



Section 1 – Your details

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Do you want is your response to be treated as confidential?

- Yes
 No

If yes, please explain why (please refer to notes below on confidentiality)

Confidentiality

Information provided in response to this consultation, including personal information, may be published or disclosed in accordance with the access to information regimes. These are primarily the Freedom of Information Act 2000 (FOIA), the Data Protection Act 1998 and the Environmental Information Regulations 2004.

If you want the information you provide to be treated as confidential, please be aware that, under the FOIA, there is a statutory Code of Practice which public authorities must comply with. This deals with, amongst other things, obligations of confidence. It would therefore be helpful if you could explain to us why you regard the information you provide as confidential. If we receive a request to disclose the information we will take full account of your explanation, but we cannot assure that confidentiality can be maintained in all circumstances. An automatic confidentiality disclaimer generated by your IT system will not alone be regarded as binding.

The Government Equalities Office will process your personal data in accordance with the Data Protection Act 1998 and in the majority of circumstances this means your personal data will not be disclosed to third parties.

Section 2 – List of consultation questions

Please refer to the consultation document before completing the online survey, as it provides further background to all of the questions.

Q.1 Do you agree that the new GPG requirements should apply to the same public bodies, with 250 or more employees, which are currently listed at schedules 1 and 2 to the Specific Duties Regulations?

- Yes
 No

If no, please explain why.

On review of Schedules 1 and 2, ELA notes that the current list is not up to date and it may not be possible to identify a complete list of missing public bodies. For example, at present, The Law Society is listed but the Solicitors Regulatory Authority is not. We note other similar omissions with regard to other regulators.

In order to ensure that all public bodies, including agencies within the public sector, are captured, it is the view of ELA that a wide definition should be adopted to ensure that the Schedules do not become quickly out of date. ELA's view is that the regulations should cover all public sector organisations (including agencies) within England Wales, not limited to those specifically listed in Schedules 1 and 2.

ELA is also aware that some government departments also head up a group of executive agencies. For example, the Department for Transport holds under its umbrella organisations such as DVLA and the Highways Agency. It is ELA's view that reporting requirements for Executive Agencies, whether named within Schedules 1 and 2 or not ought to be included within the reporting for the central department. ELA is concerned that some organisations may fall between the gaps without this being expressed in the Regulations.

Q.2 Are there any other public bodies that should be included at Schedules 1 and 2 to the Specific Duties Regulations?

Yes

No

If yes, please provide further details.

Solicitors Regulatory Authority, Bar Standards Board, Legal Aid Board, Competition and Markets Authority – this is not an exhaustive list and ELA’s view is that a broader group of organisations should be covered without specifying particular names to ensure the list remains current.

Q.3 Is it appropriate to rely on the definition of ‘employment’ in section 83 of the Equality Act 2010 for public sector employers?

Yes

No

If no, please explain why.

The Regulations should specify, expressly, that the same individuals that are able to rely on the Equality Act 2010 are also caught within the Regulations when calculating gender pay gap, which includes office holders (i.e. judges), police officers.

ELA recommends that NHS agency staff contracted to work at the relevant calculation date also be expressly included in calculations by an NHS Trust engaging the agency staff. There is some concern that agency staff may not be covered by the regulations, but as they make up a significant workforce within the NHS, it is important that information about their pay is also captured.

Q.4 Do the proposed elements of pay raise any particular issues for the public sector?

Yes

No

If yes, please provide further details.

ELA would repeat the concerns set out in its response to the GEO consultation on Mandatory Gender Pay Gap reporting on 11 March 2016 in relation to the definition of pay (attached for convenience). This includes the observation that overtime pay is excluded, but is itself a gendered issue, as women are less likely to work overtime due to the need to balance work with child care.

One general concern is that capturing the data using the “snapshot” on 5th April each year, and therefore excluding employees who are not receiving their contractual pay at that time (for example, because they are on maternity leave) would have the effect of skewing the statistics. It is likely that more women than men will be removed from the data capture exercise, possibly giving an unrepresentative picture of the gender pay gap at the organisation. Reducing the number of individuals whose pay is captured will also affect the pay quartiles.

Where an individual is on family leave at the snapshot date, ELA suggests that their rate of pay, as stated in their contract, should be included in the calculations instead of excluding them from the calculations altogether. Where they have benefited from a pay rise during any period of family leave their revised rate of pay should be used. We recognise that on occasion communication and final decisions on pay rises may be delayed (albeit the increases often then take effect retrospectively). Whilst this may mean that the contractual rate of pay for an employee on family leave may be captured without reflecting any pay rise, any slight disparity in rates as a result of delayed pay rises outweighs the disadvantages caused to employers as a result of them being obliged to exclude these employees from the snapshot altogether.

ELA is also concerned that pay should be defined so as to include the types of “bonuses” and “allowances” that have haunted the public sector equal pay litigation, and were often found to be subsumed into ordinary pay even though they were expressed to be performance related or counted as overtime even though a reduced number of hours had been worked.

Examples of this would include:

- (1) attendance allowances;
- (2) task and finish (which effectively increases a man’s hourly pay);
- (3) acting-up allowances;
- (4) annual retainers;
- (5) attendance allowances;
- (6) productivity bonuses; and
- (7) honoraria.

Many of the equal pay cases in the public sector involved such bonuses (for example: *Redcar and Cleveland Borough Council v Degnan* [2005] IRLR 179, EAT; *Council of the City of Sunderland v Brennan* [2012] IRLR 507). At present “other allowances”, “shift premium pay” and “bonus pay” are all included, while “overtime”, “expenses” and “benefits in kind” are all excluded. We repeat the comments about overtime made in our previous consultation response, but there is also the possibility that “task and finish”, being viewed as permission to leave work early without any detriment in pay, could be viewed as a benefit in kind.

ELA recommends making clear (either in the drafting of the regulations or in accompanying guidance) that the exclusion from “ordinary pay” and “bonus pay” of “remuneration referable

to....termination of employment" is not intended to include notice pay (so notice pay counts as "ordinary pay" for the purposes of the regulations).

Finally, there is a risk that the inclusion in "allowances" of any sum paid with respect to the "retention" of an employee could be viewed by employers as a bonus, which may cause confusion given the separate reporting requirements for bonus pay. ELA would suggest removing the reference to "retention" from the concept of allowances.

Q.5 Do you agree that the same deadline should be introduced for all reporting requirements under the amended Specific Duties Regulations?

- Yes
- No

If no, please explain why.

Q.6 Do these reporting requirements pose any particular issues for public sector employers?

- Yes
- No

If yes, please provide further details.



Q.7 Do you have any other comments on these measures and/or our proposed approach?

ELA attaches its response to the GEO consultation on Mandatory Gender Pay Gap reporting dated 11 March 2016 as the recommendations raised will have equal application to public sector reporting.