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EHRC Consultation:

"Our plans to enforce the gender pay gap regulations"

Response from the Employment Lawyers Association

2 February 2018

ELA Response to EHRC Consultation:

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INTRODUCTION

The Employment Lawyers Association (" **ELA** ") is a non-political group of specialists in the field of employment law and includes those who represent claimants and respondents in courts and employment tribunals. It is not ELA's role to comment on the political or policy merits or otherwise of proposed legislation or regulation, rather it is to make observations from a legal standpoint. Accordingly in this consultation we do not address such issues. ELA's Legislative and Policy Committee consists of experienced solicitors and barristers who meet regularly for a number of purposes including to consider and respond to proposed legislation and regulations.

The Legislative and Policy Committee of ELA set up a sub-committee under the chairmanship of Eleanor Mannion, Renfrewshire Council to consider and comment on the consultation paper from the Equality and Human Rights Commission entitled Closing the Gap: Enforcing the Gender Pay Gap Regulations. The details of the members of this sub-committee are outlined below.

Response

When considering the consultation and the proposals put forward by the Equality and Human Rights Commission, ELA found that there were two preliminary points that required addressing in the first instance. Those are whether the Commission has statutory power to enforce compliance and how the Commission might go about identifying employers who are not compliant. We have dealt with these issues firstly and have then set out our views on the individual multiple choice questions to provide some context for those answers.

Preliminary Point 1

Whilst ELA welcomes the Commission's consultation on its proposals for enforcing the Equality Act 2010 (Gender Pay Gap Information) Regulations 2017 ("the GPG Regs"), it has significant concerns about whether it has the requisite power to underpin such enforcement action.

ELA's concern is that attempts by the Commission to take enforcement action in line with its proposals will fail at the outset because an employer – against whom enforcement action is proposed – is likely to challenge the Commission's power to take such action.

The Commission proposes to use its enforcement powers under ss20-24 of the Equality Act 2006 ("EA06"). Each of those powers arises only in respect of an "unlawful act", as defined by s34 of the EA06. Accordingly, the Commission may only have recourse to its enforcement powers in respect of an act (including a deliberate omission) which is contrary to a provision of the Equality Act 2010 ("EA10"). Should a relevant employer breach any of its obligations under the GPG Regs, this is not a contravention of any provision of the EA10 and, thus, not an "unlawful act".

ELA acknowledges that the *Explanatory Note*/*Memorandum* (at paragraphs 7.12 and 7.13) states that a failure to comply with the GPG Regs would be an "unlawful act" for the purposes of Part 1 of the EA06 and would fall within the existing enforcement powers of the Commission under that Act. However, ELA considers that this is not a correct statement of the legal position. It should, of course, be recalled

that explanatory notes/memoranda, do not form part of the relevant legislation and have not been endorsed by Parliament. As such, they do not create legal rights or obligations and, at most, are relevant only as an indication of Parliament's intention behind the legislation as a tool to assist with interpretation of that legislation.

The GPG Regs have been enacted in accordance with s78 of the EA10. That provision imposes a power on the relevant Minister. It imposes no obligation on employers. Moreover, s78(5) of EA10 expressly permits any enabling regulations to make provision for a failure to comply with the regulations. Section 78 itself contains no provision for enforcement by the Commission.

The GPG Regs themselves are silent on the question of enforcement (whether by the Commission or by an individual employee) and do not expressly provide for any penalties (whether civil or criminal).

This stands in clear contrast to s60 of the EA10 (in respect of pre-employment enquiries about disability and/or health) which, by s60(1), imposes direct obligations on employers and, by s60(2), expressly provides that a contravention of s60(1) is enforceable as an "unlawful act" by the Commission under Part 1 of the EA06; and, by s120(8) of the EA10, it is made clear that only the Commission has the power to take enforcement action in respect of s60(1).

ELA notes that, in the Commission's response (dated 11 March 2016) to the Government's consultation on the draft gender pay gap regulations, its position on the question of whether it had the necessary enforcement powers exactly reflected ELA's own concerns, as set out above[1]. It is unclear to ELA how and/or why the Commission has now changed its view and considers that it does have the necessary power to take enforcement action in respect of the GPG Regs.

ELA does not have the same concerns about the Commission's proposed enforcement plan in respect of the gender pay gap reporting obligations on listed public sector employers under the Equality Act 2010 (Specific Duties and Public Authorities) Regulations 2017. This is because the Regulations were made in pursuance of s153 of the EA10 which permits the relevant Minister to enact regulations to impose duties on specified public authorities for the purpose of enabling the better performance by the authority of the public sector equality duty imposed by s149 of the EA10. Accordingly, the gender pay gap reporting obligations imposed on listed public sector employers under the 2017 Regulations arise directly under and by virtue of s149 of the EA10; and the Commission has the power to take action (assessment and compliance) under ss31 and 32 of the EA06 in relation to the question whether a relevant public authority has complied with a duty under or by virtue of ss149, 153 of 154 of the EA10.

If relevant employers are to take seriously the requirement to publish the requisite gender pay gap information, then a failure to comply with the GPG Regs needs to be properly enforceable. Amendments to the GPG Regs (and s120 of the EA10) will be needed to ensure that enforcement by the Commission is possible.

Preliminary Point 2

ELA welcomes the Commission's focus on promoting compliance without the need for formal enforcement action. We note that the Commission intends to work with the GEO to monitor which employers have published the information required under GPGR and the accuracy of such information, with a view to holding non-compliant employers to account.

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[1] See here: https://www.equalityhumanrights.com/en/legal-responses/consultation-response-mandatory-gender-pay-gap-reporting

Given the Commission's stated commitment to openness and transparency we recommend that clear guidance be provided by the Commission and the GEO on how they intend to identify which legal entities are, based on employee numbers, considered to be subject to the reporting obligation given that, as far as we are aware, accurate information relating to numbers of employees of individual legal entities is not publicly available.

We note that the Commission intends to publish numbers (but not names) of non-compliant employers before the last date for compliance. We assume that the intention is to publish the number of organisations it is believed are in scope and are yet to publish and we recommend that any published compliance rates before the last date for compliance make this distinction clear.

We note that the Commission intends to write to employers it has identified as non-compliant, after the last date for compliance, requiring them to confirm that they will comply within 42 days. Given the complex structure of many larger organisations and the lack of publicly available and accurate information about employee numbers we recommend that employers are also given an opportunity to explain whether and why they consider that the relevant legal entity is one which is not subject to the reporting obligations.

We note that the Commission does not propose to name and shame employers which it considers to be non-compliant. Given the difficulty identified above in identifying legal entities which are subject to the reporting obligations we agree that it would not be appropriate to name individual employers considered by the Commission to be non-compliant.

Question 1 The policy is clear about the enforcement action the Commission will take

Neither Agree nor Disagree

While it is agreed that the policy is clear on enforcement action the Commission will take in relation to private sector employers, there is a lack of clarity for public sector employers. The policy refers to public sector employers in England only who have not published the required information and sets out what action will be taken as a result. Part of these action points include an employer applying to the County Court in England and Wales or the Sheriff Court in Scotland to have notices set aside. However, it would appear that the focus of the enforcement action is on English public sector employers. This may be due to the devolved nature of public sector gender pay gap reporting in both Scotland and Wales which does not provide for the enforcement action envisaged. Further clarity is required for public sector employers in Scotland and Wales.

Question 2 The policy is clear about when enforcement action will be taken

Agree

It is clear from the policy what the timelines for enforcement action are intended to be. Therefore, in response to this question, it is clear "when enforcement action will be taken" in the strictest sense. However, we consider that there are significant evidential issues which will impact on the opportunities the EHRC has to take enforcement action in any particular case.

Failure to report

The policy makes clear that the intention in the first year is to focus enforcement work on employers who do not publish the information required by the GPGR. However, it is not clear from the policy exactly how the EHRC intends to identify companies who should be in scope but who have not reported. Of course, in many cases it will be obvious because of the size, nature and public records of the organisation. However, there are hundreds of employers which hover around the 250-employee mark, and may be in or out of scope depending on entity structure; the number of individuals employed by a particular entity within such groups may not be transparent. The issue of employee status and the employer's access to pay information in respect of contractors and atypical workers will also have an impact on the way particular companies calculate their employee threshold for reporting purposes. It is difficult to see how the necessary information to allow the EHRC to assess whether an employer should be in scope will be accessible to the EHRC without them using their investigation powers, but those powers aren't available under the policy until after the informal resolution stage. Therefore, it appears that there will be an element of guess-work in determining which companies should be in scope but have not reported. This would be a vulnerable position from which to take enforcement action.

In summary, it is not clear what will be relied on by the EHRC to trigger enforcement action in cases other than those where it is clear on the face of publicly available information that a particular employing entity has 250 or more employees but has not reported. This could leave a considerable gap.

Inaccurate reporting

The policy makes clear that, if the EHRC has capacity to do so, it may also take action against employers for publication of inaccurate data if considered necessary, proportionate and feasible to do so. Once again, it is difficult to see how the EHRC will be able to assess the accuracy of information published by any particular company without exercising its investigative powers in the first place. Unless the figures are so obviously wrong that there is no possibility of them being accurate, or there has been a claim raised by an employee during which it is formally established on the public record that inaccurate data has been used, it is very difficult to see how accuracy will be determined by the EHRC to the extent necessary to decide whether (and therefore, when) enforcement action should be taken. We would welcome your feedback on the EHRC's proposals in this respect.

Question 3 The commission is taking sufficient steps to encourage compliance with the GPGR

Disagree

The Commission can and should take further steps to encourage compliance. The EHRC's Policy entitled, "Enforcing the Gender Pay Gap Regulations" refers to promoting awareness and education including signposting employers to sources of information. Whilst there is some signposting from the ECHR website, given that the GPGR are new and so significant, more prominent promotion and signposting is required. For example there is no mention of the GPGR on the current front page of the ECHR site and relevant information is amongst the last listed on the page on Pay Gaps.

The Policy refers to working with the Government Equalities Office (GEO) and certainly the GEO has been extremely active in preparing employers and providing an action plan. It has taken steps to educate and provide materials, such as its toolkit for employers. It would be helpful to employers if this

information was more clearly signposted by the EHRC to assist employers to comply with their obligations.

The EHRC's Policy on Enforcing the Gender Pay Gap Regulations also refers at pages 6 and 7 to monitoring compliance, publicising compliance rates and promotion of enforcement work.

It is not clear how compliance with the entire GDGR, as opposed to enforcing the reporting obligation itself, is being encouraged. The proposed approach suggests enforcement action would be first considered against an employer who has not reported their GPG. The reporting of inaccurate or manipulated data does not comply with the GPGR. However, it is unclear how the Commission would scrutinise, identify or know which employers' published data and methods of calculation do not comply with the GPGR. The Financial Times has identified obvious inaccuracies in the data already published. Given the stated intention of the Commission is to ensure compliance, it needs to adopt a mechanism of auditing or scrutinising the data published in order to ensure that employers are indeed complying.

The Commission could additionally recommend more immediate consequences if an employer is late in complying, or has failed to comply with the GPGR or is suspected of inaccurately reporting its GPRG, for example:-

- That the employee representatives, works council or the employees themselves should be given access to the underlying data so that they can verify it
- that in tribunal proceedings, where an employee is bringing an equal pay claim, or possibly sex discrimination claim, the Tribunal judge:-
  (a) may infer or there should be a rebuttable presumption, from the late compliance or failure to comply with the GPGR, that the employer does not pay equal pay.
  (b) increase the compensation for the failure to comply with the EHRC Policy. The Policy could even be given a similar status to the ACAS Code of Practice on Disciplinary and Grievance Procedures.

Question 4 Taking enforcement action against non-compliant employers will encourage more employers to comply with the GPGR.

Disagree

The intended enforcement approach will incentivise some employers to comply with the GDGR, but not others. The enforcement action provided for is longwinded and will only be taken after consideration on a case by case basis of a number of published factors. Some employers will take the risk of no enforcement action ever being taken against them, and/or take the view that if enforcement action were commenced, they will have sufficient time to publish their data, before any fine could be applied.

The intended enforcement action will first be considered against an employer who has not reported their GPG. It is not clear how the Commission would scrutinise, identify or know which employers' published data and methods of calculation do not comply with the GPGR. The Financial Times has identified obvious inaccuracies in the data already published.

We consider that there are other mechanisms (e.g. as outlined above) that would encourage compliance.

Question 5 The Commission will prioritise enforcement action against those who do not publish any information in the first year. This is a reasonable approach

Agree

We think this is a reasonable approach as we are aware that there are resource issues and it will not be possible to apply enforcement action across the board in the early stages. It makes sense to prioritise non-disclosure in the first instance, as this will be easier to identify and will have a greater impact in the early stages of enforcement. The only concern is that this may encourage employers to publish information that is not necessarily correct just to ensure they have published something. We would be keen for investigations into the veracity of published information to take place at some point in the coming years.

Question 6 If a staged approach to enforcement is necessary, the Commission will contact tranches of employers randomly selected from each industry This is a reasonable approach"

Agree

If non-compliance with the GPGR is extensive enough to require a staged approach, targeting non-compliant employers by industry seems to be a reasonable way to set about tackling the problem in a methodical and structured manner. Such an approach will help to identify whether compliance is particularly poor in any particular occupation or sector, and may help to identify whether there are any particular underlying reasons for this or any specific barriers to compliance. This in turn may drive sector-specific solutions or support for employers to boost compliance rates. Random selection of a tranches of non-compliant employers within each industry would seem a sensible way to ensure fairness and consistency, and to minimise the risk that a particular employer will feel 'targeted'. An alternative approach might be to target the largest non-compliant employers in each sector group, in the hope that this might drive good practice amongst smaller organisations. It will be interesting to see whether the EHRC intends to undertake enforcement action in multiple sectors at once, or to target sectors one by one. If the latter approach is adopted, it would seem sensible initially to target the sector/sectors in which compliance rates are lowest (to ensure that the limited resources of the EHRC have the greatest possible impact).

Question 7 A non-compliant employer will be given 42 days to comply with the GPGR following receipt of a first letter from the commission.

Neither Agree nor Disagree

What does non-compliant mean? Depending on the type of non-compliance the 42 days may be unduly onerous or unreasonable.

If non-compliance is a failure to publish on the website or register on the Government website, then 42 days should not prove problematic. If non-compliance is concerned with accuracy of the information or there has been no calculation of GPG, then 42 days may not be sufficient to enable the employer to comply.

There could be 'innocent' reasons for non-compliance; the employer may not have appreciated that they meet the threshold as at snapshot date i.e. their workers may consist of a significant number of zero hours or casual labour which gives rises to complexities in relation to umbrella contracts and mutuality of obligation. There may be overseas employees who are "relevant employees".

If, as per question 5, the initial enforcement action will focus on those who have not published any information, the degree of non-compliance will be significant in the first year of enforcement. Consider allowing an 8 week period for compliance and providing clear details of the non-compliance that has taken place in order to enable rectification at an early stage..

Question 8 An employer will be given 14 days to make representations on the draft terms of reference in a section 20 investigation

Neither Agree nor Disagree

It is not clear how broad or specific the terms of reference will be. 14 days is unlikely to be sufficient to consider, take advice and respond.

Other stages provide for 28 days for compliance, a consistent time limit across the process will simplify the process for employers and the EHRC.

It appears from the consultation document that an employer could be asked at this stage to provide information and documents for use later in the investigation. If this is the case, we are unclear how onerous this would this be and how much this would affect the ability of employers to comply with the deadline. If the employer may have to deal with disclosure of evidence and make representations at this stage, 14 days is unlikely to be reasonable and more likely to lead to default, rather than co-operation and resolution.

Question 9 The commission will provide the final terms of reference within 14 days of receiving the employers written representations on the draft terms.

Neither Agree nor Disagree

This is for the commission to determine if it can meet that tight deadline; the consultation document page 9 states it will "aim" to publish the final terms of reference which implies flexibility. However, there needs to be meaningful consideration and time in which to provide for that and setting such a tight timeframe might not be the best approach.

Question 10 The commission will provide a draft section 20 investigation report within 28 days of receiving evidence requested by the commission from the employer

Neither Agree nor Disagree

It is a matter for the commission to determine if it can meet this tight deadline. Reference to "evidence" from the employer – it is unclear what type of evidence may be requested from the employer and at what stage this evidence is to be formally requested.

Question 11 An employer will be given 28 days to make representations on a draft investigation report.

Disagree

This is unlikely to be sufficient to time to consider, take advice and provide representations.

Statutory discrimination questionnaires allowed employers 8 weeks to respond, it is 28 days for submission of an ET3 but with the right to request an extension. We suggest 8 weeks here but if the decision is to retain such a short time frame, perhaps this could be mitigated by the inclusion of the right to request an extension to be granted where reasonable to do so and where clear the employer has taken steps to comply.

Question 12 An employer will be given 14 days to respond to a first offer of a section 23 agreement.

Neither Agree nor Disagree

Whether 14 days is realistic depends on terms of and complexity of agreement, employer will need to take advice and 14 days is short. 28 days would align with other timescales.

Question 13 An employer will be given 28 days to respond to a second offer of a section 23 agreement

Neither Agree nor Disagree

Depending on the complexity of the document, this should be sufficient.

Question 14 The Commission has taken the right approach to escalating enforcement action.

Agree

Subject to our comments elsewhere in relation to the legal basis of enforcement action under section 20 of the Equality Act we consider that the Commission has taken the right approach to enforcement action in terms of initially relying upon informal resolution before seeking to exercise its statutory powers. We believe that it would also be appropriate for informal action to be carried out on a strictly confidential basis before any issue of publicly identifying non-compliant employers arises and that such an approach might be best designed to elicit compliance and "buy in" from employers.

Question 15 The policy is flexible enough to take account of the specific circumstances of employers.

Agree

We consider that the policy indicated is likely to be sufficiently flexible provided that it is applied with reasonable discretion having regard to the nature of the non-compliance and the financial and other resources of the employer. In addition to drawing their attention of non-compliant employers to the obligations under the GPGR we believe it would be appropriate and useful for the Commission to direct employers to appropriate sources of independent guidance including ACAS or their legal advisors.

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