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House of Commons Select Committee inquiry

Women in the Workplace

Response from the Employment Lawyers Association

4 October 2012

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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 employees and employers 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. 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.

An ELA sub-committee responded to:

- (1) the Public Consultation on Gender Imbalance in Corporate Boards in the EU on 28 May 2012; and
- (2) the House of Lords Call for Evidence on the EU Women on Board Proposals on 10 July 2012 under the chairmanship of Brona Reeves, Barclays Bank plc.

A new sub-committee was set up by the Legislative and Policy Committee of the ELA under the chairmanship of Jemima Coleman, Herbert Smith Freehills LLP, to respond to the House of Commons select committee inquiry into Women in the Workplace. A full list of the members of the sub-committee is annexed to the report.

Summary of Response:

1. The statistical evidence and the anecdotal evidence from our members is consistent and clear: the Gender Equality Duty and the Equality Act 2010, have not yet successfully tackled the gender pay gap, prevented sex discrimination within employment nor eradicated job segregation.
2. Personal career choice and broader societal factors clearly influence the representation of women in the workplace. The law alone cannot be a panacea for gender imbalance across sectors nor achieve absolute parity of pay between the sexes. Arguably the legal emphasis should be on equality of opportunity, equality of access and eliminating unlawful sex discrimination as regards terms and conditions of employment (including pay) and treatment at work.
3. However, if it is the government's objective to tackle existing inequalities in relation to pay, ELA's view is that minor reforms of the existing legislation are unlikely either to achieve those goals or even materially to accelerate this result.
4. ELA provides comment and practical suggestions for legislative and non-legislative measures to tackle gender inequality in the workplace in response to questions 2, 4, 5 and 8. The role of investors is discussed in response to question 7.
5. Transparency can be a powerful driver of change. ELA's response includes a discussion on:
 - a. the merits of enacting section 78 of the Equality Act (a requirement for employers of more than 250 employees and public sector employers to publish information on the pay gap between men and women in their organisation);
 - b. the perceived inadequacy of the government's proposal to empower tribunals to require employers who lose gender pay claims to undertake compulsory equal pay audits. The effects of this are likely to be limited: the tribunal will not make an order in many instances eg where the employer can show good reason why it would not be useful; companies may choose to settle claims to avoid this outcome; and success relies on individual employees enforcing their rights in the first place which inevitably produces an imperfect result;
 - c. the potentially counter-productive result of the government's proposal to remove the statutory discrimination questionnaires under s.138 of the Equality Act;
 - d. the limited impact of section 77 of the Equality Act in driving greater pay transparency in the workplace (pay secrecy clauses are unenforceable if a disclosure is made to determine whether there is a connection between pay and a protected characteristic); in ELA's experience, despite the law, many

- employers retain such clauses in the hope that they will operate as a deterrent to frank discussions about pay;
- e. the restrictive nature of the positive action provisions (sections 158 – 159 of the Equality Act); the provisions are narrow in scope and difficult to apply in practice, in particular only very limited assistance is provided in relation to recruitment given the difficulty of applying the "as qualified as" test;
 - f. (on a more positive note), the anticipated benefits of recent and proposed changes in relation to corporate governance (including changes to the UK Corporate Governance Code and proposed changes to the Narrative Reporting Requirements).
6. In response to questions 5 and 8, ELA identifies practical steps which could be taken to promote part-time work including:
- a. confirmation that the right to request flexible working will be extended to all employees (there is currently no date scheduled for implementation);
 - b. consideration of ways to incentivise private sector employers to embrace the benefits of part-time work; and
 - c. the possibility of a voluntary code of practice to establish best practice in relation to the provision of quality part-time work.
7. Further, ELA highlights key factors which can operate to change societal attitudes to women in the workplace and play a part in achieving true equality of access to senior roles:
- a. female attitudes and expectations towards leadership; this should be addressed at a much earlier stage in the education system;
 - b. the existence of quality part-time work and access to flexible working opportunities;
 - c. more widespread organisational and sector networks for people working part-time or flexibly;
 - d. targeted training programmes or grants to incentivise employers to pay for additional costs involved in job sharing;
 - e. systematic programmes to tackle unconscious bias within organisations;
 - f. a review of the impact of the long-hours business culture on female retention rates; and
 - g. better mentoring and coaching opportunities.

In time, such changes could do more to address the gender pay gap and job segregation than legislation alone.

Our Response:

1. Do the Gender Equality Duty and the Equality Act go far enough in tackling inequalities, such as gender pay gap and job segregation, between men and women in the workplace?

1.1. No.

1.2. ELA takes no political view on the importance of these objectives, nor the timescale over which it is thought they should be achieved. However, the statistical evidence, plus the anecdotal evidence from our members, is consistent and clear: the Gender Equality Duty and the Equality Act 2010 have not yet succeeded.

1.3. The gender pay gap is defined as the relative difference in the average gross hourly earnings of women and men within the economy as a whole. The available data varies significantly depending on the methodology used and whether it is adjusted to take account of the number of women working part-time, the age group, relevant sector or region.

1.3.1. One of the best sources of data on the gender pay gap in Europe is Eurostat (the statistical office of the European Union). Eurostat have a recent publication which shows the gender pay gap in tabular form over the period 2002 – 2010: the table suggests that, using unadjusted data, the UK gender pay gap has decreased from around 27% ten years ago, to around 19% in 2010¹.

1.3.2. However, UK data compiled by the Fawcett Society reports a full-time gender pay gap between women and men of 14.9% in 2011 but notes that the pay gap varies across sectors and regions, rising to up to 55% in the finance sector and up to 33.3% in the City of London².

1.3.3. The UK Office of National Statistics 2011 Annual Survey of Hours and Earnings reports a 17.5% pay gap amongst full-time workers³. However the gap is greater when you take into account that many more women work part-time than men (on average around 41% of women work part-time, whereas 11% of men work part-time). Further, significant differentials are reported between age groups: the largest pay gap for all employees in 2011 was in the 40 to 49

¹ The unadjusted Gender Pay Gap (GPG) represents the difference between average gross hourly earnings of male paid employees and of female paid employees as a percentage of average gross hourly earnings of male paid employees. The population consists of all paid employees in enterprises with 10 employees or more.
<http://epp.eurostat.ec.europa.eu/tgm/table.do?tab=table&plugin=0&language=en&pcode=tsdsc340>.

² <http://www.fawcettsociety.org.uk/index.asp?PageID=321>

³ For men, median gross weekly earnings were £539 compared with £445 for women in 2011.

age group, at 27.2%, and the smallest pay gap was in the 16 to 17 age group at 0%⁴.

- 1.4. Care must be taken when vast quantities of complex data are reduced to a single figure purporting to represent the definitive "gender pay gap". However, the statistics clearly highlight that a significant gender pay gap continues to exist in the UK.
- 1.5. The precursors to the Equality Act in relation to gender equality were: the Equal Pay Act 1970 which had as its stated object "to prevent discrimination as regards terms and conditions of employment between men and women" and the Sex Discrimination Act 1975 (the SDA) which aimed "to render unlawful certain kinds of sex discrimination" and "establish a Commission with the function of working towards the elimination of such discrimination and promoting equality of opportunity between men and women generally". The Equality Act mainly restated the earlier legislation: its preamble set out no new objectives in the field, although it did envisage for the first time, the requirement for employers to publish details of the differences in the pay of male and female employees (section 78 of the Act), discussed in more detail in paragraph 2.4 below. As the provision is not yet law, its effectiveness or otherwise in potentially addressing the gender pay gap has not been tested. In any event, it is not clear that publishing such data would necessarily bring about change, since there can be (although not in every case) genuine explanations for such differences, more attributable to issues outside of employers' control, such as career choice decisions and other societal factors. Other tools may therefore be required to address the issue (as discussed in response to question 2 below).
- 1.6. Section 149 of the Equality Act created a new single public sector Equality Duty, mirroring the previous duties in relation to sex, race and disability. The Gender Equality Duty has been embraced to a certain extent by public bodies since the introduction of the Equality Act – the FSA for example has been addressing diversity issues within the financial services sphere. There is evidence that female representation within the public sector is relatively good: women hold 36.4% of board-level public appointments and 34.7% of senior civil service jobs, according to recent BBC research⁵. There are, of course, many factors at play which may explain this including, for example, workplace culture, access to flexible work, career breaks etc. However, it might also be argued that the public sector equality duty has contributed to this positive outcome. As there is currently no corresponding duty on private employers, again, its effectiveness as a tool may be limited.
- 1.7. The Equal Pay Act achieved much in tackling the effects of long-standing historical job segregation and the undervaluing of jobs traditionally seen as "women's work",

⁴ <http://www.ons.gov.uk/ons/rel/ashe/annual-survey-of-hours-and-earnings/ashe-results-2011/ashe-statistical-bulletin-2011.html>

⁵ <http://www.bbc.co.uk/news/uk-18127469>

such as caring, catering and cleaning roles. In recent years, we have seen significant progress with a raft of successful equal pay claims relating to local authority employment or contracted-out public services. The issue of job segregation is discussed in more detail in response to question 4 below.

- 1.8. The Equal Pay Act and the SDA came into force over 35 years ago. ELA's view, consistent with the statistical rate of progression towards the stated goals of the Acts, but based also on its members' experience, is that minor reforms to the existing legislation are unlikely either to achieve those goals or even materially to accelerate their achievement.
- 1.9. ELA notes that the primary legislation almost exclusively only prohibits negative behaviours. It was for the Equality and Human Rights Commission (the EHRC) to work towards what might be termed positive outcomes. However, it is no reflection on the EHRC or its predecessor the Equal Opportunities Commission that the inequalities referred to in the question remain so stark. There is no legislation which promotes or supports specific outcomes, apart from the public sector equality duty discussed above; rather, the law seeks to outlaw behaviours which might hinder those outcomes. If the goals are thought worthwhile, and it is thought appropriate to achieve them in a timescale measured other than in generations, it is clear a different approach is called for. One possibility, if it were felt that the Gender Equality Duty is successful in the public sector, would be to extend it to the private sector.
- 1.10. In ELA members' experience, direct sex discrimination is increasingly rare; overt sex discrimination even more so. Members' caseloads in the field consist primarily of allegations of 'hidden' discrimination or conduct that employers would deny was discriminatory at all. From that, it seems the SDA and the Equal Pay Act clearly did succeed, at least to some extent, not only in their more limited objective of 'rendering certain kinds of ... discrimination unlawful' but have made direct discrimination largely unacceptable as well, a position perhaps analogous to the drink-driving legislation of similar vintage. Whilst this may be considered a good outcome, it clearly falls a long way short of the legislation's broader goals let alone the specific issues referred to in the question.

2. What steps should be taken to provide greater transparency on pay and other issues, such as workforce composition?

2.1. Transparency on pay and other issues, such as workforce composition, can be achieved by legislative or non-legislative means. In ELA's view, legislation can bring about the quickest results, as evidenced by the impact of gender quotas on boardroom diversity in Norway. It is a decision for the Government how quickly success on transparency is to be achieved.

2.2. Whether a legislative or non-legislative approach is adopted it must carry effective sanctions, as a system of targets or objectives without any form or sanction is unlikely to achieve the desired result. Sanctions can include:

2.2.1. fines;

2.2.2. 'name and shame' approach;

2.2.3. company dissolution;

2.2.4. adverse inferences in a Tribunal claim;

2.2.5. procurement sanctions; and/or

2.2.6. the right for an individual to bring a legal claim.

2.3. Whether a legislative or non-legislative approach is adopted, it would be helpful for businesses to be given sufficient time to prepare prior to the introduction of any obligation.

Legislation

2.4. Section 78 of the Equality Act 2010 requires employers of more than 250 employees and public sector employers to publish information on the pay gap between men and women in their organisation. This section of the Equality Act has not yet been brought into force. If it is brought into force, this provision would inevitably create transparency on pay in these organisations, as long as compliance is effectively enforced. The intention was that the EHRC would 'name and shame' those businesses that were non-compliant. However, recent cut backs at EHRC may make this enforcement approach ineffective. Limiting the requirement to employers with 250 or more employees and public sector employees will not improve transparency in private SMEs. Gender pay gap reporting is likely to increase administrative costs for business. Businesses may have concerns about this additional burden. If section 78 is brought into force, a transitioning grace period might be included to enable businesses to identify and remedy any gender pay gap prior to reporting. N.B. If a difference in pay based on gender is published, this is likely to lead to an increase in equal pay claims, which will further increase costs for businesses. Equal pay claims may be reduced if any difference can be explained by a genuine material factor not tainted by sex in the published information. The information should also be published in a way to compare like with like (i.e. part-time work and seniority of roles) and be updated on a regular basis (i.e. at least annually).

- 2.5. Instead of bringing into force section 78 of the Equality Act as enacted, the Government has proposed compulsory equal pay audits where an employer is found guilty of gender discrimination in relation to contractual or non-contractual pay matters. Tribunals will not order audits where an audit has been completed in the last three years, the employer has transparent pay practices or the employer can show a good reason why it would not be useful. Failure to comply with an order will give rise to a civil financial penalty. A second consultation will take place on the exact contents of equal pay audits, publication requirements (for example, whether this will be to the general public or to staff and staff bodies only) and other issues. Micro-employers will be excluded initially. However, this places the burden on women themselves to prove they have been discriminated against, rather than employers demonstrating compliance with equality legislation. ELA's view is that this requirement will result in even more claims being settled prior to Tribunal Judgment to avoid carrying out a pay audit. Based on 2011/12 Employment Tribunal statistics, of the 23,800 equal pay claims dealt with by the Tribunal, only 32 were successful at Hearing, which is approximately 0.01%. In addition, the number of claims dealt with by the Tribunal does not include the unknown number of women who do not bring claims in the first place through fear of repercussions, impact on reputation, time, money and stress involved. Employers are concerned that a minority of women may use this provision to exert pressure on employers to settle. In addition, an employer could lose a gender pay discrimination claim because of a minor error. Therefore, the requirement to carry out a gender pay audit should be at the discretion of the Tribunal Judge.
- 2.6. ELA's view is that the Government Equalities Office's proposal to remove discrimination questionnaires under section 138 of the Equality Act may reduce transparency. Although sex discrimination questionnaires usually impact only one individual they provide transparency at an early stage without the need to progress to and win a Tribunal claim prior to the employer revealing information on pay disparity and workforce composition.
- 2.7. Section 77 of the Equality Act makes pay secrecy clauses unenforceable if a disclosure is made to determine whether there is a connection between pay and a protected characteristic. In practice, our members' experience is that many employers still include pay secrecy clauses in their employment agreements without highlighting the circumstances in which it is unenforceable in the hope it's inclusion continues to have a deterrent effect. Therefore, in ELA's experience, this provision has had a limited impact on transparency.
- 2.8. Draft narrative reporting regulations, due to come into force in April 2013, propose that narrative reports should state the proportion of women on boards and consider gender factors in assessing board effectiveness. This proposed change would make it easier for investors to determine and therefore influence positive behaviours in relation to diversity.

Non-legislation

- 2.9. Monitoring can play a vital role. The EHRC has published proposals for ways in which private sector employers can voluntarily measure and report on any gender pay gap alongside the government's "Think, Act, Report" initiative to encourage companies to address gender equality in their workforces. The ECHR has developed a series of equal pay resources and a number of checklists to assist employers in undertaking an equal pay audit. Alternatively, employers may address pay inequalities in their organisation through a job evaluation study or job evaluation scheme (JES). It is open to the government to give more financial and other support to companies wishing to undertake this analytical procedure for ranking jobs in a non-discriminatory way as of "equal value" as a way of promoting their gender equality objective.
- 2.10. Changes to the UK Corporate Governance Code will come into effect for financial years beginning on or after 1 October 2012 which require listed companies to: (i) report annually on their boardroom diversity policy, including gender and on any measurable objectives that the board has set for implementing the policy; and (ii) consider the diversity of the board, including gender, when evaluating board effectiveness. Although the Listing Rules do not require compliance with the code, there is a 'comply or explain regime'. Consequently, these changes may improve transparency at top level, which may then flow through to the rest of the organisation. The rate of progress in UK corporates redressing the gender imbalance of their boards should be kept under review to determine whether the current voluntary approach is effective.
- 2.11. Incentives could be offered to encourage transparency i.e. priority in public procurement for those organisations who publish diversity information. There is already some basis in the UK for using procurement as a tool to leverage equality. If a lighter touch approach to regulation is adopted then this could be one potential option to consider.

3. What has been the impact of the current economic crisis on female employment and wage levels?

3.1. The ELA has chosen not to respond to this question in detail as there is limited data on the impact of the current global economic crisis on female employment in developed countries generally, or on the UK specifically. Further, the question goes beyond our remit to make observations from a legal standpoint.

3.2. There are various reports which tackle the impact of the current economic crisis on women in developing countries, for example the United Nations discussion paper on "Impact of the Global Economic Crisis on Women, Girls and Gender Equality"⁶, the United Nations Women Watch, "The Gender Perspective of the Economic Crisis"⁷ and the Impact of the Economic Crisis on Women's Economic Empowerment⁸ and Oxfam's report on the impact of the economic crisis on women⁹

3.3. European Working Conditions Observatory has also published a report on the effects of the economic crisis on women in the labour market¹⁰.

3.4. Further, the TUC published a report in March 2011: Bearing the brunt, leading the response; women and the global economic crisis¹¹.

⁶http://www.unaids.org/en/media/unaids/contentassets/documents/document/2012/discussionpapers/JC2368_impact-economic-crisis-women_en.pdf

⁷ <http://www.un.org/womenwatch/feature/financialcrisis/>

⁸ http://www.cherieblairfoundation.org/uploads/pdf/impact_of_economic_crisis_on_women_economic_empowerment.pdf This research report concludes: "The paper shows that the magnitude and types of effects are context-specific: they are likely to vary across countries, sectors, households and among women, depending on the economic, demographic and social circumstances. In the short run, **many women are expected to lose their jobs**, particularly those working on the export sectors and/or holding flexible jobs. At the same time, a fall in the supply of micro-credit is expected to result in a **decrease in earnings among self-employed women workers** in trade, agriculture and other sectors. Additionally, there will likely be an **increase in the amount of unpaid work** that women do to support their families. In the long-run, it is expected that **an increase in girls' dropout rate from school** to compensate for their families' loss of income will deteriorate women's future socioeconomic opportunities. In addition, an **increase in the level of violence against women**, combined with **limited access to health and other support services** as a result of public expenditure cuts and lower aid receipts, complete the dim picture of the gendered impact of the crisis in developing countries."

⁹ <http://policy-practice.oxfam.org.uk/blog/2012/03/economic-crisis-two-years-on>

¹⁰ <http://www.eurofound.europa.eu/ewco/2010/03/ES1003019I.htm>

¹¹ http://www.tuc.org.uk/extras/TUC_Global_Women.pdf

4. How should the gender stereotyping prevalent in particular occupations, for example in engineering, banking, construction, and the beauty industry, be tackled?

4.1. There are clearly broad and complex cultural and societal factors underpinning such job segregation issues.

4.1.1. Any initiatives to increase the participation of an underrepresented group in a particular industry sector must address gender stereotyping and gender-related differences in learning from the early stages of education through to tertiary and higher education. For example, there is a direct correlation between the participation of women in sciences, which reduces from the ages of twelve to fourteen and continues through higher education, and the number of women working in the engineering sector.

4.1.2. There will, also, be an important role for business to play in supporting the uptake and retention of members of an underrepresented group both at later stages of education and early stages of work, through for example apprenticeships, vocational training and work placements.

4.1.3. Organisations with a workforce which is either predominantly male or female may exhibit gender specific corporate and cultural behaviours which discourage employees of a different sex from joining. Addressing these cultural and corporate barriers will encourage the participation of the underrepresented groups. Arrangements which encourage wider participation may include: flexibility of working arrangements to support balancing work and families; effective mentoring, training and development schemes; corporate reporting of gender across functions and levels; transparency of selection criteria and appointments; and approaches which address unconscious bias and stereotyping including for example, identifying positive examples that challenge stereotypes and find ways to give them public influence and visibility.

4.1.4. Looking at the legislative framework, if the government is minded to move away from a voluntary approach to these matters, there are a number of potential legislative changes which could help to tackle occupational gender stereotyping alongside general family-friendly measures which also have a crucial role to play, as discussed in more detail below.

Compulsory pay audits

4.2. The Government published its response to the Consultation on Modern Workplaces earlier this year. As discussed at paragraph 2.5 above, a power will be implemented for the Employment Tribunal to order an employer to conduct a pay audit if it

makes a finding of unlawful gender discrimination in relation to pay matters against that employer.

- 4.2.1. Whilst this is a useful development in tackling systemic gender segregation in the workplace, the power is limited in scope. The Tribunal will not make an order in a variety of potentially broad circumstances including where the employer can show a good reason why it would not be useful. Further, the power relies on individual employees enforcing their rights in the Employment Tribunal which, for a variety of reasons, they will not always choose to do. Even where the legal process is pursued, some genuine claims will fail for technical reasons which may belie underlying gender discrimination.
- 4.2.2. If the Government wishes to encourage broader transparency in pay matters it may consider exercising the existing power in section 78 of the Equality Act 2010 (discussed at paragraph 2.4 above) for the Secretary of State to order all employers with over 250 employees to publish information about gender pay gaps. This approach would put the issue on a more neutral footing, by requiring all employers of a certain size to review and report on gender pay issues annually and as a matter of course. This can perhaps be contrasted with the current proposed power which treats pay audits as a sanction, suggesting the issue is relevant only to employers who have been found to have acted unlawfully rather than a good governance issue for any organisation.

Positive action

- 4.3. Sections 158 and 159 of the Equality Act 2010 deal with lawful "positive action". These provisions were designed to reflect the findings of the Final Report of the Equalities Review that some inequalities are so entrenched that merely prohibiting discrimination is not sufficient to address them and there is a case for much wider "balancing measures".
 - 4.3.1. On their face, the positive action provisions are a potentially powerful tool in industries where gender stereotyping is prevalent. However, it is our experience that, due to uncertainties around the drafting and scope of the legislation, many organisations are reluctant to make use of the positive action provisions in practice. A key issue is the meaning of "as qualified as" in section 159 which, despite guidance, remains too uncertain for some employers to feel comfortable taking positive action in recruitment or promotion.
 - 4.3.2. There may be scope for clarifying sections 158 and 159 whilst remaining within the boundaries of European law allowing certain measures which "compensate for disadvantages".

5. What more should be done to promote part-time work at all levels of the workplace and to ensure that both women and men have opportunities to gain senior positions within an organisation while working part time?

The question deals with two issues and we have therefore addressed each point separately.

What should be done to promote part-time work at all levels of the workplace?

5.1. Part-time working is a complex issue and there is a risk that a one-size-fits-all approach looking at all levels of the workforce will not address the different needs of those who participate at different levels of the workforce. Part-time working is interlinked with socio-economic participation in the labour market. There seems to be a dichotomy between lower paid part-time workers who want to work more hours but cannot secure full-time work, and those who have a full-time professional role or senior level position who want to work less hours. Neither group seems to have the ideal situation - there is no right to work more hours, and there is no right to work less.

5.2. According to current figures and press reports the number of people working part time but who want to work more hours is at its highest since records began in 1992. Therefore, for this group of people, the creation of more part-time roles would not be the answer to their interest.

5.3. There is an argument that it could be beneficial for employers to be encouraged to take steps to promote quality part-time working at all levels of the workplace, rather than creating more low-paid jobs within certain sectors such as cleaning, catering and care, or at certain lower levels of the workforce. (For a definition of quality part-time work please see page 8 of Quality part-time work: an evaluation of the Quality Part-Time Work Fund.)

5.4. Promotion of quality part-time working might be expected to take into account the different needs of groups in society and should not be targeted at gender alone. For example, the abolition of the default retirement age and the increase in the state pension age will lead to an overall increase in the working population. The traditional-style "nine to five, five days a week" approach may not be suitable for every 66 year old. Similarly those with caring responsibilities including elderly adults or disabled children would also benefit from being able to work part-time.

5.5. Increased availability of good quality flexible working would be expected to improve the choice of working mothers who struggle to combine home life with a traditional model of working nine to five, which does not take school hours or childcare into account. For very senior women, it might be helpful to move away from the necessity to work to a formalised part-time working pattern (like 4 days for example) because that may be incompatible with the role. It might be better to normalise flexible working arrangements which permit remote working or working

from home and which grant higher levels of individual autonomy and responsibility over delivery of client service and personal contribution.

5.6. In relation to measures to promote part-time working the ELA would suggest the following steps to be taken into account.

5.6.1. Confirmation that the right to request flexible working will be extended to all employees – there is currently no date scheduled for implementation.

5.6.2. Consideration of ways to incentivise private sector employers to provide further focus on the benefits on the benefits of part-time work.

5.6.3. A voluntary Code of Practice could be issued to help employers provide quality part-time work which would take into account some of the points highlighted by the Evaluation of the Quality Part time Work Fund. In 2007, the previous government offered grants worth £500,000 to 13 employers under their Quality Part-Time Work Fund. (See Quality part-time work: an evaluation of the Quality Part-Time Work Fund.)

5.7. The evaluation study made a number of conclusions regarding the promotion of quality part-time work and these should be considered such as:-

5.7.1. Toolkits and training for managers on responding to requests for part-time working and coping with the business impact of part-time working were especially helpful, and

5.7.2. Demonstrating and selling the business case for increasing quality part-time work is crucial in getting commitment from senior management and line managers.

What more should be done to ensure that both women and men have opportunities to gain senior positions within an organisation while working part-time?

5.8. As a result of the Davies Report and the views of the European Commission a great deal of attention has focused on the number of women in the boardroom within the UK. And while ELA obviously supports these measures to broaden the diversity of board level appointments, there is a concern at large that focusing exclusively on numbers at board level might eclipse equally pressing matters such as the numbers of women at middle management or at senior management positions.

5.9. One of the key barriers to women working in senior roles identified by the EHRC in the 2011 Sex and Power survey, was expressed to be "outdated working patterns and inflexible organisations." The report further suggests that the assumption that employees must work long hours in order to advance their careers imposes greater penalties on women who are more likely to be the primary carer. The Sex and Power report also points to various talented women who prefer to set up their own business, or work as consultants in order to gain greater freedom, autonomy, work life balance and professional development.

- 5.10. Our thoughts on increasing opportunities for part-time women and men to move into senior roles include the following steps.
- 5.10.1. Any still-prevailing misplaced assumption that part-time working means that an employee is less committed and as such will be less interested in promoted posts needs to be addressed ideally by leadership and an organisation's vision for part-time working. Both HR and senior management would need to actively promote the positive benefits of part-time work.
 - 5.10.2. Many organisations may not even be aware that there is a problem with career progression and part-time work. For example organisations could be encouraged to measure the number of part-time employees/workers they employ/engage and segment this to look at gender and analyse time in post before achieving promotion.
 - 5.10.3. Mentoring and coaching schemes can also be helpful as ways to encourage part-timers (normally women) to apply for senior roles.
 - 5.10.4. Part-time working or flexible working networks can be set up internally to help organisations see the benefit of part-time working, and can be used as helpful case studies.
 - 5.10.5. Again, some of the suggestions included in the analysis of the Quality Part Time Work Fund are helpful. These include
 - 5.10.5.1. Advertisements for senior roles should state that jobs can be done on a job share or part-time basis rather than leaving it up to the individual to negotiate reduced hours.
 - 5.10.5.2. Targeted training programmes or grants to incentivise employers to pay for the additional costs that may be involved in job sharing.
 - 5.10.6. For example Royal Mail received a £25,000 grant from the government, to which it added a further £30,000 to help recruit female managers in operational roles where shift systems had previously operated as a blocker to female applicants. After reviewing the roles, the Royal Mail confirmed a number of the jobs could have flexible hours of between 16-24 hours over three or five days. Nine female and eight male part-time managers were appointed. Case studies like this show how money, planning and good communications can lead to quality flexible working.
- 5.11. The challenge with most of these steps is that they are essentially voluntary concepts with little redress in place for those who are unable to obtain quality part-time work, or who are unable to obtain promotion. Although indirect discrimination claims have given female claimants some rights of redress in relation to part-time work, individual remedies are perhaps less effective at promoting wider workplace change.

6. To what extent have the recommendations in Lord Mervyn Davies' Report "Women on Board" (published in February 2011) been acted upon?

6.1. The Davies recommendations are broadly in line with the prevailing view of government and many UK businesses that mandatory quotas would not be welcomed, and would detract from the hiring process being a genuine meritocracy. Instead, the recommendations (coupled with ongoing governance and a greater focus on how to deal with poor female retention rates at senior levels) are seen to be a good initial step with companies seeking to comply on a voluntary basis without (as yet) the threat of sanctions.

6.2. The statistics demonstrate that steady progress is being made, with executive director roles. In the annual progress report published in March 2012 it was noted that the FTSE 100 board ratio of men to women had risen from 87.5% men: 12.5% women to 84.4% men: 15.6% women. Furthermore, latest research from the Professional Boards Forum, indicate that women account for 17.3% of all FTSE 100 directorships at 4 September 2012 and there are currently only eight all-male FTSE 100 boards¹². Further, momentum has picked up with women winning 44% of FTSE board appointments since March 2012.

6.3. In addition, the Davies Report recommended that UK listed companies in the FTSE 100 should aim for at least 25% female representation on their boards by 2015, and 17 companies have already reached this target. A further 17 are currently between 20-25%. In relation to FTSE 250 companies, 21 have reached a target of 25% and a further 28 are between 20-25%.

6.4. The Davies Report also recommended that recruitment firms and headhunters take voluntary steps to improve board diversity, and a voluntary code of conduct was put in place in July 2011 for FTSE 350 board appointments. The code encourages nomination committees to place significant weight on an individual's relevant skills and personal qualities, as well as their actual experience, and recommends a target of 30% of women for the initial list of candidates put forward to each client. It also recommends that firms should have to justify any failure to meet this target. The impact of the voluntary code is discussed in more detail in response to question 9 below.

6.5. Following the Davies Report, the Financial Reporting Council has announced changes to the UK Corporate Governance Code applying to financial years beginning on or after 1 October 2012 (discussed at paragraph 2.10 above).

¹² BoardWatch, Professional Boards Forum, <http://www.boardsforum.co.uk/boardwatch.html>

- 6.6. However, the biggest change has been in the area of non-executive director roles. The Cranfield Female FTSE Board report dated March 2012 reported that of the 141 women holding 163 FTSE 100 board seats at the time of the report, only 20 (ie 12%) were executive directors compared to 143 (88%) non-executive director positions. As at March 2012, only 6.6% of FTSE 100 executive directors were women and only 4.6% of executive directors at FTSE 250 companies were women¹³. Statistics for executive roles show almost no improvement, meaning that the current self-regulation mechanism risks creating a "two-speed system".
- 6.7. The Financial Times reported in September 2012 that Europe's listed companies could be forced to ensure that at least 40% of non-executive board positions are held by women by 2020 or face fines or other sanctions under a legislative proposal being drafted by the European Commission. A summary of the main outcomes of the EU consultation on gender imbalance on corporate boards is expected imminently, together with details of a possible EU legislative initiative.
- 6.8. In any event, the ELA considers that a range of initiatives may need to be utilised to ensure the progress against the recommendations is sustained. In the UK and in other countries, cooperative approaches relying on regulatory coordination between stakeholders have proved so far quite successful.
- 6.9. The European Women's Lobby emphasises that targets, deadlines and monitoring are critical to achieving lasting change. These measures are unlikely to be enough if a major step-change is desired in these areas and must be accompanied by softer, and potentially more far-reaching, initiatives including education, to promote a culture shift. Other initiatives may include mentoring, training and the publication of lists of female board-ready candidates.

¹³ <http://www.som.cranfield.ac.uk/som/dinamic-content/research/documents/2012femaltse.pdf>

7. To what extent should investors take into account the percentage of women on boards, when considering company reporting and appointments to the board?

7.1. It is difficult to see how investors can be regulated to ensure that they take the percentage of women on boards into account when deciding in which companies to invest. However, greater reporting by companies of the steps taken to tackle female underrepresentation, and the processes adopted when making board level appointments, will ensure that investors (and others) are receiving transparent information and the issue of female under representation remains high on the board agenda.

7.2. As mentioned above (paragraph 2.8), draft narrative reporting regulations, due to come into force in April 2013, propose that narrative reports should state the proportion of women on boards and consider gender factors in assessing board effectiveness. This proposed change would make it easier for investors to determine and therefore influence positive behaviours in relation to diversity.

7.3. In Spain, companies which comply with the recommendations for gender equality (or who have good reasons for not doing so) are given priority status in the allocation of government contracts. This would clearly be of interest to investors in terms of determining when a company has a greater chance of winning new business and, therefore, being a profitable opportunity. However, this will clearly only be applicable to public procurement contracts and would not have a greater application.

7.4. If sanctions were to be imposed on companies which fail to self-regulate in a manner which is consistent with any recommendations, this could also affect investor decisions. For example, a corporate investor may not want to be associated with a company that is having to explain its actions to an appropriate regulator and/or which is receiving negative publicity about its corporate governance.

7.5. Further, if sanctions were to be imposed on a sliding scale basis, this could also increase investor risk and, therefore, investor pressure on companies to comply/self-regulate at an early stage. For example, a “comply or explain” led approach along the lines of the framework which already exists for UK corporate governance could be the starting point, with other non-prescriptive initiatives including training, networking and mentoring, increased level of disclosure and economic pressure, such as Board level diversity being a requirement for tendering for government contracts, being implemented as a second step.

8. Why are there still so few women in senior positions on boards, and what are the benefits of having a greater number?

8.1. The leaking pipeline has been held responsible by many commentators for the under representation of women on boards. There are fewer women than men rising to senior management positions in many companies, this leads to a reduced pool of female talent from which to recruit board members¹⁴. Women are adequately represented in higher education and at a junior level, the question to consider therefore is: “Why are there so few women advancing to senior positions in companies?”. There are many factors which contribute to the attrition of female talent in a company:

8.1.1. Lack of flexible working arrangements - women are more likely to work part-time or need flexibility at work. Many companies view senior positions as full time jobs which involve the employee being on call at all times.

8.1.2. Children – many women do not return to full time work after having children or they take less skilled work which allows them greater flexibility or time at home¹⁵. Unequal rules governing parental leave often mean that it is more cost effective for the mother to take a longer period of maternity leave than the father. Some women find it difficult to re-enter the workforce after this time away. Recent amendments to parental leave may help to redress the imbalance as parents have more choice to decide which person takes the parental leave. It is too soon, however, to know whether fathers will take full advantage of these changes. In addition, childcare in the UK is the most expensive in Europe¹⁶, therefore, for many families it is cheaper for the mother to stay at home than return to work.

8.1.3. Corporate culture – the workplace atmosphere, business culture, corporate governance and working hours expectations all have an impact on female retention. The divide between the sexes is particularly noticeable in certain industries. For example, women are particularly underrepresented in mining, real estate, steel and electrical companies but well represented in retail, utilities, media and banking¹⁷. This subconscious gender stereotyping that

¹⁴ “Women on Boards” February 2011, Lord Davies of Abersoch.

¹⁵ “The price of motherhood: Women and part-time work” February 2012, Vidhya Alakeson, Resolution Foundation . http://www.resolutionfoundation.org/media/media/downloads/The_price_of_motherhood_-_women_and_part-time_work.pdf

¹⁶ “Bridging the gaps created by maternity leave” April 2012, Natasha Stidder Financial Times.

¹⁷ “Gender and ethnic diversity among UK corporate boards, Corporate Governance: An International Review” 2007, Brammer, S., Millington, A. and Pavelin, S.

certain industries are for men only, has a self-perpetuating effect as women are less likely to be attracted to a male dominated working environment.

8.1.4. Lack of strong female networks – networks can be influential in recruitment and promotion decisions. The lack of women in senior positions means there are fewer women to act as mentors and role models for women in junior roles.

8.1.5. Mirror imaging/subconscious bias – some individuals will recruit candidates similar to them which perpetuates the prevalence of senior males in companies.

8.1.6. Female choice – it may be that there is a difference in the number of women that wish to work in senior roles than men.

8.2. There are various studies that suggest that a greater representation of women on company boards will improve the performance and governance of companies. If UK companies are performing well this will in turn benefit the UK economy.

8.3. There is much research which purports to demonstrate the business case for gender diversity. Bloomberg estimate that women control 70% of global consumer spending¹⁸ and, on that basis, are more likely to represent the consumer and understand what they want. Research by Catalyst¹⁹ showed women on boards can improve company's performance: companies with a higher number of female directors had a 42% higher return in sales, 66% higher return on invested capital and 53% higher return on equity²⁰.

8.4. Other studies have suggested that decision-making in general improves on a gender-balanced board due to the variety of views that are brought to the table and that a diverse board is more likely to focus on managing and controlling risk²¹. In addition, corporate governance and the ethical behaviour of companies improve when there are more women on the board²². These are all factors that will improve the health and longevity of UK companies and consequently their employees, customers and the UK economy in general will benefit.

¹⁸ <http://www.bloomberg.com/news/2011-07-24/women-controlling-70-of-consumer-spending-sparse-in-central-bankers-club.html>

¹⁹ A non-profit membership organisation that provides information and research regarding women in business.

²⁰ "The Bottom line: corporate performance and women's representation on boards", 2007.

²¹ "Diversity and gender balance in Britain plc": a study by TCAM in conjunction with The Observer and as part of the Good Companies Guide, London, UK: TCAM, 2009.

²² "Gender Differences in Ethical Perceptions of Business Practices", Franke G. R. et al., Journal of Applied Psychology, 1997; "Women on boards: Not just the Right Thing... but the 'Bright' Thing", the Conference Board of Canada 2002.

9. How successful is the voluntary code of conduct (a recommendation of the Davies Report) which addresses gender diversity and best practice, covering relevant search criteria and processes relating to FTSE board level appointments?

9.1. The voluntary code was generally welcomed when introduced in the summer of 2011. It is our submission that it is probably too early to assess its impact on Board recruitment, particularly given the long lead times for such appointments.

9.2. It is correct that the number of women on boards has increased since the publication of the Davies Report and the voluntary code, but it is difficult to assess the extent to which this rise in numbers is wholly or partly attributable to the introduction of the code. It is also difficult to measure the success or otherwise of the voluntary code, particularly as a lot of the principles it put forward are difficult themselves to measure, for example, how do you determine whether search firms have provided appropriate support to first time candidates without surveying those firms and candidates. As noted above, it is probably too soon after the introduction of the code to realistically gather evidence of that support being given and its effectiveness. As the Cranfield report "Gender Diversity on Boards: The Appointment Process and the Role of Executive Search Firms" points out, even with the code, there is a view that the appointment process is often regarded as opaque and subjective, focusing on "fit" and personal chemistry (which may, result in a tendency for boards to recruit in their own image). The Cranfield report also makes the point that recruitment is often done behind closed doors and is not an open and transparent process with few positions being generally advertised. While there are clearly market sensitivities around companies being completely open about such a process, it should, ELA submits, be possible for some prospective vacancies to be advertised on a generic "no names" basis.

9.3. Furthermore, not all board appointments are filled using a search consultancy. Positions can be filled by internal promotion or word of mouth, particularly if a company has a strong internal candidate and/or wishes to avoid the search fees typically levied by search firms.

9.4. ELA submits that it may also be worth noting that the Cranfield report only interviewed firms who have signed up to the code already and who are therefore likely to be engaging in best practice - it does not therefore give a sense of what progress (if any) is being made by other search firms. In addition, the likelihood is that companies who engage such search firms are likely to be those who have already decided, for whatever reason, to make some level of commitment to diversity. There must therefore be, ELA submits, an element of "preaching to the converted". What is more difficult to assess is the impact of the code on those companies who might not willingly embrace such an approach.

9.5. What would also be interesting (though again, ELA submits it is too early to carry out such an assessment) would be to compare progress over the last 12 months in increasing the representation of women on boards in the UK with those

jurisdictions which have taken a similar, voluntary approach, but where an initiative equivalent to the voluntary code has not been put into place. For example, in the US there has been a similar increase in diversity in recent years in Fortune 500 companies without anything along the lines of the voluntary code being in place. A Catalyst Inc. report dated July 2012 included statistics showing number of board seats held by women in Fortune 500 companies since 1995. Examples of results were as follows:

- 1995 9.6%
- 2000 11.7%
- 2005 14.7%
- 2010 15.7%
- 2011 16.1%

The increase has been slightly stagnated in the last few years but still a relatively consistent upward trend.

9.6. As it is aimed at board level appointments, the voluntary code by its very nature focuses on the "top slice" of senior level appointments. As such it does not, in and of itself do anything to address the issue of "pipeline" i.e. the concern that there is a lack of women coming up through the ranks which have been identified as having high potential and, as such might fill board level roles in 5, 10 or 15 years' time. Unless search firms make a conscious effort to look out for and encourage a pipeline then they may find it difficult to have a sufficient pool from which to draw candidates for board level appointments.

9.7. The voluntary code applies only (as, to be fair do all the initiatives so far) to large companies. As such, the code does nothing to address gender imbalance in government, the civil service/public sector and the professions. A significant number of female graduates join the professions, and, if anything, the lack of progress for women in these fields can be even more marked than in large corporates. For example, amongst the top 20 English law firms, the average proportion of women partners was only 14%

9.8. It is ELA's submission therefore, that while the voluntary code is a significant component of the attempts to increase the number of women on boards, it has its limitation. In addition, if as has been suggested, the EU introduce binding targets then any code is likely to have to become more prescriptive, pro-active and wide ranging if it is going to contribute significantly to increasing the number of women in senior positions.

Employment Lawyers Association

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