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House of Representatives

Standing Committee on Employment and Workplace Relations

Inquiry into

Pay Equity and Associated Issues relating to Increasing Female Participation in the Workforce

Follow-up to Sydney hearing, 26 September, 2008

Supplementary statement 29 September 2008

Response to the question on notice from Mr Mike Symon

Further comments: Pay equity and the public interest; elaboration of final response to question from Ms Sharryn Jackson, Chair

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1. Question on Notice: Explanation for rise in number of pay equity claims in UK.

In Clause 19 of our original submission we wrote:

> *In the UK, where individual pay equity claims had skyrocketed to over 17,000 a year in 2006, a proposed method for dealing efficiency with the underlying problem took the form of advice to the offending organisation to undertake a pay and employment equity review and implement a follow-up response plans. At this stage, however, an unduly 'light touch' legislative approach means that such audits will not be mandatory.*

This information was based on the following statement:

> *Evidence of increasing awareness of the right to equal pay and women's willingness to assert that right, can be seen in the rise in the number of equal pay claims accepted annually by employment tribunals from 590 in 1999 to 17,268 in 2006.*[1]

In this context the Government Equalities Office was charged with leading work to consolidate discrimination law into a single Equalities Act and to ensure that public sector bodies at all levels to close the pay gap. The methods include development of an equality check tool to help employers look at the range of issues impacting on the gender pay gap, statutory support for union equality representatives, and the funding of projects to improve the availability of high quality part-time work. This approach covers the public sector only. Meanwhile, in the context of the Single Equalities Bill, the UK Government consulted on ways of simplifying equal pay legislation, making it easier for it to work in practice**.** In relation to the private sector, it adopted the excessively 'light touch' approach of 'spreading good practice, and promoting use of a diagnostic gender equality check tool.

We are indebted to Mairi Steele (EOWA) for pointing out that much of the recent increase in pay equity litigation in the UK has been in the area of local government and health. Amongst the documentation she has provided is an extract from IDS Brief 859 August 2008, which cites John Cavanagh QC as giving two reasons for the escalation of cases:

- Large-scale local government (Single Status) and health sector (Agenda for Change) evaluation and re-grading exercises, whose purpose is to eliminate sex bias in pay, but which have generated litigation.
- The rise of 'no win, no fee' solicitors, who have been encouraging claimants to take legal action.

A compounding factor encouraging individual litigation is probably the impact of the 2004 EU requiring six years' back pay, compared with the two years more common in UK cases.[2] As Ms Steele comments, these circumstances are unlikely to be relevant to the Australian regulatory climate. It is to be noted, in the UK context, that GMB, the union which initiated the first equal value case, has itself been the subject of litigation, apparently partly because of its collective approach to pursuing equal pay in the context of pay protection and avoiding job losses. This was the approach adopted in a range of public sector comparable worth cases in the US in the 1980s. The GMB has appealed to the House of Lords for a ruling on the balance of collective and individual rights.

[1] PSA Delivery Agreement, Clause 3.15, October 2007)
[2] *The Times*, January 14, 2008 cited by M. Steele, email, 26 September, 2008

Meanwhile, to add to the information provided by Ms Steele, we include some advice to private sector employers, contained on a popular personnel management website. We include it because it contains advice to private sector employers:

> *Equal pay audits are not mandatory in the UK, although some have argued that the new gender equality duty has introduced such an audit requirement for those public and private sector employers to whom the duty applies.*
>
> *Large employers, whose remuneration packages may be vulnerable to equal pay claims, may choose to follow the recommendations of the EOC Code of Practice on Equal Pay and carry out voluntary self-evaluation through equal pay audits.*
>
> *However, a decision to conduct self-evaluation to reduce the risk of equal pay claims should not be taken lightly. A properly conducted audit can be complex and time consuming, especially as the definition of pay for the purposes of the EPA extends beyond salary to include other contractual benefits, such as bonus, pension and special staff allowances.*
>
> *Equal pay audits will also be open to disclosure in future litigation. Those with access to the data must be trained and supervised to ensure that data is not used inappropriately.*[3]

As we understand it, the gender equality duty is being replaced by a general duty, and many of the private sector employers covered would be those contracting with government agencies. The advice cited here is slightly out of date, but two issues remain - less stringent .equal pay regulation o the private sector, and some lack of clarity about the relationship between collective, proactive remedies, and individual retrospective remedies. We believe that Ms Steele is correct in suggesting tentatively that this is less of an issue in Australia. Here, even when individual cases are run, there has been no rush of individual claims to retrospective pay, nor do specialised tribunals make such awards as have occurred in the UK and Canada.

In the lead-up to the Single Equalities Bill, the UK Government conducted a Discrimination Law Review, issuing the Green Paper *Framework for Fairness: Proposals for a Single Equality Bill for Great Britain*. A number of responses cited this increase to over 17,000 claims a year in equal pay litigation. Among the suggestions for improving the pay equity legislative framework were the following:

- Compulsory equal pay audits, with employers required to monitor and report on action that they are taking to address all inequalities;
- Wider use of a free judicial mediation service in employment tribunals as a way of getting the parties to consider settlement from a different perspective to commercial litigation.
- Use of representative actions so that the pressures to litigate are removed from individuals.
- Power for tribunals to make wider recommendations following a finding of unlawful discrimination so that employers losing equal pay claims would be required to carry out and report on an equal pay audit and changes discriminatory policies and procedures affecting

[3] C. Walter and J. Geier (2007)'Equal Pay: Follow the US Leader', *Personneltoday,com* ,11 July 2007, available (http://www.personneltoday.com/articles/2007/07/11/41428/equal+pay+follow+the +us+leader.html, accessed 29 September 2008.

groups of employees; this was seen as giving tribunals a role in enabling remedial action which could prevent future disputes arising with other employees.[4]

- Use of hypothetical comparator to overcome problem of gender-segregated workplaces;
- Extension of the public sector equality duty to cover all strands of equality in the private, voluntary and not-for-profit sectors;
- Inclusion in the public sector duties of specific statutory duty to use procurement as a lever to tackle inequalities in the private, not-for-profit and voluntary sectors;
- Capacity for unions to bring representative actions on equal pay and discrimination cases;
- Statutory rights for union equality representatives;
- Provision for claims to be brought on more than one ground to address multiple discrimination;
- Introduction of carer status as a grounds for discrimination ;
- A purpose clause in the legislation which makes a clear statement about its principles and objectives.[5]

2. The public interest test - Is redressing pay and employment inequity in the public interest?

In hearings earlier in the day on 26th September 2007, the issue was raised that pay equity adjustments may be opposed on the grounds of public interest arguments based on costs. Even if there is less risk in Australia than in the UK of claims for retrospective redress in the form of paynment arrears, there is clearly a prospective closing of the pay gap. This however, has to be weighed against public interest arguments based on two types of opportunity cost, both involving lost productivity. These productivity arguments suggest that it is false economy to rely on pay inequity as a way of crimping on the wages bill, and that to do so is not in the public interest.

In order to justify this argument, we return to the example of the aged care industry. Our original submission referred to the significant levels of pay inequity experienced by people such as Personal Care Assistants (PCAs) in this industry. We cited a National Institute of Labour Studies (NILS) study that surveyed over 3000 staff in residential aged care facilities and found that PCAs , more than nurses, were highly dissatisfied with their pay, feeling that the value and skills of their work were undervalued. Over 60 per cent were dissatisfied or very dissatisfied with their pay levels, particularly with the flat incremental structures that failed to recognise accumulation of skills over time. As a result the turnover rate was and is is very high in this industry. The NILS study identified turnover rates of over a quarter in the first year of

[4] Fawcett Society (2007) Response to: "Framework for Fairness: Proposals for a Single Equality Bill for Great Britain", September, available http://www.fawcettsociety.org.uk/documents/DLR%20response%20final.doc, vided 289 September 2008.

[5] Amicus (2007) Unite the union Amicus Section response to the Discrimination Law Review – A Framework for Fairness: Proposals for a Single Equality Bill for Great Britain,July, available http://www.epolitix.com/Resources/epolitix/Forum%20Microsites/Amicus-Unite/DLR%20Review%20Response%20-%20July%202007%20final%20%20draft.pdf , viewed 29 September 2008.

employment. Not only does high turnover reduce the quality of services to vulnerable people, it is a budgetary drain, adding to running costs more significantly that a pay structure genuinely based on work value.[6]

Turnover is very high hidden cost to the employer, for reasons well-illustrated in the EOWA turnover costs calculator. When a staff member leaves, direct and indirect costs of replacement and lost productivity run at well over the cost of a year's salary, over and above the salary paid to the person working in the position.[7] But over and above this productivity loss to the organisation, is the national wastage resulting from under-utilised training investment. As the NILS studies showed, over 80% of staff in aged care facilities have specific occupational qualifications at Certificate III or above. Turnover represents a loss of these skills that is clearly not in the national interest. A similar point can be made about other areas where women's skills are undervalued. It is a commonplace that there would be no shortage of teachers and nurses if more of those who trained for these professions were actually working in them. Pay inequity is the source of 'brain drain' or under-utilisation of human capital that neesd to be counted as an offset in the calculation of national productivity.

3. Concluding comments

Our original submission focused on ways in which the legislation, regulations, and administrative arrangements under the act, could bring together overarching pay and employment equity principles and the infrastructure for establishing a pay and employment equity practice 'on the ground'. We argued that the following measures would be effective:

- The supportive, facilitative and educative role of FWA as an administrative agency, in addition to its tribunal role,
- Coordination with the expertise of EOWA and the AHRC in establishing standards and providing education, together with oversight of mandatory equity activities in both the public and private sectors and the tightening of review and action plan processes, rolled out at sectoral, occupational, or organisational, with pay equity reviews mandatory where 70% or more of workers are women;
- A process for auditing intangible skills, at a range of experience levels, particularly in jobs with flat career structures in sectors, occupations, industries where labour shortages are emerging and where women are concntrated ;
- A pay equity Object and Principle in the Act, framed explicitly in terms of equal value, with redress required in cases of undervaluation on any of the grounds set out in the

[6] Richardson, S. and Martin, B. (2004) *The Care of Older Australians: A Picture of the Residential Aged Care Workforce*, National Institute of Labour Studies, Flinders University, Adelaide; Moskos, M and Martin, B. (2005) What's Best, *What's Worst? Direct Carers' Work in their Own Words*, The National Institute of Labour Studies, Flinders University, Adelaide; Healy, J. and Moskos, M. (2005) *How Do Aged Care Workers Compare With Other Australian Workers?* Adelaide: National Institute of Labour Studies, Flinders University.

[7] Australia. Equal Opportunity for Women Agency (n.d.) EOWA Costing Turnover Calculator. Homepage http://www.eowa.gov.au, accessed 2 April, 2006.

Queensland Equal Remuneration principle (award history, casualisation, low unionisation, etc), without a need for a comparator, and without the need to establish discrimination;

- Statutory support for the introduction of union equality representatives and skills representatives in workplaces.

Above all, we argue that:

- A condition of the approval of agreements should be evidence of the following:
  - A clause indicating the agreed intent to audit and report publicly on impacts of implementation on the gender distribution of classifications and pay points, and gender patterns of access to over-awards and benefits;
  - A commitment that flexibility clauses will not disadvantage workers with family responsibilities, and that these workers will have genuine choice in working hours arrangements and employment modes.
- Each Modern Award should contain a statement of commitment to pay and employment equity, a provision for monitoring the gender impact of the award, and a mechanism for seeking an award review on the basis of identified patterns of undervaluation .