The Bar Council

Bar Council response to the Government consultation on equal pay and pay discrimination

27 October 2026

About us

The Bar Council is the voice of the barrister profession in England and Wales. Our 18,000+ members – self-employed and employed barristers – make up a united Bar that aims to be strong, inclusive, independent and influential.

As well as championing the rule of law and access to justice, we lead, represent and support the Bar in the public interest through:

- Providing advice, guidance, services, training and events for our members to support career development and help maintain the highest standards of ethics and conduct
- Inspiring and supporting the next generation of barristers from all backgrounds
- Working to enhance diversity and inclusion at the Bar
- Encouraging a positive culture where wellbeing is prioritised and people can thrive in their careers

- Drawing on our members' expertise to influence policy and legislation that relates to the justice system and the rule of law
- Sharing barristers' vital contributions to society with the public, media and policymakers
- Developing career and business opportunities for barristers at home and abroad through promoting the Bar of England and Wales
- Engaging with national Bars and international Bar associations to facilitate the exchange of knowledge and the development of legal links and legal business overseas

To ensure joined-up support, we work within the wider ecosystem of the Bar alongside the Inns, circuits and specialist Bar associations, as well as with the Institute of Barristers' Clerks and the Legal Practice Management Association.

As the General Council of the Bar, we're the approved regulator for all practising barristers in England and Wales.

We delegate our statutory regulatory functions to the operationally independent Bar Standards Board (BSB) as required by the Legal Services Act 2007.

Introduction

This is the response of the General Council of the Bar of England and Wales (the Bar Council) to the Office for Equality and Opportunity consultation on Equal Pay and Pay Discrimination.[1]

References

[1] **Consultation on equal pay and pay discrimination**

Consultation Questions

Pay transparency in recruitment

Question 1: Do you agree or disagree with the proposal to require employers to publish pay information either in job adverts, or in writing to the candidate before the interview (if there is no job advert)?

We acknowledge the concern and recognise the potential benefits of greater transparency over pay however we don't consider that a mandatory requirement is likely to be appropriate.

Question 2: Please explain your answer

In many industries pay or pay bands are already published with job adverts. This is particularly the case in larger organisations with job evaluation schemes in place which establish the pay band for particular roles. However, many companies both large and small will encounter far more flexibility in the recruitment process by advertising first and sharing pay information with preferred candidates as they progress. Far from avoiding wasting time on candidates whose pay expectations are misaligned our experience suggests that when a good candidate is interviewed employers, particularly smaller business and start-ups, can benefit from adapting the role to fit with the candidate. This can mean recruiting a more senior and a more junior person as a team, it can mean being open to a job share or part time work and there does not appear to be sufficient benefit to be gained to risk losing this flexibility.

Second, we consider that enforcement is likely to be impractical and an obligation which is not enforced is a burden on conscientious employers of all sizes while not improving the position with unscrupulous employers.

Finally, any requirement is unlikely to make any meaningful difference and therefore is not worth the administrative burden on employers or any regulator.

Even if employers publish pay information in job adverts or prior to interview, that does nothing to prevent negotiation of salary etc during the interview/offer process and/or during employment – negotiation of salary is something which is known to be gender-impacted.

Those reviewing this legislative framework ought also to have in mind that pay inequalities are often perpetuated and female salaries may still lag behind even if they are increased from time to time. The only way to improve pay equality is to encourage greater transparency during employment and mechanisms for pay alignment between men and women to account for this difference in negotiation power without restricting the freedom to contract at the outset.

Question 3: What pay information or conditions would be proportionate for this requirement? Examples might include salary, collective bargaining provisions, annual adjustments, or other financial benefits.

If this were to be introduced it should only cover a salary range and any collective bargaining provisions.

Question 4: What level of pay information should employers be required to publish in job adverts or disclose before an interview? For example, should a pay range, specific salary or benchmark rate be required?

As above any mandatory obligation should be limited to a salary range and any collective bargaining provisions.

<u>Job evaluations and pay audits</u>

Question 5: Do you agree or disagree with the proposal to reduce the list of current exceptions of when an Employment Tribunal must order an equal pay audit after finding an equal pay breach?

Agree.

Question 6: Please explain your answer.

We note the extremely limited use by the Tribunal of the power under the Equality Act 2010 (Equal Pay Audits) Regulations 2014 to order an equal pay audit (EPA) after a claimant succeeds in an equal pay claim. Removing three of the four exceptions which enable respondents to argue that an order to carry out an EPA should not be made would not, we believe, result in any great change to the number of cases in which the power is exercised. By focusing on the exception that would remain - "an audit completed by the respondent in the previous 3 years meets the requirements" - may possibly encourage more employers to consider completing an EPA (or an equal pay review for smaller employers) in order to take advantage of this exception were it to arise. This might also have a consequential positive impact on attitudes towards equal pay generally. However, although we are in favour of this change, we are not of the view that it would have any significant impact on equal pay litigation.

Mandating that an employment tribunal must order the implementation of a non-discriminatory job evaluation scheme

Question 7: Do you agree or disagree with the proposal that an Employment Tribunal must also order the implementation of a non-discriminatory job evaluation scheme alongside an equal pay audit, where it has found an equal pay breach?

We disagree.

Question 8: Please explain your answer

First, job evaluation schemes are not suitable for all industries or businesses and mandating their use places a considerable and disproportionate financial and administrative burden on an organisation. Employment Tribunals are not well placed to assess whether that burden should be imposed on an employer particularly given the ramifications for the wider workforce who would not be present or part of the proceedings. As both employee and employer have to agree for a job evaluation scheme to be valid, it would seem peculiar to enforce its

application by mandating its use. The buy-in secured by the necessary agreement between the parties is worth maintaining for good industrial relations as well as ensuring that the results of the evaluation are not subsequently impugned.

Second, as the extensive and protracted litigation in local authority case law demonstrates, even with union and employer collaboration and the best of intentions, a job evaluation scheme can, with time, or with hindsight, be found to be discriminatory. It is therefore not possible to guarantee that a job evaluation scheme will not later be found to be discriminatory. How would compliance with such an order be assessed and when?

Third, expertise in job evaluation schemes is difficult to come by; were such schemes to be imposed, even on business which are not suited to them, obtaining experienced professional support would be difficult especially for small businesses.

Finally, case law demonstrates the unending scope for satellite litigation in challenging job evaluation schemes and therefore, the use of job evaluation schemes does not provide finality for employers or employees in pay disputes. Many of the current equal pay cases arise are dealing with challenges to JESs introduced as part of a settlement of previous claims. When the JESs were introduced it was with the hope and expectation that they would remove discrimination identified in the last round of claims. Yet the present challenges continue to allege discrimination in the design or application of the JES. A mandatory JES is therefore not an appropriate tool to address a finding of discrimination. It is not a guarantee against future discrimination and nor does it uncover hidden discrimination. The equal pay audit may be more likely to achieve these aims or more focussed orders for audits focussed on the particular issue identified in the legislation. Many of the Respondents in these cases are large publicly funded bodies and unfocussed and generic orders are time consuming to implement and may be out of all proportion with the scale of the issue found.

Standard questionnaire in pay discrimination disputes

Question 9: Do you agree or disagree with introducing a new statutory questionnaire for pay discrimination claims only?

We disagree.

Question 10: Please explain your answer

We do not consider it desirable to re-implement a fragmented system as concerns the now displaced statutory questionnaire process. In short, if statutory questionnaires are to be revived, there is no principled basis for doing so in respect of equal pay claims alone. In any event, we doubt that many such serious claims would be resolved on the basis of questionnaires alone. The existence of the statutory grievance procedure would suggest that the main concerns regarding such a claim ought to be ventilated prior to the issuing of proceedings, and, recognising that the grievance process is not compulsory, there is the further Early Conciliation period which, if it is meant to be an effective system (as to which we make no comment here), should allow a (further) opportunity for key issues to be identified and information to be shared. Weaker claims should be weeded out by a robust case management process, but Employment Tribunals are positively hindered by the case law that has developed over time which makes it an exceptional decision to strike out any discrimination claim, even though the power to do so exists. We note that the government intends to revisit the procedural rules which may provide an opportunity to deal with the early exchange of information in equal pay cases, which we would support in general. We also note that the drawing of adverse inferences from supposedly evasive answers or the absence of answers in unlikely to be as useful a tool / mechanism to Tribunals hearing equal pay claims especially in claims for equal value, as in other jurisdictions.

We do support a mechanism by which relevant pay information can be obtained early on and not purely via litigation disclosure well down the line in the process,

but do not consider that the statutory questionnaire is the appropriate vehicle for this.

Question 11: What questions do you think should be included in a statutory questionnaire to facilitate the early resolution of cases?

We do not support the reintroduction of statutory questionnaires.

Question 12: What steps would you recommend taking to ensure the questionnaire procedure is as efficient as possible?

We do not support the reintroduction of statutory questionnaires.

Institutional home of the Unit

Question 20: Where do you think the Equal Pay Regulatory and Enforcement Unit should be based?

The Fair Work Agency.

Question 21: Please explain your answer

The FWA has a focus on enforcement. It is a new agency that has comprehensive strategic plans and is structured towards grouping together a number of enforcement agencies for the purpose of pooling knowledge and resources. The EHRC (the only other viable option, in our view) has some enforcement powers but these are not regularly used and are seen generally as lacking in effectiveness and used for test cases only. EHRC's main focus and strength comes from devising and then disseminating statutory and other procedures, to promote good practice across all sectors in relation to discrimination, equality and human rights. The FWA would therefore be a more natural fit for the Unit. It is our view that the overall alignment of the goal of enforcement between the Unit and the FWA would mean a better fit in practice. Cooperation would of course be required with the EHRC given the subject matter, but because – being realistic - its resourcing is unlikely to be substantially increased to operate the work of the Unit, the risk is that any power granted by new regulations to

take action would be watered down if handled by the EHRC. This risk is that the enforcement powers would be limited to test cases only rather than becoming a respected enforcement regime with broad scope and credibility amongst both employees and employers.

New Unit powers to support enforcement activities

Question 22: Do you agree or disagree that the Unit should have the ability to require the disclosure of evidence before triggering a formal investigation process?

Yes

Question 23: Please explain your answer

If the Unit is to provide, as envisaged, an effective substitute for tribunal proceedings on equal pay, disclosure of evidence prior to formal proceedings being initiated would be an important and expedient initial stage. If employers were to be informed that the Unit had powers in relation to the production of relevant equal pay evidence, it is possible that those employers would be more proactive themselves in e.g. undertaking equal pay audits or reviews. At present, where employers are aware that hurdles for claimants are high, there is simply no incentive or business case for them to address what is a very minimal risk.

Question 24: Do you agree or disagree that the existing investigation powers should be strengthened to enable the Unit to require that a job evaluation scheme and/or equal pay audit be undertaken as part of the investigation process, where this would help to establish whether pay discrimination has occurred?

Yes.

Question 25: Please explain your answer

In situations were there was prima facie evidence giving rise to a suspicion of unequal treatment, giving the Unit these powers will shift the onus (and cost) back on to employers to provide evidence and justify their position. Given that carrying

out a JES or EPA is recognised good practice in any event, there should be minimal effective opposition to any orders made under such a power.

Question 26: Do you agree or disagree that the Unit should have the ability to require those subject to inquiry recommendations to respond to them and provide updates on implementation?

Don't know – In favour of responses being required within a specific short framework, but not updates on implementation over a lengthier period.

Question 27: Please explain your answer

On the one hand, yes this would be an essential part of demonstrating the effectiveness of the orders and measures, with compliance dates being the obvious first step after which a sanctions process could be initiated. However requiring updates to be provided over a longer period is something that would enable employers to delay implementation of decisions/requests. This may lead to arguments and discussions over reasons for the delay that would take time and resources to review. The EHRC has perfectly clear guidance on JESs and EPAs and there is no reason why employers could not use that guidance to implement their own JES or EPA within a relatively short timeframe, instead of taking up the resources of the Unit (i.e. the enforcement body).

Question 28: Do you think the Unit should have additional new powers or capabilities to help secure remedies for workers beyond our proposal?

Yes.

Question 29: Please explain your answer

There should be some mandatory powers for the Unit, otherwise it will essentially be duplicating the work of the EHRC. Presumably the outcomes of the investigations and the names of the employers involved would be publicly available, and the knowledge of such information being made public may be enough to

encourage employers into taking action in circumstances where they would otherwise not have done so.

Making the right to equal pay effective for ethnic minority and disabled people

Question 35: Do you agree or disagree that the Equality Act 2010's protections against pay discrimination on the basis of race and disability, and those it provides under the equal pay scheme against pay discrimination on the basis of sex, should be broadly levelled-up to provide equal protection as far as possible?

This is not a question which admits of a 'agree' or 'disagree' answer.

Question 36: Please explain your answer.

The consultation identifies five specific proposed areas for 'levelling up': (1) modification of contractual terms; (2) equal pay audits; (3) equivalence of work; (4) hypothetical comparators; and (5) time limits. We have different views in respect of each of those proposals, agreeing with some and disagreeing with others.

Levelling-up direct and indirect discrimination provisions relating to race or disability

Question 37: Do you agree or disagree that Employment Tribunals should be able to require modification of the terms of a claimant's contract in successful discrimination claims relating to pay on the grounds of race or disability?

We agree.

Question 38: Please explain your answer.

As recognised by the consultation document, there is a difference in remedy if pay discrimination arises as a result of sex (equal pay), as distinct from race or disability. This arises because the mechanism of an equal pay claim is a contractual one, whereby the implied equality clause operates to modify the terms of the contract, whereas the mechanism of other pay discrimination claims is tortious. Consistently

with the Government's stated aim of achieving equality between different protected characteristics, we see no principled reason for that difference.

Question 39: What limitations or safeguards should be considered for this power, if any?

It is a matter for the Government to consider to what extent this power should mirror the modification of the contract that happens in equal pay claims by virtue of the implied equality clause. If an equal pay claim succeeds, the effect of the implied equality clause is to modify the terms of the claimant's contract as they were at the date of the claim to be no less favourable to her than her comparator's terms. The fact that the qualifying conditions for an equal pay claim cease to exist thereafter e.g. the comparator leaves or the comparator ceases to have the more favourable terms does not prevent the ongoing modifying effect of the contract. Consideration will need to be given to whether that should be the case in race and disability cases as well where that same contractual underpinning does not exist.

Equal pay audits

Question 40: Do you agree or disagree that existing requirements should be widened so that employers found to have discriminated in terms of pay on the basis of race or disability can be required to undertake an equal pay audit and job evaluation scheme?

We disagree.

Question 41: Please explain your answer

As noted within the consultation, the ordering of an equal pay audit is not a remedy which is commonly used by the Tribunal – it has only ever been used once. There are likely to be practical reasons why the Tribunal has been satisfied that the existing exceptions have applied. The extension of an ineffective remedy to race and/or disability is unlikely to be beneficial.

In any event, it is difficult to see how job evaluation schemes and/or pay audits map across to race and/or disability given the individualised nature of these protected characteristics. Race and/or disability are diverse protected characteristics with a limitless range of individual circumstances. Identifying how an audit would effectively address such a range of personal circumstances while maintaining employee privacy and avoiding fragmentation or victimisation is fraught with difficulty.

To protect privacy, it is likely that people would be grouped together, which may mask discrimination within a subset, i.e. employees with mental health disabilities may have a very different experience from those with physical disabilities and/or those with deemed disabilities such as cancer.

The other difficulty with any form of audit is that it is dependent on individuals being prepared to share diversity data which, particularly in the case of disability, cannot be assumed.

Levelling up the equal pay scheme

Question 53: Do you agree or disagree with the proposal to allow hypothetical comparators in equal pay claims in the 2 prescribed, limited scenarios described above (successor comparisons and improvement in terms)?

We disagree.

Question 54: Please explain your answer

Direct discrimination claims and equal pay claims are conceptually distinct, and it is not helpful in general to equate the two. We recognise, however, there are some similarities at their core i.e. distilling less favourable treatment of appropriately comparable people because of a protected characteristic, focussed in the case of equal pay on pay disparity and the characteristic of sex alone.

There is no equality term implied into the contract of employment in direct discrimination claims. However, section 23 Equality Act 2010 requires a comparison to be made between persons between whom there is no material difference in circumstances other than the protected characteristic at play. In equal pay cases, the starting point is to identify an actual disparity in a pay term between two people, then to consider whether that disparity is prima facie discriminatory because the persons in question are engaged in equal work; if those two tests are satisfied, to test whether there is discrimination, and, if proved, to apply the sex equality clause. In direct discrimination claims, section 23 Equality Act 2010 requires a focus on the *reason why* someone has been treated less favourably than someone with whom they do not share a protected characteristic and for this purpose an actual or hypothetical comparator can be used.

The two specific proposals envisaged in which a hypothetical comparator ought to be allowed are (i) successor cases and (ii) historic pay discrepancies.

We note that in Walton Centre for Neurology & Neuro Surgery NHS Trust v Bewley UKEAT/0564/07 the Employment Appeal Tribunal (EAT) held that Diocese of Hallam Trustee v Connaughton [1996] ICR 860, which supplied authority for using a successor as a comparator in a claim for equal pay, had been wrongly decided (per incuriam). The decision in Bewley was based on analysis of European jurisprudence. The EAT also noted that, where a claimant relies on a predecessor as a comparator, the comparison is strictly limited to the contractual terms of employment of the comparator at time their employment terminated. Speculation as to what would have happened to the comparator's pay is not permitted.

We recognise that in many ways this is a policy decision for government – should the scope of equal pay claims be expanded in this way so that a woman can claim on the basis of what someone *would* have been paid as opposed to what that person was in fact paid? The mischief at which this potential reform appears to be directed is lack

of knowledge on the part of a woman as to what a comparator is being paid, hindering the ability to find an actual comparator. In this regard, we note the reforms being proposed which are directed at improving (early) transparency as to the financial terms of a job. That may well assist here albeit that we do not consider reviving statutory questionnaires for equal pay claims alone is the appropriate method by which to do this. However, on balance, notwithstanding some of the philosophical sympathies between equal pay and direct discrimination litigation, we consider that a hypothetical comparator should not be permitted in any claim for equal pay. We consider it likely that this will further complicate the process of litigating such claims and require more statistical and other expert evidence, which will in turn increase costs and delay all round. That would be inimical to the general aims of the reforms proposed in the consultation which appear to be aimed at simplifying and speeding up equal pay litigation.

We are fortified in that view by the fact that hypothetical comparators can be relied on in direct sex discrimination claims relating to pay where the 'sex equality clause has no rule or effect' (see section 71 Equal Pay Act 1970). This may provide a better route for those cases in which an actual comparator cannot be found. This could be an example of sex discrimination if the successor is at the same work establishment (for equal pay purposes) in which case there is clear evidence and no hypothetical comparator would be necessary.

If the government is minded to permit the use of hypothetical comparators, it would be rational and principled to allow this across the board, and not simply in two categories of case; but for the reasons above, we do not, on balance, consider this to be sensible.

Question 55: Are there any other scenarios where the use of a hypothetical comparator should be considered?

No

Question 56: If yes, what are those scenarios?

Not applicable.

Question 57: Do you agree or disagree with providing discretion to the judiciary to extend time limits for bringing equal pay claims 'on a just and equitable basis'?

We agree.

Question 58: Please explain your answer

The judiciary is well versed in applying section 123 Equality Act 2010 in accordance with its discretion. We do not consider that this would open the floodgates of historic or stale claims. The reasons why a claim may be presented out of time are many and multi-factorial, and this discretion allows the maximum flexibility to Employment Tribunals (judges) to enable meritorious claims where (i) there is a good reason for late presentation and (ii) there is insufficient prejudice to the respondent to proceed in accordance with the overriding objective, whilst declining permission to extend time in cases where the converse is true. We also note that few equal pay claims are found to be out of time in any event, and that the primary time limit for bringing contractual claims in the High Court is six years; this is in sharp contrast to the limitation period for claims in the Employment Tribunal covering the same material subject-matter and terrain. The inflexibility of the limitation regime in the Equal Pay Act 1970 makes it an outlier. It is usually much more expensive to litigate in the High Court, which is not a generally costs-free jurisdiction, and is one in which costs ordinarily follow the event; therefore this is should not be a reason not to allow Employment Tribunals to extend time where it is just and equitable to do so. The main area in which claimants are caught out is when changing jobs and not realising that time has started running; the discretion would allow the reasons for this to be explored in a proportionate and fair manner without substantial judicial resource being expended.

<u>Promoting pay equality in contractual arrangements</u>

Question 64: Do you agree or disagree with the proposal to introduce a new duty on contracting parties to take all reasonable steps to uphold pay equality in contractual arrangements?

We disagree.

Question 65: Please explain your answer.

As recognised by the consultation, this is a complex topic. As the law currently stands, it is not possible to bring an equal pay claim in the absence of, at least, a single source responsible for the pay inequality and able to restore pay equality. In the context of outsourcing, the CJEU has held that there is no single source for the purposes of Article 141 enabling a claimant employed by an outsourced agency to compare herself with an employee of the principal: Allonby v Accrington and Rossendale College [2004] ICR 1328. This is so even where the level of pay is influenced by the amount paid by the principal to the outsourced agency. In the context of race discrimination, the Court of Appeal has held that a complaint by an outsourced worker against a principal about the terms of their employment contract does not fall within the scope of s.41 Equality Act 2010: Boohene v Royal Parks Ltd [2024] ICR 1036.

We consider, however, that the proposed standalone duty to take all reasonable steps to achieve pay equality is, at least as set out in the consultation, problematic for a number of reasons.

First, it is not clear to us what the consultation means when it talks about *'promoting'* pay equality in *'contractual arrangements'*. It is said that it is not intended as a *'rigid or automatic requirement to equalise wages across different employers'*. If this is not what is intended, however, it is unclear what the proposed duty is intended to achieve absent changes to the Equality Act 2010. Voluntary steps to seek to achieve greater equality between an in-house and outsourced workforce are already taken by some organisations e.g. requiring outsourcing companies to commit to paying the London

Living Wage. There is, however, no clear legal route for bringing a claim for pay equality across different employers, and if the duty to promote pay equality is limited to, for example, providing pay and demographic data (the example given in the consultation document), it is unclear how this will result in greater 'pay equality' on the part of organisations who would not otherwise choose to look to the impact of their pay arrangements on specific protected characteristics. If it is envisaged that the duty will result in contractual arrangements being changed, we consider that much greater consideration will need to be given to how that is to be achieved.

Secondly, the consultation appears to recognise that parties to the outsourced arrangements may have no influence on the employment terms of an outsourced workforce. This may particularly be the case where there have been multiple generations of contracting out, or where there are intermediaries involved in the contractual chain. Further, there is a difference between 'influence' in the sense of having a power to require specific terms and conditions to be provided to workers and 'influence' in the economic sense identified in Allonby. The consultation is silent on what influence means. Further, the consultation proposes that the duty is one on all parties in the outsourcing chain: this raises the prospect that intermediaries and outsourcing companies are under a duty to take all reasonable steps to uphold/promote pay equality in relation to the principal's contractual arrangements of which they may have no knowledge. This brings us back to the issue of what the duty is intending to achieve and its scope. If a party is under a duty to promote pay equality but has no ability to influence the relevant terms, the duty risks either being too onerous (because it cannot be complied with) or, more likely, meaningless (because there are no steps which will promote pay equality).

Thirdly, the consultation envisages that pay equality means no less favourable terms for doing equal work. This raises a whole host of issues, including (a) the different treatment of the need for an actual comparator as between the different protected characteristics; (b) how to determine what amounts to 'equal work' when the

claimants and comparators are not in the same employment (and the outsourced employer may have no idea what work is done in-house); and (c) what should happen if the outsourced workforce have mobility clauses which enable them to be moved between different contracts and therefore they are not always working 'for' the same principal with which equality is being assumed.

Fourthly, the impact of (a) TUPE; and (b) s.104I Employment Rights Act 1996 is not addressed by the consultation. Equality of terms does not necessarily mean levelling up. A duty to promote equality, if compliance results in levelling down existing terms and conditions, risks conflict with the prohibition on harmonising terms and conditions by reason of the transfer in reg 4(4) TUPE Regulations 2006. Further, an employer who seeks to vary the terms and conditions of its existing workforce on the basis that it cannot afford to fund levelling up may attract liability under s.104I ERA 1996 in seeking to comply with this proposed new duty, depending on its scope.

Fifthly, we are unsure why the consultation proposes that this duty cannot be enforced by individuals and why compensation would not be payable for breach of the duty. It is also unclear whether breach of the duty would require actual pay inequality to occur - theoretically, a party could fail to take all reasonable steps and yet pay equality might be achieved by the actions of another party in the outsourcing chain, or by happenstance. If the intention is to remedy the lacuna identified by the case law, we do not understand the rationale for excluding contracted out workers from enforcing a right which is intended to confer a benefit on them and from the remedies that would ordinarily flow from a successful claim.

We recognise that the scope of proposed legislative intervention, and specifically whether the intention is to create a right to pay equality in respect of contracting out arrangements is a matter for the Government, but it may wish to look more closely at the existing provisions of the Equality Act 2010 and how these might be modified to achieve that aim rather than creating a freestanding duty of this kind.

Question 66: Do you agree or disagree with the Equal Pay Regulatory and Enforcement Unit should be able to enforce this duty?

We disagree.

Question 67: Please explain your answer.

We disagree with the proposal.

Question 68: Do you agree or disagree that the duty to take all reasonable steps should apply to all parties involved in the outsourcing arrangement? This would mean that the principal(s), outsourced service provider(s) and intermediaries in more complex chains could be liable for a breach.

We disagree.

Question 69: Please explain your answer.

We disagree with the proposal.

Question 70: What specific steps do you think would be reasonable and proportionate for either a small, medium or large employer to take to fulfil this duty?

We disagree with the proposal. Further, the proposal to set out which steps constitute compliance in the interests of certainty conflicts with the intention that this should be a *'flexible, case-specific framework where any reasonable steps are scaled to an individual employer's circumstances'*. It is not clear that the size of employer would be an appropriate metric by which to measure the reasonableness of a possible step. It is in any event likely to prove very difficult to determine what is a 'small', 'medium' or 'large' employer and to specify steps that must be taken by different employers based on their size alone. Specifying such steps in legislation would be out of kilter with other areas of discrimination law, for instance the duty to take all reasonable steps to prevent sexual harassment, where it is for the ET to determine, based on all the circumstances, whether the employer has met that duty. It is also

unclear who is the 'employer' for these purposes, and what happens if different parties in the chain are differently sized. Finally, we note that it is unclear how the example step of *'requesting pay and demographic data'* will have any impact on achieving pay equality in the absence of any changes to the Equality Act 2010, as interpreted by the courts, does not permit cross-employer comparison for existing claims. We repeat the point above that the proposed duty may be regarded as too onerous or, alternatively, ineffective, without clarity about what any proposed steps are intended to achieve.

Question 71: Do you agree or disagree that contracting parties should not be required to pay compensation but should be required to take reasonable steps to ensure ongoing pay equality in their contractual arrangements?

We disagree.

Question 72: What remedies do you believe should be available to a claimant when a contracting party is found to be in breach of this duty? Please provide details on the types of remedies or corrective actions you would like to see implemented.

We disagree with the proposal.

The consultation proposes that this duty could not be enforced by individuals. It is therefore unclear what this question means by '*a claimant*'.

As stated above, if the intention is to remedy the lacuna identified by the case law, we do not understand the rationale for excluding contracted out workers from enforcing a right which is intended to confer a benefit on them and from accessing the remedies that would ordinarily flow from a successful claim.

Geographical scope

Question 82: Do you agree or disagree that the proposed measures should retain the same geographical scope as the discrimination and equal pay provisions of the Equality Act 2010 (applying to England, Wales, and Scotland)?

We agree.

Author: the Law Reform Committee and the Equality, Diversity and Social Mobility Committee

Contact

Eleanore Lamarque, Policy Manager, Regulation, Law Reform & Ethics

elamarque@barcouncil.org.uk