

# GENDER-BASED ANALYSIS PLUS (GBA+) AS CONSTITUTIONAL IMPLEMENTATION

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*There is renewed interest in some quarters in the executive's role in the implementation of constitutional rights. Canada currently employs a rights vetting process as its primary instrument of rights implementation. This process involves asking whether a proposed law is likely to be found to violate the Canadian Charter of Rights and Freedoms on judicial review. This article examines whether gender-based analysis plus ("GBA+") can also be understood as a mechanism for implementing constitutional rights, and equality rights in particular. GBA+ is an assessment process used in Canada to evaluate how new policy proposals fare from the standpoint of equality. The term "gender-based analysis" is something of a misnomer because officials must in fact consider how policies might affect all equality-seeking groups. The article considers what role GBA+ and analogous processes play in a constitutional state.*

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*Certains redécouvrent avec intérêt le rôle du pouvoir exécutif dans la mise en œuvre des droits garantis par la Constitution. Le Canada utilise à l'heure actuelle un processus d'examen des droits comme principal instrument de leur mise en œuvre. Dans le cadre de ce processus, on cherche à savoir si un projet de loi risque de violer la Charte canadienne des droits et libertés à l'issue d'un contrôle judiciaire. Dans cet article, l'auteure examine la question de savoir si l'analyse comparative entre les sexes plus (ACS+) peut également être considérée comme un mécanisme de mise en œuvre des droits garantis par la Constitution, et des droits à l'égalité en particulier. L'ACS+ est un processus d'analyse utilisé au Canada pour évaluer les nouvelles politiques proposées du point de vue de l'égalité. L'expression « analyse comparative entre les sexes » porte quelque peu à confusion, car les fonctionnaires qui en sont responsables doivent, en fait, examiner la façon dont les politiques pourraient influencer sur tous les groupes qui revendiquent l'égalité. L'auteure examine le rôle que cette analyse et d'autres processus analogues jouent dans un État constitutionnel.*

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## 1. Introduction

There is renewed interest in some quarters in the executive's role in the implementation of constitutional rights.<sup>1</sup> This interest is partly a response to the Trudeau government's suggestion that it intends to take rights promotion more seriously than previous governments. It also flows from the view that the executive is uniquely positioned to secure rights,<sup>2</sup> and classical concerns associated with judicial review, including that courts lack the legitimacy and competence to make the policy-type decisions rights realization requires.<sup>3</sup> The question of how the executive might fulfil this function is not a

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<sup>1</sup> Mattias Kumm, "Who's Afraid of the Total Constitution?" in Agustín José Menéndez & Erik Oddvar Eriksen, eds, *Arguing Fundamental Rights* (Dordrecht: Springer, 2006) 113 at 115 [Kumm]. See also Mark Tushnet, "Institutions for Implementing Constitutional Law" in Ian Shapiro, Stephen Skowronek & Daniel Galvin, eds, *Rethinking Political Institutions: The Art of the State* (New York: New York University Press, 2006) 241.

<sup>2</sup> For a similar argument *vis-à-vis* legislatures, see Amy Gutmann, "Foreword: Legislatures in the Constitutional State" in Richard W Bauman & Tsvi Kahana, eds, *The Least Examined Branch: The Role of Legislatures in the Constitutional State* (New York: Cambridge University Press, 2006) ix at xiii; William N Eskridge, Jr & John Ferejohn, "Super-Statutes: The New American Constitutionalism" in Richard W Bauman & Tsvi Kahana, eds, *The Least Examined Branch: The Role of Legislatures in the Constitutional State* (New York: Cambridge University Press, 2006) 320 at 327; Mark Tushnet, "Interpretation in Legislatures and Courts: Incentives and Institutional Design" in Richard W Bauman & Tsvi Kahana, eds, *The Least Examined Branch: The Role of Legislatures in the Constitutional State* (New York: Cambridge University Press, 2006) 355 at 366–67.

<sup>3</sup> See David Wiseman, "Competence Concerns in *Charter* Adjudication: Countering the Anti-Poverty Incompetence Argument" (2006) 51:3 McGill LJ 503 at 532; Mark Tushnet,

straightforward one, however. Implementing constitutional rights requires the executive to balance the various constitutional demands placed upon it and to develop a plan for satisfying them.<sup>4</sup> This raises process and substance questions of the highest order.

Canada currently employs a rights vetting process as its primary instrument of rights implementation. This process involves asking whether a proposed law is likely to be found to violate the *Canadian Charter of Rights and Freedoms*<sup>5</sup> on judicial review.<sup>6</sup> In this article I examine whether gender-based analysis plus (“GBA+”) can also be understood as a mechanism for implementing constitutional rights, and equality rights in particular. GBA+ is an assessment process used in Canada to evaluate how new policy proposals fare from the standpoint of equality. The term “gender-based analysis” is something of a misnomer because officials must in fact consider how policies might affect all equality-seeking groups.<sup>7</sup> Although GBA+ is government policy, it is not a formal legal obligation. I consider what role GBA+ and analogous processes play in a constitutional state. Do they do similar work as rights vetting or do they have independent value? Is there a justification for singling out some fundamental interests for more thorough assessment than others?

In the next section of this paper, I describe the genesis and operation of GBA+. In Part 3, I examine the role GBA+ and other impact assessments play in a constitutional state. In Part 4, I consider the relationship between GBA+ and the *Charter* vetting process. Part 5 complicates the picture by reviewing the critiques that have been levelled against GBA+. In Part 6, I ask whether GBA+ could be improved by enacting legislation to govern the process. Part 7 explores whether *Charter* vetting and GBA+ could be more

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*Weak Courts, Strong Rights: Judicial Review and Social Welfare Rights in Comparative Constitutional Law* (Princeton, NJ: Princeton University Press, 2008) at 231 [Tushnet, *Weak Courts*]; Joel C Bakan, “Constitutional Arguments: Interpretation and Legitimacy in Canadian Constitutional Thought” (1989) 27:1 *Osgoode Hall LJ* 123; Janet L Hiebert, *Charter Conflicts: What Is Parliament’s Role?* (Montreal: McGill-Queen’s University Press, 2002) [Hiebert, *Charter Conflicts*]; Sujit Choudhry, “So What Is the Real Legacy of *Oakes*? Two Decades of Proportionality Analysis under the Canadian *Charter*’s Section 1” (2006) 34:2 *SCLR* 501.

<sup>4</sup> See Vanessa MacDonnell, “The Civil Servant’s Role in the Implementation of Constitutional Rights” (2015) 13:2 *Intl J Constitutional L* 383 [MacDonnell, “Civil Servant”].

<sup>5</sup> *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11 [*Charter*].

<sup>6</sup> Hiebert, *Charter Conflicts*, *supra* note 3 at 7–9.

<sup>7</sup> “[Introduction to GBA+: Moving Beyond Sex and Gender](http://www.swc-cfc.gc.ca/gba-acsc/course-cours-2017/eng/mod02/mod02_03_01.html)”, *Status of Women Canada*, online: <[www.swc-cfc.gc.ca/gba-acsc/course-cours-2017/eng/mod02/mod02\\_03\\_01.html](http://www.swc-cfc.gc.ca/gba-acsc/course-cours-2017/eng/mod02/mod02_03_01.html)> [SWC, “Beyond Sex and Gender”].

proactive. In Part 8, I examine whether GBA+ offers any lessons for rights vetting. I conclude my analysis in Part 9.

## 2. Gender-Based Analysis

Gender-based analysis (“GBA”) was introduced by the Government of Canada in the mid-1990s.<sup>8</sup> The government noted at the time that the decision to implement GBA was influenced by Canada’s constitutional, human rights, and international obligations.<sup>9</sup> It recognized that the *Charter* right to equality mandated something more than a passive approach.<sup>10</sup> The *Federal Plan for Gender Equality* explained that “substantive equality acknowledges the systemic and structural nature of inequality. It recognizes that *both* freedom from discrimination *and* positive action are required to arrive at equal outcomes.”<sup>11</sup>

The core assumption behind the introduction of GBA was that policy-making too rarely considered the interests of women, and that explicit protocols were needed to bring women’s perspectives and interests into the policy process. Over time, the federal government’s approach to gender has become more nuanced. Status of Women Canada’s reference materials on GBA+ now state that “[n]ot all individuals identify with a binary concept of sex or gender categories of male and female, masculine and feminine. Important dialogue on gender identity is ongoing in Canada and around the world. Our understanding of sex and gender and how and when to use these designations continues to grow and shift.”<sup>12</sup> The federal government has also made clear that the interests of all equality-seeking groups must be considered as part of any gender-based analysis.<sup>13</sup> The process is now referred to as GBA+, a term that emphasizes the importance of “recognizing

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<sup>8</sup> Office of the Auditor General of Canada, *Report of the Auditor General of the House of Commons, Fall 2015* (Ottawa: Minister of Public Works and Government Services Canada, 2015) at 1 [2015 Auditor General’s Report].

<sup>9</sup> Canada, Status of Women Canada, *Setting the Stage for the Next Century: The Federal Plan for Gender Equality* (Ottawa: Status of Women Canada, 1995) at 8 [SWC, *Setting the Stage for the Next Century*]; 2015 Auditor General’s Report, *supra* note 8 at 5; Kathleen A Lahey, “Women, Substantive Equality, and Fiscal Policy: Gender-Based Analysis of Taxes, Benefits, and Budgets” (2010) 22:1 CJWL 27 at 56–57 [Lahey].

<sup>10</sup> SWC, *Setting the Stage for the Next Century*, *supra* note 9; Canada, Office of the Auditor General of Canada, *Report of the Auditor General of Canada to the House of Commons*, Spring 2009 (Ottawa: Minister of Public Works and Government Services Canada, 2009) at 7 [2009 Auditor General’s Report]; Lahey, *supra* note 9 at 56.

<sup>11</sup> SWC, *Setting the Stage for the Next Century*, *supra* note 9 [emphasis in original].

<sup>12</sup> “[Government of Canada’s Approach: Gender-Based Analysis Plus](http://www.swc-cfc.gc.ca/gba-ac/s/approach-approche-en.html),” *Status of Women Canada*, online: <[www.swc-cfc.gc.ca/gba-ac/s/approach-approche-en.html](http://www.swc-cfc.gc.ca/gba-ac/s/approach-approche-en.html)>.

<sup>13</sup> Canada, House of Commons, Standing Committee on the Status of Women, *Gender-Based Analysis: Building Blocks for Success* (Ottawa: House of Commons, 2005) at 24–25 [2005 Status of Women Report]; 2015 Auditor General’s Report, *supra* note 8 at 1–2.

and addressing ... intersecting identities,”<sup>14</sup> including “race, ethnicity, religion, age, or mental or physical disability.”<sup>15</sup>

In 2009, the Auditor General of Canada was asked to review the government’s use of GBA+.<sup>16</sup> Her report found that there was “considerable variation in the extent to which [government departments] had developed and implemented a GBA framework.”<sup>17</sup> Following the release of the Auditor General’s Report, the government published a *Departmental Action Plan on Gender-Based Analysis*.<sup>18</sup> This plan recommitted Status of Women Canada to playing an active role in training departmental personnel to implement GBA+. It also recommitted the Treasury Board Secretariat, Department of Finance, and the Privy Council Office to their “challenge role,” meaning that they would be required to look for evidence of GBA+ before approving new programs.<sup>19</sup> Standard form documents now ask departments whether they applied GBA+ in the policy development process.<sup>20</sup>

A second audit was conducted in 2015.<sup>21</sup> The Auditor General found that while Status of Women Canada and the central agencies had become more effective in their challenge role, progress in implementing GBA+ remained slow.<sup>22</sup> Of 110 federal departments and agencies, only 25 had expressed support—mere support—for the *Departmental Action Plan*<sup>23</sup> (that number has since grown to approximately 30).<sup>24</sup> While 75 per cent of those 25 departments had GBA+ processes in place as of 2015, the rest did not.<sup>25</sup> Moreover, there was considerable variation in the rigour and comprehensiveness with which GBA+ was being performed.<sup>26</sup> Half of the

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<sup>14</sup> Canada, House of Commons, Standing Committee on the Status of Women, *Implementing Gender-Based Analysis Plus in the Government of Canada* (Ottawa: House of Commons, 2016) at 3 [2016 *Status of Women Report*]. See also *2015 Auditor General’s Report*, *supra* note 8 at 1–2.

<sup>15</sup> SWC, “Beyond Sex and Gender”, *supra* note 7.

<sup>16</sup> *2009 Auditor General’s Report*, *supra* note 10.

<sup>17</sup> *Ibid* at 10.

<sup>18</sup> “[Departmental Action Plan on Gender-Based Analysis](#)”, *Status of Women Canada*, online: <[www.swc-cfc.gc.ca/gba-ac/s/ap-pa-en.html](http://www.swc-cfc.gc.ca/gba-ac/s/ap-pa-en.html)>.

<sup>19</sup> *2015 Auditor General’s Report*, *supra* note 8 at 14–15; “[An Overview of GBA+ in the Federal Government](#)”, *Status of Women Canada*, online: <[web.archive.org/web/20131016233440/http://www.cfc-sw.c.ca/gba-ac/s/overview-apercu-eng.html](http://web.archive.org/web/20131016233440/http://www.cfc-sw.c.ca/gba-ac/s/overview-apercu-eng.html)>.

<sup>20</sup> *2009 Auditor General’s Report*, *supra* note 10 at 18–20. See generally *2016 Status of Women Report*, *supra* note 14 at 12–13.

<sup>21</sup> *2015 Auditor General’s Report*, *supra* note 8.

<sup>22</sup> *Ibid* at 15.

<sup>23</sup> *Ibid* at 6; *2016 Status of Women Report*, *supra* note 14 at 4.

<sup>24</sup> *2015 Auditor General’s Report*, *supra* note 8; *2016 Status of Women Report*, *supra* note 14 at 4.

<sup>25</sup> *2015 Auditor General’s Report*, *supra* note 8 at 8.

<sup>26</sup> *Ibid* at 3.

assessments reviewed by the Auditor General were incomplete.<sup>27</sup> In one instance, GBA+ occurred after the program was implemented, and despite finding a negative gender impact, no steps were taken to remedy it.<sup>28</sup>

The Auditor General concluded that the fact that there is no statutory obligation to conduct GBA+ was making it difficult to implement across government.<sup>29</sup> He also suggested that progress had stalled because civil servants were not well equipped to conduct GBA+, supervision was weak, and the rapid pace of policy work meant that it was not always possible to perform GBA+ before a policy was implemented.<sup>30</sup>

The election of a Liberal government in October 2015 gave new life to GBA+.<sup>31</sup> Status of Women Minister Patricia Hadju's Ministerial Mandate Letter identified the implementation of GBA+ as a "top priorit[y]."<sup>32</sup> Status of Women Canada has seen an increase in its budget, and some of those funds have been earmarked for programs that build public servants' capacity to conduct GBA+.<sup>33</sup> In March 2017, the federal government released its first gender-responsive budget.<sup>34</sup> The recent Defence Policy Review also included a GBA+.<sup>35</sup>

Government documents suggest that a standard GBA+ includes several steps. Civil servants are instructed to (1) "identify issue[s]"; (2)

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<sup>27</sup> *Ibid* at 8.

<sup>28</sup> *Ibid* at 11.

<sup>29</sup> *Ibid* at 3.

<sup>30</sup> *Ibid* at 16.

<sup>31</sup> *2016 Status of Women Report*, *supra* note 14 at 10.

<sup>32</sup> Prime Minister Justin Trudeau, "[Ministerial Mandate Letter of the Honourable Patricia Hadju, Minister of the Status of Women](#)" (1 December 2015), *Office of the Prime Minister of Canada*, online: <[web.archive.org/web/20151201185402/http://pm.gc.ca/eng/minister-status-women-mandate-letter](http://web.archive.org/web/20151201185402/http://pm.gc.ca/eng/minister-status-women-mandate-letter)>.

<sup>33</sup> "[Action Plan on Gender-based Analysis \(2016–2020\)](#)", *Status of Women Canada*, online: <[www.swc-cfc.gc.ca/gba-acs/plan-action-2016-en.html](http://www.swc-cfc.gc.ca/gba-acs/plan-action-2016-en.html)>; *2016 Status of Women Report*, *supra* note 14 at 10.

<sup>34</sup> See "[Chapter 5—Equal Opportunity: Budget 2017's Gender Statement](#)", *Government of Canada*, online: <[www.budget.gc.ca/2017/docs/plan/chap-05-en.html](http://www.budget.gc.ca/2017/docs/plan/chap-05-en.html)> [Government of Canada, "Budget Gender Statement"]; Bill Curry & Robert Fife, "[Liberals to Address Women's Concerns in First Gender-Based Federal Budget](#)", *The Globe and Mail* (21 March 2017), online: <[www.theglobeandmail.com](http://www.theglobeandmail.com)>; Janyce McGregor, "[Add Women, Change Budgets? Underused Gender Policy Tool Finds New Fans in Trudeau's Cabinet](#)", *CBC News* (13 March 2017), online: <[www.cbc.ca](http://www.cbc.ca)>; Erin Anderssen, "[Liberals Fall Short with First Gender-Based Federal Budget](#)", *The Globe and Mail* (22 March 2017), online: <[www.theglobeandmail.com](http://www.theglobeandmail.com)> [Anderssen].

<sup>35</sup> "[Backgrounder: Gender-Based Analysis Plus \(GBA+\)](#)", *Government of Canada*, online: <[dgpapp.forces.gc.ca/en/canada-defence-policy/news/gender-based-analysis-plus.asp?undefined&w\\_bdisable=true](http://dgpapp.forces.gc.ca/en/canada-defence-policy/news/gender-based-analysis-plus.asp?undefined&w_bdisable=true)>.

“challenge assumptions”; (3) “gather the facts—research and consult”; (4) “develop options & make recommendations”; (5) “monitor & evaluate”; (6) “communicate”; and (7) “document.”<sup>36</sup> Francesca Scala and Stephanie Paterson explain that “GBA+ analysts are responsible for providing information and knowledge on the potential implications of policies on women and other social groups. Like other policy analysts, they provide knowledge aimed at informing policy processes and outcomes and serving the public interest.”<sup>37</sup> In their recent work on how GBA+ is implemented “on the ground,”<sup>38</sup> Scala and Paterson show that because GBA+ guidelines are fairly general, the manner in which policy analysts interpret them can result in GBA+ being applied differently across government departments.<sup>39</sup>

The departments that have had the most success in implementing GBA+ have developed detailed internal protocols that reflect the reality of policy-making within their departments. Crown-Indigenous Relations and Northern Affairs and Indigenous Services Canada have implemented their own process modelled on the elements described above.<sup>40</sup> The Departments’ “Working Guide on Gender-Based Analysis” provides worksheets and checklists departmental personnel can use to conduct GBA+, as well as examples of how each step of the process should be conducted. Health Canada has developed a similar guide.<sup>41</sup>

However, even the so-called “success stories”<sup>42</sup> are not as impressive as one might expect. For example, Immigration, Refugees and Citizenship Canada has a statutory obligation to table an annual report that includes a

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<sup>36</sup> “[Introduction to GBA+: The GBA+ Process](http://www.swc-cfc.gc.ca/gba-ac/s/course-cours-2017/eng/mod03/mod03_03_02.html),” *Status of Women Canada*, online: <[www.swc-cfc.gc.ca/gba-ac/s/course-cours-2017/eng/mod03/mod03\\_03\\_02.html](http://www.swc-cfc.gc.ca/gba-ac/s/course-cours-2017/eng/mod03/mod03_03_02.html)> [SWC, “The GBA+ Process”].

<sup>37</sup> Francesca Scala & Stephanie Paterson, “Gendering Public Policy or Rationalizing Gender? Strategic Interventions and GBA+ Practice in Canada” (2017) 50:2 *Can J Political Science* 427 at 433 [Scala & Paterson, “Gendering Public Policy”].

<sup>38</sup> *Ibid*; Stephanie Paterson & Francesca Scala, “Gender Mainstreaming and the Discursive Politics of Public Service Values” (2017) 39:1 *Administrative Theory & Praxis* 1 at 2 [Scala & Paterson, “Discursive Politics”].

<sup>39</sup> Scala & Paterson, “Gendering Public Policy,” *supra* note 37 at 11.

<sup>40</sup> “[Working Guide on Gender-Based Analysis](http://www.aadnc-aandc.gc.ca/eng/1100100028541/1100100028545),” *Indigenous and Northern Affairs Canada*, online: <[www.aadnc-aandc.gc.ca/eng/1100100028541/1100100028545](http://www.aadnc-aandc.gc.ca/eng/1100100028541/1100100028545)>; “[Gender-Based Analysis Plus](http://www.aadnc-aandc.gc.ca/eng/1523228008360/1523228179975),” Crown-Indigenous Relations and Northern Affairs, online: <[www.aadnc-aandc.gc.ca/eng/1523228008360/1523228179975](http://www.aadnc-aandc.gc.ca/eng/1523228008360/1523228179975)>.

<sup>41</sup> Canada, Women’s Health Bureau, [Exploring Concepts of Gender and Health](http://www.healthcanada.gc.ca/eng/1100100028541/1100100028545) (Ottawa: Health Canada, 2003), online: Health Canada <[publications.gc.ca/site/eng/244537/publication.html](http://publications.gc.ca/site/eng/244537/publication.html)>. See generally Kathleen McNutt & Daniel Béland, “Implementing an Integrated Governance Strategy: The Quest for Gender Mainstreaming in Canada” (2015) 45:4 *American Rev Can Studies* 467 [McNutt & Béland].

<sup>42</sup> *2016 Status of Women Report*, *supra* note 14 at 39.

GBA+ of its policies and programs.<sup>43</sup> Despite being identified as “a leader among departments on GBA+,”<sup>44</sup> the analysis contained in its annual reports is for the most part very superficial.<sup>45</sup> For example, the 2013 annual report does little more than state how many women entered Canada under various immigration categories in that year. The analysis of the Live-in Caregiver Program is slightly more detailed, because the category is largely comprised of women applicants. Even here, however, the analysis is almost entirely statistical.<sup>46</sup> The 2016 report, which was delivered after the Liberal Government came to power, is somewhat more detailed.<sup>47</sup> It provides a breakdown of women immigrants by immigration category, and goes on to explain how various aspects of its policy-making are influenced by gender considerations, approached from an intersectional perspective. At the same time, the report provides very little in the way of analysis of the sort described by Status of Women Canada in its materials on GBA+.<sup>48</sup>

In short, GBA+ has evolved from its origins as a program designed to ensure that women’s interests are accounted for in the policy process.<sup>49</sup> The analysis now takes a more fluid approach to gender, and there is a firmly entrenched commitment to intersectionality. At the same time, there is a significant gap between the aspirations of GBA+ and how it is applied in practice. The government continues to struggle to secure buy-in for GBA+. Even departments that engage in GBA+ often do so only partially or superficially.

### 3. Gender-Based Analysis Plus as Constitutional Implementation

In this section, I examine the value of processes like GBA+ in a constitutional state. A useful starting point for this discussion is to acknowledge that GBA+ was inspired in part by *Charter* rights. In addition, it is used (inconsistently, of course) to determine how new policies might impact equality-seeking

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<sup>43</sup> 2005 *Status of Women Report*, *supra* note 13.

<sup>44</sup> Citizenship and Immigration Canada, *Annual Report to Parliament on Immigration* (Ottawa: Citizenship and Immigration Canada, 2016) [2016 *Annual Immigration Report*]. See also Citizenship and Immigration Canada, *Annual Report to Parliament on Immigration* (Ottawa: Citizenship and Immigration Canada, 2013) [2013 *Annual Immigration Report*]; 2009 *Auditor General’s Report*, *supra* note 10.

<sup>45</sup> 2013 *Annual Immigration Report*, *supra* note 44.

<sup>46</sup> *Ibid* at 35–36.

<sup>47</sup> 2016 *Annual Immigration Report*, *supra* note 44.

<sup>48</sup> For a similar critique of the 2017 budget, see Anderssen, *supra* note 34.

<sup>49</sup> Bénita Bunjun et al, *Intersectional Feminist Frameworks: An Emerging Vision* (Ottawa: Canadian Research Institute for the Advancement of Women, 2006) at 8; Scala & Paterson, “Discursive Politics,” *supra* note 38 at 1.

groups. For these reasons, I suggest, GBA+ can be understood as a form of constitutional implementation.

Now, there are different ways that a process like GBA+ might be said to implement constitutional rights. One might argue, for example, that the very act of creating such an assessment process implements the right to equality. One could also characterize the ongoing work of assessing gender and other equality impacts as a form of constitutional implementation. This is not to suggest that those who conduct GBA+ are deliberately measuring policies against the constitutional yardstick of equality. But in conducting GBA+, they are focussed on the promotion of a constitutionally protected interest.<sup>50</sup>

I begin with the idea that creating a process for assessing gender impacts is itself an act of constitutional implementation. This argument is conceptually the more straightforward of the two. In a constitutional state, governments ideally seek to promote constitutional rights with the same diligence that they avoid rights infringements.<sup>51</sup> The implementation of rights can be understood as a constitutional obligation, or as a practice that follows logically from adopting a charter of rights.<sup>52</sup> Whether driven by obligation or sound practice, however, it is clear that governments do enact laws and develop policies that have the effect of promoting rights. By introducing GBA, for example, the government institutionalized a commitment to gender and later other forms of equality as part of the policy process, thereby promoting equality rights. Now, rights promotion is undoubtedly more precarious than the practice of avoiding rights infringements because it is subject to very little judicial supervision.<sup>53</sup> Canadian courts have been reluctant to find that the Constitution imposes affirmative obligations on government.<sup>54</sup> This means that while courts will readily invalidate laws that

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<sup>50</sup> Kathleen McNutt, "An Integrated Approach to Gender Equality: From Gender-Based Analysis to Gender Mainstreaming" (2010) JSGS Working Paper Series No 2 at 3 [McNutt, "Integrated Approach"]. See generally Aileen Kavanagh, "Proportionality and Parliamentary Debates: Exploring Some Forbidden Territory" (2014) 34:3 Oxford J Leg Stud 443 [Kavanagh].

<sup>51</sup> See generally Dieter Grimm, "The Protective Function of the State" in Georg Nolte, ed, *European and US Constitutionalism* (New York: Cambridge University Press, 2005) 137 at 144 [Grimm].

<sup>52</sup> Regarding obligation, see Robert Alexy, *A Theory of Constitutional Rights* (New York: Oxford University Press, 2010) [Alexy, *Theory*]; Kumm, *supra* note 1; Sandra Fredman, *Human Rights Transformed: Positive Rights and Positive Duties* (New York: Oxford University Press, 2008) [Fredman, *Human Rights Transformed*].

<sup>53</sup> See generally Tushnet, *Weak Courts*, *supra* note 3.

<sup>54</sup> Debra Parkes, "Baby Steps on the Way to a Grown-Up Charter: Reflections on 20 Years of Social and Economic Rights Claims" (2003) 52 UNBLJ 279 at 286; Margot Young, "Section 7 and the Politics of Social Justice" (2005) 38:2 UBC L Rev 539 at 549.

infringe constitutional rights unjustifiably, they rarely review the sufficiency of the steps governments have taken to implement rights.<sup>55</sup>

A second way of thinking about how GBA+ implements the constitutional right to equality is to say that when government departments perform GBA+, they are engaged in constitutional implementation. Here the focus is on the conduct of the analysis rather than on the process' creation. One obstacle to making this argument successfully is that it is at odds with how the process is understood. GBA+ is "a policy about policy making" intended to focus decision-makers' attention on the intersectional impacts of proposed laws.<sup>56</sup> Status of Women Canada directs GBA+ analysts to fulfil their obligations under this policy by "identify[ing] issue[s]," "challeng[ing] assumptions," "gathering the facts" by "research[ing] and consult[ing]," "develop[ing] options [and] mak[ing] recommendations," and "monitor[ing] [and] evaluat[ing]."<sup>57</sup> Now, this does not preclude us from concluding that the assessment of gender impacts is, in effect, a form of constitutional implementation. But additional steps are required to get there.

Whether the process of assessing equality impacts can be understood as a form of constitutional implementation depends on whether one takes a formal or functional approach to the inquiry. If one takes a functional approach, it might be sufficient that those responsible for GBA+ are actively engaged in identifying adverse equality impacts and working to address them, even if they would not characterize their role as a constitutional one.<sup>58</sup> A formal approach would require something more—perhaps a more deliberate process of constitutional assessment.

Here, Aileen Kavanagh's work is of assistance.<sup>59</sup> Kavanagh suggests that politicians can be regarded as having turned their minds to rights issues during a parliamentary debate even if they do not refer directly to

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<sup>55</sup> But see *Ontario (AG) v Fraser*, 2011 SCC 20, [2011] 2 SCR 3; *Health Services and Support-Facilities Subsector Bargaining Assn v British Columbia*, 2007 SCC 27, [2007] 2 SCR 391; *Dunmore v Ontario (AG)*, 2001 SCC 94, [2001] 3 SCR 1016; *Vriend v Alberta*, [1998] 1 SCR 493, 156 DLR (4th) 385; *Eldridge v British Columbia (AG)*, [1997] 3 SCR 624, 151 DLR (4th) 577; Jamie Cameron, "Positive Obligations Under Sections 15 and 7 of the Charter: A Comment on *Gosselin v. Quebec*" (2003) 20:1 SCLR 65 at 66.

<sup>56</sup> I am grateful to Francesca Scala for pointing out this and the observation in the previous sentence to me. See also McNutt, "Integrated Approach", *supra* note 50 at 3.

<sup>57</sup> SWC, "The GBA+ Process", *supra* note 36.

<sup>58</sup> I am grateful to Francesca Scala for emphasizing to me that GBA+ analysts understand their role in policy terms.

<sup>59</sup> See Kavanagh, *supra* note 50.

individual rights. She argues that any other standard “would be too legalistic a requirement.”<sup>60</sup> She goes on to say:

[A]lthough explicit mention of [the *European Convention on Human Rights*] is not a requirement, there should be some focus on the implications or consequences for the interests underpinning human rights. But the question of “how focused must the focus be” is tricky in the human rights context. After all, when applying the proportionality test, the courts have said that the central issue is whether there has been a balance between the relevant competing interests and whether this legislative provision is “necessary in a democratic society” ... Therefore, a broad debate on the overall merits of a particular legislative provision may qualify as legislative focus on the rights issue, in the sense that it may embody an attempt to balance the competing interests involved.<sup>61</sup>

Without taking a position on the actual issue Kavanagh is addressing, one can see how a similar approach would be appropriate in determining whether performing GBA+ has constitutional inflections. Functionally, government departments can be said to be engaged in constitutional implementation even if the task has not been framed in constitutional terms and if policy analysts do not think in terms of constitutional rights in conducting the analysis. Any other approach “would be too legalistic a requirement.”<sup>62</sup>

What is the significance of understanding these processes in constitutional terms? One answer might be that in assessing the totality of the government’s actions from a constitutional perspective, it is important to recognize and label as constitutional processes that are grounded in a commitment to rights promotion. In addition, if these processes implement constitutional rights in some sense, it is important to know whether they do so effectively, and if they do not, how their effectiveness might be improved.

Finally, though their forms vary, analogous assessment processes are pervasive throughout government. The guidelines for preparing a Memorandum to Cabinet (“MC”)—the document that forms the basis for cabinet approval of new legislation—state that an MC must contain general information about anticipated “social, economic and environmental” impacts.<sup>63</sup> It must also include a plan for measuring those impacts once a proposed bill becomes law.<sup>64</sup> The MC should identify whether the proposed bill raises concerns from the standpoint of privacy, official languages,

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<sup>60</sup> *Ibid* at 467.

<sup>61</sup> *Ibid*.

<sup>62</sup> *Ibid* at 467.

<sup>63</sup> Privy Council Office, “Memorandum to Cabinet Template” (22 November 2013), online: [A Drafter’s Guide to Cabinet Documents, Annex A](http://www.pco-bcp.gc.ca/index.asp?lang=eng&page=information&sub=publications&doc=mc/guide-eng.htm) <[www.pco-bcp.gc.ca/index.asp?lang=eng&page=information&sub=publications&doc=mc/guide-eng.htm](http://www.pco-bcp.gc.ca/index.asp?lang=eng&page=information&sub=publications&doc=mc/guide-eng.htm)>.

<sup>64</sup> *Ibid*.

gender, the environment, federalism, international law, or foreign relations, and whether it is vulnerable to invalidation under the *Charter*.<sup>65</sup> It should be readily apparent that many of these interests have constitutional dimensions. Accordingly, GBA+ and analogous processes should be on the radar of constitutional law scholars. To date, they have not been.

In a recent piece, Colleen Sheppard examined what she refers to as the “procedural turn in constitutional interpretation” in Canada.<sup>66</sup> This “procedural turn” has seen the courts articulate process-based constitutional standards—duties of consultation and negotiation, for example—in a variety of areas, including in the context of Crown-Indigenous relationships and labour relations.<sup>67</sup> Sheppard expresses cautious support for this development, noting that a focus on procedural obligations can promote “democratic participation, institutional and social transformation, empowerment, and self-governance.”<sup>68</sup> She also raises concerns about process-based approaches, however. Among these concerns are that procedural remedies are not always appropriate and that they can impede substantive legal change.<sup>69</sup> She also suggests that procedural approaches may not be sufficiently attentive to power dynamics, and that a focus on process may “deflect the resolution of substantive legal issues from the courts back to inequitable institutional, political, or social contexts.”<sup>70</sup>

Sheppard’s article is helpful in understanding how GBA+ can be viewed as a mechanism of constitutional implementation. While her focus is on the significance of case law that emphasizes the procedural dimensions of rights, Sheppard’s work highlights that constitutional rights have process implications for governments. She argues that procedure can be a tool for the “realization of constitutional rights.”<sup>71</sup> I too view process as an important component of a robust approach to rights protection. Procedural approaches have often been viewed in a negative light.<sup>72</sup> Sheppard’s intervention adds useful nuance to the debate.

Sheppard raises the possibility that too much emphasis on process could “undermine the legal recognition of certain substantive rights and undermine the possibility of obtaining concrete substantive remedies using

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<sup>65</sup> *Ibid.* This is not a complete list.

<sup>66</sup> Colleen Sheppard, “Inclusion, Voice, and Process-Based Constitutionalism” (2013) 50:3 *Osgoode Hall LJ* 547 at 573 [Sheppard].

<sup>67</sup> *Ibid.*

<sup>68</sup> *Ibid.* at 549.

<sup>69</sup> *Ibid.* at 573.

<sup>70</sup> *Ibid.* at 549.

<sup>71</sup> *Ibid.*

<sup>72</sup> This was the traditional position: see *ibid.* at 552–53.

constitutional litigation.<sup>73</sup> This concern is attenuated in the context of processes like GBA+, because they do not prevent constitutional (section 15) challenges to laws or policies that have been vetted for gender and other equality impacts. It would be a different story if the substantive challenge were somehow foreclosed.<sup>74</sup> At the same time, it is clear that the presence of these processes can have an impact on *how* subsequent constitutional litigation might proceed, on the theory that governments who deal conscientiously with rights issues should be afforded a measure of deference.<sup>75</sup> Moreover, as I explore later in this article, the points Sheppard makes about the shortcomings of procedural approaches do resonate in the GBA+ context.

#### 4. Relationship to Charter Vetting

Beyond recognizing that GBA+ and analogous processes arguably have constitutional dimensions, one might also query whether they are useful in a state already committed to vetting potential legislation for compliance with a bill of rights. Are these processes duplicative? Do they unjustifiably place certain interests, such as equality, at the apex of a hierarchy of rights?<sup>76</sup> Or are there good reasons for insisting upon these more focussed inquiries? I examine these questions below.

##### A) Different Actors, Different Processes

A close comparison of GBA+ and *Charter* vetting suggests that the degree of overlap between these two processes is actually quite small. While they may be inspired by similar commitments, GBA+ and *Charter* vetting are functionally very different. Moreover, to the extent that there is overlap, this need not be viewed in a negative light, particularly since the interest being considered is one that policymakers often overlook. Overlap can help ensure that such interests are properly considered in the policy process.

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<sup>73</sup> *Ibid* at 573.

<sup>74</sup> *Ibid*.

<sup>75</sup> See generally Hiebert, *Charter Conflicts*, *supra* note 3; Janet L. Hiebert, “The Human Rights Act: Ambiguity about Parliamentary Sovereignty” (2013) 14:12 *German LJ* 2253 at 2272–73; Kavanagh, *supra* note 50; Vanessa MacDonnell, “The New Parliamentary Sovereignty” (2016) 21:1 *Rev Const Stud* 13; Liora Lazarus & Natasha Simonsen, “Judicial Review and Parliamentary Debate: Enriching the Doctrine of Due Deference” in Murray Hunt, Hayley J. Hooper and Paul Yowell, eds, *Parliaments and Human Rights: Redressing the Democratic Deficit* (London: Hart Publishing, 2015) 385.

<sup>76</sup> On hierarchies of rights, see Kerri A. Froc, “Will ‘Watertight Compartments’ Sink Women’s Charter Rights? The Need for a New Theoretical Approach to Women’s Multiple Rights Claims under the Canadian Charter of Rights and Freedoms” in Beverley Baines, Daphne Barak-Erez & Tsvi Kahana, eds, *Feminist Constitutionalism: Global Perspectives* (New York: Cambridge University Press, 2012) 132.

Janet Hiebert explains that over time, “risk-avers[e]” government lawyers have developed a *Charter* vetting process that relies heavily on judicial conceptions of constitutional rights.<sup>77</sup> In determining whether a proposed law poses a problem from the standpoint of constitutional rights, government lawyers ask themselves whether the law is likely to be found unconstitutional on judicial review. They do not generally rely on their own interpretation of rights.<sup>78</sup> If the lawyers perceive that a successful constitutional challenge could be mounted, there is a very good chance that the proposed law will be revised before it ever appears before Cabinet for approval.<sup>79</sup>

James Kelly explains that government lawyers rely on a “Charter checklist” in conducting their analysis.<sup>80</sup> “The checklist is a comprehensive manual, updated by the Human Rights Law Section [of the Department of Justice] every six months.”<sup>81</sup> “[T]he checklist is divided to correspond with sections of the Charter, and it summarizes important cases and jurisprudential changes for the LSUs [Legal Services Units—legal staff embedded within individual government departments].”<sup>82</sup> There is also a process for monitoring legal risk, of which the risk of constitutional noncompliance is one aspect. Conducting a risk assessment involves the stages of “risk identification”; “risk evaluation”; “reaction to risk”; “communicate and consult”; and “monitoring of risk.”<sup>83</sup>

What government lawyers do, then, is perform a legal analysis of the likelihood (or “risk”) that a court will find a proposed law unconstitutional on judicial review and develop strategies for minimizing that risk if required.<sup>84</sup> While I have defended the role of lawyers in this process,<sup>85</sup> the lawyer-led, court-centric approach to *Charter* vetting has been criticized by other scholars. Hiebert argues that

The idea of “Charter proofing” legislation against a judicially defined standard does not recognize the legitimate political element of constitutional judgment about the priority that should be attached to conflicting values or about the ways to pursue

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<sup>77</sup> Hiebert, *Charter Conflicts*, *supra* note 3 at 223.

<sup>78</sup> *Ibid* at 224.

<sup>79</sup> Janet L Hiebert, “Rights-Vetting in New Zealand and Canada: Similar Idea, Different Outcomes” (2005) 3:1 *New Zealand J Public & Intl L* 63 at 72.

<sup>80</sup> *Ibid* at 71.

<sup>81</sup> James B Kelly, *Governing with the Charter: Legislative and Judicial Activism and Framers’ Intent* (Vancouver: UBC Press, 2005) at 232 [Kelly, *Governing with the Charter*].

<sup>82</sup> *Ibid* at 234.

<sup>83</sup> *Schmidt v Canada (AG)*, 2016 FC 269 (Affidavit of Patrick Vézina at 7–8) [translation by author].

<sup>84</sup> Hiebert, *Charter Conflicts*, *supra* note 3 at 7–10.

<sup>85</sup> MacDonnell, “Civil Servant”, *supra* note 4.

worthwhile legislative objectives that might infringe, in some manner, on protected rights. Confining legislative objectives to those for which government lawyers can confidently predict legal success may lead to Parliament renegeing on its responsibility to undertake initiatives in the public interest, and to pursue those effectively.<sup>86</sup>

By contrast, GBA+ is not generally conducted by lawyers, nor is it primarily an exercise in legal analysis.<sup>87</sup> For scholars interested in how rights protection and promotion might look different if it were less “legalized,”<sup>88</sup> then, GBA+ provides an interesting case study. Now, lawyers do have a role in GBA+. Their primary function seems to be “to assess legal risks associated with initiatives and also to develop strategies to minimize those risks.”<sup>89</sup> But the available information suggests that their role is much more limited than in the *Charter* vetting context.

## B) Focus on a Single Right or Interest

GBA+ also differs from *Charter* vetting in that it focuses on a single interest (an interest, granted, with multiple facets). This brings attention to equality concerns in a way that a more general process would not. Discrimination is often indirect and can reflect subconscious bias. Thus, there is justification for considering equality interests separately, particularly in a civil service that has not yet achieved sufficient diversity.<sup>90</sup> The fact that Status of Women Canada is not “influential,”<sup>91</sup> that take-up of GBA+ has been poor, and that assessments are often incomplete and/or *pro forma* merely serves to underscore the need for a separate process.

There are arguments against developing separate processes, however. Hiving off one particular interest and examining it in a vacuum can cause

<sup>86</sup> Hiebert, *Charter Conflicts*, *supra* note 3 at 224.

<sup>87</sup> Francesca Scala & Stephanie Paterson, “Bureaucratic Role Perceptions and Gender Mainstreaming in Canada” (2017) 24:6 *Gender, Work & Organization* 579 [Scala & Paterson, “Bureaucratic Role Perceptions”].

<sup>88</sup> Andrew Petter, *The Politics of the Charter: The Illusive Promise of Constitutional Rights* (Toronto: University of Toronto Press, 2010) at 211; Janet Hiebert, “Parliament and Rights” in Tom Campbell, Jeffrey Goldworthy & Adrienne Stone, eds, *Protecting Human Rights: Instruments and Institutions* (Oxford: Oxford University Press, 2003) 231 at 235, 237; Kelly, *Governing with the Charter*, *supra* note 81; James B Kelly & Matthew A Hennigar, “The Canadian Charter of Rights and Freedoms and the Minister of Justice: Weak-Form Review within a Constitutional Charter of Rights” (2012) 10:1 *Intl J Constitutional L* 35 at 61. I will use this language throughout.

<sup>89</sup> “[Introduction to GBA+: Legal Counsel](http://www.swc-cfc.gc.ca/gba-ac/s/course-cours-2017/eng/mod04/mod04_07_01.html)”, *Status of Women Canada*, online: <www.swc-cfc.gc.ca/gba-ac/s/course-cours-2017/eng/mod04/mod04\_07\_01.html>.

<sup>90</sup> *R v Williams*, [1998] 1 SCR 1128 at para 22, 159 DLR (4th) 493.

<sup>91</sup> McNutt & Bélard, *supra* note 41 at 476. On the problems associated with “specialist equal opportunity units,” see Carol Bacchi et al, “Gender Analysis and Social Change: Testing the Water” (2005) 24:4 *Policy & Society* 45 at 46 [Bacchi et al].

public servants to downplay or overlook other important interests that may be at stake,<sup>92</sup> and it ignores the reality that governments have competing obligations that cannot usually be reduced to a single interest.<sup>93</sup> If a single government department reviews the impact of a single government program from the standpoint of a single constitutional interest, there is a risk that one interest may be secured at the expense of others.<sup>94</sup> While there may ultimately be good reason to prefer one interest over another in a particular context, the assessment process must permit this determination.

One response to this concern is to point out that the information generated by GBA+ analysts is considered or ought to be considered as part of a department's overall assessment of the merits of proposed legislation. This ensures that it is able to consider both gender and other equality impacts as well as the government's obligations as a whole.<sup>95</sup>

To summarize, then, though *Charter* vetting and GBA+ share similarities, they are also different in important ways. While *Charter* vetting is highly legalized, GBA+ implements equality through a more policy-oriented process. *Charter* vetting considers the government's rights obligations as a whole, whereas GBA+ is focussed on equality impacts. Importantly, however, both processes can be understood as mechanisms for implementing constitutional rights.

## 5. Complicating Factors

It is now necessary to complicate the picture somewhat by examining the deficiencies of GBA+ as it is currently structured. These deficiencies limit the effectiveness of constitutional implementation in the gender and broader equality contexts. One critique that emerges from the academic literature is that GBA+ does not seek to upend the power structures that perpetuate oppression and disadvantage.<sup>96</sup> Rather, it is focused on mitigating the effects on marginalized groups of policies conceived by dominant interests.<sup>97</sup> In economic terms, Kathleen McNutt and Daniel Béland explain, GBA+

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<sup>92</sup> Gillian MacNaughton and Paul Hunt, "A Human Rights-based Approach to Social Impact Assessment" in Frank Vanclay & Ana Maria Esteves, eds, *New Directions In Social Impact Assessment: Conceptual and Methodological Advances* (Cheltenham: Edward Elgar, 2012) 355 at 364, 366 [MacNaughton & Hunt].

<sup>93</sup> *Ibid*; Alexy, *Theory*, *supra* note 52 at 224.

<sup>94</sup> MacNaughton & Hunt, *supra* note 92 at 364.

<sup>95</sup> See generally MacDonnell, "Civil Servant", *supra* note 4.

<sup>96</sup> See Bacchi et al, *supra* note 91; Marysia Zalewski, "I Don't Even Know What Gender Is: A Discussion of the Connections between Gender, Gender Mainstreaming and Feminist Theory" (2010) 36:1 *Rev Intl Studies* 3; McNutt & Béland, *supra* note 41.

<sup>97</sup> Bacchi et al, *supra* note 91 at 47; McNutt & Béland, *supra* note 41 at 467–68. See generally Sheppard, *supra* note 66.

“works within existing budgetary frameworks, playing a reactive role (a challenge function) to proposed programming.”<sup>98</sup> Gender mainstreaming (“GM”), by contrast, “is proactive, designed to prevent inequality through integrative planning, budgeting, and evaluation processes. In other words, GM requires substantive change to budgeting while GBA challenges the outcome of the existing process.”<sup>99</sup>

When a gender mainstreaming approach is followed, Teresa Rees explains, “the transformation of institutions becomes the agenda, rather than the continuing attempt to improve women’s access and performance within organisations and their hierarchies as they are.”<sup>100</sup> By focussing on the policies institutions produce, rather than on the institutions themselves, GBA+ is limited in what it can achieve.

Now, some scholars, not wanting the perfect to be the enemy of the good, have suggested that it is possible to harness GBA+ for positive ends.<sup>101</sup> To be successful, however, GBA+ must be “integrat[ed]... into existing policy regimes.”<sup>102</sup> To date, this has not been achieved. GBA+ remains a largely marginal phenomenon across government. As Carol Bacchi, Joan Eveline, Jennifer Binns, and others explain, this is partly because the relevant expertise is concentrated in departments like Status of Women Canada, “which tend to be marginalised from decision-making.”<sup>103</sup> Research shows that GBA+ analysts experience a similar marginalization within government departments. One participant in a study conducted by Scala and Paterson explained:

The GBA person is not located within the [strategic policy] shop; they can’t attend those meetings; they don’t get the heads up that this work is under way. They’re only seen at the very end, when it’s being routed through the planning—so what I’ve noticed is that a lot of GBA people are being moved to planning shops, and the planning shops are only involved at the very end when we’re reporting on end-of-year stuff.<sup>104</sup>

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<sup>98</sup> McNutt & Béland, *supra* note 41 at 470.

<sup>99</sup> *Ibid*; see also Joan Grace, “Sending Mixed Messages: Gender-Based Analysis and the ‘Status of Women’” (1997) 40:4 *Can Public Administration* 582 at 586–87.

<sup>100</sup> Teresa Rees, *Mainstreaming Equality in the European Union: Education, Training and Labour Market Policies* (Oxon: Routledge, 1998) at 41, cited in Bacchi et al, *supra* note 91 at 47.

<sup>101</sup> McNutt & Béland, *supra* note 41; Bacchi et al, *supra* note 91; Scala & Paterson, “Gendering Public Policy”, *supra* note 37 at 434–35.

<sup>102</sup> McNutt & Béland, *supra* note 41 at 468.

<sup>103</sup> Bacchi et al, *supra* note 91 at 46.

<sup>104</sup> Scala & Paterson, “Gendering Public Policy”, *supra* note 37 at 436.

Research confirms that scepticism or ambivalence about GBA+ is common among both rank-and-file and management-level public servants.<sup>105</sup> Scala and Paterson report that the GBA+ analysts they interviewed developed sophisticated strategies for ensuring that gender impacts were considered while at the same time avoiding any perception that they were advancing a feminist agenda: “A common discursive strategy used by our interviewees was to frame their equality work as neutral and usable policy knowledge.”<sup>106</sup> This was thought necessary because they “recognized that [GBA+] carried ideological baggage within their organizations.”<sup>107</sup>

Studies also show that commitment to GBA+ is highly politically contingent.<sup>108</sup> Although Status of Women Canada is currently enjoying a resurgence in importance, it has experienced periodic cuts to its staff and budget, most recently under the Harper Government.<sup>109</sup> Between 1993 and 2006, the Liberal Government took a series of steps that resulted in significantly less institutional and civil society support for gender-based initiatives, including eliminating the Canadian Advisory Council on the Status of Women and defunding the National Action Committee on the Status of Women.<sup>110</sup> After the Conservatives came to power, they immediately cut Status of Women Canada’s budget by almost 40 per cent.<sup>111</sup> Three quarters of the Agency’s regional offices were shuttered, and funding for independent research and advocacy around gender issues was wound up.<sup>112</sup>

Status of Women Canada has also seen its mandate oscillate dramatically over time.<sup>113</sup> The Conservatives narrowed the Agency’s mandate to focus on “increasing women’s economic security and prosperity, encouraging women’s leadership and democratic participation; and ending violence against women and girls.”<sup>114</sup> It even went so far as to “remov[e] the word

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<sup>105</sup> Olena Hankivsky, “Gender Mainstreaming in Canada and Australia: A Comparative Analysis” (2008) 27:1 *Policy & Society* 69 at 73 [Hankivsky].

<sup>106</sup> Scala & Paterson, “Gendering Public Policy”, *supra* note 37 at 434.

<sup>107</sup> Scala & Paterson, “Bureaucratic Role Perceptions”, *supra* note 87 at 590.

<sup>108</sup> Hankivsky, *supra* note 105 at 74.

<sup>109</sup> *Ibid*; McNutt & Béland, *supra* note 41 at 474; Louise Langevin, “L’analyse comparative entre les sexes: la difficile mise en oeuvre du droit à l’égalité. Analyse du Rapport de la vérificatrice générale du Canada” (2010) 22:1 *CJWL* 1 at 8.

<sup>110</sup> McNutt & Béland, *supra* note 41 at 474.

<sup>111</sup> Hankivsky, *supra* note 105 at 74; McNutt & Béland, *supra* note 41 at 479.

<sup>112</sup> McNutt & Béland, *supra* note 41 at 479.

<sup>113</sup> *Ibid*; Hankivsky, *supra* note 105 at 74.

<sup>114</sup> McNutt & Béland, *supra* note 41 at 479.

'equality' from the Status of Women's organizational mandate."<sup>115</sup> In this environment, it is unsurprising that GBA+ has not flourished.<sup>116</sup>

Some of the concerns I have described in this section relate to how GBA+ is conceived at a basic level. Other concerns have more to do with how GBA+ has been received by government departments. To these issues must be added the fact that many government departments do not assess gender and other equality impacts at all, and those that do often do so inadequately. I return to the structural questions later in this article. In the next section, I delve more deeply into the suggestion that many of the implementational challenges associated with GBA+ might be addressed by enacting legislation compelling the practice.

## 6. Improve Effectiveness by Creating a Legal Obligation?

In his 2015 report, the Auditor General suggested that one of the reasons why implementation of GBA+ has been sub-optimal is that it is not legally required.<sup>117</sup> Evidence from the UK tends to confirm this assessment. In 2001, the UK Parliament enacted legislation imposing a race equality duty on the executive.<sup>118</sup> This duty required officials to have "due regard" to racial equality concerns in making policy.<sup>119</sup> Duties in relation to disability and gender followed in 2006 and 2007, respectively.<sup>120</sup> In 2010, the UK Parliament enacted the *Equality Act 2010*, which consolidated these obligations and introduced new ones based upon an expanded list of enumerated grounds.<sup>121</sup> The new composite duty is known as the general equality duty or the Public Sector Equality Duty.<sup>122</sup> Research conducted

<sup>115</sup> *Ibid* at 480.

<sup>116</sup> *Ibid* at 479.

<sup>117</sup> *2015 Auditor General's Report*, *supra* note 8 at 3.

<sup>118</sup> "[Public Sector Equality Duty: Background](http://www.equalityhumanrights.com/en/advice-and-guidance/public-sector-equality-duty)", *Equality and Human Rights Commission*, online: <[www.equalityhumanrights.com/en/advice-and-guidance/public-sector-equality-duty](http://www.equalityhumanrights.com/en/advice-and-guidance/public-sector-equality-duty)> [EHRC, "Background"]. See also Sandra Fredman, *Discrimination Law*, 2nd ed (New York: Oxford University Press, 2011) at 62 [Fredman, *Discrimination Law*].

<sup>119</sup> EHRC, "Background", *supra* note 118; Fredman, *Discrimination Law*, *supra* note 118 at 267.

<sup>120</sup> EHRC, "Background", *supra* note 118.

<sup>121</sup> *Equality Act 2010* (UK), c 15 [*Equality Act 2010*]. See also "[Cameron Calls Time](http://www.bbc.com)" on Labour's Equality Impact Assessments", *BBC News* (19 November 2012), online: <[www.bbc.com](http://www.bbc.com)> ["Cameron Calls Time"]. These grounds include "age; disability; gender reassignment; pregnancy and maternity; race; religion or belief; sex; [and] sexual orientation" (*Equality Act, 2010*, s 149(7)).

<sup>122</sup> *Equality Act 2010*, *supra* note 121, s 149. See also EHRC, "Background", *supra* note 118. For a recent review of the jurisprudence on Equality Impact Assessments, see Aileen McColgan, "Litigating the Public Sector Equality Duty: The Story So Far" (2015) 35:3 *Oxford J Leg Stud* 453.

by NatCen Social Research shows that the Duty's statutory grounding "helped to give 'gravitas', 'status' or 'leverage' in organisations where senior managers and particular sections of organisations (e.g. procurement) had not given serious attention to equality in their day-to-day practises before."<sup>123</sup> However, there was also evidence that because decisions of public authorities were rarely subjected to judicial review for failure to meet the Duty, and because of a general lack of remedies for affected individuals, the incentives to "comply" remained ineffective.<sup>124</sup>

The Canadian experience with *Charter* vetting also suggests that these types of processes are treated differently when there are legal consequences for noncompliance. According to Hiebert, "the willingness of the Supreme Court to nullify legislation deemed inconsistent with the Charter has had an important effect both on the process of vetting bills and on the influence Justice officials exert on other departments and ministers."<sup>125</sup> A series of cases decided shortly after the entrenchment of the *Charter* "underscored the magnitude of the Charter's implications for governing"<sup>126</sup>:

In particular, they conveyed to departments the message that governments would have the burden of proof for demonstrating the reasonableness of their actions and that, if courts declare legislation invalid or grant other remedies, these judicial decisions could have substantial policy and fiscal implications.<sup>127</sup>

Indeed, the effectiveness of GBA+ and *Charter* vetting is a study in contrasts. While GBA+ has been plagued by sporadic and often half-hearted efforts at compliance, the *Charter* vetting process is taken very seriously within government and has a impact on lawmaking.<sup>128</sup> One way to address the compliance issues associated with GBA+ would therefore be to propose legislation mandating an assessment of equality impacts for all new laws and

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<sup>123</sup> NatCen Social Research, *Views and Experiences of the Public Sector Equality Duty (PSED): Qualitative Research to Inform the Review*, by Sue Arthur et al (London, UK: NatCen Social Research, 2013) at 23 [NatCen Research] [emphasis in original]. See also Independent Steering Group, *Review of the Public Sector Equality Duty: Report of the Independent Steering Group* (London, UK: Government Equalities Office, 2013) at 26 [Independent Steering Group]; Kate Clayton-Hathway, *The Public Sector Equality Duty: Analysis of Supporting Evidence* (Oxford: Oxford Brookes University Centre for Diversity Policy Research and Practice, 2013) [Clayton-Hathway, *Analysis*].

<sup>124</sup> Independent Steering Group, *supra* note 123 at 26–27; NatCen Research, *supra* note 123 at 23–24; Clayton-Hathway, *Analysis*, *supra* note 123 at 16. On "compliance", see NatCen Research, *supra* note 123. I will use this language throughout.

<sup>125</sup> Hiebert, *Charter Conflicts*, *supra* note 3 at 9.

<sup>126</sup> *Ibid.*

<sup>127</sup> *Ibid* at 9–10.

<sup>128</sup> See Mary Dawson, "The Impact of the Charter on the Public Policy Process and the Department of Justice" (1992) 30:3 *Osgoode Hall LJ* 595; Hiebert, *Charter Conflicts*, *supra* note 3; Kelly, *Governing with the Charter*, *supra* note 81.

policies. It would also address some of the political contingency problems that currently plague GBA+. The UK experience suggests that if the federal government were to take this step, it would be important to ensure that the law included appropriate enforcement mechanisms.

But enshrining GBA+ in legislation also presents a dilemma. If legislation mandating an assessment of gender impacts were enacted, the process would almost certainly become more legalized. This would alter the policy focus of the process. Both the Canadian experience with *Charter* vetting and the UK experience with the Public Sector Equality Duty support this conclusion. As I have explained, the *Charter* vetting process is led by lawyers, and involves assessing the likelihood of proposed legislation being invalidated by the courts. Unsurprisingly, this has increased the significance of the lawyer's role within government.<sup>129</sup> While there was initially unease with the importance that lawyers had assumed within this process, a *détente* of sorts was reached as policy analysts came to see the necessity of lawyer participation in crafting new programs.<sup>130</sup> As in the *Charter* vetting context, public authorities in the UK are guided by the jurisprudence in deciding what the Public Sector Equality Duty requires of them.<sup>131</sup> Now, this transformation would depend in part upon the nature of the remedies for noncompliance available to claimants. Policy-makers in the UK appear to consider litigation around compliance with the Public Sector Equality Duty to be relatively low-stakes, and this likely impacts the degree of legalization of the process.

Government lawyers are well placed to conduct *Charter* vetting because of their core commitments as professionals.<sup>132</sup> The same might be said about the prospect of lawyers being more involved in GBA+. At the same time, it is not necessarily desirable to see yet another aspect of the policy process taken over by lawyers, particularly when lawyers are already required to be attentive to possible equality rights violations as part of the *Charter* vetting process.<sup>133</sup> In short, there may well be a place for solid *policy* advice on equality impacts as new programs and laws are being developed.

How do we reconcile these competing demands? It is clear that something must be done to combat the compliance problems that plague GBA+. A

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<sup>129</sup> Kelly, *Governing with the Charter*, *supra* note 81; MacDonnell, "Civil Servant", *supra* note 4; Hiebert, *Charter Conflicts*, *supra* note 3 at 9.

<sup>130</sup> Kelly, *Governing with the Charter*, *supra* note 81 at 493–94; Hiebert, *Charter Conflicts*, *supra* note 3 at 9.

<sup>131</sup> Equality and Human Rights Commission, *Meeting the Equality Duty in Policy and Decision-Making* (London, UK: Equality and Human Rights Commission, 2014) at 6 [EHRC, *Meeting the Equality Duty*].

<sup>132</sup> MacDonnell, "Civil Servant", *supra* note 4.

<sup>133</sup> See generally Hiebert, *Charter Conflicts*, *supra* note 3.

properly structured legal obligation could go a long way toward achieving that, both in a practical, risk-aversion sense and in the sense of beginning to change perceptions among public servants about the importance of these obligations. However, finding the optimal form of regulation—one that prompts public servants to take these obligations seriously without imposing an undue burden on the policy process or converting GBA+ into a separate legal analysis of equality rights compliance—is no easy matter.<sup>134</sup>

The UK experience again provides some guidance. The UK's Public Sector Equality Duty imposes a statutory obligation on public authorities to have “due regard” to equality concerns. The UK Equality and Human Rights Commission (“EHRC”) describes the function of the general equality duty as follows:

The broad purpose of the equality duty is to integrate consideration of equality and good relations into the day-to-day business of public authorities. If you do not consider how a function can affect different groups in different ways, it is unlikely to have the intended effect. This can contribute to greater inequality and poor outcomes. The general equality duty therefore requires organizations to consider how they could positively contribute to the advancement of equality ... It requires equality considerations to be reflected into the design of policies and the delivery of services, including internal policies, and for these issues to be kept under review.<sup>135</sup>

Section 149(3) of the Act provides guidance on what it means to have “due regard” to equality concerns, specifying that public authorities must have due regard to:

the need to—

- a) remove or minimise disadvantages suffered by persons who share a relevant protected characteristic that are connected to that characteristic;
- b) take steps to meet the needs of persons who share a relevant protected characteristic that are different from the needs of persons who do not share it;
- c) encourage persons who share a relevant protected characteristic to participate in public life or in any other activity in which participation by such persons is disproportionately low.<sup>136</sup>

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<sup>134</sup> On burden, see “Cameron Calls Time”, *supra* note 121.

<sup>135</sup> “[Public Sector Equality Duty: Purpose of the Duty](#)”, *Equality and Human Rights Commission*, online: <[www.equalityhumanrights.com/private-and-public-sector-guidance/public-sector-providers/public-sector-equality-duty](http://www.equalityhumanrights.com/private-and-public-sector-guidance/public-sector-providers/public-sector-equality-duty)>.

<sup>136</sup> *Equality Act 2010*, *supra* note 121, s 149(3); Equality and Human Rights Commission, *The Essential Guide to the Public Sector Equality Duty* (London, UK: Equality

Specific equality duties have also been carved out by regulation.<sup>137</sup> In 2012, the Coalition government streamlined the Public Sector Equality Duty by removing the obligation to conduct full equality impact assessments. A public authority must “publish information to demonstrate its compliance with the [general] duty”<sup>138</sup> and “prepare and publish one or more objectives” to assist the authority in addressing equality concerns falling within its purview.<sup>139</sup> The Equality and Human Rights Commission has developed a series of guidance documents to assist public authorities in meeting their obligations under the Public Sector Equality Duty. Unlike the materials created under the predecessor duties, which established a multi-step process for complying with the Public Sector Equality Duty through the use of equality impact assessments, these materials focus on the general duty to have “due regard” to equality considerations and the specific duties to set equality objectives and publish compliance information. The guidance on the general duty makes clear that there is no rigid formula for complying with the duty.<sup>140</sup> In meeting their obligations, public authorities must take into account “the size of the organisation, the functions they carry out, and the nature of the particular decision,” among other things.<sup>141</sup> They must also be guided by the jurisprudence on the Duty.<sup>142</sup>

The preponderance of the data suggests that these changes have been well received by those in government. Public servants explain that removing the requirement of a formal impact assessment has created a helpful degree of “flexibility” in assessing equality impacts, meaning that implementation of the Duty is “capable of being tailored to the context of an organisation’s decision-making.”<sup>143</sup> It has also been suggested, however, that the Duty’s “less prescriptive”<sup>144</sup> nature has created issues in terms of public authorities knowing what is required of them.<sup>145</sup>

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and Human Rights Commission, 2014) at 5; Bob Hepple, *Equality: The New Legal Framework* (Oxford: Oxford University Press, 2011) at 135–36.

<sup>137</sup> Separate regulations have been developed for England, Wales, and Scotland.

<sup>138</sup> *The Equality Act 2010 (Specific Duties) Regulations 2011*, SI No 2011/2260, s 2(1).

<sup>139</sup> *Ibid.*, ss 3(1)–(2).

<sup>140</sup> EHRC, *Meeting the Equality Duty*, *supra* note 131 at 6.

<sup>141</sup> *Ibid.* at 6.

<sup>142</sup> *Ibid.*

<sup>143</sup> NatCen Research, *supra* note 123 at 14.

<sup>144</sup> Independent Steering Group, *supra* note 123 at 15.

<sup>145</sup> NatCen Research, *supra* note 123 at 14; Kate Clayton-Hathway, *The Public Sector Equality Duty: Empirical Evidence Base* (Oxford: Oxford Brookes University Centre for Diversity Policy Research and Practice, 2013) [Clayton-Hathway, *Evidence*]; Sandra Fredman, “Breaking the Mold: Equality as a Proactive Duty” (2012) 60:1 Am J Comp L 265 at 274 [Fredman, “Breaking the Mold”].

A 2013 report produced by NatCen Social Research explains that the range of practices adopted by public authorities can be categorized in terms of over-compliance, proportionate compliance, and under-compliance.<sup>146</sup> Those who over-comply, they explain, may be “risk-averse” and “fear ... litigation.”<sup>147</sup> Some organizations take their equality obligations very seriously and want to ensure that their work meets the highest standards of compliance.<sup>148</sup> And in some circumstances, an organization’s “equalities infrastructure” may have been firmly established under the predecessor equality duty, and their practices have not changed since the requirements of the Duty were relaxed.<sup>149</sup> Researchers also propose several explanations for under-compliance, including a weak grasp on what the duty requires, resource constraints, and a lack of leadership.<sup>150</sup> Public authorities who were regarded as being engaged in proportionate compliance tended to emphasize “critical thinking” and “pragmatism” in approaching equality issues.<sup>151</sup> Employees in these public authorities had been trained in how to meet their obligations under the Duty, and had become accustomed to weighing equality considerations as part of their ordinary tasks.<sup>152</sup> Kate Clayton-Hathway adds that public authorities that are models of compliance are also characterized by strong leadership on equality issues, regular and meaningful consultation, ongoing evidence gathering and analysis, and goal setting.<sup>153</sup>

Despite the generally favourable view of the revised duty, it is difficult to know whether the interests protected by the Duty are better off. There is evidence that some public authorities take these duties very seriously and that it has resulted in advances in equality rights.<sup>154</sup> There is also evidence, however, of “a tendency to substitute bureaucratic ‘form-filling’ for taking action,” to use Fredman’s language in relation to a predecessor duty.<sup>155</sup> In short, finding the optimal level of regulation is difficult, but is necessary if the goal is to ensure compliance with GBA+ as well as to preserve some non-legalized policy space.

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<sup>146</sup> NatCen Research, *supra* note 123.

<sup>147</sup> *Ibid* at 14, 27.

<sup>148</sup> *Ibid* at 8.

<sup>149</sup> *Ibid* at 25–27.

<sup>150</sup> NatCen Research, *supra* note 123 at 28–29.

<sup>151</sup> *Ibid* at 29–30.

<sup>152</sup> *Ibid* at 29.

<sup>153</sup> Clayton-Hathway, *Analysis*, *supra* note 123 at 15–16.

<sup>154</sup> Government Equalities Office & Schneider-Ross, *Equality Duties: Assessing the Cost & Cost Effectiveness of the Specific Race, Disability & Gender Equality Duties* (London, UK: Government Equalities Office & Schneider-Ross 2009) at 9; NatCen Research, *supra* note 123. For a rich survey of the evidence, see Clayton-Hathway, *Evidence*, *supra* note 145.

<sup>155</sup> Fredman, “Breaking the Mold”, *supra* note 145 at 269. See also Independent Steering Group, *supra* note 123.

The trend toward legalization I discuss here is consistent with a pattern Mark Tushnet identifies in the context of “weak-form” judicial review in constitutional states like Canada.<sup>156</sup> He suggests that while weak-form judicial review allows the political branches to push back on the courts’ view of what the Constitution requires, they do so less than might be expected. More often than not, Parliament essentially follows the courts’ lead. The upshot is that while

[L]egislatures have the *formal* power to respond to a judicial interpretation with which its members disagree through legislation rather than constitutional amendment, ... they exercise that power so rarely that a natural inference is that the political-legal culture in nations with weak-form review have come to treat judicial interpretations as authoritative and final.<sup>157</sup>

Weak-form review therefore begins to resemble the strong-form judicial review of countries like the United States.<sup>158</sup> Hiebert’s research suggests that this is partly the product of risk-aversion.<sup>159</sup> Similar forces would likely emerge if GBA+ were to become a legal obligation. As I have mentioned, much would depend on how the legal duty was structured and on the real and perceived risks of noncompliance. But just as weak-form review has proven “unstab[le],” as Tushnet puts it,<sup>160</sup> so too would the stability of GBA+ as a policy-oriented process likely be impacted by imposing a legal obligation.

## 7. Proactive or Reactive?

One of the shortcomings of both rights vetting and GBA+ as they are currently conceived is that they are more focussed on compliance than on implementing the values and interests that lie at their heart. Both *Charter* vetting and GBA+ are “proactive” in the sense that they aim to prevent adverse impacts on fundamental rights or interests before they occur.<sup>161</sup> While proactive in the temporal sense, however, these processes do not typically influence what policies the government enacts, or address

<sup>156</sup> Tushnet, *Weak Courts*, *supra* note 3.

<sup>157</sup> *Ibid* at 47–48.

<sup>158</sup> *Ibid*.

<sup>159</sup> See e.g. *Charter Conflicts*, *supra* note 3 at 223; Janet L Hiebert, “Parliamentary Engagement with the *Charter*: Rethinking the Idea of Legislative Rights Review” (2012) 58 *SCLR* (2d) 87 at 92–95.

<sup>160</sup> Tushnet, *Weak Courts*, *supra* note 3 at 43.

<sup>161</sup> See generally Gillian MacNaughton & Paul Hunt, “A Human Rights-Based Approach to Social Impact Assessment” in Frank Vanclay & Ana Maria Esteves, eds, *New Directions in Social Impact Assessment: Conceptual and Methodological Advances* (Cheltenham: Edward Elgar, 2012) 355 at 360; Fredman, “Breaking the Mold”, *supra* note 145; Fredman, *Human Rights Transformed*, *supra* note 52.

structural inequalities within government. Instead, the evidence suggests that their application tends to lead to legislative or policy proposals being tweaked to avoid rights infringements or adverse equality impacts.<sup>162</sup>

There is another, richer way of conceiving of “proactive” assessment. Assessment processes can also be proactive in that they prompt governments to ask themselves which policies they should implement to advance constitutional rights and equality interests, and how government institutions might be reformed to reflect the state’s fundamental commitment to equality.<sup>163</sup> This variant of proactive approach has several benefits. One, of course, is early intervention. But equally important is that this approach means that policy priorities are not simply determined by position and ideology, but also by the content of our fundamental social commitments.<sup>164</sup> This does not mean that constitutional rights specify with precision which policies the government must enact;<sup>165</sup> it does mean, however, that the executive must govern in a manner that is fundamentally responsive to higher law. This proposition remains a controversial one in some constitutional systems, particularly those with strong traditions of parliamentary supremacy.<sup>166</sup> But it need not be. This variant of proactive approach emphasizes the executive’s crucial role in securing and advancing fundamental rights.<sup>167</sup>

This type of proactive approach would be beneficial both in the rights vetting context and in the context of GBA+. In the GBA+ context, it provides one way of preserving a space for policy within a legal framework. The Constitution establishes the parameters of permissible government action, but within those parameters, and subject, of course, to competing rights and

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<sup>162</sup> This is how the *Charter* rights vetting process is described: see *Schmidt v Canada (AG)*, 2016 FC 269 (Affidavit of William F Pentney at 9); Hiebert, *Charter Conflicts*, *supra* note 3 at 10.

<sup>163</sup> Fredman, “Breaking the Mold”, *supra* note 145 at 271.

<sup>164</sup> Scott Stephenson, “Rights, Disagreement and Norms” (2013) [unpublished, copy on file with the author] at 14. Stephenson refers to “Parliament’s constitutional, as opposed to political functions”.

<sup>165</sup> Grimm, *supra* note 51; Alexy, *Theory*, *supra* note 52 at 308; Kumm, *supra* note 1 at 129–30; Tushnet, *Weak Courts*, *supra* note 3; Vanessa MacDonnell & Julia Hughes, “The German Abortion Decisions and the Protective Function in German and Canadian Constitutional Law” (2013) 50:4 *Osgoode Hall LJ* 999 [MacDonnell & Hughes, “German Abortion”]; Vanessa MacDonnell, “The Constitution as Framework for Governance” (2013) 63:4 *UTLJ* 624 at 639 [MacDonnell, “Framework”].

<sup>166</sup> See generally Janet L Hiebert, “Parliamentary Bills of Rights: An Alternative Model?” (2006) 69:1 *Mod L Rev* 7.

<sup>167</sup> Grégoire Webber, “[The Charter Party and the Work of Parliament](#)” (27 January 2016), *Policy Options*, online: <policyoptions.irpp.org/2016/01/27/the-charter-party-and-the-work-of-parliament> [Webber].

interests, policy makers have flexibility in developing the content of laws and policies.<sup>168</sup>

There is some evidence of this second type of proactive approach to GBA+ in recent government documents. The most recent federal budget includes a 25-page “gender statement”,<sup>169</sup> which lays out the government’s plan to move forward with several woman-centered policies, including programs to reduce violence against women and girls, implement a Canada Child Benefit, increase the availability of flex time in fields regulated by the federal government, and expand employment insurance eligibility for those with care obligations.<sup>170</sup> An intersectional approach is evident in parts of the report. There are multiple references to the interests of Indigenous women. The report also references LGBTQ people and women of various ages, including young women, women with young children, and elderly women. However, there is also what appears to be superficial, *post-hoc* gender analysis.<sup>171</sup> There is no reference in the budget to any consultation on gender equality issues with individuals or groups outside government, and at times the statement leaves the distinct impression that certain policy proposals have been dressed up in gender language.<sup>172</sup>

Recent *Charter* statements published by the federal government also reveal a somewhat more proactive approach to constitutional rights than has previously been evident.<sup>173</sup> Until recently, the government did not share information about individual *Charter* vetting processes.<sup>174</sup> While the *Department of Justice Act*<sup>175</sup> requires Ministers to table a statement in the House of Commons if they are introducing legislation they believe to be

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<sup>168</sup> Robert Alexy, “On Constitutional Rights to Protection” (2009) 3:1 *Legisprudence* 1 at 1; Grimm, *supra* note 51 at 150; MacDonnell, “Framework”, *supra* note 165 at 640; Alexy, *Theory*, *supra* note 52; MacDonnell & Hughes, “German Abortion”, *supra* note 165;

<sup>169</sup> Government of Canada, “Budget Gender Statement”, *supra* note 34.

<sup>170</sup> Anderssen, *supra* note 34.

<sup>171</sup> For further criticism of the GBA+ prepared in the context of the 2017 budget, see Anne Kingston, “[The Hope and Hype of a ‘Gender-Based’ Budget](#)” (22 March 2017), online: Macleans <[www.macleans.ca/politics/ottawa/the-hope-and-hype-of-a-gender-based-budget](http://www.macleans.ca/politics/ottawa/the-hope-and-hype-of-a-gender-based-budget)>; Anderssen, *supra* note 34; “[3 Ways the Trudeau Government’s First ‘Gender-Based’ Budget Failed to Deliver on Its Own Goals](#)”, *Press Progress* (22 March 2017), online: <[pressprogress.ca/](http://pressprogress.ca/)>.

<sup>172</sup> On the importance of consultation to the gender budgeting process, see Karen Judd, “Introduction: Gender Budget Analysis and Accountability to Women” in Karen Judd, ed, *Gender Budget Initiatives* (New York: United Nations Development Fund for Women, 2002) 7 at 7–8.

<sup>173</sup> Webber, *supra* note 167, notes that a similar tone is present in the Ministerial Mandate Letters.

<sup>174</sup> Hiebert, *Charter Conflicts*, *supra* note 3 at 8.

<sup>175</sup> RSC 1985, c J-2.

unconstitutional, no such statement has ever been tabled.<sup>176</sup> In 2017 the government introduced amendments to the *Department of Justice Act*, which would require Ministers, upon putting forward *any* piece of legislation, to “cause to be tabled, in the House in which the Bill originates, a statement that sets out potential effects of the Bill on the rights and freedoms that are guaranteed by the *Canadian Charter of Rights and Freedoms*.”<sup>177</sup> The federal government has already released several such statements on a voluntary basis.<sup>178</sup>

These statements do not purport to be, nor are they likely, the written results of the *Charter* vetting process. A review of the statements released to date suggest that they are best characterized as part dispassionate assessment of a proposed law’s constitutional implications and part advocacy document, designed to make the best case for the government’s chosen policy. But they do provide a limited window into what may have been discussed during the *Charter* vetting process.

Some of the *Charter* statements, such as the statements released in conjunction with legislation repealing the offences of buggery and blasphemous libel, clearly embrace a more proactive approach to constitutional rights. The statement published in connection with Bill C-51 states that “the repeal of the prohibition on publishing blasphemous libel (section 296 of the *Criminal Code*) would enhance freedom of expression protected by section 2(b) as well as section 15(1) equality rights.”<sup>179</sup> The statement on Bill C-32 notes:

The repeal of section 159 of the *Criminal Code* would promote the equality rights protected by subsection 15(1) of the *Charter*, which provides that everyone is equal before and under the law. Section 159 prohibits anal intercourse, except by a husband and wife or two persons who are both 18 years or older, and where the act is consensual and takes place in private. The offence has had a disparate impact on homosexual males, whose consensual sexual activities have been uniquely targeted for prohibition under the *Criminal Code*.<sup>180</sup>

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<sup>176</sup> Hiebert, *Charter Conflicts*, *supra* note 3 at 12.

<sup>177</sup> Bill C-51, *An Act to amend the Criminal Code and the Department of Justice Act and to make consequential amendments to another Act*, 1st Sess, 42nd Parl, 2017, cl 73.

<sup>178</sup> See Government of Canada, “[Charter Statements](#)”, *Department of Justice*, online: <[www.justice.gc.ca/eng/csj-sjc/pl/charter-charte/index.html](http://www.justice.gc.ca/eng/csj-sjc/pl/charter-charte/index.html)>.

<sup>179</sup> “[Charter Statement—Bill C-51: An Act to amend the Criminal Code and the Department of Justice Act and to make consequential amendments to another Act](#)”, *Department of Justice*, online: <[www.justice.gc.ca/eng/csj-sjc/pl/charter-charte/c51.html](http://www.justice.gc.ca/eng/csj-sjc/pl/charter-charte/c51.html)>.

<sup>180</sup> “[Charter Statement—Bill C-32: An Act related to the repeal of section 159 of the Criminal Code](#)”, *Department of Justice*, online: <[www.justice.gc.ca/eng/csj-sjc/pl/charter-charte/cs\\_s159-ec\\_s159.html](http://www.justice.gc.ca/eng/csj-sjc/pl/charter-charte/cs_s159-ec_s159.html)>.

## 8. Lessons for Right Vetting

Finally, much of the scholarship on *Charter* vetting has focussed on the standard the executive employs in determining whether its reporting obligations under the *Department of Justice Act* are triggered. Scholars have been critical of the executive's position that it is only required to report that it is introducing problematic legislation when it concludes that a bill is "manifestly unconstitutional."<sup>181</sup> Another (in my view, preferable) approach to improving accountability might be to incorporate some of the assessment best practices developed in the GBA+ context.<sup>182</sup> In particular, there is room for improvement when it comes to evidence-gathering, consultation, and publication.<sup>183</sup>

The differences between GBA+ and the *Charter* vetting process may explain why they have evolved in different ways. GBA+ involves a form of structured policy analysis. The process therefore mandates evidence-gathering, consultation, analysis, recommendations, and the like. Rights vetting, on the other hand, is a form of legal analysis. It is not surprising, then, that this process would engage the tools of legal analysis—hence the use of a checklist of possible rights infringements and an emphasis on legal risk analysis.<sup>184</sup> As an outsider, it is difficult to know what role evidence-gathering and consultation play in the *Charter* vetting process, though it likely varies. Unlike policy-makers, however, lawyers might be inclined to believe that their legal training provides them with everything they need to conduct an analysis of likely *Charter* impacts. This view would be short-sighted. Good evidence is crucial to assessing *Charter* impacts. The rights

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<sup>181</sup> Jennifer Bond, "Failure to Report: The Manifestly Unconstitutional Nature of the *Human Smugglers Act*" (2014) 51:2 Osgoode Hall LJ 377. See also Hiebert, *Charter Conflicts*, *supra* note 3. There has also been litigation on this subject. See *Schmidt v Canada (AG)*, 2016 FC 269, 399 DLR (4th) 83.

<sup>182</sup> On accountability, see Gauthier de Beco, "Human Rights Impact Assessments" (2009) 27:2 Netherlands Quarterly of Human Rights 139 at 145; NatCen Research, *supra* note 123 at 37; Fredman, "Breaking the Mold", *supra* note 145 at 273; Gabrielle Appleby and Anna Olijnyk, "Executive Policy Development and Constitutional Uncertainty: Practice and Perceptions (2017) [unpublished, copy on file with author] at 15.

<sup>183</sup> Jula Hughes & Vanessa MacDonnell, "The Art and Science of Constitutional Legislation" (2018) [unpublished, draft paper on file with author] [Hughes & MacDonnell, "Constitutional Legislation"].

<sup>184</sup> Hiebert explains that "Parliament and the courts are situated differently, in relation to *Charter* conflicts. Their respective judgments will be influenced by these different points of reference, by the distinct institutional characteristics they possess, and by the specific responsibilities that characterize their roles": Hiebert, *Charter Conflicts*, *supra* note 3 at xii-xiii. A similar point could be made about lawyers and policy analysts.

vetting process would therefore benefit from a somewhat greater focus on evidence-gathering and consultation.<sup>185</sup>

## 9. Conclusion

To date, the constitutional scholarship has not examined what role GBA+ and analogous process might play in a constitutional state. In this paper, I have suggested that GBA+ can be understood as a form of constitutional implementation, and that it and similar processes should be on the radar of constitutional law scholars, particularly those interested in how the executive implements constitutional rights.

The effectiveness of GBA+ as a means of constitutional implementation is currently limited by a range of factors. Some of these factors are political. Others relate to the design and assumptions of itself. This process has the potential to play a role in advancing a rights-based policy agenda. In order to fulfil that potential, however, it must be reformed. The government should consider formalizing its commitment to GBA+ through the enactment of legislation. This will inevitably undermine the policy-based nature of the process. Efforts should be made to retain a robust policy space to the degree possible, though Tushnet's work on "the possible instability of weak-form review"<sup>186</sup> and the experience with *Charter* vetting and the Public Sector Equality Duty in the UK suggests that this will be difficult. Moreover, governments ought to begin to take a truly proactive approach to rights realization, which provides one way of addressing persistent structural inequalities.

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<sup>185</sup> On the importance of consultation in the constitutional context, see Sheppard, *supra* note 66 at 560; Hughes & MacDonnell, "Constitutional Legislation", *supra* note 183.

<sup>186</sup> Tushnet, *Weak Courts*, *supra* note 3 at 43.