Submission of the
New Zealand Council of Trade Unions
Te Kauae Kaimahi

to the

Ministry of Business, Innovation & Employment

on the

Draft Employment (Pay Equity and Equal Pay) Bill

P O Box 6645
Wellington
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1. Introduction

1.1. This submission is made on behalf of the 30 unions affiliated to the New Zealand Council of Trade Unions Te Kauae Kaimahi (CTU). With 320,000 members, the CTU is one of the largest democratic organisations in New Zealand.

1.2. The CTU acknowledges Te Tiriti o Waitangi as the founding document of Aotearoa New Zealand and formally acknowledges this through Te Rūnanga o Ngā Kaimahi Māori o Aotearoa (Te Rūnanga) the Māori arm of Te Kauae Kaimahi (CTU) which represents approximately 60,000 Māori workers.

1.3. The CTU and the trade union movement in New Zealand has a long history of fighting for women’s rights to equal pay and for equal pay for work of equal value. Trade Unions were pivotal in the implementation of the Government Service Equal Pay Act 1960 and the Equal Pay Act 1972. The recent focus on equal pay and pay equity has been a direct result of the landmark Court decisions of Bartlett & SFWU v Terranova where it was established that the Equal Pay Act 1972 could be used to bring pay equity claims. This legal challenge was brought by Etū (formerly the Service and Food Worker’s Union) on behalf of member Kristine Bartlett. Trade Unions were key participants in the Joint Working Group on Pay and Employment Equity (JWG) that released principles on determining equal pay or pay equity claims in June 2016 which were supported by trade unions. While these were then accepted by the Government in November 2016, trade unions have strong disagreement with the additional principle that was added by the Government for a hierarchy of comparators.

1.4. The CTU and our affiliates therefore have a significant interest on ensuring that the gains that have been hard-won for women and the current pragmatic approach to addressing pay equity through the JWG Principles and not watered down or undermined through the introduction of this proposed new legislation.

2. Summary of recommendations

2.1. We consider that the key problem with the Bill is that it adds additional barriers for women taking pay equity claims by putting significant restrictions on the ‘comparator’ to determine whether a woman’s job has been undervalued because it is female dominated.
2.2. We also do not agree with the onerous requirements to prove merit in order to initiate a claim (clause 14), the Bill’s focus on the labour market (see clause 14.4, discussed in further detail below), the removal of the right to claim backpay (clause 39) and the proposed transitional provisions that would retrospectively remove existing rights.

2.3. We consider that the draft bill be amended in order to reflect to provisions in:

2.3.1. the Equal Pay Act 1972;

2.3.2. the *Bartlett v Terranova* decisions; and

2.3.3. the Joint Working Group principles as released in June 2016.

Any clauses that are inconsistent with the above are not supported by the CTU.

3. *Bartlett v Terranova* Court of Appeal decision

In terms of assessing inconsistency with the *Bartlett v Terranova* decision, it is important to remind ourselves of what the Court of Appeal decision found in relation to our key concern with this proposed legislation, the proposed approach to assessing comparators. The Court of Appeal was clear that comparators should not be confined to the sector that the employees bringing the claim are employed in and did not set out a hierarchy of comparators in their decision. The Court of Appeal found that appropriate comparators should be identified. This is clear from the following extracts of the decision:

3.1.1. Section 3(1)(b) assumes a comparison with a hypothetical male performing the work (at [134]). In determining what would be paid to the hypothetical man posited by s 3(1)(b), it may be relevant to consider evidence of wages paid by other employers and in other sectors (at [147]).

3.1.2. A male employee whose pay rate is distorted by systemic undervaluation cannot be an appropriate counterfactual (at [135]).

3.1.3. In dismissing the appeal the Court of Appeal addressed the anticipated role of the Employment Court under s9 namely:

3.1.4. To state general principles that will ensure substantive claims are to be processed in an efficient and manageable way (at [168]) before embarking on the hearing of WRC30/12 (at [239]).
3.1.5. To provide itself and the parties with a workable framework for the resolution of WRC 30/12 and enable the parties to bring the claim before it in an orderly, efficient and manageable way (at [168], [173], and [239]).

3.1.6. To exclude evidence if its probative value is outweighed by the risk that evidence will needlessly prolong the proceeding (at [169]).

3.1.7. To manage the case closely to keep it within reasonable bounds (at [169]).

3.1.8. To identify appropriate comparators (at [239] and [168] last sentence).

3.1.9. To guide the parties on how to adduce evidence of comparator groups (at [239] and [168] last sentence).

3.1.10. To guide the parties on how to adduce evidence of systemic undervaluation (by which is meant systemic undervaluation of work derived from current or historic or structural gender discrimination attributed to historical factors and to undervaluation of “female” skills) (at [36],[37], and [239]).

3.2. The Court agreed with the following statements made by the Employment Court:

3.2.1. Section 3(1)(b) requires that equal pay for women for work predominantly or exclusively performed by women, is to be determined by reference to what men would be paid to do the same work abstracting from skills, responsibility, conditions and degrees of effort as well as from any systemic undervaluation of the work derived from current or historical or structural gender discrimination.

4. Selecting an appropriate comparator

4.1. Our primary objection to the proposed legislation is clause 23 of the draft Bill.

4.2. We consider that this clause (which outlines a ‘hierarchy’ of comparators) places unnecessary barriers for women bringing pay equity claims and prevents the parties bargaining from deciding and agreeing the most appropriate comparator or comparators in their particular situation.

4.3. Clause 23 (2) provides that comparators “most closely related to the employer’s business must be selected” (emphasis added). If no appropriate comparator is found
then the same assessment must be made to similar businesses, then the same industry or sector and only then, after these three other assessments have been made, can parties look to a different industry or sector. This clause, if included in the Bill will delay and complicate bargaining on pay equity claims which is contrary to the stated purpose of the draft bill as set out in clause 3(a).

4.4. We note that other jurisdictions and their use of comparators was examined by Cabinet. We would like to emphasise that although international comparisons can be useful, jurisdictions like the United Kingdom do not select more ‘proximate’ comparators because they are the most helpful or useful, they select comparators from the same employer because their equal pay regime is essentially a breach of contract claim against usually a single employer. Additionally, in the UK back pay forms the most significant remedy for pay equity claims and this remedy is significantly limited under this proposed Bill (see clause 39).

4.5. The International Labour Organisation does not consider that equal pay for work of equal value can be achieved when the comparisons are limited to the same work. The ILO considers that comparing the remuneration of men and women in different occupations is essential in order to eliminate pay discrimination.¹

5. Test for continued undervaluation (s.14(4) and 14(5))

5.1. We do not believe that a test for “continued systemic gender-based undervaluation of work” required under clause 14(2)(c) and defined in clause 14(4) is required. If there are reasonable grounds to believe that the work has been historically undervalued as required under clause 14(2)(b) and described in clause 14(3) then it is longstanding and it is highly unlikely that the undervaluation will rapidly cease without further intervention. If the employer has reasonable grounds to believe that the undervaluation will rapidly cease without further intervention, the onus should be on its representatives to establish that case.

5.2. We have been presented with no evidence that longstanding instances of undervaluation have disappeared simply because the matters referred to in clause 14(4) were not present. Indeed we have been presented with no evidence that those matters are the material ones in continued undervaluation, let alone on how their relative importance should be judged. The proposal is asking employees, employers

and the Courts to reach agreement or make judgements on matters that even experts will find it difficult to reach a conclusion. This is not evidence-based policy that this Government says it aspires to.

5.3. We are very concerned that the onus on the employee for producing evidence for the criteria in clause 14(3) is already a significant burden. The matters in clause 14(4) add very considerably to that burden and can be added to by the employer under clause 14(4)(a)(vi). They set far too high a hurdle for establishing merit of a case in order that it can proceed, and could be used by a resistant employer to prevent or substantially delay a case from progressing. It is very much the case in this context that justice delayed, is justice denied. Delay has been a significant barrier women bringing pay equity claims in other jurisdictions e.g. the United Kingdom.

5.4. Even if we were to accept that clause 14(4) is necessary, the problems with these criteria can be illustrated by considering as an example the position of clothing workers such as skilled cutters and machinists. Statistics New Zealand lists Textile products machine operators among those most segregated to women (72.4 percent women in the 2013 census) and among the lowest paid ($29,400 median income for women). This is historically a female dominated occupation (it was 80.9 percent women in 1991) and may well satisfy the criteria for historical undervaluation in clause 14(3). Let us assume for the sake of considering clause 14(4) that it does. To be clear, we are not trying in the submission to make the case that this occupation is subject to undervaluation (though it may well be): we are simply using it by way of illustration.

5.5. It is overwhelmingly a private sector occupation and industry with many employers and types of contracting arrangements. There is most unlikely to be “a dominant source of funding across the relevant labour market, industry, sector, or occupation.” It would certainly fail clause 14(4)(a)(i). We take the opportunity to note that in any case, the logic of this criterion is unclear. We presume it is aimed at occupations in firms or sectors that are publicly funded and therefore subject to the constant downward pressure on funding of government contracting. It can depress the pay of all workers of such employers, female and male. This is of course a matter of current government policy. It could decide that such funding should be subject to fair employment conditions and pay equity for contractors’ employees, and fund that.

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This is a criterion in many ways peculiar to the current form of contracting which sees it as almost solely a commercial arrangement. It could be used to correct gender inequality, not worsen it.

5.6. There is some union representation in the industry but this has reduced significantly with the changed employment legislation since the 1990s. Whether it is “effective” will doubtless be disputed by an employer who may well claim any bargaining is effective. The outcome of 14(4)(a)(ii) is unclear.

5.7. The market share of each individual employer is likely to be low. It will therefore fail on (4)(a)(iii).

5.8. Similarly there is unlikely to be “a lack of competition from other employers seeking to employ persons in the relevant labour market” although that might occur in a regional context. It seems unlikely that a lack of regional competition for employees would cause a national problem of undervaluation. It is likely to fail clause 14(4)(a)(iv).

5.9. It is not clear how “a lack of power on the part of employees to influence the relevant labour market” is theorised to influence historical undervaluation. Major changes have been made in employment law since 1991 to ensure that this lack of power is ubiquitous. Factors in clause 14(4)(a)(ii) to (iv) and the likely oversupply of people in this occupation will almost certainly ensure that this situation holds, except perhaps for a few highly skilled and experienced individuals, but the consequence of this is not clear. On one hand the logic of clauses 14(4) and 14(5) appears to take the position that a well-performing labour market, presumably without market power by either employees or employers (contrary to the object of the Employment Relations Act which recognises the existence of excessive market power of employers in relation to employees) will lead to pay equity in its own right. But historically it is clear that it is women in occupations which have been most vulnerable because of their lack of power to influence their working conditions and employment who have suffered most from gender inequity. We are clear on how we would interpret the answer to this question, but we are not clear how the legislation is intended to be interpreted and on what ideological presumption an employer court might be expected to interpret it.

5.10. An employer could add many other features in clause 14(4)(vi) which would have to be examined.
5.11. In sum, this group of women would find it very difficult to establish a claim, and would be subject to many arguments based more on ideology than evidence, despite having a clear case under clause 14(3) and ongoing very low pay.

5.12. We also observe that the questions in clause 14(4) include ones on which employers are likely to be defensive (such as whether they have a dominant position in an industry), adding to difficulties in reaching an agreed position.

5.13. Regarding the definition of “relevant labour market” in clause 14(5), which applies to clause 14(4), we find the concept of a group of workers all of whom as a “matter of fact and commercial common sense, are substitutable” difficult to interpret: what is the concept of “commercial common sense”? Does it include “fact and commercial common sense” that is the result of discriminatory behaviour which leads to gender-based undervaluation of work?

5.14. This illustrates the problems of conceptualising employment relationships as a “market”. Employment relationships are not an exchange or purchase and sale of interchangeable widgets. The interests, prejudices, social and cultural values of both employer and employee affect the relationship and the outcome. For better and for worse there are no assurance that any two workers who are “substitutable” on some objective criterion. The concept of “labour market” is not used anywhere else in the bill: it only adds confusion to introduce it here.

5.15. Recommendation: that clause 14(2)(c), 14(4) and 14(5) be deleted as being unnecessary to achieve fair settlements of pay equity claims and because they will impede their settlement.

5.16. Alternative Recommendation: that subsections 14(2)(c) be amended to read:

(c) there are reasonable grounds to believe that the work continues to be subject to systemic gender-based undervaluation.

and clauses 14(4) and 14(5) be deleted.

6. Comment on specific draft clauses

6.1. Clause 14 (1), 14(2) - the test for determining merit is too onerous. There may be a need to prevent vexatious claims from proceeding but there should not be a requirement to establish the merits of the substantive case as an initial step. It would
be more appropriate to establish a lower bar at first instance, for example a *prima facie* or "merit to proceed" case.

6.2. **Clause 14 (4)** - Please see detailed comment above. We do not consider that requiring an analysis of the features of the “relevant labour market” is a necessary step in establishing if continued systemic gender-based undervaluation continues. We especially object to the inclusion of clauses 14(4)(a) (iii) to (v) as these factors do not appear in the JWG principles for assessing the merit of a claim. Additionally, clause 14(4) is again relevant in assessing if a male comparator is tainted by gender bias in clause 23(3)(b).

6.3. **Clause 14(5)** - Please see detailed comment above. This clause defines **relevant labour market**. It includes as part of the definition “as a matter of fact and commercial common sense…” We are not clear what this phrase means and how it is relevant in determining if a labour market is a relevant labour market, or not.

6.4. **Clause 17 (1)** - 90 days is too long for employees to wait for a response to their claim. A response should be provided by an employer after 30 days.

6.5. **Clause 21** – It should be made clear that the duty to provide information applies prior to the merits assessment in clause 14.

6.6. **Clause 22(1)(a)** – is missing “any other relevant work features” that was included in the JWG principles.

6.7. **Clause 22(2)(b)** – The wording of the clause excludes the consideration of female dominated occupations that are currently undervalued, but were not undervalued in the past.

6.8. **Clause 23** – the Bill sets out a limiting mechanism for comparators by establishing a hierarchy which tries to keep comparators as close as possible to the equal pay claimants’ workplace. The hierarchy would mean comparators would have to be selected as follows:

6.8.1. Comparators within the same business, or if not then

6.8.2. Comparators from within a similar business, or if not then

6.8.3. Comparators from within the same industry/sector, or if not then

6.8.4. Comparators from a different industry or sector.
6.9. Women need to be able to select the most appropriate comparator for their particular role, regardless of who their employer happens to be.

6.10. But under the process above they would need to prove there are no appropriate comparators in each of the steps (meaning they’d have to consider male comparators in each step and prove they don’t have the same skills, effort, responsibility and conditions) before moving on to the next one. This is at odds with the existing Equal Pay Act, the recent Court of Appeal Judgement in the Kristine Bartlett case, and is impractical and ultimately impedes and slows down women making pay equity claims.

6.11. **Clause 23(3)** – This clause attempts to prevent male comparators being used in situations where they are also tainted by gender bias. However, the test for assessing this is unnecessarily complex and involves referring back to clause 14 (and the associate considerations regarding the “relevant labour market”).

6.12. **Clause 39** – This clause prevents employees with pay equity claims claiming back pay prior to the delivery of their claim. This is a considerable disadvantage when compared to the current legislative framework that would arguably allow claimants to claim pay for a prior of 6 years prior to the delivery of their claim and, in fact, equal pay claimants are permitted to claim remuneration for unfair wage rates for up to 6 years prior to filing their claim in the Authority under this draft Bill. This provision may be inconsistent with New Zealand’s international obligations and Human Rights framework.

6.13. **Clause 42** – Penalties as low as $2,000 will not provide a significant disincentive for non-compliance with the Act. The penalties should be higher if they are to be an effective deterrent from non-compliance with the draft Bill.

6.14. **Clause 44** – This clause proposes that regulations may be made by Order in Council in relation to clauses 14, 22, and 23. These sections cover the merit assessment, assessing the claim and identifying appropriate comparators. These are significant matters and key to the workability of this legislation. Any provisions of this nature should be contained within the primary legislation and not decided behind closed doors by an Order in Council. If this amendment is not accepted, any regulations should be require separate and meaningful consultation and agreement from trade unions as the representatives of working people.
6.15. **Transitional provisions** – Although not included as draft clauses in this draft Bill, there is a table included with the Bill that proposes that if the Bill becomes law, the new law will take over all existing claims – even those that were initiated under the Equal Pay Act 1972. These provisions are inconsistent with constitutional legislative principles regarding extinguishing existing rights and retrospectivity. Claims already lodged or raised in bargaining under the Equal Pay Act 1972 should proceed under the current legislative scheme as is the normal legal practice.

6.16. **Both clause 44 and the transitional provisions** appear to be contrary to the Legislation Advisory Committee Guidelines 11.1, 11.4 and 13.1.

7. **Conclusion**

7.1. Without significant amendment, the CTU will not support this proposed legislation. We appreciate the opportunities we have been given to discuss the proposed provisions of this draft Bill with the Ministry of Business, Innovation and Employment.