

Consultation on a draft Code of Practice On equal pay

Response from the
Employment Lawyers Association
(ELA)

6th April 2010

Please fill in the name and address (or that of your organisation if relevant).

Name

Name of organisation and position held (where relevant)

Address

Postcode

Responses will remain confidential unless respondents indicate by ticking this box that they may be made available to the public on request. Please note that responses will not be attributed to individuals in any circumstances.

Section one - You and your organisation

The answers you give in this section will enable us to have a better understanding of who has responded to this consultation.

Q1 Please indicate where you are based.

Please tick one box only

- England
- Scotland
- Wales

Q2 In which capacity are you responding to this questionnaire?

Please tick all boxes that apply

- | | |
|---|-------------------------------------|
| a) For a central, devolved or local government body | <input type="checkbox"/> |
| b) For a representative organisation | <input checked="" type="checkbox"/> |
| i. Voluntary Organisation | <input type="checkbox"/> |
| ii. Trade Union or Professional Association | <input type="checkbox"/> |
| iii. Other - please tick box and describe below | <input checked="" type="checkbox"/> |

The Employment Lawyers Association ("ELA") is a non-political group of specialists in the field of employment law and includes those who represent Applicants 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. 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 list of members involved in this response is annexed to this document.

- c) As an employer
- d) As an employee
- e) As a service provider
- f) As a service user
- g) As an adviser
- h) As an individual

Q3 If you are responding on behalf of an organisation, how many people does it employ?

- Up to 50
- 51 to 100
- 101 to 500
- 501 to 1,000
- 1,001 to 5,000
- 5,001 and over
- Don't know

Section two

- Introduction

Clauses

- Equal pay for equal work
- Like work
- Work rated as equivalent
- Work of equal value
- Comparators
- Choice of comparators
- Sex Equality clause
- Non-contractual rights
- Material factor defence
- Equal pay and maternity leave
- Employment Tribunals
- Obtaining and disclosing pay information - protected pay discussions
- Equal pay questionnaires
- Confidentiality
- Occupational pension schemes / Sex Equality Rule
- Maternity equality in pension schemes
- Enforcement
- Time limits for equal pay claims
- Equal pay awards and remedies
- Protection against victimisation

Part 2 - Equal pay: good practice

Clauses

This section of the questionnaire covers the individual clauses in the Equality Act relating to equal pay.

Introduction

Q1. To what extent do you agree or disagree that this section explains the code in relation to equal pay?

Please tick one box only

Strongly agree	<input type="checkbox"/>
Tend to agree	<input type="checkbox"/>
Neither agree nor disagree	<input checked="" type="checkbox"/>
Tend to disagree	<input type="checkbox"/>
Strongly disagree	<input type="checkbox"/>
Don't know	<input type="checkbox"/>

Q2. If you disagree, please tell us where it is unclear and / or how it could be improved. Please write in the box below.

Overall, the ELA believes that this section does explain the Code in relation to equal pay. However, there are a number of general points in relation to the Code, particularly in relation to the introduction, where we would recommend some additional changes. Those changes are detailed below.

It is difficult to imagine a more difficult subject on which to produce a statutory Code, given the complexities of equal pay law, its application and implications for different sectors, and the considerable volume and complexity of case law in this area.

Given this difficulty, we do not think that the Code will necessarily achieve its stated objectives of assisting courts and tribunals in interpreting the law. Due to the the nature and complexity of relevant case law it is likely that the Code is too small a document, and it will be difficult to amend it frequently enough to provide sufficient assistance in interpreting the law. Consequently it will only be able to cover the broad legal concepts which are already in general agreement. The current draft (subject to our comments below) achieves this.

Equally, given the above restrictions the Code is unlikely to significantly assist experienced practitioners in the area, who will likely refer to the relevant case law in the first instance.

As the Code is a detailed explanation of the statutory Equal Pay provisions set out in the Equality Bill, we believe that it will only be of limited help for HR practitioners and Claimants. This is due to the complexity of the law in this area and the Code will be relatively "fixed in time"; in contrast to the ever changing case law.

The Code may well have more value in sitting alongside the expected practical guidance which the ECHR is proposing to publish in the summer. This is particularly the case where the EOC Code on Equal Pay focused much more on practical issues and was a very useful tool for practitioners, tribunals. complainants and respondents alike.

We wish to emphasise that the above should not be seen as a particular criticism of the Code, it is an extremely difficult task to undertake. However, due to the approach taken in seeking to address/interpret each term of the Equality Bill, rather than to focus on practical guidance in the area of equal pay the impact of the Code and scope of its use will, in the ELA's opinion, be more limited than perhaps it would be in other areas, due to the difficulty and complexity of the law in this area, and will not prove as useful to users as the previous EOC code, nor does it address (other than in part 2) the steps which employers can more generally take to address the equal pay gap.

Q3. To what extent do you agree or disagree that this section explains the status of the code in relation to equal pay

Please tick one box only

Strongly agree	<input checked="" type="checkbox"/>
Tend to agree	<input type="checkbox"/>
Neither agree nor disagree	<input type="checkbox"/>
Tend to disagree	<input type="checkbox"/>
Strongly disagree	<input type="checkbox"/>
Don't know	<input type="checkbox"/>

Q4. If you disagree, please tell us where it is unclear and / or how it could be improved. Please write in the box below.

Q5. To what extent do you agree or disagree that this section explains the application of the code in relation to equal pay?

Please tick one box only

Strongly agree	<input type="checkbox"/>
Tend to agree	<input type="checkbox"/>
Neither agree nor disagree	<input type="checkbox"/>
Tend to disagree	<input type="checkbox"/>
Strongly disagree	<input type="checkbox"/>
Don't know	<input checked="" type="checkbox"/>

Q6. If you disagree, please tell us where it is unclear and / or how it could be improved. Please write in the box below.

It is unclear as to how this question differs from questions 1 and 3. We have included any additional comments we have under question 9 below

Q7. To what extent do you agree or disagree that this section explains how to use the code?

Please tick one box only

Strongly agree	<input type="checkbox"/>
Tend to agree	<input type="checkbox"/>
Neither agree nor disagree	<input type="checkbox"/>
Tend to disagree	<input checked="" type="checkbox"/>
Strongly disagree	<input type="checkbox"/>
Don't know	<input type="checkbox"/>

Q8. If you disagree, please tell us where it is unclear and / or how it could be improved. Please write in the box below.

It is unclear as to how, if at all, this introductory section explains how to use the Code, other than in relation to its status. On a practical level it would be of assistance if the instruction/Code contained the following:

- An index or initial bullet point summary of each of the various sections to the Code (e.g. "comparators" - this section deals with the male or female colleague with which the complainant seeks to compare his or her terms.)
- A glossary of terms. Many of the words and phrases used in the Code (and which are identified in relation to each section in this response) are defined within the Code and are used repeatedly throughout the Code. We feel it would be particularly useful if the definitions were instead included in an initial "glossary" to allow the reader to "dip in and out" of specific sections of the Code without having to cross refer to earlier definitions. A glossary would equally prevent a definition of a complex phrase (such as "single source") from distracting from the paragraph or section within which it is first contained.
- The use of examples which relate to (or include) the private sector as

well as the public sector. We recognise that much of the case law in this area relates to the public sector, but it would be useful if examples were included which reflect the broader economy. You will also see that we have, in a number of areas, recommended that more examples are used, as they can be invaluable in aiding understanding (particularly in relation to the application of TUPE at paragraph 133) and it may be possible to shorten some of the explanatory sections of the guidance if more practical examples are included. On a practical level, it would be easier to read the Code and the examples if examples were grouped in boxes, as is the case in the non-statutory guidance.

- Some parts or paragraphs of the Code deal with case management matters or guidance (in particular paragraphs 32, 37,38 and 80-87). This seems to jar somewhat with the commentary on the provisions of the Equality Bill, and may be more appropriate for guidance or a section on procedure.
- Cross referencing to claims referred to or relied on in the Code. It is clear that a number of the explanations in the Code, particularly examples, refer to express equal pay cases (such as the Dumfries case). Given that case law will inevitably change more quickly than the Code can be amended, and that the facts of each case will be relevant to the interpretation placed on the Code by the Courts/Tribunal, we think it would be of particular use if the cases relied on (whether explicitly or whether by way of example) could be footnoted. More generally, it will also help the courts, tribunals and advisers in understanding the case from which a particular principle or part of the Code has been developed.
- Finally, the subheadings and signposting (for example the cross referencing to clauses in the Equality Bill) were extremely helpful and more signposting (whether by way of sub-headings or otherwise) would further assist in making the Code easier to use and cross refer to in a claim.

Q9. Are there any other comments that you would like to make about this section?

Where relevant please mention paragraph numbers. We welcome both positive and negative comments. Please write in the box below.

We consider that the introduction to the draft Code is unnecessarily lengthy. Given that the document runs to some 63 pages, and is therefore already

significantly longer than its predecessor, the Equal Opportunities Commission's Code (24 pages), we feel that it would be appropriate to reduce the length of the introduction. There are a number of paragraphs/sections within the introduction that do not appear to sit comfortably in the introduction and could therefore easily be removed. We believe that paragraphs 2 and 3 on page 5, and the first main paragraph on page 6, are not particularly relevant for this Code and could therefore be removed. Further suggested paragraphs for removal are set out below.

Further, the ELA considers that the reference to a "sex equality clause" in the final line of the final paragraph on page 6 requires further explanation in this part of the document as it is a technical term. It may be appropriate for this term, along with others, to be included in a glossary of terms at the end of the Code, as explained above.

On page 7 of the draft Code, the reference in paragraph 3 to the situation where women are paid less than men because they work in different sectors and are not carrying out equal work is strangely worded and does not make clear that such a situation would not fall within the remit of the equal pay sections of the Equality Bill either. We suggest that the words "is not covered in this Code" are removed and replaced with "does not fall within the scope of this part of the Equality Act." We also feel that the balance of this paragraph needs to be reworded as it confuses rather than compares and contrasts (as was presumably intended) equal pay issues and other types of sex discrimination.

The reference to sex discrimination, harassment and victimisation being the main cause of the gender pay gap appears to us to be slightly misleading. The paragraph should make clear that there are a number of reasons for the gender pay gap, including job segregation and the fact that caring responsibilities are traditionally undertaken by women leading to more women taking career breaks and/or working part-time.

The situation cited of there being sex discrimination, harassment or victimisation when women apply for jobs within traditionally male jobs or sectors, or vice versa, should be set out at the end of paragraph 3, as an illustration of sex discrimination per se rather than an issue of equal pay. It might also be useful to cite examples of what would constitute sex discrimination here, e.g. a woman not getting a particular job that is considered to be "man's work", e.g. construction work, or a requirement for all staff to work night shifts, which would be likely to have a more negative impact on female staff who are likely to bear the main responsibility for childcare/other caring responsibilities. Please see further below our comments in relation to the Sex Equality Clause and Non Contractual Rights section of the Code (paragraphs 39-46)

We note that the section on page 7 entitled “Scope of this Code” sets out the three types of equal pay claim. We believe it should then go on to mention, in very broad terms, the other stages in an equal pay claim, including the means by which an employer may defend such a claim.

Whilst the first paragraph on page 8 is accurate, it could be more simply explained by stating that the terms and conditions of full time workers and part-time workers should be compared on a similar basis, e.g. by calculating what the part-time worker’s pay and benefits would be if they worked full-time, and ensuring that these equate to the full-time worker’s pay and benefits.

We consider that the word “covered” in paragraph 2 of page 8 should be replaced with the word “protected”, in the sentence that states “...to the work of a part-time or full-time man, her situation will not be covered by the equal pay provisions of the Act and will not be covered by this Code.” Again, we consider that it would be more comprehensible for the Code to set out examples of situations that would be covered by the equal pay provisions, and examples of situations that would instead be covered by the sex discrimination provisions, and separate these out. The ELA believes that the manner in which the current wording seems to move rapidly from one to the other is not a helpful way of explaining the distinction between an equal pay claim and a claim that sits more easily within the other sex discrimination provisions of the Equality Bill. It also seems to be unnecessarily lengthy. We also note that paragraph 2 would benefit from some specific examples of unjustified and potentially unlawful provisions, criteria and practices which militate against part time working.

The reference to positive action in this Code (paragraph 2 on page 9) does not appear to be appropriately included in this Code. Again, given our views on the length of the introduction, we consider that this reference should be removed from this Code.

We consider that the word “moving” needs to be inserted twice into the penultimate sentence on page 9, before the words “into traditionally male sectors...” and “... into traditionally female sectors”.

We consider that the words “show how” need to be inserted in place of the word “apply” in the first sentence of the penultimate paragraph on page 10. In addition, the words “will be applied” need to be inserted before the words “to everyday work-related situations” in the same sentence.

We consider that the words “based on” should be inserted after the words “It also explains the circumstances under which an employer may have a “material factor” defence, which is not” in the final paragraph on page 10.

The word “gender” needs to be removed from the first sentence of the second paragraph on page 11 as it is superfluous.

In terms of length of the introduction, we would suggest that the section on page 12 relating to the role of the Equality and Human Rights Commission be removed and that only the paragraphs on page 13 relating to the Commission be retained, with perhaps one introductory sentence being added to explain what the Commission’s overall role is.

We consider that the section on human rights at pages 13 and 14 should be removed as it does not appear to be of specific relevance to the Code.

In the section on large and small employers at page 15, we consider that the reference to financial resources should be removed, on the basis that cost alone will not usually be regarded as sufficient to constitute objective justification of a discriminatory act.

Equal pay for equal work

Q1. Do you agree or disagree that this section clearly explains the relevant law?

Please tick one box only

Strongly agree	<input type="checkbox"/>
Tend to agree	<input type="checkbox"/>
Neither agree nor disagree	<input checked="" type="checkbox"/>
Tend to disagree	<input type="checkbox"/>
Strongly disagree	<input type="checkbox"/>
Don't know	<input type="checkbox"/>

Q2. If you disagree, please tell us where it is unclear and / or how it could be improved. Please write in the box below.

The ELA has the following comments on the first 9 paragraphs of the Code:

Paragraph 3 - In point 2 (that begins “In considering equal pay claims...”), it needs to be made clear that UK courts will also take account of the Equality Act and UK case law.

Paragraph 4 - We consider that the word “So” should be inserted at the beginning of the second sentence, to make clear that this sentence illustrates the point made in the first sentence. In addition, we consider that it would be appropriate for there to be some mention in this paragraph of the fact that if the claim is successful, the equality clause will be implied, and that the claimant’s pay will then be increased etc.

Paragraph 5 - We consider that the references to both article 157 and the definition of pay are confusing. We suggest that these are removed and instead that a list of the sorts of things that constitute pay is included; making it clear that it is a non-exhaustive list and perhaps also clarifying that items such as discretionary bonuses are not included.

Paragraph 7 - We do not consider that the point relating to remedies and compensation should be included in the section that it has been which relates to what constitutes pay.

Q3. Are the definitions you need to understand this section included?

Please tick one box only

Strongly agree	<input type="checkbox"/>
Tend to agree	<input checked="" type="checkbox"/>
Neither agree nor disagree	<input type="checkbox"/>
Tend to disagree	<input type="checkbox"/>
Strongly disagree	<input type="checkbox"/>
Don't know	<input type="checkbox"/>

Q4. If you disagree, please tell us where it is unclear and / or how it could be improved. Please write in the box below.

Q5. Where examples illustrate the text, please tick the relevant box.

Please tick one box only

Too many examples	<input type="checkbox"/>
Too few examples	<input type="checkbox"/>

Q6. Overall do you find the use of examples helpful / appropriate?

Yes	<input checked="" type="checkbox"/>
No	<input type="checkbox"/>

Q7. If your answer to Q6 was 'No' please state which examples you found unhelpful and how they could be improved. Please write in the box below.

Q8. Are there any other comments that you would like to make about this section?

Where relevant please mention paragraph numbers. We welcome both positive and negative comments. Please write in the box below.

Like work

Q1. Do you agree or disagree that this section clearly explains the relevant law?

Please tick one box only

Strongly agree	<input type="checkbox"/>
Tend to agree	<input checked="" type="checkbox"/>
Neither agree nor disagree	<input type="checkbox"/>
Tend to disagree	<input type="checkbox"/>
Strongly disagree	<input type="checkbox"/>
Don't know	<input type="checkbox"/>

Q2. If you disagree, please tell us where it is unclear and / or how it could be improved. Please write in the box below.

Q3. Are the definitions you need to understand this section included?

Please tick one box only

Strongly agree	<input type="checkbox"/>
Tend to agree	<input type="checkbox"/>
Neither agree nor disagree	<input type="checkbox"/>
Tend to disagree	<input checked="" type="checkbox"/>
Strongly disagree	<input type="checkbox"/>
Don't know	<input type="checkbox"/>

Q4. If you disagree, please tell us where it is unclear and / or how it could be improved. Please write in the box below.

See earlier comments on "Glossary of Terms"

Q5. Where examples illustrate the text, please tick the relevant box.

Please tick one box only

Too many examples	<input type="checkbox"/>
Too few examples	<input type="checkbox"/>

Q6. Overall do you find the use of examples helpful / appropriate?

Yes	<input checked="" type="checkbox"/>
No	<input type="checkbox"/>

Q7. If your answer to Q6 was 'No' please state which examples you found unhelpful and how they could be improved. Please write in the box below.

Q8. Are there any other comments that you would like to make about this section?

Where relevant please mention paragraph numbers. We welcome both positive and negative comments. Please write in the box below.

Work rated as equivalent

Q1. Do you agree or disagree that this section clearly explains the relevant law?

Please tick one box only

Strongly agree	<input type="checkbox"/>
Tend to agree	<input type="checkbox"/>
Neither agree nor disagree	<input type="checkbox"/>
Tend to disagree	<input checked="" type="checkbox"/>
Strongly disagree	<input type="checkbox"/>
Don't know	<input type="checkbox"/>

Q2. If you disagree, please tell us where it is unclear and / or how it could be improved. Please write in the box below.

The ELA has the following comments on this section:

Paragraph 12 – We consider that the words “gender-specific system” as referred to here, should be defined, in a glossary of terms.

Paragraph 12 – (Third, Fourth and Fifth Paragraph) We consider that the words “and their job evaluation scores remained very similar/they continued to fall in the same job evaluation grade” should be added to the end of this paragraph. We also note that there are two small typographical errors in paragraphs 4 and 5 on page 23, in that there are unnecessary hyphens between the words “job” and “evaluation”.

Paragraph 13 – We consider that the words “However, they cannot claim better terms than their colleague” should be added to the end of this paragraph.

Q3. Are the definitions you need to understand this section included?

Please tick one box only

Strongly agree	<input type="checkbox"/>
Tend to agree	<input type="checkbox"/>
Neither agree nor disagree	<input checked="" type="checkbox"/>
Tend to disagree	<input type="checkbox"/>

Strongly disagree
Don't know

Q4. If you disagree, please tell us where it is unclear and / or how it could be improved. Please write in the box below.

See earlier comments on "Glossary of terms"

Q5. Where examples illustrate the text, please tick the relevant box.
Please tick one box only

Too many examples
Too few examples

Q6. Overall do you find the use of examples helpful / appropriate?

Yes
No

X

Q7. If your answer to Q6 was 'No' please state which examples you found unhelpful and how they could be improved. Please write in the box below.

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Q8. Are there any other comments that you would like to make about this section?

Where relevant please mention paragraph numbers. We welcome both positive and negative comments. Please write in the box below.

Work of equal value

Q1. Do you agree or disagree that this section clearly explains the relevant law?

Please tick one box only

Strongly agree	<input type="checkbox"/>
Tend to agree	<input checked="" type="checkbox"/>
Neither agree nor disagree	<input type="checkbox"/>
Tend to disagree	<input type="checkbox"/>
Strongly disagree	<input type="checkbox"/>
Don't know	<input type="checkbox"/>

Q2. If you disagree, please tell us where it is unclear and / or how it could be improved. Please write in the box below.

Paragraph 17 – We consider that the reference to “same employment” should be removed as there is no similar reference in the sections on like work and work rated as equivalent, which might give a user the impression that the “same employment” requirement only applies to equal value claims. In addition, we note that there is already a separate section dealing specifically with comparators and comparators across employers, at paragraphs 26-28. Any additional comments about “same employment” would be more usefully contained in this section.

Q3. Are the definitions you need to understand this section included?

Please tick one box only

Strongly agree	<input type="checkbox"/>
Tend to agree	<input checked="" type="checkbox"/>
Neither agree nor disagree	<input type="checkbox"/>
Tend to disagree	<input type="checkbox"/>
Strongly disagree	<input type="checkbox"/>
Don't know	<input type="checkbox"/>

Q4. If you disagree, please tell us where it is unclear and / or how it

could be improved. Please write in the box below.

Please see earlier comments on "Glossary of terms"

Q5. Where examples illustrate the text, please tick the relevant box.

Please tick one box only

Too many examples

Too few examples

Q6. Overall do you find the use of examples helpful / appropriate?

Yes

No

Q7. If your answer to Q6 was 'No' please state which examples you found unhelpful and how they could be improved. Please write in the box below.

Q8. Are there any other comments that you would like to make about this section?

Where relevant please mention paragraph numbers. We welcome both positive and negative comments. Please write in the box below.

Comparators

Q1. Do you agree or disagree that this section clearly explains the relevant law?

Please tick one box only

Strongly agree	<input type="checkbox"/>
Tend to agree	<input type="checkbox"/>
Neither agree nor disagree	<input type="checkbox"/>
Tend to disagree	<input checked="" type="checkbox"/>
Strongly disagree	<input type="checkbox"/>
Don't know	<input type="checkbox"/>

Q2. If you disagree, please tell us where it is unclear and / or how it could be improved. Please write in the box below.

We appreciate that the identity of and definition of a comparator has been the subject of much litigation. With this in mind, we would suggest the following changes:

Paragraph 20 - We consider that this paragraph should make clear that, unlike other discrimination law, the comparator must be an actual person and cannot be hypothetical. This also makes sense of the comment at paragraph 34 regarding the lack of an actual comparator. We note that there is no reference in this section to the provisions of EU law which allow "single source" comparators. Given that this is another basis upon which comparators may be chosen, we consider that there should be some reference to these provisions in this paragraph (see also our further comments below on the issue of single source).

Paragraph 21 – We consider that this might be more simply set out if the words "by the same employer or an associated employer" were inserted at the beginning of each of the first 2 bullet points. The third bullet point, which is confusingly worded, could then simply be deleted.

Paragraph 23 - We consider that the reference to "such as the woman and her comparator" should be amended to refer to "including the woman and her comparator", since the common terms must still apply to the woman bringing the claim and her comparator.

Paragraph 23 - We consider that the example of a situation where terms emanate from one source should be given later in the explanation (for

example after the first paragraph in Paragraph 24). We also recommend changing the reference to "same source" to "terms and conditions which are derived from a common agreement or arrangement, such as a collective bargaining agreement or other equivalent arrangement", to avoid confusion with the concept of "single source".

Paragraphs 22-24 - We recommend adding a sub heading (or making these paragraphs sub-points), to make clear that the requirement for common terms and conditions only applies where the woman and her comparator are at different establishments. This would help shorten the paragraphs, and would set out the distinction (the logic of which may be difficult to initially understand) more clearly.

Paragraph 24 - We consider that the focus on collective agreements in this paragraph suggests that the "common terms" argument only applies in collective agreement situations. We recommend amending the final sentence of this paragraph to refer to "common terms and conditions" and not collective agreements, as a comparison can still be made, if there are common terms and conditions (i.e. they do not have to be contained in a collective agreement). In addition, this paragraph does not clearly draw a distinction between the position of EU and UK law (EU law being expressly reserved in the *Dumfries & Galloway Council v North & Others* [2009] IRLR 915 case).-

More generally, we are concerned about the reference to the *Dumfries* case. _Given that this decision is seen as controversial and is being appealed, we do not consider that it is appropriate for it to be included in the Code without qualification. Including the reference to this decision is likely, therefore, to cause the Code to become out of date very rapidly, if, as expected by many, the decision is overturned on appeal.

Paragraph 26-28 (and paragraphs 23-25). These paragraphs need to make clear the difference between the UK and EU law positions on "common terms" and "single source". At present, no clear distinction is drawn between the two. Whilst we appreciate that the issue, and the different source of laws is complex, we think it is essential that the paragraph makes clear that claimants may be able to rely on the two different sources of law in this area.

Paragraphs 26 -We consider that this paragraph should make it clear that the single source should be both responsible for the pay and capable of remedying any inequality, for example "attributable to a single source and that single source is capable of remedying...". It may be useful to add an example to this clause (for example where pay is set and managed by one authority for a number of employers). At present, the paragraph states "for

example, where differences arise from a sector-wide collective agreement or from legislation". We are not clear that this is an example of a "single source", but rather an example of where differences may arise.

Paragraph 27 - We consider that this paragraph does not add anything further, and may mislead as there is no case law on the need for an "overarching link." We consider that the reference to education authorities may instead be a useful example for paragraph 26.

Paragraph 29 - We consider that this paragraph should cross refer to the fact that there can be no hypothetical comparator in equal pay claims.

Paragraph 31 - We consider that the words "and is on the same or less pay than the woman, and" should be inserted after the words "who is not the chosen comparator". We also suggest replacing the wording "like work, equivalent work or equal work" and "work of equal value" with "equal work", to make the paragraph easier to read.

Paragraph 32 – Some members of the Group considered that the wording "and this may be prudent", as it appears less than neutral and is therefore inappropriate for a statutory Code. Other members of the Group felt that this (or some other form of wording drawing this issue to the claimant's attention) should be retained. All members of the group agreed that the last sentence should be deleted.

Paragraph 33 - This paragraph refers to an employee comparing herself to a "predecessor when he left employment". We consider that this wording could be misleading, in that an employee can also include a predecessor in the role, who has not left employment (for example someone who was promoted). As a result, we consider that the words "when he left employment" need to be removed.

Paragraph 34 – As noted above at the comment regarding paragraph 20, the first sentence of paragraph 34 really only makes sense if the lack of hypothetical comparator is previously explained.

Paragraph 36 – We consider that "another" should be amended to "a", as the male claimant is not a comparator. Also, the wording "undertaking work that is equal to his in the same employment" should be added after "a woman".

Paragraph 37 - The examples of sources of information were a contentious issue, since it will often be difficult for employees to obtain information about pay and an employer will also be bound by confidentiality and data protection obligations to its employees. Members of the Group felt that, as

the Equality Bill does not grant any specific rights to disclosure some of the members of the Consultation Group do not consider that it is appropriate to include this paragraph in the Code, particularly as it may suggest to some readers that a woman has a right to receive comparator information under the sources listed in this paragraph. On this basis we consider that this paragraph is better suited to the ECHR's guidance or to a procedural/case management part of the Code, as highlighted above and should need to include suitable qualification as to an employer's confidentiality obligations and suggestions for how an employer could provide disclosure without breaching these (e.g. by redacting names, providing summary information etc). Equally, some members of the group felt that it was appropriate to include reference to the various sources of disclosure within the Code, as it is such an important part of the process and given that the Code is likely to be more widely referred to if it remains within the Code.

Paragraph 38 – As we flagged in the introduction, this paragraph appears to relate to procedural/case management issues. As such it tends to jar with the remainder of this section of the Code, which relates directly to the interpretation of the Equality Bill. It would therefore be preferable if this was moved to a procedural/case management section. The group was split on whether this should be a procedural/case management section of the Code or a section of guidance.

Some members of the Consultation Group were also concerned that it appears less than neutral - and therefore inappropriate for a statutory code, particularly, given the Code's status, this paragraph could be taken to suggest that there is such a right and such a suggestion would be problematic for claimants and respondents alike.

Q3. Are the definitions you need to understand this section included?

Please tick one box only

Strongly agree	<input type="checkbox"/>
Tend to agree	<input type="checkbox"/>
Neither agree nor disagree	<input type="checkbox"/>
Tend to disagree	<input checked="" type="checkbox"/>
Strongly disagree	<input type="checkbox"/>
Don't know	<input type="checkbox"/>

Q4. If you disagree, please tell us where it is unclear and / or how it could be improved. Please write in the box below.

We appreciate that this is a complex area of equal pay law. However, we consider that the following definitions need to be added to this section (or to a general definitions section of the Code):

"Associated employer" (and this should be moved from paragraph 21, to paragraph 20, where it is first used).

"Establishment"

"Single Source" - this is defined but it would be useful if it were defined separately, and that references to "same source" (e.g. paragraph 23) were removed, as the latter would cause confusion with the defined term of "single source".

Please see earlier comments on "Glossary of Terms"

Q5. Where examples illustrate the text, please tick the relevant box.

Please tick one box only

Too many examples

Too few examples

Q6. Overall do you find the use of examples helpful/appropriate?

Yes

No

Q7. If you disagree, please tell us where it is unclear and / or how it could be improved. Please write in the box below.

As suggested above, more examples would be useful.

Q8. Are there any other comments that you would like to make about this section?

Where relevant please mention paragraph numbers. We welcome both positive and negative comments. Please write in the box below.

Sex Equality Clause

Q1. Do you agree or disagree that this section clearly explains the relevant law?

Please tick one box only

Strongly agree	<input type="checkbox"/>
Tend to agree	<input type="checkbox"/>
Neither agree nor disagree	<input type="checkbox"/>
Tend to disagree	<input type="checkbox"/>
Strongly disagree	<input checked="" type="checkbox"/>
Don't know	<input type="checkbox"/>

Q2. If you disagree, please tell us where it is unclear and / or how it could be improved. Please write in the box below.

The ELA has the following comments on this section:

Paragraphs 39 to 42 – We suggest that these paragraphs be moved to the beginning of the Code (for example paragraphs 5-9), since they set out the mechanism by which the law effects equal pay. We believe this would assist readers of the Code in understanding the mechanism by which equal pay can be achieved, at an early stage, without interrupting the flow of the other sections of the Code, where the issue of establishing equal work and a comparator, more easily flow into the issue of the employer establishing a GMF.

Paragraph 39 – We consider that the wording “justify the different term by reference to material factors” should correctly say “show that the difference is due to a material factor which is not tainted by sex discrimination”.

Paragraph 40 – We consider that the words “where the term is only in the man’s contract,” be inserted before the words “by incorporating the male comparator’s term into the woman’s contract.”

Paragraphs 42 – We do not consider that the statement in this paragraph that “...the equality clause operates to give the woman the benefit of all the male comparator's contract terms...” is correct. It will only operate so as to give the woman the benefit of terms which fall within the jurisdiction of an equal pay claim.

Q3. Are the definitions you need to understand this section included?
Please tick one box only

Strongly agree	<input type="checkbox"/>
Tend to agree	<input type="checkbox"/>
Neither agree nor disagree	<input checked="" type="checkbox"/>
Tend to disagree	<input type="checkbox"/>
Strongly disagree	<input type="checkbox"/>
Don't know	<input type="checkbox"/>

Q4. If you disagree, please tell us where it is unclear and / or how it could be improved. Please write in the box below.

Q5. Where examples illustrate the text, please tick the relevant box.
Please tick one box only

Too many examples	<input type="checkbox"/>
Too few examples	<input type="checkbox"/>

Q6. Overall do you find the use of examples helpful / appropriate?

Yes	<input checked="" type="checkbox"/>
No	<input type="checkbox"/>

Q7. If your answer to Q6 was 'No' please state which examples you found unhelpful and how they could be improved. Please write in the box below.

Q8. Are there any other comments that you would like to make about this section?

Where relevant please mention paragraph numbers. We welcome both positive and negative comments. Please write in the box below.

Non-contractual rights

Q1. Do you agree or disagree that this section clearly explains the relevant law?

Please tick one box only

Strongly agree	<input type="checkbox"/>
Tend to agree	<input type="checkbox"/>
Neither agree nor disagree	<input type="checkbox"/>
Tend to disagree	<input type="checkbox"/>
Strongly disagree	<input checked="" type="checkbox"/>
Don't know	<input type="checkbox"/>

Q2. If you disagree, please tell us where it is unclear and / or how it could be improved. Please write in the box below.

The ELA has the following comments on this section:

Paragraphs 43 - 46 – For the same reasons set out in relation to the paragraphs on the Sex Equality clause, we believe these paragraphs should be included at the start of the Code.

Paragraph 43 – We recommend removing the reference to "performance related pay" but retaining the reference to "overtime/shift allowance". This is because "performance related pay" as a term is also used in the context of discretionary bonus payments.

The second paragraph of paragraph 43 is confusing. We understand that it references the fact that the sex discrimination provisions are not a back-up to the equal pay provisions should the latter be validly dis-applied by a material factor defence; i.e. the sex discrimination provisions do not allow the claimant to bring a further claim if the equal pay claim fails. If such a statement needs to be included in the Code, it may be useful if it were more simply set out. For example, "This means that where a woman has a complaint about the level of her contractual pay, she must make a claim under the equal pay provisions of the Equality Act. She cannot bring a claim of sex discrimination, even if her equal pay claim is unsuccessful. Equally, where her complaint relates to something other than her contractual terms, pay and benefits, this must be brought as a claim for sex discrimination."

Equally, we recognise that it will sometimes be unclear as to whether a

claim relates to a "contractual" term or benefit, with bonuses being a particularly difficult area. Given the difficulties in this area, we think it would be appropriate for the Code to reference the fact that where an employee is unclear as to whether a particular term or benefit is contractual she may raise both a claim for equal pay and a claim of sex discrimination. However, she can only be successful in one claim relating to that term or benefit.

Paragraphs 45 and 46 – The examples at paragraphs 45 and 46 are useful. However, we feel that to avoid implying that the mere existence of differences in pay/not being put forward for a promotion would automatically mean a claim of equal pay/sex discrimination would be successful, they should be qualified by the fact that the woman is not receiving the additional bonus/was not notified of the promotion opportunity because of or for a reason related to her sex.

Paragraph 46 – We consider that the words “advised and is” need to be inserted after the words “opportunity in which the same male sales manager is”.

Q3. Are the definitions you need to understand this section included?

Please tick one box only

- | | |
|----------------------------|-------------------------------------|
| Strongly agree | <input type="checkbox"/> |
| Tend to agree | <input type="checkbox"/> |
| Neither agree nor disagree | <input checked="" type="checkbox"/> |
| Tend to disagree | <input type="checkbox"/> |
| Strongly disagree | <input type="checkbox"/> |
| Don't know | <input type="checkbox"/> |

Q4. If you disagree, please tell us where it is unclear and / or how it could be improved. Please write in the box below.

Please see earlier comments on "Glossary of terms"

Q5. Where examples illustrate the text, please tick the relevant box.

Please tick one box only

Too many examples
Too few examples

X

Q6. Overall do you find the use of examples helpful / appropriate?

Yes
No

X

Q7. If your answer to Q6 was 'No' please state which examples you found unhelpful and how they could be improved. Please write in the box below.

--

Q8. Are there any other comments that you would like to make about this section?

Where relevant please mention paragraph numbers. We welcome both positive and negative comments. Please write in the box below.

--

Material factor defence

Q1. Do you agree or disagree that this section clearly explains the relevant law?

Please tick one box only

Strongly agree	<input type="checkbox"/>
Tend to agree	<input type="checkbox"/>
Neither agree nor disagree	<input checked="" type="checkbox"/>
Tend to disagree	<input type="checkbox"/>
Strongly disagree	<input type="checkbox"/>
Don't know	<input type="checkbox"/>

Q2. If you disagree, please tell us where it is unclear and / or how it could be improved. Please write in the box below.

We appreciate that the law in relation to when a GMF will be considered to be tainted by sex discrimination is not particularly clear, . However, we do think this section now needs to be amended to reflect (or refer to) the decision in *Gibson v Sheffield County Council [2010] EWCA 63* in relation to statistical evidence (see also further below in relation to Burden of Proof).

This is also an area where further examples would be useful, to demonstrate how the different forms of analysis set out at paragraph 57 may be used from both a claimant and a respondent perspective.

Q3. Are the definitions you need to understand this section included?

Please tick one box only

Strongly agree	<input type="checkbox"/>
Tend to agree	<input checked="" type="checkbox"/>
Neither agree nor disagree	<input type="checkbox"/>
Tend to disagree	<input type="checkbox"/>
Strongly disagree	<input type="checkbox"/>
Don't know	<input type="checkbox"/>

Q4. If you disagree, please tell us where it is unclear and / or how it could be improved. Please write in the box below.

We consider that the example given at the end of paragraph 51 does not relate to the comment made immediately before it and that the comment and/or the example need to be rewritten. We would suggest a definition of or further explanation of "direct discrimination" at paragraph 54. Please also see above comments on "Glossary of terms". In paragraph 57, at the top of page 35, the word "criteria" needs to be replaced by the word "criterion".

Q5. Where examples illustrate the text, please tick the relevant box.
Please tick one box only

Too many examples
Too few examples

<input type="checkbox"/>
<input type="checkbox"/>

Q6. Overall do you find the use of examples helpful / appropriate?

Yes
No

<input checked="" type="checkbox"/>
<input type="checkbox"/>

Q7. If your answer to Q6 was 'No' please state which examples you found unhelpful and how they could be improved. Please write in the box below.

We do, overall, find the use of examples to be helpful. However, we are concerned that the examples at paragraph 61 could be assisted by further clarification. In particular:

- In the first example, the second sentence may be read so as to contradict the first sentence. A solution may be to qualify it by referring to a scheme which protected men's pay over an unjustifiable length of time or which did not appreciably narrow the gap in pay.
- It may be preferable to use an example, in the second example, which more clearly shows a how a legitimate aim could be disproportionate (since in the current example it simply states that the employer is unable to show that it is proportionate).

Q8. Are there any other comments that you would like to make about this section?

Where relevant please mention paragraph numbers. We welcome both positive and negative comments. Please write in the box below.

Equal Pay and Maternity Leave

Q1. Do you agree or disagree that this section clearly explains the relevant law?

Please tick one box only

Strongly agree	<input type="checkbox"/>
Tend to agree	<input type="checkbox"/>
Neither agree nor disagree	<input type="checkbox"/>
Tend to disagree	<input checked="" type="checkbox"/>
Strongly disagree	<input type="checkbox"/>
Don't know	<input type="checkbox"/>

Q2. If you disagree, please tell us where it is unclear and / or how it could be improved. Please write in the box below.

The ELA have some concerns about this section, in particular:

Paragraphs 62-76 – Treatment of bonuses during maternity leave is a difficult area and this section is very broad-brush. It does not, for example, distinguish between different types of bonuses (e.g. a genuine productivity-related bonus compared to a loyalty bonus). We recommend that this section is expanded to make clear that different types of bonuses should be treated differently. Paragraph 70 currently implies that the bonus is only payable for the 2 weeks' compulsory period, which is incorrect.

Paragraph 64 – Car allowances and luncheon vouchers are given as examples of remuneration. This section would benefit from further guidance on what amounts to remuneration as this is something that many clients and claimants struggle with in practice (e.g. childcare vouchers/car compared to car allowance).

Paragraph 69 - This could be clarified to make clear when the pay rise will be backdated to i.e. reference could be made to the maternity pay calculation period.

Q3. Are the definitions you need to understand this section included?

Please tick one box only

Strongly agree	<input type="checkbox"/>
Tend to agree	<input type="checkbox"/>
Neither agree nor disagree	<input type="checkbox"/>
Tend to disagree	<input checked="" type="checkbox"/>

Strongly disagree
Don't know

<input type="checkbox"/>
<input type="checkbox"/>

Q4. If you disagree, please tell us where it is unclear and / or how it could be improved. Please write in the box below.

--

Q5. Where examples illustrate the text, please tick the relevant box.
Please tick one box only

Too many examples
Too few examples

<input type="checkbox"/>
<input checked="" type="checkbox"/>

Q6. Overall do you find the use of examples helpful / appropriate?

Yes
No

<input checked="" type="checkbox"/>
<input type="checkbox"/>

Q7. If your answer to Q6 was 'No' please state which examples you found unhelpful and how they could be improved. Please write in the box below.

--

Q8. Are there any other comments that you would like to make about this section?

Where relevant please mention paragraph numbers. We welcome both positive and negative comments. Please write in the box below.

--

Burden of proof

Q1. Do you agree or disagree that this section clearly explains the relevant law?

Please tick one box only

Strongly agree	<input type="checkbox"/>
Tend to agree	<input checked="" type="checkbox"/>
Neither agree nor disagree	<input type="checkbox"/>
Tend to disagree	<input type="checkbox"/>
Strongly disagree	<input type="checkbox"/>
Don't know	<input type="checkbox"/>

Q2. If you disagree, please tell us where it is unclear and / or how it could be improved. Please write in the box below.

The ELA substantially agrees with this section, however we suggest the following amendment:

Paragraph 77 - In light of the recent decision in *Gibson v Sheffield County Council* [2010] EWCA 63, we consider that this paragraph could be revised simply to say that once a woman shows that she is paid less than a man, the burden of proof then shifts to the employer, to demonstrate that any difference is due to a genuine and material factor.

Q3. Are the definitions you need to understand this section included?

Please tick one box only

Strongly agree	<input type="checkbox"/>
Tend to agree	<input checked="" type="checkbox"/>
Neither agree nor disagree	<input type="checkbox"/>
Tend to disagree	<input type="checkbox"/>
Strongly disagree	<input type="checkbox"/>
Don't know	<input type="checkbox"/>

Q4. If you disagree, please tell us where it is unclear and / or how it could be improved. Please write in the box below.

Q5. Where examples illustrate the text, please tick the relevant box.

Please tick one box only

Too many examples

Too few examples

<input type="checkbox"/>
<input type="checkbox"/>

Q6. Overall do you find the use of examples helpful / appropriate?

Yes

No

<input type="checkbox"/>
<input checked="" type="checkbox"/>

Q7. If your answer to Q6 was 'No' please state which examples you found unhelpful and how they could be improved. Please write in the box below.

We feel that Paragraph 78 may benefit from an example of a non-discriminatory material factor, to illustrate how it can be used as a defence.

Q8. Are there any other comments that you would like to make about this section?

Where relevant please mention paragraph numbers. We welcome both positive and negative comments. Please write in the box below.

Employment Tribunals

Q1. Do you agree or disagree that this section clearly explains the relevant law?

Please tick one box only

Strongly agree	<input type="checkbox"/>
Tend to agree	<input type="checkbox"/>
Neither agree nor disagree	<input checked="" type="checkbox"/>
Tend to disagree	<input type="checkbox"/>
Strongly disagree	<input type="checkbox"/>
Don't know	<input type="checkbox"/>

Q2. If you disagree, please tell us where it is unclear and / or how it could be improved. Please write in the box below.

The ELA has the following comments on this section:

Paragraph 81 – We consider that a clear reference should be made to Schedule 6 of the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2004. We also considered whether reference should be made to the version 15 orders used in NHS litigation but decided against it on the basis that the Code is intended to be in force for a long time and the mass equal pay litigation in the NHS is more topical. Generally, the Code does not specifically deal with the mass litigation in the public sector but again this may be due to the topical nature of this work.

In addition, reference to Equal Value claims could be more easily explained by reference to a flow chart setting out the relevant process

Paragraph 84 – This paragraph should be amended to reflect the fact that a Tribunal may withdraw the requirement for an independent evaluation either on its own volition or at the request of the parties / a party.

Q3. Are the definitions you need to understand this section included?

Please tick one box only

Strongly agree	<input type="checkbox"/>
Tend to agree	<input checked="" type="checkbox"/>
Neither agree nor disagree	<input type="checkbox"/>
Tend to disagree	<input type="checkbox"/>
Strongly disagree	<input type="checkbox"/>

Don't know

Q4. If you disagree, please tell us where it is unclear and / or how it could be improved. Please write in the box below.

Please see earlier comments on a "Glossary of terms."

Q5. Where examples illustrate the text, please tick the relevant box.

Please tick one box only

Too many examples

Too few examples

Q6. Overall do you find the use of examples helpful / appropriate?

Yes

No

Q7. If your answer to Q6 was 'No' please state which examples you found unhelpful and how they could be improved. Please write in the box below.

Q8. Are there any other comments that you would like to make about this section?

Where relevant please mention paragraph numbers. We welcome both positive and negative comments. Please write in the box below.

Obtaining and disclosing pay information - protected pay discussions

Q1. To what extent do you agree or disagree that this section clearly explains the new provisions?

Please tick one box only

Strongly agree	<input type="checkbox"/>
Tend to agree	<input checked="" type="checkbox"/>
Neither agree nor disagree	<input type="checkbox"/>
Tend to disagree	<input type="checkbox"/>
Strongly disagree	<input type="checkbox"/>
Don't know	<input type="checkbox"/>

Q2. If you disagree, please tell us where it is unclear and / or how it could be improved. Please write in the box below.

The ELA substantially agrees with the contents of the section. However we would like to make the following comment:

Paragraph 88 - We felt that the opening sentence should be changed to "It is widely acknowledged that a lack of transparency in pay/pay structures may foster (rather than "fosters") gender inequality".

Q3. Are the definitions you need to understand this section included?

Please tick one box only

Strongly agree	<input type="checkbox"/>
Tend to agree	<input checked="" type="checkbox"/>
Neither agree nor disagree	<input type="checkbox"/>
Tend to disagree	<input type="checkbox"/>
Strongly disagree	<input type="checkbox"/>
Don't know	<input type="checkbox"/>

Q4. If you disagree, please tell us where it is unclear and / or how it could be improved. Please write in the box below.

Q5. Where examples illustrate the text, please tick the relevant box.

Please tick one box only

Too many examples

Too few examples

Q6. Overall do you find the use of examples helpful / appropriate?

Yes

No

Q7. If your answer to Q6 was 'No' please state which examples you found unhelpful and how they could be improved. Please write in the box below.

Q8. Are there any other comments that you would like to make about this section?

Where relevant please mention paragraph numbers. We welcome both positive and negative comments. Please write in the box below.

Equal Pay Questionnaires

Q1. Do you agree or disagree that this section clearly explains the relevant law?

Please tick one box only

Strongly agree	<input type="checkbox"/>
Tend to agree	<input checked="" type="checkbox"/>
Neither agree nor disagree	<input type="checkbox"/>
Tend to disagree	<input type="checkbox"/>
Strongly disagree	<input type="checkbox"/>
Don't know	<input type="checkbox"/>

Q2. If you disagree, please tell us where it is unclear and / or how it could be improved. Please write in the box below.

Q3. Are the definitions you need to understand this section included?

Please tick one box only

Strongly agree	<input type="checkbox"/>
Tend to agree	<input checked="" type="checkbox"/>
Neither agree nor disagree	<input type="checkbox"/>
Tend to disagree	<input type="checkbox"/>
Strongly disagree	<input type="checkbox"/>
Don't know	<input type="checkbox"/>

Q4. If you disagree, please tell us where it is unclear and / or how it could be improved. Please write in the box below.

Q5. Where examples illustrate the text, please tick the relevant box.

Please tick one box only

Too many examples

Too few examples

Q6. Overall do you find the use of examples helpful / appropriate?

Yes

No

Q7. If your answer to Q6 was 'No' please state which examples you found unhelpful and how they could be improved. Please write in the box below.

Q8. Are there any other comments that you would like to make about this section?

Where relevant please mention paragraph numbers. We welcome both positive and negative comments. Please write in the box below.

Confidentiality

Q1. Do you agree or disagree that this section clearly explains the relevant law?

Please tick one box only

Strongly agree	<input type="checkbox"/>
Tend to agree	<input checked="" type="checkbox"/>
Neither agree nor disagree	<input type="checkbox"/>
Tend to disagree	<input type="checkbox"/>
Strongly disagree	<input type="checkbox"/>
Don't know	<input type="checkbox"/>

Q2. If you disagree, please tell us where it is unclear and / or how it could be improved. Please write in the box below.

The ELA has the following comments on paragraphs 103-112.

Paragraph 112 – it is not clear what this section is trying to achieve. If it is to deal with Tribunal claims generally, then this single paragraph is too short to deal with such a large and important topic. It seems to be dealing more with obtaining disclosure during the litigation process, in which case the heading of the section should make this clear and/or it should be included in the earlier section.

Q3. Are the definitions you need to understand this section included?

Please tick one box only

Strongly agree	<input type="checkbox"/>
Tend to agree	<input type="checkbox"/>
Neither agree nor disagree	<input type="checkbox"/>
Tend to disagree	<input checked="" type="checkbox"/>
Strongly disagree	<input type="checkbox"/>
Don't know	<input type="checkbox"/>

Q4. If you disagree, please tell us where it is unclear and / or how it could be improved. Please write in the box below.

The ELA has the following comments on this section:

Paragraph 105 – this paragraph refers to the Freedom of Information Act ("FOIA") but the term is not defined until paragraph 109. The section on Confidentiality needs to be re-ordered to make clear that the FOIA is another route to obtaining information and then deal with confidentiality later.

Q5. Where examples illustrate the text, please tick the relevant box.

Please tick one box only

Too many examples

Too few examples

Q6. Overall do you find the use of examples helpful / appropriate?

Yes

No

Q7. If your answer to Q6 was 'No' please state which examples you found unhelpful and how they could be improved. Please write in the box below.

We feel that the section would benefit from the addition of more examples

Q8. Are there any other comments that you would like to make about this section?

Where relevant please mention paragraph numbers. We welcome both positive and negative comments. Please write in the box below.

Occupational pension schemes / Sex Equality Rule (including sex equality and maternity equality rule)

Q1. Do you agree or disagree that this section clearly explains the relevant law?

Please tick one box only

Strongly agree	<input type="checkbox"/>
Tend to agree	<input type="checkbox"/>
Neither agree nor disagree	<input type="checkbox"/>
Tend to disagree	<input checked="" type="checkbox"/>
Strongly disagree	<input type="checkbox"/>
Don't know	<input type="checkbox"/>

Q2. If you disagree, please tell us where it is unclear and / or how it could be improved. Please write in the box below.

We do not think that the statement at paragraph 118 is correct and it also appears to conflict with the ECHR's stance on this issue:

<http://www.equalityhumanrights.com/your-rights/gender/sex-discrimination-in-public-services/sex-discrimination-in-the-public-services-your-rights/>

More generally, we do not think (with the exception of paragraphs 118 and 119) that this section adds anything to what is already in the legislation. It simply summarises the legislation rather than explaining it. In particular, there is no explanation as to the apparently different test that applies to defend differences (paragraph 115). Paragraph 16 is also particularly unclear, as there is no explanation as to what is meant by “prescribed actuarial factors” and “prescribed benefits” in paragraph 116. This is a particularly complex area and, given the wide variety of users of the Code it may assist if some of the issues in this and the preceding paragraphs are explained in more detail or if examples are used to explain when the exceptions might apply.

The explanation also says nothing about the mechanisms for altering pension schemes that are contained in clause 68 of the Equality Bill, which could be usefully explained here.

Q3. Are the definitions you need to understand this section included?

Please tick one box only

- | | |
|----------------------------|-------------------------------------|
| Strongly agree | <input type="checkbox"/> |
| Tend to agree | <input type="checkbox"/> |
| Neither agree nor disagree | <input type="checkbox"/> |
| Tend to disagree | <input checked="" type="checkbox"/> |
| Strongly disagree | <input type="checkbox"/> |
| Don't know | <input type="checkbox"/> |

Q4. If you disagree, please tell us where it is unclear and / or how it could be improved. Please write in the box below.

We are concerned that very little of the pension related terminology is explained. It would be helpful if the Code indicated where terms such as "occupational pension scheme" are defined in legislation i.e. the Pensions Act 1993 (as amended) or such terms were included in a "Glossary" as suggested above.

Q5. Where examples illustrate the text, please tick the relevant box.

Please tick one box only

- | | |
|-------------------|-------------------------------------|
| Too many examples | <input type="checkbox"/> |
| Too few examples | <input checked="" type="checkbox"/> |

Q6. Overall do you find the use of examples helpful / appropriate?

- | | |
|-----|-------------------------------------|
| Yes | <input checked="" type="checkbox"/> |
| No | <input type="checkbox"/> |

Q7. If your answer to Q6 was 'No' please state which examples you found unhelpful and how they could be improved. Please write in the box below.

We believe that although the examples given in paragraph 118 are helpful, some additional examples would assist in the understanding of paragraph 116.

Q8. Are there any other comments that you would like to make about this section?

Where relevant please mention paragraph numbers. We welcome both

positive and negative comments. Please write in the box below.

Maternity equality in pension schemes

Q1. Do you agree or disagree that this section clearly explains the relevant law?

Please tick one box only

Strongly agree	<input type="checkbox"/>
Tend to agree	<input type="checkbox"/>
Neither agree nor disagree	<input type="checkbox"/>
Tend to disagree	<input type="checkbox"/>
Strongly disagree	<input checked="" type="checkbox"/>
Don't know	<input type="checkbox"/>

Q2. If you disagree, please tell us where it is unclear and / or how it could be improved. Please write in the box below.

We believe that paragraphs 122 and 123 are contradictory. Paragraph 122 correctly confirms that treating a woman differently when she is on a period of unpaid maternity leave is permitted, but paragraph 123 does not appear to reflect this.

Q3. Are the definitions you need to understand this section included?

Please tick one box only

Strongly agree	<input type="checkbox"/>
Tend to agree	<input type="checkbox"/>
Neither agree nor disagree	<input type="checkbox"/>
Tend to disagree	<input type="checkbox"/>
Strongly disagree	<input checked="" type="checkbox"/>
Don't know	<input type="checkbox"/>

Q4. If you disagree, please tell us where it is unclear and / or how it could be improved. Please write in the box below.

We consider that the section should define "additional" maternity leave in a way that differentiates it from "ordinary" maternity leave. Additionally, there should be some explanation as to what is meant by unpaid relative to receipt of pay and statutory maternity pay.

As suggested above, such definitions could be included in a "Glossary".

Q5. Where examples illustrate the text, please tick the relevant box.

Please tick one box only

Too many examples

Too few examples

Q6. Overall do you find the use of examples helpful / appropriate?

Yes

No

Q7. If your answer to Q6 was 'No' please state which examples you found unhelpful and how they could be improved. Please write in the box below.

We are concerned that there are no examples.

We consider that examples showing the difference in treatment between a woman during unpaid additional maternity leave and at other times would be enormously helpful.

Q8. Are there any other comments that you would like to make about this section?

Where relevant please mention paragraph numbers. We welcome both positive and negative comments. Please write in the box below.

We are concerned that the section says nothing about the obligation on employers regarding the level of contributions that should be made during a woman's maternity leave.

Enforcement

Q1. Do you agree or disagree that this section clearly explains the relevant law?

Please tick one box only

Strongly agree	<input type="checkbox"/>
Tend to agree	<input type="checkbox"/>
Neither agree nor disagree	<input type="checkbox"/>
Tend to disagree	<input checked="" type="checkbox"/>
Strongly disagree	<input type="checkbox"/>
Don't know	<input type="checkbox"/>

Q2. If you disagree, please tell us where it is unclear and / or how it could be improved. Please write in the box below.

The ELA has the following comments on paragraphs 124 - 131

The enforcement section seems to concentrate heavily on the issue of whether or not a grievance needs to be raised rather than explain much else.

Paragraph 124 – We consider it to be a bold statement that the Employment Tribunal has jurisdiction to determine claims. There is no explanation of the potential for county court jurisdiction in equal pay claims or any explanation of the provisions in the Equality Bill (contained in the current Equal Pay Act) that deal with transfer between the county court and the Employment Tribunal.

Paragraph 126 – The suggestion that a woman should seek to resolve a concern by "mutual agreement" suggests that an agreement would have to be negotiated. We feel this phrase should be deleted. It may be that if a woman raised her concern internally, her employer will be able to provide a full explanation for it and the complaint will be resolved. It would be helpful to reference the section on grievances and the Questionnaire procedure here as well as the relevant Tribunal limits within which the woman must bring her claim.

Additionally, the paragraphs dealing with grievances are not particularly easy to understand and if read in isolation could give the impression that a woman does not need to raise a grievance. Unless a claimant has a good

reason for not submitting a grievance before making a claim, she would be likely to suffer a reduction in compensation and so it is important that the Code is clear about this. We feel that paragraphs 126 and 128 should be combined so that the explanation makes it clear that a failure to put a complaint in writing before pursuing a claim to the ET failure to do so may well have consequences, even if it is not a necessary part of the proceedings.

Q3. Are the definitions you need to understand this section included?

Please tick one box only

- | | |
|----------------------------|-------------------------------------|
| Strongly agree | <input type="checkbox"/> |
| Tend to agree | <input type="checkbox"/> |
| Neither agree nor disagree | <input checked="" type="checkbox"/> |
| Tend to disagree | <input type="checkbox"/> |
| Strongly disagree | <input type="checkbox"/> |
| Don't know | <input type="checkbox"/> |

Q4. If you disagree, please tell us where it is unclear and / or how it could be improved. Please write in the box below.

Q5. Where examples illustrate the text, please tick the relevant box.

Please tick one box only

- | | |
|-------------------|--------------------------|
| Too many examples | <input type="checkbox"/> |
| Too few examples | <input type="checkbox"/> |

Q6. Overall do you find the use of examples helpful / appropriate?

- | | |
|-----|-------------------------------------|
| Yes | <input checked="" type="checkbox"/> |
| No | <input type="checkbox"/> |

Q7. If your answer to Q6 was 'No' please state which examples you found unhelpful and how they could be improved. Please write in the box below.

Q8. Are there any other comments that you would like to make about this section?

Where relevant please mention paragraph numbers. We welcome both positive and negative comments. Please write in the box below.

Time limits for Equal Pay claims

Q1. Do you agree or disagree that this section clearly explains the relevant law?

Please tick one box only

Strongly agree	<input type="checkbox"/>
Tend to agree	<input type="checkbox"/>
Neither agree nor disagree	<input type="checkbox"/>
Tend to disagree	<input type="checkbox"/>
Strongly disagree	<input checked="" type="checkbox"/>
Don't know	<input type="checkbox"/>

Q2. If you disagree, please tell us where it is unclear and / or how it could be improved. Please write in the box below.

The ELA considers this to be an extremely complicated area of equal pay law and so it needs very careful explanation, particularly in relation to Paragraph 133. At present, the difficulties of bringing claims in a TUPE context are underplayed by this clause and a worked example may be of use.

It should be made clear that the reference to “appointment” in the first sentence of Paragraph 133 is applicable to holders of public office (who do not have contracts of employment) and not to the date of appointment of an employee. The term appointment is used in the employment context and so this could be confusing.

It is not legally correct that where an employee leaves a particular post time does not start to run. In circumstances where the employee moves to a completely different role, it is possible that a claim will be triggered. This will depend on the facts and circumstances and whether the employee is in a “stable working relationship”. This is not properly explained at all.

It is also inaccurate to say that if an employer issues a contract as part of a restructuring process, time will normally start to run. Again, it will depend on the existence of a stable employment relationship.

The explanation of what happens in TUPE scenarios needs to be expanded. It should be made clear that all liability (save for any residual pension claims) transfers to the TUPE transferee. It is only the claim in respect of the period up to the date of the TUPE transfer which the claimant must bring within 6 months of the date of the transfer. The claimant can pursue the transferee

for post transfer service.

It would also be helpful if clear information was included about claims for residual pension losses in TUPE transfer situations.

Q3. Are the definitions you need to understand this section included?

Please tick one box only

Strongly agree	<input type="checkbox"/>
Tend to agree	<input type="checkbox"/>
Neither agree nor disagree	<input type="checkbox"/>
Tend to disagree	<input type="checkbox"/>
Strongly disagree	<input checked="" type="checkbox"/>
Don't know	<input type="checkbox"/>

Q4. If you disagree, please tell us where it is unclear and / or how it could be improved. Please write in the box below.

The following terms need to be explained:

- Stable working relationship
- Concealment
- Incapacitated - in relation to this term it should be made clear that this is mental incapacity as defined in the civil litigation context.

Q5. Where examples illustrate the text, please tick the relevant box.

Please tick one box only

Too many examples	<input type="checkbox"/>
Too few examples	<input checked="" type="checkbox"/>

Q6. Overall do you find the use of examples helpful / appropriate?

Yes	<input type="checkbox"/>
No	<input checked="" type="checkbox"/>

Q7. If your answer to Q6 was 'No' please state which examples you found unhelpful and how they could be improved. Please write in the box below.

The only example given (Paragraph 133) is incorrect. Please see note above.

Q8. Are there any other comments that you would like to make about this section?

Where relevant please mention paragraph numbers. We welcome both positive and negative comments. Please write in the box below.

The very last sentence at the end of paragraph 139 about choice of comparators does not make sense and we feel that it should be deleted.

Equal Pay awards and remedies

Q1. Do you agree or disagree that this section clearly explains the relevant law?

Please tick one box only

Strongly agree	<input type="checkbox"/>
Tend to agree	<input type="checkbox"/>
Neither agree nor disagree	<input type="checkbox"/>
Tend to disagree	<input checked="" type="checkbox"/>
Strongly disagree	<input type="checkbox"/>
Don't know	<input type="checkbox"/>

Q2. If you disagree, please tell us where it is unclear and / or how it could be improved. Please write in the box below.

The potential financial consequences of a declaration need to be explained.

Paragraph 142 - This needs to be better explained. It should clarify that a woman can pursue claims against a number of different comparators. The basis of the claim is irrelevant. She can pursue several different comparators on a single basis if she wishes.

Paragraph 147 - This needs to be better explained and the statutory references need to be included so that readers can understand where the dates come from.

Q3. Are the definitions you need to understand this section included?

Please tick one box only

Strongly agree	<input type="checkbox"/>
Tend to agree	<input type="checkbox"/>
Neither agree nor disagree	<input checked="" type="checkbox"/>
Tend to disagree	<input type="checkbox"/>
Strongly disagree	<input type="checkbox"/>
Don't know	<input type="checkbox"/>

Q4. If you disagree, please tell us where it is unclear and / or how it could be improved. Please write in the box below.

Q5. Where examples illustrate the text, please tick the relevant box.

Please tick one box only

Too many examples

Too few examples

Q6. Overall do you find the use of examples helpful / appropriate?

Yes

No

Q7. If your answer to Q6 was 'No' please state which examples you found unhelpful and how they could be improved. Please write in the box below.

We are concerned that there are no examples.

We consider that it would be useful to include examples in support of paragraphs 142 and 144.

Q8. Are there any other comments that you would like to make about this section?

Where relevant please mention paragraph numbers. We welcome both positive and negative comments. Please write in the box below.

Protection against victimisation

Q1. Do you agree or disagree that this section clearly explains the relevant law?

Please tick one box only

Strongly agree	<input type="checkbox"/>
Tend to agree	<input type="checkbox"/>
Neither agree nor disagree	<input checked="" type="checkbox"/>
Tend to disagree	<input type="checkbox"/>
Strongly disagree	<input type="checkbox"/>
Don't know	<input type="checkbox"/>

Q2. If you disagree, please tell us where it is unclear and / or how it could be improved. Please write in the box below.

We feel that although the section very clearly covers the extent of the circumstances where legal protection from victimisation is available, it does not explain what victimisation constitutes.

Q3. Are the definitions you need to understand this section included?

Please tick one box only

Strongly agree	<input type="checkbox"/>
Tend to agree	<input type="checkbox"/>
Neither agree nor disagree	<input type="checkbox"/>
Tend to disagree	<input type="checkbox"/>
Strongly disagree	<input checked="" type="checkbox"/>
Don't know	<input type="checkbox"/>

Q4. If you disagree, please tell us where it is unclear and / or how it could be improved. Please write in the box below.

The term victimisation needs to be explained. Please see earlier comments in relation to a "Glossary of terms".

Q5. Where examples illustrate the text, please tick the relevant box.

Please tick one box only

Too many examples	<input type="checkbox"/>
Too few examples	<input checked="" type="checkbox"/>

Q6. Overall do you find the use of examples helpful / appropriate?

Yes
No

Q7. If your answer to Q6 was 'No' please state which examples you found unhelpful and how they could be improved. Please write in the box below.

We are concerned that there are no examples.

We feel that it would be very helpful to include an example based on the Derbyshire v St Helens MBC [2005] EWCA Civ 977 case which was heard in the House of Lords.

Q8. Are there any other comments that you would like to make about this section?

Where relevant please mention paragraph numbers. We welcome both positive and negative comments. Please write in the box below.

Part 2 - Equal Pay: good practice

Q1. To what extent do you agree or disagree that this section is useful?

Please tick one box only

Strongly agree	<input type="checkbox"/>
Tend to agree	<input type="checkbox"/>
Neither agree nor disagree	<input type="checkbox"/>
Tend to disagree	<input checked="" type="checkbox"/>
Strongly disagree	<input type="checkbox"/>
Don't know	<input type="checkbox"/>

Q2. If you disagree, please tell us where it is unclear and / or how it could be improved. Please write in the box below.

This section caused considerable and lengthy debate between the Consultation Group.

Whilst, almost unanimously, we felt that (subject to the comments below) the section was helpful and useful guidance in a difficult area, there was some considerable concern about it being included in the Code (as equally there was considerable concern about it not being included in the Code).

The reason for the concern in including it in the Code is that it somewhat jarred with the first section of the Code which is almost exclusively a statement on the law/provisions of the Equality Bill. In contrast, Section 2 is a very practical guidance on how equal pay audits should be carried out. There was, therefore, concern that:

- this would be viewed very much as a legal requirement, in circumstances where the contents in this section are in fact very different to the first section of the Code;
- the issue of equal pay audits is a controversial issue as a result of suggested amendments to the Equality Bill.

Equally, other members of the Consultation Group felt that the lack of clarity and confusion in this area was precisely the reason that part of the Code should deal with this issue.

If this section is to remain part of the Code, we would recommend that it is

made clear that it does not relate to any legal requirement or provisions under the Equality Bill but rather that this is "best practice". In addition, we have a number of comments on the suggestions set out in this section which we detail below.

- Overall, the guidance in Part 2 is useful, mirroring the earlier guidance set out in the EOC Code.
- At paragraph 7 (second paragraph) we recommend deleting the reference to "medium to large sized" employers, since, in our experience, a number of the problems with pay systems highlighted also apply to small employers.
- We were concerned about the use of "merit pay" and "performance related pay" as examples of discretionary pay systems which may give rise to gender pay inequality. Whilst we agree that discretionary pay systems can give rise to such inequality, we do not think that, per se, performance related pay/merit pay systems give rise to inequality as such schemes can be implemented on a structured and objective basis.
- We also do not agree with the third bullet point that non-payment of bonus-related incentive payments during maternity leave gives rise to gender pay inequality. The law is clear that bonuses/incentive payments related to personal performance are not due during maternity leave. Whilst we appreciate that some bonus payments will fall outside of this, the example suggests that non-payment of bonuses at all during maternity leave is in some way discriminatory, which it is not. We therefore recommend that this example is removed all together.
- In relation to the final bullet point in this section, we recommend removing the words "indefinite or lengthy" from the pay protection policies example, as all pay protection policies give rise to inequality, albeit that ultimately an employer may be able to establish a GMF or objectively justify short-term pay protection.
- We recommend that at paragraph 11 the "Code" be replaced with the "Commission".
- At paragraph 12 we think it would be useful to give some examples of an audit which will not fall within these guidelines. We are aware of many examples of audits which would not fall within the Commission guidelines and think it would be useful to make this clear here.
- At paragraph 14 we recommend replacing the word "union" with "union and other employee representatives".
- At paragraph 16, second bullet point, we recommend qualifying the

references to "qualifications relating to the job", "length of service" and "any performance ratings and so on ". It would be likely that this type of information may only be relevant where a gap is identified (since it may or may not provide a GMF). However, we do not think it necessarily needs to be compiled at the start of an audit and doing so may make the approach particularly burdensome where there are a large number of employees and where evidence on (for example) qualifications may not be stored on a single database.

- More generally it may be useful to provide some additional examples of approaches to equal pay audits.
- It would also be useful if the Code could provide additional guidance to employers who do not have job evaluation schemes which have been designed with equal pay in mind, including examples of alternative schemes or approaches

Q3. Are there any other comments that you would like to make about this section?

Where relevant please mention paragraph numbers. We welcome both positive and negative comments. Please write in the box below.

Members of the ELA Working Party

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Shubha Banerjee – UNITE

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