

**Submission by the Australian Discrimination  
Law Experts Group to the Gender Equality  
Team, Department of Health & Human  
Services, Government of Victoria**

**Inquiry: The Victorian Gender Equality Bill**

12 October 2018

Submitted to:

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## **1. The Australian Discrimination Law Experts group**

This submission is presented on behalf of the Australian Discrimination Law Experts group. The Australian Discrimination Law Experts group comprises researchers from universities across Australia with expertise in discrimination and equality law and policy. The group first met in Canberra in 2010 and annually thereafter. Its goal is to inform Australian discrimination and equality law and policy development by undertaking and disseminating research, and providing expert input to law reform processes.

This submission was coordinated by Professor Beth Gaze and Dr Alysia Blackham. The members of the Australian Discrimination Law Experts group who contributed to or supported this submission are listed below:

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## 2. Summary

We strongly support the introduction of the Gender Equality Bill as a significant step towards bringing gender equality to Victorian public entities, both for the benefit of their workforces and for people affected by their policies and services. The Bill requires defined entities in the Victorian public sector to pursue gender equality by developing and implementing a Gender Equality Action Plan (GEAP) that addresses the Gender Equality Principles in section 7 of the Bill. The contents of the GEAP must include the items specified in s 11, which include specific requirements relating to workforce gender equality in terms of the gender equality indicators defined in s 4 (s 11(1)(b)), and by implementing gender impact analysis (s 11(1)(c)), also defined in s 4 as a process.

We note that in relation to workforce gender equality, the gender equality indicators are identical to those in the *Workplace Gender Equality Act 2012* (Cth) ('WGEA'), so the Bill will require the Victorian public sector to meet the same standards of data collection and reporting in relation to gender equality for employees as organisations that are subject to the WGEA. This is a worthwhile and important step forward. For it to be effective, however, we submit that more attention must be paid to the mechanisms available to encourage and ensure compliance with the law, and to make the best use of the data that is to be collected.

In relation to gender impact analysis, we regard this as a very positive step, but we are concerned that the detail in the legislation is too vague, and we recommend that more detail is provided in the Bill so that a clearer picture is given to Victorian public sector entities of their obligations, especially as this is a novel statutory requirement for any organisation in Australia.

This submission addresses several points that will help ensure that the Bill is effective in bringing about the results it seeks: namely, equalising opportunities for women in the Victorian public sector. The following values have been taken into account in developing this submission: pursuing substantive equality for women, including in the workplace and community; minimising the administrative burden on organisations; mainstreaming equality in organisational processes; and promoting accountability and transparency of organisational decision-making.

The general goals of our submission include that:

- The concerns and interests of women as employees and as affected by the policies and services of public sector bodies be brought into the frame in considering the business of Victorian public sector entities.
- The Bill's requirements should as much as possible be able to be integrated into existing processes to minimise the administrative burden of compliance.
- Monitoring and compliance be enhanced by the creation or nomination of a central authority for receiving reports and collecting data. This will facilitate analysis and cross comparison of progress towards gender equality and, more importantly, will support the development and transmission of knowledge about best practice, and less or non-discriminatory alternatives to current practices.
- Implementation of the Bill's requirements be supported by adequate resourcing and support for defined entities. This should include education, opportunities to network and explore best practice, and individualised support especially for small entities.

Adequate funding for such initiatives will be important to the success of the Bill's initiatives.

- There be meaningful engagement and consultation with local and affected communities, such as employees, service users and others affected by entities' policies, in the formulation of a GEAP. This will ensure that the community and workforce are committed to the plans and assist in implementation and monitoring at the local level.
- There be clear requirements for transparency and accountability of defined entities integrated into the Bill. Compliance and enforcement of obligations under the Bill will be greatly enhanced by clear requirements for and standards of transparency and accountability. While these alone are not sufficient to guide compliance they are an essential element of an effective compliance scheme.
- The Bill provide for ongoing review and revision of GEAPs and of monitoring and evaluation of progress towards gender equality by defined entities.
- Compliance mechanisms in the Bill be strengthened to ensure its effective implementation. In our submission, compliance will be best achieved through not only encouragement and (if possible) incentives to comply, but also through the existence of a legislative framework that allows for some action for non-compliance. The presence of both the 'carrot' and the 'stick' is important for effective compliance.

Our submission addresses the following issues, following these two introductory Parts:

- **Part 3: Substantive equality;**
- **Part 4: Coverage;**
- **Part 5: Scope of positive action;**
- **Part 6: Content of agencies' duties relating to gender equality;**
- **Part 7: Gender Equality Action Plans – content;**
- **Part 8: Monitoring and reporting on organisations' reports.**

### 3. Substantive equality

We welcome the commitment of the Victorian government to achieving gender equality through the draft Bill, including the following expressed intentions, to:

- Ensure that the structural and systemic causes of gender inequality are addressed
  - Prevent gender inequality from arising in the first place ...
  - Contribute towards achieving a Victoria that is free from all forms of violence against women and children, through gender equality
- (*Discussion Paper*, p 5)

It is clear that the intention of the Bill is to achieve substantive equality. However, public and popular understandings of equality still focus on formal equality, which assumes that men and women should be treated the same in all situations, rather than a multi-dimensional substantive approach that redresses past disadvantage, accommodates difference and includes positive responsibilities.<sup>1</sup>

The intended meaning of equality, therefore, should be spelled out more explicitly. This will provide valuable guidance to interpretation of the legislation. The Committee on the Elimination of Discrimination Against Women in its 2004 General Recommendation No. 25 used the term ‘substantive equality’ to move forward from formal approaches to equality that were not adequately ensuring the types of changes needed to overcome discrimination. This definition has since been followed by a number of other treaty committees and has been used by constitutional courts in many different countries.

We recognise that substantive equality is mentioned in s 8(b) in relation to reasonable adjustments and special measures. However, for clarity, it needs to underpin the legislation in its entirety, and be the driving principle behind it.

**We recommend that the Bill be amended by defining the words ‘gender equality’ in section 4 to mean ‘substantive gender equality’ and include explanatory words setting out the multi-dimensional meaning of substantive equality:**

*gender equality* means substantive gender equality that –

- (a) includes equality of rights, opportunities, responsibilities and outcomes between people of different genders;
- (b) aims to redress disadvantage; address stigma, stereotyping, prejudice and violence; enhance participation; and accommodate difference by way of structural change; and
- (c) may occur in combination with discrimination based on other attributes including but not limited to race, disability, sexual diversity and age, leading to intersectional or compound discrimination and inequality.

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<sup>1</sup> Sandra Fredman and Beth Goldblatt, United Nations Entity for Gender Equality and the Empowerment of Women (UN Women) 2015, *Gender Equality and Human Rights*, For Progress of the World’s Women Report 2015-2016, Discussion Paper No. 4, pp 1-65, at 8.

## 4. Coverage

### 4.1 *Defining the coverage of the Bill*

Section 6 of the draft Bill provides that the ‘defined entities’ to which it applies are to be prescribed by regulation. This leaves it up to the Minister at the time to vary coverage, and leaves it unclear which organisations are likely to be included. An important reform like this should have its scope defined in the legislation itself, and should not be subject to possible narrowing or even withering where a later Minister varies the entities it covers by regulation. **Instead, s 6 should define the entities to which it applies, and should provide that further entities can be added by regulation.** If it is desirable to have phased start dates for different organisations, to allow for new processes to be adopted, this should be dealt with specifically in the Act.

### 4.2 *Duplicate coverage of Victorian universities*

We note that all public higher education institutions, together with all private sector institutions employing 100 or more people, are already subject to the requirements for data collection and reporting in the WGEA. It appears that Victorian universities will be required to report under both this law and the WGEA. This may not be burdensome while the requirements for reporting under the two schemes are very similar, but if there was divergence in the future then complying with two sets of requirements could impose a burden on these institutions. **It would be expected, and should be clarified, that affected institutions could comply with the gender equality indicators under this law by submitting work submitted to the WGE Agency.**

### 4.3 *Inclusion of volunteers*

It is not clear whether volunteers are included in the scope of the legislation or not. By analogy with the way the *Equal Opportunity Act 2010* (Vic) (‘EOA’) covers volunteers in relation to sexual harassment, volunteers should be included in at least some of the provision for equality. In relation to gender equality, and given the wide range of areas in which volunteers contribute in substantial ways to the Victorian public sector, it would be unfortunate for volunteers to be excluded from coverage in this scheme. **We contend that volunteers should be included.**

### 4.4 *Sex and gender diversity*

We note that the Bill is entitled the ‘Gender Equality Bill’ but does not acknowledge that sex and gender are no longer binary categories, as recognised by the High Court in *Norrie’s case*.<sup>2</sup> While we accept that it is defensible to start reporting on progress towards equality with a focus on one category such as sex/gender, we would like to see reporting under the law acknowledge wider categories of both sex (eg intersex, uncategorised) and gender (eg transgender, gender-diverse, non-binary) if data is available. This would require organisations to deal with that data if employees were prepared to provide it voluntarily, but not to compel employees to provide it.

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<sup>2</sup> *New South Wales Registrar of Births, Deaths and Marriages v Norrie* [2014] HCA 11.

## 5. Scope of positive action

### 5.1 Gender impact analysis

The scope of the positive action required is defined by the content requirements for GEAPs in s 11. As noted above, this includes workforce strategies and initiatives as well as gender impact analysis in relation to ‘the effects of existing and proposed policies, programs, services and budgets on people of different genders’ (s 4). We strongly support the introduction of gender impact analysis in relation to the functions of these entities, but we are concerned that the analysis is only vaguely defined in the Bill, and there are no provisions to allow it to be further defined and clarified. **We recommend that the intended scope of gender impact analysis be clarified, including how often an analysis should be undertaken and updated, and how that analysis should filter into a GEAP.**

### 5.2 Employment context

The focus of the Bill on positive action in relation to employment within the Victorian public sector is an important area to address, given the economic importance of equal opportunity at work for women. In Victoria, it is supported by two other existing public sector duties. The first is the duty of a public authority under s 38 of the *Charter of Human Rights and Responsibilities Act 2006* (Vic) (‘the Charter’) not to act incompatibly with human rights, which includes the right to equality in s 8, expressed as follows:

#### **8 Recognition and equality before the law**

- (1) Every person has the right to recognition as a person before the law.
- (2) Every person has the right to enjoy his or her human rights without discrimination.
- (3) Every person is equal before the law and is entitled to the equal protection of the law without discrimination and *has the right to equal and effective protection against discrimination.*
- (4) *Measures taken for the purpose of assisting or advancing persons or groups of persons disadvantaged because of discrimination do not constitute discrimination.* (emphasis added)

Section 8(4) reinforces the validity of the Bill as a measure taken for the purpose of advancing groups disadvantaged because of discrimination.

In addition, s 15 of the EOA also imposes a duty on any individual or organisation that could have potential liability under the Act, which includes employers and service providers, to take reasonable steps to eliminate this liability:

#### **15 Duty to eliminate discrimination, sexual harassment or victimisation**

- (1) This section applies to a person who has a duty under Part 4, 6 or 7 not to engage in discrimination, sexual harassment or victimisation.
- (2) A person must take reasonable and proportionate measures to eliminate that discrimination, sexual harassment or victimisation as far as possible.

This requires organisations to take action in advance to avoid discrimination arising, rather than wait until it occurs to act. All Victorian public sector agencies are likely to be public authorities under the Charter and duty holders under the EOA, and therefore subject to these duties. In developing GEAPs, defined entities should take account of these additional duties, and use them to inform their analysis and decision-making. **We suggest that the guidance issued to assist defined entities in implementing the Bill emphasise the ways in which these various duties might support and promote each other, to streamline and align defined entities' obligations under different statutes.**

### 5.3 *Expansion to policy formation and service provision*

These two statutory duties can also be relied on to support the extension of the Bill's duties to a better defined and expanded gender duty. This would take the gender impact analysis further to clarify obligations of entities to consult and consider the interests of women in all their activities. The EOA s 15 duty owed by service providers is a signpost to this direction in which coverage could, and we would argue should, be expanded. At present the obligation with regard to service provision and policy development and implementation in the Bill is quite unclear and should be expanded and clarified. Both areas can have as potent an effect on women as a disadvantaged group as employment practices. Due in part to the lack of women in leadership and senior management positions, women's interests are frequently not given specific consideration in policy formation and service provision, and yet they may have specific needs or be disproportionately disadvantaged by proposed changes. **We recommend, then, that defined entities be required to include service provision and policy development and implementation in their Gender Equality Action Plans, or to develop separate plans for gender equality in relation to these functions.**

The duty in these broader contexts would not be as specific as the employment duty, because entities' functions are very diverse, and measurement and assessment of policy and service provision are more complex. Nevertheless, the Bill could require that entities show that the interests of and impact on the disadvantaged group have been considered in its processes of policy formation and implementation and service provision. An example of one such duty is the public sector duty in s 149 of the *Equality Act 2010* (UK),<sup>3</sup> which provides:

#### **149 Public sector equality duty**

- (1) A public authority must, in the exercise of its functions, have due regard to the need to—
  - (a) eliminate discrimination, harassment, victimisation and any other conduct that is prohibited by or under this Act;
  - (b) advance equality of opportunity between persons who share a relevant protected characteristic and persons who do not share it;
  - (c) foster good relations between persons who share a relevant protected characteristic and persons who do not share it.

In the United Kingdom ('UK') this provision can be the subject of litigation, but the duty imposed is fairly weak as it only requires entities to 'have due regard to' such factors.<sup>4</sup> A failure to comply with the 'due regard' standard may only lead to a declaration that the duty

<sup>3</sup> The full text of the *Equality Act 2010* (UK) ss 149 and 150 is attached at the end of this submission.

<sup>4</sup> See further Sandra Fredman, 'The Public Sector Equality Duty' (2011) 40 *Industrial Law Journal* 405 <<http://ilj.oxfordjournals.org/content/40/4/405>>.

has not been complied with, particularly if an assessment of equality issues is later conducted after the decision is already made.<sup>5</sup> This is unlikely to promote equality in practice.

In the Victorian context, a similar duty would provide an opportunity to have women's interests considered in government processes. Further, the duty could be explicitly extended to consider the interests of women from diverse backgrounds, to accommodate the diversity of women's experiences in Victoria. This would draw defined entities' attention to the variety of women's experiences, and encourage them to accommodate this diversity in their decision-making.

**We recommend, then, the introduction of a duty to consider equality issues in the exercise of defined entities' powers and functions.**

While the ability to litigate compliance with the duty would be the gold standard, it would still be a big step forward to adopt such a duty, even if the only sanction for failure to comply is to be named in a report to parliament. This leads on to the issue of reporting under the Bill which is considered further below.

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<sup>5</sup> *R (on the application of Bapio Action Ltd) v Secretary of State for the Home Department* [2007] EWHC 199 (Admin) (9 February 2007) [70]; *R (on the application of Hottak) v Secretary of State for Foreign and Commonwealth Affairs* [2015] EWHC 1953 (Admin); [2015] IRLR 827 [62].

## 6. Content of agencies' duties relating to gender equality

### 6.1 *Duty in the employment context*

As currently expressed, the employment obligations under the Bill will mirror the existing duty under the WGEA through the use of the same gender equality indicators. This will make compliance easier for all organisations as there will be one set of standards against which all organisations subject to these laws will be assessed in relation to employment practices. We agree that ease of compliance is a very important factor, but it should not be used as a limiting factor on the Bill's aims. The gender equality indicators under the WGEA are expanded through regulations to specify what data should be reported by organisations to substantiate the information on each gender equality indicator. We assume that a similar mechanism would be used under this Bill as well. There are good reasons for permitting potentially extended data collection, which could be done by regulation. **We note, however, that this will be more secure against future reduction if these requirements were included in the legislation itself.**

Collection of data at a more detailed level where possible would provide clearer information on progress, and allow for better evaluation of progress towards gender equality. This could involve providing gender-disaggregated data on applications for and selection for employment and promotion at multiple workforce levels. It could also involve, in relation to pay equity, more detailed information such as reporting on pay equity at multiple workforce levels, not just overall, which should include data on bonuses.

Ideally, data collection could include data of the sort that organisations in the UK are now required to disclose annually in gender pay gap reporting. UK organisations in the public and private sector with 250 and more employees are required to publish on their website and report to the government on:

- mean gender pay gap in hourly pay
- median gender pay gap in hourly pay
- mean bonus gender pay gap
- median bonus gender pay gap
- proportion of males and females receiving a bonus payment
- proportion of males and females in each pay quartile

This form of extended data collection and reporting could lead the way towards expecting or requiring public sector entities to conduct gender pay audits of their own workforces and work towards correcting any inequalities that are discovered. While it may not be desirable to introduce such requirements across the whole workforce, there will be many agencies that have the size and expertise to collect and report such data.

**We recommend that defined entities be encouraged or required to collect and report more detailed data on pay, bonuses, promotion, and recruitment.** A phased introduction of these more detailed requirements could be provided for after (for example) the first two years, allowing entities to adjust to reporting before expanding the information required.

It is also important to ensure that data on intersectional attributes such as age, disability, ethnicity, Indigeneity and sexual diversity be collected and reported on. If entities are not already collecting this data, then a requirement to do so could be phased in to minimise the burden of initial implementation.

**We therefore recommend amendments to the Bill as follows (amendments are listed in italics solely for cross-reference purposes, and not for the purposes of italicising the Bill text itself):**

- **Section 8(e) be amended to read: ‘collecting gender-disaggregated data to measure progress towards achieving gender equality, *cross-referenced with data on age, disability, ethnicity, Indigeneity, sexual diversity and other intersectional forms of discrimination*’;**
- **Section 11(3) be amended to read: ‘The development of a Gender Equality Action Plan, and strategies and initiatives contained in it, must include an examination of data and evidence in relation to gender equality *and intersectional forms of discrimination based on age, disability, ethnicity, Indigeneity, sexual diversity and other grounds*’.**

## 6.2 *Evaluation of compliance*

The regime under the WGEA allows for the setting of minimum standards for different industries or contexts to demonstrate progress towards workforce gender equality, and the relevant standards can be adjusted through ministerial direction.<sup>6</sup> At present the threshold set for evaluating compliance with the law is quite low, merely requiring organisations with 100 or more employees to submit a report between 1 April and 31 May each year;<sup>7</sup> and large organisations with 500 or more employees to have a formal policy or formal strategy in place that specifically supports gender equality in relation to one or more gender equality indicator.<sup>8</sup> In future years these minimum standards could be increased.

In the initial phase of the Gender Equality Bill, evaluation of progress over time may not be the top priority. However, it will become more important in subsequent years, and necessary to ensure that the resulting Act does not become a box-ticking exercise, but realises its potential to bring about change. **We recommend that provisions allowing for the setting of standards and enabling evaluation of progress towards equality based on reports submitted should be included in the Bill.** While a detailed analysis of this area is beyond the scope of this submission, the model of the WGEA should be the starting point, for consistency, although improvements may be able to be identified in light of experience with the WGEA.

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<sup>6</sup> *Workplace Gender Equality Act 2012* (Cth) ss 13, 19, 19C.

<sup>7</sup> *Workplace Gender Equality (Matters in relation to Gender Equality Indicators) Instrument 2013* (No. 1) (Cth)

<sup>8</sup> *Workplace Gender Equality (Minimum Standards) Instrument 2014* (Cth).

## 7. Gender Equality Action Plans – content

The content of GEAPs is defined in s 11(1) of the Bill. The State GEAP (Safe and Strong) includes a gender auditing pilot and gender impact assessment, and will link into local government health and wellbeing plans.

### 7.1 Consultation

Consultation is key to ensuring that defined entities embrace their obligations under the Bill, and actively seek to address gender inequality. Particularly given government resources are limited, consultation requirements help to involve local actors in monitoring and encouraging compliance by defined entities, and help to ensure that GEAPs are meaningful and relevant to those affected. Consultation is therefore fundamental for ensuring the efficacy of the Bill and resulting Act. A lack of obligation to engage with those affected is seen as a one of the key failings of the UK public sector equality duty,<sup>9</sup> but *is* present in the equality duty in Northern Ireland<sup>10</sup> and Wales.<sup>11</sup>

While some defined entities will engage in consultation activities of their own initiative, as it is best practice to do so, it is important to build such requirements into the statutory framework itself. Consultation with workers on gender equality in the workplace is included as one of the workplace gender equality indicators in s 4. However, this could be further embedded in the process of developing and evaluating a GEAP, and could extend beyond the workforce, to those affected by the entity's services and functions.

To entrench the importance of consultation in the Bill, and secure the efficacy of GEAPs and associated reporting, **we recommend that s 11 be amended to include a requirement that entities consult with employees, employee associations and those affected by an entity's services or functions in preparing a GEAP.** This could be added as a new s 11(4), to read: "In preparing a Gender Equality Action Plan, a defined entity must consult with employees, employee associations and those affected by its services or functions."

### 7.2 Gender targets

We commend the proposal that targets should be set and quotas used to ensure that change in gender representation at senior and leadership levels occurs. We understand that the citizen's jury consultation agreed on a goal of 40:40:20% representation of men and women at leadership and senior management levels of organisations. We agree that such a target is appropriate for many organisations, but we consider that in setting targets it is important to consider the proportion of women in that organisation's workforce. Unless this is done, a 40:40:20 target could actually reduce women's opportunities for advancement and leadership. For example, in a strongly female workforce such as nursing, if women represent 80% of staff in the workforce it would be inappropriate to have a target for women's leadership and senior management that ranged from 40-60%, as that would sanction under-representation of women in leadership, and continue some of the inequities that women currently face. We recommend that in drawing up guidelines for setting targets, consideration must first be given

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<sup>9</sup> Bob Hepple, 'Enforcing Equality Law: Two Steps Forward and Two Steps Backwards for Reflexive Regulation' (2011) 40 *Industrial Law Journal* 315 <http://ilj.oxfordjournals.org/content/40/4/315>.

<sup>10</sup> *Northern Ireland Act 1998* (UK) sch 9, s 5.

<sup>11</sup> *Equality Act 2010 (Statutory Duties) (Wales) Regulations 2011* (Wales) SI 1064/2011 (W155).

to the proportion of women in the particular workforce. To increase gender equity, targets for women's leadership should be at least equal to their numbers in the particular workforce.

Changing the proportion of women in any workforce (and then in leadership and senior positions) is a distinct issue and is likely to require different strategies.

### *7.3 Review and renewal of a GEAP*

The Bill provides that a GEAP must be prepared during the first 12 months in which an entity is subject to the Act, and another plan must be prepared every four years thereafter (s 10). **We recommend adding a further provision to s 10 to make it clear that a GEAP can be revised or a new plan prepared at any time before the expiry of four years from the previous plan, if it becomes desirable or necessary to do so.** This would reinforce that the four year period is a maximum time limit, not a minimum, and that entities are expected to consider the need to revise their GEAP during that four year period. It would also encourage entities to view their plans as an evolving, 'living' document, which should be constantly reviewed and considered, and integrated into their day-to-day planning and decision-making. This is key to the mainstreaming of equality into organisational processes.

To facilitate this process, **we also recommend that s 11 be amended to include a requirement that GEAPs identify the responsible officer in the organisation for maintaining, reviewing and receiving feedback on the GEAP, including their contact details.**

## 8. Monitoring and reporting on organisations' reports

### 8.1 *Publicity, the carrot and the stick*

We agree that a primary goal of implementation of this scheme is to encourage and assist organisations to comply by providing resources, default templates, guidelines and other assistance to make compliance as easy as possible and focus the attention of organisations on issues that they need to address to move forward. However, progress usually requires a stick as well as a carrot. The stick can be found in a legal framework that ensures publicity for the actions of organisations under the Bill, as well as further steps (if needed) to evaluate compliance and identify organisations that are not making efforts to address gender inequality. The legal framework must include some potential sanctions (as outlined here, not necessarily penalties) in order to ensure that implementation occurs 'in the shadow of the law', so that organisations know that there is a legal framework that can be resorted to if necessary.

There is strong evidence that good intentions, encouragement to comply, and provision of information by and to organisations are not of and by themselves sufficient to ensure changes to practices and progress towards the aim of gender equality, particularly if there is no possibility of 'escalating' enforcement.<sup>12</sup> More is needed to ensure that organisations do not simply report on data, adopt a plan, and then allow inertia to prevail. Until the latest iteration of the WGEA, for example, there was little evidence that reporting under the Act brought about significant changes to gender equality at work. The most recent version of the Act, adopted in 2012, provides more incentive for organisations to demonstrate actual change by requiring evaluation and measuring of progress towards gender equality and implementation of plans, and makes it more evident when organisations have failed to achieve this.

The elements of the necessary legal framework are:

- publication of entities' GEAPs and annual progress reports;
- notification of employees and other groups by the entity that these documents are available, and seeking feedback and comment; and
- reporting to an identified authority, which is tasked with analysing and reporting on progress towards gender equality, and which can (if necessary) evaluate progress towards the goals and publicise lack of compliance or effort where relevant.

### 8.2 *Publication*

While the Bill provides that the State Gender Equality Plan will be tabled in Parliament (s 16(5)), it has no requirement for entities' reports to be tabled or published at all. Section 10 provides only that an entity 'must report on the defined entity's GEAP in the annual report of the defined entity' (s 10(3)). **We recommend that both GEAPs and annual reports on progress against GEAPs be required to be published by the entity on its website and by an authority identified for this purpose.** This is consistent with the reporting requirements for UK organisations under gender pay gap regulations. Clear guidance will be needed on the

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<sup>12</sup> See, for example, Ian Ayres and John Braithwaite, *Responsive Regulation: Transcending the Deregulation Debate* (Oxford University Press, 1992); Bob Hepple, 'Enforcing Equality Law: Two Steps Forward and Two Steps Backwards for Reflexive Regulation' (2011) 40 *Industrial Law Journal* 315 <<http://ilj.oxfordjournals.org/content/40/4/315>>; Alysia Blackham, *Extending Working Life for Older Workers: Age Discrimination Law, Policy and Practice* (Hart Publishing, 2016).

level of detail to be reported and the prominence to be given to those publications, so they can be easily located on the entity's website.

**In addition, upon publication of the GEAP and annual reports, an entity should be required to notify its employees, employee associations and those affected by its services or functions of the publication of that information (similar to the obligations under the WGEA, ss 16(1) and 16A). These groups should also be offered an opportunity to comment on these documents (see WGEA s 16B), and provision could be made for the entity to amend their GEAP or annual report on the basis of that feedback.** While some of this detail could be dealt with in regulations, the basic obligations to publish and to notify those affected should be present in the Bill itself, as it is in the WGEA. Again, this form of engagement, notification and consultation is essential for the success of the Bill.

### *8.3 Monitoring reports and evaluation of progress*

**The Bill should identify a responsible authority to receive reports and publish them, to analyse and report on them and, in time, to evaluate compliance with the Bill's aims and report on that compliance. This could be inserted in section 17 of the current Bill.** This agency could be the Office for Women or the Secretary, but it should be identified and its powers and functions should be specified in the Bill. **The authority should have a duty in the Bill to publish the reports, and to analyse and report on them in a way that allows monitoring of progress towards gender equality and towards implementation of their GEAPs, and it should publish an annual assessment of progress. The authority's reporting should facilitate making meaningful comparisons between agencies, and with employers reporting under WGEA, and allow benchmarks to be established for specific groups of agencies.** Such analysis and publication is essential to the transparency and accountability that are in turn essential for the success of the GEAPs and the Bill's aims of ensuring progress towards equality. We note that fulfilling this role will require additional resourcing and personnel to be allocated to the responsible authority. However, this role is essential to securing the success of the Bill and resulting Act.

### *8.4 Regular reviews of progress under the Act*

It will be important that regular reviews occur of the Act's effects to determine whether changes are needed to better achieve its goals. A model for such reviews can be found in ss 44 and 45 of the Charter.

Reviews of progress should include a requirement that the effectiveness of the Act should be considered in light of current evidence-based research on how to best achieve gender equality.

## Appendix: *Equality Act 2010 (UK) s 149*

### 149 Public sector equality duty

- (1) A public authority must, in the exercise of its functions, have due regard to the need to—
  - (a) eliminate discrimination, harassment, victimisation and any other conduct that is prohibited by or under this Act;
  - (b) advance equality of opportunity between persons who share a relevant protected characteristic and persons who do not share it;
  - (c) foster good relations between persons who share a relevant protected characteristic and persons who do not share it.
- (2) A person who is not a public authority but who exercises public functions must, in the exercise of those functions, have due regard to the matters mentioned in subsection (1).
- (3) Having due regard to the need to advance equality of opportunity between persons who share a relevant protected characteristic and persons who do not share it involves having due regard, in particular, to the need to—
  - (a) remove or minimise disadvantages suffered by persons who share a relevant protected characteristic that are connected to that characteristic;
  - (b) take steps to meet the needs of persons who share a relevant protected characteristic that are different from the needs of persons who do not share it;
  - (c) encourage persons who share a relevant protected characteristic to participate in public life or in any other activity in which participation by such persons is disproportionately low.
- (4) The steps involved in meeting the needs of disabled persons that are different from the needs of persons who are not disabled include, in particular, steps to take account of disabled persons' disabilities.
- (5) Having due regard to the need to foster good relations between persons who share a relevant protected characteristic and persons who do not share it involves having due regard, in particular, to the need to—
  - (a) tackle prejudice, and
  - (b) promote understanding.
- (6) Compliance with the duties in this section may involve treating some persons more favourably than others; but that is not to be taken as permitting conduct that would otherwise be prohibited by or under this Act.
- (7) The relevant protected characteristics are—
  - age;
  - disability;
  - gender reassignment;
  - pregnancy and maternity;
  - race;
  - religion or belief;
  - sex;

sexual orientation.

- (8) A reference to conduct that is prohibited by or under this Act includes a reference to—
  - (a) a breach of an equality clause or rule;
  - (b) a breach of a non-discrimination rule.
- (9) Schedule 18 (exceptions) has effect.

### **150 Public authorities and public functions**

- (1) A public authority is a person who is specified in Schedule 19.
- (2) In that Schedule—
  - Part 1 specifies public authorities generally;
  - Part 2 specifies relevant Welsh authorities;
  - Part 3 specifies relevant Scottish authorities.
- (3) A public authority specified in Schedule 19 is subject to the duty imposed by section 149(1) in relation to the exercise of all of its functions unless subsection (4) applies.
- (4) A public authority specified in that Schedule in respect of certain specified functions is subject to that duty only in respect of the exercise of those functions.
- (5) A public function is a function that is a function of a public nature for the purposes of the Human Rights Act 1998.