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# **Gender pay gap reporting regulations (2016): advancing gender equality policy in tough economic times**

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## **Key words**

Gender pay gap reporting; gender equality policy; Equality Act 2010; state feminism; equality machinery; critical actors

## **Abstract**

This article sets out to explain why mandatory gender pay gap reporting regulations were introduced in 2016, whereas the two main parties had previously opposed state regulation. Observing the rise in the number of female MPs, it argues that the rise in descriptive representation has enabled substantive representation, but that this does not necessarily explain outcomes. Critical mass is a problematic concept due to difficulties of definition. Rather, the empirical evidence supports the idea that critical actors able to build alliances within the state machinery and beyond it, particularly by working with business influencers, are decisive in exploiting opportunities for change and securing support for it. Feminization of parliament and government also facilitate institutionalization of gender equality actors, although this process remains incomplete and contingent.

## Introduction

A 'major landmark in the long struggle for equal rights' (Hepple, 2011a: 1), the Equality Act 2010 potentially signalled a shift towards a fifth generation of equality legislation in the UK, transformative equality, characterized by mainstreaming of gender equality initiatives in policy output and practice, and positive duties on actors such as public and private sector organizations (Hepple, 2011b). Regarding action to tackle gender pay gaps, the Equality Act 2010 innovated in two ways: first, in establishing the principle of transparency which had long been obstructed by employers' fear of litigation; second, in establishing the principle of legal duties on work organizations with 250 employees or more. However, the latter provision was initially not enacted by the Labour government, and the Conservatives in opposition said they would not introduce gender pay gap reporting requirements. When the Coalition government came into office in 2010, it established instead a voluntary process.

By the general election of 2015, all three major parties had committed themselves to enacting Section 78 of the Equality Act 2010. By July 2015, the prime minister David Cameron announced a consultation on plans to require organizations with private-sector 250 employees or more to disclose their gender pay gap. The regulations were finally published in December 2016 and came into force in March 2017. In March and April 2018, organizations in both the public and private sectors<sup>1</sup> with 250 or more employees were required to report for the first time on their mean and median gender pay gaps, gender pay gaps in bonuses, and proportions of men and women employees by quartile, with all reports to be made publicly available. Government reported universal compliance (McGuinness and Pyper, 2018). In light of the experience of the first round of reporting, various recommendations to strengthen the regulations further were advocated by parliamentarians, such as lowering the eligibility threshold, refining the data required, and making accompanying narratives and action plans compulsory (see e.g. Hansard, 2018a, b). In October 2018 the government announced a consultation on new proposals to oblige organizations with 250

employees or more to report on pay figures by ethnicity (BEIS, 2018), similarly breaking with the hitherto-dominant preference of voluntary reporting; it also announced a consultation on plans to require larger companies to disclose their policies on leave for working parents.

How can this shift in approach, away from reliance on voluntary employer action towards a greater role for the state in setting the rules and enforcing compliance, be explained? How did a contested initiative move into a more consensual policy space? The shift from voluntary to mandatory reporting appears to be out of line with a wider policy preference for market-based, purely voluntary solutions (Hall and Soskice, 2011), which also applies to preferences in other areas of gender equality policy (Author, 2010; Cooke, 2011; Dickens, 2012a), particularly under Conservative governments (for example, a distaste for formal quotas whether in political or economic life: see Campbell and Childs, 2015).<sup>2</sup> The failure of the purely voluntary approach, which saw over 200 companies sign up to the initiative but only six of them publish their gender pay gap, created a pressure for change but cannot by itself explain the overturning of the path-dependent preference. Moreover, the change in approach took place in adverse economic conditions, contrary to what we might expect (Anneseley, 2010; Anneseley and Gains, 2010).

The present article seeks to answer this puzzle by drawing on recent feminist institutionalist research which widens the study of whether, when and how women in politics make a difference to policy outcomes, by investigating how critical actors build alliances within the bureaucratic and legislative machinery, and outside it. It argues that, in the case of pay equity which carries significant economic consequences and brings public policy into the sphere of private work organizations, critical actors must pay attention to the need to build alliances across parties (which may have different ideological approaches to regulating the relationship between state and business) and with businesses themselves, both directly and through intermediate associations and agencies.

Successful alignment between equality actors within government and the legislature on the one hand and the women's movement on the other is often associated with the arrival of social-

democratic parties in office (Mazur, 2002; McBride and Mazur, 2010; see also Mätzke and Ostner, 2010). However, equal employment policies do not always require centre-left government (Mazur, 2002) and may more readily lend themselves than other policy sectors to market-based strategies for adoption and implementation, involving non-state, non-feminist actors in the policy constellation. The need for alliances outside the feminist movement is not necessarily applicable in all domestic political settings, since the relationship between state and business differs across countries (Kantola and Squires, 2012), but is particularly valid in the case of the British 'liberal' gender regime (see O'Connor et al, 1999), where the rise of market liberalism has challenged the role of the state in a particularly pronounced way. In this context, 'strategic partnerships' (Mazur, 2002) must be formed by feminist activists, not just across different government agencies and within the wider 'triangle of empowerment' (Vargas and Wieringa, 1998) comprising femocrats, feminist activists, and female elected officials, but also with non-state, non-feminist actors which include business leaders and groups likely to influence business opinion. Beyond substantive representation of women in core executives, 'cooperative constellations' are a prerequisite for achievement of gender equality goals (Holli, 2008).

Critical actors in and outside the state machinery play a significant role in achieving change. Following Kanter's (1977) original emphasis on the role of individual actors within American work organizations, and Dahlerup's work (1988) positing that scholars should focus on 'critical acts' by women activists broadening the population or repertoire of activism, Childs and Krook (2009) argue that 'critical mass', that is a relatively high proportion of women in decision-making, cannot by itself explain why policy change happens (see Celis et al, 2008; Grey, 2008), not least because of difficulties in defining the appropriate threshold in different policy settings. Other factors are likely to influence outcomes, both institutional-contextual and individual actor-based (Childs and Krook, 2006, 2008, 2009). Attention must be paid to the decisive role played by specific 'critical actors' (also called 'policy entrepreneurs' in some political settings). Critical actors in this sense use their position

to campaign for women-friendly actions but they may not necessarily be women, and there are no prescribed characteristics of such actors (Childs and Webb, 2012: 10).

It is argued here that critical actors are those best placed to mediate relationships within the state machinery and outside it, through the wider policy constellation, and that critical actors with links to business leaders will be able to translate feminist policy goals into 'business case' arguments likely to create a broader coalition for change. This analysis sees state feminism as leading gender equality policy but adapting its arguments to suit a strongly pro-market policy environment. In the UK policy context, gender equality initiatives are more likely to succeed if they deploy economic arguments (Annesley and Gains, 2013), regardless of the party in office. However, the risk of incorporating business case arguments and depending on business actors for implementation is that identify politics becomes diluted and outputs softer and more open to manipulation or dilution (see e.g. Newman, 2012; Prügl, 2015). The case of gender pay reporting provides a useful case through which to investigate the outcomes of state-feminist policy coalitions utilising 'corporatized' gender equality discourses (Calkin, 2016), that is the impact of the process of adoption on policy design (output), and the way in which policy is implemented (outcomes).

Based on a range of published sources which include reports by government, parliament and statutory agencies, and published interviews with and autobiographical testimony by critical actors, this article deploys 'thick description' (Mazur, 2002) of the process by which a shift towards mandatory gender pay gap reporting took place. First, it examines changes in substantive representation of women in the core executive. Second, it identifies critical actors who built coalitions for policy change under Labour, then Coalition and Conservative governments, and shows how they were able both to contribute to and to use as a resource increasing institutionalization of equality agencies within government and parliament. Third, it considers the role of the non-governmental equality agency which is seen in comparative policy literature as a key actor in implementing policy successfully. Fourth, it examines the extent to which equality actors were able

to align their preferences with those of non-state actors, particularly in the business world. The article concludes by considering lessons for wider debates about the nature of state feminism in a highly marketized policy environment.

### **Critical actors in the legislature and executive**

#### ***Policy change under Labour (1997-2010)***

A significant contextual change in the period when the Equality Act 2010 was prepared, presented and adopted, was a marked increase in the number of women MPs to 120 in the 1997 parliament (Childs and Krook, 2009). The rise of the number of female MPs continued after 2005, to reach 143 in 2010, 191 in 2015, and 208 in 2017 (Keen et al, 2018). Moreover, the number of women in ministerial positions also increased. Tony Blair's 1997 cabinet was the first to have more than two female ministers (five, the number reaching eight in May 2006-May 2007). Meanwhile, a majority of female MPs in the Labour Party – around two thirds – identified as feminist, opening the way to substantive representation of women's interests during the period when Labour was in office (Childs, 2001). Change in policy priorities did not occur evenly during this period, but rather as part of an incremental process of internal party feminization and generational change, and external societal change, mediated through feminist and other campaign organizations close to the party (Annesley, 2010).

Even so, feminist commitment by a woman minister is of less importance than the ability of critical actors to mobilize networks and other resources through their institutional position. Thus, Harriet Harman at the Department of Social Security found herself under pressure from within her own ministry to stick to budgetary priorities (Annesley and Gains, 2010: 922-923), and had a discontinuous ministerial career in the New Labour period. Later in that period, however, she spent a longer term in office as Secretary of State leading the Government Equalities Office (during which time she was also Leader of the Commons and Lord Privy Seal), from October 2007 to May 2010, and

was able to build up a team to work on the Equality Act, although by her own account it took time to mobilize key actors across sectors (Harman, 2017: 288-291).

Patricia Hewitt had a dual mandate as Secretary of State for Trade and Industry and Cabinet Minister for Women “which made her resource rich to advance policy” in the area of work-life balance, but also on gender pay gap auditing (Annesley and Gains, 2010: 923). As a former consultant with Andersen (Accenture), Hewitt was, “the only minister, and virtually the only MP, who’d ever been in the private sector” (Institute of Government, 2016). She had already built political capital with trade unions due to her research and campaigning on working time and flexible working. Hewitt wrote to all CEOs of the FTSE100 companies and invited them to a meeting at the DTI to discuss what they were doing on equal pay. According to Sheila Wild who was then director of employment policy at the Equal Opportunities Commission, “That really moved us forward. Fast. I never moved as fast as that in all my time at the EOC” (interview with author, December 2017). As discussed further below, Hewitt’s work in the well-resourced DTI focused on developing voluntary pay reviews and action plans. The groundwork was prepared for a shift in focus “from comparable work or equal pay for work of equal value towards more general gender pay audits” (Hebson and Rubery, 2018: 116).

Harman’s work as secretary of state for equalities entailed review of the legislative framework, responding to domestic and external (European Union) pressures for change (Grimshaw, 2007; Squires, 2007), and drawing on advocacy and research by leading equalities campaigners and experts, which reflected dissatisfaction with the prevailing approach relying on individual litigation (Conley, 2014; Deakin et al, 2012; Hepple, 2012; Kahn and Meehan, 1992; Rubery and Grimshaw, 2015). The new model, as outlined in the 2001 Hepple report, rested on three basic principles: strong incentives for internal scrutiny by organizations; engagement with stakeholders; and an independent enforcement agency with the ability to apply deterrent sanctions if voluntarism fails (Hepple, 2012: 65; see also Fredman, 2008; Harrington, 2001; Hepple, 2011a). Responding to the Hepple report’s recommendations, the Labour Party pledged support for a single equality bill in its



2005 manifesto, but it took another two years for draft texts to be prepared and opened to consultation. The bill was finally presented by Harman in April 2009.

However, the bill's regulatory design fell short of the strong positive duties recommended in the Hepple report: "The most serious omission was any kind of requirement to undertake employment equity and pay equity reviews" (Hepple, 2011a: 5). The Labour government in 2007 set out a lengthy rationale for its decision not to opt for strong positive duties on employers. It was argued that equal pay reviews address only one aspect of inequality, direct discrimination, and important causes like segmentation are not addressed; second, that there was very limited evidence of impact from countries where positive duties to enact pay reviews had been introduced; and third, that excessive costs on employers made regulation disproportionate to the intended outcome (DCLG, 2007).

Presenting the Bill in parliament, Harman made clear that Section 78 was not intended to be enacted until at least 2013, and only if voluntary self-reporting did not work.

Thus, although experts had contributed to the change in approach underpinning EA2010, they were unable to exert sufficient influence to persuade government to enact Section 78. Nevertheless, preference for light-touch regulation allowed this section of the 2010 Act to receive cross-party support in parliament, on the basis of a preference for voluntary action and a minimalist approach to positive duties, in opposition to a stronger version of employer duties based on clearer definitions of comparability of jobs and on comprehensive pay reviews, as advocated by trade unions and equality campaigners.<sup>3</sup> The following sections outline how support for the idea of gender pay reporting grew, thanks to the work of critical actors, and in the context of changes in descriptive representation, to the extent that mandatory duties – albeit based on a minimal, light-touch version of such duties – came to be acceptable where previously it had been argued by the Labour and Conservative parties, and by representatives of business, that it was not only unnecessary but costly.

### ***Policy change after 2010***

After 2010, change within the Conservative Party was critical. David Cameron's 2010 cabinet included four women, and seven women were appointed to cabinet in 2015. Harman, speaking in 2018, argued that the arrival of a new generation of MPs had influenced attitudes within the party and enabled cross-party alliances on gender equality: "there has been a dramatic change in the nature of Conservative women MPs. We have now got feminists on the Tory side, who are very different from the doughty tweedy matrons of the past. These MPs are more modern, and people that we, as Labour women, can work cross-party with" (Asthana, 2018). Asked to whom she was referring, Harman singled out MPs Maria Miller, chair of the Women and Equalities Committee, Nicky Morgan, chair of the Treasury Committee, Sarah Wollaston, chair of the Health Select Committee, and Theresa May's parliamentary private secretary Seema Kennedy, as well as former education and equalities secretary (2016-2018) Justine Greening, Anne Milton, who was Minister for Women between July 2017 and January 2018, Rachel McLean, a member of the Business, Energy and Industrial Strategy Committee, and Mims Davies, who had served on the Women's Equalities Committee from July to December 2016, and said there were "loads more" (Asthana, 2018), also citing several male Conservative MPs who as fathers of young children supported a woman-friendly, family-friendly policy agenda.

Following David Cameron's election as leader of the Conservative Party in 2005, party modernization was accompanied by feminization (Childs and Webb, 2012). The number of female Conservative MPs more than doubled to reach 49 in 2010 (compared to Labour's 81 and the Liberal Democrats' 7). Meanwhile, as women's representative structures became established and gained influence within the party, gender consciousness also grew, and women's representatives placed women's demands on the table, focusing on sexual violence and care. Nevertheless, feminization of structures and women's mobilization on new women-focused demands were undermined by deep-seated resistance to state regulation as well as to the ideology and practice of specific feminist demands (Childs and Webb, 2012).

May, as Conservative spokesperson for women and equalities, had welcomed the principle of the Equality Bill in 2010 but opposed it on grounds that it followed a “bureaucratic” approach. On the gender pay gap, she argued that the Bill “contains disproportionate and bureaucratic proposals [...] which will impose unnecessary costs on businesses whilst failing to solve the problem.” Moreover, she continued, the Bill whilst generally welcomed four years previously was now being introduced at a time of economic downturn which made it even harder for businesses to support the costs: “The country is in deep recession, unemployment is soaring and businesses are struggling to stay afloat. [...] The Government have shown a complete lack of awareness of the changed conditions.”<sup>4</sup> The Coalition government agreement in 2010 was vague on the subject of pay equality, promising only to “promote equal pay and take a range of measures to end discrimination in the workplace”. The Conservative manifesto had proposed full pay audits but only in cases where employers had been found guilty of discriminatory practices, whilst the Liberal Democrats had promised to introduce fair pay audits for every company with over 100 employees “to combat discrimination in pay, for example against women”; Labour also placed gender pay gap reporting within a broader concern about pay inequalities, but proposed no regulatory action, pledging instead to “encourage” employers make greater use of pay reviews.

Instead of regulation, the coalition government chose to pursue an approach based on businesses’ voluntary action, under the Think, Act, Report initiative launched in September 2011. However, although around 200 businesses signed up for the initiative and several publicised their equality initiatives through government publications and websites, only six companies published their gender pay data. By 2013, the government claimed that around half (48%) of companies employing at least 150 people had conducted pay audits (GEO, 2013). In reality, progress on pay reviews (let alone full audits) was slow and failed to reach the informal targets set by the Equal Opportunities Commission over just over a decade previously. The Conservatives’ deregulatory agenda made the social-liberal ‘business case’ approach for gender equality vulnerable in the context of economic recession. Meanwhile, the introduction of fees for tribunal claims made it virtually impossible for equal pay

cases to be brought, whilst budget cuts had drastically reduced the capacity of the Equality and Human Rights Commission to carry out its monitoring and enforcement mission (Hepple, 2013). Although Section 78 was reported in 2013 to have been “mothballed” (Martinson, 2013), gender equality initiatives were nevertheless promoted during this period under two ministers for women and equalities, Conservative MP Maria Miller at the Department for Culture, Media and Sport, and Liberal Democrat MP Jo Swinson at the Department for Business, Innovation and Skills. The most significant of these were the introduction of the right to request flexible working from April 2014, and of shared parental leave from April 2015 (GEO, 2013).

In line with the 2010 Conservative manifesto, action on pay audits arose in the context of the Enterprise and Regulatory Reform Act 2013, which came into force in April 2013. The Act inserted a new clause into the Equality Act 2010 giving ministers the power to require employment tribunals to order an employer to carry out a pay audit where it had been found to practice discrimination on grounds of gender. In preparing the Act, the government launched a first consultation, and a second took place in May 2013. At that time the government’s position was described as supportive of equal pay audits following an employment tribunal finding as “an effective way for employers to establish whether their pay structures are robust and free from gender bias.” (DCMS, 2013). 43 responses were submitted, of which only three came from businesses, and eight from organizations representing business. Most respondents, as reported in the government response, argued not only in favour of pay audits but in support of further action to extend and enforce the practice.

The revival of a regulatory approach resulted from Swinson’s activism. Labour MP Sarah Champion, backed by Harman and other Labour MPs, had tabled a private members’ bill to enact Section 78 but it ran out of time in the parliamentary session. Frustrated by the failure of the ‘Think, Act, Report’ voluntary approach which revealed “astonishing” complacency (Swinson, 2018: 201), however, Swinson had spotted an opportunity in the Conservatives’ “fear of failing to enact the Small Business Bill before Parliament finished up for the general election” (Swinson, 2018: 202) and, backed by Labour peers in the House of Lords where the government did not have a majority, was able to push

the government to support Liberal Democrat policy on gender pay gap reporting. The Small Business Act 2015 (adopted in March 2015) included an amendment requiring the Secretary of State, “as soon as possible and within twelve months of the passing of this Act”, to introduce regulations under Section 78 of the Equality Act 2010. Faced with evidence of his unpopularity with female voters (Campbell and Childs, 2015), Cameron responded to this legislative requirement by launching a consultation within two months of taking office. The consultation was managed by the Government Equalities Office, whilst the Women’s Equalities Office worked to maintain political pressure on government.

### **Institutionalizing gender equality policy in the legislature and the executive: the Government Equalities Office and the Women’s Equalities Committee**

As noted above, ministerial appointments to the women and equalities brief provided a focal point for feminist activity, in line with classic state feminism (Mazur, 2002). The Women’s Unit was established at the beginning of the New Labour period in order to work with women’s organizations to feed women’s concerns into policy-making, but it was “small, ineffective and not well respected” (Lovenduski, 2007: 150). It was relaunched in 2001 as the Women and Equality Unit, and moved to the well-resourced DTI where, under Hewitt’s leadership, it focused on women’s economic situation, resulting notably in the Kingsmill review which set out a framework for voluntary pay reviews and audits (Kingsmill, 2001). Subsequently it moved to the Departments for Culture and then Communities and Local Government, where it worked on the preparation of the Equality Bill. The WEU was “an important instrument for the government to commission a series of research reports on women’s pay and employment” (Grimshaw, 2007: 138). However, its advocacy role in marshalling the evidence base for government intervention did not result in regulatory policy initiatives, even when as in the case of the Kingsmill report recommendations were deliberately chosen to reflect the prevailing preference for voluntary action by business: for example, the Kingsmill report’s suggestion that government should monitor employers’ voluntary pay reviews was

not taken up, and a monitoring role was instead conferred on the Equal Opportunities Commission (EOC: see below) and other non-governmental partners (Grimshaw, 2007: 140).

The Government Equalities Office (GEO), established in 2007 within the Department for Communities and Local Government (Cabinet Office) in order to head the discrimination review which led to the drafting and presentation of the Equality Bill, kept the equality agenda alive under successive ministers and governments, and later became a site of Coalition cross-party (Conservative and Liberal Democrat) action on gender equality. Harman later noted the enthusiasm and sense of purpose which animated the GEO in the run-up to the 2009 Bill, but complained that during the period when the Equality Act 2010 was prepared, the GEO “was still seen by other government departments as marginal and inferior” (Harman, 2017: 291), although its new location gave it higher prestige than its previous incarnation as a floating and dependent office (Squires, 2007).

Subsequently under the Coalition government resources were cut further: staffing levels, which had increased from 63 (Lovenduski, 2007: 151) to 100, dropped to 50 (Swinson, 2018b: 3), but in the run-up to gender pay gap reporting rose to 84. When the work of the GEO was reviewed in October 2017 by the parliamentary Women and Equalities Committee (WEC), the cross-cutting nature of the office’s activity and responsibility and frequent changes of ministerial location (or ‘churn’) was posed as a problem, blurring lines of accountability, and causing disruptive and costly discontinuity of policy (WEC, 2017). ‘Double-hatting’ whereby the equalities role is occupied by a minister with responsibility for a larger department confirms its subordinate status: Swinson later stated that her work for women and equalities had to be fitted into around a fifth of her ministerial time (Swinson, 2018b: 2). In comparison to the earlier period of Coalition government when responsibility was shared across government departments by two high-profile ministers, the two ministers then responsible for women (Anne Milton MP) and equalities (Nick Gibb MP) held relatively junior portfolios in the Education department, which in turn sits inside the large Business, Education, Innovation and Skills department. From April 2018, organizational responsibility for GEO became even more complex. Staff remained inside the Education department, whilst its budget was held by

the Home Office, and the new Minister for Women and Equalities Penny Mordaunt MP combined this job with her cabinet role as Secretary of State for International Development. The WEC in its final report recommended that the GEO should be permanently located in the Cabinet Office (WEC, 2018), but government did not act on the recommendation.

The largely subordinate nature of the GEO made it contingent on the leadership of individual ministers, creating opportunities for critical actors but also meaning that such actors lack political resources in relation to the core executive and particularly the Treasury and business department. As a result, the capacity to mainstream equalities is very limited (WEC, 2018). Although the shifting location of government departments for women and equalities is often seen as hampering effective action, there are grounds for suggesting that during the period of Coalition government multiple locations of female activism allowed gender equality policy to maintain and gain cross-party support. During this period, cross-party activism was built around care, support for working parents, and pay equity. However, this may not always be the case.

The GEO nevertheless commands political resources through its wider networks, particularly employer networks, and its research and evidence-building capacity. Initially with Conservative MP Nicky Morgan as Minister for Women and Equalities (and Secretary of State for Education), GEO led policy on gender pay gap reporting once the initial announcement had been made by David Cameron. It organized the consultation, analysed the responses, and prepared the initial proposals and draft regulations. During the preparatory period it held a series of round tables bringing together business leaders and academic experts. It worked closely with the Advisory, Conciliation and Arbitration Service (ACAS) and leading law firms to draft the regulations, which was a long process with complex decisions about how to define pay and bonuses for the purposes of reporting. Once the regulations had been published, it published guidance jointly with ACAS (ACAS/GEO, 2017), and held a series of meetings and workshops with employers by sector of activity, mobilizing the GEO's own employer networks and working closely with sectoral associations. Morgan in launching the regulations built on relationships with large companies in the business services sector, notably

Deloitte (see below). This wider constellation of business actors and law firms formed an important resource network for employers as they prepared for the first round of reporting and helped to boost regulatory compliance.

Within parliament, the committee structure has provided a way for feminist policy actors to strengthen the evidence base for policy and raise the profile of gender equality objectives. Since 2015 the Women and Equalities Committee, established in 2015 and chaired by Maria Miller MP, who as noted above had served as minister for women and equalities at DCMS, has been a forceful policy advocate, leading on initiatives on gender equality, gathering evidence and formulating recommendations, and calling the government to account on several occasions for perceived failure to act on recommendations. In line with the Good Parliament Report's recommendation (Childs, 2016), the WEC became a permanent select committee in July 2017.

The WEC's 2016 report on the gender pay gap recommended a wide-ranging approach, and saw gender pay gap reporting, although a "central plank" of government equalities strategy, as only a first step towards reducing pay gaps. Evidence received by the committee suggested that "reporting regulations are largely welcome and can play a part in concentrating organisations' minds on where pay gaps exist and how they might be reduced", but highlighted several limitations (WEC, 2016).

Alternatives such as full pay audits or the previous practice of gender pay questionnaires were held to be more comprehensive without necessarily requiring excessive administrative costs of businesses. Three main recommendations for strengthening the 2016 regulations were identified: reporting by age and part-time/full-time status as well as gender; requiring action plans as well as data; and lowering the threshold for reporting to 150 employees or more. Subsequently Miller voiced strong criticism of the way the 2016 gender pay gap regulations had been implemented, arguing that the Equality and Human Rights Commission (EHRC) was too weak and under-resourced to use its powers effectively to achieve full compliance, and calling for the reporting threshold to be lowered. In the case of gender pay gap reporting as more widely, she argued, government failed to take equality seriously: "Every single report that my committee issues, [it] feels to me, is asking the



question as to whether or not the Equality Act has the teeth it needs” (Gordon and Ehrenberg-Shannon, 2018).

Other parliamentary committees provided a platform for debate and recommendations on gender pay gap reporting. Morgan, as chair of the influential Treasury select committee, publicly commented on gender pay gap reports submitted by finance sector companies and announced in 2017 that the committee would analyse gender pay gaps in the sector. The committee’s report (published in June 2018) highlighted the need to investigate how the salary-fixing system, heavily reliant on individual bonuses, exacerbates gender disparities: with a 43.4% gap between male and female bonuses (Treasury Select Committee, 2018). The Business, Energy and Industrial Strategy committee, chaired by Labour MP Rachel Reeves, published a comprehensive review of gender pay gap reporting in July 2018, criticizing some employers for inadequate compliance and lack of action to address the pay gaps identified, and citing a list of measures for the attention of employers (BEIS Committee, 2018). The BEIS committee set out an ambitious strategy for improving effective implementation of the regulations, including more detailed information on gender breakdown of the workforce and including information on part-time and full-time workers, and urged government to lower the reporting threshold to 50 employees.

Individual MPs also used parliamentary resources to push for further change. Swinson, working with large professional services and finance companies, presented a private member’s bill on 3 October 2018 requiring companies to publish details of their parental leave policies; the government responded swiftly by launching a consultation on requirements to publish leave arrangements, as part of a set of proposals on industrial strategy (Swinson, 2018a). On 2 April Labour MP Stella Creasy launched an online campaign called #PayMeToo, backed by female MPs from the Conservative, Liberal Democrat, Plaid Cymru and SNP parties, to encourage women to urge their employers to tackle gender pay gaps (Topping, 2018). These parliamentary initiatives suggest that cross-party feminist activism will continue to put pressure on government to tighten and broaden pay reporting requirements.

## **Strengthening the equality machinery? The monitoring and enforcement role of the Equalities and Human Rights Commission**

The existence of a strong monitoring and enforcement agency is seen as essential for an effective policy model in the case of equality and human rights (FRA, 2010) and specifically for pay equity (Chicha, 2006). The UK's equality machinery has traditionally been comparatively weak and ineffective, but after 1997 the creation of new agencies in the context of the fourth generation of equality legislation helped to increase their policy ambit and capacity (Lovenduski, 2007).

The Equal Opportunities Commission (EOC) was established under the Sex Discrimination Act 1975 with the purpose of tackling sex discrimination and promoting gender equality. It had its roots in the mobilization for equal pay which took place in the 1970s, although its remit covered all aspects of gender equality. The EOC was a firm supporter of the approach outlined in the Hepple report, advocating comprehensive and positive duties on employers. In particular, it promoted equal pay audits. In 1999, it set up an Equal Pay Taskforce, chaired by Bob Mason, former human resources director at British Telecom. The taskforce's 2001 report 'Just Pay' noted that progress had been made in narrowing the aggregate gender pay gap but also that the UK had the widest gap in the EU. It outlined three main causes of pay inequality: sex discrimination (thought to account for up to half of the gap), occupational segregation, and unequal weight of family responsibilities. Anti-discrimination policy focused on the first of these causes, and the EOC 'strongly' recommended amendment of the Equal Pay Act 1970 to require employers to carry out pay audits in two stages, an initial review (EPR) leading as required to a full audit (EOC, 2001).

Instead of mandating or monitoring pay reviews, the Labour government funded the EOC to encourage employers to carry out EPRs, by providing detailed information and a toolkit on how to carry them out (EOC, 2002), by helping individual organizations with their reviews and full audits with the assistance of the Advisory, Conciliation and Arbitration Service (ACAS), and by

commissioning further research to monitor employer initiatives. It set an informal target of 50% of larger companies carrying out EPRs by 2005 (adjusted to 45% by 2008), and 25% of smaller companies. By the end of 2004 it was reported that progress had been made towards the targets in the initial period but subsequently stalled, with the number of larger companies completing reviews remaining at 34% (Brett and Milsome, 2004; Schäfer et al, 2005). Employer approaches varied considerably, with only a minority conducting full reviews, and even fewer putting in place action plans to address the gaps identified. The informal process based on information, support and evaluation revealed its limits. However, where actions had been implemented, it was found that there was a positive impact on the pay gap (Neathey et al, 2005).

In the context of the 2016 regulations, the role of the EHRC as enforcer of the regulations was regarded by many equality campaigners as problematic, due to the cuts in its budget which reduced capacity, at the same time as the EHRC was also taking up the baton on public sector equality duties, working across the UK where regulation differed across the devolved territories. The EHRC announced in early 2018 that it would write to non-compliant organizations in order to draw their attention to their duty to report, and if necessary follow up by notifying them of its intention to conduct a Section 20 investigation under the Equality Act 2006 for potential breach the regulations. Any employer not complying by 14 days after notification would be subject to prosecution and if found in breach of the regulations to a 'level 5' (unlimited) fine (EHRC, 2018a). The EHRC reported in September 2018 that it had started enforcement action on 9 April with 1,456 employers who had not reported by the deadline; by 14 May, fewer than 400 organizations remained on the non-compliance list, and all of them subsequently complied without the EHRC resorting to prosecution.

The EHRC further reported that, having achieved full technical compliance, it would begin investigations of cases where "statistically implausible" data had been submitted (EHRC, 2018b). In this it responded to accusations from feminist campaigners that the formal compliance rate hid many cases of inadequate reporting, that is, effective non-compliance. Experts estimated that

between 10% and 20% of reports contained inaccurate data (Sharp, 2018) and the Treasury committee criticized large firms in accountancy (also in law) for excluding senior partners from the gender pay figures. Criticism of the first round of pay reporting indicate that enforcement will need to tighten if the regulations are to have 'teeth'.

### **Non-state actors and the wider policy constellation**

Outside parliament, a range of non-state actors have been active in promoting gender equality in the UK. Harriet Harman in her list of "the key equality organizations" (Harman, ,2017: 289) singled out the Trades Union Congress (TUC) and the Fawcett Society, alongside the EHRC (see also Grimshaw, 2007). Gender pay gap reporting aligns with feminist organizations' campaigning: thus, for example, the Fawcett Society called the regulations a "game-changer" (Fawcett Society, 2018). However, Fawcett and others have called for further action to extend the scope of regulations by lowering the threshold, including data on other forms of inequality, and requiring more detailed gendered data.

Trade unions, too, were important actors in the voluntary process of pay reviews. However, Harman commented in 2018 that the TUC's "orthodoxy around the mantra of equal pay audits" limited unions' action to individual strategies and failed to address the transparency needed to effect wider societal change (Aitkenhead, 2018). Responding to the consultation on regulations, the TUC's equality officer Sally Brett remarked that "it was hard to keep the cynicism at bay" (Brett, 2015).

Instead, the TUC proposed ten basic points to improve the government's proposals, which remained close to the original Hepple review recommendations, including obligatory information-sharing with trade unions and other stakeholders, more detailed reporting data, and a supporting narrative. It also (along with leading equality campaign groups such as Working Families and the Fawcett Society) advocated lowering the threshold to companies with 150 employees or more. Nevertheless, Brett welcomed the regulations when they were published as "a step in the right direction" and expressed the hope that they would be accompanied by strict enforcement including financial penalties for

non-compliance (Brett, 2016). In its response to the 2018 BEIS committee report on the regulations, the TUC reiterated its demand for a lower threshold, more detailed data, and mandatory action plans. By opening up discussion and providing an informational base, albeit limited, the regulations also appear to have enabled union representatives in some companies to challenge employers about actions to tackle gender pay gaps, for example at Great Western Railways they asked management to clarify criteria for individual bonus payments (LRD, 2018).

It is among business circles that the biggest opinion shift has taken place. Employers' organizations typically advocate an individualistic, voluntarist mode of regulation allowing maximum employer discretion and eschewing state action, although private sector employers hold a range of views on the individualism-collectivism and voluntarism-(state) regulation axes (Özbilgin and Tatli, 2011). Professional bodies meanwhile occupy an intermediate position between these two, with public sector employers significantly more supportive of state regulation. However, such positions are also open to negotiation, which opens the possibility of change over time and strategic action by state actors, and/or by key business actors with access to networks of influence within the business community.

Broadly preferring a voluntarist approach, the main employers' peak association the Confederation of British Industry has nevertheless not just been drawn into networks of support for equality and diversity (as in its 2008 report *Talent not Tokenism*, produced jointly with the TUC and the EHRC: CBI, 2008) but assumed a role as policy advocate. In a 2016 report, the CBI outlined the business case for equality and diversity, claiming that organizations with diverse workforces and fair policies were also the most innovative (CBI, 2016a). It also reiterated the mode of change associated with the 'business case', that is, mutual learning and diffusion of good practice, presenting as in the 2008 report a set of company case studies. The CBI's director of employment Katja Hall giving evidence to the House of Commons at the Equality Bill's committee stage in June 2009 argued in line with the government's rejection of mandatory pay audits, saying that they would be the answer "only if the main cause of

the pay gap was discrimination between men and women doing the same job". She also referred to the cost of gender pay reporting as it was proposed in the Bill, reporting that many of their members felt the need to call in external consultations at rates typically in excess of £10,000 for medium-sized companies. Instead, she advocated a more flexible approach whereby the CBI would produce a set of indicators on such factors as "female levels of participation, participation of women at different levels within the organization, take-up of flexible working and possibly even child care", from which companies could pick and choose to suit their situation.<sup>5</sup>

The CBI's position on mandatory pay gap reporting did not change during the period between 2009 and 2016. Responding to the announcement that regulations would be introduced, Carolyn Fairbairn reminded government that it "should consult closely with business to ensure that this new legislation helps close the gender pay gap, rather than ending up as a box-ticking exercise" (CBI, 2016b), and warned that the reports should not be used to create a 'league table' of employers. However, the CBI's role as advocate of the business case was significant in helping over time to minimise opposition to the regulations within the wider business community.

By the time of the government's consultation in 2015, the failure of the *Think, Act, Report* initiative to encourage pay reviews and audits made it difficult for the CBI to argue that voluntarism could deliver. A report commissioned by the GEO to support the consultation in 2015 indicated that only around a quarter of employers carried out pay audits, although 41% used employee data in some way to look at pay gaps (IFF, 2015); moreover, the sample included only organizations which had signed up to *Think, Act, Report*. The proportion of employers engaged in pay reviews had actually fallen since the EHRC's high-profile campaign, a decade previously.

On the other hand, the breadth of responses testified to the advocacy work which had been done in the intervening period. The 2015 consultation received a high number of responses, including over 200 from businesses. 82% of employers and businesses responding agreed with the principle of gender pay gap reporting, and one third strongly agreed. 62% said they already had the necessary

data to report according to the government's proposals, and only 2% reported lack of data. Around two thirds said that implementation costs would be minimal (GEO, 2016).

Although the *Think, Act, Report* initiative had failed to provide the necessary impetus necessary to push employers into voluntarily disclosing pay information, it had nevertheless helped to create a broad network of employers with both internal and external influence. External influence, understood as the ability to act as high-profile advocates in the public sphere, was wielded by some of the very small number of transparency advocates, such as Deloitte which acted as a partner to GEO, sponsoring the launch event for the regulations in March 2016. Both external and internal influence, that is, the ability to support change through information and advocacy activities for its member organizations, was exerted by employer associations and professional bodies, such as the Engineering Employers' Federation, which represents manufacturing companies with male-dominated workforces. Deloitte was also one of ten large (mainly business services) employers which supported Swinson's initiative to increase information on company leave arrangements in 2018. In the UK's asymmetric policy environment where policy-makers give greater weight to business than to trade union concerns (Dickens, 2012) informal business advocacy played an important role in reshaping the opportunities for state regulation, as companies increasingly saw the benefits of reporting but realized that fear of peer competition constrained the momentum of 'first mover' initiatives (CBI, 2017).

## **Conclusion**

It has been argued in this article that the 2016 gender pay gap reporting regulations mark a significant break with the prevailing policy preference for voluntary action by employers. Since the regulations focus only on a narrow set of data which in turn have helped to confine public discussion to inequalities in pay at the top of organizations, and apply only to the largest organizations, they fall short of ushering in paradigmatic gender transformation, which could be defined as "fundamental

realignment of most aspects” of gender equality policy (Howlett and Cashore, 2014: 27).

Nevertheless, the regulations not only open a space for further action in this field, but also have the potential to change government’s approach to other forms of inequality such as those based on race and ethnicity. For this reason, the regulations go beyond incremental change on the same path. They involve a complex pattern of change within the policy regime of which they are part.

In several respects this change is the product of a multi-level incremental process which in turn has been enabled by institutional shifts, caused at least partly by changes in descriptive representation, and facilitated by a growing evidence base. Critical actors in the core executive played an important part in this process during the Labour years by setting in train institutional changes and the wider linkages which supported it, through network-building within and outside of parliament beyond the feminist movement. Institutions were strengthened to some extent during the period after 2010 but only partially: GEO’s resources were initially cut and later increased, but the issue of its dependence on changing ministerial configurations was not resolved; the EHRC saw its monitoring role enhanced but within a tighter budget. Institutionalization of the equality machinery is not embedded and remains a contingent process. This means that the role of critical actors is likely to remain of central importance.

The ability of critical actors to forge alliances within the state machinery, particularly within government, has long been considered a significant factor of feminist policy success (Mazur, 2002).

This study of the process of adoption of gender pay gap reporting regulations finds that growing numbers of women in the legislature and feminization of party structures strengthened the resources of critical actors by giving them access to cross-party feminist alliances within the legislature. This in turn increased pressure on government to respond to feminist policy demands.

Critical actors were also those best able to build alliances and networks outside of the state machinery, particularly with businesses and business influencers such as sectoral associations. Cross-



party female activism is likely to increase pressure for tighter enforcement and further regulatory intervention.

## Notes

1. The 2016 regulations cover Great Britain, that is, do not cover Northern Ireland. They apply to public sector organizations only in England, since separate equality duties apply to devolved government in Northern Ireland, Scotland and Wales.
2. This preference continues to be fundamental to government thinking. For example, Anne Milton MP, Minister for Women, giving evidence to the Women and Equalities Committee in October 2017 said on the subject of encouraging greater female representation in politics: *"I am always nervous of legislation. I am always nervous because you get compliance, you force compliance, but you do not necessarily get the culture shift"* (WEC, 2017a).
3. See Equality Bill, House of Commons, Committee stage, third sitting, 9 June 2009 (Bill stages, Equality Act 2010: available at <https://services.parliament.uk/bills/2008-09/equality/stages.html>). Lynne Featherstone (Liberal Democrats, member of committee) asked whether mandatory pay audits should not be introduced into the bill, stating that *"Last night I sat for two hours at the meeting of Unison and the Fawcett Society. The room was full, and every person who spoke said that the most important thing in the workplace was to have mandatory pay audits, yet they have been left out of the Bill."* The TUC's employment director, Sarah Veale, agreed: *"It would be regrettable if the Bill was not an opportunity to introduce mandatory pay audits."*
4. Equality Bill, House of Commons, second reading, 11 May 2009.
5. Equality Bill, House of Commons, Committee stage, third sitting, 9 June 2009.

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