

Senate Education and Employment Legislation Committee

Inquiry into the Fair Work Amendment (Gender Pay Gap) Bill 2015

26 February 2016

I have taught in University Law Schools and researched in the area of sex discrimination law for over two decades. I thank the Committee for agreeing to accept this submission slightly out of time.

I support the adoption of a provision that enables women to check whether they are being paid equitably compared to their co-workers. Pay secrecy and confidentiality facilitate discriminatory practices and must be addressed.

A provision that allows women to check whether pay is equitable as between themselves and their colleagues is essential as a basic safeguard to ensure that unequal pay cannot simply continue without being discovered. This is the clear lesson from the USA case of *Ledbetter v. Goodyear Tire & Rubber Co.*, 550 U.S. 618 (2007), in which Ms Ledbetter was paid less than men working at the same level for nearly twenty years. She only became aware of it through an anonymous tip off, and her claim for compensation for the lost pay failed, as she was required to show discrimination within the limitation period of 6 months (under the Civil Rights Act) which she could not do, because the decisions affecting her pay level had occurred many years earlier. As a result she was not compensated for most of the underpayment. It is possible, and indeed likely, that similar situations exist in Australia as there is, at present, no mechanism for employees to check whether their pay is fair in comparison with their co-worker's pay.

It is important for Australian law to allow women to check for pay inequity, and to ensure that a pay secrecy system based on contractual confidentiality terms does not prevent them from doing so. While the proposed Bill provides one option for doing this, alternative models exist that may be better tailored to the needs of Australian workers.

A problem with the model proposed in the Bill is that although it renders a term of a modern award, agreement or contract of employment that prevents disclosure of pay of no effect, thereby making pay secrecy clauses unenforceable, it only explicitly protects an employee who discloses pay information. It does not necessarily protect the right of employees to ask colleagues about their pay, or protect employees who request pay information from a co-worker from being penalised by their employer. It is not absolutely clear that an employee who asks one or more co-workers to share their pay information would be protected by the 'workplace right' provisions in the *Fair Work Act 2009* (ss 340, 342). Merely preventing a secrecy term from having effect, as the Bill does, is not the same as creating a positive right to make inquiries about pay equity and comparisons from co-workers rather than the employer. Ensuring that both employees who ask and those who disclose are protected from adverse consequences for such actions is essential to ensure the rights can be exercised without penalty. This could be done by adding to the Bill a provision that expressly protects employees who ask about pay rates from adverse consequences from their employers or fellow employees. Explicit protection for both the

person requesting information from co-workers and the person who provides pay information would be the most effective way to proceed. Nothing in the Bill obliges employees to provide that information, but simply asking for it or giving it on request should not be either prohibited or penalised.

Alternatively, there are other models, such as section 77 of the *Equality Act 2010* (UK) (see attachment). This model provides protection in a context whereby pay discussions can only occur for the purposes of checking pay equity within the workforce, rather than to generally publicise pay rates. While general pay transparency (such as is common in the Nordic countries) is a valuable mechanism to minimise pay inequalities, moving directly to this position may not be acceptable in Australia at the moment. The UK model provides a position that attempts to protect women's rights to pay equity while also responding to employer concerns about maintaining confidentiality of pay information.

I strongly encourage the Committee to recommend adoption of a mechanism to allow women to check pay equity with their co-workers, and to protect employees who request pay information and those who share it with them from any adverse employment consequences. This is a basic essential step towards gender pay equity. Ensuring there is explicit protection for those who seek pay information as well as those who disclose it must be, however, an essential element of any such change.

In the longer term, further important steps towards gender pay equity may include providing mechanisms for women to check with their employer (not just fellow employees) that they are being paid fairly. This could, for example, require access to pay grades and ranges, and particularly the criteria for discretionary pay elements such as performance pay. Even if individual pay levels are not disclosed, this would improve the fairness and equity of pay rules and practices. Another approach would be to require disclosure from employers (above a certain size) of pay equity data about their own workforce. I note that section 78 of the *Equality Act 2010* (UK) allows the government to require employers to publish gender pay gap information relating to their workforces. The UK government has moved ahead on this front during 2015 (as outlined below, p 4), indicating that gender pay gap reporting by employers has been accepted in the UK as an important step toward ensuring gender pay equity. While this is a different area to individual pay inquiries, it indicates that gender pay equity is an important issue that can no longer be put to one side with action deferred. It should be considered as an eventual goal in Australia as well.

Yours sincerely

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Attachment: ss 77 and 78 of the Equality Act 2010 (UK).

77 Discussions about pay

- (1) A term of a person's work that purports to prevent or restrict the person (P) from disclosing or seeking to disclose information about the terms of P's work is unenforceable against P in so far as P makes or seeks to make a relevant pay disclosure.
- (2) A term of a person's work that purports to prevent or restrict the person (P) from seeking disclosure of information from a colleague about the terms of the colleague's work is unenforceable against P in so far as P seeks a relevant pay disclosure from the colleague; and "colleague" includes a former colleague in relation to the work in question.
- (3) A disclosure is a relevant pay disclosure if made for the purpose of enabling the person who makes it, or the person to whom it is made, to find out whether or to what extent there is, in relation to the work in question, a connection between pay and having (or not having) a particular protected characteristic.
- (4) The following are to be treated as protected acts for the purposes of the relevant victimisation provision—
 - (a) seeking a disclosure that would be a relevant pay disclosure;
 - (b) making or seeking to make a relevant pay disclosure;
 - (c) receiving information disclosed in a relevant pay disclosure.
- (5) The relevant victimisation provision is, in relation to a description of work specified in the first column of the table, section 27 so far as it applies for the purposes of a provision mentioned in the second column.

<i>Description of work</i>	<i>Provision by virtue of which section 27 has effect</i>
Employment	Section 39(3) or (4)
Appointment to a personal office	Section 49(5) or (8)
Appointment to a public office	Section 50(5) or (9)

78 Gender pay gap information

- a. Regulations may require employers to publish information relating to the pay of employees for the purpose of showing whether, by reference to factors of such description as is prescribed, there are differences in the pay of male and female employees.
- b. This section does not apply to—
 - i. an employer who has fewer than 250 employees;
 - ii. a person specified in Schedule 19;
 - iii. a government department or part of the armed forces not specified in that Schedule.
- c. The regulations may prescribe—
 - i. descriptions of employer;
 - ii. descriptions of employee;
 - iii. how to calculate the number of employees that an employer has;
 - iv. descriptions of information;
 - v. the time at which information is to be published;
 - vi. the form and manner in which it is to be published.
- d. Regulations under subsection (3)(e) may not require an employer, after the first publication of information, to publish information more frequently than at intervals of 12 months.
- e. The regulations may make provision for a failure to comply with the regulations—
 - i. to be an offence punishable on summary conviction by a fine not exceeding level 5 on the standard scale;
 - ii. to be enforced, otherwise than as an offence, by such means as are prescribed.
- f. The reference to a failure to comply with the regulations includes a reference to a failure by a person acting on behalf of an employer.

In July 2015 the UK Conservative government announced that it will end the gender pay gap in a generation, requiring companies with more than 250 employees to report under s 78 as so few have reported during a period in which they were encouraged to do so voluntarily (Press release, My one nation government will close the gender pay gap, Prime Minister's Office, UK, 14 July 2015 at <https://www.gov.uk/government/news/prime-minister-my-one-nation-government-will-close-the-gender-pay-gap>). Further measures relating to reducing the gender pay gap were announced in October 2015. These include requiring larger employers to publish information about their bonuses for men and women as part of their gender pay gap reporting, extending plans for gender pay gap reporting beyond private and voluntary sector employers to include the public sector, and working with business to eliminate all-male boards in the FTSE 350 (Press release, PM announces new measures to eradicate gender pay inequality, Prime Minister's Office, UK, 25 October 2015 at <https://www.gov.uk/government/news/pm-announces-new-measures-to-eradicate-gender-pay-inequality>).