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## **The Women and Equalities Select Committee Inquiry to Inform Government Strategy on Reducing the Gender Pay Gap**

### **Response from the Employment Lawyers Association**

**4 December 2015**

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### **Introduction**

The Employment Lawyers Association (“ELA”) is a non-political group of specialists in the field of employment law and includes those who represent Claimants and Respondents/Defendants in the Courts and Employment Tribunals. It is therefore not ELA’s role to comment on the political merits or otherwise of proposed legislation, rather to make observations from a legal standpoint. The ELA’s Legislative and Policy Committee is made up of both Barristers and Solicitors who meet regularly for a number of purposes, including to consider and respond to proposed new legislation.

A sub-committee, chaired by Kiran Daurka, was set up by the Legislative and Policy Committee of ELA to consider and comment on the Women and Equalities Select Committee Inquiry. Its report is set out below. Members of the sub-committee are listed at the end of this paper.

### **Consultation questions**

- 1. How adequate are the Government’s proposals for tackling the pay gap faced by women over 40? What additional measures would be most effective in reducing the pay differentials faced by this group?**

ELA submitted a detailed response to the GEO consultation on closing the gender pay gap dated 6 September 2015 (“ELA’s Consultation Response”). A copy of ELA’s Consultation Response is **attached** to this document, below. At present, there are no detailed proposals from the Government, but drawing from our response, it is ELA’s view that the following steps may encourage employers to work towards reducing the pay gap:

- a. Publication of gender pay gap information in order to promote transparency within organisations;
- b. Clear specifications within the regulations setting out where information is to be published and how the information is to be broken down;
- c. Non-statutory guidance detailing the supporting information that employers should include as part of the additional narrative, including an action plan for next steps;
- d. An agreed method of calculation;

- e. A lower threshold than 250 employees should be introduced for those with reporting requirements;
- f. Resources made available to smaller employers (seminars, software, government service to support analysis and action);
- g. Effective enforcement measures.

**2. What actions would be most effective in improving recruitment, retention and re-training for women aged over 40?**

Whilst anecdotally ELA understands that women over 40 face particular barriers in the workplace, it is not clear from Employment Tribunal statistics how many discrimination claims are tainted by both age and sex. ELA would encourage the government to bring s.14 of the Equality Act 2010 into force in order to allow a clearer measure of the numbers of claims being commenced because of age and gender. We also draw attention to responses 18 and 19 of ELA's Consultation Response.

There is also an indication that US and UK employers are using "returnships" or "mumternships" to reintegrate women into the workplace after a period of absence. A 'returnship' is a paid scheme for older women which lasts around 12 weeks; of those on the scheme, it is understood that about half of the interns gain a permanent role. Great discussion around these schemes may encourage more employers to open up similar programmes.

**3. Is there any evidence that women aged over 40 face particular barriers to promotion? If so, what could be done to address this problem?**

The issue of the gender pay gap in older women is being considered in many other western countries. In a recent study of the National Bureau of Economic Research in the United States found "robust" evidence based on looking at more than 40,000 job applications of age discrimination in hiring female candidates and "considerably less evidence" for age discrimination against male candidates.

In the UK the TUC produced a report in 2014 called "Age Immaterial: Women over 50 in the workplace" which highlighted the issues facing women over 50 in the workplace specifically focussing on the gender pay gap.

There is a great deal of anecdotal evidence of women over fifty being forced out of a job specifically in the education sector which is female dominated. This has been noted by professional associations and unions.

However, it is difficult to collate evidence regarding discrimination specifically in older women based on discrimination claims brought in employment tribunals. This is because section 14 of the Equality Act 2010 providing for dual discrimination was not brought in. As such, women bringing discrimination claims are likely to bring either an age or sex discrimination claim, or separate claims which may not be determined as a joint cause of discrimination.

**4. Are there particular difficulties in narrowing the gender pay gap for women working in predominantly female sectors and non-professional roles? Are**

**there any evidence-based measures which could effectively address these issues?**

There is concern that some roles may be undervalued by virtue of being considered as “feminine” work. The government may consider whether to identify which roles, particularly, in the public sector are female-dominated in order to compare pay with “male” roles of equal value in order to determine a gender pay gap figure.

**5. Should the regulations on gender pay reporting be extended to organisations with fewer than 250 employees?**

Please see ELA’s Consultation Response at response 10.

It is ELA’s view that gender pay reporting should be extended to organisations with fewer than 250 employees as only 1% of business employ 250 or more individuals. Further several EU member states require gender pay reporting from far smaller employers.

**6. Would voluntary measures regarding what employers do with gender pay gap information be sufficient to create change within organisations? What could be done to ensure that information about an organisation’s pay gap is translated into action?**

ELA notes that voluntary gender pay gap reporting under "Think, Act, Report" has not generated a significant impact, with only four out of 200 large employers publishing (generally high level) gender pay gap information. Mandatory reporting in and of itself could lead to a change in behaviours such as those noted in ELA’s Consultation Response. For example, greater transparency on pay will trigger conversations with employees about what has traditionally been a "taboo" subject, and the risk of negative publicity – together with the increased risk of equal pay claims - will encourage employers to examine their pay structures and outline steps to address any pay gaps.

However, as ELA has previously noted, the extent to which information reported translates into action depends on what exactly is reported and the manner in which it is done. A high level report of the overall gender pay gap in a large organisation may lead to more questions than it answers and therefore may be unlikely to facilitate meaningful communication about pay between employers and employees. More detailed reporting (e.g. which sets out gender pay gaps by job grade/seniority or region and perhaps also age) would enable employees and other stakeholders more easily to identify any pay discrepancies between different employers. This in turn could act as an incentive for employers with larger gaps to take action to address them in order to recruit and retain a talented and incentivised workforce. On the other hand, detailed reporting may be financially and administratively prohibitive for some organisations.

Whilst it is possible that employers will take voluntary action to narrow the gender pay gap so that they can report an improvement in the subsequent report, ELA's

view (particularly given the lack of uptake on voluntary gender pay reporting) is that this may not be sufficient to achieve the government's objective to create change. The options set out below could be considered in order to translate gender pay reporting into action. (Many of these are drawn from current practice in Australia under the *Workplace Gender Equality Act*). ELA notes, however, that some of these options may require significant additional government resource in order for them to be administered:

- Maintaining a national database of gender pay reports (e.g. on the GEC or EHRC website) to facilitate comparison of pay gaps within industry sectors.
- Requiring employers to publish (as part of the gender pay report) an action plan of steps they will take prior to the next report to address gender gaps in pay and (possibly) also to address gender inequality more generally, and to report progress against that plan.
- Requiring the CEO or another senior manager/board member named in the gender pay report as a gender pay equality "champion", to promote and take responsibility for the implementation of an action plan to narrow the gender pay gap. This could be modelled on the similar concept of a "whistle blowing champion" under the current proposals for the Senior Managers Regime in the financial services industry.
- Introducing a mechanism for "spot checking" the methodology used in gender pay reporting and for auditing progress against employers' action plans to implement change within the organisation.
- Publicly recognising employers who show that they are taking effective action.
- Implementing a 'comply or explain' policy similar to the concept under the Corporate Governance Code which requires that, where there is a failure to comply with the regulations or an employer's published action plan, an explanation should be provided which sets out the background, provides a clear rationale for the action or omission and describes any mitigating activities. Also, where deviation from a particular provision or action is intended to be limited in time, the explanation should indicate when the employer expects to conform with the provision or action.
- Maintaining a public register of employers caught by the regulations who fail to provide a gender pay report (or who file a non-compliant report). (ELA notes that this would need to link in to a "comply or explain" concept if that is also introduced, so that explanations provided by non-compliant employers are included in any public censure register).
- Implementing compulsory minimum requirements<sup>1</sup>
- Requiring employers to include relevant gender pay gap information on job advertisements.
- Allowing Employment Tribunals to draw adverse inferences (e.g. in discrimination cases) against an employer who has failed to comply with the regulations (taking

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<sup>1</sup> For example, in Australia, in order to meet the minimum standard, a relevant employer must have a policy or strategy in place that specifically supports gender equality in relation to at least one area such as (i) gender composition of the workforce; (ii) equal remuneration between women and men; and (iii) availability and utility of employment terms, conditions and practices relating to flexible working arrangements and working arrangements supporting employees with family or caring responsibilities.

into account any explanation provided by the employer for such failure at the time it failed to comply).

- Protecting employees from detriment/dismissal (akin to whistle blower protection) in retaliation against employees who seek to discuss their compensation with colleagues.
- Preventing non-compliant employers from tendering in government agency procurement processes and/or losing eligibility for grants or other financial assistance.

However, ELA notes that if gender pay reporting obligations pose an unduly heavy financial or administrative burden on employers, there is a risk of disenfranchisement which may have the unintended consequence of instilling a negative attitude to gender pay reporting as "red tape". ELA is not suggesting that all of the above options should be implemented. In addition, references in the points above to "requiring" employers to take certain steps could be best practice recommendations set out in non-statutory guidance rather than requirements in the regulations themselves.

**7. Which mechanisms would most effectively ensure that policies designed to narrow the gender pay gap are fully complied with? Is there evidence from other countries or policy areas of what might work best?**

Please refer to the response to the previous question. ELA's view is that public reporting on an employer's progress against a published action plan would be one of the most effective mechanisms for ensuring that policies designed to narrow the gender pay gap are complied with.

In addition, ELA refers to its response to question 14 of ELA's Consultation Response in relation to the introduction of civil enforcement procedures. It is likely that public censure would be more effective than civil fines at the £5,000 cap currently proposed under section 78 of the Equality Act 2010. Consideration should be given to public censure in the event that an employer refuses to permit spot checking of gender pay reporting methodology or to comply with a request for an audit of progress against its gender pay equality action plan. Other initiatives include training for employers or further campaigns to raise awareness.

It is difficult to pinpoint evidence from other countries on what options may work best to ensure that policies designed to narrow the gender pay gap might work best and apply that to the UK. ELA notes that, despite introducing gender pay reporting and other measures such as minimum standards, Australia's gender pay gap has risen slightly over recent years.

However, significant legislative changes have recently been implemented in the USA (notably in California and New York) and it will be interesting to observe the impact of this over the coming years.

In New York State, the Women's Equality Act (signed in October 2015) will (among other things) impose a higher burden of proof on employers to demonstrate that any differentials in pay between the sexes for equal work is due to factors such as skill level, seniority or a bona fide factor other than sex such as education, training or experience. In California, the Fair Pay Act (which ELA understands is due to come into force in January 2016) already contained such provisions, but these have been expanded by requiring the employer to establish that a non-sex related business justification accounted for the entire wage discrepancy and was reasonably relied upon by the employer. The Californian legislation has also introduced a concept of equal pay for "substantially similar" work rather than "equal work" and the right to equal pay for substantially similar work operates across an employer's establishments.

**ELA Sub-committee**

Chair: Kiran Daurka, Slater & Gordon (UK) LLP

Felicia Epstein, ATL

Annabel Gilham, Herbert Smith Freehills LLP

Andrew Taggart, Herbert Smith Freehills LLP

# **GEO Consultation on Closing the Gender Pay Gap**

## **Response from the Employment Lawyers Association**

**6 September 2015**

### **Introduction**

The Employment Lawyers Association (ELA) is an unaffiliated and non-political group of specialists in the field of employment. Our membership includes those who represent and advise both employers and employees. It is not our role to comment on the political merits of proposed legislation, rather we make observations from a legal standpoint.

ELA's Legislative and Policy Committee is made up of both Solicitors and Barristers who meet regularly for a number of purposes; including to consider and respond to proposed new legislation.

A working group was set up by the Legislative and Policy Committee under the chairmanship of Kiran Daurka of Slater & Gordon (UK) LLP to consider and comment on the GEO's consultation on Closing the Gender Pay Gap. A full list of the members of the working group is set out at the end of this paper.

### **1. Publication of gender pay information will encourage employers to take actions that will help close the pay gap. Do you strongly agree, agree, neither agree nor disagree, disagree or strongly disagree?**

ELA agrees that publication of gender pay information is a step towards reducing the pay gap.

ELA believes that reporting the gender pay gap may encourage employers to consider steps to address existing gaps. The level of encouragement depends on what exactly is reported and the manner in which it is done. It appears highly likely to start conversations in organisations and among employees. Pay in the private sector is something that is rarely discussed and publishing these figures will lead to greater transparency for employees.

Reporting the gender pay gap will attract media attention and, for some employers, this may be negative attention. This could be the impetus some employers need to examine their structures and consider why there is a pay gap and what can be done to rectify this. The name and shame element has been an effective tool to spur some employers on to make changes. As they begin to compile the data, employers may want to put their house in order so that at the very least they have an action plan to publicise alongside the figures to help take the sting out of any potential bad publicity.



Further, we have seen the spread of equal pay litigation to the private sector in the last few years. It is likely that practitioners and unions who want to address equal pay problems will look at discrepancies in pay between the sexes and seek to capitalise on any gap that is reported. Reporting the gap might focus employers' minds on their equal pay obligations and whether they are meeting these. It may act as a useful due diligence process for employers and identify litigation risks that can be addressed.

Employers increasingly espouse their ethos of corporate responsibility. Some will see the gender pay gap as a new area in which they can publish their message of corporate responsibility but, of course to take full advantage of this, they may also need to ensure they are taking steps to minimise any gap.

At the very least, reporting the gender pay gap will facilitate communication.

## **2. How likely do you think transparency on gender pay will have an impact on:**

- (a) Encouraging girls and women to consider working in a wider variety of occupations and sectors.**
- (b) Encouraging employers to develop their female talent.**
- (c) Encouraging employees to take up flexible working or shared parental leave.**
- (d) Encouraging employers to support flexible working or shared parental leave.**
- (e) Encouraging employers to adopt good practice on how to manage and support a multigenerational workforce.**
- (f) Helping those who have a stake in the organisation, including investors, shareholders and clients.**
- (g) Helping employers to address equal pay in their organisations.**

It is ELA's view that transparency on gender pay reporting is likely to have an impact on the pay gap, but that impact should not be overstated. The Equality and Human Rights Commission (the **EHRC**) stated in 2010 that by itself information does not bring about the actions necessary to close the gap between the men's and women's pay, but it does enable questions to be asked.<sup>2</sup>

The EHRC Report noted an International Labour Organisation study which found that pay discrimination is not identified by merely reporting against remuneration range and average monthly remuneration, as it says nothing as to whether the role (or indeed industry) is undervalued on account of being 'feminine' work.<sup>3</sup>

It is worth considering comparable jurisdictions that already have gender pay reporting requirements in place. In Australia, the *Workplace Gender Equality Act* has required pay gap reporting since 2012 but full time working Australian women continue to earn the equivalent of £138 per week less than their male counterparts.<sup>4</sup> As at February 2015, the Australian national

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<sup>2</sup> 'Proposals for Measuring and Publishing Information on the Gender Pay Gap', Equality and Human Rights Commission, page 7.

<sup>3</sup> Page 24.

<sup>4</sup> 'ANZ Women's Report: Barriers to Achieving Financial Gender Equity', page 6, citing the Australian Bureau of Statistics, 2014, 6302.0 Average Weekly Earnings, Australia.

gender pay gap stood at 18.8%.<sup>5</sup> A study of employers in that jurisdiction found that pay reporting requirements without follow-through behavioural change are not effective. It found on the one hand, that risks or barriers created by measurement and reporting requirements were that “[e]nthusiasm is not sustained among managers at all levels, beyond current reporting deadlines” and “[t]he motivating link between gender equality measures/reports and business outcomes is not clearly communicated or internalised throughout the organisation”.<sup>6</sup> On the other hand, outcomes or benefits created by measurement and reporting requirements were found to be that:

- “Measurement provides the basis for action”;
- “Regular reporting keeps gender equality front of mind for executives”;
- “Gender equality is progressively seen as relevant to performance”;
- “Metrics help to generate focus and a sense of urgency”; and
- “Robust reporting provides a sound context for target-setting”.

In short, ELA’s view is that gender pay gap reporting could be a useful tool to address the issues raised in question 2 parts (a) to (g), but that it would be overreach to expect such reporting requirements to be effective in the absence of an overall strategy to address gender gaps in pay and to address gender inequality more generally.

Notwithstanding the importance of gender pay reporting, it would be unhelpful if the publication of gender pay gap data could be manipulated, making it very difficult for employees and employers to discern the true position. This is why there might be some advantage if government is prescriptive about how the data is presented and what data is required.

### **3. Employees or other interested parties (e.g. share holders) may want to gauge how an employer’s gender pay gap compares with similar organisations. How important do you think comparability is? (Not at all important; very unimportant; somewhat important; neither important nor unimportant; somewhat important; very important; don’t know.)**

Gender pay comparability is very important in assisting the monitoring and addressing of potentially discriminatory attitudes within particular industries and sectors, as well as allowing stakeholders and potential recruits to make an informed decision about an organisation’s pay practices. If the information was available, it is likely that current and potential employees would want to compare an employer’s gender pay gap with other organisations, because a large gender pay gap could be indicative of an organisation in which it is difficult for women to succeed on a par with male peers.

Other employers will also be interested in looking at this data to benchmark their own performance. This data will be of limited value for this purpose unless the data is comparable across firms (i.e. uses a similar methodology). Comparable data may be a catalyst for change at organisations with poor performance on this issue.

Investment managers, institutional asset owners (e.g. pension funds) and firms that collect environmental, social and governance (“ESG”) data on behalf of investors will analyse this data. For example, firms that collect ESG data such as ISS or MSCI already collect metrics for investors such as board gender diversity. This data feeds directly into investment decisions and encourages companies to improve their performance. Data is clearly of far greater value for this purpose when it can be easily compared across organisations.

### **4. Do you think the regulations should specify where the employer publishes their gender pay information – for example, a prominent place on their public website?**

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<sup>5</sup> See above ANZ report.

<sup>6</sup> ‘Workplace Gender and Equality Strategy Project Final Report’, The University of Melbourne and the Centre for Workplace Leadership (undated).

Yes – the regulations should specify where the employer publishes their gender pay information. This will ensure consistency and allow for easier comparability of data between organisations.

In addition to publishing gender pay information on their website, organisations could also be required to publish gender pay information in annual accounts and a central Government register. It is likely that this would further enhance transparency which may also encourage organisations to take steps to close any gender pay gaps. It is also likely to make enforcement easier.

**5. Which of the following measures showing the differences in the pay of male and female employees are you currently able to calculate from existing data and systems?**

**(a) An overall gender pay gap figure by calculating the difference between the earnings of men and women as a percentage of men's earnings.**

**(b) Gender pay gap figures broken down by full-time and part-time employees.**

**(c) Gender pay gap figures broken down by grade or job type.**

**(d) None of the above.**

As this is a combined response on behalf of ELA, it is not possible to select just one of the above options. However, the gender pay gap figures that an organisation will be able to calculate are likely to depend on the type of data recorded by the organisation (including pay details, gender and information regarding full and part-time status) together with the size of the organisation, complexity of its grading structure and capability of its HR systems and software.

An overall gender pay gap (as indicated at (a) above), is likely to be the easiest figure for an organisation to calculate. However, this figure may be heavily impacted by the demographic of an organisation and without further detail may not give a true indication of an organisation's equal pay issues and can be misleading.

ELA considers that a requirement to report gender pay gap figures broken down by full and part-time status and grade or job type (as indicated at b) and c) above) will result in organisations presenting a more meaningful equal pay and diversity profile and would allow for greater comparability between organisations.

Reporting gender pay gaps broken down into this level of detail may tend to favour larger organisations with robust HR systems, sophisticated software and more resources to carry out such calculations. By contrast, smaller organisations with less sophisticated systems may find this harder to manage. However, the scale of such a task for a large organisation may mean compliance with the reporting requirements is particularly onerous. An option may be to include a degree of flexibility to accommodate the relevant industry and size of the organisation. This is to some extent reflected in the approach taken in Australia which allows employers to report pay differences according to "workplace profile" rather than a specific national or international benchmark. However, we note that the data produced and reported should be comparable between organisations to ensure it is useful. Allowing for such flexibility could therefore potentially undermine the usefulness of the data (depending on how it was implemented). Guidance will be necessary to provide detail as to the supporting information that employers should consider including as part of the additional narrative.

In addition to considering how the gender pay gaps should be broken down (i.e. by full and part-time status and grade and job type), consideration should also be given to the method used to calculate such gaps, for example, using mean or median salary values, hourly or annual pay etc. to ensure the equal pay and diversity profile presented is as comparable as possible. ELA is unclear how hourly figures might be calculated as not all industries operate on defined contractual hours (e.g. professional and financial services). Further, ELA considers that an annual salary/income

figure including all payments made in the year might be more inclusive to ensure any seasonal work is also covered. Specifically, employers require clarity over which elements of remuneration should be included when calculating the level of the gender pay gap – these elements may include contractual bonus, discretionary bonus, commissions and even the grant of stock options, in addition to basic salary. It should be noted that in certain sectors, such as the financial services sector, these components other than basic salary, form a significant part of each employee's annual remuneration package. As such, any analysis of the gender pay gap which does not take account these components will be incomplete.

**6. Do you think that any additional narrative information published by employers should be:**

- (a) Voluntary and not set out within the regulations or non-statutory guidance.**
- (b) Voluntary, not set out in regulations, but set out in non-statutory guidance.**
- (c) Set out within the regulations.**
- (d) Other, please specify.**

ELA believes, on balance, that option (d) is the best option. Additional narrative information published by employers should be, supported by non-statutory guidance. Without context, it will be difficult for meaningful analysis of the figures to take place. Including a narrative as an essential item will allow stakeholder to examine and consider where additional work is needed in a particular industry or area in terms of gender pay gap. By simply reporting the figures without any narrative to accompany this, the impact will be diluted and/or the information may not be straightforward to understand.

This will allow for uniformity in the information being published by employers and ensure that even where employers publish the bare minimum, this is informative and beneficial.

In terms of what narrative should be included, we suggest that the demographics of the workforce are reported alongside the gender pay gap figure, as well as information relating to the corporate hierarchy. This will illustrate companies and/or industries with mixed demographics yet still publishing a large gender pay gap. Further, it will identify organisations and industries that are male/female dominated and allow further work in terms of encouraging males and females into these areas.

We suggest that the non-statutory guidance also recommends that employers include a range of steps that will be taken to rectify any pay gap that exists. The benefits of this will be seen particularly after the initial publication as employers will be able to narrate what if any measures have been put in place since previous publication.

A further consultation on the non-statutory consultation alongside the draft regulations would be welcomed to ensure that there is full understanding as to what is required from employers.

**7. How often do you think employers should report gender pay gap information?**

- (a) Every year.**

**(b) Every 2 years.**

**(c) Every 3 years.**

**(d) Other.**

(B) Currently the public sector publishes their gender pay gap figures on a two yearly cycle, the most recent publication being this year. If private sector employers are also obligated to publish their figures (and ideally in line with public sector dates) it will allow for benchmarking to take place and greater analysis of the figures published by private sector employers. The two year publication date should also allow sufficient time for employers to address what if any internal changes should be considered in light of previous gender pay gap figures published.

**8. If you are an employer, what is your assessment of the costs of conducting gender pay analysis and publishing relevant information?**

ELA is a membership organisation and is unable to respond to this question.

**9. What is the actual/estimated time taken by the lead person assigned to the activity of analysing and publishing a gender pay gap estimate?**

ELA is a membership organisation and is unable to respond to this question.

**10. Private and voluntary sector employers in Great Britain with at least 250 employees may fall within the scope of the proposed regulations. Do you think this threshold is appropriate?**

It is the view of ELA that a lower threshold would be appropriate. However the appropriate level of such lower threshold will depend on what data the regulations require employers to publish. It is understood that this will require amendment of the primary legislation.

The Department for Business and Innovation and Skills' statistical release for the "Business Population Estimates for the UK and Regions 2013" ([https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/254552/13-92-business-population-estimates-2013-stats-release-4.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/254552/13-92-business-population-estimates-2013-stats-release-4.pdf)) reveals that 99.2% of businesses are small (under 50 employees), 0.6% are medium (between 50-249 employees) and only 0.1% are large (250 employees and over). The scope and, therefore, the impact of the regulations may be drastically reduced if they cover only 1% of businesses.

Moreover, the larger the group of employers covered by the proposed regulations, the more meaningful the data and subsequent analysis will be and, therefore, the more likely it is that employers will take steps to address any gender pay gap issues identified within their business. Overall this will have a greater impact on reducing the gender pay gap, which, after all, is the purpose of the regulations.

We note, from the consultation itself (paragraph 3.2), that several EU member states have a lower threshold than 250 employees. For example, Austria's is 150, Finland's is 30 and Sweden's is only 24.

Further still, the "Examples of action at a national level" from the EU's Gender Equality Gender Pay Gap [http://ec.europa.eu/justice/gender-equality/gender-pay-gap/national-action/law/index\\_en.htm](http://ec.europa.eu/justice/gender-equality/gender-pay-gap/national-action/law/index_en.htm) demonstrate that Belgium's threshold is only 50 workers.

While we consider that a lower threshold may be aligned with achieving the stated objective of addressing the gender pay gap, the imposition of a lower threshold may cause some employers difficulty in complying with confidentiality and data protection obligations in respect of individual employees. The extent to which such risk manifests will depend on what data the regulations require employers to publish. For example, if the regulations require data to be broken down by role or grade, the risk of employees being able to identify individual pay data increases where the relevant employee population is smaller.

Subject to the concern set out above, our view is that the quantity of the threshold could decrease incrementally year on year. This was the pattern that was followed by Austria, which had compulsory equal pay reports with a threshold of 1000 employees from 2011, 500 from 2012, 250 from 2013 and 150 from 2014. Again subject to the concern set out above, our recommendation would be to introduce the 250 threshold this year with consideration of a reduction, to 150, from next year. Further consideration as to a lower threshold should be considered following the second publication of gender pay data.

We would also welcome clarity in the regulations as to when and how the threshold figure is met. For example do employees based outside the UK count towards the threshold? How will the threshold operate within larger corporate groups where there are a number of employing entities but where none of the employing entities employ more than 250 employees (or such lower threshold as is set)? ELA also seeks clarity as to whether the 250 threshold relates to headcount rather than full time positions.

**11. The cut off period for any calculation of the gender pay gap will need to be specified in the regulations. Which of the following do you consider preferable:**

- (a) 1 January.**
- (b) 6 April.**
- (c) 1 October.**
- (d) The year-end date for each business.**
- (e) No preference.**
- (f) Other (please specify, including reason).**

The year-end date for each business would be appropriate as the calculation can be done relatively easily at this point. The reporting date may be 3-6 months after that date to allow the appropriate analysis to be completed, accompanying narrative to be prepared and to encourage discussion with the workforce prior to publication.

**12. The Government is considering a number of actions to help support employers implement the proposed regulations. How helpful do you think the following measures would be?**

**(a) Helping employers to understand the new regulations (e.g. through workshops or seminars).**

Workshops and / or seminars would be a useful resource, provided they are of sufficiently high quality and the advice given to employers is consistent. We consider that smaller and

less resourced employers may place greater value on the availability of workshops or seminars, whereas larger and more resourced employers will tend to value the availability of published guidance which they can interpret with the benefit of their own legal advice.

Written guidance would be of benefit to employers and employees alike for reference.

(b) Helping employers to calculate their organisation's gender pay gap (e.g. through access to software).

Whether software is required will depend on the data employers are required to collect under the reporting requirements. If, for example, reporting requirements are limited to a headline overall gender pay gap figure, we expect most employers will be able to extract the relevant data relatively easily using existing systems which should capture employee gender and pay data. If employers are required to report more extensively, we expect that smaller employers with fewer resources may benefit from access to software or other assistance. We anticipate that existing software providers will develop products to meet this need, but Government-developed software would provide a useful benchmark against which software developed by third party developers may be compared. We expect that more resourced employers will develop their own bespoke software solutions.

(c) Helping employers with other types of supporting analysis (e.g. analysis of representation of women at different levels within the workforce).

We can see how it might assist employers, in interpreting results, to have made available to them workforce-wide or industry-wide data on typical levels of representation in different segments of the workforce, albeit that there would always need to be a considerable note of caution sounded about the dangers of drawing conclusions from generic data when each employer's circumstances will be different.

(d) Helping employers to address the issues identified by a pay gap analysis.

A Government-provided service assisting employers with supporting analysis and / or addressing issues identified by the analysis may prove helpful to smaller employers with fewer resources or a more limited human resources function. It would be important that any such service offered by the Government is staffed by suitably qualified individuals and there is consistency in approach. It would also be necessary to address how the confidentiality of information shared with the service provider would be protected. We expect that better resourced employers will seek to address issues identified using internal human resources capability and by seeking appropriate legal advice, a collateral benefit of which could be that it is easier to preserve confidentiality and benefit from legal professional privilege.

(e) Other, please specify.

Clear and consistent published guidance on the operation of pay reporting obligations would be an important and helpful resource for employers. Guidance which provides worked examples of how reporting obligations apply to a variety of pay structures would be particularly helpful.

### **13. Do you think there are alternative ways to increase transparency on gender pay that would limit the cost for employers, for example reporting to the Government via the existing PAYE system?**

We think it is very important that the government presses ahead with its plan to introduce mandatory gender pay gap reporting, and that for the reasons set out within this response, companies be obliged to publish such information in a clear and transparent manner that can be easily compared across organisations.

However, we would suggest the following alternative ways in which transparency on gender pay can be improved in a cost effective manner:

- Employment Tribunal judgments in successful equal pay cases could be published online. At present it is in practice very difficult to get hold of an Employment Tribunal judgment (unless you are prepared to spend a lot of time in Bury St Edmunds manually going through them), and many judgments are given orally. If judgments in successful equal pay cases were published online on a particular website, this would significantly improve accountability and transparency and would assist other employees experiencing similar problems if they wanted to raise issues.
- Companies working in particular industries could be required to publish their gender pay gap information in recruitment materials.
- The government via the EHRC could undertake spot audits of all companies re the gender pay gap, and publish its results.
- Employers, where the gender pay gap is above a certain percentage, could be required to publish further additional data about the gender pay gap so that it was clear from the additional information who the worst affected employees were.
- All organisations subject to the Public Sector Equality Duty, and all government departments, should be required to publish additional information over and above the basic information required by s.78. This will assist with the promotion of a culture whereby there is far greater transparency and accountability in relation to the gender pay gap.
- Confidentiality clauses which prevent employees from discussing their salaries and benefits with their colleagues are common and may not encourage transparency.

Reporting via PAYE to government would therefore be helpful if government was then to penalise non-compliance (see response to 14 below). However, publication of gender pay issues should be carried out in addition to reporting to government. To enable the appropriate government department to monitor compliance, it may be helpful to establish a register of employers who are required to report on the gender pay gap. Whilst employers should be encouraged to include themselves on the register (it may be helpful to make this compulsory), employees may also be informed of their right to check the register and seek inclusion of their employer.

### **14. Do you think that introducing civil enforcement procedures would help ensure compliance with the proposed regulations?**

This would depend on a number of factors:

- Could the enforcement notice be made public? i.e. Would the organisation be 'named and shamed'? If so, businesses may be more motivated to comply through the potential adverse publicity/reputational damage.
- Once an enforcement notice was issued, what would be the penalty for persistent non-compliance? Any fine would clearly need to be set at the right level to act as a true incentive for



compliance. Some organisations may simply prefer to pay the fine if they believe that the publication of their gender pay data could be more damaging.

If there were no provisions for civil enforcement, some employers may simply be content to avoid compliance and pay the proposed £5000 (or more) fine and face no further action. While non-compliance (if made public) could lead to reputational damage, and this may be a much bigger factor for some businesses than others. For those that are willing to take that reputational risk, there must be some other incentive to comply.

While civil enforcement could prove a useful tool for compliance, it is more likely that:

- adverse publicity/reputational damage
- loss of contracts
- loss of business opportunities

will be determinative of whether organisations comply. This is perhaps demonstrated by the tribunal regulations whereby they must order an equal pay audit to be carried out if an adverse finding is made against an employer. It is to be seen whether this encourages earlier resolution of these types of claim.

The penalty for an employer who fails to comply with the publication of information under s.78 of the Equality Act 2010 will be up to £5,000. The level of the fine is likely to be controversial and may be inconsequential to certain employers.

It is unclear whether the EHRC has the resources to effectively enforce compliance with gender pay gap reporting. The EHRC will need greater resources to enforce compliance if required to do so.

Alternatively, enforcement may be more effective if it is carried out by a government department. For example, civil penalties for employers who employ illegal workers, can be up to £20,000. These are effectively enforced by the Home Office for public funds.

Also, it may be a further option that an employer that fails to comply with reporting requirements should be penalised in any Tribunal action for equal pay claims against it. A Tribunal should be entitled to draw adverse inferences against any employer who has failed to report its gender pay gap.

Further, an employer who fails to comply with the reporting requirement should be compelled to undertake an equal pay audit and publish them same on its website or other forum available to employees/prospective employees within a 6 month timescale.

## **15. What, if any, do you consider to be the risks or unintended consequences of implementing section 78?**

It is unclear – and potentially a very important issue - how the regulations will deal with associated and group companies. The consultation (and section 78) refers to the reporting requirements applying to an “employer”, which could be taken to mean a single employing legal entity, or it could mean multiple entities within a group of companies.

For larger organisations with complex group structures involving many employing legal entities, to define the employer as the group could mean that the logistics and costs of compliance are magnified, and this approach also risks the production of unhelpful / relatively meaningless statistics in groups where responsibility for making decisions on pay is delegated and there are no Group-wide policies on pay. The Government will also need to consider how the obligations should be applied (or perhaps, for a period of time, disappplied) in the case of mergers and acquisitions and disposals.

On the other hand, if the employer is defined at legal entity level, it risks overlooking potentially important and useful comparisons within groups of companies, and in the worst (albeit unlikely) case it leaves the door open to avoidance tactics by employers keen either to avoid reporting obligations altogether (by ensuring no employing entity has more than 250 staff) or to manipulate the outcome, for example moving groups of employees where there is a particular gender skew into different employing entities (in this regard, the Government should consider including anti-avoidance provisions in the draft legislation). If it is decided to require employers to make their gender pay reports publicly available, the differing nature of group structures may make it harder to achieve a 'like for like' comparison between similar organisations.

Possible ways the Government could consider dealing with this issue are to define the employer by reference to the establishment at which employees are employed (as in collective redundancies legislation), or by reference to whether decisions on pay emanate from a single source, as in equal pay law. This is not a panacea, however, as a long history of case law dispute about what is an establishment and what is a single source demonstrates. Unless Government guidance is very clear on this point, corporations will be understandably reluctant to make their own judgment calls on whether their own group of companies is a single employer or multiple employers, for fear of adverse consequences. These would include making it harder to defend equal pay claims where there is a dispute about whether decisions emanate from a single source and whether there is a body capable of rectifying inequalities or not.

In terms of other risks and unintended consequences, the publication of gender pay gap data even if only disseminated within companies is likely to generate an upsurge in internal grievances and Tribunal claims, some of which may be unmeritorious as employees, particularly if not advised, may see a headline gender pay gap figure as amounting to evidence of discrimination in their own individual case.

#### **16. Do you consider there are any risks or unintended consequences that warrant dropping or modifying the implementation of section 78? If yes, please explain.**

See 15 above. Whether these risks or unintended consequences are sufficient to warrant dropping or modifying section 78 is a policy decision.

#### **17. How do you think the Government can most effectively encourage young girls to consider the broadest range of careers?**

ELA is unable to answer this question as it is not sufficiently experienced in education matters.

#### **18. How do you think the Government can work with business to support women to return to work and progress in their career after having children?**

The government has introduced a shared parental leave scheme which is very complicated, and may not have a significant uptake for this reason together with the low financial support available via statutory shared parental pay.

If the Government wants to support parents return to work then the provision for flexible working needs to be considered more carefully. It needs to consider gathering information about the implementation of flexible working, including job share situation in workplaces including details of what level of employees are being offered a flexible working arrangement. This would provide transparency as to the extent that flexible working arrangements are being utilised. The Government should also consider additional incentives for organisations to introduce and offer

flexible working and address employer resistance to flexible working arrangements. A public campaign using some of the information from the Job Share Project for senior employees could also address the issue of perception that flexible working is not necessarily suitable for senior employees.

Furthermore, we consider that the government should encourage measures to support women to progress in their careers after returning from maternity leave in order to avoid women returners falling into the trap of the "mummy track", which is effectively a demotion. Our view is that monitoring of women returners in particular in relation to their job role and pay grade should be undertaken which may include a maternity audit analysing the numbers of mother who remain in work following maternity leave.

The Government needs to address the needs of self-employed women as well. There has been a shift of the UK workforce toward self-employed workers. The government has stated that there has been a growth in self-employment, which reached a record high of 4.5 million in 2014. The Government needs to ensure maternity rights and shared parental leave are extended to both employed and self-employed women as best it can and extend childcare vouchers to self-employed women.

### **19. How do you think the Government can make sure that older working women are able to fulfil their career potential?**

**There is a great deal of anecdotal evidence of women over fifty being forced out of a job specifically in the education sector which is female dominated.**

This has been noted by professional associations and unions in the education sector. At the 2014 TUC Women's conference an ATL activist told delegates at the conference\* that: "Women are often being punished for being female and fifty. An unexpectedly large number of teachers being put on capability are women over fifty.

"Until older women have a similarly respected profile to that of older men, their abilities will be under appreciated and they will be more likely to experience discrimination in all aspects of the job market.

She said that in 2012 the average salary for female teachers in state-funded schools was £36,600, whereas for male teachers it was £39,900. So you lose £3,300 just for being a woman. And fewer women are promoted to senior roles in schools, so they are over represented in the classroom where their work is more stressful than if they were in management."

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