



20 November 2017

## **A proposal for policy and legislative action on equal pay and pay equity**

### **1. Introduction**

In 2013-2014 the Employment Court and Court of Appeal confirmed that claims for pay equity could indeed be taken under the Equal Pay Act 1972<sup>1</sup>. As more pay equity claims for women in the state sector were lodged under this Act, the then National government set up an employer/union working group to negotiate 'Principles', then in 2017 introduced a Bill to replace the 1972 Act. In CEVEP's view, both the Bill and aspects of the Principles undermined these Court judgments and would have made it harder, not easier, for New Zealand women to claim equal pay and pay equity. Four opposition parties voted against the Bill and, following the election, it was dropped by the new Labour-led Government.

It is CEVEP's position that, with this Bill dropped, equal pay and pay equity claims should continue under the Equal Pay Act 1972, as interpreted by the Courts. It worked for Kristine Bartlett and other caregivers, delivering substantial pay increases for 55,000 low-paid workers. We would like the government to give policy priority to supporting these claims and resolving pay equity issues across the state sector.

However, there is a view that the 1972 Equal Pay Act, written at the time of a very different wage bargaining regime, should be updated, while retaining its core criteria, rights and purposes. This would provide an opportunity to add effective criteria for male comparators, based on the Court judgements, and increase pay transparency requirements. For this reason, CEVEP has prepared its own re-write of the Equal Pay Act 1972, included in this paper.

This paper comprises three parts:

- A bullet point overview;
- A proposal for an expert advisory unit to support claimants, employers and the public;
- A draft Bill establishing rights, a claim procedure, and specialist expertise within the Employment Relations Authority and Mediation Service.

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<sup>1</sup> *Bartlett vs Terranova* [2013] NZEmpC 157 ARC 63/12 and CA631/2013 [2014] NZCA 516.

## 2. Overview

- The Equal Pay and Pay Equity Bill proposed below addresses both equal pay and pay equity. These are human rights for women under international conventions that New Zealand has ratified, not just wage arrears or bargaining issues, and both should be addressed under specific legislation.
- Claims are lodged with a neutral body, the Employment Relations Authority (ERA), as at present, not to the claimant's own employer who has a vested interest in the outcome. (There is nothing to stop a union raising the matter in bargaining, or a claimant or her union talking to her employer first if she thinks that is a good idea. Employees may seek information from their employer at any time.)
- The Bill specifies employer requirements for equal treatment, wage records by sex, reporting, providing information on request, and acting in good faith.
- Equal pay and pay equity rates are assessed on the current criteria, recently clarified by the Courts, i.e. levels of skill, responsibility, experience, effort and conditions of work. This is the 'objective appraisal' required by International Labour Organization 100 on Equal Remuneration.
- For female-dominated work, comparisons are made with two or more male-dominated jobs in male-dominated sectors. This ensures appropriate male comparators, whose pay is not also affected by sex-based undervaluation, as required by the Courts.
- If female-dominated and male-dominated are defined, the definitions must be similar; we suggest 66% whether male or female.
- The purpose of assessment, mediation and determination is to arrive at the equal pay or pay equity rate for the work.
- Claims may be determined by the Employment Relations Authority or, on a challenge, by the Court, as at present.
- Employment Relations Authority members and Mediators working under this legislation must have appropriate expertise and/or training on equal pay and pay equity and act in accordance with the specific purposes and functions of this Equal Pay and Pay Equity Bill.
- All claimants have the same right to six years' back pay as any other wage or commercial claim under the Limitations Act 2010.
- The core elements of the legislation that support the claimant in her rights are the requirement for objective appraisal, access to determination by a neutral body and the right to back pay.
- Nevertheless, for pay equity, the Bill explicitly allows settlement by negotiation at any point in the process, and the withdrawal of the claim (as occurred with the Bartlett claim).

In CEVEP's view, it is the current legal right to comparisons, determination and back pay that give strength to the claimant in negotiated settlements (which may have wider coverage or include wider employment issues). This is both fair and efficient.

In addition,

- An expert advisory body should be established and resourced to support all parties to equal pay or pay equity claims, to work with Statistics NZ to make job level pay data available, to monitor gender pay gaps, and to promote progress on gender equity. This need not be established by legislation. It is likely to be a specialist unit within MBIE.

In CEVEP's view, Equal Pay and Pay Equity legislation needs to work alongside the Employment Relations Act 2000, but be distinct from it. The point of requiring ERA members and Mediation Service staff to have appropriate expertise or training is, not only that specialist knowledge in regard to job assessments will be needed, but that the purpose of employment equity legislation is different from the purposes of the Employment Relations Act. It is to establish what the equal pay or pay equity rate is for women's work, through job comparisons backed by access to determinations. The Employment Relations Act 2000 requires parties to settle whatever wage agreements they can, assisted by mediation services whose purpose is settlement (rather than equity), but with no right to determination on bargaining matters. Equal pay and pay equity claims will require different specialist expertise, as well as access to information and assistance that the Joint Working Party on Pay Equity Principles described as essential.<sup>2</sup>

As is standard practice according to Legislation Advisory Committee Guidelines, once lodged claims must continue under the legislation under which they were lodged; i.e. the Equal Pay Act 1972. That is, unless the claimants themselves should wish to withdraw them and lodge them afresh under new legislation.

### **3. Employment Equity Advisory Office**

In May 2015, Dame Patsy Reddy, chair of the Joint Working Group on Pay Equity Principles, reported to Cabinet that:

"Employers and unions believe there is a need for additional support, as much as anything to provide a readily accessible 'shop front' for information and resources... and stress that a timely and efficient resolution to matters will be more likely with additional specialist resources such as information, research and subject matter experts."

"It will also be necessary for the regulatory and support agencies to have the necessary skills, training, knowledge and resources to effectively support the resolution of pay equity issues. This may require some specific investment on the part of government, for example in areas such as the mediation service, at the Authority and Court level and specialists available to provide information and support."<sup>3</sup>

CEVEP sees two distinct roles here:

- (i) The provision of information, expert advice and support to employers, claimants and the public by a 'shop front' unit within government, that also play a monitoring and reporting role. This Employment Equity Office will require no legislation to establish, and is discussed below.
- (ii) Specialist expertise within the Employment Relation Authority, and the Mediation Services, with specific functions under pay equity legislation to ensure that claims and job evaluations meet the legislative criteria, with the power, if needed, for the Authority to make a determination (as in the 1972 Equal Pay Act). These are specialist functions for the purpose of establishing the equal pay or pay equity rate, whereas the role of the Authority and Mediation Service in the Employment Relations Act 2000 in wage bargaining is to support settlement,

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<sup>2</sup> Dame Patsy Reddy, Recommendations of the Joint Working Party on Pay Equity Principles, 24 May 2016: Appendix 1. State Services Commission.

<sup>3</sup> Reddy, p.4.

with no power to make a determination. This is established through the proposed legislation in the next section.

To address the first role, the functions of the proposed Employment Equity Advisory Office are:

- To provide policy advice to government related to the purposes of the Equal Pay and Pay Equity legislation proposed below, including but not limited to annual reports;
- To provide information and advice to the public, employees, employers and unions;
- To monitor, analyse and publish information about gender and ethnicity pay gaps and contributing factors;
- To work with MBIE and Statistics NZ to publish pay data by sex and by occupation based on employer reports each June under s.130 of the Employment Relations Act 2000 and on Statistics NZ's June survey of incomes. This must provide hourly pay data at the 5 digit level of the NZ Standard Classification of Occupations, in a form that can be easily accessed and used by employers and employees.
- To authorise or develop organisational pay review tools and gender neutral job evaluation and other human resources tools for use by employers, employees and unions, and to provide training and training materials for the use of these tools. (This builds on the work of the Pay and Employment Equity Office from 2004 to 2008.)
- To appoint and/or train persons with specialist expertise to provide advice and support to the parties to claims;
- To make public all equal pay reviews and job evaluations undertaken in the state sector and all job evaluations that result from claims under the Equal Pay and Pay Equity Bill proposed below, in a form that provides usable job and remuneration information to employers and employees;
- To undertake any investigations, research or other activities that will support these functions and to fulfil the purposes of the Equal Pay and Pay Equity Bill.

This Office is likely to be located in the Ministry of Business, Innovation and Employment alongside the Mediation Service, but not part of that Service because of its different purposes, functions, training and expertise. CEVEP anticipates that supporting the current claims and negotiations out across the state sector, and hopefully emulated in the private sector, will be a sufficiently large first task for this specialist advisory office. It may be that, as this wave of claims and negotiations subsides, the Office can play a future role in promoting Equal Employment Opportunity in all its varied forms across the labour market. In the next several years, however, we would not support a wider role, seeing it as a distraction from the job in hand. This proposed Equal Pay and Pay Equity Bill is about ensuring women's right to be paid appropriately and fairly for the work they are employed to do now, not persuading them to take up other work.<sup>4</sup>

The second role is the specialist expertise and regulatory power that will be needed within the Employment Relations Authority, to be established under the following proposed legislation.

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<sup>4</sup> We note that the State Sector Act 1988 gives the State Services Commission a role in monitoring and promoting equal employment opportunity and 'good employer' practices by departments and other state agencies. We understand that the SSC is currently working with the PSA on improving human resources practices with regard to women's employment.

## **4. Equal Pay and Pay Equity Bill 2018**

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Amendments to Employment Relations Act 2000

### **The Parliament of New Zealand enacts as follows:**

#### **1 Title**

This Act is the Equal Pay and Pay Equity Act 2018.

#### **2 Commencement**

This Act comes into force on the day after the date on which it receives the Royal assent.

#### **3 Interpretation**

In this Act, unless the context otherwise requires,—

**Equal pay** means a rate of remuneration for work in which there is no element of differentiation between male employees and female employees based on the sex of the employees.

**Employment agreement** means any agreement, whether in writing or not, made between an employee and an employer or an employers' union or a society or body of employers, or between a group of employees or a union and an employer or an employers' union or a society or body of employers.<sup>5</sup>

**Pay equity** means **equal pay for work of equal value** under International Labour Organisation Convention 100 on Equal Remuneration and the UN Convention for the Elimination of (all forms of) Discrimination against Women.

**Female-dominated work** or **predominantly performed by female employees** in relation to any work means that, of the employees in New Zealand performing that work, at least 66% are female.<sup>6</sup>

**Male-dominated work** or **predominantly performed by male employees**, in relation to any work, means that, of the employees in New Zealand performing that work, at least 66% are male.

**Predominantly female sector or industry** is a sector or industry in which at least 66% of employees are female.

**Predominantly male sector or industry** is a sector or industry in which at least 66% of employees are male.

**Remuneration**, in relation to any employee, means the salary or wages actually and legally payable to that employee; and includes—

- (a) Time and piece wages and overtime and bonus and other special payments;
- (b) Allowances, fees, bonuses, commission, and every other emolument, whether in one sum or several sums, and whether paid in money or not;<sup>7</sup>
- (c) Employer contributions proportionate to wages and salaries, such as ACC and Kiwisaver;
- (d) Leave entitlements (other than parental leave).

## Part I – Purposes and rights

### 4 Purposes

The purposes of this Act are —

- (i) To eliminate and prevent any element of differentiation or discrimination based on the sex of employees in remuneration and other terms and conditions of employment; <sup>8</sup>
- (ii) To set out the processes by which employees may make claims relating to pay differentiation based on sex; and
- (iii) To re-enact, in an up-to-date and accessible form, the relevant provisions of the Equal Pay Act 1972. <sup>9</sup>

### 5 Equal treatment <sup>10</sup>

- (1) An employer must ensure that—

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<sup>5</sup> Cf. Equal Pay Act 1972 'Instrument means...(f) Any decision, whether recorded in writing or not, made by an employer fixing the rate of remuneration for an individual employee or a group of 2 or more employees; and for the purposes of this Act the employer and the employee or, as the case may be, each of the employees who are members of that group shall be deemed to be parties to the instrument.'

<sup>6</sup> Employment Equity Act 1990 had 60% for both definitions; E(PEandEP) bill 2017 had 66% for women and 50% for men, which was discriminatory and would mean comparing female-dominated jobs with mixed sex jobs. Judge Colgan said verbally that debate to define 'predominantly' was not relevant as pay equity claims would be very typically female occupations up around 80-95% female, bare majorities would claim equal pay.

<sup>7</sup> From EPA 1972 definition.

<sup>8</sup> (i) is from EPA 1972. Differentiation is the 'no-fault' word used in the 1972 Act. This purpose was extensively discussed and confirmed by the Courts. (ii) and (iii) are from the 2017 Bill.

<sup>9</sup> Cl.6(ii) and (iii) based on 3(c) and (d) of 2017 Bill. The 'enduring settlement' in 2017 Bill contradicted the Bill's important later requirement for regular reviews to maintain equity.

<sup>10</sup> This section is based on the 2017 Bill cl.8 but applying a wide definition of remuneration as in cl.8(2) and the criteria of skills, responsibility, experience, effort and conditions of work to both equal pay and pay equity, as these criteria are the core criteria of both under the current 1972 Act. Cl.5(2) reflects S.2A of the 1972 Act.

(a) the rate of remuneration paid, and the terms and conditions provided, to an employee do not, on the basis of sex, differentiate between employees who perform the same, or substantially similar, work; and

(b) for work that is exclusively or predominantly performed by female employees, the rate of remuneration paid for the work, and the terms and conditions provided, contains no element of sex-based differentiation.

(2) Without limiting subsection (1), the employer's obligation includes the obligation not to differentiate by sex with regard to non-monetary terms of employment, conditions of work, fringe benefits, and opportunities for training, promotion and transfer, and leave entitlements other than parental leave. <sup>11</sup>

(3) A rate of remuneration has an element of sex-based differentiation if it is less than the rate of remuneration that would be paid to male employees performing work that requires the same, or substantially similar, levels of skills, responsibility and experience, performing the work under the same, or substantially similar, conditions and with the same, or substantially similar, degrees of effort. <sup>12</sup>

## 6 Employee's right to make a claim

(1) An employee, or a group of employees who perform the same or substantially similar work, or a union representing such employees, may make a claim if that employee considers, or those employees consider, that their remuneration does not meet the criteria for equal treatment.

(2) Types of claim under this Act — <sup>13</sup>

(a) A claim in respect of treatment contrary to section 5(1)(a) is an equal pay claim;

(b) A claim in respect of equal treatment under section 5(1)(b) for work performed exclusively or predominantly by female is a pay equity claim;

(c) A claim in respect of equal non-monetary treatment may be made as a part of an equal pay or pay equity claim, or as a personal grievance of discrimination under Part 9 of the Employment Relations Act, but not both. <sup>14</sup>

(3) Where the circumstances are such that the employee would also be entitled to redress under the Human Rights Act 1993, the employee may: -

(a) make a claim under this Act; or

(b) make a complaint to the Human Rights Commission, but not both.

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<sup>11</sup> Cf. Equal Pay Act 1972, '2A Unlawful discrimination (1) No employer shall refuse or omit to offer or afford any person the same terms of employment, conditions of work, fringe benefits, and opportunities for training, promotion, and transfer as are made available for persons of the same or substantially similar qualifications employed in the same or substantially similar circumstances on work of that description by reason of the sex of that person.'

<sup>12</sup> Same wording as 1972 Act s.3(1)(b), which has been examined by the Courts in *Bartlett vs Terranova*.

<sup>13</sup> Cl.6(1) and (2) are in 2017 Bill but the order of abc is changed and the word 'discrimination' is replaced with the more neutral 1972 word 'differentiation'.

<sup>14</sup> Employment Relations Act 2000 allows a personal grievance about discrimination in pay, although the word 'pay' is not mentioned. Neither the ERA 2000 nor the Human Rights Act (discrimination in employment on grounds of sex includes assessment criteria, ie skills, responsibilities, experience, effort and conditions of work. So this is the best Act for addressing unequal pay, and including 'treatment', with wide definition of remuneration and cl.6(2)(c), allows other non-monetary aspects to be covered. If the issue is EEO, not pay, the claimant can choose which Act, as at present. Human Rights Act outcomes are usually confidential, complaints don't involve unions and so aren't applied more widely to other women. Few complaints have been taken under any Act, Talley's fish trimmers being the most wellknown.

- (4) For the purposes of cl.6(2)(c) and (3), an employee has made a claim under this Bill when that claim has been accepted by the Employment Relations Authority as complying with the purposes and criteria of this Act.<sup>15</sup>

## **7 Relationship between equal treatment and collective bargaining**

Equal pay or pay equity matters may be raised as part of collective bargaining under the Employment Relations Act, whether or not a claim has been made under this Act; excepting that –

- (a) The entry into a collective agreement by an employer and employees or their union does not settle or extinguish an unsettled equal pay or pay equity claim by those employees;
- (b) The existence of an unsettled equal pay or pay equity claim is not a justification for a failure to conclude collective bargaining on other matters.<sup>16</sup>

## **Part 2 – Procedure for claims**

### **8 Duty of good faith**

In all processes related to equal pay and pay equity claims, employers and employees must act in good faith as defined by s.4 of the Employment Relations Act 2000.<sup>17</sup>

### **9 Lodging a claim**

- (1) The employee or group of employees must make the claim in writing to the Employment Relations Authority Member for Employment Equity, stating:
- (i) The name(s) of the employee (or employees);
  - (ii) The date on which the claim is made;
  - (iii) The employee's occupation, position, and a description of the work performed by the employee;
  - (iv) The employer's name and address for service;
  - (v) If the employee has a union or other representative authorised to act on behalf of the employee in respect of the claim, the name and address for service of that representative;<sup>18</sup>
  - (vi) Whether the claim is an equal pay claim or a pay equity claim for work performed predominantly by females;<sup>19</sup>
  - (vii) If the claim is a pay equity claim, the employee may propose two or more male comparators that meet the criteria for appropriate male comparators in cl.17(2).<sup>20</sup>
  - (viii) Any prima facie evidence the employee may have of unequal treatment;<sup>21</sup>
  - (ix) Any claim for arrears of remuneration, which must not exceed a period of six years before the date of this claim.<sup>22</sup>

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<sup>15</sup> 2017 Bill.

<sup>16</sup> Based on cl.26 of the 2017 Bill, but taking out what reads like an unnecessary restriction to union-only bargaining. Issue is not just whether claim or bargaining may take longer; this allows pay equity to be raised less formally, in wage round or otherwise, but if no traction then a formal claim can be lodged under this Act. Some state unions are doing this at the moment; others are lodging claims with ERA under 1972 Act. Once pay equity issue brought to notice, if the employer makes an offer that is the same as or close to a pay equity rate in compliance with equal treatment obligations, then it can go through as collective bargaining, which is cheaper and faster.

<sup>17</sup> The 2017 Bill added a higher threshold for good faith on pay equity only, which would have been discriminatory.

<sup>18</sup> Cl.15(i) to (v) is from the 2017 Bill.

<sup>19</sup> Both equal pay and pay equity must come under this Bill, as in 1972 Act, with the same criteria for appraisal.

<sup>20</sup> Cf. 1990 Act s.42(2)(d), (e) and (f).

<sup>21</sup> I.e. minimal – personal information or publicly available job-level pay stats that indicate there seems to be a problem.

<sup>22</sup> This is the entitlement for all wages and money claims under Limitations Act 2010.

- (2) In deciding whether to accept a claim, the Employment Relations Authority must consider:
  - (a) Whether the occupation meets the criteria for a female-dominated occupation;
  - (b) Whether the claim provides all information required under (1); and
  - (c) In the case of a pay equity claim, whether the male comparators proposed by the claimant meet the criteria for an appropriate comparator under cl.17(2).<sup>23</sup>
- (3) If the claim meets the criteria in cl.9(2), the Employment Relations Authority will accept the claim and forward a copy to the named employer.

## 10 Consolidation of claims

- (1) On receiving notice of an equal pay or pay equity claim, the employer must respond to the claim within 14 days, by filing and serving on the claimant(s) a statement in reply in the format specified by the Employment Relations Authority, and:
  - (a) Must within 14 days notify all employees doing the described work that a claim for that work is in process and advise them of their right to join the claim;
  - (b) Must within 14 days notify other employers who are party to a multi-employer employment agreement which covers the work for which the claim is made;<sup>24</sup>
  - (c) May notify other employers with employees doing the same or similar work who may choose to be parties to the claim.
  - (d) In the case of a pay equity claim, may submit alternative male comparators to the Employment Relations Authority and present reasons why these should be preferred.<sup>25</sup>

## 11 Records to be kept by employers

- (1) Subject to any Regulations under this Act, every employer must comply with the provisions of section 130(1) of the Employment Relations Act 2000 and must keep the wage and time records required to be kept by that section for at least 6 years.
- (2) Every employer must each year provide to the Ministry of Business, Innovation and Employment the records for the month of June showing disaggregated data for wages, hours of employment, occupational classification (5 digit) and sex.<sup>26</sup>
- (3) (a) Every employer must keep records of --
  - (i) all pay reviews, job sizing and job evaluations undertaken<sup>27</sup> by the employer or an employers' group of which the employer is a member; and
  - (ii) all equal pay and pay equity claims pursuant to this Act in which the employer is involved.
 (b) These records must include employee notifications, data on comparators considered, job

<sup>23</sup> I.e. the Authority does not accept or reject a claim based on the prima facie evidence, but on the same criteria as in current 1972 Act. Also cf. Cf. 1990 Act s.42(2)(d), (e) and (f).

<sup>24</sup> 10(1) (a) and (b) reflects some of cl.16 of 2017 bill with a faster response time.

<sup>25</sup> The default is the claimant's choice; see powers of ERA to consider/accept a claim, and to advise, mediate, make a recommendation.

<sup>26</sup> This is based on the Green Party's Equal Pay Amendment Bill 2012 which stipulates a return of full annual data by 'no later than 1 June' each year. As Statistics NZ uses income data based on a June HLFS survey, it could be enough for employers make an annual return of just data for the month of June only. This could be used together with the HLFS to provide data on pay by sex and job to the public. Cf Employment Equity Act 1990, s.13. **Alternatively, and perhaps more efficiently**, employers' monthly PAYE data for individual employees could be required to also include sex, occupation and hours of employment, and IRD could provide disaggregated but anonymised data to MBIE and Statistics NZ as part of the government's Integrated Data Project. Note, claimants can request full records whenever needed under cl.12.

<sup>27</sup> Green Party bill says 'determinations by the employer' but the word determinations is incorrect in this context as Determinations are made by the Employment Relations Authority or Employment Court.

evaluations and comparisons, any negotiated settlement agreements, recommendations and determinations, and final pay rates or pay scales.<sup>28</sup>

## **12 Duty to provide information**<sup>29 30</sup>

- (1) The parties to a pay equity claim must, on request, provide to each other all information and wages data that is reasonably necessary to support or substantiate claims or responses to claims.
- (2) Any employer must, on request by a claimant, provide all information and wages data for work performed predominantly by male employees that is reasonably necessary to support objective appraisals and comparisons.<sup>31</sup>
- (3) Such requests must—
  - (a) Be in writing; and
  - (b) Specify the nature of the information requested in sufficient detail to enable the information to be identified; and
  - (c) Specify a reasonable time within which the information must be provided.
- (4) Any party to a claim under this Act may apply to the Employment Relations Authority for an order for disclosure of information specified in this section.
- (5) The party providing the information may—
  - (a) Request that it be treated as confidential by all parties, or
  - (b) Omit from the information any personal names or other details which may identify individuals, or
  - (c) Provide the information to an Authority Member only, who must—
    - (i) decide whether and, if so, to what extent the information should be treated as confidential; and
    - (ii) advise all parties of this decision; and
    - (iii) provide advice to the parties based on the Authority Member’s sighting of confidential information.<sup>32</sup>
  - (d) This section does not limit or affect the Privacy Act 1993;
  - (e) Nothing in the Official Information Act 1982 enables an employer that is subject to that Act to withhold information.<sup>33</sup>

## **13 Evidence for job appraisals**<sup>34</sup>

- (1) A claim for equal pay requires the employer to undertake together with the claimant a comparison of the claimant’s remuneration with the remuneration of male employees doing

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<sup>28</sup> Cf. Equal Pay Act s.17, 2017 Bill cl.41 and Green Party bill.

<sup>29</sup> Cf. EPA 4(2A) ‘The employer shall, at the request of the employee, or, as the case may be, of any employee who is a member of the group to which the instrument applies, supply to the employee all information that is relevant for the purpose of implementing this Act as to any right or benefit provided for the employee by the instrument.’

<sup>30</sup> This section is from Green Party Bill, which was incorporated into 2017 Bill. With the expertise/training this Bill requires for Authority and Mediator Service members, the ‘independent reviewer’ of the 2017 Bill is unnecessary.

<sup>31</sup> Cl.12(2) is language from the 2017 Bill extended to getting information from employers of male comparators.

<sup>32</sup> If an Authority member has the expertise required by this Bill, they are the ‘independent reviewer’ the 2017 bill suggests.

<sup>33</sup> Cl.12(4)(d) and (e) are from 2017 bill, except that (e) does not allow confidentiality under s.6 of the Official Information Act - ‘national security’ or economic/taxation policy should not override women’s human rights to equal pay.

<sup>34</sup> The term ‘objective appraisal’ is in ILO 100 which NZ has ratified and reports on – and gender neutral job evaluations based on the skills, responsibilities, etc. criteria are how ‘objective appraisal’ is done under NZ law.

the same or substantially similar work based on objective appraisals and comparison of levels of skills, responsibility, experience, effort required to do the work and the conditions of work.<sup>35</sup>

- (2) A claim for pay equity requires the employer to undertake together with the claimant a comparison of the claimant's remuneration based on an objective appraisal of levels of skill, responsibilities, experience, effort and conditions of work compared to the pay of men doing different work that requires similar levels of skill, responsibility, experience, effort and conditions of work.<sup>36</sup>
  - (a) For the purposes of a pay equity claim, a male comparator is not an appropriate comparator if there is a risk that his remuneration may also be affected by undervaluation based on gender in a female-dominated sector or industry.<sup>37</sup>
  - (b) To avoid this risk, comparison for the purposes of a pay equity claim must be made between the female work and remuneration and the work and remuneration of at least two comparators in different male jobs in two different male-dominated sectors or industries.<sup>38</sup>
  
- (3) (a) Any organisational pay review or job evaluation system used for objective appraisal must be approved by the Employment Relations Authority as --
  - (i) gender neutral; and
  - (ii) designed to objectively assess skills and responsibilities in work traditionally done by women.(b) Existing or previous job sizing or job evaluations may be relevant considerations, but cannot be assumed to be gender neutral.<sup>39</sup>
  
- (4) The comparison of skill, responsibility, experience, effort and conditions of work and their component factors may be determined to be the same or broadly similar in an overall sense<sup>40</sup>, or a proportion lower or higher on any factor, provided that any proportionality in the final equal pay rate can be clearly justified by the objective appraisal.<sup>41</sup>
  
- (5) Other evidence to support the claim may include but is not limited to:<sup>42</sup>
  - (a) Job descriptions;
  - (b) Descriptions of services to be provided for which the claimant or comparator is employed;
  - (c) Organisational pay reviews and similar documents;
  - (d) Evidence of rates of pay for similar or different jobs performed by males or females or both;
  - (e) Evidence of remuneration additional to base rates of pay, such as bonuses, commissions, fringe benefits, holiday entitlements, and employer contributions.<sup>43</sup>
  - (f) Evidence about comparators and job evaluations from any other claim that has already established an equal pay rate;

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<sup>35</sup> The same criteria apply whether it is for equal pay for women and men doing the same job or pay equity in different male/female jobs – see EPA 72 s.3(1)(a). It is essential that we don't lose this appraisal criteria for equal pay in mixed jobs.

<sup>36</sup> Equal Pay Act 1972 3(1).

<sup>37</sup> Judgments of Employment and Appeal Courts *Bartlett vs Terranova* 2013.

<sup>38</sup> CEVEP recommendation. Cf. Employment Equity Act 1990 s. 39(e) which requires comparison with two male occupations defined as more than 60% male, and Pay & Employment Equity Office work from 2004 to 2008.

<sup>39</sup> In Joint Working Group recommendations and 2017 Bill.

<sup>40</sup> 1990 Act s.48.

<sup>41</sup> This is quite standard and well understood in Human Resources job sizing but hard to express in legal language.

<sup>42</sup> The Court judgments say 'social, historical and structural evidence' may be presented as part of the evidence in a claim (alongside job comparisons). The Joint Working Group Principles and the 2017 Bill went well beyond that, requiring all claimants to present social, historical and structural evidence to prove the initial 'merit' to their employer in order to lodge a claim. CEVEP opposes this 'merit' requirement in the Principles.

<sup>43</sup> Needs best available definition.

- (g) Evidence of an historical or social nature that indicates undervaluation of the work; <sup>44</sup>
- (h) Evidence related to collective bargaining and representation by unions; <sup>45</sup>
- (i) Evidence related to the structuring of employment in the labour market or in sectors of the labour market by gender and/or ethnicity.
- (j) Evidence considered by the Employment Relations Authority to be relevant and useful. <sup>46</sup>

#### **14 Establishing the equal pay rate**

- (1) A rate of remuneration is deemed and described as the equal pay rate, or an agreement is deemed and described as an equal pay agreement, if objective appraisal shows it meets the criteria in cl.5(1). <sup>47</sup>
- (2) A rate of remuneration is deemed and described as the pay equity rate, or an agreement is deemed and described as the pay equity agreement, if objective appraisal shows it meets the criteria in cl.5(2).
- (3) An agreement resolving an equal pay or pay equity claim must –
  - (a) apply the agreed rate of pay or pay scale from the date the claim was accepted;
  - (b) include recovery of arrears for a period not exceeding six years; <sup>48</sup>
  - (c) include a schedule of future reviews to ensure that equal treatment is maintained for all employees doing the work for which the claim is made.
- (4) An agreement resolving a claim may include agreement on other terms and conditions, whether monetary or non-monetary, except that these may not be used to reduce the objectively appraised rate of pay or pay scale.
- (5) The agreement will apply to all employers who are party to the claim and all employees of those employers who do the work for which the claim is made; <sup>49</sup>
- (6) No employer may reduce the terms and conditions of employment of an employee who has made a claim or of any male employee for the purpose of settling that claim.

#### **15 Negotiated settlement**

- (1) At any time in making a pay equity claim <sup>50</sup> under this Act the claimant may withdraw the claim as part of a negotiated settlement agreement.

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<sup>44</sup> Cf. *Bartlett vs Terranova* judgments.

<sup>45</sup> Cl.13(4)(g) and (i) are in the Principles and the 2017 Bill but here they are not required to prove initial merit but as part of the substance of the claim, as in the *Bartlett vs Terranova* Judgments.

<sup>46</sup> All these kinds of evidence may support the job appraisals or may support negotiation for an acceptable settlement at any point. This will allow flexibility but still keep objective appraisal at the heart of the claim.

<sup>47</sup> Prioritises objective appraisal over negotiated settlements. The purpose is to allow settlements if claimant/unions can get a good one, but protect objective appraisals as the key mechanism in this legislation in accordance with ILO 100.

<sup>48</sup> This is the employer's incentive to settle at a fair rate and negotiate a trade-off on back pay. See also cl.13(1)(vii) on making a claim. Without this right to back pay, and the possibility of employers reducing it, employers may stall as long as they can on claims.

<sup>49</sup> This covers claim consolidation. If the government wants the equal pay rate or settlement rate to apply beyond the employees/employers who are actual parties to the claim, they do this by passing legislation, e.g. Care & Support Workers (Pay Equity) Settlement Act 2017.

<sup>50</sup> Note, this section does not apply to equal pay for women doing the same job as men, as comparison is relatively simple.

- (2) Such negotiation must follow the processes of collective bargaining in the Employment Relations Act.
- (3) The amount of such a settlement is to be described as the settlement rate of pay.
- (4) A settlement agreement may include, but is not limited to:
  - (a) The settlement rate of pay, which may including a pay scale and other components of remuneration;
  - (b) Any interim increases until the full settlement rate is reached;
  - (c) Any agreement on other terms and conditions related to such matters as training, qualifications, hours of employment;
  - (d) Any negotiated settlement of back pay entitlement under the Limitations Act 2010;
  - (e) An agreement that no further claims will be made for the period from the date the claim was registered until the date the full settlement rate is paid to the employees;
  - (f) A schedule for regular future reviews to ensure that equal treatment is maintained for all employees doing the work for which the claim is made.
- (5) The settlement agreement applies to all employers who are party to the claim and all employees of those employers who do the work for which the claim is made;
- (6) No employer may reduce the terms and conditions of employment of an employee who has made a claim or of any male employee for the purpose of settling a claim or applying a settlement agreement.<sup>51</sup>
- (7) Following an equal pay or pay equity settlement or determination, no employer may increase the pay rate for a male or males whose work has been held to be a suitable comparator in relation to a claim, unless the employer can establish reasonable grounds for any such increase
- (8) Nothing in a negotiated settlement agreement diminishes the future right of employees who are not a party to the settlement agreement to make a claim for pay equity or for back pay in respect of the same work for the same period.

## **16 Registration of agreement**

All agreements and settlement agreements on equal pay and pay equity must be registered with the Employment Relations Authority.

## **Part 3 - Institutions**

### **17 Object of this Part**

The object of this Part is to establish procedures that—

- (a) Support and ensure equal treatment for women and men and the good faith obligations that underpin this; and
- (b) Recognise that employment relationships are more likely to be successful if problems in those relationships are resolved promptly; and
- (d) Assist the parties to establish a pay equity rate in accordance with the criteria;
- (e) Recognise that expert support, information, and assistance needs to be available at short notice to the parties to those relationships;

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<sup>51</sup> Cf. 1972 Act s.15; 1990 Act s.74

- (f) Recognise that, in order to ensure women's right to equal treatment, expert assistance may include directing the parties through a recommendation or a determination.<sup>52</sup>

## **18 Employment Relations Authority**

- (1) Additional Members of the Employment Relations Authority shall be appointed by the Governor-General on the recommendation of the Minister, under ss.167 to 172 of the Employment Relations Act 2000.
- (2) The Authority Members shall :-
- (a) Undertake the specialist functions described in cl.10 of this Act;
  - (b) Have the expertise and experience appropriate to undertaking these functions;
  - (c) Have the powers of Members of the Authority under Part 10 of the Employment Relations Act 2000.

## **19 Functions and powers<sup>53</sup>**

- (1) The functions of Members of the Employment Relations Authority under this Act shall be –<sup>54</sup>
- (a) To accept claims for equal pay or pay equity that meet the criteria in cl.13 ;
  - (a) To establish any processes that, in the view of the Authority Member, will assist the parties to progress claims;
  - (b) To approve or advise on the selection of appropriate male comparators;
  - (c) To authorise appropriate job evaluation and comparison tools;
  - (d) To assist the parties to a claim to establish the equal pay or pay equity rate in accordance with the purposes and criteria of this Act;
  - (a) To consider any evidence presented under cl.13(5);
  - (b) To exercise investigative and other powers under s.160 of the Employment Relations Act;
  - (c) To advise or make recommendations to the parties on any matter related to a claim;
  - (d) To approve an equal pay or pay equity rate resulting from job comparisons as having no element of differentiation based on sex;
  - (e) To approve a negotiated settlement rate that is acceptable to the parties and reasonable in the view of the Authority Member;
  - (f) To make regular reports to the Minister responsible for this Act, including any recommendations;
  - (g) To undertake other actions that, in the view of the Employment Relations Authority, further the purposes of this Act.
- (2) In investigating any matter under this Act, the Employment Relations Authority may:
- (a) Exercise the powers of investigation in s.160 of the Employment Relations Act;
  - (b) Take into account such evidence and information as in equity and good conscience it thinks fit, whether strictly legal evidence or not;
  - (c) Call for evidence and information from the parties or from any other person;
  - (d) Require the parties or any other person to attend an investigation meeting to give evidence;
  - (e) Interview any of the parties or any person at any time before, during, or after an investigation meeting;

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<sup>52</sup> Adapted from s.143 Object of institutions in ERA 2000.

<sup>53</sup> Although there is institutional separation between the Authority and the Mediation Service, the purpose of these section is to ensure that both have specialist expertise on equal pay, pay equity, job assessment etc. and that in addressing claims under this Bill, they act to further the purposes of this Bill rather than different functions and purposes related to wage negotiations under the ERA 2000.

<sup>54</sup> See Dame Patsy Reddy's letter from the Joint Working Group to Cabinet re resources for regulatory agencies, as discussed in an earlier section of this paper.

- (f) Decide that an investigation meeting should not be in public or should not be open to certain persons:
- (3) If the Employment Relations Authority is satisfied that after a reasonable time the parties are unable to resolve any matter, the Authority may do one or more of the following:
- (a) Refer the parties to mediation with the purpose of establishing the equal pay or pay equity rate;
  - (b) Make a recommendation to the parties as in s.173A of the Employment Relations Act 2000;
  - (c) Make a determination, as in s.174-175 of the Employment Relations Act 2000;<sup>55</sup>
  - (d) Refer any matters for adjudication by the Employment Court, under s.177 of the Employment Relations Act 2000.
- (4) The Authority Member, in exercising these powers and performing these functions, must—
- (a) Comply with the principles of natural justice; and
  - (b) Act in a manner that is reasonable, having regard to its investigative role.<sup>56</sup>
- (5) A party who is dissatisfied with a written determination of the Employment Relations Authority may elect to have the matter heard by the Employment Court under s. 179 of the Employment Relations Act 2000.
- (6) For the guidance of parties to claims, the Employment Relations Authority may from time to time state general principles for the implementation of equal pay and pay equity in accordance with cl. 4 of this Act.<sup>57</sup>
- (a) Such principles may be stated--
    - (i) on the Employment Relations Authority's own motion, or
    - (ii) on the application of any organisation of employers or a union.<sup>58</sup>
  - (b) The principles may apply to any or all of the following:--
    - (i) all claims;
    - (ii) a type of claim; or
    - (iii) a particular sector or industry.
  - (c) The principles may be stated in the form of—
    - (i) a statement published by the Employment Relations Authority;
    - (ii) a recommendation to the Minister for an Order in Council for a Regulation under this Act.

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<sup>55</sup> EPA 1972, s.4(3) and (4) grants the right to arbitration by Employment Court: 'For the purpose of giving effect to the provisions of this Act... the Court, on the application of any party to the instrument or his representative, or, as the case may be, of the appropriate authority, or of an Inspector, may,... amend the instrument to the extent necessary.' See also EPA 1972 5(2) ..."conciliator is satisfied at any time on or before the first increment date that the parties are unable to agree on that question, he shall forthwith notify the Registrar of the Court, and the Court may make an order." Determinations by the Authority were permitted in the 2017 Bill. Because equal pay/pay equity is a right. Under ERA 2000 Determinations by the Authority were permitted in the 2017 Bill because pay equity and equal pay are a right. Under ERA 2000 the Authority can arbitrate on disputes, non-compliance, grievances but not on collective bargaining which is seen as a contract negotiated between the parties without state intervention. In contrast, pay equity and equal pay are women's rights under international conventions on which governments must take action; they are not just matters for negotiation in the market.

<sup>56</sup> From ERA 2000 for Authority members.

<sup>57</sup> Cf. s.9 of EPA 1972. This gives the Authority the power to issue principles that the Court had under 1972 Equal Pay Act, confirmed by recent judgments. This was bypassed by the Joint Working Group which issued recommendations for Principles. CEVEP opposes the Principles on proving initial merit, on the requirement for social/historical/labour market evidence to prove initial merit, and on selecting comparators, as these undermine current rights under the Equal Pay Act 1972 and/or the Court judgments.

<sup>58</sup> See s.9 of the Equal Pay Act 1972 and recent court judgments in regard to s.9.

## Mediation Services

- (1) Any party to an equal pay or pay equity claim may access mediation services provided under the Employment Relations Act 2000.
- (2) The Chief Executive of the department responsible for employment relations issues will ensure that all persons employed to provide mediation services in regard to equal pay and pay equity claims:
  - (a) have appropriate expertise in gender neutral job evaluation and other training specific to employment equity issues;
  - (b) will assist the parties to establish an equal pay or pay equity rate in accordance with the purposes and criteria of this Act.<sup>59</sup>

## ***Part 4 - Penalties***

### **21 Claimant must not be treated adversely<sup>60</sup>**

- (1) An employer must not treat adversely an employee who makes a claim under this Bill.
- (2) An employer treats an employee adversely if the employer—
  - (a) Refuses or omits to offer or afford to that employee the same terms of employment, conditions of work, non-monetary forms of remuneration, or opportunities for training, promotion, and transfer as are made available for other employees of the same, or substantially similar, qualifications, experience, or skills employed in the same, or substantially similar, circumstances; or
  - (b) Dismisses that employee or subjects that employee to any detriment, in circumstances in which other employees employed by that employer on work of that description are not or would not be dismissed or subjected to such detriment; or
  - (c) Retires that employee, or requires or causes that employee to retire or resign.
- (3) An employee may make a claim against the employee's employer or former employer for a contravention of subsection (1).
- (4) A claim referred to in subsection (3) is to be treated as a personal grievance under section 103(1) of the Employment Relations Act 2000 and, if an employer alleges that any of the actions described in subsection (2) were not related to the employee's making of a claim but were justifiable on other grounds, section 103A of that Act applies and the employer must establish that the employer's actions were so justifiable.

### **22 Penalties for non-compliance**

- (1) A person<sup>61</sup> who fails to comply with the provisions of this Bill in subsection (2) is liable,—
  - (a) If the person is an individual, to a penalty not exceeding \$10,000;
  - (b) If the person is a company or other body corporate, to a penalty not exceeding \$20,000.

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<sup>59</sup> Under the ERA 2000, the Mediation Service's purpose is to achieve settlement; under this proposed Bill their purpose is to achieve the equal pay rate. That doesn't prevent parties settling for less, but achieving settlement should not be the Mediation Service's function or goal under legislation to establish women's right to equal pay.

<sup>60</sup> From 2017 Bill. Cf. ERA 2000 s.67F; EPA 1972 s.15.

<sup>61</sup> The 2017 Bill said '(3) For the purposes of subsection (1), a person is involved in a failure to comply if the person would be treated as a person involved in a breach within the meaning of section 142W of the Employment Relations Act 2000.'

- (2) The provisions are—<sup>62</sup>
- (a) Cl.12 requiring all parties to a claim to deal in good faith;
  - (b) Cl.15 requiring all employers to keep records;
  - (c) Cl.16 requiring all parties to provide information on request;
  - (d) Cl.18(6) prohibiting an employer from reducing the terms and conditions of any employee in order to settle a claim for equal pay or pay equity;
  - (e) Cl.17(1), cl.18(5) and cl.19(5) requiring compliance with the pay rate established by an equal pay appraisal, a pay equity agreement or a settlement agreement for work which has been the subject of a claim under this Bill, with the penalty to apply for each employee affected;<sup>63</sup>
  - (e) Failure to comply with a determination by the Employment Relations Authority.
  - (f) Cl.21 prohibiting adverse treatment of a claimant.
- (3) An action for the recovery of a penalty for a failure to comply may be taken by:
- (a) an employee;
  - (b) an employer;
  - (c) a labour inspector;
  - (d) the Employment Relations Authority.
- (4) Section 135 of the Employment Relations Act 2000 applies, with any necessary modifications, as if the action had been brought under that section.<sup>64</sup>

### *Regulations*

#### **23 Regulations**<sup>65</sup>

The Governor General may from time to time, by Order in Council, make regulations providing for such matters as are contemplated by or necessary for giving full effect to the provisions of this Act and for its due administration.

### *Schedule 1*

#### **Amendments to Employment Relations Act 2000**

Amend s.130 Wage and time record by adding to s.130(1)(a): “(aa) the sex of the employee;”<sup>66</sup>

Whatever other amendments to the Employment Relations Act will be needed to make the Equal Pay and Pay Equity Act and the Employment Relations Act consistent with regard to:

- Appointment of sufficient Employment Relations Authority Member to address current and future claims under this Equal Pay and Pay Equity Act.;
- Determinations by the Employment Relations Authority under this Act ;
- Referrals by the Employment Relations Authority to the Employment Court;

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<sup>62</sup> The 2017 Bill’s cl.42(2)(a) is disregarded, as making a complaint about non-compliance with equal treatment is the same as a claim for equal treatment. The claim is the mechanism and back pay is the sanction and the incentive to employers to remedy things before a claim goes in.

<sup>63</sup> Cf. Equal Pay Act 1972 s.18(1). Penalties in the 2017 were low and may be appropriate for offences such as not providing information but, in CEVEP’s view, failing to pay a Determined or settled equal pay rate warrants a penalty for each employee who is adversely affected by this non-compliance.

<sup>64</sup> Cf. Equal Pay Act 1972 s 15; 2017 Bill cl.43.

<sup>65</sup> This is same as Equal Pay Act 1972 s.19. See also powers of Employment Relations Authority to recommend Regulations to Minister. The 2017 Bill clause on regulations was more prescriptive and restricting.

<sup>66</sup> This omission was acknowledged by MBIE officials in a consultation interview, but still left out of the final Bill.

- Employer records about equity claims, if they need to be included in Employment Relations Act too;
- Ensure penalties for non-compliance in the Equal Pay and Pay Equity Act are consistent with the Employment Relations Act;
- Check out consistency with adjudication by the Court as needed.

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