EQUALITY LAW AND THE LIMITS OF THE 'BUSINESS CASE' FOR ADDRESSING GENDER INEQUALITIES

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Abstract

The 'business case' for gender equality rests on the claim that organisations can improve their competitiveness through improved diversity management, in particular by reducing turnover and training costs and minimising reputational and litigation risks arising from potentially discriminatory behaviour. It is also argued that through the mechanism of socially responsible investment (SRI), shareholders can put pressure on the management of listed companies to take gender issues more seriously. We assess these claims through an empirical study which draws on interviews with institutional investors engaged in SRI and with managers in a range of organisations in both the private and public sector. We find that organisations are increasingly responding to the argument that persistent gender inequalities represent a form of mismanagement of human resources, with negative implications for the delivery of services, in the public sector, and for the efficiency of the firm, in the private sector. Shareholder engagement, however, has so far had very little impact in this area. We discuss regulatory reforms, including tighter rules on firm-level disclosure of gender policies and practices, which could address these issues.

Keywords: gender equality, diversity management, socially responsible investment, discrimination law.

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1. Introduction

How best to align the interests of society with corporate behaviour has been a contentious issue in the context of gender inequality throughout the 1990s and 2000s. In the UK context, the traditional, rights-based rationale for anti-discrimination law has had to compete with an officially sanctioned 'business case' for equality. The business case rests on the premise that addressing gender inequality is good for an organisation's competitiveness and performance. Gender equality policies and practices, it is argued, can help organisations attract and retain valued employees, understand diverse customer needs, reduce costs associated with staff turnover and low morale, and minimise the reputational and litigation risks of discriminatory behaviour. Organisations can present their progressive policies of this kind as part of a wider agenda to promote corporate social responsibility ('CSR').

As part of the CSR agenda, a number of corporate governance mechanisms have been suggested as means for advancing progressive employer practices. Pension funds and other institutional owners of shares in UK-listed companies have been encouraged to take a long-term view of their holdings and to engage more actively with investee companies (Myners, 2002). Part of this process is a growing emphasis on socially responsible investment ('SRI'), practices, according to which institutional investors not only may but, in some circumstances, must take into effect the social and environmental performance of their investee companies, alongside benchmarks based on more narrowly focused financial returns (Watchman, 2010). Changes to the law made by the Companies Act 2006 required boards of large companies to pay explicit regard to the interests of employees alongside those of other corporate constituencies when discharging their wider duty to promote the success of the company. This 'enlightened shareholder value' position gives boards leeway to adopt human resource management ('HRM') strategies which address issues of workplace equity, including gender inequalities, where they legitimately consider that to do so is in the long-term interests of the company's investors (Company Law Review, 2001; Armour et al., 2003).

Interest in the business case for gender equality has also intersected with changing attitudes towards legal regulation as a means of delivering policy goals. A discourse of 'better regulation' has grown up which associates 'hard law' with overly prescriptive and inflexible controls. 'Light touch' regulation and self-regulation, with organisations encouraged to go 'beyond compliance' in order to improve competitiveness, have been put forward as appropriate techniques for the implementation of a range of government policies, including those in the area of employment equality (DCLG, 2007).

In the 2000s these tendencies converged to produce a lively debate on the most effective means of tacking gender inequalities in the workplace. The Equal Pay

Taskforce (2001) recommended that employers should be legally required to carry out equal pay audits, clarifying the extent of the gender pay gap in their organisations, and to act on the results. The Kingsmill Report of the same year, on the other hand, recommended a more voluntarist approach, pointing to the 'business case' for equal pay and to the potential impact of corporate governance and CSR mechanisms, including shareholder activism, on employer behaviour (Kingsmill, 2001). By the end of the decade, the principle of legal compulsion had apparently prevailed with the introduction of a legal requirement for employers to report on the gender pay gap in the Equality Act 2010, but this part of the Act was not immediately brought into force and remains controversial.

In this chapter we examine the growing use of a business logic to address gender inequalities. We assess the effectiveness of the business case in practice by drawing on interviews with institutional investors involved in the practice of SRI and with managers in a range of organisations in both the private and public sector. We also make use of material from interviews with trade unions, policy makers and other relevant actors.

Section 2 below briefly reviews relevant legal and policy initiatives of the last ten years, culminating in the 2010 Equality Act. Section 3 presents some of the main critiques of the business case for addressing gender inequalities. Section 4 sets out the methods used in our empirical research. In sections 5 and 6 we present our empirical evidence on the impact of different regulatory approaches, looking in turn at the responses of investors and managers in the interviews we conducted. Section 7 concludes.

2. Legal and policy initiatives addressing the gender pay gap in the 2000s

Thirty-five years after the Equal Pay Act came into effect in the UK, there remains a significant gender pay gap. For full-time employees the difference between the median hourly pay of men and women was 10.2 per cent in 2010, while the gap for all employees was 19.8 percent. In the private sector, the gap was wider at 19.8 per cent and 27.5 per cent respectively (ONS 2010). In certain sectors, the pay gap is even more pronounced. A recent study of the finance sector commissioned by the Equalities and Human Rights Commission (Metcalf and Rolfe, 2009) revealed a pay gap of 40 per cent for full-time employees.

While there are a number of wider societal explanations for the pay gap, including occupational segregation and the unequal division of family responsibilities, it is generally accepted in policy circles that discriminatory practices by employers continue to play a role. Although pay discrimination may sometimes be intentional, it is more likely in practice to be systemic, and as such only identifiable through the evaluation of payment systems. Following the approach first adopted in Ontario under its 1987 Pay Equity Act (McColgan, 1997), the argument for mandatory equal pay audits has been increasingly made

in the UK over the last decade. The argument was first put forward by the Equal Pay Taskforce (2001), which claimed that as most managers did not believe their pay systems were discriminatory, employers would only conduct an equal pay audit if it were made compulsory.

Compulsion, however, was rejected by the government, and two months after the Equal Pay Taskforce released its report it commissioned Denise Kingsmill to undertake a further review into women's pay and employment. Kingsmill's terms of reference were limited to an examination of non-legislative proposals for addressing the pay gap (Kingsmill 2001). Given this, it is not surprising that her report should recommend a voluntarist approach in relation to equal pay audits. She based her arguments for voluntarism on an HRM perspective which stressed the link between good managerial practice and the attainment of organisations' strategic objectives. From this point of view, the persistent pay gap reflected human capital mismanagement by UK organisations. Even where equal pay audits did not uncover systemic discrimination, Kingsmill argued that they could be expected to reveal the clustering of women into lower roles within an organisation. Moreover, a deeper analysis of the data was likely to reveal a disparity between the abilities and talents of women employees and the positions they occupied within the firm. Pay audits, in addition, offered the opportunity for organisations to examine various barriers to the full utilisation of the talents and skills of their employees, such as promotional structures that disadvantaged those who took career breaks or rewarded those who worked long hours.

Kingsmill drew on the language of CSR in pointing to the Turnbull Report of 1999 and its requirement that company boards should report to shareholders on their assessment of, and response to, significant business risks. Kingsmill argued that the failure to effectively manage human capital exposed an organisation to the same level of risk as a failure to manage financial resources. Good human capital management would reduce the risks associated with equal pay and sex discrimination litigation, and the costs of staff turnover. It should also lead to an organisational composition that reflected the company's consumer base. In this vein, Kingsmill pointed to the increased interest of institutional and individual investors in how effective companies were at managing their non-financial resources, implying that 'reputational effects' and shareholder activism would help drive human capital management reform.

The issue of compulsory pay audits was revisited by both the Women in Work Commission (2006) and the Discrimination Law Review (DCLG, 2007). The Women in Work Commission was unable to arrive at a consensus on the issue and thus simply set out the arguments for and against making pay audits mandatory, while recommending various policy supports to raise awareness, promote best practice and build employer capacity to address equality issues. The Discrimination Law Review rejected mandatory pay audits on the grounds

that the potential costs would outweigh any benefits, and as such would 'contravene better regulation principles'. Instead, it recommended the promotion of best practice and the introduction of mechanisms that would increase the 'reputational benefits' for organisations that voluntarily carried them out (DCLG, 2007).

Following on from these various commissions and reviews, a number of public policy supports were implemented during the 2000s to encourage employers to conduct equal pay audits and address gender diversity more generally. The Equal Opportunities Commission ('EOC') published various toolkits and codes of practice on conducting equal pay audits and complying with equal pay legislation, and government departments began working with a number of networks of 'fair pay champions' such as Opportunity Now to promote best practice and reward exemplar employers. In 2003 legislation extended the right of individual workers bringing equal pay claims to obtain information on pay practices from their employer, using an equal pay questionnaire. Taken together, these various supports had significantly raised the profile of equal pay audits in the private sector by the mid-2000s (Neathey et al., 2005).

In the public sector, meanwhile, pay audits became *de facto* mandatory through the Civil Service Reward Principles, the National Joint Council pay agreement for local authorities, and the Agenda for Change programme in the NHS. Legislation which came into force in 2006 introduced the public sector gender equality duty, placing a duty on public bodies proactively to promote gender equality as part of a wider legal obligation to eliminate unlawful discrimination. During the same period, equal pay litigation in the public sector saw a significant increase, with a number of high-profile cases highlighting the potential liabilities for employers and unions found to have contravened the requirement of equal pay through discriminatory collective bargaining (Deakin and Morris, 2009: 629-30).

However, despite this range of public policy supports, and the various governance and business case-based arguments put forward for a voluntary approach, empirical evidence suggests that its influence on private sector organisations had been limited. The EOC commissioned a number of surveys between 2002 and 2005 examining the extent of equal pay audits among organisations. Eighty-two per cent of organisations in the 2005 survey reported that they had not conducted an equal pay review, did not have one in progress, and did not intend to conduct one (Adams et al., 2006). This evidence helped shift opinion in favour of legal compulsion once again, with the inclusion of a mandatory reporting requirement in the Equality Act 2010. Section 78 of the Act provided that with effect from 2013, organisations with more than 250 employees would be required to report on their gender pay gap on a regular basis (GEO, 2009). The 2010 Act was passed in the final days of the Labour government, and it was left to the new administration to decide when and how

far to bring it into force. In late 2010 the Coalition government announced that it would not be implementing section 78, although it stopped short of proposing its outright repeal, leaving open the possibility of its adoption at a later date (GEO, 2010). Meanwhile, the EHRC published new research indicating a continued low use of pay audits, with only a marginal improvement on take-up levels of the mid-2000s, and very low levels of internal or external disclosure of findings by those organisations conducting equal pay reviews (Adams, Gore and Shury, 2010).

3. The business case for addressing gender inequality

There is empirical evidence to suggest that addressing gender inequality can have positive effects on a firm's financial performance (see Herring, 2009). The reason for this, as Kirton and Greene (2000: 180) succinctly put it, is that 'inequality is inefficient'. The following more specific organisational benefits have been identified (cf. Monks, 2007; Hutchings and Thomas, 2005; Kirton and Greene, 2010):

- Increased competitive advantage through recruitment and retention for organisations which become 'employers of choice'.
- Improved morale and productivity through flexible work practices and perceptions of fairness.
- Improved human capital management and full utilisation of employee skills and experience
- Reductions in hiring and training costs associated with high turnover
- New insights into customer requirements and attracting new customers in organisations with a more diverse employee base.
- Increased creativity and innovation in organisations which prioritise workplace equity.
- Reduced litigation risk.
- Reputational effects, arising from reduced reputational risks associated with discrimination claims, and organisations' raised CSR profiles.

Critics of the business case do not deny that these potential benefits exist. Rather, they argue that the business case is ineffective in bringing about organisational change on a widespread scale. One of the most articulate critiques has come from Dickens (1994, 1999) who argues that the business case is 'inevitably contingent, variable, selective and partial' (Dickens, 1999: 9). She argues that the advantages of the business case are contingent on the competitive strategy of the firm. While some organisations may see attracting and retaining talented employees as an important part of the HR and wider

managerial strategies, addressing gender inequalities is likely to be less important for firms operating a cost-minimisation strategy. Indeed, it may be more cost effective for some organisations not to address gender inequalities where they benefit from discriminatory behaviour or the utilisation of women in roles that are under-valued by the market. Thus, while the business case can support progressive practices in some organisations, it can be seen as justifying regressive and discriminatory practices in others. It is also contingent on the economic climate, with recruitment and retention less of an issue for firms in times of recession.

The business case is also selective and partial in its impact *within* organisations: it can be invoked to bring more women into senior management while not addressing the needs of those lower down the organisational hierarchy. Thus many gender initiatives 'show a greater concern for the glass ceiling than the "sticky floor"' (Dickens, 1999: 10), with insufficient emphasis being placed on the interests of low-paid women, the issue of the over-representation of women in lower levels of the organisation, and power differentials (Colling and Dickens, 1998).

The business case approach also assumes that organisations can readily be convinced of the potential benefits. As Noon (2007) argues, it is based on the premise that managers just have to be educated, when in fact some may have already considered the arguments and decided that the business case benefits do not outweigh the costs involved. It also ignores the role of continuing, deeply-held prejudices on the part of some managers and employers. Thus 'it assumes irrationality where rationality might prevail, and assumes rationality where irrationality might prevail' (Noon, 2007: 770).

A further critique of the business case for gender equality is that it serves to dilute and depoliticise the rights-based goals of equality law. One of the principal functions of equality law has been to identify and remedy structures which systemically disadvantage certain social groups; the business case, by comparison, emphasises the role individuals can play in overcoming discrimination with a view to contributing to enhanced organisational performance (Hutchings and Thomas, 2005). Kirton and Greene examined this shift in focus by studying the effects of the displacement of equality officers by diversity management specialists with a generalist HRM background during the 2000s. They found that the greater legitimacy enjoyed by diversity managers meant that senior managers were more ready to give them public backing than they had been with equality officers, and that line managers were more prepared to take equality issues seriously. However, they also reported a 'considerable risk that if diversity practitioners over-identify with management and management interests, the changes they drive are more likely to serve

organisational objectives than improve working lives' (Kirton and Greene, 2009: 173).

Support for the business case, on the other hand, can be derived from a consideration of the limits of strategies based on legal enforcement. A major criticism of UK equality law has been that it is reactive rather than proactive. Litigation largely takes the form of individual claims. Following the judicial restriction, in the late 1970s, and then abolition, in the mid-1980s, of the powers of the Central Arbitration Committee to revise discriminatory payment structures, there have been few legal means available for tackling inequality at an organisational or sectoral level (Dickens, 1999). This was the context in which mandatory pay audits were advanced as a possible legal solution in the early 2000s (see section 2, above). The introduction of the gender equality duty in the mid-2000s, building on an earlier, similar duty in the context of race discrimination, marked a limited step forward, but its impact was confined to the public sector (Deakin and Morris, 2009: 604-5).

With some exceptions (see Epstein, 2002), the critique of UK equality law has mostly been concerned with particular shortcomings of the legal framework, rather than taking the form of criticism of the principle of legal intervention as such. Critics have argued that, rather than leaving it up to individuals to make a claim through a tribunal, the law should require employers to take positive steps to overcome discrimination inherent in organisational systems. Doing so would, it is suggested, change attitudes and behaviours and lessen the role of costly and confrontational litigation (Hepple *et al.*, 2000; O'Cinneide, 2003). This legal critique is consistent with aspects of the 'business case' in arguing that employer practice can be a vehicle for change, but it departs from it by stressing the need for external regulation to alter the incentive structure facing employers, and in particular to increase the litigation and reputational costs of not addressing persistent gender inequalities.

4. Research methods

We now turn to examine empirical evidence on the reaction of employers to the pressure to address gender inequality through organisational change during the 2000s. These pressures included corporate governance mechanisms, including investor pressure; government support for the 'business case' for change; legal pressures deriving from individual litigation and the gender equality duty; pressure from trade unions and employees; and the procurement process. Our results are based on 40 interviews conducted between late 2007 and early 2010.

At the organisational level, we carried out interviews with eight public sector organisations (six local authorities and two civil service departments), eight private-sector organisations (five listed companies and three professional partnerships), two universities, and two not-for-profit organisations (a housing

association and a charity). Here our interviewees were with a mix of HR managers and diversity champions, most of whom occupied senior positions in the relevant organisations. Our sample consisted mostly of organisations which had made a public commitment to greater gender equality, as it proved difficult to persuade other organisations to participate in the research. Forty-five private sector organisations were approached to take part in the study across a range of sectors. Initially, a large proportion of these were chosen for the reason they were *not* part of an employer gender network organisations such as Opportunity Now. However, all of these declined to participate. We therefore approached firms that were on public record as being committed to improving gender equity.

As Kirton and Greene (2010) also found, access to private sector organisations on gender equality issues is problematic because of concerns that public statements of commitment to gender equality might be seen to amount to window dressing, given that policies might not always be reflected in practice. Given increasing levels of equal pay litigation and the high profile of a number of controversial equal pay cases in recent years (see Deakin and Morris, 2009: 623-30), it is not surprising that employers appear to be hesitant to talk about gender inequalities and equal pay.

We also carried out interviews with five investment funds undertaking a range of approaches to SRI, and two trade unions engaging in SRI issues either through their own pension funds (that is, those providing pensions for their own employees) or on behalf of their members. In addition we interviewed a range of union officials at local, regional and national level and a number of national-level stakeholders in order to gauge views on the policy-making process.

5. Gender inequality, CSR and SRI: attitudes of investors

As we have seen (see section 2 above), the Kingsmill report (2001) placed considerable emphasis on the role of institutional mechanisms of corporate governance and corporate social responsibility in putting pressure on employers to address the question of gender inequality. Our interviews were aimed at elucidating, firstly, the importance of SRI-based strategies as a whole in the practice of asset managers and pension fund trustees, and, secondly, the extent to which investors were paying specific regard to gender equality and related issues of workplace equity.

There is evidence that CSR has become increasingly an important issue for large companies and in particular for those with a stock exchange listing. A KPMG (2008) survey showed that 80 per cent of Global Fortune 250 companies and over 90 per cent of the UK's largest 100 corporations reported CSR-related

information. Increasingly, responsibility for CSR lies with a board member. Additionally, firms are employing CSR managers, joining CSR membership associations, such as Business in the Community, and participating in CSR performance indices such as FTSE4Good (Grosser and Moon 2008).

On the investor side, shareholder engagement has grown significantly. The United Nations Principles for Responsible Investment was launched in 2006, and as of 2008 it had over 360 institutional signatories representing US$14 trillion in assets, up from US$4 trillion in 2006 (UNPRI 2008). In the UK, the SRI fund market is estimated to be around €331 billion (Waring and Edwards 2008). These developments have been supported by various national reporting requirements, which would have raised awareness of the importance of social, ethical and environmental issues on the part of pension fund trustees. In particular, pension disclosure regulations which came into force in the UK in 2000 required pension funds (on a 'comply or explain' basis) to disclose the content of their investment mandates and to report annually on how they were implementing them.

These developments, however, have largely taken place at the level of policy initiatives, or of formal corporate reporting. Our interviews were aimed at finding out how far they were shaping practice. The evidence we gathered suggests that the impact of SRI on investment practice remains limited, both in general and with specific regard to the issue of gender inequality

A first reason for this is that despite significant growth in recent years, SRI remains very much a niche market. Even among some of the larger UK investment firms which employ SRI-based approaches, SRI-specific funds range between only two and eight per cent of their total equity assets under management. These figures may understate the size of the SRI market, as other, non-SRI funds may have a CSR engagement overlay, or engage on specific CSR-related issues that are perceived to have some financial risk. Even allowing for this margin of error, the SRI market occupies a peripheral role within investment practice as a whole.

Secondly, the extent of investor activism, or active engagement with investee companies, is restricted. While most interviewees were able to cite to us examples of investor activism which had led a fund manager to engage with a company on an issue, or to file or support a shareholder resolution, the general view was that the asset managers who held shares on behalf of pension funds were not being challenged to any great extent by those funds' trustees. There was some evidence that the trustees of unions' pensions funds were beginning to raise employment-related issues with investee companies. However, UK unions were perceived to be a long way behind their US counterparts in realising the potential to influence organisational change through this route. UK unions are now offering their members training in relation to being a pension

fund trustee, and over time this may lead to more institutional activism. However, a union official told us that it is difficult to persuade senior union officials in the UK to accept the potential role of pension funds in addressing workplace issues, and then to dedicate appropriate resources to pension fund activism.

Two investment firms took the view that there was a disconnect between the way pension fund trustees saw their role, and the missions of the organisations they represented. Even public-interest organisations such as charities, campaign groups, and public sector organisations in the education and health sectors rarely used SRI-based approaches when setting out their investment mandates. As a result, campaign groups and charities might well be 'investing in an activity which they are campaigning against…. you would have thought of any sector… they would have got it before anybody else' (fund manager). While non-governmental organisations ('NGOs') were thought to be effective in influencing the engagement of SRI funds, they did this most often by lobbying SRI funds directly, rather than in their capacity as investors through their own funds.

Pension fund trustees were seen as being more conservative on SRI issues than the members and beneficiaries of their funds. This conservatism was highlighted by a union official who had recently attended a meeting of a large pension fund. An actuary stated publicly at the meeting that 'the downfall of the fund was when you let women in'. As the union official put it to us, in relation to using pension funds as a vehicle for bringing about social and ethical change, 'there are some severe barriers to overcome'. Uncertainty over the future defined benefit pension schemes, many of which have recently been closed to new members and/or to new contributions from existing members, was also seen as making trustees more risk averse on the issue of SRI.

Engagement with companies was in some cases driven not by the mandates set by institutional investors, but also by SRI investment funds themselves as part of their own strategic aims. One investment firm talked about their aim being to educate fund managers and 'transform the capital markets and get them to [have] sustainability issues… reflected in investment decisions'. SRI investment firms draw up their own engagement plans around key social, ethical and environmental issues, and then build sector and issue expertise so they can engage not only with companies, but also with fund managers and brokers.

However, even in the SRI sector, a problem is that fund managers are rewarded for short-term gains, and that the gains from CSR-based activism are not always visible. As one interviewee noted, the stock market price of a firm may drop in response to some negative CSR-related news, but it often returns to its previous level after a short period, suggesting that the initial decrease was 'a market

reaction to unexpected news as opposed to the market really factoring in what the impact is of a company not managing [CSR] issues'.

A factor limiting the impact of SRI-based approaches on gender diversity is the existence of a hierarchy of concerns within CSR. Employee issues are generally viewed as one of the four clusters of significant CSR issues along with governance, environmental and wider social issues, but within the employee cluster, issues including use of child labour, supply chain employment conditions, and health and safety are seen as carrying the greatest reputational risk and are the easiest to engage on, whereas issues such as gender equality and union recognition are regarded as more problematic because of the lower public profile they enjoy.

We had some reports of engagement with companies in relation to issues of workplace diversity and equality. However, there were no reports of significant engagement over equal pay issues. A fund manager told us that while the fund had raised concerns about the low numbers of women on boards of directors, asking questions about whether a firm had conducted a pay audit would constitute unacceptable micro-management: 'there are limits to what we think we can achieve as corporate owners'. While he acknowledged that some niche SRI firms might try to engage at this level because it fitted in with the requirement of certain ethical retail investment products, this approach did not work well, he thought, within a mainstream investment context. Thus the multiplicity of issues that investors took into account had led to the relative marginalisation of diversity issues even within the SRI segment of the market.

It is also not clear to what extent the danger of litigation over equal pay is seen to give rise to a significant financial risk for investors or the companies they hold shares in. A union official with responsibility for pension funds to whom we spoke had approached a number of SRI fund managers from different investment firms in relation to equal pay in specific listed companies which, he claimed, had inherited discriminatory pay systems from the public sector without conducting a non-discriminatory job evaluation scheme. He provided fund managers with a number of questions on equal pay practice to put to firms, taken from the EHRC website. One fund manager told him that the estimated risk liability from breaches of equal pay legislation was simply too small: it 'would have no material impact on the share price; no one would be interested'. Only one fund manager raised the questions concerned with the specified companies, but according to the union official we spoke to the issues were not acted upon by the organisation.

We also spoke with an SRI investment firm that had raised questions about pay audits on behalf of a trade union. The companies they had spoken to responded to the effect that equal pay issues or conducting a pay audit were not a part of the contract negotiations with the public sector, and said that they did not feel

that the public sector bodies awarding the contracts for service provision gave the issue much weight. One SRI investment firm had produced a document about using SRI to close the gender pay gap, but had regarded this as very much exploratory work, and it had not been possible to present the information into a quantitative form that fund managers could process as part of investment decisions.

The lack of quantitative information that third parties could use to make meaningful investment decisions was seen by most interviewees as the biggest barrier to significant levels of institutional activism in relation to CSR issue. As one interviewee noted, currently 'companies choose what they are going to report on…. when it comes to environmental and social issues'. The lack of standardised performance indicators means the CSR performance of companies could not be assessed, ranked and challenged by civil society and by investors: 'transparency is a fundamental tenet of responsibility; without transparency you can't have accountability [and] third parties have no way of judging what you have been doing'.

The lack of meaningful reporting is a consistent theme on the issue of CSR reporting. A Pricewaterhouse Coopers survey of annual reports in the UK found that while 83 per cent of companies included a CSR section in their annual reports, only 17 per cent connected CSR issues to their strategic objectives (PWC, 2007). 60 per cent of companies claimed that their employees were an essential asset for achieving their strategic objectives, but only around 20 per cent included relevant performance indicators in their annual reports.

At the same time, most of the investor firms we spoke with were not, however, opposed to greater levels of regulation. As one interviewee noted, 'companies operate within a society which itself has laws and rules… and to suppose that the control of companies can be left entirely to the shareholders as owner seems to me wrong and rather dangerous'. Thus they saw regulation as potentially important, both in facilitating institutional activism, and in helping firms understand society's expectations of employer behaviour.

6. Gender inequality, the 'business case' and legal compliance: attitudes of managers

Given the bias in our sample towards organisations with a stated commitment to diversity, it is significant that none of the listed companies we spoke to reported significant engagement with investors on SRI issues. Only one interviewee was aware of any questions from shareholders relating to gender equalities issues, and in this case it resulted in their head office requesting each subsidiary organisation to produce a diversity policy. However, it appeared to be a one-off directive to ensure that managers were not 'embarrassed in front of the

shareholders again', and there had been no follow-up or monitoring of the policy in the intervening years.

A more significant driver of change was the highlighting of the 'business case' for equality by government and by business groups such as Opportunity Now. In practice, the business case was by far the most dominant driver of gender equality pointed to by the diversity managers and champions we interviewed, in both the public and private sector. Recruitment and retention of talent, reflecting the customer base of the organisation, delivering a better product or service, reputation and, to a lesser extent, litigation risk, were all seen as well embedded justifications. These motivations were frequently combined with a strong sense that reducing inequalities was the right approach for ethical reasons. One interviewee commented that the 'business case' ultimately came back to an underlying belief system. The organisation's maternity policies had been justified on the grounds of protecting the investment in staff, in getting female employees to return to work and to be the 'leaders of the future'. But as the company had no problem recruiting talented employees, there was also a strong belief that 'we want more women in our senior management teams' simply because it was 'the right thing to do'. For some respondents, the ethical rationale was explicitly stated in the terminology of 'right and wrong', but mostly it came through in a passion for changing the organisation culture that was very personal and went well beyond the business case. It was also evident in the frustration and disappointment some respondents expressed in response to the lack of progress they felt they were making, or in their experience of the attitudes of some male colleagues.

However, while the diversity and HR managers we interviewed were motivated by both the business case and a sense of justice, the same could not be said for all of their CEOs and senior management teams. In one company, which had won awards in relation to its gender equality policy, the 'buy-in' from the CEO had come about only when he had been convinced by diversity champions about the impact upon the 'bottom line'. Every initiative they implemented had to be 'cost neutral', so that 'if I want introduce anything new, something else has to go or I have to find a way of funding it a different way'. This respondent talked about working out 'what kept the CEO awake at night' and tapping into that in order to bring about change. Following a significant employment tribunal award against the company, she had told the CEO that 'one way we could protect ourselves at tribunals was to say we did diversity training…. and that was my hook in'. The same CEO viewed 'work-life balance as part-time work and less commitment from staff', so making the 'business case' was essential to changing his perception.

In another organisation, changing a 'laddish culture' meant convincing managers that diversity was 'a business critical issue'. This also involved changing perceptions. A common response to diversity initiatives from male colleagues was, 'it's not that we've been held back because we didn't have more women, so what are women going to contribute that is going to make us even more successful?' Yet another spoke of the difficulty in justifying maternity leave policies in excess of legal minimum requirements to the organisation's accountants on the basis of protecting the organisation's investment in human resources in a context where the company did not find it hard to recruit well qualified staff. So while for this respondent good maternity leave was simply the right thing to do in that it would lead to more women in the senior management team, the justifications he gave senior management were framed in terms of the firm's business needs.

While the 'business case' was seen to be an effective tool for bringing gender equality into mainstream managerial thinking, we also found evidence that the rhetoric of organisational success was framing the discussion of gender inequalities in a limiting and depoliticising way. First, while many organisations reported they were working on changing behaviours and attitudes, most noted this was a slow process, requiring a 'major organisational transformation'. In the interim, significant energy and resources had to be invested in supporting women employees to 'survive in a political environment [and] to play the game' by building women's support networks and training and personal development programmes in order for them to developing relevant skills and confidence. One interviewee told us, 'women just have this tendency to think that their hard work will get them noticed and get them promoted whereas men think differently…. most of our men don't even realise that women want promotion'. Mechanisms that might bring about cultural change, such as target setting around promotions, were reported as being resisted by many line managers, particularly in professional services companies. In contrast, two engineering-based companies reported having achieved significant cultural change in part through the setting of targets. The public sector was also noticeably different in this regard. Managers in the civil service departments we interviewed reported target setting and robust monitoring from the Cabinet Office, and saw this as an effective driver of change.

Evidence of a depoliticisation of the equalities agenda was also present in the prioritising of business values over right-based approaches to diversity. In the public sector, there was a strong sense of diversity initiatives helping employees to balance work and their private lives. In many of the private sector firms, on the other hand, work-life balance policies were about helping employees fit the demands of their job around their private lives. This involved an acceptance that the way work was organised was a given, which could not be questioned.

For one interviewee, the issue was: ‘so if the pace is relentless, what can we do to help you fit that around your life?’ This respondent went on to say, ‘if you say to someone do you have work-life balance they'll say no because they're working long hours. If you actually ask the questions – are you able to go home if you need to, can you work from home some days, does your boss ask where you are… then I think they do have work-life balance’. In the professional services sector firms we interviewed, long hours and working away from home were just the nature of the business: ‘our industry… is not the most conducive to having children…. It means working a lot of hours and also a lot of hours away from home….. We do try to allow people to have a preference… but at the end of the day we are a business and… so we do try and be as flexible as we can but there is a limit I think and you really have to balance the business need’. Others spoke of the ‘resentment’ that was caused when women returning from maternity leave were reluctant to travel or work long hours as this increased the pressure on their colleagues: according to one respondent, this gave ‘working women a bad press’. Some also reported that because of the demands of professional work, women returning from maternity leave often gravitated to parts of the business with greater predictability of hours and less travel. However, these were often less profitable parts of the business and thus provided lower remuneration and fewer opportunities for promotion. So there was no deeper questioning of the prevailing work culture or the organisation of work and whether it was these that needed to change. This was all the more surprising in that the main gender issue these firms reported was the lack of women in senior positions, while long hours of work were one of the primary explanations given for their inability to retain female employees.

A third aspect of depoliticisation was the priority given to addressing gender inequality at the top of organisations, to the detriment of employees outside the higher managerial ranks. This lack of women in senior roles was the most common ‘pressing’ issue, often mentioned by respondents at the very start of the interview indicating it was uppermost in their minds. Concern for women in junior or administrative roles was not as pressing. A common response to questions about administrative and junior positions was that these workers had the same access to the female networks and flexible working policies as their more senior colleagues, and then the discussion quickly returned to the issue of getting women promoted into senior roles. A number of respondents argued that the solution to the gender pay gap was not pay audits but dealing with the issue of women’s progression within the organisation ‘so that they can earn higher salaries’. Occupational segregation was seen as a wider societal responsibility, beyond the scope of what the organisation could address, while low-pay was viewed as simply a reflection of the market. Little has changed, it would seem, since Colling and Dickens (1998) argued that business case initiatives would tend to focus on promoting women into senior management

roles at the expense of addressing the position of low-paid women in the organisation, the undervaluation of women's work, or power differentials; now as then, the 'exclusive reliance on management action risks promoting conceptions of equality that are partial and insecure' (Colling and Dickens, 1998: 403).

We then asked respondents how far they saw the law as driving organisational change. Most of the private sector respondents bridled at the suggestion that the law played any role at all in shaping organisational practice. A typical response was, 'we would very rarely refer to the law as the reason for doing something… our aspiration is best in class approach… We would want to do better than that'. Another commented, 'we would want to be ahead of the law', while another said that if they were to be driven by the law 'then I think we would be failing'.

However, upon probing it became clear that these respondents had interpreted the question as being 'caught out' by the law, and that they could, in other circumstances, see legislative developments as a way of educating their organisations and 'as a platform for a change of behaviour'. Several private sector interviewees pointed to the requirement under public procurement rules of disclosing diversity information as a driver of change. Additionally, the statutory right to request flexible working was mentioned spontaneously by a number of interviewees as a legal development that had enabled the HR department to enter into dialogue with operational managers. The need to be compliant with the law had provided them with the opportunity to educate their managers about the issues that employees with caring responsibilities face.

Despite many of the private sector respondents reporting that they were always ahead of the law, of the eight public sector organisations interviewed, only one had published any pay gap data. This was also the only private sector organisation in which an interviewee was in favour of pay audits being made mandatory. At the time of our interviews, it was known that future legislation on pay disclosure rules was likely, and the decision of the Coalition government to put the law on hold could not have been anticipated. In this context, the lack of anticipation of legal change among most of our interviewees is striking.

The partial application of the business case that Dickens (1999) referred to is also confirmed in our interviews. The private sector firms we spoke to were all strongly committed to addressing gender inequality and reducing the pay gap, but yet they were not convinced of the 'business case' justifications for publishing their pay gap data, either internally with staff or externally in their annual reports. In some cases, the 'business case' pointed to *not* publishing the data because of the possibility of litigation risk and the reputational risk associated with negative public perceptions of persistent inequalities which had

previously been concealed from view. As one HR manager said to us: 'we would only do it voluntarily if it showed us in a good light... without the law we would never do it'. Some of our respondents accepted that legal change would be helpful for addressing the pay gap. As one respondent put it: 'publicly I don't like transparency, privately I think it can only help' indicating that in this instance, the business imperative and practices for addressing the pay gap do not coincide.

7. Conclusion

Our findings provide mixed evidence on the use of the 'business case' to address gender inequalities. Shareholder engagement has so far proved to have very little impact in this area. The practice of SRI remains limited to a niche market, and even within the SRI sector, employment issues in general and gender inequalities in particular do not receive a high priority from asset managers and pension fund trustees. Within organisations, on the other hand, a growing stress has been placed on the business-related rationale for addressing gender equality. As part of the practice of diversity management, organisations have responded to the argument that persistent gender inequalities represent a form of mismanagement of human resources, with negative implications for the delivery of services, in the public sector, and for the efficiency of the firm, in the private sector. At the same time, the increased legitimacy of diversity management has come at a cost in terms of the deradicalisation of gender policies. This trend is particularly pronounced in organisations where diversity management practices are being applied in a way which takes as a given the organisational structures which are principally responsible for creating gender inequalities.

The legal critique of equality law mounted by Hepple *et al.* (2000) focused on the relative effectiveness of particular regulatory mechanisms in inducing organisational change. From this point of view, the problem with the existing framework of equality law is the failure to integrate legal strategies with the potential for internal reform within organisations. Our interview material suggests that diversity managers increasingly acknowledge the role that legal compulsion and the threat of litigation can play shifting managerial attitudes. On the specific issue of pay audits, there is some evidence that managers would be willing to move in the direction of more systematic investigation and disclosure of pay gaps in their orgainsations, if there was a legal trigger for doing so. Similarly, some SRI investors see legal rules mandating disclosure by companies on gender inequality issues as a crucial step for raising awareness of social and ethical issues within asset management and pension fund practice. Thus targeted legal reforms could in future operate *in conjunction with* the business case to stimulate changes in organisational and investment practice.

Making anti-discrimination legislation more proactive could also help to counter the depoliticisation of equality law which has been associated with the rise of the business case. A first step in this direction would be for the Coalition government to revisit the issue of mandatory pay disclosure and bring section 78 of the Equality Act into force.

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