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IoD response to Government consultation on equal pay and pay discrimination

About the IoD

The IoD is an independent, non-party political organisation representing 20,000 company directors, senior business leaders, and entrepreneurs. It is the UK's longest-running organisation for professional leaders, having been founded in 1903 and incorporated by Royal Charter in 1906. Its aim is to promote good governance and ensure high levels of skills and integrity among directors of organisations. It campaigns on issues of importance to its members and to the wider business community with the aim of fostering a climate favourable to entrepreneurial activity in the UK.

The IoD welcomes the opportunity to respond to this consultation on equal pay and pay discrimination. Ensuring that the UK's equal pay framework provides effective protection against unlawful discrimination while remaining proportionate and workable for employers is of considerable interest to the IoD and its members. We are therefore pleased to present our views on the proposals set out in this consultation.

Part 1: Pay transparency

Question 1: Do you agree or disagree with the proposal to require employers to publish pay information either in job adverts, or in writing to the candidate before the interview (if there is no job advert)?

Agree.

Question 2: Please explain your answer.

If implemented sensibly, a requirement for employers to publish pay information either in job advertisements or in writing could assist in increasing labour market efficiency, reducing information asymmetries, and helping candidates to make informed decisions while job searching.

However, any such requirement must be implemented with flexibility at its core, to avoid compromising employers' ability to carry out effective recruitment and creating significant litigation risk.

First, employers should be able to meet the requirement by publishing either a salary range or indicative pay band, rather than a fixed salary. As the consultation notes, precise pay is often dependent on variable factors such as experience, qualifications, location, and market conditions; it is therefore essential that employers retain the ability to offer salaries which reflect these variables, within a reasonable range.

Secondly, employers should retain the ability to make final salary offers which differ from the stated range, where they do so for legitimate business reasons. Indeed, in some cases, employers offer salaries above the originally intended range in order to secure a desirable candidate. The framework should be carefully designed such that it does not prevent employers from rewarding exceptional talent appropriately.

Thirdly, any regime should avoid excessive compliance requirements. Any obligation should be simple to understand and enforce, and employers should not face legal risks over minor discrepancies between an advertised range and an eventual offer. The approach should avoid the mistakes made in recent employment law reforms, which have been accompanied by an excessively harsh enforcement regime which risks penalising employers for genuine mistakes.

Question 3: What pay information or conditions would be proportionate for this requirement? Examples might include salary, collective bargaining provisions, annual adjustments, or other financial benefits.

The only information which should be mandated is a salary range. Guidance could encourage employers to offer more information where they feel it is appropriate, but doing so should not be a requirement. Were the requirement to include more than a salary range, the administrative costs of compliance would increase significantly.

The case for including information on collective bargaining provisions is particularly weak given that candidates are primarily concerned with likely remuneration rather than pay-setting mechanisms. Furthermore, information related to future pay progression or annual adjustments are inherently uncertain and often depend on individual and business performance.

Requiring any more information than a salary range would be excessively prescriptive and would reflect a poor understanding of how employers approach recruitment and hiring decisions.

Question 5: Do you agree or disagree with the proposal to reduce the list of current exceptions of when an Employment Tribunal must order an equal pay audit after finding an equal pay breach?

Disagree.

Question 6: Please explain your answer.

The consultation appears to proceed from the assumption that the relatively infrequent use of equal pay audits is itself evidence of a problem. However, it provides no evidence that tribunals are routinely failing to order audits where significant or systemic equal pay issues exist. Nor does it present evidence that employers found liable for equal pay breaches are regularly avoiding scrutiny of wider organisational problems as a result of the current exceptions.

A finding of an equal pay breach does not, in itself, demonstrate the existence of a wider systemic problem. Cases may arise from historical arrangements, organisational restructurings, legacy pay practices, individual decision-making, or isolated errors. The current framework recognises this distinction by allowing tribunals to distinguish between genuinely systemic issues and cases where a wider audit would add little value.

We are not persuaded that the government has demonstrated that tribunals are currently exercising this discretion inadequately. The more plausible explanation for the low number of audit orders is that tribunals are already using the existing powers appropriately. Before expanding what may be a costly and resource-intensive enforcement mechanism, the government should demonstrate that there is an identifiable failure in the current system.

Question 7: Do you agree or disagree with the proposal that an Employment Tribunal must also order the implementation of a non-discriminatory job evaluation scheme alongside an equal pay audit, where it has found an equal pay breach?

Disagree.

Question 8: Please explain your answer.

As with the proposal to reduce the circumstances in which tribunals may decline to order an equal pay audit, the government has not demonstrated that the existing framework is failing. Specifically, the consultation does not identify how many employers found liable for equal pay breaches subsequently experience further breaches as a result of inadequate job evaluation processes, nor does it demonstrate that mandatory job evaluation schemes would have prevented the issues identified in past cases.

A finding of an equal pay breach does not necessarily indicate a systemic organisational problem. Cases may arise from historical arrangements, legacy pay structures, organisational restructuring, individual decision-making, or isolated errors. Requiring tribunals to mandate the implementation of a formal job evaluation scheme in such cases risks imposing significant costs and administrative burdens without corresponding benefits.

Tribunals are already able to distinguish between cases where broader organisational reforms are justified and those where they are not. Any reform should be predicated on clear evidence that the current framework is inadequate and that mandatory job evaluation schemes would deliver benefits commensurate with the costs and administrative burdens they would impose on employers.

Question 9: Do you agree or disagree with introducing a new statutory questionnaire for pay discrimination claims only?

Disagree.

Question 10: Please explain your answer.

While the consultation argues that access to information is important in enabling workers to identify and pursue potential claims, it provides little evidence that the absence of a statutory questionnaire procedure is preventing individuals from enforcing their rights under the current framework. Nor does it demonstrate that existing tribunal powers, disclosure requirements, and case management processes are insufficient for the resolution of pay discrimination disputes.

The proposal risks encouraging speculative information requests and creating additional administrative burdens for employers, particularly SMEs, without any clear evidence that this would result in better outcomes for workers.

Against the backdrop of the government's stated commitment to reducing the regulatory burdens facing businesses, this proposal is particularly disappointing. It would reintroduce a process that was deliberately removed on the grounds that it imposed unnecessary burdens on employers, yet the consultation offers little evidence that circumstances have changed or that existing arrangements are no longer adequate. The proposal therefore points to an approach to employment regulation which is, at best, disjointed.

Question 11: What questions do you think should be included in a statutory questionnaire to facilitate the early resolution of cases?

The government has not demonstrated that a statutory questionnaire process is necessary and therefore it is difficult to comment meaningfully on the specific questions that should be included.

Should the government proceed, any questionnaire should be narrowly drawn and limited to information directly relevant to the alleged pay discrimination. It should not facilitate speculative information requests or impose disproportionate administrative burdens on employers.

Question 12: What steps would you recommend taking to ensure the questionnaire procedure is as efficient as possible?

The previous statutory questionnaire regime was removed precisely because it encouraged time-consuming and often speculative information requests. Realistically, there are few, if any, procedural safeguards that would meaningfully reduce the risk of a reintroduced

questionnaire process becoming a significant compliance burden for employers, particularly SMEs. The most effective way of avoiding such burdens would be not to reintroduce the process in the absence of clear evidence that existing mechanisms are inadequate.

Question 13: If the proposals set out in this chapter were implemented, how might employers change how they operate? For example, regarding recruitment practices or pay and conditions.

Were all the proposals set out in this chapter to be implemented, employers would be likely to respond by introducing additional compliance processes, record-keeping requirements, and legal oversight of recruitment and pay-setting decisions in order to manage the risks created by the proposals in this chapter. This would increase costs, consume management time, and divert resources away from productive business activity.

Question 14: If the proposals set out in this chapter were implemented, what costs do you think employers would face, if any? For example, wage, administrative or legal costs.

The proposals would impose a range of direct and indirect costs on employers. These would likely include administrative costs associated with reviewing recruitment processes, updating HR policies, maintaining additional records, responding to information requests, commissioning legal advice, and dedicating management time to compliance activities.

The proposals relating to equal pay audits and job evaluation schemes would be particularly costly, potentially requiring employers to undertake extensive reviews of pay structures, engage external advisers, and implement new processes and systems. These costs would fall disproportionately on SMEs, which are less likely to have dedicated HR and legal resources.

Part 2: Pay discrimination enforcement

Question 18: What specific steps or guidance should be taken to improve clarity about when an employer can lawfully pay people differently for equal work, particularly regarding the application of the material factor defence?

The government should provide clearer guidance on the application of the material factor defence, particularly in relation to labour market conditions and legitimate business needs.

The consultation largely approaches equal pay through the lens of identifying and eliminating pay differentials. It gives insufficient recognition to the fact that employers must often pay different rates for different roles in order to recruit and retain staff. Employers must often respond to recruitment and retention pressures, skills shortages, regional labour market conditions, and operational requirements. These are normal features of a functioning labour market rather than indicators of discrimination.

Guidance should make clear that genuine market-based pay differentials can constitute lawful material factors and that employers are not expected to ignore commercial realities when setting remuneration. Without greater clarity, there is a risk that the scope of equal pay law will continue to expand beyond its original purpose of preventing discrimination and instead increasingly restrict employers' ability to respond to legitimate labour market conditions.

A successful equal pay regime should distinguish clearly between discriminatory pay practices and reasonable commercial decision-making. The current framework does not always provide employers with sufficient confidence that it achieves that distinction.

Question 19: Please explain your answer, including any specific elements, examples or guidance you think the government should consider.

Employers would benefit from clearer guidance on the circumstances in which genuine commercial and labour market considerations can constitute a lawful material factor. In particular, guidance should make clear that recruitment and retention pressures, labour and skills shortages, geographic factors, experience, qualifications, and market rates are all capable of justifying differences in pay where they are unrelated to sex.

There is a risk that the current debate increasingly treats any significant pay differential as evidence of a problem requiring correction. However, employers must be able to respond to labour market realities. Different roles may attract different rates of pay because they are more difficult to recruit for, experience higher turnover, require scarcer skills, or face stronger external competition.

The government should also provide greater certainty regarding comparisons between fundamentally different roles. Recent high-profile equal pay cases have created concern among employers that the scope of equal pay law is gradually expanding beyond its original purpose of preventing discrimination and increasingly into the regulation of legitimate commercial pay-setting decisions. This risks creating legal uncertainty and encouraging defensive approaches to recruitment and remuneration.

Question 20: Where do you think the Equal Pay Regulatory and Enforcement Unit should be based?

Fair Work Agency.

Question 21: Please explain your answer.

If the government decides to establish an Equal Pay Regulatory and Enforcement Unit, it should be located within the Fair Work Agency rather than creating a standalone body.

The government has repeatedly stated its intention to simplify the employment rights landscape and reduce unnecessary complexity. Creating a new regulator to oversee an area already covered by an extensive legal framework would risk fragmentation, duplication of functions, and additional administrative costs.

Question 22: Do you agree or disagree that the Unit should have the ability to require the disclosure of evidence before triggering a formal investigation process? For example, verbal evidence, pay data and information.

Disagree.

Question 23: Please explain your answer.

Requiring employers to disclose pay data and other evidence in advance of a formal investigation risks creating substantial administrative burdens, particularly for SMEs, and may encourage speculative requests unsupported by credible evidence of wrongdoing. Employers could be compelled to devote significant time and resources to responding before any finding has been made that there are reasonable grounds for investigation.

The consultation has not demonstrated why equal pay enforcement requires such powers, how they would interact with existing investigatory mechanisms, or what safeguards would apply to prevent disproportionate or speculative use.

Question 24: Do you agree or disagree that the existing investigation powers should be strengthened to enable the Unit to require that a job evaluation scheme and/or equal pay audit be undertaken as part of the investigation process, where this would help to establish whether pay discrimination has occurred?

Disagree.

Question 25: Please explain your answer.

An equal pay audit or job evaluation scheme can be a significant and resource-intensive undertaking. Requiring employers to carry out such exercises before an investigation has established whether unlawful pay discrimination has occurred risks imposing substantial costs in circumstances where no breach is ultimately found.

More fundamentally, the consultation provides little evidence that existing investigatory powers are inadequate. Throughout this chapter, the government repeatedly proposes new powers, processes, and enforcement mechanisms without demonstrating that the current framework is failing or that the proposed interventions would lead to materially better outcomes.

Question 26: Do you agree or disagree that the Unit should have the ability to require those subject to inquiry recommendations to respond to them and provide updates on implementation?

Agree.

Question 27: Please explain your answer.

Where recommendations have been made following an inquiry, it would be reasonable for the Unit to understand whether they have been accepted, rejected, or implemented in whole or in part.

However, any reporting requirements should be proportionate and should not create an open-ended compliance burden. Employers should be able to explain why a recommendation has not been adopted where there are legitimate operational, commercial or legal reasons for doing so. The Unit should not have the power to compel implementation of recommendations through this process.

Question 28: Do you think the Unit should have additional new powers or capabilities to help secure remedies for workers beyond our proposal?

No.

Part 3: Making the right to equal pay effective for disabled people and those from ethnic minority groups

Question 36: Please explain your answer.

The consultation does not provide an answer option that fully reflects our position.

Effective protections and enforcement against unlawful pay discrimination on the basis of race, disability, and sex are crucial. However, it does not necessarily follow that the appropriate way to achieve this objective is to extend the existing equal pay framework to additional protected characteristics.

Before pursuing legislative alignment, the government should consider whether elements of the current equal pay regime are operating as intended. A number of recent high-profile cases have generated legitimate debate regarding the scope and application of equal pay law, particularly where tribunals are required to assess pay differentials arising from market conditions, recruitment challenges, skills shortages, and other legitimate commercial factors.

The consultation assumes that the existing equal pay framework represents a model that should be replicated elsewhere. However, it does not consider whether aspects of that framework may already create legal uncertainty for employers or whether extending the same approach to additional protected characteristics could amplify those challenges.

The government should therefore focus on ensuring that protections against discrimination are effective, proportionate and clear, rather than assuming that consistency necessarily requires the expansion of the current equal pay regime.

Question 37: Do you agree or disagree that Employment Tribunals should be able to require the modification of the terms of a claimant's contract in successful discrimination claims relating to pay on the grounds of race or disability?

Disagree.

Question 38: Please explain your answer.

Where unlawful discrimination has occurred, it is clearly appropriate that workers have access to effective remedies. However, the consultation provides limited evidence that Employment Tribunals are currently unable to provide appropriate redress for claimants under the existing framework, or that a new power to modify contractual terms is required.

If Tribunals are given such a power, it should be tightly targeted at remedying the specific discrimination identified in an individual case, rather than becoming a mechanism through which wider contractual arrangements are retrospectively rewritten. Employers require certainty regarding the terms on which staff are engaged and remunerated, and any new powers should be accompanied by clear limits and guidance on their application.

Question 39: What limitations or safeguards should be considered for this power, if any?

If Tribunals are given this power, any modification should be limited to what is necessary to remedy the specific instance of unlawful discrimination identified by the Tribunal. The power should not be used to restructure wider contractual arrangements, alter the terms of employees who are not party to the proceedings, or compel broader changes to an employer's pay-setting practices.

Question 40: Do you agree or disagree that existing requirements should be widened so that employers found to have discriminated in terms of pay on the basis of race or disability can be required to undertake an equal pay audit and job evaluation scheme?

Disagree.

Question 41: Please explain your answer.

As described in our answers to Questions 5, 7, and 24, a finding of unlawful discrimination does not necessarily indicate a wider systemic issue within an organisation. Extending requirements to undertake potentially costly and resource-intensive audits and job evaluation exercises risks imposing significant burdens on employers in circumstances where the underlying issue may be isolated or specific to particular facts.

Question 43: Do you agree or disagree with the proposal to allow claims for race and disability pay discrimination where the work is not materially similar but is of equal value?

Disagree.

Question 44: Please explain your answer.

The ability to bring equal value claims would significantly extend the scope of pay discrimination law beyond situations where individuals are undertaking the same or broadly similar work. Such claims require tribunals to make inherently subjective assessments regarding the relative value of different roles and increase the likelihood of legitimate commercial pay decisions being challenged.

The consultation provides little evidence that existing protections are inadequate or that the absence of equal value claims is preventing individuals from obtaining effective redress.

More fundamentally, employers must retain the ability to respond to labour market conditions when setting pay. Different roles may attract different rates of pay because they face different recruitment and retention challenges, require different skills, or operate in different labour markets. These are normal features of a functioning economy and should not automatically become grounds for legal challenge.

Before extending one of the most far-reaching aspects of the equal pay regime to additional protected characteristics, the government should demonstrate both that a clear gap exists in the current framework and that the benefits of doing so would outweigh the additional costs, complexity, and legal uncertainty that would result.

Question 53: Do you agree or disagree with the proposal to allow hypothetical comparators in equal pay claims in the 2 prescribed, limited scenarios described above (successor comparisons and improvement in terms)?

Disagree.

Question 54: Please explain your answer.

Equal pay claims should, wherever possible, be grounded in comparisons with actual individuals rather than hypothetical circumstances. The use of real comparators provides a clearer and more objective basis for assessing whether unlawful discrimination has occurred.

Allowing hypothetical comparators risks increasing uncertainty for both employers and workers by requiring tribunals to speculate about circumstances that did not in fact exist. This may make outcomes less predictable and make it more difficult for employers to understand and comply with their legal obligations.

Question 55: Are there any other scenarios where the use of a hypothetical comparator should be considered?

No.

Question 57: Do you agree or disagree with providing discretion to the judiciary to extend time limits for bringing equal pay claims 'on a just and equitable basis'?

Disagree.

Question 58: Please explain your answer.

Employers and workers both benefit from clear and predictable limitation periods. The current framework provides certainty regarding when potential liabilities have come to an end and helps ensure that claims are determined while evidence remains available and reliable.

Granting tribunals a broad discretion to extend time limits on a "just and equitable" basis risks creating uncertainty and increasing litigation regarding the limitation period itself. Employers may be required to defend decisions made many years earlier, despite the practical difficulties associated with investigating historical claims and reconstructing the circumstances in which decisions were taken.

Part 4: Promoting pay equality in contractual arrangements

Question 64: Do you agree or disagree with the proposal to introduce a new duty on contracting parties to take all reasonable steps to uphold pay equality in contractual arrangements?

Disagree.

Question 65: Please explain your answer.

A duty on contracting parties to take all reasonable steps to uphold pay equality in contractual arrangements would create significant uncertainty regarding the responsibilities of parties to commercial contracts and extending equal pay obligations well beyond the employer-employee relationship. While employers should remain responsible for ensuring compliance with equal pay law within their own organisations, it is unclear how contracting

parties would be expected to satisfy a duty to take "all reasonable steps" or where liability would ultimately rest.

Employers cannot reasonably be expected to police the pay practices of third parties over whom they have limited visibility or control. The introduction of such a duty risks creating additional compliance burdens, contractual complexity and legal uncertainty without clear evidence that existing legal obligations are inadequate.

Question 66: Do you agree or disagree that the Equal Pay Regulatory and Enforcement Unit should be able to enforce this duty?

Disagree.

Question 67: Please explain your answer.

Enforcement activity should remain focused on the employment relationship itself rather than extending responsibility across increasingly complex commercial arrangements.

Question 68: Do you agree or disagree that the duty to take all reasonable steps should apply to all parties involved in the outsourcing arrangement? This would mean that the principal(s), outsourced service provider(s) and intermediaries in more complex chains could be liable for a breach.

Disagree.

Question 69: Please explain your answer.

Extending liability throughout an outsourcing chain would create additional compliance burdens, increase contractual complexity, and discourage efficient outsourcing arrangements. The proposal also risks creating overlapping responsibilities and disputes regarding accountability rather than improving compliance.

Question 70: What specific steps do you think would be reasonable and proportionate for either a small, medium or large employer to take to fulfill this duty?

As set out in our response to Question 64, we do not support the introduction of the proposed duty.

Should the government nevertheless decide to proceed, any expectations should be proportionate and reflect the extent to which a party exercises control over pay-setting decisions. Organisations should not be expected to police the employment practices of third parties over whom they have limited visibility or influence.

Reasonable steps might include undertaking appropriate due diligence before entering into significant outsourcing arrangements, including contractual commitments to comply with equal pay and anti-discrimination legislation, and cooperating with requests for relevant information where concerns arise. Expectations should be tailored according to employer size and resources, and should not require businesses to conduct ongoing audits or monitoring of third-party workforces.

Question 71: Do you agree or disagree that contracting parties should not be required to pay compensation but should be required to take reasonable steps to ensure ongoing pay equality in their contractual arrangements?

Agree.

Question 72: What remedies do you believe should be available to a claimant when a contracting party is found to be in breach of this duty? Please provide details on the types of remedies or corrective actions you would like to see implemented.

As set out in our response to Question 64, we do not support the introduction of the proposed duty.

If the government nevertheless decides to proceed, remedies should be limited to requiring contracting parties to take proportionate corrective action within their control. Organisations should not be held financially liable for employment practices operated by third parties over whom they have limited visibility or influence.

Question 78: If the proposals set out in this chapter were implemented, what costs do you think businesses would face, if any? For example, wage, administrative or legal costs.

Employers would likely incur costs associated with reviewing existing outsourcing arrangements, conducting additional due diligence, revising contractual terms, obtaining legal advice, implementing compliance processes, and monitoring contractual relationships on an ongoing basis. In more complex supply chains, in particular, these costs could be substantial and would be especially difficult for SMEs to comply with.

The proposals would also increase the volume and complexity of contractual negotiations as businesses seek to clarify responsibilities, manage liability, and allocate risk. This could increase transaction costs and delay or discourage the implementation of outsourcing and commercial arrangements.

More broadly, the proposals risk creating a degree of legal uncertainty regarding the extent of employers' responsibilities for the actions of other parties in a contractual chain. Businesses are likely to respond by adopting more cautious approaches to outsourcing and supplier relationships, potentially reducing flexibility and increasing operating costs.

Question 82: Do you agree or disagree that the proposed measures should retain the same geographical scope as the discrimination and equal pay provisions of the Equality Act 2010 (applying to England, Wales, and Scotland)?

Agree.

I hope you have found our comments helpful. If you require further information about our views, please do not hesitate to contact us.

With kind regards,



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