

# Consultation on introducing mandatory ethnicity and disability pay gap reporting for large employers

Consultation response from The City of London Law Society.

The City of London Law Society (CLLS) is the professional representative body for solicitors and law firms in the City of London, including all the largest national and international practitioners.

## **Extending mandatory pay gap reporting to ethnicity and disability**

1. *Do you agree or disagree that large employers should have to report their ethnicity pay gaps?*
  - a. Strongly agree
  - b. Somewhat agree
  - c. Neither agree nor disagree
  - d. Somewhat disagree
  - e. Strongly disagree
  - f. Don't know or unsure
  
2. *Do you agree or disagree that large employers should have to report their disability pay gaps?*
  - a. Strongly agree
  - b. Somewhat agree
  - c. Neither agree nor disagree
  - d. Somewhat disagree
  - e. Strongly disagree
  - f. Don't know or unsure

*Please add any comments you have about the proposal to extend pay gap reporting*

### Overall

We agree in principle that some form of ethnicity and disability pay gap analysis is one way of enabling employers to identify and tackle barriers to inclusion at work. However, we are concerned about the proposed 250 employee threshold, and we have some concerns about the effectiveness of the proposal to report disability pay gaps in improving equality.

### The employee threshold

We understand the desire for consistency with the gender pay gap reporting regime, but ethnicity and disability are fundamentally different. Gender is split relatively evenly in the UK population and does not vary by geography. Organisations with 250 employees can therefore expect to be employing over 100 women, wherever they are based in the UK. Based on what we know and on what we believe to be relatively low self-declaration rates when employers seek to collect this data, disabled people and people from minority ethnic groups are a much smaller proportion of the working population and (in the case of ethnicity) this proportion varies by location. In our view, a higher threshold of, for example, 500 employees is needed to trigger these new pay gap reporting obligations, or the results will not be meaningful in many cases. We consider 500 to be a reasonable threshold in the circumstances, and note that a higher threshold of, for example, 1000 would likely

capture too few organisations (approximately 2%). However, we note that our suggested threshold of 500 is a mere suggestion (to address our concern that 250 is too low and 1000 too high for the reasons set out above) and expect that further government led research will be required to determine an appropriate threshold.

#### The effectiveness of disability pay gap reporting

We believe that representation for disability should be recognised, and we acknowledge that gender pay gap reporting has been effective and theoretically it could be beneficial to extend this to disability. However, disability is a complex characteristic with several facets, and it is essential that the complexities of disability are highlighted. Disabled individuals are not one homogenous group, and as we note in our response to question 31 there are some concerns about the proposals. Disability can be present in a person in different: forms (for example physical, mental, neurodivergent etc.); permanence (short term, long term, life long etc) and impact (a disabled employee can be fit or unfit for work depending on the circumstances). An employee can experience more than one disability simultaneously or at any point in their employment cycle, and even those with the same disability can have that disability in completely different extremities. Consequently, there is a risk that disability pay gap reporting on a binary basis could be reductionist and inaccurate.

#### Government/ CLLS engagement

We engaged with the government on the gender pay gap reporting, and we consider that it would also be beneficial to do so in the context of ethnicity and disability pay gap reporting. We think that collaboration is invaluable and that the inclusion of the private sector perspective through engagement with the government would be beneficial for the effective implementation of extended pay gap reporting. In particular, given the complexities associated with disability as set out above and our experience of advising employers on this in the context of the workplace.

### Geographical scope

3. *Do you agree or disagree that ethnicity pay gap reporting should have the same geographical scope as gender pay gap reporting?*

- a. Strongly agree
- b. Somewhat agree**
- c. Neither agree nor disagree
- d. Somewhat disagree
- e. Strongly disagree
- f. Don't know or unsure

4. *Do you agree or disagree that disability pay gap reporting should have the same geographical scope as gender pay gap reporting?*

- a. Strongly agree
- b. Somewhat agree**
- c. Neither agree nor disagree
- d. Somewhat disagree
- e. Strongly disagree
- f. Don't know or unsure

*Please add any comments you have about the proposed geographical scope*

For large employers operating across the whole of Great Britain, a fragmented approach is unhelpful. We therefore think that the same approach should be adopted across England, Wales and Scotland.

We note that Gender Pay Gap Reporting obligations extend to cover employees who are based overseas but who could bring a claim in the employment tribunal under the Equality Act 2010. Should Regulations enacting mandatory ethnicity and disability pay gap reporting apply in the same way we anticipate this giving rise to practical and legal challenges. For example, it's common for different categories or classifications to be used in other countries, and many countries also ban or severely restrict the collection of this type of data. We would suggest that the obligations are limited to those employees and workers based in Great Britain.

### **Pay gap calculations**

5. *Do you agree or disagree that employers should report the same 6 measures for ethnicity pay gap reporting as for gender pay gap reporting?*
  - a. Strongly agree
  - b. Somewhat agree**
  - c. Neither agree nor disagree
  - d. Somewhat disagree
  - e. Strongly disagree
  - f. Don't know or unsure
6. *Do you agree or disagree that employers should report the same 6 measures for disability pay gap reporting as for gender pay gap reporting?*
  - a. Strongly agree
  - b. Somewhat agree**
  - c. Neither agree nor disagree
  - d. Somewhat disagree
  - e. Strongly disagree
  - f. Don't know or unsure
7. *Do you agree or disagree that large employers should have to report on the ethnic breakdown of their workforce?*
  - a. Strongly agree
  - b. Somewhat agree**
  - c. Neither agree nor disagree
  - d. Somewhat disagree
  - e. Strongly disagree
  - f. Don't know or unsure

8. *Do you agree or disagree that large employers should have to report on the breakdown of their workforce by disability status?*
- a. Strongly agree
  - b. Somewhat agree**
  - c. Neither agree nor disagree
  - d. Somewhat disagree
  - e. Strongly disagree
  - f. Don't know or unsure
9. *Do you agree or disagree that large employers should have to submit data on the percentage of employees who did not state their ethnicity?*
- a. Strongly agree
  - b. Somewhat agree**
  - c. Neither agree nor disagree
  - d. Somewhat disagree
  - e. Strongly disagree
  - f. Don't know or unsure
10. *Do you agree or disagree that large employers should have to submit data on the percentage of employees who did not state their disability status?*
- a. Strongly agree
  - b. Somewhat agree**
  - c. Neither agree nor disagree
  - d. Somewhat disagree
  - e. Strongly disagree
  - f. Don't know or unsure

*Please add any comments you have about the proposals for calculating pay gaps.*

We agree in principle that the ethnicity, disability and gender pay gap reporting regimes should be consistent as far as possible.

However:

- If the 250 threshold is not raised then a scaled approach would be preferable whereby, for example, employers with 250 or more employees are required to report on pay quartiles only, with full reporting of all 6 measures only applying to much larger employers. If the government sticks with the 250-employee threshold, then meaningful reporting against all 6 measures is unlikely to be workable or sensible for ethnicity and disability pay gap reporting. This is especially the case for employers in certain parts of the UK. For example, according to the [2021 census](#), only 6.9% of the local population in the North East identified as having an ethnicity different from white British/White other. A company employing 250 people would therefore expect to employ just 17 non white British/White other people. We do not think that the mean and median differences in hourly pay and bonus will be statistically meaningful with such a

small dataset. The figures will be prone to significant variation each year if just one non-white employee joins or leaves.

- We agree that reporting on the breakdown of the workforce by ethnicity/disability will help to contextualise the pay gap data and enable employers to benchmark against local populations. We would expect employers to voluntarily disclose this information even if not required to report it.
- We agree that reporting the percentage of employees who did not state ethnicity or disability status will be important to qualify the meaningfulness of the pay gap statistics. We also expect this percentage to become a point of comparison between employers (regardless of size or geography). In our experience, incomplete data is the biggest challenge for employers. The government could help to address this by publishing guidance on the steps employers can take to encourage participation in data collection exercises.
- The percentage of employees not willing to disclose their disability status could also give employers some useful insight into whether their culture and environment makes employees feel safe enough to share their health conditions.

### **Action plans**

11. *Do you agree or disagree that employers should have to produce an action plan about what they are doing to improve workplace equality for ethnic minority employees?*

- a. Strongly agree
- b. Somewhat agree**
- c. Neither agree nor disagree
- d. Somewhat disagree
- e. Strongly disagree
- f. Don't know or unsure

*Please add any comments you have on this proposal*

With equality action plans becoming mandatory for large employers under the Employment Rights Bill 2024-2025, it makes sense that there is consistency. Mandating the provision of an action plan would be especially helpful for employers impacted by anti-DEI measures coming from the US, who may need to rely on a legislative requirement to justify taking such steps.

We suggest that the government allows an initial reporting period (e.g. two years) for employers to collect and report on their disability and ethnicity pay gaps, without the immediate obligation to produce action plans. While employers have been collecting, analysing and reporting on their gender pay gaps for over eight years, they will need more time to familiarise themselves and understand their ethnicity and disability pay data before developing narratives and action plans. We also suggest that, following the initial reporting period, the requirement to produce action plans is phased in, starting with the largest employers. A staggered approach would allow the development of best practice examples and provide smaller employers with practical guidance on the types of measures that could be included. It would also allow employers time to prioritise new obligations under the Employment Rights Bill to prepare equality action plans. Otherwise, simultaneously introducing three action plan regimes would be extremely burdensome for employers.

We suggest that employers are required to produce action plans which, rather than being limited to reducing the pay gap, include steps to improve equality for ethnic minority and

disabled employees more generally. This would align with the new obligations under the Employment Rights Bill in respect of gender.

12. *Do you agree or disagree that employers should have to produce an action plan about what they are doing to improve workplace equality for disabled employees?*

- a. Strongly agree
- b. Somewhat agree**
- c. Neither agree nor disagree
- d. Somewhat disagree
- e. Strongly disagree
- f. Don't know or unsure

*Please add any comments you have on this proposal*

See above.

### **Dates and deadlines**

19. *Do you agree or disagree that ethnicity pay gap reporting should have the same reporting dates as gender pay gap reporting?*

- a. Strongly agree
- b. Somewhat agree**
- c. Neither agree nor disagree
- d. Somewhat disagree
- e. Strongly disagree
- f. Don't know or unsure

20. *Do you agree or disagree that disability pay gap reporting should have the same reporting dates as gender pay gap reporting?*

- a. Strongly agree
- b. Somewhat agree**
- c. Neither agree nor disagree
- d. Somewhat disagree
- e. Strongly disagree
- f. Don't know or unsure

21. *Do you agree or disagree that ethnicity pay gap data should be reported online in a similar way to the gender pay gap service?*

- a. Strongly agree
- b. Somewhat agree**
- c. Neither agree nor disagree
- d. Somewhat disagree

- e. Strongly disagree
- f. Don't know or unsure

22. *Do you agree or disagree that disability pay gap data should be reported online in a similar way to the gender pay gap service?*

- a. Strongly agree
- b. Somewhat agree
- c. Neither agree nor disagree
- d. Somewhat disagree
- e. Strongly disagree
- f. Don't know or unsure

*Please add any comments you have about the proposals for dates and deadlines and online reporting.*

### **Enforcement**

23. *Do you agree or disagree that ethnicity pay gap reporting should have the same enforcement policy as gender pay gap reporting?*

- a. Strongly agree
- b. Somewhat agree
- c. Neither agree nor disagree
- d. Somewhat disagree
- e. Strongly disagree
- f. Don't know or unsure

24. *Do you agree or disagree that disability pay gap reporting should have the same enforcement policy as gender pay gap reporting?*

- a. Strongly agree
- b. Somewhat agree
- c. Neither agree nor disagree
- d. Somewhat disagree
- e. Strongly disagree
- f. Don't know or unsure

*Please add any comments you have about the proposals for enforcement*

### **Ethnicity: data collection and calculations**

#### **Data collection**

25. *Do you agree or disagree that large employers (250 or more employees) should collect ethnicity data using the GSS harmonised standards for ethnicity?*

- a. Strongly agree
- b. Somewhat agree
- c. Neither agree nor disagree
- d. Somewhat disagree
- e. Strongly disagree
- f. Don't know or unsure

*Please add any comments you have about the proposals for ethnicity data collection.*

We agree in principle that employers should collect ethnicity data using the detailed ethnicity classifications in the GSS harmonised standards for ethnicity based on the 2021 census. It is unclear to us, however, whether the government intends to mandate this granular approach or merely recommend it as best practice. This needs to be clarified (see answer to question 28 below).

Relatedly, it is unclear whether employers who collect ethnicity data based on different classifications, because they are an international business for example, (which often include categories which do not easily map to the GSS harmonised standards, e.g. "Latino / Latina / Latinx") will be permitted to report on that basis and/or allowed extra time to re-work their categories and re-capture relevant information. In our experience, this practice is common, and our view is that employers who have moved forward with voluntary collection, analysis and even reporting should not now be in a worse position for having taken those steps. It could be beneficial for the government to allow a longer grace period for organisations who have already been voluntarily collecting data, to acknowledge how complex and burdensome it would be for them to start again from scratch.

It is also unclear whether the question will vary between England, Scotland and Wales. The consultation document refers to using "the harmonised country-specific" approach. This is contradictory – either the questions are harmonised or they are country specific, but they cannot be both. Using different questions across Great Britain would cause several problems, including:

- whether employers' existing HR information systems can be customised to display a different set of options for different employees (and how much this will cost),
- ensuring that the correct country-specific options are served to the correct people – would this be determined by the employee's home address or place of work?
- how will the output be aggregated across the UK (especially given the differences in the Scottish classifications where there are 19 categories rather than 18)?

In our view there should be a single classification system across the whole of Great Britain.

### **Calculating and reporting ethnicity pay gaps**

26. *Do you agree or disagree that all large employers should report ethnicity pay gap measures using one of the binary classifications as a minimum?*

- a. Strongly agree
- b. Somewhat agree
- c. Neither agree nor disagree



- d. Somewhat disagree
- e. Strongly disagree**
- f. Don't know or unsure

27. *Do you agree or disagree that there should be at least 10 employees in each ethnic group being reported on? This would avoid disclosing information about individual employees.*

- a. Strongly agree
- b. Somewhat agree
- c. Neither agree nor disagree
- d. Somewhat disagree**
- e. Strongly disagree
- f. Don't know or unsure

28. *Do you agree or disagree that employers should use the ONS guidance on ethnicity data to aggregate ethnic groups? This would help protect their employees' confidentiality.*

- a. Strongly agree
- b. Somewhat agree**
- c. Neither agree nor disagree
- d. Somewhat disagree
- e. Strongly disagree
- f. Don't know or unsure

*Please add any comments you have about the proposals for calculating and reporting ethnicity pay gaps*

A simple binary comparison risks making the data meaningless. It is well documented that different minority ethnic groups have different experiences in the UK workforce. These will be masked by a simple averaging out. A binary approach is inconsistent with the ONS guidance referred to in the consultation document, which specifically states: “[a]ggregating all ethnic minority groups together into a catch-all group (e.g. White vs all ethnic minorities combined) is not recommended because of the heterogeneity of the groups.” The ONS guidance is clear that a 5-category approach is the most aggregated option that would be meaningful.

It is also unclear when employers would use “White British” as the comparison group and when “White” should be used.

We also disagree that the minimum threshold for reporting on any ethnic group should be 10 employees. The average pay of such a small dataset of 10 employees is unlikely to be informative and will be prone to significant fluctuations each year as employees at different levels join or leave. The suggested threshold is at odds with the current government guidance which suggests that a minimum group size of 50 is needed before pay gaps for that category should be published externally. We think that a minimum threshold of 50 would be preferable.

We would also welcome government guidance on how employers are expected to make their calculations before they report on their pay gap data, including worked examples, similar to that which has been made available on gender pay gap reporting.

29. *Is there anything else you want to tell us about ethnicity pay gap reporting?*

## **Disability: data collection and calculations**

### Comparing pay across employee groups

30. *Do you agree or disagree with using the 'binary' approach (comparing the pay of disabled and non-disabled employees) to report disability pay gap data?*

- a. Strongly agree
- b. Somewhat agree
- c. Neither agree nor disagree
- d. Somewhat disagree
- e. Strongly disagree
- f. Don't know or unsure

31. *Do you have any feedback on our proposal to use the Equality Act 2010 definition of 'disability' for pay gap reporting?*

The government's general intention seems to be that employees should decide for themselves if they meet the threshold test and if they want to disclose this, which is sensible. However, there are specific challenges of asking employees to self-identify if they are disabled. Employees who would meet the definition of disabled for Equality Act purposes will not necessarily regard themselves as disabled. Some may receive a new diagnosis meaning that they would not be disabled in one year but may be in the next. Others may be reluctant to share details of their health conditions. The "not responded" or "opt out" option will be an important protection for disabled employees wishing to protect their health data, but may reduce the dataset.

Employees will need guidance on what is meant by disability. To avoid the burden falling on employers, and the risks associated with employers taking different approaches, we suggest that the government produces a harmonised explainer which could be presented to employees as a clickable link or pop-up within self-identification forms. The guidance already available on what constitutes a disability under the Equality Act 2010 ([here](#)) could be used as a starting point with some practical examples of impact on day to day activities of the condition in question to be added.

We suggest the government also directs the wording of the question(s) which employers should use.

The problem with combining all types of disability together is that it overlooks the fact that different impairments will impact people differently which, in turn, impacts the steps employers may need to set out in an action plan. We therefore suggest that the government considers requiring or allowing employers to capture (in an additional question) more granular "categories" of disability, both to inform an employer's action planning and to assist employees in identifying themselves as disabled under the Equality Act definition.

This may include (for example) 5 – 10 types of condition likely to meet the Equality Act definition of disability covering physical conditions (e.g. musculoskeletal conditions), chest or breathing problems (e.g. asthma), mental health conditions (e.g. depression) neurodiverse conditions (e.g. dyslexia, ADHD and ASD) as well as asking about degenerative conditions (e.g. Arthritis) and automatic disabilities (cancer, HIV or multiple sclerosis). We also think that information such as how the employee became disabled, and if it is short-term, long-term, lifelong etc. is important, as this is another way in which disability impacts people differently. We do not suggest reporting at a granular level on these sub-groups separately against non-disabled

employees as the sample sizes are likely to be too small to be meaningful. However, it could be useful for employers to report this information in accompanying narratives. Also, if employees can see their type of condition represented in the options for response, they may be encouraged to self-identify as disabled when they may otherwise not.

As indicated above, we would be happy to engage with the government on the proposals, specifically in respect of the difficulties posed by the complexity of "disability".

32. *Do you agree or disagree that there should be at least 10 employees in each group being compared (for example, disabled and non-disabled employees)? This would avoid disclosing information about individual employees.*

- a. Strongly agree
- b. Somewhat agree
- c. Neither agree nor disagree
- d. Somewhat disagree
- e. Strongly disagree
- f. Don't know or unsure

*Please add any comments you have about the proposals for disability data collection and calculations*

As with ethnicity pay gap reporting, the risk is that a binary comparison is meaningless and that employers would need to decide whether to invest additional time in explaining the data and potentially sharing other more meaningful measures of diversity and inclusion. As with ethnicity pay gap reporting, the average pay of a dataset of 10 employees is unlikely to be informative and will be prone to significant fluctuations each year as employees at different levels join or leave.

It also gives rise to potential data protection concerns: where there is such a small dataset some employees with obvious disabilities could be identified.

It is also currently unclear what an employer who has fewer than 10 employees self identifying as disabled is meant to do in terms of the requirement to report: do they not report at all or will there be an option on the government's website to tick a box stating there are fewer than 10 employees identifying as disabled? We would suggest the latter approach of providing a tick box for this scenario by way of explanation. Simply not reporting on this metric may suggest non-compliance where this is not the case.

33. *Is there anything else you want to tell us about disability pay gap reporting?*

Employees who are disabled and unfit to work could receive company sick pay, statutory sick pay, PHI or no pay at all. These rates and policies vary amongst employers and job roles and how much an employee who is disabled and too ill to work is paid could be very different to an employee who is disabled but able to work. This information and whether the employee is in or out of work should be fed into the reporting, to produce results that accurately highlight the pay gap.

Overall, we want to help the government ensure that the approach it takes is proportionate to driving change where it is needed (and doesn't risk employers taking positive action which is disproportionate or ineffective).

*The City of London Law Society (CLLS)*