



Pay equity and legal risk management

Overview

Taking action to ensure equal remuneration between women and men is an important step for organisations to proactively manage any associated legal risks. Organisations are required by law to provide equal pay to employees who are performing work of equal or comparable value.

It is important that organisations meet their legal obligations, as failure to do so may result in the organisation and individuals being exposed to a range of legal claims.

In collaboration with the Workplace Gender Equality Agency, Dentons has developed this briefing note which outlines the legal framework related to pay equity. This briefing note also outlines key considerations for organisations in managing their legal risks at each of the six stages of the pay equity journey.

Relevant legislation and frameworks

Equal opportunity laws

Equal opportunity laws operate at federal and state/territory levels. Equal opportunity laws prohibit the unfavourable or unfair treatment of a person because they belong to a particular group of people or because they have a particular characteristic or attribute. The federal *Sex Discrimination Act 1984* (Cth) and state/territory equal opportunity laws prohibit unlawful discrimination on the basis of a person's sex in the context of employment. Equal opportunity laws can also extend to protect other types of workers, such as contractors, consultants and non-executive directors, from unlawful sex discrimination.

Direct discrimination

Organisations must not treat an employee of one sex less favourably than they would treat a person of a different sex in circumstances that are the same or not materially different. It is therefore important to carefully consider any like-for-like gender pay gaps, as they may expose organisations to the risk of a claim of direct sex discrimination.

An example of potential direct sex discrimination is offering a male graduate a higher starting salary than a female graduate, in circumstances where there are no other distinguishing factors.

Indirect discrimination

Organisations must ensure that they do not impose (or propose to impose) an unreasonable condition, requirement or practice that has, or is likely to have, the effect of disadvantaging persons of one sex. If an organisation has by-level or organisation wide gender pay gaps, it is important to carefully assess whether there are any conditions, requirements or practices within the organisation that have a disproportionate impact on one sex, and whether those conditions, requirements or practices are reasonable.

An example of potential indirect sex discrimination is imposing a condition that only full-time employees are eligible to participate in the company's discretionary bonus scheme, in circumstances where the condition

has the effect of disadvantaging women as there is a higher proportion of women who work part-time at the company.

General protections

The *Fair Work Act 2009* (Cth) confers a number of general protections on employees, including:

- protection from being treated adversely because they have exercised, or propose to exercise, a workplace right (such as a right to the benefit of parental leave); and
- protection from unlawful discrimination.

Similar to equal opportunity laws, general protections laws can also apply to a range of workers other than employees, including independent contractors.

Organisations must carefully consider their obligations under the *Fair Work Act 2009* (Cth) when making decisions, including decisions about recruitment, promotion, performance, pay and termination.

Equal remuneration orders

Under the *Fair Work Act 2009* (Cth), upon application, the Fair Work Commission is empowered to make any order it considers appropriate against an employer if it is satisfied that the relevant employees do not enjoy equal remuneration for work of equal or comparable value.

For example, the Fair Work Commission may make an order varying the pay rates contained in awards and enterprise agreements. Organisations who fail to comply with the terms of an equal remuneration order may be exposed to penalties.

Reporting requirements

Under the *Workplace Gender Equality Act 2012* (Cth), non-public sector organisations with 100 or more employees are required to report to the Agency on six gender equality indicators. Gender equality indicator 3 'equal remuneration for women and men' requires organisations to report on whether it has in place a formal policy or formal strategy on remuneration generally, whether specific gender pay equity objectives are included in the formal remuneration policy or formal strategy, whether and when a gender remuneration gap analysis has been undertaken and, if so, whether any actions have been taken as a result of the gender remuneration gap analysis.

Key considerations: Legal risk management on the pay equity journey

Steps to addressing pay equity	Key legal issues to consider along the pay equity journey	Key actions to be taken by organisations
1. Awareness Gain awareness and understanding of pay equity.	<ul style="list-style-type: none"> → Organisations have a range of obligations to provide equal remuneration to employees. → It is important to gain an understanding of the key issues and causes and why pay gaps may arise, and an understanding of any legal and commercial consequences may flow if organisations identify gender pay gaps. → Gain awareness of the legal framework for equal remuneration between women and men. 	<ul style="list-style-type: none"> → Advise your key stakeholders (e.g. company secretary, risk and compliance manager) about, and engage internal legal counsel in relation to, your organisation's obligations regarding pay equity. → Develop a strategy to minimise any legal risk exposure. → As part of your strategy, ensure a process for documenting and managing records of planned actions and decisions that minimises any legal risk exposure.
2. Build a business case Understand and support the key benefits for the organisation in addressing pay equity.	<p>Legal risk management is a key business driver for proactive management of pay equity. Organisations that proactively address pay equity may be less likely to:</p> <ul style="list-style-type: none"> → be exposed to discrimination and/or general protections complaints → have an equal remuneration order made against them → be the subject of adverse findings or criticism by a court or tribunal → face reputational damage that may arise from pay inequities. 	<ul style="list-style-type: none"> → Along with articulating other business benefits, build into your organisation's business case the key benefits associated with proactive legal risk management and meeting legal obligations associated with equal remuneration. → Adopt an approach that requires, at a minimum, compliance with the organisation's legal obligations. → Consider adopting a best practice approach to achieve a competitive edge.
3. Leadership Commitment from leadership is critical in creating change.	<ul style="list-style-type: none"> → Leadership commitment is an essential part of addressing pay equity. It is important to consider the impact of internal and external communications and ensure that any statements or commitments made are realistic and accurate. → Consider the organisation's obligations under relevant privacy laws and company policy when seeking and sharing employee data. 	<ul style="list-style-type: none"> → Understand how pay equity is aligned with the board and executive priorities so the leadership team prioritises identifying and addressing gender pay inequity. → Include the organisation's legal obligations and the relevant legal framework in your briefing to the board and executive. → Develop a draft action plan with clear goals, project planning, resource allocation and realistic timeframes. → Consult with key stakeholders and seek legal advice about your draft action plan prior to implementation with a view to minimising legal risk exposure.

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<p>4. Gender pay analysis</p> <p>Conduct a gender pay analysis, identify gender pay gaps and analyse their causes.</p>	<ul style="list-style-type: none"> → Consider the purposes for which the pay analysis will be conducted and put in place an appropriate framework. → In your data analysis, carefully analyse the underlying causes of any gender pay gaps that are identified and consider whether any gender biases are at play. → Gain an understanding of the legal consequences which may flow based on the nature of the gender pay gap identified. 	<ul style="list-style-type: none"> → Consider the purpose for which documents will be created and ensure that your documentation and record management processes are consistent with your objectives. → Consider any gender pay gaps from a legal compliance perspective to identify potential risk exposure. → Prioritise taking action on any gender pay gaps that are not explainable or justifiable. → Prioritise areas of greatest risk and greatest benefit to the organisation. → Consider seeking legal advice before communicating the results of the pay analysis.
<p>5. Strategy and action plan</p> <p>Tailor specific actions to the nature and causes of gender pay gaps. Potentially start by addressing like-for-like gender pay gaps in the first instance.</p>	<ul style="list-style-type: none"> → Consider the organisation's legal risk exposure when identifying areas of concern and determining priorities. → Consider strategies to minimise legal risk exposure moving forward, as well as addressing historical issues. → Seek advice regarding whether it is possible to take any special measures to achieve equality (i.e. 'positive' discrimination) and whether there are any limitations on doing so. → Ensure that any statements or commitments made in relation to your strategy and action plan are realistic and accurate. → Gain an understanding of the legal issues associated with proposing to change a worker's terms and conditions of employment or engagement. 	<ul style="list-style-type: none"> → Review your existing policies to ensure consistency with applicable laws. → Review existing policies and procedures governing pay and performance decisions to ensure they are free from bias. → Consider obtaining advice regarding potential legal risk exposure and ways of eliminating, or minimising, risk exposure. → Draft specific goals to address the areas of concern and contribute to minimising or eliminating the gender pay gap. → Seek legal advice about your draft goals prior to implementation to minimise legal risk exposure. → Allocate responsibility and accountability for action items. → Take proactive action to correct gaps where appropriate and address underlying causes of gender pay gaps. → Review existing decision-making processes to ensure that good record management processes are in place, and that reasons for decisions are documented, particularly for out-of-cycle pay related decisions.

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<p>6. Review and refine</p> <p>Monitor progress and strive for change and improvement.</p>	<ul style="list-style-type: none"> → Ensure that progress is maintained and that gender pay gaps do not increase or appear in areas where no gap previously existed. → Review progress against goals and implementation of actions. → Ensure the organisation meets any commitments or promises it has made. → Check legal compliance on an ongoing basis. 	<ul style="list-style-type: none"> → Consider obtaining legal advice when reviewing changes as a result of actions, and when refining goals and strategies over time. → Conduct a payroll analysis and review of your strategy at least once a year, and when there are major workplace changes (e.g. restructure or acquisition or divestment of a business). → Build processes to consider gender pay equity at the time of making remuneration decisions and during performance review processes.

Additional resources

There are a variety of resources that are freely available.

The **Workplace Gender Equality Agency** website contains further resources, information and tools to assist organisations to analyse and improve pay equity: <http://www.wgea.gov.au>

The **Fair Work Ombudsman** website contains information and advice about workplace rights and obligations: <http://www.fairwork.gov.au/>

The **Fair Work Commission** website contains information about creating fair workplaces and resolving disputes: <https://www.fwc.gov.au/>

The **Australian Human Rights Commission** website contains information on the *Australian Human Rights Commission Act 1986* (Cth), federal discrimination legislation, and how businesses can impact and promote human rights: <https://www.humanrights.gov.au/>

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