CEVEP...coalition for equal value equal pay
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Submission

to the Ministry of Business, Innovation and Employment on the Draft Employment (Pay Equity & Equal Pay) Exposure Bill

Coalition for Equal Value Equal Pay

The Coalition for Equal Value Equal Pay (CEVEP) is a voluntary organisation committed to reducing the gender pay gap in New Zealand through policy and initiatives to advance pay equity in general and equal pay for work of equal value in particular.

Our members' expertise and experience spans the breadth and history of this important policy issue.

CEVEP has campaigned for effective pay equity policy and legislation since 1986. Our activities include advocating to government and political parties, writing submissions and appearing before select committees, producing materials on pay equity for the public and the media, and organising tours of overseas experts to New Zealand.

In 2013, CEVEP was an 'intervening' party invited to assist the Employment Court in the pay equity test case taken under the Equal Pay Act 1972 by resthome caregiver Kristine Bartlett and the Service & Food Workers Union (E Tu). As an alternative to further steps under s.9 of the Equal Pay Act, the government established a Joint Working Group (JWG) to develop Principles for Pay Equity, to which CEVEP made a written submission.

Contact: Rachel Brown, rsb@xtra.co.nz

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CEVEP's key concerns

Following the *Bartlett vs Terranova* judgments, the government announced its intention to 'update' the Equal Pay Act, to incorporate the Joint Working Group's (JWG) Pay Equity Principles and to make it easier for women to file pay equity claims, rather than go to court.

CEVEP opposes this bill because it does just the opposite.

- It reduces women's right to make claims unless they meet new historical and other criteria.
- It introduces 'snakes-and-ladders' processes that will greatly increase transaction costs for claimants, for employers and for state agencies, including seeking new legal interpretations.
- The criteria for selecting male comparators overturn both the judgments and the JWG Principles.
- It does little to increase pay transparency.
- It discriminates against women by excluding only women's pay equity claims from the six years' back pay that all other successful wage and commercial money claims are entitled to.
- On these points and others, the Bill is inconsistent with its own Purposes of eliminating and preventing gender discrimination in remuneration (cl.3, cl.8).
- Claims already lodged under the 1972 Equal Pay Act must proceed under the current Act, as is normal legal practice.

Pay equity has just been agreed for 55,000 caregivers under the Equal Pay Act 1972. This first major claim was settled in just 17 months of bargaining (including funding issues) within the legal requirements of the Equal Pay Act and Employment Relations Act. Unless new legislation can offer clear improvements on that, CEVEP prefers to retain the current legislation.

Introduction

[1] Following the Employment Court and Court of Appeal judgments in the Terranova case, the Government announced its intention to 'update' the Equal Pay Act to implement the Joint Working Group's recommendations. The Minister for Women stated this will make it easier for women to file pay equity claims, rather than go to court.[1]

[2] In fact, the Government's draft Bill would do just the opposite. This draft Bill repeals the Equal Pay Act, which has so recently been demonstrated to provide a basis for pay equity cases, and puts in place an inferior piece of legislation.

[3] This Bill reduces women's right to pay equity. It imposes new tests requiring women to prove the initial 'merit' of their claim to their employer, including a requirement for historical evidence that will exclude many valid claims. The new language and tests will make claims more difficult, expensive and time-consuming to pursue, and will result in increased litigation as parties seek legal interpretations.

[4] The approach to selecting appropriate male jobs to compare with female-dominated jobs (to find a fair pay rate) is fundamentally flawed. The Bill requires claimants to choose a comparator with the same employer unless one is proven not to exist, and failing that, in the same industry unless one does not exist. This overturns both Court judgments *and* the Joint Working Group's Principles. Terranova lost this argument in both courts; and the Joint Working Group did not endorse it. Why is the government reviving it?

[5] Instead of laying down a clear, low-cost path for resolving disputes without going to court, the Bill introduces over-complicated 'snakes-and-ladders' processes that will greatly increase transaction costs for claimants and for employers. These processes will be difficult even for women represented by a union. For individual employees, the barriers will be significant. These convoluted processes and legal uncertainties will increase demand on the employment institutions, not reduce it.

[6] This Bill, if passed, will discriminate against women by prohibiting the Employment Relations Authority from awarding six years' back pay for women's pay equity claims. There is no logical reason for departing from the usual six year limitation period. Nor should usual legal practice be overturned by requiring claims already lodged under the 1972 Act to be dealt with under the new Act, rather than the legislation as it stood when the cause of action arose. On both this and regulation making powers, the Bill is contrary to the Legislation Advisory Committee Guidelines.

[7] On these points and others, the Bill is inconsistent with its own Purposes of eliminating and preventing gender discrimination in remuneration (cl.3, cl.8). It should be significantly re-drafted. A fairer, faster process is outlined on p.13. Alternatively, the current Equal Pay Act could implement the Joint Working Group's recommendations in a simple, clear way; preferably as an annex to the Act.

[8] Unless new legislation will be an improvement – and this Bill is not – CEVEP prefers to retain the current Equal Pay Act, the purposes and criteria of which have been clarified and confirmed by the Courts. Following these judgments of points of law, the 1972 Act has demonstrated it is fit for

[1] Jared Nicoll and Rachel Clayton, Vow to act on gender pay gap, *The Dominion Post* 25 January 2017; MBIE Draft Employment (Pay Equity and Equal Pay) Bill Commentary Document for Public Consultation, p.2.

purpose by delivering a pay equity rate for a large undervalued female-dominated occupation in just 17 months, including negotiation on state funding issues.

[9] In our view, this bill raises the barriers considerably. It turns pay equity into just another bargaining issue with employers, and downgrades equal pay to just another personal grievance under the Employment Relations Act.

[10] CEVEP opposes this draft Bill in its current form. It would need substantial amendments on the lines above to be minimally acceptable and we are not convinced of the need for it. Equal pay for work of equal value based on objective assessment is a fundamental right for working women under UN Conventions that New Zealand has ratified. This Bill turns it into just a matter each woman has to bargain for with her employer. Other key reasons for our opposition are listed at the beginning of this submission. We prefer to retain the current Equal Pay Act, which has been examined at length by the Courts, confirming its purposes and criteria. The recent *Bartlett vs. Terranova* case under the Equal Pay Act has just demonstrated that it can indeed be a basis for delivering pay equity for women.

Haste of the consultation and drafting process

[11] This Bill is of critical importance for a large number of New Zealand women. The Equal Pay Act, which this Bill would replace, has been in force for 45 years. CEVEP has worked for over 30 years to get a proper interpretation of the pay equity provisions. To have to respond within a matter of a few weeks to a consultation Bill with such important implications is unduly rushed. Such haste is unlikely to produce the best possible result for women, employers and the State alike.

Recommendations:

(a) CEVEP recommends retaining the current Equal Pay Act which has been shown to work
(b) CEVEP opposes this draft Bill as:
  (i) it reduces women's current right to pay equity.
  (ii) it introduces complex and repetitive processes that increase transaction costs.
  (iii) its criteria for selecting male comparators seek to overturn the Court judgements.
  (iii) it is in parts discriminatory.

Overarching purposes of the Bill

[12] The 1972 Act defines Equal Pay as: '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' (S.2). As the recent Court judgments placed considerable weight on this definition as indicating legislative purposes, these words should be included in the Bill. They are particularly relevant to equity assessments that compare factors and levels.

[13] Cl.5 on Interpretation should also include a definition that 'Pay equity means equal pay for work of equal value'. Pay equity is the term commonly used in New Zealand, but it would be helpful to have a clear link with the language in UN Convention 100 on Equal Remuneration and the UN Convention on the Elimination of All Forms of Discrimination against Women (CEDAW). Ratification of these Conventions gave rise to the 1972 Equal Pay Act and subsequent policies.

[14] Cl.3 states the Purposes of the Bill by placing 'promoting enduring legislation' first, followed by the elimination and prevention of gender discrimination in pay, as if these were a sub-set. This order should be reversed. Legislation is a means, not a policy purpose.

[15] The purposes of the Bill are to eliminate and to prevent gender discrimination in pay and other terms and conditions of employment. It is unfortunate that several sections of the Bill are inconsistent with these Purposes. Some exclude or discriminate against women seeking pay equity. In general, CEVEP finds the Bill too prescriptive, over-detailed, and repetitive in places, and in some respects certain to dissuade women from taking legitimate claims.

[16] This draft Bill does not sufficiently recognise the fact that equal pay for work of equal value based on objective assessment is a fundamental right for working women under UN Conventions that New Zealand has ratified.

[17] Each section needs to be reviewed for consistency with the Purposes in Cl.3. Will each requirement in fact make it easier or harder for women to claim equal pay for work of equal value? Does it allow sufficient flexibility for each claim to present evidence that is relevant to that kind of work? Will it allow claims to progress efficiently or does it raise barriers?

[18] Any updating of the Equal Pay Act should be minimal. It should retain the two criteria for claims: work which is done exclusively or predominantly by women (pay equity claims) (s.3(1)(b)) and work which is not (equal pay claims) (s.3(1)(a)). It should retain the criteria for assessing work in both kinds of claim: skill, responsibility, experience, effort, conditions of work. What was lacking was a clear understanding of the criteria for selecting male comparators in pay equity claims in today's context. That has now been clarified by the Courts, based on the history and stated purpose of the Act: to eliminate 'any element of discrimination' in women's pay rates. CEVEP's recommendation for selecting male comparators from male-dominated work, industries and sectors to ensure their pay rates are not also undistorted by gender bias is based on the Court judgments. The sections of the 1972 Equal Pay Act that eliminated the old female pay scales over four years could be stripped out. Claims under this updated Act would then proceed in much the same fashion as the now-settled Bartlett claim, drawing on normal mediation and/or an Authority determination if required.

Equal pay

[19] We are concerned that claims for equal pay for women and men in the same or similar work are to be buried, without explicit mention, in the list of grounds for personal grievances in the Employment Relations Act, dropping the Equal Pay Act criteria of comparing levels of skill, responsibility, service, effort and conditions of work. Women's right to equal pay in the same job as men and to pay equity in women's and men's different claims should be addressed in the same legislation.

[20] Equal pay and equal pay for work of equal value are important human rights for women under international Conventions, which New Zealand governments ratified in the 1980s and reports on biennially to UN committees. That human rights aspect would disappear from public view if equal pay becomes just a pay grievance in the Employment Relations Act.

[21] Also disappearing is the s.3(1)(a) requirement in the Equal Pay Act 1972 to consider the level of skills, responsibility, experience, effort and conditions of work in order to arrive at a fair rate compared to males in the same occupation.

[22] **Recommendations**:

(a) The Equal Pay Act 1972's definition of equal pay should be included in the Bill as considerable weight was placed on this by the Courts.

(b) Cl.5 should include a definition that pay equity means 'equal pay for work of equal value'.

(c) In cl.3 Purposes (b)(i) and (ii) on the elimination and prevention of gender discrimination should be the first and primary purpose, with 'enduring legislation' in last place at (d).

(d) All clauses and provisions within the Bill must be checked for consistency with the current Equal Pay Act's definitions, the Court judgments, the cl.3 Purposes, and cl.8 on Equal Treatment. Clauses flagged as discriminatory in this submission must be removed.

(e) Equal pay claims should continue to be addressed under the same legislation as pay equity, retaining the same base criteria for assessment and access to regulatory and support agencies with specific expertise.

(f) Greater weight must be given to the fact that equal pay and pay equity are fundamental human rights under UN Convention 100 and the UN Convention on the Elimination of all Forms of Discrimination Against Women (CEDAW).

New historical requirements will exclude valid claims

[23] The requirement for historical evidence in order to prove merit (cl.14(2)(b) and (3)) reduces women's current right to pay equity by excluding valid claims. It fails to recognise the ongoing, socially constructed way in which jobs are gendered[2] in current times. Parts of (3) could, for example, exclude three of the nine occupations researched by the 2004 Pay Equity Taskforce[3] (i.e. managers, librarians, occupational therapists).

[24] The current Act provides a clear and sufficient definition of the roles where pay equity claims may arise: 'work performed predominantly by women'. For both equal pay and pay equity, the current Act addresses inequality in the here and now, based on skill, responsibility, experience, effort and conditions of work. This was a deliberate choice of the 1970s Commission of Inquiry after considering UK and Australian legislation with looser criteria.

[25] The Court judgments used the phrase 'current ***or*** historical ***or*** structural gender discrimination', (evidently taken from the Human Rights Commission's submission). Note that the phrase uses *'or'***.**

[26] The Bill appears to make these alternative factors, which the Joint Working Group required to be 'considered', into two cumulative tests in order to establish a claim has merit (under cl. 14(2)(b) ***and*** (c)). There is no indication of where the burden of proof would lie but it appears likely it is on the applicant, albeit the threshold is 'reasonable grounds to believe'. Women trying to make pay equity claims are unlikely to be resourced to embark on the historic and social research needed, or to access pay experts in this area to make out the factors required to be proven to establish their claim has merit.

[2] See for example Julie Douglas, *Gender and the social construction of occupations*, PhD thesis, Auckland University of Technology; see Geoff Adlam (2015) "Gender: How does NZ's legal profession compare?", *Lawtalk* 22 July 2015, for an example of a currently feministing profession that already has undervaluation problems. In UK see extensive publications by Cynthia Cockburn, University of Warwick for research on how jobs are being actively gendered.

[3] Pay Equity Taskforce. (2004). *Report on Pay & Employment Equity in the Public Service, the Public Health and the Public Education Sectors*, Wellington.

[27] This would require proof (by the claimant) of historical ***and*** current ***and*** structural reasons. Enduring legislation requires a greater degree of flexibility than this, particularly if outcomes are to be based on bargaining. As the Court of Appeal stated at [138]:

> '…it is difficult to say in the abstract that as a matter of law particular types of evidence will never be relevant. The evidential value can only be determined on a case by case basis.'

[28] The Joint Working Group turned admissible factors to be presented as evidence of undervaluation into criteria for proving the initial merit of the claim. CEVEP expressed alarm at this at the time. Nevertheless, the Joint Working Group's language at least allows flexibility: '***may*** have been historically undervalued'; 'social, cultural ***or*** historical factors'.

[29] Cl.14 is even more alarming because, as well as having to meet one or more of the historical criteria in cl.14(3), ***all*** criteria under cl.14(4) are relevant as to whether the claim has merit. These mainly relate to economic criteria related to the relevant labour market. It seems unnecessary to include this list in legislation. Some or all may well be relevant to undervaluation of female-dominated work, but the interpretation of this clause appears ambiguous. It is possible some factors could be used by employers as a defence to undervaluation.

[30] In addition, cl.14(5) which defines relevant labour market for the purposes of cl.14(4) is confused and confusing. To be 'substitutable', all workers must be doing the same job – that is, an 'occupation'? Pay equity is about comparing women and men doing *different* occupations with the same levels of skill, etc. This cl.14(5) definition should be removed.

[31] Cl.14(4) also states that, for a claim to have merit, the claimant needs to establish there has been a past failure to properly assess the nature of the work, including the responsibilities involved, the conditions under which it is performed and what degree of effort is required. In practice, this will be a difficult if not impossible hurdle for claimants to overcome for the initial merit of the claim. This is a matter for gender neutral job assessments later in the bargaining process under cl.22.

[32] Equally problematic is cl.14(6) which relates to work covered by an existing pay equity settlement which has been extended to the claimant. Under this clause, even meritorious claims will be ousted from consideration unless the claimant can establish 'exceptional circumstances' (cl.36(3)). Circumstances contemplated by the Bill will not constitute exceptional circumstances. This would mean, for example, that an individual claim which is subsumed into a collective one over which the original claimant has no or limited control over will not constitute exceptional circumstances, even if the outcome means pay inequity persists. It could also mean that a future claimant cannot challenge the outcome of a past settlement, even though that pay inequity persists. Cl.24(c) requires reviews to maintain pay but, as claimants are individuals, it is unclear this applies to future employees in the job, whose rights are blocked by cl.14(6) and cl.36(3).

[33] Claims that simply re-raise matters that have been already determined consistently with the non-discrimination obligations in cl.8 will not constitute meritorious claims under the cl.22 criteria (which CEVEP supports for the substantive arguments of the claim). However, the ability to bring fresh claims where past settlements do not meet this standard is an important safeguard that should not be undermined. (Reversing the order and therefore priority given to cl. 3(a) and (b), as discussed in [14] and recommendation [22(c)] above, may help in this regard.)

[34] In summary, cl.14 overreaches both the Courts and the Joint Working Group. It creates additional hurdles for claimants to meet in order to bring a claim than currently exist under the Equal Pay Act. This could mean there is no remedial pathway, even though the employer's obligation under cl.8(b) to ensure there is no element of gender-based discrimination has been breached. These hurdles are repeated in cl. 22 and 23, imposing multiple evidential requirements on applicants throughout the process. See also discussion of burden of the Bill's processes on individual claimants in [49] to [52] below.

[35] **Recommendations:**

(a) Cl.14 is unnecessary and should be removed from the Bill. It is inconsistent with the stated Purpose of the Bill to eliminate existing and prevent future gender discrimination in remuneration.

(b) CEVEP objects strongly to the mandatory requirement for historical ***and*** structural labour market evidence being adduced to prove the initial merit of a claim. Cl.14(2)(b) and (3) requiring claims to pass a historical test, together with the problematic cl.14(5) definition, should be removed. Removing cl.14 in its entirety will achieve that.

(c) Cl.14(6) together with cl.36(3) should be removed. Bargained settlements may not be for the full pay equity rate and should not reduce women's rights by preventing future claims.

Complexity and repetitiveness of procedures

[36] Far from making claims easier for women (and employers), this Bill will greatly increase the time taken and the transaction costs for all parties, including the State. Rather than its intended aim of keeping claims out of the courts, it will provide multiple opportunities to litigate issues.

[37] The courts have just clarified pay equity criteria in the 1972 Equal Pay Act, and the Act has worked to deliver pay equity for caregivers. This Bill is not based on the language, definitions, criteria and requirements of the current Act. A new piece of legislation using new, untested language is likely to be tested through court cases. Employers will bear costs, as well as claimants. Many women will not be able to fund these cases and the procedures will therefore be a barrier to justice.

[38] Most of the increased transaction costs, however, will arise directly from the convoluted new processes required by the Bill. The Joint Working Group report, and the Cabinet paper, stated the processes under the ERA should be utilised to make taking claims simpler, quicker and more cost effective than taking a case directly to court.

[39] The Joint Working Group did not suggest the question of whether a claim had merit should be subject to possible mediation *and/or facilitation* before a ruling could be sought: mediation may assist the parties in dispute about merit. It was bargaining about the rate (once merit was established) that could utilise the facilitated bargaining model, not merit.

[40] The Bill enables or even encourages claims to be split into phases or parts, all of which can theoretically go through ***all*** the dispute resolution processes, separately. At each stage – proving merit, selecting comparators, making assessments, viewing confidential information, settling on a rate – a progress can be delayed and require repeated rounds of mediation, facilitation (see cl.27), referral to the Employment Relations Authority (see cl 28), possibly an Authority determination at any stage, possibly appeal to the Employment Relations Court on any determination. More attempts at bargaining must be made between each of these stages and levels of help sought.

[41] This is extremely inefficient and will delay claims being finally resolved.

[42] Making the setting of pay rates by the Employment Relations Authority a last resort after numerous repeated dispute resolution steps may (perversely) make it less likely parties will settle cases. The risk of an adverse finding is too remote to incentivise early settlement. The Cabinet paper (Regulatory Impact Statement) recognised the value of the existing model after the Court of

Appeal judgments in the Bartlett case, at para 33: 'Bargaining would be influenced by relevant court precedent and the incentive to avoid litigation'.

[43] The Regulatory Impact Statement's conclusion at para 41, in recommending overriding the existing model, states that early recourse to the courts is inconsistent with the Employment Relations Act. Bargaining is more economically efficient, it states, as employer and employees are best placed to know their particular circumstances and agree on the optimal mix of wages and conditions to reflect productivity and business and employee needs.

[44] The Bill should be about correcting injustice in an efficient way, not achieving economic efficiency. The market has never delivered a just outcome in terms of pay equity without a court decision or the risk of one compelling the parties to resolve the situation. The Bill will deliberately make accessing the Employment Relations Authority and Employment Court much more difficult. This risks disempowering the very women it is stated to be helping. Litigation will not be reduced by the Bill: new legislation is always tested in the courts.

[45] Access to facilitation was intended to be far less onerous than the current facilitated bargaining model. However, instead of stating that if mediation has failed to resolve bargaining for the pay equity rate, the parties can access facilitation, there is still a threshold (under cl.29(2)), which requires an application. Those applications can be (and often are) opposed or declined. This will increase cost, delay and uncertainty. Facilitation should be automatic, unless it is unlikely to assist (for example, if mediation has been marked by bad faith). Cl. 29 should be amended to remove the requirement that one or both of the grounds (Cl.29(2)) exist. Cl.29(1)(a) and (2)(b) are sufficient.

[46] These processes are more burdensome than grievance or bargaining processes in the Employment Relations Act. It is considerably more burdensome than the current process for making equal pay and pay equity claims directly to the Employment Relations Authority, followed by negotiation.

[47] It would be far simpler and cheaper for all claims (including appropriate comparators) to go directly to the Employment Relations Authority, as at present. Once claims based on the legislated criteria are accepted, the employer can be notified and good faith bargaining can proceed, if necessary with the assistance of mediation. If not settled through those processes, the Employment Relations Authority would set the rate. As precedents are established, settlements will become more straightforward. (See "A fairer, fast process" below.)

[48] The Authority will need to appoint members who have the specialist expertise to carry out pay equity determinations, including an initial assessment of whether a claim has merit. In turn, Authority members will need to have access to in-house expertise to assist with making these determinations, as would the Mediation Service. Just as Judges have access to Judges' clerks to assist with legal research, Authority members will need to have access to non-legal research. There will also be a need to support claimants with legal and expert witness support. For example, under the Human Rights Act 1993 public funding is available through the Office of the Director of Human Rights Proceedings.

Individual claimants

[49] The Bill proposes complaints-based legislation to which successive layers of bargaining (modelled on collective bargaining involving unions) have been added. This is totally inappropriate and unworkable for the 77 percent of women employees who are not represented by unions.

[50] Legislation that relies on individual complaints for enforcement does not work well for women. The market has not delivered equal pay or pay equity for a large number of women; it has perpetuated and entrenched inequality. It is unrealistic to expect good faith bargaining alone (with a last resort access to the Employment Relations Authority) to deliver good outcomes, given the inequality of bargaining power and the resources many employers will have compared to individual women. Furthermore, the Bill's processes and possible applications to the Employment Relations Authority and Employment Court place an enormous burden of acquiring evidence, including expert evidence, legal applications and submissions, etc. on claimants.

[51] The 1972 Act allows women to lodge claims with the Employment Relations Authority or Human Rights Commission, which are very used to assisting claimants. This Bill instead requires pay equity claims to be made by each individual woman directly to her employer. It is well known that it is challenging for women to negotiate their pay or seek pay rises from their employer. Making a pay equity claim directly to an employer may seem like accusing him/her of intentional discrimination, not just requesting a comparative assessment.

[52] Any new legislation should make it simpler for women to claim pay equity, not more difficult. It should allow women to continue to lodge claims for acceptance by a neutral party, as at present. The employer against whom the claim is made should not decide on its initial merit. Women should have ready access to an objective, expert body (the Employment Relations Authority) to accept claims that comply with the requirements of the Act, providing the setting for negotiation in good faith. The claim, comparators and other evidence would then be examined and tested by the parties through that process of assessment and bargaining.

Relationship with collective bargaining

[53] The bargaining model may be appropriate for collective claims for women in large unionised female occupations who can call on union expertise and resources. The role and rights of unions is unclear, compared with the Employment Relations Act. Cl.25 seems to disallow pay equity claims from being raised in normal annual bargaining, not just prevent hold-ups on settling other issues. The Cabinet paper acknowledges pay equity being raised in annual collective bargaining and the Bill needs to do likewise. It would be discriminatory for the state to exclude women's issues from normal collective bargaining, and the associated right to strike, should unions wish to raise it. Equal pay and equal pay for work of equal value, freedom of association and collective bargaining, supported by a right to strike are all fundamental UN Rights at Work.

[54] Cl.19(5) entitles the employer(s), not the women or their unions, to make the decision about whether claims made to two or more employers are consolidated. There is no mechanism for challenging this.

[55] This is inconsistent with employees' right to individual or collective bargaining under the Employment Relations Act. Women should have the right to choose whether they make individual or collective claims for equal pay and for pay equity, as at present under the Equal Pay Act and Employment Relations Act. (Employers may choose whether they consolidate their response with other employers.) Separate processes for individual or collective claims could be considered. For

individual claims, a process similar to that of the Human Rights Commission, which includes providing assistance and expertise might be appropriate. Consider, however, how long the recent settlement for 55,000 carers would have taken, and the transaction costs, had it not been resolved on a collective basis.

Employers

[56] We now know that it has been unlawful for New Zealand employers to have discriminated against women in female-dominated occupations since 1972. Very few have done anything to address this. That state of affairs should not be permitted to continue.

[57] Regrettably, this Bill requires no active steps by employers, but allows them a series of opportunities to stall claims. The Joint Working Group recommendations included that employers promptly notify other employees in similar roles, and promptly respond to claims. Under cl.16(3) and 17(3) employers can delay beyond 30 days (notification of other affected employees) and 90 days (decision about merit) if they have good reason on reasonable grounds, with no recourse for the claimant. We can't imagine what a good reason could be for needing more than 30 days to notify other employees. Possible delays or refusal to acknowledge 'merit' are good reasons for claims to be lodged with a neutral authority.

[58] As the Bill stands, 90 days is a generous timeframe for employers to make a decision about merit and respond. CEVEP sees no legitimate reason for enabling employers to delay either notification or response (potentially indefinitely as no timeframe is set for the extensions – the employer chooses the extension and the employee has no obvious recourse to the Authority about this).

Transparency

[59] CEVEP strongly supports the Joint Working Group's statement that better access to employer information is essential if claimants are to know if they are being paid properly and if necessary bring a pay equity claim.

[60] Without pay rate transparency across the labour market and within enterprises, women will always be ignorant of what their male colleagues in the same job, in similar jobs and in similar but different roles are paid. Pay transparency, in pay bands, already exists in the state sector. In the private sector the NZ Stock Exchange is heightening its expectations for disclosure of executive and director pay for publicly listed companies[4].

[61] Under the Bill, employers need to supply information only after the merit of a claim has been accepted or denied by them. Women will find this unworkable; it will have the effect of discouraging claims. Under cl.21(3) and (4), information that employers want kept confidential may only be seen by a third party. This is a mechanism drawn from collective bargaining that is not appropriate for pay equity, which is a human right. Employees and their representatives would be working in the dark. Surely it is sufficient to omit personal identifiers from the job and pay information or to request that the parties not make the information public. Commercially sensitive or other private information is often made available to counsel on a confidential basis in the course of litigation. There is no reason why this could not be the case here.

[4] *NZ Listener,* 'Awash with Dosh', April 29-May 5 2017

[62] Policy and action on pay equity cannot work without better access to information from employers, including job descriptions and pay. At present Statistics NZ can provide pay data only at the level of broad sectors, not the actual jobs that need to be compared. Without a system to ensure the collation of labour market data and a pre-claim disclosure regime, many employees will simply not have the information they need to even know whether they have a valid claim.

[63] Under S.130 of the Employment Relations Act, employers are required to keep records on the kind of work, hours and pay of each employee; sex is not listed. However, employer returns with already averaged male and female pay were the basis of Statistics NZ's QES data (discontinued in 2011). Based on currently required records, full (disaggregated) employee information without identifying names could be provided to Statistics NZ in June each year (same month as the Household Labour Force Survey) and form the basis of publicly available 5-digit occupational pay data by sex. Data at the level of actual jobs would assist both employers and employees on equity issues.

A fairer, faster process

[64] Claim processes in this Bill must be greatly simplified and properly resourced if the government's stated policy is to work.

[65] In CEVEP's view, claims should continue to be lodged with the Employment Relations Authority as at present. The criterion in the 1972 Act is clear and sufficient: 'work performed exclusively or predominantly by women', and avoids excluding some groups of women in new or newly feminised occupations.

[66] Male claimants proposed by the claimant must meet criteria based on the Court judgements, i.e. that avoid risk of the male comparators' pay also being distorted (see next section). The Authority will accept, reject or advise based on these criteria, and accepted claims will be notified to the employer(s) who will notify any other employees affected. Any concerns of the employer about appropriate comparators can be raised as part of the assessment and negotiation process, with mediation or referral to the Authority available if needed. (This was the successful process for the Bartlett claim.)

[67] The cl.14 requirement for women to prove merit to their employer should be removed, as should cl.17 and cl.18(a) which allow the employer to reject or delay the claim. This is unfair and unworkable for women, as are some sub-clauses of cl.14. Cl.14 should be removed in its entirety. Women must retain the right to lodge pay claims individually or collectively, as under the Employment Relations Act. Employers may choose whether to consolidate their response with other employers. Cl.19(1)-(3) should be rewritten. Cl.25 should state clearly that pay equity may be raised in collective bargaining (followed by cl.25(1) and (2).

As in the Court judgments, the option to present 'historical or social or structural' evidence can be part of the claim resolution process, alongside assessing and comparing the female and male work based on 'skill, responsibility, experience, effort and conditions of work' (cl.22 of the Bill, s.3(1)(b) of the Equal Pay Act). These are options since, as the Court of Appeal stated, 'evidential value can only be determined on a case by case basis'. This referred to evidence about undervaluation, *not* for the right to lay a claim. As stated above, cl.14 should be removed, and the *option* of presenting 'historical or social or structural evidence' can be placed alongside the job assessment criteria in cl.22.

[68] Under the above process, the claimant's right to request information from employers (her own and the comparators') (cl.21) now applies to claims accepted by the Employment Relations Authority and referred on to the various employers. For information considered personal or commercially sensitive, it is sufficient to allow parties to redact details provided these are not required for fair assessments, and/or to request confidentiality as part of 'good faith'. At any point during assessment and negotiation, the parties may seek the assistance of the Mediation Service, and may be directed to return to 'good faith' bargaining, to further mediation or, failing all that, referred to the Employment Relations Authority for determination. (Facilitation is an unnecessary duplication of mediation services.) Authority determinations may be appealed to the Employment Court.

[69] The Employment Relations Authority and the Mediation Service must be properly resourced by government to respond to current and future pay equity claims. Staff will require specialist training on pay equity issues in order to support and advise claimants and employers. The Authority must have access to expert in-house research and evaluation, made available to claimants prior to its use in any determinations. CEVEP supports the National Council of Women's proposal to bring together in one place the currently fragmented work, responsibilities and expertise of government agencies, including the monitoring of gender pay inequity as recommended to New Zealand by the CEDAW Committee in 2012.

[70] MBIE should consider requiring anonymised job-specific data from employer records required under s.130 of the Employment Relations Act (see [63] above) to enable Statistics NZ to publish pay data by sex at the 5-digit level of job categorisation. This will greatly assist employers and employees to know whether pay equity could be an issue.

[71] **Recommendations:**

(a) Claim processes in this Bill must be greatly simplified and properly resourced if the government's stated policy is to work.

(b) The cl.14 requirement for women to prove merit to their employer should be removed, as should cl.17 and cl.18(a) which allow the employer to reject or delay the claim. This is unfair and unworkable for women, as are some sub-clauses of cl.14. Cl.14 should be removed in its entirety.

(c) Claims should continue to be lodged with the Employment Relations Authority. The criterion in the 1972 Equal Pay Act is clear and sufficient: 'work performed exclusively or predominantly by women', and avoids excluding women in new or newly feminised occupations.

(d) Male comparators proposed in the claim must meet legislative criteria designed to avoid the risk of pay in male-dominated jobs also being distorted. The Authority may accept, reject or advise based on these criteria and notify the employer.

(e) Women must retain the right to lodge pay claims individually or collectively. Employers may choose whether to consolidate their response with other employers. Cl.19(1)-(3) should be re-written. Cl.25 should state clearly that pay equity may be raised in collective bargaining.

(f) 'Historical *or* social *or* structural' evidence may be presented in the claim bargaining process, alongside assessment based on 'skill, responsibility, experience, effort and conditions of work'

(cl.22 of the Bill, s.3(1)(b) of the Equal Pay Act). Cl.22 remains the criteria for determination by the Authority.

(g) Under the above process, the right to request information from (any) employers (cl.21) now applies to claims accepted by the Authority. It is sufficient to redact details and/or to request confidentiality as part of 'good faith'.

(h) At any point, the parties may seek the assistance of the Mediation Service, and may be directed to return to 'good faith' bargaining, to further mediation or be referred to the Authority for determination. Authority determinations may be appealed to the Employment Court. Facilitation is an unnecessary duplication and cl.27 should be removed. In referral to the Authority, cl.29(1)(b) and cl.29(2)(a) are unnecessary and burdensome and should be removed.

(i) The Authority and Mediation Service must be properly resourced and given specialist training. Claimants should also be supported and resourced.

(j) MBIE should consider a fairer, faster process as outlined above at [64] to [70] (p.13).

(k) MBIE should explore how best employer records under S.130 of the Employment Relations Act can provide a source of 5-digit job pay data for analysis and publication by Statistics NZ.

Male Comparators

[72] The Background section to the draft Bill omits the key finding of the Courts in regard to male comparators, and cl.23 of this Bill overturns it.

[73] Cl. 23(1)(a) and the preceding clause in (1) must be removed because, untangled, it describes the *same or similar* work – ie equal pay - rather than pay equity, which is men's and women's *different* jobs with similar levels of skill, responsibility, etc.

[74] CEVEP strongly opposes cl.23(2). This is directly contrary to the Court judgments. It was not part of the Principles on comparators included in the Joint Working Group recommendations (and is rightly opposed by the Council of Trade Unions (NZCTU0).

[75] The Courts stated that a male comparator is inappropriate for the purposes of the Act if their pay is likely to also be affected by gender bias; it may be necessary to look outside the workplace or sector to ensure an appropriate comparator (Employment Court [44], [46]). The Bill replaces this with a requirement to select male comparators as close as possible to the employer's business - i.e. with high risk of gender-biased pay - as long as their work is not actually female-dominated (cl.23(3). Despite the judgments, comparators may not be selected from different sectors – logically, male-dominated sectors with no risk of gender-biased pay – unless no males are available (cl.23(2)(d).

[76] This will not and cannot achieve the purposes of the Bill to eliminate and prevent any element of gender discrimination in pay.

[77] It is fairer, more efficient and less expensive to require comparators doing male-dominated work in male-dominated occupations, sectors or industries, whose pay will therefore be clearly undistorted by gender bias. This is the policy approach taken in the past.

[78] CEVEP recommends requiring job comparisons to be between the female job or job class and at least two comparators in different male jobs in two or more different male-dominated sectors or industries. The starting point will be the comparators chosen by the claimants as is the usual rule for other discrimination claims. Employers are free to persuade claimants and ultimately the Authority (and Employment Court) that other comparators are more appropriate and will deliver an outcome not tainted by gender bias. Cl.23(3) should be reworded accordingly to reinforce this simple but fundamental point arising out of the definition of equal pay under the Equal Pay Act and the Bartlett case.

[79] It is not currently clear who selects appropriate male comparators under cl.23. It should be clarified that it is the right of the claimant to nominate comparators in the claim. For the claim to be accepted by the Authority, these must meet the criteria for appropriate comparators that meet the criteria (i.e. whose pay is unaffected by gender bias). If the employer claimed against prefers different comparators, he/she must present evidence as to why these are more appropriate and negotiate the matter with the claimant.

[80] Cl.23(1)(c) is inappropriate and should be removed or amended. It will provide a perverse incentive for tainted settlements if low base rates can then be emulated in other claims. There can be no guarantee that rates which have been settled as a result of pay equity bargaining provide untainted precedents for subsequent claims: the settled rates may still be lower than genuinely unbiased rates because of affordability or funding. This is not consistent with the purposes of the Bill. For that reason, CEVEP submits that the word 'settlement' at the end of the clause should be replaced with 'determination by the Authority or Court'.

[81] CEVEP notes the Cabinet paper (Response to the proposals of the Joint Working Group on Pay Equity) suggests other jurisdictions restrict comparators to the same employer but, as shown by the table (Annex 3), this is not as limited as has been portrayed. Nor does it reflect the other mechanisms that are in place in some other jurisdictions to deal with lack of appropriate comparators within the enterprise, or other beneficial aspects of legislation such as positive obligations on employers to remedy pay inequity. Further, the paper does not analyse the results this restriction delivers for the claimants in those jurisdictions, i.e. is it actually a good model for New Zealand women?

[82] **Recommendations:**

(a) Pay equity assessments compare women's and men's *different* work, as in cl.23(1)(b). The words 'same or similar work' should be removed from cl.23(1) and other clauses related to pay equity.

(b) To meet the purposes of the Bill and the Bartlett findings, appropriate male comparators must be males whose pay is clearly undistorted by gender bias. For this reason, Cl.23(1) and (1)(a) should be replaced with a requirement to assess and compare the female job or job class against different work in two or more male-dominated jobs from male-dominated industries or sectors. Cl.23(2) should be removed in its entirety.

(c) Cl.23 should include a statement that appropriate male comparators will be nominated by the claimant. Where the employer considers that different comparators are appropriate comparators for pay equity purposes, he/she needs to establish that to the satisfaction of the claimant.

(d) Bargained settlements do not guarantee untainted precedents for subsequent pay equity claims. For this reason cl. 23(1)(c) should be removed, or amended by replacing the word 'settlement' with the words 'determination by the Authority or Court'.

(e) In Clause 23(3) all the words following 'section 22(1)' should be deleted and replaced with the words 'if the rate of pay for that work may be tainted by gender bias'.

Assessment and settlement

[83] CEVEP supports cl.22 on 'Matters to be assessed' as presenting the substantive arguments for the claim, as in the current Act. This provides the 'objective appraisal' required under UN Convention 100 for Equal Remuneration to assess whether there may be current pay discrimination.

[84] The option of persuasive argument on 'historical or structural gender discrimination' raised in the judgments related to evidential presentation at this stage of the claim. CEVEP agrees that such evidence may be very relevant in bargaining, as it was in the Bartlett claim, but does not support a shift away from the objective criteria in cl.22 as the basis for determination by the Authority, should the claim reach that level.

[85] The review in cl.24(1)(b) is a positive step. The right to regular review is very necessary. However, this review appears only to last as long as this individual woman is in the job. It does not relate to the rate for the job or occupation itself.

[86] Cl.24(2) is also welcomed. It is important there is no expectation of trade-off between existing conditions and wages. However, there is no prohibition on an employer reducing male wages or conditions to frustrate the success of a pay equity claim, through for example reducing the salary of any future hires or restructuring of male jobs to alter the outcome of comparisons. These protections need to also extend to claims that are adjudicated.

Back pay and penalties

[87] Cl.12 of the Bill allows six years' back pay for the equal pay claims being shifted to the Employment Relations Act. Other claims for wages owed under that Act are also entitled to six years' back pay. All commercial money claims are also entitled to include six years' back pay.

[88] Under this Bill, the same provisions will not apply for pay equity claims. Cl.39 states the Authority (when determining pay rates) will not have jurisdiction to award back pay before the date the claim was delivered. This breaches the principle 'no legal right without a remedy'. It is also discriminatory because the only employees singled out for inferior treatment are those in female dominant occupations. Courts in Canada have found disadvantage against this group amounts to discrimination in breach of the Canadian Charter (equivalent to s.19 of the New Zealand Bill of Rights Act). The Quebec Court of Appeal has recently ruled that a failure to make 'retroactive' payments following the required five yearly pay equity review is discriminatory.[5]

[89] CEVEP is disturbed that neither the Cabinet Paper nor the Regulatory Impact Statement advise that this limitation breaches s.19 in the Bill of Rights Act, and notes the irony that a Bill that claims to prevent future discrimination does just that.

[5] Q*uébec (Procureure générale)* c. *Alliance du personnel professionnel et technique de la santé et des services sociaux*, 2016 QCCA 1659.

[90] This provision will incentivise employers to resist settling pay equity claims involving back pay (i.e. up to six years prior to the date of application) in the knowledge no such back pay can be awarded in a determination by the Employment Relations Authority. Women are effectively prevented from bringing claims that involved back pay because the claims would stall with no possibility of a successful outcome.

[91] Employers who pay their female employees discriminatory rates have benefitted from cheap labour for years. They have had years to take steps to ensure equal pay and pay equity for their women employees. Pay equity has been a perennial policy and political issue and much publicised in recent years. Back pay should be seen as an incentive to employers to address pay equity on their own initiative, before any claim is laid.

[92] Employer penalties under s.42 are very low (and do not apply to pay equity breaches). At these levels, non-compliance will pay for any employer with a few employees in female-dominated jobs to do nothing until forced.

[93] **Recommendations:**

(a) The cl.39 limitation on back pay should be removed in its entirety.

(b) The penalty for non-compliance under cl.42(1) and (2) should be increased to $10,000.

(c) The provisions in cl 42(4) should include a breach of cl.8(1).

(d) Cl.42(6) should specify that the maximum penalty of $20,000 will be paid to each employee affected unless the Authority orders otherwise.

(e) Cl.42(6) should specify that the time limits for bringing any penalty action in relation to a breach of cl.(8)(1) is not 12 months as under s.135 of the Employment Relations Act, but six years.

Regulation making powers

[94] Cl.44 gives the Governor General by Order in Council the power to issue regulations on core and controversial aspects of the Bill: cl.14 on initial merit; cl.22 on the base criteria for job assessments; cl.23 on the criteria for selecting male comparators. That is, at some future date Cabinet, not Parliament, may make changes to core aspects of the legislation. These will lack transparency and accountability.

[95] This is contrary to the Legislation Advisory Committee Guidelines. Guideline 13.1 states that matters affecting fundamental human rights and, especially if limiting those rights, should only be dealt with in primary legislation.

[96] **Recommendation**

(a) The regulation making powers in cl.44 must be considerably reduced as they are contrary to Legislation Advisory Committee Guidelines.

Treatment of existing claims

[97] The commentary on the draft bill advises of an intention by government to recognise any settlements under the Equal Pay Act as pay equity settlements under this Bill. As discussed at [32] and [33] above, bargained settlements of pay equity claims may not be the full fairly assessed pay equity rate.

[98] MBIE proposes that existing claims will not be allowed to continue under the Equal Pay Act but will be commenced or recommended under the new Act. This is strongly opposed by CEVEP as contrary to the Legislation Advisory Committee Guidelines. Guideline 11.1 provides that legislation should not have direct retrospective effect and Guideline 11.4 states that legislation should not pre-empt matters that are currently before courts.

[99] A number of claims affecting a great many women have been registered with the Employment Relations Authority under the 1972 Equal Pay Act. These must continue under that Act. Legislative changes frequently result in a backlog to be addressed under the law as it was before the amendment or new Act, and it is standard legal practice to do so.

[100] **Recommendation:**

(a) All current or new claims lodged under the Equal Pay Act 1972 before enactment of new legislation must continue under the Equal Pay Act 1972, in line with Legislation Advisory Committee Guidelines.

Summary of CEVEP's recommendations

Introduction [11]

(c) CEVEP recommends retaining the current Equal Pay Act which has been shown to work.

(d) CEVEP opposes this draft Bill as:
- (i) it reduces women's current right to pay equity.
- (ii) it introduces complex and repetitive processes that increase transaction costs.
- (iii) its criteria for selecting male comparators seek to overturn the Court judgements.
- (iii) it is in parts discriminatory.

Overarching Purposes [22]

(a) The Equal Pay Act 1972's definition of Equal Pay should be included in the Bill as considerable weight was placed on this by the Courts.

(b) Cl.5 should include a definition that pay equity means 'equal pay for work of equal value'.

(c) In Cl.3 Purposes (b)(i) and (ii) on the elimination and prevention of gender discrimination should be the first and primary purpose, with 'enduring legislation' in last place at (d).

(d) All clauses and provisions within the Bill must be checked for consistency with the current Equal Pay Act's definitions, the Court Judgements, the cl.3 Purposes, and cl.8 on Equal Treatment.

(e) Clauses flagged as discriminatory by this submission must be removed.

(f) Equal pay claims should continue to be addressed under the same legislation as pay equity, retaining the same base criteria for assessment, and access to regulatory and support agencies with specific expertise.

(g) Greater weight must be given to the fact that equal pay and pay equity are fundamental human rights under UN Convention 100 and the UN Convention on the Elimination of All Forms of Discrimination against Women (CEDAW).

New historical requirements will exclude valid claims [35]

(a) Cl.14 is unnecessary and should be removed from the Bill. It is inconsistent with the stated Purpose to eliminate existing and prevent future gender discrimination in remuneration.

(b) CEVEP objects strongly to the mandatory requirement for historical ***and*** structural labour market evidence being adduced to prove the initial merit of a claim. Cl.14(2)(b) and (3) requiring claims to pass a historical test, together with the problematic cl.14(5) definition, should be removed. Removing cl.14 in its entirety will achieve that.

(c) Cl.14(6) together with Cl 36(3) should be removed. Bargained settlements may not be a full pay equity rate and should not reduce women's rights by preventing future claims.

Complexity and repetitiveness of procedures [71]

(a) Claim processes must be greatly simplified and properly resourced if the government's stated policy is to work.

(b) The Cl.14 requirement for women to prove merit to their employer should be removed, as should cl.17 and cl.18(a) which allow the employer to reject or delay the claim. This is unfair and unworkable for women, as are some sub-clauses of cl.14. Cl.14 should be removed in its entirety.

(c) Claims should be lodged with the Employment Relations Authority. The criterion in the 1972 Equal Pay Act is clear and sufficient: 'work performed exclusively or predominantly by women', and avoids excluding women in new or newly feminised occupations.

(d) Male comparators proposed in the claim must meet legislative criteria designed to avoid the risk of pay in male-dominated jobs also being distorted. The Authority may accept, reject or advise based on these criteria and notify the employer.

(e) Women must retain the right to decide whether to lodge pay claims individually or collectively. Employers may choose whether to consolidate their response with other employers. Cl.19(1)-(3) should be rewritten. Cl.25 should state clearly that pay equity may be raised in collective bargaining (followed by cl.25(1) and (2)).

(f) 'Historical *or* social *or* structural' evidence may be part of the claim resolution process, alongside assessment based on 'skill, responsibility, experience, effort and conditions of work' (cl.22 of the Bill, s.3(1)(b) of the Equal Pay Act).

(g) Under the above process, the right to request information from (any) employers (cl.21) now applies to claims accepted by the Authority. It is sufficient to redact details and/or to request confidentiality as part of 'good faith'.

(h) At any point, the parties may seek the assistance of the Mediation Service, and may be directed to return to 'good faith' bargaining, to further mediation or be referred to the Authority for determination. Authority determinations may be appealed to the Employment Court. Facilitation is unnecessary duplication and cl.27 should be removed. In referral to the Authority, cl.29(1)(b) and cl.29(2)(a) are unnecessary and burdensome and should be removed.

(i) The Authority and Mediation Service must be properly resourced and given specialist training. Claimants should also be supported and resourced.

(j) MBIE should consider a fairer, faster process as outlined above at [64] to [70] (pp.13-14

(k) MBIE should explore how best employer records under s.130 of the Employment Relations Act can provide a source of 5 digit job pay data for analysis and publication by Statistics NZ.

Male comparators [82]

(a) Pay equity assessments compare women's and men's *different* work. The words 'same or similar work' should be removed from cl.23 and other clauses related to pay equity.

(b) To meet the purposes of the Bill and the Bartlett findings, appropriate male comparators must be males whose pay is clearly undistorted by gender bias. For this reason, Cl.23(1) and (1)(a) should be replaced with a requirement to assess and compare the female job or job class against different work in two or more male-dominated jobs from male-dominated industries or sectors. Cl. 23(2) should be deleted in its entirety.

(c) Cl.23 should include a statement that appropriate male comparators will be selected by the claimant. Where the employer considers that different comparators are appropriate comparators for pay equity purposes, he/she needs to establish that to the satisfaction of the claimant.

(d) Bargained settlements do not guarantee untainted precedents for subsequent pay equity claim. For this reason cl. 23 (1)(c) should be removed, or amended by replacing the word 'settlement' with the words 'determination by the Authority or Court'.

(e) In cl. 23(3) all the words following 'section 22(1)' should be deleted and replaced with the words 'if the rate of pay for that work is tainted by gender bias'.

Back pay and penalties [93]

(a) The cl.39 limitation of back pay should be removed in its entirety.

(b) The penalty for non-compliance under cl.42(1) and (2) should be increased to $10,000.

(c) The provisions in cl.42(4) should include a breach of cl.8(1).

(d) Cl.42(6) should specify that the maximum penalty of $20,000 will be paid to each employee affected unless the Authority orders otherwise.

(e) Cl.42(6) should specify that the time limits for bringing any penalty action in relation to a breach of cl.(8)(1) is not 12 months, as under s.135 of the Employment Relations Act, but six years.

Regulation making powers [96]

(a) The regulation making powers in cl.44 must be considerably reduced as they are contrary to Legislation Advisory Committee Guidelines.

Treatment of existing claims [100]

(a) All current or new claims lodged under the Equal Pay Act before enactment of new legislation must continue under the Equal Pay Act, in line with Legislation Advisory Committee Guidelines.