

Comment

Gender Inequality Laid Bare: Transparency as a Tool to Drive Progress, Ethical Leadership and Good Governance in Victoria

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ABSTRACT

The state, in particular through its ability to enact legislation, has the capacity to either perpetuate or confront forms of systemic and structural disadvantage and inequality. Increasingly, transparency is being seen as key to designing effective equality law, and the ambitious new *Gender Equality Act 2020* (Vic) (The Act) is a leading example. The Act seeks to break down outdated stereotypes and systemic inequalities—particularly those that relate to gender. Central to the design of the Act is its commitment to transparency. The Act mandates a level of organisational transparency about the advancement of gender equality that has not previously been required in the public sector in Victoria, or in the rest of Australia. This transparency underpins the ambitious objectives of the Act and is integral to the obligations it puts in place to drive progress towards gender equality. A focus on transparency serves four main purposes in accelerating the pace of change towards a more gender-equal society and providing leadership in this arena. Firstly, it functions as a practical tool to encourage knowledge-sharing and innovation along the path to gender equality. Secondly, transparent reporting of defined entities' progress towards gender equality acts as a form of pressure to make material progress, instead of participating in box-ticking exercises. Thirdly, the transparency within the Act is a marker of ethical leadership, by democratising knowledge in this space. Lastly, a commitment to transparency is a sign of good governance; it both allows the public to access and interrogate public sector progress towards gender equality and ensures that government plays a leadership role in pushing for positive social change. The *Gender Equality Act 2020* (Vic) is thus an example of how laying bares our challenges related to organisational gender equality can help drive progress towards a more gender-equal future.

Keywords – Gender equality, transparency, equality law, public sector, Victoria.

Acknowledgements: The authors would like to acknowledge their colleagues in the Commission for Gender Equality in the Public Sector, in particular Kate Berry, Stefani Cooper, Enya Cai and Margot Paxman for sharing their invaluable expertise in the drafting of this article. They would also like to acknowledge the important work of Sarah Gruner, former Director of the Office for Women, who oversaw the Act's conception and development.

Disclosure statement – No potential conflict of interest was reported by the authors.

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Suggested citation: Farhall, K. and Vincent, N. (2021). "Gender Inequality Laid Bare: Transparency as a Tool to Drive Progress, Ethical Leadership and Good Governance in Victoria" *Law in Context*, 37 (2) DOI: <https://doi.org/10.26826/law-in-context.v37i2.145>

Summary

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1. INTRODUCTION

Social movements for equality across academia, politics and society have emphasised the pivotal role played by law and the state in either perpetuating or addressing systemic and structural forms of disadvantage (e.g. Cavaghan 2013; Crenshaw 1989; MacKinnon 1989). At the same time, such social movements have underscored the importance of a transparent relationship with the realities of inequality (e.g. Collins 1990; Delgado and Stefancic 2001; Möschel 2011). Transparency is fundamental to anti-discrimination efforts, and to legislation that seeks to move towards greater equality. Transparency is also fundamental to good governance that sets the standard within a society, and to any project seeking to dismantle existing power structures premised on a divide between those who hold and withhold information, and those who cannot access it (Allen and Blackham 2020; Fraser 1990; Habermas 1989). It is these principles which underpin the transparency required of organisations covered by the new *Gender Equality Act 2020* (Vic) (the Act).

Using transparency as a tool to drive positive social change can be highly effective. In recent years, for example, a focus on pay transparency—whereby an openness about remuneration empowers workers to benchmark their compensation against others at a similar level within their organisation—has enabled the successful detection of systemic pay inequalities (Heisler 2021; Treleaven and Fuller 2021). Research has shown that wage transparency can have the two-fold impact of reducing gender pay gaps, while also

sparkling productive public conversations about inequality (Treleaven and Fuller 2021).¹

Yet alongside the advantages to integrating a transparent approach within equality initiatives, transparency also has its limitations and challenges. In the sphere of pay transparency, a more open approach can generate concerns related to procedural fairness, or who receives what level of pay and why (Hartmann & Slapničar 2012; Heisler 2021). This points to the need to be ready for the conversations that transparency may generate. More broadly, there are recognised limitations in terms of what transparency does and does not achieve, and challenges to its successful navigation. At a macro level, political scientists Thomas Hale and Anne-Marie Slaughter (2006, p. 154) note that while “transparency is often used as a synonym for accountability ... real accountability requires more than monitoring”; it requires a mechanism to create change. Thus, the performance of transparency is not enough (Moors 2019), but rather must be integrated into a broader strategy that uses transparency to achieve practical outcomes.

At the more granular level, transparency also entails challenges around data management and privacy. In this context, the use of transparency as a tool for innovative policymaking must be balanced against the potential for individuals’ data to be identifiable. These challenges around accountability and privacy are shaping the implementation of the Act and are reflected in its compliance mechanisms and reporting requirements.

¹ See e.g. Vinall 2020 for an example of public discussion.

2. THE ACT, THE COMMISSION AND TRANSPARENCY

The Act is a ground-breaking piece of legislation, which is designed to drive powerful cultural and organisational change. It seeks to break down outdated stereotypes and systemic inequalities for those who may be marginalised by not only gender, but also by gender inequality that is compounded by race, age, LGBTQI+ status, ability and other attributes. The Act mandates a level of organisational transparency about the advancement of gender equality that has not previously been required in the public sector in Victoria, or in the rest of Australia. This transparency underpins the ambitious objectives of the Act and is integral to the obligations it puts in place to drive progress towards gender equality.

The generation and public reporting of data is at the heart of the Act. Approximately 300 defined entities under the Act (including public sector organisations, universities and local councils) are required to undertake an internal audit of their workplace in relation to seven prescribed key gender equality indicators—namely gender pay equity, gender composition at all levels of the workforce, gender composition of governing bodies, workplace sexual harassment, recruitment and promotion, gendered work segregation and leave and flexibility (*Gender Equality Act 2020* (Vic) s 3). In consultation with their governing bodies, staff and employee representatives, they must use this data to develop a Gender Equality Action Plan (GEAP) every four years. GEAPs will set out the strategies and measures the organisation will take to improve gender equality in the workplace. Importantly, organisations are *obligated* to demonstrate “reasonable and material progress” against the key gender equality indicators (*Gender Equality Act 2020* (Vic) s 16), and to publicly report on their progress biennially (*Gender Equality Act 2020* (Vic) s 19). In addition, defined entities must undertake a gender impact assessment for any new or renewing programs, policies or services with a direct and significant public impact. In this way, the Act not only addresses organisational gender inequality con-

cerns, but also serves to improve gender equality for the wider community.

All audit data, GEAPs and progress reports must be submitted to the Commissioner for Gender Equality in the Public Sector (the Commissioner) by dates set down in the Act. Public reporting via each organisation’s own website is required across all the obligations and the entity must notify its governing body, employees and employee representatives when plans and progress reports are publicly available. In addition, the Commissioner will publish the data, GEAPs and progress reports of all organisations covered by the Act on the website of the Commission. The transparency built into this process will ensure that key stakeholders of defined entities, as well as the wider public, have access to accurate and regular information about the state of gender equality in these entities, and the work they are undertaking to address inequalities.

3. TRANSPARENCY AS A PRACTICAL TOOL TO PROGRESS GENDER EQUALITY

The commitment to transparency within the Act generates positive support for progress. It also imposes forms of pressure and consequences on defined entities to make reasonable and material progress towards gender equality. There are several main advantages to embedding a transparent approach within the Act. Firstly, transparency forces gender equality gaps, or barriers to achieving gender equality, into the light, in order that they may be better addressed (Bohnet 2016). Secondly, the collection and publication of gender equality data and strategies facilitates knowledge sharing between sector counterparts (and beyond). Thirdly, the sharing of audit data across each organisation’s governing body, staff and employee representatives and consultation with these stakeholders to develop and publish a Gender Equality Action Plan may serve to break down the siloing of gender inequality as a challenge to be tackled by diversity

and inclusion experts alone. As organisational researchers Eriksson-Zetterquist and Renemark (2016) have found, the diffusion of gender equality knowledge throughout an organisation and the centralisation of gender equality goals are vital for generating lasting change.

Fourthly, a transparent approach helps build the evidence base for organisational gender equality. The regular reporting of data, actions and progress required under the Act will build a database of systematised, regular, and comprehensive gender equality information. While existing data from the Workplace Gender Equality Agency provides aggregated workplace gender equality data at the industry, state and national level, the Act goes further by disaggregating data down to the organisational level (with exceptions for any information that would compromise the privacy of individuals). This means that individuals and institutions can access and analyse this wealth of specific and comprehensive data. This may also help to raise public awareness about gender equality and signal the government's meaningful and ongoing commitment to it.

Beyond providing positive mechanisms to support the development of evidence-based organisational gender equality initiatives, transparency simultaneously facilitates a pressure on organisations to tackle gender inequality. The regular reporting of an organisation's gender equality data and their progress in tackling gender inequality within their workplace provides a means to hold publicly-funded defined entities accountable to a broad pool of interested parties, such as their key stakeholders (employees, customers, governing bodies, funders, partner organisations, competitors, and Members of Parliament), as well as the wider public. As behavioural economist Iris Bohnet (2016, pp. 280, 278) explains, "holding organizations accountable by asking them to 'explain' when they have not 'complied' is another lever that helps [them] follow through on their good intentions", thus reducing the "intention-action gap". Such accountability is found to work more effectively when organisations know in advance that they will be called upon to

explain, when the audience is informed and has a focus on precision and truth (Bohnet 2016) and where there is the possibility of a "gradual escalation of sanctions" (Hepple 2011, p. 322). Mechanisms within the Act afford the Commissioner various (and escalating) avenues to enforce compliance, including in cases where entities have not made "reasonable and material progress" towards gender equality (*Gender Equality Act 2020* (Vic) s 22). These mechanisms include working directly with an organisation to achieve an informal resolution, issuing a compliance notice, recommending that the Minister takes action against the organisation, naming the organisation and their failure to comply on the Commission's website—and if required, making an application to the Victorian Civil and Administrative Tribunal for an order directing the organisation to comply (*Gender Equality Act 2020* (Vic) s 26). Thus, the Act, in stating up-front the level of accountability required by defined entities, combined with the Commissioner's enforcement powers, construct the ideal set of circumstances advocated by Bohnet (2016) and should act as a powerful tool for behavioural change.

A competitive pressure to attempt to be the best in their sector (or just to ensure they do not end up 'on the bottom') may also be generated by a transparent approach to gender equality (Bohnet 2016). Given the Act provides a framework for comparing like with like organisations over an extended period across different sectors of the public workforce, it is likely to generate comparison between similar organisations within particular sectors (such as between universities, between local councils and between public service departments) as well as between different sectors (such as health and education). Non-transparent approaches to gender equality can allow organisations to perform box-ticking exercises, or publicly promote their commitment to schemes that do little to advance material progress towards gender equality. Research has found that a transparent approach which allows for comparison between organisations may accelerate the pace of change by putting pressure on organisations to innovate (Bohnet 2016).

Yet while transparency in the Act creates both support and pressure to shift the dial on gender equality, there are practical challenges associated with a commitment to transparency. Most notably, transparency entails risks surrounding privacy protection. In the case of the Act, this is especially pertinent to the requirement for defined entities to, where possible, supply data that addresses intersecting forms of inequality along axes of difference such as race, class, Indigeneity, ability and LGBTQI+ status. The smaller pool of employees who may experience intersecting forms of disadvantage or discrimination has the potential to compromise the anonymity of individuals.

In the implementation of the Act, privacy is a significant consideration and risk to be managed. The Commission is both working internally to maintain individuals' privacy, in terms of the data it collects and publishes, while also working externally with defined entities to ensure they are collecting and disclosing data in line with their privacy obligations. For the Commission itself, this involves balancing a commitment to transparency and the public good of a transparent approach, with ensuring de-identified data cannot be re-identified. A core aspect of this work includes determining what data should be suppressed in order to maintain individuals' privacy, by establishing minimum threshold levels for data publication. This means that, for example, where a defined entity reports a number of people in a particular category that does not meet the threshold, this data will not be made publicly available.

Working externally, the Commission is also committed to supporting defined entities to develop their ability to collect and manage sensitive data. There is understandable hesitancy from organisations that are concerned with getting their approach to privacy right. Part of the Commission's role is therefore to support them to consider their obligations not only under the Act, but with respect to privacy law more broadly, in assessing how they collect, use, manage, store and access sensitive data. It is important that organisations become fluent in, and comfortable with,

collecting and managing sensitive gender-disaggregated and intersectional data.

4. TRANSPARENCY AS ETHICAL LEADERSHIP AND GOOD GOVERNANCE

In addition to the practical gains afforded by using a transparent approach to achieve gender equality, there are ethical imperatives to commit to transparency. Such imperatives are particularly pertinent to legislation that, at its core, is designed to break down inequalities. Transparency underpins the rule of law and is increasingly seen as vital for democratic accountability. Recent scandals across various Australian jurisdictions regarding the allocation of government funds (e.g. Jenkins 2021; Ng 2020) have reinforced the fact that transparent and accountable governance are central to maintaining public trust, especially when it comes to spending taxpayers' money. A commitment to transparency disrupts existing power dynamics by democratising knowledge on the issue of organisational gender equality. Put simply, secrecy by a government or organisation ensures that the government or organisation retains power over those who are uninformed. Transparency, on the other hand, gives the public access to the government's process, allowing citizens to demand checks and balances on government actions and outcomes (Arnadottir 2016; Fenster 2010). Thus, the transparency and accountability required by the Act also constitutes a form of leadership through role-modelling a commitment to ethical practices (e.g. Fenster 2010; Hale and Slaughter 2006). It is for this reason, too, that the Act focuses its attention on addressing gender inequality in the public sector, specifically. By attending to its own 'backyard' in the first instance, the government and the Commissioner can better build public trust by leading from the front.

The public's appetite for transparency was similarly reflected in many of the public submissions to the inquiry process prior to the passage of the Act. Many submissions emphasised the importance of transparent reporting and processes as central to the integrity

and efficacy of the Act. This community-driven call for greater transparency may reflect the belief that a lack of transparency in business and government often signals to the public, rightly or wrongly, that an organisation may have something to hide (Fenster 2010). A transparent approach to gender equality can therefore inspire confidence in an organisation.

A lack of transparency can serve to individualise social problems, denying stakeholders the ability to identify and reveal the structural dynamics at play (Blackham and Allen 2019). Transparency may thus facilitate systemic change. The Act does this by allowing governments, organisations, employees and their advocates, social groups, individuals and the wider public to access data and information concerning the state of gender equality, ensuring organisations and individuals can place their experience within a wider context and identify systemic concerns. The dispute resolution function of the Commissioner under the Act also ensures that there is a formal, legal process for when such systemic forms of discrimination come to light within an organisation and affect a class or group of employees.

5. CONCLUSION

If we are to truly advance equality within society, we must be open to recognising, revealing, and systematically and transparently tackling disadvantage and discrimination. The transparency that is required regarding each of the obligations for defined entities under the *Gender Equality Act 2020* (Vic) serves four main purposes in accelerating the pace of change towards a more gender-equal society and providing leadership in this arena. Firstly, transparency is used as a practical tool within the Act to generate positive forms of knowledge-sharing and support to accelerate the pace of progress towards gender equality. Secondly, transparency similarly serves to place pressure on organisations to engage

meaningfully with strategies and measures to improve gender equality in their organisations, and to achieve positive results through developing innovative practices. Thirdly, certain ethical imperatives exist to undertake a transparent approach to equality legislation, given that transparency breaks down divides between powerful knowledge holders and others, by democratising access to knowledge. Finally, the use of transparency to achieve equality objectives is an example of good governance, whereby government plays a leadership role in pushing for positive social change.

While not without its challenges related to effective data collection, retention and analysis, as well as privacy concerns, using transparency in the pursuit of gender equality goals is ethically and practically justified. The new Victorian Act is a nation-leading piece of legislation. Much of its promise lies in the fact that it is likely to generate a wealth of transparent and accessible data, knowledge, and innovative practice to create a more gender-equal Victorian community.

6. REFERENCES

1. Allen, D. and Blackham, A. 2020. "Under wraps: secrecy, confidentiality and the enforcement of equality law in Australia and the United Kingdom." *Melbourne University Law Review*, 43 (2): 384–422.
2. Arnadottir, R. 2016. "The necessity of the rule of law and transparency in modern society." In Simonyi, A. and Cagan, D (eds) *Nordic Ways*. Washington, DC, USA: Brookings Institution Press.
3. Blackham, A. and Allen, D. 2019. "Resolving Discrimination Claims outside the Courts: Alternative Dispute Resolution in Australia and the United Kingdom." *Australian Journal of Labour Law*, 31 (3): 253–278.
4. Bohnet, I. 2016. *What Works: Gender Equality by Design*. Cambridge, MA, USA: Belknap Press.

5. Cavaghan, R. 2013. "Gender mainstreaming in the DGR as a knowledge process: epistemic barriers to eradicating gender bias." *Critical Policy Studies*, 7 (4): 407–421.
6. Collins, P. H. 1990. *Black Feminist Thought: Knowledge, Consciousness, and the Politics of Empowerment*. New York, USA: Routledge.
7. Crenshaw, K. 1989. "Demarginalizing the intersection of race and sex: a Black feminist critique of antidiscrimination doctrine, feminist theory, and antiracist politics." *The University of Chicago Legal Forum*, 140: 139–167.
8. Delgado, R., and Stefancic, J. 2001. *Critical Race Theory: An Introduction*. New York, USA: New York University Press.
9. Eriksson-Zetterquist, U. and Renemark, D. 2016. "Can changes to gender equality be sustained?" *Gender, Work and Organization*, 23(4): 363–378.
10. Fenster, M. 2010. "Seeing the state: transparency as metaphor." *Administrative Law Review*, 62 (3): 617–672.
11. Fraser, N. 1990. "Rethinking the public sphere: a contribution to the critique of actually existing democracy." *Social Text*, 25/26: 56–80.
12. Habermas, J. 1989. *The Structural Transformation of the Public Sphere*. Cambridge, MA, USA: MIT Press.
13. Hale, T. and Slaughter, A-M. 2006. "Transparency: possibilities and limitations." *The Fletcher Forum of World Affairs*, 30 (1): 153–163.
14. Hartmann, F. and Slapničar, S. 2012. "Pay fairness and intrinsic motivation: the role of pay transparency." *The International Journal of Human Resource Management*, 23 (20): 4283–4300.
15. Heisler, W. 2021. "Increasing pay transparency: a guide for change." *Business Horizons*, 64: 73–81.
16. Hepple, B. 2011. "Enforcing equality law: two steps forward and two steps backwards for reflexive regulation." *Industrial Law Journal*, 40 (4): 315–335.
17. Jenkins, S. 2021. "NSW Government Slammed for Using Grants to Pork-Barrel and 'Punish.'" *The Mandarin*, 31 March. <https://www.the-mandarin.com.au/152835-nsw-government-slammed-for-using-grants-to-pork-barrel-and-punish/> Accessed 9/4/21.
18. MacKinnon, C. 1989. *Toward a Feminist Theory of the State*. Cambridge, MA, USA: Harvard University Press.
19. Moors, A. 2019. "The trouble with transparency: reconnecting ethics, integrity, epistemology and power." *Ethnography*, 20 (2): 149–169.
20. Möschel, M. 2011. "Race in mainland European legal analysis: towards a European critical race theory." *Ethnic and Racial Studies*, 34(10): 1648–1664.
21. Ng, Y-F. 2020. "The 'Sports Rorts' Affair Shows the Need for a Proper Federal ICAC – With Teeth." *The Conversation*, 4 February. <https://theconversation.com/the-sports-rorts-affair-shows-the-need-for-a-proper-federal-icac-with-teeth-122800> Accessed 9/4/21.
22. Treleaven, C. and Fuller, S. 2021. "BB see: transparency legislation and public discussions of wage inequality." *Canadian Review of Sociology/Revue Canadienne de Sociologie*, 58: 7–24.
23. Vinall, M. 2020. "Pay secrecy feeds pay gaps. Transparency can change that." *Women's Agenda*, 11 June. <https://womens-agenda.com.au/latest/pay-secrecy-feeds-pay-gaps-transparency-can-change-that/>

Australian legislation

Gender Equality Act 2020 (Vic), ss 3, 16, 19, 22, 26.