommendation that the functions of the Act under section 10 should be amended to include "to work with employers to drive change in their workplaces".

Section 10 (1)(c) of the WGE Act empowers the Agency to "…review compliance with this Act by relevant employers, to review public reports lodged by relevant employers and to deal with those reports in accordance with this Act". Under this function section 19A enables the Agency to require relevant employers to give information to it related to the employer's compliance with the Act or to the employer's performance against the minimum standards.

The Agency has not made significant use of this function, whether by reason of its aim to present as a light touch regulator, or because of limited resources to undertake such audits.

NFAW recommends that the audit function of this section be made more explicit in section 10 to give it greater priority as a function of the Agency to encourage progress.

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[7] Workplace Gender Equality Agency *Submission to the Review of the Workplace Gender Equality Act 2012* November 2021, p 6. https://www.pmc.gov.au/sites/default/files/submissions/wgea-submission-13-workplace-gender-equality-agency_0.pdf

[8] Workplace Gender Equality Agency *Submission to the Review of the Workplace Gender Equality Act 2012* November 2021, p 2. https://www.pmc.gov.au/sites/default/files/submissions/wgea-submission-13-workplace-gender-equality-agecy_0.pdf

It is also the case that the definitions of non-compliance are very limited under the Act – largely defined as failing to submit any report or failing to deliver progress against the limited minimum standards.[9] Employers who year after year submit a minimalist report that delivers no progress against the gender equality indicators should be held to account.

Even in those limited circumstances, the penalties for non-compliance are paltry – the employer may be named as non-compliant and may not be eligible to compete for contracts under the Commonwealth procurement framework and "…may not be eligible for Commonwealth grants or other financial assistance".[10]

Comparators such as OECD nations are introducing more significant penalties for failure to secure progress on gender indicators.[11]

It is time for consideration of more significant penalties for non-compliance to be introduced into the WGE Act powers. We argue in response to question 9 below that organisations covered by the Act that are repeatedly non-compliant should as a consequence become liable to an external audit. Government authorised auditors have the power to:

a) undertake assessments of the extent to which an organisation has complied with relevant regulation, and issue compliance notices if it considers that an organisation has failed to comply
b) enter into agreements/enforceable undertakings with the organisation (failure to meet enforceable undertakings carry penalties including fines)
c) apply to the Court for an order requiring compliance with the duty.

Increased resources need to accompany any additional power, and more adequate resourcing is needed for WGEA to fulfil its current powers. At present, WGEA could do more to support employers to report, particularly around its education and research functions. Further resourcing is needed to enable WGEA to identify relevant employers who have not self-identified (see response to question 9) and to hold employers to account adequately, including through Agency support for the audit function. WGEA needs to be able to pursue the full range of its functions and powers as a package, as it was designed to do.

WGEA needs to be assured adequate funding into the future to enable it to progress all its functions. Inadequately funding WGEA is to set it up to fail.

[9] It also includes a relevant employer failing to inform employees, shareholders or members of the employer that a public report has been lodged (see section 16), failing to inform employees and relevant employee organisations as required by sections 16A and 16B or failing to give the Agency information under section 19A; see WGE Act section 19D note.

[10] Section 18 WGE Act.

[11] In France, for example, relevant employers can be fined up to one per cent of turnover for failing to report correctly on their gender pay gap. See Glennie M, von Reibnitz A, William J, Curtis S, Bordia S, *Gender pay gap reporting in Australia – time for an upgrad*e The Australian National University Canberra 2021, p 28. https://giwl.anu.edu.au/sites/default/files/docs/2021/10/Gender%20pay%20gap%20reporting%20in%20Australia%20-%20time%20for%20an%20upgrade.pdf

If government cannot be relied upon to adequately fund the Agency, then consideration should be given to legislating budget allocations.

Recommendation 1: NFAW recommends that the Australian Government step up the level of ambition on gender equality.

Recommendation 2: NFAW supports the WGEA's recommendation that the functions of the Act under section 10 should be amended to include "to work with employers to drive change in their workplaces".

Recommendation 3: NFAW recommends that the audit function included in section 19A be made more explicit in section 10 to give it greater priority as a function of the Agency to encourage progress (see recommendation 28).

Recommendation 4: WGEA needs to be assured of adequate funding into the future to enable it to progress all its functions as a package. Any new functions added through this review should carry with them additional resources.

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?

As noted above, NFAW considers that the Australian Government should step up the level of ambition on gender equality. This requires more expansive powers for the WGE Act and firmer regulation of employers to drive change. Australia has been languishing in the doldrums of plateauing gender equality indicators for too long.

To achieve, this, the WGE Act should be enabled to report pay equity gaps at the organisational level, rather than at the industry or sector level as is currently the case.

Gender pay inequity is one of the most deeply entrenched gender inequities we face. It is both a symptom and driver of inequality. Individual employers cannot solve the problem alone, but nor can we address it without all employers putting their shoulders to the wheel. WGE Agency data show that only around half of all reporting organisations had even conducted a gender pay equity audit over the previous two years, and fewer than half of them took action to rectify any gaps they discovered.[12] Clearly employers can do better.

[12] The Agency noted that "this was compounded in our latest dataset, in which there was a substantial drop of 6.1 percentage points in employers taking action on pay equity." Workplace Gender Equality Agency *Progress Report 2019-2020*, p 3. https://www.wgea.gov.au/sites/default/files/documents/WGEA%20Progress%20Report%202019-20.pdf

One of the results is that, as recent research from the Global Institute for Women's Leadership at the ANU showed, Australia "…received the joint-lowest ranking on the gender pay gap reporting scorecard" across the six countries studied in the report.[13]

Research on the impact of mandatory wage transparency, drawing on wage statistics of Danish companies before and after the introduction of that country's 2006 Act on Gender Specific Pay Statistics demonstrates that gender pay gaps shrink when companies are required to disclose them.[14]

Making this change will not change the reporting burden for employers as they already provide this data to WGEA. Clearly poor performers will object to the data being published and it will require political will to progress this. It is a necessary next step. See also response to questions 6 and 8 below for further discussion of gender pay equity.

Secondly, legislation should enable closer collaboration between the Australian Human Rights Commission (AHRC) and WGEA, as two arms of the National Women's Machinery. Legislation should enable broad notification of complaints from the AHRC to the Agency for Employer of Choice nominees. The Director of the Agency should further be enabled to notify the AHRC of concerns in particular sectors or industries, and the AHRC should be enabled to investigate such referrals on its own initiative, as has been recommended by Respect@Work in relation to sexual harassment.[15]

We address coverage issues separately under question 3.

Recommendation 5: The WGE Act should be amended to enable WGEA to report pay equity gaps at the organisational level, rather than at the industry or sector level as is currently the case.
Recommendation 6: Legislation should enable better sharing of information between the Australian Human Rights Commission and WGEA. In particular, the Director of the Agency should be enabled to notify the Sex Discrimination Commissioner of concerns around discrimination and harassment in particular sectors or industries, and the AHRC should be enabled to investigate such referrals on its own initiative.

[13] Glennie M, von Reibnitz A, William J, Curtis S, Bordia S, *Gender pay gap reporting in Australia – time for an upgrade* The Australian National University Canberra 2021, p 6. https://giwl.anu.edu.au/sites/default/files/docs/2021/10/Gender%20pay%20gap%20reporting%20in%20Australia%20-%20time%20for%20an%20upgrade.pdf See also Workplace Gender Equality Agency *Targets and quotas: Perspective Paper* https://www.wgea.gov.au/sites/default/files/documents/2014-03-04_PP_targetsquotas.pdf

[14] "That legislation requires companies with more than 35 employees to report on gender pay gaps. We focused on companies with 35-50 employees who had to report their wage gaps (we call them mandatory reporting firms) and compared their pay data with identical information from a group of similar-sized firms with 25-34 employees that weren't required to release gender-segregated data (our control group)." Morten Bennedsen, Elena Simintzi, & Daniel Wolfenzon "Gender Pay Gaps Shrink When Companies Are Required to Disclose Them" *Harvard Business Review* January 23, 2019 https://hbr.org/2019/01/research-gender-pay-gaps-shrink-when-companies-are-required-to-disclose-them

[15] Australian Human Rights Commission *Respect@Work* Sydney 2020 https://humanrights.gov.au/our-work/sex-discrimination/publications

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?

It is important to note that the coverage of the Workplace Gender Equality Act 2012 (the WGE Act) is not limited. The Agency's functions, as specified in section 10 of the WGE Act, include:

- To advise and assist employers in promoting and improving gender equality in the workplace, and
- To undertake research, educational programs and other programs for the purpose of promoting and improving gender equality in the workplace.

Under the WGE Act, the Agency has a remit in these areas that extends beyond 'relevant employers'. 'Relevant employers' are relevant only with respect to reporting to the Agency which forms only one part of the Agency's functions.

While reporting by 'relevant employers' is a critical tool in driving improved gender equality outcomes within those organisations and the reporting cohort more generally, reporting also supports the Agency's broader goal of driving improved gender equality across the workforce. It is not an end in itself. An understanding of all sectors and all-sized employers – is needed to meaningfully address inequalities and inefficiencies, not just for those who are defined as 'relevant employers' under the WGE Act.

As noted by the Agency, at present only 40 per cent of employees are represented by the reporting data. And, as also noted by the Agency, significant research indicates that women fare less well in areas not covered by the reporting requirements of the WGE Act, particularly in relation to small business. Reporting should be extended as far as possible and reasonable and, where not possible or reasonable, alternative mechanisms should be made available to Agency to investigate and consider gender equality across the workforce.

Number of employees

Until now the government objective of reducing the paperwork burden on business, and particularly on small business, has precluded consideration of reducing the 100-employee reporting threshold. NFAW is pleased to note the work being carried out by the Agency with the Australian Tax Office to consider ways in which Single Touch Payroll (STP) could alleviate the reporting burden on employers, alongside, importantly, improving the breadth and relevancy of data holdings (see discussion under question 7).

Recommendation 7: If STP can be utilised in reporting, and it if results in likely significant alleviation of the reporting burden, reporting should be extended to all sized businesses. If the efficiencies of STP fail to materialise and the reporting burden remains too

burdensome for smaller business, the Agency should be funded to draw from other sources (such as ABS, HILDA and administrative data sets) to ensure that it can provide accurate and meaningful insights into the state of the entire workforce for women to fulfil its full range of functions (see recommendations 18 and 21).

A workplace gender equality 'state of the nation' report would sit well with the Agency's intended educative function, and would provide a valuable resource for employers, researchers and policy-makers. It would also militate against the misuse of WGEA reporting data as representative of the experience of all working women. The biennial report (section 12 of the WGE Act) could be usefully employed to promote the Agency's work in this area.

By sector

NFAW notes favourably the work being done by the Agency and the Australian Public Service Commission to align public and private sector reporting. NFAW notes, however, the Agency's suggested imposition of a twenty-employee threshold, and questions the cost/benefit ratio of such a threshold.

As far as NFAW can ascertain there is no existing threshold applied within Government, so these agencies would currently report, and already have some mechanisms in place to report. Reporting on fewer than 20 employees is unlikely to be onerous, given there would be no need for complex data collection mechanisms within these organisations. Cross-sector data analysis and comparison would easily be conducted by eliminating the cohort of organisations with fewer than 100 employees.

NFAW also urges transparency in any data items that might be dropped from public sector reporting in the name of alignment. The Australian Public Service, for example, has rich data holdings on employee characteristics that very likely extend beyond that required under the WGE Act.

The intention regarding those organisations currently covered under the *Equal Employment Opportunity (Commonwealth Authorities) Act* 1987 remains unclear.

Recommendation 8: NFAW recommends all public sector agencies (including those covered under the *Equal Employment Opportunity (Commonwealth Authorities) Act* 1987) – including those with fewer than 20 employees – have reporting aligned to that required by relevant employers under the WGE Act, in a way that does not in any way diminish the quality of data already collected from the sector.

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?

The principal objects of the WGE Act include the removal of discrimination and barriers to equality in relation a number of specified employment matters. The Act lists a number of gender equality indicators (GEIs) which can be used to measure progress in eliminating discrimination and barriers to equality in these employment matters. These indicators are:

(a) the gender composition of the workforce;
(b) the gender composition of governing bodies of relevant employers;
(c) equal remuneration between women and men;
(d) the 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;
(e) consultation with employees on issues concerning gender equality in the workplace;
(f) any other matters specified in an instrument under subsection (1A).

Under subsection (1A) of the Act the Minister has the responsibility of setting specific datapoints through a legislative Instrument distinct from the minimum standards instrument – the Workplace Gender Equality (Matters in relation to Gender Equality Indicators) Instrument 2013 (No. 1). These data points consist of

- disaggregated data by gender on the workforce profile, the profile of the governing body, the remuneration profile of managers and non-managers and workplace profile categories and the availability of employment terms, conditions and practices by manager/non-manager
- questions on the existence or non-existence of related workplace policies or practices designed to be answered in a yes/no format to simplify the reporting burden on employers

WGEA recommendation 4

In its submission at pp 12 and 13 WGEA appears to be recommending that the first type of data collection *no longer be specified in the Instrument in the interests of 'flexibility' and 'future-proofing'*. Removing these specific reporting requirements from the Instrument is a fundamental and potentially catastrophic proposal. It would take the entire dataset out of an objective and legislatively mandated framework and leave it to the discretion of a series of appointed directors.

The implementation of the recommendation could mean the loss of/or ongoing changes to all or some of the specific datapoints in the WGEA dataset. The consequence would be the loss of the longitudinal integrity of the dataset and with that the loss of the Agency's capacity to benchmark progress or to develop and enforce minimum standards.

Far from future-proofing the WGEA dataset, this recommendation, if implemented, would progressively undermine it, and depending on the changes made at the discretion of succeeding directors, could leave it a jumble.

NFAW strongly opposes the WGEA proposal to remove specific data items from the Instrument and the dataset. While we endorse WGEA's recommendation 13 on removing the collection of data on reporting levels to the CEO, our recommendation is that otherwise changes to the Workplace Gender Equality (Matters in relation to Gender Equality Indicators) Instrument 2013 (No. 1) should only be made by addition.

Recommendation 9: NFAW strongly opposes the WGEA proposal to remove specific data items from the Instrument and the dataset. While we endorse WGEA's recommendation 13 on removing the collection of data on reporting levels to the CEO, our recommendation is that otherwise changes to the Workplace Gender Equality (Matters in relation to Gender Equality Indicators) Instrument 2013 (No. 1) should only be made by addition.

Collecting data on occupations and jobs at ANZSCO level 4

WGEA has recommended that reporting on non-managerial categories be required to be disaggregated to ANZSCO level 4. This is a critically important matter.

NFAW and the Coalition of Working Women with which it worked in advising the Minister on the original reporting Instrument also supported the collection of non-managerial data at the 4-digit ANZSCO level. The same recommendation was also made in 2015 by the Non-Manager Working Group. This change is long overdue.

Expanding reporting from ANZSCO level 1 to ANZSCO level 4 for non-manager occupational categories would significantly improve workplace gender equality data and evidence. In the banking sector, for example, 90 per cent of employees fall into one occupational category at ANZSCO 1 level – "professionals". Data aggregated to this level cannot support much analysis.

Utilising the more specific and descriptive job classifications provided at level 4 of ANZSCO results in more accurate and valuable benchmarking data for organisations on matters such as occupational segregation and gender wage differentials. For example, the Agency currently collects data on those employed as nurses under the major group 'Community and Personal Service Workers' (ANZSCO level 1). Expanding to ANZSCO level 4 of this non-manager category would mean that the Agency would have available to it data that is specifically on 'Nurses' (and other job roles in this group).

Stakeholder consultation in 2019 confirmed that some organisations are keen to provide ANZSCO level 4 data so it can be used to benchmark and implement work to improve gender equality outcomes across non-manager categories in their organisations.

In this context we note that:

- considerable work has already been done to address implementation issues such as that undertaken under the aegis of the 2015 Non-manager Working Group
- employers have already been asked to submit non-managerial occupational data at ANZSCO level 4 on a voluntary basis for the 2020-21 reporting period
- the Government has encouraged all employers using its Single Touch Payroll System (STP) to enter a, ANZSCO four-digit unit group code for each employee, arguing that 'this will enable more nuanced analysis and benchmarking of your data at a more detailed occupational level'. STP has also been adapted by WGEA as an optional reporting format

Recommendation 10: NFAW strongly supports WGEA's proposal that recommends data collection and reporting on non-manager occupations and jobs at ANZSCO level four be made mandatory from 2022.

New data items

The current Instrument specifies a new GEI -- 'Gender Equality Indicator 6—sex-based harassment and discrimination' -- and requires data to be provided on

6.1 The existence of a sex-based harassment and discrimination prevention strategy or policy.
6.2 The inclusion of a grievance process in any sex-based harassment and discrimination prevention policy.
6.3 Workplace training, if any, for managers on sex-based harassment and discrimination.
6.4 The frequency of workplace training about sex-based harassment and discrimination.

WGEA has pointed out in its 2019-20 *Progress Report* that these data points are confined to training and do not include reporting on the actual incidence of sexual harassment in the workplace. NFAW agrees that this is a critical data item in relation to any sexual harassment indicator. We accept that some employers may be disinclined to report on the incidence of such complaints in their organisation, particularly given the high incidence of non-disclosure agreements and confidentiality clauses that organisations have put in place to prevent reporting (*Respect@Work*, pp. 556ff). But we believe that, firstly, data respecting the incidence of harassment is not likely to reveal personal information, and secondly, that organisations are more likely to take preventative action consistent with the WGE Act (and the Sex Discrimination Act) if they are aware that the incidence of sexual harassment claims in their organisation will be in a public report.

Respect@Work noted in this context that in their submission the Victorian Women Lawyers had 'recommended introducing a mandatory de-identified reporting regime, which would

impose obligations on employers to report any sexual harassment complaints to an overarching body, such as the Commission' (p. 559). The mechanism for such reporting is already in place in the WGEA reporting regime. We recommend that it be used and that this data item be included in the reporting instrument.

Recommendation 11: *The Workplace Gender Equality (Matters in relation to Gender Equality Indicators) Instrument* 2013 (No. 1) should be amended to include a requirement under Gender Equality Indicator 6—sex-based harassment and discrimination -- to report on the incidence of sexual and sex-based harassment complaints in the employer's organisation.

We would also note in this context that while the public versions of individual organisational reports are accessible on the WGEA data explorer, the principal audience for an individual employer report is that employer's workforce. One of the principal objects of the Act is to 'to foster workplace consultation between employers and employees on issues concerning gender equality in employment and in the workplace'(s. 2A(d)). To support that object, GEI (e) is 'consultation with employees on issues concerning gender equality in the workplace'. The supporting data points under the Instrument are;

5.1 Consultation, if any, with employees on workplace gender equality matters.
5.2 The mode of consultation with employees on workplace gender equality matters.
5.3 The categories of employees consulted.

Subsection 16(1) of the Act provides that a relevant employer must, as soon as reasonably practicable after lodging a public report under section 13A, inform the employees of the employer, and any shareholders or members of the employer, that the employer has lodged the report and of the way in which the report may be accessed (whether this be electronically or otherwise). At present only 53.9 per cent of reporting employers have responded in relation to GEI(e) that yes, they consult their employees in some way, which suggests that the 46.1 per cent of employers may make the report accessible as required, but do not consult employees either in the course of drafting or in the course of reviewing their outcomes.

NFAW believes that the current Instrument should be amended to ask, on a yes/no basis, whether employers have consulted employees in the preparation of their WGEA report and whether they consulted employees after the public version of the previous year's report was made accessible to them. Employers should also be asked to supply the dates and mechanism of consultations.

Recommendation 12: NFAW believes that the *Workplace Gender Equality (Matters in relation to Gender Equality Indicators) Instrument 2013 (No. 1)* be amended to ask, on a yes/no basis, whether employers have consulted employees in the preparation of their WGEA report, and whether they consulted employees after the public version of the

previous year's report was made accessible to them. Employers should also be asked to supply the dates and mechanism of consultations.

WGEA's proposals concerning other specific changes

WGEA's *Progress Report* details a number of other data items which it is seeking to have included in reporting requirements. Some of these are currently voluntary, and some are new to the regime. On most of the WGEA recommendations regarding these data items NFAW has no view to offer. We recognise that there are considerable advantages to having some of the new data proposed. We also recognise that these advantages need to be offset against the need to

- minimise the reporting burden on employers wherever possible
- recognise that the dataset is principally a guide to employer action, benchmarking and the setting of minimum standards, and only secondarily a research resource
- bear in mind the scope for voluntary reporting already used by WGEA, and that around 70 per cent of reporting employers have, for example, provided age and location data on a voluntary basis
- recognise the scope for misunderstanding and misusing WGEA data. For example, the number of employers in this dataset who may pay superannuation for employees on parental leave would be very far from representative of the situation of women in the workforce more generally and should not be used in isolation in policy-making, as has occurred in the past (see response to question 6(a)).

Having said this, NFAW strongly supports a subset of the WGEA proposals in addition to that bearing on harassment

- **Requiring information on the date employers select their employee data.** Reporting organisations are required to report on the gender composition of their workforce, at a point in time in the 12-month period between 1 April and 31 March. Technically, this means a reporting organisation can submit exactly the same report two years in a row by virtue of the self-selected date. Closing this loophole would help to ensure that organisations provide data that is truly representative of changes in their workforce over the reporting year.

- **Removing the collection of data on reporting levels to the CEO.** WGEA report that many employers spend considerable time interpreting this requirement and applying it. Consequently, the Agency has taken a cautious approach to the accuracy and usefulness of this data.

- **Collecting data on the number of hours part-time employees are engaged**. Relevant employers are currently required to provide annualised full-time equivalent salary for part-time employees to the Agency to enable comparison to full-time employee salaries. The collection of the number of paid hours worked by each part-time employee would provide a more nuanced definition of part-time employment and hourly earnings because it would provide accurate data on the proportion of full-time hours that part-time employees work.

We broadly support **collecting data on whether organisations pay superannuation when an employee is on parental leave.** However, we emphasise that the data released by such reporting will be representative only of the practice among larger employers. NFAW is concerned that if this data is cited as broadly representative, as happened in the case pf employer-paid parental leave, it will be used to fuel a second 'double-dipping' campaign to undermine the case for government-paid super as part of the paid parental leave package.

With respect to **including intersectional data**. NFAW notes that the Victorian Gender Equality Act – which inter alia calls for the collection of agency workforce data – identifies a need for data on race, Aboriginality, religion, ethnicity, disability, age, sexual orientation, and gender identity. Section 11(3)(b) of GE Act requires sensitive information to be used for the audit "if available". Thus, a defined entity is permitted to use sensitive information it already holds, **however *it is not required to collect sensitive information nor are employees required to disclose sensitive information.***

If a defined entity wants to collect sensitive information to conduct an audit under the Gender Equality Act, it must seek the employee's consent. ***An employee is entitled to refuse the collection of their sensitive information and should be informed of this.*** Given the scope for workplace discrimination on many of the grounds listed, it is particularly important that the need to collect data on this item not be used to compel employees to self-identify in a hostile environment. If WGEA calls for this data, it should ensure that workplaces have a similar framework in place.

See also the discussion and recommendations relating to this matter in response to question 5 below.

Recommendation 13: With regard to the Gender Equality Indicators, and the datapoints relating to those indicators, NFAW supports:

- requiring information on the date employers select their employee data
- removing the collection of data on reporting levels to the CEO
- collecting data on the number of hours part-time employees are engaged.

Recommendation 14: We broadly support the collection of data on employer payment of superannuation for employees on paid parental leave and on intersectionality. However:

- WGEA must be vigilant to ensure data on employer-paid superannuation cannot be presented as representative of the workforce as a whole, or used to fuel a second 'double-dipping' campaign to undermine the case for government-paid super as part of the paid parental leave package

- data on intersectionality should only be collected where WGEA can be confident that such a reporting responsibility will not be used to compel employees to self-identify in a hostile environment. An employee should be entitled to refuse the collection of their sensitive information and should be informed of this.

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 (e.g. cultural and linguistic diversity, disability, age, location of primary workplace). If not, why not?

As we know from the long experience on gender equality, and as is embedded at the heart of the WGE Act, reporting can shine a light on the inadequacies of a culture to support equality and diversity.

It is difficult to find data on forms of diversity apart from sex in Australia. Certainly, the AHRC has recommended that data on cultural diversity be collected.[16] It has developed a simple cultural background classification, noting the experience of gender equality:

> has demonstrated the power of having data and reporting on gender. If we are committed to deepening our success as a multicultural society, there must be consideration of official collection and reporting of comprehensive data on cultural diversity within Australian organisations and institutions.[17]

In its last Progress Report, WGEA recommended that "[r]elevant employers should be required to report on the relative position of women, men, and individuals who do not identify as female or male in their workplaces."[18]

Understanding diversity more broadly than sex is demonstrated to deliver strong outcomes for workplaces, just as greater indicators of gender equality do.

Diversity Council of Australia research on inclusion in Australian workplaces found workers in inclusive teams are 10 times more likely to be highly effective than those in non-inclusive teams and seven times less likely to have personally experienced harassment and/or discrimination in the past year. It defines inclusion as operating when "…a diversity

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[16] Australian Human Rights Commission *Leading for Change: A blueprint for cultural diversity and inclusive leadership revisited* 2018, p 18. https://humanrights.gov.au/sites/default/files/document/publication/Leading%20for%20Change_Blueprint2018_FINAL_Web.pdf quoting 'Australian Human Rights Commission Submission to the Select Committee on Strengthening Multiculturalism', Australian Human Rights Commission, 19 May 2017, last viewed: 26/03/2018, (https://www.humanrights. gov.au/submissions/submission-inquiry-strengtheningmulticulturalism-2017); 'Submission to the UN Committee on the Elimination of Racial Discrimination', Australian Endnotes Leading for Change • 35 Human Rights Commission, 30 October 2017, last viewed: 26/03/2018, (https://www.humanrights.gov.au/ submissions/submission-cerd-2017).

[17] Australian Human Rights Commission *Leading for Change: A blueprint for cultural diversity and inclusive leadership revisited* 2018, p 3. https://humanrights.gov.au/sites/default/files/document/publication/Leading%20for%20Change_Blueprint2018_FINAL_Web.pdf

[18] Workplace Gender Equality Agency *Progress Report 2019-20*, p6. https://www.wgea.gov.au/sites/default/files/documents/WGEA%20Progress%20Report%202019-20.pdf

of people (i.e. from different ages, cultural backgrounds, genders) are respected, connected, progressing, and contributing to organisational success."[19]

Likewise, McKinsey has found that companies "…with the most ethnically diverse executive teams (in both absolute representation and also in ethnic mix) are 33 per cent more likely to outperform their peers on profitability."[20]

There is a strong argument that WGEA should stick to its core business of gender equality. Even in that case, however, understanding diversity in Australian workplaces will improve progress towards gender equality. We will not close gendered gaps in employment and support women's economic empowerment unless we understand that women are not a homogeneous group. Responses cannot be homogeneous either.

AHRC research demonstrates that women with non-European backgrounds are even more underrepresented in leadership positions than men of such backgrounds or European background women.[21]

Research by the University of Sydney on Women and the Future of Work found that "women born in Asia and Culturally and Linguistically Diverse women reported experiencing sexual harassment at twice the rate of the surveyed population".[22]

LGBTQI and Aboriginal and Torres Strait Islander workers are also more likely to experience workplace sexual harassment.[23]

Research by Jumbunna Institute of Education and Research and the Diversity Council Australia concludes that Indigenous women in management and executive positions:

> had the highest cultural load. On the other hand, [Indigenous] women who were in lower level positions were less supported when experiencing unfair treatment, racism and harassment.[24]

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[19] Diversity Council Australia (O'Leary, J. and Legg, A.) *DCA-Suncorp Inclusion@Work Index 2017-2018: Mapping the State of Inclusion in the Australian Workforce*, Sydney, Diversity Council Australia, 2017.
[20] Quoted in Australian Human Rights Commission *Leading for Change: A blueprint for cultural diversity and inclusive leadership revisited* 2018, p 15. https://humanrights.gov.au/sites/default/files/document/publication/Leading%20for%20Change_Blueprint2018_FINAL_Web.pdf
[21] Australian Human Rights Commission *Leading for Change: A blueprint for cultural diversity and inclusive leadership revisited* 2018, p 23. https://humanrights.gov.au/sites/default/files/document/publication/Leading%20for%20Change_Blueprint2018_FINAL_Web.pdf
[22] Marian Baird, Rae Cooper, Elizabeth Hill, Elspeth Probyn and Ariadne Vromen, *Women and the Future of Work*, 2018.
[23] Human Rights Commission *Respect@Work: National Inquiry into Sexual Harassment in Australian Workplace*s, 2020, p. 192–200.
[24] Evans, Olivia *Gari Yala (Speak the Truth): gendered insights* WGEA Commissioned Research Report in partnership with the Jumbunna Institute of Education and Research and Diversity Council Australia Sydney 2021, p 12.

We need to have better understanding of, and better data on, the intersectional experiences of gender inequality in Australian workplaces.

To the extent that WGEA can encourage employers to take a more sophisticated and disaggregated approach to the Gender Equality Indicators, it will encourage employers to better understand the drivers and effects of gender inequality in their workplaces. It will be of benefit to gender equality broadly and advance the rights of all Australians as it does so.

Certainly, there are international examples of collection of data across a wide range of diversity characteristics. In the USA, the Equal Employment Opportunity survey, which all companies employing more than 100 people are required to submit, includes information on a range of characteristics.[25] Some companies conduct diversity audits of staff.

NFAW does not, however, recommend that relevant employers be immediately required to report against demographic characteristics beyond sex for several reasons.

First, many employees will not feel safe or supported to report these data and being asked to do so can feel invasive. The more the organisation feels unsafe and discriminatory to staff, the less likely they will be to report, and being asked or even required to do so will only increase those perceptions.

Where employees decide against identifying themselves as a member of a particular group when they feel unsafe to do so will deliver a significant under-reporting on a number of characteristics, and likely contribute to further exclusion, marginalisation and inadequate responses by employers.

NFAW considers that mandating data collection on these grounds will exacerbate feelings of discrimination and exclusion by many employees. Requiring employers to collect these data when they are not yet supported to do so and may not be aware of the real safety issues will not advance the outcomes sought and may well result in significant under reporting as employees fail to report accurately.

Secondly, the benefits of gaining deeper and more granular demographic characteristics need to be balanced against the difficulties employers may have in collecting this extra information. WGE Act data requirements are already seen as burdensome by some employers, so requiring a sensitive and technical additional reporting requirement under the WGE Act should be balanced against the utility of that information.

It is important that the WGE Act not immediately mandate the collection of intersectional diversity data, but rather support organisations to build the cultural safety for staff and ensure the process respects inclusion and diversity and delivers accurate information.

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[25] Australian Human Rights Commission *Leading for Change: A blueprint for cultural diversity and inclusive leadership revisited* 2018, p 6 https://humanrights.gov.au/sites/default/files/document/publication/Leading%20for%20Change_Blueprint2018_FINAL_Web.pdf quoting US Equal Employment Opportunity Commission, EEO-1 Joint reporting committee, Employer Information Report EEO-1, Instruction Booklet, US Government: Washington, 2007, https://www.eeoc.gov/ employers/eeo1survey/2007instructions.cfm.

NFAW recommends instead that WGEA should further examine the practical risks and opportunities associated with collecting demographic information from staff along with gender composition data, and that it should engage a number of good practice employers to voluntarily report on intersectional composition of their workforces. This will deliver useful learnings about the benefits, risks and challenges of doing so. Some large companies with diversity networks may draw on these employee groups to develop approaches that will support greater inclusivity and safety, rather than having the opposite, if unintentional, effect.

We consider the issue of protections for employees who may be exposed to workplace discrimination on intersectional grounds in our response to question 4 above.

NFAW agrees, however, with WGEA that employers should immediately be given *the option* of reporting against "female", "male" and "Other/Not specified" categories, but that this option must be clearly specified to be voluntary. We accept that, as data on male and female status is already being collected, the option to avoid having to self-identify as either should be available, as being asked to respond to the gender binary requires gender fluid or non-binary staff to provide inaccurate information.

Nevertheless, many staff will not feel safe reporting gender fluid or non-binary status at work, so employers should not expect these results to provide an unambiguous clarity about the representation of gender fluid or non-binary staff in their workplaces.

Recommendation 15: WGEA should further examine the practical risks and opportunities associated with collecting demographic information from staff in consultation with good practice employers.

Recommendation 16: Employees should immediately be given the option of reporting against "female", "male" and "Other/Not specified" categories if they wish, but this option must be clearly specified to be voluntary.

6 . (a) How could data be better collected and/or used by WGEA to promote and improve gender equality?

Misuse of WGEA data

The WGEA database covers 40 per cent of Australian employees – 60 per cent if public sector organisations are required to report. The percentage of employing businesses that it covers is much smaller at .014 per cent. This means that the WGEA data is not representative of the workforce as a whole, but rather of the large organisations with 100+ employees. As a consequence of their size, this subset of employers is also much more likely to have designated human resource managers and formalised human resource policies as well as the resources and flexibility to introduce gender equality measures.

Conversely, 98.6 per cent of employers and their employees are engaged in smaller businesses without equivalent resources, and often without management interest directed at gender equality measures.

Take casual employees. 2015 HILDA data showed that this group made up 33 per cent of employees in firms employing 1-19 people; 21.4 per cent of firms employing between 20 and 99 people; and only 11.6 per cent of firms falling into the size band covered by the reporting requirements of the WGE Act. Given that low-wage casuals receive a wage 'penalty' for their skills, experience and the like, *despite* the notional casual loading, and given that most casuals are women, it is highly likely that the remuneration gap in WGEA's reporting entities is significantly narrower than that existing in the 98.4 per cent of smaller businesses, and indeed in the workforce as a whole.

Without going through the GEIs systematically, we would argue that the WGEA data against each of these indicators is skewed to show the existence of a much more favourable set of terms and conditions -- ranging from employer-paid parental leave to equal remuneration policies -- than apply to Australian women in the workforce more generally.

While it is generally agreed that the WGEA dataset presents an invaluable resource for researchers and policy-makers, it is critical that WGEA data not be presented as representative. WGEA is generally careful to specify the dataset it is using in its publications but is silent on the impact of the differences between what its own data shows and what is the case among smaller, non-reporting employers. Unsurprisingly, we have found researchers and journalists and even public servants who treated WGEA data as representative.

We would recommend that WGEA take more active steps to prevent its being inappropriately cited by casual users to give a much rosier picture of the situation of women in the Australian workforce than is actually the case.

In our view the situation of women in the Australian workforce would be more accurately represented if WGEA were resourced to work more closely with ABS, HILDA and other administrative datasets to build a more comprehensive picture of terms and conditions across all employer sizes. This data could also include the development of sector-specific data, taking in, for example, small hospitality venues as well as large ones, and could be published as part of WGEA's yearly report to the Minister on the state of workplace gender equality.

In this context it should be remembered that the WGE Act covers all employers, though only employers of 100+ are covered by the reporting requirement. The Agency has a responsibility to provide advice and resources to smaller employers and this dataset could inform its activities. The development of such a representative dataset could also serve as an alternative to extending the reporting requirements of the Act to smaller employers.

Recommendation 17: NFAW is concerned that WGEA data is being inappropriately used or cited by researchers to give a much rosier picture of the situation of women in the Australian workforce than is actually the case. While we would support increased access by authorised researchers to the WGEA dataset, we recommend that the authorisation process include training to ensure all data is appropriately understood and cited.

Recommendation 18: The situation of women in the Australian workforce would be more accurately represented if WGEA were resourced to work more closely with ABS, HILDA and other administrative datasets to build a more comprehensive picture of terms and conditions across all employer sizes. The development of such a representative dataset could also serve as an alternative to extending the reporting requirements of the Act to smaller employers (see recommendation 7).

6. (b) Should there be some form of pay transparency – should remuneration data in some form be public?

WGEA receives remuneration data covering base salary, plus any additional benefits such as superannuation, bonus payments, performance pay, discretionary pay, overtime, other allowances and benefits such as share allocations. Under the Act, the Agency must ensure that all remuneration data that is provided is kept strictly confidential, and a number of measures have been put in place to ensure that this is the case.

While remuneration data is removed from public reports, the agency provides each reporting organisation with benchmark remuneration data presented as percentages and including:

- the organisational gender pay gap
- the gender pay gap for all manager categories and/or
- the gender pay gap for all non-manager categories.

NFAW understands that remuneration data can constitute both personal information for the purposes of the Privacy and commercial-in confidence information. However, the same concerns do not apply to data expressed as percentages.

We will argue in response to question eight that, because of its broad relevance to and direct impact on gender equality, remuneration data expressed as a gender pay gap percentage should be used to set a public industry-specific minimum equal pay standard phased in over time for all employers covered by the reporting obligations of the Act. We are also recommending, for the same reasons, that remuneration data expressed as a gender pay gap percentage should be included in employers' public reports. Given the considerable variation between the gender pay gaps specific to different industries, the public employer reports published by the Agency should include industry-specific benchmarks as well as organisational percentages.

Recommendation 19: Remuneration data expressed as a gender pay gap percentage should be included in employers' public reports. Given the considerable variation between the gender pay gaps specific to different industries, the public employer reports published by the Agency should include industry-specific benchmarks as well as organisational percentage.

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?

Regulatory burden on reporting entities has been a consistent refrain since the inception of the *Workplace Gender Equality Agency Act 2012*. A review in 2014/15 made recommendations to streamline some reporting elements and clarify some definitions and categories. It also recommended exploring collection of data through the then soon to be introduced Single Touch Payroll (STP) system. At the time the Australian Tax Office had undertaken an extensive round of Industry briefings and incentives to stimulate the software development market to develop digital solutions for STP. A similar level of engagement and investment has not occurred for the WGEA system and NFAW believes this reflects a gender bias in Commonwealth budget policy.

Recommendation 20: There should be sufficient budget allocation to enable WGEA to invest in digital solutions to reduce the employer reporting burden.

STP already collects some data relevant to compliance reporting under the WGEA Act. The Australian Bureau of Statistics already uses STP together with other ATO datasets to enable it to update information on about 10 million jobs each week, with information on gender, age, industry and location of job.

WGEA commenced offering an STP aligned reporting option for the first time this year. It makes sense to provide WGEA with access to STP data so that the reporting burden on employers is minimised where that information has already been provided to Government. Employers should not have to report to different government departments with the same data. This is not a WGEA reporting issue, it is a fundamental failure in government regulation and service delivery. STP reporting is a new measure, and it is likely to take some reporting cycles to ensure the time saving of this digital solution is realised and the integrity of the WGEA data set maintained, however there remains significant potential to reduce employer compliance burden through this data sharing.

Further the sharing of personal income tax data as currently occurs with the Australian Bureau of Statistics, should also be scoped to identify other data sets held by the Commonwealth Government which could reduce the burden of reporting on employers.

Recommendation 21: NFAW recommends that a scoping report to immediately identify the potential alignment of STP reporting, other ATO datasets and WGEA reporting be prepared, including the agreement of a timeframe for implementation between the ATO and WGEA. Budgetary allocation for implementation of the alignment should occur through either MYEFO 2022-23 or Budget 2023-24.

There is an observed disparity in investment in a digital compliance ecosystem between the ATO and WGEA. The level of investment to develop the STP, which in phase one collected data for 2.5 million employees,[26] far outweighs the level of investment in WGEA when considered on proportionate basis. WGEA reporting covers 4.3 million employees, almost double that covered by phase 1 of the STP.[27] Government should urgently support private sector solutions to WGEA reporting in the same way it approached the IT industry to develop STP add-ons to existing accounting packages through incentives to the market and using its digital service provider engagement model to stimulate or incentivise development of a STP add-on for WGEA reporting.[28]

Alternatively, the Department of Finance could develop an in-house solution for APS reporting entities with an intention that it easily replicated for private sector reporting entities and allow for public/private sector human resource benchmarking. This is similar to what occurred for the SAP/STP interface.[29]

Reporting under the WGEA deserves the same level of investment as reporting under the Tax Act. The WGEA dataset contributes to understanding gender inequality in Australian workplaces and in driving change. Reducing the gender pay gap and improving women's pay results in increased tax receipts.

Recommendation 22: There should be greater equality in funding for digital solutions for gender equality reporting. Government should urgently support private sector solutions to WGEA reporting:

[26] A new era of payroll reporting has started | Australian Taxation Office (ato.gov.au)
[27] Australia's gender equality scorecard 2019-20 (wgea.gov.au)
[28] Software industry engagement and consultation | ATO Software Developers and for inhouse development/incentives see for example No-cost and low-cost solutions for Single Touch Payroll | ATO Software Developers
[29] Finance slashes SAP costs for Single Touch Payroll - Cloud - Software - Strategy - iTnews

- Either through incentives to the market and using its digital service provider engagement model to stimulate or incentivise development of a STP add-on for WGEA reporting, or
- or by directing the Department of Finance to develop an in-house solution for APS reporting entities with an intention that it easily replicated for private sector reporting entities and allow for public/private sector human resource benchmarking.

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?

Under the WGE Act, the Minister has the power to set minimum standards of performance for a relevant employer through a separate Instrument, the Workplace Gender Equality (Minimum Standards) Instrument 2014. According to the Explanatory Memorandum for the Instrument, 'the Minimum standards represent the minimum an employer must do to demonstrate a commitment to gender equality in their workplace.' Under s.19C of the Act, a relevant employer fails to comply if that employer fails to meet that standard *and* fails to improve on their substandard performance over a period of two years.

Section 19E of the Act places an obligation on the Agency to offer relevant employers advice and assistance if they fail to meet minimum standards.

The importance of the minimum standards provision cannot be overstated. As the objects of the Act make clear, action is the whole point of the Act. It is about '*promoting* and *improving* gender equality in the workplace' (s10(1)(a)). The metrics are there to provide an evidence base for intelligent action – they are not an end in themselves. They are intended to

- provide evidence enabling employers to prioritise and design their own gender equality strategies
- set clear industry benchmarks and targets to act as incentives to employers in a given industry
- set a clear, numerical, outcomes-based floor to performance for underperforming and non-performing employers, to provide an objective basis for measuring non-compliance with minimum standards and progress over time
- enable the Agency to develop and target advice to underperforming employers
- provide a basis for upward revision of minimum standards over time to reflect improved industry conditions and/or changing community expectations regarding employment arrangements
- provide a national benchmark to assist the Minister and Parliament to prioritise and design gender equality policies.

The most recent biannual Progress Report reviewing the data reported to the Agency found that, after 9 years of operation of the current arrangements, there is a critical 'action gap' between policy and implementation. That is, 'organisations have policies and strategies in place but little or no action is taken to implement them across their workplaces' (Review, p. 3). In practice this has meant that:

- over 45 per cent of employers who conducted a pay gap analysis took no action to close any identified gaps. This was compounded in the latest dataset, in which there was a substantial drop of 6.1 percentage points in employers taking action on pay equity (p. 3)

- there have only been marginal changes in the gender balance of the workforce, the gender composition of appointments and promotions, the representation of women on boards, and levels of consultation with employees on issues concerning gender equality (p.5)

- only one third of organisations have key performance indicators for managers relating to gender equality; a little over half of organisations consult with employees on matters related to gender equality; and the important area of succession planning has only improved slightly (p. 17).

The 'action gap' identified by the agency is the direct consequence of the deliberate weakness of the current minimum standards. The application of the current minima has been confined to larger employers (of 500+). Even for these, they set the bar virtually on the floor. Organisations are required only to have a single policy in place to support gender equality. ***The current minimum standards do not call on employers to implement that policy or to show improvement in their workplace outcomes.*** Given that almost every significant employer (99.6 per cent) has a standing policy on sexual harassment to protect themselves from liability under applicable state and Commonwealth legislation (WGEA, *Progress Report*, p. 15), the current minimum standards are functionally meaningless. This can only be assumed to have been the intent of Minister Abetz in setting the standards. NFAW raised this issue before. *The current standards are designed to enable inaction*, and they will remain as a drag on the WGE Act until the relevant minister sees fit to change them.

It is possible for minimum performance standards to be set against a number or all of the gender equality indicators set out in the Act, rather than a minimum of one. It is possible for standards to be extended from inaction to specific minimum outcomes achieved. It is also possible for coverage to be limited, as at present, to a subset of relevant employers, or phased in to apply to other relevant employers over time, or simply made to apply to all reporting employers at once.

The existing schema of the Act was carefully and thoughtfully designed to offer proportionate and relevant sticks and carrots for organisations at all stages of progress and commitment towards gender equality. It was also intended to guide the agency resource allotment most effectively. The Employer of Choice regime was intended as an incentive at the top end where brand-reputation is important and has been successful in this regard;

naming and shaming, and contract compliance were intended as a disincentive to non-reporting at the bottom end (getting those employers who just don't care in under the umbrella). The minimum standards were intended to drive incremental improvements over time mostly by enabling the agency to identify the poor-performers and target assistance to them. It was also always intended that the minimum standards could be industry-specific and would be data-driven (*Explanatory Memorandum*, pp 28-29).

NFAW understands that other organisations in the sector would like to see minimum standards used to set targets for all employers, and not just floors for poorly performing employers. In many cases these targets are conceived as specified actions to be undertaken, rather than outcomes achieved. We note in this context that the whole schema of the current Act was intended to replace action plans with measured, numerical outcomes because action plans were not producing measurable outcomes, and because industry specific benchmarks could be used to drive and measure performance.

In the Agency's own submission, the proposed targets, though numeric, appear to be left to the employer's discretion (p. 33). The likely outcome of this is that poor performers will set minimal targets and strong performers will set stronger targets. Nor is there a performance deadline beyond 'a reasonable timeframe' – though the Act itself specifies two years.

It is not clear to us how the Agency proposes to implement this recommendation from a compliance perspective, and how its advisory function would bear up under thousands of different targets and levels of achievement. They argue that consultation with employers should assist with this (p. 33).

We recognise that there is scope to define the minimum standard as the possession of an action plan and target. However, we are inclined to the view that floor-based minimum standards are more likely to be widely accepted and effective. We note that industry minimum standards would still involve a poor performing employer in planning actions to raise organisational gender equality outcomes and gathering data to report those outcomes. We also note that a system which progressively raises the floor will mean that industry benchmarks affecting employers across the industry will rise over time.

We recommend that the *Workplace Gender Equality (Minimum Standards) Instrument* 2014 should be amended so that:

- relevant employers would be required to have policies/strategies in place to support the equal remuneration and one of the other GEIs currently listed under the instrument

- for each of these GEIs, relevant employers would have to meet an industry ***minimum outcome standard based on industry benchmark data.*** **These minimum standards could target poor performers by setting a floor to workplace outcomes.** Employers whose performance does not meet the minimum standard would have two years under the Act to show improvement against the minimum standard before being non-compliant. The Agency could advise the minister on different minimum

outcome standards for different industries following consultations based on current performance

- the new minimum standards be phased in over all relevant employers over three years beginning with employers of 1000+, then 500+, and finally all remaining relevant employers.

For example, the current gender pay gap for total full-time remuneration in Financial and Insurance Services is 27.5 per cent. That means that roughly half of the employers in Financial and Insurance Services have a gender pay gap which is even wider than 27.5 per cent. Say, just to set a notional example, that the bottom 10 per cent of employers in the industry have a gender pay gap wider than 33 per cent. The Agency could set a minimum standard that would require all employers in the industry to narrow their gender pay gap to at least 33 per cent. The same process could be used to establish minimum standards for equal remuneration across all industries.

The same kind of numerical minimum outcome benchmark could be set, on an industry by industry basis, for other GEIs, providing the second objective minimum standard for compliance. In industries with low rates of women in management, the poorest performing decile of employers could be required to improve the percentage of women in management up to that of the 90 percent of top performing employers.

In the female-dominated industries such as Health Care and Social Assistance, where women are well represented in managerial positions generally, a key lagging indicator is the percentage of women in key management positions at 23.5 per cent. In that industry the poorest performing decile of employers could be required to improve the percentage of women key management positions to reach the minimum achieved by the 90 percent of top performing employers.

Note that minimum standards only require showing progress towards the set minimum, so that organisations that improve their equal pay gap and their second indicator will be compliant so long as they continue to improve, even if they do not rise to the top 90 per cent decile within the two-year timeframe. Once the bottom decile rises to the floor set by the top 90 per cent, a new minimum standard could be set to raise the floor further.

The phasing in of these standards, together with the two-year improvement period set by the Act for improvement against minimum standards, means that poor performing smaller employers could have up to five years to raise their performance against pay equity and another GEI before being exposed to compliance enforcement measures. These employers have long known know who they are, thanks to the Agency's provision of individual benchmark reports to all reporting organisations.

Recommendation 23: *The Workplace Gender Equality (Minimum Standards) Instrument 2014* should be amended, so that:

- relevant employers would be required to have policies/strategies in place to support three of the GEIs as recommended by WGEA'

- for each of these GEIs, relevant employers would have to meet industry ***minimum outcome standards based on industry benchmark data.*** **These minimum standards could target poor performers by setting a floor.** Employers whose performance does not meet the minimum standard would have two years under the Act to show improvement before being non-compliant. The Agency could advise the minister on different minimum outcome standards for different industries following consultations based on current performance

- the new minimum standards be phased in over all relevant employers over three years beginning with employers of 1000+, then 500+, and finally all remaining relevant employers.

Equal remuneration as a mandatory minimum standard

The minimum standards as they are presently set by the Minister enable employers to choose whichever gender equality objective they wish for the one policy they have to have in place. Even if they chose to leap the action gap and implement that one policy, the impact of that implementation could be narrow.

The gender pay gap is in fact a broad indicator. It is a consequence of a number of factors including gender segregation, direct and indirect discrimination in pay and promotion, skewed sharing of family responsibilities, and the underpayment of the insecure workforce. Remuneration data, and action to reduce the gender wage gap expressed by this data, influences many of the Gender Equality Indicators set under the Act, including the composition and development of the workforce, the existence and consequences of supportive working arrangements, the use of consultative practices concerning workplace gender equality and the presence and impact of sex-based and sexual harassment and discrimination.

While remuneration data is not included in public reports, the agency provides each reporting organisation with benchmark remuneration data presented as percentages and including:

- the organisational gender pay gap
- the gender pay gap for all manager categories and/or
- the gender pay gap for all non-manager categories.

Because of its broad relevance to and direct impact on gender equality, remuneration data expressed as a gender pay gap percentage should be used to set a new public industry-specific minimum equal pay standard phased in over time for all employers who are required to report under the Act.

We also recommend that remuneration data expressed as a gender pay gap percentage be made part of public reports (see response to question 6).

Recommendation 24: Because of its broad relevance to and direct impact on gender equality, remuneration data expressed as a gender pay gap percentage should be used to set a public industry-specific minimum equal pay standard phased in over three years beginning with employers of 1000+, then 500+, and finally all remaining reporting employers.

In relation to the publication of equal pay data itself, we note that at present Australian employers are able to include "gag clauses" in employment contracts that can see workers punished or sacked for even talking about their pay. In 2015 the Australian Greens introduced a bill (the *Fair Work Amendment (Gender Pay Gap) Bill 2015) that would* render any terms in a modern award, enterprise agreement or employment contract prohibiting an employee from disclosing their pay or earnings to be of no effect. Evidence provided to Parliament in this context supported the view that greater pay transparency would encourage employers to make "merit-based" pay decisions and assist women to negotiate equitable rates of pay.

In our view the minimum standards should include an explicit requirement making remuneration-related gag clauses or directions a breach of the equal remuneration minimum standard. Employers would have to tick yes or no to indicate whether they relied on or used such gag clauses in modern awards, agreements (including individual flexibility agreements), or directions. In our view this question should be featured on the top page of the WGEA report made accessible to employees, alerting them to the fact that they have a right to reveal their pay if that is their wish.

In relation to concerns expressed in relation to the Fair Work Amendment (Gender Pay Gap) Bill on behalf of smaller employers, we would note that only those organisations with 100+ employees (about 0.014 per cent of all employers) would be affected by the proposal.

Employers who are non-compliant with this feature of the minimum standard should have the ground of non-compliance included in any list of named organisations.

Recommendation 25: The Minimum standards should include a provision making terms in modern awards, agreements (including individual flexibility agreements), employment contracts or directions prohibiting an employee from disclosing their pay or earnings a breach of the equal remuneration minimum standard.

Recommendation 26: Annual WGEA reporting instruments should include a question asking employers to confirm whether such gag clauses are used or relied on in their organisations, and their responses should be featured prominently on the employer's public report. Employers who are non-compliant with this feature of the minimum

standard should have the ground of non-compliance included in any list of named organisations.

9. Are the compliance mechanisms in the Workplace Gender Equality Act, and consequences for non-compliance, effective to promote and improve gender equality?

An organisation will comply with the Act if they:

1. submit an annual report with the required data on time
2. have their CEO sign the public report
3. comply with notification and access requirements
4. meet the minimum standards or, if they haven't, improve against them within two reporting periods
5. give WGEA information to review their compliance if it requests such information
6. do not include anything false or misleading in their annual report or in any extra compliance information requested by the Agency.

The Agency issues compliance letters to confirm that an organisation is has met its obligations under the Act and so is not exposed to the relevant compliance mechanisms: naming in parliament and on the Agency's website, and possible ineligibility for some government procurement contracts and grants.

The effectiveness of current compliance mechanisms

There are a number of mechanisms which enable the Agency to identify non-compliant organisations on the six specified grounds. These are more or less effective.

- Ground 1 - submit an annual report with the required data on time

A large number of relevant organisations do not identify themselves to the Agency. The current gap between potential and actual reporting organisations is unknown, but the Explanatory Memorandum to the present Act notes that at the time of its presentation only 65 to 70 per cent of all relevant employers were meeting their legislated responsibilities under the Equal Opportunity for Women in the Workplace Act, and that there were around another 4500 organisations which were not (Attachment E, p. 65).

The only mechanism driving self-identification is the link between compliance and government procurement and grants.

The current Workplace Gender Equality Procurement Principles, canvassed below, mean that prior to preparing procurement documentation, government officials must firstly determine whether the WGE Principles apply to the procurement – that is, whether the procurement meets a specified cost threshold and is being carried out by an Australian government agency. If the WGE Principles do apply, officials are required to insert certain model clauses into their calls for tender. The model clauses mean that tenders must be

accompanied by a letter from the Agency certifying the compliance of employers who meet the reporting threshold.

Employers who meet the reporting threshold and have not identified themselves to the Agency have to self-identify if they are looking for government procurement contracts or grants. Smaller employers who do not meet the reporting threshold are also required to register with the Agency, and are issued with a tender letter to accompany their tender documentation, but will continue to have no reporting responsibility until they increase staff numbers up to the 100+ employment threshold.

The current mechanism is certainly an improvement over the previous arrangements, which did not make use of up front tender documentation, but left the identification of non-compliant employers to the efficiency and effectiveness of individual procurement officers.

These arrangements have had some effect in encouraging employers to make themselves known to the Agency. However, even if they are administered with absolute efficiency, they only affect the subset of relevant employers who are in the business of tendering for government procurement contracts. Resources should be provided to the Agency to conduct research to enable it to identify as many of the remaining non-reporting organisations as possible.

Recommendation 27: Resources should be provided to the Agency to conduct research to enable it to identify as many of the remaining non-reporting relevant organisations as possible.

- Grounds 2-5

Compliance mechanisms associated with the quality of reports only come into operation for the subset of relevant employers who are known to the Agency. Of these, the Agency's own database performs quality checks that will alert them and reporting organisations to possible non-compliance on compliance criteria 2-5.

- Ground 6

The final ground – the provision of false or misleading information – is partially addressed through provisions requiring employers to make their reports accessible to employees, who are then able to raise perceived discrepancies between reports and workplace experience directly with the Agency. We are recommending that this mechanism be supplemented by a limited mandatory audit function, which would operate as both a compliance mechanism and a compliance sanction. This function is outlined below.

Compliance sanctions

Naming

The Director of the Agency has the power under s.19D(3) of the Act to name non-compliant employers in a report to the Minister which is tabled in Parliament and posted on the

Agency's website and can also be published in the media by electronic or other means. She also has the power to specify the grounds of non-compliance to include the ground of non-compliance (e.g. failure to report, incomplete report, false or misleading information, the failure to meet/improve on minimum standards), but these grounds do not appear in the current listing on the Agency's website.

As at 16 April 2021, 92 employers were listed on the Agency's website as non-compliant. Sanctions for non-compliance offer only a weak incentive for some relevant employers to comply with the law. Some take a perverse pride in being named. Others simply view naming as unlikely to impact adversely on their business or reputation. Many of these either do not contract to supply the government with goods or services, or only contract for goods and services that fall below the set procurement threshold.

Existing sanctions simply do not touch these employers. NFAW therefore recommends that organisations covered by the Act that do not meet the legislative requirement to self-audit by returning an annual workplace report to the Agency would as a consequence become liable to an external audit. Workplace inspectors would be able to visit such organisations and issue compliance notices to enforce compliance with the WGE Act. These organisations would be able to contact the Agency for any support and assistance they might require in meeting the terms of the compliance notice.

The external audit function would apply to all organisations that were non-compliant on any of the specified grounds for two years.

Given the limited staff available to the Agency, and the need for legislative machinery to authorise inspectors to enter workplaces and issue binding compliance notices, this recommendation might best be implemented by enabling existing inspectorates such as those conducted under workplace health and safety regulations or the Office of the Fair Work Ombudsmen (FWO) to carry out such audits with staff trained and authorised to conduct workplace gender audits by the Agency.

We note in this context that Recommendation 17 of the *Respect@Work* report called for the Australian Human Rights Commission (AHRC) to be given the function of assessing compliance with and enforcing the proposed positive duty on all employers to take reasonable and proportionate measures to eliminate sex discrimination, sexual harassment and victimisation, as far as possible. Under recommendation 18, this could include providing the AHRC with the power to:

a) undertake assessments of the extent to which an organisation has complied with the duty to take such reasonable and proportionate measures, and issue compliance notices if it considers that an organisation has failed to comply
b) enter into agreements/enforceable undertakings with the organisation (failure to meet enforceable undertakings carry penalties[30]
c) apply to the Court for an order requiring compliance with the duty.

Given the link between the proposed positive duty to take measures to eliminate discrimination under the Sex Discrimination Act and the positive duty to report on measures to eliminate discrimination under the WGE Act, and given the commonality of the skills required to conduct such workplace assessments, a positive response to Recommendation 18 would result in personnel with the skills and the authority to conduct the gender equality assessments proposed here for non-compliant organisations.

Combining the audit functions of WGEA and the AHRC would also generate operational efficiencies as it is likely that organisations that are not compliant with the WGE Act would be of interest in relation to the proposed positive duty on all employers under the Sex Discrimination Act to take reasonable and proportionate measures to eliminate sex discrimination, sexual harassment and victimisation, as far as possible.

Thus far the Government has responded to Recommendation 18 of *Respect@Work* by deferring the creation of new powers for the AHRC to assess compliance with a potential positive duty until it has assessed how such amendments would intersect with existing legislation and whether such amendments would create further complexity, uncertainty or duplication in the overarching legal framework (p. 12).

NFAW therefore recommends that consultations relating to Recommendation 18 of the *Respect@Work* report take in the possibility of enabling the AHRC to conduct assessments on behalf of WGEA.

Recommendation 28: NFAW recommends that

- relevant employers who have met the criteria for being named for two years should be subject to a mandatory compliance assessment by WGEA or another government agency trained and authorised by the Agency which carries appropriate powers to enter workplaces, access information and issue enforceable compliance notices. This would include relevant employers who have not made themselves known to the Agency unless they voluntarily come forward

- implementation of this recommendation be considered as part of broader discussions following from *Respect@Work* around enabling the Australian Human Rights Commission to conduct workplace assessments and enter into enforceable agreements in regard to the proposed positive duty to take reasonable and proportionate measures to eliminate sex discrimination, sexual harassment and victimisation, as far as possible

[30] In the case of the FWO, for example, if a person fails to comply with the undertaking (i.e. the steps agreed to in the Enforceable Undertaking), the FWO may commence proceedings in Court to seek orders directing the person to comply, for compensation, or any other appropriate order.

- affected organisations be able to contact WGEA for any support and assistance they might require in complying with compliance notices.

We also recommend that while the principal sanction for non-compliance—naming in the Parliament—should be retained, the Agency should make use of its existing power to publicly specify the ground for naming as part of its report to minister and any other publication.

Recommendation 29: While the principal sanction for non-compliance—naming in the Parliament—should be retained, WGEA should also make use of its existing power to publicly specify the ground for naming as part of its report to minister and any other publication.

Procurement connected policy

In order to be considered for Australian Government procurement contracts valued at or above certain procurement thresholds, all relevant employers must be able to demonstrate they are compliant with the WGE Act by supplying a letter of compliance, either with their submission to an approach to market issued by an Australian Government agency, or before entering into a contract with an Australian Government agency. The operational details of this requirement are set out in the Workplace Gender Equality Procurement Principles and User Guide.

Historically, this procurement connected policy has not tended to result in organisations being refused a contract, but it has served as a meaningful incentive for affected employers to engage with gender equality reporting. Any time an organisation known to be non-compliant becomes compliant with the WGE Act, WGEA can issue a letter of compliance (in most cases within two business days of the organisation being found to comply with the requirements of the WGE Act).

Over the last three years, the Agency has written to Commonwealth Departmental Secretaries advising them of the current list of non-compliant organisations. The letter has requested that departments contact any non-compliant organisations with which they have a contract and advise them of their legal obligations under the Act. While this has prompted the compliance of a number of organisations (*Progress Report* 2019-20, p. 29), it is less likely that procurement officers will have established the size of the employer and any consequent reporting responsibilities if that employer has simply refused to make itself known to the Agency and so has not found its way onto the list of the non-compliant.

In addition, although the *Principles* provide a solid framework for procurement officers and suppliers, the Agency has noted that they have some operational limitations. For example, if the value of a supplier's contract falls below a related procurement threshold, the *Principles* do not apply. The current thresholds are:

- for non-corporate Commonwealth entities, other than for procurements of construction services, the procurement threshold is $80,000
- for prescribed corporate Commonwealth entities, other than for procurements of construction services, the procurement threshold is $400,000
- for procurements of construction services by relevant entities, the procurement threshold is $7.5 million.

There is also an exemption for procurement of goods and services from a SME for procurements valued up to $200. An SME is defined in the Commonwealth Procurement Rules and includes Australian and New Zealand firms with fewer than 200 full-time equivalent employees.

There are known examples of a non-compliant organisation providing goods or services to the Australian Government because the contracted amount was below the related procurement threshold or the entity is not subject to the Commonwealth Procurement Rules (*Progress Report* 2019-20, p. 29).

NFAW supports the Agency's view that a more detailed review of the application of the *Principles* would be of value, including specifying different thresholds to that of the Commonwealth Procurement Rules and exploring ways in which all Commonwealth entities could align their procurement processes to include compliance with the Act.

A parallel review should also be conducted of the Commonwealth Grants Rules and Guidelines to improve transparency on whether grantees are compliant with the Act where appropriate.

Recommendation 30: The Workplace Gender Equality Procurement Principles should be reviewed and updated, including specifying different thresholds to that of the Commonwealth Procurement Rules and exploring ways in which all Commonwealth entities could align their procurement processes to include compliance with the Act.

Recommendation 31: The application of the *Principles* should be promoted for both non-corporate Commonwealth entities and prescribed corporate Commonwealth entities.

Recommendation 32: There should be a review as to how the Workplace Gender Equality Procurement Principles can apply within the Commonwealth Grants Rules and Guidelines to improve transparency on whether grantees are compliant with the Act where appropriate.