

Senator David Pocock: Comparing the Danish gender pay gap (GPG) with the Australian GPG

In Denmark, as in most OECD countries, the gender pay gap (GPG) is the difference in the average gross hourly rate of pay between men and women.¹ See figure below from the European Commission in respect of 2020 GPG data for EU countries.



Source: European Commission: https://ec.europa.eu/info/policies/justice-and-fundamental-rights/gender-equality/equal-pay/gender-pay-gap-situation-eu_en#differences-between-the-eu-countries

In Australia, however, the GPG most commonly used is calculated on the basis of average gross weekly ordinary time earnings of adult employees working full-time. That is, we only compare men and women's *ordinary time* earnings for those employees working full time. While almost half of women employed in Australia work on a part-time basis (47.9%)² their average ordinary time earnings are not included in this calculation of the GDP.³

¹ This calculation of the gender pay gap is 'based on salaries paid directly to employees before income tax and social security contributions are deducted. Only companies of ten or more employees are taken into account in the calculations'. See:

<https://www.europarl.europa.eu/news/en/headlines/society/20200109STO69925/understanding-the-gender-pay-gap-definition-and-causes>.

² Part-time refers to employed persons who usually work less than 35 hours a week and either did so during the reference week or did not work that week. See: Australian Bureau of Statistics (2022), Labour Force, Australia, January 2022, cat. no. 6202.0, <https://www.abs.gov.au/statistics/labour/employment-and-unemployment/labour-force-australia/jan-2022#data-downloads>

³ See: Charlesworth, S., & Smith, M. (2018). Gender pay equity. In A. Stewart, J. Stanford, & T. Hardy (Eds.), *The Wages Crisis in Australia: What it is and What to do About it* (pp. 85-101). Available at: <https://researchdirect.westernsydney.edu.au/islandora/object/uws%3A49134>

It is difficult to derive a comparable hourly GPG between Denmark and Australia. This is because:

- ABS data on hourly earnings do not include managerial earnings so an hourly rate comparison can only be made between non-managerial employees – unlike in most other countries.
- Denmark, as other EU countries, uses average hourly earnings based on salaries paid to men and women rather than just ordinary time hourly earnings

In the ABS Average Weekly Earnings Survey data in November 2021 the average weekly *ordinary time* earnings data for full-time employees shows that the GPG was 14%. When all weekly earnings for full-time employees are included, there is a GPG of 16%.

The latest set of Australian data that produces hourly rates of cash earnings⁴ for non-managerial⁵ employees is the ABS May 2021 Employee Hours and Earnings (EEH) Survey⁶

Australian hourly earnings data for non-managerial employees are likely to underestimate the size of the hourly earnings gender pay gap, given that men are more likely than women to be in managerial jobs (10% to 4%), and, within those jobs, located in higher paid occupations and/or industries.⁷

When we look at hourly earnings in the EEH survey for non-managerial employees as at May 2021 we can see, as highlighted below, that:

- There is a GPG of 10% in *non-managerial total cash* hourly earnings
- There is a GPG of 8% in *non-managerial ordinary time cash* hourly earnings

The differences between various possible Australian measures of the GPG are set out clearly in the Table below. This Table was prepared by Associate Professor Meg Smith and Dr Michael Lyons in their expert evidence in the Aged Care Work Value Case. It is cited by the Fair Work Commission in its recent decision at para 399.⁸ I have added emphases in italics and highlights below.

⁴ Cash earnings are defined in the EEH survey as: 'Remuneration paid to employees on a regular and frequent basis (quarterly or more frequently) for time worked or work done, and for time not worked such as recreation and other types of leave. Cash earnings (inclusive of amounts salary sacrificed) are gross amounts, that is, before tax and other items (e.g. superannuation) are deducted.'

⁵ Managerial employees are defined in the EEH as 'employees who have strategic responsibilities in the conduct or operations of the organisation and/or are in charge of a significant number of employees. These employees usually do not have an entitlement to paid overtime. Includes professionally qualified staff who primarily perform managerial tasks in conjunction with utilising their professional skills. Owner managers of incorporated enterprises are regarded as managerial employees'. Non-managerial employees are defined as 'employees who are not managerial employees (as defined above), including non-managerial professionals and some employees with supervisory responsibilities'.

⁶ ABS (2022) *Employee Earnings and Hours, Australia, May 2021*. The EEH survey is conducted every two years and designed to provide detailed statistics on the composition and distribution of employee earnings, hours paid for and the methods used to set employees' pay. See: <https://www.abs.gov.au/statistics/labour/earnings-and-working-conditions/employee-earnings-and-hours-australia/latest-release>

⁷ ABS (2022) *Employee Earnings and Hours, Australia, May 2021*.

⁸ See: <https://www.fwc.gov.au/documents/sites/work-value-aged-care/decisions-statements/2022fwcfb200.pdf>

Table 1: Measures of pay differentials between females and males from ABS Average Weekly Earnings and Employee Earnings and Hours surveys.⁹

Measure of earnings	Females (\$)	Males (\$)	Ratio of female to male earnings
Average Weekly Earnings (AWE) survey measure (November 2021) (seasonally adjusted excluding AWOTE)			
Average weekly earnings (AWE) Average weekly total earnings of all employees	1093.80	1577.10	0.69
Average weekly earnings for full-time adults (FTAWTE)	1618.00	1934.80	0.84
Average weekly ordinary time earnings (AWOTE) for full-time adults	1591.20	1846.50	0.86
Employee Earnings and Hours Survey measure (May 2021)			
Average weekly ordinary time cash earnings (AWOTCE) for full-time non-managerial employees paid at the adult rate	1617.10	1809.10	0.89
Average hourly ordinary time cash earnings (AHOTCE) for full-time non-managerial employees paid at the adult rate	43.10	47.10	0.92
Average weekly total cash earnings (AWCE) for non-managerial employees	1131.80	1552.40	0.73
Average hourly total cash earnings (AHCE) for non-managerial employees	40.20	44.50	0.90
Average weekly total cash earnings (AWCE) for all full-time non-managerial paid at the adult rate	1639.70	1910.10	0.86
Average hourly total cash earnings (AHCE) for all full-time non-managerial employees paid at the adult rate	43.30	47.50	0.91

Source: Based on Pointon, Wheatley, and Ellis et al (2012), Layton, Smith and Stewart (2013, p. 80) and updated to include more recent data from ABS Cat. No. 6302.0 (Average Weekly Earnings Survey) (ABS 2022a) and from ABS Cat. No. 6306.0 (Employee Earnings and Hours Survey) (ABS 2022b).

Senator Barbara Pocock: Comparative right to request regulation (Australia, Netherlands, United Kingdom):

Current Provisions and proposed changes in the IR Bill

In Australia, the right to request flexible work arrangements for eligible employees is set out in the National Employment Standards in section 65 of the Fair Work Act 2009. To be eligible:

- Employees must have 12 months continuous service with their employer immediately before making the request; and
- Employees must be permanent full-time or part-time employees to make a request or if a casual employee are only entitled to do so if:
 - they have been employed by the employer on a regular and systematic basis for a sequence of periods of employment of at least 12 months immediately before making the request
 - there is a reasonable expectation of continuing employment by the employer on a regular and systematic basis; and
- Employees must be seeking a change in working arrangements because they:
 - Are the parent, or have responsibility for the care, of a child who is of school age or younger
 - Are a carer (within the meaning of the Carer Recognition Act 2010)
 - Have a disability
 - Are 55 or older
 - Are experiencing violence from a member of their family, or
 - Provide care or support to a member of their immediate family or household, who requires care or support because they are experiencing violence from their family.

The IR Bill proposes an additional circumstance where an employee can request a change in their working arrangements, which includes where an employee:

- Is experiencing violence from a member of the employee's family, or
- provides care or support to a member of his or her immediate family or a member of his or her household who requires care or support because the member is experiencing violence from the member's family:

Reasonable business grounds for refusing a request are currently set out in Section 65(5A) and include:

- that the new working arrangements requested by the employee would be too costly for the employer;
- that there is no capacity to change the working arrangements of other employees to accommodate the new working arrangements requested by the employee;
- that it would be impractical to change the working arrangements of other employees, or recruit new employees, to accommodate the new working arrangements requested by the employee;
- that the new working arrangements requested by the employee would be likely to result in a significant loss in efficiency or productivity;
- that the new working arrangements requested by the employee would be likely to have a significant negative impact on customer service.

This NES provides eligible employees with some procedural redress only if their employer does not respond to their written request within 21 days with reasons for the refusal.

From its inception in this NES, any review by the Fair Work Commission of an employer's 'reasonable business grounds' for refusal to agree to a request under subsection 65(5) was made exempt from review in section 44. Section 44 currently provides that the Fair Work Commission cannot make an order in relation to an alleged contravention in respect of reasonable business grounds under this NES. The same applies to the NES on a request for an extension of unpaid parental leave in section 76(4).

These are the only two right to request provisions in the NES and unlike all other NES are the only NES provisions effectively exempt from review by the FWC.

As set out in the Explanatory Memorandum, the IR Bill introduces dispute resolution provisions, for the very first time enabling the FWC to make orders where an employer refuses an employee's request or does not respond to the request within 21 days, including consideration of whether the employer has reasonable business grounds to refuse a request.¹⁰ What might constitute 'reasonable business grounds' in these circumstances are substantially the same as those that currently exist under the Act as set out above.

Proposals for strengthening the right to request provisions in the NES:

Eligibility: In both the UK and in the Netherlands, regulation governing right to request flexible work arrangements extends eligibility to all employees irrespective of their caring responsibilities as long as they have worked for at least 26 weeks (6 months) with their employer.

While Dutch provisions have always applied to all eligible employees since their introduction in 2000¹¹, in the UK legislative amendments were made in 2014 to the Employment Act 2002 to extend eligibility to all eligible employees rather than only those with caring responsibilities. The policy objectives of the UK 2014 amendments were to: .

- increase the availability and take-up of flexible working to enable individuals to manage their work alongside other commitments and to help employers realise the benefits flexible working can have on their business;
- provide all employees with the same access to flexible working as are available to parents and carers, whilst ensuring that businesses have the flexibility to refuse requests on business grounds;
- remove the cultural expectation that flexible working only has benefits for parents and carers, encouraging wider take-up and demand; and
- improve the functioning of the labour market through a more diverse provision of working patterns.¹²

Proposal: The RTR in section 65 should be extended to all employees with 6 months service with their employers, including casual employees where they have been employed on a regular and systematic basis, irrespective of whether caring responsibilities are the reason for this request.

¹⁰ https://parlinfo.aph.gov.au/parlInfo/download/legislation/ems/r6941_ems_d310a6ae-0ff2-4129-bc25-32c2bf274f86/upload_pdf/JC007910.pdf;fileType=application%2Fpdf. See para 598

¹¹ In the *Working Hours Adjustment Act*

¹² UK *Post-Implementation Review of the 2014 flexible working regulations*. Available at: https://www.legislation.gov.uk/uksi/2014/1398/pdfs/uksiod_20141398_en.pdf at p 6.

Business grounds for refusal: In the UK the business grounds for an employer refusal of an employee request for flexible working are set out by the Advisory, Conciliation and Arbitration Service in the Employer Code of Practice as:¹³

- the burden of additional costs
- an inability to reorganise work amongst existing staff
- an inability to recruit additional staff
- a detrimental impact on quality
- a detrimental impact on performance
- a detrimental effect on ability to meet customer demand
- insufficient work for the periods the employee proposes to work
- a planned structural change to your business

If an employee believes their flexible working request was turned down without a valid business reason as set out in ACAS Code of Practice on flexible working requests, employees may be able to take their claim to:

- ACAS for arbitration or alternative dispute resolution;¹⁴ or
- The Employment Tribunal in certain circumstance including that the employer did not handle the request in a reasonable manner.¹⁵

In the Netherlands, an employer can only refuse a request from an eligible employee where there are 'compelling' or 'serious' business or service grounds such as risks to health and safety, potential financial and organizational problems, lack of sufficient work, or insufficient budgets.¹⁶

Proposal: Where an employer refuses an employee's request for flexible work that the onus be on the employer to provide concrete evidence that this request is unreasonable in the circumstances. In section 65, this could be achieved by:

- Ensuring that the 'reasonable business grounds' for the refusal of a request set out in subsection 65(5A) are limited to reasons for which employers can provide objective evidence in respect to the impact of a specific request:
 - Vague assertions that the new working arrangements requested by the employee would 'be likely to result in a significant loss in efficiency or productivity,' as per subsection 65(5A)(d), should be excluded; OR
 - An onus placed on employers to demonstrate they are unable to 'reasonably accommodate' the flexible work request (see 'reasonable adjustment' under the Disability Discrimination Act where an employer has to make an adjustment to be made to accommodate a person unless making the adjustment would impose 'unreasonable hardship' on the employer); OR
 - Provide as Netherlands that employers are required to demonstrate a 'significant business or service interest' for refusal of an employee's request for flexible work <https://www.eurofound.europa.eu/observatories/emcc/erm/legislation/netherlands-working-time-flexibility>.¹⁷

¹³ See ACAS UK: <https://www.acas.org.uk/responding-to-a-flexible-working-request>

¹⁴ In 2021/2022 ACAS reports it undertook in-depth advisory calls on flexible working arrangements. See; ACAS Annual Report & Accounts 2021-22. Available at: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1089912/acas-annual-report-accounts-2021-2022-web-optimised.pdf

¹⁵ See: <https://www.gov.uk/flexible-working>

¹⁶ See: Bird, R. C., & Brown, L. (2018). The United Kingdom right to request as a model for flexible work in the European Union. *American Business Law Journal*, 55(1), 53-115. Available at <https://onlinelibrary-wiley-com.ezproxy.lib.rmit.edu.au/doi/pdf/10.1111/ablj.12117>, p73-75

¹⁷ See Flexible Working Act <https://wetten.overheid.nl/BWBR0011173/2016-01-01>

Proposal for extending the capacity for the FWC to review employer's refusal to grant a request for an extension of unpaid parental leave

As with the proposed amendments to the NES Right to request flexible work, the FWC should also be empowered under the Fair Work Act to make orders where an employer refuses an employee's request for an extension of unpaid parental leave under sub-section 76(4) or does not respond to the request within 21 days, including consideration of whether the employer has reasonable business grounds to refuse a request.