

AN IER RESPONSE

Response to a consultation document from
the Department for Business, Energy
& Industrial Strategy
and
the Race Disparity Unit
into
Ethnicity Pay Reporting by Employers

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Redressing the Race Pay Gap

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Executive Summary

This submission draws on best practice in comparable jurisdictions (Australia, Canada, South Africa, Northern Ireland and New Zealand) and the in-depth knowledge and expertise of the authors in relation to UK and EU equal pay and labour law. The following are our chief recommendations:

Q2 (Pay Information): Information on pay should be broken down by:

- i. **occupational group** (to render transparent the extent to which job segregation is contributing to pay disparities);
- ii. different **ethnic groups and gender** (to reflect the differences in outcomes between different ethnic groups and between men and women within such groups);
- iii. **basic pay and take-home pay** (reflecting differential access to bonuses, overtime pay and other extras) and
- iv. **whether employees work full-time or part-time, permanent or temporary** (reflecting pay gaps due to employment status).

These all follow best practice in other jurisdictions and have been shown to allow meaningful action to be taken without placing undue burdens on business.

Q3 (Contextual Information): The following supporting and contextual data will help ensure ethnicity reporting provides a true and fair picture:

- i. data on **selection** and **promotion**;
- ii. **intersectional** data, including data on gender, levels of educational attainment, disability, age and location.

Q4 (Action plans): We strongly suggest that employers should be required to publish an action plan for addressing identified disparities. This follows best practice in South Africa, Quebec, Australia and Northern Ireland.

Q8 (Classifications of ethnicity) We recommend breaking down ethnicity to reflect known facts about differential outcomes, and also including a category of white minority groups, such as those from Eastern Europe. We suggest that self-identification is the best and most effective means, as used in New Zealand.

Q9 (Size of Employer): We recommend that the Northern Ireland example be followed, which requires employers with **11 or more** employees working 16 hours or more per week to report on the composition of their workforce. We also suggest that the South African example of providing an alternative of considering **annual turnover** be implemented. This makes it possible to include employers with a high turnover but a small workforce, who are particularly important to cover. We further recommend that consideration be given to permitting smaller employers to **provide a less detailed** analysis than larger organizations. This is permitted in Northern Ireland, Quebec and Australia.

Q1: What are the Main Benefits for Employers in Reporting Their Ethnicity Pay Information?

Employers have a legal obligation under the Equality Act 2010 not to discriminate directly or indirectly on grounds of race in relation to pay.¹ This obligation exists even if no individual complaint has been brought. Mandatory reporting of ethnicity pay information is an important element in facilitating compliance by employers with their legal obligation. It helps employers, state authorities and employees in identifying payment differentials and barriers to equal pay at each occupation level in the workplace. This will enable employers and state authorities to progressively take steps to reduce these differentials.

This is a more effective and efficient strategy than responding to individual complaints, which are complex and time consuming for employers, and intimidating and stressful for workers. It also recognizes that unequal pay is a systemic problem and facilitates a systemic solution.

¹ Equality Act 2010, section 39(1) and (2).

Public authorities have the further duty under the Public Sector Equality Duty (PSED) to have due regard to the need to eliminate discrimination and promote equality of opportunity on grounds of race and ethnicity.² In particular, public authorities should have due regard to the need to remove or minimise disadvantages on grounds of race. Mandatory reporting of ethnicity pay information will assist public authorities to demonstrate that they have had due regard to the need to eliminate pay discrimination. This also applies to employers who are not public authorities, but who exercise public functions, in relation to those public functions.³

Employers who can be seen publicly to recognise the existence of race pay gaps and can demonstrate their commitment to reducing the race pay gap will be well regarded in society, attract a wider range of workers with good qualifications, and will function as an important model for other employers. Talented ethnic minority workers will be able to select the best employers.

At the same time, by making reporting mandatory, best practice employers are not exposed to undercutting from employers with poorer practices.

It is worth remembering that this issue should not only be seen through the lens of benefits to business. There are other reasons – including benefits to employees and the broader economy – which must be considered.

Q2: What Type of Ethnicity Pay Information Should Be Reported That Would Not Place Undue Burdens on Business But Allow for Meaningful Action to be Taken?

We recommend that pay information include information on pay broken down by:

- i. **occupational group;**
- ii. **different ethnic groups and gender;**
- iii. **basic pay and take-home pay;**
- iv. **if employees work full-time or part-time, permanent or temporary.**
 - (i) *Occupational group*

As the consultation paper points out, occupational segregation is an important factor contributing to ethnic pay disparities in the UK. People from ethnic minorities, particularly people of Pakistani and Bangladeshi origin, are more likely to work in low-skilled, low-paid jobs. It is therefore important to report pay information both in relation to the workforce as a whole, and broken down **by occupational group**. This would render transparent the extent to which job segregation is contributing to pay disparities.

² Equality Act 2010, section 149.

³ Equality Act 2010, section 149(2).

This approach has successfully been used in **South Africa**. Under the Employment Equity Act, (EEA), designated employers must report on the pay /remuneration and benefits received by employees **in each occupational level** of their workforce.⁴

Similarly, (albeit in relation to the gender pay gap) the **Australian Workplace Gender Equality Act 2012** (WGEA), which requires annual reporting by relevant non-government employers, including in relation to remuneration policies,⁵ specifies that data should be disaggregated to reflect differences in the full-time total remuneration **comparing different levels of management and non-manager levels**.

An analogous approach, which has been successfully used in Quebec in Canada to reveal the extent of job segregation (again in relation to gender), has been to require relevant employers to report on 'difference in compensation due to systemic gender discrimination suffered by persons who occupy positions **in predominantly female job classes**.'⁶

(ii) *Different Ethnic Groups*

The consultation paper points out that there are important differences between different ethnic groups. While people from Pakistani and Bangladeshi backgrounds tend to work disproportionately in the three lowest-skilled occupation groups, particularly in caring, leisure and other low paid service occupations, those from an Indian ethnic group are most likely to work in the highest skilled occupations. Indeed, pay statistics indicate that Indian men on average earn better than all other ethnic groups. **It is therefore important to disaggregate the data reported by ethnic group.**

This has also been done in other relevant jurisdictions. The South African Employment Equity Act requires disaggregation of the data to reflect the differences in social and economic status among racial and ethnic groups. In South Africa, the racially disadvantaged group 'Black', includes Indian, coloured, African and Chinese people.⁷ Each group pay differential should be measured separately. The Act also requires a breakdown by gender of each of these groups.

Northern Ireland legislation requires relevant employers to report on the composition of their workforce as per the **communities represented (Roman Catholic and Protestant)** and the **sex** of employees.⁸

We also submit that it would be wrong to exclude **white minority groups** from the reporting obligation. The McGregor-Smith Review that over half of employees from ethnic minority groups (including white ethnic minorities) believe they will have to leave their current organization to progress their career.⁹ (See further below)

⁴ Employment Equity Act, 55 of 1998, Section 27.

⁵ *Workplace Gender Equality (Matters in relation to Gender Equality Indicators) Instrument 2013 (No. 1) Sch 1, s 3.*

⁶ (Quebec) Pay Equity Act, Section 1.

⁷ Employment Equity Act, Section 1.

⁸ Fair Employment and Treatment Order 1998, art 55.

⁹ Consultation p.13

(iii) *Basic Pay and Take-Home Pay*

The consultation paper reiterates the finding from Baroness McGregor Smith's survey that more people from ethnic minorities than white counterparts would like to work more hours than they currently do. It is well known from the gender field that an important factor in creating a pay gap is the extent to which workers have access to extra payments above their basic rate. It is therefore recommended that data should be presented on both basic pay and take-home pay. This would include bonuses and overtime payments, such as under the **Australian WGEA**, where employers are required to provide information as to the disparity of the **base salary** as well as total remuneration **including bonuses and overtime payments**.

(iv) *Work Full-Time or Part Time, Permanent or Temporary*

(iv) It is important to disaggregate pay data according to whether employees **work full-time or part-time, and are permanent or temporary**. This too is required by the Australian WGEA, which requires that employers, in addition to information on remuneration, to report on whether employees permanent full-time, permanent part-time or casual.¹⁰ Reporting on casual workers, including those ostensibly regarded as self-employed, is crucial to give a full picture of ethnic pay disparities. The McGregor-Smith review reported that there is clear evidence of differences in working hours and levels of self-employment among BME individuals.¹¹

Q3: What Supporting or Contextual Data (if any) Should be Disclosed to Help Ensure Ethnicity Reporting Provides a True and Fair Picture?

It is recommended that the following supporting and contextual data will help ensure ethnicity reporting provides a true and fair picture:

- i. data on **selection** and **promotion**;
- ii. **intersectional** data, including data on gender, levels of educational attainment, disability, age and location.

(i) *Selection and Promotion*

It is clear from the consultation paper and the McGregor-Smith Review that there is a wealth of evidence suggesting that people from ethnic minorities progress struggle to achieve the same progression opportunities as their white counterparts and are under-represented in higher grades.¹² Over half believe that they will have to leave their current organization to progress their career.¹³ Therefore, it is recommended that data reported by employers should include information on job applicants, successful candidates, persons promoted and persons leaving the organization. However, in collecting this data, employers should assure

¹⁰ *Workplace Gender Equality (Matters in relation to Gender Equality Indicators) Instrument 2013 (No. 1) Sch 1, s 1.*

¹¹ McGregor-Smith p.44

¹² McGregor-Smith p.50- 2

¹³ Consultation p. 13; see also McGregor-Smith p.51

applicants that this information will be redacted at the time of decision-making and only used for monitoring purposes. This is crucial to avoid the unintentional or intentional bias pointed out in the McGregor-Smith review.¹⁴

This would follow the example of the **Northern Ireland** legislation, which requires employers to report, inter alia, on the composition of job applicants, composition of successful candidates, composition of persons promoted and the composition of persons leaving the organisation.¹⁵ Similarly, the **Australian** WGEA is supported by regulations which require employers to provide further information on the gender composition of managerial and non-managerial positions, as well as the composition of recruitment applications, applicants' interviews, number and proportion of employees awarded promotions and the number and proportion of employees who resigned.¹⁶

(ii) *Intersectional Data*

There is clear evidence that ethnic groups are not monolithic and that their pay depends not just on ethnicity, but also on their gender, location, educational status, whether they have a disability and other protected characteristics.

In **Northern Ireland**, although not a legal requirement, the Equality Commission recommends monitoring the composition of workforce by age, disability, race, marital status, civil partnership status, sexual orientation, and those with and without dependents, as a matter of good practice and to ensure a clear picture of what is happening in organisations.¹⁷

Q4: Should an Employer that Identifies Disparities in their Ethnicity Pay in their Workforce Be Required to Publish an Action Plan For Addressing These Disparities?

We strongly suggest that employers should be required to publish an action plan for addressing identified disparities.

This follows best practice in several leading jurisdictions.

In South Africa, section 20(1) of the EEA places an obligation on employers to prepare and implement an employment equity plan towards the achievement of employment equity. Where there are disproportionate income differentials or unfair discrimination by virtue of a difference in terms and conditions of employment, **employers are obliged to take steps to progressively reduce these differentials.**

This plan must include information on equal pay and remuneration and it must state the objectives to be achieved for each year of the plan and it must provide a timetable within

¹⁴ McGregor-Smith p.22

¹⁵ See, Equality Commission for Northern Ireland, Article 55 Review: Report Structure for Small Organisations

<https://www.equalityni.org/ECNI/media/ECNI/Publications/Employers%20and%20Service%20Providers/Monitoring%20and%20review/Article55_Report_Structure-Small_Employers.pdf> accessed 12 December 2018; Equality Commission for Northern Ireland, Article 55 Review: Report Structure <https://www.equalityni.org/ECNI/media/ECNI/Publications/Employers%20and%20Service%20Providers/Monitoring%20and%20review/Article55_Report_Structure-Large_employers.pdf> accessed 12 December 2018.

¹⁶ *ibid.*

¹⁷ *ibid.*

which this is to be achieved as well as the strategies intended to achieve the goals.¹⁸ This plan must be submitted to the department of labour for compliance review and it must be updated annually.¹⁹

Under the **Quebec** Pay Equity Act the employer must make the necessary adjustment 'to eliminate difference in compensation.'²⁰

In **Australia**, while reporting is mandatory for large employers, the regulatory approach adopted in WGEA does not specifically require employers to take any further actions to identify discrepancies or resolve them. Nevertheless, there are minimum standards related to each of the indicators, including remuneration,²¹ determined by the relevant minister.²² An employer could be found to have failed to comply on the basis of failure to improve against one of the standards set.²³ Moreover, utilising the data obtained, the Workplace Gender Equality Agency provides aggregated national public benchmark data by industry and provides confidential Competitor Analysis Benchmark Reports to employers. Where an employer fails to provide correct information, or fails to meet minimum standards, the Agency can name them as a non-compliant employer.²⁴

In **Northern Ireland**, when carrying out a review of the composition of their workforce as per Article 55 of the Fair Employment and Treatment Order 1998, organisations must consider whether it is practical to set goals and timetables for the progress towards fair participation. If it is practical to set such goals and timetables, organisations are bound to do so.

Organisations may undertake affirmative action measures within the law to bring about a change in the workforce to broadly reflect the composition of the population from which it is drawn. The types of measures that may be suitable depend on the problems identified by organisations through their Article 55 review. The Equality Commission for Northern Ireland provides extensive support in drawing up suitable affirmative action measures.

Q6. What Do You Think are the Most Effective Approaches for Employers to Improve Employee Self-Reporting or Declaration Rates?

As in South Africa, in the context of drafting employment plans, this should also be an opportunity to engage with employees, trade unions and state authorities in identifying ways in which all these stakeholders can and should work together to eradicate inequalities in pay. For example, the employment equity plan in South Africa is drafted after consultation with designated employers who have an obligation to take reasonable steps to consult and reach agreement on the preparation and implementation of their plan. The consultation and engagement must be undertaken with a representative trade union or a representative appointed by the employees.²⁵ The representative must represent the interests of employees at all occupational levels and categories in the workplace both from designated and non-designated groups.²⁶ In involving the workforce in the drafting of the plan,

¹⁸ S 20 (1), EEA.

¹⁹ S 21, EEA.

²⁰ Section 68.

²¹ *Workplace Gender Equality (Minimum Standards) Instrument 2014.*

²² *Workplace Gender Equality (Minimum Standards) Instrument 2014.*

²³ *Workplace Gender Equality Act 2012* ss3 and 13.

²⁴ *Workplace Gender Equality Act 2012* s 19A and B.

²⁵ S 16(1) EEA.

²⁶ S 16(2) EEA.

employers get better insight into the specific causes of pay/remuneration inequalities in their workplace and can target these barriers more effectively.

Q8. For a Consistent Approach to Ethnicity Pay Reporting Across Companies, Should a Standardised Approach to Classifications of Ethnicity Be Used? What Would Be The Costs To Your Organisation?

We suggest adopting the ethnic group classifications used in the 2011 Census, with extra information reflecting the differences have been shown to affect outcome (e.g. between employees of Indian, Bangladeshi, Pakistani, African and Caribbean origin).

However, we suggest that within the category of 'white', there should be provision for a fourth category, (apart from the 'English/Welsh/Scottish/Northern Irish/British', 'Irish' and 'Gypsy or Irish Traveller' categories), for individuals from vulnerable national backgrounds. This could include, for instance, white persons from Eastern European national backgrounds. We suggest retaining the last category as 'others' within the category of 'white'.

Employees should self-identify as to the category they fall into, following the New Zealand system.

We further suggest that a standardized format be used to allow comparison based on a pro-forma template.

This follows the example from **Australia**, where information on the gender composition of the workforce is presented in a standardised format which makes industry specific and cross-industry comparisons possible. Utilising the data obtained, the Workplace Gender Equality Agency provides aggregated national public benchmark data by industry and provides confidential Competitor Analysis Benchmark Reports to employers and has a mandate to pursue action against an employer found to have failed to comply with minimum standards.²⁷ A comprehensive guide is produced every year which explains and clarifies the reporting requirements.²⁸ There is also a pro-forma template for businesses to use to ensure that their reports are compliant.

Recent case-law from **New Zealand** shows the importance of compiling data which permit a macro view across industries. The case clarifying this approach, *Terranova*, examined the pay of people in the care sector. It noted that 92% of those working in the care sector in New Zealand are women. It was observed that pay seemed to be artificially depressed because of this predominance of women. Employers were encouraged to consider "what men would be paid to do the same work abstracting from skills, responsibility, conditions and degrees of effort as well as from any systemic undervaluation of the work derived from current or historical or structural gender discrimination."²⁹

A different alternative is used in **South Africa**. The EEA does not provide a single method of comparing pay /remuneration. However, based on the Code of Good Practice on Equal Pay/

²⁷ Workplace Gender Equality Act 2012 s 19A and B.

²⁸ See for example the Workplace Gender Equality Agency, *Reference Guide 2018: Guide to Reporting Under the Workplace Gender Equality Act 2012*: <https://www.wgea.gov.au/sites/default/files/2018-reporting-reference-guide.pdf>. (There is additionally a 'quick guide').

²⁹ *ibid* at [118].

Remuneration For Work Of Equal Value, employers should: 'elect a method of comparing pay /remuneration, both in money and kind...: this can be done by using either the average or the median earning of employees in the relevant jobs as the basis for pay /remuneration comparisons or by using another method that **will compare pay /remuneration in a fair and rational manner**'³⁰ Thus, whatever method is chosen **it must be fair and rational.**

So far as **costs** go, we point out that in all the countries we have reviewed, these reporting obligations have been in place and costs have been absorbed by employers. This is because the costs of leaving the ethnic pay gap unaddressed are much larger, for the worker, the employer, the State and society more generally.

Q9. What Size of Employer (or Employee Threshold) Should Be Within Scope for Mandatory Ethnicity Pay Reporting?

We recommend that the Northern Ireland example be followed, which requires employers with **11 or more** employees working 16 hours or more per week to report on the composition of their workforce. We also suggest that the South African example of providing an alternative of considering **annual turnover** be implemented. This makes it possible to include employers with a high turnover but a small workforce, who are particularly important to cover. Employers that are small in employee size, but large in relation to their revenue will be able to bear the burden to comply with this obligation.

At the same time, we suggest that consideration be given to permitting smaller employers to **provide a less detailed** analysis than larger organizations. This is permitted in Northern Ireland, Quebec and Australia. For smaller employers, there should also be the option of 'burden sharing' as in the Quebec legislation, which permits a group of employers to be recognised as a single workplace for the purposes of the Act.³¹

Annual Turnover: In South Africa, section 1 of the EEA defines designated employers as persons who employ 50 or more employees; **or** who have an annual turnover of a small business in terms of Schedule 4 to the EEA; as well as municipalities and organs of state. Thus, both the size of the employer (in accordance with turnover) as well as the size of the employee workforce is used in determining the imposition of the obligation.

Sliding scale: In **Northern Ireland**, the obligation to conduct a review as per Article 55 of the Fair Employment and Treatment Order 1998 is different for small organisations, with 50 or less employees, and for large organisations, with more than 50 employees. Small organisations do not need to conduct as detailed an analysis as larger organisations.³²

Similarly, under the Quebec Pay Equity Act, there is a sliding scale of obligations under the Act depending on the size of the employer. Regardless of the number of employees, every

³⁰ The Code of Good Practice on Equal Pay/ Remuneration For Work Of Equal Value, Gazette No. 38837 (1 June 2015) para 8.1.6.

³¹ Section 12.1

³² Equality Commission for Northern Ireland, Article 55 Review: Report Structure for Small Organisations

<https://www.equalityni.org/ECNI/media/ECNI/Publications/Employers%20and%20Service%20Providers/Monitoring%20and%20review/Article55_Report_Structure-Small_Employers.pdf> accessed 12

December 2018; Equality Commission for Northern Ireland, Article 55 Review: Report Structure

<https://www.equalityni.org/ECNI/media/ECNI/Publications/Employers%20and%20Service%20Providers/Monitoring%20and%20review/Article55_Report_Structure-Large_employers.pdf> accessed 12

December 2018.

employer must submit a report on pay equity made after consultation with the Pay Equity Commission.³³

If there are between 10 and 49 employees, the employer must determine and make adjustments to 'afford the same remuneration, for work of equal value.'³⁴ The employer must post in an accessible manner, for 60 days, the following info:

- i. A summary of the pay equity process
- ii. List of predominantly female job classes
- iii. List of predominantly male job classes used as comparators
- iv. For each female job class the amount of compensation adjustments to be paid;
- v. terms of payment; or
- vi. a notice saying no adjustments requirement³⁵

If there are between 50 and 99 employees, the employer must additionally create a **pay equity plan**.³⁶ The Act provides semi-structured guidance on how to complete a pay equity plan. Section 50 requires that the plan include:

- i. the identification of predominantly female and male job classes
- ii. the method for comparison and valuation
- iii. conditions of payment of the adjustments in compensation³⁷
- iv. In identifying comparable female and male job classes, the employer should assess the similarity of duties, qualification, rate or scale of compensation.³⁸

If there are 100 or more employees, the employer must create a pay equity plan *and* establish a pay equity committee that includes representatives of the employees. There is a positive obligation on the employer to collect and provide the information necessary to create a pay equity plan³⁹ and training on pay equity for the committee members.⁴⁰

Q11. What Support Measures Do You Think Would Be Useful for Employers?

The Ministry should provide detailed guidelines for employers to follow in the process of collecting and collating information for the ethnicity pay report. It could also provide training workshops for human resources managers or an online service where they can ask questions and get clarity on what is required in the report.

Based on the reports that have already been drafted by bodies such as the NHS, the Ministry could create opportunities for information sharing and discussion about the problems that arise in drafting such criteria. This could be between different government agencies and business that have voluntarily reported on ethnicity pay and those that have yet to report.

³³ Section 4.

³⁴ Section 34.

³⁵ Section 35.

³⁶ Section 31.

³⁷ Section 50.

³⁸ Section 53.

³⁹ Section 29.

⁴⁰ Section 26.

In **South Africa**, there is also a system of labour inspectors who visit employers to check for compliance with labour laws, including the Employment Equity Act. They also provide guidance for compliance with employment equity obligations.

In the **Australian** context, a comprehensive guide is produced every year which explains and clarifies the reporting requirements.⁴¹ There is also a pro-forma template for businesses to use to ensure that their reports are compliant.

The **Northern Ireland** Equality Commission provides several support measures to enable employers to fulfil their obligations with respect to equality and anti-discrimination law. The Equality Commission has developed an extensive employer training programme, and conducts regular training workshops, tailored to the needs of different sectors and types of organisations.⁴² These are free of cost, conducted in multiple locations across Northern Ireland, or online. It also provides online resources, and individualised help to employers and organisations.⁴³ For instance, the Equality Commission conducts monthly workshops on how to comply with the legislative duty to collate and retain monitoring information with respect to the composition of their staff, for inclusion in the annual monitoring return.

Further, the Equality Commission facilitates a number of Employers' Equality Networks designed to support groups of employers and service providers in the promotion of equality of opportunity.⁴⁴ Employers' Equality Networks for employers in the retail, STEM (science, technology, engineering and math) and voluntary sectors have been developed.

⁴¹ See for example the Workplace Gender Equality Agency, *Reference Guide 2018: Guide to Reporting Under the Workplace Gender Equality Act 2012*: <https://www.wgea.gov.au/sites/default/files/2018-reporting-reference-guide.pdf>. (There is additionally a 'quick guide'.

⁴² <<https://www.equalityni.org/training>> accessed 12 December 2018.

⁴³ *ibid.*

⁴⁴ <<https://www.equalityni.org/EmployerNetworks>> accessed 12 December 2018.