

EQUALITY PROCUREMENT: THE NEXT FRONTIER OF DISCRIMINATION LAW?

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Government procurement offers significant opportunities for advancing equality in Australia. This article evaluates how equality procurement might be integrated as part of positive equality duties, drawing on an empirical case study of the Gender Equality Act 2020 (Vic). It argues that equality procurement appears under-developed in Australia but could be strengthened by more explicit legislative provisions to prompt, require and support equality procurement.

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I INTRODUCTION

In 2022–23, the Australian federal government's AusTender procurement information system recorded 83,625 procurement contracts, with a combined value of \$74.8 billion.¹ That same financial year, the Victorian government spent \$27.3 billion on goods and services, and \$21.8 billion on construction and infrastructure.² Across Australia, then, government procurement represents potentially hundreds of billions of dollars of investment each year.

Government procurement therefore offers significant opportunities for advancing equality. While Australian scholarship has considered the public law limits of government contracting³ and the extent to which contracting might be subject to judicial review,⁴ the link between public procurement and equality in Australia is under-explored. Indeed, as Wright and Conley argue, the link between procurement and equality has received less academic attention than the potential to enforce employment standards through procurement.⁵ And yet, procurement can, and is, being used to advance equality in Australia.

Equality procurement might be integrated as one aspect of positive equality duties. Positive equality duties have significant potential to create a proactive, systemic approach to advancing equality, putting the responsibility on organisations (not individuals) to identify and proactively address inequality and discrimination.⁶ Applying positive duties to procurement could substantially increase their reach and impact. As positive duties are increasingly embedded in Australian equality law — now adopted as part of equality law in Victoria, the Northern Territory, the

¹ Department of Finance, 'Statistics on Australian Government Procurement Contracts' (28 November 2023) <<https://www.finance.gov.au/government/procurement/>>.

² Department of Government Services, 'Introducing the Social Procurement Framework Annual Report 2022-23' (26 April 2024) <<https://www.buyingfor.vic.gov.au/social-procurement-annual-report-2022-23/introducing-social-procurement-framework-annual-report-2022-23>>.

³ KM Hayne, 'Government Contracts and Public Law' (2017) 41 *Melbourne University Law Review* 155.

⁴ Daniel Stewart, 'Statutory Authority to Contract and the Role of Judicial Review' (2014) 33(1) *University of Queensland Law Journal* 43.

⁵ Tessa Wright and Hazel Conley, 'Advancing Gender Equality in the Construction Sector through Public Procurement: Making Effective Use of Responsive Regulation' (2020) 41(4) *Economic and Industrial Democracy* 975, 976 ('Advancing Gender Equality in the Construction Sector through Public Procurement').

⁶ See generally Sandra Fredman, *Human Rights Transformed: Positive Rights and Positive Duties* (Oxford University Press, 2008) ('*Human Rights Transformed*'); Sandra Fredman, 'The Public Sector Equality Duty' (2011) 40(4) *Industrial Law Journal* 405; *ibid*; Sandra Fredman, 'Breaking the Mold: Equality as a Proactive Duty' (2012) 60 *American Journal of Comparative Law* 265 ('Breaking the Mold'); Alysia Blackham, 'Positive Equality Duties: The Future of Equality and Transparency?' (2021) 37(2) *Law in Context* 98 ('Positive Equality Duties'); Alysia Blackham, *Reforming Age Discrimination Law: Beyond Individual Enforcement* (Oxford University Press, 2022) ('*Reforming Age Discrimination Law*').

Australian Capital Territory, and under the *Sex Discrimination Act 1984* (Cth), and awaiting commencement in Queensland — it is critical to consider how equality procurement might be integrated as part of positive equality duties.

This article, therefore, addresses a critical and under-explored aspect of public procurement in Australia: the extent to which it can be used to advance social and economic equality. It draws linkages, too, between the literature on positive equality duties⁷ and literature on public procurement, drawing on an empirical case study of the use of equality procurement under the *Gender Equality Act 2020* (Vic). Drawing on 44 qualitative semi-structured interviews with 47 participants who were key players and stakeholders involved in the development and implementation of the *Gender Equality Act 2020* (Vic), the article considers how equality procurement is currently operating in Victoria, and the existing linkages between the positive duty under the *Gender Equality Act 2020* (Vic) and equality procurement. This article argues that equality procurement could be a critical tool for advancing social and economic equality in Australia. It frames positive equality duties as a key means for mainstreaming equality considerations into procurement. However, at present, these links between equality and procurement are underdeveloped. This article therefore proposes ways in which equality procurement could be strengthened in Australia, particularly given the growing adoption and expansion of positive equality duties.

In Part II, we explore the idea of equality procurement as it has been developed in the literature to date, and link this to the use and development of positive equality duties in Part III, with particular consideration of the situation in the United Kingdom ('UK'), where positive equality duties are established aspects of the discrimination law framework. In Part IV, we examine the extent to which equality procurement is embedded in positive equality duties in Australia, focusing on case studies of the federal *Workplace Gender Equality Act 2012* (Cth) in Part V and the Victorian *Gender Equality Act 2020* (Vic) in Part VI. In Part VII we develop the method of our empirical case study, before presenting our results relating to equality procurement in Part VIII. Part IX concludes.

⁷ For a summary of the Australian context, see Blackham, 'Positive Equality Duties' (n 6).

II EQUALITY PROCUREMENT

Public procurement is the power of public sector organisations ‘to purchase works, goods, and services from the private sector’.⁸ ‘Equality procurement’, then, is the use of government purchasing power to advance equality and non-discrimination.⁹ Equality procurement is of growing significance as government services are increasingly outsourced and delivered by private providers.¹⁰ For Wright and Conley, social procurement can be seen as a form of responsive regulation, particularly when linked to positive equality duties.¹¹ It is also, arguably, a type of equality “mainstreaming”, pushing public entities to consider equality in all aspects of their operation as part of their day-to-day business.¹²

As Barnard argues, in the context of the European Union (‘EU’), ‘[p]rocurement is no longer just about securing equal treatment of tenderers and transparency in the procurement process but it is also about delivering social (and environmental) objectives’.¹³ Procurement is not just about purchasing; it can also fulfill a regulatory function, overcoming the limits of other regulatory tools (like individual complaints and agency enforcement).¹⁴ Procurement is therefore one means of addressing the difficulties of enforcing discrimination and equality law via individual enforcement mechanisms.¹⁵ For McCrudden, ‘[t]he power of using procurement lies in the employer’s economic interest in obtaining business from public authorities’.¹⁶ Procurement can therefore be a complementary enforcement tool, that supports and reinforces other forms of enforcement.¹⁷

Procurement entails a series of decisions by government entities:¹⁸ as Sarter summarises, equality considerations might play into *what* is procured (the design of the good or service), *how* it is procured (the conditions of procurement), and *who* it

⁸ Christopher McCrudden, ‘Procurement and Fairness in the Workplace’ in Linda Dickens (ed), *Making Employment Rights Effective: Issues of Enforcement and Compliance* (Hart Publishing, 2012) 87, 87.

⁹ Christopher McCrudden, *Buying Social Justice: Equality, Government Procurement, and Legal Change* (Oxford University Press, 2007) 3 (‘*Buying Social Justice*’).

¹⁰ *Ibid* 10–12.

¹¹ Wright and Conley (n 5) 976.

¹² McCrudden, *Buying Social Justice* (n 9) 20.

¹³ Catherine Barnard, ‘To Boldly Go: Social Clauses in Public Procurement’ (2017) 46(2) *Industrial Law Journal* 208, 211 (‘To Boldly Go’).

¹⁴ *Ibid* 212.

¹⁵ On these difficulties, see Blackham, *Reforming Age Discrimination Law* (n 6).

¹⁶ McCrudden, ‘Procurement and Fairness in the Workplace’ (n 8) 98.

¹⁷ *Ibid*.

¹⁸ EK Sarter, ‘Marketization, Regulation, and Equality: Towards an Analytical Framework for Understanding the Equality Impact of Public Procurement’ (2024) 31(1) *Social Politics: International Studies in Gender, State & Society* 1, 6 (‘Marketization, Regulation, and Equality’).

is procured from.¹⁹ More specifically, equality might be embedded in procurement in:

- Informing the decision of what to purchase at the preparation stage;
- Describing the works, services or supply at the technical specification stage;²⁰
- Selecting the supplier, including by excluding certain suppliers,²¹ or preferring some suppliers over others. This might involve a review of their past performance, ability to deliver the contract (including their existing equality policies) and/or their future commitments;
- Setting requirements or conditions for the delivery or performance of the works, services or supply (in relation to workforce composition, for example);²²
- Assessing performance under the contract, including in considering future procurement, and/or whether to renew the contract.²³

Sarter categorises proactive equality procurement measures as falling into two categories: first, those that aim to foster equality in the workplace (such as quotas for women's employment);²⁴ and, second, measures that focus externally to the workplace (as in measures focusing on the delivery of a service and its equality impacts).²⁵ In framing equality procurement, though, McCrudden prompts us to think more broadly, to consider: which groups or grounds are included (ie gender, disability, or all grounds protected by equality law)? Which contexts will the procurement rules apply to (ie employment, or more generally)? Are procurement rules designed to support existing legal obligations, or to go beyond them? How will we ensure compliance with procurement rules?²⁶

In a practical sense, equality procurement might move from a "light touch" approach to a more prescriptive application of these ideas. "Light touch" equality procurement might involve requiring organisations to provide a statement in tender documents about how they might advance equality in their workforce or delivery of the service or product. A more stringent approach might require organisations to show compliance with other (equality) laws, to support compliance and enforcement

¹⁹ Ibid 3.

²⁰ McCrudden, 'Procurement and Fairness in the Workplace' (n 8) 94.

²¹ Ibid 95.

²² Ibid 97.

²³ Cf the limits under EU law: Barnard (n 13).

²⁴ Sarter (n 18) 10.

²⁵ Ibid 10–11.

²⁶ McCrudden, *Buying Social Justice* (n 9) 92–94.

through other measures. This approach might give financial “teeth” to other regulatory regimes. More onerous again would be to require organisations to set — and meet — equality targets or quotas, including in relation to workforce or board composition. For example, from 2025, the Australian government has started requiring businesses with 500 or more employees to select and report on three gender equality targets as part of reporting under the *Workplace Gender Equality Act 2012* (Cth), including targets relating to board composition, the gender pay gap, flexible work, parental leave, consultation regarding gender equality and addressing sexual harassment.²⁷ In Canada, too, under the Federal Contractors Program (‘FCP’), those who work with the government must achieve and maintain a representative workforce; and contractors with 100 or more staff who bid on government contracts over \$1 million in value must commit to employment equity.²⁸ Failing to meet these provisions can result in a contract being cancelled or a company being unable to bid on future contracts. Concerns have been expressed, though, about how the FCP has been designed and enforced, being under-funded and over-complex.²⁹ Another approach would be to target funding to, or first approach, under-represented groups and organisations, including those run by Aboriginal and Torres Strait Islander peoples and First Nations groups.³⁰

Unlike the strictly regulated situation in the EU,³¹ there appear to be few limits on social procurement in Australia. As former High Court justice Kenneth Hayne concludes,

Subject to some important but largely unexplored limits, government can set its own tender rules. And because government can set its own criteria for determining who is an acceptable counterparty, government can, as already explained, pursue and secure whatever economic or social policy goals it sees fit by requiring those counterparties to abide by those policies.³²

²⁷ *Workplace Gender Equality Amendment (Setting Gender Equality Targets) Act 2025* (Cth); Workplace Gender Equality (Gender Equality Targets) Instrument 2025 (Cth).

²⁸ Employment and Social Development Canada, ‘Federal Contractors Program’, *Government of Canada* (policies, 11 April 2020) <<https://www.canada.ca/en/employment-social-development/corporate/portfolio/labour/programs/employment-equity/federal-contractors.html>>.

²⁹ Andrew Erridge and Ruth Fee, ‘The Impact of Contract Compliance Policies in Canada: Perspectives from Ontario’ (2001) 1(1) *Journal of Public Procurement* 51.

³⁰ See, eg, National Indigenous Australians Agency, *Indigenous Procurement Policy* (December 2020) <<https://www.niaa.gov.au/resource-centre/indigenous-procurement-policy>>.

³¹ Barnard (n 13).

³² Hayne (n 3) 165 (footnotes omitted). On these limits, see *Combet v Commonwealth* (2005) 224 CLR 494.

Thus, the limits of equality procurement in Australia are largely set by government itself. At present, though, the Australian *Commonwealth Procurement Rules* ('CPRs') appear hostile to equality procurement;³³ 'discrimination' in procurement is prohibited. The rules state:

- 5.3 The Australian Government's procurement framework is non-discriminatory.
- 5.4 All potential suppliers to government must, subject to these CPRs, be treated equitably based on their commercial, legal, technical and financial abilities and not be discriminated against due to their size, degree of foreign affiliation or ownership, location, or the origin of their goods and services.

This idea of 'discrimination', though, appears distinct from the understanding in discrimination law. Further, setting standards or targets, or conditions of performance would not breach these rules. Selection of a specific provider based on equality considerations, though, may require an amendment to the rules.

Overall, then, McCrudden argues that public procurement remains an 'underused tool'.³⁴ Even when regulations provide for the possibility of equality procurement, these provisions are not always fully utilised in practice, especially if they are voluntary.³⁵ For McCrudden, then, the successful adoption of equality procurement reflects a framework of: motivations for engagement (including, for example, positive duties); addressing political and legal barriers; political commitment and leadership; strategic planning; and monitoring implementation.³⁶ To this, Wright and Conley add training and support.³⁷

III POSITIVE EQUALITY DUTIES AND EQUALITY PROCUREMENT

Equality procurement might be integrated as one aspect of positive equality duties, and positive equality duties can drive and prompt engagement with equality procurement.³⁸ Positive equality duties represent a "next generation" approach to advancing equality.³⁹ They focus on proactive, preventative measures that can be

³³ Department of Finance, *Commonwealth Procurement Rules 2024* (1 July 2024) <https://www.finance.gov.au/sites/default/files/2024-06/Commonwealth_Procurement_Rules-1-July-2024.pdf>.

³⁴ McCrudden, 'Procurement and Fairness in the Workplace' (n 8) 88, also 107.

³⁵ EK Sarter, 'The Development and Implementation of Gender Equality Considerations in Public Procurement in Germany' (2020) 26(3) *Feminist Economics* 66, 68.

³⁶ McCrudden, 'Procurement and Fairness in the Workplace' (n 8) 100–107.

³⁷ Wright and Conley (n 5) 976.

³⁸ McCrudden, 'Procurement and Fairness in the Workplace' (n 8) 100, 108.

³⁹ Sandra Fredman, *Discrimination Law* (Oxford University Press, 2nd ed, 2011) 299–302.

taken by organisations to prevent discrimination and advance equality.⁴⁰ Positive equality duties seek to take the burden of enforcement of discrimination law off individuals, instead placing the burden of advancing equality on those in the best position to make substantive change: organisations.⁴¹ Originally pioneered in Northern Ireland, positive equality duties are now established features of UK discrimination law (the UK public sector equality duty ('PSED'))⁴² and have been subsequently adopted in several Australian jurisdictions (discussed in Part IV).

Applying positive duties to procurement could substantially increase the reach and impact of positive equality duties themselves, particularly where positive duties only apply to the public sector. Through procurement, it might be possible to extend the higher standards of equality which apply to the public sector (including under positive equality duties) to organisations in the private sector.⁴³

In the UK, McCrudden argues that the PSED has been effective in driving the inclusion of equality in procurement.⁴⁴ In a survey of local authority procurement departments in England, published in 2009, the vast majority of respondent equalities departments in local authorities in England (87%) thought that progress towards equality procurement had been driven by positive equality duties.⁴⁵ Indeed, public entities may need to introduce equality procurement provisions to comply with the PSED;⁴⁶ the Northern Ireland duty has also been interpreted as requiring consideration of equality issues in procurement.⁴⁷ However, for a positive duty to have a clear impact on procurement, it is important to provide clear guidance to public authorities about what equality procurement can and should entail.⁴⁸ In case studies of local authorities in England, progress towards equality procurement was supported by leadership buy-in and commitment, knowledge and expertise, and integration of procurement and equalities functions.⁴⁹ That said, a lack of guidance

⁴⁰ Fredman, 'Breaking the Mold' (n 6) 271.

⁴¹ Ibid 266.

⁴² *Equality Act 2010* (UK) s 149.

⁴³ Wright and Conley (n 5) 975.

⁴⁴ McCrudden, 'Procurement and Fairness in the Workplace' (n 8) 100–101.

⁴⁵ Equality and Human Rights Commission, *Equalities and Procurement Research: Summary* (2009) 2.

⁴⁶ Wright and Conley (n 5) 982.

⁴⁷ Equality Commission for Northern Ireland, *Equality of Opportunity and Sustainable Development in Public Sector Procurement* (Equality Commission for Northern Ireland, 2008) 7–8, 21. See further Christopher McCrudden, 'Procurement and the Public Sector Equality Duty: Lessons for the Implementation of the Equality Act 2010 from Northern Ireland?' (2011) 11(1–2) *International Journal of Discrimination and the Law* 85 ('Procurement and the Public Sector Equality Duty').

⁴⁸ McCrudden, 'Procurement and Fairness in the Workplace' (n 8) 109.

⁴⁹ Equality and Human Rights Commission (n 45) 2.

may also lead to innovation and experimentation by a ‘vanguard’ of public entities,⁵⁰ if organisations have strong leadership and commitment to equality.

In Scotland and Wales, specific equality duties are in place in relation to procurement. Public authorities must have due regard to whether the award criteria and conditions for performance for contracting should include considerations relevant to the performance of the PSED.⁵¹ In Scotland, though, this imposes no obligations where the requirement is not related to and proportionate to the subject matter.⁵² This likely reflects the limits of EU law on social considerations in public procurement,⁵³ which are arguably less relevant to the UK following Brexit. Despite these provisions and obligations, in a 2014 review of the PSED in Wales, organisations appeared to have less understanding of how the PSED was being applied to the process of procurement.⁵⁴ In part, this may reflect the fact that the person responsible for procurement is often different to the person responsible for equalities.⁵⁵

It is arguable, then, that the potential of positive duties in relation to procurement has yet to be realised in the UK. Manfredi and others argue that while employment and service delivery have already been sensitised to equality issues, the same cannot be said for procurement; rather, procurement is still embedded in a market paradigm, which seeks and prioritises value for money.⁵⁶ This may represent a fundamental disjunction between the aims of equality law and systems of procurement: ‘not only are equality values alien to the economic discourse which is expressed purely in utilitarian terms, but they may even be conflicting with the market logic which prevails in this sub-system’.⁵⁷ Regardless, Manfredi and others still identify examples where equality considerations have been integrated into procurement,⁵⁸ indicating that this disjunction is not insurmountable. Further, Wright and Conley consider how equality procurement might be used to advance

⁵⁰ McCrudden, ‘Procurement and Fairness in the Workplace’ (n 8) 110.

⁵¹ Equality Act 2010 (Statutory Duties) (Wales) Regulations 2011 (Wales) SI 1064/2011 (W155) reg 18; Equality Act 2010 (Specific Duties) (Scotland) Regulations 2012 (Scot) SI 2012/162 reg 9.

⁵² Equality Act 2010 (Specific Duties) (Scotland) Regulations 2012 (Scot) SI 2012/162 reg 9(3).

⁵³ See further Christopher McCrudden, ‘EC Public Procurement Law and Equality Linkages: Foundations for Interpretation’ in Sue Arrowsmith and Peter Kunzlik (eds), *Social and Environmental Policies in EC Procurement Law: New Directives and New Directions* (Cambridge University Press, 2009) 271; McCrudden, *Buying Social Justice* (n 9).

⁵⁴ Martin Mitchell et al, *Review of the Public Sector Equality Duty (PSED) in Wales* (2014) 28–9.

⁵⁵ *Ibid.*

⁵⁶ Simonetta Manfredi, Lucy Vickers and Kate Clayton-Hathway, ‘The Public Sector Equality Duty: Enforcing Equality Rights Through Second-Generation Regulation’ (2018) 47(3) *Industrial Law Journal* 365, 384 (‘The Public Sector Equality Duty’).

⁵⁷ *Ibid.*

⁵⁸ *Ibid.*

gender equality in the construction industry, drawing on a case study of the UK Women into Construction project.⁵⁹

These examples also show the potential ripple effect of the PSED to the private sector: ‘the regulatory stimulus sent to the private sector through the procurement process can set in motion a chain reaction and percolate down through the supply chain to other businesses’.⁶⁰ Government has substantial capacity to shape and improve the employment of diverse workers through its procurement of goods and services.⁶¹ In procurement, governments can ask suppliers to demonstrate their commitment to workforce diversity strategies, non-discriminatory recruitment, and the setting and reporting on voluntary targets.⁶² Thus, explicitly including procurement within the scope of positive duties is critical, both for its potential impact and for the internal logic of positive duties themselves, as it prevents governments evading their equality responsibilities through outsourcing.⁶³

Procurement can also go hand-in-hand with other obligations under positive equality duties; for example, Wright and Conley argue that including a duty to consult can strengthen obligations around procurement, as unions and civil society organisations can act as a check on the way procurement terms are drafted and enforced.⁶⁴

IV EQUALITY PROCUREMENT AND POSITIVE EQUALITY DUTIES IN AUSTRALIA

Positive equality duties are increasingly being embedded in Australian equality law. Positive duties are now part of the law in Victoria,⁶⁵ the Northern Territory (‘NT’),⁶⁶ the Australian Capital Territory (‘ACT’),⁶⁷ and under the *Sex Discrimination Act 1984* (Cth) (‘SDA’),⁶⁸ and are awaiting commencement in Queensland.⁶⁹ It is therefore critical to consider how equality procurement might be integrated as part of positive equality duties in Australia specifically, particularly given the UK experience. At

⁵⁹ Wright and Conley (n 5).

⁶⁰ Manfredi, Vickers and Clayton-Hathway (n 56) 385.

⁶¹ Australian Human Rights Commission, *Willing to Work: National Inquiry into Employment Discrimination Against Older Australians and Australians with Disability* (2016) 15 (‘Willing to Work’).

⁶² *Ibid.*

⁶³ Bob Hepple, Mary Coussey and Tufyal Choudhury, *Equality: A New Framework: Report of the Independent Review of the Enforcement of UK Anti-Discrimination Legislation* (Hart, 2000) 84, [3.74] (‘Equality’).

⁶⁴ Wright and Conley (n 5) 991.

⁶⁵ *Equal Opportunity Act 2010* (Vic) s 15.

⁶⁶ *Anti-Discrimination Act 1992* (NT) s 18B.

⁶⁷ *Discrimination Act 1991* (ACT) s 75.

⁶⁸ *Sex Discrimination Act 1984* (Cth) s 47C.

⁶⁹ *Respect at Work and Other Matters Amendment Act 2024* (Qld) s 25 inserting *Anti-Discrimination Act 1991* (Qld) ch 5C ss 131H–J, originally due to commence on 1 July 2025, but now delayed.

present, though, procurement is rarely explicitly included as part of positive equality duties in Australia.

The Victorian positive equality duty, which has been emulated in the NT, ACT, Queensland and under the SDA,⁷⁰ says:

A person must take reasonable and proportionate measures to eliminate ... discrimination, sexual harassment or victimisation as far as possible.⁷¹

This general duty is broad enough to encompass the advancement of equality through procurement. There is no guidance, though, to support organisations to adopt equality procurement as part of their compliance with the duty.

Unlike in the UK, too, these duties apply to organisations in the public *and* private sectors; the scope is broad, encompassing all ‘who [have] a duty [under the Act] not to engage in discrimination, sexual harassment or victimisation’.⁷² Equality procurement is therefore less critical for extending positive equality duties and equality standards to the private sector; indeed, these duties and standards already apply to the private sector.

The exception to this broad scope lies in the *Gender Equality Act 2020* (Vic), which creates more significant equality obligations and more onerous positive equality duties for the public sector in Victoria. Under that Act, equality procurement might be used to extend these equality obligations to the private sector. Where positive equality duties are broadly framed, however, and encompass both the public and private sectors, equality procurement might be focused instead on securing compliance with the laws (as under the *Workplace Gender Equality Act 2012* (Cth)). These two cases are considered in more detail in the sections below.

V THE *WORKPLACE GENDER EQUALITY ACT 2012* (CTH) FRAMEWORK

The *Workplace Gender Equality Act 2012* (Cth) arguably creates positive duties of transparency to advance gender equality in Australia.⁷³ The *Workplace Gender Equality Act 2012* (Cth) framework applies to federal public sector and private sector employers⁷⁴ and higher education providers with 100 or more employees.⁷⁵

⁷⁰ See Alysia Blackham, ‘Promoting Innovation or Exacerbating Inequality? Laboratory Federalism and Australian Age Discrimination Law’ (2023) 51(3) *Federal Law Review* 347 (‘Promoting Innovation or Exacerbating Inequality?’).

⁷¹ *Equal Opportunity Act 2010* (Vic) s 15(2).

⁷² *Equal Opportunity Act 2010* (Vic) s 15(1).

⁷³ See Blackham, ‘Positive Equality Duties’ (n 6).

⁷⁴ Since the passage of the *Anti-Discrimination and Human Rights Legislation Amendment (Respect at Work) Act 2022* (Cth) sch 6.

⁷⁵ *Workplace Gender Equality Act 2012* (Cth) s 4.

Employers are required to report⁷⁶ on topics including equal pay, gender composition of the workforce, gender composition of governing bodies, flexible work arrangements, consultation in relation to gender equality, and sexual and sex-based harassment and discrimination (including relevant policies and training that are in place).⁷⁷ Employers who fail to lodge a report or provide misleading information in a report will be deemed to be non-compliant and may be named by the Workplace Gender Equality Agency.⁷⁸ Since 2024, the Workplace Gender Equality Agency has been empowered and tasked with publicly reporting on the reports made under the Act,⁷⁹ allowing the aggregated analysis and comparison of different employers and their progress towards gender equality.

Employers who fail to comply with the *Workplace Gender Equality Act 2012* (Cth) framework may be prevented from contracting with the Commonwealth government. This is not specifically provided for in a provision of the Act, other than the simplified outline in s 18 of pt IVA. Section 18 relevantly says:

Relevant employers failing to comply with this Act may not be eligible to compete for contracts under the Commonwealth procurement framework and may not be eligible for Commonwealth grants or other financial assistance.

In this sense, equality procurement is used to strengthen the limited enforcement mechanisms otherwise in place in the *Workplace Gender Equality Act 2012* (Cth) framework. Consequences of non-compliance otherwise include being named by the Workplace Gender Equality Agency.⁸⁰ While ‘naming and shaming’ might be an effective enforcement mechanism in some cases, it is a fairly limited tool compared to the powers of escalation given to other regulatory agencies, like the Fair Work Ombudsman. Equality procurement, in this context, becomes a critical complement to the limited regulatory powers of the Workplace Gender Equality Agency.

The use of equality procurement connected with the *Workplace Gender Equality Act 2012* (Cth) framework is set out in the Workplace Gender Equality Procurement Principles.⁸¹ Under the principles, relevant employers must submit a letter of compliance showing that they have complied with the *Workplace Gender Equality*

⁷⁶ Ibid s 13.

⁷⁷ Ibid ss 3, 13. See further Workplace Gender Equality (Matters in Relation to Gender Equality Indicators) Instrument 2023 (Cth).

⁷⁸ *Workplace Gender Equality Act 2012* (Cth) ss 13A, 16, 19B, 19C, 19CA, 19D.

⁷⁹ Ibid s 15A. See *Workplace Gender Equality Amendment (Closing the Gender Pay Gap) Act 2023* (Cth).

⁸⁰ *Workplace Gender Equality Act 2012* (Cth) s 19D.

⁸¹ Department of the Prime Minister and Cabinet, *Workplace Gender Equality Procurement Principles and User Guide* <<https://www.wgea.gov.au/sites/default/files/documents/PMC-WGE-Procurement-Principles.pdf>>.

Act 2012 (Cth) framework before tendering or entering into a supplier contract with the federal government above the procurement threshold. They must also notify the government if they become non-compliant during the term of the contract.

Under the 2024 CPRs,⁸² the procurement thresholds are:

- a. for non-corporate Commonwealth entities (other than for construction): \$80,000;
- b. for prescribed corporate Commonwealth entities (other than for construction): \$400,000; or
- c. for procurements of construction services: \$7.5 million.

The Workplace Gender Equality Procurement Principles also specify model contractual clauses, which must be included in request documentation and contracts above the procurement threshold, to embed these requirements.⁸³

A review of the *Workplace Gender Equality Act 2012* (Cth) ('Review'), conducted in 2021, recommended the government also review the Workplace Gender Equality Procurement Principles.⁸⁴ The Review report noted 'widespread feedback that the current compliance and enforcement mechanisms [under the Act] are inadequate and need to be improved'.⁸⁵ Rather than recommending stronger compliance mechanisms (as recommended by a number of stakeholders),⁸⁶ though, the Review instead identified a need to review the procurement principles.⁸⁷ Additional enforcement powers were only recommended to be considered in future reviews if there was a reduction in the current (high) compliance rate with the *Workplace Gender Equality Act 2012* (Cth) framework.⁸⁸ The Review clearly saw procurement policies as preferable to other, 'punitive' enforcement tools, like financial penalties, compliance or improvement notices, which were not recommended by the Review.⁸⁹ However, consultations conducted for the Review showed concern that 'the current procurement principles are not consistently applied or effective for all organisations', leading to stakeholder calls for a review of the procurement

⁸² Department of Finance, *Commonwealth Procurement Rules 2024* (n 33).

⁸³ Department of the Prime Minister and Cabinet, *Workplace Gender Equality Procurement Principles and User Guide* (n 81) 14–16.

⁸⁴ Department of the Prime Minister and Cabinet, *WGEA Review Report: Review of the Workplace Gender Equality Act 2012* (December 2021) 16 <<https://www.pmc.gov.au/resources/wgea-review-report>>.

⁸⁵ *Ibid* 10.

⁸⁶ *Ibid*.

⁸⁷ *Ibid*.

⁸⁸ *Ibid*.

⁸⁹ *Ibid*.

principles.⁹⁰ Reconsidering the procurement principles, though, was largely to ensure their requirements were more clearly framed:

Stakeholders strongly support making it clearer that relevant employers must comply with WGEA's reporting obligations to receive Commonwealth procurement contracts and grants. As there are not many enforcement mechanisms in the Workplace Gender Equality Act it is important they are clear and effective. That is why it is recommended that relevant employers must comply with WGEA's reporting obligations for Commonwealth grants eligibility and Commonwealth procurement participation.⁹¹

Further, since grants and procurement operate differently, it was suggested that the *Workplace Gender Equality Act 2012* (Cth) might be amended to specifically require compliance with the Act to be eligible for Commonwealth grants.⁹²

The government committed to implement the recommendations of the Review in 2022. A review of the Workplace Gender Equality Procurement Principles was subsequently commenced in 2023, to consider: how the procurement principles are applied in practice; opportunities to strengthen the principles, to encourage compliance with the *Workplace Gender Equality Act 2012* (Cth); and the broader contribution of procurement to gender equality outcomes. The review reportedly found high levels of compliance with the Workplace Gender Equality Procurement Principles but committed to better transparency and reporting on compliance. The Office for Women has committed to revising the Workplace Gender Equality Procurement Principles in 2025.⁹³

As it stands, then, while equality procurement is a key enforcement mechanism for the *Workplace Gender Equality Act 2012* (Cth), and is seen as compensating for the general absence of other enforcement mechanisms, the way equality procurement currently works is unclear and potentially inconsistent. There is significant scope to strengthen these provisions, and to use equality procurement in a more effective way to strengthen the *Workplace Gender Equality Act 2012* (Cth). In particular, including general provisions relating to procurement and grants, in some form, in the Act itself would help ensure equality procurement is used consistently and predictably at the federal level. Further, using equality procurement simply to achieve compliance with the legislative framework does not achieve the full

⁹⁰ Ibid 75.

⁹¹ Ibid 53.

⁹² Ibid.

⁹³ Department of the Prime Minister and Cabinet, 'Review of the Workplace Gender Equality Procurement Principles' (2025) <<https://www.pmc.gov.au/office-women/womens-economic-equality/workplace-gender-equality/wge-procurement-principles-review>>.

potential or scope of equality procurement. Provisions could be used in a number of other ways, as mapped in Part II, to address discrimination and advance equality in federal procurement. Finally, these procurement measures are solely focused on gender; equality procurement could also be targeted to advancing equality on the basis of other protected grounds and characteristics.

While the *Workplace Gender Equality Act 2012* (Cth) is a piece of federal legislation, it is having a broader impact on procurement in some states and territories. For example, in Western Australia, the *General Procurement Direction 2024/02* now mandates the inclusion of a gender equality disclosure clause in procurement documentation with an estimated contract value of \$250,000 and above. Respondents are asked to disclose whether they comply with the *Workplace Gender Equality Act 2012* (Cth).⁹⁴ This could support the enforcement of the Act in other contexts, and offers an important complement to federal procurement rules.

VI THE GENDER EQUALITY ACT 2020 (Vic)

Another approach to equality procurement is evident in the *Gender Equality Act 2020* (Vic). Unlike the *Workplace Gender Equality Act 2012* (Cth), the *Gender Equality Act 2020* (Vic) is confined to the public sector: it creates a positive equality duty for defined entities (public sector organisations, universities and local councils with more than 50 employees)⁹⁵ to,

in developing policies and programs and in delivering services that are to be provided to the public, or have a direct and significant impact on the public—

- (a) consider and promote gender equality; and
- (b) take necessary and proportionate action towards achieving gender equality.⁹⁶

The *Gender Equality Act 2020* (Vic) requires defined entities, in developing and reviewing policies, programs, and services, to conduct a gender impact assessment.⁹⁷ While a gender impact assessment could encompass consideration of the impacts of procurement, and procurement policies themselves, this is not explicitly required in the statute. According to the Victorian Commission for Gender Equality in the Public Sector, a gender impact assessment on a procurement policy

⁹⁴ Department of Finance, *Gender Equality in Procurement: Disclosure Clause For the Purposes of General Procurement Direction 2024/02* (2024) <<https://www.wa.gov.au/system/files/2024-07/gender-equality-in-procurement-disclosure-clause-july-2024.PDF>>.

⁹⁵ *Gender Equality Act 2020* (Vic) s 5.

⁹⁶ *Ibid* s 7.

⁹⁷ *Ibid* s 9.

is not required 'unless you are funding another organisation to deliver a policy, program or service directly to the public', but might still be done voluntarily.⁹⁸

Given the scope of the *Gender Equality Act 2020* (Vic) is confined to the public sector, equality procurement becomes a critical tool to extend the equality measures in the Act to the private sector (as discussed in Part II). The Act does raise the possibility of equality procurement: s 49 provides that the Minister 'may issue guidelines relating to procurement policies and practices for the purposes of promoting and advancing gender equality', and a defined entity subject to the guidelines must have regard to them. However, the Minister has not issued procurement guidelines to date.

The absence of procurement guidelines under the *Gender Equality Act 2020* (Vic) may be explained by the fairly comprehensive provisions already contained in the Victorian Social Procurement Framework. Women's equality and safety is one of seven social procurement objectives contained in the Framework, which is linked to two corresponding social outcomes: adoption of family violence leave by Victorian Government suppliers; and gender equality within Victorian Government suppliers.⁹⁹ The Framework includes recommended actions potentially advancing gender equality:

For individual procurement activities valued at or above \$1 million (regional) or \$3 million (metro or State-wide) up to \$20 million (exclusive of GST), government buyers ask suppliers:

- whether they offer family violence leave in weighted framework criteria
- to demonstrate gender equitable employment practices in weighted framework criteria.

For individual procurement activities valued at or above \$20 million (exclusive of GST), government buyers ask suppliers:

- whether they offer family violence leave in weighted framework criteria
- to include performance standards or industry appropriate targets for labour hours performed by women.¹⁰⁰

⁹⁸ Commission for Gender Equality in the Public Sector, 'Applying a Gender Impact Assessment to a Procurement Policy' (20 July 2023) <<https://www.genderequalitycommission.vic.gov.au/applying-gender-impact-assessment-procurement-policy>>.

⁹⁹ Victorian Government, 'Detailed Guidance for Women's Equality and Safety', *Buying for Victoria* (5 July 2023) <<https://www.buyingfor.vic.gov.au/detailed-guidance-womens-equality-and-safety>>.

¹⁰⁰ Ibid.

The model approach requires suppliers to complete a 'gender equitable business practices self-assessment checklist' and provide a current workforce/contract staff profile. The checklist covers items like having:

- a gender equality strategy
- gender-inclusive culture (such as flexible work options)
- gender equality in leadership and management
- gender composition of teams
- equal remuneration
- gender equality audits.

Under the model approach, suppliers are asked to commit to targets for employment and/or training outcomes for Women's Equality and Safety, and to explain how they will support Women's Equality and Safety to achieve employment and training outcomes.¹⁰¹

The Victorian Social Procurement Framework clearly goes further than the federal framework. In addition to these provisions relating to women's equality and safety, the Victorian framework also includes provisions relating to Aboriginal and Torres Strait Islander peoples' businesses, disability enterprises, and inclusive employment practices (relating to disability).¹⁰² Equality procurement, therefore, goes beyond just gender. The gap in Victoria, though, is that the Social Procurement Framework is not yet closely linked to the *Gender Equality Act 2020* (Vic). The potential for the procurement framework to support, reinforce and extend the higher standards of equality that apply to the public sector has not yet been realised.

VII THE EMPIRICAL METHOD

As noted in Part V, little is known about how equality procurement operates in the federal sphere. To investigate how it is working in Victoria, particularly since the introduction of the *Gender Equality Act 2020* (Vic), we conducted a mixed methods study of the implementation of the Act over the second half of 2021.¹⁰³

¹⁰¹ Ibid.

¹⁰² Victorian Government, 'Social Procurement Framework Requirements and Expectations', *Buying for Victoria* (5 September 2023) <<https://www.buyingfor.vic.gov.au/social-procurement-framework-requirements-and-expectations>>.

¹⁰³ This discussion of research methods is adapted from Alysia Blackham, Lauren Ryan and Leah Ruppanner, 'Enacting Intersectionality: A Case Study of Gender Equality Law and Positive Equality Duties in Victoria' (2023) 49(3) *Monash University Law Review* 40. This research had ethics approval from the Human Research Ethics Committee of the University of Melbourne (ID number 2021-22402-21620-4).

Data were collected through 44 qualitative semi-structured interviews with 47 participants who were key players and stakeholders involved in the development and implementation of the Act. Forty-four of the participants identified as women, with the other three identifying as men. The participants came from 40 different organisations including metropolitan, regional and rural councils; state government departments; unions; TAFEs; universities; hospitals and health care providers; women's health sector; women's NGOs; sporting organisations; ministerial staff and gender-based consultants.

The first round of respondents were contacted using lists provided by the Commission for Gender Equality in the Public Sector that represented key stakeholder groups and previously engaged entities and supporting organisations. Building on this initial list, additional respondents were contacted and engaged using snowballing techniques and targeted desktop research to find a broader sample of participants from across a range of different entities and with a range of experiences. Additional participants were sought to diversify the sample across a range of factors include geographical location, size and type of entity/organisation, level of maturity with respect to the implementation of the Act, and a broader gender split.

Interview respondents were assigned a randomised number to preserve their anonymity throughout the process. Interviews were conducted online using Zoom due to the COVID-19 pandemic. Interviews lasted between 30 minutes and 75 minutes in duration, with the average being 45–60 minutes. Research memos were completed by the interviewer at the end of each interview and covered content including key themes from the conversation, notes on the participant's demeanour and any standout quotes, opinions or experiences. Data were transcribed using Otter.ai transcription software, then checked manually for accuracy. Using the software platform Dedoose, data then underwent multiple open and focused rounds of flexible coding using Deterding and Waters's methodology for indexing, analytical coding, and theoretical testing/refinement.¹⁰⁴

Interview questions focused on developing a broader understanding of a) how the Act evolved, and the social, economic and political conditions that encouraged its adoption; b) how the Act was being implemented, examining the work of the Commission and of defined entities; and c) how the Act's future success could best be secured, drawing on the experiences of defined entities, as well as other

¹⁰⁴ Nicole M Deterding and Mary C Waters, 'Flexible Coding of In-Depth Interviews: A Twenty-First-Century Approach' (2021) 50(2) *Sociological Methods & Research* 708 ('Flexible Coding of In-Depth Interviews').

jurisdictions nationally and internationally. Procurement was not directly raised by the interview questions in the interview schedule, but was used as a prompt in some interviews to draw out further insights from respondents. In particular, respondents raised concerns around the limited strength of the procurement requirements within the Act in response to questions seeking insight into aspects of the Act that they felt were missing and/or examples of where they felt the Act could have gone further to ensure success in meeting its intended aims. We also conducted documentary analysis of legislative materials (such as second reading speeches and parliamentary debates), inquiries, submissions, and Commission documents, to complement and inform the qualitative interviews.¹⁰⁵

The *Gender Equality Act 2020* (Vic) commenced on 31 March 2021, meaning this study was conducted at a critical juncture in the implementation of its provisions. As we conducted this study, defined entities were being asked to develop their first workplace gender audit and Gender Equality Action Plan, meaning this research was timed to capture the first reactions of defined entities as the implementation of the Act progressed. In this article, we focus on the implications of the Act for equality procurement, drawing on the findings from the qualitative semi-structured interviews. We consider the gaps and challenges of embedding equality procurement in Victoria, and building linkages between equality procurement and a new positive equality duty. We then consider how these gaps and challenges can best be addressed.

VIII PROCUREMENT AND THE *GENDER EQUALITY ACT 2020* (VIC): EMPIRICAL FINDINGS

In the interviews, respondents repeatedly identified procurement as a gap in the provisions of the *Gender Equality Act 2020* (Vic). Overall, 21 of 47 respondents raised procurement as a key issue relating to the Act and its implementation. As one respondent noted:

I think, from my perspective, the Act probably doesn't go far enough. ... I know you've got to start somewhere. But I think that government's got a lot of levers that it can pull ... I think that we probably could have gone a little bit further, particularly [around procurement]. ... government procures a lot of services. ... I think there's lots of things we could do ... to drive more women on boards or, you know, you know, procurement processes. ... Those things could have been strengthened.¹⁰⁶

¹⁰⁵ Other quantitative aspects of the project are not reported here.

¹⁰⁶ Respondent 1, also Respondent 15.

For some respondents, their focus on procurement only came after the passage of the Act, as they realised the gaps or areas that needed further development in implementing the Act itself:

[A]t the time, like, I don't think there [were] additional things that we argued for particularly strongly that aren't included, but in hindsight, I think, you know, additional levers that the State can pull, particularly around funding and procurement. I think is an area perhaps we should push further on.¹⁰⁷

For other respondents, procurement had been an ongoing concern, raised in consultations, that was then not fully embedded in the Act:

I was surprised that procurement wasn't more deliberately called out because it was in a lot of discussions ... that I was aware of at the time. And particularly because, you know, [the Act is] targeting, you know, public entities, for whom procurement is a big part of their expenditure.¹⁰⁸

Respondents repeatedly identified procurement as a way to extend the Act's provisions beyond the public sector and defined entities,¹⁰⁹ and to capture workplaces beyond the public sector, such as manufacturing, hospitality and retail, typified by precarious and low paid work,¹¹⁰ and workplaces where migrant and refugee women work:¹¹¹

[I]f you want to mainstream [gender equality] across government, in the way that we're trying to do and, and lead the way ... governments and these entities ... are a huge part of the economy in Victoria, a huge part of the employment, they're a huge part of everything. So I think [there is] the opportunity to really lead that level of change and make it sustainable in this way. And then things may follow [in] other sectors and things.¹¹²

Procurement, then, could help to compensate for and partially overcome the limited scope of the Act, which respondents saw as one of its key limitations and areas for future development.¹¹³

¹⁰⁷ Respondent 4.

¹⁰⁸ Respondent 34.

¹⁰⁹ Respondent 17, 25, 27, 34, 39, 44.

¹¹⁰ Respondent 27.

¹¹¹ Respondent 27.

¹¹² Respondent 25.

¹¹³ Respondent 8, 10, 15, 19, 25, 26, 27, 31, 32, 36, 37, 38, 39.

Several respondents therefore desired stronger provisions in the Act relating to procurement:¹¹⁴ 'just saying that the minister "may" do this, if they're so inclined, I think is probably [not enough]'.¹¹⁵ In particular, there was a sense that procurement provisions could impose more 'definite requirements',¹¹⁶ reflecting the need for clarity and clear guidance to advance equality procurement. While procurement might be addressed in gender impact assessments, respondents sought an explicit requirement to review procurement processes under the Act,¹¹⁷ which should be embedded in the Act itself¹¹⁸ (rather than being left to guidelines). The absence of legislative provisions relating to procurement was therefore seen as both a gap and a missed opportunity for the Act.¹¹⁹

Further, respondents identified the need for tailored guidance, clear examples and case studies, to support the implementation of equality procurement more broadly across the public sector,¹²⁰ and to encourage its adoption:¹²¹ 'we could just share, share, share, share. So that's just been a massive missed opportunity.'¹²² Further, respondents noted that equality procurement was often more resource intensive for the procurement team, and this additional demand had not been factored into their job description or their resourcing.¹²³ Respondents with expertise in equality were often also uncertain about entering into the procurement space,¹²⁴ reflecting both the complexity of procurement, and a disconnect between equality and procurement functions in defined entities.

Finally, for one respondent, equality procurement needs to

have more than targets, because the experience, for instance, in the Indigenous procurement space, where they set targets for in construction, is that it hasn't delivered the outcome that was intended because it's bullshit without other measures. Targets basically create incentives for organizations to try and meet targets, but not to make change. So we [need] other broader measures that will result in cultural change or change that is substantive to organisations.¹²⁵

¹¹⁴ Respondent 1, 4, 15, 17, 34, 44.

¹¹⁵ Respondent 15.

¹¹⁶ Respondent 44.

¹¹⁷ Respondent 34.

¹¹⁸ Respondent 6.

¹¹⁹ Respondent 34, 6.

¹²⁰ Respondent 30.

¹²¹ Respondent 39.

¹²² Respondent 30.

¹²³ Respondent 30.

¹²⁴ Respondent 33.

¹²⁵ Respondent 15.

The challenge, then, is to embed or “mainstream” equality in decision-making in a way that achieves structural change, rather than simply seeking to achieve headline targets. This might require proactive measures and strategies to build capacity in organisations that might benefit from equality procurement.

IX CONCLUSION

Government procurement offers significant opportunities for advancing equality in Australia. The emergence of positive equality duties in some Australian jurisdictions could help to drive and prompt engagement with equality procurement in government entities. Equality procurement could be a key tool for extending the reach and impact of positive equality duties, even where positive equality duties bind both the public and private sectors. Given positive equality duties have not yet been adopted in some Australian states and territories, or in relation to grounds other than sex at the federal level, equality procurement could extend the jurisdictional reach of equality measures and requirements to other jurisdictions. Further, equality procurement might be used as an additional enforcement mechanism for other legislation, as under the *Workplace Gender Equality Act 2012* (Cth). Equality procurement therefore represents a potentially powerful tool for advancing equality and strengthening positive equality duties.

At present, though, equality procurement appears under-developed in Australia, and underspecified in Australian legislation. In this sense, our empirical findings relating to the implementation of the *Gender Equality Act 2020* (Vic) echo the UK literature relating to equality procurement. While equality procurement has great potential, its practical impact is still under-realised. In the absence of specific and clear obligations in positive equality duties relating to procurement, the potential of positive equality duties is likely to remain under-realised. As the example of the *Gender Equality Act 2020* (Vic) illustrates, without clear guidance, organisations lack a strong steer as to how equality considerations should be embedded within procurement. The absence of clear provisions relating to procurement was therefore seen as a missed opportunity for the *Gender Equality Act 2020* (Vic). Both the *Gender Equality Act 2020* (Vic) and *Workplace Gender Equality Act 2012* (Cth) could therefore be strengthened by more explicit legislative provisions to prompt, require and support equality procurement, as is the case in Scotland and Wales. Indeed, more explicit requirements for equality procurement would strengthen all positive duties in Australia.

Overall, then, this article demonstrates the need to revisit the drafting and guidance relating to positive equality duties in Australia, to ensure procurement is embedded at the heart of organisations' obligations to advance equality. This could take the form, for example, of specific duties relating to procurement, as in Wales or Scotland. That said, Australian positive equality duties could go further, to mandate the inclusion of equality considerations in procurement. To be effective, any requirement for equality procurement should be complemented by the provision of tailored guidance, clear examples and case studies, to support organisations to understand and implement their obligations. While the Victorian Commission for Gender Equality in the Public Sector has issued a case study on equality procurement,¹²⁶ more can be done to educate and upskill defined entities about the potential for and practical use of equality procurement. Our empirical findings from the Victorian context illustrate that some public entities have clear enthusiasm and desire for equality procurement, to strengthen equality in the private sector. However, embedding this in practice will require stronger alignment between procurement and equality divisions in public sector entities, and a stronger legislative framework to align procurement with positive equality duties. As government spending and procurement continues to grow, the federal government commits to reviewing its procurement guidelines, and with the ongoing implementation of a new positive duty under the *Sex Discrimination Act 1984* (Cth), it is more than timely to renew our focus on equality procurement and its ability to advance equality in Australia.

¹²⁶ Commission for Gender Equality in the Public Sector (n 98).