Further Submission addressing Questions on Notice

Beth Gaze,

Professor, Law School, University of Melbourne

Further information was sought on the operation of the *Workplace Gender Equality Act 2012* (Cth); the proposed mandatory gender pay gap reporting under s 78 of the *Equality Act 2010* (UK) and the Executive Order on pay transparency in the USA. Each is discussed below.

In addressing the gender pay gap, two complementary policies are being adopted by these countries with which Australia usually compares itself. First is pay transparency provisions to ensure that individuals can check whether their pay is fair or not. The second is policies that require employers to review and report on gender pay gaps in their own workforce, with a view to accountability and encouraging them to take action to remove any inequalities that are revealed. The UK and USA are taking steps in both these directions, having acknowledged that it is not acceptable, either on the basis of justice, or efficiency, to simply allow gender-based pay inequalities to continue, and that therefore pro-active steps are needed to reduce the gap.

1. *Workplace Gender Equality Act 2012* (Cth)

The questions on notice related to what information has to be disclosed under this Act, and what provisions it has for strengthening its role in relation to gender pay equity.

The Act operates[1] by requiring all higher education institutions and employers of more than 100 people (whether full or part time) to lodge an annual online return with the Workforce Gender Equality Agency giving data about their workforce, which is focused not only on equal employment opportunity for women, but also on access to flexible work, which is equally beneficial to men. Employers are required to report on six 'gender equality indicators' listed in the Act. Reporting is through an online portal within 2 months of the end of the reporting year on 31 March annually. Employees and shareholders must be notified of the report, ensuring that interested and affected individuals will be better aware of the data that is available. Two important features of the system are that reporting will build a detailed database of knowledge about gender equality in the Australian workforce, and that the collection of data allows for evaluation of an employer's progress over time, to see whether performance improved on earlier reports. The gender equality indicators in the Act are:

a) gender composition of the workforce
b) gender composition of any governing body;
c) equal remuneration between women and men;

[1] The operation of the Act is described and analysed in Belinda Smith and Monica Hayes 'Using data to drive gender equality in employment: more power to the people?' (2015) 28 Australian Journal of Labour Law 191, and Beth Gaze, 'Gender equality reporting and the future of equal opportunity at work' Governance Directions, Vol. 66, No. 10, Nov 2014: 621-624

d) availability and utility of employment terms, conditions and practices relating to flexible working arrangements for employees and to working arrangements supporting employees with family or caring responsibilities; and
e) consultation with employees on issues concerning gender equality in the workplace
f) and any further matters specified by the minister by legislative instrument.

The specific content of reports beyond that listed in the Act is defined by regulations made by the Minister responsible for the administration of the Act, under the final point listed above. The data on gender pay equity that must be reported does not involve disclosure of actual pay rates, but of averaged information about the workforce. It requires, in relation to gender pay equity, reporting of annualised average full time equivalent base salary and total remuneration, including components that are pro rata to hours worked, and separately, components that are not pro-rata or are fixed amounts (such as bonuses). This data must be disaggregated by gender, by managerial/non-managerial categories and by workplace profile. Thus the pay data to be disclosed is quite general, but over time can give an idea of gender related discrepancies or changes in the workforce. The report must also comment on whether a remuneration policy or strategy exists, what (if any) gender pay equity objectives are included in the remuneration policy or strategy, and whether any gender remuneration gap analysis has been undertaken and, if so, when and what actions, if any, were taken as a result of a gender remuneration pay analysis.

This information is less detailed than the information that will be required to be disclosed in reporting in the UK under the *Equality Act 2010* s 78, or in the USA under the President's Instruction to the Equal Employment Opportunity Commission EEOC) on gender pay gap reporting (outlined below).

The second issue concerning the *Workplace Gender Equality Act* was what provision exists to strengthen its impact beyond simply the provision of information. When the Act was adopted in 2012, it sought to provide a greater incentive for progress than before through a 'minimum standards' system. It was intended that the data reported would be used as a basis for the Minister to set minimum standards to improve workforce gender equality. It was intended that the reporting year 2014-2015 would operate as a 'base period' for the setting of minimum standards relevant to particular industries and industry sectors, against which later data could be assessed. Minimum standards would be proposed by the Agency based on analysis of data for particular industries to identify relevant standards, and employers would be provided with confidential reports that evaluated their performance against the benchmark for their industry. Their progress against the minimum standards would be assessed by the Workplace Gender Equality Agency (WGEA) based on the second subsequent reporting period, allowing two reporting periods to make progress towards any minimum standards that the employer was not already meeting. This approach offered employers the benefit of a private assessment of where they stand in relation to their industry, on the basis of which they would be able to assess whether or not their efforts in relation to gender equality at work were effective. The sanction for non-compliance with this requirement would be the same as that for failing to lodge a report under the Act, which is only the possibility of being named in a report by the Agency.

However when minimum standards were set in 2014[2] they were set at a very low level, applying only to employers of 500 or more people, and requiring them only to have in place one or more policies or strategies relating to the following:

a) support and improve gender equality in the workplace;
b) advance equal remuneration between male and female employees;
c) implement flexible work arrangements for employees with caring responsibilities; **or**
d) prevent sex-based harassment and discrimination.

It is highly unlikely that any employer of 500 or more staff would, after three decades of sex discrimination law, fail to have in place policies to prevent sex-based harassment and discrimination, given the role of such policies in protecting employers from vicarious liability for the actions of their employees under all anti-discrimination laws in Australia. Hence under these minimum standards, the Act does not in practice impose any requirement on those employers to improve their practices. Nevertheless, the potential remains for future regulations to provide for minimum standards that require more pro-active measures from employers.

2. Further information about the US Executive Order on Pay Transparency (p 8 of the transcript)

President Obama made Executive Order 13665 *Non-Retaliation for Disclosure of Compensation Information* on April 8, 2014 (see extract in the Appendix to this submission). The policy basis for the order is explained in it as follows:

> When employees are prohibited from inquiring about, disclosing, or discussing their compensation with fellow workers, compensation discrimination is much more difficult to discover and remediate, and more likely to persist. Such prohibitions (either express or tacit) also restrict the amount of information available to participants in the Federal contracting labor pool, which tends to diminish market efficiency and decrease the likelihood that the most qualified and productive workers are hired at the market efficient price. Ensuring that employees of Federal contractors may discuss their compensation without fear of adverse action will enhance the ability of Federal contractors and their employees to detect and remediate unlawful discriminatory practices, which will contribute to a more efficient market in Federal contracting.

The Order amended Executive Order 11246, a longstanding executive policy that deals with positive action requirements in federal government contracting, to add a further area of protection whereby the contractor may not 'discharge or in any other manner discriminate against any employee or applicant for employment because such employee or applicant has inquired about, discussed, or disclosed the compensation of the employee or applicant or another employee or applicant.' Exceptions to this prohibition are made where an employee's essential job functions involve dealing with pay details of other employees (such as payroll or

[2] *Workplace Gender Equality (Minimum Standards) Instrument 2014*.

human resources). Executive Order 11246 is enforced by the Office of Federal Contract Compliance Programs (OFCCP), which has drafted regulations to give effect to this order.[3] These regulations make clear that the right to discuss pay involves a prohibition onformal or informal pay secrecy policies and protects employees who discuss their own or other employees' pay from dismissal or other consequences. There is no purpose limitation on this prohibition, and it applies to all forms of compensation.

This transparency approach has been criticised as too weak, because it places responsibility on employees to check for pay equity instead of requiring employers to take responsibility for reviewing their own pay arrangements and workforce and correct pay inequalities when they find them.[4]

However the USA has also moved to require employers to report workforce pay data by gender and race through federal contract compliance programs under Executive Order 11246, and is currently proposing to move further still. At the same time as signing the pay transparency executive order (April 2014), President Obama signed a Presidential Memorandum instructing the Secretary of Labor to develop a new regulation requiring federal contractors to submit summary data on compensation paid to their employees, including by race and gender. The Equal Pay reporting is required from all federal contractors and subcontractors with more than 100 employees. [5] This data is submitted as part of the regular reporting by federal contractors and subcontractors under Executive Order 11246 on a form issued by the EEOC known as EEO-1. This form records average pay data in 10 job categories ranging from Executive/Senior officials to Laborers and Service Workers, across sex, race and ethnicity. Data is reported based on one pay period chosen by the employer from July – September in the reporting year. Reports include three pieces of information related to employee compensation:

- The total number of workers within a specific job category by race, ethnicity and sex;
- Total wages defined as the total individual wages for all workers in the job category by race, ethnicity and sex; and
- Total hours worked, defined as the number of hours worked by all employees in the job category by race, ethnicity and sex.

The Equal Pay Report does not collect any individual pay information, or any information on factors such as education or experience that may affect pay. The report is confidential, but can be used by the EEOC or the OFCCP as a basis for focusing investigation and enforcement efforts towards contractors where it appears that potential pay violations exist, and away from contractors that are less likely to be in breach. Aggregate data can be released by the OFCCP on the race and gender pay gap by industry and employment category to enable contractors to review their pay data using the same metrics as OFCCP and take voluntary compliance measures.

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[3] The Regulations can be found at https://www.dol.gov/ofccp/PayTransparency.html and a fact sheet can be found at www.dol.gov/ofccp/pdf/OFCCPPaySecrecyFactSheetKnowYourRights_ES_QA_508c.pdf.

[4] Martha Burk, (Money Editor, Ms. magazine; national gender pay equity consultant) 'Obama's Weak 'Pay Transparency' Executive Order' 10 Jan 2016 at http://www.huffingtonpost.com/martha-burk/obamas-weak-pay-transpare_b_8950632.html

[5] Background to this rule is at https://www.dol.gov/ofccp/EPR.html; a fact sheet is at https://www.dol.gov/ofccp/EqualPay/EqualPayReport_NPRM_FactSheet_JRF_QA_508c.pdf.

Subsequently in January 2016, the President issued a Statement[6] to the effect that the Equal Pay reporting would be extended to all employers with 100 or more employees, not just contractors, to report summary wage data by gender, race, and ethnicity. The data will be reported across 10 job categories and by 12 pay bands, and will not involve reporting of specific individual salaries. These estimated 60,000 companies are already required to report to the EEOC, and the added reporting will commence for reports due by March 31 2018.[7] Extending the Equal Pay reporting obligation is seen as important for progress toward achieving equal pay, by encouraging and facilitating greater voluntary compliance by employers with existing federal pay laws. Because it uses an existing data collection mechanism familiar to most businesses, the compliance burden on businesses and the implementation costs to government are minimised.

Thus the USA in 2014 acted on both pay transparency and equal pay reporting, and in 2016 extended to all employers of 100 people the equal pay reporting obligation. This does not provide a public report, but it does expose the company's pay practices to examination by regulatory agencies who have power to take action against it, namely the EEOC and OFCCP. By contrast in Australia, because there are no regulatory agencies whose role is to act to support pay equity, there is a need for public reporting so that those who have the enforcement obligation can be aware that there may be a concern.

3. UK: pay transparency and mandatory equal pay audits

The UK has also acted on the two complementary fronts. Pay transparency has been addressed through s 77 of the *Equality Act 2010*, which was addressed in my previous submission. While this provision ensures employees can seek and disclose pay information, it is limited to the purpose of checking pay equity. However as noted in the University of Sydney Women and Work Group submission, it has the disadvantage that it does not invalidate pay secrecy clauses. Unless employees are very well educated on their rights, they may not be aware they have the right to discuss pay in the face of an apparently valid secrecy clause in their employment document.

The UK is in the process of adopting mandatory pay audits for all employers of 250 or more employees. This follows a period of time in which equality agencies encouraged employers to undertake voluntary pay audits to determine whether there were problems in their workforce and redress any pay inequities they discovered voluntarily. There was an insufficient response to the request for voluntary audits, so the Government decided it was necessary to require mandatory gender pay audits for larger businesses if there was to be effective progress towards gender pay equity.

Mandatory reporting for private sector businesses with 250 or more employees, will be done through the mechanism provided in s 78 of the *Equality Act*, which was attached to my previous

[6] https://www.whitehouse.gov/the-press-office/2016/01/29/fact-sheet-new-steps-advance-equal-pay-seventh-anniversary-lilly.
[7] http://www.bloomberg.com/politics/articles/2016-09-29/obama-finishes-rules-on-paid-sick-leave-and-equal-pay-for-women.

submission. Section 78 commenced operation in August 2016, and regulations to implement the reporting have been through two stages of consultation and are expected to be adopted in early 2017. The first reports, of data from the year to April 2017 will be due for publication before the start of the following reporting year in April 2018. The estimated 8,000 businesses affected will be required to report publicly on several aspects of their workforce and wage payments. They must publish their *overall mean and median gender pay gaps*, based on the gross hourly pay rate of all employees covered. Pay includes basic pay and other components such as area allowances, shift premiums and bonus pay, but excludes overtime pay,, expense reimbursement etc. In addition, employers must publish the *mean and median gender bonus gap* in their workforce, based on all bonus payments made during the year in question. They will also have to publish the proportion of male and female employees that received a bonus. Finally, they must publish the proportions of men and women in each salary quartile of their workforce, where each quartile includes ¼ of the workforce based on pay rates. Apart from the bonus gender pay gaps, all other data is based on a snapshot of the workforce for the pay period that covers 5th April.

Reports must be certified as accurate by a Director or senior officer, and must be published on a web site where the information is freely available to employees and the public. Businesses are not required to provide a comment along with the report, but they may choose to do so to contextualise the data and to explain what actions, if any, they are taking in response to it.

It can be seen that the UK approach does not rest on an agency taking enforcement action, but purely on public disclosure. As in the USA, disclosure alone has been criticised as a weak approach, as it will not necessarily lead to changes in practices. However reporting can be expected to at least provide information to women about which employers are genuinely providing equal conditions of employment.

Public sector employers of 150 or more people have been expected, though not required, to report on their gender pay gap in carrying out their public sector equality duties under s 149 of the *Equality Act 2010*. It is intended to convert this into a requirement for public sector employers of 250 or more people through amendment of the Specific Duties regulations under s 149 that define the public sector equality duties. The same data will be reported as under the private sector reporting obligation.

In conclusion, both the UK and the USA have acted recently not only to ensure transparency in pay so that women can check whether they are being paid fairly, but also to require larger employers to report pay data either confidentially to a regulatory agency that can take action to enforce pay equity rights, or else publicly so those potentially affected can themselves see the data. Movement in this direction is widely accepted in both these countries as a necessary step to progress gender pay equity more effectively than in the past.

Appendix:

Australia: Workplace Gender Equality (Matters in relation to Gender Equality Indicators) Instrument 2013 (No. 1) (Cth) (extract regarding reporting on the gender pay gap)

3.1 Disaggregated data regarding the remuneration profile of managers and non-managers by gender and by workplace profile categories including:
  3.1.1 annualised average full-time equivalent base salary; and
  3.1.2 annualised average full-time equivalent total remuneration, except for remuneration components paid on a non-pro-rata or fixed-amount basis; and
  3.1.3 a fixed total remuneration amount for remuneration components paid on a non-pro-rata or fixed-amount basis.

3.2 The existence of a remuneration policy or strategy.

3.3 The gender pay equity objectives, if any, which are included in the remuneration policy or strategy.

3.4 Whether any gender remuneration gap analysis has been undertaken and, if so, when.

3.5 The actions taken, if any, as a result of a gender remuneration pay analysis.

US: Executive Order -- Non-Retaliation for Disclosure of Compensation Information (extract)

By the authority vested in me as President by the Constitution and the laws of the United States of America, including the Federal Property and Administrative Services Act, 40 U.S.C. 101 *et seq.*, and in order to take further steps to promote economy and efficiency in Federal Government procurement, it is hereby ordered as follows:

Section 1. Policy. This order is designed to promote economy and efficiency in Federal Government procurement. It is the policy of the executive branch to enforce vigorously the civil rights laws of the United States, including those laws that prohibit discriminatory practices with respect to compensation. Federal contractors that employ such practices are subject to enforcement action, increasing the risk of disruption, delay, and increased expense in Federal contracting. Compensation discrimination also can lead to labor disputes that are burdensome and costly.

When employees are prohibited from inquiring about, disclosing, or discussing their compensation with fellow workers, compensation discrimination is much more difficult to discover and remediate, and more likely to persist. Such prohibitions (either express or tacit) also restrict the amount of information available to participants in the Federal contracting labor pool, which tends to diminish market efficiency and decrease the likelihood that the most

qualified and productive workers are hired at the market efficient price. Ensuring that employees of Federal contractors may discuss their compensation without fear of adverse action will enhance the ability of Federal contractors and their employees to detect and remediate unlawful discriminatory practices, which will contribute to a more efficient market in Federal contracting.

Sec. 2. Amending Executive Order 11246. Section 202 of Executive Order 11246 of September 24, 1965, as amended, is hereby further amended as follows:

(a) Paragraphs (3) through (7) are redesignated as paragraphs (4) through (8).

(b) A new paragraph (3) is added to read as follows:

> "The contractor will not discharge or in any other manner discriminate against any employee or applicant for employment because such employee or applicant has inquired about, discussed, or disclosed the compensation of the employee or applicant or another employee or applicant. This provision shall not apply to instances in which an employee who has access to the compensation information of other employees or applicants as a part of such employee's essential job functions discloses the compensation of such other employees or applicants to individuals who do not otherwise have access to such information, unless such disclosure is in response to a formal complaint or charge, in furtherance of an investigation, proceeding, hearing, or action, including an investigation conducted by the employer, or is consistent with the contractor's legal duty to furnish information."

Sec. 3. Regulations. Within 160 days of the date of this order, the Secretary of Labor shall propose regulations to implement the requirements of this order.