

**ANTI-ESSENTIALISM AND INTERSECTIONALITY:  
AN ANALYSIS OF THE *WORKPLACE GENDER EQUALITY  
ACT 2012 (CTH)* AND THE REVIEW OF THE *WORKPLACE  
GENDER EQUALITY ACT 2012 (CTH)***

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*Anti-essentialism demands that sex discrimination is viewed as multifaceted and influenced by additional systems of oppression, including ethnicity, sexuality, and social class. ‘Multiple jeopardy’ assists to reveal limitations of laws that ostensibly address inequalities for women, particularly laws adopting a single axis approach to women’s workplace inequality. The role of affirmative action legislation should be to redress historical discrimination experienced by marginalised groups. However, frameworks of anti-essentialism and multiple jeopardy demonstrate that the Workplace Gender Equality Act 2012 (Cth) (‘WGEA’) and Recommendation 6.1 of the WGEA Review Report: Review of the Workplace Gender Equality Act 2012 (‘WGEA Report’) lack proper consideration of the complex intersectional inequalities experienced by diverse women in Australian workplaces. This further entrenches power imbalances by masking, rather than addressing, intersectional inequality. Prior academic commentary on the WGEA is scarce and has not analysed its lack of consideration for diverse women’s experiences of workplace inequality. Analysis of Recommendation 6.1 is pertinent given the current federal government’s commitment to advancing gender equality as a national priority.*

## I INTRODUCTION

This article examines how anti-essentialism and intersectionality might be harnessed to reveal that a consideration of diverse women – their voices and their experiences of workplace inequality – is missing from certain provisions of the

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*Workplace Gender Equality Act 2012* (Cth) ('WGEA')<sup>1</sup> and Recommendation 6.1 of the *WGEA Review Report: Review of the Workplace Gender Equality Act 2012* ('WGEA Report').<sup>2</sup> Recommendation 6.1 of the *WGEA Report* is that the Workplace Gender Equality Agency ('Agency') '[u]ndertake qualitative research with relevant stakeholders, led by [the Agency], on the best way to collect more diversity data in addition to gender data to enable voluntary reporting, including on Aboriginal and Torres Strait Islander background, cultural and linguistic diversity, and disability'.<sup>3</sup> The *WGEA Report* was released in March 2022 by the then Liberal-National Coalition Government. However, the current Labor Government has made clear that it is 'committed to advancing women's economic equality'.<sup>4</sup> It has also acknowledged the significant and multifaceted barriers to workforce participation and equality experienced by women in Australia, particularly for women experiencing intersectional disadvantage.<sup>5</sup> It has announced that it is developing a national strategy to achieve gender equality,<sup>6</sup> establishing the Women's Economic Equality Taskforce,<sup>7</sup> which has been tasked with '[d]riving women's economic equality as an economic imperative'.<sup>8</sup> In March 2023, the Labor Government enacted legislation which implements some of the recommendations of the *WGEA Report*.<sup>9</sup> However these changes did not address Recommendation 6.1, despite a clear indication that the issue of diversity and the *WGEA* needs to be considered.<sup>10</sup> Issues relating to diverse women and intersectional experiences of inequality in the workplace will need to be explored in deciding whether to implement Recommendation 6.1.

As this article demonstrates, an anti-essentialist and intersectional approach to the *WGEA* and Recommendation 6.1 reveals a lack of consideration for diverse women's unique and complex experiences of inequality in Australian workplaces. The *WGEA* has been framed in a manner which essentialises women's experiences of inequality in the workplace and this essentialist approach is a significant impediment

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1 *Workplace Gender Equality Act 2012* (Cth) ('WGEA').

2 Department of the Prime Minister and Cabinet, *WGEA Review Report: Review of the Workplace Gender Equality Act 2012, December 2021* (Report, 4 March 2022) ('WGEA Report').

3 *Ibid* 15.

4 'Women's Economic Equality', *Department of the Prime Minister and Cabinet* (Web Page) <<https://www.pmc.gov.au/office-women/womens-economic-equality>>.

5 *Ibid*.

6 'National Strategy to Achieve Gender Equality', *Department of the Prime Minister and Cabinet* (Web Page) <<https://www.pmc.gov.au/office-women/national-strategy-achieve-gender-equality>>.

7 'Women's Economic Equality Taskforce', *Department of the Prime Minister and Cabinet* (Web Page) <<https://www.pmc.gov.au/office-women/womens-economic-equality/womens-economic-equality-taskforce>>.

8 'Women's Economic Equality Taskforce Terms of Reference', *Department of the Prime Minister and Cabinet* (Web Page, 25 January 2023) <<https://www.pmc.gov.au/publications/womens-economic-equality-taskforce-terms-reference>>.

9 See *Workplace Gender Equality Amendment (Closing the Gender Pay Gap) Act 2023* (Cth) ('Closing the Gender Pay Gap Act'), which amends the *WGEA*, and implements Recommendations 2, 3, 5 and 9 of the *WGEA Report*. See also Explanatory Memorandum, *Workplace Gender Equality Amendment (Closing the Gender Pay Gap) Bill 2023* (Cth) 4.

10 Commonwealth, *Parliamentary Debates*, Senate, 8 February 2023, 212–13 (Katy Gallagher, Minister for Women).

in understanding how inequality manifests for diverse women. Recommendation 6.1 lacks direction for meaningful legislative reform. An intersectional analysis of Recommendation 6.1 demonstrates a failure to understand the multifaceted and interconnected forces of oppression which perpetuate inequality for diverse women in Australian workplaces.

The scope of this article is to examine certain provisions of the *WGEA*, these being the Objects, Gender Equality Indicators ('GEIs') and Gender Equality Standards ('Standards').<sup>11</sup> The essentialist framing of the Objects has a substantial impact on both the GEIs and Standards, both of which influence the nature of the data collected, analysed, and published by the Agency. The lack of diversity data collected, analysed, and published by the Agency is perhaps the most detrimental aspect of the regulatory scheme established under the *WGEA* because it means that diverse women's unique experiences of workplace inequality remain unknown to the Agency. While the *WGEA Report* contained 10 recommendations for legislative reform,<sup>12</sup> this article focuses on Recommendation 6.1. This is because Recommendation 6.1 is the only recommendation in the *WGEA Report* which discusses diversity.

For the purposes of this article, the term 'diverse' is defined by what diversity is *not*. Accordingly, 'diverse' women in this article are women who are not of Anglo-ethnic origin, middle-class, heterosexual or cisgendered, and able-bodied. References to 'diverse' women in this article are not intended to refer to women who commonly experience a higher level of privilege above other women, typically by reason of their Anglo-ethnic origin, middle-class status, heterosexual or cisgendered identity, and lack of disability.<sup>13</sup> This definition in itself is exclusionary as it defines diverse women by who they are *not*. However, the benefit of adopting this definition is that the experiences of a variety of women who may identify with some diversity characteristics but not others, can be explored in this article.<sup>14</sup> This definition is supported by other intersectional analyses because it adopts a

11 *WGEA* (n 1) ss 2A, 3(1); *Workplace Gender Equality (Gender Equality Standards) Instrument 2023* (Cth) cl 6 ('*Gender Equality Standards Instrument*').

12 *WGEA Report* (n 2) 12–16.

13 See, eg, Kim A Case, 'Discovering the Privilege of Whiteness: White Women's Reflections on Anti-racist Identity and Ally Behavior' (2012) 68(1) *Journal of Social Issues* 78 <<https://doi.org/10.1111/1/j.1540-4560.2011.01737.x>>; Kim A Case, Rachel Hensley and Amber Anderson, 'Reflecting on Heterosexual and Male Privilege: Interventions to Raise Awareness' (2014) 70(4) *Journal of Social Issues* 722 <<https://doi.org/10.1111/josi.12088>>; Claire Maxwell and Peter Aggleton, 'The Bubble of Privilege: Young, Privately Educated Women Talk about Social Class' (2010) 31(1) *British Journal of Sociology of Education* 3 <<https://doi.org/10.1080/01425690903385329>>.

14 The authors acknowledge that other terms are used to discuss women experiencing intersectional disadvantage. For example, Diversity Council Australia adopts the term culturally and racially marginalised ('CARM') women 'in recognition of the significance of race and racism in the women's lives': see 'A Note on Language: Culturally and Racially Marginalised Women at Work', *Diversity Council Australia* (Web Page, 2023) <<https://www.dca.org.au/note-language-culturally-and-racially-marginalised-women-work>>. However, this definition does not capture intersectional disadvantage based on factors such as age and socio-economic status.

‘multiple models’ approach to intersectional factors of disadvantage and accounts for key factors such as race, age, class, sexuality, and disability.<sup>15</sup>

This article is divided into three parts. Part II provides the context and history to the *WGEA* as affirmative action legislation. It outlines the relevant provisions of the *WGEA* and the context to the *WGEA Report*. Part II also discusses prior analysis of the *WGEA* and key areas of focus in the academic literature. This review finds that there is a lack of analysis relating to the advancement of diverse women in Australian workplaces through the *WGEA*. Part III establishes the anti-essentialist and intersectional theoretical framework upon which this article is based. It outlines the key aspects of intersectionality theory which feature in the analysis, including Kimberlé Crenshaw’s ‘single categorical axis’ framework, Deborah King’s ‘multiple jeopardy’ and Patricia Hill Collins’ ‘matrix of domination’. It highlights prior intersectional analyses that have revealed complex instances of discrimination and inequality in the workplace, and outlines the methods used to analyse the submissions to the *WGEA Report*.

Part IV applies the anti-essentialist and intersectional framework to the *WGEA* and Recommendation 6.1. It first analyses the Objects, GEIs and Standards provisions of the *WGEA* and reveals the essentialist approach of these provisions to gender inequality. It highlights how the essentialist approach of these provisions impacts the Agency’s data and means that diverse women’s voices and experiences are not addressed. The second section of Part IV analyses Recommendation 6.1 of the *WGEA Report*, interrogating the arguments opposing the collection of additional diversity data raised in the *WGEA Report*, and demonstrating that these arguments lack merit.

Anti-essentialist and intersectional analyses are particularly useful in revealing the limitations or shortcomings of legislation that fails to consider diverse women, because these analyses interrogate any singular assumptions of identity upon which the legislation is based.<sup>16</sup> This article contributes to the literature on the *WGEA* because, seemingly for the first time, it undertakes an anti-essentialist and intersectional analysis of the *WGEA*. Furthermore, this article demonstrates how proposals for reform must place value in understanding the complex inequalities faced by diverse women in employment in Australia. If proposals for reform do not value understanding intersectional inequality, diverse women’s experiences of gender inequality in Australian workplaces will continue to be overlooked and remain unaddressed.

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15 Jeff Hearn and Jonna Louvrier, ‘Theories of Difference, Diversity, and Intersectionality: What Do They Bring to Diversity Management?’ in Regine Bendl et al (eds), *The Oxford Handbook of Diversity in Organizations* (Oxford University Press, 2015) 62, 66 <<https://doi.org/10.1093/oxfordhb/9780199679805.013.28>>; Leslie McCall, ‘The Complexity of Intersectionality’ (2005) 30(3) *Signs* 1771 <<https://doi.org/10.1086/426800>>.

16 Rosemary Hunter, ‘Deconstructing the Subjects of Feminism: The Essentialism Debate in Feminist Theory and Practice’ (1996) 6(1) *Australian Feminist Law Journal* 135, 142 <<https://doi.org/10.1080/13200968.1996.11077198>>.

## II LEGISLATIVE HISTORY OF THE *WGEA* AND CONTEXT TO THE *WGEA REPORT*

### A The Difference between Anti-discrimination and Affirmative Action Legislation

In the context of Australian workplaces, the federal and state anti-discrimination legislative frameworks<sup>17</sup> impose legal obligations upon employers to not discriminate against individuals on the basis of certain ‘protected attributes’<sup>18</sup> and associated characteristics.<sup>19</sup> These legal obligations are generally proscriptive obligations, enforceable in civil proceedings, and prohibit employers from engaging in discriminatory behaviour.<sup>20</sup> In contrast, affirmative action legislation imposes positive obligations upon employers, not enforceable in civil proceedings, and

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- 17 At the federal level, this is primarily comprised of the *Racial Discrimination Act 1975* (Cth) (*‘Racial Discrimination Act’*); *Sex Discrimination Act 1984* (Cth) (*‘Sex Discrimination Act’*); *Disability Discrimination Act 1992* (Cth) (*‘Disability Discrimination Act’*); *Age Discrimination Act 2004* (Cth) (*‘Age Discrimination Act’*). See also the General Protections provisions of the *Fair Work Act 2009* (Cth) pt 3-1, s 351; *Australian Human Rights Commission Act 1986* (Cth) pt IIB. At the state level this includes the *Discrimination Act 1991* (ACT) (*‘Discrimination Act (ACT)’*); *Anti-Discrimination Act 1977* (NSW) (*‘Anti-Discrimination Act (NSW)’*); *Anti-Discrimination Act 1992* (NT) (*‘Anti-Discrimination Act (NT)’*); *Anti-Discrimination Act 1991* (Qld) (*‘Anti-Discrimination Act (Qld)’*); *Equal Opportunity Act 1984* (SA) (*‘Equal Opportunity Act (SA)’*); *Anti-Discrimination Act 1998* (Tas) (*‘Anti-Discrimination Act (Tas)’*); *Equal Opportunity Act 2010* (Vic) (*‘Equal Opportunity Act (Vic)’*); *Racial and Religious Tolerance Act 2001* (Vic) (*‘Racial and Religious Tolerance Act (Vic)’*).
- 18 The protected attributes include the race, colour, descent or national or ethnic origin of a person: *Racial Discrimination Act* (n 17) s 9(1); the sex, sexual orientation, gender identity, intersex status, marital or relationship status, pregnancy or potential pregnancy, breastfeeding and family responsibilities of a person: *Sex Discrimination Act* (n 17) ss 5, 5A, 5B, 5C, 6, 7, 7AA, 7A; the disability of a person, extending to a person who has an associate with a disability and a person with a disability who has a carer, assistant, assistance animal or disability aid: *Disability Discrimination Act* (n 17) ss 5, 6, 7, 8; the age of a person: *Age Discrimination Act* (n 17) ss 14, 15. Each of the Commonwealth, state and territory statutes specifically prohibit discrimination on the ground of these protected attributes in work or employment: see, eg, *Racial Discrimination Act* (n 17) s 15; *Sex Discrimination Act* (n 17) s 14; *Disability Discrimination Act* (n 17) s 15; *Age Discrimination Act* (n 17) s 18; *Discrimination Act (ACT)* (n 17) pt 3 div 3.1; *Anti-Discrimination Act (NSW)* (n 17) pt 2 div 2, pt 3 div 2, pt 3A div 2, pt 4 div 2, pt 4A div 2, pt 4B div 2, pt 4C div 2, pt 4G div 2; *Anti-Discrimination Act (NT)* (n 17) pt 4 div 3; *Anti-Discrimination Act (Qld)* (n 17) pt 4 div 2; *Equal Opportunity Act (SA)* (n 17) pt 3 div 2, pt 4 div 2, pt 5 div 2, pt 5A div 2, pt 5B div 2; *Anti-Discrimination Act (Tas)* (n 17) s 22(1)(a); *Equal Opportunity Act (Vic)* (n 17) pt 4 divs 1–2.
- 19 Dominique Allen, Neil Rees and Simon Rice, *Australian Anti-discrimination and Equal Opportunity Law* (Federation Press, 3<sup>rd</sup> ed, 2018) 46–7, 166. This has been referred to as the ‘characteristics extension’: at 47. For an application of the characteristics extension, see *Boehringer Ingelheim Pty Ltd v Reddrop* (1984) 2 NSWLR 13, 18, 21 (Mahoney JA). The ‘characteristics extension’ has been included in the federal anti-discrimination legislative framework to ensure that one cannot elude the legislation by discriminating on the basis of certain characteristics which are ‘proxies’ to the protected attributes covered by the legislation: *Purvis v New South Wales* (2003) 217 CLR 92, 134 (McHugh and Kirby JJ).
- 20 Allen, Rees and Rice (n 19) 166; Andrew Stewart, *Stewart’s Guide to Employment Law* (Federation Press, 7<sup>th</sup> ed, 2021) 96. See again the Commonwealth, state and territory statutes which explicitly prohibit discrimination on the ground of these protected attributes in work or employment: see n 18. Notably, the federal disability anti-discrimination framework imposes positive obligations on employers to make ‘reasonable adjustments’: *Disability Discrimination Act* (n 17) ss 5, 6. As a result of amendments to the *Sex Discrimination Act* (n 17) introduced by the *Anti-Discrimination and Human Rights Legislation Amendment (Respect at Work) Act 2022* (Cth) (*‘Respect at Work Act’*) in December 2022, the *Sex*

usually to promote equal employment opportunities for a specific, identified group of employees who have historically experienced discrimination.<sup>21</sup> The imposition of positive obligations upon employers has been perceived as the logical next step beyond anti-discrimination statutes.<sup>22</sup> Affirmative action laws typically take two forms: (1) they may require employers, by way of mandatory quotas, to employ a certain percentage or proportion of their employees from target groups,<sup>23</sup> and/or (2) employers may be statutorily required to develop policies and procedures in their workplaces which identify and eliminate discrimination and barriers to advancement for target groups.<sup>24</sup> The *WGEA* is properly defined as affirmative action legislation, and takes the latter form.<sup>25</sup> Rather than imposing mandatory quota obligations upon employers, the *WGEA* is intended to assist employers to promote and improve gender equality in their workplaces through developing benchmarks and guidelines.<sup>26</sup>

## B Legislative History of the *WGEA*

### 1 *Affirmative Action (Equal Employment Opportunity for Women) Act 1986 (Cth)*

The *WGEA* began as the *Affirmative Action (Equal Employment Opportunity for Women) Act* ('*AA Act*').<sup>27</sup> The *AA Act* applied to 'relevant employers' ('employers') who were either higher education institutions or persons, bodies or associations

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*Discrimination Act* now imposes positive duties on employers and persons conducting businesses or undertakings to take reasonable and proportionate measures to eliminate sexual harassment: at s 47C.

21 Allen, Rees and Rice (n 19) 166–7; Stewart (n 20) 96.

22 Sandra Fredman, *Discrimination Law* (Oxford University Press, 3<sup>rd</sup> ed, 2022) 465–92 <<https://doi.org/10.1093/oso/9780198854081.001.0001>>; Colm O'Cinneide, 'Positive Duties and Gender Equality' (2005) 8(1) *International Journal of Discrimination and the Law* 91 <<https://doi.org/10.1177/135822910500800206>>.

23 This type of affirmative action legislation which mandates quotas does not exist in Australia but does exist in other parts of the world, particularly countries with civil law legal systems. See, for example in Germany: *Zweites Führungspositionen-Gesetz* [Second Management Positions Act] (Germany) 11 August 2021, BGBl I, 2021, 3311; in France: *Loi n° 2011-103 du 27 janvier 2011* [Law No 2011-103 of 27 January 2011] (France) JO, 28 January 2011; in Norway: *Public Limited Liability Companies Act* (Norway), Act of 13 June 1997, No 45 § 6-11a; in Spain: *Ley Orgánica 3/2007 de 22 de marzo, para la igualdad efectiva de mujeres y hombres* [Organic Law 3/2007 of March 22 for the Effective Equality between Women and Men] (Spain) 22 March 2007, arts 37.2, 38.2, 54.

24 Allen, Rees and Rice (n 19) 166–7; Stewart (n 20) 96.

25 Stewart (n 20) 96.

26 *WGEA* (n 1) ss 10(1)(a)–(b).

27 *Affirmative Action (Equal Employment Opportunity for Women) Act 1986 (Cth)* ('*AA Act*'). The *AA Act* was part of the same package as the *Sex Discrimination Act* (n 17): Beth Gaze, 'Workplace Gender Equality Act 2012: Setting Standards through Delegated Legislation' (2013) 20(3) *Australian Journal of Administrative Law* 113, 113 ('Setting Standards'); Beth Gaze, 'Gender Equality Reporting and the Future of Equal Opportunity at Work' (2014) 66(10) *Governance Directions* 621, 622 ('Gender Equality Reporting'). Its enactment occurred following a 12-month Affirmative Action Pilot Program involving 28 large private sector companies and three higher education institutions, overseen by a representative Working Party on Affirmative Action Legislation whose role was to advise the government as to the legislation form and content: Commonwealth, *Parliamentary Debates*, Senate, 17 April 1986, 1918–19 (Arthur Thomas Gietzelt).

(irrespective of incorporated status) which employed 100 or more employees in Australia.<sup>28</sup> The *AA Act* imposed an obligation on employers to develop and implement ‘affirmative action programs’.<sup>29</sup> The affirmative action programs were designed to ensure that appropriate action was taken by employers to eliminate discrimination against women in employment and that measures were taken to promote equal opportunity.<sup>30</sup> Employers were required to produce a report to a statutorily established Affirmative Action Agency regarding the development and implementation of their affirmative action programs.<sup>31</sup> Failure to produce the report could result in the Affirmative Action Agency naming the employer in a report to the Minister<sup>32</sup> and/or the employer not being eligible to compete for government contracts.<sup>33</sup>

## 2 Equal Opportunity for Women in the Workplace Act 1999 (Cth)

In 1999,<sup>34</sup> the *AA Act* was amended and renamed the *Equal Opportunity for Women in the Workplace Act* (‘*EOW Act*’).<sup>35</sup> A key objective was to make the *EOW Act* more ‘business friendly’.<sup>36</sup> Employers under the *EOW Act* were required to

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- 28 *AA Act* (n 27) s 3(1). In late 2022, the definition of ‘relevant employer’ was expanded to include Commonwealth employers of 100 or more employees. This amendment was introduced as part of the *Respect at Work Act* (n 20) sch 6. See *WGEA* (n 1) ss 4(1)(c)–(d). For other legislation covering affirmative action in the public sector, see, eg, *Public Service Act 1999* (Cth) s 18; *Government Sector Employment Act 2013* (NSW) s 63; *Government Sector Employment (General) Rules 2014* (NSW) rr 26–7. A detailed analysis of particular legislation relating to affirmative action legislation in the public sector is beyond the scope of this article. However, for further discussion of affirmative action in the public sector with respect to the RecruitAbility Scheme, see Damian Mellifont, ‘Soft Affirmative Action Lacking Traction? An Early Qualitative Exploration of the RecruitAbility Scheme Performance within the Australian Public Service’ (2018) 27(1) *Australian Journal of Career Development* 20 <<https://doi.org/10.1177/1038416217745070>>. See also Victor Sojo et al, *What Works, What’s Fair? Using Systematic Reviews to Build the Evidence Base on Strategies to Increase Gender Equality in the Public Sector* (Report, 2022) <<https://doi.org/10.6084/m9.figshare.19243536>>.
- 29 *AA Act* (n 27) s 6. See also section 8 which listed several actions that the employer was required to take when developing and implementing their affirmative action program.
- 30 *Ibid* s 3(1).
- 31 *Ibid* ss 8A(1), 13, 14.
- 32 *Ibid* ss 12, 19.
- 33 This compliance mechanism was a later introduction to the legislation in an attempt to further incentivise compliance. See *Affirmative Action (Equal Employment Opportunity for Women) Amendment Act 1992* (Cth).
- 34 The amendment was titled the *Equal Opportunity for Women in the Workplace Amendment Act 1999* (Cth).
- 35 *Equal Opportunity for Women in the Workplace Act 1999* (Cth) (‘*EOW Act*’). An independent committee reviewed the performance of the *AA Act* and concluded that while the legislation was fulfilling a valuable role and producing significant advancements for women, and desirable outcomes for businesses, amendments could ensure that the legislation became more effective and efficient: Commonwealth, *Parliamentary Debates*, House of Representatives, 22 September 1999, 10143 (Peter Reith, Minister for Employment, Workplace Relations and Small Business); Andrew Stewart et al, *Creighton and Stewart’s Labour Law* (Federation Press, 6<sup>th</sup> ed, 2016) 231. The report was entitled: Department of Workplace Relations and Small Business, *Unfinished Business: Equity for Women in Australian Workplaces, Final Report of the Regulatory Review of the Affirmative Action (Equal Employment Opportunity for Women) Act 1986* (Report, June 1998).
- 36 Commonwealth, *Parliamentary Debates*, 22 September 1999, 10143 (Peter Reith, Minister for Employment Workplace Relations and Small Business). See also Carol Andrade, ‘Women, Work and Unfinished Business: The *Equal Opportunity for Women in the Workplace Act 1999* (Cth)’ (2000) 13(2) *Australian Journal of Labour Law* 171, 182; Stewart et al (n 35) 231.

develop and implement ‘equal opportunity for women in the workplace programs’<sup>37</sup> and to complete a workplace profile regarding the composition of their workforce.<sup>38</sup> The workplace profiles and an analysis by the employer of the actions they had taken to address equal opportunity for women in their workplace were documented by employers in a public report lodged with the renamed Equal Opportunity for Women in the Workplace Agency.<sup>39</sup> Similarly to the *AA Act*, the Equal Opportunity for Women in the Workplace Agency could name non-compliant employers in a report to the Minister.<sup>40</sup>

### 3 *WGEA*

The *EOW Act* was reviewed in 2010<sup>41</sup> and amended to the *WGEA* in 2012.<sup>42</sup> The *WGEA* retained the essential framework of the *AA Act* and *EOW Act*. Like its predecessors, the *WGEA* applies to higher education institutions and private sector employers with 100 or more employees in Australia.<sup>43</sup> In late 2022, the coverage of the *WGEA* was expanded to include Commonwealth employers of 100 or more employees.<sup>44</sup> The *WGEA* also requires these employers to prepare and lodge public reports with the renamed Workplace Gender Equality Agency.<sup>45</sup> The consequences for non-compliance with the legislation also remain largely the same, aside from the Agency now having the power to name non-compliant

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37 *EOW Act* (n 35) s 6(1).

38 *Ibid* ss 3(1), 8(2).

39 *Ibid* ss 13, 13A(1).

40 *Ibid* s 19(1). While not explicitly legislated, it was also government policy that employers who failed to comply with their reporting obligations may become ineligible to compete for government contracts and receive certain industry assistance: Andrades (n 36) 182.

41 This review was completed by the Office for Women in the Department of Families, Housing, Community Services and Indigenous Affairs: Office for Women, Department of Families, Housing, Community Services and Indigenous Affairs, *Review of the Equal Opportunity for Women in the Workplace Act 1999 Consultation Report* (Report, January 2010). This review found that since the amendment to the *EOW Act* in 1999, there had been various economic, social and legislative changes which made it necessary for the legislation to be amended to reflect the contemporary challenges that accompanied women’s equal opportunity in Australian workplaces. See also Commonwealth, *Parliamentary Debates*, House of Representatives, 1 March 2012, 2440 (Julie Collins).

42 This amendment occurred through the enactment of the *Equal Opportunity for Women in the Workplace Amendment Act 2012* (Cth).

43 *WGEA* (n 1) s 4(1). The definition of ‘relevant employer’ was substantially retained from the earlier legislation in that a relevant employer is either (a) a registered higher education provider that is an employer; or a natural person, or a body or association (whether incorporated or not), being the employer of 100 or more employees in Australia: at s 4(1). The definition was slightly different in the sense that higher education providers need to be ‘registered higher education providers’. A ‘registered higher education provider’ refers to a person or body that is a registered higher education provider for the purposes of the *Tertiary Education Quality and Standards Agency Act 2011* (Cth): at s 3(1) (definition of ‘registered higher education provider’). In December 2022 the *WGEA* was amended to require Commonwealth employers to report to the Agency, and the Commonwealth Government will start mandatory reporting to WGEA from 2022–23: at ss 3, 4(1)(c)–(d); ‘Scope of the Workplace Gender Equality Act’, *Department of the Prime Minister and Cabinet* (Web Page, December 2021) <<https://www.pmc.gov.au/publications/wgea-review-report/scope-workplace-gender-equality-act>>.

44 This amendment was introduced as part of the *Respect at Work Act* (n 20) sch 6. See *WGEA* (n 1) ss 4(1)(c)–(d).

45 *WGEA* (n 1) ss 8A, 13(1).

employers on the Agency's website in addition to in a report to the Minister.<sup>46</sup> However, the substantial reframing of the *WGEA*'s Objects, combined with the introduction of the GEIs and Standards, represents a significant departure from the *EOW Act* and *AA Act*.<sup>47</sup> The introduction of the GEIs and Standards highlight a shift from reporting on processes in the *EOW Act* and *AA Act* to reporting on outcomes in the *WGEA*.<sup>48</sup>

The *WGEA* has five Objects, being:

- (a) to promote and improve gender equality (including equal remuneration between women and men) in employment and in the workplace; and
- (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.<sup>49</sup>

A key amendment which reflects the shift from processes to outcomes is the change in the content of the reports produced by employers to the Agency.<sup>50</sup> Unlike the *EOW Act*, where employers were required to report on the outcomes of their programs,<sup>51</sup> employers under the *WGEA* must prepare and lodge public reports which contain information relating to their performance against all GEIs.<sup>52</sup> The GEIs refer to the following:

- (a) gender composition of the workforce;
- (b) gender composition of governing bodies<sup>53</sup> of relevant employers;
- (c) equal remuneration between women and men;
- (d) availability and utility of employment terms, conditions and practices relating to flexible working arrangements for employees and to working arrangements supporting employees with family or caring responsibilities;
- (e) consultation with employees on issues concerning gender equality in the workplace;
- (ea) sexual harassment, harassment on the ground of sex or discrimination;
- (f) any other matters specified in an instrument [made by the Minister].<sup>54</sup>

46 Ibid s 19D. Like the *EOW Act* and *AA Act*, non-compliant employers under the *WGEA* may not be eligible to compete for contracts under the Commonwealth procurement framework or be eligible for Commonwealth grants and other financial assistance. This sanction is only listed in the 'simplified outline' of the *WGEA* but does not appear in section 19D: at s 18.

47 Carolyn Sutherland, 'Reframing the Regulation of Equal Employment Opportunity: The *Workplace Gender Equality Act 2012* (Cth)' (2013) 26(1) *Australian Journal of Labour Law* 102, 103. For a comparison of the *EOW Act* and *AA Act*: see Andrade (n 36).

48 Sutherland (n 47) 104–7.

49 *WGEA* (n 1) s 2A.

50 Sutherland (n 47) 104–7.

51 *EOW Act* (n 35) ss 13, 13A.

52 *WGEA* (n 1) ss 13, 13A.

53 The 'governing body' of an employer is defined as the body, or group of members of the employer, with primary responsibility for the governance of the employer: *ibid* s 3(1) (definition of 'governing body').

54 *Ibid*. See also section 3(1A) which provides that the Minister may, by legislative instrument, specify matters for the purposes of subparagraph (f).

The *Workplace Gender Equality (Matters in Relation to Gender Equality Indicators) Instrument 2023* (Cth) specifies additional matters in relation to each GEI for employers to include in their public reports.<sup>55</sup>

The *WGEA* also requires the Minister to set Standards in relation to the GEIs.<sup>56</sup> The Minister has set two Standards, which are only applicable to employers with 500 or more employees.<sup>57</sup> The Standards are that (a) employers must have policies or strategies in place to support each GEI,<sup>58</sup> and (b) these policies or strategies must aim to achieve the objective that corresponds with that particular GEI.<sup>59</sup> For example, for GEI 1, ‘[g]ender composition of the workforce’, the corresponding objective set by the Minister is ‘[s]upporting gender equality in the designated relevant employer’s workplace’.<sup>60</sup>

#### 4 *WGEA Report*

Carol Bacchi reminds us that Australian law reform related to affirmative action must be understood in its political context.<sup>61</sup> The Commonwealth Government’s Women’s Budget Statement 2021–22 announced a targeted review of the *WGEA* ‘to ensure it [was] fit for purpose’.<sup>62</sup> This announcement was made in the context of a tense political climate in which pressure was being placed on the former Liberal-National Coalition Government to address key issues for women.<sup>63</sup> The

55 *Workplace Gender Equality (Matters in Relation to Gender Equality Indicators) Instrument 2023* (Cth) (*‘Gender Equality Indicators Instrument 2023’*). These were originally introduced in the *Workplace Gender Equality (Matters in Relation to Gender Equality Indicators) Instrument 2013* (Cth) sch 1.

56 *WGEA* (n 1) s 19(1).

57 *Gender Equality Standards Instrument* (n 11) cl 6(1). These Gender Equality Standards were formerly referred to as Minimum Standards and were found in the *Workplace Gender Equality (Minimum Standards) Instrument 2014* (Cth) cl 5(3) (*‘Minimum Standards Instrument’*).

58 *Gender Equality Standards Instrument* (n 11) cl 6(3)(a).

59 *Ibid* cl 6(3)(b). The corresponding objective for each GEI is as follows: GEI 1: Supporting gender equality in the designated relevant employer’s workplace; GEI 2: Supporting and achieving gender equality in the designated relevant employer’s governing body; GEI 3: In relation to employees of the designated relevant employer, ensuring equal remuneration between women and men; GEI 4: Providing effective flexible working arrangements for employees of the designated relevant employer with family or caring responsibilities; GEI 5: Ensuring employees are consulted and have input on issues concerning gender equality in the designated relevant employer’s workplace; GEI 6: Prevention of, and appropriate response to, sexual harassment, harassment on the ground of sex or discrimination in the designated relevant employer’s workplace.

60 *Ibid*.

61 Carol Lee Bacchi, *The Politics of Affirmative Action: ‘Women’, Equality and Category Politics* (Sage Publications, 1996) ch 5.

62 Commonwealth of Australia, ‘Women’s Budget Statement 2021–22’ (11 May 2021) 4, 31. See also Department of the Prime Minister and Cabinet, ‘Terms of Reference: Review of the Workplace Gender Equality Act 2012’ (20 October 2021) 1 (*‘Terms of Reference’*); *WGEA Report* (n 2) 11.

63 See, eg, Julie Szego, ‘Liberal Party Lost the Trust of Australian Women Long before Morrison’, *The Sydney Morning Herald* (online, 8 June 2022) <<https://www.smh.com.au/politics/federal/liberal-party-lost-the-trust-of-australian-women-long-before-morrison-20220607-p5arlw.html>>; ‘Scott Morrison Speaks on March4Justice Rallies, Says Protests Elsewhere Are “Met with Bullets”’, *SBS News* (online, 15 March 2021) <<https://www.sbs.com.au/news/article/scott-morrison-speaks-on-march4justice-rallies-says-protests-elsewhere-are-met-with-bullets/uhp0dvahj>>; Katharine Murphy, ‘Former Parliament Staff Warn Scott Morrison to Act on Jenkins Review or Face Backlash from Women’, *The Guardian* (online, 2 December 2021) <<https://www.theguardian.com/australia-news/2021/dec/02/former-parliament->

Budget Statement announcement occurred three months after former Liberal Party junior staffer, Brittany Higgins, publicly alleged that she had been raped in the office of the Minister for Defence in the weeks prior to the 2019 federal election.<sup>64</sup> The announcement came a year after the Australian Human Rights Commission released the *Respect@Work: National Inquiry into Sexual Harassment in Australian Workplaces* Report ('*Respect@Work* Report').<sup>65</sup> Despite the former Prime Minister stating that his government had accepted all 55 recommendations of the *Respect@Work* Report in principle, in part or in full,<sup>66</sup> this was only the case for 46 recommendations, with in fact nine recommendations being 'noted' for further consideration.<sup>67</sup>

The review of the *WGEA* commenced on 20 October 2021.<sup>68</sup> A Consultation Paper which invited submissions on 10 consultation questions by 24 November 2021 was released by the Department of the Prime Minister and Cabinet's *WGEA* Review Team.<sup>69</sup> The Terms of Reference outlined that the purpose of the *WGEA* review was to consider whether the Agency had the 'appropriate powers, tools and levers' to accomplish the objectives of the *WGEA*.<sup>70</sup> Most relevant for the purposes of this analysis is consultation question five ('CQ5') which asked stakeholders:

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staff-warn-scott-morrison-to-act-on-jenkins-review-or-face-backlash-from-women>; Paul Karp, 'Scott Morrison Wants Women to Rise but Not Solely at Expense of Others', *The Guardian* (online, 8 March 2019) <<https://www.theguardian.com/world/2019/mar/08/scott-morrison-wants-women-to-rise-but-not-solely-at-expense-of-others>>; David Crowe, "'Will Make Things Worse": Domestic Violence Superannuation Policy under Review after Backlash', *The Sydney Morning Herald* (online, 17 March 2021) <<https://www.smh.com.au/politics/federal/will-make-things-worse-domestic-violence-superannuation-policy-under-review-after-backlash-20210317-p57bmr.html>>.

- 64 Samantha Maiden, 'Scott Morrison Image That Made Brittany Higgins Speak Out about Alleged Rape', *News.com.au* (online, 16 February 2021) <<https://www.news.com.au/national/politics/scott-morrison-image-that-made-brittany-higgins-speak-out-about-alleged-rape/news-story/cd43fee050269e4d3f9dc0f17dfa7b38>>; James Glenday, Andrew Probyn and Matthew Doran, 'The Big Questions Left Unanswered about the Alleged Rape of Brittany Higgins at Parliament House', *ABC News* (online, 21 February 2021) <<https://www.abc.net.au/news/2021-02-21/heres-what-we-know-and-dont-about-brittany-higgins-alleged-rape/13173526>>.
- 65 Australian Human Rights Commission, *Respect@Work: National Inquiry into Sexual Harassment in Australian Workplaces* (Report, 29 January 2020) ('*Respect@Work* Report'). The Report was released in March 2020 after an 18-month long inquiry. The Report examined the prevalence, drivers, existing measures and impact of sexual harassment on individuals and businesses in Australian workplaces: at 13–14. For the full recommendations of the *Respect@Work* Report: see 40–51.
- 66 Catie McLeod, 'Brittany Higgins Slams Scott Morrison's Sexual Harassment Reforms', *The Australian* (online, 3 September 2021) <<https://www.theaustralian.com.au/breaking-news/brittany-higgins-slams-scott-morrison-s-sexual-harassment-reforms/news-story/2f59f46f65f3c9bd70aa7804ce233173>>.
- 67 Recommendations 15, 17, 18, 23, 27, 41, 44, 45 and 47 were those 'noted' for further consideration: Attorney-General's Department (Cth), 'A Roadmap for Respect: Preventing and Addressing Sexual Harassment in Australian Workplaces' (8 April 2021) 11, 14–15, 17, 24–5. The former Liberal-National Coalition Government introduced the following legislation commencing on 11 September 2021 in response to the *Respect@Work* Report (n 65): *Sex Discrimination and Fair Work (Respect at Work) Amendment Act 2021* (Cth); *Fair Work Amendment (Respect at Work) Regulations 2021* (Cth). The current Labor Government committed to implementing all 55 recommendations. The additional recommendations have been implemented through the *Respect at Work Act*.
- 68 *WGEA Report* (n 2) 11.
- 69 Department of the Prime Minister and Cabinet, 'Review of the *Workplace Gender Equality Act 2012*' (Consultation Paper, 20 October 2021) 1 ('*WGEA* Consultation Paper'); *ibid* 11.
- 70 'Terms of Reference' (n 62) 1.

In addition to gender, should [the Agency] collect other data on diversity and inclusion criteria on a mandatory basis ...? If yes, please specify criteria (eg cultural and linguistic diversity, disability, age, location of primary workplace). If not, why not?<sup>71</sup>

In addition to the 155 submissions received by the *WGEA* Review Team, the consultation process also involved hosting eight virtual roundtables with a variety of stakeholders in November 2021.<sup>72</sup> Some submissions received during the consultation process criticised the short timeframe given to provide submissions.<sup>73</sup>

The *WGEA Report* was released in March 2022.<sup>74</sup> It made 10 recommendations.<sup>75</sup> Recommendation 6.1 is the most relevant for the purposes of this analysis. Recommendation 6.1 was that the Agency should

[u]ndertake qualitative research with relevant stakeholders, led by [the Agency], on the best way to collect more diversity data in addition to gender data to enable voluntary reporting, including on Aboriginal and Torres Strait Islander background, cultural and linguistic diversity, and disability.

There was strong support in the consultation process for collecting additional diversity data. But sensitive issues were also raised about employees being reticent to provide this information to employers because of concerns about how this information may be used and the negative impact it may have on their employment. This research will consider how to address these issues.<sup>76</sup>

This was the only recommendation that touched on the issue of diversity.

In March 2023, the Labor Government enacted legislation which implements some of the recommendations of the *WGEA Report*.<sup>77</sup> However these legislative changes focus primarily on measures relating to closing the gender pay gap, and do not address Recommendation 6.1, despite a clear indication from the Government that the issue of diversity and the *WGEA* needs to be considered.<sup>78</sup>

## 5 *Prior Analysis of the WGEA*

Prior analysis of the *WGEA* and its predecessors is limited. A significant proportion of the literature traces the history of the legislation and analyses the

71 'WGEA Consultation Paper' (n 69) 3. There were 10 consultation questions: see *WGEA Report* (n 2) app 2.

72 *WGEA Report* (n 2) 11.

73 See, eg, Australian Council of Trade Unions, Submission No 80 to Department of the Prime Minister and Cabinet, *Review of the Workplace Gender Equality Act 2012* (24 November 2021) 3; Law Council of Australia, Submission No 85 to Department of the Prime Minister and Cabinet, *Review of the Workplace Gender Equality Act 2012* (24 November 2021) 5; Law Firms Australia, Submission No 108 to Department of the Prime Minister and Cabinet, *Review of the Workplace Gender Equality Act 2012* (24 November 2021) 1.

74 Workplace Gender Equality Agency, 'WGEA Welcomes the Release of the Review of Australia's National Gender Equality Reporting Framework' (Media Statement, 4 March 2022).

75 *WGEA Report* (n 2) 7–11.

76 *Ibid* 15 (emphasis omitted).

77 See *Closing the Gender Pay Gap Act* (n 9), which amends the *WGEA*, and implements Recommendations 2, 3, 5 and 9 of the *WGEA Report*. See also Explanatory Memorandum, Workplace Gender Equality Amendment (Closing the Gender Pay Gap) Bill 2023 (Cth) 4.

78 Commonwealth, *Parliamentary Debates*, Senate, 8 February 2023, 212–13 (Katy Gallagher).

historical development of the legislative framework.<sup>79</sup> This analysis has explored the shift in focus from ‘equal opportunity for women’ in the *EOW Act* to ‘gender equality’ in the *WGEA*, representing an expanded coverage in the *WGEA* to also benefit men.<sup>80</sup> The shift from processes in the *EOW Act* to outcomes in the *WGEA* is also analysed in prior academic literature.<sup>81</sup> This research highlights how, under the *EOW Act*, the primary focus of the legislation was for employers to develop and implement workplace programs, compared to the *WGEA* where the primary focus is on an employer’s performance against the GEIs and Standards.<sup>82</sup> Analysis by Beth Gaze concentrates on the introduction of the Standards in the *WGEA*.<sup>83</sup> She notes that under the *WGEA*, the only education for employers as to what is a reasonable standard of gender equality in their workplaces is the outline of the minimum standard.<sup>84</sup>

Commentary on the *WGEA* has also highlighted the importance of the Agency’s data-collecting function. The Agency’s role in collecting data from employers is essential for the *WGEA* in achieving its Objects, particularly as the Agency’s data reflects the experiences of approximately 4.4 million employees.<sup>85</sup> As Gaze highlights, the Agency is in a critical position to drive gender equality through data collection and publication.<sup>86</sup> The Agency regularly publishes reports, factsheets and research publications on its website, allowing employees to easily access data regarding their employer’s performance under the *WGEA*.<sup>87</sup> The requirement for employers to address all GEIs in their reports to the Agency means that public, standardised information is readily available.<sup>88</sup> The public nature of the data published by the Agency can better inform shareholders and incentivise company directors to improve their company’s gender equality outcomes.<sup>89</sup> Belinda Smith and Monica Hayes argue that the Agency’s data is necessary for empowering employees in underperforming organisations to demand a better standard of

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79 See, eg, Sutherland (n 47); Gaze, ‘Setting Standards’ (n 27); Margaret Thornton, ‘Proactive or Reactive? The Senate Report on the Equal Opportunity for Women in the Workplace Amendment Bill 2012 (Cth)’ 25(3) *Australian Journal of Labour Law* 284; Emma Goodwin, ‘Equal Opportunity in the Workplace Reconfigured: Equal Opportunity for Women in the Workplace Amendment Bill 2012 (Cth)’ (2012) 18(5) *Employment Law Bulletin* 71.

80 Sutherland (n 47) 104.

81 Ibid 104–7.

82 Ibid 104–6.

83 Gaze, ‘Setting Standards’ (n 27) 113.

84 Ibid 114. This is despite the Workplace Gender Equality Agency (‘Agency’) stating that the Gender Equality Standards are representative of the standards that are necessary to improve gender equality over time: Workplace Gender Equality Agency, *WGE Act: What Reporting Organisations Need to Know* (Report, December 2012) 3.

85 These figures reflect the 2019–20 reporting year: see Workplace Gender Equality Agency, *Australia’s Gender Equality Scorecard: Key Results from the Workplace Gender Equality Agency’s 2019–20 Reporting Data* (Report, November 2020) 2 (‘*Gender Equality Scorecard 2019–20*’). The Agency’s data reflects just over 40% of Australia’s total workforce.

86 Gaze, ‘Gender Equality Reporting’ (n 27) 623.

87 Ibid.

88 Belinda Smith and Monica Hayes, ‘Using Data to Drive Gender Equality in Employment: More Power to the People?’ (2015) 28(3) *Australian Journal of Labour Law* 191, 206.

89 Gaze, ‘Gender Equality Reporting’ (n 27) 623.

gender equality in their workplaces.<sup>90</sup> Employers are also able to compare their performance against data from their industry, allowing for more meaningful comparisons to be made,<sup>91</sup> and for industry benchmarks to be developed.<sup>92</sup>

A common criticism of the *WGEA* and its predecessors is the ‘light touch’ approach to compliance, which arguably undermines the efficacy of the legislation.<sup>93</sup> Valerie Braithwaite’s analysis of the *AA Act* observed that the legislation rested on the presumption that requiring employers to engage in ‘regular review and critical self-appraisal’ would empower them to identify and change discriminatory practices in their workplaces.<sup>94</sup> However, Braithwaite explained that the *AA Act* lacked the ability to hold employers accountable because the sanctions for non-compliance were weak and there was a lack of guidance for employers in the legislation as to the required standard of their affirmative action programs.<sup>95</sup> With respect to the *WGEA*, prior research has argued that an employer’s compliance hinges on their ability to produce reports to the Agency, rather than compliance with the GEIs.<sup>96</sup> The public nature of the reports lodged with the Agency means that the most severe consequence for non-compliant employers is reputational damage by being named on the Agency’s website.<sup>97</sup> Marzena Baker, Muhammad Ali and Erica French have argued that there is a ‘compliance with legislation’ attitude held by employers towards gender equality in their workplaces.<sup>98</sup> They argue that this arises out of the requirement for employers to report to the Agency on their performance against the GEIs, rather than the ‘content, implementation guidelines or effectiveness in delivering any outcomes’ of any strategies or policies implemented to achieve the GEIs.<sup>99</sup> Dianne Hollyoak argues that in order to achieve the purpose of the

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90 Smith and Hayes (n 88) 212.

91 Ibid 206. For example, as a result of the data collected, the Agency has been able to compile and publish data as to the differences across industry groups in relation to the managerial gender pay gap: ibid 209. See also Workplace Gender Equality Agency, ‘All Industries, Gender Pay Gaps’, *WGEA Data Explorer* (Web Page) <[https://data.wgea.gov.au/industries/1#pay\\_equity\\_content](https://data.wgea.gov.au/industries/1#pay_equity_content)>.

92 Gaze, ‘Gender Equality Reporting’ (n 27) 623–4; Smith and Hayes (n 88) 193.

93 Fiona Macdonald and Sara Charlesworth, ‘Failing to Live up to the Promise: The Politics of Equal Pay in “New” Workplace and Industrial Relations Institutions’ (2018) 53(4) *Australian Journal of Political Science* 446, 451–2 <<https://doi.org/10.1080/10361146.2018.1502256>>; Glenda Strachan, John Burgess and Lindy Henderson, ‘Equal Employment Opportunity Legislation and Policies: The Australian Experience’ (2007) 26(6) *Equal Opportunities International* 525, 529–30 <<https://doi.org/10.1108/02610150710777024>>; Valerie Braithwaite, ‘The Australian Government’s Affirmative Action Legislation: Achieving Social Change through Human Resource Management’ (1993) 15(4) *Law and Policy* 327, 350 <<https://doi.org/10.1111/j.1467-9930.1993.tb00112.x>>.

94 Braithwaite (n 93) 328.

95 Ibid 328–30. See also Smith and Hayes (n 88) 192; Gaze, ‘Setting Standards’ (n 27) 113; Margaret Thornton, *The Liberal Promise: Anti-discrimination Legislation in Australia* (Oxford University Press, 1990).

96 Macdonald and Charlesworth (n 93) 453.

97 Terri MacDonald, ‘The New *Workplace Gender Equality Act*: A Step in the Right Direction’ (2013) 21 *Agenda* 26, 27.

98 Marzena Baker, Muhammad Ali and Erica French, ‘Effectiveness of Gender Equality Initiatives in Project-Based Organizations in Australia’ (2019) 44(3) *Australian Journal of Management* 425, 427 <<https://doi.org/10.1177/0312896218805809>>.

99 Ibid.

*WGEA*, the Agency must be afforded adequate powers to enforce compliance and discourage non-compliance.<sup>100</sup>

There is, however, very little analysis relating to the advancement of diverse women in Australian workplaces through the *WGEA*. This article will address this gap by critically demonstrating how certain provisions of the *WGEA* and Recommendation 6.1 neglect to consider diverse women who experience multifaceted inequality in Australian workplaces. An anti-essentialist and intersectional theoretical framework will be utilised to reveal the shortcomings of aspects of the *WGEA* and Recommendation 6.1. Part III of this article will outline the anti-essentialist and intersectional framework adopted in this analysis.

### III AN ANTI-ESSENTIALIST AND INTERSECTIONAL THEORETICAL APPROACH

Anti-essentialism and intersectionality embody the same critique of systems of oppression, but they approach this critique from distinctive angles.<sup>101</sup> While they are both theoretical tools frequently used to explore concepts of power and dominance<sup>102</sup> and dismantle assumptions which perpetuate the subordination of marginalised groups,<sup>103</sup> they are distinct theoretical approaches which will not be conflated in this analysis.<sup>104</sup>

#### A Anti-essentialism in Feminist Theory

Essentialism refers to the tendency in feminist theory to describe women's experiences of sexism in a manner that is isolated from, and independent of, other systems of oppression such as race and class.<sup>105</sup> The consequence of essentialism is that some voices are privileged while others are silenced, and the voices that are silenced are the same as those silenced in conventional legal theory.<sup>106</sup> Anti-essentialism challenges the notion that there exists a universal experience of women in relation to sex discrimination.<sup>107</sup> The tendency to essentialise women's experiences in feminist legal theory has resulted in the experiences of white, middle-class, heterosexual women becoming the reference point for policies aimed

100 Dianne Hollyoak, 'Gender Equality Toughens up: Firms Risk "Naming and Shaming"' (2013) 33(2) *Proctor* 42, 42.

101 Trina Grillo, 'Anti-essentialism and Intersectionality: Tools to Dismantle the Master's House' (1995) 10(1) *Berkeley Women's Law Journal* 16, 16–17 <<https://doi.org/10.15779/Z38MC6W>>.

102 Devon W Carbado and Cheryl I Harris, 'Intersectionality at 30: Mapping the Margins of Anti-essentialism, Intersectionality, and Dominance Theory' (2019) 132(8) *Harvard Law Review* 2193, 2199–200.

103 Grillo (n 101) 16.

104 Carbado and Harris (n 102) 2199–200.

105 Angela P Harris, 'Race and Essentialism in Feminist Legal Theory' (1990) 42(3) *Stanford Law Review* 581, 585 <<https://doi.org/10.2307/1228886>>; Grillo (n 101) 19–20; David S Cohen, 'Keeping Men "Men" and Women Down: Sex Segregation, Anti-essentialism, and Masculinity' (2010) 33(2) *Harvard Journal of Law and Gender* 509, 518–19.

106 Harris (n 105) 585.

107 *Ibid* 586; Grillo (n 101) 19–20.

at redressing historical sex discrimination and promoting equality for women.<sup>108</sup> Systems of power and social privilege ensure that the identity of ‘women’ as a group is continuously reproduced in a manner that benefits the privileged members within that group: white, middle-class, heterosexual women.<sup>109</sup> Anti-essentialism in feminist theory demands that experiences of sex discrimination are viewed as multifaceted, and as influenced by additional systems of oppression beyond sex, including ethnicity, sexuality, and social class.<sup>110</sup> It is a deconstructionist approach to feminist theory, meaning that anti-essentialism emphasises the ‘infinite variety of women’s experience’ and interrogates any singular assumptions of identity upon which legislation is based,<sup>111</sup> a concept analysed in greater detail in Kimberlé Crenshaw’s pivotal writings on intersectionality.

## B Kimberlé Crenshaw’s Intersectionality: The Single Categorical Axis

Kimberlé Crenshaw is widely recognised as a pioneer of intersectionality theory with her application of intersectionality to legal doctrines.<sup>112</sup> In her seminal work, Crenshaw argued that the dominant conceptualisations of ‘discrimination’ perceive that discrimination occurs along a ‘single categorical axis’.<sup>113</sup> Any efforts

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108 Hunter (n 16) 135.

109 Ibid 135–6.

110 Alexander Styhre and Ulla Eriksson-Zetterquist, ‘Thinking the Multiple in Gender and Diversity Studies: Examining the Concept of Intersectionality’ (2008) 23(8) *Gender in Management* 567, 569 <<https://doi.org/10.1108/17542410810912690>>; Hunter (n 16) 144; Harris (n 105) 587. See also April L Few-Demo and Katherine R Allen, ‘Gender, Feminist, and Intersectional Perspectives on Families: A Decade in Review’ (2020) 82(1) *Journal of Marriage and Family* 326 <<https://doi.org/10.1111/jomf.12638>>; Katherine J C Sang, ‘Gender, Ethnicity and Feminism: An Intersectional Analysis of the Lived Experiences Feminist Academic Women in UK Higher Education’ (2018) 27(2) *Journal of Gender Studies* 192 <<https://doi.org/10.1080/09589236.2016.1199380>>; Linda Gordon, ‘“Intersectionality”, Socialist Feminism and Contemporary Activism: Musings by a Second-Wave Socialist Feminist’ (2016) 28(2) *Gender & History* 340 <<https://doi.org/10.1111/1468-0424.12211>>; Amanda Gouws, ‘Feminist Intersectionality and the Matrix of Domination in South Africa’ (2017) 31(1) *Agenda* 19 <<https://doi.org/10.1080/10130950.2017.1338871>>; Elizabeth Evans and Éléonore Lépinard, ‘Confronting Privileges in Feminist and Queer Movements’ in Elizabeth Evans and Éléonore Lépinard (eds), *Intersectionality in Feminist and Queer Movements* (Routledge, 2020) 1 <<https://doi.org/10.4324/9780429289859-1>>; Ruth Colker, ‘The Example of Lesbians: A Posthumous Reply to Professor Mary Joe Frug’ (1992) 105(5) *Harvard Law Review* 1084 <<https://doi.org/10.2307/1341522>>; Leigh Megan Leonard, ‘A Missing Voice in Feminist Legal Theory: The Heterosexual Presumption’ (1990) 12(1) *Women’s Rights Law Reporter* 39; Marlee Kline, ‘Race, Racism, and Feminist Legal Theory’ (1989) 12 *Harvard Women’s Law Journal* 115.

111 Hunter (n 16) 142.

112 See, eg, Robert S Chang and Jerome McCristal Culp Jr, ‘After Intersectionality’ (2002) 71(2) *University of Missouri-Kansas City Law Review* 485, 485; Susan Ressler, Glenda Strachan and Janis Bailey, ‘Operationalizing Intersectionality: An Approach to Uncovering the Complexity of the Migrant Job Search in Australia’ (2017) 24(4) *Gender, Work and Organization* 376, 376 <<https://doi.org/10.1111/gwao.12172>>; Jennifer C Nash, ‘Re-thinking Intersectionality’ (2008) 89(1) *Feminist Review* 1, 2 <<https://doi.org/10.1057/fr.2008.4>>; Sumi Cho, ‘Post-intersectionality: The Curious Reception of Intersectionality in Legal Scholarship’ (2013) 10(2) *Du Bois Review* 385, 385 <<https://doi.org/10.1017/S1742058X13000362>>; Jeanne Marecek, ‘Invited Reflection: Intersectionality Theory and Feminist Psychology’ (2016) 40(2) *Psychology of Women Quarterly* 177, 177 <<https://doi.org/10.1177/0361684316641090>>; Anna Carastathis, ‘The Concept of Intersectionality in Feminist Theory’ (2014) 9(5) *Philosophy Compass* 304, 305 <<https://doi.org/10.1111/phc3.12129>>.

113 Kimberlé Crenshaw, ‘Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics’ [1989] 1 *University of*

to remedy discrimination through the legislature and judicature are influenced by the single categorical axis perception of discrimination and consequently, only perceive discrimination that occurs on a singular ground such as sex, not discrimination that occurs on a combination of grounds such as sex and race.<sup>114</sup> Crenshaw argues that the single categorical axis results in the ‘conceptualization, identification and remediation’ of discrimination in anti-discrimination statutes focusing predominantly on the lived experiences of the most privileged members within the discriminated group.<sup>115</sup> Consequently, statutes that prohibit discrimination on the basis of sex primarily protect white women and race anti-discrimination statutes primarily protect men of colour.<sup>116</sup> This means that for women of colour who experience discrimination on the grounds of both sex and race, anti-discrimination statutes fundamentally fail to protect them.<sup>117</sup> According to Crenshaw, the single categorical axis ensures that white women’s experiences become the reference point in sex discrimination cases, and the experiences of men of colour become the reference point in race discrimination cases, leaving no space for an understanding of the experiences of women of colour in relation to discrimination.<sup>118</sup> The single categorical axis allows for an analysis which explores how legislation, relying on the experiences of the most privileged members within a discriminated group, ‘marginalizes those who are multiply-burdened’ and only reflects a limited aspect of what is a ‘much more complex phenomenon.’<sup>119</sup>

### C Deborah King’s ‘Multiple Jeopardy’ and Patricia Hill Collins’ ‘Matrix of Domination’

Intersectionality insists on analysing the ‘multiple’,<sup>120</sup> and Deborah King’s analysis of intersectional discrimination as a form of what she calls ‘multiple jeopardy’ extends upon Crenshaw’s single categorical axis framework.<sup>121</sup> Multiple jeopardy directly challenges the notion that a person’s experiences of

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*Chicago Legal Forum* 139, 140. Crenshaw used Black women as the starting point for her analysis of intersectionality and how the anti-discrimination legislative framework in the United States of America took a single categorical approach to Black women’s experiences of discrimination.

114 Ibid. Crenshaw utilises a variety of anti-discrimination suits to elaborate her point, including *DeGraffenreid v General Motors*, 413 F Supp 142 (E D Mo, 1976). According to Crenshaw, the facts of this case were that five Black women sued their employer General Motors alleging that General Motors’ seniority system perpetuated effects of past discrimination against African American women. Evidence at trial demonstrated that General Motors did not employ Black women prior to 1964 and all Black women employed after 1970 lost their employment in a seniority-based layoff during a subsequent recession. The Court explicitly stated that while the plaintiffs were entitled to a remedy at law if they were discriminated against by General Motors, they were not entitled to supposedly ‘combine’ statutory remedies and create what the Court referred to as a ‘super-remedy’: at 141–3.

115 Ibid 140.

116 Ibid 143.

117 Ibid.

118 Ibid 151.

119 Ibid 140.

120 Styhre and Eriksson-Zetterquist (n 110) 568, citing Annemarie Mol, *The Body Multiple: Ontology in Medical Practice* (Duke University Press, 2002) <<https://doi.org/10.15779/Z38MC6W>>.

121 Deborah K King, ‘Multiple Jeopardy, Multiple Consciousness: The Context of a Black Feminist Ideology’ (1988) 14(1) *Signs* 42, 47 <<https://doi.org/10.1086/494491>>.

discrimination are merely additive; multiple jeopardy demands an analysis of the ‘several, simultaneous oppressions but ... the multiplicative relationships among them as well’.<sup>122</sup> King’s articulation of ‘multiple jeopardy’ arose from a critique of earlier analysis of intersectionality theory which discussed ‘double’ and ‘triple jeopardy’.<sup>123</sup> King argued that these conceptualisations take an additive approach by referring to additional discrimination experiences on the basis of sex and race, or sex, race and class.<sup>124</sup> Multiple jeopardy argues that no one form of discrimination has a ‘single, direct, and independent effect’ upon the individual experiencing the discrimination.<sup>125</sup> The respective contribution of each form of discrimination in diminishing an individual’s status is not readily apparent, and King asserts that discrimination should be perceived as multiplied when an individual’s identity is more complex and multifaceted.<sup>126</sup> King’s conceptualisation of multiple jeopardy is an invaluable tool for applying an intersectional analysis to the experiences of diverse women in the workplace.<sup>127</sup> We argue that the concept of multiple jeopardy can also reveal the inherent limitations of legislation devised to address inequalities for women, particularly in circumstances where the legislation adopts a ‘single category’<sup>128</sup> approach to experiences of women’s inequality.

In a similar vein to King’s positioning of intersectionality theory as a vehicle to analyse the phenomenon of ‘multiple jeopardy’, is Patricia Hill Collins’ conceptualisation of the ‘matrix of domination’. Collins<sup>129</sup> summarises intersectionality as the ‘critical insight that race, class, gender, sexuality, ethnicity, nation, ability, and age’ are not mutually exclusive forces perpetuating the subordination of marginalised groups but instead are forces which create and shape complex social and power inequalities.<sup>130</sup> The ‘matrix of domination’ refers to forces of oppression such as race, class and gender which perpetuate systemic

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122 Ibid.

123 King (n 121) 46, discussing Frances Beale, ‘Double Jeopardy: To Be Black and Female’ in Toni Cade Bambara (ed), *The Black Woman: An Anthology* (Washington Square Press, 2005) 109.

124 See n 123.

125 King (n 121) 47.

126 Ibid.

127 Styhre and Eriksson-Zetterquist (n 110) 576.

128 Ibid 571.

129 Patricia Hill Collins is recognised as another key scholar in the development of intersectionality theory. See, eg, Ressler, Strachan and Bailey (n 112) 376; Hae Yeon Choo, ‘The Transnational Journey of Intersectionality’ (2012) 26(1) *Gender & Society* 40 <<https://doi.org/10.1177/0891243211426724>>; Ange-Marie Hancock, ‘Intersectionality, Multiple Messages, and Complex Causality: Commentary on Black Sexual Politics by Patricia Hill Collins’ (2008) 9(1) *Studies in Gender and Sexuality* 14, 15–16 <<https://doi.org/10.1080/15240650701759359>>; Myra Marx Ferree, ‘Intersectionality as Theory and Practice’ (2018) 47(2) *Contemporary Sociology* 127 <<https://doi.org/10.1177/0094306118755390>>; Jingzhou Liu, ‘Patricia Hill Collins and Sirma Bilge: Intersectionality’ (2017) 49(1) *Canadian Ethnic Studies* 125 <<https://doi.org/10.1353/ces.2017.0006>>; Bandana Purkayastha, ‘Intersectionality in a Transnational World’ (2012) 26(1) *Gender and Society* 55, 55–6 <<https://doi.org/10.1177/0891243211426725>>; Kathryn T Gines, ‘Ruminations on Twenty-Five Years of Patricia Hill Collins’s *Black Feminist Thought: Knowledge, Consciousness and the Politics of Empowerment*’ (2015) 38(13) *Ethnic and Racial Studies* 2341, 2341–2 <<https://doi.org/10.1080/01419870.2015.1058505>>.

130 Patricia Hill Collins, ‘Intersectionality’s Definitional Dilemmas’ (2015) 41(1) *Annual Review of Sociology* 1, 2–3 <<https://doi.org/10.1146/annurev-soc-073014-112142>>.

social inequalities and power imbalances for marginalised individuals.<sup>131</sup> As a theoretical tool, the matrix of domination does not allow for separate systems of oppression to be perceived in isolation or as mutually exclusive.<sup>132</sup> Rather, the matrix of domination requires us to consider these systems of oppression as deeply intertwined and interconnected, with complex and multifaceted impacts on individuals with diverse identities.<sup>133</sup>

### **D Space for an Anti-essentialist and Intersectional Analysis of the *WGEA* and Recommendation 6.1 of the *WGEA Report***

In the Australian context, anti-essentialist and intersectional theoretical approaches have been predominantly used to analyse the shortcomings of the federal and state anti-discrimination legislative frameworks.<sup>134</sup> For example, Andrew Thackrah has argued that Australia's anti-discrimination legislative framework ignores the intersectional nature of discrimination, in that often marginalised groups are discriminated against on the basis of multiple, interconnected grounds, rather than a readily identifiable singular ground.<sup>135</sup> The essentialist framing of Australia's anti-discrimination laws largely ignores the disproportionate impact of social disadvantage experienced by minority groups.<sup>136</sup> The result of this framing

131 Patricia Hill Collins, 'Social Inequality, Power, and Politics: Intersectionality and American Pragmatism in Dialogue' (2012) 26(2) *Journal of Speculative Philosophy* 442, 454–5 <<https://doi.org/10.5325/jspephil.26.2.0442>> ('Social Inequality, Power, and Politics'); Patricia Hill Collins, *Black Feminist Thought: Knowledge, Consciousness, and the Politics of Empowerment* (Routledge, 2<sup>nd</sup> ed, 2000) 18 <<https://doi.org/10.4324/9780203900055>> ('*Black Feminist Thought*').

132 Patricia Hill Collins, 'It's All in the Family: Intersections of Gender, Race, and Nation' (1998) 13(3) *Hypatia* 62, 63 <<https://doi.org/10.1111/j.1527-2001.1998.tb01370.x>> ('It's All in the Family').

133 Ibid.

134 See, eg, Alysia Blackham and Jeromey Temple, 'Intersectional Discrimination in Australia: An Empirical Critique of the Legal Framework' (2020) 43(3) *University of New South Wales Law Journal* 773 <<https://doi.org/10.53637/ONMF2821>>; Julia Mansour, 'Consolidation of Australian Anti-Discrimination Laws: An Intersectional Perspective' (2012) 21(2) *Griffith Law Review* 533 <<https://doi.org/10.1080/10383441.2012.10854752>>; Rosemary Hunter and Tracey De Simone, 'Identifying Disadvantage: Beyond Intersectionality' in Emily Grabham et al (eds) *Intersectionality and Beyond: Law, Power and the Politics of Location* (Routledge-Cavendish, 2008) 159; Karen O'Connell, 'Can Law Address Intersectional Sexual Harassment? The Case of Claimants with Personality Disorders' (2019) 8(4) *Laws* 34 <<https://doi.org/10.3390/laws8040034>>; Andrew Thackrah, 'From Neutral to Drive: Australian Anti-Discrimination Law and Identity' (2008) 33(1) *Alternative Law Journal* 31 <<https://doi.org/10.1177/103796X0803300106>>; Patricia Easteal, 'Looking through the Prevailing Kaleidoscope: Women Victims of Violence and Intersectionality' (2002) 6 *Sister in Law, A Feminist Law Review* 48; Emma Buxton-Namisnyk, 'Does an Intersectional Understanding of International Human Rights Law Represent the Way Forward in the Prevention and Redress of Domestic Violence against Indigenous Women in Australia?' (2014) 18(1) *Australian Indigenous Law Review* 119; Larissa Behrendt and Duncan Kennedy, 'Meeting at the Crossroads: Intersectionality, Affirmative Action and the Legacies of the Aborigines Protection Board' (1997) 4(1) *Australian Journal of Human Rights* 98 <<https://doi.org/10.1080/1323238X.1997.11910983>>; Beth Goldblatt and Linda Steele, 'Bloody Unfair: Inequality Related to Menstruation' (2019) 41(3) *Sydney Law Review* 293 <<https://doi.org/10.2139/ssrn.3485987>>; Therese MacDermott, 'Affirming Age: Making Federal Anti-Discrimination Regulation Work for Older Australians' (2013) 26(2) *Australian Journal of Labour Law* 141.

135 Thackrah (n 134) 31.

136 Ibid. See also Beth Gaze, 'Context and Interpretation in Anti-discrimination Law' (2002) 26(2) *Melbourne University Law Review* 325, 329.

is that Australia's anti-discrimination laws tend to essentialise the identity and experiences of discrimination faced by minority groups.<sup>137</sup> A further consequence is that the anti-discrimination legislative framework seeks to redress experiences of discrimination through identifying singular and distinct grounds of discrimination, and this undermines the efficacy of the law to accommodate for experiences of discrimination occurring on multiple and interconnected grounds.<sup>138</sup>

The application of intersectionality frameworks has revealed complex instances of discrimination and inequality in the workplace. These include the marginalisation of LGBTQI+ individuals in the workplace,<sup>139</sup> barriers to equal employment opportunities for Asian American women,<sup>140</sup> discrimination against women with disabilities in employment,<sup>141</sup> and unique inequalities experienced by older women in the workplace.<sup>142</sup> Anti-essentialist and intersectional research has demonstrated that beyond sex and gender, diverse women often experience multidimensional workplace inequalities which become complicated by other forms of identity.<sup>143</sup>

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137 Thackrah (n 134) 31.

138 Blackham and Temple (n 134) 776. See also, in the context of English law, Iyiola Solanke, 'Infusing the Silos in the *Equality Act 2010* with Synergy' (2011) 40(4) *Industrial Law Journal* 336, 336 <<https://doi.org/10.1093/indlaw/dwr024>>.

139 See, eg, Alexander M Nourafshan, 'The New Employment Discrimination: Intra-LGBT Intersectional Invisibility and the Marginalization of Minority Subclasses in Antidiscrimination Law' (2017) 24(2) *Duke Journal of Gender Law and Policy* 107; Varina Paisley and Mark Tayar, 'Lesbian, Gay, Bisexual and Transgender (LGBT) Expatriates: An Intersectionality Perspective' (2016) 27(7) *International Journal of Human Resource Management* 766 <<https://doi.org/10.1080/09585192.2015.1111249>>; Erin A Cech and William R Rothwell, 'LGBT Workplace Inequality in the Federal Workforce: Intersectional Processes, Organizational Contexts, and Turnover Considerations' (2020) 73(1) *Industrial and Labor Relations Review* 25 <<https://doi.org/10.1177/0019793919843508>>.

140 See, eg, Peggy Li, 'Recent Developments Hitting the Ceiling: An Examination of Barriers to Success for Asian American Women' (2014) 29(1) *Berkeley Journal of Gender, Law and Justice* 140 <<https://doi.org/10.15779/Z38319S24H>>; Brian TaeHyuk Keum et al, 'Gendered Racial Microaggressions Scale for Asian American Women: Development and Initial Validation' (2018) 65(5) *Journal of Counseling Psychology* 571 <<https://doi.org/10.1037/cou0000305>>; Shruti Mukkamala and Karen L Suyemoto, 'Racialized Sexism/Sexualized Racism: A Multimethod Study of Intersectional Experiences of Discrimination for Asian American Women' (2018) 9(1) *Asian American Journal of Psychology* 32 <<https://doi.org/10.1037/aap0000104>>.

141 See, eg, Clare Hanlon and Tracy Taylor, 'Workplace Experiences of Women with Disability in Sport Organizations' (2022) 4 *Frontiers in Sports and Active Living* 792703:1–13 <<https://doi.org/10.3389/fspor.2022.792703>>; Linda R Shaw, Fong Chan and Brian T McMahon, 'Intersectionality and Disability Harassment: The Interactive Effects of Disability, Race, Age, and Gender' (2012) 55(2) *Rehabilitation Counseling Bulletin* 82 <<https://doi.org/10.1177/0034355211431167>>; Terri L Jashinsky et al, 'Disability and COVID-19: Impact on Workers, Intersectionality With Race, and Inclusion Strategies' (2021) 69(4) *Career Development Quarterly* 313 <<https://doi.org/10.1002/cdq.12276>>.

142 See, eg, Ann Therese Lotherington, Aud Obstfelder and Susan Halford, 'No Place for Old Women: A Critical Inquiry into Age in Later Working Life' (2017) 37(6) *Ageing and Society* 1156 <<https://doi.org/10.1017/S0144686X16000064>>; Monde Makiwane, Catherine Ndinda and Hannah Botsis, 'Gender, Race and Ageing in South Africa' (2012) 26(4) *Agenda* 15 <<https://doi.org/10.1080/10130950.2012.755380>>.

143 See, eg, Jawad Syed and Edwina Pio, 'Veiled Diversity? Workplace Experiences of Muslim Women in Australia' (2010) 27(1) *Asia Pacific Journal of Management* 115 <<https://doi.org/10.1007/s10490-009-9168-x>>; Caroline Essers and Yvonne Benschop, 'Enterprising Identities: Female Entrepreneurs of Moroccan or Turkish Origin in the Netherlands' (2007) 28(1) *Organization Studies* 49 <<https://doi.org/10.1177/0170840607068256>>; Anne Fearfull and Nicolina Kamenou, 'How Do You Account for It?

However, there is a lack of analysis on the *WGEA* through an anti-essentialist and intersectional theoretical lens. This article takes an anti-essentialist and intersectional approach, primarily drawing from Crenshaw's single categorical axis framework with the assistance of King's 'multiple jeopardy' and Collins' 'matrix of domination'. Informed by each of these conceptualisations, the next section of this article will analyse the essentialist and single axis approach of the *WGEA* and Recommendation 6.1 of the *WGEA Report*. The benefit of an intersectional and anti-essentialist approach is that it reveals how essentialist and singular approaches to legislation such as the *WGEA* and proposals for reform such as Recommendation 6.1 only replicate systems of power and privilege, while silencing marginalised minority groups.<sup>144</sup> An anti-essentialist and intersectional lens facilitates a critique of the essentialist presumptions of identity upon which the *WGEA* is founded,<sup>145</sup> and the vastly different outcomes these presumptions have for diverse women, dependent upon their respective level of social power and privilege.<sup>146</sup>

## E Methodology

Part IV first analyses the *WGEA* Objects, GEIs and Standards through Crenshaw's single categorical axis framework and King's multiple jeopardy framework. Recommendation 6.1 and the key arguments in opposition to the collection of additional diversity data contained in the *WGEA Report* are then analysed with the assistance of Collins' matrix of domination framework. The authors use these theoretical frameworks as lenses through which to examine the *WGEA* and Recommendation 6.1 which, at face value, appear to advance the interests of working women. However, closer scrutiny of the *WGEA* and Recommendation 6.1 through these lenses reveals assumptions and silences that ignore, and in some cases may exacerbate, intersectional disadvantage.

In adopting intersectionality as a critical lens, the authors acknowledge Barbara Foley's critique of intersectionality that '[a]lthough intersectionality can usefully describe the effects of multiple oppressions ... it does not offer an adequate explanatory framework for addressing the root causes of social inequality in the capitalist socioeconomic system'.<sup>147</sup> In this article, the authors use intersectionality for the more limited purpose of highlighting some of the effects of multiple oppressions on diverse women in Australia, and analysing the ways in which the

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A Critical Exploration of Career Opportunities for and Experiences of Ethnic Minority Women' (2006) 17(7) *Critical Perspectives on Accounting* 883 <<https://doi.org/10.1016/j.cpa.2005.08.006>>.

144 Emily Grabham, 'Intersectionality: Traumatic Impressions' in Emily Grabham et al (eds), *Intersectionality and Beyond: Law, Power and the Politics of Location* (Routledge-Cavendish, 2008) 183, 184.

145 Ibid.

146 Cate Thomas et al, 'Seeing and Overcoming the Complexities of Intersectionality' (2021) 12(1) *Challenges* 5, 6 <<https://doi.org/10.3390/challe12010005>>. See also Marjolein Dennissen, Yvonne Benschop and Marieke van den Brink, 'Rethinking Diversity Management: An Intersectional Analysis of Diversity Networks' (2020) 41(2) *Organization Studies* 219 <<https://doi.org/10.1177/0170840618800103>>; Eline Severs, Karen Celis and Silvia Erzeel, 'Power, Privilege and Disadvantage: Intersectionality Theory and Political Representation' (2016) 36(4) *Politics* 346 <<https://doi.org/10.1177/0263395716630987>>.

147 Barbara Foley, 'Intersectionality: A Marxist Critique' (2019) 28(3) *New Labor Forum* 10, 11 <<https://doi.org/10.1177/1095796019867944>> (emphasis omitted).

*WGEA* and Recommendation 6.1 tend to mask, rather than address, these multiple oppressions. As discussed above, this approach has been used to examine the shortcomings of the federal and state legislative frameworks in Australia.<sup>148</sup>

Our analysis of Recommendation 6.1 was enriched by a thorough desktop review of every submission to the Review published on the Department of the Prime Minister and Cabinet website. Collins' matrix of domination assists in revealing the inherent limitations of laws apparently devised to address inequalities for women. Our analysis of the submissions to the Review provided a rich qualitative picture of stakeholders' views, including those who experience entrenched inequality at work, and those who might be responsible for entrenching that inequality. The qualitative dataset consisted of 137 publicly available written submissions.<sup>149</sup>

The authors conducted directed qualitative content analysis of these submissions. Qualitative content analysis is 'a research method for the subjective interpretation of the content of text data through the systematic classification process of coding and identifying themes or patterns'.<sup>150</sup> Directed qualitative content analysis involves the coding of qualitative text data based on predetermined frameworks, theories or themes.<sup>151</sup> It differs from conventional qualitative content analysis, where the themes are not predetermined, but are developed from the data.<sup>152</sup> Initially, the authors' intention was to collate only data that directly responded to CQ5, because, as explained above, it was the only consultation question relating to diversity. However, a closer examination of the 137 submissions demonstrated that some of the submissions referenced the *WGEA* and issues of diversity more generally, without explicitly responding to CQ5. This was most likely because the consultation questions were merely a guide for stakeholders, and they could answer all or some of the consultation questions as they wished.<sup>153</sup> The authors decided to add an additional category of data, being submissions which, whilst not directly addressing CQ5, referred to the *WGEA* and diversity more generally. This is consistent with directed qualitative content analysis, in which '[d]ata that cannot be coded are identified and analyzed later to determine if they represent a new category or a sub-category of an existing code.'<sup>154</sup> This analysis yielded references in 69 submissions responding to CQ5 directly, and references in 57

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148 See, eg, Blackham and Temple (n 134); Mansour (n 134); Hunter and De Simone (n 134); O'Connell (n 134); Thackrah (n 134); Easteal (n 134); Buxton-Namisnyk (n 134); Behrendt and Kennedy (n 134); Goldblatt and Steele (n 134); MacDermott (n 134).

149 While 155 submissions were received by the *WGEA* Review Team during the consultation process, only 137 of those were published on the Department of the Prime Minister and Cabinet's website: 'Review of the *Workplace Gender Equality Act 2012* Submissions', *Department of the Prime Minister and Cabinet* (Web Page, 2021) <<https://www.pmc.gov.au/office-women/womens-economic-equality/workplace-gender-equality/consultation-review-workplace-0>>.

150 Hsiu-Fang Hsieh and Sarah E Shannon, 'Three Approaches to Qualitative Content Analysis' (2005) 15(9) *Qualitative Health Research* 1277, 1278 <<https://doi.org/10.1177/1049732305276687>>.

151 See, generally, Hsieh and Shannon (n 150); Abdolghader Assarroudi et al, 'Directed Qualitative Content Analysis: The Description and Elaboration of Its Underpinning Methods and Data Analysis Process' (2018) 23(1) *Journal of Research in Nursing* 42 <<https://doi.org/10.1177/1744987117741667>>.

152 *Ibid.*

153 '*WGEA* Consultation Paper' (n 69) 1.

154 Hsieh and Shannon (n 150) 1282.

submissions which discussed the *WGEA* and diversity more generally. Many of these submissions are referred to in the analysis below.

Mark Fathi Massoud's recent work on positionality encourages the explicit acknowledgement of privilege.<sup>155</sup> The authors acknowledge the potential ethical issues concerning their privilege as white, middle-class, cisgendered women writing on issues of anti-essentialism and intersectionality. The authors have attempted to adopt a sensitive and 'ally' style approach in undertaking an anti-essentialist and intersectional analysis in the following Part, to ensure that the following Part objectively utilises the tools of anti-essentialism and intersectionality to reveal the shortcomings of the *WGEA*'s operative provisions and Recommendation 6.1.

#### **IV AN ANTI-ESSENTIALIST AND INTERSECTIONAL APPROACH TO THE *WGEA* AND RECOMMENDATION 6.1 OF THE *WGEA* REPORT**

##### **A A Single Categorical Axis and Multiple Jeopardy Approach to the *WGEA***

This Part applies an anti-essentialist and intersectional theoretical framework to certain provisions of the *WGEA*, specifically the Objects, GEIs and Standards. As discussed earlier in this article, the reason for the focus on these three aspects of the *WGEA* is that the framing of the Objects has a significant impact on the GEIs and Standards, which in turn influences the nature of the data collected, analysed, and published by the Agency.

##### **1 Objects of the *WGEA***

The Objects of an Act play a central role in outlining its goals and purposes as intended by the legislature.<sup>156</sup> They are 'not to be put aside lightly'<sup>157</sup> and are the 'premise' upon which the construction of the legislation begins.<sup>158</sup> The following analysis demonstrates how the 'gender neutral' language of the *WGEA*'s Objects and their essentialist references to 'women' reflect that the *WGEA* is operating along a single categorical axis regarding women's inequality in the workplace. Framing the Objects of the *WGEA* in an essentialist manner means that the *WGEA* is

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155 Mark Fathi Massoud, 'The Price of Positionality: Assessing the Benefits and Burdens of Self-Identification in Research Methods' (2022) 49(S1) *Journal of Law and Society* S64, S71 <<https://doi.org/10.1111/jols.12372>>.

156 In interpreting legislation and applying it to facts before them, Australian courts adopt a purposive approach, often referring to the Objects of the legislation, and adopt a construction of the legislation which upholds the Objects as the legislature intended. See, eg, *Marks v GIO Australia Holdings Ltd* (1998) 196 CLR 494, 537 [123] (Kirby J); *Santhirarajah v Attorney-General (Cth)* (2012) 206 FCR 494, 555 [247] (North J); *Re Bicycle Victoria Inc and Commissioner of Taxation* (2011) 127 ALD 553, 558 [18] (Forgie D-P); *Knightsbridge North Lawyers Pty Ltd v New South Wales [No 2]* (2019) 365 ALR 314, 332 [74] (Schmidt J). The purposive approach is also enshrined in the *Acts Interpretation Act 1901* (Cth) s 15AA, and equivalent provisions in state and territory interpretation legislation.

157 *New South Wales v Commonwealth* (2006) 229 CLR 1, 269 [675] (Callinan J).

158 *Ibid*; *McKinnon v Secretary, Department of Treasury* (2006) 228 CLR 423, 428 [5] (Gleeson CJ and Kirby J).

limited in its ability to address the unique intersectional inequalities experienced by diverse women in Australian workplaces.<sup>159</sup> The failure to recognise intersectional inequality for diverse women in the *WGEA* Objects signifies that diverse women have been overlooked in the goals and purposes of the *WGEA*.

(a) *The ‘Neutral’ Framing of the WGEA*

The neutral framing of the *WGEA*’s Objects demonstrates an essentialist approach towards women’s equality in the workplace and reflects a lack of consideration for diverse women’s unique experiences of inequality. The amendment from the *EOW Act* to the *WGEA* involved a transition to a gender neutral framing of the language of the legislation.<sup>160</sup> Where the *EOW Act* referred to ‘equal opportunity for women’ in its Objects,<sup>161</sup> the *WGEA* uses the term ‘gender equality’.<sup>162</sup> For example, one of the Objects of the *EOW Act* was ‘the elimination of discrimination against, and the provision of equal opportunity for, *women* in relation to employment matters’.<sup>163</sup> In the *WGEA*, this Object becomes ‘the elimination of discrimination on the basis of *gender* in relation to employment matters’.<sup>164</sup>

Approximately one quarter of the submissions received during the 2010 review of the *EOW Act* supported the shift in language.<sup>165</sup> The justification for the transition to the language of ‘gender equality’ in the *WGEA* was that it would expand the coverage of the legislation to include men.<sup>166</sup> This was claimed to be necessary to change male behaviour towards domestic and family responsibilities, and to place a greater focus on men and women equally sharing paid employment and household responsibilities.<sup>167</sup> The review of the *EOW Act* indicated that the burden of domestic and caring responsibilities upon women in heterosexual relationships<sup>168</sup> played a significant role in limiting their advancement in the workplace.<sup>169</sup>

159 See Crenshaw (n 113) 140.

160 Sutherland (n 47) 103–4.

161 *EOW Act* (n 35) s 2A. See also the definition of ‘equal opportunity for women in the workplace programs’, the discussion of these programs, and the name of the Equal Opportunity for Women in the Workplace Agency: at ss 3(1), 6, 8, 8A.

162 *WGEA* (n 1) s 2A. See also the definition of ‘gender equality indicators’ and the name of the Workplace Gender Equality Agency: at ss 3(1), 8A.

163 *EOW Act* (n 35) s 2A(b) (emphasis added).

164 *WGEA* (n 1) s 2A(c) (emphasis added).

165 Office for Women, Department of Families, Housing, Community Services and Indigenous Affairs, *Reform of the Equal Opportunity for Women in the Workplace Act 1999 Regulation Impact Statement* (Report, 30 March 2011) 63 (*‘Reform Impact Statement’*).

166 *Ibid.*

167 *Ibid.*

168 Studies have shown that the split of domestic and family responsibilities is much more balanced and equal in homosexual relationships. See, eg, Lawrence A Kurdek, ‘The Allocation of Household Labor in Gay, Lesbian, and Heterosexual Married Couples’ (1993) 49(3) *Journal of Social Issues* 127 <<https://doi.org/10.1111/j.1540-4560.1993.tb01172.x>>; Ashraf Esmail, “‘Negotiating Fairness’: A Study on How Lesbian Family Members Evaluate, Construct, and Maintain “Fairness” with the Division of Household Labor’ (2010) 57(5) *Journal of Homosexuality* 591 <<https://doi.org/10.1080/00918361003711881>>; Abbie E Goldberg, “‘Doing’ and ‘Undoing’ Gender: The Meaning and Division of Housework in Same-Sex Couples’ (2013) 5(2) *Journal of Family Theory and Review* 85 <<https://doi.org/10.1111/jftr.12009>>.

169 Sutherland (n 47) 103–4; *Reform Impact Statement* (n 165) 63.

An anti-essentialist and multiple jeopardy approach raises various concerns with this shift in language from ‘equal opportunity for women’ to ‘gender equality’ in the *WGEA*. First, shifting the focus of the Objects to ‘gender equality’, and away from ‘equality for women’, contradicts the purpose of affirmative action legislation, which is to redress historical inequalities experienced by marginalised groups.<sup>170</sup> By adopting a neutral framing, the *WGEA* is effectively denying the unequal position of women in the workplace, both historically and presently.<sup>171</sup> In a similar fashion to race-neutral and ‘colour-blind’ affirmative action legislation, which simply ‘mask[s] racism and normalize[s] whiteness’,<sup>172</sup> the *WGEA* attempts to neutralise women’s inequality in the workplace through framing it as ‘gender inequality’. In doing so, the *WGEA* is effectively neutralising the sexism and inequality that disproportionately impacts women in Australian workplaces.

Multiple jeopardy informs us that inequality is not created by individual factors and its effects are not direct or independent for marginalised individuals.<sup>173</sup> The shift to a neutral framing of the *WGEA* Objects relies on the assumption that the substantial cause of women’s inequality in the workplace is the unequal distribution of domestic and family responsibilities in the home.<sup>174</sup> Accordingly, the neutral framing of the Objects draws the focus of the *WGEA* away from the unequal position of women in relation to men generally, and also denies the intersectional differences that exist for women who experience multiple jeopardy.<sup>175</sup> In any event, if the intention behind the gender neutral framing of the Objects of the *WGEA* was to shift male attitudes in the domestic sphere, it has been demonstrably unsuccessful. Recent census data demonstrate that 67.4% of people completing 15 to 29 hours of unpaid domestic work per week are women<sup>176</sup> and women make up 77.9% of people completing 30 hours or more unpaid domestic work per week.<sup>177</sup> Whilst men continue to experience competing social pressures which make it extremely difficult to request flexible working arrangements,<sup>178</sup> it is unlikely that a neutral framing of the *WGEA* will generate the societal changes necessary for

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170 Allen, Rees and Rice (n 19) 166–7; Stewart (n 20) 96. See also Object (b) which seemingly acknowledges the historical disadvantage of women. This Object is ‘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*’: *WGEA* (n 1) s 2A(b) (emphasis added).

171 Allen, Rees and Rice (n 19) 166–7; Stewart (n 20) 96.

172 Erin Winkler, ‘The Attack on Affirmative Action: The “Race Neutral” Excuse’ (2003) 33(3–4) *Black Scholar* 37, 39 <<https://doi.org/10.1080/00064246.2003.11413230>>. See also L Darnell Weeden, ‘Employing Race-Neutral Affirmative Action to Create Educational Diversity while Attacking Socio-economic Status Discrimination’ (2005) 19(2) *St John’s Journal of Legal Commentary* 297, 305.

173 King (n 121) 47.

174 *Reform Impact Statement* (n 165) 63.

175 Dean Spade, ‘Intersectional Resistance and Law Reform’ (2013) 38(4) *Signs* 1031, 1033 <<https://doi.org/10.1086/669574>>; King (n 121) 46–7.

176 According to Census data from 2021, approximately 1,691,697 females performed 15 to 29 hours unpaid domestic work per week, compared to 819,324 men: Australian Bureau of Statistics, *Unpaid Work and Care: Census, 2021* (28 June 2022) <<https://www.abs.gov.au/statistics/people/people-and-communities/unpaid-work-and-care-census/latest-release>>.

177 According to Census data from 2021, approximately 1,390,593 females performed 30 hours or more unpaid domestic work per week, compared to 394,995 men: *ibid*.

178 Sutherland (n 47) 104.

men to equally share the burden of domestic and caring responsibilities with their female partners.<sup>179</sup> Rather than achieving the goal outlined in the review of the *EOW Act* regarding men's roles in the domestic sphere, the neutral framing of the *WGEA* only serves to essentialise women's experiences of inequality in Australian workplaces,<sup>180</sup> as discussed below.

The shift to a neutral framing of the *WGEA*'s Objects essentialises the experiences of gender inequality for women and fails to consider or interact with diverse women's experiences of multiple jeopardy. Essentialising women's experiences of inequality in the workplace through a neutral framing means that diverse women now not only have to compete with privileged, often white, women to have their experiences of workplace inequality recognised and addressed by the *WGEA*, but now have the additional difficult task of having their voices heard above men's.<sup>181</sup> Anti-essentialism assists in highlighting how the neutral framing of the *WGEA* effectively ensures that only the voices of men and privileged women are heard in relation to gender equality in the workplace, while diverse women are silenced.<sup>182</sup> By adopting an anti-essentialist approach to interrogate the singular assumption of women's identity in the *WGEA*, it is possible to recognise how the shift away from a sole focus on women, as was the case in the *EOW Act*, to a focus on 'gender equality' in the *WGEA*, only perpetuates the power afforded to privileged women,<sup>183</sup> and ignores the intersectional inequalities faced by diverse women in the workplace.<sup>184</sup>

Anti-essentialism and Crenshaw's single categorical axis framework highlight a further problem caused by the shift in framing of the *WGEA*; there is an implicit privilege afforded to the experiences of cisgendered men and women in heterosexual relationships, despite the repeated references in the legislation to 'gender equality'. This ultimately ignores the inequality experienced by transgender and gender non-binary people in the workplace.<sup>185</sup> The shift to a gender neutral framing of the *WGEA* was clearly not intended to promote inclusivity for transgender and

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179 Ibid 103–4; *Reform Impact Statement* (n 165) 63.

180 Styhre and Eriksson-Zetterquist (n 110) 569; Hunter (n 16) 144; Harris (n 105) 587. See also Few-Demo and Allen (n 110); Sang (n 110); Gordon (n 110); Gouws (n 110); Evans and Lépinard (n 110); Colker (n 110); Leonard (n 110); Kline (n 110).

181 Crenshaw (n 113) 151–2.

182 Harris (n 105) 585.

183 Hunter (n 16) 135–6.

184 Crenshaw (n 113) 140.

185 See, eg, as to the multifaceted inequality experienced by transgender and gender non-binary people in the workplace: Ann Hergatt Huffman et al, 'Workplace Support and Affirming Behaviors: Moving toward a Transgender, Gender Diverse, and Non-Binary Friendly Workplace' (2021) 22(3) *International Journal of Transgender Health* 225 <<https://doi.org/10.1080/26895269.2020.1861575>>; Francisco Perales et al, 'You, Me, and Them: Understanding Employees' Use of Trans-Affirming Language within the Workplace' (2022) 19(2) *Sexuality Research and Social Policy* 760 <<https://doi.org/10.1007/s13178-021-00592-9>>; Francisco Perales, Christine Ablaza and Nicki Elkin, 'Exposure to Inclusive Language and Well-Being at Work among Transgender Employees in Australia, 2020' (2022) 112(3) *American Journal of Public Health* 482 <<https://doi.org/10.2105/AJPH.2021.306602>>; Madeline Donaghy and Francisco Perales, 'Workplace Wellbeing among LGBTQ+ Australians: Exploring Diversity within Diversity' (2022) *Journal of Sociology* (forthcoming) <<https://doi.org/10.1177/14407833221118383>>.

gender non-binary people.<sup>186</sup> This is demonstrated in the first *WGEA* Object which is ‘to promote and improve *gender equality* (including equal remuneration between *women* and *men*) in employment and in the workplace’.<sup>187</sup> Additionally, the *WGEA* defines a ‘woman’ as ‘a member of the female sex irrespective of age’ and a ‘man’ as ‘a member of the male sex irrespective of age’.<sup>188</sup> The neutral framing of ‘gender equality’ in the first Object, combined with the definition of ‘woman’ and ‘man’, highlights the implicit privilege afforded to cisgendered men and women in the *WGEA*, and the essentialist approach of the Objects as a result of this neutral framing. Applying an anti-essentialist framework to this issue allows for the conclusion that the implied privilege afforded to cisgendered men and women in the Objects prevents the *WGEA* from having the necessary tools to redress inequalities experienced by transgender women and gender diverse people in Australian workplaces.<sup>189</sup> These inequalities are largely ignored in the *WGEA* because of the neutral framing of its Objects.<sup>190</sup>

*(b) The Impact of the Essentialist Framing of the WGEA Objects on the Workplace Gender Equality Agency’s Data*

Crenshaw’s critique of the single categorical axis helps to illustrate that the essentialist framing of the *WGEA* Objects significantly impacts the data collected, analysed, and published by the Agency. The Objects adopt a single categorical axis approach by essentialising women’s experiences of inequality in the workplace, rather than focusing on the multitude of factors which cause unique inequalities for diverse women.<sup>191</sup> This is most evident in the second *WGEA* Object which refers to supporting ‘employers to remove barriers to the full and equal participation of *women* in the workforce, in recognition of the disadvantaged position of *women*’.<sup>192</sup> Referring to the disadvantaged position of ‘women’ as a homogenous group fails to recognise: how women from migrant backgrounds experience significant underemployment and inequality in the division of family responsibilities;<sup>193</sup> the inbuilt heteronormativity in workplaces which makes them unsafe for LGBTIQI+ employees;<sup>194</sup> and that the burden of unpaid care for unwell relatives is placed primarily upon older women, thus further decreasing and disrupting their workforce

186 *Reform Impact Statement* (n 165) 63.

187 *WGEA* (n 1) s 2A(a) (emphasis added).

188 *Ibid* s 3(1).

189 Bethany M Coston and Michael Kimmel, ‘Seeing Privilege Where It Isn’t: Marginalized Masculinities and the Intersectionality of Privilege’ (2012) 68(1) *Journal of Social Issues* 97, 99 <<https://doi.org/10.1111/1/j.1540-4560.2011.01738.x>>.

190 Perales, Ablaza and Elkin (n 185) 483. See generally regarding transgender and gender diverse peoples’ experiences in the workplace: Huffman et al (n 185).

191 Crenshaw (n 113) 140.

192 *WGEA* (n 1) s 2A(b) (emphasis added).

193 See Ressia, Strachan and Bailey (n 112).

194 See Patti Giuffre and Courtney Caviness, ‘Sexuality, Employment, and Discrimination’ in Nancy A Naples (ed), *Companion to Sexuality Studies* (Wiley Blackwell, 2020) 242 <<https://doi.org/10.1002/9781119315049.ch13>>.

participation.<sup>195</sup> By conceiving women's unequal position in a homogenous, single-axis manner, the *WGEA* Objects fail to recognise the nuanced and complex position of diverse women in the workplace.<sup>196</sup>

A consequence of this failure is that the Agency, when performing its task to collect and analyse data from employers, does not collect diversity data.<sup>197</sup> This means that the Agency is not collecting data which would 'uncover the most vulnerable groups in society that should be prioritised in terms of policy actions and responses'.<sup>198</sup> Therefore, the data that the Agency publishes only reflects inequality for women in Australian workplaces as a homogenous experience.<sup>199</sup> This is problematic from an anti-essentialist perspective, as this data is then represented in Agency publications as reflective of the experiences of all four million<sup>200</sup> women working for employers covered by the *WGEA*.<sup>201</sup>

The impact of the essentialist approach of the *WGEA* Objects on the Agency's dataset is demonstrated through an analysis of the first *WGEA* Object. This Object is to 'promote and improve gender equality (including equal remuneration between women and men) in employment and in the workplace'.<sup>202</sup> The pursuit of this Object is evident in much of the work undertaken by the Agency.<sup>203</sup> Data collected by the Agency in pursuit of this Object is collected on women as a homogenous

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195 See Janneke Berecki-Gisolf et al, 'Transitions into Informal Caregiving and out of Paid Employment of Women in Their 50s' (2008) 67(1) *Social Science and Medicine* 122 <<https://doi.org/10.1016/j.socscimed.2008.03.031>>.

196 Crenshaw (n 113) 140.

197 The Agency's functions, including its data collection functions are found in the *WGEA* (n 1): at ss 10(1), 13A(1).

198 Minderoo Foundation, Submission No 116 to Department of the Prime Minister and Cabinet, *Review of the Workplace Gender Equality Act 2012* 1.

199 See, eg, the following data sets produced by the Agency in the previous two years which reflect the homogenous focus of the Agency: Workplace Gender Equality Agency, *Australia's Gender Equality Scorecard: Key Results from the Workplace Gender Equality Agency's 2020–21 Employer Census* (Report, 11 February 2022) ('*Gender Equality Scorecard 2020–21*'); Workplace Gender Equality Agency, *Gender Workplace Statistics at a Glance* (Report, 24 February 2022) ('*Gender Workplace Statistics*'); Workplace Gender Equality Agency, *Higher Education Enrolments and Graduate Labour Market Statistics* (Report, 28 April 2021) ('*Higher Education Enrolments*'). These publications highlight, respectively, the homogenous reporting of women in top managerial roles, the gender pay gap and the uptake of paid parental leave; key, homogenous workplace statistics including workforce participation, economic security, educational attainment, paid parental leave and women in leadership; and focus on male and female ratios for higher education enrolment, undergraduate and postgraduate employment, and graduate gender pay gaps in different fields of study.

200 See *Gender Equality Scorecard 2019–20* (n 85) 2. The Agency's data reflects just over 40% of Australia's total workforce: at 2.

201 Minderoo Foundation (n 198) 12–13.

202 *WGEA* (n 1) s 2A(a).

203 See, eg, the following publications by the Agency: Workplace Gender Equality Agency, *Wages and Ages: Mapping the Gender Pay Gap by Age* (Fact Sheet, 27 June 2022) ('*Wages and Ages*'); Workplace Gender Equality Agency, *Australia's Gender Pay Gap Statistics* (Report, February 2022) ('*Gender Pay Gap Statistics*'); *Gender Equality Scorecard 2020–21* (n 199); *Higher Education Enrolments* (n 199). See also, for example, the reports the Agency publishes in collaboration: KPMG, *She's Price(d)less: The Economics of the Gender Pay Gap* (Report, 13 July 2022).

group.<sup>204</sup> By applying Crenshaw's single categorical axis, it can be seen how this is problematic because the fact sheets, reports and other publications circulated by the Agency reflect women's experiences of inequality in the workplace as uniform, when they are clearly not uniform.<sup>205</sup>

For example, in February 2022, the Agency published gender pay gap statistics,<sup>206</sup> and found that, on average, women as a collective group earn approximately 13.8% or \$255.30 per week less than men.<sup>207</sup> Problematically from an anti-essentialist perspective, the Agency represents the gender pay gap data as reflective of *all* women's experience.<sup>208</sup> Such a representation fails to engage with the unequal position of diverse women in Australian workplaces which exacerbates the gender pay gap.<sup>209</sup> This is particularly the case for the underemployment of migrant women. A recent study found that women from migrant backgrounds often face extensive obstacles in finding employment in Australia.<sup>210</sup> Such obstacles included their non-English speaking backgrounds, having qualifications which were not obtained in Australia, and having no work experience in Australia.<sup>211</sup> As a single categorical axis framework informs us, migrant unemployment becomes more complex when sex is added into the equation.<sup>212</sup> The study observed that women from migrant backgrounds were more willing to undertake employment below their profession or qualifications in order to contribute to the household income.<sup>213</sup> In other circumstances, where childcare is difficult to obtain due to a lack of extended family support available in Australia, migrant women will often take any available part-time or casual work which enables them to balance family and caring responsibilities more easily.<sup>214</sup> Alternatively in such circumstances, migrant women may depart the workforce entirely to become full-time caregivers for their children as financial pressures take hold.<sup>215</sup>

Considering the intersectional inequalities and factors which contribute to pay inequality in the workplace experienced by migrant women alone, the Agency's analysis and publication of the gender pay gap data as one-dimensional is problematic. The one-dimensional nature of the Agency's data, resulting from the essentialist framing of the first *WGEA* Object, prevents the Agency from

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204 See the 2021–22 Reporting Questionnaire published by the Agency for employers to complete: Workplace Gender Equality Agency, 'Reporting Questionnaire' (2021–22) <<https://www.wgea.gov.au/sites/default/files/documents/Reporting-Questionnaire.docx>>.

205 See, eg, *Gender Workplace Statistics* (n 199); *Gender Pay Gap Statistics* (n 203); *Gender Equality Scorecard: 2020–21* (n 199).

206 The gender pay gap refers to the difference between women's and men's average weekly full-time earnings, which is expressed as a percentage of men's earnings. The gender pay gap seeks to measure the overall position of women in the workforce but does not compare like roles: *Gender Pay Gap Statistics* (n 203) 2.

207 Ibid 1.

208 Harris (n 105) 586; Grillo (n 101) 19–20.

209 Hunter (n 16) 135–6.

210 Ressler, Strachan and Bailey (n 112) 380.

211 Ibid.

212 Ibid 385.

213 Ibid 385–6.

214 Ibid 386–90.

215 Ibid.

discovering and addressing the complex inequalities which contribute to pay inequality for migrant women, for example.<sup>216</sup> Without this data, the Agency is precluded from developing strategies which may assist employers to address diverse women's multifaceted disadvantage.<sup>217</sup>

The benefit of the Agency *not* taking an essentialist approach and collecting intersectional data is that the data reveals nuances and complexities regarding women's inequality in the workplace which would otherwise remain invisible. This was demonstrated in the Agency's 2020–21 reporting year. In this reporting year, for the first time, the Agency collected data on age diversity from employers.<sup>218</sup> While this data was provided to the Agency by employers on a voluntary basis, there was an extremely high reporting rate at 73.8%.<sup>219</sup> This high reporting rate enabled the Agency to publish its key findings on the gender pay gap disaggregated by age.<sup>220</sup> The key findings published by the Agency revealed that, while the gender pay gap is 13.8% overall, the gender pay gap differed based on a woman's age.<sup>221</sup> For example, at 24 years of age or younger, when young men and women are entering into the professional workforce, the gender pay gap is 2.5%.<sup>222</sup> The gender pay gap then steadily increases until it peaks at over 30% for women between the ages of 45 to 64.<sup>223</sup> The Agency suggested that the increase in the gender pay gap between the ages of 25 to 44 is most likely because this age sees women decrease their participation in the workforce for the uptake of family and caring responsibilities.<sup>224</sup> This time spent out of the workforce typically delays or reduces women's opportunities for career advancement by way of promotions or developing their skills, causing them to have lower remuneration compared to men who have not spent that same time out of the workforce.<sup>225</sup> If this data had not been collected, the intersectional insight that age plays a significant role in the increase of the gender pay gap would remain hidden.<sup>226</sup>

The failure to collect this data prior to 2021 has also likely impacted upon the Agency's pursuit of the third *WGEA* Object, which is promoting the elimination of discrimination on the basis of sex, including discrimination in relation to *family and caring responsibilities*.<sup>227</sup> By failing to collect age data in the past, the Agency cannot have fully appreciated nor understood that the increased gender pay gap for older women is a direct consequence of discrimination in relation to family and caring responsibilities.<sup>228</sup>

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216 Harris (n 105) 585; Ressia, Strachan and Bailey (n 112) 380.

217 *WGEA* (n 1) s 10(1).

218 *WGEA Report* (n 2) 48.

219 *Ibid* 45.

220 See *Wages and Ages* (n 203).

221 *Ibid* 1.

222 *Ibid*.

223 *Ibid*.

224 *Ibid* 2.

225 *Ibid*.

226 *Ibid*.

227 *WGEA* (n 1) s 2A(c) (emphasis added).

228 *Wages and Ages* (n 203) 1.

As an anti-essentialist framework informs us, there is no universal experience of sex discrimination for women<sup>229</sup> and the Agency's inclusion of age in gender pay gap data demonstrates this. The essentialist framing of the *WGEA* Objects has a direct impact on the data collected, analysed, and published by the Agency, and limits the Agency to a homogenous picture of women's inequality in Australian workplaces. Crucially, this homogenous picture also prevents the Agency from assisting employers to address these multifaceted inequalities experienced by diverse women.<sup>230</sup>

## 2 Gender Equality Indicators

Crenshaw's critique of the single categorical axis can be utilised to demonstrate the impact of the essentialist framing of the Objects on other provisions of the *WGEA*, particularly the GEIs. There is a lack of regard in the GEIs for the intersectional inequalities experienced by diverse women in the workplace. The essentialist framing of the GEIs is apparent in the references to the 'gender composition' of the workforce and governing bodies, and the equal remuneration between 'women and men'.<sup>231</sup> The GEIs determine the information and data that the Agency collects from employers in their public reports.<sup>232</sup> This information and data is then analysed by the Agency and reproduced on its website in the form of fact sheets, reports, and other publications.<sup>233</sup> Employers are also under an obligation to provide their employees and shareholders with access to the public reports they lodge with the Agency.<sup>234</sup> The fundamental problem with the essentialist framing of the GEIs is that the Agency, through its analysis of data and information from employers, is not in an informed position to address or consider intersectional inequalities for diverse women.

A function of the Agency is to develop benchmarks in collaboration with employers and employee organisations.<sup>235</sup> The data collected and analysed by the Agency from the reports lodged by employers as to their performance against the GEIs is the same data and information the Agency uses to develop these benchmarks.<sup>236</sup> Furthermore, the Agency uses the data and information collected to advise employers on how to improve gender equality in their workplaces,<sup>237</sup> issue guidelines,<sup>238</sup> and develop educational programs to promote gender equality in the

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229 Harris (n 105) 586; Grillo (n 101) 19–20.

230 As a result, the Agency is prevented from fulfilling its functions to diverse women in Australian workplaces: see *WGEA* (n 1) s 10(1).

231 *Ibid* s 3(1).

232 *Ibid* s 13(1).

233 *Ibid* s 15(1)(a).

234 *Ibid* s 16. Employers are also required to inform employee organisations of their lodgement of the report, as well as inform employees and employee organisations of their opportunity to comment on the public report: at ss 16A, 16B. As a result of amendments to the *WGEA* in April 2023, each Chief Executive Officer must now also provide a copy of the Agency's executive summary report industry benchmark report for the employer to each member of the employer's governing body: at s 16C.

235 *Ibid* s 10(1)(aa).

236 *Ibid* ss 2B, 13.

237 *Ibid* s 10(1)(a).

238 *Ibid* s 10(1)(b).

workplace.<sup>239</sup> The essentialist framing of the GEIs renders the Agency effectively blind to the intersectional inequalities experienced by diverse women in the workplace. Consequently, this prevents the Agency from developing benchmarks, advising employers, issuing guidelines, and creating educational programs which consider intersectional inequality.

The Agency's dataset is well regarded and provides crucial information to both employers as to their performance on an industry-wide scale, and to their employees.<sup>240</sup> Without collecting data on 'contemporary diversity, equity and inclusion categories',<sup>241</sup> the Agency has no foundation to better understand the pervasive impact that intersectional factors of inequality have in the workplace when they interact with sex.<sup>242</sup> For example, GEI 1 is 'gender composition of the workforce' and GEI 2 is 'gender composition of governing bodies of ... employers'.<sup>243</sup> It has been argued that, to better understand the impact of intersectional inequality for diverse women, GEIs 1 and 2 need to be expanded beyond 'gender composition' to include intersectional factors such as 'Aboriginality, age, disability, ethnicity and race, religion and sexual orientation'.<sup>244</sup> The Agency would then be in a better position to recognise that the gender segregation of the workforce and persisting gender pay gap are the 'product of cultural and structural forces perpetuating privilege for some in society and problems for the rest'.<sup>245</sup> The essentialist framing of the GEIs represents a persistent failure to understand gender inequality as an experience of multiple jeopardy for diverse women and conceives gender inequality as isolated from other forces of inequality.<sup>246</sup>

### 3 Standards

Crenshaw's critique of the single categorical axis reveals the extended reach of the essentialist framing of the Objects to the Standards. The Standards are established in relation to the GEIs<sup>247</sup> and only apply to employers who employ 500 or more employees in Australia.<sup>248</sup> To illustrate the impact of the essentialist framing of the Standards, the following analysis will focus on the Standard in relation to GEI 6.

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239 Ibid s 10(1)(e).

240 See, eg, 50/50 by 2030 Foundation (University of Canberra), Submission No 112 to Department of the Prime Minister and Cabinet, *Review of the Workplace Gender Equality Act 2012* 1; Australian Gender Equality Council, Submission No 60 to Department of the Prime Minister and Cabinet, *Review of the Workplace Gender Equality Act 2012* (23 November 2021) 4.

241 50/50 by 2030 Foundation (University of Canberra) (n 240) 2.

242 ACON, Submission No 69 to Department of the Prime Minister and Cabinet, *Review of the Workplace Gender Equality Act 2012* (November 2021) 6–7.

243 *WGEA* (n 1) s 3(1).

244 Australian Discrimination Law Experts Group, Submission No 126 to Department of the Prime Minister and Cabinet, *Review of the Workplace Gender Equality Act 2012* (24 November 2021) 8–9.

245 50/50 by 2030 Foundation (University of Canberra) (n 240) 4.

246 King (n 121) 47; Styhre and Eriksson-Zetterquist (n 110) 574.

247 *WGEA* (n 1) s 19(1).

248 *Gender Equality Standards Instrument 2023* (n 11) cl 6(1). These Gender Equality Standards were formerly referred to as Standards and were found in the *Workplace Gender Equality (Standards) Instrument 2014* (Cth) cl 5(3).

Both GEI 6 and the Standard were amended in early 2023.<sup>249</sup> Prior to this, GEI 6 was ‘sex-based harassment and discrimination’, and the Standard was that employers have in place policies or strategies which support the objective of ‘sex-based harassment and discrimination prevention in the employer’s workplace’.<sup>250</sup> The term ‘sex-based harassment and discrimination’ was not defined. The 2021 *Respect@Work* Report highlights that, in addition to gender, there are a multitude of risk factors which increase the likelihood of experiencing sexual harassment in the workplace.<sup>251</sup> These risk factors include workers who are aged 30 years or younger, have diverse sexual and/or gender orientations, are Aboriginal or Torres Strait Islander, are from cultural and/or linguistically diverse backgrounds, are migrant workers or temporary visa holders, or are workers with disabilities.<sup>252</sup> These intersectional risk factors for sexual harassment in the workplace were recognised in Recommendation 53 of the *Respect@Work* Report.<sup>253</sup> Recommendation 53 is that all Australian governments take ‘into account the particular needs of workers facing intersectional discrimination’ when providing increased funding to community legal centres which assist in claims of sexual harassment in the workplace.<sup>254</sup> The *Respect@Work* Report recognised that additional social inequalities make diverse women more vulnerable to sexual harassment in the workplace.<sup>255</sup>

As a result of the 2023 amendments, GEI 6 is now ‘sexual harassment, harassment on the ground of sex or discrimination’.<sup>256</sup> The Standard for GEI 6 is now that employers are required to have in place policies or strategies which support the objective of prevention and appropriate response to sexual harassment, harassment on the ground of sex or discrimination in the workplace.<sup>257</sup> GEI 6 and the Standard adopt the definitions of ‘sexual harassment’, ‘harassment on the ground of sex’ and ‘discrimination’ from the *Sex Discrimination Act 1984* (Cth) (*‘Sex Discrimination Act’*).<sup>258</sup> The inclusion of the terms ‘sexual harassment’ and ‘harassment on the ground of sex’ appear to provide some potential to require employers to address issues of intersectional vulnerability and sexual harassment in their workplace policies and strategies. This is because the meaning of these terms in the *Sex Discrimination Act* includes intersectional characteristics, such as

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249 The current GEI 6 was introduced into the *WGEA* as a result of the *Closing the Gender Pay Gap Act*. The former GEI 6 was implemented via the Minister’s power under *WGEA* (n 1) s 3(1A) in the *Workplace Gender Equality (Matters in Relation to Gender Equality Indicators) Instrument 2013* (Cth). The new Standard relating to GEI 6 can be found in the *Gender Equality Standards Instrument* (n 11).

250 *Minimum Standards Instrument* (n 57) cl 5(3).

251 *Respect@Work* Report (n 65) 19. See also Australian Human Rights Commission, *Everyone’s Business: Fourth National Survey on Sexual Harassment in Australian Workplaces* (Report, 2018) 27–8 (*‘Everyone’s Business’*); Marian Baird et al, *Women and the Future of Work: Report 1 of the Australian Women’s Working Futures Project* (Report, 2018) 92.

252 *Respect@Work* Report (n 65) 19. See also *Everyone’s Business* (n 251) 27–8; Baird et al (n 251) 92.

253 *Respect@Work* Report (n 65) 51.

254 *Ibid.*

255 *Ibid.* 92.

256 *WGEA* (n 1) s 3(1).

257 *Gender Equality Standards Instrument* (n 11) cl 6(3)(b). These Gender Equality Standards were formerly referred to as Minimum Standards and were found in the *Minimum Standards Instrument* (n 57) cl 5(3).

258 *WGEA* (n 1) s 3(1).

the age, sexual orientation, gender identity, intersex status, marital or relationship status, religious belief, race, colour, or national or ethnic origin, of the person harassed.<sup>259</sup> It has been suggested that employer reporting in relation to GEI 6 should include a disaggregation of sexual harassment complaints by intersectional factors such as gender, Aboriginal or Torres Strait Islander status, age, disability, ethnicity and race, and sexual orientation, as this would assist employers to achieve the Standard for GEI 6.<sup>260</sup> This data would then form the empirical basis for the Agency to assist employers to address intersectional experiences of sexual harassment and discrimination in the workplace.

However, whilst GEI 6 and the Standard have been amended, there is still no reporting requirement attached to GEI 6 which requires employers to collect, or report, disaggregated data.<sup>261</sup> Furthermore, the meaning of ‘discrimination’ in GEI 6 and the Standard is limited to discrimination on the basis of sex, marital or relationship status, pregnancy or potential pregnancy, breastfeeding, and family responsibilities.<sup>262</sup> It does not, for example, extend to discrimination on the ground of sexual orientation, gender identity or intersex status.<sup>263</sup>

Anti-essentialism highlights how the essentialist framing of the Standard for GEI 6 prior to February 2023 failed to recognise that, while sex and gender are key risk factors for sexual harassment in the workplace, intersectional risk factors make diverse women more vulnerable to experiencing sexual harassment in their workplaces.<sup>264</sup> The former Standard for GEI 6 adopted an essentialist approach by considering only *sex-based* harassment and discrimination, which meant that employers were not required to adequately address the additional intersectional risk factors which make diverse women more vulnerable to sexual harassment in the workplace. The former Standard for GEI 6 failed to assist employers to even *recognise* the intersectional risk factors for sexual harassment and discrimination in the workplace.<sup>265</sup> The February 2023 amendments to GEI 6 and the Standard may go some way to addressing these issues. However, they are not supported by the reporting requirements in relation to sexual harassment, and the limited meaning of ‘discrimination’ in GEI 6 and the Standard does not fully address issues of intersectional disadvantage.

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259 *Sex Discrimination Act* (n 17) ss 28A(1A), 28AA(2).

260 Australian Discrimination Law Experts Group (n 244) 10.

261 *Gender Equality Indicators Instrument 2023* (n 55) cl 11(2)(c).

262 *WGEA* (n 1) s 3(1). See *Sex Discrimination Act* (n 17) ss 5 (sex discrimination), 6 (discrimination on the ground of marital or relationship status), 7 (discrimination on the ground of pregnancy or potential pregnancy), 7AA (discrimination on the ground of breastfeeding), 7A (discrimination on the ground of family responsibilities), 28A (meaning of sexual harassment), 28AA (meaning of harassment on the ground of sex).

263 These are all separate grounds of discrimination under the *Sex Discrimination Act* (n 17) which are not included in the definition of discrimination under GEI 6 and the relevant Standard: at ss 5A, 5B, 5C; *WGEA* (n 1) s 3(1).

264 *Respect@Work* Report (n 65) 19. See also O’Connell (n 134); Ashleigh Shelby Rosette et al, ‘Intersectionality: Connecting Experiences of Gender with Race at Work’ (2018) 38 *Research in Organizational Behavior* 1 <<https://doi.org/10.1016/j.riob.2018.12.002>>.

265 Helen Campbell and Suzi Chinnery, *What Works? Preventing and Responding to Sexual Harassment in the Workplace: A Rapid Review of Evidence* (Report, November 2018) 60–2.

## **B Recommendation 6.1: A Failure to Engage with the Matrix of Domination**

Recommendation 6.1 of the *WGEA Report* reflects a failure to engage with Collins' 'matrix of domination'. The matrix of domination analyses the forces of oppression which perpetuate systemic social inequalities for diverse women.<sup>266</sup> The following section analyses how Recommendation 6.1 fails to recognise how interlacing forces of oppression, including race, class, and sex, perpetuate social inequality and power imbalances for diverse women in the workplace.<sup>267</sup>

### **1 Recommendation 6.1**

In the review of the *WGEA*, CQ5 asked stakeholders whether the Agency should collect diversity data on a mandatory basis and if so, the diversity categories for which the Agency should collect data.<sup>268</sup> Recommendation 6.1 is a direct response to CQ5. Recommendation 6.1 is that the Agency should undertake qualitative research with stakeholders on the most appropriate way to collect diversity data in addition to gender.<sup>269</sup> Whilst not exhaustive, this recommendation identifies possible diversity categories of Aboriginal and Torres Strait Islander background, cultural and linguistic diversity, and disability, as key diversity categories for which this qualitative research might explore.<sup>270</sup>

The *WGEA Report* asserted that undertaking this qualitative research with relevant stakeholders was necessary because a sensitive approach would be required for the Agency to collect additional diversity data.<sup>271</sup> The *WGEA Report* stated that employees may be reluctant to provide diversity data to their employers for 'fear of negative consequences at work',<sup>272</sup> including how such information may be used unfavourably against them.<sup>273</sup> Furthermore, lower levels of reporting might make particular employees more readily identifiable in their employer's public report.<sup>274</sup> As a result, the *WGEA Report* stated that '[p]rivacy, trust and safety' are key issues which the qualitative research would focus on.<sup>275</sup> However, the *WGEA Report* recognised the crucial role intersectional data would play in providing a more accurate picture of gender equality in Australian workplaces, and that such data would also provide the Agency with the tools to support employers to improve gender equality in their workplaces.<sup>276</sup>

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266 Collins, 'Social Inequality, Power, and Politics' (n 131) 443; Collins, *Black Feminist Thought* (n 131).

267 Collins, 'It's All in the Family' (n 132) 63.

268 'WGEA Consultation Paper' (n 69) 3. For the 2020–21 reporting year, the Agency collected additional data from employers regarding their employee's age and primary workplace location. The Agency did not require employers to mandatorily provide this data: at 6.

269 *WGEA Report* (n 2) 15.

270 *Ibid.*

271 *Ibid.* 10.

272 *Ibid.*

273 *Ibid.* 15.

274 *Ibid.* 45.

275 *Ibid.* 10.

276 *Ibid.* 45.

## 2 Overall Support for the Inclusion of Diversity Data

During the review consultation process, there was overwhelming support for the Agency to collect additional diversity data from employers.<sup>277</sup> This support was acknowledged in the *WGEA Report*.<sup>278</sup> Many submissions highlighted the benefits of collecting diversity data: it would enable the Agency to set industry and general benchmarks, trace trends in Australian workplaces, and allow employers to measure their performance against benchmarks established by the Agency.<sup>279</sup> One stakeholder argued that this additional data would enable the Agency to more readily identify gaps in salary, promotions, job security, and leadership positions for diverse women.<sup>280</sup> Additionally, the Agency would be more easily able to identify specific industries who are underperforming.<sup>281</sup>

Despite the support for the collection of additional diversity data, Recommendation 6.1 provides no immediate direction for legislative amendment that would see the Agency collect additional diversity data, or the *WGEA* take a more intersectional approach to gender inequality in the workplace. Recommendation 6.1 is vague, only recommending that the Agency undertake qualitative research to determine *how* to collect diversity data; effectively, researching how to research. Recommendation 6.1 has no tangible or meaningful impact on diverse women, whose experiences have been ignored in the construction and operation of the *WGEA*. It fails to engage with the matrix of domination, because it fails to recognise how intersectional factors of inequality are not mutually exclusive, and instead create and perpetuate social inequalities and power imbalances for marginalised

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277 See Workplace Gender Equality Agency, Submission No 13 to Department of the Prime Minister and Cabinet, *Review of the Workplace Gender Equality Act 2012* (November 2021) 25–7. See also Women of Colour Australia, Submission No 81 to Department of the Prime Minister and Cabinet, *Review of the Workplace Gender Equality Act 2012*, 2; Women on Boards, Submission No 72 to Department of the Prime Minister and Cabinet, *Review of the Workplace Gender Equality Act 2012* (November 2021) 3; Women's Services Network and Australian Women Against Violence Alliance, Submission No 75 to Department of the Prime Minister and Cabinet, *Review of the Workplace Gender Equality Act 2012*, 3; Women in Super, Submission No 82 to Department of the Prime Minister and Cabinet, *Review of the Workplace Gender Equality Act 2012* (24 November 2021) 4; Women Barristers Association, Submission No 111 to Department of the Prime Minister and Cabinet, *Review of the Workplace Gender Equality Act 2012* (24 November 2021) 5; University of Technology Sydney, Submission No 24 to Department of the Prime Minister and Cabinet, *Review of the Workplace Gender Equality Act 2012*, 8–9; Soroptimist International of Brisbane, Submission No 44 to Department of the Prime Minister and Cabinet, *Review of the Workplace Gender Equality Act 2012* (23 November 2021) 4–5; Science in Australia Gender Equity, Submission No 119 to Department of the Prime Minister and Cabinet, *Review of the Workplace Gender Equality Act 2012* (24 November 2021) 3.

278 *WGEA Report* (n 2) 15.

279 See, eg, Australian Lawyers for Human Rights, Submission No 122 to Department of the Prime Minister and Cabinet, *Review of the Workplace Gender Equality Act 2012* (24 November 2021) 4; Bankwest Curtin Economics Centre, Submission No 124 to Department of the Prime Minister and Cabinet, *Review of the Workplace Gender Equality Act 2012* (November 2021) 8; Government of Western Australia Department of Communities, Submission No 154 to Department of the Prime Minister and Cabinet, *Review of the Workplace Gender Equality Act 2012* (November 2021) 13; KPMG, Submission No 135 to Department of the Prime Minister and Cabinet, *Review of the Workplace Gender Equality Act 2012* (November 2021) 8.

280 Osmond Chiu, Submission No 26 to Department of the Prime Minister and Cabinet, *Review of the Workplace Gender Equality Act 2012* (19 November 2021) 1.

281 *Ibid.*

women.<sup>282</sup> The following section of this article will interrogate each of the key arguments in favour of Recommendation 6.1, demonstrating why they lack merit.

### 3 Privacy Concerns

A key argument in support of Recommendation 6.1 was the concern for employee privacy.<sup>283</sup> The *WGEA Report* asserted that privacy was a key issue to be explored.<sup>284</sup> A primary concern emerging out of the *WGEA Report* was that, if more nuanced data, including diversity data, was collected, it may be possible for diverse individuals to be identified in the public reports of smaller employers.<sup>285</sup> The potential for employers to negatively use diversity data collected from employees against them was also a key privacy concern.<sup>286</sup> Concerns about privacy were also raised in the submissions.<sup>287</sup>

The authors acknowledge that privacy concerns relating to the collection and use of additional diversity data need thoughtful consideration. In particular, considerations relating to matters such as Indigenous data sovereignty require attention.<sup>288</sup> Furthermore, although not expressly alluded to in the *WGEA Report*, issues relating to employers' legal obligations relating to the collection and storage of personal employee information need to be considered.<sup>289</sup> However, these valid concerns do not, of themselves, justify the weak and directionless nature of Recommendation 6.1. More nuanced consideration should have been given to how the privacy concerns raised in the *WGEA Report* might be mitigated. The concern that employers may leverage diversity information in an adverse manner against their employees might be mitigated through existing federal and state anti-discrimination legislative frameworks which prohibit discrimination in work or

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282 Collins, 'Intersectionality's Definitional Dilemmas' (n 130) 2–3.

283 *WGEA Report* (n 2) 45.

284 *Ibid* 10.

285 *Ibid* 45.

286 *Ibid* 10.

287 See, eg, Women Lawyers Association of NSW, Submission No 140 to Department of the Prime Minister and Cabinet, *Review of the Workplace Gender Equality Act 2012*, 3; 50/50 by 2030 Foundation (University of Canberra) (n 240) 2; AbbVie, Submission No 139 to Department of the Prime Minister and Cabinet, *Review of the Workplace Gender Equality Act 2012*, 7; Adamantem Capital and Legend, Submission No 67 to Department of the Prime Minister and Cabinet, *Review of the Workplace Gender Equality Act 2012* (24 November 2021) 4; Australian Government Attorney-General's Department, Submission No 152 to Department of the Prime Minister and Cabinet, *Review of the Workplace Gender Equality Act 2012*, 7; Australian Industry Group, Submission No 90 to Department of the Prime Minister and Cabinet, *Review of the Workplace Gender Equality Act 2012* (24 November 2021) 7–8; Leonora Risse, Submission No 125 to Department of the Prime Minister and Cabinet, *Review of the Workplace Gender Equality Act 2012* (November 2021) 9; Melior Investment Management, Submission No 51 to Department of the Prime Minister and Cabinet, *Review of the Workplace Gender Equality Act 2012* (24 November 2021) 4.

288 On the issue of Indigenous data sovereignty, see, eg, Maggie Walter and Michele Suina, 'Indigenous Data, Indigenous Methodologies and Indigenous Data Sovereignty' (2019) 22(3) *International Journal of Social Research Methodology* 233 <<https://doi.org/10.1080/13645579.2018.1531228>>.

289 While 'employee records' are exempt from the provisions of the *Privacy Act 1988* (Cth), diversity data is not likely to be considered part of an 'employee record': see ss 6(1) (definition of 'employee record'), 7B(3) (exempt acts and exempt practices of organisations).

employment.<sup>290</sup> Other models to protect employee privacy where diversity data is collected could have been considered.<sup>291</sup> Additional strategies undertaken by the Agency, such as the Agency collecting diversity data directly from employees, might also mitigate privacy concerns.<sup>292</sup> This could occur through the Agency creating an independent and anonymised reporting platform, maintained by Agency employees and accessible only to them.<sup>293</sup> The Agency's privacy policy<sup>294</sup> might also serve as an additional safeguard for employee privacy when collecting diversity data. There are strategies and safeguards which the Agency and employers could implement to effectively mitigate the privacy concerns raised in the *WGEA Report*, but none are considered in Recommendation 6.1. As a result, the *WGEA Report* did not consider any stronger, more purposive recommendations for legislative reform other than Recommendation 6.1. The weak nature of Recommendation 6.1 ultimately highlights the low priority for understanding and addressing diverse women's experiences of intersectional inequality in the workplace. It reflects a perception which views women's inequality in the workplace as a separate system of oppression, rather than as part of the matrix of domination which is deeply influenced by other forces of oppression such as race, class and age.<sup>295</sup>

*(a) The Regulatory Burden and the Argument Regarding a Mandatory vs Voluntary Basis for Reporting Diversity Data*

Some submissions asserted that if additional diversity data were to be collected by the Agency, this should occur on a voluntary basis, rather than on a mandatory basis.<sup>296</sup> The primary arguments emerging out of these submissions were that employees may be either unwilling or unable to provide such information,<sup>297</sup> in addition to the privacy concerns for employer access to this data.<sup>298</sup> It was commonplace for submissions to refer to any additional obligation to provide diversity data to the Agency as 'overburdening'<sup>299</sup> employers and making the

290 Each of the Commonwealth, state and territory statutes specifically prohibit discrimination on the ground of the protected attributes in work or employment: see n 18.

291 See, eg, National Foundation for Australian Women, Submission No 48 to Department of the Prime Minister and Cabinet, *Review of the Workplace Gender Equality Act 2012*, 20, citing the mechanisms under the *Gender Equality Act 2020* (Vic).

292 Australian Lawyers for Human Rights (n 279) 20–1.

293 Ibid.

294 See Workplace Gender Equality Agency, 'Privacy Policy' (June 2021).

295 Collins, 'It's All in the Family' (n 132) 63.

296 See, eg, Australian Council of Trade Unions (n 73) 31; Women's Electoral Lobby Australia, Submission No 63 to Department of the Prime Minister and Cabinet, *Review of the Workplace Gender Equality Act 2012* (November 2021) 9.

297 See, eg, Anonymous, Submission No 16 to Department of the Prime Minister and Cabinet, *Review of the Workplace Gender Equality Act 2012*, 2.

298 See, eg, Australian Gender Equality Council (n 240) 7; Australian Government Attorney-General's Department (n 287) 7; Australian Industry Group (n 287) 7–8.

299 See, eg, Australian Industry Group (n 287) 7–8; AbbVie (n 287) 7; Government of Western Australia Department of Communities (n 279) 13; Carers Australia, Submission No 83 to Department of the Prime Minister and Cabinet, *Review of the Workplace Gender Equality Act 2012* (November 2021) 3.

reporting process too ‘onerous’.<sup>300</sup> However, as discussed previously in this article, when the Agency collected additional age data in the 2020–21 reporting year on a voluntary basis, there was high reporting compliance among employers at 73.8%.<sup>301</sup> This prompted the *WGEA Report* to recommend that the Agency collect age data on a mandatory rather than voluntary basis, given the high compliance in the 2020–21 reporting year.<sup>302</sup> Employers’ substantial compliance and the *WGEA Report* recommendation for this data to be mandatorily collected by the Agency in future suggests two things. First, the benefit of collecting such intersectional data is recognised, sufficiently for the *WGEA Report* to recommend for it to be mandatorily reported to the Agency. Second, the reporting of this data was not ‘onerous’ and did not ‘overburden’ employers, because while reporting was voluntary, over 70% of employers reported this data to the Agency.<sup>303</sup>

The importance of the Agency collecting and analysing intersectional datasets from employers should outweigh the possible ‘onerous’ nature of collecting this data.<sup>304</sup> From an intersectional perspective, it is vitally important for the Agency to have a critical insight into the matrix of domination and the factors such as race, class, gender, sexuality, ethnicity, nation, ability, and age, which all perpetuate and exacerbate workplace inequality.<sup>305</sup> These intersectional factors create complex social and power inequalities for diverse women in the workplace, and the importance of the Agency collecting this data from employers outweighs any burdensome obligation placed upon the employer to provide this data.<sup>306</sup> The current essentialist focus of the *WGEA* combined with the weak nature of Recommendation 6.1 means that the Agency is presently incapable of addressing the matrix of domination creating unique inequalities for diverse women, because it lacks the dataset to do so.<sup>307</sup> Gender equality in the workplace cannot be achieved for diverse women while the Agency does not have the capacity or power to collect intersectional information from employers.<sup>308</sup> Further, a holistic understanding of gender inequality for diverse women in the workplace cannot be pursued with Recommendation 6.1 because it is inadequate and lacks meaningful direction for reform.<sup>309</sup>

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300 Business Council of Australia, Submission No 155 to Department of the Prime Minister and Cabinet, *Review of the Workplace Gender Equality Act 2012* (November 2021) 8.

301 *WGEA Report* (n 2) 45.

302 See Recommendation 7.1 of the *WGEA Report* (n 2): at 10, 15, 48.

303 *Ibid* 45.

304 See reference to ‘onerous’ in Business Council of Australia (n 300) 8.

305 Collins, ‘Intersectionality’s Definitional Dilemmas’ (n 130) 2–3.

306 *Ibid*.

307 Chief Executive Women, Submission No 47 to Department of the Prime Minister and Cabinet, *Review of the Workplace Gender Equality Act 2012* (23 November 2021) 5; Safe and Equal, Submission No 113 to Department of the Prime Minister and Cabinet, *Review of the Workplace Gender Equality Act 2012*, 5.

308 Australia’s National Research Organisation for Women’s Safety, Submission No 150 to Department of the Prime Minister and Cabinet, *Review of the Workplace Gender Equality Act 2012* (26 November 2021) 2.

309 Australian Retailers Association, Submission No 127 to Department of the Prime Minister and Cabinet, *Review of the Workplace Gender Equality Act 2012* (24 November 2021) 3.

(b) *Determining the Categories for the Collection of Diversity Data*

Many submissions outlined the categories of diversity for which the Agency should collect data from employers.<sup>310</sup> Some submissions also raised concerns regarding establishing clear dimensions for the collection of diversity data.<sup>311</sup> The categories of diversity for data collection by the Agency outlined in the submissions can be broadly summarised as follows:

- (a) Racial or ethnic background;
- (b) Cultural and linguistic diversity;
- (c) Temporary visa or migrant status;
- (d) Aboriginal or Torres Strait Islander background;
- (e) Disability;
- (f) Age;
- (g) Sexual orientation or gender identity; and
- (h) Location of primary workplace.<sup>312</sup>

Despite numerous submissions recommending the Agency collect additional diversity data in an array of categories, Recommendation 6.1 refers explicitly to collecting diversity data in relation to ‘Aboriginal and Torres Strait Islander background, cultural and linguistic diversity, and disability’.<sup>313</sup> The authors acknowledge that the categories proposed by Recommendation 6.1 are not exhaustive.<sup>314</sup> However, the limited diversity categories explicitly referred to in Recommendation 6.1 is problematic from an intersectional perspective because the reality of the matrix of domination is that factors of subordination are not mutually exclusive, nor do they operate as separate systems of oppression.<sup>315</sup> Inequality does not just occur on the basis of the categories explicitly listed in Recommendation 6.1, because identity and systems of oppression are deeply complex and intertwined; the necessary intersectional data for the Agency to

310 See, eg, Adamantem Capital and Legend (n 287) 1–2; Australia’s National Research Organisation for Women’s Safety (n 308) 1; Australian Breastfeeding Association, Submission No 94 to Department of the Prime Minister and Cabinet, *Review of the Workplace Gender Equality Act 2012*, 18; Australian Competition and Consumer Commission, Submission No 149 to Department of the Prime Minister and Cabinet, *Review of the Workplace Gender Equality Act 2012* (26 November 2021) 4–5; Australian Council of Trade Unions (n 73) 29; Australian Lawyers for Human Rights (n 279) 21; Minerals Council of Australia, Submission No 148 to Department of the Prime Minister and Cabinet, *Review of the Workplace Gender Equality Act 2012* (26 November 2021) 13; Public Sector Gender Equality Commissioner (Vic), Submission No 88 to Department of the Prime Minister and Cabinet, *Review of the Workplace Gender Equality Act 2012* (November 2021) 10.

311 See, eg, Adamantem Capital and Legend (n 287) 4; Melior Investment Management (n 287) 4.

312 Drawn from a combination of the categories outlined in the following submissions: Australian Lawyers for Human Rights (n 279) 21; Australian Competition and Consumer Commission (n 310) 4; Australian Council of Trade Unions (n 73) 31; Minerals Council of Australia (n 310) 13; Public Sector Gender Equality Commissioner (Vic) (n 310) 10.

313 *WGEA Report* (n 2) 10, 15, 45–6.

314 *Ibid* 15 (emphasis altered). Recommendation 6.1 is to

[u]ndertake qualitative research with relevant stakeholders, led by [the Agency], on the best way to collect more diversity data in addition to gender data to enable voluntary reporting, *including* on Aboriginal and Torres Strait Islander background, cultural and linguistic diversity, and disability.

315 Collins, ‘It’s All in the Family’ (n 132) 63.

address diverse women's inequality in the workplace cannot be collected in only the three diversity categories listed in Recommendation 6.1.<sup>316</sup>

### C Recommendation 6.1 Ignores Other Intersectional Models of Regulation: The *Gender Equality Act 2020* (Vic)

Considering the above, one possible explanation for the reluctance in Recommendation 6.1 to advocate for the collection of additional diversity data by the Agency is that taking an intersectional approach to women's workplace inequality in this manner is too challenging. However, this ignores that an intersectional approach has already been taken at the state level in Victoria under the *Gender Equality Act 2020* (Vic) ('*GEA*').<sup>317</sup> The *GEA* is similar in its purpose to the *WGEA*, but it applies only to the public sector, councils and universities in Victoria ('defined entities').<sup>318</sup> In adopting an intersectional approach, the *GEA* demonstrates what the *WGEA* is *not* doing: understanding the nuanced and complex experiences of intersectional inequality for diverse women.

The intersectional approach of the *GEA* is evident in its Objects. Object (c) recognises that 'gender equality may be compounded by other forms of disadvantage or discrimination that a person may experience on the basis of Aboriginality, age, disability, ethnicity, gender identity, race, religion, sexual orientation and other attributes'.<sup>319</sup> The *GEA* outlines ten 'gender equality principles', one which acknowledges that '[g]ender inequality may be compounded by other forms of disadvantage or discrimination that a person may experience on the basis of Aboriginality, age, disability, ethnicity, gender identity, race, religion, sexual orientation and other attributes'.<sup>320</sup> A further aspect of the *GEA* which demonstrates its intersectional approach is that defined entities must undertake a 'gender impact assessment' any time a new policy, program or service is being developed or reviewed, and there is a direct and significant impact on the public.<sup>321</sup> A gender impact assessment must, if practicable,

take into account that gender inequality may be compounded by disadvantage or discrimination that a person may experience on the basis of any of the following –

- (i) Aboriginality;
- (ii) age;
- (iii) disability;
- (iv) ethnicity;

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316 Ibid. See also Sujana Adapa, Jennifer Rindfleish and Alison Sheridan, "'Doing Gender" in a Regional Context: Explaining Women's Absence from Senior Roles in Regional Accounting Firms in Australia' (2016) 35 *Critical Perspectives on Accounting* 100, 100–4 <<https://doi.org/10.1016/j.cpa.2015.05.004>>.

This study found that small and medium sized regional accounting firms created a particular type of intersectional inequality which saw women facing obstacles when attempting to progress into more senior accounting roles. The study found that the problem in part was a result of the lack of support services available to female professionals in rural areas when they are balancing both their work and family commitments: at 100–4.

317 *Gender Equality Act 2020* (Vic) ('*GEA*').

318 Ibid s 1.

319 Ibid s 4(c).

320 Ibid s 6(8).

321 Ibid s 9(1).

- (v) gender identity;
- (vi) race;
- (vii) religion;
- (viii) sexual orientation.<sup>322</sup>

Similar to the *WGEA*, defined entities under the *GEA* must prepare Gender Equality Action Plans ('GEAP') that take into account the gender equality principles, including the principle relating to intersectional disadvantage,<sup>323</sup> and must submit their GEAP to the Public Sector Gender Equality Commissioner each reporting year.<sup>324</sup> The preparation of a GEAP requires defined entities to undertake a workplace gender audit, which involves the collection and analysis of gender-disaggregated data and, if available, data about Aboriginality, age, disability, ethnicity, gender identity, race, religion and sexual orientation.<sup>325</sup> Defined entities are also required to publish their GEAP on their websites<sup>326</sup> and the Commissioner can publish a GEAP that has been submitted to it,<sup>327</sup> similarly to the Agency publishing public reports from employers.

The approach adopted under the *GEA* is not without its challenges. For example, it has been recognised that the increased transparency required by the *GEA* in relation to the publication of intersectional data poses practical problems in relation to employee privacy, and in particular 'ensuring de-identified data cannot be re-identified'.<sup>328</sup> The Victorian Public Sector Gender Equality Commissioner has noted that the requirement in the *GEA* that defined entities have regard to the disadvantage or discrimination that a person may experience on the basis of Aboriginality, age, disability, ethnicity, gender identity, race, religion and sexual orientation, in addition to gender inequality necessarily requires them to 'break down or "disaggregate" their workforce data in an intersectional way'.<sup>329</sup> However, they have also observed that '[d]ata on intersectional inequality is sparse',<sup>330</sup> and have identified the need for defined entities to '[b]uild capability to effectively and safely collect intersectional workforce composition data'.<sup>331</sup>

However, the benefit of the *GEA* adopting an intersectional approach to gender equality is already evident, despite the legislation only being very recently

322 Ibid s 9(2)(c).

323 Ibid s 10(2)(a).

324 Ibid s 12(1).

325 Ibid s 11.

326 Ibid s 12(3)(a).

327 Ibid s 14(2).

328 Kate Farhall and Niki Vincent, 'Gender Inequality Laid Bare: Transparency as a Tool to Drive Progress, Ethical Leadership and Good Governance in Victoria' (2021) 37(2) *Law in Context* 125, 129 <<https://doi.org/10.26826/law-in-context.v37i2.145>>.

329 Commission for Gender Equality in the Public Sector (Vic), *Baseline Report: 2021 Workplace Gender Audit Data Analysis* (Report, August 2022) 35 ('*Baseline Report*').

330 'Workforce Gender Composition and Segregation', *Commission for Gender Equality in the Public Sector (Vic)* (Web Page, 28 October 2022) <<https://www.genderequalitycommission.vic.gov.au/baseline-audit-report-2021/workforce-gender-composition-segregation#key-issues-why-was-this-measured>>. See also *ibid* 19.

331 *Baseline Report* (n 329) 35. At the time of writing, the Commission for Gender Equality in Victoria was due to release a companion report to the *Baseline Report*, 'focusing on the analysis of its intersectional data': at 17.

enacted, and it highlights the potential for the *WGEA* if it were to legislate the collection of diversity data. For example, BreastScreen Victoria utilised a gender impact assessment to assist them to develop a policy on screening transgender and gender diverse people.<sup>332</sup> This resulted in the establishment of a specialised subgroup of the LBGTI Advisory Group at BreastScreen, and a survey conducted with transgender and gender diverse people in Victoria to better understand how BreastScreen could develop inclusive services.<sup>333</sup> As a result of the gender impact assessment, a screening policy was developed specifically for transgender and gender diverse people.<sup>334</sup> Part of this policy involved providing education and training to BreastScreen Victoria staff to ensure that the clinics are inclusive places.<sup>335</sup> Developing a policy such as this is vitally important in circumstances where it is difficult for transgender and gender diverse peoples to access healthcare services for fear of scrutiny and discrimination.<sup>336</sup> The example of BreastScreen Victoria, guided by the *GEA*, demonstrates the potential for the *WGEA* to make impactful change for diverse women experiencing intersectional inequality, if it departed from its current essentialist approach. Privacy concerns, the regulatory burden, and difficulties in determining the categories of diversity for data collection, are not sufficiently compelling reasons to prevent the collection of diversity data by the Agency when these concerns can be appropriately mitigated. These are not reasons which have prevented the *GEA* from taking an intersectional approach to gender equality and they should not continue to justify why the *WGEA* and Recommendation 6.1 take an essentialist and weak approach towards striving for gender equality for diverse women.

## V CONCLUSION

An anti-essentialist and intersectional approach to the *WGEA* has highlighted significant shortcomings with its approach to equality for diverse women in Australian workplaces. Crenshaw's single categorical axis has revealed that a failure to acknowledge intersectional inequality in the *WGEA* Objects results in a lack of consideration for diverse women's experiences of inequality in the

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332 'Case Study: Developing Trans and Gender Diverse Services at BreastScreen Victoria', *Commission for Gender Equality in the Public Sector (Vic)* (Web Page, 28 June 2023) <<https://www.genderequalitycommission.vic.gov.au/case-study-developing-trans-and-gender-diverse-services-breastscreen-victoria>>.

333 Ibid.

334 Ibid.

335 Ibid.

336 Marian K Pitts et al, 'Transgender People in Australia and New Zealand: Health, Well-Being and Access to Health Services' (2009) 19(4) *Feminism and Psychology* 475, 485 <<https://doi.org/10.1177/0959353509342771>>. See generally as to the barriers faced by transgender and gender diverse peoples in healthcare: Grayce Alencar Albuquerque et al, 'Access to Health Services by Lesbian, Gay, Bisexual, and Transgender Persons: Systematic Literature Review' (2016) 16(2) *BMC International Health and Human Rights* 2 <<https://doi.org/10.1186/s12914-015-0072-9>>; Tiffany K Roberts and Corinne R Fantz, 'Barriers to Quality Health Care for the Transgender Population' (2014) 47(10–11) *Clinical Biochemistry* 983 <<https://doi.org/10.1016/j.clinbiochem.2014.02.009>>.

workplace. The single categorical axis in which the *WGEA* Objects are rooted is evident in the shift to a neutral framing of ‘gender equality’. The justification that this would change male behaviours in heterosexual relationships towards equal family and caring responsibilities has not come to fruition. The shift to a neutral framing not only assumes that there is one experience of gender inequality for women, but it denies the different, intersectional experiences of inequality for multiply burdened women. The neutral framing makes it more difficult for diverse women to have their experiences of inequality in the workplace heard, particularly when the experiences of privileged, white women form the basis of experience that the *WGEA* relies on.

The essentialist framing of the *WGEA* Objects also means that the data collected, analysed, and published by the Agency reflects only a limited picture of gender inequality in the workplace, one that is primarily based on the experiences of white, middle-class, heterosexual women. The references to women as a homogenous group in the Objects fails to recognise the unique and complex intersectional inequalities faced by diverse women in Australian workplaces. As a result, the Agency is not collecting data which would reveal the intersectional inequalities that exist, and by extension, the Agency cannot then assist employers to address intersectional inequality in their workplaces. The Agency’s publication of gender pay gap statistics, including statistics which disaggregate gender pay gap by age, highlighted the valuable insights diversity data can provide the Agency when it is collected.

Anti-essentialism has demonstrated that the neutral framing of the *WGEA* Objects has far-reaching implications in other *WGEA* provisions. The framing of the GEIs and Standards reflect a lack of intersectional understanding. The GEIs determine the information that employers report to the Agency, and the information that the Agency analyses. In adopting an essentialist approach, the GEIs fail to collect an entire dataset relating to diverse women. The essentialist framing of the GEIs then has an impact on the framing of the Standards. This is evident in relation to the Standard for GEI 6, which, while now providing the potential to require employers to address issues of intersectional vulnerability and sexual harassment in their workplace policies and strategies, is not supported by a reporting requirement attached to GEI 6 which requires employers to collect, or report, disaggregated data in relation to sexual harassment. In addition, the limited meaning of ‘discrimination’ in GEI 6 and the Standard does not fully address issues of intersectional disadvantage.

Recommendation 6.1 arising out of the *WGEA Report* reflects a failure to engage with the matrix of domination and the multiple, interlaced forces of oppression which create unique inequalities for diverse women. This recommendation provides no meaningful path forward for diverse women’s experiences to be reflected in the *WGEA* and the data collected by the Agency. The overwhelming support for the collection of diversity data in the submissions to the *WGEA* review was not reflected in Recommendation 6.1. Justifications for its weak nature included privacy concerns, the regulatory burden, mandatory reporting of diversity data, and defining diversity data categories. The privacy concerns raised in the

*WGEA Report* can be mitigated through strategies implemented by the Agency and the state and federal anti-discrimination legislative frameworks. There are ample strategies and policies which would effectively mitigate the privacy concerns but none of those were discussed in the *WGEA Report*.

An additional argument raised in the *WGEA Report* in opposition to the Agency collecting additional diversity data was the over-burdening of employers if this data was to be collected on a mandatory basis. Ultimately, the collection of age data in 2020–21 on a voluntary basis and the high levels of reporting for that dataset highlight that the regulatory burden is not so onerous that employers will not provide the information to the Agency. In any event, the possibly onerous nature of reporting this data to the Agency does not outweigh the benefits it provides in terms of analysis. The diversity categories if the Agency were to collect diversity data must be broader and more encompassing than the diversity categories currently outlined in Recommendation 6.1. This would more appropriately reflect the diversity of experiences for women in Australian workplaces and ensure that the Agency can capture accurate data.

Despite all the reasons cited in the *WGEA Report* for *not* collecting diversity data, the *GEA* in Victoria reflects the potential for the *WGEA* if it was to take an intersectional approach. The *GEA* demonstrates that it is possible to take an intersectional, rather than an essentialist, approach to gender equality in legislation, and the impact that an intersectional approach might have on individual lives. Unfortunately, Recommendation 6.1 was a missed opportunity for the *WGEA* to create meaningful legislative change for diverse women in the workplace. The anti-essentialist and intersectional approach adopted in this analysis has demonstrated the shortcomings of the *WGEA* and Recommendation 6.1, and an unwillingness to adopt more nuanced, purposive legislative reform which would see the *WGEA* move away from its current essentialist approach to gender inequality in Australian workplaces.