Fair Work Amendment (Gender Pay Gap) Bill 2015

Inquiry submission

Executive summary

In this submission, using Australian and international research evidence collected over the last 50 years, we demonstrate that pay secrecy:

a. Contributes to a widening gender pay gap by:

   I. Helping to maintain existing systemic discriminatory pay practices, and

   II. Concealing the introduction of new discriminative pay practices by hiding the outcomes of these practices from the participants and preventing external scrutiny.

b. Impedes the productivity of organisations by:

   I. Limiting the effectiveness of performance pay systems that rely on pay performance messages to be broadly communicated to drive higher levels of organisational performance.

   II. Reducing employee satisfaction with pay, creating an environment that reduces trust and can promote conflict between employees.

The Bill effectively balances the needs of both employers and employees. Employees who prefer to keep their pay confidential do not have to reveal their pay and employers are not required to make pay information publicly available. Employers merely need to be able to provide responses to employees who ask for additional information about their pay.

We fully support the Bill. We would be pleased to appear before the committee to discuss our submission.

I. Introduction

The Bill proposes an amendment to the Fair Work Act (2009) prohibiting the enforcement of pay secrecy provisions. The proposed section 333B allows employees to disclose their pay or earnings and prevent employers from taking adverse actions against employees who disclose details of their pay.

The adoption and spread of pay secrecy in Australia has been promoted by consulting firms, possibly motivated by practices in the United States. However, there is growing evidence that pay secrecy is declining in the United States. The proportion of companies enforcing pay secrecy policies has declined from 75 percent in 1985 to 36 percent in 2001 to 23 percent in 2010 (Marasi & Bennett, in press).

In this submission, we draw on published Australian and international research and our own recent research, to demonstrate that pay secrecy contributes to the gender pay gap and represents an ineffective and costly way for organisations to manage employees.

The proposed Bill encourages organisations to make merit-based pay decisions and reduce pay discrimination. Legislation that encourages this behaviour will reduce the gender pay gap and make Australian organisations more efficient.

II. Pay secrecy and the gender pay gap

The gender pay gap

The gender pay gap is currently 18.2 percent according to the Workplace Gender Equality Agency (https://www.wgea.gov.au/sites/default/files/Gender_Pay_Gap_Factsheet.pdf). Women in full time employment take home $283.20 per week *less* than their male counterparts. Put another way, Australian women have to work an extra 66 days each year to earn the same amount as a man. More disturbing is that the gender pay gap is increasing. The gender pay gap in November 2004 was 14.9 percent.

Formal – informal pay secrecy and its enforcement

The last ten years has seen the spread of pay secrecy policies – policies under which employees are prevented from discussing their pay with colleagues. Shields, Scott, Sperling, and Higgins (2009) report that 50 percent of organisations say they discourage employees from sharing pay information by issuing them a verbal warning. A further 3 percent of organisations said they would punish employees if they shared pay information.

Our own data collection suggests that many organisations have informal pay secrecy policies. Drawing on interviews with managers, our research indicates that many organisations actively pressure employees to not disclose pay even in the absence of a formalised pay secrecy policy. Organisations reported actively disciplining employees for disclosing pay information irrespective of whether a formal written policy exists. Participants in our study expressed a general view that pay secrecy in their organisation was underpinned by an organisational culture that strongly discouraged employees from sharing pay information. As one HR manager remarked:

> *"It's just that unspoken rule that you just don't share it (pay information)".*
>
> *Quote from a study participant*

Almost all our study participants indicated that their organisation sanctioned employees who were found to have disclosed their pay details to co-workers. The severity of these sanctions varied from an informal caution through to dismissal. Since most organisations do not have a formalised pay secrecy policy, any disciplinary action or penalties are imposed on the grounds that the employee has breached the confidentiality clause contained in his or her employment contact. These penalties appear to be enforced when employees lodge pay claims or complaints using information about co-workers' pay.

Pay gap largest under pay secrecy

The Workplace Gender Equality Agency analysis shows that the pay gap is largest when pay is secret – in an individual agreement (20.6%) and almost non-existent when pay is set publicly by an award (-2.5%). In between awards and individual agreements are collective agreements. Under a collective agreement base pay tends to be public but payments over and above (e.g. performance payments) are secret. The gender pay gap is 16.9 percent when pay is set by a collective agreement.

There is also some secrecy around starting salaries, which also provides scope for different salaries for men and women. Babcock, Gelfand, and Small (2003) found that 57 percent of men negotiated their starting pay while only 7 percent of women negotiated. Reddit, an online news service recently announced a take it or leave it pay policy for starting salaries as a way to avoid private negotiations and differential starting salaries (Feintzeig & Silverman, 2015).

III. How does pay secrecy contribute to the gender pay gap?

Impact on pay decision making

Organisations are able to pay employees as they wish without having to justify the pay to employees. Under pay secrecy conscious or unconscious bias and stereotyping can affect pay decisions. Managers are free to apply criteria that disadvantages women, such as using “face time” (time in the workplace) or “perceived similarity” as measures of employee value to the organisation.

The majority of our study participants acknowledged that increasing transparency would highlight undesirable pay discrepancies to their workforce. One participant commented that her organisation paid employees of comparable performance and job responsibilities very differently. She found it difficult to reconcile these pay differences when, for all accounts, the employees were producing the same output. In other cases, participants suspected bias, favouritism and discrimination. The pattern of wide pay disparity was also traced by several participants to changes in remuneration polices that resulted in employees receiving different compensation packages depending on when they were hired. Participants complained that inherited decisions from earlier pay setting policies had left behind a legacy of wide dispersion in pay.

Unequal access to information

The information asymmetry between the employer and the employee makes it difficult for women to compare their pay to similarly situated employees. Without information women cannot challenge illegal practices such as discrimination or seek better pay elsewhere. This is best illustrated by the Lily Ledbetter case. For 20 years, Ledbetter was the only female supervisor among sixteen male supervisors for Goodyear Tire in Alabama (USA). She earned less than all her male colleagues, including those with less seniority, yet she did not know that she was underpaid because her workplace prohibited employees from discussing their pay. It was only after she received an anonymous note that revealed the earnings of her male colleagues that she realised she was underpaid (Kim, 2015).

Performance evaluations

Research demonstrates that managers’ performance evaluation decisions are influenced by the gender of their subordinate. Women are less likely to get a high performance rating relative to their male counterparts (Varma & Stroh, 2001). In fact, they are more likely to receive critical feedback. Snyder (2014) found that 58.9% of the performance reviews received by men contained critical feedback compared with 87.9% for women. And the criticisms were often based on personality. “Watch your tone”, “stop being so judgmental” showed up in 2.4% of the critical reviews received by men and in 76% of the critical reviews received by women.

The gender bias in performance evaluations provides evidence that managers' pay allocation decisions, especially when made in secret, will be biased.

Negotiation practices

Pay secrecy requires individual employees to play a greater role in the pay determination process (e.g. negotiating their performance rating or the amount of performance payments). Women are socialised *not to* negotiate – they assume they will be recognised and rewarded for good performance. Babcock et al. (2003) found that 57 percent of men negotiated their pay while only 7 percent of women negotiated. Women are also *more likely* than men to accept the first offer. Managers, believing that women will accept less than men, typically make lower opening offers to women (Glick & Croson, 2001).

When women do negotiate, they frequently adopt an accommodating style that is less likely to deliver the economic benefits of the more competitive negotiation style adopted by men (Kray & Thompson, 2004). Women who do negotiate may be labelled as "bitchy or pushy" which can result in the loss of a job offer or being ostracised and excluded from important information in the workplace (Kim, 2015). In turn, being less liked results in lower performance ratings and lower wages for women (Kulik & Olekalns, 2012).

IV. Will prohibiting pay secrecy reduce the gender pay gap?

Rational pay decision making

Secrecy allows managers more discretion in pay decision making, as fewer decisions must be justified (Day, 2012). Among our study participants there was general agreement that secrecy in pay decisions leads to lower accountability for managers making those decisions. One participant remarked that transparency would make managers more accountable for delivering equitable pay across teams. Another participant summed up the general consensus by saying:

> *"I think managers prefer pay secrecy because then they don't have to justify why they've given the pay increase or not given the pay increase".*
>
> *Quote from a study participant*

Another participant explained how pay inequities are often not addressed by managers under pay secrecy because there is no pressure to resolve them. In his words:

> *"Often you have people in a position who are probably a bit overpaid, for what they are. My experience has been that you tend to just leave those people there."*
>
> *Quote from a study participant*

He described an implicit agreement between employees and managers whereby managers allow some employees to be overpaid. In his view, 'if there was pay transparency you probably couldn't have done that.' Part of the problem may stem from the lack of accountability managers sometimes have, not only to employees, but to senior management. As one senior executive remarked:

> *"What pay transparency does… is it actually holds managers accountable and I'll be honest with you most managers when it comes to people activity are not held accountable. I mean we don't put it in their K.P.I's."*
>
> *Quote from a study participant*

Another study participant recounted a $40,000 pay difference between a male and female colleague of comparable performance. In other cases, participants talked about managers' awarding pay increases to avoid having 'uncomfortable conversations' with underperforming employees. On a similar note, one participant talked about pay decision bias stemming from conflict avoidance. She explained that managers in her organisation sometimes pay more money to employees that are most likely to question pay decisions. She believed that this strategy is employed to prevent unwanted confrontations or issues with employees about pay. Other participants recounted situations in which managers used pay decisions to reward employees for matters unrelated to performance such as tenure. Participants linked this behaviour to pay secrecy and warned that in the absence of process transparency, managers can effectively 'pay employees as they wish'. In one participant's opinion, transparency 'keeps managers honest' because managers must justify their decisions.

The Bill will encourage organisations to make rational pay decisions as decisions will have to be justified. Employers will be motived to establish fair pay systems and employees will be able to monitor, identify and remedy unfair pay (Case, 2001). As the CEO of one organisation noted, access to pay information "quells the gossip mill and exaggerations over who is making what, and leads to "greater justice" in compensation. "Any kind of favouritism or nepotism is seen,"(Helm, 2013).

A natural pay secrecy experiment

Evidence from the United States of America shows that pay secrecy increases the pay gap. Using a natural experiment of States that prohibit pay secrecy compared to those that do not, Kim (2015) examine whether States that outlaw pay secrecy reduce the gender wage gap. Eleven states in the US have legal provisions covering pay secrecy. The analysis was based on data collected from 1977-2012. The sample contained more than 2.1 million observations; approximately 1.1 million men and 1 million women. In order to account for other personal factors that have can have an impact on women's pay, Kim (2015) controlled for educational attainment, race, potential work experience, living in a metropolitan area or central city, and marital status, the number of children, the presence of children under age 5, and broad industry and occupational variables. Kim (2015) also took into account the economic conditions in each for the States, including the cost of living, economic conditions, and the business climate. After taking into account these personal and economic factors, Kim (2015) found that women's wages are higher (between 4 – 12% depending on how the data was analysed) in those states with pay secrecy laws relative to the non-pay secrecy law states.

A recent televised experiment on pay transparency provides data on the implications of employees disclosing salary details to colleagues (http://www.channel4.com/programmes/show-me-your-money). The staff at Pimlico Plumbers were challenged to reveal their earnings. The managing director of the London-based plumbing firm, said: "We didn't have an up-to-date pay structure in place. There was a lot of uncertainty, which staff wanted us to deal with……. We now have a more equal workplace and more equal wages" as a consequence of sharing pay information.

V. Evaluating pay secrecy

In section we review of the claims made in support of pay secrecy and its impact on organisations.

Pay secrecy and employee productivity

Supporters of pay secrecy argue that employee productivity will be higher: the highest levels of pay can be directed to higher performing employees. Pay secrecy, however, makes the performance pay system unpredictable: employees cannot predict the outcomes of the system (Belogolovsky & Bamberger, 2014). Our data suggests that secrecy blocks performance signals because it makes it difficult for employees to accurately compare their pay with colleagues' pay and their relative performance. Some participants were concerned that this can reduce the recognition and acknowledgement of high performers in the workplace. One participant commented that high performers would prefer to know where their pay is positioned in relation to co-workers. He explained:

> *"I think they (high performers) would prefer transparency because they would feel that they should be at the top, and so they would want to know that they were at the top. And especially if you tell them, "I'm a high performer," "OK great, how are you representing that in the way that I'm paid?"*
>
> *Quote from a study participant*

Other participants echoed these thoughts by cautioning that secrecy removes or diminishes pay's usefulness in signalling differences in performance to employees. Poor performing employees are not alerted to differences in pay between themselves and others that would indicate that the organisations places relatively less value on their contribution compared to other employees. As one participant pointed out, in the absence of pay signals, poor performers are not motivated to leave the organisation or lift performance. Employees on higher pay are put under pressure to earn their keep.

Access to pay information only generates lower employee performance when the organisation is distributing pay unfairly (Nosenzo, 2013). With pay secrecy, organisation can make poor pay decisions because they do not have to defend or justify them.

Conflict between employees

Pay secrecy is promoted as a way to minimise potential conflict between employees about pay. By inhibiting pay comparisons, organisations hope to limit perceptions of inequity and avoid negative employee attitudes and behaviour (Day, 2007). Organisations believe that employees cannot handle the truth about their value to the organisation relative to other employees.

Employees are, however, still interested in pay even when there is no information provided by the organisation. Instead they rely on rumour and "positional cues" (i.e. size of comparators house, car, life style) to make estimates of others pay. And workers can overestimate what their co-workers earn and end up being more dissatisfied than if they had accurate pay information (Lawler, 1966).

Our data is consistent with earlier research: prohibiting pay disclosure does not dampen employees' interest in comparing pay. In the absence of official pay data, employees use other signals as a basis for comparing pay. One participant recalled employees using published executive pay levels as a starting point for working backwards to estimate managers' and colleagues' pay. In other instances, employees use information relating to performance pay programs to estimates colleagues' pay.

Satisfaction with pay

Having information about pay is important to employees. The amount of money an individual has not only has instrumental implications for one's quality of life (e.g. where they live, how they live etc.), it carries significant symbolic meaning (e.g. status in the organisation and society).

Pay secrecy creates pay dissatisfaction while public pay increases pay satisfaction. (Cappelli & Sherer, 1988; Thompson & Pronsky, 1975). Shifting to an open system from a secret system can lead a large increase in pay satisfaction (Christofferson, 2012): "It took little more than transparency and communication to improve pay satisfaction from 17 percent to 82 percent". Further, workers who perceive more pay communication about how their pay is determined are higher in organisational commitment and pay satisfaction because of greater feelings of pay equity related to higher perceived communication (Day, 2012).

Trust

Trust in the workplace matters. Low trust is associated with lower levels of employee job performance and lower levels of employee citizenship (e.g. helping colleagues). When trust is low employees are also more likely to quit (Dirks & Ferrin, 2002). Pay secrecy implies that the organisation does not trust its employees, reducing an employee's motivation to contribute (Bamberger & Belogolovsky, 2010).

Pay secrecy also undermines the relationship between employees and their organisation by causing employees to doubt the quality of information given to them on any matters. Withholding pay information suggests to employees that management has something to hide, especially when organisations enforce their pay secrecy policy with threats of dismissal. Employees cannot monitor the operation of the performance pay system nor verify the information that is provided to them by management. This can generate questions about the accuracy, truthfulness and reasonableness of the information being provided by management, irrespective of the actual circumstances in the organisation. Pay openness by contrast, signals integrity.

Our research data demonstrates that pay information alleviates employees' concerns about pay fairness. By supplying pay information, organisations can reduce employee anxiety. In one participant's words, pay becomes a 'non-issue' for employees when it is not kept secret. As another participant noted:

> *"The more you try to cover things up the more people want to find out why you're trying to cover it out.'*
>
> *Quote from a study participant*

Employee preferences and experiences

Some commentators argue that individuals want pay secrecy but research has shown that some employees actually prefer pay transparency (Schuster and Colleti, 1973). Moreover, employees are exhibiting a greater preference for transparency and information sharing. New labour market entrants ("Millennials") for example, operate in an open-access culture where they are comfortable providing personal information online (Anon., 2014; Lytle, 2014).

For many Australian workers, pay transparency is part of their daily work experience. Employees that are either currently paid under a collective bargaining agreement, are an executive in a publicly listed company or are employed in the government sector work under some degree of pay transparency. Further, pay transparency has been the norm for many older Australian employees. Under the former centralised system of wage determination, wages were determined by published awards that were easily accessible to the public. There is presently no published evidence to suggest that these workers would prefer pay secrecy.

Compatibility with other HR practices

Pay secrecy policies can undermine the positive effects of other people management initiatives. These days' organisations place employees into teams and seek to foster employee engagement. Even in these open environments organisations often require employees to maintain secrecy about their individual pay levels (Lawler, 2003), which may defeat the purpose of open strategies and diminish employees' perceptions of fairness (Balkin & Gomez-Mejia, 1985). Under pay secrecy employees cannot be sure they are being treated fairly and equitably, which can lower employee engagement.

The level of pay transparency in an organisation can also influence employees' acceptance of remuneration practices. Research demonstrates that employees with more pay knowledge have a greater preference for performance-based pay systems and a lower preference for security driven pay system that provide an annual cost-of-living pay increase (Beer & Gery, 1972).

Challenges in keeping pay secret

Keeping pay secret is becoming increasingly difficult for organisations. It is unclear how successful pay secrecy policies are in preventing employees from discussing pay. An increasing number of online sites now allow employees to easily exchange pay information (Case, 2001). Meanwhile, younger workers are more open about their pay (Anon., 2014; Lytle, 2014) and head hunters routinely share information to recruit candidates (Roth, 2006). Within organisations various people must access pay information to perform payroll and HR functions.

In our own recent study, interviewed managers acknowledged that employees are likely to disclose pay information to each other. They suspected that employees contravene pay secrecy policy through casual conversations at work and social settings outside the workplace. Participants speculated that these inquiries were likely to consist of discreet conversations between a few trusted colleagues. Based on his own experience, one manager acknowledged that he makes similar inquiries with his peers. Across the interview data, there appeared to be a general acceptance that these types of discreet pay disclosures occurred. Generally-speaking, study participants were tolerant of pay disclosures unless they resulted in an employee lodging a pay compliant or making a pay demand.

VI. Balance of interests

The Bill does not require employers to publish pay information nor compel employees to share pay information. In this way, the proposed legislation safeguards the confidentiality of employees since it provides employees with the legal right to disclose their pay information ***only if they wish to***. Employees that prefer to maintain their confidentiality can continue to do so by keeping their pay secret from their colleagues.

VII. Concluding observations

Based on the available research, we support the proposed amendment that safeguards employees' rights to share pay information. We support the amendment based on the following grounds:

- It provides a mechanism for employees to gather pay data when they suspect discrimination without the fear of reprisals or retaliation from employees in the form of discipline, termination, harassment or demotion.

- It empowers women and other disadvantaged employee groups to redress pay discrimination by accessing information that can better assist them in pay negotiations. Taking into account evidence about how men and women negotiate, this amendment should help women achieve better pay parity with their male colleagues.
- Greater pay transparency will raise the accountability of organisations and managers for their pay decisions. This should encourage organisations to make rational pay decisions based on merit and reduce the incidence of pay decisions driven by bias, discrimination and nepotism. This is supported by compelling evidence showing that decision making and ethical behaviour improves when decision makers need to justify their decisions.
- The proposed amendment continues to protect the confidentiality of employees. Under the amendment, the right to disclose pay information resides with the individual employee. The amendment does not require employers to disclose the pay information of employees to others. Nor are employees compelled to disclose their own pay information to other employees or job applicants.
- Increasing pay transparency should enhance organisational performance. Currently, pay secrecy policies adversely impact job performance by blocking pay signals that stimulate performance (Lawler, 1966; Futrell & Jenkins, 1978). This diminishes the effectiveness of performance-based pay systems used in Australia.
- The amendment is consistent with best practice people management trends and brings Australian business policies into line with international remuneration practices that encourage greater transparency.
- Economic modelling indicates that pay transparency does not adversely impact organisational profitability (Charness & Kuhn, 2005).
- There is no evidence that the amendment will create conflict between employees or reduce organisational flexibility unless organisations are currently engaging in pay discrimination. Performance-based pay systems are widely applied throughout Australia such that most employees accept that individuals are rewarded differently for good and bad performance.

VIII. References

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