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Submission to the Inquiry by the Senate Finance and Public Administration References Committee into gender segregation in the workplace and its impact on women's economic equality

From: The Work and Family Policy Roundtable

Committee Secretary

Senate Standing Committee on Finance and Public Administration

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The Work and Family Policy Roundtable (W+FPR) is pleased to make a submission to the current inquiry by the Senate Finance and Public Administration References Committee into gender segregation in the workplace and its impact on women's economic equality

This submission was drafted by Professor Siobhan Austen, Curtin University; Associate Professor Meg Smith, Western Sydney University; and Alexandra Heron, Sydney University, with input from other W+FPR members.

The W+FPR has a strong interest in policy measures to address the gender pay gap and the contribution of gender segregation to it. But we wish to emphasise just how much is already known about gender segregation in employment in Australia and the problems it raises in ensuring that women are fairly remunerated for the paid work they do. There have been a plethora of government and other inquiries that have examined various facets of gender inequality in Australia. Yet very few of their recommendations have been taken up by government.

In our view the critical problem is the lack of political commitment to taking any serious action to address the problems identified. We must cease analysing and lamenting the problem of gender segregation and pay gaps and start to imagine and implement far-reaching and innovative policy as part of a wider economic and social vision for Australia. A multi-faceted/multi-level approach is required to address gender segregation and pay inequity.

The attached submission draws on our collective research expertise in the area of gender segregation, the gender pay gap and workplace relations. We would be happy to expand upon our submission at a public hearing.

Yours sincerely,

Three handwritten signatures are shown in black ink. From left to right: Barbara Pocock, Elizabeth Hill, and Sara Charlesworth. The signatures are fluid and cursive.

Emeritus Professor Barbara Pocock
Co-convenors W+FPR

Dr Elizabeth Hill

Professor Sara Charlesworth



What is the Australian Work + Family Policy Roundtable?

The Roundtable is made up of researchers with expertise on work and family policy. Its goal is to propose, comment upon, collect and disseminate research to inform good evidence-based public policy in Australia.

The W+FPR held its first meeting in 2004. Since then the W+FPR has actively participated in public debate about work and family policy in Australia providing research-based submissions to relevant public inquiries, disseminating current research through publications for public commentary and through the media.

The Roundtable is a network of 35 academics from 17 universities and research institutions with expertise on work, care and family policy.

Dr Elizabeth Adamson, University of NSW
Prof Siobhan Austen, Curtin University
Prof Marian Baird, University of Sydney
Prof Rowena Barrett, Queensland University of Technology
Dr Dina Bowman, Brotherhood of St Laurence & University of Melbourne
Dr Wendy Boyd, Southern Cross University
Dr Michelle Brady, University of Queensland
Prof Deborah Brennan, University of NSW
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Prof Alison Preston, University of Western Australia

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Prof Trish Todd, University of Western Australia
Prof Gillian Whitehouse, University of Queensland

Key Principles of the Work + Family Policy Roundtable

The W+FPR has 12 key guiding principles to inform its work and comment. We believe that in principle, work and family policy proposals should:

1. Recognise that good management of the work-life interface is a key characteristic of good labour law and social policy.
2. Adopt a life-cycle approach to facilitating good work-family interaction.
3. Support women and men to be workers as well as mothers, fathers and carers, and actively encourage fathers as carers.
4. Facilitate employee voice and influence over work arrangements.
5. Ensure sustainable workplaces and workers (e.g. through 'do-able', quality jobs and appropriate staffing levels).
6. Ensure gender equality, including pay equity.
7. Protect the well-being of children and other dependants.
8. Ensure predictable hours, earnings and job security.
9. Promote social justice and the fair distribution of social risk.
10. Treat individuals fairly, regardless of their household circumstances.
11. Ensure flexible working rights are practically available to all workers through effective regulation, education and enforcement.
12. Adopt policy and action based on rigorous, independent evidence.

See <http://www.workandfamilypolicyroundtable.org> for details of the W+FPR and its activities.



Summary

In making our submission to the Inquiry by the Senate Finance and Public Administration References Committee (the Committee) into gender segregation in the workplace and its impact on women's economic equality (the Inquiry), the W+FPR wishes to bring to the Committee's attention the large and comprehensive body of knowledge that Australian and international researchers and policy makers have developed in relation to gender workplace segregation in Australia and elsewhere and its adverse impacts on the gender pay gap (and the gender care gap). These issues have been the subject of many inquiries and empirical research reports over the past decades, many of which are described and drawn on in our submission. Numerous recommendations from those inquiries and research clearly demonstrate that a multi-faceted/multi-level approach is required to address gender segregation, and its most pernicious manifestation – gender pay inequity.

In its 2016 Election Benchmarks¹ the W+FPR set out specific ways of addressing the gendered barriers to occupational choice and advancement which result in workplace gender segregation and pay inequity. The problem with addressing these issues is not lack of knowledge and understanding of what would work but rather the lack of political commitment to taking determined action to effect change. We recommend that the Committee make this point vigorously and prominently in their report.

Below, our submission addresses the Inquiry's terms of reference by focusing on gender occupational segregation in the workplace including the contribution of the gendered undervaluation of jobs to this outcome. Institutional constraints including strong gendered social norms, lack of quality reduced hours jobs and less than optimal availability of formal care provision for dependants create significant barriers for women wishing to combine paid and unpaid work (and men wishing to care). These constraints are the fundamental causes of Australia's gendered labour market.

¹ The W+FPR 2016 Election Benchmarks are available at: http://www.workandfamilypolicyroundtable.org/wp-content/uploads/2016/05/Work-Care-Family-Policies_Online_s.pdf

Our submission also examines and explains why existing measures of gender segregation underestimate its extent. It goes on to discuss the different ‘rational choice’ and ‘institutional constraint’ approaches to understanding how society and the economy work. Which approach is taken by policy makers and other stakeholders affects their analysis of the causes of workplace gender segregation and the gender pay gap and whether they are susceptible to remedy by policy action.

The W+FPR adopts the institutional constraint approach and in this submission draws on the W+FPR 2016 Election Benchmarks and other initiatives to outline policy directions that are positive for gender equality and economic performance.

Introduction









The male employment rate (for those aged 15-64) is currently 78.1%, whilst the female employment rate is 68.1%. Women in employment also work fewer hours than men with 54% working full-time (men, 83%).² These different working patterns are intimately connected with women carrying out considerably more unpaid work than men, and undertaking the majority of informal care for children and parents (Meagher 2014). The challenges which women face in combining paid and unpaid work contribute to gender industrial and occupational segregation in the labour market which this Inquiry is investigating. A recent estimate suggests that industrial and occupational segregation together contributed to 30% of the gender pay gap in Australia in 2014 (KPMG 2016).

There are many different types of gender segregation in the labour market. This submission focuses on horizontal occupational segregation, which encompasses divisions by type of job, whilst also acknowledging the vertical divisions that relate to the different representation of men and women at different levels of particular occupational hierarchies (for example, the over-representation of women academics in junior and casual lecturing positions, and the over-representation of male academics in the professoriate).

The broadest set of occupational classifications (eight occupations covering the whole workforce, at the highest level of classification) and their gender composition is shown in Table 1 below

² ABS (2017) Labour Force, Australia, Detailed - Electronic Delivery Dec 2016, Cat.No. 6921.0.55.001. The employment rate is the proportion of the civilian population of a certain age group.

Table 1: Occupations by gender and part-time and full-time hours

		Female			Male		
Occupation		Full-time (%)	Part-time (%)	Total (%)	Full-time (%)	Part-time (%)	Total (%)
 Clerical and Administrative Workers		43.0	31.8	74.8	21.5	3.7	25.2
 Community and Personal Service Workers		25.5	43.3	68.8	18.9	12.3	31.2
 Sales Workers		19.2	41.5	60.7	23.2	16.1	39.3
 Professionals		35.7	18.5	54.2	40.1	5.7	45.8
 Managers		26.7	8.5	35.2	60.0	4.8	64.8
 Labourers		12.0	20.5	32.5	43.0	24.5	67.5
 Technicians and Trades Workers		8.9	5.8	14.7	77.5	7.8	85.3
 Machinery Operators And Drivers		6.3	2.8	9.1	78.3	12.5	90.9
Total employees		25.0	21.2	46.2	44.3	9.5	53.8

Source: WGEA (2016) using ABS data

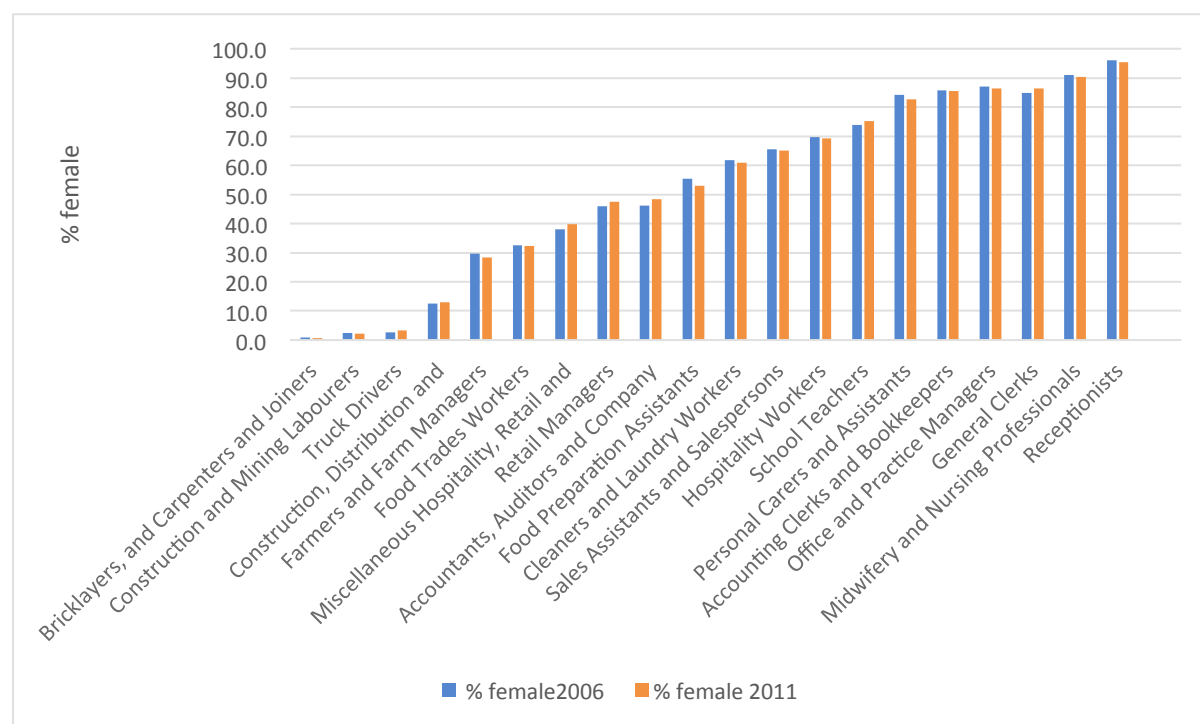
TOR a: The nature and extent of industrial and occupational gender segregation in Australian workplaces relative to comparable jurisdictions, including gender segregation in tertiary education courses.

We make three points here. The first is the high level of occupational gender segregation when analysed using the occupational classification method used in Australian Bureau of Statistics (ABS) data, that is the Australian and New Zealand Standard Classification of Occupations (ANZSCO). This contains five different levels of detailed classification from eight at level 1, the broadest (see Table 1 above), to gradually more detailed (four further levels, often referred to as one-, two-, three-, four- and six- digit levels).

These data demonstrate a high level of occupational segregation in Australia. Census data for 2011 enable measurement of the level of feminisation of different occupational groups at the ANZSCO 3-digit level. These measures reveal that several occupational groups – personal assistants and secretaries, receptionists, child carers, education aides and midwifery and nursing professionals all have a feminisation rate of more than 90%, whilst the category of personal assistants and secretaries is 97.8% female. The data also show that several occupations are almost completely dominated by men. Seventeen occupations have a feminisation rate of less than 10% and several occupations, including bricklayers and carpenters and joiners, have a feminization rate of less than 1%.

The degree of occupational segregation in the Australian labour market shows little sign of change. Figure 1 below shows the feminisation rate of the largest 20 occupational groups (at the 3 digit classification level) in 2006 and 2011, highlighting the absence of any substantial change. Indeed, across the 20 occupational groups (which together comprise close to 50% of all employees), the average change in the feminisation rate was only 0.1% between 2006 and 2011.³

Figure 1: Top 20 Occupations by Level of Feminisation, 2006 and 2011



Source: ABS (2006, 2011) Census of Population and Housing⁴

Whilst the level of occupational segregation shown in the above chart is undoubtedly high, it does not provide a complete picture of the extent of segregation in the Australian workforce.

Our second point is that the above ANZSCO data does not disclose the segregation that occurs through the different roles of men and women *within* the various occupational groupings. In the academic workforce, for example, there is a relatively equal representation of men and women (the feminisation rate of the ‘tertiary education teachers’ group was 48.5% in 2011). However, *within* this workforce there are large gender differences in discipline areas, employment contract types (continuing, fixed-term, sessional, casual) and representation in the different levels of the academic hierarchy (May,

³ KMPG (2016) finds that occupational segregation has decreased slightly between 2007 and 2014 (using annual data collected by the Household Income and Labour Dynamics (HILDA) survey (pp 25)

⁴ Mike Dockery’s assistance with data on feminization rates across occupations is gratefully acknowledged

Peetz, and Strachan 2013). Gibbon's research on the career barriers faced by women pilots in the Australian defence forces provides a further example of vertical segmentation. It demonstrates the way the patterns described above for academics can occur in non-traditional areas of employment for women within the sector (military), specific service (navy, army or air force) and in the narrow field of aviation within each service area. These pockets of highly feminised workforces are obscured even when relatively detailed occupational groups are examined (Gibbon 2014).

Thirdly, the measures of occupational segregation based on ANZSCO data (such as those used in Figure 1) are also limited by their reliance on occupational classification systems which are themselves reflective of the pattern of gender segregation (Blackwell 2001a, 2001b). For example, Burchell et al. (2015) note that, in the European context, the areas where most women are employed are often treated in these classification systems 'as rather undifferentiated aggregate occupations, while men's employment areas are more finely disaggregated, reflecting the historical bargaining power attached to men's specific skills.'

TOR b: Factors driving industrial and occupational gender segregation in the Australian context

The issue of occupational gender segregation has been the subject of numerous investigations informed by a range of disciplines, including law, economics, psychology and sociology. In a survey of the literature, Austen, Jefferson and Lord (forthcoming) grouped the broad literature on the causes of gender segregation into two overarching approaches. One emphasises the rational, individual decisions by individuals and organisations who have full control over their destinies including the advantages with which they are born⁵, and the other highlights the effects of institutions (including social norms) and regulatory frameworks on gendered patterns of work. From these two contrasting approaches spring very differing understandings of gender segregation in paid (and unpaid) work.

The *rational choice approach* includes the influential household production models of orthodox economic analysis. In these, gender segregation is treated as the product of women's 'rational choice' to not invest in as much human capital (educational qualifications and training) as men and to pursue (often lower paid) occupations which allow more reconciliation between waged work and care responsibilities. However, the relevance of these models has been undermined by contradictory evidence, including the significant growth in women's involvement in a range of fields of higher education (as reflected in the data in Table 2). At a conceptual level, the rational choice models are deficient because they fail to take account of the ways in which occupational 'choices' and their consequences are shaped by labour and other institutions.

⁵ See Folbre (2016) for an incisive and gendered critique of the notion that the wages a person earns are their 'Just Deserts' for the work they do.

Table 2: Ratio of Female to Male Enrolment Count by Field of Education (Domestic Students), 2015

Natural and Physical Sciences	0.98
Information Technology	0.19
Engineering and Related Technologies	0.18
Architecture and Building	0.64
Agriculture Environmental and Related Studies	1.1
Health	2.67
Education	3.1
Management and Commerce	0.88
Society and Culture	1.81
Creative Arts	1.54
Food Hospitality and Personal Services	0.58
Mixed Field Programs	1.7
Non-Award course	1.56
Total	1.37

Source: Department of Education and Training (2015), UCube Data, accessed on January 21 2017 at <http://highereducationstatistics.education.gov.au/Default.aspx>

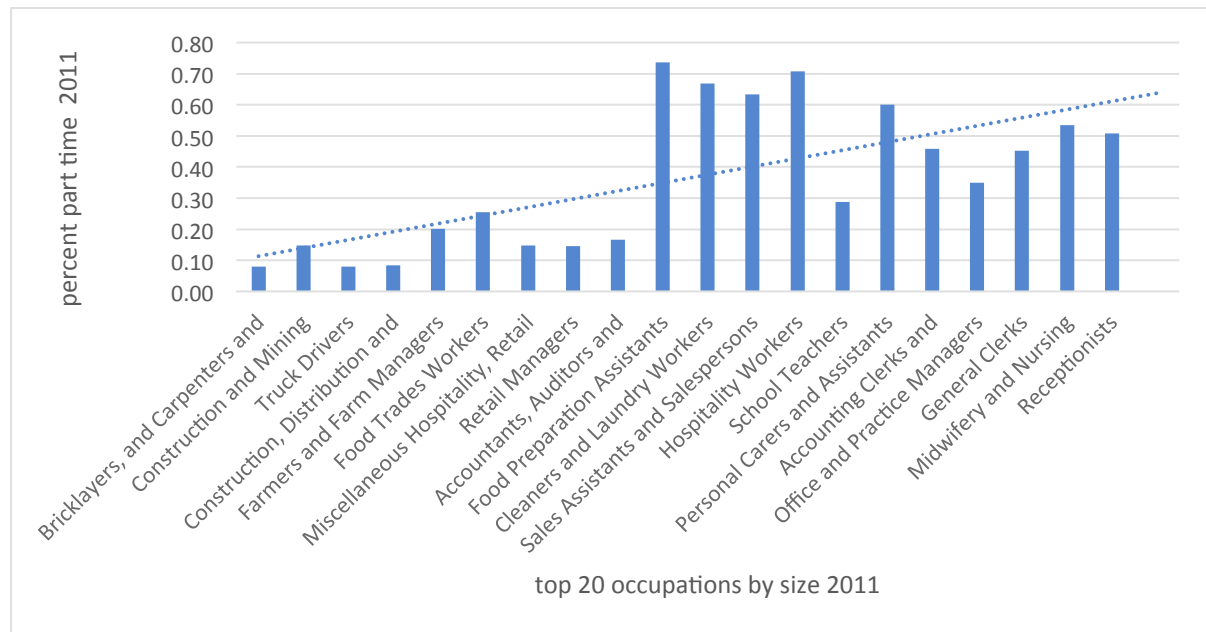
In contrast, as shown in the *institutional approach* literature, individuals' occupational choices are understood to be constrained by a range of gendered social norms and labour institutions, which often operate in a way that forces women into accepting lower status and often segregated jobs (Crompton and Lyonette 2005; Fagan and Rubery 1996; Rubery and Fagan 1995; Tomlinson 2006). Institutional studies highlight an initial broad set of factors as contributing to occupational segregation:

- Discriminatory or gendered recruitment and other practices, including promotion, that act to exclude women and men from non-traditional jobs areas (Riach and Rich 1987, 2006; Budig and England 2001; England 2005);
- Organisational requirements for long work hours, or working hours that are inconsistent with significant caring responsibilities and standard childcare arrangements (e.g., breakfast meetings, travel requirements) (Cha 2013; Nielson et al. 2004);
- Organisations' criteria for career success that emphasise continuous uninterrupted employment, rather than non-linear careers which allow for career breaks or periods of reduced hours work required to undertake care (McDonald, forthcoming);
- A scarcity of jobs where it is possible to combine work and family responsibilities including lack of access to flexible work arrangements (especially part-time work), even when such policies are available (e.g., Kornberger et al., 2010; Stone and Hernandez, 2013);

- Technology that may cause some work to be perceived to be physically demanding, but which may be open to a broad range of individuals if work is re-designed, particularly in the light of technological advances.

In Australia the effect of these factors is apparent in data showing very low rates of part-time work in highly masculinised occupations (see Figure 2 below)

Figure 2: Top 20 Occupations by Part-Time Rate & Level of Feminisation, 2011



Source: ABS (2006, 2011) Census of Population and Housing

Government policy settings are an important determinant of occupational segregation because they:

- Directly shape the actions available to employers. For example, work hours regulations influence the ability of men and women to compete for the full range of jobs.
- Shape the incentives available to employers. For example, minimum wage protections limit the gains to employers from the low wages paid to marginalised workers, and in doing so undermine the financial drivers of occupational segregation.
- Influence the impact of employers' actions on women's occupational choices. For example, child care and elder care policies can reduce other drivers of occupational segregation by ameliorating the constraints imposed on carers by current working-time regimes. Affordable, high-quality and accessible non-home-based care options increase the range of occupations in which parents can work.

International studies show that parental leave, childcare and flexible working options have a positive impact on women's workforce participation of (see, for example, Korpi et al. 2013; Martin et al. 2014 for parental leave). Research also points to a negative relationship between the availability of affordable, accessible and high quality child and elder care and the likelihood of women's participation in lower-status/lower-paid occupations and/or employment contracts (Connolly and Gregory 2008).

TOR c: Economic consequences of gender segregation for women, including the contribution of industrial and occupational gender segregation to the gender pay gap

This part of our submission addresses the apparently conflicting evidence on the effect of occupational segregation on the gender pay gap. Some Australian studies identify positive effects (see Baron and Cobb-Clark 2010) whilst the majority find negative outcomes. We show how these different results reflect the measurement issues discussed above, and raise important concerns relating to the undervaluation of feminised occupations.

Studies of the effect of occupational segregation which have identified favourable effects on the gender pay gap have relied on the application of decomposition techniques⁶ to broad occupational data. As such, their results have a very specific (and potentially confusing) meaning. Specifically, the results imply that, keeping current wage structures constant, the movement of women from broad occupational groups where the rate of feminisation is high (such as clerical and sales work and professionals) to those where the feminisation rate is low (such as labourers and transport and production work) would *increase* the gender pay gap (see Austen et al., 2015).

This result arises because women's pay outcomes in the *broad* occupational groups (the eight groups at level 1) where they are under-represented are currently relatively poor; and women's pay outcomes in some of the *broad* occupational groups where they are over-represented are currently relatively high. As noted above (Table 1), women are relatively well represented in the *broad* occupational category of 'professionals', and they are under-represented in the *broad* occupational category of 'labourers'. The 'thought experiment' of decomposition analysis involves shifting women out of the professional group and into the labouring group – and then examining the change in their average wage, under the existing wage structure. Not surprisingly, the average wage of women falls and the gender pay gap increases.

This type of analysis clearly misses most of the effects of occupational segregation on the gender pay gap. When the decomposition approach is applied to data on broad occupational groups, it does not reveal:

⁶ A statistical method that enables an assessment of the different measurable factors potentially contributing to gender pay gaps.

- a) The impacts of segregation on pay at finer occupational levels. For example, it does not measure the impacts on the gender pay gap of men's greater representation in the (relatively highly paid) Science, Building and Engineering Professionals occupational group, and women's greater representation in the (relatively lowly paid) Health and Social Professionals group; and
- b) The effects on the gender pay gap of vertical segregation, where men and women are in the same occupational group but men disproportionately hold the senior positions (for example, as school principals) and women disproportionately hold the lower level positions (for example, as teachers).

These limitations of the decomposition approach are highly significant given that estimates at a somewhat more detailed level of occupational classification (the 18 classes at level two, ANZSCO) conclude that 96.5% of the total gender pay gap is due to wage differences *within* the 18 broad occupational groups (Cobb-Clark and Tan 2010).

In this context, it is important to note the findings of an unpublished examination of the effects of occupational segregation on the gender pay gap that used the more finely graded classification of occupations in the 2011 Census (at level 3 referred to earlier). Dockery (2016) measured the level of feminisation in 97 occupational groups and combined this data with measures available in the HILDA survey to assess the effect of occupational segregation on individual wage outcomes and the gender pay gap. Dockery found that occupational segregation *increased* the gender pay gap, albeit by a relatively small degree. He also found a *negative* correlation between the level of feminisation in an occupation and the (hourly) wage outcomes of the men and women employed (that is the higher the feminisation level, the lower the hourly rate in that sub occupation), with the largest negative impact associated with men's wage outcomes (that is men had lower wages than women in the occupations examined).

The negative relationship between the degree of occupational feminisation and the wage outcomes of employees found in Dockery's study, are in line with international studies. The findings are consistent with the phenomena of undervaluation, which is the tendency for employers to ascribe a lower value to work done in more feminised occupations (see Levanon, England and Allison, 2009).

The links between occupational segregation and undervaluation are an important aspect of the economic impact of gender segregation. However, these are also overlooked in decomposition analyses because the decomposition technique takes the current occupational wage structure as a given and is only concerned with the effects on the gender pay gap of the distribution of men and women across the occupational wage structure.

The effects of occupational segregation on undervaluation occur in a variety of ways.

- Segregation reduces the likelihood that gendered assumptions and practices will be challenged. These assumptions and practices include treating women's skills as 'natural' and relying on notions of a woman's essential nature as a carer (and, thus, less concerned with material rewards). As Folbre notes in the US context 'Cultural constructions of gender.... still promote self-interest for men and altruism for women, encouraging a moral as well as physical division of labor' (2016: 36). These assumptions mean essential job skills (for example social skills and other skills associated with caring or domestic labour) are less likely to be recognised, described in detail and rewarded appropriately. Australian evidence shows that these assumptions and the practices arising from them are currently used to justify low rates of pay in key female-dominated occupations in the care sector (Austen et al., 2013; Charlesworth & Macdonald 2015).
- Segregation increases the chances that women will work in part-time jobs that are undervalued because they fail to comply with a male norm of full-time work. For example, Preston and Yu (2015: 44) found a part-time/full-time pay differential of 22.5% and argue for arrangements 'that ensure fair and equitable treatment of all part-times relative to full-timers.'
- Segregation makes male comparators less available for the evaluation of women's work, increasing the likelihood of misrecognition (and subsequently undervaluation) of women's skills. Burchell et al. (2015) note that segregation contributes directly to the undervaluation of women's skills when the formal pay and grading structures used for female-dominated jobs are based on male-type skills.

Occupational segregation also contributes to the gender division of labour in many households because couples often make decisions about who will undertake market work and care work on the basis of earning capacity. The gender division of household labour and gendered cultural norms is a key component of the care penalties faced by many women over their life course (eg, Livermore et al 2011), including higher rates of poverty in older age.

Because occupational segregation is typically associated with women's underrepresentation in jobs with decision-making authority, it is also negative for women's representation in the political and corporate sphere, which has dynamic, long-term effects on women's economic outcomes.

TOR d: Approaches to addressing gender segregation as it relates to economic inequality and the gender pay gap in comparable jurisdictions

For reasons of time we do not address this Term of Reference but there are many useful analyses from international bodies on gender segregation and the gender pay gap comparing attempts by different countries to deal with this issue, including and some examples where progress has been made. Two comprehensive research reports are one by the European Commission, (2009) and one by the ILO, Rubery and Koukiadaki (2016).

TOR e: Policy Directions and Legislative Issues

This part of the submission is divided into two sections. The first section sets out general principles for social and economic policy that are positive for promoting gender equality and outlines a number of different policy initiatives. The second section contains detailed guidance on legal mechanisms for tackling the gender pay gap in occupations, industries and individual firms

1. Policy Directions

The inter-related issues of segregation and undervaluation as well as dismantling barriers to women's employment (e.g. lack of childcare) must be addressed to improve gender equality in relation to pay. For example, reductions in the gender pay gap will require action that addresses the over-representation of women in lower paid occupations, *and* action on the undervaluation of work that is commonly undertaken by women.⁷

The W+FPR's 2016 Election Benchmarks provide specific proposals capable of early policy action.⁸ We also propose that the Committee recommend the Government consider the development of a longer term gendered industrial strategy. Two components of such a strategy are described below (points a) and b)). The first would boost women's employment by expanding the care infrastructure and the second would revalue care work by paying workers more. Both proposals have been developed by the UK Women's Budget Group (WBG).⁹

⁷ This also implies that it isn't necessary – or even desirable - for action aimed at gender equality to target *zero* occupational segregation, or to discourage women from working in traditionally female-dominated sectors, such as the care sector. Indeed, some studies have found that the over-representation of women in the care sector of the economy has contributed positively to the growth in female employment in recent decades (Mandel and Shalev 2009; Bettio and Veraschagina 2009).

⁸ The W+FPR 2016 Election Benchmarks are available at: http://www.workandfamilypolicyroundtable.org/wp-content/uploads/2016/05/Work-Care-Family-Policies_Online_s.pdf

⁹ A network of leading UK feminist economists, researchers, policy experts and campaigners committed to achieving a more gender equal future.

a) Investing in the care economy

This is a proposal to invest 2% of GDP in formal care services for pre-school age children, for those with a disability and to provide elder care in seven countries including Australia. WBG modelling indicates that, compared to¹⁰ a similar investment in construction industries, greater employment impacts could be generated¹¹ (De Henau et al 2016). The investment would generate jobs in the care industry ('direct' impacts), in associated industries needed to supply services and materials for the care services created (the 'indirect employment effect'), and through positive effects on household income boosting demand generally (the 'induced employment effect'). In Australia the estimated return from such an investment in care work is an extra 600,000 jobs, as compared to 387,000 jobs from a similar expenditure on construction.

The importance of this initiative for gender equity arises from its positive impacts on women's employment and earnings. Women's employment rate would rise more than men's and in Australia this would reduce the gender employment gap by 2.6 percentage points, achieving a 21% reduction in the gender employment gap.¹² Additionally, there would be significant community and economic flow on effects including increased taxes, decreased spending on social security and an improved social care infrastructure.

b) Investing in childcare workers' salaries

Ensuring the payment of decent wages and conditions in the early childhood education and care sector¹³ as advocated by the W+FPR 2016 Election Benchmarks¹⁴ will have further positive impacts on gender equality and economic performance. The WBG modelled this type of initiative on the basis of (1) paying childcare workers at the level of equivalent staff in primary schools and (2) expanding childcare to a free universal system providing 40 hours weekly for 48 weeks per year, in the United Kingdom context (De Henau 2016). They estimate substantial direct, indirect and induced employment growth would result, and predict an increase in the ability of unpaid carers to enter or increase paid work. The gender pay and employment gaps would be reduced.

The cost would be high: In the UK this would amount to 3% of GDP. Most funding would come from all the employment gains made, due to the tax take increasing (direct and indirect on consumption) and social security spending reducing (88%). A proposal for the UK was that a range of revenue raising measures (tax increases) would also be needed. Similar initiatives are under discussion in Australia. Some have been previously advocated by the

¹⁰ Accepting both types of investment are needed.

¹¹ Subject to the economy's capacity.

¹² De Henau et al. 2016: 26.

¹³ In Australia early childhood educators have a qualification anywhere between a four year teaching degree and a six month certificate III in childcare.

¹⁴ The W+FPR 2016 Election Benchmarks are available at: http://www.workandfamilypolicyroundtable.org/wp-content/uploads/2016/05/Work-Care-Family-Policies_Online_s.pdf

W+FPR and are contained in the W+FPR's Election Benchmarks,¹⁵ such as reducing superannuation tax breaks.

2. Legal mechanisms for tackling the gender pay gap

a) The Fair Work Act 2009

As Rubery and Koukiadaki (2016: 26) note '[w]hile it is true that the existing gender pay gap is primarily a socioeconomic problem, particular shortcomings in equal pay legislation have limited progress in this area'. This is strikingly true of federal equal pay legislation in Australia. As shown in the detailed discussion below, whilst many commentators were reasonably optimistic that the legislation's 'potential' would be realised in considering the successful social and community workers equal pay claim in 2012¹⁶ (eg Charlesworth and Macdonald 2015), more recent developments in the child care educators' case (see below)¹⁷ have derailed these hopes.

Thus we include below a short description and evaluation of the operation of equal pay provisions in labour law in Australia. We hope the Committee will find this useful in understanding how a situation has been reached where it is unlikely that the equal remuneration and related provisions in the Fair Work Act 2009 as currently configured and interpreted will operate effectively to address the gender pay gap.

The weaknesses in equal remuneration regulation are counter-productive for pay equity and **the Committee needs to recommend action to implement the many proposals for changes to tackle this and other problems in equal remuneration provisions in labour law as the W+FPR have previously detailed in its Election Benchmarks.**¹⁸

Evaluation of equal remuneration provisions in labour law

This section of the submission identifies the complexities in the assessment by Australian tribunals' of the value of work, specifically as it concerns equal remuneration applications. Assessing work value is a routine feature of tribunal decision-making and wage setting. However, this matter is the basis of particular attention and contest in the context of equal remuneration proceedings where the assessment of equal or comparable value is a requirement. In short how do tribunals reconcile differences between work that is normatively 'masculinised' and 'feminised' work. From the outset, such assessments and the equal value discourses underpinning them, have been highly contested (Webber, 1985). Within Australian equal remuneration proceedings there has been an inconsistency about whether comparative assessments of work, and specifically comparative assessments of

¹⁵ The W+FPR 2016's Election Benchmarks are available at:

http://www.workandfamilypolicyroundtable.org/wp-content/uploads/2016/05/Work-Care-Family-Policies_Online_s.pdf

¹⁶ Equal Remuneration Case [2011] FWA 2700; Equal Remuneration Case [2012] FWA 1000.

¹⁷ Equal Remuneration Decision 2015 [2015] FWCFB 8200

¹⁸ The W+FPR 2016's Election Benchmarks are available at:

http://www.workandfamilypolicyroundtable.org/wp-content/uploads/2016/05/Work-Care-Family-Policies_Online_s.pdf

masculinised and feminised work, are fundamental to tribunals' assessment of equal or comparable value (Smith, Layton & Stewart, forthcoming). In the context of a highly segregated labour market and a plateau in gender pay equity ratios, the result has been a halting and shifting case law and uncertainty about whether the objective of equal remuneration is supported by the policy and institutional apparatus that has been developed to support it (Macdonald & Charlesworth, 2013).

The development of Australia's remuneration regulation has proceeded as a series of distinct changes. These are outlined briefly below and there is also reference to recast approaches to equal remuneration developed in New South Wales and Queensland in 2000 and 2002.¹⁹

1969 and 1972 Federal Equal Pay Principles

Prior to gender pay equity reform in 1969 and 1972, Australia's federal industrial relations jurisprudence was characterised by the inclusion of gender as an explicit and acceptable criterion in wage fixing (O'Donnell & Hall, 1988; Ryan and Conlon, 1975). The establishment of separate female rates of pay was promoted through two principles adopted by the Commonwealth Arbitration Court in 1912.²⁰ Under these principles, equal pay was granted to women only in those occupations where men's employment was at risk due to the use of 'cheaper' female labour. Where this risk did not exist, and because of the inherent 'suitability' of women for the work at hand, women were granted a proportion of the male rate, based on the assumption that they did not have a family to support (Short, 1986, p. 316). Further support to this principle was provided in 1918 when the Court fixed a lower minimum basic wage for women in the clothing industry, based on their cost of living needs.²¹

The barrier of institutionalised sexism in wage fixing was partly reversed by the determination of equal pay principles in 1969 and 1972. In 1969, the Conciliation and Arbitration Commission (ACAC) adopted the principle of equal pay for equal work, which rested on a narrow interpretation of equal pay. The decision only applied to situations where 'work performed by men and women was of the same or a like nature'.²² A specific exclusion applied to work predominantly undertaken by women. This construction limited the available remedies to women who worked in identical jobs to men but received lower award wages than their male counterparts. As a result of the restrictions in the 1969 principle, only 18 percent of women in the workforce received equal pay (Scutt, 1992, p. 278).

The restricted nature of the measures available under the 1969 decision soon became apparent and led to further applications as part of proceedings for the 1972 National Wage

¹⁹ For a comprehensive review see also the appendices on federal and state equal remuneration regulation in Layton, Smith and Stewart, 2013.

²⁰ *Rural Workers' Union v The Mildura Branch of the Australian Dried Fruits Association* (1912) 6 CAR 61.

²¹ *Federated Clothing Trades of the Commonwealth of Australia v Archer* (1919) 13 CAR 647, at 709.

²² *Equal Pay Case 1969* (1969) 127 CAR 1142, at 1158.

Case. As a result of the 1972 proceedings, the effective exclusion of female-dominated industries from the ambit of the 1969 decision was lifted through the introduction of the broader principle of 'equal pay for work of equal value'.²³ For the purpose of assessing the value of the work, comparisons could be made between male and female classifications within an award. However, where such comparisons were unavailable or inconclusive, for example where the work was performed exclusively by females, the principle allowed comparisons to be made between female classifications within the award or in different awards. It also acknowledged that in some cases comparisons with male classifications in other awards might be necessary and that problems might be encountered, particularly where cross-award comparisons were involved (Layton, Smith & Stewart, 2013, p. 132).

1986 Comparable Worth Proceedings

The widened scope of the 1972 principle was viewed as advantageous to equal remuneration reform. However, there was limited detailed examination of the concept of equal value, as the proceedings that followed the 1972 principle were largely determined by consent without substantive work value inquiries (Thornton, 1981, p. 473, 477–80; Bennett, 1988, p. 540–1, Rafferty, 1994, p. 453–4; Short 1986, p. 316). This context shaped the comparable worth proceedings which arose from an application for wage increases for nurses where the applicants, supported by the Australian Council of Trade Unions, sought a series of rulings from the tribunal including that it apply the 1972 equal pay for work of equal value principle by way of the concept of comparable worth.²⁴ In rejecting comparable worth, the ACAC determined the comparable worth approach was contrary to the 1972 equal pay principle's direction to work value inquiries. The Commission indicated further unease with the concept of comparable worth as a method of comparison (Layton, Smith, Stewart, 2013, p. 49, 135), noting that comparable worth as practised in the United States 'refers to the value of the work in terms of its worth to the employer'.²⁵ Further its acceptance as a wage fixing principle would open a floodgate of applications in other areas, which could undermine centralised wage fixation:

It is clear that comparable worth and related concepts, on the limited material before us, have been applied differently in a number of countries. At its widest, comparable worth is capable of being applied to any classification regarded as having been improperly valued, without limitation on the kind of classification to which it is applied, with no requirement that the work performed is related or similar. It is capable of being applied to work which is essentially or usually performed by males as well as to work which is essentially or usually performed by females. Such an approach would strike at the heart of long accepted methods of wage fixation in this country and be particularly destructive of the present Wage Fixing Principles.²⁶

²³ *Equal Pay Case 1972* (1972) 147 CAR 172.

²⁴ The Royal Australian Nursing Federation and the Hospital Employees' Federation of Australia supported by the Australian Council of Trade Unions.

²⁵ *Comparable Worth Case* (1986) 13 IR 108, at 113.

²⁶ *Comparable Worth Case* (1986) 13 IR 108, at 113.

Legislative Commitment to Equal Remuneration

Federal industrial relations legislation was amended in 1993 to enshrine the objective of equal remuneration for men and women.²⁷ The effect of these amendments was to give the Commission power to issue equal remuneration orders to secure 'equal remuneration for work of equal value' with this term explicitly defined to mean rates of remuneration established without discrimination based on sex.²⁸ Only one case proceeded to extended arbitration that considered the assessment of work value. These proceedings featured an unsuccessful application by the Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union (AMWU) on behalf of process workers and packers employed at HPM Industries. The Australian Industrial Relations Commission (AIRC) determined that applicants not only had to demonstrate equivalence in work value but were required also to establish a discriminatory cause for any male/female earnings disparity that was the subject of the application.²⁹

The limitation of the discrimination test was that it failed to recognise the gendered nature of wage disparities (Smith & Stewart, 2010). Women receive lower income because they work in low paid 'feminised' jobs, which have been undervalued through often complex and overlapping processes deeply embedded in Australia's system of wage fixing and industrial relations (Smith & Ewer, 2008, p. 59). In those proceedings the AIRC's only specific commentary on the measurement of equal value arose because the applicants sought to use competency standards to demonstrate equivalence in work value; in response the Commission considered that the competency standards process was not appropriate to establish equivalence. While the Commission found that the competency standards provided 'an objective and gender neutral mechanism for measuring the relative competencies', they were found not to provide a means for assessing other attributes, such as 'elements of responsibility that are not skill-related, the nature of the work and the conditions under which the work is performed'.³⁰ The Commission noted that work value inquiries remained the means to support applications for equal pay orders (Layton, Smith, Stewart, 2013, p. 138), with work value defined as 'the nature of the work, skill and responsibility required or the conditions under which the work is performed'³¹.

The 1993 equal remuneration amendments remained largely unchanged through the introduction of the Workplace Relations Act 1996 (Cth) but were amended by the Workplace Relations Amendment (Work Choices) Act 2005 (Cth) in an important respect. Applicants were required to cite explicit reference to a comparator group of employees, defined in the legislation as 'the employees whom the applicant contends are performing

²⁷ By way of the Industrial Relations (Reform) Act 1993 (Cth) which amended the Industrial Relations Act 1988 (Cth).

²⁸ Through reference to the International Labour Organisation's Equal Remuneration Convention 1951 (No. 100).

²⁹ *HPM Case* (1998) 94 IR 129, at 158.

³⁰ *HPM Case* (1998) 94 IR 129, at 159.

³¹ *HPM Case* (1998) 94 IR 129, at 161.

work of equal value to the work performed by the employees to whom the application relates'.³²

Equal Remuneration Principles in New South Wales and Queensland

Extended consideration by Australian industrial tribunals of the design of equal remuneration regulation would next occur through a series of pay equity inquiries, most notably in the state jurisdictions of New South Wales (1997-98) and Queensland (2001), that would inform recast regulatory approaches to gender pay equity through new equal remuneration principles (Industrial Relations Commission of New South Wales, 1998a; Industrial Relations Commission of New South Wales, 1998b; Industrial Relations Commission of New South Wales, 1998c; Queensland Industrial Relations Commission, 2001). These principles gave expression to legislative provisions in both jurisdictions that made reference to *equal remuneration for work of equal or comparable value*.³³ These principles gave explicit focus to gender-based undervaluation, rather than discrimination, as a means of assessing whether the objective of equal remuneration had been met. Applicants could demonstrate that the objective of equal remuneration for work of equal or comparable value was not met, on the basis that the work, cited in the application, was undervalued. Nor do the ERPs require that applications demonstrate undervaluation by way of reference to explicit comparator groups. Undervaluation is not explicitly defined, but the Queensland equal remuneration principle lists the features of an occupation or industry that may be indicators of undervaluation. These include whether the work has carried a female characterisation, the industrial features of feminised industries and occupations, and whether sufficient and adequate weight has been placed on the skills and responsibilities typically exercised in feminised work. Both principles allow for an assessment that existing rates of pay may not have been properly set, and provide the capacity for the tribunal to assess the current value of the work (Layton, Smith & Stewart, 2013, p. 51). Those principles in turn became the basis for significant wage increases for feminised occupations in both jurisdictions.³⁴

Equal Remuneration Provisions in the Fair Work Act

The developments in New South Wales and Queensland opened up clear differences between state and federal industrial jurisdictions in the regulation of gender pay equity. Given the advent of a significantly expanded national jurisdiction that would operate to the exclusion of state labour law there was considerable focus on the equal remuneration provisions of the Fair Work Act (Smith & Stewart, 2014).³⁵ A related question concerned the

³² Workplace Relations Act 1996 (Cth) s 622. These particular amendments took effect 27 March 2006.

³³ *Re Equal Remuneration Principle* (2000) 97 IR 177; *Equal Remuneration Principle* (2002) 114 IR 305.

³⁴ See *Re Crown Librarians, Library Officers and Archivists Award Proceedings —Application under the Equal Remuneration Principle* (2002) 111 IR 48; *Re Miscellaneous Workers' Kindergartens and Child Care Centres etc (State) Award* (2006) 150 IR 290; *Liquor Hospitality and Miscellaneous Union, Queensland Branch, Union of Employees v Australian Dental Association (Qld Branch) Union of Employers* (2005) 180 QGIG 187; *Liquor Hospitality and Miscellaneous Union, Queensland Branch, Union of Employees v Children's Services Employers Association* (2006) 182 QGIG 318; *Queensland Services, Industrial Union of Employees v Queensland Chamber of Commerce and Industry Ltd* (2009) 191 QGIG 19; *Australian Workers' Union of Employees, Queensland v Queensland Community Services Employers Association Inc* (2009) 192 QGIG 46.

³⁵ Fair Work Act 2009 (Cth) (FW Act).

sustainability of the wage increases awarded through equal remuneration applications in state jurisdictions, given the regulatory change that had transferred significant areas of coverage to the federal sphere (Connolly, Rooney & Whitehouse, 2012). The legislation authorised Fair Work Australia (FWA, which replaced the AIRC), to make 'any order 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'.³⁶

The SACS Case

The provisions in the Fair Work Act were tested by way of an application by the Australian Services Union for equal remuneration orders in the *Social, Community, Home Care and Disability Services Industry Award 2010*.³⁷ FWA handed down the first of the two major decisions in the proceedings in May 2011. The major features of this first decision were FWA's finding that the work was undervalued on a gender basis, and FWA's direction to the parties to make further submissions on remedy. FWA's finding of gender-based undervaluation operated as a set of linked conclusions that drew significant inspiration from the evidence concerning the nature of work in the SACS industry (Cortis and Meagher, 2012). Thus FWA concluded that: much of the work is caring work; such a characterisation can contribute to devaluing the work; the work is undervalued, and given that caring work has a female characterisation, the undervaluation is gender-based.³⁸ The ASU were directed to make further submissions on remedy, including specifically the extent to which the undervaluation was gender-based.³⁹ In a February 2012 majority decision concerning remedy, FWA largely accepted the use of care work as a proxy for gender-based undervaluation.⁴⁰ A key feature of the minority decision was the view that the applicants had failed to demonstrate the undervaluation of work in the SACS sector was gender-based, as they had 'not sought to make comparisons between women's pay and men's pay'.⁴¹

The Early Childhood Education and Care Case

The provisions were tested on a second occasion, in July 2013, when applications were made for equal remuneration orders in relation to certain workers in the early childhood education and care (ECEC) sector. Rather than addressing the substantive application in the first instance, the Full Bench of the Fair Work Commission (FWC, as FWA had by then become), sought submissions on the legislative and conceptual framework for the proceeding and, after a lengthy delay, handed down a decision in November 2015 dealing with preliminary issues of interpretation.⁴²

³⁶ FW Act s 302(1). The equal remuneration provisions are contained in Part 2-7 of the legislation.

³⁷ Application for Equal Remuneration order by Australian Municipal, Administrative, Clerical and Services Union, FWA Form F1, 11 March 2010. The four other unions were the Health Services Union, the Australian Workers' Union of Employees (Queensland), United Voice and the Australian Education Union. The case proceedings to FWA had the support of the Commonwealth - See Gillard (2009) and Australian Government and Australian Services Union (2009).

³⁸ *Equal Remuneration Case* [2011] FWAFB 2700 at [253].

³⁹ *Ibid*, at [286], [295].

⁴⁰ *Equal Remuneration Case* [2012] FWAFB 1000 at [63].

⁴¹ *Ibid*, at [87], [96].

⁴² Equal Remuneration Decision 2015 [2015] FWCFB 8200.

The ruling is notable for its emphasis on statutory construction and its ‘close, textual analysis of Part 2-7 which persuaded the bench that there were cogent reasons to depart from the approach taken by the bench in the SACS case in three critical respects’ (Stewart et al. 2016, 15.43).⁴³ First, applications must reference a comparator which must be of the opposite gender.⁴⁴ To establish the jurisdictional basis required by the legislation for an order to be made in favour of a group of female employees, an applicant must identify a group of male employees, doing work of equal or comparable value, who receive higher remuneration. It is insufficient for applicants to show that ‘an employee or group of employees of a particular gender are considered not to be remunerated in accordance with what might be considered to be the intrinsic or true value of their work’.⁴⁵ In doing so the Commission rejected gender-based undervaluation as a means of assessing whether the objective of equal remuneration for work of equal or comparable value is met. To assess the comparison of jobs the bench indicated that it would rely on work value in accordance with the established industrial understandings of the term.⁴⁶

Secondly, the comparison does not require the explicit identification and disregard of any differences which are not gender-related. Applicants are not required to identify that proportion of the wage difference between the comparators that were gender-related. The precise *reasons* for the difference in remuneration are irrelevant to the initial question of whether there is a basis for making an order, though they may be relevant to the FWC’s decision as to whether to exercise its discretion to redress that difference. Thirdly, and on a related point, if a lack of equal remuneration can be established between the two groups, there is no warrant for ‘discounting’ any remedy to exclude pay differences that are not gender-related. In this regard the bench stressed the requirement in s 302(1) to *ensure* equal remuneration. Once the FWC is satisfied that equal remuneration is lacking, it may choose to grant a remedy or not, noting that the decision to issue an equal remuneration order remains a discretionary one. In choosing to make an equal remuneration order, the FWC must bridge the entire gap between the remuneration of the two groups, subject only to the phasing-in of increases specifically allowed by the legislation.⁴⁷

The insistence by the Full Bench on binary, gender-based comparators has narrowed the grounds on which equal remuneration claims can be heard as equality for women can only be claimed through reference to a masculinised benchmark. This elevates as primary a discourse whereby equality for women is equated as equality to men; this test serves as the benchmark for comparison and thus the means to success, or failure (Palmer, 2002). Utilising tests cohered around the ‘male comparator’ speak directly to the way in which laws

⁴³ This section of the submission draws significantly on the overview of the case provided in Stewart et al. (2016).

⁴⁴ *Equal Remuneration Decision 2015* [2015] FWCFB 8200 at [158], summarising the more detailed reasoning later in the judgment.

⁴⁵ *Ibid*, at [290].

⁴⁶ *Ibid*, at [279]-[280].

⁴⁷ *Ibid*, at [223]-[228], [305].

can impact upon women and men differently (Smith, Layton, Stewart, forthcoming). In a segregated labour market, the mandatory requirement for a binary comparator fails to recognise and respond to the differences between masculinised and feminised work. The requirement for a binary comparator weakens the capacity of the objective of equal remuneration to be met as the Commission will rely on a narrowly cast test that excludes considerations of whether the rates of pay, at the subject of the application, align to the contemporary assessment of the work.

Prior to moving to the proposal for publication of gender pay gap data we draw the Committee's attention to the FWC's recent decision⁴⁸ to cut penalty rates for Sunday workers in the context of modern award reviews of hospitality and retail awards. This will negatively affect large numbers of retail and hospitality industry workers. This decision highlights two matters that are critical to the consideration of gender pay equity. One, the capacity of modern award reviews to cut rates of pay for low-paid workers in feminised areas of work, and two the limitations in the capacity of modern award reviews to address equal remuneration.

b) Publicising the gender pay gap by individual employers

Currently, non-government Australian employers of 100 and over employees already have systems to collect extensive gendered pay information for their annual gender equality reporting to the WGEA, but this data is not made public. This suggests that public reporting of individual employer gender pay gaps (GPGs) could be implemented in Australia with little delay or extra employer work. A scheme could be devised that would allow employers to accompany their GPG data with an explanation of why a gap exists and their action plans to overcome this. Such an initiative is likely to provide an added impetus to address GPGs at firm level and for employers to press Government for policy changes which could help them achieve more equitable pay outcomes. McGrath-Champ and Jefferson (2013) suggest the need for such an impetus in their illuminating analysis (based on their detailed investigation into the GPGs in a large professional services firm in Australia) of the current problems in identifying and remedying firm specific gender pay gaps even in firms committed to doing so and having extensive gender pay data available to them.

The feasibility of the proposed measure has been demonstrated recently in the United Kingdom. There employers with 250 or more employees will be required to publish their annual gender pay gaps in a range of ways from April 2018.⁴⁹ These include average and median hourly gaps, average and median bonuses, the percentage of women and men employed receiving a bonus and the proportions of both men and women in each of four equal pay bands constructed by an employer from top to bottom of the firm's pay range.

⁴⁸ 4 yearly review of modern awards – Penalty Rates 2017, [2017] FWCFB 1001.

⁴⁹ The Equality Act 2010 (Gender Pay Gap Information) Regulations 2017, available at: <http://www.legislation.gov.uk/ukxi/2017/172/contents/made>

Conclusion

Australian policymakers and researchers have developed a large and comprehensive body of knowledge about gender segregation in Australia: it has been the subject of many inquiries and research projects many of which are described and drawn on above. Numerous recommendations from those inquiries and research clearly demonstrate that a multi-faceted/multi-level approach is required to address gender segregation, and its most pernicious manifestation - pay inequity. Yet the problem remains that there is a lack of political commitment to taking determined action to effect change. We recommend that the Committee make this point vigorously and prominently in their report.

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