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Senate Finance and Public Administration Legislation Committee

Inquiry into the Workplace Gender Equality Amendment (Closing the Gender
Pay Gap) Bill 2023

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27 February 2023

Authorisation

This submission has been authorised by the NFAW Board

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Inquiry into the Workplace Gender Equality Amendment (Closing the Gender Pay Gap) Bill 2023

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.

Most of the provisions included in the Workplace Gender Equality Amendment (Closing the Gender Pay Gap) Bill 2023 (the Bill) were recommended in the submissions made by NFAW and other women's organisations to the [2021 Review of the Workplace Gender Equality Act 2012](#) (the Review).

While the Government has committed itself to implementing all the recommendations of that review ([Explanatory Memorandum](#), p. 2), the Review itself is a cautious document, many of whose recommendations have been hedged round with requirements for further research and/or consultation prior to any actual implementation. Of the 10 recommendations made in the Review, Recommendations 1, 3.1, 6, 7.2¹, 7.3, and 8 fall into this category.

According to the Explanatory Memorandum, the measures contained in the Bill actually implement, in part or in full, Recommendations 2, 3, 5, and 9 of the Review (p. 4). Of these, only Recommendations 2 (on the publication of gender pay gap percentages) and 5 (on aligning the definitions of sexual harassment in the Act and in the Instrument), appear to be fully implemented.

NFAW welcomes most of the provisions in the Bill. Our concerns relate to the provision implementing Recommendation 3 of the review and to the related measures to operationalise that provision outlined in the Impact Statement attached to the Explanatory Memorandum.

Recommendations

Recommendation 1: *including minimum standards in targets*

The Bill should be amended to include minimum outcomes for all employers as well as DIY targets for individual employers in the higher outcome deciles or quintiles. We recommend that

- instead of renaming minimum standards 'gender equality standards' the Bill use the term 'gender equality measures' to include both the proposed 'gender equality targets' and 'gender equality minimum standards';

¹ (Review) p. 49

- the current Minimum Standards Instrument enable the minister to set minimum workplace outcomes against each of the GEIs as well as template targets to be adapted by better performing individual employers;
- where an employer's GEIs fall below the industry minimum standard set by the minister, its initial target should be to meet that standard. WGEA should support these employers as a matter of priority; and
- the setting of minimum standards by the Minister be undertaken following consultation with WGEA and the SDC, as well as employer and other relevant stakeholders.

Recommendation 2: *minimum consultation requirements*

We recommend that relevant employers ensure all their employees receive information regarding the existence and content of policies being reported to the WGE Agency against Gender Equality Indicators 4.10-4.14, namely:

- 4.10 The existence of a flexible working arrangements policy or strategy.
- 4.11 The existence of policies or strategies to support employees with family or caring responsibilities.
- 4.12 The existence of any non-leave based measures to support employees with family or caring responsibilities.
- 4.13 The existence of a policy or strategy to support employees who have or are experiencing family or domestic violence.
- 4.14 Measures, if any, to support employees who have or are experiencing family or domestic violence.

We further recommend that the Bill be amended to include the provision set out in Review Recommendation 3.2.a, which would require relevant employers to report the date they share with their employees, shareholders, and/or members the gender equality reports that the employers provided to WGEA.

Discussion: Implementation of Recommendation 3

BACKGROUND

The WGE Act lists a number of gender equality indicators (GEIs) which can be used to measure progress in eliminating discrimination and barriers to equality a range of 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). (Note that sex-based harassment was specified under (f) in the Act. (Division 4 of the Bill would amend the Act to Insert a new indicator: '(ea) sexual harassment, harassment on the ground of sex or 17 discrimination'.)

Under subsection (1A) of the WGE Act the Minister has the responsibility of setting specific data requirements relating to each of these GEIs through 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.

The Minister also has power under the WGE Act to set minimum standards of performance against the GEIs through a separate Instrument, the [Workplace Gender Equality \(Minimum Standards\) Instrument 2014](#). Under the current minimum standard, which has not been raised since 2014, the subset of organisations covered by the Act employing 500+ people are required only to have a single policy in place to support gender equality. There are no minimum requirements for smaller organisations covered by the Act.

The current minimum standards call on employers to possess a policy but not to implement that policy or to show improvement in their workplace outcomes as a consequence of that policy. Given that almost every significant employer covered by the WGE Act (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.

Recommendation 3 of the Review proposed a functional role for the minimum standards consistent with the intention and objects of the 2012 WGE Act ([Equal Opportunity for Women in the Workplace Amendment Bill 2012 Explanatory Memorandum](#), pp. 28-9). In full Recommendation 3 reads:

- 3.1 Bridge the 'action gap' to strengthen the existing minimum standards by amending the Workplace Gender Equality (Minimum Standards) Instrument 2014 to:
 - a. add a new minimum standard to require relevant employers with 500 or more employees to commit to, achieve and report to WGEA on measurable genuine

targets to improve gender equality in their workplace against three of the six gender equality indicators

b. strengthen the existing minimum standards to require relevant employers with 500 or more employees to have policies or strategies that cover all six gender equality indicators (not just one policy or strategy for one gender equality indicator in the current minimum standards), and

c. rename the minimum standards to be ‘gender equality standards.’

Conduct further stakeholder consultation to identify the best way to implement this recommendation and conduct a regulatory impact assessment ahead of implementation.

3.2 Strengthen accountability of relevant employers to take action to improve gender equality in workplaces by amending the Workplace Gender Equality (Matters in relation to Gender Equality Indicators) Instrument 2013 (No. 1) to:

a. require relevant employers to report the date employers share with their employees, shareholders, and/or members the gender equality reports that the employers provided to WGEA, and

b. require relevant employers to provide the Executive Summary report and Industry Benchmark report from WGEA to employers to their Board/Governing Body.

The Bill itself would implement only Recommendations 3.1.c and 3.2.b. In the case of 3.1.c, it would do this by amending all references to ‘minimum standards’ in the Act to read ‘gender equality standards’. This change of nomenclature is linked to proposed changes to the Minimum Standards Instrument consistent with the remaining parts of recommendation 3 of the Review. The detailed implementation processes for Recommendations 3.1.a and 3.1.b—the operational core of the amendments—are set out in the Impact Statement conducted consistent with Recommendation 3 and included in the Explanatory Memorandum for the Bill. While these implementation proposals would mark a great step forward for gender equality in large (500+) workplaces, they do raise some issues that the Committee should consider.

IMPLEMENTATION OF RECOMMENDATION 3.1.A – THE THREE TARGETS

Attachment D of the Impact Statement incorporated in the Explanatory Memorandum sets out the operational core of the proposed Bill. According to Attachment D:

Employers [in organisations with 500+ employees] will receive a ‘menu’ of options for targets that can be set against each GEI. Employers will choose three targets from these options that will address the opportunity for improvement that they identified in their gender equality analysis. Employers will also set the timeframe for meeting each of the three targets, between one and three years (recognising some areas take more time to improve). (p. 81)

Generally an effort has been made to specify targets in terms of the outcomes data specified in the Workplace Gender Equality (Matters in relation to Gender Equality Indicators) Instrument.

That is, employers would be expected to identify a target based on an increase in the actual percentage of women in senior management, or women on boards, or an actual percentage decrease in their gender pay gap. They would then be required to meet that target within a specified timeframe. How they achieve that outcome is up to them. This outcomes-based approach requires more than the simple possession of a policy document, and provides both the employer and the WGE Agency with a clear measure of action and success.

The same specificity has been sought for those GEIs which focus on policies rather than outcomes data: GEI(d) relating to flexible working arrangements, (e) relating to consultation, and new indicator (ea) relating to sexual harassment and harassment on the ground of sex or discrimination. This effort has been successful with GEI(d), which would call for the actual implementation of specific flexible and family friendly policies, such as the payment of superannuation on paid parental leave. The same focus on outcomes has been achieved with GEI(ea), the target for which is to be drawn from recommendation 46 of [Respect@Work](#), which in turn calls for ‘indicators and methods for measuring and monitoring sexual harassment prevalence, prevention and response’.

The proposed targets for GEI (e), consultation, are discussed in the following section, as consultation bridges the matters addressed in both [Recommendation 3.1.a](#) and [Recommendation 3.1.b](#).

More broadly, the outcomes focus set out in Appendix D of the Impact Statement incorporated in the Explanatory Memorandum is consistent with the scheme of the WGE Act and welcome. However, the broad strategy of setting targets for all organisations marks a change from the original legislation, which was intended to focus on the poorest performers by setting minimum performance outcomes and gradually raising the floor.

Undoubtedly there is much to be said for setting targets for all relevant employers rather than just those in the bottom decile or quintile, but there are also reasons for maintaining a focus on what should constitute the minimum gender equality outcomes or standards for all employers.

- The ‘targets for all’ model does not, despite the proposed change of name to ‘gender equality standard’, set a standard. A range of distinct organisation-specific DIY targets cannot be called a national standard or even an industry standard. Organisations A and B – even organisations in same industry—might have significantly different ‘standards’. There is no floor.
- Where there is no floor there is no scope to raise the floor over time. The poorest performers may set the most minimal targets and fall further behind.
- Where there is no floor the WGE Agency will have no capacity to focus its attention on poor performers. Its monitoring and advisory activities will have to address all relevant organisations. Even with the support of an effective database this will have the effect of fragmenting its attention. Such fragmentation would become more considerable if – as is greatly to be hoped – relevant employers of fewer than 500

employees were ever to be asked also to set targets in the coming years. Better performing organisations are already targeted through the WGE award regime in any event.

- If the WGE Instrument included a floor of minimum outcomes as well as targets for better performers, these could be used to provide the Sex Discrimination Commissioner and courts with clear, objective minimum performance standards for establishing liability in individual cases of sexual harassment and discrimination, on the model of WHS standards.
 - The Government has already amended the SD Act to incorporate a positive duty for employers to ‘take reasonable and proportionate measures to eliminate sex discrimination,’ and to require the SDC to determine what ‘reasonable and proportionate measures’ mean in a given workplace. A set of WGE/SD minimum standards – which already incorporate the same “reasonableness” test in both Acts -- would clarify minimum outcomes for the SDC as well as for employers. NFAW would be happy to provide additional material on this proposal.
- If WGEA minimum standards were available to assist the SDC in her decision-making the incentive for poorer performing employers to raise their workplace outcomes would be substantially increased.

In our view, the Bill should be amended to include minimum outcomes for all employers as well as DIY targets for individual employers in the higher outcome deciles or quintiles. We recommend that:

- instead of renaming minimum standards ‘gender equality standards’ the Bill use the term ‘gender equality measures’ to include both the proposed ‘gender equality targets’ and ‘gender equality minimum standards’;
- the current Minimum Standards Instrument enable the minister to set minimum workplace outcomes against each of the GEIs as well as template targets to be adapted by better performing individual employers;
- where an employer’s GEIs fall below the industry minimum standard set by the minister, its initial target should be to meet that standard. WGEA should support these employers as a matter of priority; and
- the setting of minimum standards by the Minister be undertaken following consultation with WGEA and the SDC, as well as employer and other relevant stakeholders

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- the setting of minimum standards by the Minister be undertaken following consultation with WGEA and the SDC, as well as employer and other relevant stakeholders.

IMPLEMENTATION OF RECOMMENDATION 3.1.B -- THE 6 POLICIES

While the menu of targets to be set against GEIs under Recommendation 3.1.a is admirably specific and outcomes-focussed, 3.1.b, set out above, calls, very generally, for Australian’s largest employers simply to ‘have policies or strategies that cover all six gender equality indicators’.

While policies or strategies are very important, the possession of a policy or a strategy and has not been shown to be an indicator of action. As noted above 100 per cent of the employers covered by the WGE Act have a standing policy on sexual harassment to protect themselves from liability under applicable state and Commonwealth legislation (Explanatory Memorandum Impact Statement, p. 37; WGEA, [Progress Report](#), p. 15). For most employers the policy was on sexual harassment, and sexual harassment has worsened.

National surveys of workplace harassment reported in Respect@Work and based on questions about specific behaviours likely to constitute sexual harassment found prevalence rates of 11 per cent in 2003, 4 per cent in 2008, 21 per cent in 2012 and 33 per cent in 2018. In 2018, the same year that the AHRC was finding a workplace harassment rate of 33 per cent, WGEA reported that among organisations covered by its legislation, 97.92 per cent had anti-harassment policies in place. More than 72 per cent of those reporting harassment

to the AHRC survey were in those workplaces (p. AHRC, [Fourth national survey on sexual harassment](#), 2018, p. 64). Clearly the possession of a policy is not sufficient to deliver an outcome.

Broad consultation is one necessary means of bridging the gap between policies and actions.

Under s. 16 of the WGE Act employers are required to inform employees that they have lodged a GE report and advise them how to access it. Given the gap between the possession of policies and actual workplace practice long experienced by WGEA, the point of s. 16 was to ensure that employees were aware of gender equality policies affecting them so that they could comfortably seek to use them, and to provide some assurance that what employers reported and what they provided corresponded -- as experience had shown that this was not always the case (EOWA, 2009). The means of advising employees how to access the WGEA report was not specified in the Act. It could, for example, be embedded in the corner of a website. The extent to which any information about the employer's WGE report and policies reached employees is wholly unknown.

This is the extent of the consultation required under the Act at present.

The detailed process to implement Recommendations 3.1.a and 3.1.b set out in Appendix D to the Impact Statement would amend the minimum standards instrument to require large employers to possess a best practice consultation policy (which can be had off the shelf). If they choose to make consultation one of their three targets, they would be required to both possess such a policy and to

- Expand consultation to include all employees
- Set and achieve a response rate of __% of employees

In our view the implementation strategy could make better use of consultation to help bridge the gap between policy and practice by ensuring that employees understood the policies applying to them. We recommend, then, that relevant employers ensure that all employees receive information regarding the existence and content of policies being reported to the Agency against Gender Equality Indicator 4.10-4.14, namely:

- 4.10 The existence of a flexible working arrangements policy or strategy.
- 4.11 The existence of policies or strategies to support employees with family or caring responsibilities.
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References

Equal Opportunity for Women in the Workplace Agency (EOWA). (2009). *Submission to the review of the Equal Opportunity for Women in the Workplace Act and Agency*. Copy in possession of author.