

**Please note: this is draft for consultation and should not be taken as final text**

The Equality and Human Rights Commission

# Equal Pay

## Statutory Code of Practice

### Draft for Consultation

This draft code is based on the Equality Bill as printed on 3 December 2009 (introduced into the House of Lords on 4th December 2009).

## Foreword

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The new Equality Bill is the most significant piece of equality legislation for a generation. It will simplify, streamline and strengthen the law. It will give individuals greater protection from unfair discrimination. It will make it easier for employers and companies to understand their responsibilities. And it will set a new standard for public services to treat everyone, no matter what their background or personal circumstances, with dignity and respect.

As I write, the Bill is before parliament. We in the Equality and Human Rights Commission hope to see it on the statute book in a matter of months. Our biggest priority, in the short term, is to do what we can to help make that happen.

The point of legislation, however, is not to put ink on vellum. If the Bill is to fulfil its potential, it needs to be translated into practical change in the way companies act, the way public authorities plan and deliver services, the opportunities each of us enjoys in our everyday life.

As the statutory champion for fairness, the Equality and Human Rights Commission monitors compliance with the law, enforcing and litigating where necessary. But our role is not limited to picking up the pieces when things go wrong. First and foremost we aim to provide information, support and encouragement so that organisations can get things right.

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The Commission places great importance on illuminating the Equality Bill. It is our job to help individuals understand and assert their rights, and to help organisations (both public and private) understand what legislative change means for them. With some elements of the law possibly coming into force as early as October 2010, there is no time to lose. That is why we are planning to publish two significant documents before the legislation comes into effect.

The first is a set of statutory codes, setting out clearly and precisely what the legislation means. They will draw on precedent and case law. They will explain the implications of every clause in technical terms. The statutory codes will be the authoritative source of guidance for anyone who wants a rigorous analysis of the legislation's detail. For lawyers, advocates and human resources experts in particular, they will be invaluable.

The second document will be non-statutory guidance. Our goal is to make equality and diversity part of everyday business for everyone, not just the experts. Indeed, we will have failed if what we produce speaks only to a small circle of people. That's why the non-statutory guidance is designed to be down-to-earth, practical, and accessible.

As we draft these documents we are acutely aware that they should reflect the needs, expectations and language of the people who are going to use them. Many individuals and organisations have already been kind enough to share their thoughts on what good guidance looks like, and what they expect to see in our documents. We are grateful for their input.

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This document is the draft statutory code on the equal pay provisions of the Equality Bill. This publication starts a formal period of consultation. (The draft of non-statutory guidance, and formal consultation on it, follow shortly.)

We look forward to hearing reactions and comments, and responses to a number of specific questions in this text. Clear and authoritative codes will be vital to enable new equality law to fulfil its promise: this is your chance to help us get them right.

A handwritten signature in black ink, appearing to read 'N Kinghan', with a long horizontal flourish extending to the right.

**Neil Kinghan**

Interim Director General of the Equality and Human Rights  
Commission

# Equal Pay Code

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## Introduction

### **Purpose of the Equality Act**

The Equality Act 2010 (the Act) brings together discrimination law introduced over four decades through legislation and regulations. It replaces most of the previous discrimination legislation, including the Equal Pay Act 1970 which is now repealed. The Act covers discrimination because of age, disability, gender reassignment, marriage and civil partnership, pregnancy and maternity, race, religion or belief, sex and sexual orientation. These categories are known in the Act as ‘protected characteristics’.

An important purpose of the Act is to create a single approach to discrimination against people with different protected characteristics, where this is appropriate. However, there are some important differences in the way that discrimination is defined, particularly for disability. There are specific equal pay provisions that relate only to the protected characteristic of sex. There are also some circumstances that would amount to discrimination against people with some protected characteristics, but not with other characteristics. People using the Act therefore need to be familiar with the differences that relate to people with different characteristics.

The Act has also brought in provisions to strengthen the law by making discrimination unlawful in circumstances not covered under previous discrimination law. Broadly speaking, discrimination in most areas of activity, against people with protected characteristics described in the Act, is now unlawful. These areas of activity include, for example, employment, education, housing, the provision of services and the exercise of public functions. An organisation may have duties under more than one area of the Act because, for example, it employs

people and provides services to customers.

These different areas of activity are covered under different parts of the Act. Part 3 of the Act deals with discrimination in the provision of services and the exercise of public functions. Part 4 deals with discrimination in the sale, letting, management and occupation of premises, including housing. Part 5 covers employment and other work-related situations. Part 6 covers education including schools, further education, higher education and general qualifications bodies. Part 7 deals with discrimination by membership associations and political parties.

### **Purpose of the Equal Pay Provisions of the Act**

Part 5 of the Act is based on the principle that people with the protected characteristics set out in the Act should not be discriminated against in employment, when seeking employment or when engaged in occupations or activities that are not, in legal terms, employment but are nevertheless related to work. Pay is clearly a very important part of employment.

Historically, women have often been paid less than men for doing the same work or equivalent work. Because of this entrenched inequality, European Union law and the Equality Act 2010 have specific provisions on equal pay and equality of employment contract terms between men and women. In European law these provisions are contained within Article 157 of the Treaty of the Functioning of European Union (formerly Article 141 of the EC Treaty), and in the Equal Treatment Directive 2006/54. In domestic law, these issues are dealt with in Clauses 64 – 80 (Chapter 3 of Part 5) of the Equality Act 2010, entitled “Equality of Terms”.

The Act says that men and women carrying out equal work should receive equal pay, equal benefits and equally favourable conditions in their contracts. Under these provisions of the Act, all employment contracts (and similar contracts for office holders and member of the armed forces) have an implied sex equality clause.

All employers, large and small, in the private, public or voluntary sector, have the same legal duties under the equal pay provisions.

### **Scope of this Code**

This Code explains clauses 64 – 80 of the Act that provide for equality between men and women in pay and other terms of employment where they carry out equal work. The Act defines equal work as like work, work rated as equivalent or work of equal value. These terms are defined in this Code. The equal pay provisions apply to all employment situations, including apprenticeships, part-time working and home working. They also apply to office-holders and members of the armed forces.

Women and men tend to be concentrated in different sectors of the economy, with traditionally male sectors often attracting higher wages than the traditionally female sectors. The situation where women are paid less than men because they work in different sectors and are not carrying out equal work is not covered in this Code. However there may be sex discrimination, harassment or victimisation when women apply for jobs within traditionally male jobs or sectors (e.g. surgery or engineering) or work in these jobs or sectors. There may also be sex discrimination, harassment or victimisation when men apply for jobs in traditionally female jobs or sectors (e.g. childcare or nursing) or work in these jobs or sectors. Such discrimination maintains the overall gap between men's and women's pay in the workforce generally. Sex discrimination against men and women of this nature is covered by the other provisions of Part 5 of the Act and explained in the Equality and Human Rights Commission's Employment Code.

Women are more likely than men to work part-time. The equal pay provisions in the Act, explained in this Code, apply to part-time employees and full-time employees. As with all types of work, when a woman employed part-time carries out work that is equal to the

work of a man employed full-time, she should have, pro rata, equal pay and equality in other terms of employment. The Part-Time Workers (Prevention of Less Favourable Treatment) Regulations 2000 may also be relevant here. These Regulations make it unlawful for part-time workers to be treated less favourably than comparable full-time workers, regardless of sex.

A wider problem is that women may be concentrated in jobs or sectors where there is traditionally a high level of part-time working and which attract low pay. Where a woman carries out part-time work which is not equal work (defined as like work, work rated as equivalent or work of equal value) to the work of a part-time or full-time man, her situation will not be covered by the equal pay provisions of the Act and will not be covered by this Code. However, where a woman needs to work part-time because of caring responsibilities, there may be sex discriminatory practices in traditionally full-time jobs (such as management roles) that make it hard for her to work in them on a part-time basis. In particular, there may be unjustified provisions, criteria or practices in some jobs that militate against part-time working, which amount to unlawful sex discrimination. This type of situation would be covered by other provisions of Part 5 of the Act (i.e. not equal pay), explained in the Commission's Employment Code.

Even where women and men work within the same sector or for the same employer, women are often concentrated in the lower grades that attract lower pay. Such a situation may or may not be covered by the equal pay provisions of the Act. For example, if women and men are in different grades but, on evaluating their jobs, they are found to be doing equal work, then this would be a situation covered by the equal pay provisions, explained in this Code. If, after proper job evaluations, the grade boundaries are correct but the lower grades are found to be heavily populated by women and the higher grades are heavily populated by men, there may be other discrimination issues in the workplace, covered by other areas of Part 5 of the Act rather than the equal pay provisions. For example,

there may be unjustifiable provisions, criteria or practices that make it disproportionately difficult for women to get jobs in higher grades compared to men or there may be harassment of women at higher grades. These situations are explained in the Commission's Employment Code.

The situations described above, where women and men are working in different types of jobs or different sectors are often referred to as occupational segregation and stratification. While every employer must ensure that they do not discriminate or breach the equal pay provisions, there may be wider reasons for segregation and stratification which are not caused by a particular employer's provisions, criteria or practices or by direct discrimination by that employer. These reasons may relate to previous employment, education, socio-economic disadvantage or social norms more generally (for example the expectation that women rather than men are carers). An employer can help to compensate for this wider disadvantage through positive action measures. Positive action in employment is explained in the Commission's Employment Code.

Organisations in the public sector, including employers, employment service providers, education providers and qualifications bodies are covered by the public sector equality duties, set out in Part 11 of the Act (clauses 148 – 156). This duty requires public bodies to have due regard to eliminating discrimination (including breaches of equal pay provisions), to advancing equality of opportunity and to fostering good relations. This duty may require public bodies to introduce measures to close the gender pay gap within their own workforce and within the workforce more generally, where relevant to the activities of the public body. For example, a careers service or university could help to close the pay gap in the workforce at large by introducing permitted positive action measures to support women into traditionally male sectors and men into traditionally female sectors. The duty is explained in the Commission's Public Sector Equality

## Duty Code.

Where there is a breach of the equal pay provisions and the employee in question also experiences sex discrimination or discrimination because of a different characteristic (for example race), reference should be made to this Code and to the Employment Code.

Discrimination in pay or contract terms, because of a protected characteristic other than sex is covered in the Employment Code and not in this equal pay Code, because the equal pay provisions of the Act (chapter 3 of Part 5) only relate to equality of pay and terms between men and women. Discrimination in employment because of two characteristics, for example sex and race, is also covered in the Employment Code.

This Code applies to England, Scotland and Wales.

## **Purpose of the Code**

The main purpose of this Code is to provide a detailed explanation of the equal pay provisions of the Act and to apply legal concepts in the Act to everyday work-related situations. This will assist courts and tribunals when interpreting the law and help lawyers, advisers, trades union representatives, human resources departments and others who need to apply the law. The Code also provides practical guidance on carrying out equal pay audits. This guidance will help people to understand the steps that an employer should take to ensure that there are no unjustifiable pay inequalities.

**Part 1** of the Code explains the equal pay provisions of the Act. These include the important concepts of 'like work', 'work rated as equivalent' and 'work of equal value'. It also explains the circumstances under which an employer may have a 'material factor' defence, which is not sex. It covers the provisions which ensure that a woman on maternity leave has equal contract terms and the provisions relating to occupational pensions. This part of the Code also explains the consequences for an employer who breaches the

equal pay provisions of the Act. The new provision, brought in by the Act at Clause 77, which makes a contract clause prohibiting colleagues from discussing their pay unenforceable in certain situations, is also explained in Part 1.

**Part 2** of the Code includes guidance for carrying out equal pay audits, which will identify where there are gender pay gaps between men and women carrying out equal work. Many employers do not know how to analyse the pay of their workforce, and therefore do not know whether there is a gender pay gap, whether that gap can be justified, or how to close it. This leaves employers vulnerable to litigation. The Commission recommends that all employers carry out regular equal pay audits, as this is the best way to avoid equal pay claims. By knowing where the gaps are between men and women's pay, the employer can then take steps to close these gaps, where such gaps cannot be justified.

The Commission has also produced practical guidance to help employers to achieve equal pay. The practical guidance may help people who have no previous understanding of discrimination law, employment law or equal pay to understand the equal pay provisions.

### **Status of the Code**

The Commission has prepared and issued this Code under the Act on the basis of a request by the Secretary of State. It is a statutory Code. This means it has been approved by the Secretary of State and laid before Parliament. The Code does not impose legal obligations. It is not an authoritative statement of the law; only the tribunals and the courts can provide such authority. However the Code can be used in evidence in legal proceedings brought under the Act. Tribunals and courts must take into account any part of the Code that appears to them relevant to any questions arising in proceedings. If employers, and others who have duties under the Act's provisions on employment and occupation, follow the guidance in the Code, it may help to avoid an adverse decision by a tribunal or court in such proceedings.

## **Role of the Equality and Human Rights Commission**

The Equality and Human Rights Commission was set up under the Equality Act 2006 to encourage and support the development of a society in which:

- people's ability to achieve their potential is not limited by prejudice or discrimination,
- there is respect for and protection of each individual's human rights,
- there is respect for the dignity and worth of each individual,
- each individual has an equal opportunity to participate in society, and
- there is mutual respect between groups based on understanding and valuing of diversity and on shared respect for equality and human rights.

The Commission has duties to promote human rights and equality and to provide advice about the law so that discrimination is avoided. It also has powers to enforce discrimination law in some circumstances. The Commission can bring proceedings where an employer has issued an instruction to discriminate, or where that employer has caused or induced another person to discriminate. It can bring proceedings to prevent an employer from using a discriminatory job advertisement. It can also issue enforceable non-discrimination notices.

Where the Commission has information to suggest that an employer has committed an unlawful act, it can carry out an investigation under s. 20 of the Equality Act 2006. Where the Commission has information to suggest that there is a pattern of discrimination by employers generally, for example in a particular sector or against a group of people with particular protected characteristics, it can carry out an Inquiry under s.16 of the Equality Act 2006.

As part of an investigation or Inquiry the Commission can require the employer to provide information about its policies or practices under schedule 2. This could include information about the pay and contractual terms of its employees. The employer cannot unreasonably refuse to provide such information. The Commission will use these powers of investigation and Inquiry strategically to promote equality and human rights, and to tackle entrenched discrimination and pay inequality. It has previously used these powers to require companies in the financial services sector to provide data on pay gaps between men and women.

These provisions of the Equality Act 2006 have not been repealed by the Equality Act 2010.

## **Human Rights**

Public authorities have a duty under the Human Rights Act 1998 (HRA) to act compatibly with rights under the European Convention for the Protection of Fundamental Rights and Freedoms (the Convention). It is unlawful for public authorities to breach Convention rights in any area of their activity, including employment and work-related activities. Organisations not in the public sector have a duty to act compatibly with Convention rights only in relation to functions of a public nature that they may carry out.

Where an organisation has such an obligation in relation to employment or work-related activities, it will find it easier to ensure compliance with the HRA and the Convention if it follows the advice given in this Code and other Codes relevant to human rights.

Courts and tribunals also have a duty to interpret primary legislation (including the Equality Act 2010) and secondary legislation in a way that is compatible with Convention rights, unless it is impossible to do so. This duty applies to courts and tribunals whether a claim is made by an individual against a private or a public authority. So in any employment discrimination claim made under the Act, the court or tribunal must ensure that it interprets the Act compatibly with the Convention.

In practice, human rights issues in the workplace can arise in relation to forced labour, privacy and data protection, freedom of expression and thought, trade union activity, and harassment. Discrimination in the enjoyment of other Convention rights is also prohibited. Because of the close relationship between human rights and equality it is good practice for employers, when drawing up policies, to consider equality and human rights within these policies, to ensure that all employees are treated with dignity and to avoid discrimination and human rights violations.

## **Large and small employers**

The equal pay provisions, like the other provisions of Part 5 of the Act, apply equally to large and small employers. However, employers and others who have duties under the Act's provisions will have different ways of complying with these provisions of the Act, depending on the size of the organisation and the number of people they employ. While all employers have the same legal duties under the Act, the way that these duties are put into practice may be different. Small employers may have more informal practices, have fewer written policies, and may be more constrained by financial resources. This Code should be read with awareness that large and small employers may carry out their duties in different ways, but that no employer is exempt from these duties because of size.

Small employers are less likely to have a human resources team or legal team to provide advice so may need to take advice on compliance with the Act from an external organisation (such as the Equality and Human Rights Commission) or to use the Commission's other practical guidance.

## **Men and women**

The equal pay provisions in the Equality Act apply to both men and women but to avoid repetition and for clarity, this Code is written as though the claimant is a woman comparing her work and pay with those of a man, referred to as the male comparator.

### **Use of the words ‘employer’ and ‘employee’**

As explained above, the equal pay provisions of the Act apply to some people who are ‘workers’ but not employees in the legal sense – such as office holders and those serving in the armed forces. In this Code, these people are also referred to as ‘employees’ for convenience. Similarly, people who recruit or ‘employ’ these people are referred to as ‘employers’. This term also refers to an ‘employer’ recruiting his or her first employee. The term ‘employment’ is also used to refer to these wider work-related relationships covered by these provisions of the Act.

### **References in the Code**

In this Code, ‘the Act’ means the Equality Act 2010. References to particular clauses and Schedules of the Act are shown in the margins. Occasionally other legislation or regulations are also referenced in the margins.

### **Changes to the legislation**

This Code refers to the law as it is expected to be at the time the Equality Act 2010 comes into force. There may be subsequent changes to the Act or to other legislation which may have an effect on the duties explained in the Code. Readers of this Code will need to keep up to date with any developments that affect the Act’s provisions including developments in European law which have an impact on equal pay provisions. Further information can be obtained from the Equality and Human Rights Commission. See below for contact details.

## **Further information**

[To be provided in published version]

How to get hold of the Act

How to get hold of the Code

Contact details for The Equality and Human Rights  
Commission (the Commission)

Equality and Human Rights Commission England  
Arndale House  
Arndale Centre  
Manchester  
M4 3EQ

Telephone 0845 604 6610

Equality and Human Rights Commission Scotland  
The Optima Building  
58 Robertson Street  
Glasgow  
G2 8DU

Telephone 0845 604 5510

Equality and Human Rights Commission Wales  
1st Floor  
3 Callaghan Square  
Cardiff  
CF10 5BT

Telephone 0845 604 8810

## Part one

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### **Basis of equal pay law**

1. The Equality Act guarantees equal pay for women and men doing equal work. This implements a fundamental principle of European Union law.
2. The original EC Equal Pay Directive (75/117), implementing Article 141 of the Rome Treaty, was consolidated into the recast Equal Treatment Directive, which relates to “implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation”. Article 4 of the recast Directive provides as follows:

**“For the same work or for work to which equal value is attributed, direct and indirect discrimination on grounds of sex with regard to all aspects and conditions of remuneration shall be eliminated.”**

In considering equal pay claims under the Equality Act the British courts take into account the provisions of the Treaty, the relevant Directives and the decisions of the European Court of Justice. A woman bringing an equal pay claim will usually do so under the Equality Act but in some circumstances she can claim directly under European law.

3. Certain public sector employers are subject to additional duties with regard to equal pay between women and men, see [PSED Code].

## Equality clause

4. The Equality Act provides that a sex equality clause will be implied into a woman's contract of employment in order to ensure equality in pay and equality of other contractual terms for women and men doing equal work. If the woman's claim for equal pay with a male colleague is successful, the result will be that her pay is increased to be the same as the man's and/or other contractual terms are changed to be no less favourable. Pay awards can be backdated for up to six years.

Practical guidance on key issues in equal pay can be found on the Commission's website ([www.equalityhumanrights.com](http://www.equalityhumanrights.com)).

## What is pay?

5. Like the Equal Pay Act that went before it, the equal pay provisions in the Equality Act (the equality of terms provisions) apply to all contractual terms under which a person is employed.

Article 157 (formerly 141) defines pay broadly as:

**'The ordinary basic or minimum wage or salary and any other consideration, whether in cash or kind, which the worker receives directly or indirectly, in respect of his employment, from his employer.'**

Article 157 is not limited to contractual terms and has been held to cover discretionary travel concessions, automatic pay increases, certain fringe benefits, non-contractual redundancy payments, training allowances and occupational pensions.

6. A woman can compare any term in her contract with the equivalent term in her male comparator's contract. This means that each element of the pay package has to be considered separately and it is not sufficient to compare total pay. For example, a woman can claim

equal pay with a male comparator who earns a higher rate of basic pay than she does, even if other elements of her pay package are more favourable than his. She can also claim for a term that is in the man's contract but not in hers, for example bonus payments.

7. The remedies and compensation that a successful claimant may be awarded are set out in [paragraph remedies XR]

### **Who is protected?**

8. The equality of terms provisions in the Equality Act apply to all employers irrespective of their size and whether they are in the public or private sector. They can be relied upon by:
  - Employees including apprentices and those working from home, whether employed full-time, part-time, under casual or temporary contracts and regardless of length of service;
  - Office-holders (both personal office, which includes holding the office of constable and public office). More information on office holders is set out in [ ];
  - Other workers (e.g. self-employed individuals and contract workers) whose contracts require personal performance of the work;
  - Crown employees (e.g. employment under or for the purposes of a government department or any officer or body exercising on behalf of the Crown functions conferred by a statutory provision);
  - House of Commons and House of Lords staff; and
  - Armed Forces personnel.

## Equal Pay for equal work

9. A woman can claim equal pay and other contract terms with a man in the same employment doing work that is: **Clause 65(1)**
- The same or broadly similar, provided that where there are any differences in the work these are not of practical importance (known as “**like work**”)
  - Different, but which is rated under the same job evaluation scheme as being work of equal value (known as “**work rated as equivalent**”)
  - Different, but of equal value in terms of factors such as effort, skill and decision-making (known as “**work of equal value**”).

## Like Work

10. To be engaged in “like work” means the woman and her male comparator(s) are doing the same work or, if not the same work then work of a broadly similar nature without differences of practical importance. **Clauses 65(2)**

There are two stages involved in considering whether people are doing like work.

The first stage is to establish whether the work actually being done by the woman and her male comparator(s) is the same or broadly similar. The work does not need to be identical. A general consideration of the work and the knowledge and skills needed to do it, is required.

Once the woman has shown that the work is of a broadly similar nature, there should be consideration of whether any differences between the work are of practical importance having regard to: **Clause 65(3)**

- The frequency with which differences occur in practice; and
- The nature and extent of the differences.

It is for the employer to show that there are differences of practical importance in the work actually performed. Differences such as additional duties, level of responsibility, skills, the time of work being done, qualifications, training and physical effort could be of practical importance. A detailed examination of the nature and extent of the differences and how often they arise in practice will be necessary. A mere contractual obligation on a man to do additional duties is not sufficient, it is what happens in practice that counts.

The fact that a man has a larger workload does not preclude a like work comparison with a woman.

### **Examples of “Like Work”**

11. Like work comparisons that have succeeded, in the particular circumstances of the case, include:
  - Male and female cleaners doing ‘wet’ and ‘dry’ cleaning in different locations on the same site;
  - A woman cook preparing lunches for directors and a male chef cooking breakfast, lunch and tea for employees;
  - Male and female supermarket employees who perform similar tasks, requiring similar skill levels, will be doing like work even though the men may lift heavier objects from time to time. The differences are not of practical importance in relation to their pay.

### **Work rated as equivalent**

12. A woman’s work is rated as equivalent to a man’s if a job evaluation study gives an equal value to their jobs in terms of the demands made on the employees, or would give them an equal value if the evaluation had not used a gender-specific system.

**Clause  
65(4)**

An employer undertakes a job evaluation study to evaluate jobs in terms of demands made on workers. Job evaluation is a way of systematically assessing the relative value of different jobs.

**Clause  
80(5)**

The job evaluation study should evaluate jobs by reference to factors such as effort, skill and decision making. In order to be valid, a job evaluation study must be rigorous, capable of impartial application and as objective as possible. This means that factors connected only with the nature of the job rather than the person doing the job should be taken into account. It must also be thorough and analytical in nature by assessing the component parts of particular jobs. It must encompass both the woman's job and her comparator's.

Job evaluation studies must be non-discriminatory and not influenced by gender stereotyping of different jobs or different types of work. A scheme which results in different points/evaluations being allocated to jobs because it values certain demands of a job differently for men and women would be discriminatory. Such a scheme will not prevent a woman claiming that her work is rated as equivalent to a male colleague if the sex-specific values were removed.

**Clause  
65(5)**

Work is rated as equivalent if the jobs have been assessed as scoring the same number of points and/or as falling within the same job evaluation grade. A small difference may or may not reflect a material difference in the value of the jobs, depending on the nature of job-evaluation exercise.

The Commission has produced guidance on non-discriminatory job-evaluation studies which is available from its website.

- 13.** Where a woman's job is rated as higher than that of a colleague under a job evaluation scheme, this will not prevent that woman from claiming equal terms with their colleague.

### **Examples of “Work rated as equivalent”**

14. Work rated as equivalent comparisons could involve:
- Where a female care worker and a male refuse worker have been placed in the same job evaluation grade, but the employer has refused to pay the woman (who had been evaluated as having fewer points) the rate for the grade.
  - A job evaluation study rated the jobs of female classroom teaching assistants and their better paid male physical education instructors as not equivalent. If the study had not given undue weight to the skills involved in the men’s jobs it would have rated the jobs as equivalent. An equality clause would operate in this situation.

### **Work of equal value**

15. If there is no job evaluation study, or none rating her work as equivalent, a woman may claim that her work is equal to her male comparator’s in terms of the demands made on her by reference to factors such as effort, skill and decision-making.
16. Work of equal value means that the jobs done by a woman and her male colleague are different but can be regarded as being of equal value or worth, having regard to the nature of the work performed, the training or skills necessary to do the job, the conditions of work and/or the decision-making that is part of the role.
17. As long as the woman and her male comparator are “in the same employment” the scope for equal value job comparisons is broad.

**Clause  
65(6)  
and 130  
(5)**

### **Examples of work of equal value**

18. Equal value comparisons that have succeeded in the particular circumstances of the case, include:

- Cooks and carpenters
- Speech therapists and clinical psychologists
- Kitchen assistants and refuse workers
- A support worker and a highway responses team member
- A night-care assistant and a painter and assistant buyer
- A kitchen team leader and a street lighting sub-foreperson
- Fish packers and a general labourer

**19.** A woman can claim equal pay using any or all of these methods of comparison. For example, a woman working as an administrator in a garage could claim 'like work' with a male administrator working alongside her and 'equal value' with a mechanic.

### **Comparators**

**20.** A woman can claim equal pay and/or other contractual terms for equal work with a man employed by the same employer or an associated employer. **Clauses 79(3),(4) & (9)**

### **Location of the comparator**

**21.** The man must be employed:

- at the same establishment or workplace;
- at a different establishment or workplace provided that common terms and conditions apply to the woman and her comparator (for example, where they are employed at different branches of the same shop) or generally between employees; or
- by an associated employer which means a company over which another company has

control or companies over which a third party has control (for example, the employer's parent company) either at the same establishment or workplace or a different workplace where common terms and conditions apply.

- 22.** In determining whether a male colleague at a different workplace is someone with whom a woman can compare herself, the woman does not have to show that her terms and conditions are identical, but must be able to show that they are substantially comparable or sufficiently similar for a comparison to be made.
- 23.** The woman must show either that a male colleague shares common terms and conditions of employment with her, or that common terms apply generally for most workers or classes of workers (such as the woman and her comparator) at the different establishments. Examples of common terms and conditions include, but are not limited to, terms and conditions emanating from the same source, such as a collective agreement or an equivalent arrangement.
- 24.** Therefore, in some circumstances, a woman can make a comparison with a male colleague at a different workplace where there may not be a common collective agreement but nonetheless their terms and conditions of employment are, on a broad basis, sufficiently similar.

Comparison with a colleague at a different workplace where there is only a similarity of terms can only occur where there is a real possibility of a comparator being employed at the person's workplace. For example, if an office would never employ a forklift truck driver, no comparison can be made unless there is a common collective agreement.

- 25.** The geographical scope of the equality of terms provisions in the Equality Act is not specified. In most cases, given the test for a comparator as set out above this will not be an issue as a woman and her comparator will be based in the UK. However, the Equality Act does not require either the woman or her comparator to be employed in an establishment in

Great Britain.

### **Comparing across employers**

- 26.** Comparisons can be made between colleagues who do not work for the same employer, but where differences in pay or other contract terms are attributable to a single source and there is a single body which is capable of remedying any inequality, for example, where differences arise from a sector-wide collective agreement or from legislation.
- 27.** A woman can nominate a comparator employed by a different employer where there is an overarching link – for example a woman teacher can compare herself to a man employed by a different education authority where there is a national scheme and a national negotiating body that can implement equal pay.
- 28.** Where, however, no single source is responsible for setting pay and rectifying any inequality this test is unlikely to be satisfied. For example, civil servants who seek to compare themselves to civil servants in a different government department by asserting that they shared the same ultimate employer (the Crown) would not be successful if the function of pay-setting was delegated to each government department rather than being determined centrally.

### **Choice of Comparator**

- 29.** A woman must select the male colleague(s) with whom she wishes to make a comparison.
- 30.** The colleague identified as a comparator need not be representative of those individuals doing a particular type of work. A woman could compare herself to a man whose pay is higher than his peers for anomalous reasons provided he is doing equal work.
- 31.** The fact that an employer can demonstrate that a male colleague who is not the chosen comparator, does like work, equivalent work or equal work to the woman

does not prevent her from seeking to assert equality of terms with a different colleague doing work of equal value who has more favourable pay or other contractual terms.

**32.** A woman can select more than one comparator and this may be prudent. Multiple comparators may be necessary for a term-by-term comparison of a woman's contract [see paragraph [ ]]. However, comparison with too many colleagues could result in an Employment Tribunal restricting the comparison.

**33.** The principle of equal pay for equal work is not confined to situations where men and woman are contemporaneously doing equal work. A woman can compare herself to either a man working at the present time or to a predecessor when he left employment. There may be evidential and practical problems for a woman comparing herself to a male predecessor who did the job some time ago.

A woman cannot ordinarily make a comparison with her successor, as this would involve hypothetical assumptions.

**34.** Where there is no actual comparator, so that a sex equality clause cannot operate, a woman can rely upon the direct sex discrimination provisions of the Equality Act [see Employment Code paragraphs [ ]]. For example, an employer tells a female employee that she would be paid more if she were a man. If she cannot point to a male colleague employed on equal work in the same employment (see paragraph [ ]) a woman cannot use the equality of terms provisions. However, she could claim under the direct sex discrimination provisions as the less favourable treatment she has received is clearly based on her sex.

**Clause  
71(1) &  
(2)**

In this situation the female employee could rely on a hypothetical comparator.

### **A man's claim for equal pay**

- 35.** A man can bring a contingent (piggyback) claim for equality of terms with a woman who has successfully claimed equal pay with another male comparator.

### **Identifying the comparator**

- 36.** The comparator does not have to give consent to being named.
- 37.** There are a number of ways in which a woman may be able to identify and select a colleague as a comparator. These include:
- her own knowledge and experience;
  - the colleague's job having been rated as equivalent under a job evaluation scheme (see paragraph [ ]);
  - voluntary disclosure by the employer of pay information on a generalised basis;
  - through an internal grievance procedure (see paragraph [ ]);
  - through the statutory Questionnaire process (see paragraph [ ] and Chapter 12 of the Employment Code, paragraph [ ]);
  - disclosure (asking for sight of documents/information as part of the Employment Tribunal process). Once a woman has filed a claim with the Employment Tribunal and there is, on the face of it, inequality of terms, an application can be made for disclosure to enable the woman to identify and name appropriate male colleagues as comparators;
  - through the Freedom of Information Act 2000;
  - through the Data Protection Act where the woman is the subject of the data but that data refers to a comparator.

- 38.** As new information often comes to light during the course of an equal pay claim, a woman may seek to amend her list of comparators. Such requests should be made promptly and for a good reason.

### **Sex Equality Clause**

- 39.** Where a woman identifies a less favourable term in her contract of employment in comparison to a male colleague doing equal work, or the absence of a term from which he benefits, and the employer is unable to justify the different term by reference to material factors (see paragraph [ ]), then the sex equality clause has effect. **Clause 66(2)**
- 40.** The equality clause operates by changing the less favourable contractual term in the woman's contract so that it is no less favourable than the male comparator's, or by incorporating the male comparator's term into the woman's contract.
- 41.** The equality clause operates in relation to each separate and distinct term of a woman's contract. This means that each provision in her contract (or absence of provision) can be compared to each provision in the contract of a male colleague, rather than an overall comparison being made of total pay and contractual benefits in both contracts. For example, a woman can claim equal pay with a male colleague doing equal work who earns a higher rate of basic pay than she does, even if other elements of her contract are more favourable than his.
- 42.** Where a job evaluation study has rated the work of a woman and her comparator as equivalent, the equality clause operates to give the woman the benefit of all the male comparator's contract terms including those which have not been determined by the rating of the work. **Clause 66(4)**

## Non contractual rights

43. The equality of terms provisions deal only with contractual terms pay and benefits i.e. non-discretionary bonuses, sick pay, performance related pay (overtime/shift allowance) and pension benefits.

The sex discrimination at work provisions of the Equality Act (see paragraph [ ]) are not applicable where an equality clause or equality rule (see paragraph [ ]) operates or would operate but for the effect of a material factor defence (see paragraph [ ]).

Clause  
71(1)

44. The sex discrimination provisions deal only with non-contractual pay and benefits such as discretionary bonuses, promotions, transfers and training and offers of employment or appointments to office.
45. For example, a female sales manager is entitled under her contract of employment to an annual bonus calculated by reference to a specified number of sales. The female sales manager discovers that a male sales manager working for the same employer and in the same office receives a higher bonus under his contract for the same number of sales. The female manager's claim would be brought under the equality of terms provisions, based on the operation of an equality clause.

However, if the female sales manager is not paid a discretionary Christmas bonus that the male manager is paid, she could bring a claim under the sex discrimination at work provisions [see paragraph XR Employment Code].

46. Equally, if the same female sales manager is not advised of a promotion opportunity in which the same male sales manager is successful, the female sales manager's could bring a claim under the sex discrimination at work provisions [see paragraph XR Employment Code].

## Defences to an equal pay claim

47. The possible defences that an employer may raise in response to a claim about the breach of an equality clause or rule are:
- the woman and her colleague are not doing equal work;
  - for equal value claims only - the jobs being done by the woman and her colleague have been evaluated and rated differently under an analytical job evaluation scheme that is free of sex bias;
  - the difference in pay is genuinely due to a material factor, which is not the difference of sex.

## Material factor defence

48. Once a woman has shown that she is doing equal work with her male comparator, her claim will succeed unless her employer can prove that the difference in pay or other contractual terms is due to a “material factor” which is nothing to do with sex. **Clause 69(1)**
49. A factor will be material if it is significant and causally relevant. It must be the real reason (cause) for the difference in terms and sufficiently explain that difference. It is for the employer to prove that it is material. **Clause 69(6)**
50. Material factors can take many forms and more than one factor may be relied upon. Whether a material factor defence succeeds or fails will always depend on the circumstances of the case. There is no such thing as an automatic or blanket defence.

Reasons which have succeeded in the particular circumstances of the case include;

- performance (i.e. contract terms offered to reward an employee for exceptional past personal performance);

- rewards for working arrangements (i.e. a nightshift allowance to compensate for working anti-social hours);
  - length of service (see paragraph [ ]);
  - geography (i.e. a London weighting allowance);
  - skills, qualifications and experience of individuals (i.e. contract terms offered to reflect a candidate having a university degree or a greater level of work-related experience than colleagues);
  - levels of responsibility;
  - market rates/forces (e.g. contract terms offered to attract particular candidates and/or to pay workers at established market/sector rates);
  - pay protection arrangements (see paragraph [ ]); and
  - where terms and conditions have been preserved by the Transfer of Undertakings (Protection of Employment) Regulations 1981 or 2006.
- 51.** An equal pay claim will fail if the employer shows that the difference in pay is due to one or more material factors. An employer seeking to rely upon a material factor will be required to provide evidence of both the factor and the extent of the differential it causes. For example, evidence of actual difficulties in recruiting and retaining people to do the job being done by the higher-paid comparator.
- 52.** The material factor must not itself be tainted by discrimination. For example, where a market forces argument is itself dependent on practices which historically discriminate against women, it will not be a viable basis for a defence.
- 53.** Where a material factor applies at a particular point in time but subsequently ceases to apply it will no longer provide a defence to differences in contractual terms. For example, an employer recruits a new employee at

a lower than normal rate of salary due to severe financial constraints at the time of recruitment. Subsequently the employer's financial position improves. Once the reason for the difference in pay ceases to exist the employer cannot continue to rely upon that factor to explain differences in pay or other contractual terms.

- 54.** The material factor cannot be directly discriminatory, therefore based on a person's sex (see paragraph [ ]). A directly discriminatory material factor can never be justified. **Clause 69(1)(a)**
- 55.** If the material factor places women doing equal work at a particular disadvantage when compared to male colleagues it will be indirectly discriminatory unless the employer can objectively justify the material factor by showing it is a proportionate means of achieving a legitimate aim (see paragraph XR [ ]). **Clause 69(2)**
- 56.** Statistical analysis which indicates an appreciable difference in the terms offered to comparable men and women (i.e. doing work of equal value) but where one job is predominantly carried out by one sex, is one way of showing disparate impact.
- 57.** The analysis could include looking at matters such as:
- who are the appropriate groups of workers (the "pool") to allow for a meaningful comparison to be made (see paragraph [ ]);
  - the size of the pools, as pools which do not contain sufficiently large numbers could provide distorted statistics;
  - how the relevant statistical information should be interpreted to allow for the rationale behind any conclusions reached in relation to the statistics to be understood; and
  - the level of disparity needed to establish sex discrimination.

The assessment of that information is likely to vary depending on whether a provision, criteria or practice is the basis for the contractual differences (such as part-time workers receiving less favourable terms) or rather statistical evidence shows a discrepancy between comparable men's and women's contractual terms. See paragraphs [ ] of the Employment Code for further consideration of indirect discrimination and justification and the need for the use to be a "proportionate means of achieving a legitimate aim".

- 58.** Whether a material factor achieves a legitimate aim on a proportionate basis will depend on the facts of each particular case. **Clause 69(2)**
- 59.** Cost savings cannot justify a difference in treatment alone, but cost issues can be taken into account when linked to a broader justification.
- 60.** The Equality Act states that for the purpose of justifying reliance upon a material factor the long-term objective of reducing inequality between men's and women's terms of work will always be regarded as a legitimate aim. **Clause 69(3)**
- 61.** However, even where the aim is legitimate, the employer must be able to show that the manner in which it seeks to achieve the aim is proportionate in the circumstances. For example;
- a process to phase out historical disparity in pay and benefits between men and women, which involves a period of pay protection for men to cushion the impact on them of the new arrangements, has the long-term objective of reducing inequality between the sexes and therefore be a legitimate aim. However, if protecting the men's pay in fact perpetuated the historic discrimination by continuing to pay women less, then it is unlikely this would be a proportionate means of achieving the legitimate aim; or
  - a firm of accountants structures employees pay on the basis of success in building relationships

with clients (including at after hours client functions). Due to childcare responsibilities fewer women than men can participate in these functions and women's pay is much lower. The employer is unable to show the way it rewards client relationship building is proportionate, taking into account the disadvantage to women employees.

### **Equal Pay and Maternity Leave**

- |            |   |                         |
|------------|---|-------------------------|
| <b>62.</b> | The Equality Act provides that a maternity equality clause will be implied into a woman's contract of employment whilst she is on maternity leave.  | <b>Clause<br/>73</b>    |
| <b>63.</b> | The maternity equality clause is effective in relation to three areas of pay during maternity leave, namely: <ul style="list-style-type: none"><li>• the calculation of maternity-related pay;</li><li>• bonus payments; and</li><li>• pay increases following maternity leave.</li></ul> | <b>Clause<br/>74</b>    |
| <b>64.</b> | During maternity leave a women's entitlement to receive contractual remuneration (i.e. salary or other benefits with a transferable cash value such as a car allowance or luncheon vouchers) stops unless her contract provides for maternity related pay.                                |                         |
| <b>65.</b> | However she is entitled not to lose a benefit simply because of her maternity leave in certain areas such as pay rises and contractual bonus payments.  | <b>Clause<br/>73</b>    |
| <b>66.</b> | There is no need for the woman to identify a comparator when seeking to rely on the maternity equality clause.  |                         |
| <b>67.</b> | Maternity-related pay means pay other than statutory maternity pay to which a woman is entitled as a result of being pregnant or being on maternity leave.  | <b>Clause<br/>74(9)</b> |
| <b>68.</b> | Detailed rules on the calculation of maternity related pay are set out in the Equality Act. These ensure that any pay increase a woman receives or would have   | <b>Clause<br/>74(3)</b> |

received had she not been on maternity leave is taken into account in the calculation of her maternity-related pay.

- 69.** For example: early in her maternity leave a woman receiving maternity-related pay becomes entitled to an increase in pay. If her terms of employment, do not already provide for the increase to be reflected in her maternity-related pay, the employer must recalculate her maternity pay to take account of the pay increase. **Clause 74(4)**
- 70.** Similarly the maternity equality clause therefore ensures that any pay or bonus related to time before the maternity leave starts, during compulsory maternity leave or after maternity leave ends is paid without delay and the woman is treated in the same way as her colleagues who are also entitled to pay or bonuses but who are not on maternity leave.
- 71.** For example: a woman becomes entitled to a contractual bonus for work she undertook before she went on maternity leave. Her employer cannot delay payment of the bonus and must pay it to her when it would have been paid had she not been on maternity leave.
- 72.** Employers need not pay a woman a proportion of any annual bonus related to her period of maternity leave other than the two week compulsory maternity leave period (or four weeks for factory workers).
- 73.** If a woman's contract does not provide for her to receive, following the end of her maternity leave, a pay increase which would have been paid to her had she not been on maternity leave, the maternity equality clause will operate so as to increase the woman's pay on her return to work. **Clause 74(8)**
- 74.** The provisions of the Equality Act which deal with prohibited conduct in relation to a woman being pregnant or on maternity leave cover non-contractual pay and benefits and are explained in the Employment Code. They are not applicable in those circumstances when a maternity equality clause or maternity equality rule (see paragraph [ ]) operates or would operate. **Clause 76**

75. For example, a woman who is in line for a promotion tells her employer that she is pregnant. The employer tells the woman he will not promote her because she is likely to be absent on maternity leave during a very busy period. This will amount to pregnancy discrimination and any claim would be brought by the woman under those provisions of the Equality Act (see paragraph [ ] of the Employment Code).
76. However, if the same woman is promoted and her increased promotion salary takes effect after the commencement of her maternity leave, her maternity-related pay will need to be recalculated to take account of the salary increase and the salary increase will be payable to the woman on her return to work from maternity leave. If this does not happen any claim would be brought by the woman under the equality of terms provisions of the Equality Act, specifically the maternity equality clause (see paragraph [ ]).

### **Burden of proof**

77. A woman claiming equal pay must prove facts from which an Employment Tribunal could decide that her employer has paid her less than a male colleague doing equal work. It is then for her employer, if the claim is denied, to prove that the difference in pay and/or other terms is for a material reason other than sex.
78. If a woman can demonstrate that she is employed to carry out equal work with a male colleague (who is a real rather than hypothetical comparator) in the same employment (see paragraph [XR]) but that her male colleague receives better pay or other contractual benefits than her, the woman will have shown a potential breach of an equality clause or rule. If, however, her employer proves that there is a non-discriminatory material factor which has resulted in the difference in pay the woman's claim will fail.
79. If the woman asserts that the material factor is indirectly discriminatory it is for her to provide evidence

of this, statistical or otherwise. The employer will then need to objectively justify the material factor (i.e. prove that it is a proportionate means of achieving a legitimate aim). [(see paragraph [XR])]

## **Employment Tribunals**

- 80.** In making a decision about a case the Employment Tribunal has to assess the evidence about:
- The work done by the woman and her comparator;
  - The application and validity of the rating under a job evaluation study if the claim is for work rated as equivalent;
  - The value placed on the work (sometimes with the advice of an Independent Expert), in terms of the demands of the jobs if the claim is for work of equal value;
  - The pay or contract terms of the woman and her comparator and how it is arrived at; and
  - The reasons for the difference in pay or contract terms if the employer raises a material factor defence.
- 81.** There are special tribunal procedures for work of equal value claims. For guidance on the Employment Tribunal process information can be obtained from: [www.employmenttribunals.gov.uk](http://www.employmenttribunals.gov.uk)
- 82.** The concept of equal contract terms for work of equal value means that a person can claim equality of contract terms with a colleague of the opposite sex doing a completely different job. In comparing the jobs in these circumstances the Employment Tribunal will apply techniques akin to an analytical job evaluation study, whereby the demands on the jobholders and the skills required of them in respect of each job are assessed using objective criteria. The Employment Tribunal may also appoint a member of the panel of
- Clause 130(2)**

independent experts to assess the value of the jobs and prepare a report. The appointed independent expert may make a detailed study of an employer's pay/benefits system and the employer would be expected to co-operate with any such exercise.

- 83.** A member of the panel of independent experts is a person designated as an expert by ACAS. This person will not be a member of ACAS' Council nor an ACAS member of staff. **Clause 130(8)**
- 84.** An Employment Tribunal may withdraw the requirement for a report from an independent expert. In such circumstances the Employment Tribunal might instead request that the independent expert provide it with specific documentation or respond to other requests. **Clause 130(3)**
- 85.** If an Employment Tribunal requests that a report is prepared by an independent expert and does not withdraw that request the Employment Tribunal cannot determine the question of whether work is of equal value until the report is provided. **130(4)**
- 86.** The parties to a claim might also, in certain circumstances, be able to appoint someone with equal pay expertise to act as an expert on their behalf or on a joint basis.
- 87.** If a job evaluation study has assessed two jobs as being of different value, then an equal value claim will fail unless the Employment Tribunal has reasonable grounds for suspecting that the evaluation was tainted by discrimination [ see para XX ] or was in some other way unreliable. **Clauses 130(5) & (6)**

### **Obtaining and disclosing pay information**

- 88.** It is widely acknowledged that a lack of transparency in pay/pay structures fosters gender inequality and the continuance of a gender pay gap. Transparency means individuals being able to understand how each element of their pay packet contributes to their total earnings in a pay period. Measures that promote

openness and understanding of pay/pay structures for employers/employees and trade unions play an important role in achieving gender equality at work.

### **Protected pay discussions**

- 89.** Any term of a person’s contract which prohibits or restricts a “relevant pay discussion” with colleagues, which includes former colleagues, (often called “secrecy clauses”) in the same employment (see paragraph [ ]) is unenforceable. **Clauses 77(1) & 77(6)**
- 90.** If an employer takes action against an employee for having such discussions the employee may claim victimisation. **Clause 77(4)**
- 91.** This provision is intended to promote openness and dialogue about pay and bring an end to opaque pay structures.
- 92.** A relevant pay discussion is one which is about: **Clause 77(2)**
- pay; and
  - which relates to whether or to what extent there is a connection between pay and having (or not having) a protected characteristic (see paragraph [ ]).
- This is not confined to the protected characteristic of sex.
- 93.** To qualify as a relevant pay discussion, the discussion must be between colleagues or ex-colleagues and relate to some degree to the question of whether pay may be discriminatory.
- 94.** For example, a discussion between a woman and a man for the purpose of establishing whether the man is being paid more than the woman could be a relevant pay discussion. However, two male colleagues simply comparing their respective salaries are unlikely to be having a relevant pay discussion.

- 95.** Involvement in a relevant pay discussion can include but is not limited to: **Clause 77(3)**
- asking a colleague to provide information about his/her pay and/or benefits;
  - providing information to a colleague about pay and/or benefits; and
  - receiving information from a colleague about pay and/or benefits.
- 96.** Colleagues involved in relevant pay discussions are protected from victimisation by their employer as a result of taking part. **Clauses 77(4) & (5)**
- 97.** For example: A female colleague thinks she is underpaid compared with a male colleague. She asks him what he is paid, and he tells her. The employer takes disciplinary action against the man as a result. The man can bring a claim for victimisation against the employer for disciplining him.
- 98.** However, an employee who discloses information about pay to a competitor of their employer in contravention of a confidentiality obligation would not be afforded protection from, for example, disciplinary action as a result of breaching a secrecy clause in a contract of employment.

### **Equal Pay questionnaires**

- 99.** A woman who believes she is not receiving equal pay is entitled to write to her employer asking for information that will help to establish whether this is the case and if not, the reasons for the pay difference. There is a prescribed questionnaire procedure which can be used to obtain this information. A question or response is admissible as evidence in Tribunal proceedings whether or not the question or response is contained in the statutory questionnaire or response form. **Clauses 137(1)-(3)**
- 100.** The questionnaire process allows employees to ask in accordance with prescribed time-scales for information from their employers, which will help them to determine

whether there is a basis to pursue a claim against their employer.

- 101.** An Employment Tribunal cannot order an employer to respond to a questionnaire but if the employer fails, without reasonable excuse, to reply to a questionnaire within 8 weeks, or responds with an evasive or equivocal reply, the Employment Tribunal may draw an adverse inference at the hearing. Further guidance is given in the notes accompanying the questionnaire.
- 102.** There are limited statutory exemptions which would prevent an adverse inference being drawn.

**Clauses  
137(4)-  
(5)**

### **Confidentiality**

- 103.** A person can use the statutory questionnaire process to request key information and it is likely that in many cases an employer will be able to answer detailed questions in general terms, while still preserving the anonymity and confidentiality of other employees.
- 104.** The statutory questionnaire process cannot be used to require an employer to disclose an employee's personal details, unless an Employment Tribunal orders the employer to do so.
- 105.** The Information Commissioner has helpful guidance ("When should salaries be disclosed?") on its website, on the issue of balancing the general right to information under the FOIA and individual rights which are protected by the Data Protection Act.
- 106.** Often information requested from an employer, whether through a grievance or the statutory questionnaire process, will not be confidential, but some information such as the exact details of a colleague's pay package, may be confidential to that person. Personal data (information about a person from which the person can be identified) is protected by the Data Protection Act 1998 ("DPA") and can only be disclosed in accordance with eight data protection principles. Pay records will usually be personal data covered by the DPA, although they might not be if an

employer's pay/benefits are determined via collective bargaining or an employer publishes its pay scales.

- 107.** Disclosure is permitted if the colleague consents to the release of the information.
- 108.** The Commission has produced guidance that explains an employer's legal obligations when responding to an equal pay questionnaire or to a request for information during the course of tribunal proceedings, in light of the DPA. However, this is a developing area of law and, if in doubt, an employer should seek specific advice from the Information Commissioner and/or take legal advice.
- 109.** The Freedom of Information Act 2000 ("FOIA") and Freedom of Information (Scotland) Act 2002 ("FOI(S)A") give the public a general right of access to recorded information held by certain public authorities and by bodies on behalf of such public authorities.
- 110.** Individuals and in particular employees of public authorities can use the FOIA or FOI(S)A to obtain information which would allow them to determine whether or not they might have an equal pay claim or to assist them in the preparation of such a claim.
- 111.** Further information on the FOIA and FOI(S)A can be found at <http://www.foi.gov.uk/>

### **Tribunal claims**

- 112.** Information in relation to pay and other contractual terms can also be obtained as part of the Employment Tribunal process (see paragraph [ ]).

Once a woman has lodged an equal pay claim, she can seek relevant information about pay and other contractual terms from her employer in a number of ways. These include:

- Disclosure;
- requests for Additional Information; and

- requests for Written Answers.

## Occupational pension schemes

### General

- 113.** Employers may provide benefits to their current and former employees and their dependants through occupational pension schemes. The schemes are legally separate from the employers and are administered by trustees. The benefits will be in the form of pensions and lump sums. Special provisions apply to such schemes because of their separate legal status and the nature of the benefits they provide.

### Sex equality rule

- 114.** An occupational pension scheme is treated as including a sex equality rule if it does not have such a rule already. If a term of the scheme is less favourable to a woman than it is to a male comparator (see paragraph [ ]), then the term is modified so that it is not less favourable. Also, a discretion that is capable of being exercised in a way that would be less favourable to the woman than to her male comparator is modified so as to prevent the exercise of the discretion in that way. **Clauses 67(1)–(2)**
- 115.** However, if the trustees or managers of the scheme can show that the difference is because of a material factor which is not the difference in sex, then the sex equality rule will not apply to that difference. **Clause 69(4)**
- 116.** Also, the sex equality rule does not apply to differences resulting from the application of prescribed actuarial factors to the calculation of employer contributions; where different amounts are paid where actuarial factors are applied to the determination of prescribed benefits; and where different amounts of pension are paid by the scheme which are attributable to differences in certain prescribed state pension benefits. **Schedule 7, part 2, paragraphs 3-5**

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|--|---------------------------------|
| <p><b>117.</b> The sex equality rule applies to the terms on which people become members of the scheme and terms on which members of the scheme are treated. It also applies to any discretion affecting the way people become members and the way in which members are treated.</p>   | <p><b>Clauses 67(3)–(4)</b></p> |
| <p><b>118.</b> So a rule which provides for men and women to draw their benefits from the scheme at different ages, or on satisfying different conditions, is not consistent with the sex equality rule. The rule would be overridden to require benefits to be provided at the more favourable age, or on the person satisfying the conditions applicable to either men or women.</p>   | <p><b>Schedule 7 Part 2</b></p> |
| <p><b>119.</b> The effect is that men and women are treated equally to comparable members of the opposite sex in relation both to the terms on which they are permitted to join the scheme and to the terms on which they are treated once they have become scheme members.</p>  |                                 |
| <p><b>120.</b> The terms on which benefits are provided to dependants of members, and associated discretions, are also covered by the sex equality rule.</p>   | <p><b>Clauses 67(5)–(6)</b></p> |
| <p><b>121.</b> Where people of the same sex are treated differently according to their family, marital or civil partnership status, a person must select a comparator of the opposite sex who has the same status. So if a scheme provides a particular benefit only to members who are married or in civil partnerships, a member who is not married or in a civil partnership cannot choose as a comparator a member of the opposite sex who is married or in a civil partnership for a claim in relation to that benefit.</p> | <p><b>Clauses 67(7)–(8)</b></p> |

### **Maternity equality in pension schemes**

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|--|---------------------------------|
| <p><b>122.</b> An occupational pension scheme is treated as including a maternity equality rule if it does not have such a rule already. If a term of the scheme relating to membership, the accrual of rights or the determination of the amount of a benefit does not treat a woman on maternity leave as it treats her when she is not on</p> | <p><b>Clauses 75(1)–(6)</b></p> |
|--|---------------------------------|

maternity leave, then the term is modified. The only time a woman on maternity leave will be treated differently is when she is on a period of unpaid additional maternity leave, when she will not be entitled to accrue occupational pension benefits as of right.

- 123.** So where a woman is a member of an occupational pension scheme and goes on maternity leave, the scheme must provide life cover and pension accrual on the same basis as before her leave started.

## **Enforcement**

### **General**

- 124.** The Act provides that an Employment Tribunal has the jurisdiction to determine claims relating to a breach of an equality clause or rule. **Clause 126(1)**
- 125.** Members of the armed forces must make a service complaint about the breach of an equality clause or rule before an Employment Tribunal can consider a claim from such a person. Members of the armed forces cannot withdraw a service complaint if they wish the Employment Tribunal to hear their claim and must either have their service complaint referred to the Defence Council or apply to have it referred themselves. **126(6)**
- 126.** It is not necessary to put a complaint about pay or contractual terms in writing to the employer before a claim can be made in the Employment Tribunal. However, before making a complaint to the Employment Tribunal about equal pay, a woman should consider trying to resolve the issue by mutual agreement with her employer, perhaps through the employer's grievance procedure.
- 127.** The ACAS Code of Practice sets out guidance for employees and employers in relation to raising and dealing with grievances (see paragraph [ ]) which includes complaints about pay or contractual terms.
- 128.** If Employment Tribunal proceedings are commenced **Trade Union**

and there has been an unreasonable failure by either party to adhere to the ACAS Code this could result, if the Tribunal considered it to be just and equitable, in an uplift (where the failure is the employers') or reduction (where the failure is the employee's) in any compensatory award of up to 25% to address the failure. Part of the ACAS Code refers to bringing formal grievances before bringing legal claims to the Tribunal.

**Labour  
Relations  
(Consolidation)  
Act  
1992**

- 129.** Employers and employees can also seek advice from an ACAS conciliator. ACAS can be contacted at [www.acas.org.uk](http://www.acas.org.uk). Employees could also seek advice from employee or trade union representatives.
- 130.** The time limit for making a complaint to the Employment Tribunal is not extended to take account of the time taken to complete a grievance procedure. See section [XX] on time limits.
- 131.** When responding either to a grievance or to a statutory questionnaire employers need to:
- Decide whether or not they agree that woman and her comparator are doing equal work
  - If the employer does not agree they should explain in what way the work is not equal
  - Consider the reasons for any difference in pay/benefits or other contractual terms and whether (if necessary) these can be objectively justified (see paragraph [ ])
  - Explain the reasons for any difference in pay/benefits or other contractual terms.

### **Time limits for Equal Pay claims**

- 132.** A complaint to an Employment Tribunal about equal pay must normally be made before the end of what is known as the "qualifying period", usually 6 months after the end of employment. This is a different time-

**Clauses  
128(1)-  
(3)**

limit from sex discrimination claims for which the time limit is ordinarily 3 months. (see paragraph [ ] Employment Code).

- 133.** The 6 months' time limit runs from the end of the woman's employment contract or appointment. If a woman has left the particular post about which the claim is being made, provided she remains in the same employment the time does not start to run. Where an employer issues a new contract, for example, as part of a restructuring process, the 6 month time limit will, however, normally start to run from the end of the old contract. Equally, where an employee transfers to a new employer under the Transfer of Undertakings (Protection of Employment) Regulations 2006, the 6 month time limit will start to run from the date of the transfer. **Clauses 119(1) & (3)**
- 134.** The qualifying period will depend upon the specific circumstances, which are set out below. **Clause 128(3)**
- 135.** Where the fact of the pay inequality was deliberately concealed and the woman could not reasonably have been expected to discover the inequality, the time starts to run from the date she actually discovered or could reasonably have discovered the inequality.
- 136.** Where the woman is incapacitated, the time starts to run from the end of the incapacity. The incapacity must last six months from the end of the employment or six months from the date from which the pay inequality was actually discovered or could reasonably have been discovered.
- 137.** Members of the armed forces have 9 months rather than 6 months to make their applications to the Employment Tribunal provided that they raise a service complaint as mentioned at [ ]. **Clause 128(4)**
- 138.** Civilians working for the armed forces are not governed by these rules and must make an application to an Employment Tribunal on the same basis as other people.
- 139.** It is the woman's responsibility to ensure her claim is made in time. Individuals and their representatives

should be alert to the importance of observing these time limits. It should be noted that using an employer's grievance procedure does not extend the time limits set for lodging a claim, nor does serving a statutory questionnaire (see paragraphs [ ] and [ ]).

Awareness of these time limits may affect choice of comparator particularly where a predecessor comparator is being relied upon.

### **Equal Pay awards and remedies**

- 140.** If a claim to an Employment Tribunal is not settled and the matter is considered at a full hearing where the claim is upheld then the Employment Tribunal may: **Clause 131**
- Make a declaration as to the rights of the woman and/or her employer. Such a declaration will relate to the proceedings brought and could, for example, require a pay rise to the level of the comparator (including any occupational pension rights) or require any beneficial term in comparator's contract but not in the woman's to be inserted into her contract;
  - Order the employer to pay arrears of pay or damages to the person who has brought the claim.
- 141.** A declaration may be made even if the Employment Tribunal decides not to award any compensation. A declaration is not a recommendation (see paragraph [ ]).
- 142.** While a woman can bring claims on the basis of the three job comparison types (like work, work rated as equivalent and work of equal value), she cannot recover loss for all, only the highest paid job comparator.
- 143.** An Employment Tribunal cannot make an award for injury to feelings for breach of an equality clause.

**144.** In England and Wales, the Tribunal can award arrears of pay or damages going back not longer than 6 years from the date that proceedings were brought in the Employment Tribunal. This is extended to the day on which the breach first occurred where either or both:

**Clause  
131(4)**

- the employee has been incapacitated; and/or
- the party who breached the equality clause concealed that fact and the employee did not and could not reasonably have discovered the breach.

In Scotland, the Employment Tribunal can award arrears of pay or damages going back not longer than 5 years from the date that proceedings were brought in the Employment Tribunal. This is extended to 20 years where the employee had a relevant incapacity or there was a fraud or error.

**145.** In certain circumstances interest may be awarded on arrears of pay. Interest will be calculated as simple interest accruing day-to-day in accordance with prescribed statutory rates.

**Clauses  
131(4)  
131(5)**

**146.** Where a claim to an Employment Tribunal is upheld which relates to a breach of an equality rule or a breach of an equality clause in relation to membership of or rights under an occupational pension scheme, then an Employment Tribunal may make a declaration as to the rights of the parties concerned. But the Employment Tribunal cannot order arrears of benefits or damages or any other amount to be paid to the complainant unless he/she is a pensioner member of the scheme.

**Clauses  
132(1)-  
(3)**

**147.** So an Employment Tribunal could declare that a person who has been stopped from joining an occupational pension scheme in breach of an equality rule should be admitted from 8 April 1976, but the scheme would have been able to continue to provide different benefits for men and women until 17 May 1990.

- 148.** Where an Employment Tribunal makes a declaration in respect of the terms on which a member of a scheme must be treated, the employer must provide such resources to the scheme as are necessary to secure the member's rights without further contribution by the member or any other members. **Clause 132(8)**

### **Protection against victimisation**

- 149.** The Equality Act protects employees from being victimised for matters including making a complaint (unless this is both untrue and made in bad faith) about equal pay, unlawful discrimination or harassment or for giving evidence about such a complaint. The protection against victimisation also applies to employees involved in 'relevant pay discussions' (see para XX). Victimisation because a person intends to bring a claim is also unlawful. The 'complaint' does not have to be by way of filing a claim with the Employment Tribunal, but includes any discussion or correspondence about the matter between the woman and her employer. The protection against victimisation also includes not only the woman bringing the claim, but also any person who assists her, for example, a comparator. **Clause 27**
- Clause 77(4)**

Further information on victimisation is set out [cross refer to Employment Code, Prohibited Conduct]

## Part two

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# Good equal pay practice

### Introduction

1. Despite the implementation of equal pay legislation in the 1970s, there is still a significant gender pay gap and it has been estimated that it will take another 20 years to close the gap without further corrective action.

Pay inequality results not only in continuing disadvantage to women, but also in time-consuming and costly litigation, most frequently in the public sector, but also in the private sector.

2. The financial loss to women arising out of the gender pay gap is well documented, but organisations also lose out by failing to properly reward the range of skills and experience that women bring to the workforce.

The most commonly recognised risk of failing to ensure that pay is determined without sex discrimination is the risk of equal pay litigation. The direct costs to an organisation of a claim can include not only any eventual equal pay award to the woman or women bringing the claim but also the costs of time spent responding to the claim, and the costs of legal representation.

The indirect costs are harder to quantify, but include lower productivity on the part of those employees who consider that they are not getting equal pay and on the part of managers whose time is taken up in dealing with the claim and its repercussions.

3. Tackling the gender pay gap reduces the risk of costly litigation. It can also increase efficiency and productivity by attracting the best employees, reducing staff turnover, increasing commitment, and reducing absenteeism. Pay is one of the key factors affecting motivation and relationships at work. It is therefore important to develop pay arrangements that are right

for the organisation and that reward employees fairly. Providing equal pay for equal work is central to the concept of rewarding people fairly for what they do.

4. Employers should not discriminate on any protected ground in their pay arrangements – see Employment Code. The information on good practice set out here focuses on eliminating gender pay inequalities, which are the focus of this Code of Practice. However, the methods used to identify and remedy unlawful gender pay gaps can also be used to remedy unlawful pay discrimination on other grounds.

### **Reviewing or auditing pay**

5. Employers are responsible for providing equal pay and for ensuring that pay systems are transparent. Pay arrangements are often complicated and the features that can give rise to discrimination in pay are not always obvious. A structured pay system, based on sound, bias-free job evaluation, is more transparent and more likely to provide equal pay than a system that relies primarily on managerial discretion.
6. Most employers believe that they provide equal pay for equal work, irrespective of the sex of the job holders or whether they work full or part-time. An equal pay audit is the most effective way of establishing whether an organisation is in fact providing equal pay.

For organisations subject to the public sector equality duties, it demonstrates action to promote equal pay as required by those duties. It provides a risk assessment tool for pay structures.

The Commission recommends all employers carry out regular equal pay audits. A model for carrying out an equal pay audit is described below.

7. The Commission publishes guidance on reducing or eliminating the risks that various common pay practices, listed below, pose in terms of potential non-compliance with an employer's legal obligations. In many cases, this will involve carrying out a few

straightforward checks or reviewing a relevant policy.

The following pay practices, which are found throughout medium-to-large sized private and public sector organisations, can allow gender pay inequality to persist. There is detailed guidance on the Commission's website about the law and risk management in relation to these issues:

- Lack of transparency and unnecessary secrecy over grading and pay
  - Discretionary pay systems (e.g. merit pay and performance related pay)
  - Non-payment of bonuses or other incentive payments during maternity leave
  - Different non-basic pay, terms and conditions for different groups of employees (e.g. attendance allowances, overtime or unsocial hours payments)
  - More than one grading and pay system within the organisation
  - Long pay scales or ranges
  - Overlapping pay scales or ranges, where the maximum of the lower pay scale is higher than the minimum of the next higher scale, including 'broad banded' structures where there are significant overlaps
  - Managerial discretion over starting salaries
  - Market based pay systems or supplements not underpinned by job evaluation
  - Job evaluation system which has been incorrectly implemented or not kept up to date
  - Indefinite or lengthy pay protection policies.
- 8.** Risks of equal pay challenge generally arise, not out of any intention to discriminate, but through pay systems not being kept under review and up to date. ACAS, the employment relations' experts, provide basic advice on

the various different types of pay systems and on job evaluation.

9. An equal pay audit involves comparing the pay of women and men who are doing equal work in the organisation, investigating the causes of any pay gaps and planning to close any gaps that cannot be objectively justified on non-discriminatory grounds.

### **The benefits of conducting an equal pay audit**

10. The benefits to an organisation of carrying out an equal pay audit include:
  - Complying with the law and good practice
  - Identifying, explaining and eliminating unjustifiable pay gaps
  - Having rational, fair and transparent pay arrangements
  - Demonstrating to employees and to potential employees a commitment to fairness and equality
  - Demonstrating the organisation's values to those it does business with.
11. This Code recommends equal pay audits as the most effective method of ensuring that a pay system is free from unlawful bias. The audit should include:
  - Comparing the pay of men and women doing equal work – ensuring that this considers work that is the same or broadly similar (like work), work rated as equivalent, and work that can be shown to be of equal value or worth.
  - Identifying and explaining any pay gaps
  - Eliminating those pay gaps that cannot be objectively justified on non-discriminatory grounds

- 12.** A process that does not include these features cannot claim to be an equal pay audit. The Commission provides extensive guidance for employers on conducting equal pay audits, which is available on its website.
- 13.** An equal pay audit is not simply a data collection exercise. It entails a commitment to put right any unjustified pay inequalities. This means that the audit must have the involvement and support of managers who have the authority to deliver the necessary changes.
- 14.** The validity of the audit and the success of subsequent action taken will be enhanced if the pay system is understood and accepted by the managers who operate the system, by the employees and by their unions. Employers should therefore aim to secure the involvement of employees and, where possible, trade union representatives, when carrying out an equal pay audit.

## **Conducting an equal pay audit**

### **A model for carrying out an equal pay audit**

- 15.** The Commission recommends a five-step equal pay audit model:

**STEP 1:** Deciding the scope of the audit and identifying the information required

**STEP 2:** Determining where men and women are doing equal work.

**STEP 3:** Collecting and comparing pay data to identify any equal pay gaps

**STEP 4:** Establishing the causes of any significant pay gaps and assessing the justifications for them

**STEP 5:** Developing an equal pay action plan

The Commission's Equal Pay Resources and Audit Toolkit provides detailed guidance on how to conduct an audit.

### **STEP 1: Deciding the scope of the audit and identifying the information required**

- 16.** This is a particularly important aspect of the audit, especially if it is the first audit that an organisation has undertaken. It is worth investing time and thought at this stage. In scoping the audit employers need to decide:
- Which employees are going to be included? It is advisable to include all employees who are deemed to be in the same workplace, establishment or service (see paragraph 20-21 of the Code)
  - What information will be needed and what tools are available? Employers will need to collect and compare two broad types of information about their employees, the jobs they do, and what they are paid. Ensure that this information is collected about part-time as well as full-time employees.
    - All the various elements of their pay, including pensions and other benefits.
    - The sex of each employee; their job, grade or pay band; qualifications related to the job; what hours they work; their length of service; any performance ratings and so on.

The Commission has produced guidance that explains an employer's legal obligations regarding data protection when carrying out an equal pay audit, available on its website.

The key tool for conducting pay audits is the Commission's equal pay audit kit and its 5-step process. Guidelines on conducting equal pay audits have also been published by various bodies including local government, and the Joint Negotiating Committee for Higher Education Staff, the TUC and various trade unions. These contain useful additional sector specific advice.

The employer needs to consider carefully what resources are needed.

- Who should be involved in carrying out the audit? An equal pay audit requires different types of input from people with different perspectives, including those with knowledge and understanding of :
  - the organisation's pay and grading arrangements;
  - any job evaluation system/s in use;
  - payroll and human resource information systems;
  - key equality issues, such as occupational segregation and the systemic tendency to undervalue work done by women.
- When to involve the workforce? Employers need to consider when to involve the trade unions or other employee representatives.
- Whether expert advice is needed? Employers may also wish to consider whether to bring in outside expertise. The Advisory, Conciliation and Arbitration Service (ACAS), the employment relations experts, offer practical, independent and impartial help to help bring pay systems up to date.

## **STEP 2: Determining where women and men are doing equal work**

17. In Step 2 an employer needs to check whether women and men are doing:
- Like work – that is work that is the same or broadly similar or
  - Work rated as equivalent under a valid job evaluation scheme or
  - Work of broadly equal value or worth, considering factors such as effort, skill and decision-making.

**These checks determine where women and men are doing equal work. They are the foundation of an equal pay audit.**

Employers who do not have analytical job evaluation schemes designed with equal value in mind will need to find an alternative means of assessing whether men and women are doing equal work. The Commission's Equal Pay audit toolkit includes suggestions as to how this can be done.

Employers who do use analytical job evaluation schemes need to check that their scheme has been designed and implemented in such a way and at all times so as not to discriminate on grounds of sex. The Commission's toolkit provides helpful guidance on this.

### **STEP 3: Collecting and comparing pay data to identify any significant equal pay gaps**

18. Once employers have determined which employees are doing equal work, they need to collate and compare pay information to identify any significant gaps by:
- Calculating average basic pay and total earnings
  - Comparing access to and amounts received of each element of the pay package.

To ensure comparisons are consistent, when calculating average basic pay and average total earnings for men and women separately, employers should do this either on an hourly basis or on a full-time equivalent salary basis (grossing up or down for those who work fewer, or more, hours per week – excluding overtime - than the norm).

Employers then need to review the pay comparisons to identify any gender pay gaps and decide if any are significant enough to warrant further investigation. It is advisable to record all the significant or patterned pay gaps that have been identified. The Commission's toolkit gives detailed advice and guidance on collecting and comparing pay information and when pay gaps may be regarded as significant.

Modern software allows for speedy and in-depth investigation of pay gaps on any protected ground and also provides an essential tool for equality impact assessments.

#### **STEP 4: Establishing the causes of any significant pay gaps and assessing the justification for them**

**19.** In Step 4 employers need to:

- Find out if there is a genuine and material reason for the difference in pay that has nothing to do with the sex of the jobholders,
- Examine their pay systems to find out which pay policies and practices have caused or are contributing to any gender pay gaps.

Pay systems vary considerably. Pay systems that group jobs into pay grades or bands have traditionally treated jobs in the same grade or band as being of broadly equal value, either because they have been evaluated with similar scores under a job evaluation scheme, or because they are simply regarded as equivalent. However, recent years have seen a trend towards structures with fewer, broader grades or bands and greater use of performance pay and market factors. A single broad band or grade may contain jobs or roles of significantly different value because it encompasses a wide range of job evaluation scores. This, coupled with a wider use of other determinants of pay and more complex methods of pay progression, means that it is important for employers to check all aspects of the pay system from a variety of standpoints: design, implementation, and impact on men and women.

The Commission has produced a series of checklists and guidance notes to help employers deal with the more common causes of unequal pay in the workplace [see above paragraphs XX].

## **STEP 5: Developing an equal pay action plan**

- 20.** Where the reason for the pay difference is connected with the employee's sex, or another protected ground, employers will need to remedy this and provide equal pay for current and future employees doing equal work.

Employers who find no gaps between men's and women's pay, or on other protected grounds, or who find gaps for which there are genuinely non-discriminatory reasons, should nevertheless keep their pay systems under review by introducing regular monitoring undertaken jointly with trade unions. This will ensure that the pay system remains free of bias.