

EQUAL PAY BILL [HL]

EXPLANATORY NOTES

What these notes do

These Explanatory Notes relate to the Equal Pay Bill [HL] as introduced in the House of Lords on 28 January 2020 (HL Bill 65).

- These Explanatory Notes have been prepared by the Fawcett Society on behalf of Baroness Prosser in order to assist the reader of the Bill and to help inform debate on it. They do not form part of the Bill and have not been endorsed by Parliament.
- These Explanatory Notes explain what each part of the Bill will mean in practice; provide background information on the development of policy; and provide additional information on how the Bill will affect existing legislation in this area.
- These Explanatory Notes might best be read alongside the Bill. They are not, and are not intended to be, a comprehensive description of the Bill.

Table of Contents

Subject	Page of these Notes
Overview of the Bill	2
Policy background	2
Legal background	3
Territorial extent and application	4
Commentary on provisions of Bill	4
Clause 1: Right to Know: amendment to the Equality Act 2010	4
Clause 2: Right to Know: amendments to the Equality Act 2006	5
Clause 3: Comparators	5
Clause 4: Time limits	5
Clause 5: Remedies in non-pensions cases	6
Clause 6: Statement of particulars	6
Clause 7: Gender and ethnic origin pay gap reporting	6
Financial implications of the Bill	6
Related documents	7

Overview of the Bill

- 1 The Equal Pay Bill amends the Equality Act 2010, the Equality Act 2006, and the Employment Rights Act 1996 to:
 - a. provide employees with the Right to Know relevant information about a possible comparator for equal pay purposes. Where an employee suspects that an individual or group may constitute a comparator, they would have a right to know certain information about the comparator's pay or benefits, and related information. They could obtain this information by making a formal request to their employer. The Bill provides for safeguards to ensure proper use of the information, and for enforcement through the courts, and by the Equality and Human Rights Commission;
 - b. ensure that women are able to bring equal pay cases without being ruled out by strict time limits; that the remedies they receive include sums for injury to feelings, personal injury and lost pension rights; and that following Brexit employers will not be able to deny women their rights to equal pay through complex ownership structures;
 - c. provide for the inclusion of information on equal pay within the written statement of employment particulars; and
 - d. mandate the following changes to gender pay gap reporting: the lowering of the threshold for reporting to 100 or more employees; the inclusion of data on pay of employees of different ethnic origins; the publication by each employer of an action plan; and the publication of additional pay data.

Policy background

- 2 This Bill has been drafted by an expert working group of barristers, solicitors, HR professionals, and people with experience of equal pay cases, chaired by Daphne Romney QC and convened by the Fawcett Society, a gender equality campaign charity. Information on the members of that working group, and research relating to the Bill, is contained in the Fawcett Society's report *Why Women Need a Right to Know: Shining a light on pay discrimination*.¹
- 3 The right to equal pay for equal work, including work of equal value was established in the Equal Pay Act 1970. This right is achieved by inserting by implication a sex equality clause into any employment contract which does not contain it. It has primarily been used by women to rectify pay inequality with men, in which case it modifies a corresponding clause into their contract as the one in the man's contract. For the purpose of clarity this explanatory note will refer to cases brought by women, but the provisions in the Bill would apply equally to men.
- 4 Individual women require pay information for a comparator man or group of men in order to know whether they are experiencing pay discrimination, and therefore to access the right to equal pay. That information may be withheld by employers. When women do obtain this information, research shows that it is often down to a combination of luck and the support of male colleagues.² In order to access a comparator's pay information, if the employer will not provide it voluntarily, women must currently make a claim in the Employment Tribunal or County Court, and then seek an order for disclosure. In the absence of pay information, women may have insufficient grounds to bring a claim. If they do bring a claim, the current

¹ Andrew Bazeley and Gemma Rosenblatt (2019), *Why Women Need a Right to Know: Shining a light on pay discrimination*, Fawcett Society: London

² Andrew Bazeley and Gemma Rosenblatt (2019), *Why Women Need a Right to Know: Shining a light on pay discrimination*, Fawcett Society: London

process entails significant cost, time, and often distress for women, as well as cost and time for their employers.

- 5 This Bill would provide a legal right to be given that information at an earlier stage – a Right to Know. This would be supported by a remedy in the courts and by the possibility of enforcement by the Equality and Human Rights Commission.
- 6 There are a number of discrepancies between the remedies and time limits applicable in equal pay claims and those that apply to other types of employment discrimination claims brought under the Equality Act 2010. This Bill seeks to end those discrepancies. It would also enshrine the EU law-derived doctrine of ‘single source’ into UK statute.
- 7 The Government introduced gender pay gap reporting requirements for public and private sector employees through regulations in 2017, beginning with the first reporting deadlines in March and April 2018. In its second year, the requirement has continued to see very high levels of compliance. The requirement currently only relates to data on gender, not to any other characteristic; and it applies to organisations with 250 employees or more, which has been estimated to cover only 34% of the UK workforce and a small percentage of private employers. This Bill seeks to extend this provision to cover a greater percentage of the workforce, as well as the protected characteristic of ethnicity.

Legal background

- 8 The right to equal pay for equal work now sits in the Equality Act 2010. Part 5 Chapter 3 of that Act provides the right to equal pay, and Part 9 Chapter 4 provides for its enforcement in court. Broadly, these provisions say that if a person is employed on work that is equal to the work done by a comparator of the opposite sex, but the terms of their contract are less favourable than their comparator’s (e.g. because they provide for lower pay, or because a beneficial term is not included), then the law inserts a term into their contract remedying this inequality. The definition of equal work includes work which is one of the following:
 - a. like work, meaning it is the same or similar to work done by the comparator and any differences between their work are not of practical importance in relation to the terms of their work;
 - b. rated as equivalent to the comparator’s work by a job evaluation study giving it an equal value; or
 - c. of equal value to the comparator’s work, meaning equal in terms of the demands made by reference to factors such as effort, skill and decision-making.
- 9 The Equality Act 2010 also introduced new provisions. Section 77 (discussions about pay), provides that a term in a person’s contract is unenforceable if it prevents them from talking about pay with a colleague for the purposes of uncovering pay discrimination relating to any protected characteristic. It also provides that any detriment suffered by the employee because of asking for the information or by the employee providing it would be victimisation. Section 78 (gender pay gap information), sets out the framework for gender pay gap reporting, which has now been in place for two years.
- 10 Section 138 of the Act (obtaining information, etc), preserved the provision in the predecessor legislation for a questionnaire which an individual could use to obtain information from their employer in relation to a discrimination case. If the employer did not provide this information, a court could in appropriate circumstances draw an inference of discrimination against them. Section 138 was omitted under the Enterprise and Regulatory Reform Act 2013.
- 11 The Equality Act 2006 provided for the creation of the Equality and Human Rights Commission and sets out the legal basis for the investigation and enforcement action it takes.

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This Bill amends that Act for the purposes of the enforcement of the Right to Know.

- 12 The Equality Act 2010 (Gender Pay Gap Information) Regulations 2017 implemented section 78 of the Equality Act 2010, setting out the basis for publication of information about the pay of women and men by organisations with over 250 employees.
- 13 Section 1 of the Employment Rights Act 1996 requires an employer to give an employee a written statement identifying certain information in relation to her or his contract, not later than two months after the beginning of an employment. Such information includes the parties to the contract, the date when the employment began, and the rate and intervals of remuneration.

Territorial extent and application

- 14 The Bill would form part of the law of England and Wales and Scotland and would come into force on the day it is passed.

Commentary on provisions of Bill

Clause 1: Right to Know: amendment to the Equality Act 2010

- 15 Subsection (2) of this clause amends section 77 of the Equality Act 2010 (discussions about pay) to insert new clauses 77A to 77C, creating the Right to Know.
- 16 Under new clause 77A if an employee, worker or personal or public office holder (“A”) suspects that a person or group of people (“B”) is a comparator for equal pay purposes, they have a right to know information about the pay, benefits, and other relevant information of that person or group of people.
- 17 A may identify B by their name, the nature of their work, or by specifying a more favourable term which exists in B’s contract. In the latter case, B does not also need to be identified by name or the type of work they do.
- 18 Information may be requested a current or former employer, or an associated employer (“P”). P may also be a single person or body which, under the doctrine of single source emanating from European Union law and as set out in clause 3 of this Bill, has the power to rectify any difference in the terms of work which apply to the person requesting information, and a potential comparator.
- 19 The Secretary of State must set out in regulations a form to be used when A requests, and P supplies, the information; and must set out the information to be provided. P has to respond within 20 working days. Provision is made for delays in exceptional circumstances, which may include unexpected and prohibitive failure of P’s human resources computer systems, sudden loss of staff capacity, fire, or similar.
- 20 New clause 77B sets out safeguards to ensure that information obtained under 77A may only lawfully be used for purposes relating to A’s legal right to equal pay for equal work, or by another person working for (in the broad sense defined in this Bill and the Equality Act 2010) the same person (P) who is doing equal work to A. These safeguards include a restriction on sharing the information beyond a set list of relevant individuals and organisations. A person obtaining the prescribed information who does not adhere to these safeguards would not be protected against action taken by their employer on the ground of wider dissemination of the information.

- 21 If A uses the Right to Know, and P does not provide the information, A may then apply to a court or tribunal for disclosure of information as part of an equal pay claim. If the court or tribunal orders that disclosure is made, it is likely that A will have incurred costs and expenses for making the claim, and/or for amending it following disclosure. New clause 77C requires that the court or tribunal consider whether to make a costs order in favour of A in such circumstances, to compensate them for those costs or expenses. The court may also draw an adverse inference against P, as was possible before 2013 under section 138 of the Equality Act 2010, from the failure to supply the information sought.

Clause 2: Right to Know: amendments to the Equality Act 2006

- 22 This clause amends the Equality Act 2006 to add new clauses 24B to 24D, to give the Equality and Human Rights Commission (EHRC) the power to enforce the Right to Know.
- 23 Subsection (2) of new clause 24B sets out the threshold for EHRC enforcement action of the right contained in new clause 77A(1)(a) of the Equality Act 2010, as inserted by this Bill. The threshold is set at a level such that if B being a comparator is within the range of possibilities open to a reasonable person A, the EHRC may take enforcement action. The relevant suspicion is that B may be a comparator, not that equal pay law has been breached, as the latter requires additional information, obtaining which is the purpose of the Right to Know.
- 24 New clause 24B sets out a two-stage process for enforcement. First, the EHRC serves a notice that it believes P has not complied with the Right to Know, with a 20-working day window for response. Then, if P has failed to provide evidence to show that there has not been a breach, the EHRC may serve a penalty notice, with a further 20 working day window for response. The level of fines under the penalty notice is to be determined by the Secretary of State in regulations. P may appeal either notice in the Employment Tribunal under clause 24C.

Clause 3: Comparators

- 25 Under European Union law as established in *Lawrence v Regent Office Care Ltd*,³ where a single source (a body or organisation) is able to rectify an unlawful pay inequality between a man and a woman, the woman may bring an equal pay claim against that single source, comparing herself with the man, even if he does not fit within the Equality Act 2010 definition of a “comparator”. This might be because the man and woman do not have the same employer, or work in different establishments without common terms and conditions. This case law has been applied in the recent *Asda Stores Ltd v Brierley*⁴ case to the example of retail and depot workers working for different sections of a company, run under a single Board of Directors.
- 26 This clause seeks to insert this doctrine directly into UK statute. This would have the effect of enshrining single source into UK law, and limiting potential future changes to it through case law after the UK leaves the European Union.

Clause 4: Time limits

- 27 Section 129 of the Equality Act 2010 sets out a strict six-month time limit for bringing an equal pay case in the Employment Tribunal. For other discriminatory breaches of the Equality Act 2010, the time limit is usually three months although the Tribunal has discretion to extend the limitation period to such extent as they deem it ‘just and equitable’ to do so. This clause would extend that discretion to equal pay cases.

³ (C-320/00) [2002] 9 WLUK 174

⁴ [2019] 4 All E.R. 450

Clause 5: Remedies in non-pensions cases

- 28 Case law determined under the Equal Pay Act 1970, which has substantially similar wording to section 132 of the Equality Act 2010, has held that equal pay claimants are not entitled to damages for non-economic loss. Clause 5 of this Bill would change the law so that such damages, for personal injury and injury to feelings, can be awarded in equal pay claims, in the same way that they can for all other discrimination claims.
- 29 This clause would also allow the court to award damages for loss of pension rights which would have accrued were it not for pay discrimination; in other words, had the claimant been paid the right amount equal to their comparator. The amount and form of such an award would follow the existing formula for calculating pension rights applied by the courts in other discrimination cases.

Clause 6: Statement of particulars

- 30 This clause would add information about an employee's right to equal pay for equal work into the statement of particulars which must be provided by employers under section 1 of the Employment Rights Act 1996. It would achieve this by requiring the Secretary of State to set out regulations under the negative procedure prescribing the information to be included.

Clause 7: Gender and ethnic origin pay gap reporting

- 31 This clause would widen the scope of gender pay gap reporting regulations to include ethnicity, requiring employers to publish data on how ethnicity and gender intersect in terms of pay. It would additionally apply the reporting requirements for gender and ethnicity to organisations employing between 100 and 250 employees.
- 32 It would specify that certain additional information be included within regulations under section 78 of the Equality Act 2010. That information would include the actual mean and median average hourly pay, rather than just the proportionate difference, and the pay of part-time and full-time employees.
- 33 The clause would also introduce a requirement for the Secretary of State to make regulations requiring employers who publish gender and ethnicity pay gap data (an 'action plan') to produce a document setting out the course of action they pursue to reduce those pay gaps. Subsection (8) sets out elements which may be part of those action plans.

Financial implications of the Bill

- 34 There will be financial implications as a result of compliance, with additional pay gap reporting requirements by public sector bodies, and collection and enforcement of the same by the Government and the EHRC. Dependent upon the behaviour of employees and of employers, there may be financial implications as a result of possible new court and Employment Tribunal cases. The Bill gives the EHRC discretionary power to enforce the Right to Know, which would have financial implications when used.

Related documents

35 The following documents are relevant to the Bill and can be read at the stated locations:

- Equality Act 2010: <http://www.legislation.gov.uk/ukpga/2010/15/contents>
- Equality Act 2006: <http://www.legislation.gov.uk/ukpga/2006/3/contents>
- Employment Rights Act 2006:
<http://www.legislation.gov.uk/ukpga/1996/18/contents>
- Andrew Bazeley and Gemma Rosenblatt (2019), *Why Women Need a Right to Know: Shining a light on pay discrimination*, Fawcett Society: London:
<https://www.fawcettsociety.org.uk/why-women-need-a-right-to-know-shining-a-light-on-pay-discrimination>

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