



Human Rights Commission  
Te Kāhui Tika Tangata

# Human Rights Commission Submission on the Equal Pay Amendment Bill

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# Submission of the Human Rights Commission on the Equal Pay Amendment Bill

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## I. Introduction

1. The Human Rights Commission (Commission) welcomes the opportunity to make this submission to the Education and Workforce Committee on the Equal Pay Amendment Bill (Bill).
2. One of the Commission's statutory functions under section 5(1)(d) of the Human Rights Act 1993 (HRA) is to promote equal employment opportunities, including pay equity. The Commission has a longstanding interest in structural gender discrimination that affects whole industries or sectors of workers, dating back to its submission on the 1971 Commission of Inquiry into Equal Pay in New Zealand. More recently, the Commission's work on pay equity has included:
  - a. Publication of the 2012 inquiry report *Caring Counts, Tautiaki Tika*, which examined equal employment opportunities in the aged care sector. The inquiry concluded that carers are one of the lowest paid groups in the country and that the pay scales reflect historic systemic undervaluing of the role played by women.
  - b. Intervening in both the Employment Court and Court of Appeal proceedings in *Bartlett v Terranova*.
  - c. Submitting on the Draft Employment (Pay Equity and Equal Pay) Bill and the Employment (Pay Equity and Equal Pay) Bill.
  - d. Consultation with the Ministry of Women on pay transparency.
3. The gender pay gap in New Zealand is currently 9.2 percent, with the gap being much wider for Māori, Pasifika, Asian, Middle Eastern, Latin American and African women (MELAA)<sup>1</sup> and

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<sup>1</sup> Tracking Equality at Work, Summary and Recommendations (June 27 2018) p. 12, [https://www.hrc.co.nz/files/2115/3013/8951/Tracking\\_Equality\\_Report\\_FINAL.pdf](https://www.hrc.co.nz/files/2115/3013/8951/Tracking_Equality_Report_FINAL.pdf), Māori women earn \$6.67 less an hour; equating to a gap of \$13,000 /year; Compared with European men Pacific women earn \$7.28 less an hour;

disabled women.<sup>2</sup> Effective and accessible pay equity legislation is a particularly important vehicle in eliminating the gender pay gap for these vulnerable groups.

## II. Overview

4. The Commission is pleased to see the Equal Pay Act 1972 as the vehicle to implement the Reconvened Joint Working Group (RJWG) principles and recommendations. However, the Commission's view is that the Bill in its current form fails to take a robust and meaningful approach to pay equity.
5. The principle of pay equity is almost 100 years old and has been recognised in labour law and human rights legislation since the 1950s. The New Zealand government has a duty under international and domestic human rights law to ensure equal pay for work of equal value. This is not a right that women should be left to bargain for. The Commission's submission identifies the following issues with the Bill.
  - a. **Pay transparency:** The RJWG identified pay transparency, including access to adequate information, as an important gender pay disparity issue requiring consideration by the Government. However, the current Bill fails to address this issue. Pay transparency is an essential element of pay equity – the right to request pay information and pay reporting by companies can provide women with the information required to trigger a pay equity claim. New Zealand has fallen behind other similar jurisdictions, such as the United Kingdom, Australia and some Canadian States in this regard.
  - b. **Back pay:** Female employees who have been discriminated against in the field of employment have a right to a remedy under international human rights law. The Commission considers it discriminatory to distinguish between the treatment of back pay for pay equity claims and other claims under the Equal Pay Act. We refer to the detailed analysis of recent Canadian Supreme Court cases on this issue in Appendix 1 of the Coalition for Equal Value Equal Pay (CEVEP) submission, which found that pay equity legislation that failed to provide for back pay was discriminatory.
  - c. **Access to Justice:** The bargaining framework under the Bill, which provides for a mediation and facilitation for each pay equity issue puts in place procedural barriers that may cause delays in access to justice for potential human rights breaches. Pay equity claims are about potential breaches of human rights and women have the right to timely and effective justice.
  - d. **Onus on Women:** The Bill places the onus on women to raise a pay equity claim directly with their employer, failing to recognise the bower imbalance between employers and female employees. Given that women may find it challenging to

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equating to an income gap of \$14,000/year; Asian women earn \$6.55 per hour less than European men, which is \$13,624 per year; MELAA women earn \$4.55 per hour less than European men which is \$9,464 per year.

<sup>2</sup> Tracking Equality at Work, Summary and Recommendations (June 27 2918) p. 12, [https://www.hrc.co.nz/files/2115/3013/8951/Tracking\\_Equality\\_Report\\_FINAL.pdf](https://www.hrc.co.nz/files/2115/3013/8951/Tracking_Equality_Report_FINAL.pdf) Disabled women also earn significantly lower amounts than men – 48 percent of disabled women earn \$30,000 or less as compared to 28 percent of disabled male workers.

raise pay equity claims directly with their employer, an independent body should be established to provide women with pay equity information and assistance in raising pay equity claims.

### III. Human Right to Pay Equity

6. Pay equity or “equal pay for work of equal value” is a fundamental right under international human rights law. The principle of pay equity is almost 100 years old and sits amongst the foundational principles of human rights law. In the Treaty of Versailles (1919) the High Contracting Parties recognised "the principle that men and women should receive equal remuneration for work of equal value" as "of special and urgent importance."<sup>3</sup>
7. New Zealand has obligations under international human rights treaties and the International Labour Organisation (ILO) conventions relevant to the prevention of discrimination on the grounds of sex and the principle of pay equity. The principle of pay equity was incorporated into the ILO framework of international labour standards in the 1950s through Convention 100 - Equal Remuneration<sup>4</sup> and Convention 111 - Discrimination (Employment and Occupation).<sup>5</sup> New Zealand has ratified both conventions.
8. New Zealand has also ratified international human rights treaties that uphold the principle of pay equity. Both the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) and the International Covenant on Economic, Social and Cultural Rights (ICESCR) place obligations on States to eliminate workplace discrimination and uphold the rights of equality of remuneration, treatment and conditions of work:

CEDAW, art 11(1)(d)

*States Parties shall take all appropriate measures to eliminate discrimination against women in the field of employment in order to ensure, on a basis of equality of men and women, the same rights, in particular: . . . (d) The right to equal remuneration, including benefits, and to equal treatment in respect of work of equal value, as well as equality of treatment in the evaluation of the quality of work;*

ICESCR, art 7(a)(i)

*The States Parties to the present Covenant recognize the right of everyone to the enjoyment of just and favourable conditions of work which ensure, in particular (a)*

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<sup>3</sup> Treaty of Versailles (1919), art 427, principle 7. New Zealand signed the treaty as part of the British Empire delegation.

<sup>4</sup> Convention 100 established the principle of “equal pay for equal value” that was earlier expressed in the Treaty of Versailles. Article 2(1) of Convention 100 provides that each Member State shall: *...by means appropriate to the methods in operation for determining rates of remuneration, promote and, in so far as is consistent with such methods, ensure the application to all workers of the principle of equal remuneration for men and women workers for work of equal value.*

<sup>5</sup> Convention 111 further reinforced and built upon the equality principle of Convention 100, by obliging Member States to introduce labour policies that eliminate discrimination, through an undertaking to: *Declare and pursue a national policy designed to promote, by methods appropriate to national conditions and practice, equality of opportunity and treatment in respect of employment and occupation, with a view to eliminating any discrimination in respect thereof*

*Remuneration which provides all workers, as a minimum, with: (i) Fair wages and equal remuneration for work of equal value without distinction of any kind, in particular women being guaranteed conditions of work not inferior to those enjoyed by men, with equal pay for equal work.*

9. New Zealand's compliance with the above conventions is reviewed every four or so years by expert UN committees. The CEDAW Committee has criticised New Zealand for its lack of compliance with the human rights principle of equal pay for work of equal value in its last five reviews of New Zealand (1998,<sup>6</sup> 2003,<sup>7</sup> 2007,<sup>8</sup> 2012,<sup>9</sup> 2018).

10. At New Zealand's May 2018 review, the CEDAW Committee noted concern about the "occupational segregation with concomitant wage differentials and the concentration of women in unpaid work or in lower paying jobs in the informal economy." The Committee recommended that New Zealand:

*Adopt and enforce the principle of equal pay for work of equal value in a revised employment relations legislation covering both public and private workplaces, including through analytical job classification and evaluation methods and regular pay surveys, and regularly review wages in sectors in which women are concentrated.*<sup>10</sup>

11. New Zealand was also reviewed by the Committee for the ICESCR in July 2018. In relation to pay equity, the Committee recommended that New Zealand:

*Adopt measures to incorporate the principle of equal pay for work of equal value in the State party's legislation and develop a streamlined mechanism to implement it across occupations.*<sup>11</sup>

12. With regard to the Government's human rights obligations under domestic law, section 19(1) of the New Zealand Bill of Rights Act 1990 provides that:

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<sup>6</sup> CEDAW A/53/38/Rev 1 paras 243-291 (1 January 1998) "The Committee expresses serious concern at the continuing wage differential between women and men, which was not expected to narrow under current trends... and at the impact of the repeal of the Pay Equity Act for women's equal pay rights. The Committee recommends that further efforts, including through legislation and innovative policies, be made to reduce the gender wage differential... The Government should also consider developing an "equal pay for work of comparable value" strategy, and reinstate respective legislation."

<sup>7</sup> CEDAW A/58/38 (Part II) paras 379-431 (18 August 2003) "The Committee further recommends that efforts be made to eliminate occupational segregation, through education and training, the application of the principle of equal pay for work of equal and comparable value, and the promotion of additional wage increases in female-dominated sectors of employment..."

<sup>8</sup> CEDAW/C/NZL/CO/6, para 19 (15 August 2007) "The Committee recommends that the State party enact and implement comprehensive laws guaranteeing the substantive equality of women with men in both the public and private sectors, especially in regard to equal pay and equal opportunity in employment. It also recommends that the State party include adequate sanctions for such acts of discrimination against women and ensure that effective remedies are available to women whose rights have been violated."

<sup>9</sup> CEDAW/C/NZL/CO/7, para. 32 ( 7 August 2012) "The Committee recommends that the State party: (a) Enact appropriate legislation that guarantees the operationalization and implementation of the principle of "equal pay for work of equal value", in line with article 11 (d) of the Convention; (b) Effectively enforce the principle of equal pay for work of equal value, through establishing specific measures and indicators, identifying time frames to redress pay inequality in different sectors and reviewing the accountabilities of public service chief executives for pay policies."

<sup>10</sup> CEDAW/C/NZL/CO/8, para 34(c) (25 July 2018).

<sup>11</sup> E/C.12/NZL/CO/4 para 31(d) (1 May 2018).

*Everyone has the right to freedom from discrimination on the grounds of discrimination in the Human Rights Act 1993.*

Sex is a prohibited ground of discrimination in the Human Rights Act (HRA).<sup>12</sup>

13. To reflect the fundamental importance of pay equity as a principle of international human rights law, the Commission recommends that the Bill could be strengthened by expanding the purpose section of the Equal Pay Act 1972.

#### **Recommendation 1**

Add the following wording to the purpose section of the Equal Pay Act 1972: *“The Act recognises that pay equity is a fundamental human right and that pay equity is an important element of a commitment to substantive sex and gender equality.”*

#### **Recommendation 2**

Under the interpretation section of the Equal Pay Act 1972 define pay equity as *“equal pay for work of equal value”* with reference to ILO Convention 100, the Convention on the Elimination of All Forms of Discrimination Against Women and the International Covenant on Economic, Social and Cultural Rights.

## **IV. Issues with the Bill**

### **A. Pay transparency**

14. The RJWG noted, with regard to resources, that parties bargaining on pay equity need “ready access to adequate information and resources to assist them in the deliberations” and suggested that

*government give further consideration to its role in supporting pay equity information and in how to encourage transparency across employers, for example with comparator information.*

15. The RJWG further highlighted that “implementation of pay equity principles and process will not of themselves solve wider issues of disparity” and identified pay transparency as an important gender pay disparity issue:

*In the wider context of gender equality, issues such as equal opportunity in employment, including advancement, **transparency of remuneration processes used to set and maintain remuneration levels** and the effect of caring responsibilities contribute to the gender pay gap.*

16. This Bill provides a timely opportunity for the government to take a robust approach to pay equity by amending the Equal Pay Act 1972 to include pay transparency mechanisms. The Commission’s submission on the previous version of the Bill recommended incorporating a

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<sup>12</sup> Human Rights Act 1993, s 21(1)(a).

pay transparency mechanism into pay equity legislation. It is disappointing that no progress has been made on this issue under the current Bill.

17. Pay transparency is an essential component of pay equity. Pay transparency can be improved through a range of measures, such as providing employees with a right to access pay information, requiring companies to report on pay, and conducting pay audits on companies. These measures can provide women with the information they need to assess whether they have a viable pay equity claim to start with.
18. The Government's new Gender Pay Principles for the state sector provide for a stand-alone principle on transparency and accessibility in recognition of the essential role transparency plays in closing the gender pay gap:

*Transparency and accessibility is essential to the sustainable elimination of gender pay gaps. Maintaining transparent employment and pay practices is likely to prevent gender pay gaps from occurring and attract and retain a diverse and committed workforce.<sup>13</sup>*

19. While these principles are only applicable to the state sector, the Commission believes that pay transparency is just as important to the private sector and should be reflected under the current Bill.
20. The European Commission (EC) Recommendation (2014) on strengthening the principle of equal pay between men and women through transparency<sup>14</sup> provides useful guidance on pay transparency measures and how they can be implemented. The EC encourages European Union Member States to implement, at the very least, one of the core measures enhancing pay transparency to assist them in effective implementation of pay equity and to tackling gender pay gap.<sup>15</sup> The core measures mentioned entail:
  - a. *an employee's right to request information on gender pay levels for the same work or work of equal value;*
  - b. *an employer's duty to report on average gender pay levels by category of employee or position;*
  - c. *an employer's duty to conduct an audit on pay and pay differentials on grounds of gender; and*
  - d. *measures to ensure that the issue of equal pay, including pay audits, is discussed at the appropriate collective bargaining level.*
21. The Commission recommends that the right to obtain information and pay reporting requirements should be included in the Bill. We set out further details of these transparency measures and some best practices examples from other countries below.

#### *Employee's right to obtain pay information*

22. Section 13K of the Bill sets out a duty for parties to a pay equity claim to provide to each other, on request, information relating to a claim. However, this duty is too narrow as it only

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<sup>13</sup> <http://women.govt.nz/work-skills/income/gender-pay-gap/gender-pay-principles>

<sup>14</sup> [http://ec.europa.eu/smart-regulation/impact/ia\\_carried\\_out/docs/ia\\_2014/c\\_2014\\_1405\\_en.pdf](http://ec.europa.eu/smart-regulation/impact/ia_carried_out/docs/ia_2014/c_2014_1405_en.pdf)

<sup>15</sup> Ibid.

applies once a claim has commenced. The right of an employee to request information on gender pay levels should be available at all times, not only once a pay equity claim is commenced.

23. As recommended by the European Commission, an employee's right to obtain information should:

*ensure that employees can request information on pay levels, broken down by gender, for categories of employees doing the same work or work of equal value. This information should include complementary or variable components beyond the fixed basic salary, such as payments in kind and bonuses.*<sup>16</sup>

24. A right to information would help raise awareness and provide the tools required for female employees to make a pay equity claim. Only when pay information is available to show indicators of presumed gender pay discrimination can individual employees be alerted and enabled to discuss equal pay rights with their employer.

25. Several countries provide for a right for individual employees to request information on pay levels, broken down by gender for the same work of equal value. Norway's Gender Equality Act gives employees the right to request the pay data of individual comparators at company level, but any data received must be kept confidential.<sup>17</sup> Germany's new law on transparency (the details of which are set out below) provides a best practice example of providing employees with the right to request pay information.

## Germany

In January 2017, Germany passed the **Act on the Transparency of Pay** aimed at promoting gender equality in pay. The Act came into force in July 2017. It provides for the individual right to information about remuneration paid to peers for **organisations with more than 200** employees.

The right to information includes:

- Disclosure of the remuneration that employees of the other gender receive for comparable work on a monthly average;
- Breakdown of this information for up to two specified wage components (e.g. base salary, bonus payments);
- Information on the relevant criteria for the determination of their own remuneration as well as the remuneration for the same / comparable work.

The Act also requires companies with more than **500 employees to conduct voluntary internal audits** to review remuneration schemes and actual remuneration in light of gender equality. Status reports are also required under the German Commercial Code to report on gender equality and equal pay.<sup>18</sup>

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<sup>16</sup> Para II(3)7

<sup>17</sup> <https://www.regjeringen.no/en/dokumenter/the-act-relating-to-gender-equality-the-/id454568/>

<sup>18</sup> <https://www.twobirds.com/en/news/articles/2018/germany/wage-transparency-act> ;  
<https://www.bakermckenzie.com/en/insight/publications/2017/05/transparency-pay-act>

## Pay Reporting

26. Pay reporting, broken down by gender, would complement and enhance women's ability to bring pay equity claims under the Bill. The Commission's web-based interactive tool Tracking Equality at Work measures equality at work. The 2018 Tracking Equality Report recommended that:

*The New Zealand Government enacts legislation enforcing a requirement that companies with more than 100 workers publicly report annually on their gender pay, bonus gaps and other EEO metrics to track progress.*<sup>19</sup>

27. The European Commission has recommendation to Member States that they:

*should put in place measures that ensure that employers in undertakings and organisations with at least 50 employees regularly inform employees, workers' representatives and social partners of the average remuneration by category of employee or position, broken down by gender.*

28. Some good practice pay reporting examples are set out below.

### Australia

The **Workplace Gender Equality Act 2012**<sup>20</sup> requires non-public sector **employers with 100 or more staff to submit a report to the Workplace Gender Equality Agency** between 1 April and 31 May each year for the preceding 12-month period.

The Workplace Gender Equality Agency is an Australian Government statutory agency created by the Act. The Agency issues compliance letters to confirm that an organisation is compliant with its reporting obligations. The consequences of non-compliance are that

- the Agency may name a non-compliant employer in a report to the Minister or by electronic or other mean
- non-compliant employers may not be eligible to tender for contracts under the Commonwealth and some state procurement frameworks and may not be eligible for some Commonwealth grants or other financial assistance.

The Agency lists non-compliant organisations publicly on its website each year.<sup>21</sup> It also uses the reporting data to develop educational Competitor Analysis Benchmark Reports based on six gender equality indicators.

### Ontario, Canada

In May 2018, the Canadian province of Ontario passed **Bill 3, the Pay Transparency Act 2018**,<sup>22</sup> the first piece of pay transparency legislation in Canada. The Act comes into force in January 2019. It requires employers to report their pay practices to the Ministry of Labour,

<sup>19</sup> Human Rights Commission, Tracking Equality at Work 2018 Summary and Recommendations (27 June 2018) [https://www.hrc.co.nz/files/2115/3013/8951/Tracking\\_Equality\\_Report\\_FINAL.pdf](https://www.hrc.co.nz/files/2115/3013/8951/Tracking_Equality_Report_FINAL.pdf)

<sup>20</sup> <https://www.legislation.gov.au/Details/C2016C00895>

<sup>21</sup> <https://www.wgea.gov.au/sites/default/files/non-compliant-orgs-list.pdf>

<sup>22</sup> [https://www.ola.org/sites/default/files/node-files/bill/document/pdf/2018/2018-05/bill---text-41-3-en-b003ra\\_e.pdf](https://www.ola.org/sites/default/files/node-files/bill/document/pdf/2018/2018-05/bill---text-41-3-en-b003ra_e.pdf)

and authorises the appointment of compliance officers to investigate whether employers have complied with the Act. Key provisions include:

- Employers are prevented from seeking compensation history about any applicant
- Employers who advertise a publicly advertised job must include information about the expected compensation or the range
- All employers with **100 or more employees must publish a pay transparency report** that must include the composition of the workforce, differences in compensation with respect to gender and other prescribed characteristics and must be posted online and be published online by Minister.
- Provides powers to compliance officers to investigate or inspect employers' compliance with the Act
- Employers can be penalised for contravening the Act in accordance with the regulations

### United Kingdom

In April 2017, the United Kingdom introduced the **Equality Act 2010 (Gender Pay Gap Information) Regulations 2017**.<sup>23</sup> The Regulations require **all employers with more than 250 employees to publish information relating to the gender pay gap** in their organisation. This includes information on the difference between the average hourly rate of pay to male and female employees; the difference between the average bonus paid to male and female employees; the proportions of male and of female employees who receive bonuses; and the relative proportions of male and female employees in each quartile pay band of the workforce. The **Equality and Human Rights Commission is responsible for ensuring employers publish their gender pay gap reports**. It will initially informally approach employers who have not met the reporting deadline, but employers could ultimately face fines and convictions.

### Ireland

In May 2017, the **Irish Human Rights and Equality Commission (Gender Pay Gap Information) Bill 2017**<sup>24</sup> was introduced. The Bill would amend the Irish Human Rights and Equality Commission Act 2014 to require employers to publish information relating to the difference in the pay of male and female employees. The Bill is at the end of the first stage and is currently being debated before parliament.

29. Incorporating pay transparency measures into the Bill would improve the opportunity for individuals to take action in case of presumed gender pay discrimination and stimulate systematic action by institutional actors like employers, trade unions, employers and government agencies.

30. The Commission recommends that an independent body is set up to receive transparency reports and to provide an information and resource service for employees to go to regarding potential pay equity issues. More details on this independent body are set out in section D

<sup>23</sup> <http://www.legislation.gov.uk/ukdsi/2017/9780111152010>

<sup>24</sup> <https://www.oireachtas.ie/en/bills/bill/2017/64/?tab=debates>

below.

31. The Commission urges the Select Committee to take this opportunity to incorporate pay transparency measures into the Bill.

#### **Recommendation 3**

**Add a clause to Part 2 of the Bill that amends section 130(1) the Employment Relations Act 2000 to require employers to keep records of pay levels broken down by gender for all categories of employees doing the same work or work of equal value. This information should include fixed salary and bonuses.**

#### **Recommendation 4**

**Add a clause to Part 2 of the Bill that adds a pay transparency section to the Equal Pay Act 1972:**

- (a) requiring all employers to provide an employee with information at any time, on request, showing the pay and gender for all employees doing the same kind of work, while ensuring the confidentiality of details.**
- (b) requiring employers with 100 or more employees<sup>25</sup> to submit, to an independent body, a pay transparency report that must include the composition of the workforce, differences in compensation with respect to gender. The employer's report must be posted online and be published by the Ministry for Business, Innovation and Employment**

## **B. Back pay**

32. Under section 13ZC of the Bill, the Employment Relations Authority (Authority) or courts can award back pay when making a determination in relation to a pay equity claim. Section 13(3) of the Equal Pay Act allows for the recovery of remuneration for up to six years before the commencement of proceedings. In contrast, section 13ZD of the Bill applies a six-year limitation on back pay, but this is subject to an 11-year transitional period. The section provides for different back pay periods depending on the “applicable start date” using the reference date of five years after the commencement of the Act. According to the Explanatory Note to the Bill, this is to incentivise employers to address pay equity issues as soon as possible after the Bill comes into force.
33. The Attorney General's section 7 New Zealand Bill of Rights Act report on the Bill, recognised that the difference in treatment of back pay for pay equity claims as compared to other claims under the Equal Pay Act may result in discrimination under section 19 of the Bill of Rights Act. However, the AG concluded that the difference in treatment is justified by drawing a distinction between pay equity and other equal pay claims:

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<sup>25</sup> This reporting obligation would cover nearly 47 percent of all private sector employees in New Zealand. According to Statistics NZ 2017 Business Demography Statistics, as of February 2017 New Zealand has very few large enterprises but half of all employees work for them. Less than 1 percent of business enterprises in New Zealand (2,460 enterprises) have 100 or more employees and engage 47 percent of all employees in New Zealand, [http://archive.stats.govt.nz/browse\\_for\\_stats/businesses/business\\_characteristics/BusinessDemographyStatistics\\_HOTPFeb17.aspx](http://archive.stats.govt.nz/browse_for_stats/businesses/business_characteristics/BusinessDemographyStatistics_HOTPFeb17.aspx)

*Unlike an equal pay claim, which arises from active discrimination by an individual employer, pay equity relates to systemic social issues and takes account of historical discrimination against an occupation. We recognise that it may be unfair for employers to be held liable for a longer period of back pay, and therefore held responsible for historical societal inequality. The limit on back pay balances the employees' grievance with the impact on employers.*

34. Similarly, the Disclosure Statement to the Bill justified the limit to pay equity back pay on the basis of avoiding blameworthiness on the part of the current employer.

35. The right to a remedy for an individual whose human rights have been violated is a fundamental principle of international human rights law. Article 8 of the Universal Declaration of Human Rights provides for this right:

*Everyone has the right to effective remedy by the competent national tribunals for acts violating the fundamental rights granted him by the constitution or by the law.*

36. The ICCPR incorporates the right to a remedy into legally binding law under article 2(3)(a), which states:

*To ensure that any person whose rights or freedoms as herein recognized are violated shall have an effective remedy, notwithstanding that the violation has been committed by persons acting in an official capacity.*

37. The purpose of the Bill is to provide female employees with the ability to bring a claim against their employer in order to eliminate discrimination against women in the field of employment. The right to a remedy for a violation of the right to be free from discrimination does not differentiate between structural and “active” discrimination.

38. The Commission's position is that it may be discriminatory to treat back pay for pay equity claims differently to other claims. The right to a remedy is not necessarily about blame as eluded to in the AG report and Disclosure Statement – in the case of pay equity it is about the right of women to an adequate remedy for a breach of the 100-year old human rights principle of equal pay for work of equal value. The avoidance of blame is not an adequate justification to differentiate between back pay available for successful pay equity claims and equal pay claims.

39. The Commission's position is that a distinction should not be drawn between the treatment of back pay for pay equity claims and other claims under the Equal Pay Act. Female employees making pay equity claims should not be treated differently depending on when they raise their claim. The Commission refers to Appendix 1 of CEVEP's submission on this point, which refers to the recent Canadian Supreme Court case of *Quebec (Attorney General) v Alliance du personnel et technique de la sante et des services*.<sup>26</sup> In this case it was found that the Quebec Pay Equity Act was discriminatory by not requiring back pay as a result of pay audits conducted every five years. Notably, Abella J stated:

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<sup>26</sup> <http://canlii.ca/t/hrx1n>

*Although the scheme purports to address systemic discrimination, it in fact codifies the denial to women of benefits routinely enjoyed by men — namely compensation tied to the value of their work. Men receive this compensation as a matter of course; women, under this scheme, are expected to endure five-year periods of pay inequity, and to receive equal compensation only where their employer voluntarily acts in a non-discriminatory manner, or where they can meet the heavy burden of proving the employer engaged in deliberate or improper conduct.<sup>27</sup>*

40. Furthermore, the potential financial exposure of employers should not be an excuse for limiting back pay for women who bring pay equity claims. The Employment Court in the *Terranova* case also reinforced this point:

*History is redolent with examples of strongly voiced concerns about the implementation of anti-discrimination initiatives on the basis that they will spell financial and social ruin, but which provide to be misplaced or have been acceptable as the short term price of the longer term social good.<sup>28</sup>*

41. The Canadian Supreme Court also noted that by reducing employers' obligations to provide back pay in the hopes of encouraging compliance was not an adequate justification for sacrificing women's right to back pay. The Court noted:

*Reducing employers' obligations in the hopes of encouraging compliance subordinates the substantive constitutional entitlement of women to be free from discrimination in compensation to the willingness of employers to comply with the law. It sends the policy message to employers that defiance of their legal obligations under the Act will be rewarded with a watering-down of those obligations. And it sends the message to female workers that it is they who must bear the financial burdens of employer reluctance. Any benefits of that approach are outweighed by its harmful impact on the very people whom this pay equity scheme was designed to help.<sup>29</sup>*

42. The Bill does not prevent parties to a pay equity claim from reaching a negotiated settlement that includes back pay at a different rate. Potential back pay should be seen as a positive lever or negotiation tool for women to achieve equitable outcomes and should not be limited. This was recognised in the Regulatory Impact Statement which noted that the use of back pay as leverage in bargaining

*could encourage employers to progress with bargaining and could incentivise them to work proactively with employees to address pay equity issues. It may also help to increase bargaining power for individual women employees and claimants from vulnerable and/or unpaid workforces.*

### **Recommendation 5**

**Amend section 13ZD of the Bill to allow back pay for all pay equity claims to be paid for up to 6 years regardless of when the claim is filed.**

<sup>27</sup> [38]

<sup>28</sup> [110]

<sup>29</sup> [56]

## C. Access to justice

43. While one of the aims of the Bill is to provide a simple and accessible process for pay equity claims, the bargaining process through mediation and facilitation is burdensome on claimants. Section 13P of the Bill allows any party to a pay equity claim to refer one or more issues relating to the claim to mediation, including:
- a. *whether the pay equity claim is arguable*
  - b. *whether the employee's claim relates to work that is the same as, or substantially similar to, work performed by another claimant for the purposes of consolidating those employees' claims*
  - c. *whether work performed by others is comparable work for the purposes of the assessment*
  - d. *whether proposed remuneration no longer differentiates between male and female employees... for the purposes of settling a pay equity claim*
44. Section 13R of the Bill then allows any party to the pay equity claim to seek assistance from the Authority through facilitation, including for the issues listed above. Before it can accept a reference for facilitation, section 13S provides that the Authority is required to consider whether sufficient efforts, including mediation, have failed to resolve the issues relating to the claim. Section 13U provides that pay equity bargaining continues subject to the issue being determined by the Authority.
45. The Commission is concerned that by allowing mediation and facilitation for each of the issues listed above could cause significant delays for women seeking to access justice for a potential violation of their right to be free from discrimination. Effectively each of the issues relating to the claim could go through mediation and facilitation separately before a determination from the Authority can be sought.
46. The Commission's view is that mediation should be provided under the Bill for all of the issues, except for the arguability of the claim. Not only do women have the onus on them to raise the claim, but they then have to show that the claim is "arguable" and the employer then gets to decide whether it is arguable. The Commission does not believe that the issue of arguability is one that should be subject to mediation before a claim can be commenced. Pay equity regards breaches of fundamental human rights principles – the onus should not be placed on women to prove they have an arguable claim in order for bargaining to commence so that they can vindicate their rights.

### **Recommendation 6**

**Remove the facilitation process from the Bill. Parties should be able to seek assistance through mediation for the whole claim and if agreement cannot be reached parties can then seek a determination from the Authority.**

## D. Unfair onus on women

47. The current Bill places the onus on women to raise a pay equity claim with their employer. It fails to recognise the power imbalance between employers and female employees. The Ministry of Women's webpage on the gender pay gap highlights that women can be less willing than men to negotiate pay and conditions and that women can be treated differently than men when they do negotiate.<sup>30</sup> Given that women already find it difficult to negotiate pay and conditions, it is highly likely that they will find it challenging to raise a pay equity claim directly with their employer. This would be particularly onerous for female employees who are not part of a union.
48. The Commission notes the resource implications that may arise, especially for female employees who are not represented by a union. Individual women or small groups of women may struggle to make out the grounds that the work has been "historically undervalued" or to have the data directly at hand to show that their work is predominantly performed by female employees. They will need to be properly resourced with adequate legal advice and other resources such as policy analysis to assist them with the drafting of the claim. They may struggle to access financial advice and analysis.
49. Equal pay claims are lodged directly with the Authority or the Commission under the 1972 Act. Other human rights claims can be raised directly with independent bodies, such as discrimination with the Commission and privacy with the Office of the Privacy Commissioner.
50. If the Bill proceeds with a model where women cannot make claims directly to the Authority or courts, it is essential that an independent body is established to provide women with pay equity information and to provide assistance to women in raising pay equity issues with their employers.
51. The Australian Workplace Gender Equality Agency provides a good model for such a body.<sup>31</sup> As outlined above, the Agency is established under statute and is responsible for receiving reports by companies with 100 or more staff containing information relating to gender equality indicators such as remuneration between employees. The Agency's activities also include publication of gender equality scorecards and key trends based on company reporting, providing toolkits for businesses and working with a network of pay equity ambassadors made up of chief executives and heads of departments to promote pay equity.

### **Recommendation 7**

**Establish an independent gender equality agency tasked with receiving pay reports from companies with 100 or more employees and providing information and assistance to women to make pay equity claims.**

<sup>30</sup> <http://women.govt.nz/work-skills/income/gender-pay-gap>

<sup>31</sup> <https://www.wgea.gov.au/>