

Title: Legislative measures to promote equal pay Lead department or agency: Government Equalities Office Other departments or agencies: The Tribunals Service	Impact Assessment (IA)
	IA No: GEO 1029
	Date: 17/01/2011
	Stage: Consultation
	Source of intervention: Domestic
	Type of measure: Primary legislation
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Summary: Intervention and Options

What is the problem under consideration? Why is government intervention necessary?

Equal pay remains a key concern in the UK. Despite the legal framework around equal pay being in place since 1975, there is still a significant gender pay gap, and continuing evidence of non-compliance with the law in the public, private and voluntary sectors (estimated 28,000 claims per year in employment tribunals). Individually enforceable rights such as the right to equal pay do not always enable employees to challenge wider or systematic unfairness in pay and reward by their employers. Therefore, as part of a broader package of measures aimed at tackling the gender pay gap, government intervention is necessary on equal pay enforcement to ensure that employers who are found to breach the law take the necessary corrective action to ensure that they do not continue to do so.

What are the policy objectives and the intended effects?

The two legislative approaches considered in this impact assessment underpin Government's wider strategy which seeks to improve transparency in pay matters by a voluntary approach to reporting of pay data, and to strengthen enforcement. In particular, Government proposes mandatory pay audits for the small number of employers who are found to have breached equal pay law, as opposed to requiring them for all employers irrespective of whether or not the law has been breached. Publishing the results of audits will improve transparency in these cases, enabling a judgement in a tribunal case to be used to challenge any systematic unfairness in pay. This will ensure that employers who have breached the law take appropriate action to ensure they avoid future breaches.

What policy options have been considered, including any alternatives to regulation? Please justify preferred option (further details in Evidence Base)

Government has considered a range of measures to improve transparency in pay matters and strengthen enforcement of equal pay law, to complement a general voluntary approach to pay transparency.

Option 1: do nothing. This relies on employers taking suitable corrective action following a finding with limited further support.

Option 2 (preferred): require an employment tribunal to impose pay audits except in particular circumstances. This would target intervention in cases where there has shown to be a need, and it makes best use of the information available.

Instead of the general voluntary approach to pay transparency, including option 2 as presented above, Government also considered requiring employers of 150 employees or more to carry out mandatory pay audits. This approach was considered to be excessively burdensome on the majority of employers who are compliant with the law.

Will the policy be reviewed? It will be reviewed. **If applicable, set review date:** 04/2018

What is the basis for this review? Sunset Clause. **If applicable, set sunset clause date:** 04/2020

Are there arrangements in place that will allow a systematic collection of monitoring information for future policy review?	Yes
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SELECT SIGNATORY Sign-off For consultation stage Impact Assessments:

I have read the Impact Assessment and I am satisfied that, given the available evidence, it represents a reasonable view of the likely costs, benefits and impact of the leading options.

Signed by the responsible SELECT SIGNATORY:  Date: 16/5/11

Summary: Analysis and Evidence

Policy Option 2

Description:

Require an employment tribunal to impose pay audits after a finding of gender pay discrimination except in particular circumstances

Price Base Year 2010	PV Base Year 2010	Time Period Years 10	Net Benefit (Present Value (PV)) (£m)		
			Low: TBC	High: TBC	Best Estimate: TBC

COSTS (£m)	Total Transition (Constant Price) Years	Average Annual (excl. Transition) (Constant Price)	Total Cost (Present Value)
Low	TBC	TBC	TBC
High	TBC	TBC	TBC
Best Estimate	TBC	TBC	TBC

Description and scale of key monetised costs by 'main affected groups'

We have discussed potential costs to the Tribunals Service arising from this policy and at this early stage it has not been possible to come to a robust estimate. Specific unit costs are not currently available. We will revise this throughout the policy development process.

(Note: Cost of imposed pay audits not included as these would only be incurred by employers found to be in breach of equal pay law)

Other key non-monetised costs by 'main affected groups'

There are no non-monetised costs which are regarded as a direct impact of this policy, or which do not relate to non-compliance.

BENEFITS (£m)	Total Transition (Constant Price) Years	Average Annual (excl. Transition) (Constant Price)	Total Benefit (Present Value)
Low	0	0	0
High	0	0.4	3.0
Best Estimate	0	0.2	1.5

Description and scale of key monetised benefits by 'main affected groups'

There may be benefits to the below affected groups as a result of an increase in settlement in equal pay claims by 0-10%:

- Private sector employers: Annually recurring - £0-0.08million
- Voluntary sector employers: Annually recurring - £0-0.02million
- Individuals: Annually recurring - £0-0.02million
- Exchequer: Annually recurring - £0-0.24million

Other key non-monetised benefits by 'main affected groups'

The principal benefits of this measure are benefits to individuals and employers where the imposition of a pay audit will correct pay systems and provide equal pay, both to the individuals themselves, and the groups they represent.

Key assumptions/sensitivities/risks

Discount rate (%)

3.5

- Estimated cost of a pay audit presented in Annex 1
- The estimated number of equal pay claims accepted by the Tribunals Service is 28,000 which is explained further in the evidence base
- A possible impact on settlement behaviour of this policy has been considered. A broad range has been used to account for uncertainty about the exact nature or size of this. In addition, sensitivity analysis has been included as to the impact this may have on the number of pay audits imposed on employers.
- Of the 104 annual equal pay claims where claimants succeed at hearing against private and voluntary sector employers, 25% will result in an equal pay audit being imposed, resulting in 26 audits being imposed per annum.

Direct impact on business (Equivalent Annual) £m):			In scope of OIOO?	Measure qualifies as
Costs: 0	Benefits: 0.4	Net: -0.4	No	N/A

Enforcement, Implementation and Wider Impacts

What is the geographic coverage of the policy/option?	Great Britain				
From what date will the policy be implemented?	01/04/2013 (estimated)				
Which organisation(s) will enforce the policy?	Tribunals Service ¹				
What is the annual change in enforcement cost (£m)?	See page 22				
Does enforcement comply with Hampton principles?	Yes				
Does implementation go beyond minimum EU requirements?	N/A				
What is the CO ₂ equivalent change in greenhouse gas emissions? (Million tonnes CO ₂ equivalent)	Traded: N/A		Non-traded: N/A		
Does the proposal have an impact on competition?	No				
What proportion (%) of Total PV costs/benefits is directly attributable to primary legislation, if applicable?	Costs: 100		Benefits: 100		
Distribution of annual cost (%) by organisation size (excl. Transition) (Constant Price)	Micro N/A	< 20 N/A	Small N/A	Medium N/A	Large N/A
Are any of these organisations exempt?	No	No	No	No	No

Specific Impact Tests: Checklist

Does your policy option/proposal have an impact on...?	Impact	Page ref within IA
Statutory equality duties ² <u>Statutory Equality Duties Impact Test guidance</u>	Yes	20
Economic impacts		
Competition <u>Competition Assessment Impact Test guidance</u>	No	21
Small firms <u>Small Firms Impact Test guidance</u>	No	21
Environmental impacts		
Greenhouse gas assessment <u>Greenhouse Gas Assessment Impact Test guidance</u>	No	22
Wider environmental issues <u>Wider Environmental Issues Impact Test guidance</u>	No	22
Social impacts		
Health and well-being <u>Health and Well-being Impact Test guidance</u>	No	22
Human rights <u>Human Rights Impact Test guidance</u>	No	22
Justice system <u>Justice Impact Test guidance</u>	Yes	22
Rural proofing <u>Rural Proofing Impact Test guidance</u>	No	22
Sustainable development <u>Sustainable Development Impact Test guidance</u>	No	22

¹ May need to be updated to reflect potential changes of devolving employment tribunals in Scotland

² The public sector equality duty contained in the Equality Act 2010 came into force in April 2011 (to Great Britain only). The Toolkit provides advice on statutory equality duties for public authorities with a remit in Northern Ireland.

Evidence Base (for summary sheets) – Notes

References

Include the links to relevant legislation and publications, such as public impact assessments of earlier stages (e.g. Consultation, Final, Enactment) and those of the matching IN or OUTs measures.

No.	Legislation or publication
1	Equal Pay Act 1970
2	Sex Discrimination Act 1975
3	Equality Act 2010

Evidence Base

Annual profile of monetised costs and benefits* - (£m) constant prices

	Y ₀	Y ₁	Y ₂	Y ₃	Y ₄	Y ₅	Y ₆	Y ₇	Y ₈	Y ₉
Transition costs	TBC									
Annual recurring cost	TBC									
Total annual costs	TBC									
Transition benefits										
Annual recurring benefits	0.2	0.2	0.2	0.2	0.2	0.2	0.2	0.2	0.2	0.2
Total annual benefits	0.2	0.2	0.2	0.2	0.2	0.2	0.2	0.2	0.2	0.2

* For non-monetised benefits please see summary pages and main evidence base section

Evidence Base (for summary sheets)

Problem under consideration

Despite the legal framework around equal pay being in force since 1975, there is still a significant gender pay gap, and continuing evidence of non-compliance with the law. In 2010, the ONS estimated that women working full-time were still paid on average 10.2 per cent less than their male counterparts; if you compare the pay of all men and women in work, including those working part-time, the gap is as much as 19.8 per cent. Research published by the GEO in February 2010 found that one third of the pay gap could not be explained by any observable factors¹.

There is still a large number of equal pay claims (see figure 1) estimated here at 28,000 per annum. These claims, particularly those relating to work of equal value and those involving a large number of claimants with similar claims (referred to here as “multiples”) can be complex and take considerable time and effort to resolve. It is likely that the number of claims will continue to take up a significant proportion of the resource available to the Tribunals Service; it is also likely that full use may not be being made of the considerable volume of information that has been gathered during a tribunal hearing, and the effort put into that tribunal by all parties. While the immediate claimants have their pay corrected, other employees who may be disadvantaged may still have to raise a claim to have this happen. Steps to prevent these further claims being necessary are therefore desirable.

However, individually enforceable rights such as the right to equal pay do not always enable employees to challenge wider or systemic unfairness in pay and reward by their employer, because the resolution of a single case does not necessarily expose all the gender-related pay inequality within the workforce. Therefore, changes are needed to the enforcement regime so that those who are disadvantaged in this way can bring a claim if the employer does not himself correct the situation.

Given the Government’s commitment to supporting voluntary action by employers on gender pay, these measures are needed to ensure that where breaches of equal pay law are found to have taken place by a tribunal, employers and the tribunals are given the most appropriate and cost effective tools to correct pay inequality, and mitigate future liability to legal action.

Rationale for intervention

Government intervention is considered necessary to help ensure that women achieve equal pay where an employer has already been shown to discriminate in this way.

It is right to ensure that those employers who have breached the law once, having taken the matter all the way through tribunal, have learned the right lessons, and to use whatever means possible to help them correct the issues which led to that breach the law.

Failure by employers to correct the factors which might have led to a successful equal pay claim against them following a hearing may leave them vulnerable to future claims. Exposing and dealing with any remaining inequality immediately may enable them to resolve those issues by negotiation without tribunal process.

Full pay audits are an established way by which an employer can ensure that he is treating his employees fairly. Although currently there is no one agreed form of an audit, the general principles are well established, and can be related to the requirements of the law; however, there is no requirement on employers to conduct such audits.

A further requirement of this kind made on employers in the limited circumstances where they have been found to have breached the law will support the voluntary approach to reporting of pay information which Government is also proposing. It will also supplement the increased transparency which may result from section 77 of the Equality Act 2010, which made pay secrecy clauses unenforceable where discussions may expose pay inequality.

With this in mind, it is right to limit the imposition of penalties of this kind following a finding to those cases where the imposition will have the desired effects. This means the tribunal considering the case must have some facility, whether of its own discretion or in line with a predetermined standard, not to apply it. Where an employer is acting, as a result of the case or otherwise, to correct his pay structure

¹ Olsen, W, Heuvelman, H, Gash, V, & Vandecasteele, L. (2010). *The Gender Pay Gap in the UK 1995-2007*, Government Equalities office

generally he will be able to argue at Tribunal that no requirement to conduct an audit should be made of him. This will ensure that the requirement will be imposed where it will add value to the finding itself.

Policy objective

The overall objective of these particular measures is to ensure that employers, who have breached equal pay law, correct any remaining gender pay inequalities within the workforce, and to supplement the voluntary approach to improving transparency concerning gender pay, which GEO is separately developing with business organisations, as outlined in the Government's Equality Strategy². It is also the objective to avoid needless burden on business, so employers who have already taken steps to ensure their pay structures are compliant, by undertaking an equal pay audit or otherwise ensuring that their systems are transparent and non-discriminatory, should not be made subject to a further, unnecessary requirement. Similarly there may be some businesses, particularly very small ones, for which an audit might not be helpful. In achieving this aim, it should also be possible to reduce the likelihood of further claims against that employer by enabling them to negotiate early, so reducing potential burdens on the tribunal system.

Options

These options should be considered complimentary to government's overall approach to voluntary pay transparency.

Option 1: Do nothing. This relies on employers taking suitable corrective action following a finding with limited further support.

Option 2 (preferred): require an employment tribunal to impose pay audits except in particular circumstances. This would target intervention in cases where there has been shown to be a need, and make the best use of the information available.

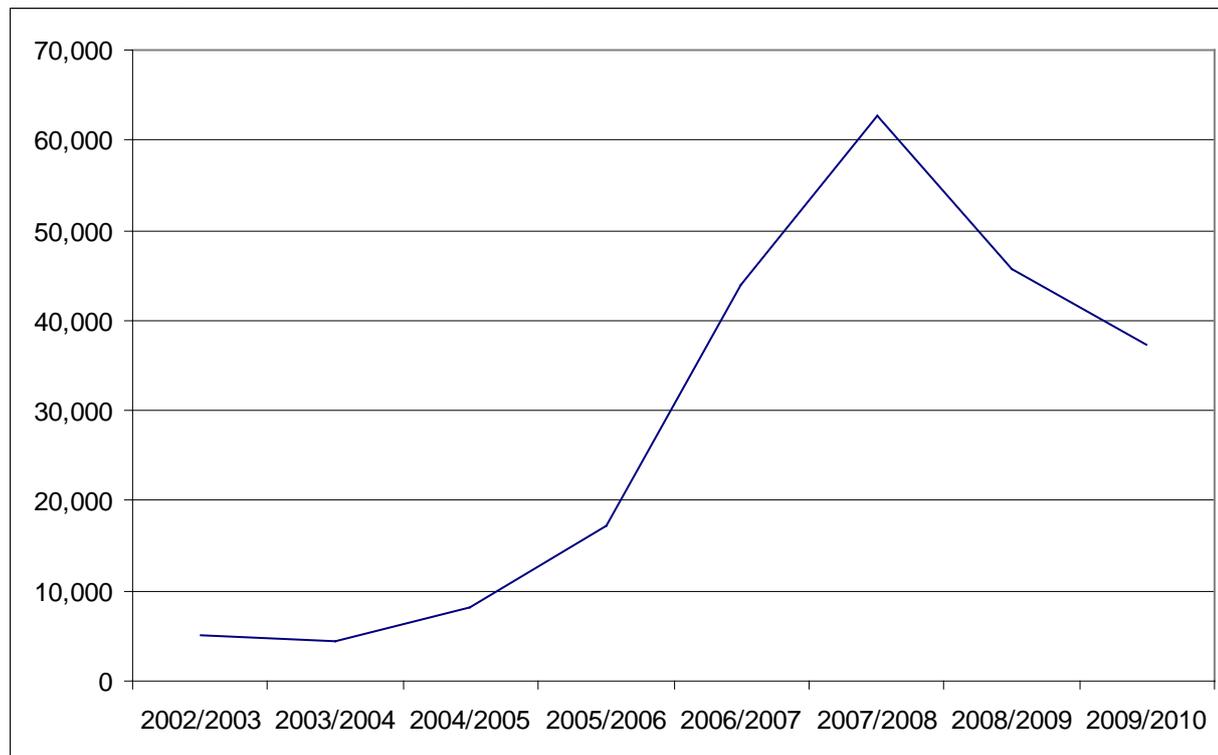
² The Equality Strategy - Building a Fairer Britain (December 2010); <http://www.equalities.gov.uk/pdf/GEO%20Equality%20Strategy%20tagged%20version.pdf>

Costs and benefits

Option 1: Do nothing

Over the last 5 years there has been a large surge in equal pay claims (see figure 1). This has primarily been driven by large multiple claims against NHS and Local Authority employers. The rise in NHS claims followed largely from the 'Agenda for Change' programme of pay restructuring. A national agreement from 1997 committing all local authorities in England and Wales to implement 'single status' pay systems by 1 April 2007³ has revealed anomalies in pay that have contributed to a large number of claims.

Figure 1 – Equal pay claims accepted by the tribunal service, 2002/2003 – 2009/2010



Source: Employment Tribunal Service annual reports and statistics, 2002/2003-2009/2010

The estimated average number of equal pay claims per annum is 28,000. This has been calculated by taking an average over the past 8 years to account for the large surge in the last few years. There were only 5,000 equal pay claims accepted in 2002/2003, rising to a peak of 63,000 in 2007/2008, and settling at 37,000 in 2009/2010. Whilst surges in tribunal claims do occur, across all jurisdictions, it would not be correct to assume that the recent surge in equal pay claims might be persistent – this surge is largely a result of particular public sector pay restructuring exercises, which have exposed historic inequalities (see table 2 below), and that this effect is unlikely to be replicated elsewhere in the economy. Therefore taking an 8 year historical average is deemed to be a reasonable estimate for the underlying baseline. This provides the best estimate of the expected number of claims per annum going forward, from which we can then consider the number of claims which occur against private, public and voluntary sector employers.

Likewise, the average outcomes of equal pay claims, as listed in table 1, have been calculated as an average over the past 8 years. This method in part accounts for anomalous outcome rates in individual accounting periods. For example, in 2005/2006, 33% of claims disposed were successful at hearing, which can be linked to a small number of very large multiple claims.

³ An earlier implementation date of 1 April 2006 was set for Local Authorities in Scotland

Table 1 – Percentage of equal pay claims reaching stated outcome

	Percentage reaching outcome
Total that reach hearing	7.7%
<i>Of which...</i>	
<i>Successful at tribunal (claimant)</i>	<i>6.2%</i>
<i>Unsuccessful at hearing (claimant)</i>	<i>1.5%</i>
Total that settle	48.2%
<i>Of which...</i>	
<i>Privately settled</i>	<i>29.6%</i>
<i>ACAS conciliated</i>	<i>18.6%</i>
Other Outcomes	44.1%
<i>Withdrawn</i>	<i>23.4%</i>
<i>Struck out (Not at Hearing)</i>	<i>20.2%</i>
<i>Dismissed at a preliminary hearing</i>	<i>0.5%</i>
<i>Default judgement</i>	<i>0.1%</i>

Source: Employment Tribunal Service annual reports and statistics, adjusted to account for private settlements using SETA 2008

Over recent years the vast majority of equal pay claims have been against public sector employers. The claims with the Tribunals Service (as opposed to the number which are accepted or disposed in any given accounting period) in 2008/2009 state that 99% of claims are against NHS and Local Authority employers.

Table 2 – Breakdown of origin of equal pay claims at tribunal, 2008/2009

	Number of equal pay claims	Percentage of total claims
NHS	28,511	24.4%
Local Government	86,668	74.2%
Other	1,574	1.3%
Total	116,753	

Note: other comprises central government and private sector employers

Source: Tribunals Service

However, this underestimates the exposure of other sectors to equal pay claims as a large number of the claims still with the tribunals relate to large multiples, as previously discussed. Taking the breakdown of the origin of equal pay claims as they occur at tribunal in any particular accounting period may not provide an accurate representation of the likely future exposure of different sectors to equal pay claims, as the judgements in existing cases clarify the effect of the law. Therefore, the estimated breakdown of new claims by sector going forward, as stated in table 3, corrects for the fact that recent statistics have been affected by a specific caseload surge from NHS and Local Government employers.

Table 3 – Equal pay claims by economy sector

	Percentage of equal pay claims	Estimated Annual Number of Claims
Public Sector	94%	26,418
Private Sector	5%	1,405
Voluntary Sector	1%	281

Source: GEO estimates, Tribunals Service

Under this option, non-legislative means of supporting employers have also been considered for example:

- Strengthening and updating available guidance with regards equal pay audits which could be distributed to employers who have been found in breach of equal pay law at tribunal
- Signposting employers who breach equal pay law to available information sources and good practice with regards equal pay subsequent to tribunal findings.

However, these non-legislative measures have not been costed because it is considered that they would not materially mitigate the risk of future claims. It is unlikely that, where an employer has been taken all the way to a final hearing in an equal pay case and has not up till that point been able to conciliate the claim or corrected their pay systems, additional signposting or generic guidance will be of benefit.

All benefits and costs discussed for options 2 are additional to the *Do Nothing* option, and are direct impacts of the policy options.

Option 2 (preferred) – Benefits

Benefits of equal pay

The benefits of businesses and other organisations changing their pay practices to reflect equal pay requirements are difficult to quantify, and have not been monetised in this assessment. This is because the scale of benefits to individuals will depend on the extent to which they are currently underpaid, and the benefits to firms will depend on the amount of unfairness still present in their pay systems, and the extent to which they are able to reduce their exposure to fresh cases by negotiating compliant pay systems. However, there is some evidence to suggest that equal pay audits do benefit employers.

For example, the equal pay reviews survey carried out in 2008 by IFF research stated that 87% of employers who conducted a pay audit did so because they saw it as good business sense⁴. Furthermore, 82% of those who conducted audits did so because they wanted to be seen as good practice employers. Clearly the majority of those who do undertake audits believe there are economic benefits from ensuring equal pay throughout an organisation; for example in demonstrating commitment to staff and to fairness, in ensuring that they are making maximum use of their employees' capacity, and in protecting themselves from the cost of legal action. It has not been possible to quantify the reduction in the number of cases reaching tribunal which will result from the requirement to conduct audits – this is because to do so would require an estimate of the remaining unfairness within the pay structures of non-compliant employers, and this would be very speculative.

There will also be benefits for individuals in the wider workforce of an employer, because the discipline of conducting the pay audit will put the employer in a position where he will have to recognise, and correct, any remaining unfairness in his pay structures. It will enable the employer, by acting before fresh cases are raised, to negotiate settlements without legal action. This will promote equal pay in the workforce where it is needed, and increase fairness in employment, without unfairly burdening good, compliant employers.

⁴ Equal pay review survey, 2008, IFF research; Equality and Human Rights Commission; http://www.equality-ne.co.uk/downloads/349_Equalpay.pdf

Due to the difficulty in robustly quantifying any monetised benefits to individuals and employers from moving closer towards equal pay in the work place, we have included these real benefits only in the non-monetised summary. It should nevertheless be noted that in fair and flexible labour markets, for work of equal value, the demand and supply of labour ought to be the sole factor in determining an equal rate of pay for men and women, and that anything else is evidence of market inefficiencies. Therefore, there must also be real macroeconomic benefits in ensuring equal pay, for which pay audits are useful in identifying the issue and promoting action.

Reduction in number of annually accepted claims reaching employment tribunal hearing

As an impact of this measure, it is possible that the rate of settlement in equal pay claims will increase, as employers may see the prospect of an audit as a threat to be avoided rather than a potential benefit. This might be because of the process costs of conducting the audit, or because of fear that conducting an audit would, instead of enabling them to negotiate any changes to their pay structures that are still needed, simply raise new cases against them. This would result in benefits to individual claimants, employers and the Exchequer from fewer claims proceeding to tribunal hearing. **However, if this were the case, there would be other significant non-monetised costs to individual claimants, and the groups they represent within organisations, from not achieving formal recognition that the employer was in breach of the law.**

It is extremely difficult to quantify in advance behavioural decisions of this kind since they are likely to be highly individual and dependent on specific circumstances. Furthermore, it is uncertain whether the impacts on behaviour will be proportionally greater for private sector employers than public sector. Given the fact that the majority of equal pay claims against public sector employers have resulted from large scale pay evaluation exercises, it is highly unlikely that for example a Local or NHS authority's incentives to settle cases against them would be impacted by this proposal. It is expected that a pay audit would not be imposed on these organisations even where there was a finding of unequal pay as it would serve no further purpose, since they have recently conducted audits.

However, if private and voluntary sector employers identify significant potential costs associated with a pay audit being imposed were they found to be in breach of equal pay law, this may increase the likelihood that they seek to settle the case and thus avoid a hearing. In order to monetise benefits in kind to the affected groups as a result, we assume an increase in the settlement rate of 0-10%. Despite these benefits, there would be significant costs where settlement does not result in formal recognition that the employer was in breach of the law, for both the claimant and the groups they represent.

Using the figures presented in table 1, it is estimated that 813 (48.2% of the 1,700 assumed annual equal pay claims brought against private and voluntary sector employers accepted) are settled. A 10% increase in the settlement rate, which is offset by the number of claims which would otherwise have proceeded to tribunal hearing, will result in an additional 81 claims that are settled annually⁵.

Benefits to Employers

The benefits to employers of claims not proceeding to hearing are derived from a proportional reduction in their overall average costs per claim. The median time spent by an employer on a discrimination related employment tribunal case is nine days, and the median length of a hearing is one day⁶. We use these figures as appropriate proxies for the time spent by employers on equal pay cases (true figures are not available for equal pay cases, see Annex 1). Also, we assume that the preparation time for an equal pay case hearing would take at least one day. Therefore, per case, the benefit to employers of settling the case and consequently avoiding a hearing is £1,200⁷. The total annual benefits to private and voluntary sector employers from the increase in the settlement rate are therefore **£0 – 0.09million per annum**.

⁵ Note: We do not here apply any adjustment for the sake of multiples or single claims, and therefore the number of claims brought is taken as equivalent to the number of employers affected. This assumption is expected to be revised throughout the policy development process.

⁶ SETA 2008

⁷ $[(1+1)/9] \times £5,283 = £1,174$ (see Annex 1 also)

Benefits to Individuals

The benefits to individuals of claims not proceeding to hearing are derived from a proportional reduction in their overall average costs per claim. The median time spent by an individual on a discrimination related employment tribunal case is fourteen days, and the median length of a hearing is one day⁸. We use these figure as appropriate proxies for the time spent by individuals on equal pay cases. Also, we assume that the preparation time for an equal pay case hearing would take at least one day. Therefore, per case, the benefit to individuals of settling and consequently avoiding a hearing is £250⁹. The total annual benefits to individuals from the increase in the settlement rate are therefore **£0 – 0.02million**.

Benefits to the Exchequer

The benefits to the Exchequer, or Tribunals Service, of claims not proceeding to hearing is calculating by multiplying the average cost of a hearing (see Annex 1) with the number of cases no longer proceeding to hearing. The total annual benefits to the Exchequer from an increase in the settlement rate for equal pay claims brought against private and voluntary sector employers are therefore **£0 – 0.24million per annum**.

Option 2 (preferred) – Costs

Familiarisation costs

Employers will need to be aware of the fact that an equal pay audit may be ordered if they are found to have provided unequal pay at tribunal hearing. This is expected to be a minimal familiarisation cost on employers, which will be incurred alongside the requirements on employers to become familiar with the wider changes to the Tribunals Service process (and the flexibility at work provisions) expected to be implemented at the same time as this measure.

Furthermore, familiarisation with specific guidance on the specification of and method of conducting an equal pay audit would only be required of an employer where an order had been made. Hence, this has been accounted for in the overall average cost of an audit (see Annex 1).

Therefore, there will be no significant familiarisation costs as an impact of this policy.

Transitional costs to the Tribunals Service

It is understood that there will be transitional costs and ongoing costs to the Tribunals Service associated with training staff, providing guidance and generally ensuring this measure is enforced effectively. However, after discussions with the Tribunals Service, it was not possible to estimate these costs. Specifically, Ministry of Justice and Tribunals Service are not in a position to supply estimated unit costs at this consultation stage of the policy. We will continue to work to come to a robust monetised estimate throughout the policy development process.

The specific detail of the audit requirement that the Tribunal is to impose is to be decided following a further consultation, and will be expressed in secondary legislation. Any associated costs would therefore be explored as part of the development of the secondary legislation. We do not expect that the Tribunal will be in the position of having to examine employers systems to design particular structures.

New equal pay claims

As a result of this measure, there could be an increase in the number of equal pay claims being made against employers. This could arise as a result of activists, trade unions and some advisers seeking to encourage and support claims with a view to increasing the chance of challenge to the employer's systems. Individuals who might settle on their own account may be persuaded to maintain their challenge through the tribunal process in order that an audit will be imposed, and other employees will be saved from the risk of similar disadvantage. Some new claims of less merit may be raised if employees anticipate that employers will settle more readily as a result of fear of audits. The specific nature of equal pay rights, depending as they do primarily on a factual comparison of work, should keep

⁸ SETA 2008

⁹ $[(1+1)/14] \times \pounds 1,769 = \pounds 253$ (see Annex 1 also)

this effect relatively small. Rather than monetising this impact based on arbitrary assumptions, it will be consulted on and further research will be conducted to determine whether or not it is a realistic expectation that new claims will arise as a result of this policy.

The cost of pay audits where they are imposed following the claimant being successful at a hearing

It is estimated overall that with no impact on the rate of settlement, there will be on average 1,700 claims successful at hearing each year (6.2% of the estimated 28,000 claims accepted annually). Of the equal pay cases where the claimant is successful at hearing, a small fraction will have been made against private and voluntary sector employers; 104 (6.2% of 1,682)

It is also expected that a small percentage of those claims which are successful at hearing will result in a pay audit. This is because the majority of the equal pay claims made in recent years against public sector employers have followed large scale pay harmonisation exercises, which have been intended to equalise pay, and it is not envisaged that a tribunal would be empowered to order an audit in such circumstances, where there would be no benefit because any systemic disadvantages have already been exposed and corrected.

Furthermore, audits might not commonly be of use for small employers, or where there are clear and transparent pay systems in place. Therefore, initially, we estimate that no more than 25% of claims successful at hearing against private and public sector employers would lead to the imposition of a pay audit (see sensitivity analysis). Hence, it is estimated that approximately **26** pay audits will be recommended annually from the estimated number of annual claims, were there no change in settlement behaviour. The total direct cost of conducting these pay audits to private and voluntary sector employers, using an average cost per audit of approximately £8,800 (see Annex 1 for derivation of audit cost), would be approximately **£0.23million per annum**.

However, as pay audits would only be imposed for employers who have been found to be non-compliant with equal pay legislation, these costs have not been included as an impact of the policy.

Risks and assumptions of option 2 (preferred)

There is a degree of risk and uncertainty around the impact of option 2. Firstly, when considering this measure in isolation, as discussed, there is a need to understand the impact on the behaviour of employers. For example, this measure may lead to an increase in the rate of settlement in equal pay claims. The wider non-monetised benefits to individuals of ensuring employers correct imbalances in pay systems would be less likely to occur if, to avoid the possibility of conducting an audit where a claim is successful, an employer elects to settle instead. Any change in behaviour may result in monetised savings to individuals, employers and the Exchequer where a claim does not proceed to hearing, due to a reduction in time, effort, and legal costs spent on individual claims. There would however also be significant costs. These costs are less easy to monetise, and they relate to the potential fairness in pay achieved for individuals, and the groups they represent within organisations, not being achieved if claims are stopped from proceeding to a hearing.

Furthermore, this measure will potentially be implemented alongside thirteen other measures with a direct impact on the Tribunals Service, on which consultation is to be held, and which are dealt with in a separate assessment¹⁰. Interaction with these measures could ultimately affect the number of pay audits expected to be imposed as a result of this policy. However, due to the complexity of the possible interactions, all of which are subject to consultation, it is only possible at this stage to conduct a separate assessment for each individual proposal on the basis of an otherwise stable environment, as presented by this impact assessment. However, a very broad indication of the possible interactions with other measures is given below.

Sensitivity analysis around settlement behaviour

Of the thirteen concurrent proposals which will impact on the Tribunals Service, a new measure requiring all claims to be submitted to The Advisory Conciliation and Arbitration Service (ACAS) in the first

¹⁰ The BIS Impact Assessment on proposed changes to employment tribunals is likely to be published after this impact assessment.

instance, to increase the frequency of pre-claim conciliation, could have a significant impact on what constitutes the typical number of equal pay claims entering the tribunal process.

Furthermore, proposals which are intended to deter vexatious or unmeritorious claims, could also impact on the number of claims reaching the Tribunals Service and raise settlement and success rates (though we might expect the overall number or level of settled and successful claims to be largely unaffected).

Of the above interactive effects, the requirement for all claims to be submitted to ACAS for pre-claim conciliation could have the largest impact on the analysis as presented. If we assume that some fraction of those claims which make up the typical caseload (28,000 claims) will now be pre-claim conciliated, then this consequently reduces the number of claims which might be successful at hearing, and therefore, would potentially reduce the number of instances in which equal pay audits are ordered. Table 4 below shows the number of equal pay audits that would be expected for different changes in settlement behaviour. For example, a 10% increase in the rate of settlement for equal pay claims (including pre-claim conciliation) would lead to 16 fewer equal pay audits annually than with a 0% change in settlement behaviour (retaining the assumption that 25% of claims successful at hearing lead to a pay audit being imposed).

As also mentioned previously, there is no definite expectation of how many successful equal pay claims at hearing will result in an equal pay audit being ordered. We previously assumed this might be 25% of successful claims against private and voluntary sector employers. Therefore, table 4 sets out the number of equal pay audits expected to result from this policy as this figure is varied.

Table 4 also illustrates the sensitivity of the number of equal pay audits resulting from this measure with regard to both assumptions as discussed above.

Table 4 – Number of pay audits recommended dependent on the rate of settlement

		Percentage of successful claims resulting in an equal pay audit			
		5%	10%	25%	50%
Percentage increase in the rate of settlement	0%	5	10	26	52
	5%	4	7	18	36
	10%	2	4	10	20
	12%	1	3	7	13

Source: GEO estimates

One-In-One-Out (OIOO): Direct costs and benefits to business

There are no direct costs to business or voluntary sector organisations, as a direct result of this policy, since any costs that might result stem from a breach in equal pay law. The costs of audits on employers ought to not be considered for the purposes of OIOO as they are effectively a sanction against non-compliance.

Whilst it is acknowledged that increasing the settlement rate in equal pay claims may have significant non-monetised costs to individuals where this does not lead to a correction in pay systems, there would nonetheless be very small direct benefits to business and voluntary sector organisations where they avoid the costs of proceeding to dispute the claim.

Therefore, overall, this measure should not be considered an IN for the purposes of OIOO, and hence, no OUT has been identified.

Summary and implementation plan

Option 2 was chosen as the preferred and most proportionate means of meeting the policy objectives. It will require employers to conduct pay audits only where there has been shown to be a need, placing no significant burdens on the majority of employers, who are not in breach of equal pay law.

It is envisaged that primary legislation will follow consideration of the consultation responses, possibly introducing legislation into Parliament late in 2011, if the timetable permits. Any necessary secondary

legislation (for example on the detailed content of an audit) would be subject to consultation in parallel with presentation of the primary legislation, with a view, subject to that consultation, to making it shortly after the primary legislation is enacted. It is envisaged that the proposals as a whole would probably come into force a year after enactment of the primary legislation, so current estimates would suggest the legislation would come into force in April 2013.

Annex 1: Unit Costs

Exchequer

The average cost of an accepted employment tribunal claim is calculated using the Employment Tribunals Service Annual Accounts and Report 2005/2006¹; net operating cost divided by the number of claims accepted. Therefore, the average cost to the exchequer per claim accepted is £673 in 2009/2010 prices.²

The average cost of an equal pay hearing, as distinct from an accepted claim in general comprises the following components, which are subsequently uplifted by wage costs and represented in table 4³:

- Judicial hearing, preparation (half a day⁴) and write-up time (5 hours);
- Admin time (4 hours)
- Lay members present (2 per hearing)
- Expert hearing time

Also, using SETA 2008, the median length of a tribunal hearing is assumed to be 1 day. The cost of an equal pay tribunal hearing, using figures obtained from the tribunals services and uplifted to include non-wage labour costs, is £2,921. The cost of court-appointed assessors, who are required in some cases to examine the jobs of claimants and their comparators in order to establish whether there is work of equal value, have been estimated at £1,000 per day and are included in this figure.

Table 5 – Cost of an equal pay hearing to the Tribunals Service, 2010 prices

	Estimated cost
Hearing time (judicial)	£634
Hearing time (admin)	£62
Hearing time (lay members)	£456
Write up time (judicial)	£453
Preparation time (judicial)	£317
Expert equal value	£1,000
Total Cost	£2,921

Source: Tribunals Service, GEO estimates

Individuals

The average costs to individuals of an equal pay claim are calculated using SETA 2008, and reflect average values where the primary jurisdiction of a claim was discrimination⁵. Discrimination is thought to be the most appropriate jurisdiction to use in comparison because these cases involve essentially the same issues of unfairness related to a protected characteristic, and share concepts such as direct and indirect discrimination. The issues considered in many equal pay cases are certainly no less complex than those that arise in discrimination cases. The cost to the individual of market work forgone as a result of claiming is represented by loss of earnings.

¹ Employment Tribunals Service Annual Accounts & Report, 2005/2006; <http://www.employmenttribunals.gov.uk/Documents/Publications/ARA0506.pdf>; More recent accounts for the Employment tribunals Service are not available as annual reports are now published under the Tribunals Service as a whole, which are not as indicative of the true actuarial cost

² GDP deflator, HM Treasury;

³ Tribunals Service

⁴ A day is assumed to comprise 7 hours

⁵ Note, all cost figures in this Impact Assessment are adjusted from median figures to account for 0 values

Table 6 – Cost of an equal pay claim to the individual, 2010 prices

	Estimated cost
Cost for Advice and Representation	£863
Costs incurred from travel and communication	£30
Loss of Earnings	£876
Total	£1,769

Source: SETA 2008 adjusted for zero values

Employers

The average costs to employers of an equal pay case are calculated using SETA 2008. This is calculated as the cost of advice and representation, time spent by corporate managers and senior officials, and time spent by other employees, namely dedicated personnel, training and industrial relations managers, on the case. The median hourly wage is assumed to be £45.53⁶ and £26.21⁷ respectively for these two roles. The overall average cost to an employer of an equal pay case is £5,283 in 2010 prices. Note, this cost per employer applies to the average per case, which could consist of multiple or single claimants.

Table 7– Cost of an equal pay claim to the employer, 2010 prices

	Estimated cost
Time spent on case by directors & senior staff	£1,912
Time spent on case by other staff	£550
Cost for advice and representation	£2,820
Total	£5,283

Source: SETA 2008 adjusted for zero values, ASHE 2010

Settlements and Compensation

Settlements

The median settlement for discrimination-related claims, and therefore employment tribunal claims, reaching conciliation, either privately or through ACAS, is £3,893 in 2010 prices, after adjusting for non-money settlements, according to SETA 2008.

Compensation awards

The median compensation award for equal pay employment tribunal claims successful at tribunal is £13,411 in 2010 prices according to SETA 2008.

The Cost of a Pay Audit

We are aware of no widely-shared understanding of what it would cost to complete a full equal pay audit. Clearly costs to a particular employer would vary depending on how much of the required information had already been gathered and suitably stored, how many employees there were, how complex or varied the work undertaken was, and other factors. The estimates below are therefore based on assumptions that most of the company pay data is already held electronically and can be reasonably easily accessed, and that the mix of tasks undertaken is not unusually complex. We make no allowance for one-off costs to develop systems. Although they are clearly different tasks, we have assumed the same daily charge for external advice as we have assumed would be made by an equal value assessor in an equal pay case.

⁶ ASHE 2010 –111 incl. 21% uplift for non-wage labour costs

⁷ ASHE 2010 –1135, incl. 21% uplift for non-wage labour costs

- Internal time required 4 weeks
- Carried out by a “personnel, training, and industrial relations manager⁸” or equivalent
- External time – 5 days
- Cost per day of external advice, £1,000

Given the above assumptions, the typical cost of an audit would be approximately £8,800 to the employer. For large employers this figure is likely to be far higher, whilst for small employers, it is certainly a significant overestimate.

⁸ ASHE 2010 Code 1135, median weekly earnings, incl. 21% uplift for non-wage labour costs; £946.46

Annex 2: Post Implementation Review (PIR) Plan

Basis of the review: The Government is committed to promoting equal pay for equal work in the UK and understanding how this can be achieved. It is also working to encourage institutions to become more transparent about their pay. Reviewing this policy will ensure that we can understand its effect and any attributable difference it makes to equal pay, the outcomes of equal pay claims, and employers' approach to pay equality.

Review objective:

- To establish whether the Equal Pay policy has achieved its primary intention and objectives, and how this has worked (process, and observed outcomes and differences).
- To understand the effect Equal Pay policy has had on equal pay claim tribunal outcomes (changes in both process and outcome), and whether this is a positive change.

Review approach and rationale: The review approach would be developed more widely in conjunction with other monitoring exercises around the voluntary approach to voluntary equality reporting, including equal pay.

The review approach will consist of specifically commissioned primary research, monitoring of data sources and the input of evidence from related surveys. There already exists a large quantitative survey of employment tribunal applications (SETA) run by BIS, that provides detailed outcome data from the tribunal process. However, this is not expected to report again until 2013. To avoid duplication of this work, remain proportionate in the review costs relating to demonstrable outcomes, and considering the evidential requirements for this impact assessment, the most achievable research would be of qualitative methodology.

To provide comprehensive evidence on the changes to the outcomes and costs of equal pay claim process, the review approach will need to include evidence from a number of different sources. There is an evidential requirement to understand the effect the pay audit has both directly (consequence of undertaking a pay audit) and indirectly (those that proceed through the claim process but did not reach a recommended pay audit or those that changed pre-claim and did not enter the full tribunal process). This is especially important if the review is going to demonstrate behavioural change in employers relating to pay transparency. The review approach will therefore cover:

- Monitoring of Tribunal Service administrative data and ACAS Annual Reports
- Analysis of SETA data (when available) to understand patterns of change in process and outcomes
- In-depth qualitative evaluation of individuals, employers and stakeholders (such as courts and ACAS) at various tribunal stages of an equal pay claim including:
 - those resulting in a pay audit
 - those that settled part way through a claim
 - those with recent equal pay claim that did not enter the tribunal process (not required due to previous and/or voluntary audit or like action by employer)
- Small qualitative evaluation of audit providers (through ACAS)

Where it is possible, all review work will aim to demonstrate the difference the Equal Pay policy has made directly to equal pay; where this has helped employers provide equal pay moving forward and where this has led to greater transparency. However, due to the very small numbers of businesses that are likely to be required to conduct pay audits it will be challenging to demonstrate the prevalence of these changes in a statistically reliable way, within the three to five year period of the review. We are also aware that many public sector organisations will have carried out a pay audit so the impact of this policy will more likely be on private and voluntary sector organisations. As a consequence evaluation activity will be concentrated in these areas.

Baseline:

A baseline position is still being established for this policy and as such further baseline information, by which the policy can be compared against, will be set out in a report within the first year of the review, it will contain information on:

- Gender Pay Gap: As indicated in the main body of the impact assessment, the current gap in pay between men and women's full time median earnings is 12.2%¹. The baseline position for the gender pay gap is further set out in detail in the GEO research report "The gender pay gap in the UK: 1995 to 2007"²
- Metrics from Tribunal Service administrative data
- Employment Relations Research Series No.107: Findings from the Survey of Employment Tribunal Applications 2008³: Provides a baseline of findings from 2008 (non-specific to equal pay claims although some data tables distinguish claims made under the Wage Act 1986). The report includes data from 2008 on outcomes of tribunals, initial expectations, satisfaction with outcome, and the impact of the tribunal on employer policies. It also contains analysis of data on the cost and benefits of the case for both claimant and employers, broken down by finance, time and non financial costs
- Specific work already being undertaken to further develop evidence sources and improve baseline data. This includes:
 - Gathering and synthesising published information and non-published data such as Tribunal Service and ACAS management data, and a variety of further sources such as academic literature and recent BIS literature review
 - Studying an initial targeted sample of ET judgements in cases not involving local government or NHS employers
 - Qualitative study on the drivers of settlement behaviour, through a survey of claimant and employer representatives
 - Targeted survey of employers examining what happens after conduct of a pay audit
 - Extending the usability of uncoordinated and un-compiled employment tribunal judgement data

Success criteria:

- Employers revise practices as consequence of pay audit
- Employers are more likely to be transparent about their pay

Monitoring information arrangements:

Existing surveys and systematic data sources relating to equal pay and the equal pay claim process:

- Tribunal Service administrative data
- ACAS Annual Reports
- Gender Pay Gap statistics: both the Labour Force Survey and the Annual Survey of Hours and Earnings – both Office for National Statistics
- Survey of Employment Tribunal Applications (SETA) - last run 2008, next report due 2013
- EHRC
- Pay system training organisations

¹ ONS Annual Survey for Hours and Earnings November 2009

² Summary:

http://webarchive.nationalarchives.gov.uk/20100505211508/http://www.equalities.gov.uk/pdf/GPAYGAP_gpg_summary_FINAL.pdf

³ <http://www.bis.gov.uk/assets/biscore/employment-matters/docs/10-756-findings-from-seta-2008>

Annex 3: Specific Impact Tests

Equality Impact Assessment

Author/ editor/ assessor	Government Equalities Office (GEO)
Partners/ decision-makers/ implementers	Government Departments (Department for Business, Innovation and Skills, Ministry of Justice), the Tribunal Service, employers, trades unions and the legal profession.
Start date	October 2010
Scope	Proposed legislative measures to strengthen enforcement of equal pay law.
End date	When the proposed legislation comes into force (excepting ongoing monitoring)
Relevance	The proposed legislative measures are highly relevant to gender equality. As the legal framework on equal pay relates solely to discrimination on grounds of gender, the measures have low relevance to other protected characteristics; however, the wider strategy to improve transparency may also benefit other groups and this is being considered in the development of policy. ¹
Policy aims	<p>Government's aim is to promote equal pay. The legislative measures considered in this impact assessment underpin its wider strategy which seeks to improve transparency in pay matters and strengthen enforcement.</p> <p>In particular, the government proposes mandatory pay audits for the small number of employers who are found to have breached equal pay law. This will not only improve transparency in these cases, but for the first time enable a judgement in an individual case to be used to challenge wider or systemic unfairness in pay and reward.</p>
Available evidence	<p>In 2009, the ONS estimated that women working full-time were still paid on average 10.2 per cent less than their male counterparts; if you compare the pay of all men and women in work, including those working part-time, the gap is as much as 19.8 per cent.</p> <p>Although the legal framework on equal pay has been in place since 1975, there are still a large number of equal pay claims. In the Impact Assessment that accompanies the consultation, this is estimated at 28,104 per annum.</p>
Evidence gaps	There is limited evidence on whether and how access to justice in relation to equal pay may vary amongst different groups, for example in relation to disability or ethnicity.
Involvement and consultation	Government will consult fully on these measures and on this impact assessment before a decision is made to introduce legislation. This impact assessment will be updated to reflect evidence from the consultation and published alongside the government response.

¹ For example, we will require public bodies with 150 or more employees to publish data on equality in their workforces. The Equality and Human Rights Commission's Code of Practice and guidance will set out what workforce equality data should be published by different types of public bodies, and we would expect this to include data on important inequalities such as the gender pay gap, the proportion of staff from ethnic minority communities and the distribution of disabled employees throughout an organisation's structure.

<p>What is the actual/likely impact</p>	<p>These measures will benefit gender equality by strengthening enforcement of equal pay law.</p> <p>Any individual may make use of the equal pay claim process, but the primary benefits will fall to women. These benefits will apply to women who suffer pay disadvantage as against men irrespective of whether they also have another protected characteristic such as race or disability.</p> <p>Although there are exceptions, women across most groups tend to suffer bigger pay gaps than men in those groups – for example, the pay gap for disabled men is 11% when compared with non-disabled men, while the gap for disabled women against disabled men is double this². By strengthening the enforcement of equal pay, these measures should therefore have a positive impact on equality across all groups.</p> <p>We are not aware of evidence to suggest there could be any negative impacts arising from these measures on other groups.</p>
<p>Monitoring and review</p>	<p>Government will monitor the effectiveness of its strategy to promote equal pay.</p> <p>Should the legislation on which it is consulting be introduced, GEO will put arrangements in place to monitor the impact of these measures, in particular to establish whether the Equal Pay policy has achieved its primary intention and objectives, and how this has worked (process and the observed outcomes and differences) and to understand the effect these measures have on equal pay claim tribunal outcomes (changes in both process and outcome) and whether this is a positive change.</p>

Competition Assessment Impact Test

Using the four key questions of competition impact assessment, as set out below, we do not believe this measure will have any impact on the ability of firms to compete.

Does this measure...?

1. Directly limit the number or range of suppliers?
2. Indirectly limit the number or range of suppliers?
3. Limit the ability of suppliers to compete?
4. Reduce suppliers' incentives to compete vigorously?

This measure is not recognised to have any impacts on suppliers in any specific markets, and therefore no impact on competition more generally.

Small Firms Impact Test

We do not believe there will be any significant adverse impact on small firms as a result of this policy.

Firstly, with regards option 2, while a requirement on a small business to conduct an equal pay audit is not ruled out on principle in the consultation proposals, we do propose that the Tribunal should not impose one if it is not likely to be helpful in preventing further offending. It is unlikely to be helpful to very small firms to be subjected to the requirement, and the smaller the firm is; the less likely it is that it will face such a requirement. The consultation specifically draws attention to this issue.

² Hills, J et al, 2010 An anatomy of Economic Equality in the UK: a Report of the National Equality Panel Government Equalities Office

Greenhouse Gas Assessment Impact Test

We do not believe there will be any impact on greenhouse gas emissions as a result of this policy.

Wider Environmental Issues Assessment Impact Test

We do not believe there will be any wider environmental issues as a result of this policy.

Health and Well-being Impact Test

We do not believe there will be an impact on health and well-being as a result of this policy.

Human Rights Impact Test

These proposals do not contravene individuals' human rights.

Justice Impact Test

The imposition of an audit is itself a new civil sanction, though it is also to some extent preventative of further offending. Options for enforcement of the sanction, subject to consultation, would include backing the audit with the possibility of the imposition of a fine or civil penalty where the order to conduct an audit is not complied with. We estimate audits will be imposed in 26 cases per year. There would therefore potentially be enforcement costs in a very small number of cases (we assume that most audit requirements would be complied with, and that recovery action would be necessary in approximately half the number of fines imposed), but we have not costed this. A range of possible enforcement methods is considered in the consultation document. We have similarly made no estimate of the benefit to be gained by the Treasury from fine recovery.

We have discussed in the Impact Assessment a possible small increase in tribunal cases, but the costs have not been monetised. We believe that there will also be some compensatory reduction in potential cases reaching tribunal as a result of the conduct of audits, but have not attempted to quantify this, as noted in the evidence base.

It is possible that the imposition of an audit could be subject of appeal to the EAT. However, structuring the requirement clearly to impose such an audit except in specified circumstances should reduce the likelihood of such appeals.

Rural Proofing Impact Test

We do not believe there will be an impact on rural proofing as a result of this policy.

Sustainable Development Impact Test

We do not believe there will be an impact on sustainable development as a result of this policy.

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