

# **International Mechanisms to Revalue Women's Work**

**Research Exploring and Evaluating International Mechanisms that Aim to Revalue or Result in the Revaluation of Women's Work**

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## Acronyms

AfC: Agenda for Change  
ALEO: Arms Length External Organisation  
ASU: Australian Services Union  
CCRF: Canadian Charter of Rights and Freedoms  
CEDAW: Convention on the Elimination of All Forms of Discrimination of Against Women  
CEIDF: Ile-de-France Savings Bank  
CGT: Confédération Générale du Travail  
CHRA: Canadian Human Rights Act  
COSLA: Convention of Scottish Local Authorities  
DFEH: Department of Fair Employment and Housing  
DHBs: District Health Boards  
EHRC: Equality and Human Rights Commission  
ELC: Early Learning and Childcare  
EPC: Equal Pay Coalition  
EqIA: Equality Impact Assessment  
ET: Employment Tribunal  
EU: European Union  
EWMS: Equal Wage Management Standard  
FAPP: Federal Act on Public Procurement  
FWA: Fair Work Australia  
FWC: Fair Work Convention  
FWF: Fair Work First  
GPG: Gender Pay Gap  
HSE: Health and Safety Executive  
IEWN: Institute for the Equality between Women and Men  
ILO: International Labour Organisation  
ISESCR: International Covenant on Economic, Social and Cultural Rights  
JE: Job Evaluation  
JEGS: Job Evaluation and Grading Support  
JES: Job Evaluation Scheme/s  
KSF: Knowledge and Skills Framework  
LO: Landsorganisationen i Sverige (Swedish TU Confederation)  
LRD: Labour Research Department  
ME: Minority Ethnic  
NACWG: National Advisory Council for Women and Girls  
NCS: National Care Service  
NHS: National Health Service  
NJC: National Joint Council  
NJCJES: National Joint Council Job Evaluation Scheme  
NLW: National Living Wage  
NMW: National Minimum Wage  
ONA: Ontario Nurses' Association  
PNH: Participating Nursing Homes  
PSED: Public Sector Equality Duty  
rLW: Real Living Wage (sometimes known as Scottish Living Wage)  
SACS: Social and Community Service

SCHCDS: Social, Community, Home Care and Disability Services  
SEIU: Service Employees International Union  
SFC: Scottish Funding Council  
SG: Scottish Government  
SJC: Scottish Joint Council  
SPF: Federal Labour Service  
SS: Single Status  
STUC: Scottish Trade Union Congress  
TEHY: Finnish health care union

# Executive Summary

## Policy context and research aims

Scottish Government has indicated its commitment to equal pay and closing the gender pay gap and has taken steps to deal with low pay and achieve fairness at work through the Fair Work Convention and allied initiatives.

While employment law is a reserved matter for the Westminster Government, the Scottish Specific Duties Regulations provide some scope for the Scottish Government to take action in the public sector, particularly in relation to the gender pay gap.

Scottish Government commissioned research to identify practical mechanisms and approaches used internationally to redress the undervaluation of women's work, along with evaluation of their effectiveness and applicability in the Scottish context. Its focus is on traditionally low-paid jobs in social care, early learning and childcare, retail, catering and cleaning.

The research draws on an extensive desk-based research exercise complemented by interviews with key experts. The report includes 12 mini case studies of international mechanisms that aimed to improve the value attached to women's work, with a view to identifying transferable learning in the Scottish context.

## Key findings

There is considerable evidence that women in Scotland – as elsewhere – are at a disadvantage in the labour market and that their work is generally undervalued compared to men's.

Undervaluation is a key driver of the gender pay gap and may mean that women are paid less than men for the same level of efficiency within the same job, and/or that women are heavily over-represented in occupations that tend to be lower paid and undervalued compared to those that are male dominated.

The term 'collective bargaining' means the process by which recognised trade unions negotiate with employers over pay, working conditions and other issues affecting their members. Evidence shows that, by number, the wholesale, retail and health and social care sectors employing high proportions of women, have the lowest collective bargaining coverage.

Despite gender pay gap reporting, there are no sanctions for employers who fail to comply with equal pay legislation and remedies for women generally rely on lengthy and expensive individual legal action. Unless backed by a trade union, this makes pay justice for most women unattainable. The intervention of 'no win, no fee' lawyers in the public sector – especially in Scottish local government – has required some women to pay for litigation.

Moreover, the research suggests that across Europe existing equal pay legislation is not being fully utilised as a vital tool to help women achieve equal pay for work of equal value and close the gender pay gap, whether through collective bargaining, legal action, or the design of gender-neutral Job Evaluation Schemes.

Use of Job Evaluation based on equal value principles is key to the revaluation of women's work across all areas, but particularly relevant in the private sector where job evaluation schemes have not generally been designed to comply with equal pay legislation.

Across Europe, including in Scotland, there is evidence that lower government expenditure on public sector pay under austerity negatively impacted the gender pay gap, highlighting how public sector pay policies affect the valuation of women's work. Privatisation and the contracting out of public services have had adverse outcomes for women, who form the majority of the workforce in public services. Privatisation has removed women from collective bargaining coverage and the ability to use equal pay legislation to address pay inequality.

Evidence indicates that women's position in the labour market has been weakened by Covid-19 and that many mothers who were working at the start of the pandemic are now unemployed or working reduced hours.

## **Key recommendations**

The following paragraphs provide a summary of the key recommendations based on the evidence review undertaken, case studies and interviews with key stakeholders. Detailed recommendations are available in the main body of the report.

### **Collective Bargaining**

- Unionisation and collective bargaining are key tools in closing the gender pay gap.
- Systematic collection of data on pay and grading, hours and conditions of work by gender, but also enabling intersectional analysis, could be made mandatory for private and public employers in any future reform of equality legislation.
- There is scope for the extension of sectoral collective bargaining to social care and/or for a separate bargaining group for health and social care workers, in line with the recommendations of the Feeley Report.
- A National Care Service could also provide for the alignment of the health and social care workforces, allowing for the pay and grading of social care workers within either the Agenda for Change or Scottish Joint Council frameworks.

### **Job Evaluation**

- Scottish Government could provide training and support for private sector employers to develop equal value proofed job evaluation. The benchmarking Fair Work Employer Support Tool could include job evaluation.



- There is potential for public sector job evaluation schemes to be adapted to apply to public facing jobs in the private sector.
- Scottish Government could issue guidance to all public sector employers on the need to update and maintain job evaluation schemes and ensure that new and changed jobs are evaluated and correctly graded to achieve equal pay for work of equal value. This is particularly the case in the light of Covid-19, which has demonstrated that the knowledge and responsibilities of certain groups of women workers are not reflected in their grading and pay.
- Evidence suggests that adequate funding should be made available to establish and maintain existing public sector pay and grading structures like Single Status and Agenda for Change that are designed to deliver equal pay for work of equal value.

### **Privatisation and Procurement**

- Privatisation and contracting out of public services are shown to have a negative impact on the valuation of women's work. Scottish Government should consider reviewing its approach to the privatization of services.
- Scottish Government could bring forward Fair Work Convention proposals that minimum contract standards should be developed for publicly funded social care services, including abandoning zero hours contracts.
- Procurement regulations could have a greater focus on actions to reduce the gender pay gap, along with payment of the real living wage as the minimum rate of pay for any job.
- Scottish Government could consider adoption of a free online self-analysis tool for contractors to provide evidence of compliance with equal pay legislation as part of wider compliance in companies with public contracts.

### **Gender Pay Gap Reporting**

- Scottish Government could strengthen gender pay gap reporting by revising the Scottish Specific Duties Regulations 2012. It could consider requiring public bodies to publish gender pay gap data on contracted-out workforces, as well as retention rates for those returning from maternity leave. It could develop some form of Equal Pay Certification, drawing on Iceland's example, to strengthen compliance.
- In a number of international examples, gender pay gap reports or action plans require the involvement of trade union or employee representatives.
- As in California and Iceland, pay gap reporting measures could be extended to race and ethnicity and there should be discussion as to whether and how there could be further extension to cover other protected characteristics, as well as reporting on pay gaps between workers on standard and non-standard contracts, as introduced in Japan.

### **Expertise, Education and Training**

- Canada and New Zealand have appointed Pay Equity Commissioners or Government Negotiators to lead negotiations with key stakeholders. These

are part of a bargaining framework for employers, workers and unions to negotiate equal pay in good faith and encourage the use of mediation and dispute resolution services, with legal action as a last resort. Scottish Government could consider the establishment of an Equal Pay Champion to encourage, monitor and advise on action to achieve equal pay across the economy and advise the Fair Work Ministerial Working Group and Civil Service departments.

- Scottish Government could establish an ongoing programme of training and support for public and private sector HR professionals and key decision makers with a view to widening awareness of equal pay legislation and developing expertise in the use of job evaluation and other mechanisms to achieve equal pay. This could be a function of a Scottish Centre for Equal Pay.
- Trade union expertise is important to address equal pay. Resources could be allocated to launch a long-term programme of training in equal pay and job evaluation for trade union representatives and paid officials.

## The Law

- Scottish Government could continue to lobby UK Government to develop more effective equal pay legislation based on collective, negotiated solutions as well as group litigation to replace the current individual complaints-based regime and could develop such an approach for future devolution.
- New law should:
  - include a duty on employers to review their compensation practices, identify gender based inequalities, and take steps to eliminate them.
  - require 'levelling up' of women's pay to that of men doing work of equal value and enshrine the right to proxy comparators, allowing women in predominantly female workplaces or sectors to cite male comparators not in the same workplace or employment in order to achieve equal pay.
- Devolution of Employment Tribunals could increase scope for improved equal pay law.
- Equal pay measures should cover workers on non-standard contracts, including so-called 'self-employed workers'.

# Introduction

This report is based on research commissioned by the Scottish Government (SG) to improve understanding of international mechanisms that aim to revalue, or result in the revaluation of, women's work. Its focus is on historically low-paid jobs in social care, early learning and childcare (ELC), retail, catering and cleaning. The research is part of the SG's work to promote gender equality and reduce the Gender Pay Gap (GPG) through the Gender Pay Gap Action Plan<sup>1</sup>. It aims to identify practical mechanisms and approaches utilised internationally to redress the undervaluation of women's work, along with evaluation of their effectiveness and applicability in the Scottish context. Two distinct approaches, reflected in international examples, are identified in this report – one gender neutral, enshrined in job evaluation in particular organisations or sectors, and the second addressing gender segregation, and the difficulties of comparing the value of jobs in male- or female-dominated sectors<sup>2</sup>.

The different meanings of 'equal pay' and 'pay equity' should also be acknowledged. Equal Pay refers to equal pay for equal work, addressing circumstances in which men and women do the same kind of work in an organisation, and is enshrined in equal pay legislation. Pay Equity is a wider term that includes equal pay for work of equal value and compares jobs usually done by women with different jobs usually done by men on the basis of levels of skill, effort and responsibility across organisations (often called proxy comparators). While the report generally uses the term 'equal pay' (except in the cases of Canada and New Zealand where pay equity is explicit in legislation), the aspiration is for pay equity.

The research aims to:

- Examine the issues of women's pay and conditions and mechanisms for how pay is set and changes over time in four sectors/occupations in Scotland:
  1. So-called 'elementary' occupations, such as cleaning, kitchen and catering
  2. Adult health and social care
  3. Early learning and childcare
  4. Sales and customer service (retail)
- Explore and describe international evidence of mechanisms that have sought explicitly or implicitly, to revalue women's work
- Evaluate how far they are applicable to the Scottish context and to the four key sectors above, in which women are over-represented in Scotland

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<sup>1</sup> Scottish Government (2019) A Fairer Scotland for Women: A Gender Pay Gap Action Plan. Fair Work, Employability and Skills Directorate. Available at: <https://www.gov.scot/publications/fairer-scotland-women-gender-pay-gap-action-plan/> Accessed 30.6.21.

<sup>2</sup> The Bilson Report (2004) Pay Equity: A New Approach to a Fundamental Right. Government of Canada: Canada.

# Research Methods

The research is based firstly on desk research of existing largely grey and digital literature designed to identify the issues of women's pay and conditions and pay determination mechanisms in the public, private and third sectors. The literature review takes an intersectional approach, highlighting the particular issues faced by different groups of women, such as older women, minority ethnic (ME) and disabled women. It also considers the impact of Covid-19 on women's work ([Appendix 2: Literature Review](#)).

Secondly, the research is informed by seven interviews with key actors with expertise in equal pay at Scottish and wider international level. The semi-structured interviews were based on informed consent and recorded and transcribed.

Thirdly, the research produced 12 mini-case studies of mechanisms at international level that explicitly or implicitly revalued women's work. In addition to the interviews with key actors outlined above, each of these case studies involved at least one interview with a key actor with appropriate expertise, plus documentary evidence, including government reviews of equal pay legislation, legislation itself, government and trade union guidance and collective bargaining agreements. Interviews were based on informed consent and recorded and transcribed. The case studies, presented in [Appendix 1](#), outline:

1. The context and objectives of the mechanism
2. Implementation
3. Outcomes in terms of any uplift in women's pay or terms and conditions
4. Any barriers to effective implementation
5. Potential to ensure long-term equal value pay outcomes in the Scottish context.

A dedicated meeting of the Project Steering Group for this research, which included key equality stakeholders, trade unions and civil society representatives, discussed and evaluated the extent to which the mechanisms identified might be replicable in the Scottish context.

Key criteria on which the evaluation was based included:

- Devolved policy-making powers of the Scottish Government
- The Scottish legal system
- Institutional bodies, sectoral relationships and the role of the FWC
- The specific characteristics of health and social care in Scotland
- Intersectional impact – outcomes for different groups of women
- The impact of Covid-19
- The experience of measures to date to secure equal pay for work of equal value in Scotland

# Findings

## Women's Position in the Labour Market in Scotland

There is considerable evidence that women in Scotland – as elsewhere – are at a disadvantage in the labour market and that their work is generally undervalued compared to men's. (The [Literature Review in Appendix 2](#) provides a more in-depth summary of women in the Scottish labour market). Undervaluation occurs when women receive less acknowledgement, lower pay and poorer conditions for their skills, knowledge and experience than men in comparable jobs or jobs evaluated as having equal value. Undervaluation is a key driver of the GPG and may mean that women are paid less than men for the same level of efficiency within the same job, and/or that women are heavily over-represented in occupations that tend to be lower paid and undervalued compared to those that are male dominated. Covid-19 has raised important questions about the valuation of what have historically been considered 'low-skilled' or 'unskilled' work or 'elementary' occupations, including in health and social care, cleaning, security, food production and distribution and retail.

Well over a third (43%) of women in Scotland work in sectors in which women are disproportionately represented. Of this proportion, 17% are in personal service occupations, 15% in administrative and secretarial jobs, and 11% in sales and customer services<sup>3</sup>. Specific occupations within those sectors with an over-representation of women include social care; leisure and other services; sales and customer service; and so-called 'elementary' occupations such as cleaners, or kitchen and catering assistants. Almost half (46%) of women workers in Scotland are concentrated in the public administration and defence, education and health and social work sectors<sup>4</sup>.

While the Scottish GPG has narrowed, it remained at 10.9% in 2020 for all employees – a reduction from 14.4% in 2019. For full-time employees it was 3.0% in 2020 – a reduction from 7.2% in 2019. The figure for full-time workers was 4.9% in the public sector in 2020 and 15.6% in the private sector. For part-time workers the overall GPG was -10.3%, 10.3% in the public sector and -0.6% in the private sector<sup>5</sup>. Close the Gap report that while the GPG varies between different ME groups, migrant women face wider GPGs than white women<sup>6</sup>. In 2018, average hourly pay in the UK was £9.93 for disabled women, compared to £13.20 for non-disabled men<sup>7</sup>. While there is no firm pay data for LGBTQI women, the high level of discrimination faced suggests some impact on earnings.<sup>8</sup> Over one third (38.5%) of

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<sup>3</sup> Scottish Government (2019) Scotland's Labour Market: People, Places and Regions – Annual Population Survey 2019. Available at: <https://www.gov.scot/publications/scotlands-labour-market-people-places-regions-statistics-annual-population-survey-2019/>. Accessed 4.3.21.

<sup>4</sup> Ibid.

<sup>5</sup> ONS (2020) Annual Survey of Hours and Earnings 2020.

<sup>6</sup> Close the Gap (2019) Still Not Visible. Available at: [https://www.closesthegap.org.uk/content/resources/1557499847\\_Still-Not-Visible.pdf](https://www.closesthegap.org.uk/content/resources/1557499847_Still-Not-Visible.pdf)

<sup>7</sup> [Disability pay gaps in the UK - Office for National Statistics \(ons.gov.uk\)](#)

<sup>8</sup> Stonewall (2017) UK survey with YouGov of LGBT workers in Britain. Available at: [https://www.stonewallscotland.org.uk/system/files/lgbt\\_in\\_scotland\\_work\\_report.pdf](https://www.stonewallscotland.org.uk/system/files/lgbt_in_scotland_work_report.pdf)

women workers in Scotland work in low-paid occupations, compared with 20.6% of men<sup>9</sup>.

Evidence indicates that women's position in the labour market has been weakened by Covid-19 and that many mothers who were working at the start of the pandemic are now unemployed or working reduced hours<sup>10</sup>. Initial research suggests disabled mothers are three times more likely to have lost jobs as a result of the pandemic<sup>11</sup>. Close the Gap report the disproportionate disruption faced by women in Scotland, who are more likely to work in a sector that has been shut down, but also that these sectors have an over-representation of ME women, migrant women and young women<sup>12</sup>. At the same time UK research found that ME women were more likely to have to work on the frontline and work more hours than usual during Covid-19 than white women<sup>13</sup>.

The Scottish Women's Budget Group has called for a gender equal economy in Scotland to address both the Covid-19 recovery and climate emergency:

'Core to tackling climate destruction is valuing life-sustaining livelihoods, including the care economy. This means a new deal for care workers whether in social care, unpaid care, childcare, teaching, or health care. These are low carbon jobs that have positive multiplier effects when accompanied with sufficient investment. They are also roles that are disproportionately carried out by women, showing that a green and just stimulus centred on care can be a strong lever for tackling inequality.'<sup>14</sup>

The 'caring economy' prioritises the environment and care, investing in the care workforce. It would transform both paid and unpaid work, redistributing caring responsibilities between women and men, and between the family and the State. Gender mainstreaming would be central to policy, embedding Equality Impact Assessments (EqIAs) in policy design and budgeting processes, alongside a

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<sup>9</sup> Scottish Government (2019) A Fairer Scotland for Women: A Gender Pay Gap Action Plan. Fair Work, Employability and Skills Directorate. Available at: <https://www.gov.scot/publications/fairer-scotland-women-gender-pay-gap-action-plan/> Accessed 30.6.21.

<sup>10</sup> HR Review (2021) Working Mothers Now Working Fewer Hours or Stopped Working Altogether. 25 May 2021. Available at: <https://www.hrreview.co.uk/hr-news/working-mothers-now-doing-fewer-hours-or-stopped-working-research-suggests/135598?fbclid=IwAR0loCw7fCfWbjQJ055noziMrGKEB-Vm9843iAQRBLq-XY-SLkaeCTxQSds>. Accessed 30.6.21.

<sup>11</sup> The Fawcett Society, the UK Women's Budget Group, Engender and Close the Gap (Scotland), Women Equality Network Wales, and Northern Ireland Women's Budget Group (NIWBG) (2021) Disabled mothers three times more likely to have lost work during the pandemic 17 March 2021 Women's Budget Group. Available at: <https://wbg.org.uk/media/disabled-mothers-three-times-more-likely-to-have-lost-work-during-the-pandemic/>. Accessed 30.6.21.

<sup>12</sup> Close the Gap (2020) Disproportionate Disruption: The Impact of COVID-19 on Women's Labour Market Equality. Available at: <https://www.closesthegap.org.uk/content/resources/Disproportionate-Disruption---The-impact-of-COVID-19-on-womens-labour-market-equality.pdf>. Accessed 30.6.21.

<sup>13</sup> Women's Budget Group (2020) BAME Women and Covid19: June 2020. Available at: <https://wbg.org.uk/analysis/bame-women-and-covid-19/>. Accessed 30.6.21.

<sup>14</sup> Scottish Women's Budget Group (2021) Challenges For 2021 and Beyond:3. <https://www.swbg.org.uk/content/publications/SWBG-Challenges-for-2021-and-Beyond.pdf>

comprehensive programme of capacity building on gender analysis and requirements under the Public Sector Equality Duty<sup>15</sup>.

## Collective Bargaining

The term 'collective bargaining' means the process by which recognised trade unions negotiate with employers over pay, working conditions and other issues affecting their members. The Labour Research Department's (LRD) survey of Scottish collective bargaining shows that, by number, the wholesale, retail and health and social care sectors employing high proportions of women, have the lowest collective bargaining coverage<sup>16</sup>.

In half of the collective agreements identified by LRD, negotiations cover Scotland, rather than the whole of the UK, and the majority of bargaining in Scotland takes place at national or industry-level. Three-quarters of workers covered by collective bargaining come under large sectoral agreements including the local government Scottish Joint Council (SJC) agreement, which also includes local government staff working through Health and Social Care Partnerships and in arms-length external organisations delivering health care; NHS Scotland Agenda for Change; the Scottish Agricultural Wages Board and the Construction Industry Joint Council. These figures highlight potential for the SG to promote the extension of collective bargaining to the private sector and smaller employers, and to influence women's pay and conditions either directly or indirectly.

Existing literature confirms the generally positive impact of collective bargaining and unionisation on the GPG, including where there is gender segregation. Research has shown that unions generally lower within-establishment gender gaps in pay, but also the economy-wide GPG<sup>17</sup>. In the public sector across the EU, the positive effect of collective agreements on the GPG between 2008 and 2018 was confirmed in public administration and education where the average GPG was lower in organisations with national or industry-level pay agreements, compared to those with no agreement<sup>18</sup>. However, in health and social work across the EU, the relationship is not as straightforward, and the collective agreement does not necessarily translate into a lower GPG, possibly because privatisation has removed workers from public sector employment and collective bargaining<sup>19</sup>. While the lower level of privatisation in Scotland and SG commitment to paying the rLW may mean Scotland is an exception, the Australian case study ([Appendix 1: Case Study 1](#)) suggests that decentralised collective bargaining systems create barriers to achieving pay equality because they fragment the pay bargaining process.

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<sup>15</sup> Ibid.

<sup>16</sup> Labour Research Department (2021) *Scotland's Collective Bargaining 2021: A report for the STUC*. Scottish Trade Union Congress: Scotland.

<sup>17</sup> Hayter, S. (2015) Unions and collective bargaining in Berg, J. (ed.). *Labour markets, institutions and inequality* (Geneva, ILO); Elvira M. and Soporta, I. (2001) How Does Collective Bargaining Affect the Gender Pay Gap? *Work and Occupations*. 28(4):469-490  
<https://journals.sagepub.com/doi/10.1177/0730888401028004005>.

<sup>18</sup> EPSU (2021) *Closing the Gender Pay Gap in Public Services in the Context of Austerity*, January 2021. Available at: <https://www.epsu.org/article/closing-gender-pay-gap-public-services-context-austerity>  
Accessed 30.6.21.

<sup>19</sup> Ibid.

Research on the EU GPG highlighted that the average, unadjusted GPG in the public sector across the EU-28 between 2007 and 2018 increased during recession and has only just started to recover, although the overall average obscures variation between countries<sup>20</sup>. Austerity measures have differed in depth and nature between EU states and have had differential outcomes. Two measures of austerity that increase the GPG are increases in unemployment across economies and lower levels of government expenditure on public sector pay. The latter suggest that punitive public sector pay policies within the EU under austerity have impacted negatively on the GPG.

Close the Gap highlights fluctuation in the Scottish GPG during 2011 and 2012, when there was a rise in the combined mean pay gap from 16% to 18%. Close the Gap suggests that one explanation for this is the high number of public sector workers, the majority of whom are women, who have been affected by the public sector pay freeze, job losses and reductions in the number of posts. This highlights how economy-wide changes can affect the GPG.

A recent working paper for the International Labour Organisation (ILO)<sup>21</sup> on the role of trade unions in closing the GPG identified three measures relevant to achieving equal pay in the public sector, where women predominate in the workforce. These measures are: collective action on the under-evaluation of women's work, action to address internal pay differentiation through job evaluation and intervention in procurement. In line with the recommendations of the independent FWC, the SG, as part of its commitment to fair work, has adopted collective bargaining coverage as an indicator of progress in its National Performance Framework.

## **Mechanisms**

In terms of measures taken to narrow the GPG as a result of austerity measures, the UK Civil Service union, Prospect, has successfully combined collective bargaining with strategic litigation to achieve equal pay and to narrow the GPG in several parts of the English Civil Service ([Appendix 1: Case Study 12](#)). Prospect's success was achieved despite the negative impact of localised pay bargaining imposed by the Government in the early 1990s and pay restraint within the public sector since 2010, which led to pay stagnation and a subsequent increase in the GPG in four central government departments. The case highlights the impact of public sector pay freezes in trapping younger women on lower pay rates.

The landmark case of Cadman and Wilson against the Health and Safety Executive (HSE) in 2001 challenged length of service as an acceptable means of progression. Since Cadman and Wilson, Prospect has also taken cases in the Valuation Office, Veterinary Laboratory Agency, Prison Service and Intellectual Property Office, all with the support of male comparators. The union's most recent success was in the Meteorological Office. Here a pay freeze meant that rates remained at 2008 levels and by 2014 70% of people were still in the 'development zone', despite their

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<sup>20</sup> Ibid.

<sup>21</sup> Rubery, J. and Johnson, M. (2019) Closing the Gender Pay Gap: What Role for Trade Unions? International Labour Organisation. Available at: [https://www.ilo.org/wcmsp5/groups/public/---ed\\_dialogue/---actrav/documents/publication/wcms\\_684156.pdf](https://www.ilo.org/wcmsp5/groups/public/---ed_dialogue/---actrav/documents/publication/wcms_684156.pdf) Accessed 30.6.21.



experience, widening the GPG. The ad hoc use of recruitment and retention allowances had also distorted the pay system.

Alongside litigation, Prospect also took industrial action, lobbied MPs and produced an 'Equal Pay Manifesto'. Despite ongoing pay freezes in the public sector, the Met Office got agreement from the Treasury to settle individual cases and establish a new pay structure. Individual, retrospective equal pay settlements and a new pay agreement were negotiated in 2018. These resulted in a pay increase of up to 20% per annum for 70% of employees and narrowed the Gender Pay Gap from 10% to 2% in three years. However, the agreement did include reductions in allowances, weekend premia and performance related pay, which the employer insisted on to make the offer affordable and which caused some tensions between employees.

In Sweden, public sector union Kommunal aimed to address gender segregation by linking occupational wage levels to educational attainment ([Appendix 1: Case Study 9](#)). In 2016 a one-year collective agreement, with an increase of 2% for all blue-collar workers<sup>22</sup>, was agreed. There was an understanding that Kommunal would then demand an additional increase for assistant nurses, and that if the strategy was not successful during that year, the metal union, Metall, would join Kommunal in strike action giving the assistant nurses huge leverage. (At present such 'secondary' industrial action would be unlawful in the UK, although this could change in the future in Scotland). A three-year deal was signed early in 2016 for an additional wage increase for assistant nurses. Under the subsequent 2020–23 agreement, Kommunal broadened its focus and moved away from the link to that specific occupation.

In 2020 Kommunal reached a new, four-year, collective agreement with Sweden's regions and municipalities, including a one-off lump sum payment of SEK 5,500 (£463) for 400,000 workers in health and social care and schools on top of wage increases in line with the industry norm of 5.4% over 29 months. The extra increase was partly as a result of Covid-19. Representatives of Kommunal reported that the wider support of unions for these additional pay increases was important, particularly where they were seen by some as being at the expense of other workers.

In Finland, following a longstanding pay freeze, TEHY, the union covering health and social care professionals, achieved an Equality Allowance through national negotiations, for women in female-dominated sectors. This was in addition to other nationally negotiated increases ([Appendix 1: Case Study 4](#)). The Equality Allowance was designed to secure successive higher pay increases in female-dominated sectors and to close the GPG. TEHY predicted that a 1.8% salary increase in the health and social care sector, on top of what would be negotiated in future annual pay increases in male-dominated occupations, could narrow and potentially close the national GPG in Finland within ten years. However, Covid-19,

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<sup>22</sup> 'Blue collar' generally refers to manual workers who perform tasks such as cleaning, cooking, shelf-stacking, sales, construction and grounds maintenance work. The concept also generally embraces retail check-out, care and childcare work – although in those instances it arguably fails to acknowledge the emotional and intellectual labour involved.

disruption to national collective bargaining and financial constraints, meant that the Equality Allowance was rejected by the employers in 2020.

Following a decade-long campaign, TEHY has also secured the removal of health and social care professionals from the general collective agreements and established a separate social and health care collective agreement from September 2021. The 2020–22 agreement negotiated a 30-minute cut in weekly working time and a pay increase of 3.02% for all those covered by it. Women in the union argue that gender equality is not a priority for general collective agreements as the trade union representatives taking part in the negotiations come from male-dominated sectors or occupations. A separate agreement will allow for better consideration of the specific characteristics of health and social care work in terms of working hours and pay.

### **Applicability**

While there are questions about the long-term sustainability of equality allowances and one-off additional increases and their impact on job-evaluated pay and grading systems, the FWF Action Plan and the SG's influence over local government, the Civil Service, NHS and other public sector employers provides scope for negotiations between trade unions, employers and the SG, over the revaluation of women's work through collective bargaining. Measures such as those in Finland and Sweden would need the support of unions and employers and, as the lessons of the Scottish Single Status agreement have highlighted, would need to be properly funded, applied and communicated.

The LRD report suggests that with backing from the SG and supported by the FWF Action Plan, separate collective bargaining could be established in the Scottish social care sector along the lines of the Finnish model, expanding bargaining coverage by up to 100,000 workers. It also mentions extension of the local government SJC and Agenda for Change agreements to staff working for contractors and arms-length external organisations (ALEOs). These suggestions may be superseded by the establishment of a National Care Service. It is suggested that this might involve a separate collective agreement and bargaining, although there are important equal and low pay considerations to take into account. These are highlighted later in the report in the section on the proposed National Care Service.

## Recommendations

### The SG could:

- Support and encourage unionisation and collective bargaining in areas of low-paid women's work, reinforcing this goal in the Fair Work Action Plan. In particular, focusing on encouraging unionisation among migrant workers who have lower unionisation rates.
- Provide further support for sectoral and collective bargaining, including the extension of sectoral bargaining to social care, and the implementation of the sector-level body for social care workers, as proposed by the FWC's Fair Work in Scotland's Social Care Sector report<sup>23</sup>, subject to the considerations raised later in this report.
- Promote discussion between employers and unions of additional pay increases for bargaining groups with disproportionately high numbers of low-paid women workers, consistent with equal value, JES and equal pay law and in the light of Covid-19.
- Encourage systematic collection of data by public, private and third sector employers on pay and grading, hours and conditions of work by gender, race and ethnicity, migrant status, disability, maternity and age. Data collection could be made mandatory for both private and public employers in any future reform of UK equality legislation to facilitate effective collective bargaining and action to achieve equal pay.
- Consider establishing a Scottish Centre for Equal Pay and appointing an Equal Pay Champion. Both could play a key role in the promotion of equal pay and collective bargaining, alongside the Fair Work Action Plan and the Fair Work Ministerial Working Group.

## Job Evaluation (JE) – The Review and Maintenance of JE in the Public Sector

Job evaluation is a means of ensuring that different jobs with the same employer are ranked in order of relative worth, in a transparent manner, and paid accordingly. JES free of gender bias will establish relative worth and jobs of equal value, ensure that attributes of female-dominated jobs such as the need to respond to emotional demands from clients are included in the job analysis and that there is no gender bias in the assessment of the relative contribution of jobs done by men and women. However, job evaluation is not a means to ensure that other pay-related benefits

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<sup>23</sup> Fair Work Convention (2019) Fair Work in Scotland's Social Care Sector February 2019. Available at: <https://www.fairworkconvention.scot/our-report-on-fair-work-in-social-care/> Accessed 30.6.21.

such as bonuses, overtime and seasonal payments are free of gender bias. Generally, pay-related benefits are more likely to be paid to men than women and can contribute significantly to unequal pay and the GPG. They need to be subject to gender equality audits and paid on the same basis to both men and women.

Use of an analytical JES free of gender bias is a means of determining 'equal value' as defined by the Equality Act 2010. Job evaluation and equal value were linked as far back as the ILO Equal Remuneration Convention of 1951. Use of a JES which complies with equal pay law can also provide an employer with a defence to an equal pay claim. Section 65(6)(a)(b), of the Equality Act 2010 defines equal value as follows:

“A’s work is of equal value to B’s work if it is –

- a) neither like B’s work nor rated as equivalent to B’s work, but
- b) nevertheless equal to B’s work in terms of the demands made on A by reference to factors such as effort, skill and decision-making.”

Belgium has introduced legislation which requires gender-neutral JES within each collective agreement in the private sector ([Appendix 1: Case Study 2](#)).

## **Job Evaluation in Scotland and the UK**

The UK public sector leads the global field in development and use of JES designed to be free of gender bias and thus determine equal pay for work of equal – and relative – value. The NJCJES has been universally used in New Zealand as the basis for an economy-wide approach to gender-neutral job evaluation. The local government National Joint Council (NJC) and Scottish Joint Council (SJC) JES, the NHS JES which underpins Agenda for Change (AfC), the new Police Scotland scheme, the Job Evaluation and Grading Support (JEGS) scheme in the Civil Service and others in higher and further education are all examples of JES which were developed in order to deliver equal pay for work of equal value and transparent pay systems, compliant with the Equality Act 2010. The schemes were developed jointly by trade unions and employers, each using recognised JE experts.

The National Joint Council for Local Government Services (NJC) Single Status agreement was reached for the whole of UK local government, including Scotland in 1997. The agreement harmonised the conditions of work of manual and white collar workers and established a common UK pay spine on which employees would be placed following JE exercises within local authorities. A separate bargaining structure – the Scottish Joint Council (SJC), Single Status agreement and SJC JES – were introduced in Scotland in 1999. The agreement provides for common pay and conditions for manual workers and administrative, technical and professional staff, an SJCJES and a common pay spine for all SJC councils. The initial 1999 Single Status SJC JES differed in some significant aspects from the NJCJES. It has since been revised twice, lastly in 2015. A minority of local authorities chose to use other JES to underpin Single Status pay and grading structures. In Scotland,

Glasgow City Council developed its own JES and lost an appeal in the Court of Session<sup>24</sup> against UNISON and others, who challenged its compliance with the Equality Act 2010 and ability to deliver equal pay.

As in the rest of the UK, no additional funding above the central grant provided by the SG to councils was made available for implementation of Single Status or the creation of equal value proofed pay and grading structures. This resulted in significant financial pressure on local authorities and cuts in men's pay – largely through the removal of bonuses paid almost exclusively to men – to create 'equality'<sup>25</sup>. Most – 85% – of Scottish local government funding comes via central government in the form of grants. Only 15% is derived locally from Council Tax, although revenue support grant contains an element derived from the 'non-domestic' Business Rate<sup>26</sup>. While direct negotiations over pay and conditions take place between the Convention of Scottish Local Authorities (COSLA)<sup>27</sup> and the Trade Union Side of the SJC, the SG provides a significant proportion of local government funding and its Best Value legislation requires councils (and other public bodies) to achieve value for money and also comply with equality legislation. Underfunding of Single Status has been a major barrier to the successful and universal achievement of equal pay for work of equal value and has resulted in protracted litigation<sup>28</sup>. The Scottish Audit Commission reported that by the end of 2018/19 councils had spent £1.314 billion settling equal pay claims<sup>29</sup>. In comparison the equivalent Agenda for Change – the later parallel to Single Status in the NHS – was fully funded.

The 2006 NHS JES used in Scotland is the same as that used in the rest of the UK, although there is a separate and active JE subgroup of the NHS Scotland Terms and Conditions Committee, which ensures that the scheme reflects jobs in NHS Scotland is kept up to date and carries out training needs analysis. Implementation of AfC was fully funded by the SG.

The 2019 Police Scotland JES was designed to create a single, new pay and grading system across the ten legacy pay systems integrated into Police Scotland in 2013. It was based on the SJC-JES, but modified to incorporate jobs such as Police Community Support Officers and police custody workers. SG invested £13.4

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<sup>24</sup> Glasgow City Council v. UNISON and Ors. Court of Session 2019.

<sup>25</sup> Audit Scotland (2017) Equal Pay in Scottish Councils. Available at: [https://www.audit-scotland.gov.uk/uploads/docs/report/2020/ir\\_090620\\_equal\\_pay\\_in\\_councils.pdf](https://www.audit-scotland.gov.uk/uploads/docs/report/2020/ir_090620_equal_pay_in_councils.pdf) Accessed 9.8.21

<sup>26</sup> Scottish Government (2021) Scottish Public Finance Manual. Available at: <https://www.gov.scot/publications/scottish-public-finance-manual/local-government-finance/local-government-finance/>. Accessed 30.6.21.

<sup>27</sup> COSLA is a cross party organisation that works with councils to ensure they have the resources they need.

<sup>28</sup> UNISON Scotland (2009) Delivering Pay Equality in Scottish Local Government Submission to the Scottish Parliament on Single Status. Available at: <https://archive.scottish.parliament.uk/s3/committees/lgc/inquiries/EqualPay/UNISON.pdf>. Accessed 30.6.21

UNISON Scotland (2017) Delivering Equal Pay in Scottish Local Government: UNISON Scotland Submission to the Accounts Commission. UNISON: Glasgow.

<sup>29</sup> Accounts Commission (2020) Equal Pay in Councils – Impact Report. [https://www.audit-scotland.gov.uk/uploads/docs/report/2020/ir\\_090620\\_equal\\_pay\\_in\\_councils.pdf](https://www.audit-scotland.gov.uk/uploads/docs/report/2020/ir_090620_equal_pay_in_councils.pdf).

million in the new pay system and its implementation resulted in a 10% narrowing of the GPG within Police Scotland.

The JEGS (Job Evaluation and Grading Support) JES for grades below Senior posts in the Civil Service is a UK-wide scheme. However, it is suggested<sup>30</sup> that the latest updated version of the scheme is not being employed in the SG and allied agencies, which gives some grounds for concern.

The FEDRA JES in further education (launched in 2019) and the HERA scheme in higher education are also both jointly developed schemes designed to produce grading and pay structures that comply with the legal requirement for equal pay for work of equal value and transparency.

## **Mechanisms**

The 2018–20 collective bargaining initiative by the National Joint Council (NJC) for Local Government Services in England, Wales and Northern Ireland ([Appendix 1: Case Study 11](#)) aimed to increase the lowest rates of pay (and thereby pay throughout the pay structure), ‘equality proof’ the NJC Job Evaluation Scheme (NJCJES), restore ‘equal value’ differentials (gaps between pay points) that had been distorted by adoption of the rLW by local authorities and further narrow the GPG. In doing so, both the Employer and Trade Union sides of the NJC hoped to improve and ‘future proof’ the NJCJES and maintain equal pay for work of equal value within local government and associated employers. The negotiations were part of the routine NJC pay negotiation cycle and took place following years of below-inflation pay increases, a four-year pay freeze from 2009–12 and then a 1% pay ‘cap’. These had left local government and allied workers earning less than those in equivalent posts in the NHS, the Police and in the Civil Service, while NJC conditions like sick pay, holiday pay and car allowances had been cut in over 60% of councils.

The 2018–2020 NJC agreement established a universal bottom rate of pay of £9 per hour in 2018 – equal to the rLW of £9 for 2018–19 (now £9.50). It also re-structured the NJC pay spine, which contains common pay points to be used by constituent NJC councils and equalised gaps between pay points up to scale point 20 – halfway up the pay spine. This ensured that differentials reflecting equal pay for work of equal value can be maintained into the future and increments on the pay spine – at least up to the middle – are equal. The Employers Side would not agree to equalisation of gaps between pay points higher up the spine for cost reasons, but agreed that the issue should be addressed in future negotiations. As a result of the Agreement the NJC GPG narrowed from 5.7% to 2.3%.

## **Applicability**

Public sector job evaluation schemes have largely succeeded in establishing equal value-proofed rank order of jobs – if not equal pay. The JEGS within the Scottish Civil Service is under the direct remit of the SG, which also has indirect influence over local government, the NHS and other public sector bodies through funding and legislation such as Best Value in local government. JES outcomes have sometimes

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<sup>30</sup> Interview with Prospect official, April 2021.

been undermined by lack of funding, such as with Single Status, and perpetuation of gender bias in bonus payments, overtime, seasonal work payments and the loss of pay for women associated with term-time only working in school-based jobs.

While there are costs, the avoidance of litigation and associated costs have to be considered. The cost of not funding Single Status has been considerable in both Scotland and the rest of the UK. Long-term sustainability of pay systems also needs to be considered. Job evaluation schemes and pay and grading structures need regular reviews to ensure that changes to jobs are reflected in their grading, new jobs are evaluated properly and expanded jobs resulting from re-organisations are re-evaluated. Capacity and expertise are key to such reviews and are considered below.

While FWF recommends employer commitment to employee voice, including trade union recognition, use of zero hours contracts only where appropriate, positive action to address the GPG and payment of the rLW, it assumes compliance with equal pay law, but does not reference JE. International examples suggest that compliance with equal pay law needs to be specified and monitored.

The Covid-19 pandemic has led to a growing and widespread realisation of the importance of cleaning, catering, care, retail and early learning and childcare work. It has been recognised that predominantly women workers have been responsible for ensuring public health and safety, care of the elderly and those at high risk of infection and provision of care and childcare support for those – mostly women – required to work at home or long hours in vital front-line jobs in the NHS and care. Retail workers have continued to work throughout the pandemic, providing a vital public service, sometimes at considerable risk to themselves.

As the note by JE expert Sue Hastings points out ([Appendix 4](#)), attitudes to the value of specific jobs can change over time and according to new circumstances and shifting social values. This appears to be the case with the low-paid women's jobs that are the subject of this report. It might be appropriate to amend public sector JES to reflect the high levels of responsibility associated with the jobs above. This could be done by changing factor weightings for 'responsibility for people' factors, which have traditionally been lower than 'responsibility for financial and physical resources' factors – or weighted lower in private sector schemes like Hay. Changes could be justified by the purpose or mission of local authorities, the NHS and schools and associated private contractors.

## Recommendations

### The SG could:

- Issue guidance under the Scottish Specific Duties, to all public sector employers on the need to update and maintain JES and ensure that new and changed jobs are evaluated and correctly graded to ensure equal pay for work of equal value. The NJC Trade Union Side guide to local government pay and grading reviews – ‘Keeping Pay Equal’ could be useful in this work<sup>31</sup>.
- Extend the requirement for public authorities to produce Equal Pay Statements under the Scottish Specific Duties to include evidence of JE and pay and grading reviews.
- Ensure that adequate funding is made available to establish and maintain pay and grading structures which deliver equal pay for work of equal value in the public sector, like Single Status.

## Job Evaluation (JE) – Extension into the Private Sector

Although originating in the private sector, there is little use of job evaluation or transparent means of determining the value of private sector jobs such as cleaning, catering, childcare and retail. In addition, most existing private sector JES are not regarded as equal value compliant by equality experts. Lack of strong legislation or action to require and support the use of equal value-validated JE in the private sector has obvious implications for women in low-paid jobs in cleaning, catering, retail, early learning and childcare, and care occupations. Current equal value claims by shop floor women workers and cashiers in supermarkets, comparing themselves to male warehouse staff, exemplify the problems arising from the absence of JE based on equal value principles and their consolidation into pay structures.

Pay in the retail sector is determined by collective bargaining in larger retailers and the statutory National Living Wage (NLW). However, the most important impact on the GPG in retail are potentially the equal pay cases currently being pursued by female checkout workers against Asda – the biggest-ever equal pay claim in the private sector in the UK, with parallel claims in other supermarket chains. The checkout workers are claiming pay discrimination on the basis that the predominantly male warehouse workers are on wages of between 80p and £3 an hour more than them. Asda has recently lost its appeal to the Supreme Court, in which it sought to overturn a verdict by the Court of Appeal that the pay of 35,000 predominantly women store workers can be directly compared with that of mainly-male depot staff in its distribution operation. It is reported that Asda could be facing

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<sup>31</sup> GMB/ UNISON/ Unite (2017) Keeping Pay Equal – Trade Union Side Guide to Local Government Pay and Grading Reviews UNISON. Available at: <https://www.unison.org.uk/content/uploads/2017/05/24309.pdf>  
Accessed: 30.6.21.



backdated pay claims totalling £8 billion. Similar claims are currently being pursued by women workers at Tesco, Next, Sainsburys, Morrisons and Co-op.

Job comparisons by experts for the women applicants are based on factors such as knowledge, experience, responsibility for planning, maintaining stocks, looking after finance, health and safety, data handling, the need for concentration, the stress of the job, problem-solving, communication, physical skills, and working conditions. The Employment Tribunal found that the women's job descriptions did not accurately depict the demands placed upon them as shop floor workers. Asda had claimed that checkout workers were not required to have any particular knowledge about products in order to do their jobs – this claim was dismissed by the Employment Tribunal.

## **Mechanisms**

In Belgium the 2006 Equal Value Project was set up to develop analytical and gender-neutral JES. Belgian legislation calls for parties subject to private sector collective agreements to establish evaluation/classification schemes free of gender bias ([Appendix 1: Case Study 2](#)). Technical guidance and support from the federal Institute for Equality between Women and Men (IEWM) has been acknowledged as important to the narrowing of the GPG in Belgium<sup>32</sup>. The 2007 Gender Act focused on gender mainstreaming and discrimination in employment and was reinforced by a 2007/08 cross-industry agreement, which encouraged the social partners to develop and use gender-neutral job evaluation. In 2008, Collective Agreement Number 95 called for further measures to secure equal treatment in employment, followed by the 2012 law focussed on the GPG and requiring annual pay audits, biennial gender analysis of wage structures in companies with more than 50 employees and action plans where women are seen to be earning less than men and wage bills covering women workers are lower than those for men<sup>33</sup>.

## **Applicability**

JE expert Sue Hastings ([Appendix 4](#)) has examined the potential for public sector schemes to be adapted to apply to public-facing jobs in the private sector. She concludes that the AfC JES or NJCJES could possibly be adapted to the retail sector and banking or finance companies. She points out that Jersey and Guernsey have both adopted the NJCJES for a wider range of jobs than in local government and that New Zealand used the NJCJES in the late 1990s to develop a universal JE tool to apply across the economy while reforming its equal pay legislation. As in Belgium the SG could encourage private sector organisations to develop and apply gender-neutral job evaluation schemes. Job evaluation could possibly be employed

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<sup>32</sup> European Parliament (2012) Report to the EU Parliament with Recommendations to the Commission on Application of the Principle of Equal Pay for Male and Female Workers for Equal Work or Work of Equal Value 10/5/2012 (2011/2285(INI)) Edit Bauer Rapporteur Committee on Women's Rights and Gender Equality. Available at: [https://www.europarl.europa.eu/doceo/document/A-7-2012-0160\\_EN.html](https://www.europarl.europa.eu/doceo/document/A-7-2012-0160_EN.html) Accessed: 30.6.21.

<sup>33</sup> Khan, U; Broughton, A; Ledermaier, S; Rickard, C; Speckesser, S and Mallender, J (2013) European added value of applying the principle of Equal Pay for men and women for equal work or work of equal value European Added Value of EU measures on the application of the principle of Equal Pay ANNEX II. Available at: <https://www.employment-studies.co.uk/resource/european-added-value-applying-principle-equal-pay-men-and-women-equal-work-or-work-equal>. Accessed 30.6.21.

as a tool to increase the pay of catering, cleaning retail and childcare workers in the private sector. However, it should be recognised that there is currently little awareness amongst private sector employers of equal pay law and the need to pay equal pay for work of equal value and almost no use of job evaluation in areas of the private sector in which many low-paid women are employed – hence the current mass equal value claims in the retail sector.

European and UK research suggest that there is unlikely to be sufficient HR knowledge or capacity in the private sector to carry out JE and establish equal pay proofed pay and grading systems, without either support and guidance. Existing private sector JES are likely to undervalue attributes of women’s work and not produce equal pay for work of equal value. In addition where there is just one core occupation – e.g. cleaning – job evaluation might not be appropriate or the solution to low pay. It should also be clear that private contractors operating in public services – with the exception of the NHS where AfC pay and conditions are often followed – generally determine pay according to a ‘market’ that undervalues women’s work, the funding level of the contract and the profit to be extracted, with no reference to equal pay law. Implementation of JE will reflect conditions in the contract with the public body, contract compliance and the level of contract funding.

The SG could draw on the Belgian experience and legislation in any future reform of equal pay law – and in lobbying the Westminster Government – to ensure that there is a requirement for all employers to ensure that gender-neutral job evaluation is part of action plans to ensure equal pay for work of equal value. The Equality Act 2010 also needs amending to apply a stricter test of what comprises a gender-neutral JES.

Establishing equal pay for work of equal value is disruptive and there are costs to employers. It cannot generally be established on a cost-neutral basis. There may therefore be resistance to considering JE in the immediate post-pandemic era or in small companies where margins are tight and HR resources scant. Trade union membership and recognition are weak in many areas of the private sector in which women are concentrated, undermining the potential for a joint approach to JE.

## Recommendations

### The SG could:

- Once legal proceedings are finalised, prepare to support the large supermarkets and unions in implementing JE across the sector, as part of an economy-wide initiative to underpin equality-proofed pay structures in future. This could be reflected in the SG's Retail Strategy.
- Promote the appropriate use of JE in other areas of the private sector where women are concentrated in low-paid jobs, by launching a widespread equal value and job evaluation awareness exercise with employers and employers' organisations.
- Work with Close the Gap, the STUC, the EHRC, equal pay experts, academics and other appropriate bodies to offer detailed training and support to private sector employers. The benchmarking tool (Fair Work Employer Support Tool) produced by Fair Work First could include JE. The proposed Scottish Centre for Equal Pay and Equal Pay Champion could play a key role in this work.

## A Scottish Care Service – The Integration of Health and Social Care

In 2021, the SG gave its commitment to the creation of a National Care Service (NCS)<sup>34</sup>. The Independent Report on Social Care in Scotland ('the Feeley Report'), published in February 2021, made a number of detailed recommendations about the creation of a National Care Service<sup>35</sup>. These have major implications for the predominantly female social care workforce.

The Feeley Report recommends that an NCS be established by statute with standardisation and implementation of fair work requirements and practices agreed and set at a national level by the new NCS and delivered locally across the country. It recommends 'improvements in the conditions of employment, training and development of the workforce'. Even more significantly, it recommends 'a national job evaluation exercise for work in social care, to establish a fair and equitable assessment of terms and conditions for different roles. This should take account of skills, qualifications, responsibilities and contribution' (Recommendation 43)<sup>36</sup>. This could provide a major opportunity to re-evaluate social care work in Scotland. The Feeley Report also recommends 'Establishing a national forum comprised of workforce representation, employers, Integration Joint Boards and the SG to advise

<sup>34</sup> The Scotsman (2020) National Care Service Recommended Solution to Adult Social Care Crisis 3rd February 2021. Available at: <https://www.scotsman.com/health/coronavirus/national-care-service-recommended-solution-adult-social-care-crisis-3123041> Accessed 30.6.21.

<sup>35</sup> Scottish Government (2021) Independent Review of Adult Social Care in Scotland Chaired by Derek Feeley (Feeley Report). Available at: <https://www.gov.scot/groups/independent-review-of-adult-social-care/> Accessed 30.6.21.

<sup>36</sup> Ibid. Recommendation 43 Conclusions.

the National Care Service on workforce priorities and to take the lead in creating national sector level collective bargaining of terms and conditions. (Recommendation 46)<sup>37</sup>.

Sectoral collective bargaining and the establishment of the national forum could create important opportunities to tackle low pay amongst care workers, re-evaluate their jobs to reflect the current and post-pandemic care context and establish equal pay for work of equal value with workers elsewhere in the public sector. JE expert Sue Hastings ([Appendix 4](#)) highlights recent learning about the high value of care jobs from the Covid-19 pandemic and suggests that they should be re-evaluated within existing local government and/or Agenda for Change job evaluation schemes to reflect the higher level of responsibility and other factors evident within them. These JES themselves may be in need of review to reflect the pandemic context, public sector re-organisations and other changes to jobs.

The possibility of a separate collective agreement and job evaluation scheme, coupled with a potential link to SJC/Agenda for Change pay and conditions could represent an improvement for many care workers – especially in the private and voluntary sectors. However, some caution about the establishment of single-sector bargaining in care is required from an equal pay perspective and is suggested from a closer examination of the composition of the social care sector.

According to recent research by LRD for the STUC<sup>38</sup>, over 101,000 care workers are employed in the private and voluntary sectors in Scotland, across 2,913 separate organisations. Others are employed on SJC or Agenda for Change terms and conditions in Health and Social Care Partnerships, local authorities or the NHS, which currently employ 1,876 care workers. There is little evidence of trade union membership or collective bargaining in the fragmented private and voluntary sectors, with Scottish Care unable to give details of either to the Feeley review. A new national forum or subsequent collective bargaining unit would therefore embrace a large number of workers who are currently not unionised and from workplaces in which no collective bargaining currently occurs. The question of ‘voice’ and negotiating power of a group of predominantly women workers, spread thinly across a large number of workplaces, therefore needs to be given careful consideration. It is not known how representative Scottish Care is of the private and voluntary sector employers either.

Furthermore, it is suggested by Feeley that a new job evaluation scheme be devised for the proposed care sector bargaining unit. While a potential link to Agenda for Change has been mooted, this proposal contains some dangers as it could break the link with other jobs in the public sector, ignore the relative worth of jobs which would not fall within the scope of the care bargaining unit and establish worse grading and pay levels and conditions than apply to jobs of equal value elsewhere. Pressure to keep pay and conditions at a minimum could be applied by private and voluntary sector employers unless full funding of equal value with jobs

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<sup>37</sup> Ibid. Recommendation 46 Conclusions.

<sup>38</sup> Labour Research Department (2021), Scotland’s Collective Bargaining 2021: A Report for the STUC Scottish Trade Union Congress.

elsewhere in the public sector and improved pay and conditions underpins any agreement.

It is also noted that the Feeley review posited a cost of £15.5 million to pay the real Living Wage of £9.50 to care workers and a further £4 million if it were applied to 'auxiliary staff' in the care sector, while the trade unions are calling for a £15 rLW. It is likely that the pay of many care workers would fall above the rLW rate if properly evaluated to reflect pandemic and post-pandemic responsibilities, knowledge and skills by revised SJC or AfC job evaluation schemes. Indeed, any assumption that the rLW is the appropriate bottom rate of pay for care workers would need to be carefully scrutinised. The SG would therefore need to ensure that a commensurate and appropriate budget – likely to significantly exceed £20 million – was allocated to achieve equal pay for work of equal value for care workers.

Finally, there is a further danger in separating care and allied workers from those in local government or the NHS. Given the high proportion of women in the care sector – 83% – it could prove very difficult to identify male comparators within the new collective bargaining unit as a lever to achieve equal pay for work of equal value. Women's equal pay rights could be limited within a separate bargaining group and this needs very careful consideration.

## **Mechanisms**

The implementation of equal pay agreements sometimes has unintended consequences, as seen in the case of 'aged care' workers in New Zealand. In 2011/12, the New Zealand Human Rights Commission led an inquiry into the 'aged care' sector ([Appendix 1: Case Study 8](#)). It made a wide range of recommendations including that the Minister of Health should direct District Health Boards (DHBs) to develop a mechanism to achieve pay parity between health care assistants working in DHBs and carers working in home support and residential facilities within three years. A subsequent equal pay claim by a care and support worker, against her employer, Terranova Homes and Care Ltd argued that the caring work she did was undervalued because it was mainly performed by women. This was compared to work that was male-dominated but required a similar level of skill, effort and responsibilities. The claim was upheld and extended to 55,000 workers, who also worked in aged care, disability and home support, resulting in higher wages and a new classification structure.

This success of the Terranova case led to the 2017 Care and Support Worker (Pay Equity) Settlement Act, which was broadly welcomed by both workers and managers, but meant that smaller providers struggled to remain in business under the existing funding model. An unintended consequence was the reduction in working hours of care and support workers to reduce costs and increased workloads, with negative effects on the quality of care. The main legislation and

funding changes were not effectively communicated to workers and managers and there was a lack of support provided for these groups to deal with the changes<sup>39</sup>.

## Applicability

The creation of a National Care Service (NCS) will provide a major opportunity to re-assess the value of care in Scotland, to re-evaluate the work of those who provide care post Covid-19 and to build on the recommendations of the FWC Inquiry into Social Care. Several of the Feeley recommendations suggest a framework essential for ensuring pay equality for the social care workforce. It would provide an opportunity to move towards the integration of health and social care workforces that would contribute to more integrated health and social care provision. This could also give social care workers new opportunities for career progression. However, a key issue will be the linkage of pay rates to other public sector agreements and the starting rate of pay in the sector.

Funding and the involvement of the private sector are two issues that need to be addressed if an NCS is to be successful in addressing the re-evaluation of social care work. The experience of several countries shows the importance of adequately funded pay equality agreements, including that of Canada where inadequate resources put pressure on working hours and increased workloads. There may also be challenges for smaller providers particularly in rural areas where there may be only one or two providers. The creation of a National Forum to take a lead on national sector level collective bargaining would provide an institutional framework for the future negotiation of collective bargaining agreements.

The private sector currently provides a significant amount of social care in Scotland, whether paid for directly by clients or via local authority commissioning. The Feeley Report provides some suggestions about how the private sector could be managed within NCS. Key requirements for sector-wide pay equality are that any national job evaluation exercise is applied to the private sector and the results are made mandatory within it. The Feeley Report recommends that:

‘The care home sector must become an actively managed market with a revised and reformed National Care Home Contract in place..... A ‘new deal’ must form the basis for commissioning and procuring residential care, characterised by transparency, fair work, public good, and the re-investment of public money in the Scottish economy.’<sup>40</sup>

This would mean that the private sector would become part of a managed market. The Feeley Report also proposes that:

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<sup>39</sup> Douglas, J and Ravenswood, K (2019) The Value of Care: Understanding the Impact of the 2017 Pay Equity Settlement on the Residential Aged Care, Home and Community Care and Disability Support Sectors Auckland: New Zealand Work Research Institute.

<sup>40</sup> Scottish Government (2021) Independent Review of Adult Social Care in Scotland Chaired by Derek Feeley (Feeley Report), Recommendation 36 Conclusions. Available at: <https://www.gov.scot/groups/independent-review-of-adult-social-care/> Accessed 30.6.21.

'Commissioning decisions should encourage the development of mutually-supportive provider networks as described above, rather than inhibiting co-operation by encouraging fruitless competition'<sup>41</sup>.

## Recommendations

### The SG could:

- Eliminate competition from the commissioning process, in line with the Feeley Report and the Fair Work Action Plan, in order to support fair work and fair pay and move towards collaborative commissioning.
- Establish core requirements for ethical commissioning to support the standardisation of care and employment standards and implementation of equal pay, set at a national level by the new National Care Service and delivered locally across the country.
- Establish a national forum comprised of workforce and employer representatives, Integration Joint Boards and the SG, which could advise the National Care Service on workforce priorities and take the lead in creating national sector level collective bargaining of terms and conditions, as recommended by the Feeley Report.
- Ensure that changes to collective bargaining for predominantly female social care workers, a move towards sectoral bargaining and a customised JES for care are based on alignment with other public sector agreements and designed to deliver equal pay for work of equal value with jobs elsewhere in the public sector, with commensurate funding made available.

## Privatisation and Procurement

Privatisation of those public service jobs in which women predominate – particularly catering, cleaning, health and social care – has led to downward pressure on women's earnings and working conditions and exclusion of women from collective bargaining and GPG reporting regulations<sup>42</sup>. This has disguised the real GPG within public services. The achievement of equal pay for women in social care, early learning and childcare, cleaning and catering jobs will remain compromised while

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<sup>41</sup> Scottish Government (2021) Independent Review of Adult Social Care in Scotland Chaired by Derek Feeley (Feeley Report). Recommendation 40 Conclusions. Available at: <https://www.gov.scot/groups/independent-review-of-adult-social-care/> Accessed 30.6.21.

<sup>42</sup> Grimshaw, D (2013). Austerity, Privatization and Levelling Down: Public Sector Reforms in the United Kingdom. Available at: [https://ideas.repec.org/h/elg/eechap/15209\\_15.html](https://ideas.repec.org/h/elg/eechap/15209_15.html) Accessed 21.5.21.  
Prizzia, R (2005) An International Perspective of Privatization and Women Workers. Journal of International Women's Studies. 7(1): 55-68.

privatisation continues, unless the achievement of equal pay for work of equal value can become a contract condition and contractors comply with equal pay legislation that is amended to enable 'privatised' women to compare themselves with men doing work of equal value, but remaining 'in-house'.

In the case of cleaners, a firm's ability to pay the real Living Wage is dependent on contractual terms under outsourcing<sup>43</sup>. The funding level of the contract will also be crucial. Unrealistic cleaning contracts mean downward pressure on wages and conditions, which are largely determined by contract value. The EHRC found that high levels of competition drive pay downwards at early stages in the tendering process and when contracts are due for renewal. Good procurement practice is thus crucial and Scottish legislation allowing public bodies to specify the Living Wage potentially very important. Previous research found that paying cleaners the rLW has been seen to have clear benefits. Cleaning firms adopting it reported lower levels of absenteeism and staff turnover and clients reported improved service<sup>44</sup>. However, absence of effective enforcement of labour rights and labour inspections in cleaning have also been highlighted<sup>45</sup>.

A 2015 analysis of outsourcing in the care sector<sup>46</sup>, showed how the pay of predominantly female and increasingly ME front-line workers had failed to keep up with that of workers in the public sector, especially in relation to pensions, sick pay and travel/subsistence allowances. In 2014, Cunningham and James<sup>47</sup> examined the changing nature of social care outsourcing and the effect on employment conditions in voluntary/not-for-profit organisations in Scotland. The use of more arms-length and cost-based contracting had led to an erosion of employment conditions. The use of Approved List Providers reduces costs as well as destroying the relationships between local authorities and providers, which are replaced by more remote relationships with procurement and finance. The personalisation of care, through personal budgets and direct payments, has also created conditions for new public management demands for efficiency and value for money. Voluntary organisations and not-for-profit providers have less and less scope for protecting pay and working conditions, including reducing access to sick pay, pensions and other benefits<sup>48</sup>.

From October 2016 the SG and COSLA jointly agreed that front-line care staff working in publicly funded adult social care should be paid at least the rLW of £9.50, in part to resolve recruitment and retention difficulties. Local health and social care partnerships transfer funding via local authorities to care providers.

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<sup>43</sup> Equality and Human Rights Commission (EHRC) (2014) *The Invisible Workforce: Employment Practices in the Cleaning Sector*. Available at: <https://www.equalityhumanrights.com/en/publication-download/invisible-workforce-employment-practices-cleaning-sector> Accessed 30.6.21.

<sup>44</sup> Ibid.

<sup>45</sup> Focus on Labour Exploitation (2021) 'If I Could Change Anything About My Work...' Participatory Research with Cleaners in the UK. Working Paper No. 1. Available at: [www.labourexploitation.org](http://www.labourexploitation.org). Accessed 30.6.21.

<sup>46</sup> Baines, D. and Cunningham, I. (2015) Care Work in the Context of Austerity. *Competition and Change* 19(3): 183-193 <https://journals.sagepub.com/doi/10.1177/1024529415580263>.

<sup>47</sup> Cunningham, I. and James, P. (2014) Public Service Outsourcing and its Employment Implications in an Era of Austerity: The Case of British Social Care. *Competition and Change* 28(1): 1-19 <https://journals.sagepub.com/doi/10.1179/1024529413Z.00000000045>.

<sup>48</sup> Ibid.



Research by the University of Strathclyde<sup>49</sup> reported that there was consensus among participants in their study that the introduction of the rLW for adult social care workers represented ‘a significant progressive effort by the SG to improve the working conditions and living standards of front-line staff in the sector’. There was only limited evidence that providers were cutting other terms and conditions of employment to fund payment of the rLW, although it was reported that differentials between care workers and supervisors were being squeezed as a consequence of rLW rates being paid to the lowest paid. A number of authorities were apparently making the rLW a de facto requirement of tendering.

The FWC has completed analysis on the driver of zero hours and insecure work as a direct result of ‘non-committal tendering frameworks’ in social care and have called for the immediate suspension of these<sup>50</sup>.

A similar commitment exists for publicly funded early learning and childcare (ELC) where Funding Follows the Child is the long-term policy framework to support its delivery, agreed by both SG and COSLA. It is ‘provider neutral’ and is underpinned by a National Standard that all settings – regardless of whether they are in the public, private or third sector, or childminders – have to meet. A key aspect of Funding Follows the Child is the payment of sustainable rates to providers that reflect the cost of delivery and payment of the real Living Wage to childcare workers delivering the funded entitlement.

## **Mechanisms**

In Switzerland the 2016 Charter for Equal Pay in the public sector and the Federal Act on Public Procurement (FAPP) state that contracts will only be awarded to suppliers that guarantee equal treatment of men and women in respect of pay for workers performing services ([Appendix 1: Case Study 10](#)). By signing the Charter, authorities affirm that state-affiliated companies and companies in tenders under public procurement or as subsidy bodies implement equal pay as employers. Under the Ordinance on Public Procurement, the awarding authority may call for checks in respect of equal treatment of women and men and the task of conducting such checks may be assigned to federal, cantonal or local authority gender equality offices. The Logib (Lohnvergleichsinstrument Bund) is a free, online federal self-analysis tool for companies with 50 and more employees, allowing companies to check whether they comply with the requirement of equal pay for women and men. Logib can be used by organisations applying for public contracts or subsidies to provide the required evidence of compliance with equal pay. In 2017 all companies with 50 and more employees were obliged to carry out a self-test every four years under the supervision of a third party and to communicate the results to the

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<sup>49</sup> Cunningham, I; Baluch, A and Cullen A-M (2018) Implementing the Scottish Living Wage in Adult Social Care: An Evaluation of the Experiences of Social Care Partners, and Usefulness of Joint Guidance. Coalition of Care Support Providers Scotland. Available at: <https://www.ccpscotland.org/wp-content/uploads/2018/11/Univ-of-Strathclyde-Living-Wage-implementation-research-November-2018.pdf> Accessed 30.6.21.

<sup>50</sup> Fair Work Convention (2019) Fair Work in Scotland’s Social Care Sector. February 2019. Available at: <https://www.fairworkconvention.scot/our-report-on-fair-work-in-social-care/> Accessed 30.6.21.

employees. However, lack of effective monitoring, enforcement and checks are perceived as the greatest challenge to compliance with the Charter<sup>51</sup>.

A report on the EU-wide GPG found examples of industrial action by women in occupationally segregated sectors to defend and/or improve their pay and terms and conditions in the context of austerity and in particular, reductions in local government spending across Europe. In the case of care workers this often reflected the impact of privatisation. In most cases industrial action was not framed in terms of equality or the GPG, although may be posed in terms of seeking recognition and societal revaluation of their work.

Prospect's current campaign to gain trade union recognition for catering and retail workers in the trading companies within the Scottish heritage sector points to the issues for outsourced workers, including exclusion from Civil Service job evaluation schemes and pay structures and collective agreements. Similarly, cleaners working for companies contracted to National Rail in the major stations in Scotland have been backed by the Transport Union RMT in a campaign to receive the rLW<sup>52</sup>. Cleaners on public sector contracts represented by UNISON reported fewer incidents of zero-hour contracts than those contracted by the private sector.

### **Applicability**

Recognition of the impact of contracting out of services on the valuation of women's work and their ability to access equal pay would be an important step forward. The SG has capacity to end privatisation and contracting out in central and local government, health and social care and rail, at least once existing contracts have expired. The renewed public ownership of ScotRail and transfer of the workforce to an arms-length Scottish company is an opportunity to redress the impact of privatisation on workers in the rail industry, including cleaners and catering workers.

The SG considers the payment of the real Living Wage to be a significant indicator of an employer's commitment to Fair Work practices, although under EU procurement law, it cannot be a mandatory requirement as part of a competitive procurement process. Equal pay could be treated similarly to the rLW in SG and other public sector procurement under the the Scottish Specific Duties Regulations 2012. Fair Work First, which is to be applied in all appropriate grants, commissioning and procurement contracts by the public sector, already includes equal pay as a requirement. However, it assumes that there is compliance with equal pay law, whereas international examples and UK experience suggest widespread lack of knowledge of equal pay requirements and compliance needs to be specified, monitored and accredited.

Although quality carries more weight in procurement than price, since pricing criteria are more comprehensive than those reflecting quality, indicators of equal

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<sup>51</sup> Key expert testimony.

<sup>52</sup> BBC (2019) Cleaners Campaign Starts at Scottish Railway Stations. Available at: <https://www.bbc.co.uk/news/uk-scotland-glasgow-west-49401062> Accessed 17.3.21.

pay or the rLW, may not prevail. Cunningham<sup>53</sup> et al. in their report on the initial application of the rLW in social care, identified a number of lessons that could be learned. They found that providers, lead bodies of employers and contracting authorities agreed that the level of transparency and consultation regarding the introduction of the rLW was limited. The distribution of funding to resource the rLW in adult social care was viewed as being overly complex, and again there was limited transparency in terms of how decisions regarding final sums were arrived at. There was variation in approaches to implementing the rLW ranging from percentage uplifts for all providers to undertaking detailed individual negotiations – variation in approaches on equal pay may be resolved by easy access to a self-analysis tool.

## Recommendations

### The SG could:

- Recognise the negative impact of privatisation on the valuation of women's work and their working conditions and prepare for an end to privatisation and contracting out of public services.
- Highlight to contractors that active compliance with equal pay legislation and principles is a significant indicator of an employer's commitment to Fair Work practices, along with payment of the real Living Wage as the minimum rate of pay for any job.
- Implement the FWC's recommendation to suspend 'non-committal tendering frameworks' in social care and the call in its report into Social Care in Scotland for commissioning practices to set out minimum contract standards and sector level engagement between purchasers, providers and those who deliver social care services.
- Support the development of a self-analysis tool for companies to provide evidence or certification of compliance with equal pay legislation and principles, perhaps through the Scottish Centre for Equal Pay proposed in this report, integrated with the Fair Work Employer Support Tool developed in the Fair Work Action Plan.
- Consider developing and introducing capacity for checks on equal pay in companies with public contracts.

<sup>53</sup> Cunningham, I; Baluch, A and Cullen A-M (2018) Implementing the Scottish Living Wage in Adult Social Care: An Evaluation of the Experiences of Social Care Partners, and Usefulness of Joint Guidance. Coalition of Care Support Providers Scotland. Available at: <https://www.ccpsscotland.org/wp-content/uploads/2018/11/Univ-of-Strathclyde-Living-Wage-implementation-research-November-2018.pdf> Accessed 30.6.21.

## Gender Pay Gap Reporting

As a result of the 2014 EU Transparency Recommendation and Member State law governing pay transparency, measures requiring organisations to report their GPG have been introduced across a number of countries, although in some they have been limited to the private sector. In the UK, private and voluntary sector employers with 250 or more employees must report and publish their GPGs. Under the 2016 amendment to the Scottish Specific Duty, the reporting threshold for public authorities was reduced to 20 in respect of GPG reporting and equal pay. Scottish public sector organisations with 20 or more employees must publish GPG information and an equal pay statement. The reports must cover the whole authority and should include both part-time and full-time staff. The report must calculate the gap as a percentage difference between hourly pay for men and women, excluding overtime. These requirements are stronger than the specific duty for England, where public bodies need only produce GPG information and not equal pay statements and the threshold for reporting is 150 plus employees. However, the Scottish regulations do not specify whether the mean or median measure of pay should be used, which can create confusion.

### Mechanisms

In 2019 France saw the introduction of the Index Égalité requiring private sector companies with 50 or more employees to publish a range of measures calculating the GPG. This was to be extended to the public sector at the end of 2020 ([Appendix 1: Case Study 5](#)). The Index provides a common methodology to measure unjustified GPGs according to an 'equal pay for equal work' principle, with a score out of 100 calculated on five indicators. If a company scores lower than 75 it is required to put in place corrective measures within three years. Companies that do not publish their index or do not implement their scores expose themselves to a maximum penalty of 1% of their wage bill. Publication is expected to be on company websites or circulated to employees by other means with worker representatives having access to the information.

For the first time in France a group action has been taken on the GPG against the Ile-de-France Savings Bank (CEIDF). Under 2016 judicial reforms, class action allows a judge to order measures to put an end to discrimination and redress the harm suffered by all those included in the group concerned with companies summoned before the Paris Tribunal de Grande if management has not addressed the GPG through adequate measures. The French Confédération Générale du Travail (CGT) trade union confederation had been urging the CEIDF management to enter negotiations over the GPG since June 2019, calculating their GPG at 18% or 700 euros per month. It reported that it takes women on average three years longer to get promoted and that they face a 'glass ceiling'. The bank claims the pay gap is only 1%. In October 2019, the CGT took the CEIDF to court over discrimination against women and is at the second stage of proceedings, expecting an outcome in June.

The CGT sees this 'group action' as a way to open ambitious collective bargaining on the GPG. If successful, it means that all 2,700 women working for CEIDF can benefit, as they can then join the claim once the judgement has been made. The

union suggests that the Index Égalité has been used to conceal pay gaps – a company can claim 95 points out of 100 while maintaining a 10% GPG. While the Index does not solve the problem of the GPG it does expose it, and has had a small impact in encouraging the recruitment of women to senior positions and changing attitudes. Application and enforcement remain challenges.

In 2017 the Icelandic Government mandated organisations of 25 people or more in the private and public sectors to prove they pay men and women equally. The Equal Wage Management Standard (EWMS) is an externally certified, mandated standard to determine the value of a job in relation to other roles in the organisation. It was the result of tripartite working between Employers' Associations, the Government and trade unions, and allows employers to prove they pay men and women the same and receive certification. Failure to pay women and men equally results in a daily fine. Employers must review their equal pay certification every three years. The EWMS does not guarantee equal wages, it ensures that evaluation of jobs within an organisation is not dependent on gender. Unions report a lack of infrastructure to support the standard, including sufficient certification bodies.

From 2018 Iceland became the first country to require companies to prove they pay employees in the same roles equally, regardless of their gender, sexuality, or ethnicity. From 2021 the Californian federal government requires employers with over 100 employees to submit annual pay data reports by gender, race and ethnicity and job category and pay band. Data has to be reported to the Department of Fair Employment and Housing (DFEH), which may seek an order requiring the employer to comply with the requirements. In the UK, mandatory ethnicity pay gap reporting appears to have been rejected by the Government's Commission on Race and Ethnic Disparities' 2021 report<sup>54</sup>, which suggests it should be voluntary.

## Applicability

Close the Gap's 2019 analysis of Gender Pay Gap reporting in Scotland found that less than two in five employers had published a narrative to explain the causes of their GPG, with the majority providing a poor level of analysis. Less than a third of employers had published actions, the majority of which were unmeasurable and unlikely to result in positive change. Only 6% had published targets, with most lacking timescales and only 4% had provided evidence of action taken since the last reporting round. The analysis suggests an issue with compliance. Close the Gap conclude that:

'The standard of reporting in 2019 suggests a strong sense of complacency from employers on the Gender Pay Gap as a priority issue, and a lack of commitment to take steps to address it'<sup>55</sup>.

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<sup>54</sup> Commission on Race and Ethnic Disparities (2021) The Report of the Commission on Race and Ethnic Disparities UK Government. Available at: <https://www.gov.uk/government/publications/the-report-of-the-commission-on-race-and-ethnic-disparities>

Accessed 30.6.21.

<sup>55</sup> Close the Gap (2019) One Year on and Little Change: An Assessment of Scottish Employer Gender Pay Gap Reporting. Available at: <https://www.closesthegap.org.uk/content/gap/>  
Accessed 30.6.21.

In particular, Close the Gap noted the tendency for employers to refer to the GPG as 'a societal issue' as a reason for their inaction.

Across Europe – including the UK – unions have been critical of employer discretion in GPG reporting, including over what constitutes categories of 'equivalent jobs'. They have also been critical of the exclusion of smaller employers. Unions have produced checklists of what elements of pay and promotion should be included and how information should be disseminated and to whom. Key criticisms are the exclusion of contracted-out workers, as well as the weakness of compliance and enforcement measures. There might be scope for the SG to consider strengthening GPG reporting requirements, particularly in public contracts, under the review of the operation of the Public Sector Equality Duty (PSED) in Scotland. There may be a case for Equal Pay Certification under a Scottish Centre for Equal Pay.

## **Recommendations**

### **The SG could:**

- Consider some form of Equal Pay Certification to strengthen GPG reporting, by revising the Scottish Specific Duties Regulations 2012.
- Monitor compliance with GPG reporting and look at how employer discretion can be challenged.
- Make the formulation of equal pay action plans in conjunction with trade union or employee representatives a requirement.
- The SG could support calls by Maternity Action and others for reporting of the duration of return to work and retention rates after maternity leave as part of Gender Pay Gap reporting since it is proven that maternity discrimination and the 'motherhood pay gap' exacerbate the overall GPG.
- Strengthen GPG reporting by revising the Scottish Specific Duties Regulations 2012 and consider requiring public bodies to also publish GPG data on contracted-out workforces in any review of GPG reporting. There should be clarification of which hourly measure of pay to use.
- Extend pay gap reporting measures to race and ethnicity as in California and Iceland, and discuss whether and how there should be further extension to other cover other protected characteristics.
- Institute systematic collection of employee data by protected characteristics across the public sector and, when legislative change becomes possible, across all employers.

## **Application, Inspection and Enforcement of Regulation**

The case studies suggest that whatever legislation and regulations are in place, a key issue is compliance and enforcement. In Canada, the Bilson Review<sup>56</sup> recognised the ‘need for ultimate recourse to an independent adjudicative body with expertise in pay equity issues’. A proactive pay equity model should involve a system in which stakeholders are fully supported in taking steps to achieve pay equity, and that this would make it less likely that complaints and litigation would be resorted to by employees or their representatives. However the report acknowledged that recourse to an adjudicative mechanism would be a necessary even as a last resort. It noted that an adjudicative body should be independent, but have specialised expertise in pay equity.

### **Mechanisms**

Subsequent to the Bilson Review, in 2015, the New Zealand Government appointed a Crown Negotiator to lead negotiations with key stakeholders – care providers, unions and funders, initially to resolve the case with Terranova and then other equal pay claims. The 2020 Equal Pay Amendment Bill aims to provide a clearer and accessible process for pay equity claims, but also sets out a bargaining framework for employers, workers and unions to negotiate in good faith. It encourages use of mediation and dispute resolution services if agreement is not reached with legal action a last resort. It is hoped to mark a move away from adversarial legal proceedings. A union can raise a pay equity claim on behalf of its members with multiple employers, while multiple unions within a workplace can raise a collective claim.

In Canada the position of Equity Pay Commissioner has been established to administer and enforce the Equity Pay Act. The Commissioner will play a key role in assisting workplace parties in understanding their rights and fulfilling their obligations, including through the development of tools and education materials, investigating complaints and considering applications, and facilitating the resolution of disputes. Employers will have to submit annual statements to the Commissioner regarding their pay equity plans.

### **Applicability**

The SG could explore the appointment of an independent Equal Pay Champion to raise the profile of equal pay and play a key role alongside the Fair Work Ministerial Working Group and the proposed Centre for Equal Pay in developing expertise, education and training.

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<sup>56</sup> The Bilson Review (2004) Pay Equity: A New Approach to a Fundamental Right. Government of Canada: Canada.

## Recommendations

### The SG could:

- Consider the appointment of an Equal Pay Champion or equivalent to promote a bargaining framework for employers, workers and unions to negotiate in good faith over equal pay claims.
- Consider the use of mediation and dispute resolution services if agreement is not reached, with legal action a last resort.

## Equal Pay and JE Expertise – Education and Training

Ensuring the viability of job evaluation schemes requires adequate capacity on both the employer and trade union sides and the involvement of JE experts. It is widely recognised that there are now very few JE experts with equal pay expertise or the technical ability to develop or maintain new or existing gender-neutral JES. Equally, many of the trade union reps and officials who were trained to implement the SJC and AfC JES have retired. High-level knowledge of JES and good leadership is required by HR functions, while sufficient numbers of trade union reps and paid officials need to be trained to ensure that job evaluation is not a one-off event, but an ongoing, dynamic process that is mainstreamed across employers.

### Mechanisms

In 2006 Belgium established the Equal Value Project to establish analytical and gender-neutral job evaluation schemes ([Appendix 1: Case Study 2](#)). The Institute for the Equality between Women and Men was given responsibility for this work and for producing guidance and training on JE for employers and trade unions<sup>57</sup>.

Previous research had suggested that where equal pay for work of equal value has been raised for women in senior and/or high-profile positions, trade unions have reported that women concentrated in lower grades have not seen this as relevant to them<sup>58</sup>. In the case of Ireland a case study of public service broadcaster, RTÉ, found that the focus on high-paid workers 'took no cognisance of the people who were on lower pay grades' with a lack of clarity amongst union members as to what the GPG is, leading the union to conclude 'we have a job of education to do with our own members to get them to understand.' The Irish Congress of Trade Unions concurred that 'much of the discussion around the pay of senior journalists is far from the experience of the vast majority of women'<sup>59</sup>.

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<sup>57</sup> Institute for the Equality of Women and Men (IEWM) (2010) Checklist: Gender neutrality in JE and Classification. Available at: [https://igvm-iefh.belgium.be/sites/default/files/downloads/39%20-%20Checklist\\_ENG.pdf](https://igvm-iefh.belgium.be/sites/default/files/downloads/39%20-%20Checklist_ENG.pdf) Accessed 30.6.21.

<sup>58</sup> EPSU (2021) Closing the GPG in public Services in the Context of Austerity. EU Social Dialogue Project VS/2018/0074. Available at: <https://www.epsu.org/sites/default/files/article/files/GPGreport.pdf> Accessed 3.4.21

<sup>59</sup> Ibid.



## Applicability

The Bilson Review recommended the establishment of a Pay Equity Agency that could play an important role in ‘providing publicity, guidance, sensitisation, training, monitoring and dispute resolution’. The focus on development of gender-neutral JE in the private sector and accompanying guidance and training provided by the Belgian IEWM, suggest a model that could be adopted by the SG – either by providing increased resources to a third sector organisation, or by establishing a specialist unit such as a Scottish Centre for Equal Pay, which could be located within a university. The aim would be to demonstrate the value of JE and action to achieve equal pay to private sector employers and help with its implementation.

## Recommendations

### The SG could:

- Set up a programme to develop new JE experts who can assist employers and trade unions to develop and maintain gender-neutral JES.
- Establish ongoing training and support for public and private sector HR professionals and key decision-makers with a view to widening awareness of equal pay legislation and developing expertise in the use of JE and other mechanisms to achieve equal pay and close the GPG, possibly within a Scottish Centre for Equal Pay.
- Allocate resources to the Union Modernisation Fund and/or the Scottish Union Learning Fund to launch a long-term programme of equal pay and JE training for trade union reps and officers.

## Moving Away From Non-Standard Contracts

Women are more likely to be on non-standard contracts than men. These are contracts that are not open-ended and have no fixed weekly hours or direct relationship between employer and employee, and include zero hours, guaranteed hours and temporary contracts and term-time working. Such contracts are concentrated in accommodation and food and health and social work<sup>60</sup>. School-based workers other than teachers are also subject to non-payment for much of the school holiday period, while men in seasonal occupations in local government – such as gritting or grounds maintenance – are paid for 52 weeks and are given other duties during ‘down times’. The 2019 Fair Work in Scotland’s Social Care Sector report<sup>61</sup> reported that one in five workers (20%) are not on permanent

<sup>60</sup> Statista (2021) Percentage of People in Employment on a Zero Hours Contract in the United Kingdom 1<sup>st</sup> Quarter, by Industry. Available at: <https://www.statista.com/statistics/407833/share-zero-hour-contracts-industry/> Accessed 12.7.21

<sup>61</sup> Fair Work Convention (2019) Fair Work in Scotland’s Social Care Sector. February 2019. Available at: <https://www.fairworkconvention.scot/our-report-on-fair-work-in-social-care/> Accessed 30.6.21.

contracts, with 11% on zero-hours contracts. Work in retail is associated with non-standard working contracts, seen to reduce costs, with contracts as low as four hours a week that can then be flexed up<sup>62</sup>.

## **Mechanisms**

Japan has taken a different legal approach to addressing pay inequality. In 2018 the government introduced the Work Style Reform Act, which mandates organisations to pay regular and non-regular (non-standard) workers the same in the private sector ([Appendix 1: Case Study 7](#)). Implemented in 2020, the purpose of this Act is to address pay disparity between regular workers and non-regular employees. The Ministry of Labour produced guidelines to assess the gaps between regular and non-regular workers, but it is not mandatory to use these guidelines or to conduct a job evaluation exercise. This Act is not about equal pay between men and women, but it is hoped that through addressing pay disparities between regular and non-regular work more comprehensive and transparent processes for wage determination will be created, which will indirectly affect women who are predominantly located in non-regular work. There are concerns, however, over the fact that the enforcement mechanism is individual rather than collective – an employee has to negotiate to address any observable imbalances to correct the gap.

## **Applicability**

While the Japanese context is very different, recognition that non-standard contracts have disproportionate impacts on women working in care, retail, catering, cleaning and in schools, including on pay, is overdue. A number of European countries have outlawed or restricted zero-hours and minimum hours contracts and there is scope to ensure that term-time working in schools is treated in the same way as seasonal working for men, such as gritters and grounds maintenance workers in local government. While regulation is not within the remit of the Scottish Parliament, a stronger line could be taken in procurement and public contracts linked to the required quality of service.

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<sup>62</sup> Tomlinson, M. and Walker, R. (2010) Recurrent Poverty: The Impact of Family and Labour Market Changes. February 2010. Joseph Rowntree Foundation. Available at: <https://www.jrf.org.uk/report/recurrent-poverty-impact-family-and-labour-market-changes> Accessed 30.6.21.

## Recommendations

### The SG could:

- Consider promoting pay equity between regular and non-regular workers as part of wider equal pay measures. This could be achieved through revising the Scottish Specific Duties Regulations 2012 to cover the public sector.
- Mandate pay gap reporting between regular and non-regular workers as part of the 'due regard to equality' provision in the public sector under the Scottish Specific Duties Regulations 2012.
- Implement the FWC's call for the suspension of zero-hours contracts and precarious work in social care as soon as possible.

## Changing UK Law – Making Equal Pay Law More Effective

Equal opportunities legislation, as defined in the Scotland Act 1998, remains under the control of Westminster. Scottish ministers do not have the power to amend the Equality Act 2010, but do have the scope to make regulations imposing specific duties on public bodies listed in Part 1 of Schedule 19 to enable them to apply the Public Sector Equality Duty more effectively. This has been done by means of the Equality Act 2010 (Specific Duties) (Scotland) Regulations 2012. There are different specific duties for the four UK nations, however, the Welsh and Scottish duties are more prescriptive than the English duty. The purpose of the specific duties in the devolved nations is to promote compliance by public bodies with the general duty.

The 2015 Smith Commission Agreement<sup>63</sup> states that while the Equality Act 2010 will remain reserved, the SG can introduce gender quotas in public bodies and can legislate 'in relation to socio-economic rights in devolved areas' when making strategic decisions. These powers give the SG powers to establish new protections for public bodies with regards to their devolved functions, but the SG cannot lower the protections that are included in the Equality Act 2010<sup>64</sup>. In 2018 the EHRC carried out a review into the PSED in Scotland in three areas: the duty to publish equality outcomes and report progress, the duty to gather and use employee information, and the duty to publish GPG information<sup>65</sup>.

While Scottish Ministers only have powers to impose duties on public bodies to ensure Scottish functions are carried out with due regard to meet the PSED, the Scottish Parliament does have powers, under the Scotland Act 1998, to encourage equal opportunities, impose duties on Scottish public bodies and those cross-

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<sup>63</sup> Smith Commission (2015) Scotland in the United Kingdom: An Enduring Settlement. Available at: [https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/397079/Scotland\\_EnduringSettlement\\_acc.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/397079/Scotland_EnduringSettlement_acc.pdf) Accessed 13.3.21.

<sup>64</sup> HM Government (2015) Scotland in the United Kingdom: An Enduring Settlement. Available at: [https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/397079/Scotland\\_EnduringSettlement\\_acc.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/397079/Scotland_EnduringSettlement_acc.pdf). Accessed 10.5.21.

<sup>65</sup> EHRC Scotland (2018) Effectiveness of the Specific PSED Duties in Scotland. Scotland: Coalition of Racial Equality and Rights.

border public bodies that operate in Scotland to meet the requirements of the PSED and this may provide some scope for the SG to take action in relation to the GPG.

Further differences between the Scottish, English and Welsh systems were expected with the devolution of Employment Tribunal (ET) procedures as advocated by the Smith Commission. The management of the reserved Tribunals would be devolved while Westminster would retain power over the legislation<sup>66</sup>. However, these plans have now been put on hold until at least 2022<sup>67</sup>. As the plans move forward, however, there could be scope for addressing the GPG through the procedures used in the Scottish Employment Tribunals, for example ET judges providing recommendations that apply to the wider workforce and not just the employee who brought the case, as currently happens.

Devolution of equal pay and wider equality law could 'support the creation of a systemic intersectional gender architecture by placing the power to legislate and regulate around equality'<sup>68</sup>. This approach would allow Scotland to establish its own equality regulator that requires public bodies to 'involve the communities their decisions affect'<sup>69</sup>.

## Mechanisms

In Canada, pay equity is a human right protected under the Canadian Human Rights Act (CHRA). Pay Equity Regulations will be introduced under the Pay Equity Act (2018) in 2021 ([Appendix 1: Case Study 3](#)). These represent proactive pay equity legislation to replace the current complaint-based regime with a proactive regime for the federal jurisdiction as proposed in the Bilson Review:

'It places positive obligations on employers to review their compensation practices, identify any gender-based inequities, and take steps to eliminate them. Unlike the complaint-based approach, the proactive approach also includes timeframes for the elimination of any inequities. It is a systemic approach to a systemic issue'<sup>70</sup>.

Under proactive legislation, pay equity is achieved by implementing a pay equity plan, generally formulated on the basis of the following steps:

- determination of job classes and their gender predominance;
- identification of the evaluation process, method and tools;

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<sup>66</sup> SPICe (2015) SPICe Briefing the Smith Commission Report – Overview. Scotland: Scottish Parliament.

<sup>67</sup> Scottish Legal News (2020) Plans to Devolve Tribunals Delayed for at Least Two Years. Available at: <https://www.scottishlegal.com/article/plans-to-devolve-tribunals-delayed-for-at-least-two-years> Accessed 6.3.21.

<sup>68</sup> NACWG (2020) #GenerationEqual: First Minister's National Advisory Council on Women and Girls 2020 Report and Recommendations. Available at: [https://onescotland.org/wp-content/uploads/2021/01/562006\\_SCT1120576152-002\\_NACWG.pdf](https://onescotland.org/wp-content/uploads/2021/01/562006_SCT1120576152-002_NACWG.pdf) Accessed 10.5.21.

<sup>69</sup> Ibid.

<sup>70</sup> The Bilson Review (2004:111) Pay Equity: A New Approach to a Fundamental Right. Government of Canada: Canada.

- actual evaluation of these job classes;
- wage comparisons and identification of wage gaps;
- determination of the method of payment for salary adjustments;
- payment of salary adjustments.

The proactive model aims to avoid the confrontational approach that has marked discrimination cases brought before the courts and associated costs. The proactive regime will require all employers with over ten employees to conduct a pay equity exercise to identify and correct gender-based pay inequities. The legislation will contribute to reducing the GPG by addressing the portion of the gap due to the undervaluation of work done by women, particularly in light of Covid-19. Employers with ten or more employees will form a pay equity committee made up of employer and employee representatives. This committee will be responsible for developing a pay equity plan that will identify pay equity gaps between predominantly male and female job classes of equal value and determine any increases in compensation owed by the employer to employees in female job classes to close those gaps. A methodology is provided to compare the average compensations between predominantly female and male job classes using an equal average or equal line method.

Supporting methodologies for job comparisons are an essential part of implementing pay equity legislation. While gender-neutral job evaluation schemes are important for highlighting equal pay for work of equal value in sectors where male comparators exist, they are less useful in female-dominated sectors, where undervaluation of women's jobs is likely to reflect sexist assumptions about the value of women's work and market pressures. Changes to Californian Equal Pay legislation in 2016 eliminated the requirement for employees to work at the 'same establishment' in order to enable an equal value comparison. Canada and New Zealand have legislated for the use of 'proxy comparators' to enable equal value to be established in female-dominated sectors and workplaces. In New Zealand, the Pay Equity Settlement Act was applied to care and support workers to pay them in line with male roles.

Although the Canadian Pay Equity Commission created proxy indicators in 1993, it was not until 2019 that it established that men in similar larger workplaces could be used as a 'proxy' comparator where the wage gap between men and women had already been identified by the job-to-job comparator ([Appendix 1: Case Study 3](#)). In 2016, the Ontario Nurses' Association (ONA) and the Service Employees International Union (SEIU) applied to the Pay Equity Hearings Tribunal alleging that the Participating Nursing Homes (PNH) had violated the Pay Equity Act RSO 1990 c P.7 because of a failure to maintain pay equity for their employees. The Tribunal rejected the arguments of ONA / SEIU.<sup>71</sup> Although this initial case was rejected, a later judicial review in 2019 found that Article 15 of the Canadian Charter of Rights

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<sup>71</sup> Ontario Nurses' Association v. Participating Nursing Homes; Service Employees International Union Local 1 v. Participating Nursing Homes, 2016 CanLii 2675 (Ont. PEHT).

and Freedoms (CCRF) had been violated as it failed to give effect to equality protection. The Act has a statutory mandate 'to recognise and redress the systematic discrimination that women suffer in the way in which they are compensated in the workforce and ensure discrimination does not emerge. Therefore, the court found that 'the decision of the Tribunal was unreasonable' and concluded that women in predominantly female workplaces should have access to male comparators to maintain pay equity. The rulings of the Superior Court and Appeal Court are significant in that they acknowledge the importance of having access to a system of 'proxy' comparability in re-evaluating women's work and pay.

In Canada the proposed regulations also allow private and public sector employers without any predominantly male job classes to choose, with certain restrictions, between two methods outlined in the proposed Regulations – the 'proxy' or 'typical job classes' methods – to establish a pay equity plan. The proxy method would require an employer or pay equity committee without a male comparator to select three or more predominantly male job classes from another organisation or business covered by the Act and to develop 'proxy' male job classes in their plan. The Canadian Government has produced a cost-benefit analysis of the legislation.<sup>72</sup>

Under Australia's Fair Work Act, the Fair Work Commission can make an Equal Remuneration Order, which requires certain employees be given equal remuneration for work of equal or comparable value ([Appendix 1: Case Study 1](#)). These Orders overrule collective agreements between employers and trade unions that already exist. In 2010, five trade unions, led by the Australian Services Union, made an application to the industrial tribunal, Fair Work Australia (FWA), for a first Equal Remuneration Order on behalf of social and community service (SACS) workers. In 2012, two years after the initial submission, FWA found in favour of the proposed wage increases (ASU, 2012). In response to this second submission, FWA made an order providing for increases of between 19% and 41% weekly rates for social and community workers, to be phased in over an eight-year period<sup>73</sup>. Although this was a major win for workers in the social and community services sector, it did not result in wider pay equity in other sectors at either state or federal levels for several reasons. One technical reason was that the FWA was not involved in wage setting in some of the industries where women's work is

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<sup>72</sup> Government of Canada (2020) Regulatory Impact Statement. Canada Gazette Part 1, Volume 154, No. 46 Pay Equity Regulations. Available at: <https://canadagazette.gc.ca/rp-pr/p1/2020/2020-11-14/html/reg1-eng.html> Accessed 30.6.21.

'Employers in the federally regulated private sector (FRPS) will carry total quantified costs of \$1.953B for the 10-year period of 2020–29, expressed in terms of present value, 99.83% of which is a result of pay equity payouts, since all increases in compensation paid in the FRPS are attributable to the proposed Regulations rather than to the Act. The costs are minimal for the public service of Canada (PSC) [i.e. the federal government as employer] and \$22,423 for the federal government as regulator. There are no costs for employees in either the FRPS or PSC nor any costs for other Canadian households. Over that same period, the monetised benefits associated with the proposed Regulations are estimated at \$30M over 10 years for the FRPS, approximately \$2M for the PSC and \$1.950B for employees in the FRPS (due to payouts resulting from pay equity increases). Therefore, the total costs associated with the proposed Regulations are \$1.953B over 10 years, while the total benefits associated with the proposed Regulations are \$1.982B over the same period resulting in a net benefit of \$28.7M over 10 years (present value)'.

<sup>73</sup> Macdonald, F. and Charlesworth, S. (2013) Equal Pay Under the Fair Work Act 2009: Mainstreamed or Marginalised?' UNSW Law Journal. 36(2): 563-586.

undervalued. This limited the power of the FWA to achieve gender pay equity for the whole workforce<sup>74</sup>. The long-standing trend towards decentralised collective bargaining at enterprise level also made it difficult to establish sector-wide agreements. This case highlights the importance of developing integrated equality and collective bargaining systems. Central government must play a key role in leading this integration.

In California from 2017, equal pay legislation was extended to cover race and ethnicity so employers cannot pay their employees less than employees of another race or ethnicity for substantially similar work. 'Substantially similar work' has replaced 'equal work' and is viewed as a composite of skill, effort and responsibility, and performed under similar working conditions. 'Substantially similar work' refers to work that is mostly similar in skill, effort, responsibility, and performed under similar working conditions. Skill refers to the experience, ability, education and training required to perform the job. Effort refers to the amount of physical or mental exertion needed to perform the job. Responsibility refers to the degree of accountability or duties required in performing the job. Working conditions has been interpreted to mean the physical surroundings such as temperature, fumes, ventilation and other hazards<sup>75</sup>.

## Applicability

Governments play a key role in defining remuneration principles in occupations with predominantly female workforces in order to achieve pay equity and in establishing equal pay principles and enshrining clear guidelines for comparing pay between women in female-dominated occupations and men with 'substantially similar skills, responsibility, and service' in male-dominated occupations in law. In Scotland legal change may be dependent on successful pressure on the Westminster Government, devolution of employment law and/or preparation for new legislation in the event of Scottish independence.

Changes to equal pay legislation allowing for proxy comparators are crucial in addressing sectoral segregation, as in the case of Canada, which allows proxy comparisons without restrictions in terms of public or private sector. However, even here, the report of its Pay Equity Task Force (the Bilson Review)<sup>76</sup> noted that it is not so effective in private, feminised sectors with low union representation and high numbers of migrant workers. Proxy comparisons need to take into account the features of all jobs, the size of the external organisation, the market it serves, the

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<sup>74</sup> Healy, J. and Kidd, M. (2013) Gender Based Undervaluation and the Equal Remuneration Powers of Fair Work Australia. *Journal of Industrial Relations*. 55(5): 760-782.

<https://journals.sagepub.com/doi/10.1177/0022185613491683>

<sup>75</sup> Government of California (2020) California Equal Pay Act (Labor Code section 1197.5) and Labor Code section 432.3 California Department of Industrial Relations. Available at: [https://www.dir.ca.gov/dlse/california\\_equal\\_pay\\_act.htm](https://www.dir.ca.gov/dlse/california_equal_pay_act.htm) Accessed 30.6.21.

<sup>76</sup> The Bilson Review (2004) Pay Equity: A New Approach to a Fundamental Human Right. Government of Canada: Canada.

nature of its products and production techniques and whether it is a profit or non-profit organisation.

## Recommendations

### The SG could:

- Lobby UK Government to move towards simpler, proactive collective pay equity legislation to replace the current individual complaints-based regime. The new focus would be on a duty on employers to review their compensation practices, identify any gender-based inequities, and take steps to eliminate them
- Lobby UK Government to reform equal pay legislation to require 'levelling up' of women's pay to that of men doing work of equal value and to enable class or group actions.
- Consider whether to push for UK law to enshrine proxy comparators.
- Explore campaigning for pay equity between regular and non-regular workers as part of wider improvements to equal pay legislation as in Japan. Equal pay measures must cover workers on non-standard contracts, including so-called 'self-employed workers'. Reporting measures could be included in the revised Scottish Specific Duties Regulations 2012.
- Ensure that Equal Pay Gap reporting measures include gender, race and ethnicity and that future Scottish measures extend to all protected characteristics.
- Promote the development of widespread expertise on equal pay law and the possible means to make it more effective, possibly as part of a Scottish Centre for Equal Pay.
- Ensure mainstreaming of knowledge of equal pay law and practices across government departments and agencies such as the Scottish Exchequer, the Directorate General for Economy, Audit Scotland and the Accounts Commission to ensure achievement of equal pay for work of equal value is properly supported.
- Move towards the devolution of Employment Tribunals and employment legislation to facilitate the integration of employment and equality law into one jurisdiction.

## Conclusions

This report shows that successfully achieving equal pay for women in low-paid occupations depends on addressing a number of issues. While some measures are



beyond the current jurisdiction of the SG, there are actions that can be taken. Current equal pay law within the Equality Act 2010 is weak and prohibitive and places the onus on individual women to seek justice, rather than providing collective solutions. Procedures are lengthy and women who are not trade union members are unlikely to be able to proceed with a claim. The intervention of 'no win, no fee' lawyers in mass equal pay litigation in local government may have enabled women to seek legal redress, but legal fees have been deducted from some settlements. Lack of knowledge and understanding, together with the weak application and enforcement of existing equal pay legislation means that it is not being fully utilised as a vital tool to help close the GPG, whether in collective bargaining, legal action or the design of gender-neutral job evaluation schemes.

The UN Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) and the International Covenant on Economic, Social and Cultural Rights (ICESCR) both call for effective legal systems that eliminate all forms of gender discrimination and deliver equal pay. CEDAW calls for signatories:

- to incorporate the principle of equality of men and women in their legal system, abolish all discriminatory laws and adopt appropriate ones prohibiting discrimination against women
- to establish tribunals and other public institutions to ensure the effective protection of women against discrimination
- to ensure elimination of all acts of discrimination against women by persons, organisations or enterprises

ICESCR, Article 7, calls for:

'(i) Fair wages and equal remuneration for work of equal value without distinction of any kind, in particular women being guaranteed conditions of work not inferior to those enjoyed by men, with equal pay for equal work.'

Through the establishment of the National Taskforce on Human Rights Leadership and the forthcoming Human Rights Bill, the SG has shown a commitment to incorporating CEDAW into Scottish law and can move to further ensure the delivery of the principle of equal pay for work of equal value across the Scottish economy and public sector. To this end, all SG departments, public bodies and agencies with remits that span the economy, the labour market and pay policy or which scrutinise or regulate the actions of public bodies, should be required to undergo training in equal pay law and practice. Common guidance and standards for ensuring that pay equity is mainstreamed in their work could be developed by the proposed Scottish Centre for Equal Pay or existing equality bodies.

Government is responsible for ensuring expertise and knowledge of rights to equal pay and mechanisms to secure it. This may mean a widespread programme of education of employers, HR professionals and trade unionists across the economy and labour market. The report emphasises that a whole layer of expertise in job

evaluation has been lost and needs to be renewed. Regular training in equal pay and job evaluation for workers, trade unions and employers is necessary so that a body of expertise can be built up and maintained over time. The current legal case allowing for comparison of cashiers and warehouse workers in large national retailers offers an opportunity (once the legal case is finalised) for the SG to work with and support retail employers to ensure pay equity for their workers, extending job evaluation into the private sector. The appointment of an Equal Pay Champion could lead this work, as well as ensuring that current JE in the public sector is revised and updated, including for Scottish Parliament employees and government arms-length and trading organisations.

A commitment to a proactive pay equity approach and a move away from the individual complaints-based regime that has led to recent adversarialism and litigation would be a significant start. Government commitment is essential to ensuring equal pay for work of equal value and higher pay for women in catering, cleaning, care, retail, early learning and childcare work. Adequate funding of public sector mechanisms to deliver equal pay for work of equal value such as Single Status is essential. Stronger systems of collective bargaining and sectoral bargaining are associated with a narrower Gender Pay Gap and need to be put in place or encouraged by the SG. The extension of collective bargaining could begin to address the under-evaluation of the work and pay of cleaners and care workers and recognise their responsibilities under Covid-19. The creation of a National Care Service provides an important opportunity for implementing job evaluation in social care work, providing steps are taken to ensure comparability with jobs of equal value in other sectors and that equal pay rights are not undermined by the 'ring-fencing' of predominantly female care workers within a single bargaining unit.

The report emphasises the damage done to women workers by privatisation and their removal from collective bargaining and union organisation. A move away from the culture of privatisation and contracting out by the SG would be a huge step forward for women. A start could be made in ScotRail, with the restoration of collective bargaining and JE to cleaning and catering workers.

Our research also attests to the reality that equal pay costs in terms of money and human resources and unless pay audits, job evaluation, pay settlements and services are properly resourced and funded, the revaluation of the work of women in Scotland will not be possible.

# Appendix 1 – Case Studies

## Case Study 1 – Australia: Equal Remuneration Orders

In Australia, the Gender Pay Gap (GPG) was 11.8% in 2018<sup>77</sup>; collective bargaining covered 61% of employees in 2018<sup>78</sup>. This case study examines how the Australian Services Union (ASU) made the first application for an Equal Remuneration Order for workers in the social and community services in 2010. This application was supported by the Australian Government, trade unions and civil society organisation but opposed by employers. In 2012, after an initial rejection of part of the claim, Fair Wage Australia (FWA), the industrial relations tribunal, agreed to the proposed wage increases.

### Initiative

The National Pay Equity Coalition<sup>79</sup>, has played a leading role in redefining approaches to pay equity at state level by promoting the concept of undervaluation, which does not require evidence of, or proof of discrimination against women or male-female comparability. In 2009, the Fair Work Act was passed, which attempted to modernise industrial relations. The same year, the Australian Government and the ASU drew up a ‘Heads of Agreement’ that set out the commitment of the Federal Government to support the development of an ‘appropriate’ federal equal remuneration principle and to provide research and evidence to Fair Wage Australia (FWA).

On 11 March 2010, five trade unions, led by the ASU, made a first application for an Equal Remuneration Order under Fair Wage Australia (FWA), for social and community services (SACS) workers. They asked the FWA to find that a) the SACS industry is female dominated, 2) the work is undervalued, 3) that there is a causal relationship between the SACS sector being female dominated and the work being undervalued.<sup>80</sup> This application was supported by the Australian Government, trade unions and civil society organisations but opposed by employers, for example, the Australian Chamber of Commerce and Industry. This case used the gender-based undervaluation principle, which was developed by State industrial tribunals in the 1990s.

### Outcome

In 2012, two years after the initial submission, the FWA found in favour of the proposed wage increases. In response to this second submission, the FWA made an order providing for increases of between 19% and 41% to the SCHCDS Award weekly rates from level two. These were to be phased in over an eight-year

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<sup>77</sup> OECD (2021) Gender Wage Gap. Available at: <https://data.oecd.org/earnwage/gender-wage-gap.htm>. Accessed 2.4.21.

<sup>78</sup> OECD (2021) Collective Bargaining Coverage. Available at: <https://stats.oecd.org/Index.aspx?DataSetCode=CBC>. Accessed 2.4.21.

<sup>79</sup> A feminist advocacy and policy group active in New South Wales and federal industrial relations from 1988 to 2011.

<sup>80</sup> Australian Municipal, Administrative, Clerical and Services Union and Others, ‘Applicants’ Outline of Contentions’, Submission in SACS Equal Remuneration Case, C2010/3131, 7 June 2010, 16.

period<sup>81</sup>. Although this was a major win for workers in the social and community services sector, it did not result in improved pay equity in other sectors at either state or federal levels. There are several reasons for this. One technical reason was the limited use of the tribunal system in wage setting, which limited the power of FWA to achieve gender pay equity for the whole workforce. However, there have been criticisms of FWA in that it views unequal pay as a technical problem to be solved rather than related to inequality within society<sup>82</sup>. The FWA did not draw on the experience of several awards made at state level, in Queensland and New South Wales, in the previous decade, which could have added weight to its decisions. In the wider context, the lack of any federal equal remuneration principles combined with the growing decentralisation of collective bargaining and resulting fragmentation of pay agreements has led to a failure to improve pay equity<sup>83</sup>.

### **Applicability**

The Australian experience suggests a number of lessons for the SG. Remuneration principles in occupations with predominantly female workforces have to be defined in order to achieve pay equity. Trade unions play a key role in bringing cases to court. Decentralised collective bargaining systems create barriers to achieving pay equity because they fragment the pay bargaining process. Most importantly, governments have a key role to play in establishing equal pay principles. Without government commitment and action, long-term changes in pay equity will not be achieved.

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<sup>81</sup> Healy, J and Kidd, MP (2013) Gender-based Undervaluation and the Equal Remuneration Powers of Fair Work Australia. *Journal of Industrial Relations*. 55(5): 760-782.

<sup>82</sup> Macdonald, F. and Charlesworth, S. (2013) Equal Pay Under the Fair Work Act 2009: Mainstreamed or Marginalised?' *UNSW Law Journal*. 36(2): 563-586.

<sup>83</sup> Key informant interviews, ASU equal pay expert.

## Case Study 2 – Belgium: Job Evaluation Schemes in Equal Pay Legislation

Belgium has one of the lowest GPGs in Europe. In 2019 women's gross hourly earnings were 5.8 % less than men's overall compared to a European average of 14.1%<sup>84</sup>. The GPG based on annual pay is wider, reflecting the impact of part-time work. There has been no noticeable GPG narrowing since 2012. Collective bargaining covers 96% of employees<sup>85</sup>. Belgian legislation calls for parties to private sector collective agreements to establish evaluation/classification schemes free of gender bias. Technical guidance and support from the federal Institute for Equality between Women and Men (IEWM), has also been acknowledged as important to implementation. Further legislation requiring gender mainstreaming in employment practices, annual pay audits and biennial analyses of pay structures – followed by action plans to rectify unequal pay – all contribute to the low GPG.

### Initiative

In 2006 Belgium introduced the Equal Value Project to establish analytical and gender-neutral job evaluation (JE) schemes. The Institute for Equality between Women and Men (IEWM) was given responsibility for this work and for producing guidance and training on JE for employers and trade unions. The IEWM is a semi-independent body, under ministerial control from an administrative perspective but remains autonomous with respect to legal action or the provision of advice to government and other public authorities. A specific unit within the IEWM is responsible for gender mainstreaming processes at federal level. A checklist was designed to detect gender discrimination in job classification (JE) schemes and highlight the factors that ensure a gender-neutral job classification system.

This work was followed by the 2007 Gender Act, which focused on gender mainstreaming and discrimination in employment reinforced by a 2007/08 cross-industry agreement that encouraged the social partners to develop and use gender-neutral JE. In 2008, Collective Agreement Number 95 called for further measures to secure equal treatment in employment, followed by the 2012 law, which focused on the GPG and required annual pay audits, biennial gender analysis of wage structures in companies with more than 50 employees and the requirement for action plans where women earn less than men and where wage bills covering women workers are lower than those for men. Companies must provide data broken down by gender to the National Bank. The law also requires the Federal Labour Service (SPF) to check and sign off job classifications on the basis of their gender neutrality.

### Outcome

JES that include attributes of female-dominated jobs, for example, emotional demands involved in care work, and that ensure gender-free weighting of job factors have been widely acknowledged in Belgium as crucial to achieving equal

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<sup>84</sup> Eurostat (2021) GPG 2019 Data. Available at: [https://ec.europa.eu/eurostat/statistics-explained/index.php?title=File:GPG\\_2019\\_data.PNG](https://ec.europa.eu/eurostat/statistics-explained/index.php?title=File:GPG_2019_data.PNG). Accessed 24.3.21.

<sup>85</sup> OECD (2021) Collective Bargaining Coverage. Available at: <https://stats.oecd.org/Index.aspx?DataSetCode=CBC>. Accessed 2.4.21.

pay for work of equal value and narrowing of the GPG. However, there is still an absence of sanctions in several areas of the law in Belgium with questions raised about the completion of Social Balance Sheets, the National Bank unable to sanction employers, and no requirement for the enforcement of action plans<sup>86</sup>. A further weakness is the fact that confidentiality over pay persists. Interpretation of work of equal value is based on classifications of functions and limited to work conducted within the same sub-sector, the same company, with the same job title and seniority. Small companies and the public sector are excluded<sup>87</sup>.

In 2019 it was proposed to strengthen legislation: Where remuneration structures were unequal action plans would be compulsory, as would the appointment of a mediator – an employee of the company appointed to find a compromise with the employer if an employee claims to be the victim of gender pay inequality. Companies would have to publish gender pay analysis reports on a website, and would be awarded a label on the basis of those analysis reports, which would be publicly accessible.

### **Applicability**

Although progress in developing JE schemes has been slow in Belgium, the focus on development of gender-neutral JE in the private sector and accompanying guidance and training provided by IEWM, suggest a model that could be adopted by the SG. If properly resourced and empowered such a body, located within government, the third sector or a university, could demonstrate the value of JE to private sector employers and help with its implementation.

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<sup>86</sup> Key informant interviews: General Labour Federation of Belgium.

<sup>87</sup> IGVM-IEFH Belgium Government, Eliminating the Gender Pay Gap by Law – Lessons learned from Belgium. Available at: [https://igvm-iefh.belgium.be/en/publications/eliminating\\_the\\_gender\\_pay\\_gap\\_by\\_law\\_lessons\\_learned\\_in\\_belgium](https://igvm-iefh.belgium.be/en/publications/eliminating_the_gender_pay_gap_by_law_lessons_learned_in_belgium) Accessed 14.07.2021.

### Case Study 3 – Canada: Access to Male Comparators

The Canadian GPG was in 17.6% in 2019<sup>88</sup> with 31% of employees covered by collective bargaining in 2020<sup>89</sup>. This case study examines the struggle for pay equity in Ontario through an examination of the Ontario Equal Pay Coalition (EPC) and the Ontario Nurses' Association (ONA)/ Service Employees International Union (SEIU). It shows the importance of having an agreed methodology for re-valuing women's work, as well as pay equity legislation. The use of the Canadian Charter of Rights and Freedoms to challenge the decision of the Pay Equity Hearings Tribunal shows how a human rights framework can be effective in establishing legal decisions to protect pay equity.

#### Initiative

The creation of the Ontario Equal Pay Coalition (EPC), in 1974, drew together trade unions, feminist groups and civic organisations to fight for pay equity. It was unusual for trade unions and feminist groups to work together at that time. One of the first achievements was the 1988 Ontario Pay Equity Act, which recognised the value of women's work. Pay equity plans identified where 'women's work' was paid less than 'men's work' because of discrimination in wage setting policies. The 1988 Act required employers, both public and private, to take appropriate action in their workplaces, recognise the value of women's work in their own policies and be prepared to fund the resulting pay increases. Ontario was the first Canadian province to extend employment equity to the provincially regulated private sector.<sup>90</sup>

However, in predominantly female workplaces, it was not possible to do job-to-job comparisons because of a lack of male jobs for women to compare with. The Pay Equity Commission, created by the 1988 Pay Equity Act, recommended two new comparison methods: 1) Proportional – compares male and female job classes and looks at how male job classes are paid across an organisation by examining the relationship between compensation and the value of work performance; 2) Proxy – in workplaces where there were few or no male job classes, a similar, larger workplace could be used as a 'proxy' comparator because the wage gap between men and women had already been identified by the job-to-job comparator. Although there were attempts to put these recommendations into legislation, no statutory agreements were reached and by 2012, there was evidence that the GPG was increasing in Ontario.

In 2016, the Ontario Nurses' Association and the Service Employees International Union (SEIU) applied to the Pay Equity Hearings Tribunal alleging that the Participating Nursing Homes (PNH) had violated the Pay Equity Act RSO 1990 c P.7 because of a failure to maintain pay equity for their employees. The Tribunal

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<sup>88</sup> OECD (2021) Gender Wage Gap. Available at: <https://data.oecd.org/earnwage/gender-wage-gap.htm>. Accessed 13.5.21.

<sup>89</sup> OECD (2021) Collective Bargaining Coverage. Available at: <https://stats.oecd.org/Index.aspx?DataSetCode=CBC>. Accessed 2.4.21.

<sup>90</sup> Workers covered by the 'Social, Community, Home Care and Disability Services Industry' Award 2010 (SCHCDS Award).

rejected the arguments of ONA / SEIU in 2016<sup>91</sup>. In 2019, ONA and SEIU applied for a judicial review of this decision.

## Outcome

In 2019, the Ontario Superior Court of Justice Divisional Court concluded that the Act did not contravene S.15 of the Canadian Charter of Rights and Freedoms (CCRF), but that the Tribunal failed to consider CCRF values when interpreting the Act. It failed to give effect to the CCRF equality protection as the Act has a statutory mandate 'to recognise and redress the systematic discrimination that women suffer in the way in which they are compensated in the workforce and ensure discrimination does not emerge. Therefore 'the decision of the Tribunal was unreasonable'. Women in predominantly female workplaces should have access to male comparators to maintain pay equity. The Tribunal should explain what procedures to use to ensure claimants have access to male comparators to determine if pay equity is maintained<sup>92</sup>. This decision was upheld on appeal. The ruling of the Superior Court and Appeal Court are significant in that they acknowledge the importance of methodology in re-evaluating women's work and pay through having access to a system of 'proxy' comparability. This decision can be seen as part of wider changes in Canada, where new pay equity legislation has been introduced by other provincial administrations. At Federal level, the Pay Equity Act (2018) will be supported by the Pay Equity Regulations recently consulted on by the Federal Government, which will ensure that women and men in federally regulated public and private sector workplaces will receive equal pay for work of equal value<sup>93</sup>.

## Applicability

Supporting methodologies for job comparisons are an essential part of implementing pay equity legislation. For predominantly female workplaces, there has to be an agreed comparator, a 'proxy', with a similar larger workplace and adequate funding for the pay increases that result and ways of ensuring that pay increases are maintained. The role of government in this process is key and this case study highlights the role of 'human rights' principals<sup>94</sup>. Employers alone will not make these changes. Trade unions play an essential role in maintaining the campaigns for equal pay and in bringing cases to court.

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<sup>91</sup> Ontario Nurses' Association v. Participating Nursing Homes; Service Employees International Union Local 1 v. Participating Nursing Homes, 2016 CanLii 2675 (Ont. PEHT).

<sup>92</sup> Ontario Nurses' Association v. Participating Nursing Homes, 2019 ONSC 2168 Divisional Court File No.: 362/16 and 364/16 DATE: 20 19-04-30.

<sup>93</sup> Government of Canada (2021) Government of Canada Moves Forward on Pay Equity to Help Address Wage Gaps in Federally Regulated Workplaces. Available at: <https://www.canada.ca/en/employment-social-development/news/2020/11/pay-equity.html>. Accessed 30.6.21.

<sup>94</sup> Key informant interviews, Equal Pay experts.



## Case Study 4 – Finland: Equality Allowances

The GPG in Finland was 16.6% in 2019<sup>95</sup>, while collective bargaining covers nearly 90% of employees<sup>96</sup>. This case study discusses the impact of national sectoral collective bargaining on the GPG and particularly women in health and social care. The background is the Competitiveness Pact, a national collective agreement signed following economic stagnation since 2008, which had resulted in a rapid increase in both unemployment and government debt. The Pact negotiated by the Finnish Government, business representatives and 90% of trade unions in 2016, had a disproportionate impact on low-paid women and by implication the GPG. In response to the outcome of this austerity measure, TEHY, the health care union, adopted a strategy of negotiating an 'Equality Allowance' for those in female-dominated occupations. In addition it argued that gender equality is not a priority for general collective agreements as the representatives taking part in the negotiations come from male-dominated sectors or occupations. The union secured an agreement to remove nursing staff from general collective agreements with a view to the negotiation of a separate collective agreement for health care professionals.

### Initiative

The vast majority (92%) of Finnish health care professionals are women. TEHY is the largest trade union in Finland for health and social care professionals with 160,000 members. All union members are qualified professionals who have a degree in health or social care or are studying to become a qualified health or social care professional. TEHY negotiates 10 collective agreements (one in the municipal sector, one in the state sector and eight in the private sector).

The Competitiveness Pact introduced by the Government in 2016 was negotiated and agreed as a way of preventing the introduction of further austerity measures. It was the first in Finland to have resulted in a reduction in real hourly wages, including a weakening of established working arrangements and benefits. The national agreement introduced a wage freeze for workers in private and public sectors until 2017, a 24-hour increase in annual working time, a 30% reduction in holiday bonuses (a sum in addition to holiday pay) in the public sector, an increase in pension and employment insurance contributions for employees, and a reduction of the same for businesses. It hit women in low-paid jobs in the health and social care municipal sector particularly hard. In this context and despite government and social partners commitment to challenging the GPG, progress had stalled.

TEHY's strategy since the Competitive Pact has been to negotiate an Equality Allowance for women in female-dominated sectors over and above nationally negotiated increases along with the removal of the extra 24 hours annual working time. In addition TEHY has been pushing to remove nursing staff from the general collective agreements arguing that it has been difficult to change the pay and working conditions of nursing staff because the regulations are incorporated in

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<sup>95</sup> OECD (2021) Gender Wage Gap. Available at: <https://data.oecd.org/earnwage/gender-wage-gap.htm>. Accessed 2.4.21.

<sup>96</sup> OECD (2021) Collective Bargaining Coverage. Available at: <https://stats.oecd.org/Index.aspx?DataSetCode=CBC>. Accessed 2.4.21.

large general collective agreements covering a diverse range of workers that require the agreement of all parties.

### **Outcome**

In 2021 TEHY achieved its aim of removing 180,000 municipal health and social care professionals, including homecare and residential care workers, from the general collective agreements and secured a separate collective agreement allowing for better consideration of the specific characteristics of nursing work. This includes shift and on-call work and renewed job descriptions due to health and social care reform. There are separate collective agreements for outsourced health and care workers.

While it has not yet achieved an Equality Allowance TEHY will try again in the next negotiations with local government employers in 2022 and it may attract the support of other unions. TEHY economists suggest that a 1.8% annual salary increase in the health and social care sector on top of what will be paid in future general collective agreements (in male-dominated occupations) could contribute to narrow, and potentially end, the GPG in Finland within ten years<sup>97</sup>.

### **Applicability**

An Equality Allowance would need the support of trade unions, employers and local government employers and would have to be funded by the SG. The reconfiguration of collective bargaining structures for health and care workers would need similar support, but could be part of discussions of a National Care Service.

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<sup>97</sup> Key informant interview, TEHY.

## Case Study 5 – France: The Index Égalité

In 2019 the French GPG was 16.5%<sup>98</sup>, with collective bargaining coverage at 98%<sup>99</sup>. In France the introduction of the Index Égalité in 2019 requires private sector companies with 50 or more employees to publish a range of measures calculating the GPG. The Index was extended to the public sector in 2020. In October 2019 the Confédération Générale du Travail (CGT) took the first class action on the GPG against the Ile-de-France Savings Bank (CEIDF) to secure measures to end an 18% GPG. The Bank claims the GPG is 1% and unions argue that the Index has been used to conceal pay gaps in companies.

### Initiative

The French Government introduced the Index Égalité in 2019, requiring disclosure of the GPG by private sector companies with more than 50 employees. The Index provides a methodology to measure GPGs according to an ‘equal pay for equal work’ principle measuring with a score out of 100 calculated on the following indicators:

1. The GPG between women and men, calculated in reference to the average pay of women compared to the average pay of men, by age cohorts and categories of equivalent jobs (40 points).
2. The rate of disparities in individual pay rises that do not reflect promotions between women and men (20 points).
3. The rate of disparities in promotions between women and men (15 points).
4. The percentage of employees who benefited from a pay rise during the year of their return from maternity leave if there were increases in pay during their leave period (15 points).
5. The number of workers of the under-represented gender among the ten employees who earn the highest wages in the firm (10 points).

Indicators 2 and 3 are combined (35 points) for companies with between 50 to 250 employees. A score lower than 75 requires companies to put in place corrective measures within three years. Workers’ representatives have access to the information. Companies that do not publish their Index or do not implement their scores expose themselves to a maximum penalty of 1% of their wage bill. Publication is expected to be on company websites or circulated to employees by other means.

French unions have a number of criticisms of the Index, in particular employer discretion to determine what constitutes categories of ‘equivalent jobs’. Focusing on the ‘rate’ of disparities in individual pay rises does not reveal the amount of pay

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<sup>98</sup> Eurostat (2021) GPG 2019 Data. Available at: [https://ec.europa.eu/eurostat/statistics-explained/index.php?title=File:GPG\\_2019\\_data.PNG](https://ec.europa.eu/eurostat/statistics-explained/index.php?title=File:GPG_2019_data.PNG). Accessed 24.3.21.

<sup>99</sup> OECD (2021) Collective Bargaining Coverage. Available at: <https://stats.oecd.org/Index.aspx?DataSetCode=CBC>. Accessed 2.4.21.

actually awarded to both categories. Publishing the rate of disparities in promotions between women and men says nothing about the nature of the promotions. As in other European countries unions are critical of the exclusion of smaller companies.

For the first time in France a group action has been taken on the GPG. Under 2016 judicial reforms class action allows a judge to order measures to put an end to discrimination and redress the harm suffered by all those included in the group concerned with companies summoned before the Paris Tribunal de Grande if management has not addressed the GPG through adequate measures. The CGT had been urging the CEIDF management to enter negotiations over the GPG since June 2019, calculating the gap at 18% or 700 euros per month. It reported that it takes women on average three years longer to get promoted and that they face a 'glass ceiling'. The bank claims the pay gap is only 1%. In October 2019, the CGT took CEIDF to court over discrimination against women and is at the second stage of proceedings, expecting an outcome in summer 2021.

In 2021 the Finance Act provides that companies with at least 50 employees benefiting from the aid of the economic stimulus plan implemented to address the economic consequences of the Covid-19 pandemic and having a score of less than 75/100 on the Index will have to set and publish their targets as well as their correction and salary catch-up measures.

### **Outcome**

The CGT see these 'group action' proceedings as a way to open ambitious collective bargaining on the GPG, which if successful means that all 2,700 women working for CEIDF can benefit, as they can then join the claim once the judgement has been made. The union suggests that the Index Égalité has been used to conceal pay gaps – a company can claim 95 points out of 100 while maintaining a 10% GPG. While the Index does not solve the problem of the GPG it does expose it and has had a small impact in encouraging the recruitment of women to senior positions and changing attitudes. Application and enforcement remain challenges<sup>100</sup>. The CGT is pursuing wider demands on childcare provision and increasing paternity pay to 100% of salary.

### **Applicability**

The Index provides much more specific criteria and requirements than UK GPG reporting regulations, including on promotions and the implications of maternity leave on pay. It also necessitates corrective action and allows recourse to the courts. It reflects the potential for group or class action in addressing the GPG and the role the courts might place in enforcement.

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<sup>100</sup> Key informant interview, CGT.

## Case Study 6 – Iceland: Equal Wage Management Standard

Iceland has been ranked number one on the World Economic Forum's Global Gender Gap Index for 12 years (2009–20). The GPG fell from 20.5% in 2008 to 13.8% in 2019<sup>101</sup>, however, this is adjusted for working hours. Collective bargaining covers 90% of workers<sup>102</sup>. In 2017 the Icelandic Parliament introduced the Equal Wage Management Standard (EWMS), based on a job evaluation tool. It is a certified mandated standard and the result of tripartite working between employer associations, the Government and trade unions. From 2018 Iceland became the first country to require companies to prove they pay employees in the same roles equally, regardless of their gender, sexuality, or ethnicity. From 2020 certification became a requirement with daily fines for organisations without certification.

### Initiative

In 2017 the Icelandic Government mandated organisations with 25 or more employees in both the private and public sectors to prove that they pay men and women the same for work of equal value. This law was driven by the commitment of the social partners to develop a bottom-up tool for companies to use to help close the GPG, based on equal pay certification under the Standard ÍST (Icelandic) 85 standards. Certification involves a two-step job evaluation system to disassociate work tasks from skills and values the task itself rather than the incumbent. The standard highlights four main criteria – expertise, responsibility, effort, and work environment – that the company is required to consider. An external certification process performed by accredited auditors checks compliance, with a daily fine of around 400 euros a day for non-compliance. Employers are required to renew their certification every three years and an Equal Pay symbol is conferred by the Centre for Gender Equality, confirming the organisation has established procedures ensuring its handling of, and decisions on, pay do not include gender-based discrimination.

### Outcome

The Equal Wage Management Standard (EWMS) places the onus on employers to prove equal pay and reportedly has been well received and addresses enforcement, lacking in other international equal pay certification schemes. Third-party enforcement promotes compliance. The positive benefits of the EWMS include giving transparency to employees and employers about how wages are designed and tasks valued, but it has also stimulated wider discussion on how jobs are valued and criteria for valuation. However, it is also reported that implementation of the EWMS is time-consuming and resource intensive, especially for smaller organisations who have less experience of implementing standards. Additionally, there was a lack of infrastructure to support the standard, including a sufficient number of certification bodies. It is recognised the Standard can only promote equal pay within an organisation, but cannot ensure equal pay for work of

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<sup>101</sup> Statistics Iceland (2021). Informed Society, Wages. Available at: <https://www.statice.is/statistics/society/wages-and-income/wages/>. Accessed 15.3.21.

<sup>102</sup> OECD (2021) Collective Bargaining Coverage. Available at: <https://stats.oecd.org/Index.aspx?DataSetCode=CBC>. Accessed 2.4.21

equal value at societal level or the wider undervaluation of women's work. It has been suggested that there is a failure to agree on how value is attached to gendered jobs that undermines job evaluation at the organisational level<sup>103</sup>.

### **Applicability**

The applicability of the EWMS to Scotland is limited by Westminster retaining power over employment and equal opportunities law. There is scope, however, to introduce some form of Equal Pay Certification strengthening the GPG reporting duties by revising the Scottish Specific Duties Regulations 2012. In particular, there could be an external body responsible for monitoring GPG reporting with certification and the possibility of punitive measures for non-compliance.

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<sup>103</sup> Wagner, I (2020) Equal Pay for Work of Equal Value? Iceland and the Equal Pay Standard. Social Politics, Summer 2020 pp. 1–20.

## Case Study 7 – Japan: Legislation Comparing Regular and Non-Regular Workers

The current GPG in Japan is falling but remained high at 23.5% in 2019<sup>104</sup>, with collective bargaining coverage low at 16.8% in 2018<sup>105</sup>. Labour market participation for women is low (53.3%) compared to men (71.4%)<sup>106</sup>. Occupational segregation is common with only 15% of senior leadership positions held by women, while women's income is around half of that of men<sup>107</sup>. Women are over-represented in non-regular (non-standard) employment, often as part-time workers or on fixed term contracts. This case study follows the strategy of Japan to use legislation to address pay inequality between those in permanent, open-ended work and non-standard workers. While this is not an initiative to address gender discrimination per se, it has scope to address the GPG indirectly, as women are predominately located in non-regular or non-standard work. Due to the short time span since introduction, there is as of yet little evaluation of its effectiveness.

### Initiative

In Japan equal pay for equal work between men and women was established in The Labour Standards Law 1947, Article 4. However, in Japan there is no concept of equal value and it is rare for courts to apply job evaluation to address the gender pay issue or gender pay cases. In 2018 the 'Act on Arrangement of Relevant Acts for Promotion of Work Style Reform' for the private sector was passed by the Japanese government and came into force in April 2020. The purpose of this Act is to address pay disparity between regular workers (full-time and permanent contracts with a direct relationship between employer and employee) and non-regular employees. The Ministry of Labour produced guidelines to assess the gaps between regular and non-regular workers, but it is not mandatory to use these guidelines or to conduct a job evaluation. This Act is not about equal pay between men and women, but it is hoped that through assessing pay disparities between regular and non-regular work more comprehensive and transparent processes for wage determination will be created, which will help reduce gender pay disparity. The dominant framing by the Government is about addressing productivity, the balance between the number of regular and non-regular workers, the low birth rate and ageing society<sup>108</sup>. The enforcement of the Act is at individual level, where the worker initiates a negotiation to correct the GPG.

### Outcome

It is too early to ascertain whether the new Act has indirectly reduced the GPG as little time has passed since its introduction and GPG reporting is not mandatory in Japan. There is potential, however, for women's work to be revalued under this

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<sup>104</sup> OECD (2021) Gender Wage Gap. Available at: <https://data.oecd.org/earnwage/gender-wage-gap.htm>. Accessed 2.4.21.

<sup>105</sup> OECD (2021) Collective Bargaining Coverage. Available at: <https://stats.oecd.org/Index.aspx?DataSetCode=CBC>. Accessed 2.4.21.

<sup>106</sup> Statistics Bureau of Japan (2020) Statistical Handbook of Japan. Available at: <http://www.stat.go.jp/english/data/handbook/index.html>. Accessed 20.3.21.

<sup>107</sup> World Economic Forum (2020) Global Gender Gap Report 2020. Available at: [http://www3.weforum.org/docs/WEF\\_GGGR\\_2020.pdf](http://www3.weforum.org/docs/WEF_GGGR_2020.pdf). Accessed 19.3.21.

<sup>108</sup> Key informant interview, equal pay expert.

system where women are over-represented in non-regular work. Enforcement is lacking, however, relying on individuals to take cases when gaps are noted.

### **Applicability**

There is scope for the SG to replicate aspects of the Work Style Reform Act under the Scottish Specific Duties Regulations 2012. The current Specific Duties in Scotland mandate organisations pay due regard to equality. Given in Scotland many minority groups are over-represented in non-regular or non-standard work, there could be a provision for assessing and eliminating pay gaps through job evaluation between regular and non-regular workers in the public sector.



## Case Study 8 – New Zealand: The Pay Equity Settlement Act

In New Zealand the GPG was 6.5% in 2019<sup>109</sup> and collective bargaining coverage 18.6% in 2020<sup>110</sup>. This case study looks at the New Zealand experience of addressing pay equity in the aged care sector. The New Zealand Human Rights Commission's report 'Caring Counts' (2012) created a supportive policy environment through its recommendations for the role of Health Boards in creating equal pay in the sector. This provided the inspiration for a case brought by a care and support worker, supported by her trade union, against her employer, Terranova Homes and Care Ltd. The case eventually led to the 2017 Pay Equity Settlement Act, but the results show that implementation of new legislation has to be carefully planned, monitored and evaluated. In 2015 the Government appointed a Crown Negotiator to lead negotiations on equal pay claims. More widely, the New Zealand Government has just announced Fair Pay Agreements, sectoral agreements between unions and employers that set minimum standards (such as sectoral minimum wages), with enforced arbitration.

### Initiative

There is a tradition of low pay, poor working conditions and minimal entry requirements in the aged care sector because the work has been considered 'women's work' although there have been many attempts by trade unions to change this<sup>111</sup>. In 2011/12, the New Zealand Human Rights Commission led an inquiry into the ageing care sector, which resulted in a final report, 'Caring Counts: Report of the Inquiry into the Aged Care Workforce' (2012)<sup>112</sup>. It made a wide range of recommendations including pay, qualifications, travel, health and safety. Two of its most significant recommendations were in relation to pay:

- The Minister of Health directs District Health Boards (DHBs) to develop a mechanism to achieve pay parity between health care assistants working in DHBs and carers working in home support and residential facilities
- DHBs and residential care and home support providers implement pay parity for carers across the government-funded health sector within three years.

The publication of 'Caring Counts' led to the formation of the Caring Counts Coalition in 2012, which brought trade unions, aged care providers and the Human Rights Commission together to campaign for better pay in the aged care sector. Their recommendations inspired a care and support worker, Kristine Bartlett, supported by her union (E Tū), to file a pay equity claim under the Equal Pay Act

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<sup>109</sup>OECD (2021) Gender Wage Gap. Available at: <https://data.oecd.org/earnwage/gender-wage-gap.htm>. Accessed 2.4.21.

<sup>110</sup> OECD (2021) Collective Bargaining Coverage. Available at: <https://stats.oecd.org/Index.aspx?DataSetCode=CBC>. Accessed 2.4.21.

<sup>111</sup> Martin, S; Davies, K and Ross, A (2019) Driving and Achieving Equal Pay: The PSA's Insights into its First Equal Pay Settlements. Public Services Association. Available at: <https://www.psa.org.nz/assets/Uploads/PSA-equal-pay-paper-FINAL-Tuesday-27-November2.pdf>. Accessed 14.5.21.

<sup>112</sup> Human Rights Commission (2012) Caring Counts: Report of an Inquiry into the Aged Care Workforce Available at: [https://www.hrc.co.nz/files/1214/2360/8576/Caring\\_Counts\\_Report.pdf](https://www.hrc.co.nz/files/1214/2360/8576/Caring_Counts_Report.pdf). Accessed 14.5.21.

1972 against her employer, Terranova Homes and Care Ltd. She argued that the caring work she did was undervalued because it was mainly performed by women. This was compared to work that was male dominated but required a similar level of skill, effort and responsibilities, working under different employers.

The claim was upheld and extended to 55,000 workers, who also worked in aged care, disability and home support, resulting in higher wages and a new classification structure. However, there were subsequent appeals by the employers<sup>113</sup>.

## Outcome

In 2015, the New Zealand Government appointed a Crown Negotiator to lead negotiations with key stakeholders – care providers, unions and funders – to resolve the case with Terranova and other equal pay claims. This led to the 2017 Care and Support Worker (Pay Equity) Settlement Act<sup>114</sup>. The Crown Negotiator played a key role in providing access to increased funding for the pay increases.

Recent research by the New Zealand Work Research Institute, informed by interviews with 69 participants from across New Zealand, found that although the Pay Equity Settlement Act was broadly welcomed by both workers and managers, there had been unintended consequences due to the way in which the funding had been implemented. Smaller providers had struggled to remain in business under the current funding model. Although the settlement prescribed hourly pay rates over four levels, depending on length of service and qualifications, workers on level 3 and level 4, the highest levels, were affected negatively because home and community care managers reduced the hours available to them in order to cut costs. The workloads of care and support workers had increased, which led to some negative effects on the quality of care. The main legislation and funding changes were not effectively communicated to workers and managers and there was a lack of support provided for these groups to deal with the changes<sup>115</sup>.

The Equal Pay Amendment Bill passed in 2020 aims to provide a clearer and more accessible process for pay equity claims, but also sets out a bargaining framework for employers, workers and unions to negotiate in good faith. It encourages use of mediation and dispute resolution services if agreement is not reached, with legal action a last resort. It is hoped to mark a move away from adversarial legal proceedings. A union can raise a pay equity claim on behalf of its members with multiple employers, while multiple unions within a workplace can raise a collective claim.

## Applicability

First, improving the pay equity of aged care workers requires a change in perception of care work by society and linking it to human rights raises awareness of the importance of care work. The Human Rights Commission report (2012) was

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<sup>113</sup> Decent Work Good Care (2019) A Promising Policy New Zealand Pay Equity and Career Structure for Aged Care Workers. Available at: <https://decentworkgoodcare.com/> Accessed 30.6.21.

<sup>114</sup> Douglas, J and Ravenswood, K (2019) The Value of Care: Understanding the Impact of the 2017 Pay Equity Settlement on the Residential Aged Care, Home and Community Care and Disability Support Sectors Auckland: New Zealand Work Research Institute.

<sup>115</sup> Ibid.

a significant step in this process because it included some specific recommendations about equal pay. Second, the 2017 Pay Equity Settlement Act was an achievement, but the implementation of this Act has shown that there can be unforeseen consequences that need to be addressed, particularly the initial communication of a settlement and the provision of adequate funding and support for key stakeholders. The appointment of a Crown or similar national Negotiator for equal pay and move to a requirement for parties to negotiate in good faith are approaches that could be adopted by the SG. These requirements are based on the experience of involving the Crown Negotiator with key stakeholders as well as bringing together human rights and industrial relations expertise<sup>116</sup>.

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<sup>116</sup> Key informant interview, New Zealand Nurses Organisation.

## Case Study 9 – Sweden: Negotiating Additional Increases for Health and Care Workers

In Sweden the GPG was 11.8% in 2019<sup>117</sup> and collective bargaining coverage 88% in 2018<sup>118</sup>. In Sweden the public services trade union, Kommunal, has addressed the GPG by linking occupational wage levels to educational attainment. In 2016 it gained the support of the Swedish metal workers' union, Metall, for a three-year collective agreement with additional pay increases for assistant nurses. Under the 2020–23 agreement, Kommunal broadened its focus and moved away from a link to a specific occupational title. It reached a four-year collective agreement including a one-off lump sum payment to 500,000 workers covered by its collective bargaining agreement, mostly health and social care and kindergarten workers, of SEK 5,500 (around £460), plus 0.9% pay increase on top of the 5.4% industry norm.

### Initiative

Historical occupational segregation remains the biggest barrier in Sweden with 'blue collar' occupations represented by the Swedish Trade Union Confederation – Landsorganisationen i Sverige (LO) – with 14 member unions covering workers on the basis of industry. The 1997 Industrial Agreement stressed the principle that the negotiated industry norm should determine wage increases and they should not be higher. Public services union, Kommunal, made several unsuccessful attempts to unite the LO unions around a GPG strategy that would agree higher wage increases for occupations with high concentrations of women. Around 2013 Kommunal started developing a different strategy, which involved removing the emphasis on gender and instead focusing upon education. Given that in Sweden, entry into occupations is based on educational qualification, the strategy appeared to make sense in addressing the occupational segregation that underpins the GPG. Eventually Kommunal got support from the metal workers' union Metall, the biggest union within the LO confederation, and was asked to focus on one group of workers. Assistant nurses and care assistants comprise 78% women and are a distinct occupation in Sweden requiring a formal education of three years in upper secondary school. Kommunal calculated that on an average yearly basis, assistant nurses earn SEK 40,000 (around £3,300) less than car mechanics, yet these two occupations require the same educational level.

In 2016 a one-year Industrial Bargaining Agreement with an increase of 2.2% for all blue-collar workers was agreed. There was an understanding that Kommunal would then demand an additional increase for assistant nurses, and that if the strategy was not successful during that year, Metall would join Kommunal in strike action, giving the assistant nurses huge leverage. A three-year deal was signed early in 2016 for an additional wage increase for assistant nurses: SEK 500 (around £420) in 2016 (in addition to SEK 520 increase for all), SEK 180 (£15) in 2017 (in addition

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<sup>117</sup> Eurostat (2021) GPG 2019 Data. Available at: [https://ec.europa.eu/eurostat/statistics-explained/index.php?title=File:GPG\\_2019\\_data.PNG](https://ec.europa.eu/eurostat/statistics-explained/index.php?title=File:GPG_2019_data.PNG). Accessed 24.3.21

<sup>118</sup> OECD (2021) Collective Bargaining Coverage. Available at: <https://stats.oecd.org/Index.aspx?DataSetCode=CBC>. Accessed 2.4.21

to an overall SEK 530 increase), and SEK 150 (£13) in 2018 (in addition to an overall SEK 535 increase).

### **Outcome**

The 2016 deal obtained by Kommunal for the assistant nurses was initially deemed a success. However, in 2017 and 2018, a buoyant Swedish economy caused a labour shortage that pushed private sector blue collar wages beyond the negotiated minimum. Public sector wages, however, only increased according to the negotiated deal, reducing its impact for assistant nurses. Nevertheless, the gap would have been bigger without the negotiated additional increase. Under the subsequent 2020–23 agreement, Kommunal broadened its focus and moved away from a link to a specific occupational title as employers had recategorised some workers. In 2020 the union reached a new, four-year collective agreement with Sweden's regions and municipalities including a one-off lump sum payment to 500,000 workers in health and social care and kindergartens of SEK 5,500 (around £460) covering May to October, plus a 0.9% pay rise – the union estimated that this would result in a 1.8% increase for these workers, in addition to the 5.4% norm over 29 months. Private sector (outsourced) health and social care workers received 0.5% over three years. The extra increase was partly as a result of Covid-19, but Kommunal reported that it was getting more difficult to sustain the support of other LO unions and that employers were signalling that the industry norm has to be interpreted as a ceiling rather than a floor, in particular with regard to groups such as cleaners<sup>119</sup>.

### **Applicability**

The lifting of rates for groups in public services with predominantly women workers could be negotiated through sectoral collective bargaining under the influence of the SG. Such a strategy, would, however, have to be agreed by Scottish trade unions and funded by the Government.

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<sup>119</sup> Key informant interviews, Kommunal.

## Case Study 10 – Switzerland: The Federal Act on Public Procurement

In Switzerland there remains a GPG of 18.3% in 2019<sup>120</sup>, while collective bargaining coverage was 45% of employees in 2017<sup>121</sup>. In Switzerland the Charter for Equal Pay in the public sector (launched in 2016) and the Federal Act on Public Procurement (FAPP) state that contracts shall only be awarded to suppliers that guarantee equal treatment of men and women in respect of pay. The awarding authority may call for checks in respect of equal treatment conducted by federal, cantonal or local authority gender equality offices. The Logib (Lohngleichheitsinstrument Bund) is a free federal self-analysis tool for companies with 50 and more employees can be used by organisations applying for public contracts to provide evidence of compliance with equal pay.

### Initiative

In 2019 the *Grève des Femmes* or *Frauenstreik* involved hundreds of thousands of women across Switzerland in a protest demanding higher pay, greater equality and more respect. Following the 2019 strike, the vpod/ssp public services union wants to see equal pay auditing of all public employers with the involvement of the unions and an across-the-board pay increase for occupations and sectors dominated by women – particularly care jobs.

The Charter for Equal Pay in the Public Sector launched in 2016 requires regular monitoring to ensure equal pay within the public administration, corporations close to the public administration, public procurement or subsidies. The FAPP states that ‘contracts shall only be awarded to suppliers that guarantee equal treatment of men and women in respect of pay for workers performing services in Switzerland’. By signing the Charter authorities affirm state-affiliated companies and companies in tenders in public procurement or as subsidy bodies, implement equal pay in their sphere of influence – as employers. Signatories agree to carry out regular checks to ensure equal pay. The Ordinance on Public Procurement states that the awarding authority may call for checks in respect of equal treatment of women and men. The task of conducting such checks may be assigned to federal, cantonal or local authority gender equality offices.

The Logib (Lohngleichheitsinstrument Bund) is a free federal self-analysis tool for companies with 50 and more employees, allowing companies to check whether they comply with the requirement of equal pay for women and men. It is based on regression analysis and was recognised by the Swiss Federal Supreme Court in 2003. It uses Excel and is thus directly applicable to workplaces using payroll statistics and without extra training for the personnel. Logib can be used by organisations applying for public contracts or subsidies to provide the required evidence of compliance with equal pay. In 2017 all companies with 50 and more

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<sup>120</sup> Eurostat (2021) GPG 2019 Data. Available at: [https://ec.europa.eu/eurostat/statistics-explained/index.php?title=File:GPG\\_2019\\_data.PNG](https://ec.europa.eu/eurostat/statistics-explained/index.php?title=File:GPG_2019_data.PNG). Accessed 24.3.21.

<sup>121</sup> OECD (2021) Collective Bargaining Coverage. Available at: <https://stats.oecd.org/Index.aspx?DataSetCode=CBC>. Accessed 2.4.21.

employees were obliged to carry out a self-test every four years under the supervision of a third party and to communicate the results to the employees.

### **Outcome**

A business survey found that 50% of companies that carried out a self-test made adjustments, usually raising women's wages. Together with the self-test tool Logib, the Charter was awarded the Public Service Award 2018 by the United Nations. To date, 16 cantons, 113 municipalities and the Federal Government have signed the Charter, along with 62 companies. From November 2019, following the fourth National Meeting on the Promotion of Equal Pay in the Public Sector, state-affiliated companies at all federal levels and other companies with a public mandate have had the opportunity to join the Charter. However, the effective application of gender equality legislation is perceived as the greatest challenge<sup>122</sup>.

### **Applicability**

There is scope for strengthening the Public Sector Equality Duty to require that contracts are awarded to suppliers that can evidence equal pay. A free self-analysis tool could be made available for organisations allowing them to check whether they comply with the requirement of equal pay for women and men.

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<sup>122</sup> Key informant interview, vpod (DE).

## Case Study 11 – UK: Maintaining Single Status and Equal Pay in Local Government

The UK GPG was 15.5 % in 2020<sup>123</sup> and collective bargaining coverage 26.9% in 2019<sup>124</sup>. This case study examines a collective bargaining initiative within the National Joint Council for Local Government Services in England, Wales and Northern Ireland (NJC). The objective was to increase the lowest rates of pay (and thereby pay throughout the pay structure), 'equality proof' the NJC Job Evaluation Scheme (NJCJES), restore 'equal value' differentials established through use of the NJCJES and further narrow the GPG. In doing so, both sides of the NJC hoped to improve and 'future proof' the NJCJES and maintain equal pay for work of equal value within local government and associated employers.

### Initiative

The NJC covers 1.6 million employees across councils and schools in England and Wales and in Education Boards in Northern Ireland. Most large academy chains and many 'arms-length' employers also use it. Three-quarters (76%) of NJC employees are women and 60% work part-time (less than 37 hours a week). The NJC 'Single Status' agreement (NJCSSA) was reached after lengthy negotiations in 1997. The agreement initially also applied to Scotland, which was part of the NJC and had a Scottish sub-committee of it. However, a unilateral decision was taken by the Scottish trade unions and employers to leave the NJC and a Scottish Joint Council (SJC) and separate Single Status agreement was reached in 1999. An SJCJES was also developed, which is now in its third iteration following changes to ensure equal value. The NJCSSA aimed to harmonise working conditions across manual and white collar jobs within a single collective agreement and establish a pay and grading system that complied with the Equal Pay Act and delivered 'equal pay for work of equal value'.

It was important to have one common JES and pay system for the harmonised workforce. The Employers Side of the NJC would not agree to 'national' grades, so each employer – over 400 councils and many schools – had to evaluate jobs and establish a local pay structure and there was no agreed deadline for implementation. Unfortunately, unlike with the parallel – and slightly later – Agenda for Change scheme in the NHS, the Government would not provide extra funding for councils to introduce the new pay and grading system and establish equal pay, at a time when 'efficiency reviews' were impacting on budgets. This led to widespread removal of bonus schemes and 'levelling down' of men's pay, rather than 'levelling up' of women's pay and mass litigation by the trade unions and 'no win, no fee' lawyers. This is estimated to have cost NJC councils over £3 billion in

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<sup>123</sup> ONS (2020) Gender Pay Gap in the UK. Available at:

<https://www.ons.gov.uk/employmentandlabourmarket/peopleinwork/earningsandworkinghours/bulletins/genderpaygapintheuk/2020>. Accessed 2.4.21.

<sup>124</sup> OECD (2021) Collective Bargaining Coverage. Available at:

<https://stats.oecd.org/Index.aspx?DataSetCode=CBC>. Accessed 2.4.21.



legal fees and settlements<sup>125</sup>. Since 2010, almost 60% of central Government funding for local government in England has been cut.

Despite low NJC pay settlements, two-thirds of councils had individually and unilaterally implemented the independent Foundation Living Wage (FLW) by 2018 – a higher level of pay for the lowest-paid workers than NJC pay. This distorted job evaluated differentials, caused ‘bunching’ of workers on the lower pay points and undermined supervisory relativities.

Negotiations on the 2018–20 NJC followed years of below-inflation pay increases, a four-year pay freeze from 2009–12 and then a 1% pay ‘cap’. These had left local government and allied workers earning less than those in equivalent posts in the NHS, the Police and in the Civil Service, while NJC conditions such as sick pay, holiday pay and car allowances have been cut in over 60% of councils.

### **Outcome**

The 2018–20 NJC agreement established a universal rate of pay of £9 per hour in 2018 as the bottom pay point – almost equal to the FLW. It also re-structured the pay spine and equalised gaps between pay points up to scale point 20. This ensured that differentials reflecting equal pay for work of equal value can be maintained into the future and increments on the pay spine – at least up to the middle – are equal. (The Employers Side would not agree to equalisation of pay gaps higher up the spine for cost reasons, but agreed that it should be addressed in future negotiations). As a result the GPG in local government narrowed from 5.7% to 2.3% from the point of implementation and within a year<sup>126</sup>.

### **Applicability**

The agreement has applicability to Scottish local and national governments and the SJC – as well as other public sector employers with equal value proofed job evaluation schemes and pay structures. It is an example of the importance of ‘maintenance’ of the JES and pay and grading structure to maintain equal value differentials and equal progression, combined with a significant pay increase for the lowest paid. Action of this kind is needed at regular intervals to ensure that JE schemes and pay structures remain fit for purpose<sup>127</sup>.

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<sup>125</sup> Close The Deal, Fill The Gap, EU December 2015, The Single Status Agreement in UK Local Government 1997-2015. Available at: [https://www.fillthegap.eu/sites/default/files/attachment/case\\_study/SSA%20Case%20Study.pdf](https://www.fillthegap.eu/sites/default/files/attachment/case_study/SSA%20Case%20Study.pdf). Accessed 24.5.21

<sup>126</sup> Key informant interviews: UNISON.

<sup>127</sup> Audit Scotland (2017) Equal Pay in Scottish Councils. Available at: <https://www.audit-scotland.gov.uk/report/equal-pay-in-scottish-councils>. Accessed 9.8.21.

## **Case Study 12 – UK: Litigation, Job Evaluation, Collective Bargaining and Industrial Action in the English Civil Service**

This case study focuses on the long-standing campaign by Civil Service trade union, Prospect, to achieve equal pay for work of equal value for their members across the English Civil Service. Prospect has successfully combined litigation with collective bargaining and revision of the Job Evaluation and Grading Support System (JEGS) job evaluation scheme to achieve equal pay and narrow the GPG in several parts of the Civil Service. This is despite the impact of localised pay bargaining imposed by the Government in the early 1990s and pay austerity within the public sector since 2010.

### **Initiative**

Civil Service union Prospect's use of equal pay litigation has been focused on different aspects of gender discrimination within pay systems across Westminster Government Departments and Agencies. It has generally been followed by settlements and collective bargaining to narrow the GPG. The landmark cases of Cadman and Wilson were lodged against the Health and Safety Executive (HSE) in 2001, when the union successfully challenged length of service as the means of pay progression. Following moves to rectify the gender imbalance in posts within the HSE, the women were earning £9,000 and £6,000 per annum less than men doing the same work because they had been in HSE jobs for less time. The case had nine hearings – from the Employment Tribunal to the European Court of Justice (ECJ) – which modified the findings of the 1989 Danfoss case, decided in the European Court of Justice, in which it was ruled that length of service was a legitimate means of determining pay. In the case of Cadman and Wilson, the ECJ ruled that the employer had to show that longer service/experience resulted in better performance.

Since then, Prospect has also taken cases in the Valuation Office, Veterinary Laboratory Agency, Prison Service and Intellectual Property Office. JEGS, which had been modified to better reflect the attributes of women's jobs, was used to evaluate jobs in the Met Office. However, separate and overlapping pay ranges were established for different jobs, undermining JE outcomes and equal pay for work of equal value. The proportion of women employees increased from 25% to 32%, with over 60% of women having less than five years' service. A pay freeze meant that rates remained at 2008 levels and by 2014, 70% of people were still in the 'development zone', despite their experience, widening the GPG. The ad hoc use of recruitment and retention allowances had also distorted the pay system. Alongside litigation, Prospect took industrial action, lobbied MPs and produced an 'Equal Pay Manifesto'.

### **Outcome**

Despite ongoing pay austerity in the public sector, the Met Office got agreement from the Treasury to settle individual cases and establish a new pay equal value 'proofed' pay structure in 2018. It resulted in a pay increase of up to £7,000 per annum for most employees and a narrowing of the GPG from 10% to 1%. As a result of its 20-year campaign to win equal pay for work of equal value for women

across the English Civil Service, Prospect has tackled many of the issues responsible for unequal pay and the GPG. The JEGS JES has been updated, pay and pay systems have been analysed and changed to bring them into line with successful litigation and JE outcomes. Prospect is also using newly established GPG reporting requirements to negotiate better recruitment and promotion schemes, flexible working and training for women to tackle gender discrimination in employment and promotion. An equal value 'culture' has been established within the union and the campaign is being extended to women employed on outsourced contracts<sup>128</sup>.

### **Applicability**

Key aspects of Prospect's campaign have applicability to achieving equal pay within the Scottish Civil Service, although the Scottish jobs, which are the subject of this research, are largely found in outsourced catering and cleaning contracts in trading companies in national monuments, galleries and gardens. It appears that the version of the JEGS JES used in Scotland is an old version which has not been equal value 'proofed'. This could easily be rectified. In addition, Prospect in Scotland does organise some workers in trading companies, so a systematic approach to equal/low pay similar to that adopted in England could be pursued with the contractors, along with other relevant unions.

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<sup>128</sup>Key informant interviews Prospect.

## Appendix 2 – Literature Review

This literature review examines issues affecting Women in Scotland's pay and conditions in so-called 'elementary' occupations (such as cleaning and catering), adult health and social care, early learning and childcare (ELC) and sales and customer service. The report highlights the importance of occupational and sectoral gender-segregation for the valuation of women's work – that is where particular occupations or sectors are disproportionately inhabited by women or men, as in the four covered in this report.

Pay in the occupations considered in this review is determined to varying degrees by national, sectoral and organisational collective bargaining and the value of contracts awarded by public bodies, but also procurement regulations. Variation in pay between occupations is influenced by the extent to which workers are directly employed by national, regional or local authorities, or are in services that have been privatised or outsourced to contractors. The review considers the impact of the privatisation and outsourcing of public services, particularly social care, and considers proposals for a National Care Service and macro-economic strategies investing in the care economy. It examines the importance of the National Living Wage, but more importantly the Living Wage Foundation (rLW) wage in cleaning and catering. It also considers the potential impact of current equal pay cases involving national supermarkets on pay and the GPG in retail work.

The review begins by setting out the Scottish labour market and the governmental and legal landscape, including the Scottish Government's (SG) vision for fair work and the work of the FWC. It then explores pay systems covering public service workers, and mechanisms that have been introduced to secure equal pay, on the basis that these might cover a proportion of health and social care workers, early learning and childcare workers and possibly catering workers. Reflecting the fact that women are disproportionately directly or indirectly employed in publicly funded services where there is scope for SG influence, there is a focus on collective bargaining and the currency and practical implementation of existing job evaluation schemes in key Scottish public sector organisations.

The literature review considers how the pay of all four occupations is determined, including in the private and third sectors. There is a focus on health and social care, because of its governance by public funding regimes, the steps already taken by the Scottish Government to introduce the rLW and the wealth of literature on the valuation of care work. The review takes an intersectional approach differentiating between women's work experiences by race and ethnicity, migration status, age and disability. It also examines evidence of the legacy of austerity measures and Covid-19 on women's work, in particular evidence of the disproportionate effect on ME women.

## The Gender-Segregated Labour Market

National statistics show that between a third and a half (42%) of women in Scotland work in gender-segregated occupations and of this proportion 17% are in personal services occupations, 15% in administrative and secretarial, and 11% in sales and customer services<sup>129</sup>. Just under one third (30%) of men are employed in occupations with high levels of gender segregation – 19% in skilled trades and 11% in process, plant and machinery<sup>130</sup>. Figure 1 illustrates the extent of occupational segregation in Scotland.

Figure 1: Proportion of Employment Aged 16 and Over by Gender and Occupation, Scotland, 2019<sup>131</sup>

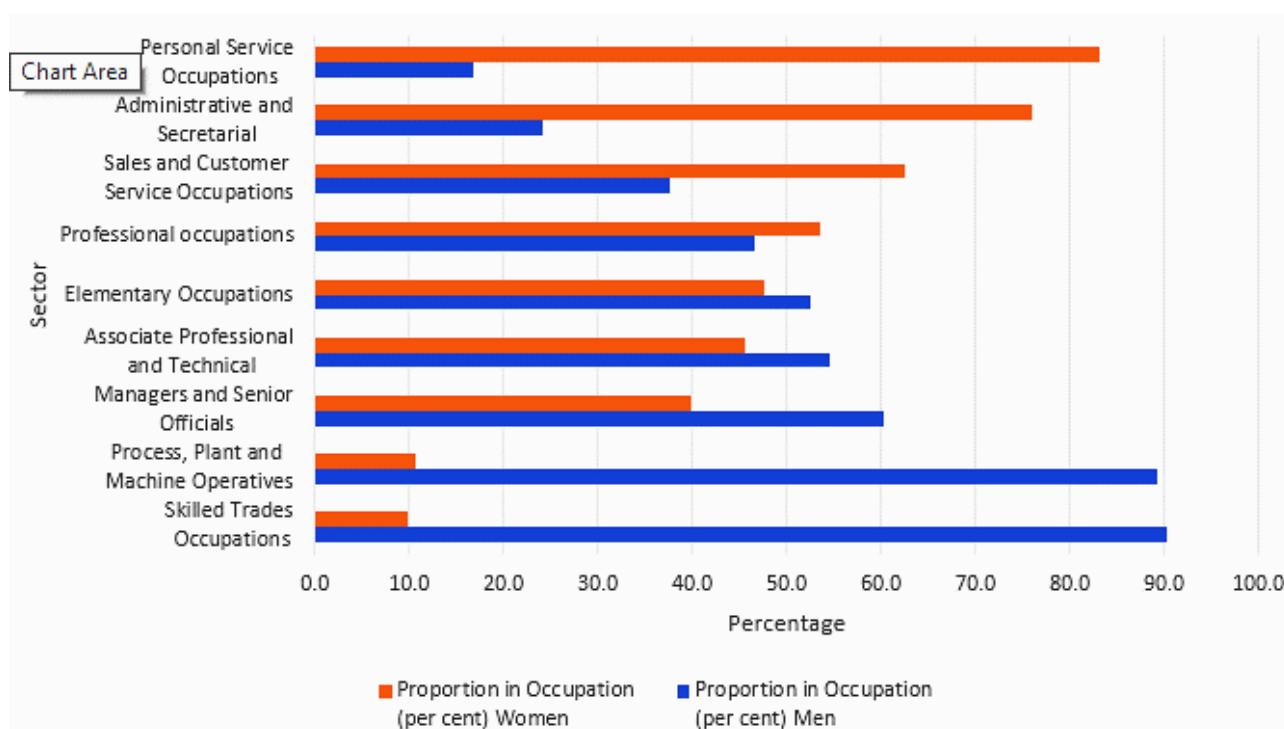


Table 1 shows similar segregation by sector, with over a third of female employment in the public sector compared to under one fifth of male employment. In terms of sectors, women predominate in private catering, retail and cleaning sectors, while half of female employment is in the private early learning and childcare sector. Among women employed in health and social care, around one third work in the private sector and well over half (58%) in the public sector – close to the figures for all employed<sup>132</sup>.

<sup>129</sup> Scottish Government (2019) Annual Survey of Hours and Earnings. Office for National Statistics. Available at: <https://www.gov.scot/publications/annual-survey-of-hours-and-earnings-2019/>. Accessed 20.3.21.

<sup>130</sup> Ibid.

<sup>131</sup> Ibid.

<sup>132</sup> Ibid.

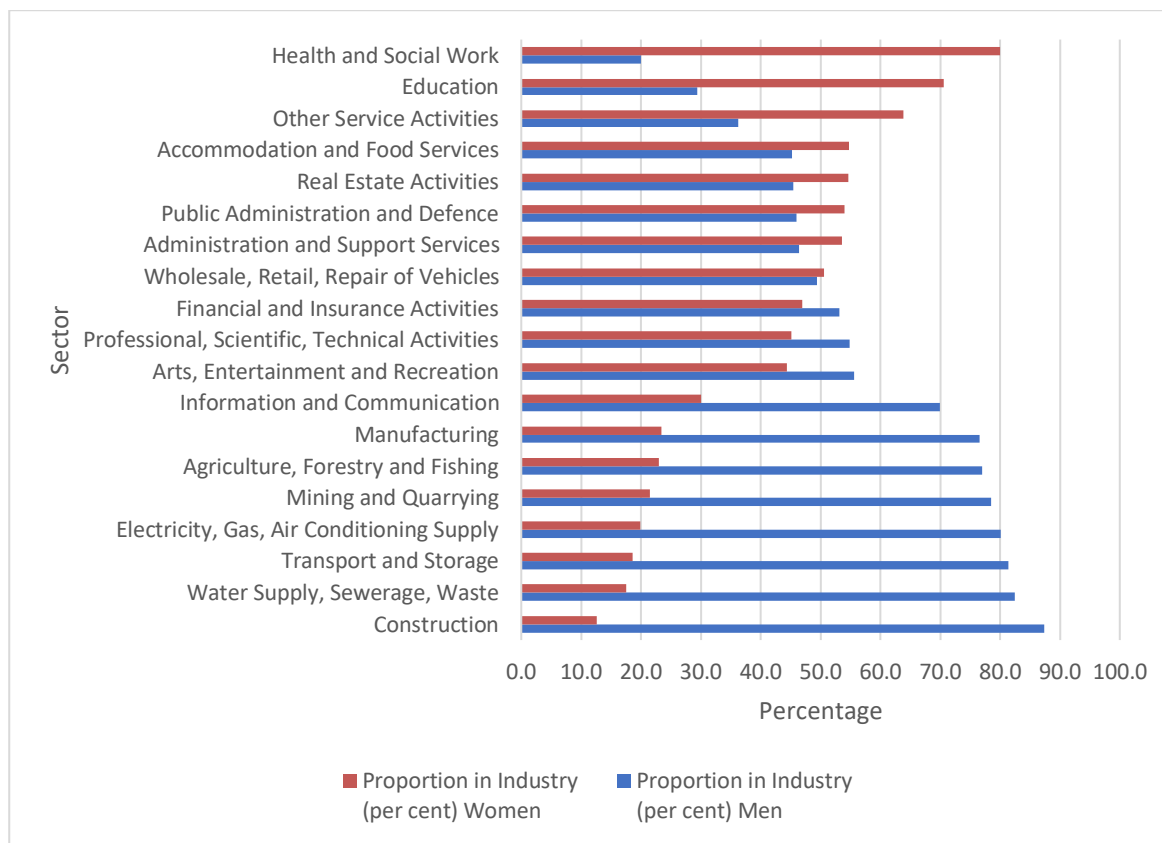
Table 1: Proportion of Employment by Public/Private/Third Sectors and Defined Industry Sectors, 2019<sup>133</sup>

		All Employment (%)	Health and Social Care (%)	Retail (%)	Catering (%)	ELC (%)	Cleaning (%)
All	Private Sector	70.9	30.8	99.0	93.9	51.2	93.4
	Public Sector	26.1	57.4	-	-	-	-
	Third Sector	3.0	11.8	-	-	-	-
Male	Private Sector	80.9	27.7				
	Public Sector	17.3	56.9	-	-	-	-
	Third Sector	1.9	15.4	-	-	-	-
Female	Private Sector	60.5	31.6	98.6	89.8	49.8	94.6
	Public Sector	35.3	57.5	-	-	-	-
	Third Sector	34.2	10.8	-	-	-	-

<sup>133</sup> Annual Population Survey, Jan-Dec 2019, ONS

Figure 2 illustrates the gender breakdown by standard industrial categories.

Figure 2: Proportion of Sector Employment Aged 16 and Over by Gender, Scotland, 2019<sup>134</sup>



Almost half of women in Scotland (46%) are concentrated in public, administration and defence, education and health and social work sectors. Here pay is determined by national sectoral collective bargaining agreements<sup>135</sup> and there is thus potential for equality bargaining, although the effect of privatisation on the occupations in question cannot be under-estimated<sup>136</sup>. Just under half (44%) of men work in

<sup>134</sup> Scottish Government (2019) Annual Survey of Hours and Earnings. Office for National Statistics. Available at: <https://www.gov.scot/publications/annual-survey-of-hours-and-earnings-2019/>. Accessed 20.3.21. UK SIC 2007. Standard Industrial Classification 2007: Available at: <https://www.ons.gov.uk/methodology/classificationsandstandards/ukstandardindustrialclassificationofeconomicactivities/uksic2007>. Accessed 30.6.21.

Health and social care – SIC86, 87, 88 (excluding SIC88.91)

Retail – SIC47

Catering – SIC56.1, 56.2

Early learning and childcare – SIC85.1, 88.91

Cleaning – SIC81.21

<sup>135</sup> ONS (2020), Trade Union Membership, UK 1995-2019: Statistical Bulletin. Available at: [https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/887740/Trade-union-membership-2019-statistical-bulletin.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/887740/Trade-union-membership-2019-statistical-bulletin.pdf). Accessed 27.5.21.

<sup>136</sup> Grimshaw, D (2013). Austerity, Privatization and Levelling Down: Public Sector Reforms in the

construction, manufacturing, transport, storage and information, energy and water and agriculture, forestry and fishing, where sectoral collective bargaining is less comprehensive<sup>137</sup>.

Sectoral and occupational segregation underpins the GPG<sup>138</sup> in Scotland, which was 10.9% for all employees and 3% for full-time employees in 2020<sup>139</sup>. While the GPG is persistent there have been substantial reductions since 2019 when the figures were 14% and 7% respectively. The overall GPG is twice as large in the private than the public sector (21% and 10% in 2020). As elsewhere, the GPG is higher in professional, scientific and technical activities (25%) and financial and insurance activities (23%) and reductions in the GPG can represent a narrowing of the differences between men and women's pay at the bottom of the pay distribution. In Scotland, as elsewhere, the GPG is highest amongst older employees, aged 50-64 (18% GPG) and there is evidence of a 'motherhood penalty' (8% GPG among those aged 35-49 compared to -3% for full-time employees aged 16-24)<sup>140</sup>. The latter reinforces UK research that shows by the age of 42, mothers who are in full-time work are earning 11% less than full-time women without children<sup>141</sup>.

European-wide research has suggested the impact of austerity measures following the 2008 financial crash on the public sector GPG<sup>142</sup>. The average unadjusted GPG in the public sector across the EU-28 between 2007 and 2018 increased during recession and has only just started to recover, although there is variation between countries – austerity measures have differed in their ferocity between EU states and have had differential outcomes. Two measures of austerity impact the GPG. Both increases in unemployment and cuts in expenditure on public sector pay increase the GPG. The latter will reflect both job cuts and pay freezes and cuts and suggests that public sector pay policies under austerity have impacted negatively on the GPG. The GPG is wider for those earning most and narrower at the bottom of pay distributions, supporting the suggestion that austerity may cause convergence between men and women's pay at the lower end. The trend may be affected by trade union attempts to protect the lowest paid against pay cuts or freezes or an outcome of statutory minimum pay policies.

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United Kingdom. Available at: [https://ideas.repec.org/h/elg/eechap/15209\\_15.html](https://ideas.repec.org/h/elg/eechap/15209_15.html). Accessed 21.5.21.

Prizzia, R (2005) An International Perspective of Privatization and Women Workers. *Journal of International Women's Studies*. 7(1): 55-68.

<sup>137</sup> Scottish Government (2019) Annual Survey of Hours and Earnings Office for National Statistics. Available at: <https://www.gov.scot/publications/annual-survey-of-hours-and-earnings-2019/>. Accessed 20.3.21.

<sup>138</sup> Median GPG, as % of men's salaries.

<sup>139</sup> Scottish Government (2021) Gender Pay Gap Action Plan: Annual Report. Available at: [https://www.gov.scot/publications/gender-pay-gap-action-plan-annual-report/pages/4/#:~:text=In%202020%2C%20the%20gender%20pay,percentage%20points%20over%20the%20year.&text=The%20median%20gender%20pay%20gap,the%20UK%20level%20\(15.5%25\)](https://www.gov.scot/publications/gender-pay-gap-action-plan-annual-report/pages/4/#:~:text=In%202020%2C%20the%20gender%20pay,percentage%20points%20over%20the%20year.&text=The%20median%20gender%20pay%20gap,the%20UK%20level%20(15.5%25)). Accessed 23.6.21.

<sup>140</sup> Scottish Government (2020) Annual Survey of Hours and Earnings: 2020. Available at: <https://www.gov.scot/publications/annual-survey-of-hours-and-earnings-2020/>. Accessed 15.4.21.

<sup>141</sup> TUC (2016) The Motherhood Pay Penalty, London: TUC. Available at: <https://www.tuc.org.uk/sites/default/files/MotherhoodPayPenalty.pdf>.

<sup>142</sup> EPSU (2021) Closing the GPG in Public Services in the Context of Austerity. EU Social Dialogue Project VS/2018/0074. Available at: <https://www.epsu.org/sites/default/files/article/files/GPGreport.pdf>. Accessed 3.4.21, Op.Cit.



Close the Gap note a fluctuation in the Scottish GPG during 2011 and 2012 where there was a significant jump in the combined mean pay gap from 16% to 18%<sup>143</sup>. It suggests that the fluctuation reflects the high number of public sector workers, the majority of whom are women, who have been affected by the public sector pay freeze, job losses and reductions in the number of posts. Close the Gap propose that this trend highlights how economy-wide changes affect the GPG. It also highlights the decline in the GPG for the lowest earners and state that this may be a result of the introduction of the rLW across of the public sector, the commitment to pay the rLW for adult social care workers and the impact of the introduction of the National Living Wage by the UK Government.

Close the Gap also note the absence of Scottish data to illuminate how the different labour market experiences of disabled, ME, migrant and young women are reflected in the GPG. From UK Labour Force Survey it concludes that ME women cannot be treated as a homogenous group.

Close the Gap has also indicated the disproportionate impact of Covid-19 on Women in Scotland<sup>144</sup>. It argues that women in low-paid jobs will be particularly affected by job disruption and the need for more unpaid care, impacting their ability to do paid work. Women are also less likely to be in work that can be done from home during periods of social distancing, resulting in a greater risk to their job retention and financial security. Close the Gap identify that overall, women are more likely to work in a sector that has been shut down (18%, compared to 14% for men), but these sectors also have an over-representation of ME women, migrant women and young women (39% of women under 25 work in these sectors, compared to 26% of men aged under 25). Since women are the majority of low-paid workers, and account for two-thirds of workers earning less than the rLW, receiving only 80% of their usual salary through the Job Retention Scheme may push women into poverty. Increased unemployment and underemployment are more likely to affect women.

## Legislative Environment

The Scotland Act 1998 (as amended in the Scotland Act 2012 and 2016) gave power to Scotland to establish a Scottish Parliament and the Scottish Executive, which have jurisdiction over devolved issues such as education, the environment and health. However, employment remains a reserved issue, under the control of Westminster. The principal piece of legislation covering equality in Scotland is the Equality Act (2010), which applies across England, Scotland and Wales. The Equality Act (2010) sets out the legislative parameters for addressing discrimination based on nine protected characteristics<sup>145</sup> and differentiates between direct and indirect, victimisation and harassment. The Equality Act 2010 is enforced through a two-pronged approach: legal compliance through the Employment Tribunal system

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<sup>143</sup> Close the Gap (2018) The Gender Penalty: Exploring the Causes and Solutions to Scotland's Gender Pay Gap Available at: <https://www.closesthegap.org.uk/content/resources/The-Gender-Penalty-Feb-2018.pdf>. Accessed 16.3.21.

<sup>144</sup> Close the Gap (2020) Covid Disproportionate Disruption: The impact of COVID-19 on Women's Labour Market Equality May 2020. Available at: <https://www.closesthegap.org.uk/content/resources/Disproportionate-Disruption---The-impact-of-COVID-19-on-womens-labour-market-equality.pdf>. Accessed 17.4.21.

<sup>145</sup> Sex, disability, race, age, religion or belief, marriage and civil partnership, gender reassignment, sexual orientation, pregnancy and maternity.

and administrative sanctions through the Equality and Human Rights Commission (EHRC). The Employment Tribunal system hears complaints for breaches of law brought by individual workers or employees. Administrative sanctions are applied by the EHRC after carrying out investigations, if they find a breach of the law has occurred. However, as employment remains a reserved area, the Scottish Government has no current scope for amending the Equality Act 2010.

### Potential Devolved Powers

Scope for amending the Equality Act 2010 may widen in the future, if further devolved powers are granted. Twelve equality organisations submitted a call to the Smith Commission<sup>146</sup> to encourage the Commission to consider the devolution of equality law on the basis that it is essential to secure social justice and equality in Scotland<sup>147</sup>. The Scottish Refugee Council based these calls on three key areas of difference between Scotland and the rest of the UK: a different demographic makeup giving rise to unique equality issues; areas of Scottish law that are already devolved intersecting with UK equality law that has not been designed with these differences in mind; and the Scottish Government having the appropriate local knowledge to allow it to legislate appropriately<sup>148</sup>. Macdonald<sup>149</sup> furthers these calls for devolved equality law, claiming fully devolved equality law will help create a 'gender-equal Scotland'. The third annual report by the First Minister's National Advisory Council on Women and Girls focuses on Scotland's gender architecture and its ability to secure justice for women in Scotland. The report recommends full devolution of equality legislation and policy-making to 'support the creation of a systemic intersectional gender architecture by placing the power to legislate and regulate around equality'<sup>150</sup>. This approach would allow Scotland to establish their own equality regulator that requires public bodies to 'involve the communities their decisions affect'<sup>151</sup>.

### The Role of the Public Sector Equality Duty

While devolving equality law more broadly is currently under debate, the Scottish Government does have limited power over equality law in the public sector. Importantly, the Equality Act (2010) created the Public Sector Equality Duty (PSED), which uses reflexive legislation to place additional duties on the public sector across the UK and replaces the previous specific duties on disability, race and gender. The purpose of the specific duties is to help public bodies comply with the general duty. The main thrust of the general and specific duties is for public

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<sup>146</sup> Smith Commission (2015) Scotland in the United Kingdom: An Enduring Settlement. Available at: [https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/397079/Scotland\\_EnduringSettlement\\_acc.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/397079/Scotland_EnduringSettlement_acc.pdf). Accessed 13.3.21.

<sup>147</sup> Scottish Refugee Council (2021) Letter Calls for Devolution of Equality to be Considered. Available at: <https://www.scottishrefugeecouncil.org.uk/letter-calls-for-devolution-of-equality-to-be-considered/>. Accessed 10.5.21.

<sup>148</sup> Ibid.

<sup>149</sup> Macdonald, L (2021) Scottish Government Advisors Recommend Full Devolution of Equality Legislation and Policy. Available at: <https://scottishlegal.com/article/scottish-government-advisers-recommend-full-devolution-of-equality-legislation-and-policy>. Accessed 10.5.21.

<sup>150</sup> NACWG (2020:26) #GenerationEqual: First Minister's National Advisory Council on Women and Girls 2020 Report and Recommendations. Available at: [https://onescotland.org/wp-content/uploads/2021/01/562006\\_SCT1120576152-002\\_NACWG.pdf](https://onescotland.org/wp-content/uploads/2021/01/562006_SCT1120576152-002_NACWG.pdf). Accessed 10.5.21.

<sup>151</sup> Ibid.

sector organisations to have ‘due regard’ to ‘eliminate discrimination, harassment, victimisation and any other conduct prohibited by the Act’ based on the nine protected characteristics, although in a more limited sense for marriage and civil partnership. There are different specific duties for the four nations, however, with the Welsh and Scottish duties more prescriptive than the English duty.

The specific duty that applies to Scotland is the ‘The Equality Act 2010 (Specific Duties) (Scotland) Regulations 2012’ and subsequent amendments. Under the Scottish specific duty, Scottish public sector organisations must publish GPG information and an equal pay statement. The reports must cover the whole authority and should include both part-time and full-time staff. Overtime is excluded from the analysis. The report must calculate the gap as a percentage difference between the hourly pay for men and the hourly pay for women. In 2013, when the Scottish specific duties first came into force, only organisations with 150 plus employees were covered. Since amendments were made in 2016, organisations with 20 plus employees need to comply with reporting. These requirements are stronger than the specific duty for England, where public bodies need only produce GPG information and not equal pay statements and the threshold for reporting is 150 plus employees.

The EHRC carried out a review of the Equality Act 2010 (Specific Duties) (Scotland) Regulations 2012 in three areas: the duty to publish equality outcomes and report progress, the duty to gather and use employee information and the duty to publish GPG information<sup>152</sup>. It found that 69 out of 148 authorities had data that showed a change in the GPG in the period 2013 and 2017. Nearly half of the 47 authorities who had data that could be compared both in 2013 and 2017, saw a decrease of under 2% in the GPG, with 17 authorities seeing an increase of over 2%. EHRC Scotland also found poor levels of reporting compliance, although this improved towards the end of the analysis period, which they attribute to an increased understanding of reporting rules<sup>153</sup>. While the specific duty in Scotland is more prescriptive than in England, key concerns remain. For example, Scottish Water found a GPG slightly in favour of women, using the Equality Act 2010 (Specific Duties) (Scotland) Regulations 2012 calculations, but slightly in favour of men, using the Equality Act 2010 (Gender Pay Gap Information) Regulations 2017<sup>154</sup>. The Coronavirus (Scotland) Act 2020 permits organisations to forgo detailed reporting requirements if it helps them respond to the pandemic. However, the law requires public bodies to still publish equality outcomes, GPG information, equal pay reports and their progress in achieving these outcomes because it deems that equality remains essential<sup>155</sup>.

The Scottish Parliament has powers, under the Scotland Act 1998, to encourage equal opportunities and impose duties on Scottish public bodies and those cross-

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<sup>152</sup> EHRC Scotland (2018) Effectiveness of the Specific PSED Duties in Scotland. Scotland: Coalition of Racial Equality and Rights.

<sup>153</sup> Ibid.

<sup>154</sup> Scottish Government (2019) Employer Methods for Addressing the Gender Pay Gap. Edinburgh: APS Group Scotland.

<sup>155</sup> EHRC (2020) Public Sector Equality Duty in Scotland. Available at:

<https://www.equalityhumanrights.com/en/public-sector-equality-duty-scotland> Accessed 6.3.21.

border public bodies that operate in Scotland to achieve the general duty under the Public Sector Equality Duty. Therefore, control over the Equality Act 2010 (Specific Duties) (Scotland) Regulations 2012 provides some scope for the Scottish Government to take action in relation to the undervaluation of women's work.

## Employment Tribunals

The same Employment Tribunal (ET) rules govern employment tribunals in England, Wales and Scotland. However, there are some differences in the way the tribunals operate. Firstly, witness statements are not generally used in Scotland, instead solicitors draft witness statements that are not exchanged with the opposing side and oral evidence is given on the day through examination in chief<sup>156</sup>. Furthermore, Employment Law judgements made in the Court of Session are not legally binding in England and Wales, but are in Scotland<sup>157</sup>. Wider differences between the Scottish and English and Welsh system are expected when the Employment Tribunal procedures are devolved following the Smith Commission. It has been suggested that specialist divisions in the Sheriff Court could deal with equality issues and powers to create these divisions lie in The Courts Reform (Scotland) Act 2014. The management of the reserved Tribunals would be devolved, while Westminster would retain power over the legislation<sup>158</sup>. These plans have now been put on hold until at least 2022<sup>159</sup>, but there could be scope for addressing the GPG through the procedures used in the Scottish Employment Tribunals, for example ET judges providing recommendations that apply to the wider workforce and not just the employee who brought the case, as currently happens.

## Fair Work Action Plan and Fair Work First

Fair Work is the Scottish Government's strategic foundation, with the Fair Work Framework established to achieve this goal by 2025. The FWC was set up in 2015 and is an independent advisory body to the Scottish Government. The Fair Work Framework was published by the FWC in 2016 and includes five key principles: effective voice, respect, security, opportunity and fulfilment<sup>160</sup>. This framework is to be used as best practice guidance and to identify areas for development.

Fair Work First is the key plank the Scottish Government uses to encourage employers to be more diverse and create inclusive workplaces where employees have security of pay and contracts, can improve skills and achieve effective voice in the workplace. Importantly, Fair Work First recommends employers commit to key criteria; using appropriate channels for employee voice including trade union

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<sup>156</sup> Cradden, J (2013) Scottish Employment Law: Small but Significant Differences can be a Trap for the Unwary. Available at: <https://www.inhouselawyer.co.uk/legal-briefing/scottish-employment-law-small-but-significant-differences-can-be-a-trap-for-the-unwary/>. Accessed 19.6.21.

<sup>157</sup> Furber, L (2020) Employment Law in the United Kingdom, What Differences Are There? Available at: <https://www.crunch.co.uk/knowledge/employment/employment-law-in-the-united-kingdom-what-differences-are-there/>. Accessed 6.3.21.

<sup>158</sup> SPICe (2015) SPICe Briefing The Smith Commission Report – Overview. Scotland: Scottish Parliament.

<sup>159</sup> Scottish Legal News (2020) Plans to Devolve Tribunals Delayed for at Least Two Years.

Available at: <https://www.scottishlegal.com/article/plans-to-devolve-tribunals-delayed-for-at-least-two-years>. Accessed 6.3.21.

<sup>160</sup> Scottish Government (2021). Fair Work Action Plan. Available at: <https://www.gov.scot/publications/fair-work-action-plan/>. Accessed 17.6.21.

recognition, investment in workforce development, use of zero-hours contracts<sup>161</sup> only where it is appropriate, positive action to address the GPG and make workplaces more inclusive and payment of the rLW<sup>162</sup>.

The Fair Work Action Plan is being used by the Scottish Government to address three broad themes:

- Support employers to adopt Fair Work practices
- Deliver Fair Work to a diverse and inclusive workforce
- Embed Fair Work across the Scottish Government

There is a sixteen-point plan to achieve the three broad themes:

1. Work with employer and partners to deliver Fair Work First. This goal includes asking employers to commit to the following criteria:
  - Voice channels such as trade union recognition
  - Workforce development
  - No inappropriate use of zero-hours contracts
  - Gender Pay Gap action plans and creating a diverse workforce
  - Real Living Wage (sometimes known as Scottish Living Wage)

The Scottish Government will extend the Fair Work First criteria public contracts, grants, funding streams and business support.

2. Develop a benchmarking tool for employers. The focus of this tool is to allow employers to critically assess their organisations. In January 2021, a Fair Work Employer Support Tool was published to help employers self-assess their fair work practices<sup>163</sup>.
3. Create an online Fair Work service for small and micro employers that provides a central point of information. This hub will be linked to the Enterprise and Skills portal.
4. Refresh the Scottish Business Pledge to ensure it is compatible with the Fair Work First Framework. This is a voluntary pledge that focuses on boosting productivity by promoting fairness, equality and sustainable employment<sup>164</sup> based on the business case for equality. To sign up organisations must be headquartered in Scotland or have an employee body in Scotland, pay all employees over 18 the rLW, not use zero-hours contracts inappropriately,

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<sup>161</sup> ZHCs do not guarantee fixed working hours and thus a regular level of earnings.

<sup>162</sup> Scottish Government (2021) Fair Work Action Plan. Available at: <https://www.gov.scot/publications/fair-work-action-plan/>. Accessed 17.6.21.

<sup>163</sup> Fair Work Employer Support Tool (2021) Helping You Progress in Fair Work. Available at: <https://fairworktool.scot>. Accessed 17.6.21.

<sup>164</sup> Scottish Business Pledge (2021) Let's Work Together to Build Stronger Businesses and a Fairer Scotland. Available at: <https://scottishbusinesspledge.scot/>. Accessed 17.6.21.

take action to address the GPG and commit to achieving five of the following<sup>165</sup>:

- Invest in skills and a diverse workforce
  - Innovation
  - Workforce engagement
  - Internationalisation
  - Prompt payment
  - Supporting the community
  - Environmental impact
5. Focus on creating a Fair Work ethos in the future workforce. This action point includes educating the future workforce about Fair Work with a focus on raising awareness of gender issues.
  6. Co-host an International Fair Work Summit in collaboration with the FWC. The goal of this point is to showcase Scotland's work on an international stage<sup>166</sup>.
  7. Extend the workplace equality fund to enable more employers to address long-term barriers in the labour market.
  8. Support the Scottish Trade Union Congress (STUC) with funding for an additional round of Fair Work and Trade Union Modernization.
  9. Reflecting the pledge the Scottish Government made with the National Performance Framework<sup>167</sup>, the Scottish Government will work with the STUC to increase collective bargaining coverage. Other STUC collaborations include work on the procurement process, in the early learning sector and hospitality sector.
  10. Address issues in the collaborative economy, including developing employers' knowledge of Fair Work and produce guidance for workers about their rights.
  11. Support the FWC to run an inquiry into the construction sector, which faces significant challenges in terms of Fair Work. In addition to developing a Fair Work Charter, win collaboration with the Scottish Futures Trust.
  12. Address the challenges faced by frontline social care sector workers. The FWC undertook a report into the sector in 2019<sup>168</sup> and the Scottish

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<sup>165</sup> Ibid.

<sup>166</sup> Scottish Government (2021) Fair Work Action Plan. Available at: <https://www.gov.scot/publications/fair-work-action-plan/>. Accessed 17.6.21.

<sup>167</sup> Scottish Government (2021) National Performance Framework. Available at: <https://nationalperformance.gov.scot/>. Accessed 19.6.21.

<sup>168</sup> Fair Work Convention (2019) Fair Work in Scotland's Social Care Sector. February 2019. Available at: <https://www.fairworkconvention.scot/our-report-on-fair-work-in-social-care/>. Accessed 30.6.21.

Government commit to consider and respond to the recommendations of this report.

13. Commit to making funding available for the rLW to be paid to all workers delivering funded childcare places in the early learning sector. Additionally, the Scottish Government will work with the Poverty Alliance to build a Living Wage Nation, focusing on increasing the wages of 25,000 people.
14. Address the needs of unpaid carers through the Carer Positive employer accreditation scheme.
15. Within the Scottish Government develop a Fair Work Ministerial Working Group to move forward a strategic approach to embedding Fair Work across the Government.
16. Continue to campaign for Employment Law to be devolved and set out the SG proposals including replacing the NMW and NLW with rLW and repealing the Trade Union Act.

### **Fair Work and Social Care FWC Report Recommendations**

In 2019 the FWC carried out a report into the Social Care sector in Scotland. The sector is reported to be in crisis, with increased demand, funding pressures and high staff turnover rates<sup>169</sup> The key recommendations from the report include:

- 1) A sector-level body to ensure that social care workers have effective voice in the development, design and delivery of social care service. This body would comprise employers, unions, policy makers and other relevant parties. Their scope would be to scrutinise work practices and provide information and include policy. In time, it could become a forum for sectoral bargaining.
- 2) Minimum contract standards should be developed for publicly funded social care services that are in line with the Fair Work Framework and Fair Work First.
- 3) Commissioning practices in social care need to be reconsidered. This can be achieved through minimum contract standards and sector level engagement between purchasers, providers and those who deliver social care services.
- 4) Key stakeholders in the sector should apply the Fair Work Framework with the necessary commitments.
- 5) These recommendations should be incorporated into the Scottish Government's Fair Work Action Plan and Gender Pay Action Plan.

### **Collective Bargaining**

As above, Women in Scotland are more likely to be employed in the public sector and thus their pay and conditions are determined, directly or indirectly, by national collective agreements enshrining single status and job evaluation. Two key

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<sup>169</sup> Ibid.

agreements are Agenda for Change in the NHS and Single Status in local government.

## Single Status

In 1997, the UK Single Status agreement in local government brought manual and white-collar workers together within a single collective agreement (the 'Green Book') and established a new pay and grading system based on the principle of equal pay for work of equal value and a jointly agreed job evaluation scheme (JES)<sup>170</sup>. In 1999 the Scottish Joint Council concluded its own Single Status agreement, the National Agreement on Pay and Condition (Scotland 'Red Book'). This agreement states that 'employees will be afforded equal opportunities in employment irrespective of disability, gender, race, religion, age, sexuality, and marital status', but also parental status, caring responsibilities and hours of work'. Councils 'will ensure that discriminatory practices are identified and removed and non-discriminatory practices introduced in all areas of employment'<sup>171</sup>. Scotland developed its own JES, with different factors and weightings to the UK NJC scheme. This produced different results than the NJCJES for some groups of women manual workers. The Scottish JES has subsequently been revised twice, most recently in 2015.

The Westminster and Scottish governments provided no extra funding for Single Status, unlike the parallel Agenda for Change scheme in the NHS<sup>172</sup>. Pay and terms and conditions in health are determined by Agenda for Change (health workers) with specific provision negotiated at the level of NHS employers. In contrast, in local government the trade unions wanted core national grades and UK/national level implementation, but neither the Scottish Joint Council (SJC) or Scottish employers would agree. Consequently, individual councils implemented their own job evaluation and pay and grading schemes, utilising core SJC pay scales. The trade unions produced large amounts of guidance on job evaluation and the application of equal pay law to Single Status negotiations. While local pay and grading systems are undoubtedly now broadly compliant with equal value principles and there is a sustainable mechanism for grading jobs into the future across the UK, lack of funding and deadlines, a residual bonus problem, the intervention of 'no win, no fee' lawyers, employer and trade union reluctance and austerity have all played a part in leaving UK national governments with hefty bills for litigation and equal pay settlements. In the case of NJC employers this has amounted to well in excess of £2 billion, while in Scotland the bill for litigation is £750,000 – with many cases outstanding<sup>173</sup>. The Scottish Audit Commission

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<sup>170</sup> NJC (2018) Single Status Agreement 'Green Book' (2018 version). Available at: <https://www.unison.org.uk/content/uploads/2018/07/NJC-Green-Book-18.pdf>. Accessed 30.6.21.

<sup>171</sup> UNISON-Scotland (2021) Single Status Red Book. Available at: <https://unison-scotland.org/service-groups-and-sectors/local-government/single-status-red-book/>. Accessed 12.6.21.

<sup>172</sup> Audit Scotland (2017) Equal Pay in Scottish Councils. Available at: <https://www.audit-scotland.gov.uk/report/equal-pay-in-scottish-councils> Accessed 9.8.21.

<sup>173</sup> Equalities Watchdog Told Glasgow City Council its Pay Scheme Was Discriminatory in 2010 – But it Fought on. Available at: <https://www.heraldscotland.com/news/16318451.equalities-watchdog-told-glasgow-city-council-pay-scheme-discriminatory-2010---fought/> Accessed 11.10.21.



reported that by the end of 2018/19 councils had spent £1.314 billion settling equal pay claims<sup>174</sup>.

## Agenda for Change Scotland

Agenda for Change (AfC) was agreed in Scotland in 2004 and covers around 154,000 NHS employees, excluding doctors, dentists and some senior managerial staff. It should also apply to contracted-out workers via the Scottish Two-Tier Agreement<sup>175</sup>. These are likely to include a high proportion of cleaning, catering, laundry and other blue-collar workers. AfC comprises an 'equal value' proofed job evaluation system capable of evaluating 'new' and future jobs, a Knowledge and Skills Framework (KSF) linked to progression and harmonised conditions for manual, professional and technical, health care and administrative staff<sup>176</sup>.

The AfC pay system consists of nine pay bands, the lowest Band 1 exceeding the rLW. A three-year settlement from 2018/19–2020/21 increased the starting pay in each band, increased progression to the top of each band and increased pay for those at the top of the bands. The agreement also included four areas for reform – policy on the management of sickness absence, organisational change and protection of earnings, utilisations and application of TOIL (Time off in Lieu) and appraisal and incremental progression. Partnership working within NHS Scotland is strong, as reflected in the review by Bacon and Samuel<sup>177</sup> and provides a platform to ensure that equal pay for work of equal value is delivered for catering, cleaning and care workers within NHS Scotland. It is also proposed that a separate collective agreement for the National Care Service could be based on Agenda for Change pay and conditions.

## Adult Health and Social Care

The health and social care sector encompasses older people's care and care for people with disabilities. One in ten workers in Scotland are employed in the health and social work sector – 398,000 people, of whom 70% are women. Nearly half (49%) of the sector has low and medium skills; over a third (35%) of the sector is aged 50 plus and only approaching one in ten (8%) of the sector is aged between 17 and 24 years because young people do not see care work as a career<sup>178</sup>. In contrast, hospitality has a younger workforce.

In Human Health and Social Work Activities the GPG increased from 15% in 2012 to 17% in 2019<sup>179</sup>. Close the Gap suggests that GPG increases during this period might reflect the impact of the public sector pay freeze, job losses and reductions in

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<sup>174</sup> Accounts Commission (2020) Equal Pay in Councils – Impact Report. [https://www.audit-scotland.gov.uk/uploads/docs/report/2020/ir\\_090620\\_equal\\_pay\\_in\\_councils.pdf](https://www.audit-scotland.gov.uk/uploads/docs/report/2020/ir_090620_equal_pay_in_councils.pdf).

<sup>175</sup> <https://www.gov.scot/news/pay-rise-for-nhs-scotland-staff/>

<sup>176</sup> <https://www.nhsemployers.org/publications/nhs-job-evaluation-handbook>

<sup>177</sup> Bacon, N and Samuel, S (2012) Partnership in NHS Scotland 1999-2011. Available at: <https://www.staffgovernance.scot.nhs.uk/media/1384/nottingham-report.pdf>. Accessed 10.5.21.

<sup>178</sup> Scottish Government (2019:14) Scotland's Labour Market: People, Places and Regions Annual Population Survey 2019. Available at: <https://www.gov.scot/publications/scotlands-labour-market-people-places-regions-statistics-annual-population-survey-2019/>. Accessed 30.6.21.

<sup>179</sup> NACE 86,87,88.

the number of posts on women<sup>180</sup>. Table 2 shows the gap for full-time employees, based on average hourly rates, was 12% in 2020, it also shows the different calculations for mean and median hourly rates.

Table 2: Gender Pay Gap, UK, 2020 in Health and Social Care Professions<sup>181</sup>

	Gender Pay Gap Median	Gender Pay Gap Mean
Full Time	10	11.6
Part Time	-7.2	0.4

Table 3 demonstrates that over one in ten (12%) of the Human Health and Social Work Activities workforce was paid less than the rLW in 2012. This had increased to 17% in 2016 but fell to 11% in 2019, showing that there had been little improvement in seven years<sup>182</sup>.

Table 3: Percentage of Human Health and Social Work Workforce Paid Less Than the rLW, 2012–19<sup>183</sup>

	2012	2013	2014	2015	2016	2017	2018	2019
% workforce earning less than real Living Wage	11.8	13.9	14.5	15.7	16.8	12.9	13.7	11.3

The Fair Work in Scotland’s Social Care sector report (2019) found that there were 202,090 Full Time Equivalent (FTE) workers employed in social care, 83% women. Over one in ten (13%) of the workforce work over 50 hours a week and one in five (20%) are not on permanent contracts, with 11% on zero-hours contracts<sup>184</sup>.

The key issue is recognition of the value of women’s care work, to support the case for better pay and conditions. In Australia, Denmark, Germany and Italy care workers are only slightly less well paid than construction workers but, in the US and UK, care workers are paid almost half of what construction workers are paid. In Australia, Denmark, UK and the US earnings of care workers are below the national

<sup>180</sup> Close the Gap (2018) The Gender Penalty: Exploring the Causes and Solutions to Scotland’s Gender Pay Gap. Available at: <https://www.closesthegap.org.uk/content/resources/The-Gender-Penalty-Feb-2018.pdf>. Accessed 1.12.18.

<sup>181</sup> ONS (2021) Gender Pay Gap. Available at: <https://www.ons.gov.uk/employmentandlabourmarket/peopleinwork/earningsandworkinghours/datasets/annualsurveyofhoursandearningsashegenderpaygaptables>. Accessed 23.6.21.

<sup>182</sup> Ibid.

<sup>183</sup> Ibid.

<sup>184</sup> Scottish Government (2019) A Fairer Scotland for Women: A Gender Pay Gap Action Plan. Fair Work, Employability and Skills Directorate. Available at: <https://www.gov.scot/publications/fairer-scotland-women-gender-pay-gap-action-plan/> Accessed 30.6.21.

average and the differences between childcare and care for older people is small. In some countries, pay for childcare workers is often higher than for care workers because the training and qualifications required are higher. Working conditions in the care sector are characterised by low pay, long hours, tiring work and irregular work<sup>185</sup>.

## Outsourcing Care

Baines and Cunningham's<sup>186</sup> analysis of outsourcing in the care sector identified that the pay of predominantly female and increasingly minority ethnic frontline workers had failed to keep up with that of workers in the public sector, especially in relation to pensions, sick pay and travel/subsistence allowances. In addition, skills were being undermined with a reduction of autonomy and discretion for frontline workers. The emotional content of care work has been replaced by increased bureaucracy.

A key determinant of pay is the widespread use of zero hours contracts (ZHCs), where women are more likely to be on a ZHC than men<sup>187</sup> – and the related non-payment of travel time, where the time spent travelling between clients' homes is either not paid or paid in full. Similarly, time spent training or in supervision is not paid. A study of the implementation of UNISON's Ethical Care Charter, adopted by over 20 local authorities including in Scotland<sup>188</sup> found that the introduction of the Living Wage (LW) or London Living Wage under the Charter had introduced a higher benchmark for pay and changed the wider care labour market by putting pressures on neighbouring local authorities to uplift rates. The LW was centrally funded by three local authorities and in the case of Renfrewshire, partly by the Scottish Government. However, while the case study authorities committed themselves to moving away from ZHCs and unpaid travel time, this has proved to be problematic. While a number of councils had given homecare workers the option of guaranteed hours contracts (GHCs) there is evidence that some care workers have been reluctant to move to GHCs because they have to commit to being available for unscheduled work, including early mornings, evenings and weekends, which those with caring responsibilities cannot or do not want to work, but which under GHCs (unlike ZHCs) they cannot then turn down<sup>189</sup>. GHCs share characteristics of Minimum Hours (MHCs) contracts in sectors such as retail, namely demanding availability beyond contractual hours.

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<sup>185</sup> De Henau, J; Himmelweit, S; Łapniewska, Z and Perrons, D (2016) Investing in the Care Economy: A Gender Analysis of Employment Stimulus in Seven OECD Countries: A Report by the UK Women's Budget Group Commissioned by the International Trade Union Confederation. Available at: <http://oro.open.ac.uk/50547/>. Accessed 3.5.21.

<sup>186</sup> Baines, D and Cunningham, I (2015) Care Work in the Context of Austerity. Competition and Change. 19(3): 183-193.

<sup>187</sup> Ndzi, E (2018) Banning Zero Hours Contracts Would Help Reduce the Gender Pay Gap. Available at: <https://theconversation.com/banning-zero-hours-contracts-would-help-reduce-the-gender-pay-gap-98892>. Accessed 23.6.21.

<sup>188</sup> Moore, S (2017) An Evaluation of UNISON's Ethical Care Charter. UNISON: London.

<sup>189</sup> The Taylor Report quotes the example of McDonald's similarly offering GHCs to workers and finding the take-up to be only around 20% – it is unclear whether additional hours were expected.

Cunningham and James<sup>190</sup> examined the changing nature of social care outsourcing and the effect on employment conditions in voluntary/not-for-profit organisations in Scotland. The use of more arms-length and cost-based contracting had led to an erosion of employment conditions. The use of Approved List Providers reduced costs by choosing the cheapest bids as part of a procurement process determined by financial priorities rather than local authorities developing relationships with local providers and working together to find ways of meeting local needs. Cunningham and James found that voluntary organisations/not-for-profit providers had less and less scope for protecting pay and working conditions, including reducing access to sick pay, pensions and other benefits.

Baines et al.<sup>191</sup> also explored the position of personal care workers in the not-for-profit sector. The cash-for-care model of personal funding, which means that workers are only paid from the individual service-user's package for the time spent with the service user, has had a damaging effect on pay and terms and conditions for care workers. There is no sick pay and consequently workers work when ill. They also provide additional hours without pay when a care package does not cover the cost of care and the not-for-profit provider cuts the worker's hours, thus using their discretion to provide better care for clients. Bureaucratic tasks were not recognised as paid work and so care workers again put additional unpaid work in. Workers were motivated by an ethic of care and solidarity with service users. These findings were reflected in the 'Fair Work in Scotland Social Care sector report', which concluded that fair work was not being delivered in the care sector. The wider systems of funding and commissioning make it difficult to offer fair work:

'Social care providers should be commissioned based on their level of skill, expertise, understanding and application of the Fair Work Framework, and on costs based on the right numbers of staffing required and a satisfactory and fair income level for each member of staff'<sup>192</sup>.

## **The Scottish Living Wage in Adult Social Care**

From October 2016 the Scottish Government and the Convention of Scottish Local Authorities (COSLA) jointly agreed that frontline care staff working in publicly funded adult social care should be paid at a minimum the rLW, in part to resolve recruitment and retention. Local health and social care partnerships would transfer funding via local authorities to care providers. Research by the University of Strathclyde<sup>193</sup> reported that there was consensus among voluntary and private sector providers, employers, COSLA, trade union representatives and civil servants that the introduction of the rLW for adult social care workers represented 'a

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<sup>190</sup> Cunningham, I and James, P (2014) Public Service Outsourcing and Its Employment Implications in an Era of Austerity: The Case of British Social Care. *Competition and Change*. 18(1): 1-19.

<sup>191</sup> Baines, D; Cunningham, I; Kgaphola, I and Mthembu, S (2020) *Affilia*. Journal of Women and Social Work 35(4): 449-465.

<sup>192</sup> Scottish Government (2019) Fair Work in Scotland's Social Care Sector 2019. Available at: <https://fairworkconvention.scot/our-report-on-fair-work-in-social-care/>. Accessed 19.6.21.

<sup>193</sup> Cunningham, I; Baluch, A and Cullen A-M (2018) Implementing the Scottish Living Wage in Adult Social Care: An Evaluation of the Experiences of Social Care Partners, and Usefulness of Joint Guidance. Coalition of Care Support Providers Scotland. Available at: <https://www.ccpsscotland.org/wp-content/uploads/2018/11/Univ-of-Strathclyde-Living-Wage-implementation-research-November-2018.pdf>. Accessed 30.6.21.

significant progressive effort by the Scottish Government to improve the working conditions and living standards of front-line staff in the sector'. However, the evaluation found that providers, lead bodies of employers and contracting authorities agreed that the level of transparency and consultation regarding the introduction of the rLW was limited. The distribution of funding to resource the rLW in adult social care was viewed as being overly complex, and again there was limited transparency in terms of how decisions regarding final sums were arrived at. There was variation in approaches to implementing the rLW ranging from percentage uplifts for all providers to undertaking detailed individual negotiations. There was limited evidence that providers were cutting other terms and conditions of employment to fund increases in the rLW, although it was reported that differentials were being squeezed. A number of authorities were apparently making the rLW a de facto requirement of tendering.

### **Addressing the Gender Pay Gap – Public Policy and Government**

Two international studies of changes in the position of nursing and care workers in the light of increased funding of health and other public services and the abandonment of neo-liberal policies show that although government and the public sector play an important role, unified trade unions, access to training and resulting professionalisation have roles to play in ensuring equal pay<sup>194</sup>.

For example, in Argentina, the National Law on Nursing Activities<sup>195</sup> provided guidelines for public and private sectors. It set out reduced working hours, stress-related leave entitlements and early retirement for 'critical' areas, e.g., neuro-psychiatric institutions and intensive care. However, leave for emotional reasons or for training was not included and this had implications for the take-up of training. Overall, government contributed to challenging traditional views of care and the role of professionalisation and education in addressing gender stereotypes. Esquivel and Pereyra<sup>196</sup> conclude that progressive care policies have to be accompanied by policies that challenge gender stereotypes and allow workers to take part in collective bargaining arrangements.

### **Macro-Economic Strategies – Investing in the Care Economy**

In 2021 the Scottish Women's Budget Group set out a number of steps to a 'caring economy' to address the climate emergency and recovery from Covid-19. It advocates tackling gender segregation and investing in care and envisages a caring economy as 'gender equal' providing time for both men and women to care<sup>197</sup>. Previously, in 2016, the International Trade Union Confederation commissioned a report from the UK Women's Budget Group, which presented a case for investment in the care sector, informed by a series of case studies of high-income countries. The case for infrastructure investment has been used in relation

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<sup>194</sup> Esquivel, V and Pereyra, F (2017) Care Workers in Argentina. *New Solutions: A Journal of Environmental and Occupational Health Policy*. 27(4): 462–482; Kowalchuk L (2018) Nurses' Labor Conditions, Gender, and the Value of Care Work in Post-Neoliberal El Salvador. *Critical Sociology*. 44(4-5): 777–791.

<sup>195</sup> Law 24.004 passed in 1991.

<sup>196</sup> Esquivel, V and Pereyra, F (2017) Care Workers in Argentina. *New Solutions: A Journal of Environmental and Occupational Health Policy*. 27(4): 462–482.

<sup>197</sup> Scottish Women's Budget Group (2021) *Challenges For 2021 and Beyond*.

<https://www.swbg.org.uk/content/publications/SWBG-Challenges-for-2021-and-Beyond.pdf>.

to physical infrastructure, but the arguments for social infrastructure are less often used. However, the crisis in care resulted in research projections that try and quantify what social investment might translate into, in terms of jobs. Investment in social infrastructure includes the labour force and its skills as well as the buildings and facilities necessary to deliver care services. The effect of investing in care services will create jobs that will have multiplier effects on other sectors<sup>198</sup>.

The UK Women's Budget Group investigated whether investment of 2% of GDP would have the greatest impact on jobs and the GPG in the construction or care sectors. It found that investment in the construction sector would lead to an increase in employment of men by 0.9 to 2.4% and for women 0.1% to 0.4%. In contrast, the same investment in the care sector would result in an increase in employment of 2.4% to 5.5% for women and for men of 0.4 to 1.3%, which would reduce the country's gender gap in employment by two points. However, with the size of investment in the care sector, it was expected that more men would enter the sector, which would reduce occupation segregation by gender and the GPG<sup>199</sup>.

This report has been widely disseminated. The concept has been taken up by the OECD at international level and is being promoted at national level in Australia. Dawson<sup>200</sup> recently published a case for a care-led recovery from Covid-19, based on work done by the Women's Budget Group.

## Elementary Occupations

One in ten of those employed in Scotland work in so-called elementary occupations, which includes cleaners, hospital porters and labourers<sup>201</sup>. Table 5 shows the average GPG was 10% for full-time and 4% for part-time workers. There has been a steady decrease in the employment rate of those working in elementary occupations, from 12% in 2004, although there is regional variation to 9.8% in December 2020<sup>202</sup>. In Scotland, a quarter (25%) of all EU nationals in employment worked in elementary occupations, higher than the 14% of non-EU nationals and 10% of UK nationals.

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<sup>198</sup> De Henau, J; Himmelweit, S; Łapniewska, Z and Perrons, D (2016) Investing in the Care Economy: A Gender Analysis of Employment Stimulus in Seven OECD Countries: A Report by the UK Women's Budget Group Commissioned by the International Trade Union Confederation. Available at: <http://oro.open.ac.uk/50547/>. Accessed 3.5.21.

<sup>199</sup> De Henau, J and Himmelweit, S (2020) The Gendered Employment Gains of Investing in Social vs. Physical Infrastructure: Evidence From Simulations Across Seven OECD Countries. IKD Working Paper No. 84, Open University.

<sup>200</sup> Dawson, E (2020) The Case for a Care-led Recovery Per Capita Fighting Inequality in Australia. Available at: [https://percapita.org.au/our\\_work/the-case-for-a-care-led-recovery/](https://percapita.org.au/our_work/the-case-for-a-care-led-recovery/). Accessed 19.3.21.

<sup>201</sup> NOMIS (2021) Labour Market Profile Scotland. Available at: <https://www.nomisweb.co.uk/reports/lmp/gor/2013265931/report.aspx#tabempocc>. Accessed 16.3.21.

<sup>202</sup> NOMIS (2021) Employment by Occupation Time Series. Available at: [https://www.nomisweb.co.uk/reports/lmp/gor/2013265931/subreports/gor\\_empocc\\_time\\_series/report.aspx?](https://www.nomisweb.co.uk/reports/lmp/gor/2013265931/subreports/gor_empocc_time_series/report.aspx?). Accessed 16.3.21.

Table 4: Gender Pay Gap, UK, 2020 in Elementary Occupations<sup>203</sup>

	Gender Pay Gap Median	Gender Pay Gap Mean
Full Time	8.1	10.1
Part Time	-3.2	3.9

## Cleaning

Gender segregation is particularly apparent in cleaning. UNISON Scotland reports cleaners working on contracts for the public sector are over 80% female and the majority are 45-54 years old<sup>204</sup>. In the UK generally there is evidence that ME and migrant workers are over-represented in cleaning<sup>205</sup>. Similarly, the EHRC<sup>206</sup> reported that across the UK, the cleaning sector has a higher-than-average number of older workers, with the same pattern seen in Scotland specifically<sup>207</sup>.

The FLEX<sup>208</sup> report found that almost half of their survey respondents were bullied because of their age, nationality, race or sex. However, those cleaners who were undocumented were less likely to report such abuses<sup>209</sup>. Wider research shows similar patterns of discriminatory treatment towards migrant, pregnant, older and disabled workers in the cleaning sector<sup>210</sup>.

The average cleaner's salary in Scotland is 11% less than the UK average and 30% less than the average salary for Scotland<sup>211</sup>. UNISON Scotland's<sup>212</sup> 2014 survey of cleaners working in areas where it organises found that they mostly work part time, averaged 23 hours per week and nearly a quarter had other jobs<sup>213</sup>. Wider UK-based studies reported pay rates between £5 and £7.50 in the private sector in 2014 and £6.31 and £9 in the public sector, with a downward trend<sup>214</sup>.

<sup>203</sup> ONS (2021) Gender Pay Gap. Available at:

<https://www.ons.gov.uk/employmentandlabourmarket/peopleinwork/earningsandworkinghours/datasets/annualsurveyofhoursandearningsashegenderpaygaptables>. Accessed 23.6.21.

<sup>204</sup> UNISON Scotland (2014) Dishing the Dirt. Scotland: UNISON.

<sup>205</sup> EHRC (2014) The Invisible Workforce: Employment Practices in The Cleaning Sector. London: EHRC. Available at: <https://www.equalityhumanrights.com/en/publication-download/invisible-workforce-employment-practices-cleaning-sector> Accessed 30.6.21.

<sup>206</sup> Ibid.

<sup>207</sup> UNISON Scotland. (2014) Dishing the Dirt. Scotland: UNISON.

<sup>208</sup> FLEX (2021) If I Could Change Anything About My Work... Participatory Research with Cleaners in the UK. London: FLEX.

<sup>209</sup> Ibid.

<sup>210</sup> EHRC (2014) The Invisible Workforce: Employment Practices in The Cleaning Sector. London: EHRC. Available at: <https://www.equalityhumanrights.com/en/publication-download/invisible-workforce-employment-practices-cleaning-sector> Accessed 30.6.21.

<sup>211</sup> Adzuna (2021) Scotland Cleaners Salary Stats. Available at: <https://www.adzuna.co.uk/jobs/salaries/scotland/cleaner>. Accessed 23.6.21.

<sup>212</sup> UNISON Scotland (2014) Dishing the Dirt. Scotland: UNISON.

<sup>213</sup> Ibid.

<sup>214</sup> EHRC (2014) The Invisible Workforce: Employment Practices in the Cleaning Sector. London: EHRC. Available at: <https://www.equalityhumanrights.com/en/publication-download/invisible-workforce-employment-practices-cleaning-sector> Accessed 30.6.21.

While some cleaners operate on an hourly rate, many in the hospitality sector were on piece rates, or an hourly rate that depended on cleaning an unrealistic set number of rooms per hour, which resulted in wages below what was then the National Minimum Wage<sup>215</sup>.

The FLEX report on UK-wide cleaning reported widespread low pay with 6% of cleaners paid below the National Living Wage and varying issues with pay including under-payment, non-payment, late payment and deductions<sup>216</sup>. Nearly half did not qualify for Statutory Sick Pay because of the Lower Earnings Limit (particularly when working for multiple employers), found existing sick pay entitlements inadequate and feared losing work for calling in sick or were denied SSP. A proportion were denied holiday pay. The report highlighted dangerous working conditions, risk to physical and mental health in the workplace as well as work-related violence and sexual harassment. The EHRC<sup>217</sup> reported occupational segregation within cleaning, where some jobs were designated 'men's work', noting that this perception of men and women's work can result in unequal pay. Women in its study felt their work was undervalued compared to traditionally male work such as portering<sup>218</sup>. The FLEX<sup>219</sup> report demonstrates that employment status is important, with those classed as 'workers' or 'self-employed' having fewer rights and protections, with employers able to cut hours for those on casual contracts. Discrimination on the basis of race, ethnicity and nationality is endemic and low levels of unionisation and language barriers mean cleaners may not be in a position to enforce any rights that they might have.

Wages in so-called 'elementary occupations' are rarely the result of collective bargaining, but public sector unions may bring pressure to bear on employers. Cleaners working for companies contracted to National Rail in the major stations in Scotland have been backed by transport union, RMT, in a campaign for the rLW<sup>220</sup>. Cleaners on public sector contracts represented by UNISON<sup>221</sup> reported fewer incidents of zero-hour contracts than those contracted by the private sector. Cleaning firms' ability to pay the rLW is dependent on contractual terms under outsourcing<sup>222</sup>. Unrealistic cleaning contracts mean downward pressure on wages and conditions, with cleaning wages largely determined by contract value<sup>223</sup>. The EHRC<sup>224</sup> found that high levels of competition drives pay downwards at early

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<sup>215</sup> Ibid.

<sup>216</sup> FLEX (2021) *If I Could Change Anything About My Work... Participatory Research with Cleaners in the UK*. London: FLEX

<sup>217</sup> EHRC (2014) *The Invisible Workforce: Employment Practices in the Cleaning Sector*. London: EHRC. Available at: <https://www.equalityhumanrights.com/en/publication-download/invisible-workforce-employment-practices-cleaning-sector> Accessed 30.6.21.

<sup>218</sup> Ibid.

<sup>219</sup> FLEX (2021) *If I Could Change Anything About My Work... Participatory Research with Cleaners in the UK*. London: FLEX.

<sup>220</sup> BBC (2019) *Cleaners Campaign Starts at Scottish Railway Stations*. Available at: <https://www.bbc.co.uk/news/uk-scotland-glasgow-west-49401062>. Accessed 17.3.21.

<sup>221</sup> UNISON Scotland. (2014) *Dishing the Dirt*. Scotland: UNISON.

<sup>222</sup> EHRC (2014) *The Invisible Workforce: Employment Practices in the Cleaning Sector*. London: EHRC. Available at: <https://www.equalityhumanrights.com/en/publication-download/invisible-workforce-employment-practices-cleaning-sector> Accessed 30.6.21.

<sup>223</sup> Ibid.

<sup>224</sup> Ibid.



stages in the tendering process and when contracts are due for renewal. Procurement is thus crucial and Scottish legislation allowing public bodies to specify the rLW potentially important. Previous research found that paying cleaners the 'real Living Wage' has been seen to have clear benefits. Cleaning firms adopting the Living Wage reported lower levels of absenteeism and staff turnover, clients reported improved service and cleaners were positive about the increased wages<sup>225</sup>. However, absence of effective enforcement of labour rights and labour inspections in cleaning have also been highlighted<sup>226</sup>.

## Catering

Work in so-called elementary occupations is historically deemed as 'low skilled' and approaching half (45%) of workers in Scotland are employed in work that is low or medium skilled<sup>227</sup>. However, in food and accommodation the rate is approaching two-thirds (63%)<sup>228</sup>. Overall, 7% of the workforce work in the accommodation and food service sector<sup>229</sup> and this sector has seen a growth of 14,000 men and 8,000 women since 2009<sup>230</sup>. These services contribute £6 billion to Scottish GDP and form the main component of the tourism sector<sup>231</sup>.

Over half (55%) of those working in the sector are women<sup>232</sup>. However, pay and conditions reflect not only gender, but age and migrant status. The average age of workers in kitchen and catering jobs in the UK in 2011 was 25<sup>233</sup>. As Figure 3 shows, the sector is also dominated by migrant workers, EU and non-EU nationals. In the accommodation and food services (hotels and restaurants) sector almost 22% of the workforce were born outside the UK (and at least half from the EU).

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<sup>225</sup> Ibid.

<sup>226</sup> FLEX (2021) If I Could Change Anything About My Work... Participatory Research with Cleaners in the UK. London: FLEX.

<sup>227</sup> Scottish Government (2020) Annual Population Survey 2019. Available at: <https://www.gov.scot/publications/scotlands-labour-market-people-places-regions-statistics-annual-population-survey-2019/pages/4/>. Accessed 16.3.21.

<sup>228</sup> Ibid.

<sup>229</sup> NOMIS (2021) Labour Market Profile Scotland. Available at: <https://www.nomisweb.co.uk/reports/lmp/gor/2013265931/report.aspx#tabempocc>. Accessed 16.3.21.

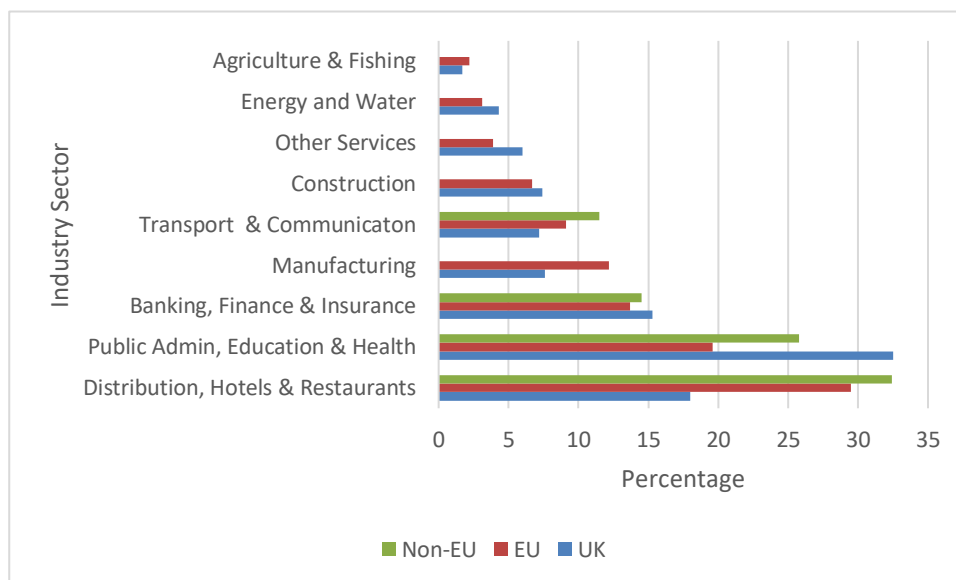
<sup>230</sup> Scottish Government (2020). Annual Population Survey 2019. Available at: <https://www.gov.scot/publications/scotlands-labour-market-people-places-regions-statistics-annual-population-survey-2019/pages/4/>. Accessed 16.3.21.

<sup>231</sup> Scottish Government (2020) Tourism and Events. Available at: <https://www.gov.scot/policies/tourism-and-events/>. Accessed 23.6.21.

<sup>232</sup> Scottish Government (2020) Annual Population Survey 2019. Available at: <https://www.gov.scot/publications/scotlands-labour-market-people-places-regions-statistics-annual-population-survey-2019/pages/4/>. Accessed 16.3.21.

<sup>233</sup> Statista (2021) Average Age of Hospitality and Tourism Sector Employees in the United Kingdom (UK) in 2011, by Occupation. Available at: <https://www.statista.com/statistics/300271/average-age-of-hospitality-and-tourism-sector-employees-in-the-united-kingdom/>. Accessed 5.4.21.

Figure 3: Proportion Employed by Industry and Nationality (Aged 16 and Over), Scotland, 2018<sup>234</sup>



Catering assistants' average salary in Scotland is 22% less than the average salary across Scotland but is 36.4% above the national salary for catering assistants.

Catering workers are also employed on public sector contracts, where again bargaining over pay and conditions is removed from the remit of collective bargaining. In a 2017 UNISON<sup>235</sup> survey of school catering workers across the UK, 41% reported that they were concerned with pay; unpaid overtime was commonplace as were second jobs to keep staff afloat. There are cases where unions negotiate on behalf of catering staff: Unite has negotiated pay, meal allowances and long service awards with the catering company that supplies Eurostar<sup>236</sup>. The union has represented catering staff transferred from direct employment with London Zoo to Charlton House Catering and took action at a failure to consult on detrimental changes to employment conditions<sup>237</sup>.

<sup>234</sup> Scottish Government (2019) Annual Survey of hours and earnings Office for National Statistics. Available at: <https://www.gov.scot/publications/annual-survey-of-hours-and-earnings-2019/>. Accessed 20.3.21.

<sup>235</sup> UNISON (2017) UNISON School Catering Staff Survey. Available at: [https://www.unison.org.uk/content/uploads/2018/01/Schools-Catering-staff-report-1.pdf?utm\\_source=rss&utm\\_medium=rss#:~:text=In%20November%20and%20December%202017,and%20catering%20managers%20\(16%25\)](https://www.unison.org.uk/content/uploads/2018/01/Schools-Catering-staff-report-1.pdf?utm_source=rss&utm_medium=rss#:~:text=In%20November%20and%20December%202017,and%20catering%20managers%20(16%25).). Accessed 4.4.21.

<sup>236</sup> Unite (2015) Good Deal for Catering Staff on Eurostar. Available at: [www.restaurantworkers.co.uk/411892324](http://www.restaurantworkers.co.uk/411892324). Accessed 17.3.21.

<sup>237</sup> Flores (2013) Union Wins Action for ZSL London Zoo Catering Workers. Available at: <https://www.hrreview.co.uk/hr-news/employment-law/union-wins-action-for-zsl-london-zoo-catering-workers/45122>. Accessed 17.3.21.

In Canada, the Hospital Employees Union (HEU) started to organise low-paid women workers in outsourced service such as housekeeping, laundry and food services in the private health care sector in Vancouver, many of whom were migrant women and women of colour. The HEU overcame organisational problems sponsoring the first Living Wage Campaign in Vancouver and developed links with civil society groups, e.g. First Call British Columbia (an anti-poverty coalition) and the Canadian Centre for Policy Alternatives<sup>238</sup>. Not all the strategies were successful. There were internal tensions within the HEA between higher paid public sector members and lower paid private sector members. Some of the tensions were resolved by getting higher paid public sector workers to reconsider the links between race and class in segmented labour markets.

## Early Learning and Childcare

Early learning and childcare (ELC) workers provide care and education for children from birth to the age of five. These ELC workers can be self-employed in the home, e.g. child minders, or work in a formal setting in a nursery or school either in the public or private sector. The labour force for ELC is highly gender segregated. In Scotland only 4% of the ELC workforce are male<sup>239</sup>. The Scottish Government, however, is committed to improving the gender diversity of its ELC workforce and worked recently with the Scottish Funding Council (SFC) to deliver an Early Years Challenge Fund to pilot approaches to increase the number of men enrolling onto ELC qualifications<sup>240</sup>.

The Care Inspectorate<sup>241</sup> report that are 250,560 registered children in ELC in Scotland. There are 3,588 ELC services, with 4,330 childminding services, 18 childcare agencies and a total of 42,180 staff working in ELC<sup>242</sup>. In 2017 over 90% of nurseries were run by the public or private sector with the public sector being slightly larger and covered a wider number of services.<sup>243</sup>

There has been significant expansion of ELC provision across Scotland with an increase in funded places rising to 1,140 hours from the age of three, and those two year olds who will benefit most, from August 2021. This expansion of funded childcare was originally set for August 2020 but was delayed due to the Covid-19 pandemic. A multi-year capital and revenue funding agreement has been made with COSLA to fund this expansion in entitlement<sup>244</sup>. In particular, this agreement includes sufficient funds to cover the payment of the rLW to all childcare workers

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<sup>238</sup> Chun J.J. (2016) Organizing Across Divides: Union Challenges to Precarious Work in Vancouver's Privatized Health Care Sector. *Progress in Development Studies*. 16(2): 173-188.

<sup>239</sup> Scottish Government (2018) Encouraging More Men into Childcare. Available at: <https://www.gov.scot/news/encouraging-more-men-into-childcare/>. Accessed 18.3.21.

<sup>240</sup> Ibid.

<sup>241</sup> Care Inspectorate (2021) Early Learning and Childcare Report our Role, Purpose and Learning During the Covid-19 Pandemic. Available at: <https://www.careinspectorate.com/images/documents/6030/Early%20Learning%20and%20Childcare%20Report%20Our%20Role,%20Purpose%20and%20Learning%20during%20the%20COVID-19%20pandemic.pdf>. Accessed 14.7.21.

<sup>242</sup> Ibid.

<sup>243</sup> SSSC (2019) The Children's Services Workforce 2017. January 2019. Available at: [https://data.sssc.uk.com/images/WDR/CSW/Childrens\\_Services\\_Workforce\\_2017.pdf](https://data.sssc.uk.com/images/WDR/CSW/Childrens_Services_Workforce_2017.pdf) 14.7.21.

<sup>244</sup> Scottish Government (2021) Early Education and Care. Available at: <https://www.gov.scot/policies/early-education-and-care/early-years-workforce/>. Accessed 18.3.21.

who are providing childcare for funded hours<sup>245</sup>. The National Standard for Early Learning and Childcare Providers states that partner providers must have ‘a fair and equal pay policy across their setting, including a commitment to supporting the real Living Wage’. This increase in funded hours has had an unintended impact on those not in the local authority sector. For example, the Social Mobility Commission<sup>246</sup> reports that local authority settings offer free care to children who are not yet three years old and, therefore, eligible for funded places, but will reach age three before the end of the first term they are in childcare. In England, this practice disadvantages childminders, in particular, who are unable to offer a free place until the child reaches three years old<sup>247</sup>.

The Scottish Social Services Council<sup>248</sup> reports that the majority of ELC workers employed in the private and voluntary sector earn less than the rLW and they recognise the need to apply the rLW provision for adult care workers to ELC workers. However, from August 2021 the SG has committed to paying the rLW to all workers who deliver the funded ELC entitlement. Pay in ELC is determined by a mixture of sectoral collective bargaining under single status, organisational collective bargaining and unilateral pay setting by private sector organisations and through self-employment. Pay also varies between the ELC setting, e.g. it depends whether the setting is local authority, private or in the voluntary sector<sup>249</sup>. However, in England, these settings also use more agency staff, who are paid higher, although without benefits. Agency staff do not want to take on permanent roles, which can have a destabilising effect on the sector<sup>250</sup> – a level three qualified worker under 25 could earn less than an unqualified worker over the age of 25 despite doing the same job<sup>251</sup>. In Scotland, an ELC worker can expect to be paid between £15-28k per year depending on experience<sup>252</sup>. Research shows the majority of costs borne by ELC providers come from staff salary – 71%<sup>253</sup>. Pension contributions are more common in the private sector (44%) compared to the not-for-profit sector (23%)<sup>254</sup>.

Other research has found that in some instances low pay is accepted and the desire to work with children outweighs the low pay received<sup>255</sup>. The National Day

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<sup>245</sup> Ibid.

<sup>246</sup> Social Mobility Commission (2020) The Stability of the Early Years Workforce in England. Social Mobility Commission: London.

<sup>247</sup> Ibid.

<sup>248</sup> Scottish Social Services Council (2017) First Call for Evidence for the Independent Review of Early Learning and Childcare Workforce and Out of School Care Workforce. Available at: <https://www.sssc.uk.com/knowledgebase/article/KA-01408/en-us>. Accessed 18.3.21.

<sup>249</sup> Social Mobility Commission (2020) The Stability of the Early Years Workforce in England. Social Mobility Commission: London.

<sup>250</sup> Ibid.

<sup>251</sup> Ibid.

<sup>252</sup> Early Learning and Childcare Careers (2021) Why Work in Early Learning and Childcare. Available at: <https://childcarecareersscotland.scot/why-work-early-learning-childcare/>. Accessed 14.7.21.

<sup>253</sup> Scottish Government (2016) Costs of Early Learning and Childcare Provision in Partner Provider Settings. Available at: <https://dera.ioe.ac.uk/27569/1/00506140.pdf>. Accessed 14.7.21.

<sup>254</sup> Ibid.

<sup>255</sup> Bird, P.P. (2012), Establishing a Positive Emotional Climate in an Early Years Setting, PhD thesis, University of Worcester. Available at: <http://eprints.worc.ac.uk/2338/1/PP%20Byrd%20PhD%20Thesis%202012%20-%20Establishing%20a%20Positive%20Emotio%20%281%29.pdf>. Accessed 18.3.21.

Nurseries Report on the Scottish workforce found that the vast majority of respondents to their survey reported issues with recruiting staff with at least 71% of providers facing recruitment challenges and that even when staff are in post 62% faced 'significant challenges' in retaining staff<sup>256</sup>. The survey found in the previous 12 months turnover rates were at 29% of the entire childcare staff employed by respondents, higher than the UK economy as a whole, where the rate was 15-18%. Level three<sup>257</sup> qualified staff are the most in demand but the hardest to recruit and the most likely to leave the sector<sup>258</sup>. The main reason for leaving was to move to a school-based or local authority early years setting and/or to seek higher salaries outside the ELC sector, followed by better salaries within other private or voluntary sector settings. The phasing-in of 1,140 hours was seen as a driving factor in the movement of staff from private and voluntary providers to local authority settings and providers expressed concern about the recruitment of extra staff to fulfil the commitment.

Stewart et al.'s earlier report for UNISON Scotland<sup>259</sup> proposed that retention rates in Scotland varied by sector, but there was 83% retention overall; 90% retention in the local authority settings; and 78% in the private sector. The higher retention levels in the public sector were due to higher rates of pay and more opportunities for staff development<sup>260</sup>. Some workforce churn can be attributed to the gendered nature of the workforce, where many women take a leave the job when they have children<sup>261</sup>. Further, a proportion of women in England do not return to childcare and ELC work as the cost of childcare outweighs the salary they would earn<sup>262</sup>. The Social Mobility Commission<sup>263</sup> reports the low supply of workers is also a result of gender segregation where childcare is considered 'women's work' and low status. Age is also an important consideration. The ELC workforce, in Scotland, is dominated by those in the early or mid-stages of their career<sup>264</sup>. The average age of staff in the private sector is 28 years old and 43 years old in the public sector<sup>265</sup>. The National Day Nurseries Report on the Scottish workforce found that over one-third (35%) of staff were under the age of 25<sup>266</sup>. The prevalence of a younger workforce has implications, firstly on retention and secondly on the professionalisation of the sector. Totenhagen et al.<sup>267</sup> found that older childcare workers are more likely to be committed and have higher retention rates. The

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<sup>256</sup> NDNA (2019) NDNA 2018/29 Workforce Survey Scotland. NDNA: Scotland.

<sup>257</sup> Level three qualified staff have a diploma in Early Years Education and Childcare.

<sup>258</sup> NDNA (2019) NDNA 2018/29 Workforce Survey Scotland. NDNA: Scotland.

<sup>259</sup> Stewart, R; Findlay, J; Betram, T (2017) Early Learning and Childcare Research Report. Available at: <https://unison-scotland.org/wp-content/uploads/EarlyYearsFinalReport-2017.pdf>. Accessed 18.3.21.

<sup>260</sup> Ibid.

<sup>261</sup> Carroll, M; Smith, M; Oliver, G and Sung, S (2009) Recruitment and Retention in Front-Line Services: The Case of Childcare. Human Resource Management Journal. 19: 59-74. <https://doi.org/10.1111/j.1748-8583.2008.00076.x>

<sup>262</sup> Social Mobility Commission (2020) The Stability of the Early Years Workforce in England. Social Mobility Commission: London.

<sup>263</sup> Ibid.

<sup>264</sup> Stewart, R; Findlay, J; Betram, T (2017) Early Learning and Childcare Research Report. Available at: <https://unison-scotland.org/wp-content/uploads/EarlyYearsFinalReport-2017.pdf>. Accessed 18.3.21.

<sup>265</sup> Ibid.

<sup>266</sup> NDNA (2019) NDNA 2018/29 Workforce Survey Scotland] NDNA: Scotland.

<sup>267</sup> Totenhagen, C.J; Hawkins, S.A; Casper, D.M; Bosch, L.A; Hawkey, K.R; and Borden, L.M (2016) Retaining Early Childhood Education Workers: A Review of the Empirical Literature. Journal of Research in Childhood Education. 30(4): 585–599.

dominance of a younger workforce could, therefore, raise concerns about persistent unfilled vacancies. The age profile of the workforce also affects qualification, with those aged 54 and above less likely to have a degree-level qualification<sup>268</sup>. This suggests there is a steady professionalisation of the industry over time, meeting the Scottish Government's aim to improve the professionalisation of the sector.

The Scottish Social Services Council<sup>269</sup> recognised the need for ELC providers to be qualified. The Scottish Social Services Council<sup>270</sup> has focused on registration and mandates that workers achieve registration within six months of starting employment and in 2013/14 approximately 89% of workers in the sector held an appropriate qualification. Stewart et al.<sup>271</sup> call for the increased professionalisation and complex work of Scottish ELC workers to be recognised by Government and the sector. Siraj and Kingston<sup>272</sup>, in their review of the early years workforce in Scotland, went further to recommend a national pay scale for ELC workers to be adopted by all local authorities and highly recommended this also be applied to private and third sector who are engaged in care for local authority funded children. They called for the pay disparities between the local authority, private and voluntary sectors to be addressed and advocate raising the pay in all ELC settings to ensure that the status of teaching younger children is comparable with that of teaching older children.

Bonetti<sup>273</sup> highlights the importance of an ELC workforce that is ethnically, culturally and linguistically diverse, yet in England it is mainly white with only a small minority of ME workers and even fewer workers reporting a disability<sup>274</sup>. Scotland has a similar picture, with the average age being 34 years old, only 2% report a disability and 1% of the workforce is ME<sup>275</sup>. To address the lack of diversity in the ELC workforce, the Scottish Government has run national recruitment campaigns to support the 1,140 hours expansion, and increase the proportion of men, ME and disabled people in the ELC workforce<sup>276</sup>. Bonetti<sup>277</sup> reports low numbers of disabled

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<sup>268</sup> Stewart, R; Findlay, J; Betram, T (2017) Early Learning and Childcare Research Report. Available at: <https://unison-scotland.org/wp-content/uploads/EarlyYearsFinalReport-2017.pdf>. Accessed 18.3.21.

<sup>269</sup> Scottish Social Services Council (2017) First Call for Evidence for the Independent Review of Early Learning and Childcare Workforce and Out of School Care Workforce. Available at: <https://www.sssc.uk.com/knowledgebase/article/KA-01408/en-us>. Accessed 18.3.21.

<sup>270</sup> Ibid.

<sup>271</sup> Stewart, R; Findlay, J; Betram, T (2017) Early Learning and Childcare Research Report. Available at: <https://unison-scotland.org/wp-content/uploads/EarlyYearsFinalReport-2017.pdf>. Accessed 18.3.21.

<sup>272</sup> Siraj, I and Kingston, D (2015) An Independent Review of the Scottish Early Learning and Childcare (ELC) Workforce and Out of School Care (OSC) Workforce. Available at: <https://www.gov.scot/publications/independent-review-scottish-early-learning-childcare-elc-workforce-out-school/>. Accessed 18.3.21.

<sup>273</sup> Bonetti, S (2019) The Early Years Workforce in England. Education Policy Institute: London.

<sup>274</sup> Siraj, I and Kingston, D (2015) An Independent Review of the Scottish Early Learning and Childcare (ELC) Workforce and Out of School Care (OSC) Workforce. Available at: <https://www.gov.scot/publications/independent-review-scottish-early-learning-childcare-elc-workforce-out-school/>. Accessed 18.3.21.

<sup>275</sup> Skills Development Scotland (2019) Achieving Diversity in the Scottish Early Learning and Childcare Workforce. Skills Development Scotland: Scotland.

<sup>276</sup> Early Years Scotland (2021) Towards a More Diverse Early Years Workforce. Available at: <https://earlyyearsscotland.org/blog/towards-a-more-diverse-early-years-workforce>. Accessed 4.4.21.

<sup>277</sup> Bonetti, S (2019) The Early Years Workforce in England. London: Education Policy Institute.

people in the ELC workforce, but also that disability affects propensity to work part time, with 3% of part-time workers reporting they do so because of disability.

## Sales and Customer Service (retail)

In the UK there has been an increase in the proportion of men in the retail workforce – to 46% in 2018 and there are indications that this has led to an increase in full-time employment<sup>278</sup>. Prior to Covid-19 the sector was identified as having the highest outflow rate to unemployment with 31 % of retail leavers exiting to unemployment, and these workers were disproportionately young. Post-Covid there is evidence of substantially increased redundancies in the context of the shift to online shopping. Pay in retail is determined by three mechanisms: collective bargaining in larger retailers; the National Living Wage; and, potentially, the current equal pay cases being brought in national supermarkets. Table 6 shows that the average GPG for both full-time and part-time employees was 5% in a sector dominated by women.

Table 5: Gender Pay Gap, UK, 2020 in Sales and Customer Services (%)<sup>279</sup>

	Gender Pay Gap Median	Gender Pay Gap Mean
Full Time	1.4	4.7
Part Time	0.3	4.7

Across the UK the retail trade union, USDAW, has UK collective bargaining agreements with the Co-op, Morrisons, Tesco and Sainsburys and also negotiates pay with Argos, Next Distribution and Poundland and, in Northern Ireland, Primark. The National Living Wage is a key factor in retail pay, although USDAW reports that the majority of its members have a basic rate above the National Living Wage. In 2018, an USDAW membership survey found that when the National Living Wage was at £7.83, 55% of respondents earned between £7.83 and £8.50 per hour, with 42% earning above this rate and 3% below. USDAW supports an increase in the National Living Wage to £10 per hour and an end to youth rates. The four major supermarkets with which USDAW negotiates pay a basic rate that is higher than the National Living Wage, with a major breakthrough in January 2021 when the union achieved £10 an hour at Morrisons as part of its New Deal for Workers campaign taking staff beyond the real Living Wage<sup>280</sup>. Morrisons is the first UK

<sup>278</sup> Resolution Foundation (2019) Sorry, We're Closed: Understanding the Impact of Retail's Decline on People and Places. London: Resolution Foundation.

<sup>279</sup> ONS (2021) Gender Pay Gap. Available at:

<https://www.ons.gov.uk/employmentandlabourmarket/peopleinwork/earningsandworkinghours/datasets/annualsurveyofhoursandearningsashegenderpaygaptables>. Accessed 23.6.21.

<sup>280</sup> <https://www.usdaw.org.uk/About-Us/News/2021/Jan/Morrisons-pay-deal-Usdaw-negotiates-a-10-per-hour>. Accessed 25.7.21.

supermarket to pay £10 an hour. The union cites only one major retailer, IKEA, that is real Living Wage Accredited.

It has been recognised that progression opportunities in retail are limited and that the differential rates between shopfloor workers and supervisors have been eroded. In Argos in 2017 USDAW negotiated a 6.8% increase for supervisors to recognise this. Tesco has implemented a skills payment to reflect the requirements of particular job roles, worth up to an additional £2.74 per hour. However, the company has also cut managerial roles. The narrow differentials in many parts of the retail sector mean that career progression is not attractive<sup>281</sup>. In the UK nearly one in five retail employees reports that they are over-qualified and over-skilled for their current role<sup>282</sup>.

Work in retail is associated with non-standard rather than permanent open-ended working contracts with the National Living Wage seen to have shifted the structure of employment towards part-time roles or guaranteed/minimum hours contracts as low as four hours a week that can then be flexed up. A Joseph Rowntree report recognised a preference amongst retailers for the flexibility of MHC contracts<sup>283</sup>. Associated with this move away from a standard working day is reductions in premia for Sunday and night-time working.<sup>284</sup> There are anecdotal reports that under Covid-19 the same approach has been taken to furlough pay. USDAW has called for minimum contracts of 16 hours per week, for everyone who wants it. As in other sectors retail workers are also affected by changes to in-work benefits that top-up low pay.

In 2018 analysis of GPG reporting data in the 50 largest UK retail companies by PWC showed that the mean pay gap was 13%. Women are disproportionately represented in lower skilled and lower-paid areas of the industry and underrepresented in technical areas<sup>285</sup>. In a female-dominated sector there is a lack of progression of women to management occupations. Retailers have reported introducing mentoring schemes, internally, to address this issue<sup>286</sup>.

The most important issue potentially impacting the GPG in retail is the Equal Pay Case taken by mostly female checkout workers against Asda – the biggest-ever equal pay claim in the private sector in the UK. The Supreme Court has ruled that

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<sup>281</sup> Ussher, K (2016) Improving Pay, Productivity and Progression in the Retail Sector. York: Joseph Rowntree Foundation.

<sup>282</sup> Mosley, P; Winters, G and Wood, S (2012) Wholesale and Retail Sector Skills Assessment 2012. Available at:

[https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/306426/ briefing-paper-ssa12-wholesale-retail.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/306426/ briefing-paper-ssa12-wholesale-retail.pdf). Accessed 4.4.21.

<sup>283</sup> Tomlinson, M. and Walker, R (2010). Recurrent poverty: The Impact of Family and Labour Market Changes. York: Joseph Rowntree Foundation.

<sup>284</sup> Moore, S; Tailby, S; Antunes, B and Newsome, K (2018) Fits and Fancies: the Taylor Review, The Construction of Preference and Labour Market Segmentation. Industrial Relations Journal. 49 (5-6): 403-419.

<sup>285</sup> PWC (2018) Gender Pay Gap Reporting – Spotlight on Large Retailers. Available at <https://www.pwc.co.uk/services/human-resource-services/gender-pay/spotlight-on-large-retailers.html>. Accessed 19.4.21

<sup>286</sup> Devins, D; Bickerstaffe, T; Mitchell, B and Halliday, S (2014) Improving Progression in Low-Paid, Low Skilled Jobs in the Retail, Catering and Care Sectors. Project Report. Joseph Rowntree Foundation.



the pay of 35,000 mostly women store checkout workers can be directly compared with that of mainly-male depot staff in its distribution operation<sup>287</sup>. The case will now go to an Employment Tribunal to prove that the roles performed are of equal value. It is reported that Asda could be facing backdated pay claims totalling £8 billion. Similar claims have been taken by women workers at Tesco, Next, Sainsburys, Morrisons and Co-op. Job comparisons included factors such as knowledge, experience, responsibility for planning, maintaining stocks, looking after finance, health and safety, data handling, the need for concentration, the stress of the job, problem-solving, communication, physical skills, and working conditions. The ruling found that the women's job descriptions did not accurately depict the demands placed upon shop floor workers. Asda had claimed that checkout workers were not required to have any particular knowledge about products in order to do their jobs – the claim was dismissed by the ET. Importantly, the UK Supreme Court ruling means that companies cannot rely on the fact that workers are in two different locations to avoid the protections afforded by the Equality Act 2010.

Following the move to online shopping, amplified by Covid-19, a number of major retailers have announced retail job losses. The FT reported that retail job losses drove a record fall in UK employment over the summer of 2020 and were set to continue as the Covid-19 pandemic accelerated the shift from store-based sales to online shopping<sup>288</sup>. It quoted official data showing that the number of positions in the retail trade – which has been declining as a share of UK employment for 15 years – fell by 78,000 between June and September, making it the main driver of a record loss of 475,000 jobs. Such jobs may be offset by the recruitment of largely male couriers, parcel sorters and warehouse workers by companies such as Hermes and Yodel, yet a proportion of these are categorised as 'self-employed' with limited access to employment rights and paid by delivery. Major food retailers have also recruited additional staff to pick online orders. As yet it is not possible to conclude how far the shift to online shopping represents a changed gender division of labour in retail, displacing a largely female workforce.

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<sup>287</sup> Asda Stores Ltd (Appellant) v. Brierley and others (Respondents) Judgement given on 26 March 2021 Available at: <https://www.supremecourt.uk/cases/docs/uksc-2019-0039-judgment.pdf>. Accessed 30.6.21.

<sup>288</sup> Financial Times (2020) Retail Job Losses Rise as Virus Shifts UK Shoppers Online. Financial Times 15.12.2020. Available at: <https://www.ft.com/content/b03a0990-c85c-44e9-8e7e-4f2e82751c1e>. Accessed 23.4.21.

## Appendix 3 – Glossary

**Agenda for Change:** the collective name for the NHS terms and conditions of service.

**Arms-length and trading organisations:** organisations used by councils to deliver key services.

**Austerity:** government measures to reduce public expenditure.

**Blue collar workers:** workers who carry out manual labour in receipt of, commonly, an hourly wage.

**Class action:** a type of legal proceeding in which one person (the plaintiff or applicant) brings a claim on behalf of a wider group of people who have been affected in a similar way, or by the same circumstances.

**Collective agreements:** the agreements that result from collective bargaining.

**Collective bargaining:** the official process by which trade unions negotiate with employers, on behalf of their members on the terms and conditions of their employment. Collective bargaining is only possible where an employer recognises a trade union.

**Contracting out of public services:** putting out to competitive tender a publicly funded and provided service with contracts awarded largely on the basis of price by the private sector.

**COSLA:** the Convention of Scottish Local Authorities is the national association of Scottish councils and acts as an employers' association for its 32 member authorities.

**Employment tribunals:** Courts that hear claims of breaches of employment law.

**Equal pay:** men and women who work for the same employer and who do the same kind of work must legally be given equal pay, unless any difference can be justified.

**Equal pay certification:** this certification is usually externally moderated and certifies that an organisation pays equal wages to men and women.

**Equal pay commissioner:** in Canada an individual who can provide expertise and support to coordinate responses to equal pay issues including key equal pay claims and rulings.

**Equal pay legislation:** the legal parameters for paying workers, set by the UK Government.

**Equality allowance:** an additional payment for female workers to close the Gender Pay Gap.

**Equality impact assessment:** a method of systematically taking equal opportunities into consideration when making a decision related to policy, budgets or services that could have disproportionate impacts on individuals or groups protected under the Equality Act 2010.

**Gender equality:** when the treatment of men and women does not depend on their gender. Treating men and women this way should ensure they are treated equally.

**Gender mainstreaming:** An approach that integrates gender considerations into all facets of an organisation's work to ensure gender equality.

**Gender-neutral job evaluation:** generally, the criteria associated with job evaluation in the context of equality are referred to as gender-neutral. This term

emphasises the necessity of including all the overlooked aspects of women's jobs in the job evaluation process and of giving them as much attention as the characteristics of men's jobs.

**Gender Pay Gap:** the difference between average gross hourly earnings of men and women as a percentage of the average gross hourly earnings of male paid employees (excluding overtime).

**Gender predominance:** jobs that are associated with one gender or the other, based on quantitative or qualitative criteria.

**Gender-segregated jobs:** jobs carried out predominantly by one gender.

**Group action:** a type of legal proceeding in which one person (the plaintiff or applicant) brings a claim on behalf of a wider group of people who have been affected in a similar way, or by the same circumstances.

**Integration Joint Boards:** these are boards that are responsible for strategic planning and delivery of the functions they have discretion over.

**Intersectional:** The interconnected nature of social categories such as gender, race and class that may produce overlapping and interdependent systems of discrimination or disadvantage.

**Job evaluation:** a method used to measure the characteristics of the jobs within an enterprise, with the aim of establishing their relative value.

**Jurisdiction:** one system of law or law courts.

**Litigation:** the process of taking legal action against an individual or organisation.

**National Living Wage:** the legal hourly minimum rate an employee or worker over 23 years of age should earn for their labour.

**National Minimum Wage:** the legal hourly minimum rate an employee or worker under 23 years of age should earn for their labour.

**National Pay Equity Coalition:** A feminist advocacy and policy group active in New South Wales and federal industrial relations from 1988 to 2011.

**Non-regular workers:** these are workers who are on non-standard contracts;

**Non-standard contracts:** contracts that are not permanent or open ended.

**Occupational segregation:** the clustering of men and women into different jobs or types of work (horizontal segregation) and into different levels of work (vertical segregation).

**Pay equity:** Equal pay for work of equal value based on a comparison of jobs usually done by women with different jobs usually done by men on the basis of levels of skill, effort and responsibility.

**Privatisation:** when the ownership and control of a business moves from the public sector to the private sector, and/or the management of a service or activity is transferred from national or local government to the private sector.

**Proactive approach to pay equity:** the proactive approach to pay equity is different from the traditional complaints-based model of pay equity in that it does not rely on a complaint to initiate a pay equity review. It places positive obligations on employers to review their compensation practices, identify any gender-based inequities, and take steps to eliminate them.

**Protected characteristics:** defined under the Equality Act 2010 as race/ethnicity, disability, age, sex, pregnancy and maternity, religion or belief, marriage/civil partnership, sexual orientation, and gender reassignment.

**Proxy method:** used when there is no male comparator within an organisation. It allows the organisation to find male comparators in an external organisation.

**Proxy pay comparator:** used when there is no male comparator within an organisation. It allows the organisation to find male comparators in an external organisation.

**Public Sector Equality Duty:** requires public bodies to have due regard to the need to eliminate discrimination, harassment, victimisation and any other conduct prohibited by the Equality Act 2010; advance equality of opportunity between persons who share a relevant protected characteristic (as defined by the 2010 Act) and persons who do not share it; and foster good relations between persons who share a relevant protected characteristic and persons who do not share it.

**Real Living Wage (rLW):** a wage rate that is higher than the NLW and NMW and allows workers to receive pay that meets the cost of everyday living. The rate is determined by the Living Wage Foundation on an annual basis.

**Regular workers:** workers on permanent contracts with job security and favourable terms and conditions, such as sick pay.

**Revaluation of women's work:** the value of women's work is reconsidered and given the appropriate value, often in line with the value attached to comparable men's work.

**Sectoral collective bargaining:** when collective bargaining is carried out at sectoral level and any collective agreements apply to the whole sector.

**Sectoral segregation:** where women are clustered in certain sectors of the economy.

**Single Status:** the introduction of common pay and conditions, job evaluation and a single pay spine for former manual workers and administrative, technical and professional staff in local government.

**Social partner:** representative of management and labour who engage in collective negotiation.

**Specific Duties Regulations 2012 Scotland:** these regulations apply specific duties to Scottish public sector organisations to help them meet the general duties of the Public Sector Equality Duty.

**Trade union:** an organisation of a group of workers who fight to improve terms and conditions of employment and campaign on issues of justice and fairness.

**Tripartite negotiation:** negotiation between employers, trade unions and government.

**Undervaluation:** defined as women receiving lower pay and reward for their skills, knowledge and experience than men in comparable jobs

**Unionisation:** the process of workers becoming members of a trade union.

# Appendix 4 – Equal Value and Job Evaluation: A Note by Sue Hastings<sup>289</sup>

## Context

The concept of 'equal value' is not absolute, although the term sounds as though it should be. Nor is 'equal value' clearly defined in UK equality legislation, or in the legislation of any other jurisdiction. All such legislation is premised on the understated understanding that jobs done by women have historically tended to be undervalued, for social, industrial and political reasons.

Under UK legal provisions, which jobs are of equal value is ultimately determined by Employment Tribunals (or occasionally higher courts), in the light of evidence and opinions from independent experts, parties and parties' own experts. This system inevitably throws up inconsistent decisions on equal value issues.

Because it is not defined, the understanding of what is 'equal value' can and has changed over the period since the 1970 Equal Pay Act, and even since the Equal Value Amendment of 1983, effective from January 1984. Arguably, fewer speech and language therapists would have been successful had their substantive cases been heard when they were submitted in 1987 and 1988 than was actually the case when they were resolved in the late 1990s.

## Where Does Job Evaluation Come In?

The concepts of equal value and job evaluation have been linked since the ILO Directive (1951). Job evaluation as a means of 'achieving' equal pay for work of equal value was written into the 'work rated as equivalent' clause of the 1970 EPA, in the form of 'if women's and men's jobs have been evaluated equally in a JES, then the women should have the same pay as the men. This was expanded in the 1983 Equal Value Amendment legislation in two ways:

- (1) Using JE terminology as the guidance on how equal value should be determined – comparison under 'headings such as effort, skill and decision', further clarified in the 2010 Equality Act to 'factors such as effort, skill and decision making';
- (2) Allowing a fair and non-discriminatory JES to provide a defence to equal value claims.

Because many women workers are employed in jobs which are historically undervalued and therefore underpaid - such as caring, early years, shop work, catering and cleaning - re-evaluating their work can involve significant costs to employers. For this reason, and because they were encouraged by the legislation

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<sup>289</sup> This note was written in reference to the UK as a whole, however all content is applicable to Scotland.

to do so, many private and public sector employers implemented job evaluation schemes in the 1970s and 1980s that were designed to replicate the historical status quo as closely as possible, in the knowledge that the schemes would almost certainly provide deterrents and defences to equal pay claims, which they generally did.

Private sector employers also took the approach of evading the UK 'same employment' provisions of the legislation by selling off or contracting out to other employers the jobs of either potential claimants or potential comparators.

This approach was copied by public sector organisations when claims against them became more frequent and involved much larger number of claimants than previously from the late 1980s onwards, and public sector finances were severely constrained. Local authorities in particular used various mechanisms for contracting out the jobs of their various large groups of female employees, for example, cleaning staff, care home staff, housing management, leisure centres.

The scope for taking claims under the Equality Act is a legal issue requiring tribunals and courts to take a much broader view of what constitutes same employment or same service. It is not an argument against using job evaluation to move towards equal pay for work of equal value.

## **Job Evaluation Schemes Designed to Comply with Equal Value Requirements**

There are a number of schemes in existence designed to comply with good equal value practice. Whether they still do is considered below. Such schemes have generally, but not exclusively, been developed in the public sector where employers, at least those working in HR, have been somewhat more amenable to the idea. The most prominent of these schemes are:

- (1) The Local Government (Single Status) NJCJES;
- (2) The (Agenda for Change) NHS JES.

- The features of these schemes, which are intended to move towards equal pay for work of equal value, include:
- Knowledge factors broken down into their component parts, so that previously undervalued skills such as interpersonal skills and physical skills can be measured separately and not undervalued relative to knowledge acquired through qualifications, as tended to be the case in historical JES;
- Acknowledgement of alternative routes to the acquisition of theoretical knowledge, such as experience in current and previous spheres, as well as informal and formal training;
- Similarly, identification of different types of responsibility so that some forms of responsibility are not undervalued relative to others;

- In particular, separate identification of factors measuring responsibilities for providing services to people, whether they be clients, patients, recipients of local government services, including children in schools and nurseries, residents of care homes, users of leisure services;
- Other responsibility factors covering discrete and distinct types of responsibility, for example, for physical resources, information, other employees, and defined to ensure that they measure relevant aspects of typically female jobs as well as those of typically male jobs, for instance, defining physical resource responsibilities to include those belonging to external clients, as well as those belonging to the employing organisation;
- Effort factors that explicitly measure emotional effort; and working conditions factors which explicitly measure people-related working conditions such as body fluids and hazards associated with working with vulnerable people.

Somewhat ironically, because of the widespread contracting out of local government services, the Local Government JES has been used outside the areas for which the NJC is responsible, for example, in housing associations and academy chains in England. The Health Service JES, which has associated nationally determined pay scales, is used fairly commonly among private and charity sector providers of health and related care services, for instance, in private hospitals.

### **Use for Jobs Other Than Those for Which They Were Designed**

The question is whether either or both of these schemes could be used outside such obviously analogous organisations. Although neither has implemented it, for financial and local political reasons, both the States (Governments) of Jersey and Guernsey have separately tested the NJS JES for use across their public sectors, including what in the rest of the UK would be described as Civil Service departments. In both cases, local union and management nominees have been trained in the use of the NHS JES and been asked to try to match local job descriptions for health and social care and a wider range of jobs to the UK nationally agreed profiles – with varying degrees of success. However, those carrying out the training and pilot exercises, including myself, have been satisfied that with some wording changes, additional guidance and training, and some new sets of profiles it would be possible to use this scheme across the public sector.

Perhaps because it is a little older, the Local Government JES seems less attractive as a model for wider application, but there is no obvious reason why, with suitable wording changes and additional guidance, it could not also be used more widely within the public sector. It was the basis for a universal equal value tool developed in New Zealand in the late 1990s to assist in the implementation of that country's equal pay legislation.

The emphasis above on public sector jobs is because they all provide direct or indirect services to the public and this can be accommodated within the range of Responsibility factors of both schemes, notably because both schemes have a

specific factor to measure Responsibilities for People/Patients/Clients/Service Users. Where the concept of service to members of the public is relevant in private sector organisations, either of the schemes might also be applicable, for example, to retail distribution, banking and finance companies, although to my knowledge there has been no testing of either scheme in this way.

I am less convinced that either scheme could easily be adapted for use in private manufacturing or agriculture sectors, as the responsibility factors are not appropriate for jobs involving production, whether of goods or foods.

It should be noted that although the NHS JES (together with the national profiles) is publicly and freely available on the NHS Employers' Organisation website, it is in effect copyright to the Joint Technical Working Group that oversees it, so there could be legal issues to applying it to a wider range of jobs in the UK.

### **Would These Schemes Deliver Equal Pay for Work of Equal Value in the Post-Pandemic World?**

It is not yet clear whether it will be sustained, but the 'value' of 'keyworker' jobs, undertaken predominantly, although not exclusively, by women, did appear to increase in the public's collective mind during the UK pandemic. The key feature of all these jobs, from nurses to home carers to shop workers, is that they were and are providing services direct to members of the public who needed their help in order to sustain anything like 'normal' life.

The question is whether such an increase in perceived value could be reflected in job evaluation schemes and in particular in the two schemes mentioned above. I believe it could, by increasing the weighting attributable to factors measuring people-related demands. Currently, both schemes have equal weighting of their respective Responsibility factors, so, for example, in the NHS JES the same number of points are available for the Responsibility for Patient Care factor as for the Responsibility for Financial and Physical Resources factor, as this was seen as a fair way of resolving potential differences of opinion between groups of employees and managers with different types of responsibility. In both cases, this reflected increased implicit weighting of people-related factors compared to previous pay structures, so carried the prospect of pay increases for people-related jobs compared to other jobs. In the Health Service equal weighting of the Responsibility factors reflected what could be afforded at the time and was politically acceptable.

But it would be perfectly possible to give greater weight to people-related factors in people-facing service organisations, justified by the purpose or 'mission' of the organisation. This would be the reverse of the position in historical JE schemes. The (Korn Ferry) Hay system, for example, has a complicated weighting system but in practice favours jobs with financial responsibilities; other historical schemes had other methods of achieving similar outcomes. The first version of the Medequate system for the health service did not have any factor to measure responsibilities for



patients. When, under pressure, one was introduced it was very lowly weighted, arguably so as not to upset the status quo.

'Equal value' implies upsetting the status quo and this could be achieved by re-weighting existing job evaluation schemes to reflect a different perspective on service-providing jobs.

Sue Hastings

10 May 2021