



# Submission on the Gender Equality Bill exposure draft

OCTOBER 2018



Victorian Equal Opportunity  
& Human Rights Commission

# 1. Introduction

The Victorian Equal Opportunity and Human Rights Commission (Commission) welcomes the release of the exposure draft of the Gender Equality Bill (exposure draft). We also welcome the opportunity to comment on the accompanying *Gender Equality Bill exposure draft: Discussion paper* (discussion paper).

## 1.1 About the Commission

### OUR ROLE AND FUNCTIONS

The Commission is an independent statutory body with responsibilities under the: *Equal Opportunity Act 2010* (Equal Opportunity Act); *Charter of Human Rights and Responsibilities Act 2006* (Charter); and *Racial and Religious Tolerance Act 2001*. Our role is to protect and promote human rights and eliminate discrimination, sexual harassment and victimisation, to the greatest extent possible. We do this through a range of functions.

<b>Resolve complaints</b>	We resolve complaints of discrimination, sexual harassment, racial and religious vilification and victimisation by providing a free confidential dispute resolution service.
<b>Research</b>	We undertake research to understand and find solutions to systemic causes of discrimination and human rights breaches.
<b>Educate</b>	We provide information to help people understand and assert their rights, conduct voluntary reviews of programs and practices to help organisations comply with their human rights obligations and provide education and consultancy services to drive leading practice in equality, diversity and human rights, including a collaborative approach to developing equal opportunity action plans.
<b>Advocate</b>	We raise awareness across the community about the importance of equality and human rights, encouraging meaningful debate, leading public discussion and challenging discriminatory views/behaviours.
<b>Monitor</b>	We monitor the operation of the Charter to track Victoria's progress in protecting fundamental rights.
<b>Enforce</b>	We intervene in court proceedings to bring an expert independent perspective to cases raising equal opportunity, discrimination and human rights issues. We also conduct investigations to identify and eliminate systemic discrimination.

## OUR WORK ON GENDER EQUALITY

The Commission's strategic priorities are: embedding a human rights culture; improving workplace equality; protecting human rights in closed environments; and reducing racism.<sup>1</sup> These priorities drive our vision for a fair, safe and inclusive Victoria. In the area of improving workplace equality, we have committed to:

- contributing to Victorian Government initiatives and committees designed to prevent and respond to gender inequality;
- partnering with employers through our education and consultancy service to identify the drivers for workplace inequality and implement structural and cultural changes to increase equality and diversity;
- providing victims of sex discrimination and sexual harassment with a confidential, accessible and effective conciliation process to resolve complaints;
- continuing our landmark independent review work into the nature, prevalence and impact of discrimination and sexual harassment in key sectors.<sup>2</sup>

We have identified the workplace as an important setting to address sex discrimination and sexual harassment, and promote gender equality. However, our work covers all areas of public life, such as the provision of goods and services, education, sport and the provision of accommodation. We also seek to address gender inequality through our work to realise our three remaining strategic priorities.

### 1.2 This submission

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This submission addresses:

- the need for gender equality legislation
- questions 1-4, 6-7, 9 and 14-15 of the discussion paper
- certain reforms to the Equal Opportunity Act that, in our view, will further promote gender equality and strengthen the implementation of gender equality legislation.

Our views and recommendations are based, among other things, on our extensive experience resolving complaints, conducting best practice research,<sup>3</sup> providing tailored education and support in the development of fit-for-purpose equal opportunity human rights and diversity and inclusion action plans,<sup>4</sup> providing information and advice<sup>5</sup> and intervening in court proceedings,<sup>6</sup> related to sex discrimination, sexual harassment and gender inequality. They are also informed by our participation in key bodies related to gender equality.<sup>7</sup>

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1 Victorian Equal Opportunity and Human Rights Commission, *Upholding human rights close to home: Strategic plan (2017)*.

2 See, for example, Victorian Equal Opportunity and Human Rights Commission, *Independent review into sex discrimination and sexual harassment, including predatory behaviour in Victoria Police: Phase one report (2005)*; Victorian Equal Opportunity and Human Rights Commission, *Independent review into sex discrimination and sexual harassment, including predatory behaviour, in Victoria Police: Phase 2 audit (2017)*.

3 Ibid.

4 The Commission delivered 366 tailored education and consultancy sessions to 5,338 participants in public, private and community organisations in the 2017-2018 financial year, and 376 education and consulting sessions to 5,267 participants in the 2016-2017 financial year.

5 The Commission responded to 8,585 individual enquiries from members of the public in the 2017-2018 financial year, and 8,278 enquiries in the 2016-2017 financial year.

6 See, for example, *Tate v Department of Human Services [2015] VCAT 507*; *Fertility Control Clinic v Melbourne City Council [2015] VSC 424*.

7 For example, the Equal Workplaces Advisory Council, the Ministerial Council on Women's Equality and the Ministerial Taskforce on the Prevention of Family Violence and other forms of Violence Against Women.

# 2. Need for gender equality legislation

## 2.1 Current legislative protections

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In Victoria, the right to equality is enshrined under the Equal Opportunity Act and the Charter. These laws operate alongside limited protections of the right to equality under federal law, notably in the *Workplace Gender Equality Act 2012* (Cth) (Workplace Gender Equality Act) and the *Sex Discrimination Act 1984* (Cth) (Sex Discrimination Act).

### EQUAL OPPORTUNITY ACT

The Equal Opportunity Act is intended to encourage the identification and elimination of discrimination, sexual harassment and victimisation and their causes, and to promote and facilitate the progressive realisation of equality. Its objectives are:

- a. to eliminate discrimination, sexual harassment and victimisation, to the greatest possible extent;
- b. to further promote and protect the right to equality set out in the Charter of Human Rights and Responsibilities;
- c. to encourage the identification and elimination of systemic causes of discrimination, sexual harassment and victimisation;
- d. to promote and facilitate the progressive realisation of equality, as far as reasonably practicable, by recognising that –
  - i. discrimination can cause social and economic disadvantage and that access to opportunities is not equitably distributed throughout society;
  - ii. equal application of a rule to different groups can have unequal results or outcomes;
  - iii. the achievement of substantive equality may require the making of reasonable adjustments and reasonable accommodation and taking of special measures;
- e. to enable the Victorian Equal Opportunity and Human Rights Commission to encourage best practice and facilitate compliance with this Act by undertaking research, educative and enforcement functions;
- f. to enable the Victorian Equal Opportunity and Human Rights Commission to resolve disputes about discrimination, sexual harassment and victimisation in a timely and effective manner, and to also provide direct access to the Victorian Civil and Administrative Tribunal for resolution of such disputes.<sup>8</sup>

The Equal Opportunity Act provides mechanisms to achieve these objectives, including by: prohibiting various forms of unlawful discrimination (including on the basis of breastfeeding, carer status, gender identity, marital status, pregnancy and sex),<sup>9</sup> as well as sexual harassment<sup>10</sup> and victimisation;<sup>11</sup> providing avenues for complaint and redress for discrimination and

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<sup>8</sup> *Equal Opportunity Act 2010* (Vic) s 3.

<sup>9</sup> *Ibid* s 6.

<sup>10</sup> *Ibid* s 92.

<sup>11</sup> *Ibid* ss 103, 105.



sexual harassment;<sup>12</sup> and empowering the Commission to undertake work in the community to advance the aims of the Act.<sup>13</sup>

The Act also imposes a positive obligation on all duty holders, including employers, to take 'reasonable and proportionate measures to eliminate ... discrimination, sexual harassment or victimisation as far as possible'.<sup>14</sup>

## CHARTER

Section 8 of the Charter protects the right to 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.

The Charter operates by placing obligations on the legislature, judiciary and executive.<sup>15</sup> It protects human rights, including the right to recognition and equality before the law, in three key ways. The Charter:

- acts as a filter for new legislation – all new laws to be considered by Parliament require a statement of Charter compatibility, which scrutinises how the new law compares with rights enshrined in the Charter<sup>16</sup>
- places an obligation on courts and tribunals to interpret all Victorian laws, as far as is possible, in a way that is compatible with human rights<sup>17</sup>
- makes it unlawful for a public authority to act in a way that is incompatible with a human right or, in making a decision, to fail to give proper consideration to a relevant human right.<sup>18</sup>

In particular, the obligation on public authorities to consider and act consistently with the right to equality, supports government actions for gender equality.

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12 Ibid s 111.

13 Ibid s 156.

14 Ibid s 15(2).

15 *Charter of Human Rights and Responsibilities 2006 (Vic)* s 6.

16 Ibid s 28.

17 Ibid s 32.

18 Ibid s 38.

## 2.2 The need for gender equality legislation

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The Equal Opportunity Act and the Charter contain important equality protections. Yet, despite the existing protections, gender inequality is an ongoing concern in Australia, including in Victoria. For instance:

- in 2017, the World Economic Forum ranked Australia 35th out of 144 countries (down from 15th in 2006) for gender equality<sup>19</sup>
- the pay gap between women's and men's full-time weekly earnings is 14.6 per cent in Australia or 12.2 per cent in Victoria<sup>20</sup>
- women are far more likely than men to have been sexually harassed in the workplace in the last five years (39% of women compared to 26% of men)<sup>21</sup>
- more than a third of Victorians hold low levels of support for equal relationships between women and men.<sup>22</sup>

As a result, many women are unable to participate fully in political, social, economic and cultural life, which can undermine their economic security<sup>23</sup> and physical and mental health.<sup>24</sup> Research has also found that factors associated with gender inequality are the most consistent predictor of violence against women.<sup>25</sup>

Men are also affected by gender inequality. For instance, gender stereotyping not only disadvantages women, but also men (as well as society in general). We see evidence of this when men face challenges when trying to care for their children, such as being denied access to flexible work by their employers.<sup>26</sup>

The ongoing barriers to gender equality suggest that further measures are needed to ensure the full advancement of women and substantive equality of women and men.

Legislation that has a dedicated focus on gender equality – like the exposure draft – is an important tool to achieve these goals in practice. Notably, four of the five top-rated countries in the World Economic Forum's 2017 *Global gender gap report* have some form of gender equality legislation, which, in many cases, imposes positive obligations to work towards the achievement of gender equality.<sup>27</sup>

Like these laws, the Gender Equality Bill, if enacted, would prioritise the achievement of gender equality, by imposing positive obligations on defined entities and focusing attention on the underlying causes of inequality between women and men. This leadership and commitment, when married with effective action-oriented planning, enforcement mechanisms, support, funding and oversight, can create real change.

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19 World Economic Forum, *The global gender gap report* (2017) 68.

20 Workplace Gender Equality Agency, *Australia's gender pay gap statistics* (2018).

21 Australian Human Rights Commission, *Everyone's business: Fourth national survey on sexual harassment in Australian workplaces* (2018) 26.

22 Victorian Health Promotion Foundation, *VicHealth indicators survey 2015 selected findings* (2016) 11.

23 Australian Human Rights Commission, *Accumulating poverty? Women's experiences of inequality over the lifecycle* (2009).

24 Victorian Health Promotion Foundation, *Gender equality, health and wellbeing strategy* (2017-2019) 9.

25 Our Watch, Australia's National Research Organisation for Women's Safety (ANROWS) and VicHealth, *Change the Story: A shared framework for the primary prevention of violence against women and their children in Australia* (2015) 23.

26 Australian Human Rights Commission, *Supporting working parents: Pregnancy and return to work national review* (2014).

27 World Economic Forum, *The global gender gap report* (2017) 3. Iceland, Norway, Finland and Sweden have all adopted dedicated gender equality legislation. See: *Act on Equal Status and Equal Rights of Women and Men* (Iceland); *The Act Relating to Gender Equality 2007* (Norway); *The Act on Equality Between Women and Men 1986* (Finland); *Discrimination Act 2008* (Sweden).

Furthermore, by expanding the positive obligations of defined entities to work towards gender equality, the Bill would, if adopted, complement and strengthen the existing legislative protections. For instance, customised Gender Equality Action Plans provide an opportunity to understand the state of gender equality in the public sector, through the creation of a data baseline. The Bill would also provide a platform to monitor progress towards a future state of gender equality as the entities work towards, and report on progress implementing, the targets and goals in their plans.

If enacted, the Bill would also contribute to some extent to the implementation of the Australian Government's obligations under article 2 of the *Convention on the Elimination of All Forms of Discrimination against Women* (CEDAW).<sup>28</sup> Among other things, article 2 obliges States Parties to 'embody the principle of equality of men and women in their national constitutions or other appropriate legislation'<sup>29</sup> and 'establish legal protection of the rights of women on an equal basis with men and to ensure through competent national tribunals and other public institutions the effective protection of women against any act of discrimination...'.<sup>30</sup>

For these reasons, we welcome the release of the exposure draft. The focus of our submission is on ensuring that the legislation is effective as possible to ensure:

- that women and men in Victoria benefit from a robust law that is consistent with human rights obligations and leading best practice approaches to achieving gender equality; and
- the successful long-term implementation of gender equality in Victoria.

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28 See also Committee on the Elimination of Discrimination against Women, *General recommendation no 28 on the core obligations of States Parties under article 2 of the Convention on the Elimination of All Forms of Discrimination against Women*, 47th sess, UN Doc CEDAW/C/GC/28 (16 December 2010) ('General Recommendation 28'); *Report of the Committee on the Elimination of Discrimination against Women: Thirtieth Session; Thirty-First Session*, UN GAOR, 59th sess, Supp No 38, UN Doc A/59/38 (2004) annex I ('General Recommendation No 25, on Article 4, Paragraph 1, of the Convention on the Elimination of All Forms of Discrimination against Women, on Temporary Special Measures') [3]–[14] ('General Recommendation 25') [3]–[14]; Andrew Byrnes, 'Article 2' in Marsha A Freeman, Christine Chinkin and Beate Rudolf (eds), *The UN Convention on the Elimination of All Forms of Discrimination against Women: A commentary* (Oxford University Press, 2012) 71.

29 *Convention on the Elimination of All Forms of Discrimination against Women*, opened for signature 1 March 1980, 1249 UNTS 13 (entered into force 3 September 1981) ('CEDAW') art 2(a).

30 *Ibid* art 2(c).

# 3. Successful implementation

The discussion paper asks a number of questions related to the successful implementation of the Gender Equality Bill:

What do you think are the critical actions necessary for the success of gender equality legislation? (Question 1)

What other activities should the government undertake to support this legislation? (Question 2)

What do you think is best practice in measures to support implementation of legislation that drives lasting social change? (Question 3)

What preparations are needed to ensure readiness of impacted organisations before legislation takes effect? (Question 14)

What should be done to encourage or incentivise broader sectors or organisations to voluntarily comply with the principles, even if they are not obliged to do so? (Question 15)

Consistent with best practice, the Commission considers that a multifaceted approach is needed to promote gender equality in employment and in the workplace. Recognising that no single measure alone is sufficient to create lasting social change, a combination of measures enshrined in the legislation is needed, including:

- a robust definition of gender (section 3.1 of this submission)
- strong objectives and principles related to gender equality (sections 3.2 and 4)
- the provision of adequate education and support for all workplaces (section 3.3)
- further detail, including in relation to the core elements of Gender Equality Action Plans (section 5)
- independent monitoring of the implementation of the legislation (section 7.1)
- effective consequences for non-compliance (section 7.2)
- the existence of strong complementary legislation to create an enabling environment for gender equality (section 8).

In addition, the Commission notes that successful implementation of the legislation would be furthered by clarification of the overlap between the exposure draft and the Equal Opportunity Act. For instance, given the potential for the action plan mechanisms in the exposure draft and the Act to meet similar objectives, successful implementation would be aided by explicit clarification of the relationship between Gender Equality Action Plans and Equal Opportunity Action Plans – specifically that an example of a satisfactory report or document may be an Equal Opportunity Action Plan that has been developed in accordance with the Equal Opportunity Act.



## 3.1 A robust definition of gender

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Clause 4 of the exposure draft defines the term ‘gender equality’ as ‘equality of rights, opportunities, responsibilities and outcomes between people of different genders’.

The exposure draft does not, however, define the term ‘gender’. The Commission is concerned that the intended meaning of the term is unclear. We are also concerned that the failure to define the term or to do so inclusively may result in attempts to undermine the objectives of the Act.

We submit that clause 4 should define the term ‘gender’ and clarify that it refers to women and men, is inclusive of people who identify as trans and who are intersex and captures intersectional experiences of gender inequality.

### RECOMMENDATION 1

**That the term ‘gender’ is defined in clause 4, with a view to clarifying that it is intended to refer to women and men, be inclusive of people who identify as trans and are intersex, and capture intersectional experiences of gender inequality.**

## 3.2 Strong objectives

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Clause 3 of the exposure draft provides that the object of the Gender Equality Act is ‘to promote and encourage progress towards achieving gender equality and improving the status of women’.

Promoting and encouraging progress towards achieving gender equality and improving the status of women are important objectives and should be retained.

- The focus on women recognises that women have experienced, and continue to experience, widespread discrimination and inequality based on their sex and gender, despite existing legal protections. This focus on improving the status of women is consistent with CEDAW, which acknowledges that ‘extensive discrimination against women continues to exist’ and emphasises that such discrimination ‘violates the principles of equality of rights and respect for human dignity’.<sup>31</sup> It is also consistent with leading best practice gender equality laws in other jurisdictions. For example, Finland’s *Act on the Equality between Women and Men 1986* aims to ‘prevent discrimination based on gender, to promote equality between women and men, and thus to improve the status of women, particularly in working life’.<sup>32</sup>
- The focus on promoting and encouraging progress towards achieving gender equality strikes an important balance between recognising the need to address women’s particular and entrenched experiences of discrimination and inequality as well as the disadvantage men can experience because of sex and gender (eg through barriers to balancing work and family lives).

The Commission is nevertheless concerned that the exposure draft does not capture the full range of objectives needed to ensure the successful implementation of the legislation. We are also concerned that the objective in clause 3 is weak when compared to the objectives in the Equal Opportunity Act, the Sex Discrimination Act<sup>33</sup> and the Workplace Gender Equality Act.<sup>34</sup>

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31 CEDAW, preamble.

32 *Act on Equality between Women and Men 1986* (Finland) s 1.

33 *Sex Discrimination Act 1984* (Cth) s 3.

34 *Workplace Gender Equality Act 2012* (Cth) s 2A.

Given that the Victorian Government has acknowledged in the discussion paper that Australia is falling behind, despite the many advances made towards gender equality in recent decades, the Commission respectfully conveys that weak objectives may undermine the overall effectiveness of the legislation as they guide its interpretation and application.<sup>35</sup>

The Commission considers that the objectives in clause 3 could be significantly strengthened by aligning them more closely with the objectives set out in:

- section 3 of the Equal Opportunity Act, in particular sections 3(a) to 3(d)<sup>36</sup>
- section 2A of the Workplace Gender Equality Act, noting the similar focus of this legislation on the workplace<sup>37</sup>
- section 3 of the Sex Discrimination Act, specifically sections 3(a) and 3(d).<sup>38</sup>

The objectives could be further strengthened by recognising the importance of addressing employment and the workplace as key settings where gender inequality occurs, as well as the preventive role workplaces can play in achieving equality.<sup>39</sup>

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35 Beth Gaze, 'Context and Interpretation in Anti-Discrimination Law' (2002) 26(2) *Melbourne University Law Review* 325.

36 See section 2.1 of this submission.

37 *Workplace Gender Equality Act 2012* (Cth) s 2A (providing that the principal objects of the Act are: '(a) to promote and improve gender equality (including equal remuneration between women and men) in employment and in the workplace; (b) to support employers to remove barriers to the full and equal participation of women in the workforce, in recognition of the disadvantaged position of women in relation to employment matters; and (c) to promote, amongst employers, the elimination of discrimination on the basis of gender in relation to employment matters (including in relation to family and caring responsibilities); and (d) to foster workplace consultation between employers and employees on issues concerning gender equality in employment and in the workplace; and (e) to improve the productivity and competitiveness of Australian business through the advancement of gender equality in employment and in the workplace').

38 *Sex Discrimination Act 1984* (Cth) s 3 (providing that the objects of the Act are: '(a) to give effect to certain provisions of the Convention on the Elimination of All Forms of Discrimination Against Women and to provisions of other relevant international instruments; and ... (d) to promote recognition and acceptance within the community of the principle of the equality of men and women').

39 Our Watch, Australia's National Research Organisation for Women's Safety (ANROWS) and VicHealth, *Change the story: A shared framework for the primary prevention of violence against women and their children in Australia* (2015) 38.

## RECOMMENDATION 2

That clause 3 is amended to include the following additional objectives:

1. to further promote and protect the right to equality set out in the *Equal Opportunity Act 2010*, the *Charter of Human Rights and Responsibilities 2006* and the *Convention on the Elimination of All Forms of Discrimination against Women*
2. to promote recognition and acceptance in employment and in the workplace of the principle of the equality of women and men, noting that workplaces are both a site of inequality and can play an important role in achieving gender equality
3. to recognise that an individual's experience of gender inequality may be compounded by other forms of discrimination and disadvantage by virtue of other personal characteristics, such as race, religious belief or activity, disability, age, sexual orientation or gender identity
4. to encourage the identification of systemic drivers of gender inequality in employment and in the workplace, and support defined entities to address these drivers
5. to promote and facilitate gender equality, by recognising that:
  - a. sex discrimination can cause social and economic disadvantage and that access to opportunities is not distributed equitably between women and men in society
  - b. equal application of a rule to women and men can have unequal results or outcomes, when biologically, socially and culturally constructed differences between them are not taken into account
  - c. the achievement of substantive equality between women and men in employment and in the workplace may require the making of reasonable adjustments and reasonable accommodation and the taking of special measures.

### 3.3 Education and support

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The Commission's experiences helping workplaces implement their obligations under the Equal Opportunity Act have shown us first hand that organisational capability to plan for and implement best practice gender equality initiatives varies widely.

We are therefore of the view that defined entities will benefit from tailored education, resources and tools to help them build their knowledge, skills and capability to implement the legislation successfully.<sup>40</sup> Consistent with best practice,<sup>41</sup> this includes enabling defined entities to adopt a holistic approach to gender equality as 'core business' that, among other things, includes:

- aligning the entity's strategic focus and values to reflect gender equality principles
- identifying, and taking action to address, barriers to gender equality and improving the status of women
- building leadership culture and communicating leadership support for gender equality initiatives
- reviewing policies and procedures to embed a gender lens across all work areas and functions
- strengthening workforce capability related to gender equality
- establishing accountability mechanisms to strengthen implementation of Gender Equality Action Plans.

Clause 15 of the exposure draft provides that the Secretary may issue guidelines to help defined entities comply with their obligations to prepare and implement Gender Equality Action Plans and meet gender equality targets. It further requires that defined entities have regard to such guidelines.

The guidelines will be a critical tool to help defined entities understand and implement their obligations. However, just as the existence of guidelines will aid implementation, their absence will likely create a barrier to implementation.

It is for this reason that we recommend that clause 15 is amended to require guidelines to be issued. Furthermore, we submit that the guidelines should be issued by an independent oversight body, similar to the role of the Workplace Gender Equality Agency,<sup>42</sup> rather than the Secretary. This proposal would remove the discretion in the exposure draft and provide an agency independent of government with responsibility for helping defined entities to meet their obligations. The role of an independent body in overseeing the legislation, including our proposal that such a body has key functions related to education and support, is discussed in section 7.

#### **RECOMMENDATION 3**

**That clause 15 is amended to require an independent body to issue guidelines to help defined entities comply with their obligations to prepare and implement tailored Gender Equality Action Plans that will deliver effective and sustained gender equality outcomes and meet gender equality targets.**

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40 The Workplace Gender Equality Agency recognises the importance of tailoring gender equality strategies to individual workplaces: Workplace Gender Equality Agency, *Gender strategy toolkit: A direction for achieving gender equality in your organisation* (undated) 3, 6. An RMIT report advises that programs addressing the gendered drivers of violence against women should be 'tailored to meet the differing resource and capacity needs of specific contexts and situations': Anastasia Powell, Larissa Sandy and Jessica Findling, *Promising practices in workplace and organisational approaches for the prevention of violence against women*, report prepared for Our Watch (2015) 21.

41 Our Watch, Australia's National Research Organisation for Women's Safety (ANROWS) and VicHealth, *Change the story: A shared framework for the primary prevention of violence against women and their children in Australia* (2015) 42; Our Watch, *Respectful relationships: Education in schools: Evidence paper* (2015) 19.

42 *Workplace Gender Equality Act 2012* (Cth) s 10(b).

# 4. Gender equality principles

Clause 7 of the exposure draft sets out a number of Gender Equality Principles:

- All Victorians should live in a safe and equal society, have access to equal power, resources and opportunities and be treated with dignity, respect and fairness.
- Gender equality benefits all Victorians, regardless of gender.
- Gender equality is a human right and precondition to social justice.
- Gender equality brings significant economic, social and health benefits for Victoria.
- Gender equality is a precondition for the prevention of family violence and other forms of violence against women and girls.
- Advancing gender equality is a shared responsibility across the Victorian community.

Question 4 of the discussion paper asks:

Do you agree that these are the critical principles ... that should underpin the legislation?  
What should be added, or needs to be changed?

The Commission welcomes the inclusion of the principles in the exposure draft. The articulation of clear legislative principles is of particular importance in legislation that is aimed at driving social change and challenging the status quo. Clear principles can also provide guidance if and when there is a need for statutory interpretation. Furthermore, the principles in clause 7 align with the preamble of both CEDAW and the Charter, as well as the objectives of the Equal Opportunity Act<sup>43</sup> and the Sex Discrimination Act.<sup>44</sup>

We submit that the exposure draft could be further strengthened through additional principles that would allow for greater alignment with the government's human rights obligations. Such principles should address the relationship between the achievement of gender equality and the:

- elimination of wrongful gender stereotyping;
- need for temporary special measures; and
- importance of applying an intersectional lens.

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<sup>43</sup> *Equal Opportunity Act 2010* (Vic) s 3.

<sup>44</sup> *Sex Discrimination Act 1984* (Cth) s 3.



## 4.1 To live free of gender stereotyping

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Wrongful gender stereotyping is a pervasive human rights violation: it is a root cause of sex discrimination, gender inequality and other human rights violations. CEDAW (as well as other international human rights treaties)<sup>45</sup> recognises the harm that gender stereotypes can cause and therefore requires the government to modify or transform gender stereotypes and eliminate wrongful gender stereotyping.<sup>46</sup>

Importantly, the Committee on the Elimination of Discrimination against Women – the UN treaty body responsible for monitoring compliance with CEDAW – has characterised the obligation to address gender stereotypes/stereotyping as central to the elimination of all forms of discrimination against women and the achievement of substantive gender equality.<sup>47</sup> It has clarified that efforts to eliminate discrimination and improve women’s de facto position in society will be inadequate to achieve substantive equality, unless they are also accompanied by measures to transform structural inequality that stems from, among other things, stereotyping. It has also explained that inherent to the principle of gender equality ‘is the concept that all human beings, regardless of sex, are free to develop their personal abilities, pursue their professional careers and make choices without the limitations set by stereotypes, rigid gender roles and prejudices’.<sup>48</sup>

The Commission therefore suggests that the Gender Equality Principles should be amended to incorporate the following additional principle:

All human beings, regardless of sex or gender, should be free to develop their personal abilities, pursue their professional careers and make choices about their lives without the limitations set by gender stereotypes, rigid gender roles or prejudices.

Incorporating this principle will aid in the realisation of two of the stated intentions of the legislation, namely to ‘ensure that the structural and systemic causes of gender inequality are addressed’ and ‘prevent gender inequality arising in the first place’.<sup>49</sup> It is also consistent with clause 8(d) of the exposure draft, which requires defined entities to consider ‘having regard to the negative impacts of gender stereotypes on all Victorians; and the importance of challenging gender stereotypes’ in their Gender Equality Action Plans.

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45 See, for example, *Protocol to the African Charter on Human and Peoples’ Rights on the Rights of Women in Africa*, opened for signature 11 July 2003, OAU Doc CAB/LEG/66.6 (entered into force 25 November 2005) arts 2(2), 4(2) (d), 12(1)(b); *Inter-American Convention on the Prevention, Punishment and Eradication of Violence against Women*, opened for signature 9 June 1994 (entered into force 5 March 1995) arts 6(b), 8(b).

46 CEDAW preamble, arts 2(f), 5, 10(c). See also Rikki Holtmaat, ‘Article 5’ in Marsha A Freeman, Christine Chinkin and Beate Rudolf (eds), *The UN Convention on the Elimination of All Forms of Discrimination against Women: A commentary* (Oxford University Press, 2012) 141.

47 Committee on the Elimination of Discrimination against Women, Views: *Communication No 28/2010*, 51st sess, UN Doc CEDAW/C/51/D/28/2010 (13 April 2012) (‘RKB v Turkey’).

48 *General Recommendation 28*, UN Doc CEDAW/C/GC/28 [22].

49 Discussion paper, 5.

## 4.2 Special measures may be necessary and are not discriminatory

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Special measures – also known as temporary special measures<sup>50</sup> – are sometimes required to address past discrimination against women and gender inequality.

CEDAW clarifies that the '[a]doption of temporary special measures aimed at accelerating de facto equality between men and women shall not be considered discrimination as defined in the present Convention'.<sup>51</sup> In addition, the CEDAW Committee has explained that temporary special measures are not an exception to the norm of non-discrimination; in its view, they 'are part of a necessary strategy ... directed towards the achievement of de facto or substantive equality of women with men in the enjoyment of their human rights and fundamental freedoms'.<sup>52</sup> This authoritative view is held more widely, including by the UN Committee on Economic, Social and Cultural Rights.<sup>53</sup>

In line with the position under international law, the Equal Opportunity Act expressly allows for the taking of 'special measures' to promote or realise substantive equality for members of a group with a particular attribute, such as sex.<sup>54</sup> Special measures are allowed and are not considered unlawful discrimination if they meet certain requirements in the Act.<sup>55</sup> Special measures are also time limited in that upon realising equality, the measure ceases to be a special measure.<sup>56</sup>

Taking into consideration the importance of special measures for addressing inequality, the Commission respectfully suggests that the Gender Equality Principles should be amended to incorporate the following additional principle:

Temporary special measures may be necessary to achieve substantive equality of women and men, and are not discriminatory.

Incorporating this principle will aid in the realisation of one of the stated intentions of the legislation, namely to 'ensure that the structural and systemic causes of gender inequality are addressed'.<sup>57</sup> It is also consistent with clause 8(b) of the exposure draft, which requires defined entities to consider including 'making reasonable adjustments and implementing special measures to achieve substantive equality' in their Gender Equality Action Plans.

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50 These are 'time-limited positive measures intended to enhance opportunities for historically and systematically disadvantaged groups, with a view to bringing group members into the mainstream of political, economic, social, cultural and civil life': Rebecca J Cook, 'Obligations to adopt temporary special measures under the Convention on the Elimination of All Forms of Discrimination against Women' in Ineke Boerefijn et al (eds), *Temporary special measures: Accelerating de facto equality of women under Article 4(1) UN Convention on the Elimination of All Forms of Discrimination against Women* (2003) 111, 119. They are 'promotional measures of assistance, compensation, and correction': Frances Raday, 'Article 4' in Marsha A Freeman, Christine Chinkin and Beate Rudolf (eds), *The UN Convention on the Elimination of All Forms of Discrimination against Women: A commentary* (2012) 123-139, 124.

51 CEDAW art 4(1).

52 *General Recommendation 25*, UN Doc A/59/38, annex I [18].

53 Committee on Economic, Social and Cultural Rights, *General comment no 16: The equal rights of men and women to the enjoyment of all economic, social and cultural rights*, UN Doc E/C.12/2005/4 (2005) [15].

54 *Equal Opportunity Act 2010* (Vic) s 12(1).

55 *Ibid* s 12(3).

56 *Ibid* s 12(7).

57 Discussion paper, 5.

## 4.3 Recognising intersectionality

It is well recognised that women and men may experience discrimination because of the intersection of their sex/gender and other attributes – often described as intersectional discrimination.

It is for this reason that intersectional discrimination is prohibited under international law.<sup>58</sup> The CEDAW Committee has explained, for instance, that CEDAW requires States Parties to ‘legally recognize and prohibit such intersecting forms of discrimination and their compounded negative impact on the women concerned’.<sup>59</sup> It has also clarified that ‘[i]ntersectionality is a basic concept for understanding the scope of the general obligations of States parties contained in article 2 [of CEDAW]’.<sup>60</sup> Other human rights treaty bodies, as well as a number of state laws, also recognise intersectional discrimination and require states to identify and address it.<sup>61</sup>

Noting the importance of addressing intersectional discrimination for the realisation of substantive equality, the Commission respectfully suggests that the Gender Equality Principles should be amended to incorporate the following additional principle:

Gender equality requires consideration of all groups of women and men, including those who are most marginalised and may suffer discrimination or inequality by virtue of their sex or gender and other characteristics, such as race, religious belief or activity, disability, age, sexual orientation or gender identity.

The Commission notes that the inclusion of such a principle is consistent with clause 8(c) of the exposure draft, which requires defined entities to consider ‘recognising that an individual’s experience of gender inequality may be compounded by other forms of disadvantage and discrimination’ in their Gender Equality Action Plans.

### RECOMMENDATION 4

That the Gender Equality Principles in clause 7 are amended to include the following additional principles:

1. all human beings, regardless of sex or gender, should be free to develop their personal abilities, pursue their professional careers and make choices about their lives without the limitations set by stereotypes, rigid gender roles or prejudices
2. temporary special measures may be necessary to achieve substantive equality of women and men, and are not discriminatory
3. gender equality requires consideration of all groups of women and men, including those who are most marginalised and may suffer intersectional discrimination or inequality by virtue of their sex or gender and other characteristics, such as race, religious belief or activity, age, disability, sexual orientation or gender identity.

58 See, for example, CEDAW arts 10, 11(2), 12, 14 16(1)(e).

59 *General Recommendation 28*, UN Doc CEDAW/C/GC/28 [18]. See also *General Recommendation 25*, UN Doc A/59/38, annex I [12].

60 *General Recommendation 28*, UN Doc CEDAW/C/GC/28 [18]. See also *General Recommendation 25*, UN Doc A/59/38, annex I [12].

61 See, for example, *Report of the Committee on the Elimination of Racial Discrimination*, UN GAOR, 55th sess, Supp No 18, UN Doc A/55/18 (2000) annex VA (‘General Recommendation XXV on Gender-Related Dimensions of Racial Discrimination’); *Magna Carta of Women 2008* (the Philippines) s 4.

# 5. Gender Equality Action Plans

The exposure draft requires defined entities to develop and report on Gender Equality Action Plans. Clause 8 details the actions that defined entities must consider including in their plans, while clause 11 specifies the matters that defined entities must address in their plans. Clause 10(3) requires defined entities to report on their plans in their annual reports or as otherwise prescribed.

The Commission welcomes this development, noting, as set out in the discussion paper, that requiring the development and implementation of Gender Equality Action Plans is consistent with international best practice.<sup>62</sup> We nevertheless submit that the exposure draft can be strengthened in line with the recommendations below.

## 5.1 Scope of Gender Equality Action Plans

### MINIMUM STANDARDS

Question 4 of the discussion paper asks:

Do you agree that these are the critical ... actions that should underpin the legislation? What should be added, or needs to be changed?

The Commission is concerned that clauses 8 and 11 of the exposure draft, which both address the content and scope of Gender Equality Action Plans, impose different requirements on defined entities: defined entities *must consider* including in their plans the 'actions for achieving gender equality' in clause 8, whereas they *must specify* the matters in clause 11. As such, it appears that the exposure draft sets out different categories of actions and matters for Gender Equality Action Plans, with different levels of responsibility. The relationship between the clauses is also unclear.

There is a risk that the current approach will create confusion about what defined entities need to include in their plans, which may, in turn, undermine the Act's successful implementation. The Commission submits that the actions and matters set out in clauses 8 and 11(1) should be replaced with a single list of minimum standards that all defined entities *must* address in their Gender Equality Action Plans. The *Disability Discrimination Act 1992* (Cth)<sup>63</sup> and Finland's *Act on Equality between Women and Men 1986*<sup>64</sup> are examples of legislation with mandatory minimum standards for action plans.

Mandated minimum standards would establish a baseline of actions and matters that defined entities must address, while still affording flexibility to enable them to develop tailored actions and go further in their plans. Clear standards would also promote the development of comprehensive and meaningful plans that support organisational change, consistent reporting and data collection to monitor compliance.

62 See, for example, *Act on Equality between Women and Men 1986* (Finland); *Act on Equal Status and Equal Rights of Women and Men 2008* (Iceland).

63 *Disability Discrimination Act 1992* (Cth) s 61.

64 *Act on Equality between Women and Men 1986* (Finland) s 6(2).

The Commission recommends that the minimum standards include:

- an assessment of the state of gender equality in the prescribed entity, including a gender impact analysis
- how the defined entity will further the Gender Equality Principles and particular strategies and initiatives it will implement to achieve gender equality, including to address gaps
- communication of these initiatives and educating staff about the Gender Equality Action Plan
- governance, including measures to allocate adequate financial and human resources to implement the Gender Equality Plan effectively
- data collection, noting that the *Equality Act 2010* (UK) requires the publication of data, including in relation to the gender pay gap
- the setting of goals and indicators, where these may be reasonably determined, against which success of the plan in achieving the objectives of the legislation can be assessed
- a review of the extent to which measures previously included in the plans have been implemented and of the results achieved.

#### **RECOMMENDATION 5**

1. That the actions in clause 8 and the matters in clause 11(1) are replaced with a single list of minimum standards that all defined entities must address in their Gender Equality Actions Plans.
2. That the minimum standards include:
  - a. an assessment of the state of gender equality in the prescribed entity, including a gender impact analysis
  - b. how the defined entity will further the Gender Equality Principles and particular strategies and initiatives it will implement to achieve gender equality, including to address gaps
  - c. communication of these initiatives and educating staff about the Gender Equality Action Plan
  - d. governance, including measures to allocate adequate financial and human resources to implement the Gender Equality Plan effectively
  - e. data collection, noting that the *Equality Act 2010* (UK) requires the publication of data, including the gender pay gap
  - f. the setting of goals and indicators, where these may be reasonably determined, against which success of the plan in achieving the objectives of the legislation can be assessed
  - g. a review of the extent to which measures previously included in the plans have been implemented and of the results achieved.



## GENDER IMPACT ANALYSIS

Clause 11(1)(c)(ii) of the exposure draft provides that defined entities that have not implemented a gender impact analysis must state in their Gender Equality Action Plan that they will implement the analysis over the next four years.

Given the critical role gender impact analyses can play in helping entities to develop action plans that effectively promote gender equality,<sup>65</sup> the Commission recommends that, where a defined entity has not implemented a gender impact analysis, the period for implementing the analysis is reduced from four years to one year. An implementation period of one year would reduce the time that an entity's plan is not informed by a gender impact analysis and any resulting ineffectiveness.

### RECOMMENDATION 6

That clause 11(1)(c)(ii) is amended so that where a defined entity has not implemented a gender impact analysis, the period for implementing the analysis is reduced from four years to one year.

## 5.2 Supporting organisations to develop plans

Clause 15 of the exposure draft provides that the Secretary may issue guidelines to help defined entities comply with their obligations to prepare and implement Gender Equality Action Plans and meet gender equality targets. It also requires defined entities to have regard to any guidelines issued by the Secretary.

As noted in section 3.3, the Commission welcomes the inclusion of this provision – the guidelines will be a critical tool that will help defined entities to understand and implement their obligations under the legislation. However, we suggest that an independent oversight body be responsible for issuing guidelines.

The discussion paper asks:

What preparation, guidance materials or training is needed to support organisations to develop Gender Equality Action Plans? (Question 6)

Section 152 of the Equal Opportunity Act prescribes educative functions for the Commission to assist organisations to prepare and implement action plans to improve compliance with the Act. This is in addition to the Commission's educative function under section 156 of the Act. The Commission's experience supporting action plan development and implementation shows that tailored education and consultancy is key to enable organisations to tailor plans to meet organisational needs based on gender audit data and gender impact analysis that meet legislative requirements and drive lasting social change.

65 European Institute for Gender Equality, *Gender impact assessment: Gender mainstreaming toolkit* (2016) 8.

In line with these functions, in section 3.3 the Commission outlined education and consultancy options to build readiness and support implementation of the legislation.<sup>66</sup> In addition to this, to support the development of Gender Equality Action Plans, the Commission recommends tailored education, consultancy and the development of guidance materials to build capability to:

- identify strategies and initiatives aligned to the Gender Equality Principles
- set benchmarked targets, goals and indicators
- develop and conduct a gender equality audit to establish a baseline
- conduct gender impact analysis of existing and proposed programs, policies, services and budgets
- develop communication strategies for staff
- establish governance measures to support implementation
- review and evaluate progress.

The Commission's existing functions and experience could be applied to support the successful implementation of a Gender Equality Act.

#### **RECOMMENDATION 7**

**That adequate funding is allocated to support the development and delivery of tailored education, consultancy and guidance materials to support defined entities to develop Gender Equality Action Plans.**

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66 Programs to address gender inequality should be 'tailored to meet the differing resource and capacity needs of specific contexts and situations': Anastasia Powell, Larissa Sandy and Jessica Findling, *Promising practices in workplace and organisational approaches for the prevention of violence against women*, report prepared for Our Watch (2015) 21.

## 6. Targets and indicators

Clause 14(1) of the exposure draft provides that targets may be prescribed in regulations. Clause 14(2) states that a defined entity must take reasonable steps towards meeting the targets that apply to them and clause 14(3)(a) provides that it must report on its progress towards meeting those targets.

Clause 11 also provides that a Gender Equality Action Plan must include specific strategies and initiatives to be implemented by the defined entity to promote gender equality, giving consideration to prescribed workplace gender equality indicators. Indicators are defined in clause 4, but can also be prescribed in regulations.<sup>67</sup>

The Commission welcomes the inclusion of targets and indicators in the exposure draft. In our experience working with organisations that are attempting to change existing social and cultural norms, the introduction of targets – when they are supported appropriately by other gender equality strategies, such as tailored action plans, indicators and education – can help to drive and accelerate change.

Targets can make leaders accountable for outcomes and the development of strategies to achieve these outcomes – what gets measured gets done.<sup>68</sup> They can also fast track women into key positions for immediate impact, counter the effects of a flawed merit-based system of promotion and drive cultural change by having a ‘critical mass’ of women in key roles that can lead to sustainable change.<sup>69</sup>

Targets are most effective when they are clearly linked to appropriate indicators to direct strategies and initiatives and enable progress to be monitored.

The Commission notes that many other jurisdictions have recognised the role that targets and quotas can play in achieving gender equality. For instance:

- Norway has a quota of 40% minimum representation of each gender in public companies;<sup>70</sup>
- Iceland mandates that the ratio of female to male appointments to governmental or municipal committees, councils and boards needs to be as equal as possible (not below 40%, where members are more than three);<sup>71</sup>
- Denmark requires an equal composition of men and women on certain public committees, commissions and other bodies;<sup>72</sup> and
- France has a quota of 40% representation of each gender on corporate boards of publicly listed companies.<sup>73</sup>

The European Commission has attributed the progress that many of these nations have made towards more gender equal boards and governing bodies principally to the adoption of legislative and other positive measures to promote gender balance.<sup>74</sup>

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67 Exposure draft, cl 26.

68 Victorian Equal Opportunity and Human Rights Commission, *Independent review into sex discrimination and sexual harassment, including predatory behaviour in Victoria Police: Phase One Report* (2015) 215.

69 Ibid.

70 *The Act Relating to Gender Equality 2007* (Norway) s 13.

71 *Act on Equal Status and Equal Rights of Women and Men 2008* (Iceland) art 15.

72 *Act on Gender Equality 2000* (Denmark) s 8.

73 *Act of 27 January 2011 on the balanced representation of women and men on governing and supervisory boards and on professional equality 2011* (France).

74 European Commission, *Report on equality between men and women in the EU* (2018) 31.

## 6.1 Clarifying and strengthening obligations

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While welcoming the inclusion of targets and indicators, we are concerned that the exposure draft does not define these terms. We therefore suggest that the Bill define the terms ‘indicators’ and ‘targets’.

The Commission is also concerned that the use of the term ‘may’ in clause 14(1) is considerably weak, and leaves the inclusion of targets in the regulations to the discretion of the Secretary. We consider that this wording should be strengthened, so that the regulations ‘must’ prescribe gender equality targets. Further, we suggest that the development of targets and indicators be developed in consultation with key gender equality stakeholders, including any independent body and the Ministerial Council on Women’s Equality (see section 7).

Education, including on the need for targets, as well as engagement with affected stakeholders, will be important to the overall success of implementing targets (see section 3.3 for related recommendations).

### **RECOMMENDATION 8**

1. That the exposure draft is amended to define the terms ‘targets’ and ‘indicators’.
2. That clause 14(1) is amended to provide that the regulations ‘must’ prescribe gender equality targets.
3. That clause 14 is amended to require the Secretary to consult with key gender equality stakeholders, including any independent statutory body with oversight of the legislation and the Ministerial Council on Women’s Equality, and consider their recommendations before prescribing targets and indicators in the regulations.

## 6.2 Types of targets

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The discussion paper asks:

What kinds of public sector targets should be included in the regulations of the Gender Equality Bill? (Question 7)

The Commission notes that the exposure draft contains no detail about the domains in which targets should apply. This is in contrast to the definition of ‘workplace gender equality indicators’ in clause 4 of the exposure draft.

It may be that the intention is that the targets are set against the prescribed indicators, which include:

- gender composition of the workforce
- gender composition of governing bodies
- equal remuneration irrespective of gender
- availability and utility of terms, conditions and practices relating to flexible working arrangements and working arrangements supporting workers with family or caring responsibilities
- consultation with workers on issues concerning gender equality in the workplace.

However, this is not clear from the exposure draft.

Drawing on our experience and in reviewing other comparable legislation,<sup>75</sup> the Commission suggests that clause 14 of the exposure draft should be amended to clarify that the targets apply *in relation to the gender equality indicators*.

If the legislation is to drive real cultural change across public entities (and possibly beyond) then there needs to be concerted effort across a number of key domains to drive gender equality outcomes. There is a need for the full range of indicators where women experience discrimination and inequality to be enshrined in the legislation. Otherwise, the targets that follow may produce very limited outcomes.

Additional indicators should therefore be included in the exposure draft to ensure that it captures the full range of domains that should be considered when setting targets to address gender equality in the workplace. At a minimum, these additional indicators should include:

- gender composition in recruitment (both in terms of recruitment panels and people recruited)
- gender composition in promotion and progression opportunities
- gender composition in senior management and executive roles, courts and tribunals and elected local government councils.

Recognising the role of targets in advancing gender equality, the Commission is also supportive of including the targets in *Safe and Strong: A Victorian Gender Equality Strategy* in the legislation or regulations (in addition to the indicators discussed above). This includes that: 50% of new appointments to paid public boards are women; 50% of executive appointments in the Victorian Public Service are women; 50% of new appointments to courts (including VCAT) are women; 50% of councillors and Mayors in local government are women by 2025; and 40% of appointments to state sport and recreation organisational boards are women by 2019.

#### **RECOMMENDATION 9**

1. That clause 14(1) is amended to clarify that the gender equality targets apply in relation to the gender equality indicators.
2. That clause 4 is amended to reflect the following additional indicators:
  - a. gender composition in recruitment
  - b. gender composition in promotion and progression opportunities
  - c. gender composition in senior management and executive roles, courts and tribunals and local government councils.
3. That the targets in *Safe and Strong: A Victorian Gender Equality Strategy* are retained and codified in the legislation or regulations.

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<sup>75</sup> See, for example, *Workplace Gender Equality Act 2012* (Cth) s 3.



## 6.3 Reporting frequency

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Question 9 of the discussion paper asks:

What frequency or volume of reporting would strike a balance between transparency and accountability, whilst minimising regulatory burden?

Clause 14(3)(a) provides that a defined entity must report on its progress towards the targets that apply to them in their annual report or otherwise as prescribed.

The Commission supports the annual reporting requirement. Annual reporting strikes an appropriate balance between not overburdening prescribed entities and ensuring sufficient data to monitor the implementation of the Act. It is also an appropriate timeframe to facilitate continuous improvement within the entities themselves, assess compliance and allow for necessary changes to be made where targets are not being progressively met or where further assistance is required.

We note that other key laws require reporting to be on an annual basis.<sup>76</sup> We further note that annual reporting is consistent with business planning and annual reporting cycles that are commonplace for public entities captured by the exposure draft.

Annual reporting to an independent body (as we propose in section 7 below) would enable the body to monitor progress towards achieving gender equality across the public sector and produce thematic reports addressing any systemic issues.

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<sup>76</sup> See, for example, *Workplace Gender Equality Act 2012* (Cth) s 13A; *Charter of Human Rights and Responsibilities Act 2006* (Vic) s 41(a)(i).

# 7. Independent monitoring and compliance

In line with best practice and our experience, the Commission considers that successful implementation of a Gender Equality Act will be enhanced by conferring on an agency independent of government the responsibility to oversee the legislation, as discussed in section 7.1 below.

In our view, such an agency would have at its disposal a comprehensive package of compliance tools, ranging from the provision of support to defined entities to comply with the legislation through to publicly naming non-compliant entities. These tools would include the ability to:

- provide independent support, guidance, resources and advice to entities to encourage compliance
- review Gender Equality Action Plans and any related reports or analysis for compliance
- maintain a public register of Gender Equality Action Plans and related reports
- request further information from an entity to review compliance
- offer targeted support and advice to non-compliant entities to help them comply
- submit a report to the Minister with the names of defined entities the body believes have not complied with the legislation, including details of non-compliance and the steps the entity proposes to take to address non-compliance
- publish the names of non-compliant entities in its own report or on its website
- report to the Minister on the overall implementation of the legislation and progress towards gender equality in Victoria.

As discussed in section 7.2 below, the availability of a robust package of compliance tools that will ensure the successful implementation of the legislation requires a strengthening of the provisions of the exposure draft that deal with compliance.

## 7.1. Independent monitoring of the legislation

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The discussion paper proposes that a monitoring and compliance system be established and that the Department of Health and Human Services (DHHS), primarily through the Office for Prevention and Women's Equality, monitor the implementation of the legislation. We note that the exposure draft itself does not outline who will be responsible for monitoring the legislation, although it does provide the Minister and the Secretary with a role in promoting compliance (see section 7.2).

The Commission welcomes the involvement of the DHHS in driving the implementation of the legislation across the public sector, as it currently does for the *Safe and Strong* and the *Free from Violence* strategies.

However, consistent with international<sup>77</sup> and national<sup>78</sup> best practice and our experience overseeing the Equal Opportunity Act, the Charter and the Racial and Religious Tolerance Act 2001, we submit that an agency independent of government should oversee the legislation. This body should be adequately resourced to undertake this role on an ongoing basis. To ensure effective long-term

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77 See, for example, *Equality Act 2010* (UK); *Act on Equal Status and Equal Rights of Women and Men 2008* (Iceland) art 4.

78 See, for example, *Workplace Gender Equality Act 2012* (Cth) Pt III (vesting the Workplace Gender Equality Agency with monitoring powers).

monitoring and analysis, the functions, powers and responsibilities of the independent statutory body should be enshrined in legislation.

An analogous example can be found in the Workplace Gender Equality Act, which sets out the functions of the Workplace Gender Equality Agency. These include providing advice and assistance to employers in promoting and improving gender equality in the workplace, issuing guidelines, reviewing compliance, collecting and analysing information, undertaking research and educational programs, and reviewing the effectiveness of the Act in achieving its purpose.<sup>79</sup> Its powers are broad and include the 'power to do all things necessary or convenient to be done for or in the connection of the performance of the functions of the Agency'.<sup>80</sup>

The Workplace Gender Equality Act sets out clear and separate roles for government and the Agency. This includes that the Minister, in consultation with the Agency, is responsible for setting the minimum standards in relation to gender equality indicators, while the Agency is responsible for reviewing compliance with the Act and reporting to the Minister on non-compliance and related matters.<sup>81</sup>

The Commission respectfully suggests that the Victorian Government adopt a similar approach with respect to the Gender Equality Bill, vesting an independent body with similar functions and powers as those out in the Workplace Gender Equality Act.<sup>82</sup>

Given our existing functions and expertise, we consider that there would be value in vesting such monitoring functions in the Commission (see section 7.2 below).

#### **RECOMMENDATION 10**

**That the exposure draft is amended to establish, or vest responsibility in, an independent statutory body with oversight of the legislation.**

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79 Ibid s 10.

80 Ibid s 10(2).

81 Ibid Pt IVA.

82 Ibid s 10.

## MONITORING PROGRESS AND REPORTING ON IMPLEMENTATION

An independent body with statutory powers could review Gender Equality Action Plans, monitor progress against indicators and targets, and report to the Minister on the operation of the legislation and progress towards promoting gender equality in Victoria. This could include reporting from time to time on any thematic gender equality issues in the workplace within and across defined entities and the public sector.

The independent body's role in monitoring progress and reporting on the effective implementation of the legislation, would among other things, require research and collecting and analysing information provided by defined entities. Defined entities should be required to submit their Gender Equality Action Plans and any related reports or analysis (such as those referred to in clauses 10-11 of the exposure draft) to the independent body. The body could then review such reports for compliance with the legislation, request further information as necessary, undertake analysis and report to the Minister. This proposal would bring the Gender Equality Bill into alignment with the Workplace Gender Equality Act and the functions of the Workplace Gender Equality Agency,<sup>83</sup> particularly in relation to reviewing the effectiveness of the Act in achieving its purposes and reporting 'to the Minister on such matters in relation to gender equality in the workplace as the Agency thinks fit'.<sup>84</sup> This would also be similar to the Commission's existing function to report annually to the Attorney-General on the operation of the Charter.<sup>85</sup>

The body could also maintain a public register of Gender Equality Action Plans and reports to ensure transparency and openness, just as the Equal Opportunity Act provides in relation to Equal Opportunity Action Plans.<sup>86</sup>

### RECOMMENDATION 11

**That the exposure draft is amended to:**

- 1. require defined entities to submit their Gender Equality Action Plans, gender impact analyses and related reports to an independent body for review**
- 2. provide an independent body with the power to maintain a public register of all plans, analysis and reports**
- 3. provide an independent body with the power to request information from a defined entity that relates to compliance with the legislation or the entity's performance against Gender Equality Action Plans.**

83 Ibid ss 10, 13A, 19A(1), 12(2).

84 Ibid ss 10(1)(g), 10(1)(h).

85 *Charter of Human Rights and Responsibilities Act 2006* (Vic) s 41. The reports are available on the Commission's website: <<https://www.humanrightscommission.vic.gov.au/home/our-resources-and-publications/charter-reports>.>

86 *Equal Opportunity Act 2010* (Vic) s 152.

## 7.2. Additional consequences for non-compliance

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The discussion paper proposes that the DHHS will advise the Minister on the compliance of all affected organisations and that the Minister will have the discretion to name public sector organisations that do not comply with their obligations in the Minister's annual report on gender equality.<sup>87</sup> We welcome this proposal to incentivise compliance and agree that it will be more effective than self-monitoring. It will also improve transparency.

Additional consequences for non-compliance are nevertheless needed to ensure the successful implementation of the legislation and drive lasting change. Compliance powers should also be vested in an independent body with monitoring and oversight responsibilities.

### **PUBLICLY NAMING NON-COMPLIANT DEFINED ENTITIES**

As noted above, the Commission is supportive of a compliance system that enables the Minister to publicly name non-compliant entities. However, we urge the Victorian Government to strengthen the impartiality of the compliance mechanism. This could be achieved by providing an independent body (rather than the Secretary) with the power to name non-complying defined entities in a report to the Minister and by other means such as publication on its website.

Clauses 17 and 18 of the exposure draft provide the Secretary with wide discretion to issue a notice to non-complying entities and further discretion to decide whether or not to name a non-complying entity in the Minister's annual report. Notwithstanding the need to ensure procedural fairness (appropriately achieved through the proposed clause 18(2)), the exposure draft should provide an independent body with the power to name an entity in a report to the Minister where it reasonably believes that the entity has, without reasonable excuse, not complied with the legislation. The Minister should then promptly table the report before both houses of parliament. In addition, the independent agency should have the power to name non-compliant entities in its own report or on its website.

Such a proposal is similar to the role of the Workplace Gender Equality Agency, which receives and reviews public reports from employers each year and can require information related to their compliance to determine whether or not an employer should be publicly named, whether in a report to the Minister or by other means.<sup>88</sup>

We also respectfully suggest that the proposed notice issued on defined entities prior to being publicly named, as set out in clause 17 of the exposure draft, should also require the defined entity to set out in its response what steps it will take to address non-compliance. These steps, along with the details of the non-compliance should be included in any report or publication naming non-compliant entities.

We suggest that the exposure draft be clarified to ensure consideration of whether a reasonable excuse has been provided for non-compliance when determining whether or not a defined entity should be publicly named, as in the case of the Workplace Gender Equality Act.<sup>89</sup>

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87 Exposure draft, cl 18; Discussion paper, 18.

88 *Workplace Gender Equality Act 2012* (Cth) ss 19C, 19D.

89 *Ibid* s 19D(1).



## RECOMMENDATION 12

1. That clause 17 of the exposure draft is amended to:
  - a. provide an independent body with the power to issue a notice to non-complying defined entities (rather than the Secretary)
  - b. require a defined entity, who has received a notice, to respond in writing with the steps they will take to address non-compliance
2. That clause 18 of the exposure draft is amended to:
  - a. provide an independent body with the power to name a non-complying defined entity in a report to the Minister (rather than the Minister naming non-compliant entities in the Minister's annual report) or in other ways such as on an independent body's website
  - b. require consideration of whether a defined entity has provided a reasonable excuse for their non-compliance, when determining whether or not to publicly name a non-compliant defined entity
  - c. require the Minister to table a report it receives from the independent body in each house of parliament within 15 sitting days of that House after the day on which the Minister receives the report.

## RECOMMENDATION 13

That the exposure draft is amended to set out all the powers and functions necessary for an independent monitoring body to effectively oversee the Act, including to:

1. advise and assist defined entities in promoting and improving gender equality in the workplace
2. issue guidelines to assist defined entities to achieve the purposes of this Act
3. promote and contribute to an understanding and acceptance of the objectives of the Act
4. provide tailored information, educational and support programs in relation to promoting the objectives and an understanding of the Act
5. assess compliance with the Act by a defined entity, review Gender Equality Action Plans and related reports lodged by defined entities
6. collect and analyse information provided by defined entities under the Act
7. undertake research
8. review the effectiveness of the Act in achieving its objectives
9. report to the Minister on such matters in relation to the promotion of gender equality as the body thinks fit
10. do all things necessary or convenient to be done for or in connection with the performance of the functions of body outlined in paragraphs (1)-(9).

## SUPPORT FOR NON-COMPLIANT ORGANISATIONS

Recognising that no single measure alone is sufficient to create lasting change, any monitoring and compliance system should form part of a package to support defined entities to make progress against their Gender Equality Action Plans and comply with the legislation. In sections 3.3 and 5.2 we discuss the importance of education and support being provided to all organisations subject to the legislation. We know from our experience assisting public and non-public sector bodies that supporting entities to develop their own expertise is what gives rise to success.

Defined entities that do not meet compliance requirements should be offered additional support in the form of advice and assistance, with the aim of improving their performance against their Gender Equality Action Plans and ensuring compliance in the following reporting period. This proposal is consistent with the Workplace Gender Equality Act, which requires the Workplace Gender Equality Agency to offer advice and assistance to employers who fail to meet minimum standards in relation to gender equality indicators that may apply during the first reporting period.<sup>90</sup>

The Commission suggests that any independent body tasked with overseeing this legislation have the power to offer to provide advice and assistance to defined entities who are found to be non-compliant to assist them to meet their obligations under the legislation. This should include advising on the specific steps and activities an entity needs to implement to improve compliance under the legislation.

The Commission plays an important role supporting organisations (public and non-public) to comply with their positive duties under the Equal Opportunity Act, and would be well placed to fulfil this role.

### RECOMMENDATION 14

**That the exposure draft is amended to enable an independent body to offer to provide advice and assistance to a defined entity who has not complied with the Act to assist them to meet their obligations under the legislation.**

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90 *Workplace Gender Equality Act 2012 (Cth)* s 19E.

## THE COMMISSION'S EXPERIENCE AND FUNCTIONS

The Commission, as an independent statutory agency and Victoria's leading human rights expert, is well placed to take on a role overseeing and monitoring the implementation of a Gender Equality Act, including carrying out key oversight and compliance functions.

The Commission's status as an independent statutory agency would enable us to act as an impartial expert source of knowledge from which non-compliant agencies can seek independent advice, support and guidance on their obligations under the Act. This independence would support greater integrity and trust in the oversight functions and provide greater incentive to comply.

The Commission has a number of existing powers and functions relevant to the promotion of gender equality in the workplace, including to provide information and education in relation to human rights,<sup>91</sup> carry out research,<sup>92</sup> report publicly,<sup>93</sup> issue practice guidelines<sup>94</sup> and conduct reviews.<sup>95</sup> The Commission may also investigate a breach of the Equal Opportunity Act, including in relation to sex discrimination and sexual harassment in the workplace, under certain conditions.<sup>96</sup> For example, where the Commission has reasonable grounds to suspect serious contraventions of the Act relating to a class of persons that cannot reasonably be expected to be resolved through dispute resolution or by the Tribunal, we can conduct an investigation where it would advance the Act's objectives.<sup>97</sup>

The Commission's investigative and reporting functions serve as a strong base upon which more specific and systemic investigative functions could be built, should the Commission be appointed as the independent body to oversee the legislation. Such a proposal would maintain the Commission as Victoria's central independent agency for Victoria's equality and human rights laws, and would support the creation of a 'centre of excellence' on these laws. It would also reduce the risk of fragmentation and confusion around equality and human rights legal obligations and enable a holistic focus to removing systemic discrimination and improving equality for disadvantaged groups.

### RECOMMENDATION 15

**That the exposure draft is amended to recognise the Victorian Equal Opportunity and Human Rights Commission as the independent monitor of a Gender Equality Act.**

91 *Equal Opportunity Act 2010* (Vic) ss 155(1)(a), 156(1).

92 *Ibid* s 157.

93 *Ibid* s 158.

94 *Ibid* s 148.

95 *Ibid* s 151; *Charter of Human Rights and Responsibilities Act 2006* (Vic) s 41(c).

96 *Equal Opportunity Act 2010* (Vic) s 127.

97 *Ibid*.

# 8. Complementary legislative reforms

The discussion paper asks:

What other activities should the government undertake to support this legislation?  
(Question 2)

What do you think is best practice measures to support implementation of legislation that drives lasting social change? (Question 3)

To support and complement the gender equality legislation, the Victorian Government should ensure that there is strong complementary legislation to create an enabling environment for gender equality and support the objectives of the gender equality legislation and promote its purpose. This includes strengthening the Equal Opportunity Act to improve practical and legal redress for those who have been discriminated against, and removing barriers that lead to unequal participation in the workforce.

In addition, the legislation must be complemented by a broad investigative power to enable the in-depth examination of gender equality issues in particular workplaces.

As discussed in section 7 above, mechanisms currently exist under the Equal Opportunity Act for investigations and are used to support the Act's positive obligations to improve equality. This function could be utilised by the Commission to investigate and address gender equality issues in particular workplaces, driving organisational change and promoting the objectives of the gender equality legislation.

We note, however, that amendments to the Equal Opportunity Act in 2011 narrowed the circumstances in which the Commission can conduct investigations, by creating additional procedural requirements<sup>98</sup> and removing certain powers to compel the production of information or documents.<sup>99</sup>

In addition, the Equal Opportunity Act was enacted with a broad public inquiry function that enabled the Commission, with the Attorney-General's consent, to undertake public inquiries into serious matters of public interest concerning any matter relating to the operation of the Equal Opportunity Act.<sup>100</sup> This broader function, if reinstated, would enable the Commission to conduct public inquiries that address systemic causes of discrimination including those related to gender equality in the workplace, to promote the progressive realisation of equality.

The Commission's investigative and public inquiry functions were also complemented by enforcement mechanisms including the ability to seek enforceable undertakings and issue compliance notices.<sup>101</sup> Both were later repealed.

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98 The previous section 127 of the Act provided that the Commission could conduct an investigation into any matter that raised an issue that is serious in nature and that indicated a possible contravention of the Act and related to a class or group of persons. An investigation could be conducted if it would advance the objectives of the Act. The current provision requires that before an investigation is conducted, there should be an attempt to resolve the matter through dispute resolution or the Tribunal.

99 *Equal Opportunity Act 2010* (Vic), No 16 of 2010 s 132 (repealed 22 June 2011).

100 *Ibid* s 128.

101 *Ibid* ss 143-147.

When considering these previous functions, it is useful to have regard to similar enforcement provisions in the UK, as a comparable jurisdiction with positive equality duties under the *Equality Act 2010* (UK). While those positive duties are much broader, they are similarly designed to eliminate discrimination including within public entities. Under the Equality Act, the UK's Equality and Human Rights Commission can assess compliance with and enforce the general equality duty by issuing compliance notices. These notices are enforceable by application to a court of law for an order requiring compliance.<sup>102</sup> That Commission can also enter into an agreement with a public body whereby the body agrees to take certain steps to comply and the Commission agrees not to issue a notice.<sup>103</sup>

In order to complement and strengthen the gender equality legislation, we suggest that consideration should be given to reinstating the Commission's previous functions under the Equal Opportunity Act, in relation to the threshold requirements of the investigative function,<sup>104</sup> the conduct of public inquiries<sup>105</sup> and compliance powers.

Additional reforms that would support the gender equality legislation and promote lasting social change include recognition in section 6 of the Equal Opportunity Act of:

- a new protected attribute of 'family violence', noting that family violence exacerbates the effects of gender inequality and disproportionately affects women
- a broader definition of 'gender identity', to recognise non-binary identification
- a new protected attribute of 'intersex status', or an updated formulation of this attribute following discussion with intersex groups.

A further reform that would support the legislation is amending the Equal Opportunity Act to require duty holders to make reasonable adjustments for pregnant employees.

The Commission would welcome the opportunity to explore how the enhancement of the Equal Opportunity Act could support implementation of a Gender Equality Act.

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102 *Equality Act 2006* (UK) s 32.

103 *Ibid* s 23.

104 *Equal Opportunity Act 2010* (Vic), No 16 of 2010 s 132 (repealed 22 June 2011) s 127.

105 *Ibid* s 128.





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