



The Scottish Parliament
Pàrlamaid na h-Alba

ECONOMY, JOBS AND FAIR WORK COMMITTEE

AGENDA

12th Meeting, 2017 (Session 5)

Tuesday 18 April 2017

The Committee will meet at 9.30 am in the David Livingstone Room (CR6).

1. **Decision on taking business in private:** The Committee will decide whether to take items 3 and 4 in private.

2. **Gender Pay Gap:** The Committee will take evidence from—

Peter Hunter, Regional Manager, UNISON Scotland;

Cheryl Gedling, Industrial Officer, Public and Commercial Services Union (PCS);

Ann Henderson, Assistant Secretary, STUC;

Richard Hardy, National Secretary, Prospect;

and then from—

Val Dougan, Equality and Diversity Committee, Law Society of Scotland;

Kevin Burnett C. Eng, MICE, MIStructE, President, Aberdeen Association of Civil Engineers, Institution of Civil Engineers Scotland;

Dr Donald Macaskill, Chief Executive, Scottish Care;

Professor Catriona Paisey, Professor of Accounting at Glasgow University, member of the ICAS Council and Ethics Board, ICAS.

3. **Gender Pay Gap:** The Committee will consider evidence heard at today's meeting.

4. **Work programme:** The Committee will consider its work programme.

EJFW/S5/17/12/A

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The papers for this meeting are as follows—

Agenda Item 2

Written Submissions

EJFW/S5/17/12/1

PRIVATE PAPER

EJFW/S5/17/12/2
(P)

Agenda Item 4

PRIVATE PAPER

EJFW/S5/17/12/3
(P)

Gender Pay Gap

UNISON SCOTLAND

Introduction

UNISON is Scotland's largest trade union representing over 150,000 workers, primarily in the public sector. We welcome the committee's inquiry into the gender pay gap.

Our response to the questions posed is as follows:

1 **What are the strengths and limitations of the different definitions of the gender pay gap?**

It can be misleading to think in terms of a single or general gender pay gap. The pay gap has many dimensions and Scotland requires data capable of measuring pay equality in different ways. For deeper analysis and understanding it is therefore vital to strengthen data gathering.

There is no perfect definition of the pay gap and the choice between the following options is a trade-off between methods which highlight different dimensions of a complex problem.

1.a **Mean or median.**

The soaring value of "high pay" has a distorting effect on the pay gap. The question is how best to monitor pay given this distortion.

Mean earnings will include "high pay" and therefore show wider pay gaps that are stubbornly resistant to noticeable change - the unaccountable pay setting of senior executives will tend to mask any marginal gains by low paid women.

Median earnings will tend to "highlight" any gains for low paid women relative to their social class peer-group by excluding top pay. This will be helpful in assessing whether policies are assisting "real" women in "real" jobs but UNISON recognises that such an approach risks giving false comfort about the enduring gulf in pay between women and the "unreal" earnings of super-rich men.

UNISON would argue that the bottom line issue is the poverty caused by low pay and the urgent need to address the element of poverty pay that arises from discrimination. Discrimination in "high pay" is not unimportant, but the case for a focus on poverty suggests that Government ought to adopt a definition that reveals most about the bottom of the labour market, not the top. But, wherever possible Scotland should seek to measure both mean and median pay in order to capture the different class and gender dimensions of pay inequality.

1.b **Full time work**

The distortion created by fulltime earnings arguably has a greater effect than the

choice between median and mean. For example, in the recent UK report to the UN periodic review of human rights compliance in the UK, the gender pay gap was recorded as 18.1% in the UK but 6.2% in Scotland. This disparity is largely explained by the fact that Scottish data is for full time workers only.¹

Part time working tends to carry an additional pay penalty over and above other factors such as gender, age or job type. Primarily because it links to motherhood or discrimination linked to other care roles (see below)². Data on the part-time pay gap is weak compared to full time pay data but, with few exceptions, the pay gap is significantly wider.

Full time data is easier to gather because full time workers tend to be well represented in data samples, but full time data tends to mask the full extent of discrimination. Therefore, focusing on full-time earnings to the exclusion of part-time data gives false comfort about the extent of the gender pay gap.

1.c Payment by results (PBR) & other additional payments

As we know from local government pay, PBR and other additional payments such as overtime have tended to be deeply discriminatory. It is vital that this inequity is measured and addressed. However, the primary objective of gender pay gap data is to reveal the irrational bias upon which work tasks are gendered, valued and rewarded through base pay. Discrimination in additional payments should be recorded and tackled separately from base pay. Helpfully, the 2017 gender pay reporting regulations require separate recording of PBR.³

1.d Hourly or weekly

The different working patterns of women and men will distort pay gap analysis unless it is stripped down to an hourly rate for base pay. Hourly pay comparisons reveal the irrational and discriminatory bias way in which tasks are valued once working patterns have been excluded.

Action on pay equality requires a multifaceted approach, including action on work patterns. However, from a data tracking perspective, discrimination in working patterns requires to be measured and tackled separately. Helpfully, the 2017 gender pay reporting regulations address this point.

1.e Employees or workers

Recent legal cases involving Uber, Deliveroo and others have highlighted a longstanding problem – the vulnerability of people working without the benefit of employee status.

¹ [UK Report to the UN Periodic Human Rights Review March 2017](#)

² [The Motherhood Pay Penalty TUC 2016](#)

³ [The Equality Act 2010 \(Gender Pay Gap Information\) Regulations 2017](#)

As with part-time workers, precarious or “atypical” workers tend to be significantly lower paid than employees. The data is harder to obtain than that for employees. This reflects the fact that some low pay employers define contracts to remove workers from PAYE and the proper attention of data gathering agencies such as HMRC.⁴

If the pay gap data for Scotland is to command confidence and tackle exploitation it is important that it includes all people in paid work regardless of contractual status.

The 2017 gender pay reporting regulations draw on the Equality Act 2010 definition of employee. This includes "employment under a contract of employment, a contract of apprenticeship or **a contract personally to do work**". This definition of employment captures precarious workers engaged under an obligation of personal performance (no sub-contracting) regardless of whether there is an ongoing mutual obligation to supply and perform work (as with a contract of employment).

However, caselaw shows that employers persist in excluding precarious workers from the regulation of pay. Vigilance and action will be required to ensure that companies are including precarious workers in their pay data returns under the new pay transparency regulations.⁵

2

Are current Scottish Government and Office for National Statistics (ONS) statistics adequate for policy making and scrutiny in this area?

The poor quality of data on Scottish poverty is a significant issue and featured prominently at the UN review of Economic, Social and Cultural Rights when Scottish participants were frequently unable to fully answer questions due to the absence of disaggregated data.⁶ This requires action.

Robust data is vital for monitoring and evaluating the effect of policy. For example, UNISON welcomes the Scottish Government commitment to Fair Work and inclusive growth, but we need data to reveal impact. We expect Scotland's model of inclusive growth to diverge from the UK's more divisive and deregulated model of growth. As this happens it will be increasingly important to evidence the impact on pay in Scotland as compared to the UK. The risk is that UK data sets are not capable of generating the disaggregated data required to reveal where growth is inclusive and where it is not.

⁴ ["Deliveroo pedals the new language of the gig economy" Financial Times 6 April 2017](#)

⁵ [Aslam & Ors v Uber B.B. & Ors Case No: 2202550/2015](#)

⁶ [ICESCR: Concluding observations on the sixth periodic report of the United Kingdom July 2016](#)

Pay data must be disaggregated in various ways. Age, gender and job type are just three of the ways to pinpoint where the pay gap is widest. Other factors with a compounding negative effect are race, nationality, disability, region, industry etc. It is important to identify specific pay gaps generated by compound or multiple discrimination. If Scotland is to identify and address pockets of heightened discrimination we need data sets need capable of supporting this type of detailed analysis

For example, with Brexit looming we now need comprehensive pay and employment data for health and social care workers by national origin as well as age and gender for the regions in Scotland. We need that for both workforce planning and to measure inclusive growth. The existing data simply isn't adequate.

The design of the 2021 census presents an opportunity to improve data quality. Success requires attention to employment questions alongside a review of the current assumption that Scotland is ready to use online as the primary form of data gathering. The risk is that unrealistic expectations about the extent of online participation will degrade Scotland's census data.

3 Is the Scottish Government's National Performance Framework indicator based on the most appropriate measurement of gender pay?

Probably not. The key weakness is the unhelpful reliance on full time data for employees for reasons outlined above. The inclusion of part time and precarious or atypical workers would significantly improve accuracy, address the growth of the "gig economy" and align the measure more closely to an anti-poverty approach. The exclusion of additional earnings is helpful.

As regards median versus mean, it might be argued that the primary task is to establish pay equality between people in broadly comparable circumstances. Measures to track and tackle the conduct of the super-rich might, perhaps, lie in a different policy field? If so, median earnings might be seen as a more pragmatic or accurate way of assessing how the labour market creates bias between workers in otherwise comparable circumstances, at the lower end of the market.

Having said all that, the ability to disaggregate UK data for Scotland, and within Scotland, is vital. The "tighter" the definition in terms of marginal job types the harder it is to build a data set capable of being disaggregated by personal characteristics such as gender, race, disability etc. This is because the employment circumstances of precarious workers can be hard to identify. In the final analysis it's an exercise in trading-off strengths and weaknesses.

4 What reasons are there for the existence of the gender pay gap?

There is a difference between the causes or the origins of inequality on the one hand, and, on the other hand, the reasons why this problem continues to exist. The causes of the gender pay gap are well known

- occupational segregation;
- the under-valuing of female dominated work;
- the motherhood pay penalty; and,
- the male domination of job hierarchies.

The reasons why these problems endure is, perhaps, a different question.

Young women leave school with better grades than young men and tend to enjoy a marginal cash advantage in the 18-21 age group although there is no stable trend there. But any sense of a meritocracy ends there.

4.1 Occupational Segregation

Within the labour market there are two broad issues linked to job type. Women and men tend to be segregated into different jobs and industries. Male dominated roles tend to be secure and well valued relative to women. Generally they have a greater tendency to be employed; full time; permanent; with additional payments, career progression and occupational pensions.

It is important to note that all these characteristics bring their own direct cash advantage in gross earnings, but they also correlate with a separate tendency to a higher rate of hourly base pay.

Female dominated jobs have a greater tendency to be part time; temporary or precarious and lacking progression routes. These characteristics of female dominated all have a direct and negative effect on gross income, but they also correlate with lower hourly rates of base pay.

Action: The policy response to segregation must therefore be: to reduce the systemic under valuing of gender segregated roles; to reduce the inequality in both pay and benefits linked to gender segregated roles; AND, to adopt measures to enable women to breakdown segregation in education, training, at labour market entry points and through career transition. (see below for Fair Work, Inclusive Growth and the Enterprise & Skills Review)

Action is also required to enable workers to combine flexible work arrangements with promotion and career progression. The Scottish Parliament was the first legislature to adopt an equal opportunities policy or framework. Yet there is little in the way of formal arrangements to enables MSPs to work flexibly when required to by changing personal or family circumstances. For example, how does an MSP combine parliamentary work with a care commitment to a family member?

MSPs could send a powerful message to other public figures in leadership roles by expressly providing for flexible work arrangements in parliament, in government and in Ministerial appointments to leadership roles in NDPBs.

4.2 The Motherhood Pay Penalty

The term “motherhood pay penalty” refers to the pay gap experienced by working mothers. Used correctly, the term applies to the additional pay gap faced by

mothers as compared to women in similar circumstances but without dependent children.

As with other pay gaps, the scale of the penalty varies by factors such as age, occupation and social class. Young mothers with short work histories face greater pregnancy discrimination and pay penalties. Older mothers with established careers experience less discrimination, are more likely to remain in the labour market and encounter smaller pay penalties.⁷

Action: the welcome investment in expanded childcare is an effective way to combat the motherhood pay penalty but, of itself, it is not enough. There is a fundamental question to be asked – do we engineer family life to address the unfettered demands of the labour market or do we support families to thrive without pay penalties?

Substantial shared parental leave would ease the pressure on childcare and enable parents to choose to invest personal time in the early development of young children.

4.3 **Male Dominated Hierarchies**

Segregation is essentially about position or location within a divided labour market. Regardless of their occupational position women also find discriminatory barriers in career progression. Pregnancy related discrimination remains rife in the labour market as does discrimination linked to motherhood and other family commitments.

Health, demographic and parenting changes frequently leave women with a career that is book-ended or sandwiched between care for children and care for elderly relatives. Continued discrimination on the basis of assumptions about care responsibilities is reflected by the continued dominance of men in promoted or management roles with consequent impact on managerial pay and the pay gap more generally.

4.4 **Why does the gender pay gap persist?**

The causes of the gender pay gap are well documented and recognised by Government. What is perhaps less readily acknowledged are the reasons why the problem endures despite well-established policy commitments and legislative action.

UNISON has been negotiating, litigating, striking, picketing, lobbying and protesting about unequal pay for decades. We have direct and costly experience of some

⁷ <https://www.tuc.org.uk/sites/default/files/MotherhoodPayPenalty.pdf>

clear problems.

While many employers are committed to equality it is not uncommon for employers to:

- sack pregnant women,
- withdraw flexible working arrangements,
- knowingly retain discriminatory pay systems,
- manipulate job evaluation schemes,
- delete doctored pay records,
- defend indefensible legal claims,
- buy silence from test case litigants,
- threaten claimants with dismissal,
- outsource workers seeking equality,
- divide workers into subsidiary companies on gender lines, and,
- generally invest time and effort in maintaining the status quo.

Little is done to incentivise and reward those employers or managers committed to equality. And little is done to penalise those who discriminate. When the most recent round of local government litigation concludes the total cost of the litigation will be in the region of £1 billion.

The absence of any censure or penalty suggests that this twelve year process of attrition is viewed as the reasonable exercise of public sector governance. Later this year the Accounts Commission will report on the conduct of equal pay litigation within local government and there should be important lessons for the future to take from that report.⁸

In fairness to Scottish Government, the pace of action on settlement increased noticeably in recent years when the First Minister took a direct interest in the conduct of employers and expressed a willingness to penalise councils that failed to resolve outstanding complaints. The effect of that intervention suggests that, while there should always be a priority attached to voluntary action and good practice, there must be a real sanction for unlawful behaviour alongside effective remedy for workers.

Although substantive employment and equality law is reserved to Westminster there are various measures that can be adopted and key steps are summarised below.

Action: Abolish Employment Tribunal fees, improve litigation procedures, improve litigation remedies, review and strengthen public sector equality duties, strengthen the right to parental leave and flexible working and strengthen the protection of part time workers. All these equality rights derive from EU obligations and are therefore

⁸ [Equal Pay Scoping Document: Accounts Commission August 2016](#)

at risk following secession from the EU.

5 Are there specific issues with gender pay within the Scottish public and private sectors?

The NHS pay system and system of parental and equality rights is fairly robust and sits within a well established staff governance framework.

In local government pay equity depends on the degree of engagement by councils with the 2016 guidance issued by the SJC. This guidance applies the revised 3rd edition of the job evaluation scheme, calls for action to restore job analyst capacity at the local level and directs authorities to review those "hotspot" jobs which became the focus of mass litigation.

More generally the sustained austerity cuts applied to local government have created turbulent change in job and service design with the risk that job evaluation scores are obsolete. Furthermore, austerity has greatly limited the ability of authorities to invest in programmes to enhance equality outcomes.

The adverse equality impact of austerity applies to all public sector organisations through the Scottish Government policy of pay restraint. Government has permitted a modest degree of flexibility in payroll spending to fund pay reviews. However, a one-off additional spend of perhaps 0.5% is not adequate to address enduring inequality. The need for a review of the adverse equality impact of pay restraint is overdue as is the need for greater flexibility for public bodies to address unequal pay.

6 What are some examples of good or bad practice within Scotland or internationally?

Examples of bad practice are listed under the section on enduring inequality (above). An additional example of bad practice relates to pay transparency. Reference has already been made to the welcome introduction of rules on pay transparency. The case of *South Lanarkshire Council v The Scottish Information Commissioner* illustrates the extent to which public bodies have been willing to conceal unequal pay.⁹

In that case the commissioner had directed the Council to reveal information on the gender profile of jobs at particular grades. The order was given against a backdrop of protracted, mass litigation. The Council refused and contested the issue to the UK Supreme Court.

The willingness of a public body to invest heavily in legal costs to obstruct pay

⁹ [South Lanarkshire Council v The Scottish Information Commissioner \[2013\] UKSC 55](#)

transparency is evidence of the fact that pay differences don't persevere because of disinterest or inactivity. Across local government, whether pay differences were made transparent, or not, was actively decided as a matter of council policy.

6.1 **Equal parenting**

Turning to good practice, there is evidence of a slight trend towards equal parenting. This is welcome. However, parental leave is still heavily gendered and measures are required to ensure men take paid paternity leave.

Affordable childcare

Scottish Government's investment is welcome as is the commitment to promote payment of the Scottish Living Wage. However, a reality check is required. Employment in childcare and early year's education is a skilled and valuable role. The demands of early years work will tend to exceed the demands of other living wage jobs. And yet the rates of private sector pay compare unfavourably with cleaning, road sweeping or refuse collection.

So, ironically, the expansion of free childcare advances the pay prospects of some women while perpetuating the low pay of others.

6.2 **Greater access to flexible working**

The TUC recently reported that only 6 per cent of jobs with a full-time equivalent salary of £19,500 are advertised as being available on a flexible or part-time basis. This is a major component of the problem.

The "right" to flexible working is no right at all. What the law provides is a right to request flexible working and a right to receive an explanation if the request is refused.

If George Osborne can use part time roles to edit a mass circulation newspaper, represent the constituents of Hatton and coordinate the regeneration of northern England a woman might reasonably expect to have better odds than one in twenty when looking to combine flexible working and a degree of seniority at work.

7 **Can more be done to promote equal pay through the Scottish Business Pledge and the Fair Work Convention?**

UNISON welcomes the Fair Work Framework and will be reporting on its successful application in public sector organisations later in 2017. However, it must be understood that the framework delivers change in the workplace through an approach that is radically different to either bargaining or regulation.

It is not a common legal standard with which an employer either does or does not

comply. The framework describes an ongoing process not an event.

Building a Fair Work culture in the labour market requires awareness, engagement, ownership and application by both employers and trades unions. As such it takes time, commitment and investment. It is, perhaps, too early to be looking for significant changes across the public sector.

One organisation where UNISON can report very positive progress is Skill Development Scotland. At SDS a Fair Work approach was central to the successful conclusion of a strategic pay review that delivered strong equality outcomes and a transformational change through a joint commitment to link pay to learning and skills development.

8 What are the enterprise agencies and local authorities doing to support gender pay equality and can more be done?

One important current issue is the Enterprise and Skills Review. The agencies under review provide Government with considerable influence over the links between gender and learning, skills, training, employment, promotion, investment and job creation.

The second phase of the review has ten work streams all of which have clear implications for gender equality and the wider Fair Work agenda. All of this is welcome and UNISON would encourage the Government not to be deflected from the need for a strong national body that promotes close cooperation and aligns the work of the review agencies towards the goal of inclusive growth.

However, although fairness and equality are embedded in each of the work streams, to a degree, there is no work stream dedicated to inclusion, equality or fair work. As with all equality initiatives there is a danger that a commitment to mainstreaming everywhere falls short of real change anywhere.

The review has some considerable time to run and the opportunity for real change remains.

9 What role can procurement policy play in promoting equal pay?

The Fair Work Convention reported that there is strong evidence to link fairness at work with enhanced productivity. Procuring services from fair, efficient and effective contractors makes good sense.¹⁰

Conversely, it is irrational for Government to contract with discriminatory organisations on a price comparison and then lose that cost saving by asking the tax payer to pick up the social costs of unfair work through welfare benefits and employment training.

¹⁰ <http://www.fairworkconvention.scot/framework/FairWorkConventionFrameworkFull.pdf>

There are several barriers that hinder the effective use of procurement to drive fairness and efficiency in public contracting. Prior to revised guidance in 2015, Scottish Governments past and present have been equivocal about the scope for assessing workforce matters in procurement. Post Brexit there will be scope for a more robust approach and this Brexit opportunity should be seized.

Within existing rules the weight attached to Fair Work can render the assessment irrelevant. Recent research on social care procurement by UNISON identified that workforce matters are commonly weighted as low as 4% in tender evaluation and, where contracts are awarded, performance monitoring is weak.¹¹

Employers tend to self-assess their fair work performance when bidding for contracts. This data is open to question. Scottish Government has helpfully invested in programmes to enable workers to engage in Fair Work assessments through the Union Development and Modernisation Fund. This engagement would have a real effect on employer conduct if joint fair work assessments were a requirement of public sector procurement in the same way that other statutory codes require joint workplace action such as equality, safety and other matters.

Action: Direct public bodies to apply adequate weighting to workforce matters; to monitor contract performance; to reward joint fair work assessments; and, to publish all evaluation and monitoring data for public scrutiny. Further strengthen fair work requirements in procurement regulations and guidance post Brexit.

10 Are the devolved public sector bodies (including the Scottish Government, National Health Service, and local authorities) examples of good practice?

The NHS pay system is the largest and most robust equality proofed pay system in the UK. Government can have confidence that, while health jobs remain gender segregated to a degree, the tasks within those segregated roles are objectively valued and rewarded appropriately.

The NHS has a variety of recognised policies to counter pay discrimination including flexible working, enhanced maternity and parental leave, self-scheduling etc. The Knowledge and Skills Framework enables low paid workers to acquire the skills required for career progression and there are specific schemes to address compound discrimination in promotion and pay such as NHS Lothian's programme for BAME staff "Leading better care, leading across difference".¹²

UNISON Scotland

¹¹ [Delivering Quality Social Care Procurement: UNISON Scotland March 2017](#)

¹² [http://www.parliament.scot/S4_EqualOpportunitiesCommittee/Inquiries/Notes_on_NHS_visit-Final_version\(1\).pdf](http://www.parliament.scot/S4_EqualOpportunitiesCommittee/Inquiries/Notes_on_NHS_visit-Final_version(1).pdf)

Gender Pay Gap

The Law Society of Scotland

Introduction

The Law Society of Scotland (“the Society”) is the professional body for over 11,000 Scottish solicitors. With our overarching objective of leading legal excellence, we strive to excel and to be a world-class professional body, understanding and serving the needs of our members and the public. We set and uphold standards to ensure the provision of excellent legal services and ensure the public can have confidence in Scotland’s solicitor profession.

We have a statutory duty to work in the public interest, a duty which we are strongly committed to achieving through our work to promote a strong, varied and effective solicitor profession working in the interests of the public and protecting and promoting the rule of law. We seek to influence the creation of a fairer and more just society through our active engagement with the Scottish and United Kingdom Governments, Parliaments, wider stakeholders and our membership.

The Society’s Equalities Sub-committee welcomes the opportunity to consider and respond to the Scottish Parliament Economy, Jobs and Fair Work Committee’s Call for Evidence on the Gender Pay Gap. The Sub-committee does not propose to respond to all of questions posed in the call for evidence but has the following comments to put forward for consideration.

Summary

There is an ongoing debate as to the reasons for the existence of the gender pay gap. Some research suggests that the gender pay gap cannot alone be attributed to wider social structures and that therefore it must, in part, be due to unconscious gender discrimination. Others disagree, and are of the view that the gender pay gap can be attributed solely to the differing roles assumed by men and women in society. This response begins by presenting some of the arguments on both sides for the reader to consider.

Regardless of the reason for the gender pay gap, to the extent that it persists, it appears that legislation has been ineffective in providing a resolution. It is suggested that a number of structural features of the equal pay model in the Equality Act 2010 are barriers to addressing the disparity. These structural features include a simplistic notion of formal equality and a rigidity of the equal pay regime.

With regard to gender pay in the Scottish public sector, the Sub-committee has limited its comments to the approach of local authorities to the equal pay regime and their experience in connection with the implementation of the Single Status Agreement (SSA). In particular, it is suggested that the introduction of the SSA opened up a Pandora’s Box of problems for local authorities which has led to a substantial amount of litigation. It would appear

that the influx of litigation is attributable to a number of factors which the Sub-committee has summarised at the end of the section.

The Sub-committee concludes the paper with a look at the gender pay gap in the legal profession and a discussion of the data we have collected through our “census” *Profile of the Profession* which we have been undertaking for over a decade. The census gives the Society a snapshot of the profession at a given time but also allows us to identify emerging trends. As a result of this data, we have undertaken a number of policy actions which we believe are “best practice” and which we note below.

What are the reasons for the existence of the gender pay gap?

The latest empirical research has revealed that the differentials in the median (and mean) gross hourly earnings between the genders **cannot be attributed alone, or in aggregate, to market forces, differences in human capital,¹³ occupation/job characteristics, or workplace segregation.** This has led some scholars to conclude that these variations in pay between men and women **can be imputed to unconscious gender discrimination,¹⁴** which is known in economic terms as the ‘**discrimination coefficient**’.¹⁵ Consider the following extracts:

While the pay gap can be partially explained by wider social structures, including occupational segregation, the undervaluation of women’s work and the unequal division of family responsibilities, it is generally accepted in policy circles that discriminatory practices by employers also contribute to the ongoing inequality in pay. The assumption is that while some pay discrimination may be deliberate, it is more likely in practice to be systemic, and as such only identifiable through systematic evaluation of payment systems by employers.¹⁶

In the case of women doing the same jobs and/or working in the same workplaces as men, women’s wages are held down by their lower levels of seniority, their exclusion from bonus payment schemes and, in cases where such schemes do apply to their jobs, by discriminatory methods of appraisal. Women are less able to work overtime in respect of which, at least in the manual sector, significant premia apply. This

* The following text is reproduced from D. Cabrelli, *Employment Law in Context*, 2nd edition (Oxford, Oxford University Press, 2016) © Oxford University Press.

¹³ The expression ‘human capital’ is a shorthand reference to the prediction that earnings will rise commensurately with the accumulation of skills such as education and training. According to the human capital literature, a gender skills gap exists.

¹⁴ See the comprehensive analysis in A. McColgan, *Just Wages for Women* (Oxford, Clarendon Press, 1997) 214–82 and K. Mumford and P. N. Smith, ‘The Gender Earnings Gap in Britain: Including the Workplace’ (2007) 75 *The Manchester School* 653, 670.

¹⁵ G. S. Becker, *The Economics of Discrimination*, 2nd edition (Chicago, University of Chicago Press, 1971).

¹⁶ S. Deakin, C. McLaughlin, and D. Chai, ‘Gender Inequality and Reflexive Law: The Potential of Different Regulatory Mechanisms’ in L. Dickens (ed.), *Making Employment Rights Effective: Issues of Enforcement and Compliance* (Oxford, Hart Publishing, 2012) 116

inability is not simply the result of child-care commitments—employers are also less likely to organise female jobs around the expectation of full-time work but are, instead, likely to introduce part-time shift work. And, whereas male shift working is generally paid a premium, female ‘twilight shifts’ are frequently not so rewarded because they are seen as convenient to working mothers. Finally, part-time workers are generally not entitled to overtime pay until they have exceeded normal full-time hours. To these factors may be added those of occupational and workplace segregation, women frequently working in smaller, less profitable organisations and in occupations in which the availability of cheap, (particularly part-time) female labour keeps wages down... these factors ought to be regarded as tainted by discrimination. In brief, traditional economists tend to take the view that discrimination does not persist within the market and that, therefore, women’s lower wages must be explicable by their lower levels of human capital and/or their preference for non-monetary compensation. These ‘human capital’¹⁷ and ‘compensating differentials’ approaches do not withstand scrutiny. The factual assumptions upon which they rely (i.e., that women are less educated and less productive, that their jobs are less skilled, that the gender-pay gap can be attributed in large part to differential levels of experience by sex, that ‘female’ jobs have better terms and conditions than those generally done by men), are incorrect. Further, they are suffused with stereotypical assumptions about women and the nature and value of typically female jobs. . .¹⁸

In stark contrast to the sentiments articulated in these passages, other commentators are less convinced that the stubbornness of the gender pay gap can be ascribed to managerial practices which are inherently discriminatory on the grounds of gender. Instead, it is contended that disparities in pay **can be attributed to non-discriminatory factors such as the differing roles assumed by men and women in society**, with the latter more likely to perform a dual role: i.e. as an economic actor labouring for wages in the workplace whilst also bearing a disproportionate share of family caring responsibilities in their social and private lives. The **argument runs that the time spent on these caring duties which are non-remunerated depresses the female worker’s earning potential and productivity in the labour market¹⁹ and that this is one of the consequences of the transition from the traditional ‘male breadwinner’/‘female carer’ model to the ‘dual breadwinner’/‘dual carer’ model:**

¹⁷ See G. S. Becker, ‘Investment in Human Capital: A Theoretical Analysis’ (1962) 70 *Journal of Political Economy* 9 and G.S. Becker, ‘Human Capital, Effort, and the Sexual Division of Labor’ (1985) 3 *Journal of Labor Economics* S33–S58.

¹⁸ A. McColgan, ‘Regulating Pay Discrimination’ in H. Collins, P. Davies, and R. Rideout (eds.), *Legal Regulation of the Employment Relation* (London, Kluwer Law International, 2000) 204–5

¹⁹ See also A. McColgan, *Just Wages for Women* (Oxford, Clarendon Press, 1997) 214–82 and 391–7.

. . . it is inevitable that women will be paid, on the whole, less than men. This is because there are several reasons why men and women are paid differently that, although related to the sex differences between employees, cannot be attributed to sex discrimination. What are these non-sex reasons? First, it is still the case that women take career breaks far more frequently than men, and it is inevitable that employees who take career breaks are likely to be paid less than those who do not, for several reasons. They may not return to the same job, for example, and therefore start a new career. They may not think any longer in terms of a career but more in terms of financial provision for the family and family-friendly aspects of work available to them, such as more flexible hours. Or they look more for a job that allows shorter hours, of itself resulting in a lower income. And these types of jobs are more likely to be of a lower status than those which are more career-orientated and therefore are lower paid. The counter-argument to this, however, is that it is true that, at least to a degree, the reasons why women take more career breaks than men can be attributed to societal pressure on women to be the primary partner in a mixed-sex couple to look after children, at least in their early years. It may not be something that women desire more than men but they would feel more obligated than men to fulfil. In other words, this is a form of sex discrimination in that women take career breaks for child-rearing because of a stereotypical assumption that society makes about them that is not inevitable. Of course, in the early stages, when there may be breastfeeding, physical recovery and other issues to consider, certain sex-related factors have an inevitable role, but after that time, there is no reason why men should not play an equal part in the child-rearing responsibilities which could involve them in taking career breaks at least as much as their partners. They do not do so, the argument runs, because of societal assumptions and traditions which themselves display a form of sex discrimination in that the result is that women are adversely treated. The difficulty with this argument, for the purposes of legal protection of women against sex discrimination, is that it does not amount to discrimination by an employer but by society at large. It is hardly feasible to construct legislation that gives a claim to women which they can exercise against society at large. . . It also needs to be remembered that women who take career breaks for the purposes of child-rearing may not only lose the time that they have taken off work and the lack of progression in seniority that this entails compared with their previous male counterparts who have continued to climb the tree, but that frequently women will return to a different occupation, or if they remain in the same field of work possibly to a different employer. It is inevitable that such a move will entail lower pay on average. The second reason why women may be paid less on the whole than men that cannot be put down to discrimination, at least by their employer, is that the work that men and women do are quite different when considered generally. Twice as many men as women are self-employed. Of these, a greater proportion of men work full-time and women part-time. . . It does not necessarily follow that the self-employed are paid more than those who are employed, but it might

follow that there is a greater incentive to work longer hours more profitably if workers do so for themselves rather than for another. . . It is also true that women traditionally have worked in those sectors of the economy that are more fragmented, with a few employees scattered here and there. These types of workers are less likely to belong to a trade union than those who work in labour-intensive situations such as a factory or national firms. Hairdressing, hotels, catering and so on, with a dispersed workforce, have lower density union membership. Trade unions find these types of workers particularly difficult to recruit, if only for simple practical reasons. . . Such are the arguments in favour of the idea that, perhaps, the figures on the relative pay of men and women reflect a non-discriminatory profile of differences between male and female working. There are certainly differences between the sexes in pay, but these are to be expected given the differences in working patterns between them which are not caused by discrimination (at least by employers) but by individual and couple choices, and by societal attitudes towards the differing roles that men and women play in child-rearing. . .²⁰

Whatever one's perspective on these competing positions, to the extent that the gender pay gap persists, this does appear to be symptomatic of the ineffectiveness of 40 years of equal pay legislation in the UK.²¹ A number of structural features inherent within the equal pay model in the Equality Act 2010 have been identified as barriers to the eradication of the existing pay disparity:

- (1) The simplistic notion of formal equality—that females doing the same, broadly similar, or equivalent jobs as males should be paid at the same rate as the latter—underpinning the current incarnation of the equal pay regime, is insufficiently radical to uproot ingrained gender pay inequalities. Commentators have advocated responses to the phenomenon of pay inequality which are much more innovative than the existing individual litigation-driven model based on symmetrical treatment.²²

²⁰ S. Honeyball, *Great Debates: Employment Law* (Basingstoke, Palgrave Macmillan, 2011) 106–8

²¹ See T. Bawden and S. Rogers, '40 Years Since the Equal Pay Act, Equality Remains a Dream' *The Guardian*, 8 March 2011 available at <http://www.guardian.co.uk/uk/2011/mar/08/four-decades-on-equal-pay-yet-to-come?INTCMP=SRCH> (last visited 10 February 2016).

²² See S. Fredman, 'Reforming Equal Pay Laws' (2008) 37 *Industrial Law Journal* 193, 215–18 and S. Deakin, C. McLaughlin, and D. Chai, 'Gender Inequality and Reflexive Law: The Potential of Different Regulatory Mechanisms' in L. Dickens (ed.), *Making Employment Rights Effective: Issues of Enforcement and Compliance* (Oxford, Hart Publishing, 2012) 116, in which it is argued that more inventive regulatory strategies such as anticipatory and proactive equality duties and gender pay gap audits at the level of public and private sector organizations (on which, see section 78 of the Equality Act 2010, which is projected to come into force in Autumn 2016 at the time of writing, and A. Bird, 'The Gender Pay Gap is Still too Big' *The Guardian*, 15 June 2012 available at

- (2) This is compounded by the rigidity of the equal pay regime and its relative inability to (a) address occupational segregation²³ where jobs are structured along gender lines, e.g. the '3Cs' of catering, caring and cleaning and (b) confront the adverse effects on labour market participants of flexibilization in the relations of production in the productive economy, which have been charted by scholars such as Fredman and Collins.²⁴
- a. With regard to the phenomenon of job segregation, this is an expression descriptive of the situation where certain occupations or jobs are performed exclusively by women. Where a woman is situated in such an environment and no man is to be found working for her employer in the same trade, job, or profession, the rules in Chapter 3 of Part 5 of the Equality Act 2010 are not sufficiently flexible to assist the female claimant in her quest for equal pay. In such circumstances, the rules are restrictive, since the female claimant is disentitled from invoking a hypothetical male comparator in her equal pay claim.²⁵ Instead, she must identify an actual comparator working for the same employer (or an associated employer) in the same establishment or an alternative establishment operating on the basis of common terms and conditions.²⁶ Given the absence of an actual male comparator in segregated workplaces, this will stop the female claimant's equal pay claim in its tracks from the very beginning. This 'common terms and conditions' defence is often cited in mass equal pay litigation. In Scotland, it served the purpose of prolonging first wave litigation against local authorities for several years whereby it was argued by the employer that predominantly female APT&C workers could not compare themselves with predominantly male manual

<http://www.guardian.co.uk/commentisfree/2012/jun/16/gender-pay-gap-audits> (last visited 10 February 2016)), could more usefully be deployed.

²³ For a discussion of occupational segregation, see B. R. Bergmann, *The Economic Emergence of Women* (New York, Basic Books, 1986), chapters 5 and 6; J. Browne, *Sex Segregation and Inequality in the Modern Labour Market* (Bristol, Polity Press, 2006); and A. McColgan, *Just Wages for Women* (Oxford, Clarendon Press, 1997) 22–7, 35–40, 45–52, and 57–60. This segregation may be the product of historical practices, e.g. where certain jobs, trades, or professions were treated as 'out of bounds' for female workers, with a clear demarcation between 'men's work' and 'women's work', on which, see S. Fredman, *Women and the Law* (Oxford, Clarendon Press, 1997) 111.

²⁴ See S. Fredman, *Discrimination Law*, 2nd edition (Oxford, OUP, 2011) 156–61; S. Fredman, 'Reforming Equal Pay Laws' (2008) 37 *Industrial Law Journal* 193, 195–201; and H. Collins, 'Regulating the Employment Relation for Competitiveness' (2001) 30 *Industrial Law Journal* 17, 20.

²⁵ However, this is subject to (a) section 71 of the Equality Act 2010 which would enable the female claimant to invoke a hypothetical comparator pursuant to any direct discrimination claim (rather than an equal pay claim under Chapter 3 of Part 5 of the Equality Act 2010) she might raise under section 13 of the Equality Act 2010 in relation to her payment terms, on which, see section 14.2.1.2 and (b) the female claimant's entitlement to invoke a male worker as a hypothetical comparator where he was a predecessor in her role: see section 64(2) of the Equality Act 2010 and *Macarthy's Ltd. v Smith* [1980] IRLR 210.

²⁶ See section 79 of the Equality Act 2010.

workers on separate terms and conditions.²⁷ It has been used again more recently by ASDA in the cases brought by predominantly female shop workers seeking to compare themselves with predominantly male warehouse workers on separate terms and conditions.²⁸

- b. The flexibilization of the relations of production associated with the modern service-based economy (e.g. franchising, outsourcing, joint venture networking, public/private partnering, etc.) have resulted in the fragmentation and rapid adaptation of working patterns away from the traditional bilateral relationship forged between an employer and an employee or worker. As such, there is greater scope for female workers to find that their employment relationship has been reconfigured entailing a change of employer and the emergence of a tripartite or multilateral relationship, e.g. owing to the employee's former employer having engaged in a process of contracting-out, contracting-in, service provision change, or where an employment agency is inter-positioned between the employee and the former employer. In such circumstances, the potential for current equal pay legislation to apply is minimal to non-existent inasmuch as it insists that a female claimant must select a male comparator working for the same (or an associated) employer at the same establishment or an alternative establishment with common terms and conditions.²⁹ In short, the claimant may well find that she is 'unable to bring [an] equal pay claim. . . on the basis of a comparison with colleagues with whom [she] work[s] at the same establishment, because [her] employer has been changed [and differs from the employer of those colleagues].'³⁰ Again this defence was used in Scotland by Glasgow City Council in the context of the local authority litigation to argue that their predominantly female care workers employed in an arms' length company could not compare themselves with directly employed male workers. This defence was unsuccessful but was only dropped by the Council after several years of litigation and an unsuccessful appeal to the Court of Session.³¹

Of course, at a more technical level, other defects exist in the equal pay regime.³² For example, it is a real challenge for a potential female claimant to

²⁷ (*North & Ors v Dumfries & Galloway Council* [2013] UKSC)

²⁸ *Brierley and Ors v Asda Stores Ltd*, ET 2016

²⁹ See section 79 of the Equality Act 2010.

³⁰ S. Fredman, 'Women at Work: The Broken Promise of Flexicurity' (2004) 33 *Industrial Law Journal* 299, 316.

³¹ (*Glasgow City Council v Unison and Fox Cross Claimants* [2014] CSIH 27).

³² For a comprehensive critique of the domestic equal pay framework, see S. Fredman, 'Reforming Equal Pay Laws' (2008) 37 *Industrial Law Journal* 193, 196–211.

procure information about earnings levels in order to establish a pay disparity.³³ As part of the solution to this problem, the UK Government introduced section 139A of the EA and the Equality Act (Equal Pay Audits) Regulations 2014³⁴ in 2014, which empower a tribunal to order an employer who has been found to have breached equal pay law, to conduct an equal pay audit. In addition, the UK Government has recently activated the provisions of section 78 of the Equality Act 2010³⁵ which impose mandatory gender pay gap reporting on private and voluntary sector employers. At the time of writing, the reporting obligation is restricted to employers with 250 employees or more, with a phased implementation dependent on the size of the employer and the number of employees it employs. As such, its effectiveness is likely to be limited in the short to medium term. More significantly, the UK Government also impeded a claimant's access to information about earnings when it repealed the statutory 'obtaining information' process set out in section 138 of the Equality Act 2010 and regulation 3 of, and Schedule 2 to, the Equality Act 2010 (Obtaining Information) Order 2010³⁶ in April 2014. Seen from the perspective of enabling claimants to gain access to the relevant information they need to evaluate the existence of firm-specific gender pay gaps, the UK Government's approach has been somewhat disjointed.

There is an additional glaring deficiency in the legislation insofar as a female claimant's successful equal pay claim may result in the 'levelling down' of the male comparator's pay, rather than the 'levelling up' of the claimant's pay to that of the male comparator:³⁷

The primary shortcoming of any legislation directed specifically at the gender-pay gap is that it fails to address substantive, as opposed to relative, justice. Even if legislation were to be drawn so as to require the adjustment of wages on a proportional basis... equal pay legislation will not, as a rule, prevent an employer from paying male and female employees equally badly.³⁸

The courts and tribunals have stated numerous times that it is not a function of the equal pay legislation to secure 'fair' pay. Furthermore, if the employer

³³ See *South Lanarkshire Council v Scottish Information Commissioner* [2013] 1 WLR 2421, where a local authority unsuccessfully attempted to block a freelance journalist's access to information about the particular points on the pay scales assigned to posts.

³⁴ SI 2014/2559.

³⁵ See section 147 of the Small Business, Enterprise and Employment Act 2015 and the consultation process on the content and format of the information to be provided, available at <https://www.gov.uk/government/consultations/closing-the-gender-pay-gap> (last visited 10 February 2016).

³⁶ SI 2010/2194. ACAS has issued a guidance note on asking and responding to questions about equal pay and discrimination in the workplace, available at <http://www.acas.org.uk/media/pdf/m/p/Asking-and-responding-to-questions-of-discrimination-in-the-workplace.pdf> (last visited 10 February 2016).

³⁷ See the discussion in S. Fredman, *Discrimination Law*, 2nd edition (Oxford, OUP, 2011) 162.

³⁸ A. McColgan, *Just Wages for Women* (Oxford, Clarendon Press, 1997) 394

does raise the pay of the successful female claimant to that of the comparator, this does no more than modify the claimant's contract and there is nothing in the legislation compelling the employer to alter the overall pay structure for the benefit of the claimant's female colleagues. This underscores the absence of a collective dimension to the equal pay regime and lays bare the shortcomings of the emphasis on the individual litigation-driven model in the legislation. Accordingly, for a more equitable distribution of pay, claimants are left to have recourse to collective bargaining, which in the past, has failed female employees to some extent.³⁹

An additional defect in the equal pay regime is that it is not designed to pay workers what they are actually worth. As such, the problem of 'justified proportionate inequality' is not addressed in the legislation. Consider Hypothetical A:

Charles Le Roux ('CLR') is employed by Danny's Demolishers Ltd. ('DD') as a labourer at its Canterbury depot. He is paid £2,300 gross per month. Anita Falcon ('AF') is the deputy head of the Canterbury depot, which is two pay grades higher than CLR. AF is paid £2,500 gross per month. She complains to DD that she ought to be paid considerably more than her current salary on the basis that a pay differential of £200 gross per month between her pay and that of CLR is marginal taking into account the fact that CLR is two pay grades below her on the pay scale. AF presents a claim to an employment tribunal claiming that her pay would have been much higher than her current rate if she had been male and invokes CLR as a comparator. Unfortunately, the EA does not proscribe disproportionate pay differentials. Therefore, the employment tribunal has no option but to strike out AF's claim.⁴⁰

Furthermore, an employer is not liable if it can convince a tribunal or court that the pay disparity is attributable to a material factor which is not tainted by direct sex discrimination or, if indirectly discriminatory, can be objectively justified as a proportionate means of achieving a legitimate aim. As such, there is an explicit defence at the heart of the equal pay model which enables an employer to be excused from equalizing the pay of its male and female

³⁹ For example, the negotiation of the single status pay agreement, on which, see the discussion in C. McLaughlin, 'Equal Pay, Litigation and Reflexive Regulation: The Case of the UK Local Authority Sector' (2014) 43 *Industrial Law Journal* 1 and L. J. Hayes, 'Women's Voice and Equal Pay: Judicial Regard for the Gendering of Collective Bargaining' in A. Bogg and T. Novitz (eds.), *Voices at Work* (Oxford, OUP, 2014) 35.

⁴⁰ See *Evesham v North Hertfordshire Health Authority* [2000] ICR 612, 628F per Roch LJ; *Redcar & Cleveland Borough Council v Bainbridge* [2008] ICR 238; and I. Steele, 'Beyond Equal Pay' (2008) 37 *Industrial Law Journal* 119. For mechanisms that could be deployed in order to tackle disproportionate pay, see S. Fredman, 'Reforming Equal Pay Laws' (2008) 37 *Industrial Law Journal* 193, 199–200. However, there is an argument that the decision of the European Court of Justice ('ECJ' or 'CJEU') in *Murphy v An Bord Telecom Eireann* [1988] ECR 673 is authority for the proposition that EU law would allow a female claimant a 'justified proportionate inequality' claim in the circumstances adumbrated in hypothetical A.

staff. Moreover, other defences available involve the employer establishing that the claimant and her comparator are not doing equal work and/or that the comparator selected by the claimant is disallowed.⁴¹ Allied to the fact that the equal pay regime is notorious for being bedeviled by complexity and inordinate delays in its enforcement, there is something to be said for the contention that these factors combine to give rise to a 'denial of justice.'⁴² It is worthwhile noting that, in Scotland, the majority of equal pay litigation in recent years has been brought against local authorities in relation to the implementation of Single Status and, as we refer to in our response below, has taken between 8-10 years to resolve and, in some cases, is still ongoing.

Are there specific issues with gender pay within the Scottish public sector?

What are local authorities doing to support gender pay equality and can more be done?

Here, we only comment on the approach of local authorities to the equal pay regime in Chapter 3 of Part 5 of the Equality Act 2010 and the experience of local authorities in connection with the implementation of the Single Status Agreement (SSA). The SSA was a national collective agreement negotiated between local authorities and trade unions in Scotland in 1999. It was designed to harmonise the terms and conditions of council employees and remove historical pay differentials between men and women working in the same or similar jobs in local government. However, although the SSA aimed to reduce the gender pay gap and remove discriminatory pay structures, in reality, its introduction opened up a Pandora's Box of problems for local authorities.

It had been anticipated that SSA would serve to eradicate the gender pay gap in the local authority sector. The thinking was that (1) the introduction of a transparent, single pay spine structure applicable to all staff working for a local authority would be more likely to remove ingrained discriminatory differentials in gender pay,⁴³ and (2) the framework established by the SSA would be more effective at ensuring the progression of women up the pay hierarchy. Somewhat naively, it was believed that implementation of SSA would be cost neutral. However, the reality has been rather different. Many councils reacted poorly to the requirement to implement SSA, by delaying implementation, settling back pay claims at a fraction of the monetary value to

⁴¹ See the Statutory Code of Practice on Equal Pay at para 74 available at <http://www.equalityhumanrights.com/sites/default/files/documents/EqualityAct/equalpaycode.pdf> (last visited 10 February 2016). The Code of Practice is admissible in evidence in criminal, or civil, proceedings and if an employer fails to adhere to this Code of Practice, this must be taken into account by a court or tribunal in any case in which it appears to the court or tribunal to be relevant: section 15(4) of the Equality Act 2006.

⁴² See L. Dickens, 'The Road is Long: Thirty Years of Equality Legislation in Britain' (2007) 45 *British Journal of Industrial Relations* 463, 478.

⁴³ See S. Corby, 'Equal opportunities: fair shares for all?', in S. Corby and G. White (eds), *Employee Relations in the Public Services: Themes and Issues* (London, Routledge, 1999) 95.

which female employees were legally entitled, or by simply ignoring SSA and engaging in collective bargaining at a local level.⁴⁴ These claims arose in the 'first wave' of litigation which was primarily related to historic bonuses, premiums, allowances and supplements paid to males in occupations rated as equivalent to the female claimants, whilst the 'second wave' litigation involved claims against councils who had allegedly implemented SSA improperly.

The explanations for the failure of equal pay litigation against Scottish councils to dry up is rather complex. The litigation can be attributed to a combination of contributory factors, some of which are the following:

- a. The longevity of the historic bonuses, allowances, supplements and other wage premiums negotiated and secured by trade unions for their male members in the 1960s, 1970s and 1980s;
- b. The effect of trade union involvement in the local implementation of SSA, e.g. the unrealistic back pay settlements and the inclusion of pay protection and job enrichment schemes. The conflicting loyalties experienced by trade unions led them towards taking these measures;
- c. The alleged perpetuation of pay discrimination through the denial of pay protection and job enrichment schemes to the predominantly female workers who suffered pay discrimination prior to the implementation of single status
- d. The failure of SSA to address head-on the dominant contributory factor for pay inequality, namely the endemic occupational segregation in staff/job types in local authority employment;
- e. The alleged discriminatory approach to job evaluation under Single Status when evaluating traditionally female roles like home carers, classroom assistants, clerical workers and catering assistants.
- f. The alleged perpetuation of pay discrimination through service redesign and outsourcing in order to preserve pay rates in predominantly male roles and to prevent cross-service comparisons;
- g. The misguided (with the benefit of hindsight) reliance on decentralised and local implementation of the new pay structures and compilation of job evaluation studies pursuant to the roll-out of the SSA;

⁴⁴ For example, South Lanarkshire Council, on which, see the decision of the Employment Appeal Tribunal in *Russell and others v South Lanarkshire Council* (Appeal No. UKEATS/0067/09/BI).

- h. The delays in implementing the SSA by local authorities: evidence suggests that the local authorities in England who implemented SSA early avoided backdated pay claims and equal pay litigation generally;⁴⁵
- i. The impact of legal decisions on the calculation of compensation payouts and the procedural rights of claimants;⁴⁶
- j. The decisions of certain local authorities to opt out of the nationally prescribed job evaluation scheme developed by the Scottish Joint Council for Local Government Employees pursuant to the roll-out of the SSA;
- k. The failure of local authorities to outsource to genuine third parties pursuant to standard procurement processes, rather than to external arm's length organisations ("ALEOs") where the council retained an ownership or controlling stake or share.
- l. The failure to treat equal pay settlements as pensionable and thereby perpetuate the effects of pay discrimination into retirement.

The gender pay gap in the legal profession

For over a decade the Society has undertaken a "census" of the profession (*Profile of the Profession*) which gives us both a robust basis of what the profession looks like at a given time but also allows us to see emerging trends. This is invaluable for informing our policy work. It allows us to see where the profession is making progress, where more work may be needed, and how we should target support and encouragement.

The last survey (2013) saw 3,449 members respond. This was circa 25% of the practising profession at the time.

Amongst many other things, respondents were asked to indicate their salary or earnings p/a against a range of options. The distinction between salary and earnings is important as equity partners are not employees and will not receive a salary.

When the earnings figures were analysed it became clear that male solicitors on average earned more than female solicitors. Women featured more prevalently in the £15k to £45k brackets whilst men were more prevalent in

⁴⁵ S. Deakin, S. Fraser Butlin, C. McLaughlin and A. Polanska, 'Are Litigation and Collective Bargaining Complements or Substitutes for Achieving Gender Equality? A Study of the British Equal Pay Act' (2015) *Cambridge Journal of Economics* 381, 389.

⁴⁶ *Magorrian v Eastern Health and Social Services Board* [1998] ICR 979, *Preston v Wolverhampton Healthcare NHS Trust* [2001] 2 AC 415, *McCarthy and others against North Lanarkshire Council* (Case S/102122/2006 & Others) and *Birmingham City Council v Abdullah* [2013] IRLR 38.

the £65k to £150k brackets.

There are numerous reasons for this.

The most obvious being the demographic change in the profession over time. The Society focuses on post-qualification experience (PQE) rather than age as we think this gives us the best evidence (i.e. it is perfectly possible for a 55 year old to be a newly qualified solicitor whilst a 37 year old could have fifteen years' PQE).

Until the early 1990s the majority of those admitted to the solicitor profession were male. Since that point, more women have been admitted each year (and in recent years that trend has intensified). Whilst the profession as a whole is narrowly majority female (51% female to 49% male) the distribution is not equal. Solicitors over the age of 45 are disproportionately likely to be male. Solicitors under the age of 45 are disproportionately likely to be female (circa 60% of solicitors under 40 are female). The increased feminisation of the profession shows no signs of abating. Intake into the LLB each year is roughly 2/3rds female to 1/3rd male. Traineeship numbers are similar.

As solicitors with more post-qualification experience PQE are more likely to earn more and the average male solicitor is disproportionately likely to have more PQE and – conversely – as solicitors with less PQE are likely to earn less and the average female solicitor is disproportionately likely to have less PQE it is understandable why there is a pay gap between the average male and the average female solicitor.

In the 2013 report, women were more likely to be trainees, assistants and associates compared to their male counterparts while men were more likely to be equity partners or consultants.

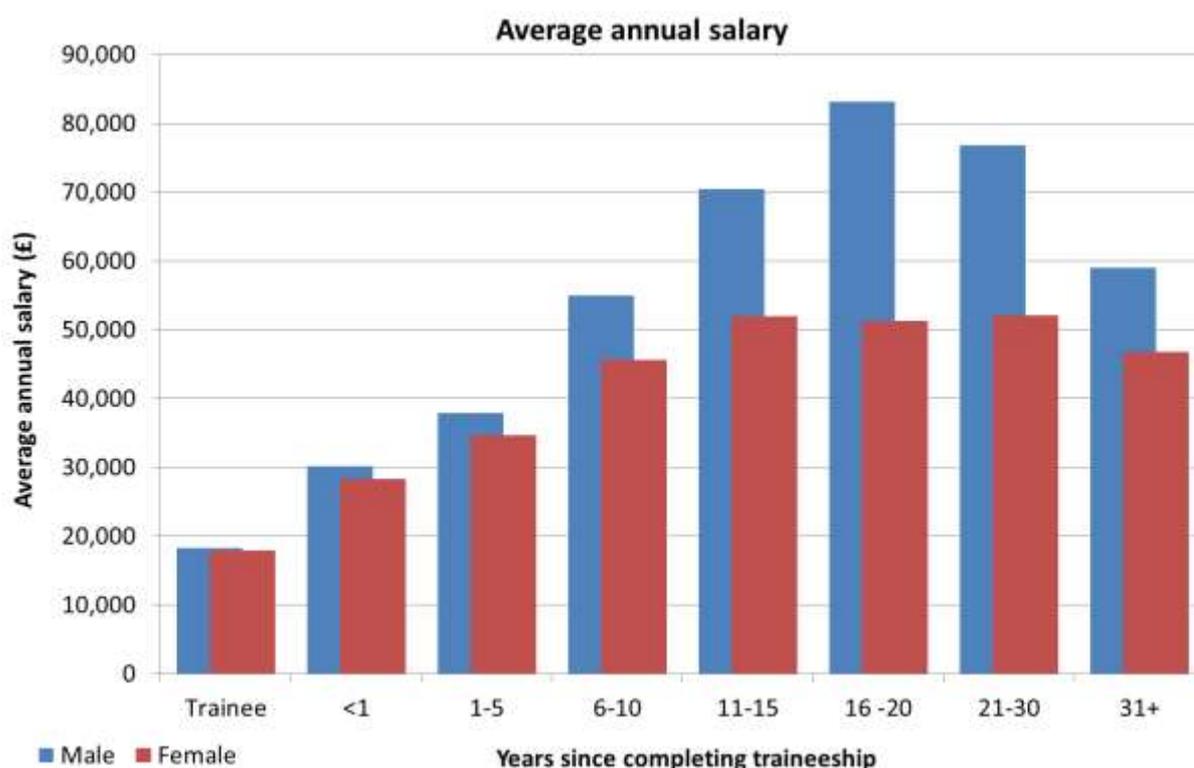
Whilst the changing gender dynamic may explain some level of pay gap it clearly does not explain the current pay gap.

When gender is taken into account there is no real difference in salary between men and women who are trainees or those who have up to five years' PQE. However, for those with over five years' PQE, a disparity started to show:

- For those with 6 to 10 years' PQE, although they were in a minority, a greater proportion of men (16% of men) than women (6%) had moved out of the lower salary bands to be earning over £80k p/a.
- For those with 11-20 years PQE, women (70%) were more prevalent in the salary brackets from £15k to £65k than men (46%).
- For those with 11-20 years PQE, men (39%) were more prevalent in the salary brackets to earn more than £80k women (15%).
- For those with 21-30 years' experience, women (64%) were more prevalent in the salary brackets between £25k to £65k than men (37%).
- For those with 21-30 years' experience, men (58%) were more prevalent in the salary brackets over £65k than women (31%).

The report collected information on full-time equivalent basis recorded in 18 bands which we recoded into 18 corresponding mid-band values which are used to calculate average salaries. For instance, respondents indicating they earned £25,001 to £30,000 were coded as £27.5k

The figure below shows the gap between male and female salaries is all but non-existent at the outset of their careers but steadily widens as careers progress. For females, salaries remain relatively flat from 6-10 years onwards whereas for males it continues to grow to 16-20 years and then drops back down close to the 6-10 years level.



The table below provides full details of average (FTE) salaries by gender and number of years since completing their traineeship. This shows that, across all categories, females receive on average, lower salaries than males with the same number of years of experience, with the gap widening significantly upon reaching 6-10 years' experience.

Duration since completing training	Mean Annual Salary (£)		Male-Female Difference	
	Male	Female	£	%
Trainee	18,228	17,896	-332	-2%
<1	30,099	28,353	-1,745	-6%
1-5	37,919	34,599	-3,320	-9%
6-10	54,982	45,631	-9,351	-17%
11-15	70,448	51,960	-18,488	-26%
16-20	83,075	51,251	-31,825	-38%
21-30	76,769	52,042	-24,727	-32%

Duration since completing training	Mean Annual Salary (£)		Male-Female Difference	
	Male	Female	£	%
31+	58,971	46,748	-12,223	-21%
All years	77,095	44,445	-32,650	-42%

Overall, the female full-time equivalent average salaries of £44,500 is 42% less than the average salary for males £77,095.

This is complex. When considering inequality of those who are 16-20 years qualified of 21-30 years qualified we are to a large extent analysing inequality that occurred some time ago.

We have placed considerable emphasis on the gender pay gap in the profession. We chose to publish the gender pay gap very visibly in July 2015 to promote debate and discussion on this topic. We have subsequently undertaken a number of policy actions which we believe are "best practice":

- The publication of the *Parents in the Profession* guides. These were written for solicitors, by solicitors and were supplemented by an event for returning parents.
- In late 2015, we published a series of recommendations for the Scottish Government, Scottish Courts & Tribunals Service and Judicial Appointments Board for Scotland.
- In the summer of 2016, we ran a campaign titled "*#letstalkprogression*". A two-sided leaflet (one side covered facts and figures and the other a series of questions to prompt discussions) was disseminated with our members' Journal. This was accompanied by a major digital campaign. We also undertook a number of round-table discussions on how the profession can ensure fair progression.
- We have consistently published articles on this area: *Bridging the gender pay gap; what about the men, why gender equality is not just an issue for women, equality means business, and why do young women leave their jobs?* We have also had articles published on Engender's website, in *The Scotsman* and *The Herald*. Our members' Journal has published responses and some of these articles gained considerable social media attention.
- We have published a series of interviews with senior women in the profession as role models and this will continue.
- We continue to promote our equality & diversity standards to the profession. We have held numerous one to one discussions with medium to large size law firms regarding their own pay gaps and progression rates.

The Law Society of Scotland

Gender Pay Gap

Professor Catriona Paisey, University of Glasgow
Professor Nicholas Paisey, Heriot-Watt University, Edinburgh

There is an increasing body of evidence for the existence of a persistent gender pay gap in the UK. As the Scottish Parliament's Gender Pay Gap Inquiry call for evidence states, women are more likely than men to work part-time and to be in low skilled jobs. They are less likely than men to work in sectors such as engineering and technology, and they are under-represented in leadership and managerial roles. The pay gap increases as women age and especially if they have children. The evidence presented here relates to a career group of chartered accountancy professionals that is highly educated, in full-time work and in a context where men and women are working in approximately equal numbers. The evidence relates to people who are young (typically mid-twenties) and therefore not yet at an age where many had children. Thus, the evidence, while limited in scope, provides some insights into gender pay rates in a sector that might be expected to display less of a gender pay gap than other sectors or contexts.

Research was undertaken into the social background and pay of newly qualified chartered accountants (CAs) who were admitted into the Institute of Chartered Accountants of Scotland (ICAS) in 2009¹. Typically, these entrants would have begun their three-year training contract in 2005 or 2006. ICAS admissions have increased steeply in recent years. Up until the 1990s, ICAS only trained in Scotland but it then moved into training in England and Wales (mainly London offices of some of the Big 4²). Admissions peaked in 2009 reflecting the boom years prior to the financial crisis. Thus the period reported here represents a cohort where there was considerable demand for trainees.

The group is quite homogeneous. Nearly all had gained either a 2.1 or first class honours degree. 71% had attended a state-funded school and around three-quarters had attended an elite university.

The questionnaire was sent to all 886 people admitted to ICAS in 2009 (483 men and 403 women). 212 replies were received, a response rate of 23.9%.

The research was conducted in order to investigate social mobility in the accountancy profession but a question was included in the questionnaire relating to the pay of respondents. The following is a summary of the key findings in relation to the pay data disclosed by respondents.

Key findings:

- Average pay for female newly qualified CAs was 89% of that reported by male newly qualified CAs, representing a gender pay gap for this specific cohort of 11%.
- The gender pay gap was less for women who had qualified as CAs with Big 4 accountancy firms, hence the greatest gap is found in newly qualified CAs who trained with small and medium sized firms.

- The gender pay gap varied depending upon the degree subject studied by the CAs. Females who had studied for degrees including accountancy and/or business subjects or arts and humanities subjects earned less than their male counterparts. Interestingly, in relation to the current inquiry, females whose degree subject had been in mathematics or sciences earned more than their male counterparts. This points to the importance of encouraging girls to study such maths and science subjects at school and university.
- The gender pay gap also varied depending upon the classification of university attended. Females who had attended Oxford or Cambridge Universities or a Sutton Trust 8³ university earned more than males who had attended those universities. However, females who had attended other universities earned less than males who attended those universities.
- The majority of respondents had attended a Sutton Trust 30⁴ university. In this group, females earned 93% of the salary earned by males who had attended those 30 universities.
- The largest gap was found in females who had attended universities outside of the Sutton Trust 30. For this subgroup, the females only earned 81% of the salary earned by similar males.

Conclusion

A gender pay gap exists for newly qualified chartered accountants. Although the results only relate to one year group and should be treated with caution given the small sample size, it is of particular note that females who graduate in maths and sciences do not suffer a gender pay gap. Similarly females who graduate from highly elite universities do not suffer a pay gap but a pay gap emerges for graduates of all but a handful of universities. These findings may point to ways in which the gender pay gap could be addressed.

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1. The research was undertaken by Professor Catriona Paisey, University of Glasgow, Professor Nicholas Paisey, Heriot-Watt University, Edinburgh, Professor Heather Tarbert, University of the West of Scotland and Dr Betty Wu, University of Glasgow.
2. The so-called Big 4 represent the four largest chartered accountancy firms, namely Deloitte, Ernst and Young (EY), KPMG and PwC.
3. Research for the Sutton Trust sometimes identifies the following top 8 universities: LSE, Nottingham, UCL, Durham, Manchester, Warwick, Oxford and Cambridge
4. Sutton Trust top 30 (includes four Scottish universities): Bath, Birmingham, Bristol, Cambridge, Cardiff, Durham, Edinburgh, Exeter, Glasgow, Imperial College, King's College London, Lancaster, Leeds, Leicester, Liverpool, LSE, Manchester, Newcastle, Nottingham, Oxford, Reading, Royal Holloway London, Sheffield, Southampton, St Andrews, Strathclyde, Surrey, UCL, Warwick, York