



Response to the Equality and Human Rights Commission consultation enforcing the gender pay gap regulations

1. Answers to multiple choice questions

1. The policy is clear about the enforcement action that the Commission will take.
 - Agree
2. The policy is clear about when enforcement action will be taken.
 - Agree
3. The Commission is taking sufficient steps to encourage compliance with the gender pay gap regulations.
 - Neither agree not disagree
4. Taking enforcement action against non-compliant employers will encourage more employers to comply with the gender pay gap regulations.
 - Agree
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 The Commission will prioritise enforcement action against those who do not publish any information in the first year.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
6. If a stages approach to enforcement is necessary, the Commission will contact tranches of employers randomly selected from each industry. This is a reasonable approach.
 - Disagree

7. A non-compliant employer will be given 42 days to comply with the gender pay gap regulations following receipt of a first letter from the Commission. This is sufficient time to comply.
 - Agree
8. An employer will be given 14 days to make representations on the draft terms of reference in a section 20 investigation. This is sufficient time to make representations.
 - Agree
9. The Commission will provide the final terms of reference within 14 days of the receiving the employer's written representations on the draft terms. This is a reasonable timeframe.
 - Agree
10. The Commission will provide a draft section 20 investigation report within 28 days of receiving evidence requested by the Commission from the employer. This is a reasonable timeframe.
 - Agree
11. An employer will be given 28 days to make representations on a draft investigation report. This is sufficient time to make representations.
 - Agree
12. An employer will be given 14 days to respond to a first offer of a section 23 agreement. This is sufficient time to respond to a first offer.
 - Agree
13. The Commission has taken the right approach to escalating enforcement action.
 - Agree
14. The policy is flexible enough to take account of the specific circumstances of individual employers.
 - Agree

2. **Further comment**

Close the Gap is Scotland's expert on the gender pay gap. We have been working with employers and policymakers to influence and enable action that will address the causes of the pay gap for 17 years.

In general, we agree with the Commission's proposed approach to enforcing the gender pay gap regulations. However, would note the following specific comments on the proposed range of activities to encourage compliance and the means of enforcement.

a) Range of activities to encourage compliance

On whether the Commission is taking sufficient steps to encourage compliance with the gender pay gap regulations we have answered neither agree nor disagree. Although the type of activities set out in the policy seem appropriate, there is no information on the design and implementation of these activities. Without this information it is difficult to assess whether these steps are sufficient and will improve compliance. In Scotland specifically, we are not aware of any employer-focused education and awareness-raising that has been undertaken or that is planned.

Signposting employers to sources of information is identified as a key component of Commission activity to ensure high levels of compliance, and we would welcome this. We would suggest that the Commission include our free *Close Your Pay Gap* online tool (www.closeyourpaygap.org.uk), which was developed specifically to support employers to calculate and report their gender pay gap. Critically it also enables employers to identify the causes, and the action that should be taken to narrow their pay gap. The tool focuses on five key priority areas which align with the causes of the gender pay gap and can be used by employers in a variety of ways including:

- To calculate a company's gender pay gap information;
- To identify the priority areas for the company, by using their data, and answering a short series of questions about their employment practice; and
- To generate tailored guidance and an action plan that targets the causes of the company's pay gap.

There is also a range of guidance and briefings which can be downloaded. There is no other tool or resource in the UK or elsewhere which provides such

comprehensive information and support to employers in reporting their gender pay gap.

We welcome that the Commission's proposal to monitor compliance will include checking the accuracy of information published. Close the Gap has undertaken three biennial assessments of public bodies gender pay gap reporting under the Scottish Specific Duties, and inaccuracy of information has presented as a significant problem. In 2015, only 50% of the public bodies included in our assessment had published an adequate pay gap figure, in that it met the requirements of the duty. 15% of public bodies published a figure that was considered inadequate because it was either calculated incorrectly, it was not a top line figure, or it excluded some employees. 35% did not published a pay gap at all.¹

An analysis by The Financial Times in December 2017 found that one in twenty companies that had reported by that time had published data that was statistically improbable and therefore almost certainly inaccurate². It is therefore extremely important that enforcement activity address the misreporting of gender pay gap information by employers, whether wilful or not.

The devolution settlement means that Scottish employers, and organisations working to advance equality, such as Close the Gap, operate in a different policy context and also, in some regards, legal context. Close the Gap operates only in Scotland, and our work is focused on supporting employers based in Scotland. At present, the UK Government's online viewing service for pay gap reporting does not enable the user to search or view reporting by region i.e. it does not enable the viewing of Scottish employer reporting information. This is a significant flaw which creates challenges in assessing the compliance and quality of reporting by employers in Scotland. It is therefore critical that the Commission takes cognisance of this when publicising compliance rates. Compliance rates, and statistics throughout the year to demonstrate the effectiveness of enforcement work, disaggregated by UK region would be invaluable to work by Close the Gap, and also the Commission in Scotland, on supporting compliance with the regulations. Similarly the results of the

¹ Close the Gap (2015) *Making Progress? Assessing employer compliance with the public sector equality duty* <https://www.closesthegap.org.uk/content/resources/Making-Progress---An-assessment-of-employers-compliance-with-PSED-November-2015.pdf>

² <https://www.ft.com/content/ad74ba76-d9cb-11e7-a039-c64b1c09b482>

Commission's enforcement work should also be published by region, elucidating enforcement activity and results in Scotland.

The Commission's enforcement work creates an important opportunity to collect Scottish-specific data on employer compliance rates, and responses to enforcement action.

Means of enforcement

We agree that it is reasonable the enforcement work in the first year focuses on employers who do not publish the information required by the regulations.

The Commission in Scotland took a similar approach of supporting the poorest performing public bodies as part of the Scottish Specific Duties project on equality outcomes. While this approach may improve the compliance of those who have not published, it does not address the employers who have published information that is very poor quality. In general, public body performance under the Specific Duties has been very poor, and performance has deteriorated since their introduction in 2013. In the medium and longer terms, enforcement work which focuses on the poorest performers does not address overall poor quality of pay gap reporting.

We support the proposal to take enforcement action against employers for publication of inaccurate data. In Close the Gap's 17 years' of working with employers, it is very common for employers to misunderstand the gender pay gap and/or misrepresent the situation in their own organisations by publishing misleading or inaccurate information. As mentioned above, an investigation by The Financial Times has already identified that some employers have published inaccurate gender pay gap information. It is critical that the Commission takes a strong approach to this employer practice.

Where a staged approach to enforcement is necessary, we agree that tranches of employers from each industry should be contacted. However, we do not agree that employers should be selected randomly. It would be more helpful to include a sample of different sized employers which would enhance the existing evidence on employer responses to gender pay gap reporting requirements. It is also essential that region be included in the sample, and specifically that a sample of employers from Scotland be included in each tranche in order that a Scottish-specific picture can be developed, which will inform interventions by specialist support organisations such as Close the Gap.