



Law Society  
of Scotland

# Consultation Response

## Ethnicity Pay Reporting

January 2019



## Introduction

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The Law Society of Scotland is the professional body for over 11,000 Scottish solicitors. With our overarching objective of leading legal excellence, we strive to excel and to be a world-class professional body, understanding and serving the needs of our members and the public. We set and uphold standards to ensure the provision of excellent legal services and ensure the public can have confidence in Scotland's solicitor profession.

We have a statutory duty to work in the public interest, a duty which we are strongly committed to achieving through our work to promote a strong, varied and effective solicitor profession working in the interests of the public and protecting and promoting the rule of law. We seek to influence the creation of a fairer and more just society through our active engagement with the Scottish and United Kingdom Governments, Parliaments, wider stakeholders and our membership.

Our Equalities Law and Employment Law sub-committees welcome the opportunity to consider and respond to the UK Government consultation: Ethnicity Pay Reporting. The sub-committees have the following comments to put forward for consideration.

## Consultation questions

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### **Question 1. What are the main benefits for employers in reporting their ethnicity pay information?**

We have no comment on this question.

**Question 2. 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?**

**Please indicate from the list below and state the reasons for your answers.**

- 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 consider that option d, ethnicity pay information by pay quartile, is the most appropriate method of recording ethnicity pay information.

This option has the benefit of mirroring gender pay reporting methodology and providing clear insight into the hierarchy of an organisation and the concentration of ethnic minorities within pay quartiles.

By providing a clear insight into the hierarchy of an organisation, it is hoped that option d will encourage employers to take targeted action to address any concerns with pay distribution and the distribution of ethnic minorities within the organisation structure.

We note that further consideration will be needed to address the scenario where an employee may be identifiable by an employer reporting ethnicity pay information by pay quartile. Guidance on how to approach such a scenario should be provided to employers, including the possibility of an alternative reporting method in order to protect an employee's anonymity.

We consider that introducing new ethnicity reporting requirements that are not consistent with the gender pay gap reporting would cause unnecessary confusion for employers. We hope that adopting consistent reporting methodology will result in more accurate reporting.

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

We consider that there should be no mandatory requirement to provide contextual data. A requirement to provide contextual data will add unnecessary complexity to the reporting requirements of employers. Collating ethnicity pay gap data will be a new administrative task for many employers and should be kept as simple as possible to encourage employers to engage with ethnicity pay gap reporting.

We suggest including an option to produce a voluntary narrative to provide context to the ethnicity pay gap reporting information as a more appropriate measure. A voluntary narrative will provide employers with flexibility to address the unique demographic and data of a particular organisation. Guidance should be issued to employers to outline contextual data which will be meaningful to disclose in order to provide a true and fair picture.

As with Question 4 below, we recommend that guidance is issued to employers providing examples of contextual data which is considered good practice to disclose, and to promote the practice of employers publishing this data on a voluntary basis. Employers should be positively recognised for producing meaningful data. This could be achieved by grading the contextual data produced by employers in comparison to a 'model data'. For example, employers could be awarded a number of stars out of five to demonstrate their compliance with good practice. This could be published on a government website to enable the public to view and access data on employers' compliance and adherence to good practice. Such a grading system would be resource dependent, and consideration will be required as to which body would be responsible for grading employers and how such a grading system would be funded.

We consider that ethnicity pay gap reporting should mirror the requirements of gender pay gap reporting for the purpose of simplicity, and to avoid potential confusion for employers and the risk of the collated data being misinterpreted. Contextual data should only become a mandatory reporting requirement if a similar requirement is introduced for gender pay gap reporting. This may be at a further stage in reporting requirements once ethnicity pay gap reporting and gender pay gap reporting become a familiar scheme for employers.

### **Question 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?**

We consider that there is merit in mirroring gender pay gap reporting, so that there is no mandatory obligation to publish a narrative or action plan. Employers should be strongly encouraged to publish a narrative or an action plan.

We recommend that guidance is issued to employers providing examples of actions plans which are considered good practice, and to promote the practice of employers publishing voluntary action plans. Employers should be positively recognised for producing a meaningful action plan. This could be achieved

by grading employers' action plans in comparison to a 'model action plan'. For example, employers could be awarded a number of stars out of five to demonstrate their compliance with good practice. This could be published on a government website to enable the public to view and access data on employers' compliance and adherence to good practice. In future years, actions plans could be compared to the previous year and graded based on the progress and developments achieved. Such a grading system would be resource dependent, as consideration will be required as to which body would be responsible for grading employers and how such a grading system would be funded.

There is a risk that a mandatory action plan may become a 'tick box exercise' and will not encourage genuine change across the UK. It is hoped that by identifying a system that will reward good practice of employers that this will encourage genuine engagement and may promote real change.

As ethnicity involves a non-binary data gathering exercise, it would be overly burdensome to require employers to publish narratives and actions plans on a compulsory basis at this stage. This is particularly so as it is not currently a mandatory requirement under the gender pay gap reporting provisions to publish a narrative or action plan. We suggest that an action plan should only become a mandatory reporting requirement if a similar requirement is introduced for gender pay gap reporting. This may be at a further stage in reporting requirements once ethnicity pay gap reporting and gender pay gap reporting become a familiar scheme for employers.

Given the additional complexities involved in ethnicity pay gap reporting, due to the diverse demographic in Scotland and across the UK, it is hoped that employers will wish to provide narratives and action plans on a voluntary basis to add context to the data reported, and this should be strongly encouraged via the introduction of schemes which positively recognise good practice.

### **Question 5. Do you currently collect data on ethnicity at your workplace?**

Not applicable.

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

The consultation paper sets out a number of examples of steps which have been taken by organisations and which have been effective in improving self-reporting and declaration rates.

In the experience of our committee members, employees don't often complete separate (anonymous) ethnicity forms during the recruitment process, and so encouraging reporting as part of the recruitment process will clearly not work as a single measure. The same could be said of using any single measure. From the experience of organisations such as Nationwide Building Society (used as a case study in the consultation) a suite of measures is likely to be most effective in encouraging self-reporting and declaration.

Asking employees to declare/self-report during recruitment and at other key points of the working relationship (such as the annual appraisals period) accompanied by an explanation of

- what information is being gathered;
- what the data will be used for;
- the benefits of having accurate and complete ethnicity information for the company and individual workers; and
- reassurances of how the information will be kept (confidentially and accessible by limited personnel), protected and not used for any purpose other than reporting and taking steps to improve diversity in the organisation; and how long it will be retained for

will, it is hoped lead to improved self-declaration and reporting.

Employers should also explain to employees that they will not be identifiable from the information.

### **Question 7. How should self-reporting and non-disclosure rates be reflected in the information reported by employers?**

We consider that self-reporting and non-disclosure rates should be reflected in the information reported by employers.

Self-reporting rates demonstrate the level of employee engagement, and may be indicative of a negative or positive environment regarding employee engagement within an organisation.

Non-disclosure rates are also important as it may provide insight as to whether employees are comfortable sharing their ethnicity data with their employer. A requirement to publish this information may encourage employers with low disclosure rates to take steps to improve reporting in the future and ultimately increase the value of the data.

Together, self-reporting and non-disclosure rates provide additional context as to the probative value of the ethnic pay reporting information. For example, if there is low engagement, the ethnicity pay report may not be fully representative of the ethnicity pay gap within an organisation.

The self-reporting and non-disclosure rates need to be published in a meaningful way. Employers should therefore breakdown the figures so that it is clear how many employees were asked to self-report and how many of that number chose not to as a proportion of the whole organisation.

Also, if ethnicity pay information is reported by the quartile (in accordance with our response to Question 2, above), then the number of individuals declining to report as a proportion of the total numbers of employees in the quartile should also be reported.

Employers should be encouraged to prepare a narrative explaining what has been done to encourage self-reporting and to explain the reasons for their particular self-reporting statistics across the organisation as a whole or, where appropriate, in particular pay quartiles.

**Question 8. 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 consider that a standardised approach to classifications of ethnicity should be used as a minimum reporting requirement. This standardised approach should be mandatory. This is essential to ensure that there is a consistent approach to ethnicity pay reporting across companies; the information provided has probative value and allows meaningful comparisons to be made across companies in the UK; and progress can be monitored.

It is considered beneficial for employers to be encouraged to specify or clarify the position, in circumstances where they have no employees within a classification of ethnicity or alternatively employees of an ethnic background not detailed within the standardised classification. This will enable employers to add context to the information reported. In accordance with our response to Question 3 above, this additional contextual data should be encouraged to be provided on a voluntary, rather than be a mandatory basis.

We have no comment on the potential costs to organisations of introducing a standardised system of classification.

**Question 9. Please outline steps that should be taken to preserve confidentiality of individuals.**

We consider that guidance should be issued to employers to ensure that they remain compliant with both their ethnicity reporting requirements and data protection obligations under GDPR.

We suggest that, to protect anonymity and sensitive personal data of employees, if there are five or fewer responses in respect of a particular classification that this data should be suppressed.

Given the demographics of Scotland, and across the UK generally, there may be a high level of suppression required within organisations that have low representation of an ethnic group. There is a concern that this may undermine the value in having reporting at all. To overcome this potential concern, and to ensure that ethnicity pay gap reporting continues to be of probative value, it is considered prudent that there is an obligation for organisations which require to suppress responses to publish contextual data regarding suppression. A narrative should be published to explain that data has been suppressed to protect anonymity. A narrative regarding suppression should be mandatory.

Guidance should be provided to encourage employers to report alternative ethnicity pay gap reporting data in circumstances where suppression of data is required to protect anonymity. Guidance should take the form of case studies, with various scenarios, outlining best practice for reporting alternative or supplementary data in circumstances involving suppression. It should also outline approaches to be adopted to ensure compliance with GDPR.

**Question 10. What size of employer (or employee threshold) should be within scope for mandatory ethnic pay gap reporting?**

- a) All employers**
- b) Employers with 50+ employees**
- c) Employers with 250+ employees**
- d) Employers with 500+ employees**
- e) Other threshold**

We consider option c is appropriate for ethnicity pay gap reporting. The reporting requirement should be consistent with gender pay gap reporting requirements at this stage. If, in the future, the requirement to report on the gender pay gap is extended to organisations with fewer than 250 employees then consideration can be given at that point to extending the requirement for such organisations to report on the ethnicity pay gap. However, in view of the numbers of employees in some ethnic minority groups across different parts of the UK, meaningful reporting by employers with fewer than 250 employees may not be appropriate even if the threshold for gender pay gap reporting is lowered in the future.

Depending on the classifications used, it may be very difficult for organisations with less than 250 employees to meaningfully report on the ethnicity pay gap. There is also a concern that if employers with less than 250 employees are required to publish ethnicity data that this will create additional issues and pressure in protecting employees' identities and personal sensitive data given the demographic across Scotland, and in the UK generally.

We consider that requiring only employers with 500+ employees to report ethnicity pay gap information is too restrictive and would provide a very limited picture of the ethnicity pay gap, as it is understood that there is only a very small percentage of employers which fall within this category across the UK.

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

We consider that support similar to that provided for gender pay gap reporting would be helpful.

That support included detailed guidance and case studies produced by Acas and the Government Equalities Office.<sup>1</sup>

This could be extended to include guidance on confidentiality and GDPR issues as well as providing templates for action plans to tackle gaps uncovered, self-reporting forms, and communications for staff on self-reporting/declarations as a starting point. This would be particularly valuable for smaller employers (nearer the 250 employee threshold).

It is also considered beneficial for ethnicity pay gap reporting requirements to mirror gender pay gap reporting requirements and terminology, in so far as that is possible. Employers with 250 or more employees should now be familiar with gender pay gap reporting requirements. Introducing ethnicity pay gap reporting requirements that do not mirror gender pay gap reporting requirements and terminology may cause unnecessary confusion and may lead to errors with the information reported.

The standard classifications to be used and any supporting guidance for employers should be provided with sufficient lead in time to the proposed 'data capture date' to enable employers to take the necessary steps to prepare for compliance with ethnicity pay gap reporting requirements.

The experience of Scottish public authorities in relation to the Public Sector Equality Specific Duties may be relevant in considering what challenges might be faced, and what support would be helpful in implementing ethnicity pay reporting. As part of the Public Sector Equality Specific Duties that apply to Scottish public authorities, employers with 20 or more employees have a duty to publish a statement on equal pay every four years. This duty requires that listed authorities publish, within their statements, an equal pay policy and information on occupational segregation both by grade and by occupation. In 2017, authorities with 150 employees had to report in relation to sex, disability and race. Of the 151 authorities covered by this duty, less than half reported on occupational segregation in particular pay grades by race and disability.

In addition, since 2013 authorities have been required to gather data and report on race in relation to other employment areas like recruitment and development and retention and it has been reported that many authorities continue to struggle to produce this information.<sup>2</sup>

The Equality and Human Rights Commission has concluded that there is a large volume of information that is unknown about employees' protected characteristics and this has meant that it is not possible to confidently produce overall conclusions in relation to change in workforce diversity across listed authorities, or clusters of authorities. We have concerns that similar difficulties would be experienced with pay gap

<sup>1</sup> Acas and GEO, Guidance: Managing gender pay reporting (December 2017)

<sup>2</sup> Equality and Human Rights Commission, *Public authorities' performance in meeting the Scottish Specific Equality Duties 2017: Measuring Up? Report 7* (November 2017)



reporting by ethnicity in the private sector where there may be varying degrees of success with equal opportunities monitoring and reporting of ethnicity. We would therefore encourage that further consideration be given to the experience of the public sector in reporting employment data by ethnicity in the development of these proposals.

**For further information, please contact:**

Marina Sinclair-Chin

Policy Team

Law Society of Scotland

DD: 0131 476 8136

[marinasinclair-chin@lawscot.org.uk](mailto:marinasinclair-chin@lawscot.org.uk)