Equal Pay and Reflexive Regulation

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INTRODUCTION

This paper looks at the issue of equal pay in the context of wider debates about the effectiveness of regulation. The question of whether firms should be forced or encouraged to conduct an equal pay audit has been the subject of much discussion in the UK since the Equal Pay Taskforce (2001) first recommended that they should be made compulsory. However, the discourse of 'better regulation principles' has encouraged a shift away from 'command and control' or 'hard' forms of regulation that have been described as overly prescriptive and inflexible towards 'soft' governance. Instead, 'light touch' regulation, self-regulation, the encouragement of firms to go 'beyond compliance' in order to improve competitiveness, and other forms of 'soft' governance have been the order of the day in a more deregulatory climate. Thus, in relation to pay audits, the Kingsmill Report (2001) commissioned by the Government recommended a voluntary approach, pointing to the business case arguments and the potential impact of corporate governance and CSR mechanisms. However, despite significant levels of public policy support in the intervening decade, this approach has failed to get significant numbers of firms to conduct a pay audit.

Drawing on the concept of 'reflexive regulation', we argue that mandatory pay audits can be understood as reflexive regulation rather than hard law, and that reflexive regulation is an approach that has the potential to avoid the dichotomy between 'hard' and 'soft' forms of regulation (Deakin and McLaughlin 2008). Mandatory pay audits would provide transparency in relation to pay systems, thus enabling employees and unions to engage in deliberative learning processes with employers over narrowing the pay gap.

In looking at the issue of pay audits, the paper draws on the early conclusions of a research project that explores some of the barriers to the institutional mechanisms of corporate governance and CSR having the impact envisioned by the Kingsmill Report, and that compares the impact of these mechanisms with the impact of other pressures on organisations to adopt progressive HRM policy in relation to gender equity. Interviews, which are only recently completed, were conducted with a range of organisations in both the private and public sector, as well as with SRI institutional investors, trade unions, policy makers and other relevant stakeholders. The paper proceeds in four parts: section one outlines the debate over mandatory pay audits in the UK and assesses the impact of the voluntary approach to date; section two looks at the question of why this approach has not been more effective, placing the discussion in the wider context of the potential impact of CSR to bring about change; section three introduces the concept of 'reflexive regulation' and discusses its potential to overcome the dichotomy of 'hard' and 'soft' forms of regulation; and section four assesses the potential application of 'reflexive regulation' to the area of equal pay.

ADDRESSING THE GENDER PAY GAP

More than thirty years after the Equal Pay Act came into effect in the UK there remains a significant gender pay gap. For full-time employees the difference between the mean hourly pay of men and women is currently 16.4 percent, while the gap for all employees is 20.2 percent. In the private sector, the gap is wider at 20.8 percent and 28.8 percent (ONS 2009).

In certain sectors the pay gap is more pronounced. For example, a recent study of the finance sector commissioned by the Equalities and Human Rights Commission (Metcalf and Rolfe, 2009) revealed a pay gap of 40 percent for full-time employees.

While there are a number of explanations for the pay gap, including occupational segregation and the division of family responsibilities, it is generally accepted in policy circles that discrimination continues to play a role. Although some pay discrimination may be intentional, mostly it is assumed to be systemic and unseen, and as such only identifiable through a systematic evaluation of payment systems. Following the approach first adopted in Ontario under its 1987 Pay Equity Act (McColgan 1997), the argument for mandatory equal pay audits has been increasingly made in the UK over the last decade. The argument was first made in the UK by the Equal Pay Taskforce (2001), which argued that most employers did not believe their pay systems were discriminatory and therefore would only conduct an equal pay audit if it were mandatory.

Compulsion, however, was rejected by the government, and two months after the Equal Pay Taskforce released its report Denise Kingsmill was commissioned to undertake a similar review into women's pay and employment. Here the terms of reference were limited to an examination of *non-legislative* proposals for addressing the pay gap (Kingsmill 2001). Given this, it is not surprising that Kingsmill recommended a voluntarist approach in relation to equal pay audits. She based her arguments for a voluntary approach on the link between the management of an organisation's employees and attaining its strategic objectives. She suggested that the current pay gap reflected human capital mismanagement by UK organisations. Even if equal pay audits did not reveal systemic discrimination, she argued they would reveal the clustering of women into lower roles within an organisation. Moreover, a deeper analysis of the data would reveal a disparity between the abilities and talents of women and the positions they occupy within the firm. Pay audits, therefore, offer the opportunity for organisations to examine the various barriers to the full utilisation of the talents and skills of their employees (such as promotional structures that disadvantage those who take career breaks or reward those who work long hours). Significantly, she draws on the language of both corporate governance and CSR. In pointing to the Turnbull Report and its requirement that company boards report on the assessment of, and response to, significant risk, she argued that the failure to effectively manage human capital exposes an organisation to the same level of risk as the failure to manage financial resources. Good human capital management would reduce the risks and costs associated with equal pay and sex discrimination litigation, and the costs of staff turnover. It would also lead to an organisational composition that reflected the company's consumer base. She also pointed to the increased interest of institutional and individual investors in how effective companies were at managing their non-financial resources, implying that 'reputational effects' and shareholder activism might help drive human capital management reform.

The issue of compulsory pay audits was revisited by both the Women in Work Commission (2006) and the Discrimination Law Review (2007). The former were unable to arrive at a consensus on the issue and thus set out the arguments for and against, while recommending various policy supports to raise awareness, promote best practice and build employer capacity to address equality issues. The latter rejected mandatory equal pay audits arguing that the potential costs would outweigh any benefits, and as such would 'contravene better regulation principles'. Instead, it recommended the promotion of best practice and the introduction of mechanisms that would increase the 'reputational benefits' for organisations that voluntarily carry them out (DCLG 2007).

Following on from these various commissions and reviews, a number of public policy supports were implemented during the 2000s to encourage employers to voluntarily conduct equal pay audits and address gender diversity more generally: the Equal Opportunities Commission (EOC) published various toolkits and codes of practice on conducting equal pay audits and complying with equal pay legislation; the government began working with a number of networks of 'fair pay champions' such as Opportunity Now to promote best practice and reward exemplar employers; and the equal pay questionnaire came into effect in 2003,

allowing individual employees to request information from their employer in relation to equal pay. Taken together, these various supports were considered to have raised the profile of equal pay audits in the private sector by the mid-2000s (Neathey et al. 2005). In the public sector, pay audits became *de facto* mandatory through the Civil Service Reward Principles, the National Joint Council pay agreement for local authorities, and Agenda for Change in the NHS. The public sector Gender Equality Duty also places a duty on public bodies to proactively promote gender equality and eliminate discrimination. At the same time, the issue of equal pay litigation in local authorities has been constantly in the media, highlighting the penalties involved in unequal pay and further raising the profile of equal pay issues for the private sector.

However, despite the range of public policy supports, and the various CSR and governance business case arguments put forward for a voluntary approach, the empirical evidence suggests that its impact in influencing private sector organisations to conduct equal pay audits has been very limited. The EOC commissioned a number of surveys between 2002 and 2005 examining the extent of equal pay audits among organisations. Eighty-two percent of organisations in the 2005 survey had not conducted an equal pay review, did not have one in progress and did not intend to conduct one (Adams et al. 2006). Clearly the voluntarist approach has been ineffective. This is also a conclusion that the Minister for Women and Equality has now reached in introducing mandatory reporting in the Equalities Bill 2009. From 2013 organisations with more than 250 employees will be required to report their gender pay gap on a regular basis (GEO 2009). But why have the institutional mechanisms of corporate governance and CSR not had the impact envisioned by Kingsmill? The following section draws on the interviews with institutional investment funds and SRI managers in examining this question. It examines these questions in the wider context of the potential impact of CSR.

GENDER INEQUALITY AND CSR

Is the ineffectiveness of institutional mechanisms of corporate governance and CSR in relation to equal pay to do with a lack of interest in the issue itself, or does it represent a more general limitation of such mechanisms to bring about significant social change? To what extent is the faith placed by governments in voluntary, 'light touch' and various 'soft' governance mechanisms misplaced? There is no doubting that issues of corporate social responsibility have become increasingly important for corporations driven by concerns about reputational risk and long-term financial performance. A KPMG (2008) survey showed that 80 percent of Global Fortune 250 companies and over 90 percent of the UK's largest 100 corporations report CSR information. Increasingly, responsibility for CSR lies with a board member. Additionally, firms are employing CSR managers, joining CSR membership associations, such as Business in the Community, and participating in CSR performance indices such as FTSE4Good (Grosser and Moon 2008). On the investor side, shareholder engagement has grown significantly. The United Nations Principles for Responsible Investment was launched in 2006, and as of 2008 it had over 360 institutional signatories representing US$14 trillion in assets, up from US$4 trillion in 2006 (UNPRI 2008). In the UK, the SRI fund market is estimated to be around €331 billion (Waring and Edwards 2008). These developments have been supported by various national reporting requirements. In the UK, the SRI Pension Disclosure Regulation, which came into effect in 2000, and the 2002 Myners principles, which require pension funds (on a 'comply or explain' basis) to report their investment principles and to report annually on how they are implementing them, are both perceived to have raised the awareness of social, ethical and environmental issues for pension fund trustees. More recently, the 'Enhanced Business Review' requires companies to disclose information relating to environmental matters, employees, and social and community issues in as much as they affect the performance of the business.

And yet, despite these developments, our interviews with a range of investment funds show that the impact of such institutional governance mechanisms remains quite minimal. Firstly, even with the significant growth in SRI in recent years, it still remains very much a niche market. Even among some of the larger UK investment firms that are well known for their SRI, the SRI-specific funds ranged between two and eight percent of their total equity assets under

management (though other funds may have a CSR engagement overlay, or engage on CSR issues when the issue is perceived to have some financial risk, but are not explicitly SRI). As one SRI Manager noted in relation to the impact of the Myners principles 'things haven't moved on as fast as they could have… We were very optimistic… [but] it hasn't really grown that much'. Secondly, the extent of 'investor activism' is somewhat limited. While most interviewees were able to cite examples of investor activism that had led a fund manager to engage with a company on an issue, or file or support a shareholder resolution, the general view was that fund managers were not being challenged to any great extent by institutional investors. There was some evidence that union trustees were beginning to raise employee issues, though UK unions were perceived to well behind their US counterparts in realising the potential to influence organisational change through their pension funds. UK unions are now offering their members training in relation to being a pension fund trustee, and over time this may lead to more institutional activism. Two investment firms also noted that there was a disconnect between pension fund trustees and the mission of the organisations they are representing, and that they would expect organisations such as charities, campaign groups, and public sector organisations in education and health, to be far more active in relation to SRI. In relation to campaign groups and charities (who would have significant investment funds from donations), it was noted that some of them do not even have an SRI policy and might well be 'investing in an activity which they are campaigning against…. You would have thought of any sector… they would have got it before anybody else'. While NGOs are effective in influencing the engagement of SRI funds, it is mostly done through the media or by lobbying SRI funds directly, but rarely as investors through their investment funds. The explanation offered for this disconnect was that the pension fund trustees are often more conservative than the individuals within their organisations who are interested in ethical and social issues. Additionally, despite the fact that CSR issues can be legally taken into consideration by trustees, there is still a 'mindset about obsession with fiduciary duty… that by taking these sorts of issues into account, are you breaching that or are you not?' Given the current uncertainty around defined benefit pension schemes, combined with instability in the stock markets, it is not surprising that CSR issues may not feature highly for pension fund trustees seeking to maximise returns for their pension funds.

Engagement with companies is driven not only by individual and institutional investors, but also by SRI investment funds themselves as part of their own strategic aims. One investment firm talked about their aim being to educate fund managers and 'transform the capital markets and get them to [have] sustainability issues… reflected in investment decisions'. Thus, SRI investment firms draw up their own engagement plans around key social, ethical and environmental issues, and then build sector and issue expertise so they can engage not only with companies, but also with the fund managers and brokers. But even at this level there are blockages as fund managers are rewarded for short-term gains and the gains from CSR are not always tangible. As one interviewee noted, the stock market price of a firm may drop in response to some negative CSR news but it often returns to its previous level after a short period, suggesting that the initial decrease was 'a market reaction to unexpected news as opposed to the market really factoring in what the impact is of a company not managing [CSR] issues'.

In relation to specific issues, such as gender diversity, it is evident that in relation to CSR there is a hierarchy of concerns. Employee issues are generally viewed as one of the four clusters of significant CSR issues along with governance, environment and social issues, but within the employee cluster, issues like use of child labour, supply chain employment conditions, and health and safety carry the greatest reputational risk and are the easiest to engage on, whereas issues such as freedom of association and union recognition are more problematic. It was also suggested that there is a fine line between engaging with companies over important issues and moving into micro-management, and that some issues like union recognition and collective bargaining might fall into micro-management. There were some reports of engagement with companies in relation to diversity and developing equal opportunities policies, but no significant engagement over equal pay issues. One investment firm had produced a document in 2002 about using SRI to close the gender pay gap but this was very

much exploratory work, and as yet they have not been able to turn the information into a form that fund managers could process as part of investment decisions. Thus, there is a multiplicity of issues that investors have to take into account, which leads to the relative marginalisation of certain issues.

The issue of transparency and lack of quantitative information that third parties can use to make meaningful investment decisions was seen by most interviewees as the biggest barrier to significant levels of institutional activism in relation to CSR issue. Developments such as the Myners principles and Statements of Investment Principles were seen as only a start. While pension disclosure rules have led to a significant increase in the number of pension funds drawing up statements about investment principles, the consensus was that the actual impact on practice was questionable; 'a one-off policy statement sits in the drawer or in an investment management agreement signed by two people that probably left the company a couple of years ago'. Without meaningful reporting about how the policy is actually being implemented and what has been achieved, the perception is that most are meaningless statements of intent. However, for pension funds to engage effectively on CSR issues with the companies they invest in, they will also require a commensurate level of transparent, quantitative and regular information to be reported by these companies. As one interviewee noted, currently 'companies choose what they are going to report on…. when it comes to environmental and social issues', and the lack of standardised performance indicators means the CSR performance of companies cannot be assessed, ranked and challenged by civil society and by investors: 'transparency is a fundamental tenet of responsibility; without transparency you can't have accountability [and] third parties have no way of judging what you have been doing'. The lack of meaningful reporting is a strong theme on CSR reporting in the literature. The PWC (2007) report on the effectiveness of the Business Review finds that while 83 percent of companies include a CSR section in their annual reports, only 17 percent connect CSR issues to their strategic objectives. In relation to employees, it finds that while 60 percent of companies claim that people are an essential asset for achieving their strategic objectives, only around 20 percent included relevant performance indicators.

Most of the investor firms we spoke with were not opposed to greater levels of regulation. As one interviewee noted, 'companies operate within a society which itself has laws and rules… and to suppose that the control of companies can be left entirely to the shareholders as owner seems to me wrong and rather dangerous'. Thus, they see regulation as important, both in facilitating institutional activism, and in helping firms realise what the standards are that are expected by society. Their main concern was that any regulation was 'sophisticated' and not 'command and control'. So what then might 'sophisticated regulation' look like?

REFLEXIVE REGULATION

Reflexive regulation occupies a middle ground between purely voluntarist approaches on the one hand, and 'command and control' forms of law on the other. As we have seen, voluntarist or self-regulatory approaches, at least on their own, are largely ineffective. They assume that the interests of business will align with important societal interests through enlightened self-interest, and in doing so ignore a range of barriers to this occurring. The 'command and control' approach, in contrast, relies on prescriptive controls underpinned by sanctions for non-compliance. This approach has also been criticised for being ineffective. In the area of equal pay, the ineffectiveness of 'hard law' is evident in the enduring pay gap, thirty years after the enactment of equal pay legislation.

At a deeper level, the critique of 'command and control' is that there are limits to the effectiveness of the law to fully address issues within the economic and organisational spheres. The language of autopoiesis or systems theory is useful here. Autopoiesis suggests that various sub-systems are autonomous and closed, and thus the ability of one sub-system to influence another may be limited. Law has its own unique linguistic forms and institutional processes, and these translate only partially into the economic and organisational spheres. The more prescriptive the law, the less effective it is in bringing about the desired outcome, which often results in increasing legal 'juridification' and greater levels of detail and complexity. Reflexive regulation offers a way out of this by matching the legal rules with the

aim of the legislation through a process of enforced or stimulated self-regulation. Thus, the actors within the economic and organisational spheres adjust their behaviour as a result of the stimuli from the legal system. This approach does not imply there is no role for regulation, but rather that regulation is procedural rather than substantive. An example in the field of employment law would be where employers and unions might negotiate an agreement through collective bargaining processes wherein statutory norms might be varied – the so called 'bargained statutory adjustment' (Davies and Kilpatrick 2004). Default rules with sanctions would still exist, and would apply as a last resort, but the idea is that these would act as stimuli for the parties to reach an agreement that was preferable to them and was more suited to their local context. Thus, the focus of reflexive regulation would be on the procedures by which legal norms could be modified.

This approach implies that the outcomes are more flexible than those imposed by 'command and control' regulation as a result of the deliberation that occurs between a range of stakeholders. Additionally, while there may be a range of potential solutions to a particular issue, a reflexive governance approach also encourages a learning process to take place about which solutions are more effective. So there is not only deliberation within organisations, but also between organisations, and this process can be aided by benchmarking procedures and other 'best practice' dissemination mechanisms. Thus, 'reflexive regulation is governance by design, rather than a process left entirely to the forces of spontaneous order' (Deakin and McLaughlin 2008: 320). However, for this to be effective in practice, 'bridging institutions' between the legal sub-system and the sub-system within which the reflexive laws are meant to operate must be in place. That is, institutions or mechanisms must exist in which effective deliberation and participatory decision-making can occur. In the employment relations context these might include collective bargaining or other employee-based consultation mechanisms. Where these mechanisms do not exist, the law has a capacity building role to play in enabling such institutional mechanisms to develop.

Thus, the theory of reflexive regulation suggests that it can avoid the rigidity and complexity of the 'command and control' approach while at the same time circumventing the inaction of purely self-regulatory approaches. However, reflexive regulation is a fairly new field, both theoretically and practically, and much is unknown about the sorts of conditions that might enable this approach to work. For example, disclosure rules on how firms are dealing with various aspects of their social, environmental and ethical performance might well fall within a reflexive governance approach, and yet these mechanisms have been largely ineffective. Moreover, the sorts of comply or explain 'light touch' mechanisms that have been introduced within the financial sector have completely failed to deliver the intended outcomes, and pressure is now building for a far more robust regulatory regime. The current range of crises certainly provides much research material for trying to uncover the sorts of procedural rules, as well as the sorts of default rules and appropriate sanctions, that might enable reflexive regulation to be effective. That is the 'frame', or 'the conditions under which a deliberative process may succeed [need to] be identified, and once identified, must be affirmatively created, rather than taken for granted' (De Schutter and Deakin 2005:3).

There are also a number of limitations to a reflexive regulatory approach that need to be considered. The first is that the bridging institutions need to be able to fulfil the role that is ascribed to them. However, given that in the employment field, deliberative mechanisms such as collective bargaining have been systematically undermined in the past thirty years, questions exist about what sorts of effective alternative mechanisms could emerge. Employee representative forums have been encouraged by the information and consultation directives, but given the power dynamic in the employment relationship, the extent to which these might act as an effective counter to management in any meaningful deliberative process is questionable. This raises the second and related limitation of a reflexive approach, and that is that conflicting economic and political interests might be underplayed or even ignored, and the issues being addressed depoliticised (McCrudden 2007). The danger is that power relations are not challenged through any deliberative mechanisms. This is particularly pertinent for any discussion over equal pay, where conflicting economic interests are clearly visible and where *distributive* as well as *deliberative* negotiations might occur simultaneously. Given these

limitations, then, how effective is a reflexive approach to equal pay and gender equality more generally likely to be?

PAY AUDITS IN PRACTICE

Contrary to the Discrimination Law Review that suggested mandatory pay audits would contravene 'better regulation principles', our argument is that they actually fit within a reflexive law framework. This is because they do not commit employers to a particular outcome but rather to a process of evaluating their pay systems and disclosing the information. Thus, they have the potential to play an important role in stimulating a deliberative learning process around addressing equal pay.

Initial evidence from our research shows that where pay audits were conducted voluntarily, they were far less effective when there was a lack of transparency. In contrast, those conducted in an open and deliberative way led to a deeper analysis of the causes of the pay gap and related gender issues. A number of private sector firms we interviewed had conducted equal pay audits but they had not disclosed the findings. In one case, the relevant union had asked to see the results but their request had been refused. Grosser and Moon (2008) similarly report that even among the best performing gender diversity companies in their research, the majority do not report information on equal pay audits. Without transparency, the results cannot be assessed or challenged. Thus, there is no deliberation among stakeholders and the end result is likely to be only a partial evaluation of discrimination within a company's pay and other HR systems.

A comparison of a private sector and public sector organisation that were part of our research illustrates the lost potential quite well. The private sector firm had conducted a pay audit in secrecy and claimed that it had shown there to be no gender discrimination within the organisation's payment systems. However, later in the interview the issue of appointments was discussed and it was noted by the HR Director that men bargained significantly harder during the interview process than women, to such an extent that a man might end up with a starting salary of up to £10,000 more than a woman with similar experience and qualifications. When questioned about whether the pay audit would uncover those sorts of discrepancies, the response was that 'we haven't done it to that level of detail [and] I don't think we want to… because [of] what you might find and therefore what it would cost to correct'. In contrast, one of the public sector organisations interviewed, which has carried out open and transparent equal pay audits on an annual basis for some years, also raised the issue of appointments. They cited a case where a man and a woman with similar experience had been appointed within the same department at the same time. They had both been offered a starting salary on the same scale point, but the male bargained for a higher starting point claiming he wouldn't take the job otherwise. Six months later, when it became clear that the women was a far better quality employee, the department came back to HR looking to raise the salary of the female. The HR department of this organisation was able to use this example, in tandem with the transparent and detailed pay audit, to highlight to departmental managers the gender bias in the appointments process and its impact on the gender pay gap.

In the first case, the pay audit was conducted in secrecy by management, and as a result was narrow in scope and failed to highlight some potential issues in relation to starting salaries. Additionally, the outcomes of the appointment process were not perceived to be inequitable, but rather the inevitable outcome of individual bargaining. Additionally, despite the potential litigation risk, it was felt that the organisation could find some way to justify the differences retrospectively if it was ever challenged. The HR manager in this example seemed committed to addressing diversity issues, but her approach to equal pay was fairly narrow. In contrast, the pay audit in the public sector organisation was part of a transparent deliberative process that stimulated learning within the organisation around some of the underlying causes of pay inequality. While it was driven by a particularly effective HR department, the inherent transparency of the union negotiated pay-scales made their job easier.

Good pay audits also have the potential to go beyond simply highlighting discriminatory pay systems. As Kingsmill (2001) noted, highlighting a gender pay gap within an organisation

should lead to an exploration of why it exists, and thus to an examination of other HR systems, such as promotional structures. Some of the causes of the pay gaps will relate to outside factors, but organisations can exert some influence over these factors. One University we interviewed had altered its promotion criteria for academics as a result of the pay audit. In this case the initial audit had found a pay gap between male and female academics, but only across the entire scales and not within different categories. At this point they could have concluded that their pay systems were not discriminatory, in that the causes of the pay gap lay elsewhere. However, they saw the pay audit as a tool for deeper analysis, and by analysing the gender gap by part-time and full-time status, it became clear that working part-time was the major promotion obstacle for women and thus a significant contributor to the pay gap. This led the organisation to conduct some qualitative research among part-time staff, which revealed the various pressures around teaching while still needing to achieve the same publication outputs as full-time academics in order to earn promotion. As a result of this process, the University changed its promotion criteria so that academic outputs were weighted on a pro-rata basis. It was hoped that over time this may have some impact on the promotion of female academics, and thus on the gender pay gap within the University.

Despite opposition to mandatory pay audits from some, though not all, of the private sector companies we interviewed, a number of them raised the positive role of regulation as a catalyst for change within their organisations. The requirement under public procurement rules of disclosing diversity performance was noted by several private sector organisations as a driver of change. Additionally, the right to request flexible working was mentioned spontaneously by a number of interviewees as a legal development that had enabled the HR department to enter into dialogue with operational managers. The need to be compliant with the law had provided them with the opportunity to educate their managers about the issues that employees with caring responsibilities face. Rather than leading to a tick-box exercise, in some cases it had resulted in a positive learning process. And like a mandatory equal pay audit, the right to request flexible working is an example of reflexive regulation in that it opens up a process of dialogue rather than committing the parties to a particular outcome. Of course, the sorts of HR managers that were willing to take part in the research are committed to gender diversity and believe both in the justice arguments as well as the business case. Thus, they see such legal developments as a tool to advance, in a deliberative process with their management colleagues, what they see as important diversity issues. In organisations without such gender champions, it is likely that the right to request flexible working will be met 'with a long list of unchallengeable business reasons why such a request may be refused' (Dickens 2007: 470). Thus, overcoming the conflicting political and economic interests, and balancing inherent power inequalities, is clearly an essential part of designing effective reflexive regulation, though not easily achieved.

One complicating factor for reflexive solutions is the tension between existing hard law and reflexive approaches to resolving equal pay that has arisen in relation to equal pay cases in local authorities, where thousands of cases are currently clogging up the employment tribunals. The theory of reflexive regulation grants some legal protection to reflexive solutions, with legal default rules applying when agreement cannot be reached. The example in the field of employment law of the so called 'bargained statutory adjustment' was referred to earlier. In such a situation, this would involve collectively agreed settlements taking precedence over legal rights, provided they meet certain standards. As one union official noted, you never get everything you want in a collective agreement, "Everything at the end of the day is a shabby compromise…. but it's done on the basis of this is the best we can negotiate; it's not some of you can take it and some of you can't. Once we take a vote on it, it's implemented collectively, that the whole basis. Why would [employers] bother negotiating with us otherwise?" But in relation to equal pay law, negotiated agreements are not protected from legal challenge. Thus, rather than the law acting as a default or as a matter of last resort when self-regulation fails, the law acts in addition to the self-regulatory arrangements and thus may undermine the collectively agreed settlement. In the case of *Allen V GMB* the Employment Tribunal ruled (later overturned by the Employment Appeal Tribunal but upheld by the Court of Appeal) that in arriving at a negotiated collective settlement the union, which had attempted to balance a

range of conflicting interests (back pay, pay cuts, and potential job losses through service cuts and outsourcing), had discriminated against their female members. While the ruling did not directly challenge collectively negotiated settlements per se, it has highlighted the tension between reconciling collectively agreed settlements with individual rights. If collectively agreed settlements are not equality proof, those involved in negotiating the agreements may find themselves facing legal action from individuals covered by the agreement. As a result of the ruling, the process of negotiating collective agreements over equal pay has been slowed down by the need to seek legal advice at every stage.

A connected issue is the financial implications for employers of up to six years in back pay for equal pay claims. The aim of pay audits is to encourage organisations to engage in an open examination and discussion of their pay systems, but when such an open discussion might result in significant financial penalties, it is not surprising that many private sector employers are unwilling to have their pay systems examined closely, particularly given the high profile that equal pay litigation in the public sector has received in recent years. One widely reported suggestion to this problem is an 'equal pay moratorium', a period in which an employer would be free from litigation while they conducted a pay review and rectified any pay discrimination. This approach was used in Ontario, and to limit the impact on employers going forward, adjustments to pay rates were restricted to 1 percent of the previous year's payroll per year until equity had been achieved (McColgan, 1993). However, the issue of a moratorium was discussed in the Discrimination Law Review and ruled out on the grounds that it ran counter to EU law, and it has not been included in the Equalities Bill. While the Bill provides for mandatory reporting of an organisation's pay gap, the lack of a moratorium, and thus the threat of litigation, will result in the bare minimum of information being released and will undermine the potential for deliberative learning processes. Neither does the Bill provide for the possibility of 'bargained statutory adjustments'. It does, however, allow a tribunal to make a ruling for an entire workforce and not just the individual who made the claim. This represents a significant shift away from the individual litigation-based route of anti-discrimination law in the UK to this point, though it is unclear where this will leave collectively negotiated solutions.

CONCLUSION

This paper has examined some of the various pressures on organisations to promote gender equality and to carry out pay audits. It did this in the context of wider debates over the effectiveness of different regulatory regimes. At this stage the research is incomplete, and so the findings and discussion presented here are tentative. Nonetheless, some lessons are beginning to emerge. It is clear that the institutional mechanisms of corporate governance and CSR have not had the impact on gender equity envisaged by Kingsmill (2001). A number of barriers underpin the ineffectiveness of such 'soft' regulatory strategies, one of which is the lack of meaningful reporting, which is an issue both for gender diversity and CSR more generally. Without detailed, transparent and standardised information it is difficult for civil society, investors, employees or other stakeholders to hold organisations to account. A reflexive approach to regulation has the potential to overcome this and other limitations of a voluntarist regime. Reflexive regulation provides the stimuli for self-regulation that is currently missing in a voluntarist approach, while not slipping into the trap of overly prescriptive 'command and control' regulation. The advantage of a reflexive strategy is that, in theory at least, its sets up deliberative learning processes leading to flexible solutions and effective organisational change. Mandatory pay audits are a viable reflexive strategy in that they would force organisations to produce and internally publish information on their pay systems, thereby providing the level of transparency that would enable employees and unions to engage with employers over the gender pay gap. A key component, however, of effective reflexive law is the bridging institutions within which effective deliberation can take place. With the decline in collective employee voice mechanisms in the UK over the past thirty years, and the weakness of alternative bridging mechanisms, such as investor activism, it is not clear where appropriate alternative bridging mechanisms might emerge. Given that addressing the gender pay gap involves dealing with conflicting economic interests, such mechanisms are fundamental to

bringing about change. The other complicating factor is the existing legal framework. The theory of reflexive regulation grants some legal protection to reflexive solutions, with legal default rules applying when agreement cannot be reached. Currently, however, the situation is such that the law acts in addition to any self-regulatory arrangements and thus may well undermine reflexive solutions. Additionally, the financial implications of back-pay may well limit the extent of deliberation that takes place when the new reporting requirements signalled in the Equalities Bill come into effect. Thus, while we are positive about the potential for mandatory pay audits to be an effective reflexive strategy if the right preconditions existed at the level of the legislative 'frame', given some of the limitations we have identified, it is expected that this potential will only be partially realised.

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