



## National Council of Women of New Zealand

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## Submission to the Transport and Industrial Relations Committee on the Employment (Pay Equity and Equal Pay) Bill 284-1

### Introduction

The National Council of Women of New Zealand, Te Kaunihera Wahine o Aotearoa (NCWNZ) is an umbrella group representing 258 organisations affiliated at either national level or to one of our 19 branches. In addition, about 380 people are individual members. 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.

### 1. Background

- 1.1. NCWNZ has 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* (the Court of Appeal decision) 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.
- 1.2. In May this year, we made a submission on the Exposure Draft of the Employment (Pay Equity and Equal Pay) Bill (the Bill). It is our view that the current Bill provides no significant changes to the key proposals set out in that Exposure Draft. Consequently, our current submission generally reaffirms the concerns expressed earlier. The submission has been prepared in consultation with the NCWNZ Employment Standing Committee, Parliamentary Watch Committee and a number of our affiliated organisations and members.

### 2. Summary and Recommendations

- 2.1. This submission reaffirms concerns expressed in our earlier submission on the Draft Exposure Bill.
- 2.2. The Bill provides an opportunity for New Zealand to fulfil related international obligations and recommendations, including those of the United Nations Committee on the Elimination of Discrimination Against Women (CEDAW) and the International Labour Organisation (ILO). We urge the Government to amend the Bill accordingly.

- 2.3. Government commitment to the proper resourcing of pay equity/equal pay and related work is essential if legislation is to be effective. This includes the provision of resources and support necessary for successful and sustainable implementation and monitoring of legislative change.
- 2.4. Current work and responsibility for pay equity/equal pay is fragmented and involves a range of government and other organisations. We recommend that a centre with relevant expertise and knowledge be established to focus and coordinate pay equity/equal pay work.
- 2.5. It is essential to also address the wider context within which the gender pay gap exists. This includes human resource management systems and practices. We strongly support current employment equity initiatives in this regard.
- 2.6. The decision on whether a pay equity claim has merit must be made by an independent, neutral body.
- 2.7. The timeframe of 90 days for the employer's response to whether a claim has merit is too long. We support a shorter timeframe of between 10 and 30 days.
- 2.8. The potential for repeated time extensions by the employer would result in undue stress on claimants and, as with other parts of the Bill, place frustrating barriers in the way of claimants and unnecessarily draw out the process.
- 2.9. When identifying appropriate job comparators, the 50 per cent for male-dominated work and 66 per cent for female-dominated work should be a guide only.
- 2.10. The process for identifying appropriate comparators is complex, repetitive and onerous. The claimant must be able to select the most relevant comparator irrespective of employer, industry or sector.
- 2.11. NCWNZ supports the availability of mediation services in the pay equity process. Specialist expertise and knowledge of pay equity issues would be necessary to a credible process and additional resources would be required to provide those services.
- 2.12. NCWNZ does not support the making of regulations that are prescribed without consultation with all concerned parties. Appropriate consultation and the parliamentary process should be required.
- 2.13. We believe that current pay equity claims should proceed without delay, under the current Equal Pay Act 1972.
- 2.14. Unless there are significant amendments to the Bill, it should be set aside and the current Equal Pay Act 1972 apply until agreement can be reached on new legislation.

### **3. General Comments**

- 3.1. We believe that the Bill provides an opportunity for New Zealand to fulfil related international obligations and recommendations and we urge the Government to amend it accordingly. We note that the United Nations Committee on the Elimination of Discrimination Against Women (CEDAW) in its 52nd session, July 2012, recommended 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.*

*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.*

- 3.2. Further, Convention 100 of the International Labour Organisation (ILO) sets out the principle of equal remuneration for men and women for work of equal value. ILO Convention 111 requires ratifying countries to implement a national policy to promote equality of opportunity and treatment of men and women in employment and occupation. New Zealand has ratified both ILO Conventions.
- 3.3. Government commitment to the proper resourcing of pay equity/equal pay and related work is essential if legislation is to be effective. In addition to the actual pay settlements, this should include the provision of resources and support that are necessary for successful and sustainable implementation and monitoring of legislative change.
- 3.4. 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 with relevant expertise and knowledge be established to focus and, where relevant, coordinate pay equity/equal pay work. A centre 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 expertise is currently in short supply.
- 3.5. While welcoming the recent 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 discrimination in the workplace, both direct and indirect, including human resource management systems and practices 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. We strongly support current initiatives in this regard.
- 3.6. The rest of our submission focuses on specific clauses in the pay equity section of the Bill, given that those proposals are of most concern. NCWNZ believes that the pay equity section requires major amendment if any significant and sustainable progress in closing the gender pay gap is to be achieved. Without such amendment we believe that the Bill should be set aside and the current Equal Pay Act 1972 remain in place until more agreement on any changes can be reached. Responses received from NCWNZ membership to this Bill have been strong and unanimous in the key areas noted below.

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

- *The employer must.... as soon as is reasonably practicable and not later than 90 days after receiving the claim, decide whether, in the employer's view, the pay equity claim has merit.*

- *The employer may, by notice to the employee, extend the time limit for making and notifying the employer's decision as to the merit of the claim, if the employer has genuine reasons, based on reasonable grounds, for requiring the extension. (The employer must set out the reasons and grounds for requiring the extension).*

- 4.1. Our strong view is that the decision on whether a pay equity claim has merit must be made by an independent, neutral body, not the employer. The process must be, and be seen to be, objective by both parties. We believe that leaving the decision to the employer can result in conflicts of interest, either real or perceived.
- 4.2. Further, it appears that the burden of evidence is placed on the claimant which would require research, legal expertise, financial resources and information. 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 need 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.
- 4.3. The timeframe of 90 days for the employer's response to whether a claim has merit is considered too long. Suggested timeframes from our members included 10, 20 or 30 days with a small number of members believing that the 90 day timeframe was reasonable. There is the potential for repeated time extensions resulting in undue stress on claimants and, as with other parts of the Bill, placing frustrating barriers in the way of claimants and unnecessarily drawing out the process. Such terms as "genuine reasons" and "reasonable grounds" lack clarity and can be subjective.
- 4.4. These provisions would, in our view, exacerbate the current unequal balance of power between employee and employer to further favour of the latter. They are likely to inhibit claimants coming forward, resulting in a continuance of pay inequities.

## **5. Clause 24 (2): Identifying appropriate job comparators:**

*Work is performed by male comparators if, of the employees in NZ performing that work, more than 50% are male. (Work is performed by female comparators if, of the employees in NZ performing that work, more than 66% are female.)*

- 5.1. Our members are at a loss as to the rationale for the difference in percentages required to identify female and male-dominated comparator occupations. Our view is that the percentages should be a guide only. Identifying relevant comparator occupational groups should be based on whether there is undervaluation. That is the key issue. We note earlier in this submission, and under Clause 24(3) below, the potential role of an independent Centre in providing information, advice and support throughout the process.

## **6. Clause 24 (3) identifying one or more appropriate comparators against which to assess a pay equity claim.**

*Comparators must be identified using a hierarchy of four steps. (selecting one or more comparators employed by the same employer; then from similar employers; then from within the same industry or sector; and then from a different industry or sector). Each step is required in the process of identifying comparators.*

- 6.1. The Bill introduces a complex, repetitive and onerous series of steps for identifying comparators. We believe that the process is too prescriptive. Claimants would need to investigate male comparators at each of the required steps and prove that the comparator occupation does not involve the same skills, conditions, responsibilities and effort before moving on to the next step in the process.
- 6.2. We believe that the claimant must be able to select the most appropriate comparator, irrespective of employer, industry or sector. The Bill does not recognise that gendered occupations are to be found in workplaces, enterprises, sets of employers and specific industries or sectors.
- 6.3. Identifying and determining comparators is a fundamental, key part of the pay equity process. It can be complex and require specific skills and knowledge, including good, comprehensive data. We believe that it illustrates the need for an independent, moderating body to assist and support both claimants and employers in agreeing on relevant comparators. This could be part of the role of a new Centre proposed earlier in this submission.
- 6.4. The Principles developed by the Joint Working Group relating to both whether a claim has merit and identifying comparators include that: 'The work may have been historically undervalued...' (our emphasis). The Bill, however, introduces more stringent requirements for establishing historical undervaluation of work and systemic gender-based undervaluation of work. These would be time-consuming and beyond the resources of individual and other claimants. It 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-dominated occupations.
- 6.5. We reaffirm the view set out in our submission on the Draft Exposure Bill. This clause is contrary to both the spirit and intent of 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 make a claim.

## **7. Clause 27, Mediation: Parties may refer issues to mediation**

- 7.1. NCWNZ supports the availability of mediation services. We make the point, however, that specialist expertise and knowledge of pay equity issues would be necessary to a credible process. In particular, when considering issues around merit and comparable work. Mediation services would require additional resources to provide those services.

## **8. Clause 45: Regulations (a - c)**

*This enables the Governor-General, by Order in Council, to make regulations for one or more purposes: prescribing matters that must be taken into account: when considering or determining whether a pay equity claim has merit; when assessing a pay equity claim; and when identifying appropriate comparators.*

- 8.1. NCWNZ does not support the making of regulations that are prescribed without consultation with all concerned parties. The Clause lacks transparency and potentially allows for changes that, while possibly appearing minor and/or technical, may be significant in terms of the direction and effectiveness of the legislation. Further, we believe it is contrary to the Legislative Advisory

Guidelines 11(1)4. The Clause should clearly state that appropriate consultation and the parliamentary process would be required.

**9. Schedule 1: Transitional, savings and related provisions.**

**Part 1: Clause 3 (1-2): Existing claims at commencement of Act discontinued but may be recommenced.**

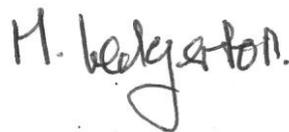
- 9.1. We note that pay equity claims currently lodged or being discussed in bargaining include: mental health support workers; social workers; administration and clerical workers in district health boards; and education support workers. NCWNZ believes that these provisions would diminish claimants' legal rights and would disadvantage thousands of women working in low paid, undervalued occupations.
- 9.2. Claimants, after investing a huge amount of time, resource and commitment, would have to begin the process under new rules and from scratch. The additional wait for claims to be settled and for claimants to receive recognition of their work would be significant. Our members believe that changing the rules when claims are already underway, would be patently unfair. Comment from our members includes the view that this clause, and the Bill as a whole, is a deliberate attempt to subvert the application of Court determinations and the Kristine Bartlett/careworkers' case to other claims.
- 9.3. We do believe that these provisions would be contrary to the Court of Appeal decisions and the recommendations of the Joint Working Group and that they may also violate established legal principles that laws should not have retrospective effect. NCWNZ recommends that current pay equity claims proceed, without delay, under the current Equal Pay Act.

**10. Conclusion**

- 10.1. NCWNZ believes that unless there are significant amendments to the Bill, including those related to concerns addressed in this submission, it should be set aside and the current Equal Pay Act 1972 apply until agreement can be reached on new legislation.
- 10.2. An extract from one of our branch responses to the Bill sums up the overall NCWNZ view: "This legislation undermines existing claims, restricts future claims and sets up unfair conditions for the consideration of claims."



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