

# **Institutional Interactions in Gender Pay Equity: A Call for Inclusive, Equal and Transparent Labour Markets**

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## **Abstract**

Closing the gender pay gap is not proving to be a linear process as the changing environment is resulting in constantly moving goalposts. This article, therefore, focuses on identifying institutional arrangements and policies that may promote an environment conducive to gender pay equity. A review of institutional mechanisms and outcomes in wage setting, covering legal, collective and voluntary initiatives, finds that such an environment involves three characteristics, namely: labour market inclusiveness in order to narrow not widen overall wage inequalities; policies to generate the political will to achieve gender equality, which may require aligning gender pay equality issues with wider progressive equality agendas; and more transparent systems of wage setting and outcomes. The contention that gender pay equality is more likely to be achieved in more inclusive labour markets and societies also implies that there are strong interactions across policy domains and mechanisms; action on one front may not be successful if it is not supported by complementary policies and reinforcing mechanisms. Four main policy areas are identified and discussed: these are aimed at extending regulatory coverage, raising minimum standards, promoting fairness and

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developing more proactive and holistic mechanisms of implementation, for example through a 'gender duty'.

**Keywords:** Gender Pay Equity, Institutional Framework, Inclusiveness, Gender Equality, Transparency.

## ***1. Introduction***

The central argument developed in this article is that the socially-progressive goals of gender equity and inclusive and transparent labour markets should be pursued as joint goals. This means mainstreaming gender equity concerns into inclusive labour market policies and also mainstreaming inclusivity goals into gender equity policies within a broader framework of transparent labour markets.

The case for developing a joint approach stems from the synergies between a gender pay equity strategy and an institutional wage setting environment that is conducive to inclusive and transparent labour markets. The focus here is on changing the structural conditions to assist in closing the gender pay gap and we do not address the role of the efforts, preferences and behaviour of women in closing the gender pay gap which has tended to dominate the research landscape. This is because women's efforts may be made against an environment in which gender inequality is embedded and which may even develop in ways that inhibit, rather than promote gender equality.<sup>1</sup> Consequently, our focus is on changing the institutional environments through changing the behaviour of both employers and the state, which together shape the opportunity structures for women.

Through a review of institutional mechanisms and outcomes in wage setting, covering legal, collective and voluntary initiatives, the argument is made that a supportive environment for gender pay equity involves three characteristics, namely: narrower not wider wage inequalities; policies to generate the political will to achieve gender equality which may require aligning gender pay equality issues with wider progressive equality agendas; and more transparent systems of wage setting and outcomes.

The case for greater wage equality is that gender equality measures should not have to compensate for general widening wage inequalities.<sup>2</sup>

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<sup>1</sup> Jill Rubery and Damian Grimshaw, 'The Forty Year Pursuit of Equal Pay: A Case of Constantly Moving Goal Posts' (2015) 39(2) Cambridge Journal of Economics 319.

<sup>2</sup> Francine D. Blau and Lawrence M. Kahn, 'The Gender Earnings Gap: Learning from International Comparisons' (1992) 82(2) American Economic Review 533.

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These not only slow progress in closing the aggregate gender pay gap but may also increase wage inequalities among women as well as between women and men. Women's average position may even be improving while inequality among women is increasing, thereby calling into question whether the average gender pay gap provides an adequate measure of progress on gender equality for all women. There is a need, therefore, to build in 'intersectional sensibility' to policy considerations, to take into account the implications for gender and social class<sup>3</sup> and, where appropriate, other dimensions of inequality. Furthermore, a socially progressive approach to closing the gender pay gap requires a more equal distribution of pay, requiring redistribution not only from men but also from capital as the wage share in societies has declined<sup>4</sup> just as more labour- and mainly female labour - has entered the labour market. The push for gender equality has the capacity to try to reverse this trend by limiting the availability of cheap labour to drive down the wage level. However, there is still a danger that it could intensify distributional struggles among already relatively disadvantaged workers, particularly if the focus is on reducing gender pay gaps at a micro level, within individual firms and industries, rather than a more macro level redistribution, relating to the relative value attached to whole sectors and occupations.

There are two reasons why we also need policies likely to provide the political will to push for gender equality. First, as gender pay equality involves redistribution, resistance to its achievement can be anticipated. Second, because the struggle for gender equality has been so long-term, interest among the wider public may be declining in part because there is a belief that it has already been achieved. New momentum is needed to generate the political will needed for renewed progress. Aligning gender equality with other progressive equality agendas should extend support and synergies, particularly in a context of general stagnating or declining real wages. However, alignment requires a double form of gender mainstreaming; that is, mainstreaming gender equity concerns into inclusive labour market policies and mainstreaming inclusivity goals into gender equity policies.<sup>5</sup> Thus, progressive equality agendas need to

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<sup>3</sup> Merike Blofield and Juliana Martínez Franzoni, 'Maternalism, Co-responsibility and Social Equity: A Typology of Work-Family Policies' (2015) 22(1) *Social Politics* 38; Hadas Mandel and Michael Shalev, 'Gender, Class and Varieties of Capitalism' (2009) 16(2) *Social Politics* 161.

<sup>4</sup> International Labour Organisation (ILO), 'Global Wage Report 2014/15' (2014) <<http://www.ilo.org/global/research/global-reports/global-wage-report/2014/lang-en/index.htm>> accessed 27 June 2018.

<sup>5</sup> Blofield and Martínez Franzoni (n 3).

take up gender issues, for example in relation to support for care work.<sup>6</sup> A transparent environment is finally needed because without it progress is not only difficult to measure and monitor but the causes of inequality remain hidden and obscure.

To develop this argument further, we first review the current and potential roles for wage setting mechanisms- legal, collective and voluntary- in creating inclusive, gender equal and transparent labour markets. The key point emerging from this review is the complementarity and synergy between transparent and inclusive labour markets and the promotion of gender equality, and conversely the contradictions and constraints on the promotion of gender equality within segmented, unequal and non-transparent labour market systems. This review suggests the need for new mechanisms to promote gender equality alongside transparent and inclusive labour markets. Four main policy areas are identified and discussed: these are aimed at extending regulatory coverage, raising minimum standards, promoting fairness and developing more proactive and holistic mechanisms of implementation, for example through a 'gender duty'.

## ***2. Wage Setting Institutions: The Contributions and Limitations of Legal, Collective and Voluntary Mechanisms***

Figure One provides an overview of the characteristics of an inclusive, gender equal and transparent labour market. This is shown to depend on both horizontal and vertical dimensions to wage setting: by horizontal – indicated by the horizontal lines- we mean the coverage of employment standards. Here we differentiate between coverage of employing organisations (top horizontal line) and coverage of workforce groups (bottom horizontal line). Not only should there be widespread coverage but also convergence at a reasonable (decent work) level around minimum standards to provide an egalitarian basis on which to build vertical differentials - as indicated by the vertical lines in the diagram. On the left hand side we indicate the core principles for pay differentials under inclusive labour markets: that is, high minimum standards, due recognition for skills and experience (that is avoiding one of the major problems in female-dominated sectors, namely the lack of such

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<sup>6</sup> Ruth Pearson, 'Gendered, Globalisation and the Reproduction of Labour: Bringing the State Back In' in Shirin M. Rai and Georgina Waylen (eds) *New Frontiers in Feminist Political Economy* (Routledge, 2014) 19-42.

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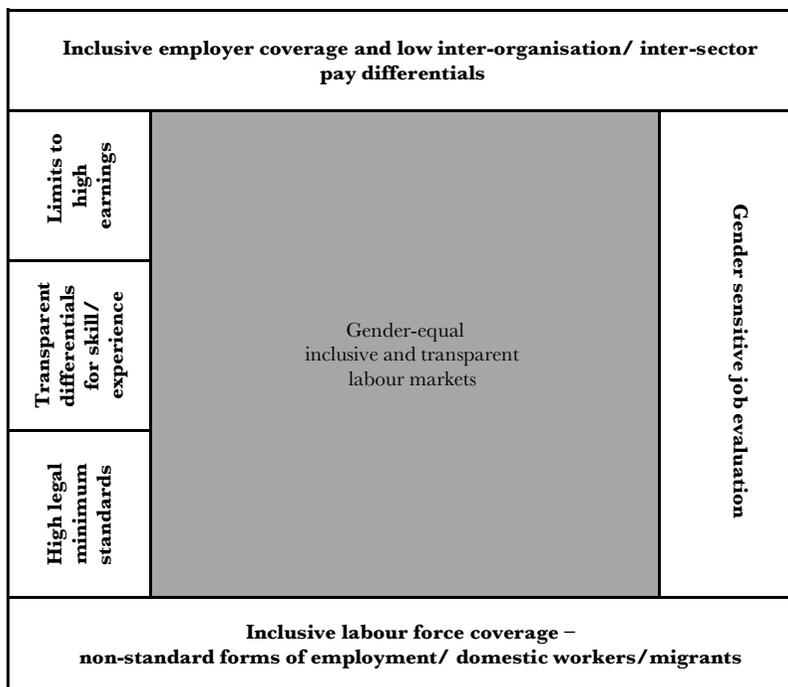
recognition and of opportunities for progression),<sup>7</sup> transparent wage structures and limits to high pay. On the right-hand side the need to integrate gender sensitive evaluation of jobs and skills within this framework of more inclusive and transparent labour markets is highlighted.

This diagram sets the framework for, according to our definition, establishing inclusive, equal and transparent labour markets. Labour market policies also need to be complemented by policies to support those with care responsibilities, both through the provision of services and through support for access to social protection for those engaged in unpaid care work or unable to access paid employment. These complementary policies may have equal importance for gender equality and indeed are included in our argument for a more universal and holistic approach to gender equality. However, the prime focus here is on conditions for gender equality within the wage employment system.

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<sup>7</sup> Damian Grimshaw and Jill Rubery, 'Undervaluing Women's Work' (2007) Equal Opportunities Commission Manchester, Working Paper Series No 53. <[http://www.equalityhumanrights.com/uploaded\\_files/equalpay/undervaluing\\_women\\_s\\_work.pdf](http://www.equalityhumanrights.com/uploaded_files/equalpay/undervaluing_women_s_work.pdf)> accessed 6 November 2015.

Figure One: Inclusive labour markets for gender equality



The contributions of legal, collective and voluntary mechanisms in moving towards the goal of an inclusive, gender equal and transparent wage labour market are identified in this review as potentially and ideally complementary rather than competitive, but in their current state of development they all remain insufficient. Legal mechanisms are important because interest in gender pay equity has tended to follow rather than precede legal rights to equal pay in most countries, and legal developments have had a catalytic and symbolic influence on non-statutory moves to promote equal pay. Despite scepticism towards legal interventions in some European countries with strong traditions of autonomous collective regulation, there is a clear need for policy action to be underpinned by legal rights. Specific types of legal intervention may also provide a framework or a catalyst for widening the agenda for collective bargaining. However, legal principles can also be more effectively enforced when implemented through and monitored by collective bargaining. This applies for example to the equity effects of minimum wage policies that may be enhanced when combined with and

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embedded in collective regulation.<sup>8</sup> Likewise, countries with high collective bargaining coverage are likely to have more inclusive labour markets, measured along a range of dimensions including overall wage inequality.<sup>9</sup>

However, even where collective bargaining coverage is high, wage setting institutions are not necessarily conducive to gender equity: there is evidence of continuing trade union reluctance to address skill differentials<sup>10</sup> and of the continuing influence of the male breadwinner family wage.<sup>11</sup> Collective regulation may also not be sufficient to resist state policies to reduce public sector wages that tend to widen the gender pay gap.<sup>12</sup> Furthermore, disadvantaged groups, whether these be marginalised women workers, migrants or domestic workers, remain underrepresented within social dialogue institutions.<sup>13</sup> Voluntary mechanisms, for example the implementation of codes of practice by companies, may make some contribution to gender pay equality.<sup>14</sup> Yet, without mechanisms for enforcement and scrutiny, their impact is likely to be partial, uneven and also short-lived, dependent upon the latest social issue to which companies feel under pressure to respond.

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<sup>8</sup> Damian Grimshaw (ed) *Minimum Wages, Pay Equity, and Comparative Industrial Relations* (Routledge, 2013), 247.

<sup>9</sup> Susan Hayter and Bradley Weinberg, 'Mind the Gap: Collective Bargaining and Wage Inequality' in Susan Hayter (ed) *The Role of Collective Bargaining in the Global Economy* (Edward Elgar, 2011); Gillian Whitehouse, 'Legislation and Labour Market Gender Inequality: An Analysis of OECD Countries' (1992) 6(1) *Work Employment & Society* 65; Blau and Kahn (n 2); Lars Calmfors and John Driffill, 'Bargaining Structure, Corporatism, and Macroeconomic Performance' (1988) 3(6) *Economic Policy* 13.

<sup>10</sup> Paula Koskinen-Sandberg, 'Non-Decision Making in the Reform of Equal Pay Policy: The Case of Finnish Gender Equality Legislation' (2016) 35(4) *Equality, Diversity and Inclusion: An International Journal* 280; Paula Koskinen-Sandberg, 'Job Evaluation, Performance-related Pay and Gender Pay Equity: Gendered Practices in Pay Systems, and their Implications for Equal Pay Policy' (2015) *Swedish School of Economics* (Hanken), Helsinki, Finland.

<sup>11</sup> Andrea Schäfer and Karin Gottschall, 'From Wage Regulation to Wage Gap: How Wage-Setting Institutions and Structures Shape the Gender Wage Gap Across Three Industries in Twenty Four European Countries and Germany' (2015) 39(2) *Cambridge Journal of Economics* 467.

<sup>12</sup> Jill Rubery, 'Public Sector Adjustment and the Threat to Gender Equality', in Daniel Vaughan-Whitehead (ed) *Public Sector Shock: The Impact of Policy Retrenchment in Europe* (ILO, 2013) 23-43.

<sup>13</sup> Linda Briskin and Angelika Muller, 'Promoting Gender Equality through Social Dialogue: Global Trends and Persistent Obstacles' (2011) ILO and Industrial and Employment Relations Department Working Paper No 34. <[http://www.ilo.org/ifpdial/information-resources/publications/WCMS\\_172636/lang-en/index.htm](http://www.ilo.org/ifpdial/information-resources/publications/WCMS_172636/lang-en/index.htm)> accessed 27 June 2018.

<sup>14</sup> S Barrientos and B Evers, 'Gendered Production Networks: Push and Pull on Corporate Responsibility?' in S. M. Rai and G. Waylen (eds) *New Frontiers in Feminist Political Economy* (Routledge, 2014).

### A. Legal Regulation

The institutional design and operation of legal mechanisms are highly relevant to the notions of gender equal, inclusive and transparent labour markets. Reflecting the complex nature of gender equality, legislation designed to deal with the gender pay gap has developed to be diverse and multi-layered. However, significant shortcomings still remain. In respect of inclusiveness, a large number of individuals are still excluded from legislation that has been shown to protect women's incomes. This is often due to the continuing emphasis of legal systems on the standard employment relationship to the exclusion of workers in the informal economy.<sup>15</sup> But problems exist also in terms of income equality. Minimum wage policies often fail to include mechanisms for updating the level of wages in line with prices. At the same time, other legal mechanisms tend not to prevent sector or company level minimum wage policies reproducing discrimination by setting minimum wages for female-dominated sectors/occupations lower than others.

In respect of gender equality *per se*, despite the recognition of the principle of equality, shortcomings in national legal mechanisms have limited progress in the eradication of the gender pay gap. This is broadly due to the continuing emphasis on a negative prohibition on discrimination rather than a positive duty to promote equality. More specific issues include the primary focus on equal pay for work of equal value for men and women<sup>16</sup> despite evidence of intersectional discrimination (e.g. for black women or women migrants). Equally importantly, the insistence that a female claimant must select a male comparator working for the same employer limits the effectiveness of equal pay legislation in organisations characterised by flexible relations of production and fragmented working patterns.<sup>17</sup>

Finally, in respect of transparent labour markets, the confidential nature of information regarding pay, especially in the private sector, means that a claimant has no way of knowing whether a colleague is paid more, reducing at the same time the scope for organisations to take appropriate action to eliminate gender bias from their policies and

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<sup>15</sup> Leah F. Vosko, *Confronting the Norm: Gender and International Regulation of Precarious Work* (Law Commission of Canada, 2004).

<sup>16</sup> Bob Hepple, Mary Coussey, and Tufyal Choudhury, *Equality: A New Framework, Report of the Independent Review of the Enforcement of UK Anti-Discrimination Legislation* (Hart, 2000); Sandra Fredman, 'The Right to Equal Pay for Work of Equal Value' (2013) Background Paper for the UN Working Group on Discrimination against Women in Law and Practice <<https://www.ohchr.org/EN/Issues/Women/WGWomen/Pages/ESL.aspx>> accessed 27 June 2018.

<sup>17</sup> David Cabrelli, *Employment Law in Context* (OUP, 2014) 521.

practices. Besides, the lack of ability of individual litigants to bring actions, in conjunction with structural problems in enforcement processes (such as the procedure and the costs of litigation), are affecting organisational compliance. At a broader level, equal pay legislation only addresses part of the problem, namely, pay for work of equal value. It thereby fails to address discrimination encountered by women in promotion, training and education that keep disadvantaged groups in lower paid jobs,<sup>18</sup> nor does it address the issue of unpaid care work.

### *B. Collective Bargaining and Social Dialogue*

Just as with legal regulation, the impact of collective regulation on gender and social equality depends on its form. Collective bargaining has both macro and micro level impacts on the gender pay gap. At the macro level, research suggests that social dialogue and collective bargaining are most likely to promote inclusive employment systems that are beneficial to gender equality where the bargaining is coordinated and conducted at a national or sectoral level.<sup>19</sup> This would have most effect where coverage is wide, especially where collectively bargained social benefits are an important part of social protection. Trade unions may also be active in campaigning for measures to raise low pay or extend employment standards or legal rights. At the more micro level, collective bargaining can reduce managerial discretion in pay practices. In regard to specific gender equality measures, collective bargaining can be a mechanism to promote more gender friendly policies whether via working time arrangements or gender-sensitive pay and grading systems. Trade union scrutiny of gender pay audits has also been found to increase their effectiveness,<sup>20</sup> and the credible likelihood of trade union action can also be an important spur to voluntary action by employers.

Collective bargaining is not always positive for gender equality, especially when coverage is limited or there is clear male breadwinner legacies defended through collective bargaining.<sup>21</sup> That said, the alternative, namely employers acting without constraint, is also not found to be beneficial for gender pay equity. Where collective regulation is

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<sup>18</sup> Fredman (n 16) 2.

<sup>19</sup> Blau and Kahn (n 2) 538; Calmfors and Driffill (n 9) 47.

<sup>20</sup> Marie-Thérèse Chicha, 'A Comparative Analysis of Promoting Pay Equity: Models and Impacts' (2006) ILO Working Paper No. 49 DECLARATION/WP/49/2006 <[http://www.ilo.org/wcmsp5/groups/public/@ed\\_norm/@declaration/documents/publication/wcms\\_decl\\_wp\\_27\\_en.pdf](http://www.ilo.org/wcmsp5/groups/public/@ed_norm/@declaration/documents/publication/wcms_decl_wp_27_en.pdf)> accessed 27 June 2018.

<sup>21</sup> Schäfer and Gottschall (n 11).

weak, rent sharing tends to favour men.<sup>22</sup> Trade unions have also taken a minimalist approach to gender equality bargaining even when legally mandated, limiting it primarily to work-life-balance policies<sup>23</sup> and trends tend to be towards more decentralised bargaining, less extensive coverage and more outsourcing of female-dominated jobs to take advantage of either no collective agreements or agreements setting low wages.

Collective organisation is thus a necessary and desirable mechanism for promoting gender equality but it is insufficient in its current form for structural and secular reasons: these include its traditional support of the male breadwinner and male-dominated skill categories,<sup>24</sup> its failure to organise disadvantaged groups and those in non-standard forms of employment (NSFE), its weak and often narrow approach to equality bargaining,<sup>25</sup> its secular weakness in many advanced countries and its limited development beyond narrow enclaves of protected employment in many developing countries.

### *C. Voluntary Action*

Voluntary actions can and do play a role in promoting gender pay equity, inclusive and transparent labour markets,<sup>26</sup> but these actions are most effective when they fill gaps in institutional frameworks left by traditional social partners. Voluntary codes of conduct have spread within global supply chains under pressure from consumer groups, trade unions and other NGOs. The codes differ greatly in their ambitions for employment rights and their governance structures, and compliance problems can occur when they conflict with other business priorities.<sup>27</sup> Voluntary actions that result in improving women's pay may be initiated by employers, but it is often hard to identify the underlying reasons which may include pressure on employers and/or their clients exerted by the

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<sup>22</sup> Brenda Gannon et al, 'Inter-Industry Wage Differentials and the Gender Wage Gap: Evidence from European Countries' (2007) 38 (1) *The Economic and Social Review* 135, 151. François Ryck and Ilan Tojerow, 'Rent Sharing and the Gender Wage Gap in Belgium' (2004) 25(3/4) *International Journal of Manpower* 279; Hipolito Simón, 'International Differences in Wage Inequality: A New Glance with European Matched Employer–Employee Data' (2010) 48 *British Journal of Industrial Relations* 310, 313.

<sup>23</sup> European Trade Union Confederation (ETUC), 'Bargaining for Equality' (2014) ETUC 32  
<[https://www.etuc.org/sites/default/files/publication/files/bargaining\\_equality\\_en.pdf](https://www.etuc.org/sites/default/files/publication/files/bargaining_equality_en.pdf)> accessed 27 June 2018.

<sup>24</sup> Sandra Fredman, 'Women at Work: The Broken Promise of Flexicurity' (2004) 33(4) *Industrial Law Journal* 299.

<sup>25</sup> European Trade Union Confederation (n 23)

<sup>26</sup> Barrientos and Evers (n 14).

<sup>27</sup> Richard Locke et al, 'Beyond Corporate Codes of Conduct: Work Organization and Labour Standards at Nike's Suppliers' (2007) 146(1-2) *International Labour Review* 21.

state, trade unions or employers' associations, community or consumer groups or other NGOs.

Research has found incentives to be more effective in inducing employer action than negative punishments,<sup>28</sup> but many employers initiatives lack ambition and are partial in their effects. Commitment is stronger where employers perceive a business need to recruit and retain women, but again this often applies only to specific groups of women.<sup>29</sup>

In developing countries, women in the informal sector or domestic work typically organise outside traditional institutional structures to pursue gender equality issues,<sup>30</sup> but this distinction may blur if the NGOs develop into effective trade unions for women in the informal sector. Furthermore, the impact of NGO action in promoting fair trade may be limited if consumers lack commitment to paying higher prices for commodities.

### ***3. Towards More Inclusive, Gender Equal and Transparent Labour Markets: The Need for More Complementary Policies?***

This review of the three main mechanisms for wage setting and promoting gender equality- legal, collective and voluntary- revealed that all are inadequate on their own but have the potential for complementarity and synergy. Legal regulation is essential to underpin fundamental rights to equality but on its own tends to provide only for a negative-complaint driven approach. However, legal rights can also underpin and extend collective regulation, while the threat of more extensive legal action may provide a spur for voluntary actions.

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<sup>28</sup> Eva Heckl, Christina Enichlmair and Ingrid Pecher, 'Study on Non-Legislative Initiatives for Companies to Promote Gender Equality at the Workplace—Contract VC/2008/0348' (2010) Austrian Institute for SME Research for the European Commission/DG Employment, Social Affairs and Equal Opportunities 13.

<sup>29</sup> Linda Dickens, 'Beyond the Business Case: A Three-Pronged Approach to Equality Action' (1999) 9(1) Human Resource Management Journal 9.

<sup>30</sup> UN Women, 'Progress of the World's Women 2015-16: Transforming Economies, Realizing Rights' (2015) <[http://progress.unwomen.org/en/2015/pdf/UNW\\_progressreport.pdf](http://progress.unwomen.org/en/2015/pdf/UNW_progressreport.pdf)> accessed 27 June 2018; ILO, 'Domestic Workers Across the World: Global and Regional Statistics and the Extent of Legal Protection' (2013) <[http://www.ilo.org/travail/Whatsnew/WCMS\\_173363/lang--en/index.htm](http://www.ilo.org/travail/Whatsnew/WCMS_173363/lang--en/index.htm)> accessed 27 June 2018; ILO, 'Domestic Workers Negotiate New Collective Agreements in Uruguay and Italy' (2013) <[http://www.ilo.org/travail/areasofwork/domestic-workers/WCMS\\_212212/lang--en/index.htm](http://www.ilo.org/travail/areasofwork/domestic-workers/WCMS_212212/lang--en/index.htm)> accessed 3 March 2018.

Collective bargaining may complement legal regulation, for example reinforcing the equity effects of legal minimum wages and reducing compression of women's wages towards the minimum wage. However, these benefits depend upon coverage which in turn often depends on legal mechanisms for extending collective regulation. In the European context, this could mean supporting, rather than undermining, the coordination capacity of multi-employer bargaining arrangements which play a crucial role in promoting inclusive labour markets.<sup>31</sup> In a wider context, it could mean supporting, through voluntary, collective and legal regulation, the establishment of decent work criteria throughout a supply chain.

Beyond policies to establish or maintain solidaristic pay and inclusive bargaining, there are specific gender issues that need addressing. These include, for example, the development of new social movements to organise the more marginalised,<sup>32</sup> many of whom are women, the extension of both bargaining and legal rights to address reconciliation of care commitments and work schedules, the development of policies to tackle the embedded undervaluation of women's work within collective agreements or the gender effects of performance-related pay systems,<sup>33</sup> and changes to social benefits to extend rights to those who are only intermittently in wage work or full-time in unpaid care work.<sup>34</sup> Again this policy agenda requires a mix of legal, collective and voluntary actions (to plug gaps in the first two mechanisms).

The contention that gender pay equality is more likely to be achieved in more inclusive and transparent labour markets also implies that there are strong interactions across policy domains and mechanisms; action on one front may not be successful if not supported by complementary policies and reinforcing mechanisms. When policies pull in competing directions, progress for gender equality in one direction may be offset by regress in another. Complementarity is needed, in particular between employment policies and support for social reproduction, as women cannot advance in employment without support for care and women outside employment need access to social protection and opportunities to

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<sup>31</sup> Aristeia Koukiadaki, Isabel Tavora and Miguel Martinez-Lucio, 'Joint Regulation and Labour Market Policy in Europe during the Crisis: A Seven-Country Comparison', in Aristeia Koukiadaki, Isabel Tavora and Miguel Martinez-Lucio (eds) *Joint Regulation and Labour Market Policy in Europe During the Crisis* (European Trade Union Institute, 2016) 125.

<sup>32</sup> Ruth Milkman (ed) *Organizing Immigrants: the Challenge for Unions in Contemporary California* (Cornell University Press, 2006).

<sup>33</sup> Jill Rubery, 'Performance Related Pay and the Prospects for Gender Pay Equity' (1995) 32 *Journal of Management Studies* 637.

<sup>34</sup> Alain Supiot (ed) *Beyond Employment: Changes in Work and the Future of Labour Law in Europe* (OUP, 2001); Leah F. Vosko, *Managing the Margins Gender, Citizenship, and the International Regulation of Precarious Employment* (OUP, 2010).

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re-enter employment. Furthermore, trade-offs between policies may have particular consequences for sub-groups of women, for example for different social classes.<sup>35</sup> These require attention if narrowing the aggregate gap between men and women is not to be at the expense of the more disadvantaged. In promoting inclusive labour markets, intersectional effects within each gender need to be considered, not only changes in aggregate or average indices. What policy takes priority will also depend on the dominant form of gender pay inequality in a particular institutional environment. That said, in most countries, the largest gender equality gains will come from actions to support the more disadvantaged by raising minimum wages or reducing exclusions from formal employment. Finally because achieving gender pay equity is like hitting a constantly moving target, which puts even the current level of gender pay equity at risk, policies are needed to defend existing gains as well as to secure new advances.

These varying considerations have informed the development of a four-pronged approach to developing policy to promote gender pay equity in the context of inclusive and transparent labour markets. The four prongs involve extending coverage and establishing high minimum standards, the two anchors to inclusive labour markets. These need to be built on by policies to promote fair pay throughout the hierarchy by removing embedded discrimination, preventing new forms of discrimination and promoting a renewed interest in fair pay, including by enforcing transparency. Finally, there is the all important need for a positive, proactive and holistic approach to policy implementation.

Table One takes these four policy prongs and identifies firstly examples of policy proposals that could promote both gender and social equality. To extend coverage, this could involve extending collective and legal regulation of wages and developing more universal, non-employment contingent social protection. With respect to raising standards, this could involve establishing high minimum wages sufficient to provide for adult subsistence. With respect to promoting non discrimination and fairness, these could entail new initiatives to value women's skills within a wider framework of rights to fair and proportional pay for all. Under positive implementation measures, new approaches such as a holistic gender duty are put forward, which could also be extended to other 'duties' to promote fair and proportional pay. Table One outlines how these selected exemplar policies could contribute to both gender equality and inclusive labour markets by meeting the criteria

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<sup>35</sup> Becky Pettit and Jennifer L. Hook, *Institutionalizing Inequality: Gender, Family, and Economic Inequality in Comparative Perspective* (Russell Sage, 2009) 167; Mandel and Shalev (n 3) 170.

of reducing overall wage inequality, developing a stronger political will to address gender equality and promoting transparency.

*Table One: Closing the Gender Pay Gap—Key policy Implications*

	Coverage	Standards	Non-Discrimination	Positive Implementation
Proposed Policies	<p>a) Legal extension of minimum wages and collective agreements to cover all sectors and contract types</p> <p>b) Universal social protection and minimum benefits-social wage rather than employer-provided benefits</p>	Minimum wages should be set at living wage levels	Introduction of a general right to pay proportional to value within firms, enforced through transparency requirements and equality audits	Establishment of a positive duty of equality – for gender and other dimensions
Gender Equality	<p>a) Extension of standards to areas of women’s employment currently excluded</p> <p>b) Social protection for those in NSFE and unpaid labour benefits primarily women</p>	Removal of the notion of women only needing a component wage from minimum wage standards – legal and collective	Reduction of undervaluation of women’s work through gender sensitive skill evaluations. Extension of right to pay proportional to value	Holistic proactive approach needed in contrast to complaint-driven legal approach; action across a range of fronts including pay systems, working time, recruitment and progression etc.

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Inclusive Labour Markets	<p>a) Wider coverage of at risk groups such as migrants reduces wage inequality at the lower end and increases transparency on basic entitlements</p> <p>b) Social protection for NSFE and unpaid labour also protects other at-risk groups</p>	<p>High minimum wage standards reduce wage inequality and increase transparency of basic entitlements</p>	<p>Extended right to pay proportional to value within firms to all workers can limit pay inequality at top end, widen support for equal value/increase transparency</p>	<p>Holistic approach can be followed with respect to other sources of inequality-by group or form of employment- and can widen support for equality policies if duty is extended to other groups</p>
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### ***4. Policy Proposals***

#### *A. Extending Coverage of Employment and Social Protection*

##### (i) The Extension of Collective Agreements and Employment Standards: New Ways of Reaching the Hard to Reach Areas

New policy initiatives are needed to extend equality and other relevant legislation, including minimum wage legislation, to cover disadvantaged groups currently excluded from scope.<sup>36</sup> Protection needs expanding to cover, for example, migrant workers, workers in agriculture, family undertakings, or domestic service, the bogus self-employed persons and workers in the informal economy.

Coverage is not only important for legal rights but also for collective regulation. At present, multi-level collective bargaining is no longer seen as a mechanism for facilitating inclusive growth but instead is relegated to a means of adjusting labour costs within the narrow sphere of the company. Labour market reforms in Anglo-Saxon economies in the 1980s and 1990s and the pursuit of ‘regulated austerity’ during the recent

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<sup>36</sup> On low minimum wages for domestic workers, see Martin Oelz and Umar Rani, ‘Domestic Work, Wages, and Gender Equality: Lessons From Developing Countries’ (2015) ILO Working Paper No 7. < [http://www.ilo.org/global/publications/working-papers/WCMS\\_430902/lang-en/index.htm](http://www.ilo.org/global/publications/working-papers/WCMS_430902/lang-en/index.htm)> accessed 27 June 2018.

economic crisis<sup>37</sup> have resulted in an extensive dilution of both the representative and, most importantly, the regulatory functions of trade unions, with the regulatory function being consciously displaced by the state.<sup>38</sup> But there is increasing evidence suggesting that bargaining coverage is crucial for inclusive and sustainable growth. Table Two provides estimates of how sectoral bargaining results in much higher coverage in general and of non-union workers in particular than company bargaining: bargaining coverage seldom exceeds 25 per cent of workers in countries characterised by company-level bargaining.<sup>39</sup> Table Two also shows how legal extension of collective agreements to non-signatory employers also results in a much higher share of non-unionised workers (note the no extension countries are dominated by Scandinavian countries who have a much higher share of unionised workers in general due in part to trade union membership being linked to unemployment insurance). Even reports by the OECD<sup>40</sup> and the IMF<sup>41</sup> expect reducing legal extension of collective wage agreements to widen the wage distribution and increase market inequality. Collective regulation (collective bargaining) should be supported as a public good with inclusive regulatory coverage of industrial/occupational workforces.<sup>42</sup> Support for collective bargaining and the imposition of minimum wages at sectoral level through the operation of extension mechanisms would complement a pay equity strategy and would discourage firm-level bargaining that leads to wider inequalities.

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<sup>37</sup> Simon Deakin and Aristeia Koukiadaki, 'The Sovereign Debt Crisis and the Evolution of Labour Law in Europe' in Nicola Countouris and Mark Freedland (eds) *Resocialising Europe in a Time of Crisis* (CUP, 2013)

<sup>38</sup> Keith Ewing, 'The Function of Trade Unions' (2005) 34(1) *Industrial Law Journal* 1, 15.

<sup>39</sup> Jelle Visser, Susan Hayter and Rosina Gammarano, 'Collective Bargaining Trends: Erosion, Stability or Decline?' (2015) Issue Brief No. 1 ILO Labour Relations and Collective Bargaining <[http://www.ilo.org/global/topics/collective-bargaining-labour-relations/publications/WCMS\\_409422/lang-en/index.htm](http://www.ilo.org/global/topics/collective-bargaining-labour-relations/publications/WCMS_409422/lang-en/index.htm)> accessed 27 June 2018.

<sup>40</sup> Organisation for Economic Cooperation and Development (OECD), 'All on Board: Making Inclusive Growth Happen' (2014) 73 <<https://www.oecd.org/inclusive-growth/all-on-board-making-inclusive-growth-happen.pdf>> accessed 27 June 2018.

<sup>41</sup> Era Dabla-Norris et al, 'Causes and Consequences of Income Inequality: A Global Perspective' (2015) *International Monetary Fund* 26 <<https://www.imf.org/external/pubs/ft/sdn/2015/sdn1513.pdf>> accessed 27 June 2018.

<sup>42</sup> Paul Marginson, 'The Changing Nature of Collective Employment Relations' (2014) Manchester International Relations Society 50th Anniversary Conference, 21 November <[https://www2.warwick.ac.uk/fac/soc/wbs/research/irru/publications/recentconf/pm\\_-\\_changing\\_collective\\_er\\_-\\_mirs.pdf](https://www2.warwick.ac.uk/fac/soc/wbs/research/irru/publications/recentconf/pm_-_changing_collective_er_-_mirs.pdf)> accessed 3 March 2018.

## Inclusive, Equal and Transparent Labour Markets

*Table Two: Coverage of Union and Non-Union Members by Level of Bargaining and Extension Regime in Europe 2000-2009*

Percentage of the Workforce					
	Company	Sector	No Extension	Conditional Extension	Automatic Extension
Union	20.3	35.8	73.1	35.6	28.4
Non-Union	7.1	41.2	15.6	31.4	52.2
Total	27.4	77.0	88.7	67.0	80.6

Source: Table 1, J Visser ‘Wage Bargaining Institutions—From Crisis to Crisis’ European Economy Economic Papers 4881

In a similar vein, extending the reach of collective regulation and more broadly labour standards across the supply chain would not only mean that labour costs are removed from being used as an element of competition among suppliers in the private sector or bidders for public contracts, but would also ensure that such processes would not exert a downward pressure on wages and working conditions. Incorporating social objectives into public or even private procurement, including compliance with collective agreements, promoting equal pay, could protect against the use of outsourcing to reduce pay.<sup>43</sup>

### (ii) Establishment of More Universal Social Protection Rights

Gender gaps in income over the life course relate not only to wages but also to support outside of wage work. Entitlements to support when unemployed, sick or on maternity leave or retired are often linked to employment status. To provide for gender equality in income and for women’s economic independence, it is important to delink as far as possible access to at least minimum social protection from employment status and to provide a significant social wage. At least minimum social protection and social services need to be available to all women, whether

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<sup>43</sup> Virginia Doellgast and Elisa Pannini, ‘The Impact of Outsourcing on Job Quality for Call Centre workers in the Telecommunications and Call Centre Subcontractor Industries in Drahokoupil’ in Jan Drahokoupil (ed) *The Outsourcing Challenge: Organizing Workers across Fragmented Production Networks* (European Trade Union Institute, 2015) 137-156; Ioulia Bessa et al, ‘The National Minimum Wage: Earnings and Hours in the Domiciliary Care Sector’ (2013) Low Pay Commissions <<https://www.gov.uk/government/publications/national-minimum-wage-impact-on-the-domiciliary-care-sector>> accessed 10 April 2018.

or not in formal employment and this social wage needs to be funded through forms of progressive taxation (including taxation of employers' wage bill).<sup>44</sup> A complementary universal social wage policy<sup>45</sup> which partially at least socialises the costs of children reduces the level of the minimum wage necessary to meet minimum adult living wage costs. The need for a more universal approach has been recognised in the ILO's new social protection convention that no longer only covers those in employment.

There are various means by which social protection systems can do more to value women's work whether as unpaid care work or in intermittent employment or NSFE, where eligibility for social protection may not be achieved. One mechanism is to provide social rights to citizens independently of employment status: examples include healthcare in the UK, pensions in Denmark or basic incomes as proposed by Standing<sup>46</sup> and others. Other, less comprehensive, strategies for protecting those in unpaid care work or in NSFE with limited entitlements include: providing credits for care work or education;<sup>47</sup> reducing, revaluing or extending the period over which minimum contributions for eligibility are accumulated, thereby assisting access for those in low wage or NSFE; extending coverage to all forms of NSFE including self-employment which is often excluded; or providing a high minimum level of social benefits.<sup>48</sup> The significance of these policies depends upon the overall position of women in the labour market; for example, extending maternity rights to the self-employed has even greater importance in developing countries where more women are in the informal sector.<sup>49</sup>

With the growth of NSFE and the spread of women's employment, many European countries have taken one or more of the above steps.<sup>50</sup> However, there are many variations in the treatment of, for example, the self-employed or minimum contributions for eligibility. Spain, for example, has loosened considerably the employment criteria for access to paid maternity leave for those under age 26 in recognition of the instability of the youth labour market while the UK has one of the lowest

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<sup>44</sup> Juliana Martínez Franzoni and Diego Sánchez-Ancochea, 'Can Latin American Production Regimes Complement Universalistic Welfare Regimes?: Implications from the Costa Rican Case' (2013) 48(2) *Latin American Research Review* 148.

<sup>45</sup> Pearson (n 6) 19-42.

<sup>46</sup> Guy Standing, *The Precariat: The New Dangerous Class* (Bloomsbury Academic, 2011) 176.

<sup>47</sup> Supiot (n 34) 24.

<sup>48</sup> Jill Rubery et al, 'Challenges and Contradictions in the 'Normalising' of Precarious Work' (2018) 32 (3) *Work, Employment and Society* 509.

<sup>49</sup> Blofield and Martínez Franzoni (n 3).

<sup>50</sup> Rubery et al (n 48).

paid maternity leaves but strict entitlements to access. Slovenia requires employers to pay full-time insurance contributions for those on mandated reduced hours working due to care of young children, and France has reduced minimum contributions per quarter year from the equivalent of 200 hours at minimum wage employment to 150. In contrast, Germany has so far failed to provide minimum benefits in pensions or unemployment benefits or to require the self-employed to be covered by pensions.<sup>51</sup>

In line with the objective of economic independence for women, it is vital that social protection rights should be individualised and not dependent on household means-testing. However, individualisation without compensation and rewards for unpaid care work would have regressive impacts on women, so that full individualisation may not be appropriate before progress is made in equality in the wage labour market and in social protection systems.

*B. Employment Standards: From Minimum to Living Wages as an Instrument of Gender Equality*

The case for promoting gender pay equity is founded to a large degree on the problem that not only is it distributionally unfair but it also normally results in women not being able to function as independent adults. Gender pay equity is thus not only about levelling pay up to men's but about eradicating the male breadwinner regime's legacy that sets women's wages below an adult's living wage and thereby reduces women's capacity to form families.<sup>52</sup> Traditionally, the notion of wages as providing for living costs rather than linked to the productivity of the individual or the job, has provided a rationale for the male breadwinner wage.<sup>53</sup> However, with wider acceptance of women's rights to economic independence, there has been a new movement to ensure minimum wages are compatible with adult minimum income needs for women as well as men. Women's right to be economically independent has been recognised in the policy programmes of the EU and could be the basis of further new international initiatives in this area. The ILO Constitution acknowledges the need for 'the provision of an adequate living wage' as one of the conditions for 'universal and lasting peace... based on social

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<sup>51</sup> *ibid.*

<sup>52</sup> Ann Orloff, 'Gender and the Social Rights of Citizenship: The Comparative Analysis of Gender Relations and Welfare States' (1993) 58(3) *American Sociological Review* 303.

<sup>53</sup> Deborah M. Figart, Ellen Mutari and Marilyn Power, *Living Wages, Equal Wages: Gender and Labour Market Policies in the United States* (Routledge, 2002) 107.

justice'.<sup>54</sup> However, the ILO's 1970 Convention No 131 on Minimum Wage Fixing refrains from providing substantial guidance as to what an adequate minimum wage level should be and associated recommendations to make levels appropriate to guarantee adequate living standards are often non-specific.<sup>55</sup> The ILO could combine this, so far mainly symbolic, commitment to an adequate living wage with a commitment to gender pay equity that embraces the principle that women should have the right to function as economically independent adults. One possibility is thus to push for a new convention on minimum wages as proposed by Brosnan 'requiring that *all* workers be entitled to a minimum wage and that it is backed up by some level of enforcement...a convention could require countries to have minimum wages set at a specific level, which increases over time to allow the governments and employers in low-income countries to make the necessary adjustments'.<sup>56</sup>

One issue in setting a living wage is whether individuals and households are primarily dependent upon wages for all their needs or whether there is a significant social wage covering major costs associated with raising children, care for children or the elderly, health insurance and pensions. A complementary social wage that is not necessarily tied to employment status could ease the task of raising the level of minimum wages to a living wage. Although the social wage provision has to be funded by taxation, the burden can be shared more progressively and not loaded on low wage employees or employers of lower wage labour. Campaigns for a living minimum wage have the capacity to mobilise wide public support as it is an understandable and recognisably fair principle.<sup>57</sup> Women, however, are the main beneficiaries so that support

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<sup>54</sup> See also Article 7 of The International Covenant on Economic, Social and Cultural Rights ((adopted 16 December 1966, entry into force 3 January 1976) 993 UNTS 3) on just and favourable working conditions, which requires that remuneration ensures fair wages and a 'decent living' for workers and their families; Article 10 on the protection of the family and Article 11 on the right to an adequate standard of living. In monitoring states, the Committee on Economic, Social and Cultural Rights has stressed that the minimum wage should apply universally, irrespective of industry or geographic area (see Ben Saul, David Kinley, and Jaqueline Mowbray, *The International Covenant on Economic, Social and Cultural Rights* (OUP, 2014).

<sup>55</sup> Peter Brosnan, 'The Minimum Wage in a Global Context' in Jonathan Michie (ed) *The Handbook of Globalisation* (2<sup>nd</sup> ed, Edward Elgar, 2011) 223. While ILO Convention No. 26 has been ratified by 105 countries, which is one of the highest rates of ratification, ILO Convention No. 131 has so far been ratified only by 52 countries. See also ILO Recommendation No. 135 on Minimum Wage Fixing; Convention No. 95 on the Protection of Wages and Convention No. 173 on the Protection of Workers' Claims (Employer's Insolvency).

<sup>56</sup> *ibid* 227 (emphasis in original).

<sup>57</sup> Stephanie Luce, 'Living wages, Minimum Wages and Low-Wage Workers' in Stephanie Luce et al (eds) *What Works for Workers? Public Policies and Innovative Strategies for Low-Wage Workers* (Russell Sage Foundation, 2014) 215-44.

may depend on acceptance of women's rights to be independent adults. Many of the campaigns have involved wider community groups and NGOs as well as trade unions and have led to optimistic accounts of the potential for new social movements. Although new momentum around fair pay issues is welcome, it is mainly found in countries such as the US and the UK where collective and legal regulation is weak and has involved voluntary or locally-related provisions. And, as Luce stresses in relation to the US living wage campaigns, raising the legal federal minimum wage would have covered more people.<sup>58</sup> Thus, what is needed is for living wage campaigns to become embedded in universal and legally enforceable standards.

Setting a minimum living wage level provides an equitable platform on which to build differentials by skill and contribution. There is, however, a danger of compression around the high minimum wage particularly in sectors which traditionally have had low average wage levels. This problem can be seen both in a deregulated labour market such as the UK, where the minimum wage has changed from a residual floor to a going wage rate, and in more regulated countries such as France, where the institutionalised high minimum wage has often exceeded minimum wages set in collective agreements. In France, this hinders pay progression in sectors with a tradition of average low pay as several skill grades may fall below the national minimum wage, something that has affected public as well as private sectors. This reflects weak collective bargaining and a lack of commitment to upgrading the pay scale in low paying and often female-dominated sectors. The outcome is that some legacy of the male breadwinner model still survives in the low relative pay for skill in these sectors. This suggests the need to combine campaigns for a living minimum wage to set the baseline across the labour market with new ways to improve the setting of pay differentials, as we turn to next.

*C. Generalising Rights to Fair Treatment and Equal Pay for Work of Equal Value—To Combine Progressive Social and Gender Equality Measures*

General rights to fair pay, including equal pay for work of equal value, could provide vehicles for joint mobilisation of social equality and gender equality agendas. There is a strong case even in relation to gender equality, for widening the currently narrow rights linked to equal pay for work of equal value by gender. The main factors include: (i) the problem of finding male comparators; (ii) the fact that the right to equal pay only

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<sup>58</sup> *ibid.*

applies when work is directly of equal value and there is no right to pay proportional to value; and (iii) the confinement of comparison of conditions to within one employer, even in a context of networked and fragmented production systems. These deficiencies in current equal pay legal regimes have been recognised in some countries and are also beginning to rise up the EU's agenda.

Thus, in Australia the concept of undervaluation emerged under several states jurisdictions and is not dependent on either direct proof of discrimination or strict male-female comparators. The national system, the Fair Work Act (s. 300), also imposes no requirement for valid male comparators or for discrimination to be established as a basis of equal remuneration claims and rulings.<sup>59</sup> Instead, a case for undervaluation may be made via a detailed award history showing how earlier decisions devalued (or failed to properly value) the work<sup>60</sup> or on the basis of feminisation indicators, including occupational gender segregation and low unionisation<sup>61</sup> Ontario's Pay Equity Act included the proportionality idea for implementing equal value, so that the fairness of pay in women's occupations can be determined, even if male comparators are not present, with action plans used to remedy deficiencies devoting at least one per cent of the wage bill to this exercise per year. Ontario's Pay Equity Act also allows for proxy comparisons but only in the publicly-funded broader public sector to jobs assessed under either job-to-job or proportional value comparisons.<sup>62</sup> In Europe, the European Committee of Social Rights has emphasised its expectation that states ratifying the European Charter on Social Rights should permit comparison of wages beyond the given enterprise, particularly where the workforce is largely,

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<sup>59</sup> Joshua Healy and Michael P. Kidd, 'Gender-based Undervaluation and the Equal Remuneration Powers of Fair Work Australia' (2013) 55(5) *Journal of Industrial Relations* 760.

<sup>60</sup> Witness statement of Dr Meg Smith, Australian Municipal, Administrative, Clerical and Services Union and Others Exhibit ASU 2, Equal Remuneration Case (2011) Fair Work, Melbourne, Australia, 20-1. <[www.fwa.gov.au/sites/remuneration/submissions/ASU\\_Submission\\_W3.pdf](http://www.fwa.gov.au/sites/remuneration/submissions/ASU_Submission_W3.pdf)> accessed 10 April 2018; Gillian Whitehouse and Tricia Rooney, 'Approaches to Gender-based Undervaluation in Australian Industrial Tribunals: Lessons from Recent Childcare Cases' in Marian Baird, Keith Hancock, and Joe Isaac (eds) *Work and Employment Relations: An Era of Change* (Federation Press, 2011) 113.

<sup>61</sup> Siobhan Austen, Therese Jefferson and Alison Preston, 'Contrasting Economic Analyses of Equal Remuneration: The Social and Community Services (SACS) Case' (2013) 55 *Journal of Industrial Relations* 60, 62.

<sup>62</sup> In 1996, the government repealed the proxy comparison method with the passing of Bill 26, Savings and Restructuring Act, Schedule J. However, a legal challenge (*SEIU Local 204 v Attorney General* [1997] OJ No. 3563) was brought against this legislation, and the Ontario Supreme Court decided that repealing the proxy method violated The Charter of Rights and Freedoms. The court declared that Schedule J had no force or effect, reinstating the proxy method in the Pay Equity Act as though it had never been repealed.

or even exclusively, female; to do otherwise would amount to a restrictive application of the principle of equal pay.

Another increasingly frequent measure to extend the scrutiny of pay structures and practices for gender equality is the use of gender pay audits. The adoption of these audits has been motivated by a recognised need to both increase transparency by providing a database on which to promote equality and by the lack of success under the traditional complaint-driven legal approaches in reducing the gender pay gap. According to the Workplace Gender Equality Agency (Australia), the pay gap is almost non-existent when pay is set transparently compared to 20.6 per cent when pay information is withheld.<sup>63</sup> While these initiatives are welcome, to some degree they move in the opposite direction to making comparisons outside the enterprise and instead focus on internal patterns of pay discrimination which is unlikely to help raise pay in female-dominated segments. Another problem is that there are major differences among countries in the scrutiny and follow-up plans envisaged consequent on gender pay audits:<sup>64</sup> where trade unions are involved in scrutiny and follow-ups (for example Sweden and Quebec and more recently Denmark, Austria and Germany) the prospects of action to reduce gender pay equality are greater than when the scrutiny mechanisms are weak or there are no requirements for follow up (for example in Australia and the UK), or austerity measures are reducing the scope for new collective initiatives (Spain).<sup>65</sup>

To further develop these dual mechanisms of comparison across enterprises and sectors and to promote greater transparency with respect to pay dispersion within companies, it may be beneficial to consider generalising rights to fair pay and to equal pay for work of equal value to all employees. The benefits depend on the following considerations. Firstly, although the principle of equal pay for work of equal value has intuitive appeal, support may dissipate when it is realised that this is not a general right but only applies to a strict male-female comparator in most countries. It may be a wasted opportunity not to build on that intuitive appeal to develop a wider momentum in favour of fair and proportionate pay for all. Indeed, pay audits are only likely to be

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<sup>63</sup> Michelle Brown, 'To Close the Gender Pay Gap We Need to End Pay Secrecy' (*The Conversation*, 16 September 2014) <<http://theconversation.com/to-close-the-gender-pay-gap-we-need-to-end-pay-secrecy-31626>> accessed 3 March 2018.

<sup>64</sup> Chicha (n 20).

<sup>65</sup> Jill Rubery and Aristeia Koukiadaki, 'Closing the Gender Pay Gap: A Review of the Issues, Policy Mechanisms and International Evidence' (2016) Gender, Equality and Diversity Branch, ILO <[http://www.ilo.org/gender/Informationresources/Publications/WCMS\\_540889/lang-en/index.htm](http://www.ilo.org/gender/Informationresources/Publications/WCMS_540889/lang-en/index.htm)> accessed 27 June 2018.

supported long term if there are actions to remedy anomalies and unfairness regardless of the gender of the person to whom it applies. Secondly, the requirement on firms to provide more transparent information on their gender pay outcomes could be used to encourage them to adopt more transparent, consistent and equitable pay setting principles and practices in general. Thirdly, many countries are also passing or have passed wider non-discrimination legislation. Implementation of that legislation with respect to pay would be facilitated by a general right rather than a series of specific initiatives. This last point, however, brings us to a concern that a general right might lead to gender inequalities being ignored.<sup>66</sup> Gender inequalities play a particular role in shaping pay inequities for it is gender segregation that facilitates the embedding of inequalities in the organisation, status and pay of occupations, firms and sectors. This may increasingly apply to some other groups – for example, if some occupations become associated with migrant labour – but in most societies, gender has the widest reach in shaping pay differentials. Indeed other disadvantaged groups may frequently be employed in female-dominated segments. This means that there is a need for continuing gender specific action on equal pay, alongside the development of wider rights for fair pay and for pay proportional to value.

#### *D. Positive Implementation: A Gender Duty as a New Way of Combining Legal, Collective and Voluntary Measures*

Reforms in the areas analysed in the previous sections should take place within a broader framework that supports a holistic, proactive approach towards gender equality. Such an approach would establish a basis for action across a range of fronts, including pay systems, working time, recruitment and progression. In contrast to the conventional complaint-driven legal approach, the imposition of a gender duty, consistent with treating closing the gender pay gap as a human rights priority, would constitute the main mechanism here for dealing with the gender pay gap in a holistic way. Such an approach could be adopted not only with respect of gender equality but also regarding other sources of inequality – by group or form of employment, promoting social equality more broadly. In mobilising all general policies and measures specifically for achieving equality by actively and openly taking into account at the

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<sup>66</sup> Fredman (n 17) 10.

planning stage their effects on women and men, a ‘transformative’<sup>67</sup> form of equality would be hence achieved.

A positive duty to equality is distinguished by a number of characteristics. The first is the requirement to take into account the impact by gender across all an organisation’s activities.<sup>68</sup> As the European Commission stated in 2008, positive duties ‘means mobilising all general policies and measures specifically for achieving equality by actively and openly taking into account at the planning stage their effects on women and men and by assuming that a transformation of institutions and/ or organisations may be necessary.’<sup>69</sup> In this respect, a positive duty to equality has the capacity to become a core part of the way in which an organisation operates and conducts its business. Thus rather than equality being considered the responsibility solely of human resource managers, a positive duty to equality calls for a rounded and progressive approach, which questions the way organisations traditionally operate and offers a route for equal pay to be seen as a mainstream issue that is promoted throughout the organisation.

The second characteristic is the focus of the duties. Rather than deriving from an individual right of a victim or group of victims against specified perpetrators, ‘proactive models place responsibility on bodies which are in a position to bring about change, whether or not they have actually caused the problem’;<sup>70</sup> the initiative hence lies with policy-makers and implementers, service providers or employers.<sup>71</sup> In the gender context, the existence of a duty may also serve to compel organisations to adopt gender equality initiatives, even where the perception exists that gender inequality is no longer a ‘real problem’.<sup>72</sup> The promotion of such proactive equality duties can also remedy the problems of the existing individual litigation-driven model that has been based on symmetrical treatment.<sup>73</sup>

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<sup>67</sup> Bob Hepple, ‘The Key to Greater Gender Equality’ (2014) 12 Equal Rights Review 59, 61.

<sup>68</sup> Hepple, Coussey and Choudhury (n 16) 59.

<sup>69</sup> European Commission, ‘Manual for Gender mainstreaming’ (2008) <<http://eiga.europa.eu/gender-mainstreaming/resources/international/manual-gender-mainstreaming-employment-social-inclusion-and-social-protection-policies-0>> accessed 31 August 2018.

<sup>70</sup> Sandra Fredman, ‘Equality as a Proactive Duty’ in Nicola Countouris and Mark Freedland (eds) *Resocialising Europe in a Time of Crisis* (CUP, 2013) 139.

<sup>71</sup> Sandra Fredman, *Discrimination Law* (2<sup>nd</sup> ed, OUP, 2011) 299.

<sup>72</sup> Deborah L. Rhode, *Justice and Gender* (HUP, 1991) 128.

<sup>73</sup> Colm McLaughlin and Simon Deakin, ‘Equality Law and the Limits of the ‘Business Case’ for Addressing Gender Inequalities’ in Jacqueline Scott, Shirley Dex and Anke C. Plagnol (eds) *Gendered Lives: Gender Inequalities in Production and Reproduction* (Edward Elgar, 2012) 153-73.

The third characteristic of a positive duty to equality is the range of actors involved in the process. A distinctive feature of such a model is the recognition of the need to incorporate ‘opportunities for those directly affected to participate, through information, consultation and engagement in the process of change’ as a basic principle of anti-discrimination law.<sup>74</sup> The promotion of a gender duty would imply action at different levels. At the international level, the ILO should ‘examine how the equality conventions could better support transformative equality’.<sup>75</sup> Consideration should also be provided to the inclusion of the principle of equal pay in international trade agreements and the existing equality promoting reporting and planning mechanisms that are required at the international and regional levels.<sup>76</sup> At the national level, a positive duty to equality would build on and strengthen the equal pay principles recognised in many legal systems.

## 5. Conclusions

The starting point for the analysis was the need to consider how to develop and promote an environment conducive to gender pay equity. Given the changing environment that has made closing the gender pay gap a case of constantly moving goalposts,<sup>77</sup> the focus of the article was on institutional arrangements and policies rather than on the behaviour and trajectories of individual women. In doing this, we examined not only gender specific measures but also how to combine these with more general policy measures to create a more conducive environment for gender equality. This is because not only are gender specific policy measures more likely to be effective in a supportive environment, but there may also be contexts in which general policy measures may even substitute for gender specific policies – though the need for vigilance against gender discrimination is always needed.

The key contention of this article is that gender pay equity needs to be pursued through a policy package that promotes inclusive and transparent labour market alongside specific measures to address gender pay equity. Initiatives to improve the pay of women within specific companies may have limited effects, even for the groups concerned, if

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<sup>74</sup> Hepple, Cousseay and Choudhury (n 16) 2.19.

<sup>75</sup> Hepple (n 67) 61.

<sup>76</sup> Mary Cornish and Fay Faraday, ‘Litigating Pay and Employment Equity: Strategic Uses and Limits: The Canadian Experience’ (International Pay and Employment Equity for Women Conference, Wellington, New Zealand, June 2004).

<sup>77</sup> Rubery and Grimshaw (n 1).

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companies are able to outsource work to lower paying firms or if gender equity is achieved within the workplace through downgrading the pay of men as collective regulation is weakened or abolished. The recent successes in promoting rights for domestic workers involving the ILO, national and local actors indicate that progress can be made towards a more inclusive and less gender-biased employment system. Strengthening and extending employment standards, through higher minimum wages, providing more equal rights for workers in NSFE and promoting more extensive and inclusive collective bargaining, need to be combined with effective and new gender-specific measures. These measures need to extend the scope for addressing the undervaluation of women's work beyond cases based on within company comparisons with men, and build on the essential individual legal rights to equal treatment by extending duties on employers to promote gender equality in an active manner. To bring these two elements together and widen support and understanding of gender pay equity policies, consideration should be given to generalising a right to fair pay and equal pay for work of equal value within an employing organisation, to increase awareness and understanding, though this should not be allowed to detract from efforts to remedy the undervaluation of women's work. These should be complemented by legal and institutional support for a transparent environment, as this would contribute not only to the measurement and monitoring of progress in pay equity but would also shed light on the causes of continuing wage inequalities.

The contention that gender pay equality is more likely to be achieved in more inclusive labour markets and societies also implies that there are strong interactions across policy domains and mechanisms; action on one front may not be successful if it is not supported by complementary policies and reinforcing mechanisms. This applies to the entire range of policy mechanisms examined in this article, namely legal, collective or voluntary. Despite the complementarities between these different mechanisms, the existence of limitations finally suggests that there is also a need for new initiatives and new thinking, which could provide the basis for a renewed push for gender pay equity. Treating closing the gender pay gap as a human rights priority<sup>78</sup> would be a significant step towards ensuring progress in gender equality. In this respect, institutional mechanisms should address 'the complex task of regulating both individuals *and* institutions'.<sup>79</sup> The adoption and support of positive

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<sup>78</sup> Hepple (n 67) 59.

<sup>79</sup> Colleen Sheppard, 'Mapping Anti-discrimination Law onto Inequality at Work: Expanding the Meaning of Equality in International Labour Law' (2012) 151(1-2) *International Labour Review* 1,8 (emphasis in original).

equality duties at both international (eg. the ILO) and national levels would build on and strengthen the operation of existing mechanisms, supporting ultimately the eradication of pay discrimination and ensuring the objective of genuine gender equality.