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BEIS consultation: Ethnicity pay reporting

Response from the Employment Lawyers Association

11 January 2019

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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 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 working party, co-chaired by Kiran Daurka of Leigh Day and Robert Davies of Gummer & Co, was set up by the Legislative and Policy Committee of ELA to respond to the consultation document issued by the Department for Business, Energy and Industrial Strategy on ethnicity pay reporting. The working party members are listed at the end of this paper.

Executive Summary

- I. ELA welcomes the introduction of ethnicity pay reporting. It is understood that the main purpose of the reporting requirement is for employers to actively monitor recruitment, retention and progression of staff across all ethnicities to ensure that diversity policies are working.
- II. ELA hopes that pay reporting creates a clear sense for employers that inclusion and diversity is more than just “nice to have”; and instead acts as a catalyst to ensure business embraces it as an essential.
- III. Pay reporting may be a blunt tool. For it to be meaningful, numbers depend on narrative and contextualisation relevant to the reporting employer or sector; we have seen this with Gender Pay Gap reporting. The ultimate approach regarding Ethnicity Pay Reporting may need to be developed and refined over time.
- IV. It is therefore to be hoped that, once a firm foundation for such reporting has been laid, the requirements can be reviewed, refined and strengthened as time progresses. For this reason we would strongly recommend a review of Ethnicity Pay Reporting is to be factored in to the

approach within a specified period of time after its introduction with a view to increasing the effectiveness of reporting as appropriate. For example, any mandatory requirement on employers to provide specified contextual data alongside pay data *before* the concept of ethnicity pay reporting is embedded is likely to be (and perceived to be) unduly burdensome for employers and confusing or unhelpful for employees and other stakeholders.

1. What are the main benefits for employers in reporting their ethnicity pay information?

The working group's experience when working with clients identifies the following as valuable factors:

1.1 Insight

- 1.1.1 Pay reporting helps to identify and highlight disparity so action can be taken – transparency is the first step. Transparency holds organisations accountable and allows third parties to review data whether as a potential client, potential employee or as a regulator.
- 1.1.2 The process would collate real data for employers to use. Employers need data to identify what steps to take to improve fairness in the workplace.
- 1.1.3 The process enables data to be used to understand the profile of the workforce. Employers can go further than simply reporting and use the data to conduct an exercise into what the key issues and concerns really are for ethnic minorities in the workplace, what they mean in a wider context and consider what action can be taken on the back of that.

1.2 Informs Strategy

- 1.2.1 Informs the organisation's Inclusivity & Diversity Strategy which will then feed into its plans for talent investment, pipelining, recruitment, attraction and retention.
- 1.2.2 Bolsters existing Inclusivity initiatives – building on the positive momentum achieved with gender pay gap reporting, it can illustrate that Inclusivity & Diversity is a "board level" issue and not a one-off or "nice to have" HR initiative.

- 1.2.3 A consistent approach across sectors will help benchmark and measure progress both individual employer and industry-wide.
- 1.2.4 May encourage a more diverse pool of talent.
- 1.2.5 Publicly reporting informs the importance of action plans as it propels diversity strategies higher up the list of actions

1.3 Employee Relations

- 1.3.1 Reporting encourages diversity at all levels within an organisation.
- 1.3.2 Establishes a baseline from which employers can monitor individual progress.
- 1.3.3 Uncovers sources of discontent amongst workforce and empowers employees to raise concerns with their employers, so action can be taken resulting in greater job satisfaction.

2. What type of ethnicity pay information should be reported that would not place undue burdens on business but allow for meaningful action to be taken?

Please indicate from the list below and state the reasons for your answers.

- a) **One pay gap figure comparing average hourly earnings of ethnic minority employees as a percentage of white employees**
- b) **Several pay gap figures for different ethnic group, using standardised ethnicity classifications**
- c) **Ethnicity pay information by £20,000 pay band**
- d) **Ethnicity pay information by quartile**
- e) **All of the above**
- f) **Other**
- g) **Don't know**

2.1 Answer: (b) and (d)

2.2 Our view is that all large (250 or more employees) and medium-sized employers (50-249 employees) should report ethnicity pay information by quartile (option d). However, we also consider that there is a case for **very large** employers (to be defined but potentially for

example over 5,000 employees within a group) additionally reporting their ethnicity pay gaps in a way that reflects multiple ethnic groups (option b).

2.3 Comments on option (a) - one single pay gap figure

2.3.1 This option has the advantage of simplicity but risks being tokenistic as it is too simplistic:

(a) Employment outcomes vary substantially between different ethnicities. This is presumably true within individual organisations as well as the economy as a whole. In light of the evidence, rolling all 'non-white' ethnicity groups into one would not be a helpful approach and it would not provide the level of detail of reporting required to assess whether or not there are disparities of treatment between all ethnic groups, as set out in the Ministerial Foreword of the consultation document.

(b) The concept of a single 'ethnic minority' definition does not fully reflect modern Britain and would not work globally. Additionally, this concept may be perceived by modern Britain as a disregard of its culturally diverse population and may engender a sense of disenfranchisement amongst ethnic groups. It would be preferable to define multiple ethnic groups in neutral terms as opposed to running the risk of being seen to “lump them together” or describe them as minorities.

(c) There is a business case for ethnic *diversity* - this means multiplicity (see for example the McKinsey Report *Delivering through Diversity*, dated January 2018, which measures diversity not only in terms of absolute representation but also in terms of the variety or mix of ethnicities).

(d) It is also unclear what the category “white” would include here and whether it simply white and British, or whether all white ethnicities are to be included. As indicated above, the both options are problematic.

2.4 Comments on option (b) - several pay gap figures for different ethnic groups

2.4.1 In our view this option is preferable to option (a). However:

(a) It is important to note that comparing the average pay of one ethnic group against that of another ethnic group involves a comparison of two potentially unreliable figures depending on the numbers of employees who do not declare their ethnicity or tick “prefer not to say”. However, if this is the preferred approach, then ELA’s view is

that there would need to be several pay gap figures comparing the gap between the highest paid ethnic group and everyone else. So for example, if white, British employees have the highest pay average, then all others groups are separately compared to them. There may also need to be a further breakdown based on gender/age/geography if the workforce is large enough to allow for anonymity. The “prefer not to say” group should also form a category of classification. We do not think that the comparison should necessarily be against white British employees, as they will not necessarily be the highest paid ethnic group and this approach tends to position white British as the default.

(b) However, we think option (b) will only produce statistically dependable results in very large employers, where the numbers of employees in each ethnic group is likely to be large enough for the calculation of their 'average' pay to be sensible. (See also our answer to question 10). The threshold for pay gap reporting would need to be decided but we expect that only employers with over 5,000 employees could be expected to show meaningful results under option (b). Even within such employers, results may need to be suppressed where based on a low number of responses (see answer to question 9).

(c) One alternative option for large and medium-sized employers could involve them reporting pay data to a central government body which could then amalgamate the data into larger data sets and publish average pay gaps, for example by sector.

2.5 Comments on options (c) and (d) - pay band or quartile reporting

2.5.1 Reporting the percentages of different ethnic groups within each pay band or quartile would reflect the **representation** of different ethnicities more clearly and meaningfully than reporting **pay gap** figures and, in our view, could be required of all large and medium sized employers (see answer to question 10). In ELA's view, this type of reporting could work even when the numbers of employees within each ethnic group are very small. This is because it does not require any averaging of pay.

2.5.2 The percentages should reflect multiple ethnic groups (rather than just 'white' and 'ethnic minority') for the reasons given above (see comments at para 2.3.1).

2.5.3 ELA's view is that reporting should include the percentage of employees who did not disclose their ethnicity or who ticked 'prefer not to say' since this would show whether

such employees are concentrated in a particular quartile or unevenly distributed across pay quartiles.

2.5.4 In our view, quartile reporting (option (d)) is preferable to pay band reporting (option (c)):

(a) Publishing ethnicity data by £20,000 pay band would provide a more granular picture of diversity across an organisation and, for that reason, may be more meaningful. However, this is not how gender pay gap reporting operates. The gender pay quartile requirement caused significant confusion (possibly partly because of an earlier suggestion that the approach would involve dividing the *pay range* into quartiles, as opposed to the workforce). There is evidence that many employers misunderstood the requirement and misreported as a result. We think it would simply increase the scope for confusion and miscalculation all round if a different approach is now adopted for ethnicity pay reporting.

(b) In addition, publishing ethnicity data by £20,000 pay band carries greater risk of identifying individuals and their pay, and this in turn could reduce the numbers of employees willing to disclose their ethnicity.

(c) For those reasons, therefore, we think that pay quartile reporting using the same methodology as for gender pay gap reporting is preferable to publishing ethnicity data by £20,000 pay band.

2.6 General comments on question 2

2.6.1 We need to learn the lessons of gender pay gap reporting:

(a) There is evidence that many employers misunderstood the requirements and miscalculated their data (see para 2.5.4(a) above). The government needs to reflect on why this may be the case and how we can avoid a similar scenario with ethnicity pay gap reporting. There may be an underlying lack of confidence in statistics and the mathematical concepts underpinning the calculations.

(b) It is also important to consider the process (if any) by which mistakes may come to light. Employers do not display their full calculations in their reports. This is the right approach but it makes it difficult to verify or compare methodologies.

(c) Despite the principle of gender pay gap reporting being relatively simple, the calculations were not. With hindsight, this was inevitable but we need to learn the key lesson that, whichever method is chosen to calculate and report pay gaps, it will involve complexity and grey areas.

(d) We therefore think it important that the ethnicity pay gap methodology mirrors the gender pay gap reporting methodology as far as possible, although ELA considers that a headline pay gap figure may be less helpful than for gender (see our response to question 10). Adopting a new approach will increase confusion whereas mirroring the existing approach may help to embed understanding/ confidence, which in turn may improve compliance with both sets of requirements.

(e) We also note that listed PLCs will shortly come under a new reporting requirement to report the ratio of their CEO's pay to that of their median employee, and the employee at the 25th and 75th percentile of their UK workforce. The calculation approach does not precisely mirror the approach in the gender pay gap reporting regulations. A third approach to calculating ethnicity pay gaps should be avoided where possible, unless the requirement to report ethnicity pay is to demonstrate representation rather than pay gap (see our response to 10 below), but even in that case we advocate for quartiles to be split in the same way as the gender pay gap reporting methodology.

(f) Having made those points, we are also of the view that some aspects of the gender pay gap reporting requirements merit reconsideration. For example, the treatment of part-timers in the bonus gap calculation should be addressed. Ideally, the gender pay gap regulations should be remedied at the same time as the ethnicity pay gap reporting requirements are introduced, so that the ethnicity pay gap reporting requirements do not contain similar problems and that the two sets of requirements are consistent.

3. What supporting or contextual data (if any) should be disclosed to help ensure ethnicity reporting provides a true and fair picture?

3.1 General approach

3.1.1 We agree that there are a number of contextual factors that will contribute to an organisation's ethnicity pay gap and that may be relevant in helping to understand the data that is published. However, we also consider that the factors identified in the introductory section above support keeping the mandatory information which employers are required to report in relation to ethnicity pay as simple as possible. Such an approach may be the most likely to embed the concept and language of ethnicity pay reporting, with the public, with employees and with employers, and also go some way to alleviating concerns which may lead to a unwillingness to self-report.

3.1.2 Requiring organisations to provide too much contextual data may risk overcomplicating the process and imposing too high an administrative burden. By its nature, any ethnicity pay reporting is likely to impose a significant burden on business, particularly in the early days. This is despite business' previous experience analysing and reporting gender pay gap data, which has many key distinctions from ethnicity pay reporting and so will not provide directly comparable knowledge. We would also highlight the difficulties that employers are likely to face in providing contextual data in a relevant and meaningful way. Few, if any, employers will currently record employees' ethnicity, pay, age and gender in a way that enables pay gap analysis to be carried out.

3.1.3 We consider that, so far as is possible (given the differences between gender and ethnicity), there should be consistency in the approach between pay gap reporting related to different characteristics. This has the benefit of simplicity and makes it more likely that reporting will be understood and not misinterpreted by employees, the media and the general public. For this reason, amongst the others identified in response to Question 2, ELA supports reporting on the basis of quartiles, broken down on the same basis as gender pay gap reporting.

3.1.4 If successful, then further aspects can be phased in over time but as the concept of reporting on ethnicity pay data is likely to be a completely new experience for many

organisations, it may be best for some of the suggestions to be as simple as possible so that this project is given the opportunity to grow initially.

3.2 Mandatory contextual data

3.2.1 We recommend that it is mandatory for employers to provide details of:

(a) The demographics of their organisation, to include breakdown of:

- Ethnicities across workforce broken down by quartile (as recommended in response to Question 2)
- Ethnicities by pay band (to reflect recommendations in previous answers)
- Employees broken down by region/geographical location, in sufficient detail where possible to address possible skewing of results. For example, if an employer has a large black workforce in London (which also pays more) but has establishments across the country, any pay average per band may artificially suggest that black employees earn most on average. The Civil Service pay breakdown falls in this category whereby black employees are said to earn the most on average as a whole, but when you break down by region, they earn the least in every region including London. We suggest that employers select the applicable region(s) from a set list to enable easy and meaningful comparison.

(b) Any variation in pay gaps or representation reported from previous years (where applicable).

3.2.2 We believe that the information referred to above is necessary to understand any data reported. We believe that, in keeping with the comments above, this is a simple approach and not unduly burdensome on employers.

3.3 Voluntary contextual data

3.3.1 A narrative will be important for employers to provide context to their data and for employees and other stakeholders to understand the data. However, as with gender pay gap reporting this should be voluntary rather than mandatory so that businesses can provide information that is relevant to the organisation and particular circumstances, rather than additional prescribed information. We recommend that

employers are encouraged, although not required, to provide the following information:

- (a) Any action which they have taken to address any ethnicity pay gap;
- (b) Any action which they intend to take to address any ethnicity pay gap;
- (c) The timescale over which they anticipate seeing improvements, and why;
- (d) Any narrative explaining any variation in previous year's reports;
- (e) What they see as the reasons for any ethnicity pay gap, including any particular obstacles;
- (f) Whether they perceive any particular obstacles or issues for individuals who are both (i) female and (ii) and of particular ethnic group;
- (g) Anything else they consider relevant to their (i) organisation (ii) sector;
- (h) A summary of Diversity and Inclusiveness measures taken in their organisation.

3.3.2 We recommend that how to provide a breakdown of demographics, and how to provide any contextual data (including that suggested above) is covered in a Statutory Code of Guidance. We also recommend that the guidance encourages employers to focus on the mid to long term (i.e. in the next 5-10 years) as well as identifying what may be more modest proposals directed at what they aim to improve on in the next year.

3.3.3 We recommend that employers are able to link online to any narrative, as with the register of Gender Pay Gap Reports.

3.3.4 Depending on the success of the initial ethnicity pay reporting, we consider that whether contextual data should be made mandatory, and, if so, precisely what it should cover, should form part of the recommended future review. Several factors may combine to explain pay disparities in any given case, including issues of gender, race and socio-economic status. As employers and analysts become more experienced with pay reporting, a body of data builds up and the processes as a whole become more consistent, accurate and refined, it may be that it is possible to ask employers to report data in such a way that a multi-factorial analysis can be more easily applied.

This is beyond the scope of this consultation but is a consideration which we recommend is borne in mind on any future review of pay reporting requirements.

4. Should an employer that identifies disparities in their ethnicity pay in their workforce be required to publish an action plan for addressing these disparities?

4.1 Many employers will wish to publish an action plan in these circumstances and to provide context for the disparity, as well as establish how they plan to show progression. Further, publishing a plan will assist organisations to consider strategies to improve their statistics.

4.2 The aim of mandatory pay reporting is to drive change. A requirement to publish a plan is more likely to trigger action and ultimately lead to change – this is consistent with advice that has been published by GEO, CIPD and ACAS on gender pay gap reporting.

4.3 While some committed and likely larger employers may publish action plans anyway, making it voluntary is likely to be overall ineffective. Publishing action plans is currently not mandatory for Gender Pay Gap reporting and only one fifth of employers who have published reports have published action plans (according to the BEIS Report on GPG Reporting).

4.4 A requirement to publish an action plan is in-line with the over-arching theme of transparency which lies behind pay reporting. There is a benefit to employers in being able to show their progress against their action plan and therefore have a “good news story” to sell for year 2 and beyond. i.e. that they have implemented their actions even if reducing the gap is taking a while.

4.5 We have considered that ethnicity pay gap reporting should be consistent (and not more onerous) than gender pay gap reporting. We would therefore suggest that, while a requirement to publish an action plan is desirable, this should be introduced at the same time as the same requirement for gender pay gap reporting. One argument could be that ethnicity pay reporting should lead the way. However, keeping the regimes as uniform as possible is likely to be most practical from an employer’s point of view and therefore most likely to be complied with. One option would be to delay the requirement to introduce an action plan until year 2. This would allow the pay reporting system time to “bed in”, allow

employers to get to grips with their numbers and give them an opportunity to benchmark against other employers in their sector, before committing to action.

4.6 There is an argument that reporting in itself is enough to drive change. However, this is still a very slow process. We would suggest that any requirement to publish a plan should be accompanied by a requirement to report on progress in the next pay gap report.

4.7 A requirement to publish an action plan could have the effect of disengaging employers from the issue, as action becomes a box ticking exercise rather than something which employers are committed to. There is an argument that this is what happened with “Race Equality Action Plans” published in the public sector. However, on balance, we consider that it is more likely that it will focus the minds of employers and push the issue up their agenda, ultimately to their benefit.

4.8 To help employers meet any duty to publish an action plan, we would suggest that mandatory action plans follow a set template. The template could be simple but would help employers understand the sorts of elements they are expected to include and think about. It should also assist with an element of consistency between plans which would then assist with comparison, which is one of the issues that is likely to be complex with ethnicity pay gap reporting when so many groups are being compared and which has also been of assistance in gender pay gap reporting. If action plans could be automated in any way (e.g. by having an on-line action plan for completion) this may also assist compliance.

4.9 It would be useful for employers to have guidance on the sorts of action that is likely to be effective, similar to the Government Equalities Office’s “Reducing the Gender Pay Gap and improving gender equality in organisations: Evidence based actions for employers”.

5 Do you currently collect data on ethnicity at your workplace? If yes, do you use standard ethnicity classifications for reporting? If so, which ones?

5.1 ELA is a membership organisation and is unable to answer this question easily given the number of workplaces that our members belong to.

6 What do you think are the most effective approaches for employers to improve employee self-reporting or declaration rates?

6.1 As the consultation document notes, there are a number of approaches which could improve self-reporting or declaration rates. For example:

- 6.1.1 Use of online reporting forms;
- 6.1.2 Including a “prefer not to say” category;
- 6.1.3 Including the data collection as part of the recruitment process;
- 6.1.4 Explaining to employees the purpose of the data collection and providing appropriate reassurance in respect of data protection (see also the response to question 9);
- 6.1.5 Setting the data recording exercise in the context of ethnicity pay regulations and the wider ambition to improve diversity.

6.2 In relation to the recruitment process, we consider that collection of information specifically for the purposes of complying with these provisions is appropriate only at the onboarding stage (i.e. once the candidate has secured the role).

6.3 In light of the Nationwide Case Study it would seem that each of these approaches is effective. Additionally, the importance of explaining the purpose of the data collection was made apparent by the EHRC research. It would seem that if there is one effective approach that an employer could take, then explanation would be it.

- 6.4 The principal reason for collecting this data is to combat serious inequality in our society, and that without this data, the picture which is built of the current situation will be less accurate, and consequently efforts to improve the position will be less likely to succeed. Thus the fundamental incentive is that each person can play their part.
- 6.5 In addition, at the employer level, efforts to combat pay inequality and lack of career progression based on ethnicity could help the employer promote diversity in its workplace more broadly in terms of attracting talent, and also maintaining strong and positive morale within its own workforce.
- 6.6 Importantly, it must be emphasised that there is no down-side to the individual in providing this data: it will be robustly protected under the GDPR and anonymised so far as possible; it will not be used for any other purpose; no detriment will follow; and the method of providing it will not be complicated or time-consuming. It would assist to be able to state what will happen to the data once the employer has collated it: i.e. a report will be prepared and submitted to the Department for BEIS, and whether by that stage it will be anonymised, i.e. no individual employee will be identifiable from the data in the report.
- 6.7 It is likely that any data collection that has already been carried out by employers will need to be repeated to comply with the regulations. Therefore, enough lead-in time will need to be provided to allow employers to complete this.
- 6.8 Further thought will have to be given as to whether there will be any regulation prescribing how and when data must be collected. We consider that employers would be likely to welcome guidance on effective data collection even if ultimately the structure of how they should approach it is left to the individual employers. So, for example, guidance could cover issues such as: (i) how often should data be collected and then refreshed/reviewed, (ii) whether any deadlines should be given by the employer, (iii) data protection (iv) how to encourage responses and (v) how to assess data accuracy. Otherwise, if there is no guidance for employers regarding how and when to refresh their data, for example, then the ongoing usefulness of their reporting may be impacted.

6.9 Additionally, if the ‘five or fewer responses’ *de minimis* approach to reporting is adopted (see question 9) then thought will have to be given to whether there will be any regulation of how rigorously employers must collect their data as there could potentially be a scenario where an employer who has not made any effort to collect appropriate data will be exempt from the requirement to report. There is of course significant overlap between this question and question 9. In the successful Nationwide example, employees were reminded that their declarations are confidential. However, as explained in question 9 the narrower the categories that are adopted the more likely it is that individuals may be able to be identified from the data meaning that confidentiality could not necessarily be assured which could impact on reporting rates. Thought would need to be given to the balance between these two competing issues.

7 How should self-reporting or non-disclosure rates be reflected in the information reported by employers?

7.1 Obstacles to self-reporting and relevant considerations.

- 7.1.1 While not every relevant employer reported their Gender Pay Gap data on time, media pressure meant that they did all eventually publish this information.
- 7.1.2 Gender is less complex and, broadly, less controversial than ethnicity so most employees may be expected to be prepared to confirm their gender in a staff information form. However, many employees may be concerned to report their ethnicity (see Introduction and response to Q3 above).
- 7.1.3 We consider that a general mistrust about what employers may do with ethnicity information is likely to be a factor which discourages employees from self-reporting. This is an area where collation of reliable data would be helpful in analysing how best to encourage honest self-reporting. With the recent implementation of GDPR, employees are more aware of their data privacy and data protection rights generally, which could feed into an unwillingness to report sensitive data.

7.1.4 However, these concerns and risks may be mitigated once the purpose and use of the data is clearly and openly explained to all employees.

7.2 Need to raise awareness and inform of reasons for asking employees for ethnicity information

7.2.1 All of the factors/obstacles to self-reporting summarised above require that employees are given clear and simple information about why they are being asked to self-report their ethnicity, and what the information will (and will not) be used for.

7.2.2 While results may not be perfect initially, it is to be hoped that raising awareness of the reasons for the reporting and the benefits that this can have for society and for people from all ethnic backgrounds will eventually improve the accuracy of the data.

7.2.3 We could seek to learn from those organisations that are already reporting ethnicity pay information on a voluntary basis. For example, we could recommend a similar approach to the Nationwide Building Society, where they achieved high levels of compliance:

- a) Explain the reasons for ethnicity reporting to raise awareness
- b) Remind them of how it will be kept confidential so that their fears of any action as a result of disclosing ethnicity are allayed. We would suggest an additional sentence making clear that the information will be kept separate from, and have no bearing on, any employment decisions personal to the employee.
- c) Give the option of prefer not to say so that if these safeguards are still not enough, they can opt out of responding.

7.2.4 We recommend that Statutory Guidance is published to assist employers in how effectively to convey this message to employees, and in measuring its effectiveness. We recommend that there is a consultation on any such Guidance, and that ELA is given the opportunity to respond.

7.2.5 One idea which we would like to see the subject of consultation for such Guidance is the form of approved wording which employers can use on their

self-reporting requests. Although we do not propose this to be mandatory, we believe that this could be helpful.

- 7.2.6 There could be scope for AI and automated data collecting tools/apps to be of huge benefit in pay reporting generally, including in allaying concerns about self-reporting and giving assurances of anonymity.

7.3 Mandatory information

- 7.3.1 We recommend that to give a caveat for the data, it is mandatory for employers to provide details of how many employees who were asked chose not to self-report:
- (a) as an organisation as a whole; and
 - (b) any variation from the previous year's reports (if applicable).
- 7.3.2 This data could be of assistance in identifying any trends in non-disclosure or improvements that may encourage self-reporting.
- 7.3.3 Being required to provide this information would reflect and underscore the reliance placed on self-reporting, and assist in analysing how much reliance should be placed on any data which is reported. We believe that, in keeping with the comments above, this is a simple approach and not unduly burdensome on employers.
- 7.3.4 Only those organisations which are able to provide a meaningful analysis should form part of the national calculations. For example, if the percentage of those who self-report is less than, say, 75% (or lower) then the data should have a footnote against it to demonstrate that it is not a full reflection of the workforce.
- 7.3.5 Initial responses might be slow but if the government is tough on the sanctions for employers who have not sorted out these reports – and have an advertisement campaign highlighting the benefits of reporting then more will be motivated to respond.
- 7.3.6 We have considered if employers should be required to report for at least, say, 60% of their workforce or face punishments or fines. However, we are concerned that this could lead to employers rushing or reporting inaccurate

data. This could result in mixed messages being given when the employer asks employees to self-report.

- 7.3.7 Also, ethnicity pay reporting is likely to get a lot of media scrutiny and so fines may not be needed but one of the criticisms of the Gender Pay Gap was that there did not appear to be any serious punishment or sanction if the employer did not report on time. ELA would welcome consideration of sanctions for failure to report or to do inaccurately.

7.4 Suggested further voluntary information

- 7.4.1 We are mindful that contextual narratives can motivate organisations to reduce pay gaps. We recommend that employers are also encouraged, although not required, to identify:

- (a) Any positive steps which they have taken to encourage employees to self-report;
- (b) Any positive steps which they intend to take to encourage employees to self-report;
- (c) The timescale over which they anticipate seeing improvements, and why;
- (d) How they explain any variation from previous year's reports (if applicable);
- (e) What they see as the reasons for their self-reporting statistics, including any particular obstacles.

- 7.4.2 We recommend that how to provide self-reporting figures, and how to provide any contextual data (including that suggested above) is covered in a statutory Code of Guidance (see above).

- 7.4.3 We recommend that employers are able to link online to any narrative, as with the register of Gender Pay Gap Reports.

8 For a consistent approach to ethnicity pay reporting across companies, should a standardised approach to classifications of ethnicity be used? What would be the costs to your organisation?

8.1 We think that a standardised approach to classifications of ethnicity across companies is essential to ensure that data collected on ethnicity pay reporting can be meaningfully compared. Without the ability to compare data collected by different companies, the information will be less useful and will not be able to show trends across the UK workforce on ethnicity. We have suggested two different approaches so that the Government can review the merits and weaknesses of each approach.

8.2 Option 1 - using the 2011 Census classification of ethnicities

8.2.1 One of the most in-depth set of categories appears to be the 2011 Census which generally reflects the ethnic makeup of the United Kingdom. Therefore, we would suggest that the 2011 Census classifications of ethnicity should be used for ethnicity pay reporting across companies. Another reason for using this classification is because it is the most familiar method of data capture for ethnicities in the United Kingdom. We also note that the 2011 census ethnicity classifications are likely to be used again for the upcoming 2021 census.

8.2.2 However, while we appreciate that the way that employees choose to identify their ethnicity is complex, some ELA members consider that there is a risk that an overly lengthy list of classifications could cause administrative issues for employers. This could make it much harder to comply as they may have to change their ethnicity data collection systems if they do not use the 2011 census categories. As a result, we have offered another potential option to explore. – the binary or simplified approach.

8.3 Option 2 – binary or simplified approach

8.3.1 The government could suggest use of a binary or at least a simplified approach (of only 5-6 categories) at least in the first instance. This will make the ethnicity pay reporting statistics easy to digest and analyse and will mean that employers will not see ethnicity reporting as a higher burden than the Gender Pay Gap Reporting obligations.

8.3.2 However, this is potentially a divisive approach and will not highlight those ethnic groups that are doing better or worse than others. Therefore, a more detailed approach is likely to be more accurate in highlighting pay inequality.

8.4 How this could develop

8.4.1 Some employers may prefer an initial period in which reduced categories were used for ethnic identification. However, such an approach must be balanced with the need for clear and meaningful data. It is difficult to understand how a binary approach might work in reality and what the reporting process would show should such an approach be used.

8.4.2 Further, as suggested within response 2 above, ELA recommends pay reporting rather than pay gap reporting for most employers as this will provide more meaningful information about representation within organisations.

8.4.3 Given the general lack of data collated by employers on ethnicity, this form of reporting may require a longer lead-in time to ensure employers are ready to collect relevant data, particularly if the 2011 Census classifications are used.

8.5 Costs to organisations

8.5.1 ELA is unable to comment on this aspect of the consultation as it is a body made of many members.

9 Please outline steps that should be taken to preserve confidentiality of individuals.

9.1 GDPR Recital 26 provides that the principles of data protection do not apply to anonymous information, 'namely information which does not relate to an identified or identifiable natural person or to personal data rendered anonymous in such a manner that the data subject is not or no longer identifiable. This Regulation does not therefore concern the processing of such anonymous information, including for statistical or research purposes'.

9.2 However, it may be desirable or necessary as part of the consideration of pay disparity to obtain some categories of information from which individuals can be identified. Whilst it is unlikely to be desirable or necessary to record a data subject's name, it might be

desirable or necessary to record their age, sex or their role when analysing intersectional aspects of pay disparity. Consideration should be given to whether such information is absolutely necessary: for example, the year of birth (as opposed to the date of birth) may be all that is in fact necessary.

9.3 In smaller organisations, it may be possible to identify an individual simply from the data relating to their ethnicity, in which case it will be impossible to obtain the data required without the subject being identifiable. The likelihood of the subject being identifiable will increase the narrower the classifications adopted, and if the ethnicity data is linked with data relating to other protected characteristics, such as gender.

9.4 Several measures are mentioned in the consultation paper to mitigate this risk:

9.4.1 Suppression of values based on a low number of responses, such as in the Civil Service where values based on five or fewer responses are suppressed in order to protect confidentiality, and also because the numbers involved are too small to draw any reliable conclusions. As to the private sector, our view is that suppression is to be avoided as far as possible, as (i) the point of pay reporting is to identify inequality across groups which are likely by definition to be minority groups, and (ii) the confidentiality concern is adequately addressed by compliance with the GDPR as summarised below.

9.4.2 Reducing the scope of ethnicity pay reporting to employers with employees above a certain numeric threshold –see response 10 below.

9.4.3 Inclusion of an opt-out response (as adopted by Nationwide), thereby allowing the individual employee to choose to decline to provide data which, in the context of that particular organisation, may result in that individual being readily identified.

9.5 If the data subject is identifiable from the data obtained, the data must be processed in accordance with the GDPR – i.e:

9.5.1 Personal data must be processed lawfully, fairly and transparently, for a specified, explicit and legitimate purpose (Article 5). The processing will only be lawful if one of the Article 6 scenarios applies. One of these is consent for one or more specific purposes. Consent is defined in Article 4 as ‘any freely

given, specific, informed and unambiguous indication of the data subject's wishes by which he or she, by a statement or by a clear affirmative action, signifies agreement to the processing of personal data relating to him or her.' Article 7 sets out the conditions for consent, which include that the request for consent is given in an intelligible and easily accessible form, using clear and plain language, and if it is part of a document with other information on it, the request for consent must be clearly distinguishable. It must be as easy to withdraw consent as it is to give it.

9.5.2 Information relating to racial or ethnic origin is a special category of personal data under the GDPR, and this is prohibited unless one of the scenarios in Article 9 applies: one scenario is that the data subject has given 'explicit' consent to the processing of that data for one or more specified purposes – in this context, nothing short of "opt in" will suffice.

9.6 It would be therefore be advisable to err on the side of caution and comply with the GDPR in respect of all data provided, as some data provided may render the data subject identifiable, and compliance will also offer comfort and reassurance to the data subject. It is acknowledged that heavy penalties are associated with failure to comply with the GDPR, and guidance issued by the ICO will assist employers trying to ensure that they comply. Indeed, the ICO's views on the data protection issues raised in this consultation are likely to be informative and consultation with them is recommended so that employers faced with these issues can easily locate clear, consistent and helpful practical guidance.

9.7 Where data is collected online, and a system built to ensure that a person cannot submit their information more than once, a unique code which can only be used once can be randomly assigned to each participant. In such a situation, the name of the individual to whom each code is given should not be recorded.

10 What size of employer (or employee threshold) should be within the scope for mandatory ethnicity pay reporting?

10.1 Answer: it depends upon the requirement.

10.2 In 2013, the Department for Business and Innovation and Skills found that 99.2% of businesses are small (under 50 employees), 0.6% are medium (50 – 249 employees) and only 0.1% are large (250 or more employees). A requirement which applied only to large or very large employers would therefore miss the vast majority of employers.

10.3 However, we have concerns that **average ethnicity pay gap** data cannot be meaningfully reported by anyone other than the very largest of employers. This is because the data needs to reflect numerous ethnic groups (see answer to question 2). Most employers may have very low numbers of employees within some ethnic groups and cannot therefore make a sensible comparison of their average pay against the highest paid ethnic group's average pay. Advice from statisticians should be taken on the threshold, but we would expect that meaningful pay gap reporting cannot be done at organisations employing fewer than 5,000 employees although potentially could be lower depending on the approach taken to suppression of calculations involving low numbers of employees.

10.4 However, other employers could be required to report the **percentages of different ethnic groups within each pay quartile**. This requirement could be applied to both large and medium-sized employers (i.e. 50+ employees). It could also reflect numerous ethnic groups. However, given the complexities of ethnicity pay reporting and the initial need to drive up data collection, there is a strong case for phasing in this requirement, so that it applies first to large employers and then (after, for example, one year) to medium-sized employers.

10.5 As ELA highlighted in its response to Baroness McGregor-Smith's call for evidence in May 2016, there is a lack of data across all employers within Britain. Accordingly, the first step is to ensure that all employers are collecting data and encouraging their employees to provide it. This first step should be a requirement for all employers, irrespective of size. Without data, employers cannot analyse or evaluate whether their policies are working.

10.6 ELA's view, therefore, is that all employers should gather data, with medium and large employers to report annually on the percentage of different ethnic groups within each of their pay quartiles and the very largest employers to report annually on their ethnicity pay gap, broken down into multiple ethnic groups. As mentioned at paragraph 2.4.1(c) above, we have suggested that the government could use additional data to publish pay gap information across groups, such as by sector, but this information may not be meaningful if published in isolation.

11 What support measures do you think would be useful for employers?

11.1 We think that similar support to that provided under the gender pay gap reporting regime would be useful.

11.2 In addition, we think it may be helpful for employers to be directed to a central source of statistics about the ethnicity of particular regions to allow them to set their data within a geographical context. This will ensure that all employers use the same "context" in any explanations or supporting commentary.

11.3 Unlike gender, our experience is that many employer pay systems do not include ethnicity and so sufficient time should be given to employers after the announcement of standardised classifications before the requirements are introduced. This is to allow HR systems to be amended to capture the data required.

11.4 We think that the simpler the classifications are, the easier it will be for employers to implement. This will need a shorter lead-in time than larger numbers of potential classifications. This is because fewer alterations will need to be made to systems and the data will be easier to manipulate. In addition, the simpler the classification the easier it may be for employees to accurately identify their classification.

12. Conclusion

12.1 Overall, the working party was in agreement that the requirement to report ethnicity pay is a positive step towards diversity and then equality. There has been a lack of focus on

race issues in recent years and to require employers to focus on race initiatives is to be welcomed.

12.2 The working party was also in general agreement that ethnicity pay reporting is not the same as gender pay gap reporting and the focus should therefore be on representation at all levels within organisations. The complexities with classifications coupled with the sensitivity around self-reporting emphasise that headline figures of pay gaps may oversimplify the true analysis required. In reality,

12.3 The working party considered that a review of the outcomes following Gender Pay Gap reporting should be undertaken to ensure that reporting is effective. A review and further consultation of the sanctions that may be imposed should an organisation not report, or report using misleading data, is also welcomed.

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