Call for evidence on equality law

Response from Lewis Silkin LLP, 30 June 2025

Question 1. *Please tell us in what capacity you are primarily responding:*

- *As an individual*
- *As an academic, or on behalf of an academic or research organisation*
- *As a large enterprise, with at least 250 employees*
- *As a small or medium enterprise, with fewer than 250 employees*
- *As a large public authority, with at least 250 employees*
- *As a small or medium public authority, with fewer than 250 employees*
- *On behalf of a civil society organisation or group*
- *On behalf of an organisation that represents employers*
- *On behalf of an organisation that represents employees – for example, trade unions*
- *Other*

Question 2. *If you are responding on behalf of an employer or another organisation, what is its name?*

Lewis Silkin LLP, a law firm advising predominantly large and multinational employers in the private sector.

Equal pay for race and disability

Question 6. *Do you have evidence about the prevalence of pay discrimination on the basis of race, disability and sex in England, Scotland and Wales and/or the effectiveness of existing measures in reducing pay discrimination?* [Yes, No]

Question 7. *What evidence is there on the prevalence of pay discrimination on the basis of race, disability and sex in England, Scotland and Wales? We are particularly interested in evidence relating to:*
- the overall prevalence - how levels and patterns of pay discrimination may differ across different situations, sectors, employer types or types of work - how these levels and patterns of pay discrimination may differ where the discrimination is based on sex, race or disability

Our experience of advising predominantly private sector employers is that we are rarely asked for advice about pay discrimination on the basis of race and disability. We do regularly advise on pay discrimination on the basis of sex.

We are aware that there are statistics showing a pay gap between disabled and non-disabled employees, and between employees from different ethnic groups. However, this pay gap is not necessarily an indicator of pay discrimination. Disabled people and those from certain ethnic groups may well experience discrimination and/or disadvantage which means that they do not have the same opportunity to work in full-time and well-paid work. This will cause a pay gap between different groups. This is not the same as pay discrimination, where people are paid differently for doing the same or equal work.

Pay discrimination based on sex is a historically entrenched problem, largely caused by occupational segregations and approaches to traditionally "male" and "female" jobs which values them differently even though the work is equivalent. For example, refuse workers (traditionally male) and cleaners (traditionally female). We have no evidence that the same issue applies to race or disability. For example, there are no obvious types of work that tend to be done by people from a particular ethnic background which are underpaid compared to an equivalent job done by mainly white employees.

It is already possible to bring a discrimination claim about pay based on race or disability. Our lack of experience of these claims does not necessarily indicate that they are difficult to bring, or that an extension of the equal pay scheme would lead to more claims or overcome barriers to enforcing rights. We very rarely even advise on employee grievances about pay based on race or disability. Our view is that a lack of equality in pay for certain ethnic groups and for disabled people is not due to pay discrimination (paying people differently for doing the same or equivalent work), but discrimination in other areas such as recruitment and promotion. This is our experience of helping many employers with gender pay gap reporting, where pay gaps between men and women tend to be caused by lack of representation at higher levels in an organisation.

Question 9. *Do you have evidence about actions the government could take, and those it should avoid, to make the right to equal pay effective for ethnic minority and disabled people?* [Yes, No]

Question 10. *What evidence is there to establish the steps that should or should not be taken to make the right to equal pay effective for ethnic minority and disabled people?*

Our strong view is that extending the equal pay scheme to race and disability would not help to make the right to equal pay effective for ethnic minority and disabled people. It would not help individuals to bring claims, or help employers to grapple with a complex legal process. We provide more information in the next questions on our reasons for this view. In summary, they are (1) the time, cost and complexity of equal pay claims compared to a discrimination claim, and (2) the fact that forcing people with an actual comparator down the equal pay route potentially makes bringing a claim more difficult rather than easier.

Question 11. *What evidence is there of the changes needed to make expanding the equal pay scheme to claims on the basis of race and disability effective, if this approach were taken?*

We would be particularly interested in:

- *advantages that the equal pay scheme may offer claimants that are not available to those currently bringing claims for race or disability pay discrimination, and how they could be extended*
    - There is an automatic pay equality clause if a claimant can show they are doing equal work compared to a comparator, without the need to show evidence of discrimination. The claim will succeed unless the employer can prove the justification for any difference in pay. In a direct discrimination claim, the claimant must show some evidence of discrimination before the burden of proof shifts to the employer to show there was no discrimination. However, the process of showing equal work with a comparator in an equal pay claim is often complex and time consuming.
    - It is possible to compare jobs of equal value, with no need for the comparator to be doing the same work. In a direct discrimination claim, the comparator needs to be in materially the same circumstances, making it difficult to compare different jobs. However, as discussed in question 7, it is unclear that this type of comparison is necessary outside pay discrimination based on sex (where "female" jobs have historically been undervalued compared to "male" jobs).

- If statistics show a pay disparity between two jobs of equal value, one mainly done by women and one mainly by men, the employer may be required to objectively justify the difference. This does not apply in the same way in a discrimination claim. However, again, it is unclear that this type of comparison is necessary (or even possible) outside pay discrimination based on sex.
- A successful equal pay claim permanently changes the contractual pay term, and the employer may be required to carry out a compulsory equal pay audit.
- Equal pay claims have a longer time limit of 6 months, compared to 3 months for a discrimination claim – but this is due to be equalised by the Employment Rights Bill.

- *disadvantages that claimants may face under the equal pay scheme that are not currently faced by those bringing claims for race or disability pay discrimination, and how they could be removed*
  - The complexity and cost of establishing the correct comparator and whether work is of equal value. Claims often get bogged down for years in complex legal arguments on these issues. Expert evidence is often required on whether jobs are of equal value. It is not clear how to improve this as the structure is integral to the equal pay scheme.
  - If there is an actual comparator for a claim about pay discrimination based on sex, the complex equal pay rules must be used. There is no option to bring this as a simpler discrimination claim instead – even if the claim is essentially based on the simple argument that a hypothetical comparator who is of a different race or non-disabled would be paid more. A possible solution would be to remove this rule for sex claims as well - but the risk is that that this just leads to both equal pay and discrimination claims being brought at the same time on the same facts, adding to the complexity.
  - The requirement to bring an equal pay claim where there is a comparator also causes a confusing overlap with other sex discrimination claims that might be brought at the same time, including claims about non-contractual pay. Equal pay claims only cover contractual terms, so claims about non-contractual pay such as a discretionary bonus or discretionary pay rise must be brought as a discrimination claim. A claim will often be about multiple aspects of a claimant's pay. This is an artificial distinction and adds to the complexity of enforcing rights to equal pay.
  - The comparison is not binary as for sex, and the equal pay scheme forces a binary comparison with an actual comparator:
    - Disability – would the comparison be based on Equality Act definitions of disabled and non-disabled people, or allow comparisons between different disabilities? It cannot be assumed that the same disadvantage applies to all disabilities. It may also be difficult for a disabled claimant to know who they can compare themselves with, as many disabilities are hidden and might be kept confidential by an employer.
    - Race – the issue is how to compare people from different backgrounds, and how a claimant would select their comparator. A simple comparison of, for example, white vs non-white is crude and misses the nuances of pay discrimination between people from different ethnic backgrounds. But allowing a comparison between any different ethnic groups is complex, and again this is not necessarily information that a claimant would know about possible comparators.

- *any unintended consequences that could arise from such an approach, and any steps which could reduce the risk of these*
    - This approach risks making claims about pay discrimination harder rather than easier, especially if the equal pay scheme must be used if there is an actual comparator.
    - Our view is that the observation in the call for evidence about there being thousands of equal pay claims and few race/disability pay claims is misleading, as the equal pay claims are principally large group claims based on occupational segregation and historic views of men's/women's jobs.
    - The most successful equal pay claims have been for large groups of workers based on occupational segregation, often backed by unions. This is very unlikely to apply to race or disability equal pay claims.

Question 12. *What evidence is there regarding any potential barriers that individuals could face in making equal pay claims and approaches to address these barriers?*

See our previous comments about the complexity of equal pay claims, particularly where there are issues about appropriate comparators or whether jobs are of equal value. These claims are particularly difficult for individuals who are representing themselves (rather than for group claims backed by a union or single law firm). Where there is an actual comparator for the claim, there is currently no option to bring a simpler discrimination claim instead. As noted already, a possible solution would be to remove this rule - but the risk is that that this just leads to both equal pay and discrimination claims being brought at the same time on the same facts, adding to the complexity.

Pay transparency

Question 25. *Do you have evidence about the possible impacts of introducing pay transparency measures on pay equality on the basis of sex, race or disability and/or on employers?* [Yes, No]

Question 26. *What evidence is there about the possible impact of pay transparency measures on pay equality on the basis of sex, race or disability?*

We are particularly interested in:

- *the impact on pay equality across different sectors, types of work, or types of pay, such as bonuses*
- *whether certain pay transparency measures are more effective in addressing discrimination on the basis of one characteristic than another (for example sex rather than race or disability)*
- *whether a voluntary, mandatory or combined approach to pay transparency for employers may be more effective at improving pay equality*
- *whether there are any risks associated with introducing pay transparency and if so, how these could be mitigated*

- Since some of the proposed pay transparency measures closely resemble the pay information rights in the EU's Pay Transparency Directive, the main implication of the proposals would be that the EU Directive would essentially be rolled out (in part) to the UK. We would expect the Directive's requirements to influence best practice in the UK over time but legislation would clearly accelerate and mandate this shift.

- The effectiveness and workability of the pay information rights in the Directive has yet to be seen, so there is an argument for waiting until evidence about the Directive's practical impact emerges before rolling out these requirements in the UK.
- The suggestion that employers should provide information about others doing work of equal value would be especially challenging in the UK. In our experience, few UK employers have robust systems for assessing equal value (as defined by the Equality Act). This would be especially onerous for SMEs.
- In relation to bonus awards, these are typically highly confidential and generally related to individual performance and other factors personal to the employee, so requiring employers to divulge details of bonuses awarded to colleagues would clearly have significant privacy and employee relations implications.

Equal pay audits

Question 28. *Do you have evidence about the effectiveness of the Equality Act 2010 (Equal Pay Audits) Regulations 2014?* **[Yes, No]**

Question 29. What evidence is there about the effectiveness of the Equality Act 2010 (Equal Pay Audits) Regulations 2014?

We are particularly interested in:

- *the effectiveness of the regulations' requirements as to when an equal pay audit must be carried out, and the exemptions to these*

  The regulations have had very limited effect because an audit can only be ordered when an employment tribunal finds that there has been an equal pay breach. Most equal pay claims settle or are withdrawn at some point during the litigation process rather than resulting in a finding by the tribunal.

- *the frequency with which Employment Tribunals are ordering equal pay audits to be carried out*

  Despite having over 250 lawyers specialising in employment law, we have no examples of any of our clients having been ordered to carry out an equal pay audit after losing an equal pay claim. The first reported example of this happening (*Macken v BNP Paribas*) is from 2021 despite the law being in place since 2014. In practice, an audit is much more likely to be meaningful and effective in a group equal pay claim.

Question 30. *Do you have evidence on the possible impact of requiring employers to undertake equal pay audits in cases where pay discrimination has been found in relation to race or disability?* [Yes, No]

Question 31. *What evidence is there on the possible impact of requiring employers to undertake equal pay audits in cases where pay discrimination has been found in relation to race or disability?*

We are particularly interested in:

- *the impact on pay equality on the basis of race and disability*
- *potential risks associated with an expansion, and where these exist, how risks could be mitigated*

Our evidence is that it would have very little impact on pay equality, based on the very limited impact on pay equality for sex under the current system.

Combined discrimination

Question 32. *Do you have evidence about the prevalence of combined discrimination in England, Scotland and Wales and/or the effectiveness of actions t*hat can be taken to protect individuals against combined discrimination and accessing redress? [Yes, No]

Question 33. *What evidence is there on the prevalence of combined discrimination in England and Wales and Scotland?*

We are particularly interested in:

- *the overall prevalence of combined discrimination*
- *how levels and patterns of combined discrimination may differ across different situations, sectors or regions*

Question 34. *What evidence is there as to whether there is currently sufficient legal protection against discrimination based on a combination of protected characteristics?*

There are arguments that dual discrimination is necessary to protect certain groups. For example, women experiencing the menopause. It is arguable that this is not solely sex discrimination or solely age discrimination (because neither a younger woman nor an older man would be treated in the same way. In some cases, there may be a disability discrimination claim, but only if the woman's symptoms are serious enough to amount to a disability.

In practice, we have seen some employment tribunals being willing to find that the treatment is two types of discrimination separately. However, dual discrimination would provide clearer and more certain legal protection for groups that are disadvantaged by a particular combination of protected characteristics.

Another disadvantage of the current position is that it doesn't allow positive action for groups that are disadvantaged by a combination of characteristics. At the moment the employer would need to show that both groups are disadvantaged before positive action would be lawful, as confirmed in the current government guidance on positive action in the workplace – see https://www.gov.uk/government/publications/positive-action-in-the-workplace-guidance-for-employers.

Question 36. *What evidence is there as to the effectiveness of commencing section 14 of the 2010 Act in protecting against combined discrimination and providing redress for those who have experienced it?*

We are particularly interested in evidence relating to how the provision might be interpreted in courts and tribunals once commenced.

Our view is that the current section is too narrow because it only covers direct discrimination, and only allows two characteristics to be combined.

- The same facts may often be relied on as constituting harassment as well as direct discrimination, and it would be inconsistent and confusing to allow combined discrimination for one type of claim and not the other.
- Combined discrimination may also arise in an indirect discrimination claim, where a combination of characteristics puts a group at a particular disadvantage. For example, a rule that everyone must use workplace toilets aligned to their birth/biological sex may indirectly discriminate against trans women on the basis of safety and dignity, due to the combination of characteristics of being trans and biologically male. This disadvantage may be different from the experience of trans men.
- There are groups that may be disadvantaged or discriminated against due to a combination of three (or more) characteristics – for example, young black men.