



Fair Work Amendment (Gender Pay Gap) Bill 2015

Senate Education and Employment Committee

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Acknowledgement

The Law Council of Australia wishes to acknowledge the assistance of the following Law Council Committees and Constituent Bodies in the preparation of this submission:

Law Council of Australia National Human Rights Committee

Law Council of Australia Equal Opportunity Committee

Law Council of Australia Industrial Law Committee

Law Society of New South Wales

Law Institute of Victoria

Introduction

1. The Law Council of Australia is pleased to provide the following submission to the Senate Education and Employment Committee on the Fair Work Amendment (Gender Pay Gap) Bill 2015. This submission covers:
 - engagement of Articles 2, 3, 5 and 11 of the *Convention on the Elimination of Discrimination against Women* (CEDAW), and Articles 3 and 7 of the *International Covenant on Economic, Social and Cultural Rights* (ICESCR);
 - engagement of the International Labor Organisation *Equal Remuneration Convention* and *Discrimination (Employment and Occupation) Convention*;
 - impacts of increased transparency of remuneration on the retention and progression of women lawyers; and
 - industrial law related issues associated with the Bill.
2. The Law Council of Australia, Law Society of New South Wales and the Law Institute of Victoria support the aims of the Bill as a useful mechanism to assist in addressing the gender pay gap within the Australian community. Data collected by the Workplace Gender Equality Agency (WGEA) indicates that the gender pay gap currently stands at 17.9%.¹ On a trend analysis, it has barely shifted over the last decade. Since 1995, the gender pay gap consistently ranged between 15 and 17 per cent.² However, when the issue of pay transparency is factored in the gap tends to be greater, particularly in comparing the pay levels for awards, collective agreements and individual arrangements.³
3. The Law Council is of the view that the Federal Government has an obligation under international law to introduce laws aimed at bringing about equal remuneration for work of equal value, with Australia having ratified the CEDAW, ICESCR, and the *Equal Remuneration Convention* and the *Discrimination (Employment and Occupation) Convention*.
4. Removing legal prohibitions on workers discussing their pay will assist in removing pay secrecy which can hide discrimination and unconscious bias. Providing the opportunity to discuss pay in an optional, rather than mandatory form, as proposed in the Bill, is the Law Council's preferred approach from a legal and policy perspective.
5. Laws that prohibit discrimination based on gender and provide for equal remuneration for work of equal value⁴ have not removed the gender pay gap. Differences in remuneration arising for work of equal value remain. Discrimination is difficult to remove where it is hidden from view. The Law Council has a particular interest where this affects the legal profession, including the retention and progression of women lawyers.

¹ ABS (2015), Average Weekly Earnings, Australia, May 2015, cat. no. 6302.0, viewed 7 January 2016, www.abs.gov.au/ausstats/abs@.nsf/mf/6302.0.

² Workplace Gender Equality Agency, Gender Pay Gap Statistics, September 2015, viewed 12 February 2016, www.wgea.gov.au/sites/default/files/Gender_Pay_Gap_Factsheet.pdf.

³ ABS (2015), Employee Earnings and Hours, Australia, May 2014, cat. no. 6306.0, viewed 7 January 2016, www.abs.gov.au/AUSSTATS/abs@.nsf/mf/6306.0.

⁴ Including Part 2-7 of the *Fair Work Act 2009* (Cth).

6. The Law Council, Law Society of New South Wales and the Law Institute of Victoria support the passage of the Bill. However, the Law Council suggests that amendments are warranted to give fuller effect to the intended aims of the Bill.

Why Does Gender Pay Inequality Happen?

7. The Law Institute of Victoria notes that the causes of gender pay inequity are complex and multidimensional, making the issue persistent and difficult to solve.⁵ Industries where women have traditionally dominated the workforce, such as healthcare, education, human resources and administration, tend to be paid less, and some of the lowest-paid industries including retail, hospitality and accommodation services, predominantly employ women.⁶

Workplace Laws and Gender Pay Equity

8. The Law Institute of Victoria notes that it is important to place the development of workplace laws and gender pay equity in context. Australian laws relating to pay equity date back to 1907, when gender discrimination in labour was institutionalised in the Harvester decision.⁷ The Harvester decision determined the male basic wage on the basis of 'family' needs, while the female basic wage was determined on 'individual' needs for a single woman. Several cases following the Harvester decision sought to reinforce the pay inequity and ultimately the principles considered in the case led to the segregation of males and females into different occupations which helped perpetuate gender pay inequalities.⁸
9. It was many decades later that the principle of equal pay for equal work was considered and first agreed to in the Equal Pay Case of 1969.⁹ However, the principle only applied in cases where males and females performed similar work, and due to a history of labour segregation work usually performed by females, such as nursing and administrative support services, were not covered by the decision.
10. The principle of 'equal pay for work of equal value' (which determined the value of work without regard to gender) was not developed until 1972 in the National Wage Case and Equal Pay Case.¹⁰ Legislation for equal remuneration was eventually enacted in 1993 through the *Industrial Relations (Reform) Act 1993* and the principle has continued throughout all the industrial relations legislation, including the current *Fair Work Act 2009* (Cth).
11. The *Fair Work Act 2009* (Cth) requires the Fair Work Commission to take into account the principle of equal remuneration for work of equal or comparable value in the setting and adjusting of minimum wages as well as the adjustment of modern awards.¹¹ The Fair Work Commission must also make equal remuneration orders that:

⁵ Marianne Delpo Kulow, 2013, 'Beyond the Paycheck Fairness Act: mandatory wage disclosure laws a necessary tool for closing the residual gender wage gap', *Harvard Journal on Legislation* Vol 50, p 385.

⁶ *Ibid* n2.

⁷ *Ex parte HV McKay* (1907) 2 CAR 1 (Cth).

⁸ For a comprehensive review of the development of equal remuneration within the Australian context see Layton M, Smith M and Stewart A (2013), *Equal Remuneration under the Fair Work Act 2009*, The University of Adelaide, a report for the Pay Equity Unit of the Fair Work Commission.

⁹ *Equal Pay Case* (1969) 127 CAR 1142 (Cth).

¹⁰ *National Wage Case and Equal Pay Cases* (1972) 147 CAR 172 (Cth).

¹¹ *Fair Work Act 2009* (Cth), s.134(1)(e).

“it considers appropriate to ensure that, for employees to whom the order will apply, there will be equal remuneration for work of equal or comparable value”.¹²

12. While the workplace relations legislation enacted in the last 20 years have all provided for equal remuneration, the gender pay gap has continued to grow. A recent report commissioned by the Fair Work Commission titled, ‘Earnings and Characteristics of Employees by Gender and Industrial Arrangement’¹³ found that the hourly earnings for award-reliant females and males were relatively similar. However, when wage negotiations were decentralised into private individual arrangements, on average males earned more than females, even when controlling for personal and employment characteristics. The authors established that awards reduced the gender pay gap and that a more decentralised form of wage-setting produced the opposite effect. One of the major differences between the two processes is transparency.

Proposed Amendments to the Fair Work Amendment (Gender Pay Gap) Bill 2015

13. The Law Council supports the Bill, however suggests that some amendments to the Bill are warranted to greater reflect its aims as outlined in the Explanatory Memorandum.

Restrict Bill to Permitting Disclosure to Colleagues and Advisers

14. As drafted the conduct that the Bill seeks to permit extends beyond employees merely being able to tell their colleagues what they are paid. It seeks to removes the capacity to place a restraint on employees telling people other than their colleagues what they are paid. That means employers could not reach an agreement with an employee that the employee will not tell the public or other employers their remuneration.
15. While there may be reasons why it is in the public interest for some employees to have that freedom, the stated purpose of this Bill does not appear to be advanced by permitting such conduct. The Industrial Law Committee has suggested that the Bill could be restricted to its stated purpose by adding the following bold words to proposed 333B(a):

*“prohibits an employee from disclosing **to other employees of the employer, an industrial association or professional adviser**, the amount of, or information about, the employee’s pay or earnings”*

Expansion of Bill to Refer to all Remuneration

16. The Explanatory Memorandum states that the provision is to be read broadly, to permit employees to disclose “a broad range of information about the employee’s pay or earnings” that would include “share allocations . . . professional memberships . . . company cars or parking spaces”. However, the word “pay” is not defined by the *Fair Work Act 2009* (Cth). Its ordinary meaning would not include matters such as professional memberships, company cars or parking spaces.

¹² *Fair Work Act 2009* (Cth), s 302 (1).

¹³ David Rozenbes and Samantha Farmakis-Gamboni, *Earnings and characteristics of employees by gender and industrial arrangement*, A report for the Pay Equity Unit of the Fair Work Commission, December 2015.

17. The word “earnings” is defined in s332(1) of the *Fair Work Act 2009* (Cth) for the purpose of defining a high income employee. The definition includes “the agreed money value of non-monetary benefits”. Even if it were to be assumed that definition should also be applied when the same word is used in the proposed new section, it would arguably not capture all of the non-monetary benefits that the Explanatory Memorandum seeks to have protected. In particular, benefits that do not have an “agreed” money value may not be included.
18. Alternative approaches that would be more suited to achieving the stated purpose, include:
- (a) adding a suitable definition of the expression “pay or earnings” for the purposes of the provision; or
 - (b) replacing the expression “pay or earnings” with the word “remuneration”.
19. While not defined by the Act the word “remuneration” is used in the Act and has a well-understood meaning that incorporates all monetary and non-monetary compensation for work done. In *Equal Remuneration Decision 2015* [2015] FWCFB 8200 at [276] the Commission said (footnotes omitted):

*“All parties appearing before us accepted that ‘remuneration’ should be interpreted according to its ordinary meaning, so that it is not confined to wages or salary and includes all other monetary and non-monetary compensation paid as consideration for service under an employment contract. This approach is consistent with that taken to the interpretation of ‘remuneration’ under the WR Act by the Federal Court Full Court in *Oliveri v Australian Industrial Relations Commission* and a Full Bench of the Commission in *Rofin Australia Pty Ltd v Newton*. In the absence of any special definition of ‘remuneration’ in the FW Act, we accept that it should be interpreted in accordance with its ordinary meaning.”*

Provide Protection to Employees who reveal their Remuneration to Colleagues

20. As drafted the Bill would prevent an award, enterprise agreement or contract from permitting an employer to take “adverse action” against an employee for revealing their remuneration. “Adverse action” is defined in Part 3-1 and includes dismissal, injuring an employee in their employment and altering the position of the employee to the employee’s prejudice.
21. The Bill however does not create a workplace right for employees to reveal to fellow employees their remuneration. That means that employees would not have the protection of Part 3-1 if their employer took adverse action against them for revealing their remuneration to their fellow employees.
22. The issue could be addressed by the Bill creating such a workplace right. If that were to be done it would be appropriately balanced by a similar workplace right to choose not to disclose remuneration, to ensure protection for employees who might be pressured to reveal their remuneration.
23. Such an approach could be achieved in various ways, including by adding a further sub-provision stating that *an employee has the right to disclose or not disclose to other employees of the employer, an industrial association or professional adviser, their pay and earnings [or remuneration].*

Convention on the Elimination of Discrimination against Women

24. The Statement of Compatibility with Human Rights notes that the Bill engages Article 2 and Article 5 of CEDAW. The Law Council notes that the Bill also engages Articles 3 and 11 of CEDAW. These provisions provide that:

Article 3

“States Parties shall take in all fields, in particular in the political, social, economic and cultural fields, all appropriate measures, including legislation, to ensure the full development and advancement of women, for the purpose of guaranteeing them the exercise and enjoyment of human rights and fundamental freedoms on a basis of equality with men.”

Article 11

“1. States Parties shall take all appropriate measures to eliminate discrimination against women in the field of employment in order to ensure, on a basis of equality of men and women, the same rights, in particular:

....

(d) The right to equal remuneration, including benefits, and to equal treatment in respect of work of equal value, as well as equality of treatment in the evaluation of the quality of work...”

25. Australia’s compliance with these articles with respect to the gender pay gap arose in the Concluding Observations of the Committee on the Elimination of Discrimination against Women (CEDAW Committee) issued on 30 July 2010.¹⁴ The CEDAW Committee urged Australia:

“...to take concrete measures to eliminate occupational segregation, including by removing barriers to women in all sectors and to ensure equal opportunities for, and equal treatment of, women and men in the labour market...[i]t further requests that the State party provide a comprehensive assessment of the effectiveness of the Fair Work Act in eliminating pay gap in its next periodic report.”

26. The Law Council notes that the proposed amendment to the Fair Work Act 2009 (Cth) to increase pay transparency would go some way to fulfilling Australia’s compliance with the CEDAW Committee’s Concluding Observations. The Law Council is of the view that that the Bill positively engages Articles 2, 3, 5 and 11 of CEDAW.

International Covenant on Economic, Social and Cultural Rights

27. The Statement of Compatibility should also note the engagement of Article 3 and Article 7 of ICESCR. They provide that:

¹⁴ Concluding Observations of the Committee on the Elimination of Discrimination against Women, CEDAW/C/AUL/CO/7, 30 July 2010.

Article 3

“The States Parties to the present Covenant undertake to ensure the equal right of men and women to the enjoyment of all economic, social and cultural rights set forth in the present Covenant.”

Article 7

“The States Parties to the present Covenant recognize the right of everyone to the enjoyment of just and favourable conditions of work which ensure, in particular:

(a) Remuneration which provides all workers, as a minimum, with:

(i) Fair wages and equal remuneration for work of equal value without distinction of any kind, in particular women being guaranteed conditions of work not inferior to those enjoyed by men, with equal pay for equal work...”

28. Article 3, in relation to article 7 requires, inter alia, that the State party identify and eliminate the underlying causes of pay differentials.¹⁵

29. Australia’s compliance with Article 7 and the gender pay gap arose in the Concluding Observations of the Committee on Economic, Social and Cultural Rights (ICESCR Committee) issued on 12 June 2009.¹⁶ The ICESCR Committee recommended that Australia:

“...continue strengthening its effort to enhance equality between men and women in the work place, in particular those initiatives aimed at implementing the principle of equal pay for work of equal value.”

30. The Law Council notes that the proposed amendment to the Fair Work Act 2009 (Cth) to increase pay transparency would go some way to fulfilling Australia’s compliance with the ICESCR Committee’s Concluding Observations. The Law Council is of the view that that the Bill positively engages Articles 3 and 7 of ICESCR.

Equal Remuneration Convention and Discrimination (Employment and Occupation) Convention

31. While not required in the Statement of Compatibility, due to the definition of human rights contained in the *Human Rights (Parliamentary Scrutiny) Act 2011*, the Law Council notes the relevance of Australia’s international law obligations under the International Labour Organisation *Equal Remuneration Convention* (No. 100) and the *Discrimination (Employment and Occupation) Convention* (No. 110).

32. Ratified by Australia on 10 December 1974, the purpose of the *Equal Remuneration Convention* is to ensure equal remuneration for men and women workers for work of equal value. In particular, Article 2 states:

¹⁵ Committee on Economic, Social and Cultural Rights, E/C.12/2005/4, 11 August 2005.

¹⁶ Concluding Observations of the Committee on Economic, Social and Cultural Rights, E/C.12/AUS/CO/4, 12 June 2009.

“1. Each Member shall, by means appropriate to the methods in operation for determining rates of remuneration, promote and, in so far as is consistent with such methods, ensure the application to all workers of the principle of equal remuneration for men and women workers for work of equal value.

2. This principle may be applied by means of--

*(a) **national laws** or regulations...*” [emphasis added]

33. The Law Council notes that the Bill would be consistent with Australia’s treaty obligations under the *Equal Remuneration Convention* as a measure that is aimed at ensuring the principle of equal remuneration for men and women workers for work of equal value. The relevance of the *Equal Remuneration Convention* and its intersection with CEDAW is noted in General Recommendation 13 by the CEDAW Committee.¹⁷

34. Ratified on 15 June 1973, the purpose of the *Discrimination (Employment and Occupation) Convention* is to ensure states implement measures aimed at prohibiting discrimination and exclusion on the basis of race or colour, sex, religion, political opinion, national or social origin in employment. Article 2 states:

“Each Member for which this Convention is in force undertakes to declare and pursue a national policy designed to promote, by methods appropriate to national conditions and practice, equality of opportunity and treatment in respect of employment and occupation, with a view to eliminating any discrimination in respect thereof.”

35. Article 3 provides further detail on how to comply with Article 2. Article 3 states:

“Each Member for which this Convention is in force undertakes, by methods appropriate to national conditions and practice:

...

*(b) To **enact such legislation** and to promote such educational programmes as may be calculated to secure the acceptance and observance of the policy”*

...

[emphasis added]

36. The Law Council notes that the Bill would also be consistent with Australia’s treaty obligations under the *Discrimination (Employment and Occupation) Convention* as a measure which seeks to provide the equality of treatment in respect of employment.

Gender Pay Equity Best Practice Guide

37. The Law Society of New South Wales notes that the Fair Work Ombudsman’s Gender Pay Equity Best Practice Guide states that there are many benefits for business in achieving gender pay equity, including the following:

(a) achieving fairness and respect in the workplace;

¹⁷ Committee on the Elimination of Discrimination against Women, General Recommendation 13 (eighth session, 1989).

- (b) creating a motivated, happy and productive workforce;
- (c) becoming an employer of choice;
- (d) attracting and retaining the best and brightest staff;
- (e) improving staff retention and thereby reducing turnover costs;
- (f) fulfilling a business' legal obligations;
- (g) inspiring consumer confidence;
- (h) preventing negative public relations issues arising from legal proceedings or allegations of gender pay inequity;
- (i) avoiding a costly discrimination complaint; and
- (j) attracting government contracting opportunities.

38. The Gender Pay Equity Best Practice Guide also notes that ensuring transparent remuneration policies and practices is an example of organisational best practice to achieving gender pay equity.

Retention and Progression of Women Lawyers

39. Retention and re-engagement of women in the legal profession is an important issue for the national profession and one which has been a priority for the Law Council of Australia.
40. In 2013 the Law Council conducted the National Attrition and Re-engagement Study to obtain quantitative and qualitative data and confirm trends in progression, attrition and re-engagement rates of female lawyers. The results of the 2014 Final Report indicate that women continue to fare worse than males in terms of remuneration and status despite the majority of female law students and young lawyers. An opportunity was identified for clear and transparent data and guidance to be provided on pay rates, particularly how much lawyers should be paid and how they should be performing relative to their level.
41. The Law Council considers that removing legal prohibitions on workers discussing their own pay and enabling workers to discuss what they are being paid will assist to reduce opportunities for pay discrimination amongst employees, thereby serving to ultimately reduce the gender pay gap and improve the progression and retention of women lawyers.

Conclusion

42. The Law Council supports the passage of the Bill, noting that amendments are still required to ensure that the aims of the Bill, that is reduction of the gender pay gap, are as effective as possibly intended.
43. The Law Council notes that passage of the Bill would positively engage the Government's obligations under international law. CEDAW, ICESCR, the *Equal Remuneration Convention* and *Discrimination (Employment and Occupation) Convention* make specific reference to the importance of measures, legislative and in

other forms, aimed at increasing equality and respecting the value of equal work. Furthermore, United Nations Committees have called on the Australian Government to strengthen efforts targeting the gender pay gap.

44. Removing confidentiality clauses that lead to secrecy and non-disclosure of pay rates will provide more women with the opportunity to be aware of whether a pay difference exists and the extent to which they may be paid less than their male counterparts. If employees are able to discuss and compare pay for similar work openly, without breaching their contract for fear of adverse action, that will help in addressing the gender pay gap.

Attachment A: Profile of the Law Council of Australia

The Law Council of Australia exists to represent the legal profession at the national level, to speak on behalf of its Constituent Bodies on national issues, and to promote the administration of justice, access to justice and general improvement of the law.

The Law Council advises governments, courts and federal agencies on ways in which the law and the justice system can be improved for the benefit of the community. The Law Council also represents the Australian legal profession overseas, and maintains close relationships with legal professional bodies throughout the world.

The Law Council was established in 1933, and represents 16 Australian State and Territory law societies and bar associations and the Law Firms Australia, known collectively as the Council's Constituent Bodies. The Constituent Bodies are:

- Australian Capital Territory Bar Association
- Australian Capital Territory Law Society
- Bar Association of Queensland Inc
- Law Institute of Victoria
- Law Society of New South Wales
- Law Society of South Australia
- Law Society of Tasmania
- Law Society Northern Territory
- Law Society of Western Australia
- New South Wales Bar Association
- Northern Territory Bar Association
- Queensland Law Society
- South Australian Bar Association
- Tasmanian Bar
- Law Firms Australia
- The Victorian Bar Inc
- Western Australian Bar Association

Through this representation, the Law Council effectively acts on behalf of more than 60,000 lawyers across Australia.

The Law Council is governed by a board of 23 Directors – one from each of the constituent bodies and six elected Executive members. The Directors meet quarterly to set objectives, policy and priorities for the Law Council. Between the meetings of Directors, policies and governance responsibility for the Law Council is exercised by the elected Executive members, led by the President who normally serves a 12 month term. The Council's six Executive members are nominated and elected by the board of Directors.

Members of the Executive as at 1 January 2016 are:

- Mr Stuart Clark AM, President
- Ms Fiona McLeod SC, President-Elect
- Mr Morry Bailes, Treasurer
- Mr Arthur Moses SC, Executive Member
- Mr Konrad de Kerloy, Executive Member
- Mr Michael Fitzgerald, Executive Member

The Secretariat serves the Law Council nationally and is based in Canberra.