

Gender Pay Gap

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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

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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.

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

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](#)

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

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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.

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

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](#)

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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

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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

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

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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 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

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

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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 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

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

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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 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.

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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.

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

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

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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

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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)