



**National Council of
Women of New Zealand**

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Submission to the Ministry Business, Industry and Employment on the Employment (Pay Equity and Equal Pay) Bill – Exposure Draft

Introduction

- 0.1. The National Council of Women of New Zealand, Te Kaunihera Wahine O Aotearoa (NCWNZ) is an umbrella group representing 283 organisations affiliated at either national level or to one of our 21 branches. In addition, about 260 women are individual members of branches. Collectively our reach is over 290,000 with many of our membership organisations representing all genders. NCWNZ's vision is a gender equal New Zealand and research shows we'll be better off socially and economically if we're gender equal. Through research, discussion and action, NCWNZ in partnership with others, seeks to realise its vision of gender equality because it is a basic human right.
- 0.2. This submission is based on our established policies and numerous submissions on equal pay and related issues. It has been prepared in consultation with the NCWNZ Employment Standing Committee, Parliamentary Watch Committee and a number of our affiliated organisations and members.
- 0.3. NCWNZ welcomes the opportunity to comment on the Draft Employment (Pay Equity and Equal Pay) Bill (the Draft Bill). We have a long history of working to progress equal pay and pay equity in New Zealand, establishing policy calling for equal pay as early as 1896. We welcomed the October 2014 Court of Appeal decision in *TerraNova v Service and Food Workers' Union* (now E Tū) including the finding that the Equal Pay Act 1972: "requires equal pay for work of equal value (pay equity) not simply the same pay for the same work". We subsequently supported the recommendations of the Joint Working Group on Pay Equity Principles (the Joint Working Group) chaired by Dame Patsy Reddy.

1. Summary and Recommendations

- 1.1. NCWNZ sees the consultation period for proposed legislative changes as inadequate and rushed, reflected in the number of clauses that require significant amendment.
- 1.2. Without major amendments, the Draft Bill should be set aside and the current Equal Pay Act 1972 remain in force.
- 1.3. Political commitment to the resourcing of pay equity/equal pay and related work is essential, in addition to the actual pay settlements.

- 1.4. We recommend that a centre/unit be established to operationalise and implement the principle of pay equity/equal pay in accordance with the recommendations of Article 11(d) of the UN Convention on the Elimination of Discrimination Against Women (CEDAW).
- 1.5. NCWNZ believes that it is also essential to address the wider context within which the gender pay gap exists including discriminatory practices in the workplace.
- 1.6. Clause 3 or Clause 8: Reference to 'equal value' should be explicit in the new legislation in accordance with language and definitions used in related international law, conventions and publications.
- 1.7. Clause 8: We recommend that the clause be amended so that both employees and employers have access to the necessary information upon which they may identify inequities.
- 1.8. Clause 14: Proposed processes are repetitive, lengthy and numerous and introduce additional barriers for claimants to overcome in order to make a claim.
- 1.9. Clause 14: Proposals require cumulative tests in order to establish whether a claim has merit. This does not reflect the intent of the Court Judgements.
- 1.10. Clause 14: The employer, against whom the claim is made, should not decide on its merits. We recommend that the Draft Bill be amended to continue to allow claimants to lodge claims with a neutral party such as the Employment Relations Authority.
- 1.11. Clause 14: We recommend that the clause be either significantly reworked or completely removed from the Draft Bill.
- 1.12. Clause 17: We recommend that the 90 days' period for an employer's response be reduced to 20 working days and the clause amended to include the ability of an employee to challenge the extension.
- 1.13. Clause 21: NCWNZ supports this clause but believes it should be strengthened. Better mechanisms for transparency should be provided, including the provisions of the related private member's bill currently in the House.
- 1.14. Clause 23 we recommend that:
- (1)(a) be deleted along with the phrase 'same or similar work' in clauses referring to pay equity, and
 - (2)(a-d) be removed from the Draft Bill and replaced with a provision that simply states that claimants can select the most appropriate comparator for their particular group.
- 1.15. Clause 39: We recommend that this clause be deleted and pay equity claims be treated the same as other pay claims in terms of back pay.
- 1.16. 2 Clause 42:
- We recommend that the \$2,000 penalty in 42(1) and (2) be significantly increased.

- 1.17. Clause 44: NCWNZ does not support the making of regulations that are prescribed without consultation with all concerned parties.
- 1.18. Current pay equity claims: We recommend that current pay equity claims proceed, without delay, under the current Equal Pay Act 1972.

2. General Comment

- 2.1. Given the importance and complexity of the issues involved in furthering pay equity/equal pay in New Zealand, NCWNZ sees the consultation period for proposed legislative changes as inadequate and rushed. This is reflected in the number of clauses in the Draft Bill that, in our view, require either significant amendment or rejection .
- 2.2. NCWNZ believes that proposed changes to the Equal Pay Act 1972 and related legislation should be faithful to the overall spirit and intent of the original Act, Court of Appeal Judgement and the recommendations of the Joint Working Group noted above. They should provide a framework within which progressing pay equity claims can be achieved fairly, efficiently and as simply as possible. Procedures and requirements should facilitate, not hinder, the process. This is not the case with key aspects of the current Draft Bill. Without major amendments, it is our view that the Draft Bill should be set aside and the current Equal Pay Act 1972 remain in force.

2.3. Resourcing, Implementation, Monitoring, Evaluation and Review

- 2.3.1. Political commitment to the resourcing of pay equity/equal pay and related work is essential. In addition to the actual pay settlements, this should include the development of resources and support that are necessary if the legislation is to be successfully implemented. As noted in the Regulatory Impact Statement (paragraphs 88-98) current work and responsibilities for pay equity/equal pay is fragmented and involves a range of government and other organisations. We recommend that a centre or unit with relevant expertise and knowledge be established to focus and, where relevant, coordinate pay equity/equal pay work.
- 2.3.2. A centre/unit could facilitate claims, provide advice and support, maintain monitoring and evaluation and summarise trends. It could also assist in the development of specific expertise for those who will be responsible for implementing the legislation. This is currently in short supply. This would be in accordance with the CEDAW recommendation of the 52nd session (July 2012) which states that the State party (New Zealand):

Ensure that there is a monitoring institution for gender pay inequity with the State party's administration, despite the closure of the Pay and Employment Equity Unit in the Department of Labour.

- 2.3.3. Similarly, it would respond to the related CEDAW recommendation (July 2012 above) that the State party (New Zealand):

Enact appropriate legislation that guarantees the operationalisation and implementation of the principle of 'equal pay for work of equal value' in line with article 11 (d) of the Convention.

- 2.4. While welcoming the current historic initiatives to address pay equity, NCWNZ believes that it is essential to also address the wider context within which the gender pay gap exists. Significant factors in that gap include discriminatory practices in the workplace, both direct and indirect, including human resource management systems around: starting rates; transparency of information; performance appraisal processes; access to training; flexible working hours; paid parental leave; and career progression. Progress towards achieving pay equity must be accompanied by employment equity within the workplace itself if the gender pay gap is to be successfully addressed.
- 2.5. The rest of our submission focuses on specific clauses in the Draft Bill that we see as requiring amendment, if barriers to the taking of pay equity claims are to be removed or minimised. They include key clauses set out below.

3. Clause 3: Purposes: (or Clause 8: Equal treatment)

- 3.1. The Draft Bill provides an opportunity to incorporate terms that are now commonly associated with pay equity and more clearly define it. A statement of principle which includes reference to 'equal value' should be explicit in the new legislation. This could be done through a definition of 'pay equity' either in clause 3 or clause 8.
- 3.2. Incorporating the concept of 'equal value' would accord with related international law and conventions. We note the International Labour Organisation's Convention 100 (Article 1 (b)) that refers to: "Equal remuneration for men and women workers for work of equal value". The CEDAW uses the same language and definitions in its publications and recommendations.

8. Clause 8: Equal treatment

- 8.1. While the clause places an obligation on the employer not to discriminate, it does not provide employees with access to the necessary information upon which they may identify inequities. Both the employer and the employee(s) should participate in any exercise in that regard. We recommend that the clause be amended accordingly.

14. Clause 14: (1-5) Employee may make pay equity claim

- 14.1. Comments made in our discussions on the Draft Bill included numerous reference to its processes as a 'snakes and ladders' exercise. This applies to the proposed processes in (2), (3) and (4) and indeed to other repetitive, lengthy and numerous processes in the Draft Bill. This clause goes beyond the decisions of the Courts and the Recommendations of the Joint Working Group. Compared to the Equal Pay Act 1972, it introduces additional barriers for claimants to overcome in order to take a claim. This is also the case in clauses 22 and 23 in which further evidential requirements are imposed on claimants.

- 14.2. Addressing new requirements for establishing historical undervaluation of work and continued systemic gender-based undervaluation of work would be formidable, time-consuming and beyond the resources of individual and other claimants. It is also likely to be difficult to find historical material on jobs outside the professions and the requirement for historical evidence may also exclude new female occupations.
- 14.3. The Draft Bill appears to require cumulative tests in order to establish that a claim has merit (2) (b) and (c) using 'and' to join the two. This does not reflect the intent of Court Judgements that refer to proof of "current or historical or structural gender discrimination." Similarly, in (4) (a) (i-vi) all criteria appear to be required to prove a claim has merit. This would require significant cost, expertise and time.
- 14.4. A major concern with this clause is that it establishes an individual complaints-based system employer. Whereas the current Equal Pay Act provides for women to lodge claims with the Employment Relations Authority or Human Rights Commission. It is well-established that the imbalance of power in the individual employee and employer relationship does not benefit women. We believe that the employer, against whom the claim is made, should not decide on its merit. NCWNZ recommends that the Draft Bill be amended to continue to allow claimants to lodge claims with a neutral party such as the Employment Relations Authority which will make decisions regarding the claim's merit.
- 14.5. Further, the processes involved place the burden of evidence on the claimant which would require costly legal and other expertise. This will not be an option for low paid women employees who make up the majority of female-dominated occupations. It seems likely that a woman would be required to either pay for a lawyer to take her case — or to take one with union support. This does not acknowledge that significant numbers of women do not belong to a union.
- 14.6. NCWNZ believes that clause 14 introduces new and additional barriers to the taking of pay equity claims, compared to the provisions of the current Equal Pay Act 1972. We recommend that the clause be either significantly reworked or completely removed from the Bill.

17. Clause 17: Employer must form view as to whether pay equity claim has merit

- 17.1. Reference to what is 'reasonably practicable' and to 'reasonable grounds' is threaded through this clause. We believe that this is too vague a term for effectively identifying and progressing claims that have merit. It will allow a relatively easy extension of the time limit by the employer, with no stated time limit on that extension. If this clause proceeds, we suggest that, at the least, the 90 days' period for an employer's response be reduced to 20 working days and the clause be amended to include the ability of an employee to challenge the extension.

21. Clause 21: Duty to provide information

- 21.1. NCWNZ supports this clause but believes that it should be strengthened through legally enforceable penalties and/or interventions in the event of non-compliance. A lack of transparency of information

about workplace practices and procedures, and in particular pay rates, has been a longstanding barrier to progress in achieving pay equity/equal pay. Legislation will be ineffective without transparency of information.

- 21.2. Employers' and others' concerns regarding confidentiality of information are addressed in the Draft Bill through the provision of information to an independent reviewer as outlined in (3) and (4) of the clause. Additional mechanisms around transparency should be provided, including consideration of current State Sector practices, the use of confidentiality agreements and the use of pay and other data that excludes personal identification.
- 21.3. We note that there is a private member's bill on this issue currently in the House and recommend that this be incorporated into the current Draft Bill. The private member's bill includes clauses on increased penalties for non-compliance, a duty on employers to audit their remuneration systems, provide relevant information to Labour Inspectors and requires that pay systems be subjected to a gender-inclusive job evaluation standard. NCWNZ supports those provisions.

23. Clause 23 (2) (a-d) Identifying appropriate comparators

- 23.1. Clause 23 (1) refers to 'appropriate comparators against which to assess a pay equity claim'. (1)(a) however, appears to refer to equal work: 'work that is the same as, or substantially similar to....' . Given that pay equity is about comparing work that is different, but of equal value, we suggest that (1)(a) be deleted along with the phrase 'same or similar work' in clauses referring to pay equity.
- 23.2. NCWNZ sees the proposals as creating substantial barriers to identifying and reaching agreement on appropriate occupational comparators. (2) (a-d) sets out a series of four steps that claimants must take in the process of identifying comparators. Claimants will need to prove, at each step, that the comparators do not have the same skills, experience, responsibilities, working conditions and degrees of effort, before moving to the next step in the hierarchy of selection. In our view this does not reflect the intent of the Court of Appeal decision or the Joint Working Group's recommendations noted above. Nor is it consistent with the existing Equal Pay Act 1972. We understand that the Joint Working Group's exhaustive discussions considered this approach and rejected it.
- 23.3. Identifying comparators is a key stage in the taking of a pay equity claim. The Draft Bill's proposals will be time consuming, resource intensive and impractical. They will certainly hinder progress in taking pay equity claims given that the information is needed to inform bargaining. We recommend that (2) (a-d) be removed from the Draft Bill and be replaced with a provision that simply states that claimants can select the most appropriate male comparator/s for their particular occupational group. We note that the Courts have stated that an appropriate comparator must be one that is free of any gender bias affecting pay in that sector or industry.

39. Clause 39: Limitation period where pay equity claim is resolved by determination

- 39.1. This clause extinguishes the right to back pay for pay equity claimants. This clearly discriminates against women by excluding only women's pay equity claims from the six years' back pay to which all

other successful pay claims, including those for equal pay, are entitled. We recommend that this clause be deleted and pay equity claims be treated the same as other pay claims in terms of back pay.

42. Clause 42: Penalty for non-compliance

- 42.1. Our view is that the penalties are too low to deter employers from delaying or frustrating claims. We suggest that the \$2,000 penalty in 42 (1) and (2) be significantly increased. Otherwise, it may well be cheaper and easier for an employer to not comply, than to comply with the Bill's provisions.

44. Clause 44: Regulations

- 44.1. NCWNZ does not support the making of regulations relevant to the Draft Bill that are prescribed without consultation with all concerned parties. The proposal lacks transparency and potentially allows for changes that, while possibly appearing minor and technical, may be significant in terms of the direction and effectiveness of the legislation. Further, it is contrary to the Legislative Advisory Guidelines 11 (1) 4.

Current Pay Equity Claims

The commentary on the Draft Bill proposes that where a formal agreement to bargain has been entered into, those pay equity claims will not be allowed to continue under the Equal Pay Act 1972, but will be dealt with under the new legislation. We understand that this is contrary to accepted legal practice and to the Legislative Advisory Committee Guidelines 13(1). Further, it seems likely that new legislation is many months away and claimants' wait for justice significantly lengthened.

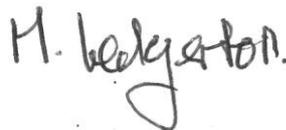
Given the large number of claims already registered with the Employment Relations Authority, the proposal would disadvantage thousands of women working in low-paid, undervalued occupations. It could significantly prolong their wait for fair pay and be contrary to the positive moves made in the direction of pay equity/equal pay for work of equal value in recent years. We recommend that current, pay equity claims proceed, without delay, under the current Equal Pay Act.

Conclusion

NCWNZ believes that unless there are significant amendments to the Draft Bill it should be set aside and the current Equal Pay Act 1972 apply until agreement can be reached on new legislation.



Rae Duff
National President



Margaret Ledgerton
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