THE GLOBAL INSTITUTE FOR WOMEN'S LEADERSHIP

Submission to the Review of the *Workplace Gender Equality Act 2012*

November 2021

Australian National University

Global Institute for Women's Leadership
[redacted]

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Dear WGEA Review team,

Thank you for the opportunity to provide a submission to the Review of the Workplace Gender Equality Act 2012.

This submission has been prepared by the ANU Global Institute for Women's Leadership (GIWL) and their research affiliates at the ANU College of Business and Economics (CBE). Our submission responds to the Workplace Gender Equality Agency Review consultation questions and Terms of Reference.

Before responding to a number of the specific consultation questions, this submission provides a summary of recent research completed by GIWL and CBE researchers on the gender pay gap reporting system in Australia.

For the full report, as well as the companion international report that includes cross-country comparisons of gender pay gap reporting systems, please refer to the following links:

Gender pay gap reporting in Australia – Time for an upgrade (2021):

https://giwl.anu.edu.au/research/publications/gender-pay-gap-reporting-australia-time-upgrade

Bridging the Gap: An Analysis of Gender Pay Gap Reporting in Six Countries (2021):

https://www.kcl.ac.uk/giwl/assets/bridging-the-gap-full-report.pdf

This review is an important opportunity to make evidence based, targeted and meaningful amendments to the Act to improve gender equality in Australian workplaces.

We welcome the opportunity to provide further detail or be of assistance to the Review team.

Kind regards,

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Gender Pay Gap Reporting: Research Summary and Recommendations

There is increasing evidence that Australia is losing ground on its charge to achieve gender equality in workplaces and beyond. On contemporary measures of equality outcomes, Australia is only a mid-range performer and ranks below comparably wealthy nations. Australia ranks only 50th in the World Economic Forum's Global Gender Gap Index, sliding from 24th in 2014. Much of this decline can be attributed to the workplace. Australia has been ranked in equal first place for women's education since 2014 but has fallen from 14th in 2014 to 70th in 2021 for women's economic participation and opportunity (WEF, 2014; 2021). Women now outnumber men in university graduations, but female dominated occupations continue to be lower paid than those that are male dominated, and women remain under-represented in senior and leadership positions (WGEA, 2019).

Organisation-level pay equality legislation is an important complement to anti-discrimination laws, as many decisions on pay and the valuation of work are made by individual employers. Our research, conducted in April-June 2021, examined the effectiveness of Australia's *Workplace Gender Equality Act 2012* by drawing on stakeholder interviews, reviews of academic literature, government and industry reports, and cross-country comparisons of gender pay gap reporting systems in five other countries: France, South Africa, Spain, Sweden and the United Kingdom (UK). Over eighty interviews were conducted internationally, with 17 interviews in Australia across four key stakeholder groups: government, gender equality advocates and experts, employers, and trade unions. The study identified 11 indicators of best practice in gender equality reporting, including measures around accountability, transparency, stakeholder consultation, intersectional data capture and coverage. When rated against each of the 11 indicators, Australia ranked joint last with the UK.

In our 2021 report, *Gender pay gap reporting in Australia – Time for an upgrade*, we make three specific recommendations and outline two matters for consideration and further consultation. These are summarised below and discussed in more detail in response to the consultation questions in this submission.

Recommendation 1 - Publish gender pay gaps of individual organisations to enable external stakeholders to hold employers accountable for gender equality performance.

Recommendation 2 - Nominate outcome-based minimum standards related to rolling average reductions In the gender pay gap to establish expectations for closing the gap.

Recommendation 3 – Utilise existing non-compliance sanctions to exclude non-compliant organisations from government procurement, contracting and financial assistance to reaffirm Federal government commitment to gender equality and deter further slippage in compliance rates.

We also highlight two important considerations that require further consultation to operationalise for the Australian context. They relate to (1) expanding organisational coverage of the Act by reducing the employer size threshold and adding public sector employers (as planned), and (2) expanding demographic data collection to include other measures of social (dis)advantage such as ethnicity, Indigenous status and disability status for disaggregation of gender pay gap reporting.

Although these issues are of major policy concern, feedback from stakeholders in our study reflects a lack of consensus on how they can be best incorporated into the current Australian system given the already heavy reporting burden. Consultation with employers would be required to explore options for operationalising these two important weaknesses of the current reporting regime.

The recommendations arising from our research are designed to empower employees, unions, investors, consumers, and gender equality advocates, as well as the regulator, to monitor and hold organisations to account for making progress on gender equality and closing the gender pay gap. Without higher levels of transparency and minimum requirements related to gender equality outcomes (such as the pay gap), rather than policies as is currently the case, Australia risks falling further behind other countries as a place where women will continue to face economic insecurity and inequality across their lifetime. Making enhancements to Australia's gender pay gap reporting is critical for Australia to reclaim its once world-leading position on legislating for gender equality. This is increasingly urgent in light of the recent worsening of the national gender pay gap in the midst of a global pandemic, which serves as a timely reminder to ensure continued commitment to progress.

Response to Consultation Questions

Question 1

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

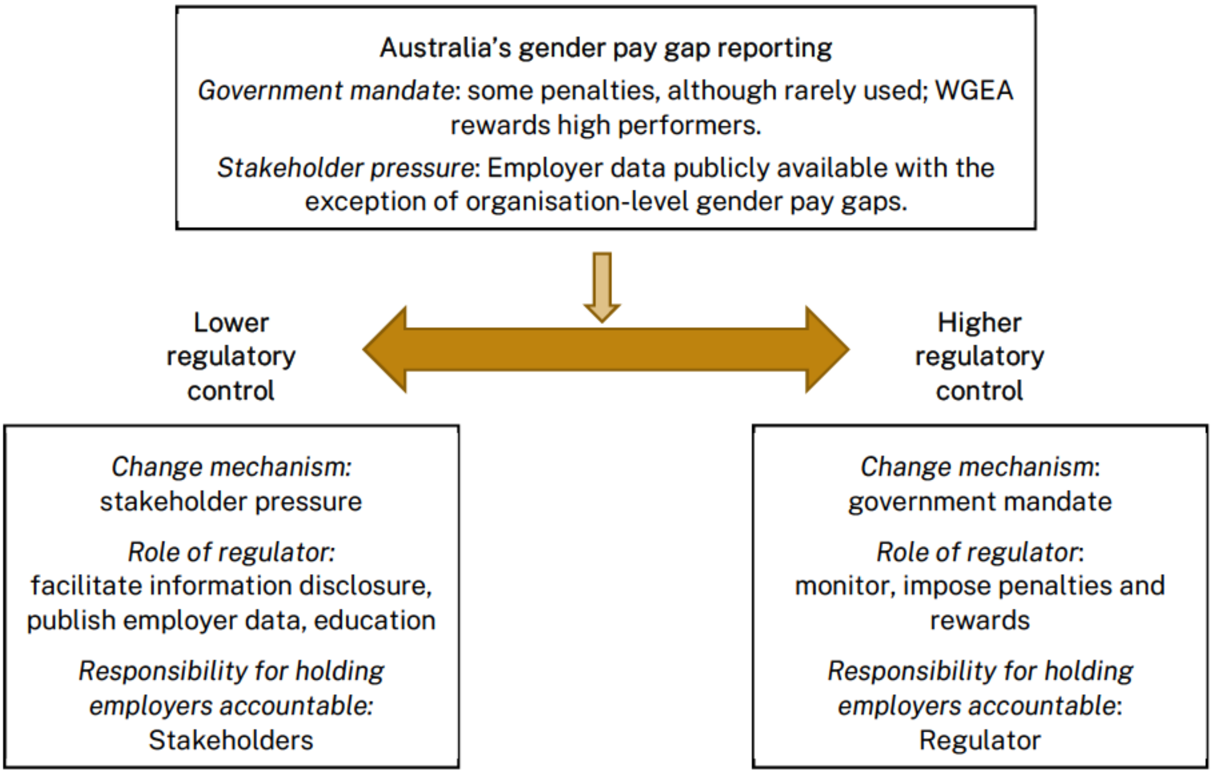
> Australia's legislation involves relatively low regulatory control. Within this model, WGEA is effectively supporting employers to fulfil their reporting obligations. If (as is recommended in this submission) minimum standards are raised to require progress towards reducing gender pay gaps, the Agency may require access to financial penalties or more wide ranging sanctions if compliance were to fall sharply.

When it comes to the role of regulation in influencing employers to close their gender pay gap, there are different change pathways that sit along a spectrum involving varying degrees of regulatory control. At one end of the spectrum is *low regulatory control*, which involves using market forces through stakeholder (e.g. employees, unions, investors, activist groups) pressure to bring about change. This pathway is based on the influence of disclosure and involves stakeholders applying pressure on employers to close the gender pay gap. The role of the regulator is to facilitate information disclosure on gender pay gaps, so that interested stakeholders can hold employers accountable for closing the gaps in their organisations. The model is dominant in the UK.

At the other end of the spectrum is *high regulatory control*, in which government mandate provides the regulator with a high degree of control over employers. This approach uses force through legally obligating employers to take positive action to close the gender pay gap and involves the use of penalties and rewards. The regulator therefore has significant power over employers to bring about change and holds employers accountable. The model is dominant in continent European countries.

As outlined in Figure 1, Australia's reporting regime sits somewhere in the middle of this spectrum and with weaker control mechanisms than other countries. For the most part, Australia has, to date, pursued a disclosure-based approach of low regulatory control, rather than mandating positive action through high regulatory control. A notable exception is that unlike the UK, organisational level gender pay gaps are not publicly disclosed, which limits the effectiveness of stakeholder pressure as a change mechanism to reduce the gender pay gap. Our research and recommendations outlined in the report, *Gender pay gap reporting in Australia – Time for an upgrade* suggest that for stakeholders to hold employers accountable for closing gender pay gaps, WGEA need to disclose organisation-level gender pay gaps.

Figure 1: Change mechanisms for closing organisational gender pay gaps with mandatory reporting



Question 2

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

> In interviews, representatives from unions, investors and activist groups discussed how their use of WGEA data to support or advocate for gender equality is impeded by the lack of publicly available pay gap data, and the quantification of gender equality policies as opposed to policy disclosure and/or negotiation.

Under the 2012 Act, employers disclose the presence of gender policies via survey response, but do not disclose the policies themselves. The most common criticism expressed by stakeholders of the information reported under the Act was the 'yes'/'no' style disclosure on policies and practices. Concerns were raised about the usefulness of such responses, as they provide no indication of quality, implementation, uptake or effectiveness. Australia contrasts from international comparison countries in quantifying the number of gender policies rather than disclosing and/or negotiating their content. Although this facilitates comparison across firms, it limits the capacity for stakeholders to hold individual employers accountable for the quality and implementation of their gender policies.

To illustrate, when discussing their routine monitoring activities stemming from WGEA data releases, one union interviewee noted that, in the absence of any minimum quality standards, organisations could legitimately report 'yes' to WGEA on the presence of a relevant policy without that policy meeting legislative requirements for employee protection.

Consistent with this, after nearly four decades of gender equality reporting in Australia many organisations have gender equality policies in place, but evidence suggests that many policies are ineffective. For example, in the 2020 WGEA dataset, 98.5% of organisations reported having a sexual harassment policy, yet regular surveys by the Human Rights Commissioner continue to find experiences of widespread workplace sexual harassment (AHRC, 2018; 2020).

The second recommendation in our report to nominate outcome-based minimum standards to formally establish expectations for closing the gender pay gap at the organisation level is in direct response to this issue, and is a critical area where change is needed. More detail is provided in consultation question 8.

Question 3

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

Coverage should be expanded to capture smaller organisations, as without it a significant proportion of the workforce is unaccounted for, stifling national progress. Consultation with medium sized organisations will be required to assess capacity to meet existing reporting requirements, and balanced against options for condensed obligations.

Internationally, Australia's reporting threshold is at the higher end for employer size despite smaller organisations displaying high gender pay gaps (see Figure 2).

Employer size The minimum employee threshold legally bound by gender pay gap reporting legislation.					
Australia	France	South Africa	Spain	Sweden	UK
100+	50+	50+	50+ (from 2022)	All (10+ must report)	250+
Employer sector Whether the legislation applies to public or private employers, or both.					
Australia	France	South Africa	Spain	Sweden	UK
Private (extension to public sector planned)	Private	Public and Private	Private and some public sector employees	Public and Private	Public and Private

Evidence from our cross-country analysis led to the conclusion that, from an international perspective, the problem of the gender pay gap was too important to only target large employers, and all employers should be covered in the legislation. Within Australia, however, there was no consensus among stakeholders interviewed in our study that the threshold should be adjusted. Despite the relatively unfavourable international comparison for employer size threshold, interviewees generally expressed similar perspectives to those articulated in public reviews of the legislation – that a case to reduce the threshold is not clear cut, as adjustments to the threshold would carry both benefits and costs. On the one hand, there is significant concern amongst academics and advocacy groups that the existing threshold leads to the exclusion of a large proportion of female employees, particularly the most vulnerable who are over-represented in casual and part-time employment by smaller businesses. Confounding the issue, however, is the view that the reporting burden in Australia is particularly heavy due to the breadth of data collected, and the significant increase in workload that would be associated with an increase in reporting organisations may not be accompanied by the necessary increase in funding to WGEA.

The ramification of the size threshold is illustrated in Figure 2, which shows that the earnings distributions by gender vary markedly by organisation size. There is a higher proportion of women in lower earning categories for smaller organisations (<100 employees) compared to larger organisations. This highlights the relatively advantaged population of employees represented in larger organisations that fit within the current reporting threshold. It also highlights that a segment of the labour force with the highest gender pay gap is not covered by gender equality reporting legislation.

Figure 2: Distribution of male and female employees by average weekly cash earnings

Source: ABS Employee Earnings and Hours, Australia (2018) (Table Builder).

Notes: Includes both public and private organisations.

Question 5

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

WGEA should move towards collecting data on other measures of social disadvantage to better capture intersectional disadvantage. Further consultation will be required to establish widely agreed upon measures.

Our research found that it was important to include data on diversity and inclusion, and other measures of intersectionality, on a mandatory basis. Stakeholders interviewed noted the absence of other measures of disadvantage, in addition to the binary measure of gender. The absence of such measures contrasts with most public sector equality reporting frameworks that capture Indigenous status, disability and language background. For example, recently passed public sector workplace equality legislation in Victoria captures these in addition to sexual orientation and religion. An intersectional approach was also recommended in the cross-country study, with South Africa as a pertinent example of how gender disparities intersect with race.

While several Australian interviewees acknowledged the benefits of capturing additional dimensions of inequality, there was no consensus on whether the requirements of the 2012 Act should be extended to reflect intersectional disadvantage in the short term. A particular challenge noted was identifying a set of standardised, acceptable measures of ethnicity. The Diversity Council of Australia (DCA) and the University of Sydney Business School have recently developed a standardised approach for defining, measuring, and reporting on workforce cultural diversity in a respectful, accurate and inclusive way[1].

[1] https://www.dca.org.au/research/project/counting-culture-2021

Question 6

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

Organisation level pay gaps should be made public; this form of transparency would bring Australia in line with the UK and allow a broader range of stakeholders to monitor pay equality and advocate for improvements.

Transparency

To advance capacity for stakeholder monitoring and pressure, the first key recommendation of our report was to increase transparency to include publicly available organisation-level gender pay gaps (total remuneration for full-time employees and all employees) at the organisation level. This was the most common recommendation amongst Australian stakeholders interviewed in our study and was also the most important change nominated by recently outgoing Director of WGEA, Libby Lyons (WGEA, 2021). Publishing organisation-level pay gaps would bring Australia in line with the UK on this issue, which was noted as a major strength of the UK system.

The UK has only required public disclosure of organisation-level pay gap data since 2017, however early signs show that market reactions could induce a reduction in the pay gap. For example, there is emerging evidence that the publication of organisation-level gender pay gaps is influencing consumer behaviour, by reducing consumers' purchase intentions from high pay gap firms (Schlager et al, 2021). Early evidence also suggests that the preference of employees, in particular women, to work at organisations with lower pay gaps, is contributing to narrowing the gap now that data is publicly available (Blundell, 2020). The UK case study highlights that the public release of pay gaps can be introduced successfully, and with high approval among external stakeholders about transparency and accessibility.

A particularly important implication of publicly releasing organisation-level gender pay gaps is that it unlocks the potential for market forces to impact the gender pay gap through increased stakeholder pressure. Verve Super, a gender-focused ethical investment superannuation fund, described a gender-based investment movement in the US and UK, in which investment is directed towards companies achieving progress in gender equality outcomes. Although Australian investing landscape was described as embryonic in this field, it is well positioned to drive change through the prevalence of superannuation funds, which are increasingly moving towards socially responsible investment principles including gender.

For example, the funds management industry, guided by the Australian Institute of Company Directors, has already demonstrated its influence in gender advocacy through a push for female representation on company boards. Data on the board composition of Australian listed companies have been required to be disclosed for over a decade, during which time the proportion of women on ASX200 listed boards has grown from under one in ten in 2008, to over one in three in 2021 (Fitzsimmons et al., 2021).

Yet, board representation is just one facet of gender equality. Verve Super noted that the multi-dimensional WGEA dataset potentially provides Australian investors with a unique opportunity to pursue a holistic approach to gender-based investment. Without the release of the organisation-level gender pay gap data, however, it is difficult to perform a thorough assessment of organisations' performance that can be used as a criterion to invest, and thereby influence the gap.

Data collection and reporting

While WGEA data collection is in many ways world-leading, there are some areas of the reporting that could be improved to promote gender equality. The GIWL cross-country study highlights that while simple headline measures are useful ‘attention-grabbing tools’ to facilitate comparisons, it is also essential that broader coverage of measures (and disaggregation of such measures) with associated narratives are published to unpack the underlying causes of the gap within organisations and across the wider workforce.

While the focus on full-time employees in the headline national gender pay gap statistic provides a consistent basis for comparison, it only covers 32% of adult[2] women (and 54% of adult men) in Australia (ABS, 2021; June 2021 figures). That is, part-time employees, who represent 27% of adult women (and 13% of adult men), are excluded (ABS, 2021; June 2021 figures). The use of ordinary time also hides the gendered access to other benefits (such as bonuses or overtime) that are more fully reflected in total earnings (Charlesworth & Smith, 2018) and the use of an average wage does not reveal trends across the full wage distribution (Todd & Preston, 2012). While the statistics calculated by WGEA based on the reporting obligations in the *2012 Act* are annualised and more inclusive of all types of earnings including superannuation, the focus remains on full-time employees.

The focus on full-time employees is of particular concern in Australia due to the high rates of lower-earning, part-time and casual work amongst women. Other countries have different approaches, but also generally acknowledge the importance of a broad set of measures that are inclusive of all working women and representative of their disadvantage given their lower labour force participation.

[2] Adults are defined as civilian population aged 15 years and over (ABS, 2021).

Question 7

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?

Minimum standards should be amended to designate outcome based expectations for performance – namely, a reduction in the gender pay gap. Minimum standards should apply to all reporting entities.

Throughout all iterations of Australia's gender equality legislation, women's rights advocates, trade unions and academics have been critical of the lack of mandated corrective action. Consistent with this, while the publication of organisation-level pay gap data was the most common suggestion among interviewees in our study, when asked to nominate a *single* most important change, the one most cited was the enactment of mandated positive action on gender equality. Expectations for corrective action can be achieved within the scope of the *2012 Act*, through the authority designated to the relevant Minister to nominate minimum standards (for reporting organisations with over 500 employees). This was the second recommendation in our report on gender pay gap reporting in Australia.

At present, the minimum standard is satisfied by stating that a formal policy or strategy is in place to support gender equality in at least one indicator domain such as recruitment, promotion, performance management or overall gender equality. The creation of policies in itself does not guarantee improved gender equality, particularly if these policies are inappropriate or poorly executed. Moving the mandated minimum standard to one related to outcomes would increase the accountability of organisations for achieving progress through positive action. Rolling average reductions are recommended as natural workforce fluctuations may make it impossible to achieve reductions in every year. Furthermore, to reduce its gender pay gap over the medium to long term, some employers may need to recruit more junior women to train in non-traditional (male-dominated) occupations, which would result in a short-term increase in their pay gap. It is important to note that the determination of appropriate standards would require extensive consultation.

Question 8

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

> High compliance rates under the Workplace Gender Equality Act 2012 suggest the "naming and shaming" approach to non-compliant organisations is reasonably effective. If the Act were to move toward requirements for corrective action, WGEA may require access to financial penalties or stronger sanctions; there are no international examples of corrective regimes without these.

Recent slippage in compliance suggests that the use of available sanctions is needed. Currently, the compliance mechanisms appear not to be fully utilised, and our third recommendation is a direct response to this weakness. Failure to support the **implementation of sanctions for non-compliance** symbolises a lack of commitment to gender equality by the Federal Government and may discourage compliance by reporting entities into the future. Although the *2012 Act* does not prescribe sanctions, it makes them available by specifying that non-compliant entities *"may not"* be eligible for government contracts and financial assistance such as Commonwealth grants. However, recent audits found 31 non-compliant organisations in receipt of government contracts (SMH, 2021). To maximise the symbolic value of the Act, administrative controls should be strengthened to prevent both intentional and unintentional ignorance of non-compliance by government departments.

Finally, a recurring theme in interviews was that the impact of high compliance and strong enforcement mechanisms was only as strong as the requirements themselves. As outlined in the previous section, compliance with the Act does not require organisations to act on identified gender inequalities, or reduce their gender pay gap. As such, failure to undertake positive actions is not a breach of reporting obligations and carries no penalty. Adopting minimum outcomes standards, as set out in the response to consultation question 8 above, would help to ensure compliance is focused on *taking action to improve* workplace gender equality, rather than on *reporting* the presence of workplace gender equality policies.

Conclusion

To summarise, Australia has made some progress on closing the gender pay gap, but there is limited evidence that stakeholders are able to use gender equality reporting to influence gender equality practice. The world-leading support and data translation activities with an internationally respected Agency alone is not enough to drive widespread change. More focus on corrective action and transparency of organisation-level gender pay gaps is needed.

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