

**TUC Response to
the Ethnicity Pay
Reporting
Consultation**

Introduction

The TUC is the voice of Britain at work. We represent more than 5.5 million working people in 48 unions across the economy. We campaign for more and better jobs and a better working life for everyone, and we support trade unions to grow and thrive.

Unions play a vital role in ensuring that rights under the Equality Act are respected and upheld by way of collective bargaining, raising awareness of rights amongst employers and employees, assisting in resolution of disputes, providing support to members in pursuing claims to the employment tribunal, as well as adopting strategic litigation to clarify legal issues and establish norms to be followed in the workplace.

The TUC has a long history of opposition to racism and xenophobia and has consistently highlighted and campaigned against discrimination against Black and Minority Ethnic (BME) workers in the British labour market, the workplace and in wider society.

The TUC welcomes the proposal to introduce regulations which will require employers to publish ethnicity pay information. We have seen clear evidence in the first year of gender pay gap reporting of the impact of mandatory reporting of pay data. Within weeks of the reporting deadline, all relevant employers had complied with their duty to publish pay data. While the TUC believes that concerted action to close the gender pay gap will require further change, including requiring employers to publish mandatory action plans, the high levels of compliance with current reporting requirements evidences the success of a mandatory approach over voluntary initiatives.

Given the size of the challenge around ethnicity pay gaps, the galvanising power of mandatory pay reporting would be an important step towards beginning to tackle the £3.2bn pay penalty experienced by Black and ethnic minority workers. There are additional complexities surrounding mandatory ethnicity reporting requirements when compared to gender pay reporting. However, Government should ensure that in drafting the regulations and accompanying guidance there is a clear focus throughout on the main objective of this measure; encouraging employers to identify the inequalities which are the root causes of the ethnicity pay gap and take meaningful, sustained action to address them.

1. The kind of information which should be collected

The TUC believes that ethnic monitoring and regular reporting are essential if businesses and other employers are to identify and address patterns of inequality in the workplace. Organisations need to collect baseline data, update this information regularly so that the information can be seen in the context of wider trends, and measure results against clear, timebound objectives. We have consistently called on government to introduce measures requiring employers across the private and public sectors to establish ethnic monitoring systems that cover recruitment, promotion, pay, and grading, access to training, performance management and discipline and dismissal.

The introduction of mandatory ethnicity pay reporting needs to be supported by a more comprehensive approach to ethnic monitoring by employers in the private and public sectors. We recognise that many employers, especially in the private sector, do not

currently have detailed systems for ethnic monitoring and that the introduction of mandatory ethnicity pay reporting will mean that a number will have to take action to develop or expand workforce ethnic monitoring. However, we believe this is an opportunity for employers to put in place monitoring systems that allow them to not only comply with new requirements to publish pay data, but also to collect sufficient information to enable them to develop an evidence-based plan that targets the causes of any pay gaps. Without up-to-date ethnic monitoring data on areas such as retention, recruitment and promotion, training and development opportunities and performance management, employers will find it difficult to develop a clear picture of their workplace and identify any areas where BME staff are underrepresented or potentially disadvantaged. Although we believe that there should only be two categories for mandatory pay reporting (see section 2), employers should be encouraged to adopt a more detailed approach to workforce monitoring, using census categories to support a nuanced understanding and effective targeting of action.

2. What should be reported

The TUC believes that the following should be reported.

- An overall figure, comparing average hourly earnings of BME employees as a percentage of white employees' earnings. The average gap should be required on both a mean and median basis, since both calculation figures have pros and cons as indicators.
- The pay gap between full-time and part-time BME and white employees
- The pay gap between BME women and white male employees
- The distribution of BME employees by quartiles of full-time equivalent earnings.
- The proportion of BME and white employees doing part-time and full-time work and those employed on a permanent, fixed term or casual basis.
- The pay gaps in basic pay and in additional payments such as bonuses, commission, overtime, recruitment and retention supplements between BME and white employees.
- The percentage of employees who have shared information relating to their ethnicity to inform the calculation of the information listed above

Given the current low level of ethnic monitoring that exists in the labour market, the system of ethnicity pay gap reporting should not be over complicated, for example involving the publication of data for a wide range of ethnic groups. Unnecessary complexity could not only increase the likelihood of employers failing to fully comply with the regulations but also reduce the impact of transparency. For example, if smaller employers, or those with low levels of BME staff were required to publish ethnicity pay data across the full range of census categories, it is unlikely that they would be able to do so due to the need to protect the confidentiality of their employees, with workforce statistics commonly not including information based on five or fewer responses. However, where employers have a more comprehensive set of data and are able to publish this they should be encouraged to do so.

As the quality of data used to calculate ethnicity pay gaps could be compromised by low levels of participation in workforce ethnic monitoring schemes, it is important that employers publish the proportion of their workforce whose information has informed the calculations.

3. Transparency and Action Plans

We believe that transparency and dialogue between employers, employees and trade unions play an important role in tackling discrimination in the workplace. Therefore, when drafting the regulations on ethnicity pay reporting, special attention must be given to internal reporting.

When the impact of gender pay gap reporting is examined, it is clear that a majority of employees have a deep interest in both the pay gaps that exist in their workplace and the steps that employers are taking to address these but are not routinely being given this information. Recent research revealed that around three-quarters of those in workplaces required to publish gender pay gap figures were willing to take action to help their employers tackle pay gaps. However, almost half had not read or heard any information about their organisation's own gap¹. The regulations should therefore specify that employers need to take appropriate steps to ensure employees have access to the published pay data and accompanying action plan, giving examples of how this could be done, e.g. posted on a company intranet, on employee notice boards or included in staff newsletters. The regulations should also require employers to send the information directly to representatives of a recognised trade union and to consult on actions that they intend to take to narrow any pay gap that exists.

Currently, in gender pay reporting there is no mandatory requirement for an action plan or narrative to be published. Analysis by EHRC has shown limited levels of voluntary compliance, with only around one in five employers having published a timebound action plan, with around half producing a narrative, many of which contained very little detail or clear commitments.² The TUC has consistently argued that without mandating employers to put such plans in place the legislation is unlikely to have significant impacts on employers pay gaps.

The only way in which ethnicity pay reporting will translate into required meaningful change is through sustained activity which is focused on the root causes of pay gaps, informed by ethnic monitoring. In order to move from the production of pay data to sustainable action, the approach to mandatory transparency which has proved so effective in gender pay numerical reporting needs to be broadened from numbers to actions (as is also the case in respect of the gender pay gap).

As part of reporting on their ethnicity pay gap, employers should be required to produce a narrative explaining how the figures were arrived at, and to make an evidence-based statement that sets out what they consider to be the main causes of any ethnicity pay gaps

¹ EHRC/BMG Poll: Gender Pay Gap Employee Poll, 2018, <https://www.bmgresearch.co.uk/gender-pay-gap-employee-poll/>

² Ibid

and an action plan setting out what they intend to do to close these gaps. Even in organisations where a gap does not currently exist, it would be useful for organisations to set out how they intend to maintain this position.

The TUC believes that in order to ensure employers effectively address the issues that they have identified in their analysis of pay and other data, the government should not only require publication of an action plan and narrative but provide clear statutory guidance on how to develop this. Although the detail of solutions may differ between individual employers, there are a number of areas for action which all relevant employers should pay close attention to.

The guidance should build on good practice elements set out in Chapter 18 of the EHRC's existing employment code of practice³ and require employers to

- monitor the key areas of the employment relationship including:
 - recruitment and promotion
 - pay and remuneration
 - training
 - appraisals
 - grievances
 - disciplinary action
 - dismissals and other reasons for leaving
- assess which of their employment policies and practices have an impact on the ethnicity pay gap,
- access proposed policies, to make sure that they do not risk affecting the BME workers negatively,
- consult the workforce and, particularly, involve BME workers at all stages,
- publish the results of their assessments, consultations and monitoring,
- set aspirational targets to close the pay gap and publish, report on and review these on a regular basis.

We believe this requirement would encourage a more action-based approach rather than one that only requires an employer to publish numerical data. It would also ensure that employers have the monitoring information that they require to tackle some of the key drivers of ethnicity pay gaps.

We recognise that many employers will need time to establish or strengthen monitoring systems to enable them to produce ethnicity pay data. However, this should not detract from the urgency with which the ethnicity pay gap needs to be addressed. It is important

³ EHRC, 2011, Employment Statutory Code of Practice
<https://www.equalityhumanrights.com/en/publication-download/employment-statutory-code-practice>

therefore that Government publish guidance to support employers to do this as soon as possible and set an ambitious implementation timetable.

Guidance for employers on the regulations should also encourage dialogue with employees and their representatives on action to narrow ethnic pay gaps. In addition, guidance should be developed to help employees and trade unions understand the requirements of the new regulations to explain what their rights are to receive information and how the requirements will be enforced.

4. Ethnic Data Classification

The TUC recognises that the question of what categories should be used when monitoring race discrimination has always been subject to debate. The ethnicity classification employed in the census and other official statistics in the UK since 1991 have reflected the different views in the debate that has taken place about the collection of data between the concepts of ethnicity and race and nationality.

Where employers are already collecting data, it is likely that they are using a number of different classification systems and attempting to impose a standard set of classifications that employers use may be counterproductive. The TUC believes that what is important is that the regulations set a clear system of classification for the way that the ethnicity pay data is reported.

Whilst we recognise that discrimination may be experienced by differently by ethnic groups and that there is some differentiation in outcomes between different ethnic groups discrimination is experienced by all BME groups in the labour market. We believe that the ethnic pay gap is an indicator of structural racism in the labour market rather than the problem itself.

The TUC believes that a simple top-level ethnic classification reporting system used by the Race Disparity Unit that reports pay gap data for white ethnic groups (including White British and White ethnic minorities) compared with all other ethnic minorities should be used. We view the primary purpose of any pay gap reporting system as highlighting where and how racial discrimination manifests itself in the labour market and ensuring that this is effectively addressed by employers.

5. Size of Organisation

The TUC supports the recommendations made in the McGregor Smith review that the requirement to report on the ethnicity pay gap should apply to companies with 50 or more employees. Small businesses accounted for 99.3% of all private sector businesses at the start of 2018 and 99.9% were small or medium-sized enterprises (SMEs). Total

employment in SMEs was 16.3 million; 60% of all private sector employment in the UK⁴. If the regulations are to be effective the TUC believes that they need to apply to the majority of workplaces. Excluding SMEs by setting threshold of 250 employees would exclude a substantial number of workplaces where BME workers are employed.

If the government disagrees with this analysis, and believes that the threshold for reporting should be higher, the TUC suggests that the government should consider a threshold of employers with 150 or more employees. This would mirror the equality information reporting requirements for public authorities under the Public Sector Equality Duty.

6. Enforcement

The question of enforcement has not been addressed in the consultation document. However, without an effective enforcement mechanism, any positive impact of mandatory ethnicity pay gap reporting will be significantly reduced.

We believe that the EHRC in its role as a regulator should be given the role of monitoring compliance with ethnicity pay reporting regulations. This would mirror the Commission's role in enforcing compliance with the gender pay gap regulations. We believe that the powers available to the EHRC to enforce gender pay gap reporting regulations are too cumbersome and drawn out to provide swift, effective enforcement. Any regulations relating to ethnicity pay gap reporting should be supported by a more effective enforcement mechanism. Enforcement activity must extend beyond a mere tick box approach of merely checking that data has been published. It must also examine the accuracy of the data and check compliance with mandatory publication of narratives and action plans. This means the EHRC will require appropriate powers and additional resourcing. The EHRC's powers will also have to be amended so that it is able to issue compliance notices and to enforce those notices through court orders. This would mirror the provision in s.32 of the Equality Act 2006 which enables the EHRC to enforce the public sector equality duty.

The TUC believes the EHRC should also be given powers to issue fines to those who fail to comply with a notice. The power to issue fines would mean the EHRC would have an alternative enforcement option rather than being forced to follow the resource-intensive route of applying for a court order. The maximum fine under s.78 is £5,000. We believe this is an insufficient penalty for a failure to comply. Fines should continue to be issued if there is ongoing non-compliance and the EHRC should use its power to take an employer to court if there is repeated non-compliance. The ultimate sanction would be company directors being held in contempt of court. We note that the government has a policy of naming and shaming employers who are not paying the national minimum wage and have greatly increased the maximum civil penalty for underpayment to £20,000 per underpaid worker to ensure more effective enforcement. We would encourage the government to learn from this approach in the enforcement of ethnicity pay reporting.

⁴ Federation of Small Businesses, UK Small Business Statistics, <https://www.fsb.org.uk/media-centre/small-business-statistics>

However, if it is to effectively deliver on any enforcement role in relation to ethnicity pay reporting regulations, the EHRC must have its core funding increased to carry out these new duties. The EHRC has faced substantial cuts since 2010. Its budget is more than 60 per cent lower and staffing more than 72 per cent lower than when it was established in 2007. It has rarely used its unique powers to enforce the existing duties to publish equality information under the Public Sector Equality Duty, partly due to lack of resources and the more than 40,000 public authorities it has to monitor. In addition to this an increase in core funding, the TUC also recommends that the EHRC is given additional funding specifically targeted at enabling it to carry out regular monitoring exercises to assess compliance.

With a minimum of 8,000 private sector organisations likely to be covered under current proposals (more if the threshold is lowered to achieve meaningful change as the TUC suggests - see section 5), the regulations must be drafted and reporting structured in a way that makes monitoring compliance as effective and efficient as possible. This strengthens the case for having a standard method of calculating ethnic pay gaps and for the information to be published in a specified, accessible way. The government should also consider requiring employers to report the information in annual reports and to a body such as Companies House which would ensure further transparency

Finally, the TUC suggests that if an employer fails to properly comply with the regulations then a tribunal should be able to take this into account when determining any subsequent tribunal claim on a related matter such as race discrimination. The government should also make compliance with ethnicity pay reporting key to becoming a preferred bidder for public sector contracts.

7. Trial or Phased Approach

The TUC is concerned that the Government's general approach to dealing with problems of racial discrimination in the labour market is generic and does not seek to tackle specific problems faced by BME Communities. In its report to CERD the UK Government stated that *"it believes that it's a mistake to see inequalities only in terms of race and ethnic origin since socio- economic status and poverty affect people's chances in life. We have therefore made a deliberate shift away from interventions specifically on the basis of race and ethnicity."*

This approach fails to recognise the reality that race discrimination plays a significant role in determining the socio-economic status of BME people and the poverty suffered by BME communities. It also ignores the institutional and systemic discrimination that exists in the UK labour market and wider society.

Although this issue is under researched, it has previously been found to be at its most acute in the private sector and was highlighted by the Government's National Employment Panel Business Commission on Race Equality in the Workplace in its report 60/76⁵. In the course

⁵ 60/76 The Business Commission on Race Equality in the Workplace
<http://webarchive.nationalarchives.gov.uk/20100406130654/http://dwp.gov.uk/docs/buscommissionreport.pdf>

of the Commission's work, it surveyed over a thousand businesses to find out their attitudes to race equality and what they were doing to promote it. Their findings included:

- 42% could not articulate reasons for their company to take steps to promote race equality;
- 61% did not recognise a connection between diversity and business performance; and
- 83% did not believe they would face formal investigation of their employment practices, or that an employee would ever take them to a tribunal.

The approach of Government has traditionally been one of promoting good practice in the public sector with the hope that it will encourage better practice in the private sector. Given the prevalence of race discrimination in the workplace highlighted in the Ruby McGregor Smith report the TUC believes this approach has failed. The Government's response to that review was to state that, *'we believe that in the first instance, the best method is a business-led, voluntary approach and not legislation as a way of bringing about lasting change'*.

We welcome the acknowledgement in the consultation document that voluntary approaches to dealing with discrimination in employment do not result in significant progress. The experience of gender pay reporting has shown that a voluntary requirement to publish figures was completely ineffective in persuading sufficient numbers of employers to comply and that a mandatory approach is necessary. The size of existing ethnicity pay gaps and the enduring nature of disadvantage and discrimination faced by BME workers make the introduction of mandatory reporting a matter of real urgency. Any delay in implementation as a result of a staged approach or trialling would merely serve to entrench disadvantage.

Although evidence points to current low levels of detailed ethnic monitoring among employers⁶ the notion of ethnic monitoring to identify areas of underrepresentation, disadvantage or discrimination and action planning in response to the results of such monitoring is not a new one. As highlighted in section 3, the EHRC's employment statutory code of practice from 2011 provides a clear framework for employers to take steps to understand the impact of their policies on BME employees and applicants and take action to address areas of concern. This publication was preceded by the Commission for Racial Equality's statutory code on racial equality in employment which covered similar ground but with a specific focus on ethnicity⁷. Clear guidance on good practice from authoritative sources has existed for decades in this area but it is clear that it has not been widely adopted. What is needed therefore is not a delay to examine further good practice approaches but to give employers the impetus for action which we know from gender pay gap reporting lies in the requirement for mandatory transparency. We would echo the

⁶ EHRC, 2018, Measuring and reporting on disability and ethnicity pay gaps, <https://www.equalityhumanrights.com/sites/default/files/measuring-and-reporting-on-ethnicity-and-disability-pay-gaps.pdf>

⁷ Commission for Racial Equality, 2005, Statutory Code of Practice on racial equality in employment, <https://www.bfwh.nhs.uk/wp-content/uploads/2015/07/Code-of-Practice-on-the-Duty-to-Promote-Race-Equality.pdf>

words of Ruby McGregor-Smith at the start of her review of race in the workplace⁸: “the time for talking is over”. In order to begin to dismantle the structural disadvantage facing BME people at work we need rapid action to implement ethnicity pay reporting without unnecessary delay.

⁸ Race in the workplace: The McGregor-Smith Review,
https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/594336/race-in-workplace-mcgregor-smith-review.pdf