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Submission to the Inquiry by the Senate Education and Employment Legislation Committee into the Fair Work Amendment (Gender Pay Gap) Bill 2015

by

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The Women and Work Research Group

The University of Sydney Business School Women and Work Research Group (the WWRG) comprises academics from the University of Sydney Business School and the University of Sydney more generally who have an interest in research and policy development regarding gender and work.

The WWRG provides a scholarly environment for inquiry into all aspects of women, work, employment, family and community in the Asia-Pacific region and beyond. It provides a focal point for collaboration with established and emerging scholars, with research centres with similar interests and with practitioners and policy makers in the field. The WWRG has an extensive membership of academics and practitioners and holds regular seminars, roundtables and conferences. A number of members have a particular expertise in women's labour force participation issues, parental leaves, flexible working and women's pay and career patterns.

The WWRG also engages closely with public and political debates about maternity, family and carers' leave, the implications of changing industrial relations regulations on women, childcare and family violence. Recent studies and reports have included a focus on women and leadership in the NSW public sector, on work and care chains in the Asia-Pacific, an analysis of the financial impact of changes to Australia's paid parental leave system and on paid domestic violence leave.

Introduction

The gender pay gap (GPG) persists in Australia and elsewhere with the Organisation for Economic Co-operation and Development (OECD) interactive data tables graphically demonstrating this.¹ Australia's GPG is particularly persistent showing no ongoing decrease over recent years, rather an upward trend since 2004.² The GPG is caused by a number of interlinked factors. Women undertake the main share of caring roles in society, both formal and informal.³ The expectation and the reality of this means women need jobs they can combine with caring. This contributes to industry and occupational gender segregation where women are employed in predominantly less well paid industries (eg health care and social assistance) or are predominantly in lower level occupations in better paid ones (eg the finance and technology sectors). Caring roles have also been historically undervalued in the paid job market. Discrimination too plays its part with much research finding a large part of the GPG

¹ OECD Gender webpage, gender pay gap data available, <http://www.oecd.org/gender/data/genderwagegap.htm> viewed 8 March 2016.

² See above & Workplace Gender Equality Agency (2016) *Gender Pay Gap Statistics*, available, https://www.wgea.gov.au/sites/default/files/Gender_Pay_Gap_Factsheet.pdf viewed 8 March 2016.

³ Craig, L. and Mullan, K (2009) '“The Policeman and the Part-Time Sales Assistant”: Household Labour Supply, Family Time and Subjective Time Pressure in Australia 1997-2006,' *Journal of Comparative Family Studies*, pp.547-561.

unexplained by occupation or industry segregation, educational levels or choice of qualification.⁴

Many tools are used in Australia and internationally to decrease the GPG, including mandatory publication of organisational gender pay gaps (about to be introduced in the UK),⁵ and in Australia collective equal pay claims⁶ as well as gender equality reporting.⁷ The European Commission promotes pay transparency as one of these tools for reducing the GPG.⁸

The Fair Work Amendment (Gender Pay Gap) Bill 2015 (the Bill) aims to promote equal pay by removing regulation which, whether through an award, enterprise agreement or contract, curtails employees' freedom to discuss their salaries with each other. The Explanatory Memorandum states it intends to 'remov[e] legal prohibitions on workers discussing their own pay... without fear of retaliation from their boss'⁹ as a way to assist in reducing the GPG.

The value of pay transparency

Pay transparency may mean that pay systems are comprehensible and understood by employees so they know how their pay is established. It may also mean that employees are free to discuss their pay freely without any concern that they may be penalised by their employers. This latter type of pay transparency is the purpose of the Bill.

Both the types of pay transparency described above are tools for tackling the gender pay gap. Based on this and on the experience of the UK and the US on this policy issue (outlined below), we support the intent of the Bill but would suggest some changes and urge the Committee to make supplementary recommendations to improve its likely impact.

⁴ For example, Cassells, R, Yogi, V, Miranti, R and McNamara, J (2009) 'The impact of a sustained gender wage gap on the Australian economy,' University of Canberra: National Centre for Social and Economic Modelling, Canberra; Watson, I (2010) 'Decomposing the gender pay gap in the Australian managerial labour market,' *Australian Journal of Labour Economics* vol. 13(1), p. 49.

⁵ Gov UK website, Mandatory Gender pay gap reporting, available, <https://www.gov.uk/government/consultations/mandatory-gender-pay-gap-reporting> viewed 16 March 2016.

⁶ Under the Fair Work Act 2009, claims may be made to the Fair Work Commission.

⁷ Required by the Workplace Gender Equality Act 2012 for non public sector employees with 100 or more employees.

⁸ European Commission (2014) 'Commission Recommendation of 7.3.2014 on strengthening the principle of equal pay between men and women through transparency' available, http://ec.europa.eu/justice/gender-equality/files/gender_pay_gap/c_2014_1405_en.pdf viewed 8 March 2016.

⁹ Explanatory Memorandum to the Fair Work Amendment (Gender Pay) Bill 2015, p.1.

The USA

The US collective labour regulation legislation, the National Labour Relations Act 1935 (the NLRA), partially protects employee pay discussions needed for ‘mutual aid.’¹⁰ However, its scope and enforcement are problematic as:

- judicial decisions have considerably narrowed the extent of its protections over the years,
- available remedies where it is breached have proved ineffective and
- cases are ‘lengthy, burdensome and potentially expensive’ for employees to bring.¹¹

From mid 2014, the US Government prohibited federal contractors ‘from discriminating or retaliating against employees for discussing their compensation,’¹² a regulation which covers 20% of the US workforce.¹³ This new federal contractors’ requirements in the USA partially compensates for the failure of the Paycheck Fairness Act (PFA) to pass into law in the USA. The PFA would have provided more employees with pay transparency as if passed it would prohibit:

‘employers from punishing employees for sharing salary information with their coworkers and makes clear that employees cannot contract away or waive their rights to discussing and disclosing wages. This change would greatly enhance employees’ ability to learn about wage disparities and to evaluate whether they are experiencing wage discrimination.’¹⁴

Furthermore, and reinforcing the need to encourage pay transparency, action has been taken at state level in the US to prohibit pay secrecy:

‘Eleven states have passed their own laws banning pay secrecy: Michigan (1982), California (1984), Colorado (2008), Illinois (2004), Maine (2009), Vermont (2005), New Jersey (2013), New York (2015), Minnesota (2014), New Hampshire (2014), and Connecticut (2015).’¹⁵

¹⁰ National Women's Law Centre (2012) ‘Combating Punitive Pay Secrecy Policies,’ Factsheet, p.2.

¹¹ National Women's Law Centre (2012) ‘Combating Punitive Pay Secrecy Policies,’ Factsheet, p.2.

¹² Friedman, DS and O’Connor, C. (2014) ‘Pay transparency: the new way of doing business,’ *Compensation & Benefits Review*, vol. 46(5-6), 292-294, p.292.

¹³ Friedman and O’Connor, above, p.293.

¹⁴ National Women's Law Centre (2015) ‘How the Paycheck Fairness Act Will Strengthen the Equal Pay Act’, p.1.

¹⁵ Kim, Marlene (2015) ‘Pay Secrecy and the Gender Wage Gap in the United States,’ *Industrial Relations: A Journal of Economy and Society*, vol. 54(4), pp. 653-654.

The UK

The UK Equality and Human Rights Commission (EHRC) says of pay secrecy:

‘Pay secrecy can mask discrimination. On a very basic level, how does a woman know she is getting equal pay for equal work if she does not know and is forbidden or actively discouraged from finding out what male colleagues earn?’¹⁶

The EHRC also notes:

‘Research into openness about pay is one of the factors known to be associated with a narrowing of the gender pay gap so such secrecy matters. There is a correlation between transparency – making visible the impact on male/female earnings differentials of the ways in which an organisation sets rates of pay – and a lower gender pay gap. The gender pay gap in the public sector, where generally speaking, pay is more transparent, is 11.6% as compared to a private sector gap of 20.8%.’¹⁷

A number of UK experts on how to combat gender pay inequity have commented recently to the WWRG that ending secrecy about pay rates would help reduce the gender pay gap. They are also concerned about the lack of impact of the UK provision (see below) partly due to how it is drafted and partly as its existence is so little known.

Camilla Palmer, an Honorary QC for her services to employment law states:

‘Ending pay secrecy between employees in organisations is essential to combatting gender pay inequity. Even so, most employees will be nervous about discussing their pay in case it rebounds on them as their employer disapproves. So we need a mechanism enabling employees to find out from their employer what the pay is for jobs similar to theirs.’¹⁸

Geraldine Healy, Professor of Employment Relations & Director of the Centre for Research in Equality and Diversity (CRED), Queen Mary University of London, an internationally respected researcher in equal pay comments:

‘Pay secrecy inhibits knowledge about pay and pay distribution within organisations. Such pay secrecy has serious consequences making it more difficult to enforce equality legislation and is a barrier to reducing the gender pay gap. Pay transparency is an important step forward, particularly where there is a requirement that transparent pay is disaggregated by department and occupation. Such detailed transparency would compel employers to justify their remuneration strategies. Many employers would find such justification a challenge because of the informal nature of pay determination which is often detrimental to women’s pay conditions. Pay transparency is not new; in the

¹⁶ UK Equality and Human Rights Commission webpage, ‘Protected discussions with colleagues and others about pay’, available,

<http://www.equalityhumanrights.com/private-and-public-sector-guidance/employing-people/guidance-employers-about-their-rights-under-equality-act-2010/equal-pay/discussing-pay-colleagues/protected-discussions-colleagues-and-others-about-pay>
viewed 8 March 2016.

¹⁷ See EHRC above.

¹⁸ Personal communication 4 March 2016.

debate on pay secrecy we should not forget that pay is transparent for workers on the minimum wage and for those whose pay is determined jointly with unions in collective agreements where the gender pay gap is low. Such existing transparency raises the question as to why pay secrecy provokes such debate and necessitates regulation. One can only conjecture that pay secrecy is defended in order to protect individualised pay determination, thereby preventing the transparency of pay for senior and middle levels and ultimately preserving the existing gender pay gap.’¹⁹

Emily Pfefer, doctoral student at Queen Mary University of London working on gender pay gap issues, made the point: ‘social constraint on pay discussions between colleagues is so great that clear legislation is needed to start to overcome it.’²⁰

In the UK, a limited protection for employees discussing their pay was enacted in 2010.²¹ The provision is complex. It prevents an employer from enforcing a term in an employee’s contract which prohibits an employee disclosing their pay or asking a colleague (or ex-colleague) about this. However, this protection only applies where the disclosure or request is to discover if there is sex (or another ground of) discrimination.

A leading British barrister practising in equal pay matters has pointed out that s77 (of the UK Equality Act 2010) permits contractual prohibitions on discussing pay to remain in contracts, only making their enforcement against a protected employee impossible. She comments:

- this means the employer may leave a total ban in place potentially misleading employees as to the state of the law
- this may also lead an adjudicating tribunal in a claim for victimisation for a discussion or disclosure, to consider that leaving the total ban in the contract is a ‘device to cover up discrimination or to frighten off employees from asking questions.’
- ‘few employees will know that they are protected by [the legislation].’
- assessing if an employee intended to make inquiries or disclosure for discrimination purposes may be difficult for an employer to know or an employee to show.²²

Other commentators have also pointed out that employees are left with the job of enforcing their rights if victimised for a discussion.²³ There have been no reported cases under the new provision.

¹⁹ Personal communication 12 March 2016.

²⁰ Personal communication 9 March 2016.

²¹ S. 77 Equality Act 2010 (UK).

²² Romney D, Queen’s Counsel (QC) (undated) ‘Equality Act 2010 ‘Briefing 3: Stripping the rhetoric out of Pay Secrecy clauses,’ published by Cloisters Chambers, London, available, www.cloisters.com/news-pdf-downloads/daphne-romney-s--77.pdf viewed 8 March 2016.

²³ Doherty, M (2011) ‘Evolutionary Rather Than Revolutionary: The Equality Act 2010.’ *Business Law Review* pp. 52-53, cited in Pfefer, E (20) ‘Policy Debates on Wage Transparency in the US and the UK and Their Implications for Gender Pay Equality’ *MSc dissertation*, the London School of Economics.

Conclusion

We note and agree with Professor Gaze's submission²⁴ to the Committee that as it stands the Bill may not protect employees who ask for pay details but only those disclosing them. For the reasons above the WWRG suggests the UK legislation, if used as a model, would need its problematic aspects remedied.

Thus whilst noting that other countries are seeking legislative means to enable greater pay transparency, and welcoming the Bill as providing a useful practical step to promote gender pay equality in Australia, we suggest the following for the Committee's consideration:

- That the Bill expressly bans pay secrecy clauses, making provision for their removal in the relevant instruments, or as a minimum amends it as Professor Gaze suggests, that is to ensure employees who ask for pay details as well as those disclosing them are protected from victimisation for doing so.
- The Fair Work Information Statement given to an employee at the beginning of their employment by their employer²⁵ contain a statement about the provision in order to educate the community about pay transparency.
- The Fair Work Ombudsman is further resourced to provide:
 - Publicity for the new provision so it is widely understood;
 - Assistance to employers and employees in ensuring the new law is complied with.

Acknowledgement

The WWRG acknowledges the assistance of Emily Pfefer, doctoral student at Queen Mary University of London, who is researching pay secrecy and the wage taboo. She completed her MSc dissertation 'Policy Debates on Wage Transparency in the US and the UK and Their Implications for Gender Pay Equality' at the London School of Economics.

²⁴ Submission 17.

²⁵ Ss 124-125 Fair Work Act 2009 and see the Fair Work Ombudsman website, available <https://www.fairwork.gov.au/employee-entitlements/national-employment-standards/fair-work-information-statement> viewed 8 March 2016.