

# consultation response

# Women and Work Commission

# the Gender Pay Gap

An IER submission

**PREPARED BY**

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## **BIOGRAPHICAL NOTE**

Aileen McColgan is a Vice President of IER, Professor of Human Rights Law at King's College London, and a Barrister at Matrix Chambers. Aileen was also a member of the Local Government Pay Commission which reported in October 2003.

## WOMEN AND WORK COMMISSION: WRITTEN EVIDENCE

1. The Institute of Employment Rights is an independent think-tank supported by the labour movement. Established in 1989, the Institute is a unique network of lawyers, academics and trade unionists. Our aims are to inform debate and disseminate new ideas on trade union and employment rights. To that end, the Institute makes submissions regarding current and future policy proposals and welcomes the opportunity to participate in this consultation process.
2. For further information on the work of IER contact Carolyn Jones, Director, 177 Abbeville Road, London SW4 9RL. Direct line: 0151 727 8083; [cad@ier.org.uk](mailto:cad@ier.org.uk). Office lines: 020 7498 6919; [office@ier.org.uk](mailto:office@ier.org.uk) or visit our website at [www.ier.org.uk](http://www.ier.org.uk).
3. We should note at the outset our sense of *déjà vu*: there have been a wealth of investigations into the extent and nature of the gender-pay gap, and of possible legislative and other approaches to it.
4. One aspect of the necessary response is clear to all those who spend time considering the problem. In February 2001 the Equal Pay Task Force reported, in *Just Pay*, that it had ‘no alternative but to make a strong recommendation that the Equal Pay Act be amended to require employers to carry out regular equal pay reviews’. This recommendation was made on the back of the Task Force’s finding that:

the vast majority of employers do not believe they have a gender pay gap and therefore do not believe an equal pay review is necessary. We are firmly of the view that there will be little or no progress in closing the pay gap unless employers take the essential first step of examining whether they have gender inequalities in their pay systems. However, the overwhelming evidence to date is that most will not do so voluntarily.
5. The Task Force’s Report echoed the conclusions of the Independent Review of the Enforcement of UK Anti-Discrimination Legislation which

had reported in 2000.<sup>1</sup> In April 2001 the Government asked Denise Kingsmill to carry out an independent review into women's employment and pay by autumn of the same year. Kingsmill's terms of reference were restricted, to the dissatisfaction of many commentators, to the examination of **non-legislative** proposals (hence excluding mandatory pay reviews). The Kingsmill report did not (unsurprisingly) recommend mandatory legislative pay reviews, but did recommend that the pay reviews ordered by Tessa Jowell, then Minister for Employment, in central government departments and agencies be required by all public sector bodies. The report further stated that:

If it becomes clear over the next few years that a voluntary approach is leading to an unacceptable 'tail' of laggards who are simply not putting in place the systems to enable them to answer basic questions about their employment of women and the extent of any gender pay gap then it would be appropriate to return to the issue of whether a mandatory requirement for employment and pay reviews is necessary.

6. The EOC Task Force's recommendation for mandatory pay reviews did not give rise to government action, the then Women's Minister Barbara Roche instead providing the EOC with £100,000 to assist in the development of a new 'Equal Pay Kit' to form the basis of reviews carried out by employers on a voluntary basis and expressing the hope that 'carrying out an equal pay review will soon be seen as good business practice for every employer'.
7. In 2001 the EOC expressed the hope that 50% of large employers would have conducted a review by the end of 2003, 25% of other employers to have done so by the end of 2005. Research carried out in November 2003 (S. Brett and S. Milsome, 'Monitoring progress on equal pay reviews') showed that 45 per cent of large organisations (500+ employees) had completed, were carrying out, or planned to start an equal pay review before the end of 2004. 31% of small or medium-sized (25–499 employees) were in the same position. The researchers concluded that the EOC's target for smaller firms was likely to be achieved by the end of

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<sup>1</sup> Hepple, Cousseay & Choudhury, Hart Publishing, July 2000.

2005 and that, although its large employer targets had not been met, 'The Government's less ambitious target ... 35 per cent of large employers ... by 2006' seemed likely to be achieved. But the research also reported that 49 per cent of large employers and 62% of small and medium-sized employers 'had no current plans to carry out an EPR. Further:

- Public sector organisations were almost twice as likely as private sector organisations to have conducted or be conducting an EPR, or to be planning one... [and]
- The majority of organisations which had completed EPRs, or were in the process of conducting one, had begun the process in 2002 or 2003...

Employers that had no plans to carry out an EPR were asked their reasons for not doing one. The great majority stated that they believed they already provided equal pay. This concurs with earlier research by NOP Business for the EOC which pointed to an unwarranted complacency amongst employers that their pay systems were not discriminatory [citing J. Morrell, M. Boyland, G. Munns and L. Astbury, *Gender Equality in Pay Practices* (EOC Research Discussion Series, 2001)].

8. Without mandatory equal pay reviews there will be no significant reductions in the gender pay gap in the short to medium term (and no guarantee of longer term reductions for reasons discussed below). Research carried out by W. Olsen and S. Walby for the EOC, 'Modelling gender pay gaps' found that:

- Gender differences in lifetime working patterns account for 36% of the pay gap. On average, women work fewer years in full-time employment than men (19% of the pay gap); have more interruptions to employment for childcare and other family care (14%); and are more likely to work part-time (3%).
- While each year worked full-time is associated with increased wages ... each year of part-time employment is associated with a slight reduction in wages.
- Rigidities in the labour market account for a further 18% of the pay gap. Men are more likely to work with other men and women with other women and, after other factors are taken into account, wages are 1% higher for every rise of 10 percentage points in the male proportion of an occupation. This accounts for 10% of the pay gap, while other labour market institutional factors, including that men tend to work in larger firms than women, account for 8%.

- 38% is due to other factors associated with being female, including direct discrimination and differences in the labour market motivations and preferences of women as compared with men. Some of this will be attributable to indirect discrimination or systematic disadvantage, including how the work that women choose to do is valued...
  - Indirect discrimination and systematic disadvantage can affect the labour market motivations and preferences of women; are part of the causes of labour market rigidities; and are part of the reasons that particular types of working patterns result in lower wages. Simplistic assumptions that gender wage differences due to variations in education and working patterns are legitimate because they reflect skills, qualifications and experiences that are relevant to employers are therefore incorrect.
9. Much of the pay gap which is attributable to the factors outlined above is not capable of being addressed. The reward of years spent in full-time employment is indefensible from an equality perspective unless it makes the worker better at his or her job (a proposition which does not appear to be supported by the evidence that years in part-time employment are not rewarded). The fact that men are rewarded for working with other men and women penalised for working with other women suggests that the achievement of equal pay for work of equal value **within** organisations will be insufficient: it will not address that part of the gap which is attributable to **industrial** segregation.
10. Over time one part of the answer to this may be to encourage diversification across industrial sectors of women (and men), a response which may also address part of the gender pay gap which stems from occupational segregation. But these long term solutions do not address the pay inequities suffered by women **today**, and there is every reason to suppose that the movement of women into previously male jobs and sectors will simply result in the creation of niche 'female' areas (or ghettos) within those predominantly masculine jobs and sectors, and/or reductions in the relative wages in the previously male jobs and sectors.<sup>2</sup> Nor will supply-side factors address that part of the 38% of the gender-pay gap which is attributed by the research to direct and indirect discrimination.

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<sup>2</sup> See discussion in A. McColgan, *Just Wages for Women* (OUP: 1997), pp.273-278.

11. Equal pay reviews are a necessary but not a sufficient answer to the gender-pay gap. They will not assist women in predominantly female workplaces who are amongst the lowest paid. Such women have few if any suitable comparators in any intra-workplace job comparison exercise. Even if they had, these workplaces are disproportionately unlikely to be unionised and any pay review process conducted within them would be vulnerable to employer manipulation (this became clear in Ontario, Canada, with the implementation there of the Pay Equity Act 1985<sup>3</sup>). Such women will only benefit from the adoption of an industrial or sectoral approach to the problem.
12. In this respect we believe the Sectoral Forums discussed and agreed as part of the Warwick Agreement in July 2004 offer an opportunity to pilot an institutional structure which could have a great impact on pay equality. Not only would such Forums take decisions over pay, training and working conditions out of the enterprise, they would also bring external expertise and support to what are too often unorganised and vulnerable workers.
13. We turn now to the specific questions posed by the Commission. We do not seek to provide answers to all those questions but will confine our remarks to those to which we can make a useful contribution.

**Question 2: What are the barriers that prevent women who are not working, working part time or are underemployed from working in jobs which make full use of their existing skills?**

14. The question presupposes that part-time employment is necessarily associated with under-use of women's skills, rather than under-valuation of those skills. It is the case that part-time women workers tend to be herded into relatively lower-skilled jobs in low paying sectors and workplaces.<sup>4</sup> But work undertaken by part-time women is also systemically

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<sup>3</sup> See generally A. McColgan, *Just Wages for Women*, chapter 7 and working paper for *Equality: a New Framework, The Report of the Independent Review of the Enforcement of UK Anti-Discrimination Legislation*, note 1 above.

<sup>4</sup> J. Rubery and B. Burchell, 'Part-time Work and Gender Inequality' in A. Scott (ed), *Gender Segregation and Social Change* (OUP: 1994), A Manning & B Petrongolo, 'The Part-time Pay Penalty (LSE and Women and Equality Unit, 2004, Memorandum from the EOC to the House of Commons Select Committee on Education and Employment, *Part-time Working* (1998) Vol II.

undervalued.<sup>5</sup> It is unfortunate that the Commission's questions appear to embrace supply-side explanations for the gender-pay gap given the strength of evidence indicating that a significant portion of the gap is the result of employer behaviour. Compare, for example, the conclusion reached in summer 2004 by the ESRC publication *The Seven Ages of Man and Woman* (K. Whitfield *et al*) that there is a 'consistent and unambiguous pattern' that 'women doing broadly comparable hours and broadly comparable work earn less than their male counterparts'. Note also the general remarks made above.

15. Turning to the question why those women who are under-employed in terms of their skills find themselves in that position, women have always suffered work-related disadvantage by virtue of their disproportionate shouldering of responsibility for childcare (and elder and other dependent care). The effects of this on their employment prospects have perhaps been exacerbated by increasing employer-led demands for 'flexibility' and the long working hours culture which characterises the UK labour market. Those (largely women) who cannot meet demands for long house and flexibility around the employer's needs are unable to compete in the market for 'good' jobs and are left to fish in the pool of lower-paying, part-time work.

**Question 5: What other solutions might support women into jobs which make best use of their potential?**

16. One of the most significant issues which needs to be addressed is long working hours. Permitting women – even parents and workers generally – to work flexibly or part-time would be a start inasmuch as it would permit women / parents generally to shape their existing jobs to their own caring responsibilities. But the difficulty with this is that, even if such rights are given to workers (or parents) generally rather than to women, their uptake is very disproportionately female and the expectation that women will use

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<sup>5</sup> see, for example, Rubery and B. Burchell *ibid*, S. Horrell, J. Ruberry and B. Burchell, 'Unequal Jobs or Unequal Pay?' (1990) 20 *Industrial Relations Journal* 176, N. Millward and S. Woodland, *Gender Segregation and Male/ Female Wage Differences* (LSE 1995) the Memorandum from Collette Fagan to the House of Commons Select Committee on Education and Employment, *Part-time Working* (1998) Vol II.



such rights acts as an incentive for employers to discriminate against them. As Pillinger warned (107 *Equal Opportunities Review* 2003):

Across Europe, some experiments in making working time more flexible have had the consequence of legitimising women's exit from the labour market, and therefore further undermining their position within it. For example, working time experiments in Finnish municipalities and health services, to introduce a six-hour day, part-time work, part-time benefits and work rotation – the bulk of which have been taken up by women – have had this negative consequence associated with them. Parental leave schemes in Sweden have had such a low take-up from fathers that a father's month is now included in the 12-month leave entitlement for parents [i.e., it can be transferred to the mother rather than simply lost].

17. The significance of working hours to the 'glass ceiling' is recognised by the EOC in 'Sex and power: who runs Britain? 2005':

A major barrier is that work is organised in a way which assumes people don't have caring responsibilities – hours are very long and work is not flexible enough, especially at senior levels.

Many mothers and carers do jobs well below their capabilities because they can't find higher productivity work that they can combine with their family responsibilities.

One of the reasons women choose part-time work when they have a family or care for another person is because full-time work, especially at senior levels, often means very long hours...

And, as work intensifies in our increasingly 24/7 high pressure society, increased flexibility offers real opportunities for employers and individuals...

18. Other factors which need to be explored include the persistence of sex discrimination in the workplace, not least around pregnancy and maternity – see the ongoing Formal Investigation by the EOC into pregnancy discrimination and the material produced by the Commission in relation thereto. Again according to 'Sex and power: who runs Britain? 2005', 'about 20% of women face dismissal or financial loss as a result of their pregnancy' and 'Over a third of mothers, more than one in ten fathers and nearly one in five people with another unpaid caring role have given up or turned down a job because of their caring responsibilities'.

**Question 6: What are the barriers to attainment of qualifications at school?**

19. This question appears to miss the point that girls leaving school and full-time education are significantly better qualified than their male peers (in 2001-2, for example, according to the EOC's *Facts about Women and Men in Britain 2004*, 81% of GCSE examinations sat by girls in England and Wales generated A-C grades by comparison with 73% of those sat by boys. At A level, too, girls outperformed boys in every subject (69: 65% gaining A-C grades in English language, 72: 70% in English literature, 75: 70% in Mathematics; 64: 59% in Biological sciences, 73: 69% in Chemistry, 75: 65% in Physics, 68: 61% in Business studies, 77: 67% in Geography and 75: 72% in History. The problem is that these qualifications are not matched by earnings.

**Question 7: What prevents girls from considering a wider range of subjects, in particular those more usually studied by boys? What good practice exists? What other solutions could encourage girls to consider a wider range of subjects?**

20. Again this question partly misses the point. It is true that the gender divisions which open up in school may contribute to occupational segregation in the workplace. And there is some gender division in subject choice.<sup>6</sup> It may be a useful exercise to explore why girls are more inclined than boys to study English and (marginally) history, boys more inclined to study physics and (marginally) geography. But it is important not to confuse subject specialism with the value of eventual job choices.
21. One should also be cautious about making too many assumptions about gender divisions in education.<sup>7</sup> While the figures do show very clear

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<sup>6</sup> In 2001/2, for example, according to the EOC's 'Women and Men in Britain 2004' 337 000 girls and 339000 boys took English language GCSE examinations, 278 000 girls and 261000 boys English literature, 197000 girls and 178000 boys French, 350000 girls and 359000 boys Mathematics, 261000 girls and 258000 boys Science double award, 213000 girls and 250000 boys design & technology, 127000 girls and 95000 boys art, 111000 girls and 142000 boys geography, and 118000 girls and 119000 boys history; and A level entries were more distinct with 26000 girls and 16000 boys taking English language, 45000 girls and 20000 boys taking English literature, 29000 girls and 44000 boys mathematics, 38000 girls and 22000 boys biological sciences, 23000 girls and 22000 boys chemistry, 9800 girls and 30600 boys physics, 24000 girls and 27000 boys business studies, 20000 girls and 23000 boys geography, and 25000 girls and 23000 boys history.

<sup>7</sup> In 2001-2 women outnumbered men in medicine and dentistry by 17 000 to 13 000, in Subjects allied to medicine by 70 000 to 16 000, in biological sciences by 43 000 to 25 000, in

gender differences in, particularly, subjects allied to medicine, languages, education, creative arts and design, physical sciences, computer science, architecture building and planning and engineering and technology, perhaps the most interesting aspect of them is the very strong clustering of male students across a narrow range of subjects (engineering & technology, computer science and business and administrative studies accounting for, respectively, 14, 12 and 11% of all male students, subjects allied to medicine and business and administrative studies 13% and 11% respectively of female students) and the fact that there were 550000 women but only 470 000 men in undergraduate studies.

22. One of the factors which reduces female wages (and is illustrated by the facts in the *Enderby* case) is that, where an occupation is significantly female, employers can resist wage inflation pressures by (for example) opening the occupation up to part-time or other 'flexible' forms of working, thus tapping into a reserve of female labour which would otherwise not be utilised. This tactic is not generally available in predominantly male occupations. It is true, therefore, that strong concentrations of women within particular occupations (the same is true for industries) can contribute to a relative downward impact on pay. But this is not because those 'female' jobs are less valuable than 'male' jobs whose incumbents are in a position to benefit from upward wage pressures. And the solution to this 'crowding' cannot sensibly be – for those women already in the workplace – that they retrain to occupy 'male' jobs:

- In the first place, this would be an absurd misuse of existing human capital and the resources already ploughed by the state into education.

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veterinary science by 2400 to 900, in agriculture & related studies by 4000 to 3000, in social, economic & political studies by 49 000 to 33 000, in law by 25 000 to 16 000, in business & administrative studies by 62 000 to 56 000, in librarianship & information science by 13 000 to 8 000, in languages by 42 000 to 16 000, in the humanities by 19 000 to 16 000, in education by 38 000 to 12 000, and in creative arts & design by 52 000 to 34 000, while men outnumbered women in, in physical sciences by 27000 to 17000, in mathematical sciences by 10000 to 6000, in computer science by 54000 to 14 000, in engineering & technology by 67 000 to 12 000, in architecture, building & planning by 18 000 to 7 000.

- Secondly, significant movements of women into jobs is associated with downward pressure in pay in any event. If surgery were to become a predominantly female specialism and geriatrics male there is every reason to suppose that the relative pay of geriatricians would improve significantly by comparison with that of surgeons (see introductory remarks).
- Thirdly, to the extent that there may be gender-specific preferences for certain types of study and employment, it would be irrational to coerce choice against those preferences, as distinct from taking all reasonable steps to ensure that choices are not being channelled into traditionally 'sex appropriate' specialisms.

23. In short, the solution to women's underpayment is not to make nurses become systems programmers (this would, in any event, result in decline in the pay of systems programmers), rather to reward women for the work that they do by recognising the skills, effort etc., involved.

**Question 9: What are the barriers to women's greater access to training and lifelong learning? What good practice exists? What other solutions are there?**

24. Again the answer to this question is likely to lie partly in women's dual burden. But this is not the whole story. Submissions by UNISON to the Trade and Industry Select Committee Inquiry into The Effect of Occupational Segregation on the Gender Pay Gap include the following:

21. Part-time workers have lower levels of access to training than those working full time. In 2004, 37% of full time workers had received training in the previous thirteen weeks, compared to 28% of part-time workers [citing the Labour Force Survey, Spring 2004] As the majority of part time workers are women, this suggests that women will be disproportionately affected by a lack of training opportunities in their workplaces.
22. The particular barriers to training part-time workers relating to employer attitudes were identified in a Union Learning Fund supported project carried out by the South West TUC. This found that employers expressed the following views about people working part time:
  - Part-timers are less committed

- Part-timers are not interested in training
  - Part-timers have low skills
  - Part-timers have their own free time for training
  - Induction and on the job training is enough
  - Training part-timers doesn't pay
  - Experience is worth more than qualifications.
23. The TUC supports the extension of some form of ETP nationally as announced in the pre-budget report. Further, the TUC believes that a right to paid time off to train for all workers, particularly up to level 2 is important in order to reach those employers that refuse to train their workers. This has important implications for the economy, as well as for individuals to reach their full potential.
24. There is evidence that unionised workers have greater access to training than those who are non-unionised, and that women in particular benefit from this. However, trade unions' ability to offer access to training to workers is restricted by the lack of a statutory right to collective bargaining over training. While there are some rights to consultation on training under the statutory recognition procedure, the right to be consulted on training does not apply to workplaces where there is *voluntary* recognition.
25. The TUC has called on the Government to introduce statutory rights for collective bargaining on training as we believe that this will significantly increase the numbers of women, and especially those working part time, who can have access to training that will improve their skills and thus productivity and employability.

**Question 10: What are the barriers to women progressing in the workplace? What positive examples are there of women/companies overcoming them? What other solutions are there?**

**Question 11: What are the barriers to women moving into non-traditional jobs? What positive examples are there of women/companies overcoming them? What other solutions are there?**

25. It is well understood and has been demonstrated time and again by the evidence that women face sex discrimination at work both in terms of harassment and overt hostility when they work in predominantly male workplaces/ occupations (the police service, military and fire service provide rich examples of this) and also in the form of 'glass ceilings' to progression: jobs which demand, essentially, that those doing them have a 'wife' to take care of them such that they can devote all their time and attention to work; jobs which do not permit any flexibility according to the

needs of the worker, jobs in which predominantly or exclusively male networks have an impact on progression. The research on this has been done and significant amounts of it are available on the EOC website.<sup>8</sup> It is unnecessary for the Women and Work Commission to reinvent this particular wheel by focusing on barriers to women's career progression. Those barriers are important and need to be removed. But the problem for women at work *today* is that many are being underpaid for the jobs they *are* doing. Getting different women in the future into different work does not address *this* problem for *these* women *today*.

**Question 12: What are the barriers to undertaking equal pay reviews? What are the positive examples and other solutions? In particular, what are your views on mandatory pay reviews?**

26. Mandatory pay reviews are essential if the current undervaluation of women in the workforce is to be addressed. Without making reviews mandatory many employers will be reluctant to undertake them, not least because of the difficulties they raise as regards vulnerability to 'work rated as equivalent' equal pay claims and the threat of being required to pay up to six years' backpay in connection therewith. There has been some success reported in the rolling out of voluntary pay reviews. But the research reported in the introduction to this submission makes it clear that progress appears to have stalled with only a handful of employers who were not in the position of having carried out, carrying out or planning to carry out an equal pay review within the next thirteen months having longer term plans to do so.

**Question 13: What are your views of equality and equal pay representatives? How would one become an equal pay representative? What would be the basis in law? What support would be necessary from trade unions and from employers?**

27. Equality/equal pay representatives would be a crucial aspect of any move towards the reduction of the gender-pay gap by the imposition of proactive obligations on employers. It is imperative that the natural tendency of employers to minimise the costs of 'doing' equal pay is balanced by strong employee representation in the process. Such

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<sup>8</sup> And see recently *Whitfield et al* *ibid*.

representatives need to have the infrastructure, support and access to training provided by unions and it makes sense, in organised workplaces, for them to be (properly trained) union representatives.

28. The question of what to do with non-unionised workplaces is much more difficult. Even if 'employee representatives' could be guaranteed effective protection from pressure/ threats made by employers, it is difficult to ensure that they would be adequately informed about the relationship between gender and pay determining factors to be able to balance the employer's interest in minimising the costs of the pay review by manipulating the outcome. For this reason consideration needs to be given to structural arrangements whereby organised labour could become involved in the structural approach to equal pay. One solution is to require employers to involve in the process any union which (although unrecognised) has a threshold number of women members in the workplace. Another would be the 'rolling out' of adjusted rates across sectors (contract compliance and/or 'fair wages clauses' mechanisms could be used). A third suggestion would be to use the pilot Social Forums proposed for low paying sectors as a mechanism for removing the pay-gap. Such pilot Forums should be obliged to undertake pay audits across the sector and establish a negotiated framework of pay that will fundamentally challenge if not remove the traditionally stubborn pay gap.