



# A Guide for General Counsels

## Insights into Ethnicity Pay Gap Reporting



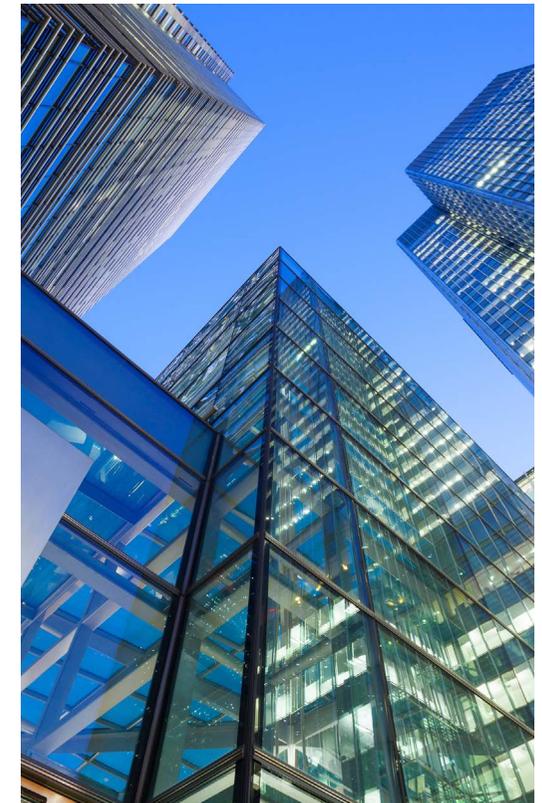
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# Contents

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Introduction	03
Introduction from Sandra Kerr CBE, Race Director at BITC - Why publish an Ethnicity Pay Gap Report?	04
The Anatomy of a powerful Ethnicity Pay Gap Statement	05
Ethnicity Pay Gap Reporting – Legal Myths Debunked	20
Conclusion	26



# Introduction

## The current landscape

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### Ethnicity pay gap reporting is currently voluntary in the UK.

The Government ran a consultation for employers about ethnicity pay gap reporting that ended in January 2019, and on 9 February 2021, the Women and Equalities Select Committee called for the Government to publish proposals on mandatory ethnicity pay gap reporting within the next six months, in its report “Unequal impact? Coronavirus and the gendered economic impact”. There is a growing movement, driven by the co-writers of this guide, Business in the Community (“BITC”), for reporting to become mandatory.

### Aims for this guide

This guide has a different lens on ethnicity pay gap reporting. It is aimed at General Counsels, and so it focuses on some of the legal considerations behind ethnicity pay gap reporting, and in particular, data protection and employment concerns. In addition to debunking the legal myths that may prevent organisations from publishing their reports, the purpose behind this guide for General Counsels is threefold:

- a. To encourage organisations to publish their pay gap.
- b. To analyse the anatomy of a really powerful ethnicity pay gap report. Often this means going beyond the obligations that have been in place for gender pay gap reporting, that has been mandatory for certain businesses since the Regulations came into force in April 2017.
- c. To celebrate the hard work of the many BITC Race at Work Charter signatories that have voluntarily published their ethnicity pay gaps.

### Methodology

There is no mandatory way to publish an ethnicity pay gap report. This report is not, and is not intended to be, the last word on how to write about your organisation’s pay gap. It is designed to start a conversation about how to innovate in an area of policy and law that is in flux.

To write this guide, we reviewed the published ethnicity pay gap reports amongst the BITC Race at Work Charter signatories. We have drawn together key areas where organisations have gone beyond gender pay gap reporting methodology, or where they have innovated to create their reports, and we have asked some organisations questions to understand their approach.

### What the guide covers

This guide only reviews ethnicity pay gap reporting in the United Kingdom. The context is very different globally – for example, in many European jurisdictions, it is prohibited to ask questions about an employee’s ethnicity, so this type of reporting would not be possible. In Sweden, ethnicity pay gap reporting is not widespread but any person’s tax return is freely accessible, so there is some transparency surrounding pay data.

If you are an organisation based in Northern Ireland, the gender pay gap reporting requirement is different to England, Scotland and Wales because employment law is a devolved matter. The gender pay gap reporting requirement is not in force yet, but it is set to include a requirement that information should also include statistics on workers within each pay band in relation to ethnicity and disability.<sup>1</sup>

In the guide, we speak about the gender pay gap reporting methodology. By this, we mean the Gender Pay Gap Regulations which were issued in 2017, and which apply to large private and voluntary sector employers with 250 employees or more. Public sector employers follow a different regime.

Please note that at the time of publication, there is an important discussion happening about how ethnic identifiers should change in the future. Our guide looks at ethnicity pay gap reports published before April 2021, and the term “BAME” (Black, Asian and Minority Ethnic) was the term most often used in ethnicity pay gap reports at this time. Therefore, the term is also used in this report, with the understanding that moving forward, use of the term is very likely to change.



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<sup>1</sup> Section 19(6)(f) Employment Act (Northern Ireland) 2016.

# Introduction from Sandra Kerr CBE, Race Director at BITC

## Why publish an Ethnicity Pay Gap Report?

I want to say a huge thank you to Hogan Lovells for their generous Pro Bono support that has enabled us to jointly publish this insightful report, since we first started working on the guide in Summer 2020.

It has been a long journey from the McGregor-Smith Review Recommendation in 2017 that was clear. Implement ethnicity pay gap reporting if employers did not voluntarily act. The Race at Work 2018 survey asked questions about capturing ethnicity data and pay gap reporting and only 11% of employees said that their employers were capturing ethnicity pay data, and of that 11%, only half said that their employers were publishing their pay data. I want to commend more than 630 employers who have signed the Race at Work Charter, and as part of that have committed

to capturing ethnicity data and publicising progress.

I also want to commend all those listed within this report who have already started leading from the front with the publication of their ethnicity pay gap reports.

We have opened the Race at Work 2021 survey and are asking employees questions on capturing ethnicity data and pay. It will not be the overwhelming positive response that it should be as we are still waiting on the Government to take action. It will however, give some interesting insight into how ready UK Plc is to take action. The Race at Work Charter 2020 survey report found that whilst 60% of employers were capturing ethnicity pay data only 30% were publishing it.

Ethnicity pay gap reporting is an important tool that employers can use to ensure that they are being fair in pay, reward and recognition. It can also help an organisation identify where there may be structural issues on how talent from diverse ethnic backgrounds is distributed within the organisation. De-aggregating the data gives an additional layer of transparency on where there may be pay disparities within ethnic groups and by location. Most importantly, it ensures the issues of race, ethnicity and inclusion remain pertinent issues for discussion at the top table within organisations.





## The Anatomy of a powerful Ethnicity Pay Gap Statement

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There are no formal legal requirements about how to present an ethnicity pay gap report, because publishing the gap is currently voluntary.

One sensible approach is to follow the gender pay gap reporting legal obligations. However, this framework could still be restrictive, and some organisations have decided to move beyond gender pay gap obligations and to innovate in order to make their ethnicity pay gap statement as impactful as possible.

## Learning by example

For this guide, we reviewed the ethnicity pay gap reports published by BITC Race at Work Charter signatories, and grouped key themes for innovation in this area. In brief, these ideas are:

### a. Contextualise your pay gap

Think about your organisation and what the key reference points are to give context to your ethnicity pay gap.

Some organisations have given a broader view of ethnicity pay gaps in their sector; for others, they have written about intersectionality between areas such as ethnicity, disability or sexual orientation, which has given new insight into their pay gap.

Context is important for two reasons:

- i. It promotes transparency, and helps the reader to understand the gap.
- ii. It can assist an organisation to identify more specific and targeted ways to address their ethnicity pay gap, because an intersectional approach has the potential to give a clearer understanding of the workforce.

### b. Keep your statistics understandable and transparent.

This comes down to a balance between level of detail and readability. For the organisations that we spoke with, they:

- i. used visuals to signpost the reader to the key messages;
- ii. focused on their stakeholders and readers in the design of the report from an early stage; and
- iii. some kept a dialogue with the design of their gender pay gap report, to keep their messaging consistent across different pay gaps.

### c. Is it possible for your organisation to move beyond the gender pay gap methodology?

Interrogate the methodology behind calculating your ethnicity pay gap and think about the ways that you can adapt it to your specific organisation:

- i. Is it possible for your organisation to report on a wider group of employees than might be required under the gender pay gap framework?
- ii. Can you take a broader approach to what amounts to pay?

This might mean including equity partners in the calculation, or publishing your pay gap even if you have less than 250 employees. It might mean reporting on your share plans in a different way.

### d. Which ethnic groups do you include in your ethnicity pay gap?

Some organisations calculate the pay gap between Black, Asian and Ethnic Minority employees and those who do not share these ethnic identifiers. This guide also looks at organisations who have identified the pay gap by specific ethnic group, by using the 2011 Census definitions for example.

Some organisations collect data based on specific ethnic identifiers, but they prefer to publish a high-level statistic. As mentioned at (b), this comes down to the balance between including too many statistics in your report, and keeping the message clear and succinct. This will be nuanced according to your organisation.

### e. Can you publish your ethnicity pay gap by location? Or the proportion of Ethnic Minority employees by job type?

Think about what will give the clearest picture of the gap for your organisation, or help you to identify the root causes of the gap.

For organisations that are UK-based and regional, publishing a pay gap by location could give more insight into how to address the pay gap if the gap differs across offices.

The gender pay gap methodology asks organisations to report the gap by pay quartile. For some organisations, it may be possible to also report on the numbers of Ethnic Minority employees in each job type.





**f. Encourage higher rates of disclosure of ethnicity among employees**

Your ethnicity pay gap data will be inaccurate if only a small number of employees choose to disclose their ethnicity. The key areas that organisations spoke about centred on:

- i. Keeping disclosure messaging accountable, trust-based, and being clear about why you are asking for the data and what you will do with it.
- ii. Checking in frequently with employees to ask them to disclose their ethnicity – avoid only asking at the beginning of their career and never asking again. This allows you to include anyone who did not feel comfortable when you first asked the question, and it also allows you to track progression of your employees through your organisation.

**g. Create an action plan to address your pay gap**

The gender pay gap methodology does not require organisations to create an action plan to address their gap. However, creating a plan is a simple way to stay accountable and look at what works, and what is less successful, year on year.

There is a risk that the gap may become bigger before it reduces, reflecting steps that you have taken to try to reduce the pay gap that will only come to fruition over the longer term. An example would be if your organisation begins to recruit more Ethnic Minority employees at apprentice or graduate scheme level. That context can be explained through narrative reporting.

In drafting an action plan, it is key to understand that the ethnicity pay gap report cannot stand alone in an organisation. It should be supplemented by a holistic approach to diversity & inclusion, and the pay gap report is a space to discuss your organisation's equality initiatives more widely.

Below are some detailed examples of innovation in this space:

# Contextualising the Ethnicity Pay Gap

Although gender pay gap reporting obligations do not require organisations to give a wider context to statistics, doing so can allow for a different lens on the pay gap.

An organisation can contextualise by different reference points, for example by the sector, the UK labour market, or by reference to intersectionality.

Looking at pay gaps at a macro level can advocate for wider change, and help the reader to understand an organisation's specific pay gap by reference to a broader view.

## Contextualising by sector

Given the Chartered Insurance Institute's specific placement within the insurance sector, as a professional body dedicated to building public trust in the insurance and financial planning profession, they spoke about the UK workforce and the insurance sector as a whole before focusing on their ethnicity pay gap: "When looking at the insurance profession specifically, *The Insurance Census 2017/12* from *POST* magazine, in association with the Chartered Insurance Institute (CII), found that about 14% of the UK's workforce were Black, Asian or Minority Ethnicities according to the national census in 2011, whereas for the insurance sector that figure is lower than 10%, with Asian making up 6%, Black 2.1% and Chinese 0.3%."

Caren Thomas, CII HR Director, noted the importance of contextualising their pay gap within the insurance sector:

*"Publishing our data is all about sharing knowledge, insight and data to develop thinking and sharing of practice. We encourage transparency recognising that we have a long way to go just like many other organisations."*



# Contextualising the Ethnicity Pay Gap

## Contextualising by reference to intersectionality

Caren Thomas, CII HR Director, noted:

*“We believe that an understanding of intersectionality may help us to understand that not one aspect of inequality can really be considered in isolation for effective and long term change to happen.”*

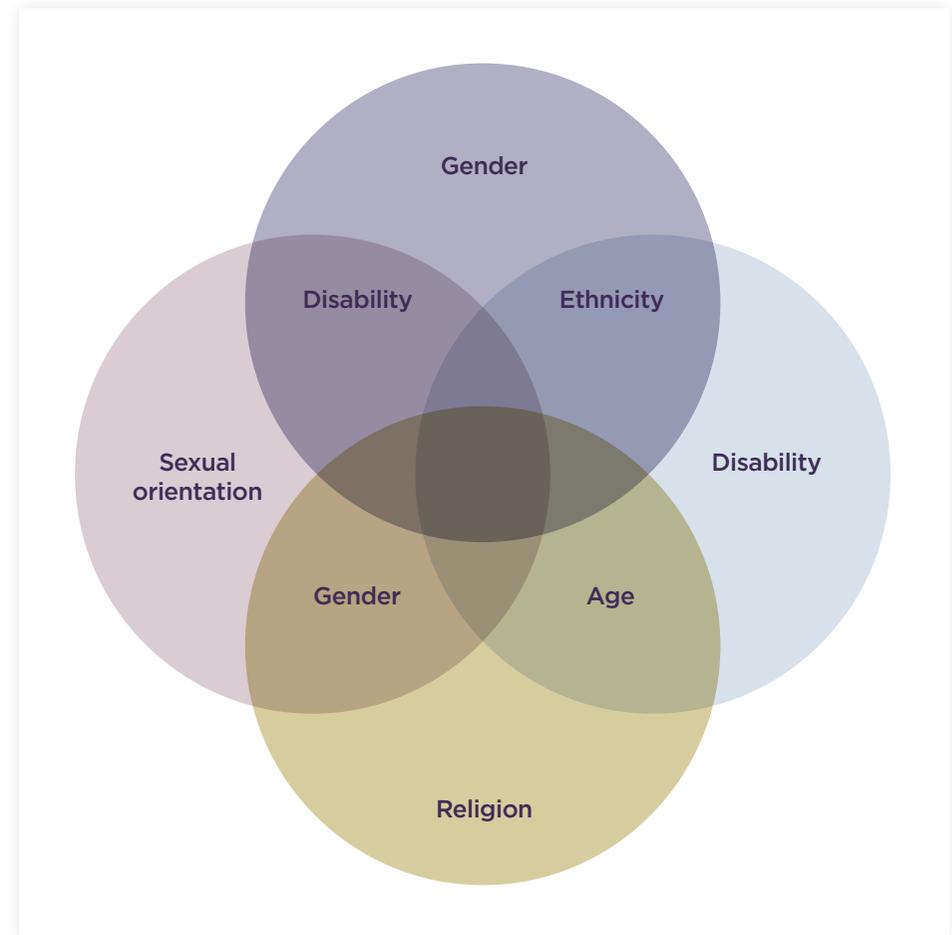
Jonathan Payne, Diversity & Inclusion Programme and Frameworks Manager at Network Rail, added:

*“In 2020 we decided to report on the intersectionality between gender and race, which we felt was the natural next step bearing in mind we have the data at hand to be able to do this, and it provides further insight into the pay gap. In an organisation where 81% of employees are male and 80% of those that have shared their ethnicity data are White, we feel this is a useful exercise and one that promotes transparency.”*

Although Hogan Lovells does not currently report on the intersectional pay gap, in 2019 we also added our sexual orientation pay gap to our annual pay gap report, alongside our ethnicity and gender pay gaps, which we have published for the last three years.

## Example

Example of intersectional approach, CII, Ethnicity Pay Gap Reporting:



# Clear statistics and format

There can be a tension between:

- wanting to be transparent and showing the statistics in great detail; and
- confusing readers with too much information, or lots of statistics.

We asked some Race at Work Charter signatories how they navigated getting the balance between giving people a full picture of the ethnicity pay gap, while also keeping the messaging clear.

## Key points to think about:

### • Transparency

Sophie Lea, UK Equality, Diversity and Inclusion Manager at Mott MacDonald, commented that she “has seen some reports with 50 pages of data cut in different ways where [I] felt that the message was lost under the weight of the data. Presentation is really important. Mott MacDonald wanted to make the report really clear and transparent to make it accessible to everyone, using a combination of visuals and narrative to explain the data.”

Mott MacDonald consulted with BITC about how to make their ethnicity pay gap report as visually clear as possible.

### • Visuals

Hogan Lovells has also produced a [visual infographic](#) that can be read alongside the ethnicity pay gap report and other diversity & inclusion data, where people may want a quick-read of the headline figures.

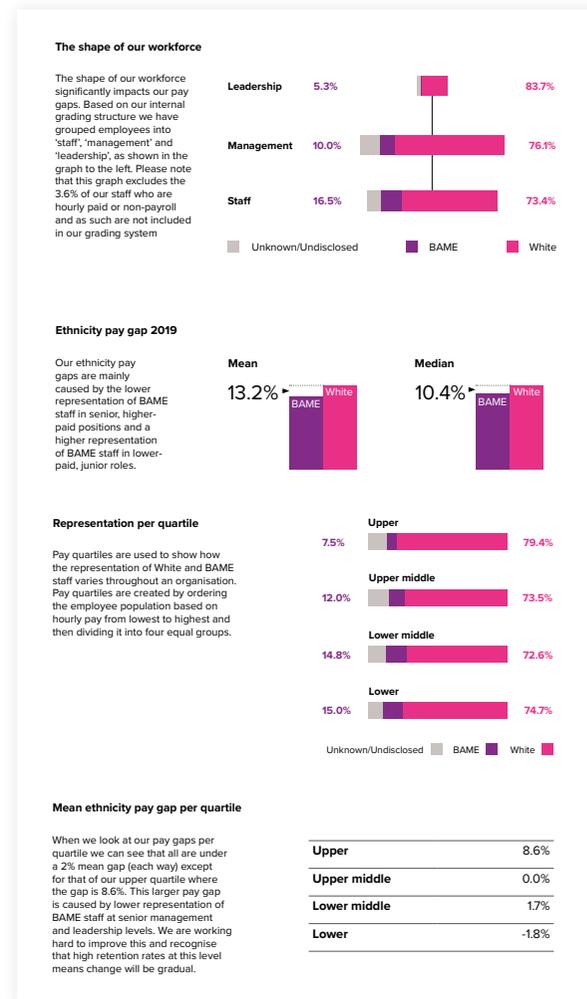
### • Keeping a dialogue with the gender pay gap report and how that is presented:

Caren Thomas, CII HR Director, commented:

“The Report format follows the same format that we use for the gender pay gap which enables clarity of understanding and easier absorption of information. We believe that the data has complexity and so providing the information in a regular and repeatable format can assist understanding and eventually, easier identification of actions.”

## Example

Example of format, [Mott MacDonald 2019 Ethnicity Pay Gap Report](#):



# Clear statistics and format

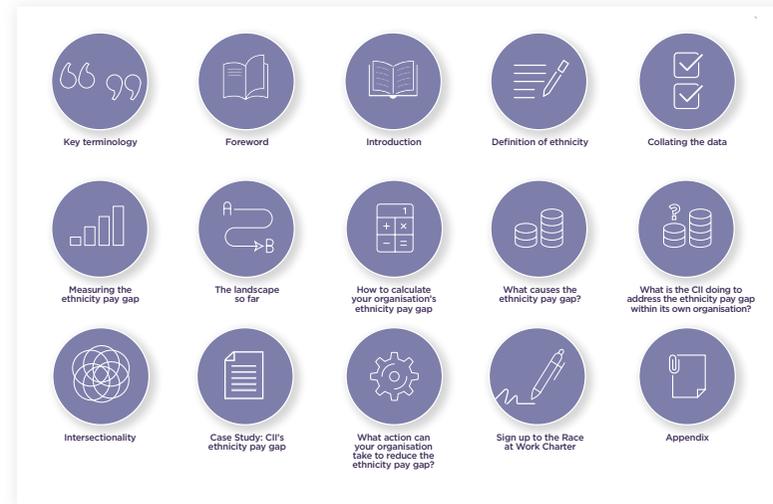
- Communicating with multiple stakeholders

Sophie Lea, UK Equality, Diversity and Inclusion Manager at Mott MacDonald, noted:

*“Another challenge in presenting the data is that there are a number of key audiences for the report; these include colleagues in the business where there is a desire to have transparency about what is being done and where the business still needs to improve; the senior leadership teams where there is a lot of interest in progress; also clients and potential recruits. There is a desire be clear about where change is needed and for clients to be able to see how Mott MacDonald is ensuring this change happens.”*

## Example

Example of format, CII Ethnicity Pay Gap Reporting:



### Case study: CII's ethnicity pay gap

The CII has not historically required colleagues to formally record their ethnicity, and in preparation for the forthcoming ethnicity pay gap reporting we have raised awareness internally of the purpose of collating this information and how it will be used.

We have currently managed to obtain self-identified ethnicity definitions for 70% of our colleagues and recognise that further engagement will be required to increase this participation to the desired 100%.

It is important to note the CII's headcount is 230 people and therefore some of the cohorts within each cluster have very small numbers of representatives, which, when combined with the current 70% voluntary responses, means the data lacks statistical significance and may not reflect a true picture of where we are.

When using the mean hourly rates there is virtually no pay gap between our White and BAME colleagues (0.84% in favour of White colleagues). However, when we use the median hourly rates the ethnicity pay gap favours our BAME colleagues by 15.7%. This is due to there being a higher proportion of BAME colleagues paid in the highest pay quartile, than the proportion of white colleagues paid in this quartile.

Ethnicity Pay Gap at 2018

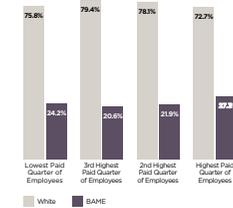
	December
Mean ethnically hourly pay gap	1%
Median ethnically hourly pay gap	-16%

Overall Workforce

White	77%
Ethnicity	23%



Ethnicity Distribution Pay Quartiles



# What is the statistical basis for the pay gap?

Many organisations have chosen to use the statutory gender pay gap reporting methodology to inform how they calculate their ethnicity pay gap. Here are some examples in which organisations can go further, where doing the calculation in a different way could give a clearer view of the pay gap.

## Publishing your pay gap if you have less than 250 employees

Under the gender pay gap framework, a private or voluntary sector employer should publish their pay gap if they have 250 or more employees on the “snapshot date”. Some employers may choose to publish an ethnicity pay gap report where they have fewer than 250 employees.

## Including Equity Partners

Some organisations have gone beyond the statutory framework for gender pay gap reporting, by including equity partner pay to increase the numbers of employees considered in their calculation.

Hogan Lovells includes equity partners (as well as non-equity partners) in our calculation for our ethnicity, gender and sexual orientation pay gaps. This includes a separate partner pay gap for transparency.

## Share Plans

Broadly speaking, the gender pay gap statutory method says that organisations should include share plans at the point that an income tax point arises, and using the amount subject to income tax in the calculation. This means that some types of share plan will not need to be reported by law.

For some organisations, depending on their remuneration structure, they could go beyond this in their ethnicity pay gap report. This could be done through additional reporting and context, or by adding accounting footnotes.

## Example

Example of Partner Data in Hogan Lovells 2020 Ethnicity Pay Gap Report.

### Employees only ethnicity pay and bonus gap (Hogan Lovells Services)

Hourly pay				Bonus			
Mean		Median		Mean		Median	
2020	2019	2020	2019	2020	2019	2020	2019
9.5%	9.6%	16.0%	10.1%	3.3%	0.0%	21.2%	-0.2%

### Partner total compensation gap

Total compensation			
Mean		Median	
Current year	Previous year	Current year	Previous year
27.0%	17.9%	12.5%	6.5%

Current year partner reporting data relates to the statutory reporting date of 5 April 2020 for UK partners. As there is no statutory guidance on this calculation for partners, we have used total compensation for the 12 month period as per Hogan Lovells financial year from 1 January to 31 December 2019. Previous year relates to the financial year ending 31 December 2018. Partners are not employees and, in the case of equity partners, receive a share of the profits of the firm.

# Deciding which groups to include in the ethnicity pay gap

We spoke to a number of organisations about whether they calculated the ethnicity pay gap by reference to individual ethnicities.

There was a clear consensus that collating pay gap data by specific ethnicity, rather than using the commonly-used term “BAME”, gives greater clarity on the specific barriers facing different groups. In terms of presenting the pay gap, this needs to be balanced against the data becoming too granular, which risks losing the clarity of the message.

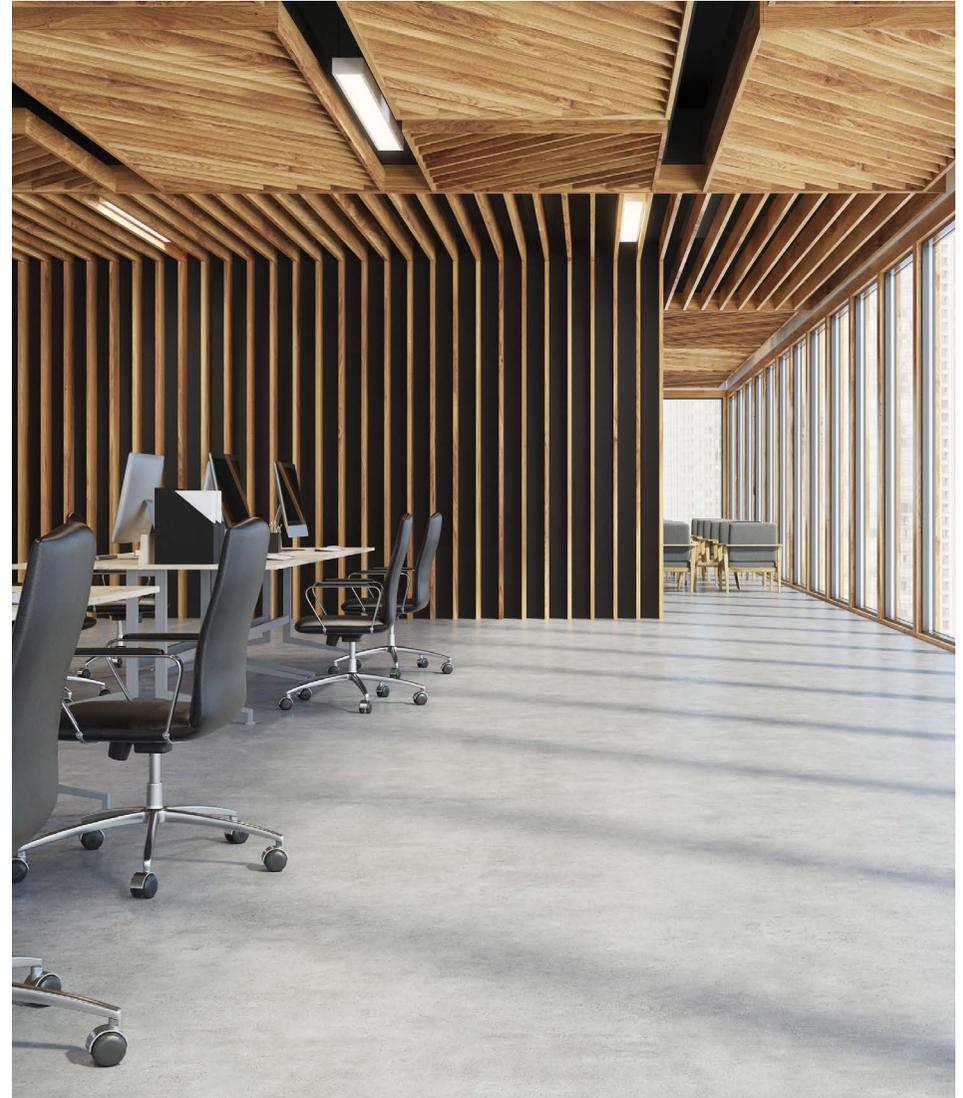
Teach First uses the ethnic identifiers used in the last census to calculate their ethnicity pay gap: *““BAME” vs “non-BAME” is a good top-level measure, but it is not detailed enough. Examining data broken down by the commonly-used Census categories helps to understand the proportion of employees from a particular ethnic background in the workplace and the roles in which they are most represented. By identifying problems and barriers faced by employees from specific ethnic minorities, Teach First can take more targeted action to address challenges and maximise employee potential. Publishing data at this level also lets employees from ethnic minorities know their individual experiences are recognised and taken seriously.”*

However, depending on the organisation, there can be circumstances where breaking down the data to multiple ethnic groups can skew the gap, and risk confusing readers. If that applies to your organisation, it is important to note that some companies are collating the data at a granular level, and then taking a balanced view on the most accessible way to present the data in the report.

For example, Network Rail has reported on the individual ethnic groups of Black, Asian and Ethnic Minority employees:

*“From a practical standpoint, it was easy to prepare our report in this way because we capture the data at that level anyway, giving respondents to the survey 13 ethnicity options to choose from. Over 80% of people have shared their ethnicity now out of a workforce of over 43,000 and we have found that Network Rail has employees representing 102 nationalities. We could break it down even further, noting that if you start to get too granular you cease to have the volume of data to make the statistics meaningful when reporting. In fact, internally we do go into more detail and use that to inform policy.”*

(Jonathan Payne, Diversity & Inclusion Programme and Frameworks Manager at Network Rail.)



3 Please see the introduction to this guide for a discussion of references to ethnic identifiers such as “BAME”.

# Deciding which groups to include in the ethnicity pay gap

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Jeni Thakrar, Talent and Inclusion Partner at Canada Life, also stressed that:

*“The desire to offer a more detailed view of Ethnic Minority data must be balanced against ensuring that individual employees cannot be identified internally by any data reported.”*

This need for anonymity as data sets become more granular is a point that also should be taken into consideration in the following two ideas.



# Looking at the proportion of Ethnic Minority employees at different job levels

Some organisations have innovated by looking at the numbers of Ethnic Minority employees according to job type or level.

For example, Network Rail's 2020 Ethnicity Pay Gap Report contains a useful infographic, detailing the breakdown between BAME, White and Employees who prefer not to say or have not disclosed. Teach First includes an appendix to its 2020 Ethnicity Pay Gap Report which includes this data across 7 job levels including that of CEO.

## Working to close the pay gap may mean that it initially gets bigger

In reports, it could be a good idea to address a key concern of many organisations upfront – the ethnicity pay gap fluctuating over time.

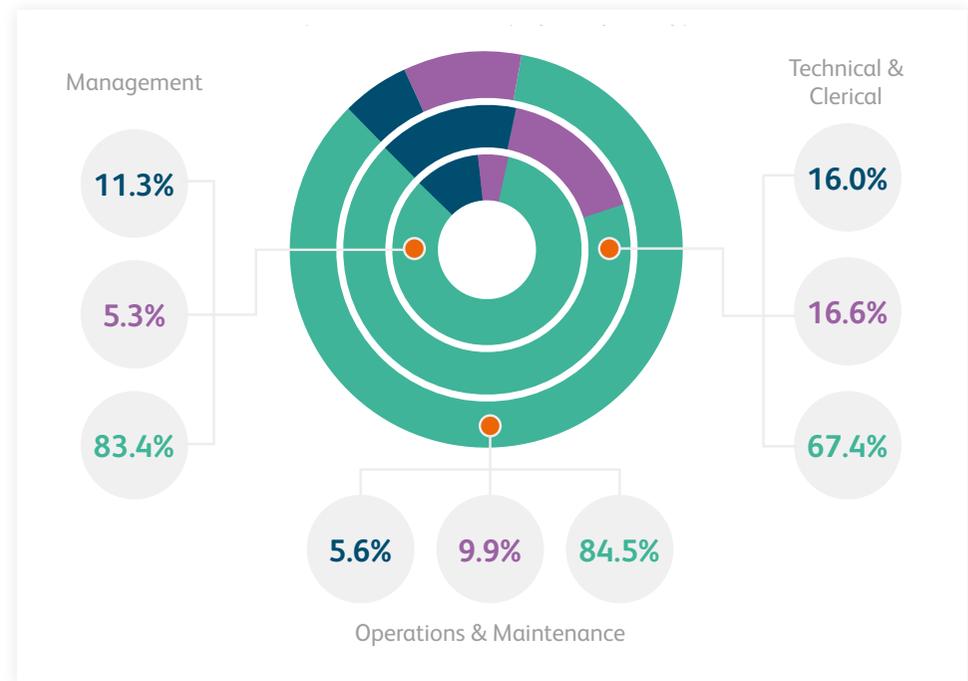
It is important to flag that there are circumstances in which working to close the gap, by recruiting Ethnic Minority employees at apprentice or graduate scheme level, can mean that the gap initially gets bigger.

Network Rail commented, *“The organisation appreciates that in practice its targets to both reduce the ethnicity pay gap and to increase Black, Asian and Ethnic Minority employees can contain conflicting objectives. Introducing more Black, Asian and Ethnic Minority employees at lower levels of the organisation and in entry level jobs may result in a negative impact on the ethnicity pay gap to start with. This is particularly noted in our graduate and apprenticeship schemes which we have seen significant increases in the number of females and Black, Asian and Ethnic Minority people joining Network Rail. Over time this should improve as those employees progress through the organisation, however our ethnicity pay gap may increase before it comes down, and we can view this as a positive thing: today’s graduates and apprentices are tomorrow’s leaders.”* (Jonathan Payne, Diversity & Inclusion Programme and Frameworks Manager at Network Rail.)

One way of showing progression through job levels is to publish raw data at very regular intervals. For example, Teach First has decided to publish raw numbers of employees by ethnicity twice a year to demonstrate the change in demographics across job levels, which helps to explain and understand the pay gap.

## Example

Example of showing ethnicity breakdown by job type in [Network Rail 2020 Ethnicity Pay Gap Report](#):



# Looking at the ethnicity pay gap by location

Some organisations have started to collate this data, with a view to publishing it in the next few years. However, it is very dependent on the location structure of the organisation, and how remuneration is set.

As explained in the introduction to our guide, a multi-national organisation would struggle to do this, as some jurisdictions (most notably in Europe) actually prohibit asking employees about ethnicity.

For organisations with a UK regional presence, it can produce useful results. Network Rail intends to review pay differentials by location, and are creating regional scorecards for each area of the business so that they can see the ethnicity pay gap by area. Jonathan Payne, Diversity & Inclusion Programme and Frameworks Manager at Network Rail commented, *“The organisation is structured along railway routes. The regions are therefore quite different, requiring different needs to be addressed and appropriate solutions to be implemented. Network Rail has proportional targets in each region, based on suborganisations within the organisation rather than regional demographics. We have a central diversity & inclusion team, and then each function unit has a lead that is responsible for driving change in their area of the business.”*

For some organisations, like Teach First, an awareness of ethnicity pay gaps by location has updated its approach to reward. It now advertises a single, non-negotiable starting salary for each job level across all locations, save for a London weighting.



## Encouraging employees to help us by disclosing ethnicity data

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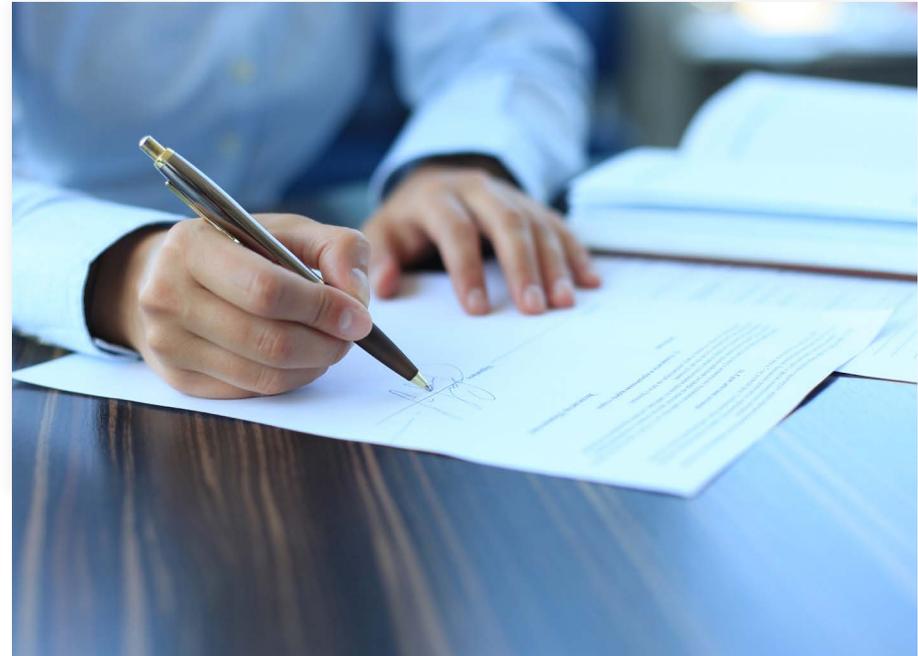
Encouraging employees to disclose their ethnicity is key to knowing that the ethnicity pay gap of an organisation is accurate. For the organisations that we asked about disclosure, there was a common consensus that trust-based messaging, and accountability to respond to the data, were key to creating an environment where employees felt comfortable to disclose their ethnicity.

We will discuss the legal framework around disclosure of ethnicity data later in this guide, because it is important to put in safeguards around voluntary disclosure of ethnicity. The following are practical ideas about how to increase the disclosure rate in your organisation:

- Canada Life has a 99% voluntary disclosure of ethnicity among employees - one of the highest disclosure rates of the organisations that we approached. To achieve this, they have focused on asking for voluntary disclosure of ethnicity at the beginning of their recruitment process, rather than asking for equal opportunities data once an employee is hired:

*“The driver for this change of approach and move to request equal opportunities data at the earlier stages of the recruitment process, is so Canada Life can better monitor any patterns or potential drop off rates in Ethnic Minority applicants as they progress through all stages of our application process.*

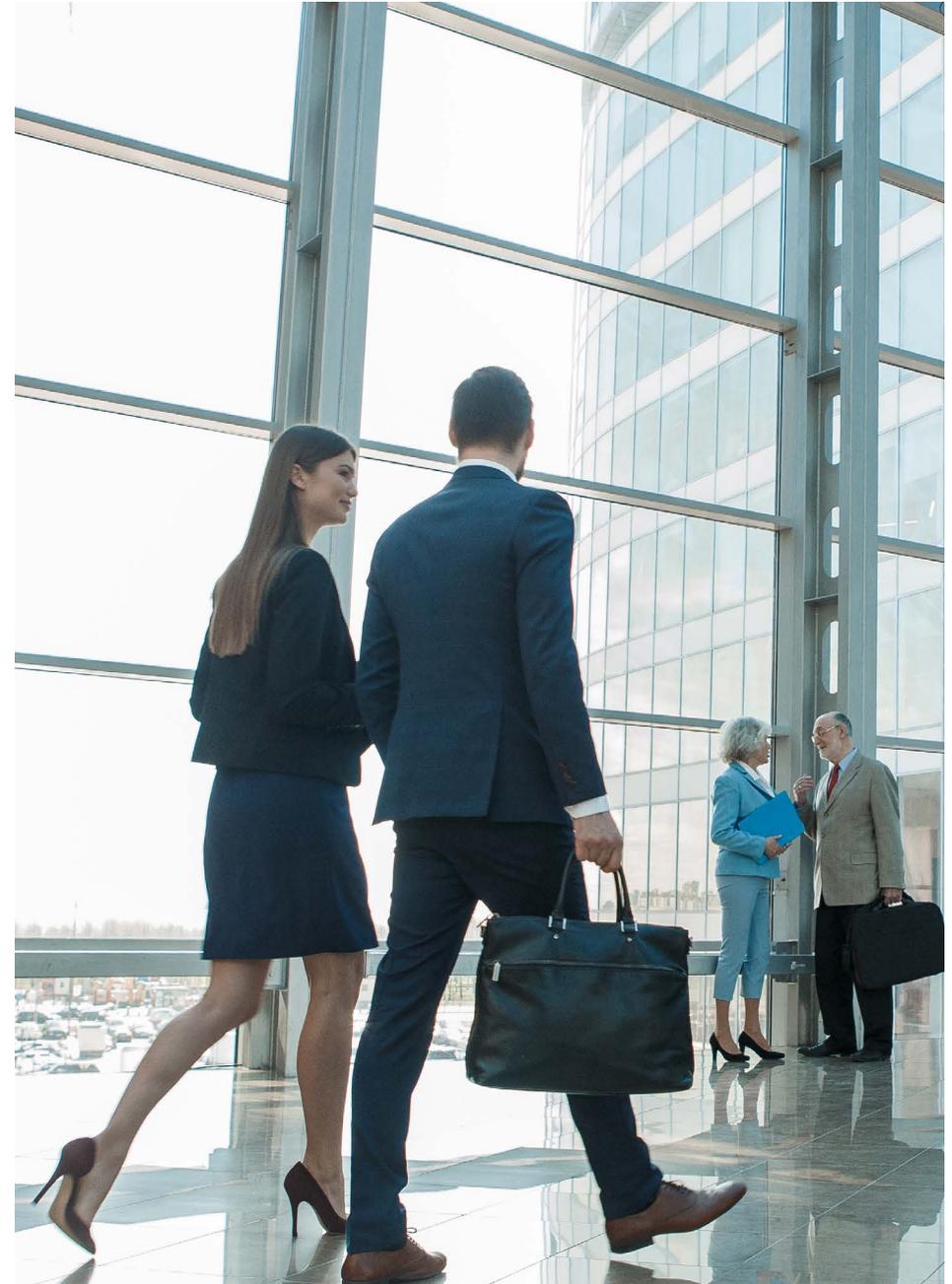
*Our Talent Acquisition team is committed to tracking whether any systemic barriers are preventing people from applying for roles or progressing through the application process. We’re also going to introduce other measures to minimise bias at every stage of the recruitment process, including blind CV sifting, investing in and developing tool kits for interviewing leads and managers, and having HR present during interviews to minimise bias and ensure our selection processes are fair and equitable.” (Jeni Thakrar, Talent and Inclusion Partner at Canada Life.)*



## Encouraging employees to help us by disclosing ethnicity data

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- At Hogan Lovells, we encourage all our people to share their diversity data on an annual basis through our Self-ID campaign. This campaign has involved the following:
  - We created a Self-ID hub on the intranet to house all of our resources in one place. This includes FAQs and direct links to the relevant screens on the HR system.
  - 90% of our people have shared their race / ethnicity with us. You can read our case study, alongside those of other Race at Work Charter signatories, in the BITC Race at Work Charter [One Year On Report 2019](#), for our success in driving up this disclosure.
  - At the recruitment stage, Self-ID questions are built into the application platform. Applicants cannot submit their application without answering these questions and we provide a 'prefer not to say' option, should they not wish to share their diversity data.
  - Our people can update their diversity data at any time by going into our HR system and we incorporate reminders into various D&I communications to keep Self-ID in the front of our colleague's minds.
- Teach First's biggest mechanism driving up disclosure has been a quarterly email to all employees with incomplete data containing a "quick fill" form (and trust-based messaging) that can be filled out in less than 5 minutes directly from the email. It also reminds employees when they are first hired, when they pass their probation, and during its annual compliance window.



# Creating an action plan to reduce the gap

Publishing an action plan goes further than the gender pay gap statutory obligations, and keeps the organisation accountable for closing the pay gap.

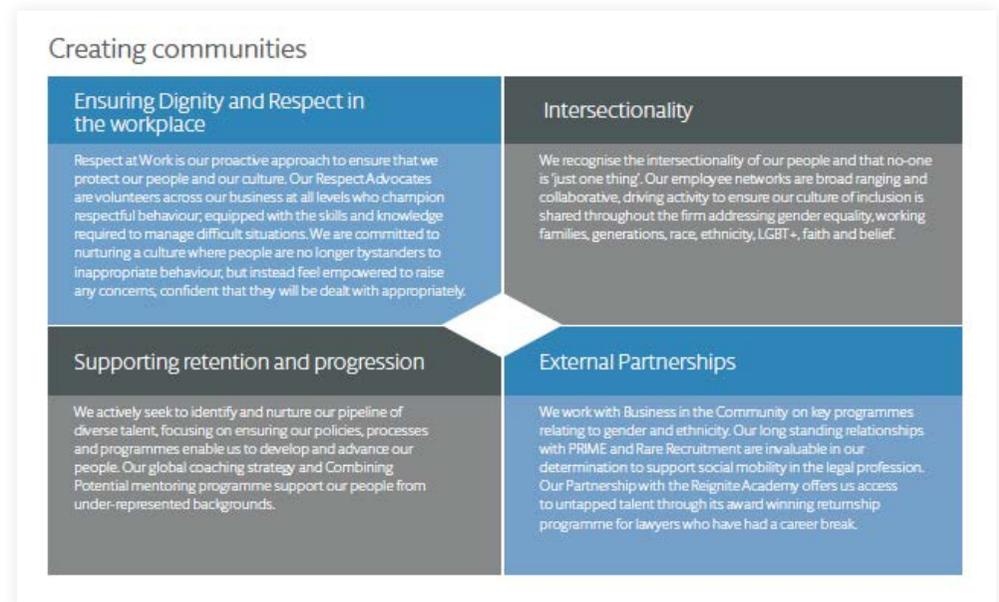
It can also be important to take a holistic approach to ethnicity pay gap reporting. The gap itself is only one part of the wider context. Therefore, organisations can speak about their wider work to improve inclusivity.

At Hogan Lovells, we recognise that representation of Ethnic Minority talent declines with seniority, which impacts our pay gap. We have an action plan to support our continued focus on retention, progression and inclusion of Ethnic Minority talent as we aim to improve representation at senior levels. This includes working closely with our race and ethnicity network. Our obligations as a signatory of the Race Fairness Commitment require us to interrogate our data and examine the recruitment and progression of Black, Ethnic Minority and White Employees; both lawyers and those in our Business Services team. We have factored additional commitments into our action plan related to training, monitoring and mentorship to identify areas for improvement for Ethnic Minority colleagues.

Some organisations specifically make reference to the recommendations that they have taken on board from the McGregor Smith Review, which is a landmark report about race equality in the UK.

## Example

Example of an action plan to reduce the pay gap, taken from the Hogan Lovells 2021 Infographic on UK Diversity and Inclusion.





## Ethnicity Pay Gap Reporting – Legal Myths Debunked

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There are legal myths surrounding ethnicity pay gap reporting which can stand in the way of organisations publishing their report. Here is a list of the key legal concerns, and the reasons why they should not stand in your way.

# Myth 1

## “We cannot publish the report because of GDPR”

The UK General Data Protection Regulation (“GDPR”) does not prohibit organisations from publishing information about the pay gap that may exist between different ethnic groups. In fact, it may even be possible in the UK to produce these types of report without the prior consent of employees. For pay gap reporting to comply with UK data protection law, organisations should follow this straightforward five-step guide:



### #1 Understand the scope of the GDPR’s application

In order for an organisation to perform the analysis which will likely be relevant to undertaking a pay gap assessment of this nature, it will be necessary to understand both the ethnicity and salary of each employee. The process of using this data about employees, in order to produce aggregated statistics which highlight any disparities in salaries between different ethnic groups, is a processing activity that is governed by the GDPR.

As long as the report is aggregated and anonymised when published (i.e. includes no directly or indirectly identifiable information relating to specific employees), then the pay gap data included within the report should not be caught by the regulation. This is significant because it means that employees do not have any privacy rights over the contents of the report.

### #2 Undertake a data protection impact assessment

An employee’s ethnicity is considered to be ‘special category data’ for the purposes of the GDPR. Where special category data is being processed on a ‘large scale’ then the reporting organisation is required to undertake a data protection impact assessment (“DPIA”).

In determining whether a DPIA is necessary, the size of the organisation and number of employees that work for it will be the most important factor. For SMEs and micro organisations this condition is unlikely to be satisfied, so while a DPIA may still be desirable and good practice, it is unlikely to be mandatory. However, for larger companies with a significant number of employees, a DPIA should be undertaken.

The purpose of a DPIA is to assess the risks to the impacted individuals of the relevant processing activity. In this case, those individuals are the organisation’s employees. When undertaking a DPIA in this context, it is important to consider the following points:

- Is the ethnicity and salary data being processed fairly and lawfully (see step #3 below)?
- How will the organisation ensure that individual employees are not identifiable from the pay gap report that is published?
- What technical controls will be deployed to ensure that access to ethnicity and salary data be limited to only those individuals who need to use it?
- How will the personal data be otherwise secured to avoid unauthorised access?
- Could the data set that is used to generate the pay gap report be pseudonymised, so that individual employees are not directly identifiable?
- How will employees be informed that their ethnicity and salary data will be used for this purpose (see step #5)?

### #3 Ensure that the processing is lawful

An employee's ethnicity is considered to be 'special category data' for the purposes of the GDPR. Where special category data is used, then an additional pre-condition must be satisfied under the GDPR in order for the processing to be considered lawful.

Explicit consent is one example of a pre-condition which can be used to process special category data. However, in the UK at least, it is unlikely to be desirable to rely on consent. This is because consent is both difficult to obtain in practice and cannot be mandatory. In other words, an employee could freely decide to refuse their consent. Equally, it is arguable that consent would not be considered valid here due to the imbalance of power between an employer and employee, meaning that consent could never be truly given freely.

The alternative and more appropriate option is to process ethnicity data in reliance on the 'substantial public interest' condition. In the UK, the Data Protection Act 2018 sets out a number of sub-conditions that need to be satisfied in order for an organisation to be able to justify processing on the basis of it being necessary for reasons of substantial public interest. The most relevant here is likely to be the 'equality of opportunity or treatment' purpose.

In order for the equality of opportunity or treatment sub-condition to apply, it's necessary to only use the ethnicity data for aggregated reporting and not to take decisions about specific individuals. Equally, if an individual has informed the organisation that they do not wish for their ethnicity data to be used to assess pay gaps, then they need to be excluded from the analysis which forms the basis for the report. Finally, a policy document also needs to be put in place. The content of this document is considered further in step #4 below.

It is worth noting that irrespective of whether consent or substantial public interest is relied upon, it would remain the individual's choice as to whether they wish to voluntarily disclose their ethnicity. However, by relying on public interest it does mean that a GDPR standard consent form would not need to be provided or agreed to in order for the processing to be lawful. Equally, there would be no absolute right for the individual to withdraw their consent to the use of that data in the future (although other rights may still apply, depending on the circumstances).

### #4 Have a documented policy

The policy document required in order to rely upon the 'substantial public interest' condition in the UK, needs to explain the organisation's procedures for how it will comply with the GDPR's data protection principles when processing ethnicity data for this purpose. The content needs to specifically address the organisation's approach to retention and erasure of ethnicity data, providing an indication of how long the data is likely to be retained for.

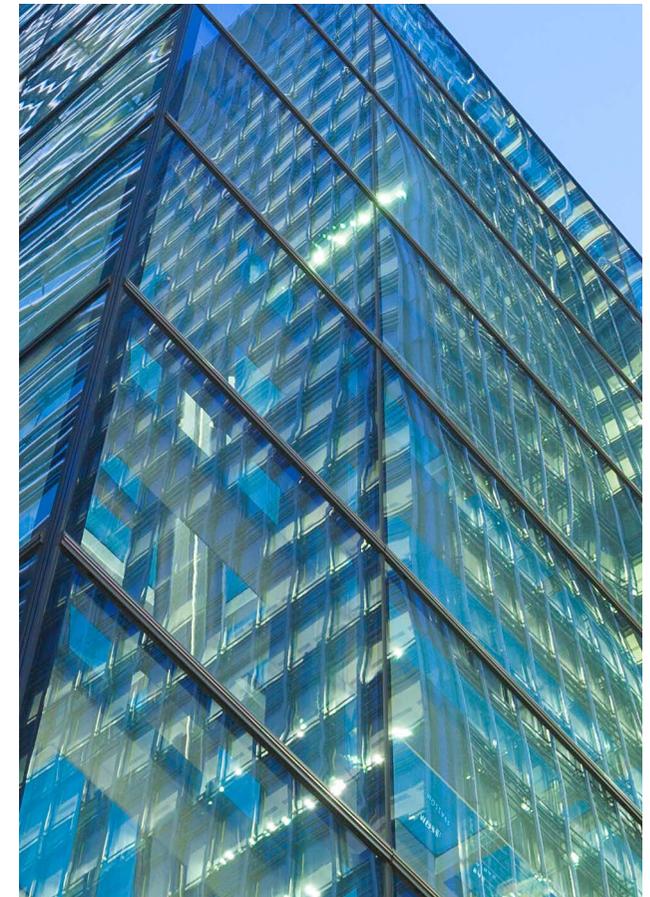
One option is to create a policy which is dedicated to the organisation's approach to pay gap reporting, which includes reference to this information.

### #5 Inform employees about the initiative

The GDPR's principle of transparency means that employees need to be informed about how their personal data will be processed. Organisations will therefore need to make it clear that their ethnicity and salary data will be used for the purpose of pay gap reporting, along with the lawful grounds of processing that are being relied upon (see step #3 above).

The relevant information should be included in the organisation's employee privacy policy. However, it may be that further steps are also taken to make people aware

of the initiative and how their data will be used, such as via a dedicated email communication or employee-wide campaign. We have discussed practical examples of how to encourage disclosure in the previous chapter.



# Myth 2

## “Reporting on our ethnicity pay gap will increase the likelihood of successful discrimination claims”

**For many organisations, ethnicity pay reporting will reveal a gap between the average pay of different ethnic groups. This may give rise to a concern that reporting the figures increases the risk of pay-related race discrimination claims.**

From a strict legal perspective, pay gap reporting does not necessarily give rise to a greater risk of successful discrimination claims. A pay gap does not automatically indicate that a pay system is influenced by direct or indirect race discrimination. Just as reporting gender pay gap figures does not indicate that an employer is in breach of equal pay law, reporting ethnicity pay gaps does not in itself demonstrate that an employer is breaking race discrimination laws.

There may nonetheless be a risk that additional transparency around pay gaps encourages employees to bring claims, even if these are ultimately unsuccessful. This may be a particular concern if the gap is large and the way in which the pay gap is reported is misleading or inaccurate, which is often outside the employer’s control.

Discrimination claims can occur during the recruitment stage in an organisation (and even before someone has applied for the job), so where ethnicity data is asked for at the point of applying for a role, safeguards need to be in place. As long as the data is either anonymous or held completely separately from the other recruitment data, and the organisation makes it clear why it is asking for the information, that should not give rise to the risk of a successful discrimination claim from an unsuccessful applicant.

Of course, if there is a marked difference in pay between employees of different ethnicities doing the same job, then including comparisons of the pay gap by job type in the ethnicity pay gap report is more likely to increase the likelihood of successful discrimination claims against the employer. This would clearly be an area that an employer would need to act to resolve as soon as possible.

There was a similar concern that there would be a rise in discrimination claims after gender pay gap reports were first published, but in practice the statistics do not demonstrate that claims have risen in the long term as a consequence of

pay gap reporting. In 2017/18, the total number of equal pay claims increased sharply. This was before the publication of the first gender pay gap reports in April 2018 and reflected the abolition of tribunal fees in 2017, which led to an increase in claims across the board.

During the 2018/19 and 2019/20 periods, the number of equal pay claims was towards the lower end of the number of equal pay claims typically lodged in the years before tribunal fees were introduced in July 2013.

The table below shows the number of equal pay claims lodged:

- tribunal fees in existence
- gender pay gap reporting introduced



## Myth 3

“Underlying documents and reports will have to be disclosed in the event of a claim”

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Another concern when gender pay gap reporting was introduced was the risk that employers might be required to disclose the background documents used to prepare the reports if pay-related litigation ensued. A related question was whether employers should take steps to try to make documents privileged and exempt from disclosure, for example by involving lawyers when preparing reports.

It is important to remember that documents only have to be disclosed in litigation if they are relevant to a case. The fact that an employer has collated statistical information about its ethnicity pay gap does not automatically mean that the information is relevant to a subsequent pay discrimination claim. As discussed above, the existence of a pay gap is not necessarily evidence of discrimination. Employees are already able to obtain potentially relevant information, for example in relation to the pay of named comparators, through the disclosure process. Concern about possible future disclosure obligations is unlikely to be a sound reason for deciding not to report on ethnicity pay gaps voluntarily.

However, different considerations may apply to documents that relate to an employer’s analysis of the underlying statistical data, particularly if this indicates that there is potential for a successful race discrimination claim (such as workers of different ethnicities being paid different rates for the same job). This is the sort of information that would be potentially disclosable and that a tribunal could take into account when deciding a claim.

As it will not be possible to correct a pay gap without analysing the reasons for it, it is unlikely to be sensible to decide not to conduct the analysis because of the risk of having to disclose information in due course. In the long run it is likely to be better to identify and correct a problem than to continue to ignore it.

An employer that is seriously concerned that analysis will reveal direct or indirect race discrimination in its pay practices may want to conduct its analysis with the benefit of legal advice, so that the documents attach legal professional privilege as far as possible. This is already reasonably common in the context of equal pay audits. This allows an employer to identify any equal pay issues in its organisation while minimising the risk of having to disclose those documents in a subsequent claim.



## Myth 4

“The reputational consequences of having a pay gap will outweigh the good of publishing the data in the first place”

Reporting an ethnicity pay gap clearly has the potential to generate negative headlines. However, these are mitigated by:

- Having a clear communications strategy for the media and the workforce, explaining the causes of the pay gap and – more importantly – what steps the employer will take to address those causes;
- The fact an organisation is voluntarily reporting on its ethnicity pay gap demonstrates a commitment to tackling the issue that should outweigh negative headlines about the extent of the gap; and
- Failing to report on the ethnicity pay gap could be seen to indicate an unwillingness to address the issue, which could itself result in negative publicity, particularly where peer organisations are reporting voluntarily.



# Conclusion

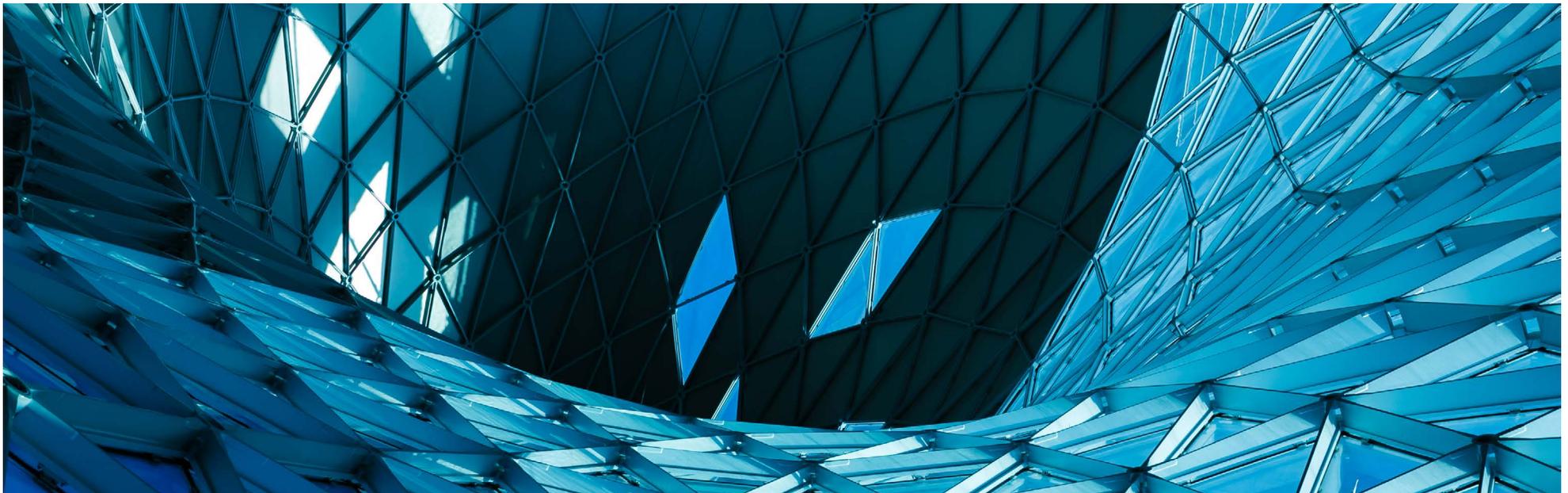
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In the ‘Guide for General Counsels - Insights into Ethnicity Pay Gap Reporting’, we have considered the key legal ‘myths’ that are barriers to employers reporting their ethnicity pay gaps.

We have also provided practical, real-life case studies to show how other organisations are approaching this issue, to contribute to the question – what is the anatomy of a meaningful ethnicity pay gap report? For some, this means taking a step beyond the gender pay gap methodology and innovating around both the calculation of the ethnicity pay gap, but also contextualising it by region, sector or the UK labour force. For others, it means coming up with an action plan to reduce the gap, while realising that the gap is likely to get worse before it gets better. This is due to organisations driving to recruit more Ethnic Minority employees in apprentice or graduate entry level roles, before they progress through the organisation in the years to come.

Ultimately, with this guide comes a recognition that ethnicity pay gap reporting is only one piece of the puzzle. When gender pay gap reporting became mandatory for some businesses in the UK, discrimination based on gender was not eradicated. However, greater transparency can lead to greater accountability. Publishing ethnicity pay gap data may not end discrimination based on ethnicity, but it will lead to more conversations about the ethnicities that make up workforces, and catalyse more positive steps forward for employers.

Finally, we would like to recognise the Race at Work Charter signatories who have voluntarily published their ethnicity pay gap reports. We hope to see this list expand and we welcome further discussion about this vital issue.



## Signatories<sup>4</sup> who have published an ethnicity pay gap report:

- Baker McKenzie
- Bank of England
- Barclays
- Birmingham City Council
- British Film Institute (BFI)
- Burges Salmon
- Business in the community
- Canada Life Limited
- Capsticks Solicitors LLP
- CBRE UK Ltd
- Centrica PLC
- Channel 4
- Chartered Institute of Personnel and Development (CIPD)
- Chartered Insurance Institute
- CITI
- City of London Corporation
- Civil Service
- Confederation of British Industry (CBI)
- Deloitte
- Deutsche Bank
- DWF Law
- EY
- FCO Services
- Financial Conduct Authority
- Financial Times
- Freshfields Bruckhaus Deringer LLP
- Gloucestershire County Council
- Gowling WLG
- Grant Thornton UK LLP
- Guardian Media Group
- Hachette UK
- Hogan Lovells
- House of Commons
- House of Lords
- HSBC UK
- Irwin Mitchell
- ITN
- KPMG
- L&Q
- Lambeth Council
- Linklaters
- Lloyds Banking Group
- London Fire Brigade
- Mazars
- Metropolitan Police Service
- Metropolitan Thames Valley Housing
- Mills & Reeve
- Mott MacDonald
- National Audit Office
- Nationwide
- NatWest Group
- Network Rail
- NHS
- NHS England
- Norton Rose Fulbright
- O2 (Telefónica UK)
- Ofcom
- Osborne Clarke LLP
- Pinsent Masons
- PwC
- Riverside
- RPC
- Sainsbury's
- Santander
- Scottish Government
- Senedd Commission
- Shakespeare Martineau
- Shell
- Shoosmiths
- Slaughter and May
- Softcat plc
- SQA
- Teach First
- The Christie NHS Foundation Trust
- The Growth Company
- The House of Commons and Parliamentary Digital Service
- The London Borough of Hammersmith & Fulham
- The London Borough of Tower Hamlets
- The Royal Borough of Kensington and Chelsea
- The Telegraph
- University of St Andrews
- University of Warwick
- ViacomCBS Networks International
- VIVID Housing Ltd
- Wellcome Trust
- Wesleyan
- Westminster City Council
- Zurich Insurance UK

This list is not exhaustive and there may be some Race at Work Charter signatories who have published an ethnicity pay gap report but are not included. Before publication of this guide, BITC gave the signatories on this list the opportunity to confirm whether they wanted to be included in the guide.

## Acknowledgements

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<sup>4</sup> Race at Work Charter signatories

<sup>5</sup> This information was reviewed by Hogan Lovells International LLP and was correct as at the publication date 14 April 2021. It is for information only. It is not intended to create, and receipt of it does not constitute, a lawyer-client relationship with Hogan Lovells International LLP.

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