Rights Resource Network SA

connecting change creators + law makers

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Office of the Hon Connie Bonaros MLC
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Dear the Hon Connie Bonaros MLC

Preliminary Comments on the *Gender Equality Bill 2020*

Thank you for the opportunity to provide comments in response to the draft *Gender Equality Bill 2020* (the Bill). In our view, this draft Bill marks a significant, positive step forward in promoting substantive gender equality for South Australians and we commend your efforts in developing this proposed legislation, and urge you to continue to consult broadly on its key features. On behalf of the Rights Resource Network SA - a social enterprise organisation connecting researchers, non-government organisations and community members with law makers in South Australia - we warmly invite you and your office to make use of our extensive Network to share information about the Bill and to encourage a range of relevant community organisations, experts and individuals with lived experience to share their views with you.

The below preliminary comments have been drafted primarily by Network Director Dr Sarah Moulds, in consultation with a range of Network members including the South Australian Council for Social Service (SACOSS), Embolden SA, Associate Professor Anne Hewitt (University of Adelaide) and Associate Professor Marinella Marmo (Flinders University). We look forward to supplementing these preliminary comments with more considered analysis and contributions as the draft Bill progresses.

Strong support for the objects of the Bill and its key features

We strongly support the introduction of the *Gender Equality Bill* as a significant step towards achieving gender equality within South Australian public entities and for people affected by their policies and services. The Bill requires defined entities in the SA public sector to pursue gender equality by developing and implementing a Gender Equality Action Plan and by implementing a system of Gender Equality Audits and Gender Impact Assessments to be overseen by a new office of the Commissioner for Gender Equality. The Bill also acknowledges the important role intersectional discrimination plays in gender inequality, and incorporates provisions designed to ensure that general equality action plans are developed in close consultation with employees and community members. The Bill also includes a set of 'workplace general equality indicators' that form the basis for assessing progress towards gender equality by the relevant entities and requires regular progress reports to be provided.

The Commissioner for Gender Equality is provided with the power to issue compliance notices to entities that have not undertaken gender impact assessments or general equality audits, or not prepared a general equality action plan, or not made reasonable and material progress towards

gender equality targets or gender equality indicators. This is supported by a Tribunal review process, and the power for the Commissioner to accept enforceable undertakings from a relevant entity. A review of the Act is also included. These are very positive, welcome features.

This legislation has some similarities to the *Gender Equality Act 2020* (Vic) passed in February of this year, and with the federal *Workplace Gender Equality Act 2012* (Cth) (the WGEA). However, it exists in a different legislative context than both of those two existing pieces of legislation. For example, unlike Victoria, South Australia has no Human Rights legislation and its anti-discrimination regime is woefully under-resourced when compared with interstate or federal counterparts. In many ways, this Bill addresses shortcomings previously identified with the Victorian legislation, such as those identified by the Australian Discrimination Law Experts Group, particularly when it comes to compliance and enforcement measures. However, there are aspects of the Bill that may require further careful consideration – particularly in so far as the mechanisms established interact with other local and national regimes. Some of these issues are set out below.

Coverage

Section 4 of the Bill provides the Minister with a discretion to either prescribe or exclude certain relevant entities from the scope of the Bill. This leaves it up to the Minister at the time to vary coverage and leaves it unclear which organisations are likely to be included. An important reform like this should have its scope defined in the legislation itself and should not be subject to possible narrowing where a later Minister varies the entities it covers by regulation.

Section 4 also refers to Universities which are already subject to the requirements for data collection and reporting in the WGEA. This would mean that SA universities will be required to report under both this law and the WGEA. This may be regarded as a positive thing, particularly in light of the serious incidence of sexual harassment and gender equality concerns among Universities in South Australia. However, it is important to note that there appear to be some differences between the gender equality indicators set out in the Bill and those set out in the WGEA which could give rise to compliance burden arguments.

We also note that volunteers, and those completing vocational placements and work experience are excluded from the scope of the definition of 'workforce' and therefore are not included in most of the workplace gender equality indicators in the proposed legislation. We recognise this exclusion may be an attempt to limit the compliance burden of the legislation. However, we are concerned this limitation potentially affects the capacity of the legislation to achieve its objects to 'promote, encourage and facilitate the achievement of gender equality' and 'enhance economic and social participation by persons of different genders'. Practical experience in the workplace, whether completed as a vocational placement, work experience or as a volunteer, is increasingly being recognised as a critical pathway into employment. By failing to include those gaining such experience within many of the proposed gender equality indicators, the capacity of experience opportunities to be inequitably distributed to men remains a concern.

Extending the coverage of the legislation to volunteers and those completing work experience and vocational placements also has a number of broader benefits. First, it limits the chances that labels such as 'volunteer' and 'work experience' could constitute 'disguised employment relationships', a concern recently noted by the ILO's Committee of Experts on the Application of Conventions and Recommendations.[1] If this occurred in the context of this Bill, it could significantly undermine its utility. Secondly, it is consistent with the argument that equality at work should be seen as an objective that should apply to *all* forms of work, whether paid or unpaid, and whether or not undertaken as part of education or training. In addition, given the wide range of areas in which volunteers and other unpaid workers contribute in substantial ways to the SA public sector, it would be unfortunate for them to be excluded from coverage in this scheme. It would not be unique for such groups to be covered. It is noted that *Equal Opportunity Act 2010* (Vic) covers volunteers in relation to sexual harassment.

It is further noted that the definition of 'Employee' states that it does not include a contractor or subcontractor. Given the trend towards increased outsourcing, thought should be given to including contractors and sub-contractors within the scope of 'employee' and 'workforce'. It would then require that the employer ensure, through contractual stipulations/obligations, that the contractor complies with the gender equality indicators and reporting requirements.

In addition, while the Bill is entitled the 'Gender Equality Bill' it does not define 'gender' or acknowledge that sex and gender are no longer binary categories, as recognised by the High Court in *New South Wales Registrar of Births, Deaths and Marriages v Norrie* [2014] HCA 11 (*Norrie's case*) and discussed at length in the work of the South Australian Law Reform Institute in its *Audit Report: Discrimination on the Grounds of Sexual Orientation, Gender, Gender Identity and Intersex Status in South Australian Legislation* (September 2015). The Bill should be amended to encourage relevant entities to report upon wider categories of both sex (e.g. intersex, uncategorised) and gender (e.g. transgender, gender-diverse, non-binary) if data is available.

Content Required in Gender Equality Action Plans

Section 19 of the Bill sets out the process and requirements for relevant entities preparing a Gender Equality Action Plan and includes the potential for additional requirements to be included by regulation. While the requirement to develop Action Plans is warmly welcomed, the broad scope of section 19, and its almost complete deference to both the relevant entities own planning and targets provided in any regulations, is in direct contrast to the clear indicators prescribed by section 23 and requirements to develop gender equality targets in section 24. While section 19 contains some reference to the entity's own gender equality targets, it is not clear why section 19 does not require Gender Equality Action Plans to include explicit references to gender equality indicators in section 23, targets prescribed in section 24 or to the objects and principles set out in section 2. While this cross-referencing detail could be provided by regulations or guidelines developed after the

[1] ILO, *Promoting Employment and Decent Work in a Changing Landscape* (Report of the Committee of Experts on the Application of Conventions and Recommendations (articles 19, 22 and 35 of the Constitution), Report III (Part B), International Labour Conference, 109th session, International Labour Office 2020) 92.

enactment of the Bill, amending section 19 to clearly reference sections 23 and 24 would add clarity and precision to the Action Plan regime, and improve the effectiveness of the compliance measures contained in the Bill.

Positive duties

Section 14 of the Bill includes a positive duty to '*consider, promote and take necessary and proportionate action towards gender equality'* in the development of policies and programs and in service delivery. While this is a major positive step forward for SA, there is no corresponding requirement to incorporate the details of these positive duties within the Gender Equality Action Plan in section 19, nor any explicit reference to positive duties in section 27, leaving it unclear how this positive duty will be incorporated into the compliance and enforcement regime in Part 6. Given the prohibition of litigation with respect to this positive duty provided by section 16, it will be important to clarify precisely what the consequences are for failing to comply with section 14, and how the test of '*necessary and proportionate action'* will be developed and applied in practice.

It is also noted that this inclusion of a positive duty in the Bill, while welcome, exists in a very different context to the Victorian legislation which can draw upon corresponding duties under section 38 of the *Charter of Human Rights and Responsibilities Act 2006* (Vic) ('the Charter') to help unpack the precise legal meaning of positive duties for public entities. This includes the notion of 'reasonable steps' or 'reasonable and proportionate action' which is a different test to that contained in the current Bill, making it unclear precisely what types of actions would be required under the proposed provision.

Collection of data and gender equality audits

Section 18 sets out a requirement for relevant entities to undertake gender equality audits addressing the general equality indicators prescribed by section 23 and requirements to develop gender equality targets in section 24. This is a welcome inclusion.

This section of the Bill could also be improved by allowing for the setting of standards and enabling evaluation of progress towards equality based on previous audit reports submitted. The model in the WGEA could be used as starting point.[2]

Collection of data at a more detailed level where possible would provide clearer information on progress and allow for better evaluation of progress towards gender equality. This could involve providing gender-disaggregated data on applications for and selection for employment and promotion at multiple workforce levels, as well as detailed information on pay equity at multiple workforce levels, and bonuses. Ideally, data collection could include data of the sort that organisations in the UK are now required to disclose annually in gender pay gap reporting, such as: mean gender pay gap in hourly pay; median gender pay gap in hourly pay; mean bonus gender pay gap; median bonus gender pay gap; proportion of males and females receiving a bonus payment; proportion of males and females in each pay quartile.

[2] See e.g. *Workplace Gender Equality Act 2012* (Cth) ss 13, 19, 19C. *Workplace Gender Equality (Matters in relation to Gender Equality Indicators) Instrument 2013* (No. 1) (Cth) *Workplace Gender Equality (Minimum Standards) Instrument 2014* (Cth).

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Compliance and Monitoring

The compliance and monitoring regime set out in Part 6 of the Bill is welcomed as a positive step forward for SA, and will be vital to the effectiveness of the Bill in achieving its stated aims. With this in mind, regard should be had to ensuring as much detail and precision is included in Part 6 as possible, particularly when it comes to the standards to which relevant entities will be held, and the circumstances in which the Commissioner is able to invoke his or her powers to issue compliance notices. For example, section 27(1)(d) currently provides that the Commissioner may issue a compliance notice to a relevant entity if the Commissioner reasonably believes that the entity, without reasonable excuse, has failed to comply with this Act by (d) not making *reasonable and material progress* in relation to the gender equality targets in respect of the workplace gender equality indicators (emphasis added). Further information is needed (ideally in the Bill itself or otherwise in Guidelines issued by the Commissioner and drafted before the Bill is passed) as to what some of the key tests in this provision mean in practice. For example, the standard of 'not making reasonable and material progress' needs to be explained. It may be that the description of 'reasonable and material progress' set out in Part 4 s24 of the Bill is to be used as the framework for the test under section 27. If that is the case, this should be made clear in Part 6 of the Bill to avoid any potential confusion. Alternatively, perhaps other existing regimes in Victoria and under the WGEA could assist in developing further detailed guidance as to what this test might entail. Cross-references back to the objects and principles contained in section 2 of the Bill within section 27 may also be one way of assisting in the interpretation of the tests in this provision.

In providing these preliminary comments we wish to again emphasis our general support for the objects and key features of this Bill and reiterate our offer to help facilitate further community consultation on this important reform. For example, Associate Professor Anne Hewitt, Associate Professor Marinella Marmo and Dr Sarah Moulds would be very pleased to arrange a time to discuss the Bill (and in particular its potential implications for the university sector) with you or your staff. Please contact Sarah on 0401132544 or sarah.moulds@unisa.edu.au to arrange a time. Alternatively, the Network would be pleased to host an online workshop with interested members to provide further comments on the Bill.

Yours sincerely

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