



Consultation reference: Ethnicity Pay reporting

Issued: 11 October 2018

Respond by: 11 January 2019 at 11:45 pm

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This is a response from the Discrimination Law Association to the government's consultation on ethnicity pay reporting.

The Discrimination Law Association ("DLA"), a registered charity, is a membership organisation established to promote good community relations by the advancement of education in the field of anti-discrimination law and practice. It achieves this by, among other things, the promotion and dissemination of advice and information, and the development and co-ordination of contacts between discrimination law practitioners and similar people and organisations in the UK and internationally. The DLA is concerned with achieving an understanding of the needs of victims of discrimination amongst lawyers, law-makers and others and of the necessity for a complainant-centred approach to anti-discrimination law and practice. With this in mind the DLA seeks to secure improvements in discrimination law and practice in the United Kingdom, Europe and at a wider international level.

The DLA is a national association with a wide and diverse membership. The membership currently consists of over 300 members. Membership is open to any lawyer, legal or advice worker or other person substantially engaged or interested in discrimination law, and to any organisation, firm, company or other body engaged or interested in discrimination law. The membership comprises, in the main, persons concerned with discrimination law from a complainant perspective.

Consultation questions

1 What are the main benefits for employers in reporting their ethnicity pay information?

Everyone talks about a commitment to racial equality.

A number of employer organisations are likely to have policies and brochures that seek to support and promote equal opportunities in the workplace. However, the detail behind the publicised good intentions and accolades are often opaque or non-existent. What is required is meaningful action.

Transparency about pay and progression in organisations is imperative if they are to deliver real progress.

We agree with Baroness McGregor – Smith CBE in her 2017 report, ‘Race in the workplace,’¹ that, “Until we know where we stand and how we are performing today, it is impossible to define and deliver real progress. No company’s commitment to diversity and inclusion can be taken seriously until it collects, scrutinises, and is transparent with its workforce data. This means being honest with themselves about where they are and where they need to get to as well as being honest with the people they employ.”

We are not aware of any organisations that have a truly diverse workforce from top to bottom.

We have seen the headlines that the potential benefit to the UK economy from full representation of BME individuals across the labour market, through improved participation and progression, is estimated to be £24 billion a year, which represents 1.3% of GDP.

Employers with diverse workforces perform better and are more profitable. They embrace and tap into the widest pool of talent.

A study on the effect of diversity on business outcomes was conducted by McKinsey and Company in 2015 which reported that (i) companies in the top quartile for ethnic diversity are 35% more likely to have financial returns above their respective national industry medians; and (ii) companies in the bottom quartile for both gender and ethnicity are statistically less likely to achieve above-average financial returns. Diversity is a competitive differentiator.²

The financial case is clear. A commercial imperative. But there is also a moral case. Organisations need to reflect the face of modern Britain.

By collating and publishing data, employers can stand back and properly reflect and make informed decisions about ethnicity pay gaps in their organisation. The exercise of introspection is likely to be a real wake up call. Good employers can showcase the business benefits of greater diversity. They can also set out aspirational targets and positive steps they are taking to improve pay and progression and market this successfully in their business portfolio when tendering for work, attracting new talent and customers.

We have seen with the gender pay gap reporting requirement that where employers are required to collect and publish data, they will take action. Legislation must be passed to make it a mandatory requirement for employers to collate and publish their workforce ethnicity pay data (see further analysis in the response to question 10).

2 What types of ethnicity pay information should be reported that would not place undue burdens on business but allow for meaningful action to be taken?

¹ www.gov.uk/government/publications/race-in-the-workplace-the-mcgregor-smith-review

² McKinsey (2015) ‘Why diversity matters’ available at: <http://www.mckinsey.com/business-functions/organisation/ourinsights/why-diversity-matters>

Please indicate from the list below and state the reasons for your answer?

- a) **One pay gap figure comparing average hourly earnings of ethnic minority employees as a percentage of white employees**
- b) **Several pay gap figures for different ethnic groups using standardised ethnicity classifications**
- c) **Ethnicity pay information by £20,000 pay band**
- d) **Ethnicity pay information by pay quartile**
- e) **All of the above**
- f) **Other**
- g) **Don't know**

We note that ethnicity pay information could be reported in different ways which have implications for how nuanced the consideration of data can be.

We recommend adopting (a) above, namely one pay gap figure comparing average hourly earnings of ethnic minority employees as a percentage of white employees. For the avoidance of doubt, any overtime and bonus payments should be excluded from this exercise.

This approach has the benefit of the gender pay gap methodology (with which large employers are already familiar).

It provides one headline figure which arguably is easier to communicate. We accept that this process involves rolling classifications of ethnic minority groups into one, losing the differentiation in outcomes for different groups. However, we are mindful that a more granular level of detail could result in figures not being reported due to risks of disclosure of individual personal information which would defeat the exercise.

Another approach would be to report ethnicity pay gap figures using the NHS model ³with 6 categories: Asian; Black; Mixed; White; Other and Unknown Ethnic Groups. This model is attractive as it is simple and goes a step further. The drawback is that variations of outcomes within the groups will not be highlighted.

At this stage, as a starting point, we consider that it is imperative for employers to introspect and start reporting data. The methodology and detail of ethnicity pay reporting should be reviewed after a 3 year period with discussion on whether there needs to be a breakdown in the reporting of different ethnic groups.

We note that Baroness McGregor Smith recommended publishing ethnicity data by a £20,000 pay band. Her argument was that this provided an at a glance view of an organisation's ethnic minority representation in its hierarchy. However, given that many

³<https://www.ethnicity-facts-figures.service.gov.uk/workforce-and-business/public-sector-pay/nhs-basic-pay/latest>

women experiencing the largest ethnic gender pay gaps are working in some of the lowest paid jobs⁴, we feel that this banding will overlook a significant number of relevant workers. It also overlooks the contextual factor that a significant proportion of people from ethnic minorities are concentrated in London where pay is comparatively higher for all jobs.

Also, the relevant comparison is between BME and white workers within the same employer.

If evidence shows that pay banding is the most effective method, then in the alternative, we would recommend a lower pay band, say around £10,000.

We hope that once the government has an opportunity to consider the evidence on ethnicity and pay, coupled with the evidence on pay following the gender pay reporting, the government will take steps to tackle multiple discrimination by implementing section 14 of the Equality Act 2010 to address dual discrimination; and consult on implementing a race equality clause similar to section 66 of the Equality Act 2010.

3 What supporting or contextual data (if any) should be disclosed to help ensure ethnicity reporting provides a true and fair picture?

To properly understand how geographical location in Britain impacts on pay, our view is that first, the data would need to be arranged to show regional variations.

Second, the age profile of those from ethnic minority groups would need to be compared with those from a white background to identify if age, which can be used as a proxy for labour market experience, assists in providing an explanation in any pay and progression differences.

Third, given that pay and progression tend to work together, length of service should also be a factor. This may assist in shining a much needed light on the question of whether ethnic minorities with greater length of service and/or experience are paid less than those with a white background in the same organisation with the same level of service and/or experience. There is no evidence to suggest that BME employees lack ambition or motivation in the workplace.

BME individuals struggle to achieve the same progression opportunities as their white counterparts. Research in 2015 by Business in the Community found that 1 in 8 of the working age population are from a BME background, yet only 1 in 16 top management positions are held by an ethnic minority person.⁵ BME individuals are underrepresented at managerial and senior positions in business.

With this material to hand, going forward, employers could then also examine (separately if need be) if and how ethnicity makes a difference to men and women's pay. It would provide a fuller picture of intersectional effects on pay differences.

⁴ Fawcett Society, Gender pay gap by ethnicity in Britain – Briefing March 2017

⁵ Business in the Community 2015: Report on Race at Work 2015

We recognise the need to keep the approach to reporting as simple as possible. However, this additional information could help employers understand the disparities and more importantly, provide a context for change and an impetus to have discussions about the pay of their workforce.

4 Should an employer that identifies disparities in their ethnicity pay in their workforce be required to publish an action plan for addressing these disparities?

Although not mandatory, under the gender pay gap reporting, employers were strongly encouraged to publish a narrative to explain their results.

Our view is that if ethnicity pay reporting is to drive any meaningful change, then it should be a mandatory requirement for employers to provide a narrative explaining the results and an action plan that sets out what they intend to do to close the pay gap.

However, just drafting and publishing reports is not enough. We recommend that civil penalties for non-compliance are introduced and enforced by the HMRC. This would be a similar approach to the powers given to the HMRC to enforce the national minimum wage. For this to be effective, the level of fine would need to be carefully determined so that it incentivises and encourages compliance. The employer will then have a choice: improve the pay of their workers and in turn morale and productivity or pay a percentage of their profits to the HMRC.

The Equality and Human Rights Commission's enforcement powers are drawn out and disproportionate for enforcement of gender pay gap reporting. Most are predicated on investigations being carried out, followed by a notice requiring the employer to prepare an action plan to remedy the breach, then an application for a court order requiring the employer to comply and then seeking a conviction for breach of the court order if there is no compliance. HMRC is likely to be a more effective enforcer.

5 Do you currently collect data on ethnicity at your workplace?

Not applicable to us.

6 What do you think are the most effective approaches for employers to improve employee self-reporting or declaration rates?

We accept that given there is no legal obligation for individuals to disclose which ethnic group they identify themselves with or an employer to collect this information it may be challenging to obtain such information from employees. However the fact that some people may choose not to take part or disclose this information is not a reason not to start requesting and collating data.

If ethnicity pay reporting is to work, then reporting rates by individuals has to be improved.

We anticipate that fear, lack of trust or even ambiguity may deter individuals from volunteering this information. However, employers already hold a significant amount of sensitive information about their employees (gender, age, disability, health questionnaires and immigration status to name a few).

The key is likely to be in explaining to employees why the data is being collected and how it will be used and stored. EHRC research found this was the most significant factor in overcoming barriers.⁶

Clear and sensible communication should encourage employees to provide information on ethnicity:

- tell staff why data is being collected and the benefits
- explain how the data will be used and kept
- make the data easy to collect i.e short on-line form
- collate data during the recruitment process
- have a 'prefer not to say' option to help avoid false declarations

The case study in the consultation reports that Nationwide Building Society increased their diversity declaration rates from just over 26% at the beginning of 2015 to 97% by December 2016. Their campaign was simple and open. It appears that honesty and simplicity work. This model should not be difficult for other employers to adopt.

We note the reference to data collection not being 'burdensome' and 'costly.'

We ask employers to put themselves in the shoes of ethnic minorities who they employ, who carry the burden of knowledge and/or reasonable suspicion day in day out, that because of their ethnicity, there is a very strong possibility that they are paid less than their white colleagues. Pay is personal. It is how we are rewarded by our employers. We ask employers to stop and think how some members of their workforce must feel.

The real and justified cost will be in having to justify differentials in pay and having to make adjustments to pay in the organisation once the data is collated and published.

7 How should self-reporting or non-disclosure rates be reflected in the information reported by employers?

These could be reported in percentage terms with reference to the total number of individuals asked to self-report showing a breakdown of (i) the number of individuals who actually provided disclosure; (ii) the number who chose the option of 'prefer not to say'; and (iii) the number who refused to take part in the process.

⁶ www.equalityhumanrights.com/en/publication-measuring-and-reporting-disability-and-ethnicity-pay-gaps

8 For a consistent approach to ethnicity pay reporting across companies, should a standardised approach to classifications of ethnicity be used? What should be the costs to your organisation?

We accept that individuals may define their ethnic group differently and may associate themselves with more than one group or none of the categories provided.

We anticipate that most employers have ethnicity classifications built into their HR and IT infrastructure systems. If they don't, there will be some cost in changing them. We cannot comment on costings.

A standardised approach to classifications of ethnicity across industry will be helpful for consistency and objective evaluation.

The options appear to be twofold: 5 broad classifications in the 2001 Census of White, Asian, Black, Mixed and Other; or the 18 detailed ethnic groups used in the 2011 Office of National Statistics Census: English/Welsh/Scottish/Northern Irish/British/Irish/Gypsy/Irish Traveller/White and Black Caribbean/White and Black African/White and Asian/Any Other Mixed/multiple ethnic background/Indian/Pakistani/Bangladeshi/Chinese/Any Other Asian/Asian British.

A person's ethnicity can be multifaceted and therefore we recommend the use of the 2011 ONS classification. It is widely used by employers and it provides for a more nuanced classification than the 2001 classification.

In addition, gender should also be captured so that a proper evaluation can take place about the combined effect of gender and BME status on pay.

9 Please outline steps that should be taken to preserve confidentiality of individuals?

Safeguarding anonymity of individuals who provide data will be paramount as any information about an individual's racial or ethnic origin is classified as special category personal data under the data protection laws. Although no longer classified as, 'sensitive personal data' most will view it as such.

The data could simply capture details about pay, ethnicity and gender. The civil service method of suppressing values based on five or fewer responses could be adopted. This is where figures are not included in data to protect confidentiality and because the numbers involved are too small to draw any reliable conclusions.

To encourage greater participation, the fact that data will be used in an anonymised format should be made clear at the outset when collecting the data.

10 What size of employer (or employee threshold) should be within the scope for mandatory ethnicity pay reporting?

- **All employers**
- **Employers with 50+ employees (as recommended by the McGregor-Smith Review)**
- **Employers with 250+ employees (as for the gender pay gap reporting)**
- **Employers with 500+ employees**
- **Other threshold**

We share the view of Baroness McGregor – Smith’s original recommended threshold of 50+ employees.⁷

This threshold is large enough to preserve anonymity of individuals and most organisations of this size will have some form of HR or IT infrastructure in place to collate data.

We do not agree with the government’s judgment that this risks a too great a burden on business. The consultation is silent on why it would.

Why should having a transparent pay process be burdensome? It should be the norm.

We note that a threshold of over 250 employees would mirror the gender pay gap reporting methodology but there is no reason why this figure should also be accepted for the ethnicity pay gap reporting.

BME employees are more likely to be lowest paid within their job type and in the lowest paid types of job⁸; and evidence also suggests a double disadvantage for some ethnic minority women when it comes to pay. It is therefore important that people are not excluded from the exercise.

In fact, there is no reason say in 5 year’s time, why employers cannot produce a single pay gap report including information about gender, ethnicity, disability and age. This is likely to be more cost effective and informative.

We do not accept that a business led voluntary approach to reporting is a way of bringing about lasting change. No doubt, some businesses may want to comply but the vast majority won’t. What is the incentive to do so? How many businesses ‘voluntarily’ disclosed gender pay gap data to reduce the pay gap before it was mandatory to do so?

We anticipate that very few businesses will volunteer information about the ethnicity pay gap. Why would any business risk reputational damage by highlighting any disparities with reference to diversity and pay in its organisation?

⁷ The Fawcett Society recommended a 50 employee threshold for gender pay gap reporting (see Gender pay gap reporting deadline briefing April 2018) as did the Runnymede Trust (<https://www.runnymedetrust.org/blog/runnymedes-director-on-governments-race-equality-announcement>).

⁸ BEIS analysis of ONS Labour Force Survey 2016 Quarter 1.

The civil service already publishes information on ethnicity and pay. NHS England has also released information on its ethnicity gap. The government can learn from these 'early adopters' and from some of the FTSE 100 companies who collect, use and store ethnicity data, before introducing mandatory reporting in 12 month's time.

Drawing attention to brilliantly worded inclusion policies and talking about the benefits of greater diversity in the workplace is not enough. If the government is genuinely committed to ensuring that this is a country of opportunity where everyone regardless of race or gender can fulfil their potential, then reporting must be mandatory. We all knew that wearing a seat belt was the right thing to do but how many of us actually did it before we were required to by law?

The Prime Minister in launching the Race Disparity Audit and Ethnicity Facts and Figures website in October 2017 was clear: "if disparities between the treatment of ethnic groups, whether in the case of health, education, employment, housing, criminal justice or work, cannot be explained, then it must be changed."

Without transparent and robust data it will be impossible to measure and improve upon inclusivity and bring about change. The government should legislate to introduce mandatory reporting of ethnicity pay data for employers with 50 or more employees.

Employers have to be held responsible and accountable.

The DLA recommends that not only should reporting be mandatory but there must be civil penalties (as set out above) for non-compliance. We echo what is set out in the literature that this is not about 'naming and shaming' companies, but unless financial penalties are enforced, businesses are unlikely to give this exercise the time, attention and detail it requires.

11 What support measures do you think would be useful for employers?

In the case of gender pay gap reporting, the government provided a package of support to help employers calculate and address their gender pay gap. Guidance and fact sheets were developed by the Government Equalities Office and the Advisory, Conciliation and Arbitration Service (Acas), including training courses and support for communication with employees.

Similar assistance will be helpful and needed on ethnicity pay reporting. The EHRC could also be tasked to assist in this exercise by providing on-line training modules and fact sheets.

There should be a mandatory requirement for all staff at all levels to undertake unconscious bias training. The government can assist businesses by setting up free accessible on-line training.

We anticipate that those with less than 250 employees, who have not participated in the gender pay gap reporting, will have to do a lot of groundwork to be in a position to publish

data. Some may be starting from scratch in collecting this data from employees. The government should set up a dedicated team to assist such employers offering hands on advice. Given that the benefit to the economy of fully utilising BME talent has been estimated at £24 billion, the government may want to offer tax incentives for the first year of reporting. This is likely to assist with the initial cost of learning and setting up a system to collect and collate data, and provide a financial incentive to do so.

Discrimination Law Association

Dated: 11 January 2019

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