Regulatory Impact Statement

Equal Pay Act 1972: Principles and Process

Agency Disclosure Statement

This Regulatory Impact Statement has been prepared by the Ministry of Business, Innovation and Employment and the Ministry for Women. It provides an analysis of proposals to address the misalignment between the existing pay equity regime in the *Equal Pay Act 1972*, and the employment relations framework in the *Employment Relations Act 2000*. The analysis accepts that there is no intention to change the status quo policy objective to address pay equity in employment.

The economy-wide cost and impacts of potential pay equity wage adjustments are unknown. However, as the proposals are not expected to change pay equity outcomes, in terms of wage adjustments, this is not expected to be materially different under the proposals.

No formal cost-benefit analysis has been carried out for any of the proposals. Instead, qualitative judgements of the impacts (positive and negative) of the options considered have been used to determine the preferred options.

This Regulatory Impact Statement incorporates the analysis that took place as part of the Joint Working Group on Pay Equity Principles (the JWG). This focused on the status quo and implementing the JWG's proposals.

The JWG was comprised of representatives from unions (New Zealand Council of Trade Unions, the Public Service Association, E tū, FIRST Union, the New Zealand Nurses Organisation and the New Zealand Educational Institute), businesses (BusinessNZ and the Employers and Manufacturers Association) and government (the Ministry of Business Innovation and Employment and the State Services Commission).

Union and business parties on the JWG also consulted with various parts of their membership on the final recommendations. No significant concerns with the JWG's final recommendations were raised during this consultation.

This is an updated analysis from the version submitted in September 2016. The highlighted updates reflect that there have been changes made to the Joint Working Group Principles, by the Reconvened Joint Working Group[1] in February 2018. The new recommendations were informed by the experiences of parties who had used the principles in pay equity bargaining under an agreement between the New Zealand Council of Trade Unions and the State Services Commission. Ministers have also made decisions on further proposals which have been included.

[1] The Reconvened Joint Working Group included the Ministry for Women.

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16 May 2018

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1. This Regulatory Impact Statement provides an analysis of options for amending the pay equity regime to clarify when a pay equity claim may be present, the context within which pay equity may be addressed, and align it with the existing employment relations framework. These options all implement pay equity. There is no change the current policy objective to address pay equity in employment.

Status quo

Background: Court decisions endorsed a statutory pay equity regime in New Zealand

1. Before October 2014, it was clear that the Equal Pay Act 1972 provided for equal pay for the same work. There was no common position on whether it also provided for pay equity. Pay equity means equal pay for work of equal value – meaning women should receive the same pay as men for jobs that require the same or substantially similar degrees of skill, effort and responsibility performed under the same or substantially conditions.
2. In October 2014, a Court of Appeal decision in TerraNova v Service and Food Workers Union (now E tū) endorsed the view that the Equal Pay Act establishes a pay equity regime.
3. The Court of Appeal's decision means that the Equal Pay Act does not just include equal pay (the same pay for the same work), but also includes pay equity (the same pay for work of equal value).

Pay equity and equal pay

4. The term **equal pay** is commonly used to refer to the principle that women and men should receive the same remuneration for doing the same job. An example of equal pay is where a male drainlayer and a female drainlayer, all else equal, receive the same pay. Equal pay is a way to address direct and (to some extent) indirect discrimination on the basis of gender – where an employer pays people differently solely because of their gender.

5. The term **pay equity** is commonly used to refer to the principle that women and men should receive the same remuneration for doing jobs that are of equal value. For example, a drainlayer should receive the same pay as a police officer if the *value* of the work is determined to be the same.

6. Pay equity is seen as a way to address systemic discrimination where jobs that have traditionally been performed by women are considered to be paid less than if that job had been traditionally performed by men. These jobs may have included tasks and duties that could have been seen as 'women's work'. This involves making judgements about the relative value of skills, responsibilities, effort and conditions of work in abstract from the market-set pay.

Application of equal pay and pay equity in the Equal Pay Act

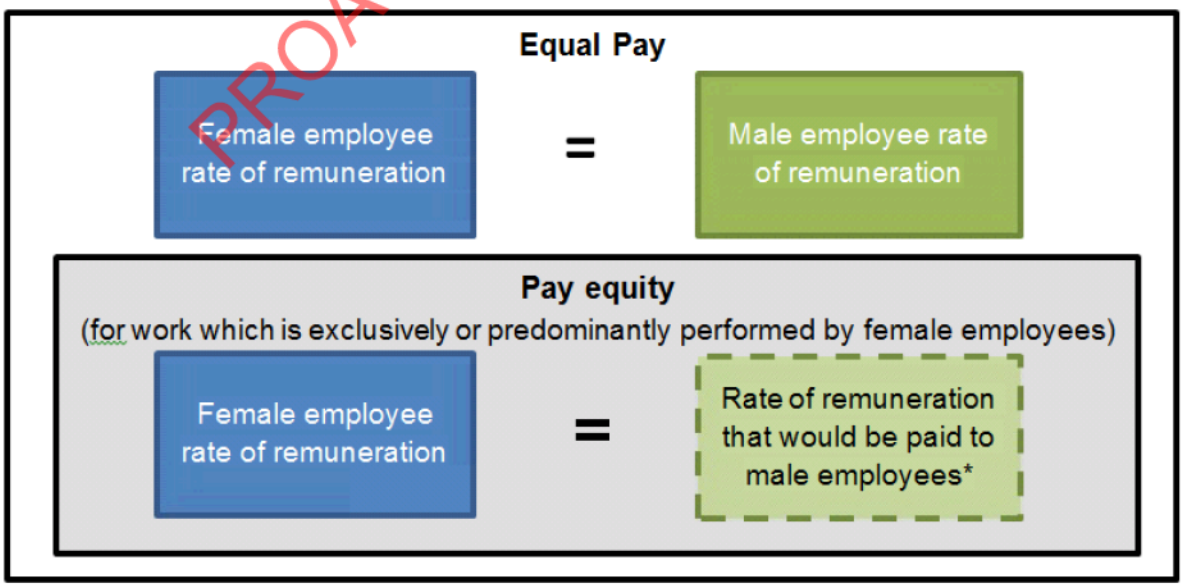
7. Figure 1 below provides a simplified representation of how the concepts of equal pay and pay equity are applied in the Equal Pay Act.

8. The Equal Pay Act defines equal pay to mean a rate of remuneration for work in which rate there is no element of differentiation between male employees and female employees based on the sex of the employees (refer s2(1)). Note that figure 1 assumes that there is no difference between the male and female employees other than gender.

9. For work predominantly or exclusively performed by women, a direct comparison between female and male employees performing the same work can be problematic as the remuneration paid to the men performing the work may itself be subject to discrimination.

10. Therefore, for work predominantly or exclusively performed by women, the Equal Pay Act requires equal pay for women 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 (the Court of Appeal's interpretation of s3(1)(b)). This is the concept of pay equity.

Figure 1: Application of equal pay and pay equity in the Equal Pay Act



* 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.

Effect of a pay equity regime on the labour market

11. The interpretation of the Equal Pay Act means any employee performing work predominantly performed by women, irrespective of their level of pay (whether they are low, moderately or highly paid), may bring pay equity claims under the Equal Pay Act. The claims would allege that the work would have been paid more (that is, that the work is undervalued) were it not predominantly performed by women, with 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.

12. The specific effects of the Court of Appeal's decision upon the labour market (including the extent to which any pay rate adjustments reduce employment) will depend on:

    a. the existence and degree of undervaluation due to systemic gender discrimination (which is difficult to determine), and

    b. the number and timing of pay equity claims that are raised[2] by employees or their representatives / unions and when any wage increases come into effect.

The existence and degree of undervaluation due to gender discrimination

13. There is no direct empirical evidence on the extent to which systemic gender discrimination is occurring and, if it is present in some female dominated workforces, the extent to which it is depressing pay levels in those occupations. Existing evidence is, at best, consistent with the theory of systemic discrimination in female dominated occupations; however it does not rule out the possibility that non-discriminatory factors are driving gender segregation in female dominated occupations. Indirect evidence includes:

    a. occupational segregation (the clustering of women and men in particular occupations): female-dominated occupations tend to be lower paid than those dominated by men, which could be due to systemic discrimination (e.g. labelling some jobs as 'women's work', i.e. involving care and domestic work), and

    b. the 'unexplained' portion of the gender pay gap.

Occupational segregation

14. Parts of New Zealand's labour market are highly gender-segregated: around half of women and men still work in occupations where most people are the same gender as them. Over 0.5 million people work in occupations (based on ANZSCO level 6) in which over two thirds of the workforce are women. A list of these occupations, is attached at Appendix 1. In other jurisdictions, pay equity laws have generally focussed on occupations where over 60-70 per cent of the workforce are women. For instance, in Ontario, Canada, female-dominated workforces are defined as having more than 60 percent women.

15. Existing evidence that has looked at the gender pay gap in New Zealand has identified that female dominated occupations tend to be lower paid than those dominated by men. This could be due to undervaluation of work predominantly performed by women (e.g. labelling work associated with caring and the household as 'women's work'). Differences in occupation and industry of employment have been found to explain 20-40 per cent of the gender pay gap (Dixon 2000). In March 2017 the Ministry for Women released research it commissioned showing that up to 80 percent of the gender pay is due to 'unexplained' or hard-to-measure factors. These include bias, behaviours and discrimination (Ministry for Women 2017).

9(2)(j)

Unexplained gender pay gap

16. The gender pay gap is a high level indicator of the difference between women and men's earnings. Stats NZ measures the gender pay gap by comparing the median hourly earnings of women and men in full and part-time work. As of December 2017, there was a gender pay gap of 9.4 percent. The gender pay gap has been steadily trending downwards since the late 1990s.

17. Research consistently identifies an 'unexplained' portion of the gender pay gap. The unexplained portion is generally considered to include bias, behaviours and discrimination, which negatively affect decisions about recruitment and career progression of women. The 'unexplained' portion also includes the effect of any characteristics that were not able to be observed by quantitative research. As a result, the precise effect of direct or indirect discrimination within the 'unexplained' portion is unable to be quantified. In addition, the 'explained' portion of the gender pay gap (including occupational segregation) is likely to be influenced by societal pressures, which could include underlying discrimination, such as social expectations about appropriate types of work for women and men.[3]

18. Dixon (2000) identified that 20-60 per cent of the gender pay gap remained 'unexplained'. Recent research by Pacheco and Cochrane (unpublished 2016) indicates that the 'unexplained' portion may have increased in relative proportion as a contributor to the gender pay gap. Pacheco and Cochrane found that roughly two-thirds of the gender pay gap remained 'unexplained' when observable individual and job characteristics were controlled for (as measured by average hourly earnings using 2012 data). The observable characteristics include personal characteristics (age, ethnicity, qualifications, migrant status, etc.), occupation, industry, and other job-related characteristics (union membership, tenure, part-time status and whether the employment is permanent or not). The increased proportion may be due to women's increasing level of skills (as measured by qualifications) and time in the workforce relative to men since the Dixon research in 2000.

19. Sin, Stillman and Fabling (2017) have researched the presence of gender discrimination in New Zealand wage rates. The research uses a decade of annual wage and productivity data from New Zealand's Linked Employer-Employee Database, focusing on wage differences within industries in the private for-profit sector. They find the average gender difference in productivity is considerably smaller than the average gender difference in wages. This shows women are paid less than men for the same contribution to firm output, which is further evidence of gender discrimination.

20. Other contributors to the gender pay gap include:

    a. vertical segregation (where there are a higher proportion of men than women in senior higher-paid positions)

    b. women being more likely to take career breaks and/or work part-time, principally because women spend more time than men on unpaid and caring work. This means that women accumulate less experience in the workforce over time, though the overall difference in experience has narrowed over time. Dixon (2000) found that differences in the amount of work experience between women and men explain 15-50 per cent of the gap

    c. The gendered nature of parenting in New Zealand. Upcoming Ministry for

[3] One US study of college graduates from the American Association of University Women shows that one year after graduation, women and men experienced a wage gap. This occurred even with accounting for variables like occupation, economic sector, hours worked each week (data unavailable in New Zealand) multiple jobs, months unemployed since graduate, undergraduate transcript, undergraduate major, undergraduate institution sector, institution selectivity, age, region, and marital status. Women were paid only 93 percent of what men were paid even after considering these factors (Corbett & Hill, 2012).

Women research by Pacheco and Sin (due 29 May 2018) indicates that New Zealand mothers experience two kinds of penalties in the labour market after having their first child. The first gap is a gender pay gap for mothers that are likely to be educated and older, whose gender pay gap widens the longer they are out of the labour market. The second gap is an 'employment gap' which is more likely to happen to mothers who are less educated, younger, and have less contact with the labour market. These mothers may not experience a significant gender pay gap as they are more likely to be employed in low-paid work, however they may be also make a choice, possibly a mediated or forced one, to do unpaid work at home and not take on paid work.

Systemic discrimination as a market failure

21. If there is systemic gender discrimination occurring, then this would mean that market set wages do not reflect the marginal product of labour. From an economic perspective, this is a problem as distorted price signals will not allocate labour efficiently.

22. In theory, competitive market forces would reduce or eliminate discrimination that creates economic inefficiencies. For example, if employees in certain occupations are underpaid at the prevailing market rate due to systemic discrimination, over time we would expect those employees to shift to occupations in which their skills are appropriately paid.

23. However, there possible reasons why the market may not eliminate systemic discrimination in practice. This includes:

    a. Crowding of women into female dominated occupations: Restricted entry for women to higher-paid male-dominated occupations due to societal expectations or active discrimination. Alternatively, restricted exit from female-dominated work due to, for example, limited availability of part-time or flexible work opportunities, or inadequate career pathways for women in male dominated occupations. This limited potential to move to other types of jobs (occupational mobility) reduces employees' relative bargaining power, which may depress wages relative to other workers who are able to more easily switch occupations.

    b. Monopsony power: Where an employer is the only (or the dominant) employer in the industry and the workers have few choices about their employment. This situation may enable the employer to exercise its power to set wages and, as a consequence, has not enabled undervalued pay rates to adjust. This could depress wage rates, including where Government is the sole or dominant employer or funder. However, being dominant in an industry or region does not necessarily lead to an employer exercising monopsony power. Where workers have employment choices or where the firm's own demand for labour is not flexible in practice, then an employer's monopsony power is curtailed.

    c. Information asymmetries: Employers may be using market rates as a benchmark for their own wage setting, but those market rates are not being informed by knowledge of how similarly skilled individuals are paid in different occupations.

24. These arguments are likely to apply differently in different types of industries. For example, relative bargaining power may be more pertinent in sectors where workers are low paid and there are few suitable alternative occupations (which may also reflect an overlap of issues).

Implications of the TerraNova case

25. While the Court of Appeal decision on the TerraNova case relates to the aged care sector, the interpretation of the Equal Pay Act applies to the wider labour market. 9(2)(g)(i)

9(2)(g)(i)

26. It is difficult to estimate the size of any pay increases that need to be addressed. The size depends on the existence and degree of undervaluation due to gender discrimination (which is difficult to determine), and the number and timing of pay equity claims that are pursued (which is in the hands of the parties). It is also unknown, at this stage, when any wage increases may come into effect.

9(2)(j)

Government response to the Court of Appeal decision

28. Following the Court of Appeal decisions, in October 2015 the Government established a Joint Working Group on Pay Equity Principles (the JWG) to make recommendations for dealing with pay equity claims under the Equal Pay Act. The JWG's proposals are listed below, and a summary is attached at Appendix 2. The JWG's work included clarifying when a pay equity issue may be present. That is, the work must be female dominated, and consideration must also be given to other factors that have led to historic and ongoing undervaluation.

29. In addition to the JWG, Cabinet agreed to a negotiation process to address pay and associated workforce issues for care and support workers in the health sector as part of the Government's response to the TerraNova case. The negotiations were intended to address pay equity and end litigation on the TerraNova case.

30. Subsequent to the TerraNova case, a number of additional claims under the Equal Pay Act have been filed. The majority of these are on behalf of other care and support workers who are covered by the current negotiation process. Other claims have been filed on behalf of social workers employed by the Ministry of Social Development and education support workers employed by the Ministry of Education, and against the State Services Commissioner in respect of equal pay principles for the wider public service.

31. In May 2016 the JWG completed its work and made its recommendations to the Government.

32. In February 2018, the Government asked a Reconvened Joint Working Group (RJWG)[4] to provide further practical and specific guidance on key areas of the principles:

    a. determining the merit of a pay equity claim (including considering the role of an employer in this process) from employee and employer perspectives
    b. determining how appropriate comparators should be selected when assessing the work subject to a pay equity claim

[4] The RJWG was chaired by Traci Houpapa MNZM and included the Ministry for Women in its membership.

c. the legislative vehicle to implement the JWG principles and recommendations.

33. The RJWG reported back to the Ministers at the end of February 2018, recommending clarifying and simplifying the process for initiating a pay equity claim, making no changes to the principles on comparators, and amending the Equal Pay Act 1972 to implement the principles.

34. In this paper, the combination of the original JWG recommendations and RJWG further recommendations, as set out in the below table, will be referred to as the RJWG principles. The RJWG recommended some changes to the process of raising and accepting pay equity claims (Principle 2 below) with the key implication being lowering the threshold for raising a claim, and recommended that the Equal Pay Act 1972 be amended to implement the principles.

Original JWG Principles	Reconvened JWG changes
1. Any employee or group of employees can make a claim.	Reconfirmed
2. In determining the merit of the claim as an equal pay claim, the following factors must be considered: A. The work must be shown to be predominantly performed by women B. The work may have been historically undervalued because of: i. any relevant origins and history of the work and the wage setting for it; ii. any social, cultural, or historical factors that may have led to undervaluing of the work and the remuneration for it; iii. a characterisation or labelling of the work as "women's work"; iv. any social, cultural, or historical phenomena that have led to women being considered to have natural or inherent qualities not required to be accounted for in wages paid. C. Whether gender-based systemic undervaluation has affected the remuneration for the work due to i. features of the market, industry or sector or occupation which may have resulted in continued undervaluation of the work, including but not limited to a dominant source of funding across the market, industry or sector; or the lack of effective bargaining; ii. the failure by the parties to properly assess or consider the remuneration that should be paid to properly account for the nature of the work, the levels or responsibility associated with the work, the conditions under which the work is performed, and the degree of effort	2A. To determine whether to proceed with the claim as a pay equity claim the work must be predominantly performed by women. In addition, it should be arguable that: B. The work is currently or has been historically undervalued (due to the same factors under 2B in the original JWG Principles). C. Consideration may also be given to whether gender-based systemic undervaluation has affected the remuneration for the work (due to the same factors under 2C in the original JWG Principles **plus** areas where remuneration for this work may have been affected by any occupational segregation and/or any occupational segmentation). D. Agreeing to proceed with a pay equity claim does not in and of itself predetermine a pay equity outcome.

required to perform the work; iii. any other relevant work features.	
3. A thorough assessment of the skills, responsibilities, conditions of work and degrees of effort of the work done by the women must be undertaken.	Reconfirmed
4. The assessment must be objective and free of assumptions based on gender.	Reconfirmed
5. Current views, conclusions or assessments of work value are not to be assumed to be free of assumptions based on gender.	Reconfirmed
6. Any assessment must fully recognise the importance of skills, responsibilities, effort and conditions that are commonly over-looked or undervalued in female dominated work such as social and communication skills, responsibility for the wellbeing of others, emotional effort, cultural knowledge and sensitivity.	Reconfirmed
7. To establish equal pay, there should be an examination of i. the work being performed and the remuneration paid to those performing the work; and ii. the work performed by, and remuneration paid to, appropriate comparators.	Reconfirmed
8. An examination of the work being performed and that of appropriate comparators requires the identification and examination of: i. the skills required; ii. the responsibilities imposed by the work; iii. the conditions of work; iv. the degree of effort required in performing the work; v. the experience of employees; vi. any other relevant work features.	Reconfirmed
9. An examination of the work and remuneration of appropriate comparators may include: i. male comparators performing work which is the same as or similar to the work at issue in circumstances in which the male comparators' work is not predominantly performed by females; and/or ii. male comparators who perform different work all of which, or aspects of which, involve skills and/or responsibilities and/or conditions and/or degrees of effort which are the same or substantially similar to the work being examined; and iii. any other useful and relevant comparators.	Reconfirmed
10. The work may have been historically undervalued because of: i. any relevant origins and history of the work and the wage setting for it; ii. any social, cultural or historical factors which may	Reconfirmed

have led to undervaluing or devaluing of the work and the remuneration paid for it; iii. there is or has been some characterisation or labelling of the work as "women's work"; iv. any social, cultural or historical phenomena whereby women are considered to have "natural" or "inherent" qualities not required to be accounted for in wages paid.	
11. A male whose remuneration is itself distorted by systemic undervaluation of "women's work" is not an appropriate comparator.	Reconfirmed
12. Equal pay is remuneration (including but not limited to time wages, overtime payments and allowances) which has no element of gender-based differentiation.	Reconfirmed
13. Equal pay must be free from any systemic undervaluation, that is, undervaluation derived from the effects of current, historical or structural gender-based differentiation.	Reconfirmed
14. In establishing equal pay, other conditions of employment cannot be reduced.	Reconfirmed
15. The process of establishing equal pay should be orderly, efficient, kept within reasonable bounds and not needlessly prolonged.	Reconfirmed
16. Any equal pay established must be reviewed and kept current.	Reconfirmed

Summary

35. In practice, the Court of Appeal decision results in the courts and the labour market determining how pay equity claims are resolved. The Employment Court would set principles under section 9 of the Equal Pay Act (potentially influenced by the RJWG's principles). Other pay equity cases would be dealt with through the courts and existing bargaining processes. Bargaining would be influenced by relevant court precedent and the incentive to avoid litigation.

Problem definition: Misalignment with existing employment relations framework

36. Under the existing employment relations framework:
    a. wages are mostly agreed between individual employers and employees and are informed by market information and subject to minimum standards.
    b. most wages are set at the individual or workplace level (the number of collective agreements has declined).
37. The government now has very limited involvement in wage-setting (compared to the past), where the Minimum Wage Act 1983 remains the only direct statutory government wage-setting tool.
38. The arrangements in the Equal Pay Act are more aligned with those that were in place in the 1970s than our current arrangements. When the Equal Pay Act was passed, wage setting in the private sector was highly centralised. The predominant bargaining system was compulsory conciliated bargaining for blanket-coverage

awards that set minimum terms and conditions of employment. Where an agreement could not be reached, the Court of Arbitration had the power to resolve disputes and set wages and minimum working conditions. This is no longer the case.

39. Consequently under the Equal Pay Act, the Employment Court has a more determinative role in setting wages than it does in other areas of employment law. At any time, the Employment Relations Authority and Employment Court can be asked to determine what a "pay equity rate" is for a particular job. Bargaining is not a necessary precondition.

40. As the court has not yet considered a substantive pay equity case under the Equal Pay Act, it is uncertain exactly how the court would determine a pay equity rate. The Court of Appeal has suggested the Employment Court be asked to issue a statement of principles (as is provided for under s9 of the Equal Pay Act) which should provide the Employment Court and the parties with a workable framework to enable the parties to bring that claim before the Court in an orderly and manageable way. The statement of principles may, for example, identify appropriate comparators and guide the parties on how to adduce evidence of other comparator groups or issues relating to systemic undervaluation.

41. If the court sets pay rates in relation to a claim under the Equal Pay Act, where employees and employers agree on the applicability of that court decision to their circumstances, the rates would, in effect, become minimum rates in bargaining. Where there are disputes about the applicability of court decisions, there is likely to be bargaining or further court cases.

42. Figure 2 provides a simplified outline of the process for addressing pay equity concerns under the Equal Pay Act. Note that:

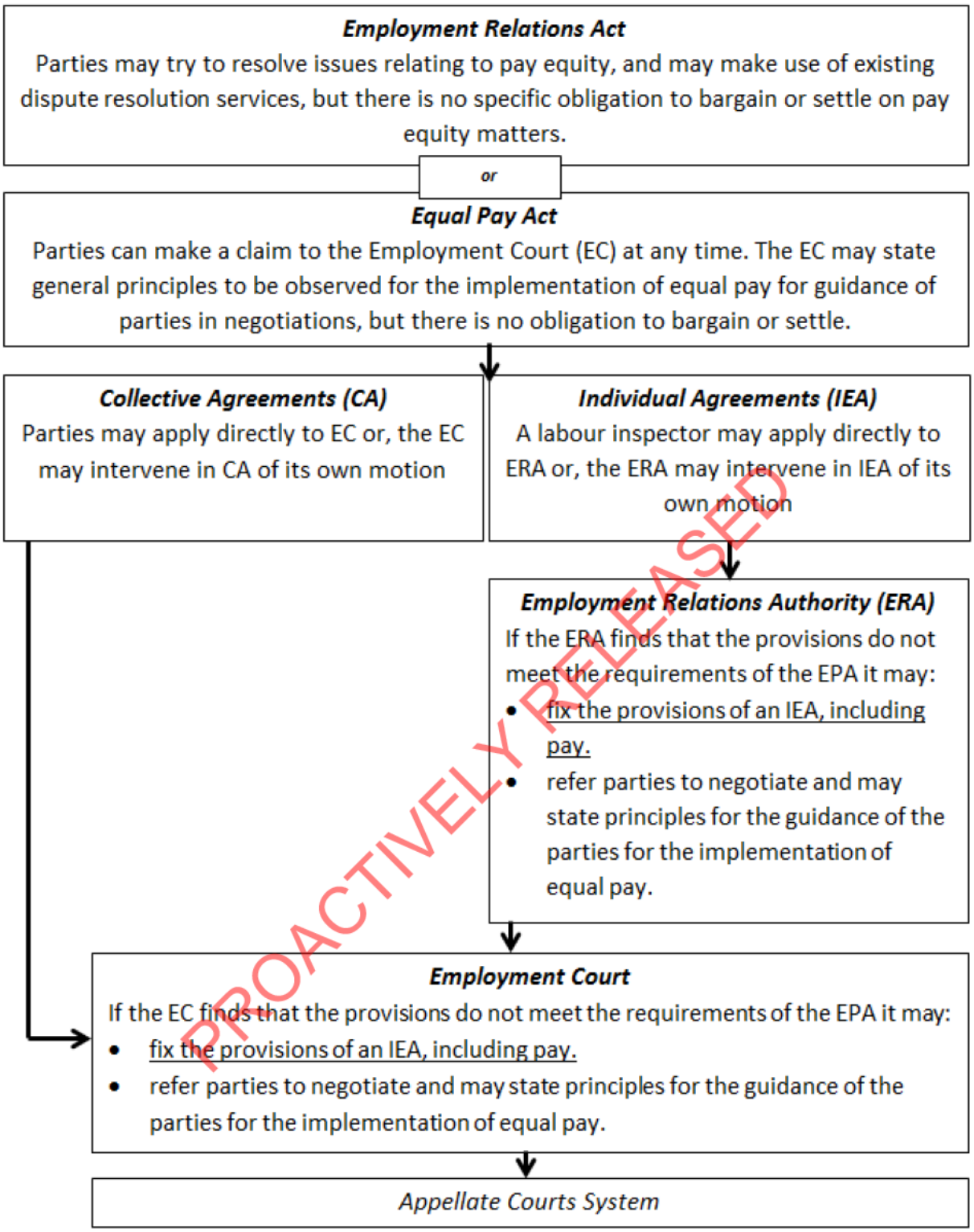
    a. voluntary bargaining on pay equity can occur (under the Employment Relations Act framework), as it can for most employment matters.

    b. parties can make a claim for pay equity to the Employment Court at any time (collective agreements can apply directly to the Employment Court, while it is expected that individual employment agreements will need to be taken by a Labour Inspector to the Employment Relations Authority in the first instance.

    c. When the Employment Court (or the Employment Relations Authority) is not satisfied that the employment agreement meets the requirements of the Equal Pay Act, it may refer the parties to negotiate (and set principles as guidance) or amend the provisions of the employment agreement in order to meet the requirements of the Equal Pay Act.

43. The significant and early role for the Court in determining pay rates under the Equal Pay Act is misaligned with the existing employment relations framework. This is a problem because it may frustrate the purpose of the Employment Relations Act to build productive employment relationships through the mutual obligations of trust and confidence, encouraging low-level dispute resolution, and reducing the need for judicial intervention (early recourse to Court is not consistent with these purposes). There are very limited circumstances under the Employment Relations Act where the Court can make a determination of employment conditions (including pay).The bargaining framework in the Employment Relations Act (and associated dispute resolution mechanisms) is considered to be more economically efficient as employers and employees are best placed to know about their particular circumstances and agree on the optimal mix of wages and conditions to reflect productivity and business and employee needs, recognising that employers and employees, including their representatives / unions may have different access to information, particularly in relation to pay equity before a claim has been raised and they start working together.

Figure 2 - Status Quo process for pay equity claims in the court system



Other issues

44. The Court of Appeal's judgment also highlighted a number of challenges within the Equal Pay Act which may be undesirable from a regulatory systems perspective. The meaning of some provisions is ambiguous and the legislation has not kept up with changes in the wider employment relations framework. The Equal Pay Act provides the Employment Court with powers to administratively set general principles that will inform how claims are determined, which is unusual in our judicial system.

Benefits and costs of the status quo

45. Given the Court of Appeal decision, there is now a process where a pay equity rate can be determined by the court. This has the benefit of providing access to pay equity for those parties with pay equity claims who may be unable to address such a claim through normal bargaining processes.

46. Since the TerraNova decision, a number of unions have raised claims with state sector employers, including through filing claims with the Authority or in normal collective bargaining. In December 2016, the SSC and the New Zealand Council of Trade Unions agreed to work through the JWG principles together for these claims.

47. While it is not possible to quantify the benefits and costs of the status quo (ie pay equity claims being determined by the courts)in monetary terms, in relative terms the status quo process:

    a. creates uncertainty as a result of an interpretation of the Equal Pay Act that is new. This means that it is not clear what principles will be used to assess pay equity or to set pay equity rates, nor whether court decisions in these areas will be applicable to other pay equity claims. Once the court has established precedent in this area, this aspect of uncertainty is reduced.

    b. involves a court-based process to establish a pay rate that can be expected to be costly for the parties involved making it a poor fit with modern bargaining processes. The status quo requires the parties to operate in a process that is out-of-date and inconsistent with other employment relations processes, including having to deal with the challenges that the Court of Appeal noted with the Equal Pay Act

    c. Direct access to the court under the Equal Pay Act creates uncertainty for bargaining parties as litigation under the Equal Pay Act may start at any time. Under the Employment Relations Act, parties are likely to have participated in facilitation or mediation before employment relations issues are heard by the court

    d. involves a narrow response (i.e. a pay equity rate) to addressing pay equity when non-pay as well as pay rate measures may be more relevant, in some cases, to addressing pay equity

    e. may encourage some bargaining as parties seek to settle pay equity to avoid litigation.

Options to address the misalignment of the status quo pay equity process

48. All of the options considered achieve pay equity and do not seek to overturn the Court of Appeal decision in TerraNova or extinguish claims under the Equal Pay Act.

49. The following options have been identified in the feasible set. This includes a "do nothing more" option (i.e. the status quo):

Status quo, including allowing Courts to determine equal pay rates	There would be no amendment to the existing legislation. The courts and the labour market would determine how pay equity claims are resolved and the government would not set the policy direction. The Employment Court would set principles under section 9 of the Equal Pay Act (which may be influenced by the JWG's principles), and may determine the substantive matters in the TerraNova case (if it is not settled) and any new pay equity cases would be dealt with through the courts and existing bargaining processes.
Option 1: Implement the	There would be no amendment to the existing legislation (i.e.

recommendations of the RJWG without legislation	option 1 above) but the RJWG recommendations (primarily the principles) would be implemented through voluntary adoption by employers and employees for pay equity claims. This is likely to be supported by agreements that are entered into to adopt and apply these principles and to withdraw action under the Equal Pay Act and to bargaining using the principles instead. Government adoption of the principles in bargaining would influence pay equity practices in the wider labour market as Government is a significant labour market participant. Bargaining parties would only be able to access dispute resolution support as currently provided. Any court decision on the section 9 principles would influence pay equity bargaining.
Option 2a: Implement the RJWG recommendations in legislation without modification	Amendments to the Equal Pay Act and the Employment Relations Act to implement the recommendations of the JWG. As the RJWG are silent on the way in which comparators would be used, this option is also silent on a hierarchy of comparators. This is the distinguishing feature between this option and option 2b.
Option 2b: Implement the RJWG recommendations in legislation with a modification to include a hierarchy of comparators	The RJWG recommendations would be put into legislation. A hierarchy of pay equity comparators would be included in legislation starting with comparators within the employer, then the industry before other comparators are used.
Option 2c: Implement the JWG recommendations in legislation with modifications to (i) include a hierarchy of comparators, and (ii) require pay equity claims to have a dominant source of funding	In addition to option 2b above, this option would require pay equity claims to have a dominant source of funding across the occupation, industry or sector to access the pay equity regime (ie to proceed to pay equity bargaining or other remedies).
Option 3: Restrict the pay equity sections of Equal Pay Act to equal pay by restricting comparators to the same work	Amend the Equal Pay Act to remove any ability to use comparators in establishing a claim except men performing the same job. This would have the effect of limiting rights to equal pay only (that is, where it is the same job then men and women must be paid the same). It would mean the Equal Pay Act would not provide for pay equity, undermining the RJWG process to develop a pay equity regime. A window would be left open either for a time specified in legislation or as a consequence of the date that the amendment to the Equal Pay Act comes into effect. During this period, parties would be able to file and, depending on whether the amendment allows it or not, settle claims under the Equal Pay Act.
Option 4a: Back pay to be awarded to the date the pay equity legislation is	Amendments to the Equal Pay Act and the Employment Relations Act to implement the recommendations of the RJWG.

passed, with a six year limitation	Under this option, back pay could be awarded by the courts back to the date new legislation is passed, with a six year limitation. Option 4a could also include a 'sub-option' to provide discretion to the court when deciding whether to award back pay.
Option 4b: Back pay to be awarded to the date a claim is made	As under option 4a, the RJWG recommendations would be put into legislation. Under this option, back pay could be awarded by the courts back to the date a claim is made with a six year limitation.
Option 4c: Delay the commencement of the date from which employers are held liable for back pay or employers back date claims to the date the claim is made (whichever is soonest)	As under option 4a, the RJWG recommendations would be put into legislation. Under this option, the effective date of employers being on notice would be five years after the introduction of legislation. Employers would be liable to back date claims to that point with a six year limitation. If pay equity claims were made within five years of the legislation passing, the Court could award back pay to the date the claim was made. Option 4c could also include a 'sub-option' to provide discretion to the court when deciding whether to award back pay.

Objectives/criteria

50. The criteria for identifying which options address the misalignment of the Equal Pay Act process with modern employment relations are identified in the following table. The criteria for assessing options that carry most weight in the process of assessment have been highlighted in green.

Table 1: Criteria for assessing options

Criteria	What does this mean?	Why is it important?
Effective at achieving pay equity	The process is effective at addressing systemic discrimination which has deep rooted societal causes that mean jobs traditionally performed by women may be undervalued in the labour market.	- Freedom from discrimination is viewed as important to society - Discrimination is economically inefficient.
Supports productive employment relationships consistent with modern bargaining frameworks	The objective of the Employment Relations Act is to build productive employment relationships through the promotion of good faith in all aspects of the employment environment and of the employment relationship. Employees and employers can openly and constructively engage on employment matters. Employees and employers are able to find innovative, mutually acceptable working arrangements to suit their particular circumstances over time. Mediation is the dispute resolution - mechanism with reduced need for judicial intervention.	- Mutual trust and good-will are an important part of productive working relationships - Employees and employers have the most information about their preferences, increasing the chance of finding mutually beneficial working arrangements at least cost - Solutions can be found for different circumstances/problems over time -
Supports a better functioning labour market	A well-functioning labour market is able to signal relative labour scarcity and productivity, informing employee and employer decisions (e.g. skills investment, labour/capital mix), but targeted interventions may be needed to ensure it supports desired outcomes.	- Markets signals are provided about the most productive use of labour and capital (allocative efficiency) - Markets can influence decisions that support future productivity, e.g. investment and innovation (dynamic efficiency) - Interventions can be targeted at problem in order to address issues in the labour market - Interventions are based on considering whether the expected benefits outweigh the expected costs - Issues, such as pay equity, that are inherently abstract and involve a significant degree of judgement to address are better addressed through bargaining. - Settlement rates address pay equity

		(or are close to it)
Provides certainty	Rights and obligations (process and/or outcomes) are clear and predictable to labour market participants.	- Certainty is important to minimise the risk of unintended consequences (i.e. not achieving pay equity)
Minimises unnecessary costs	Including: - compliance costs incurred by employers and employees in the process of exercising or meeting their rights and obligations - administrative costs incurred by labour market institutions	- Compliance costs erode any potential net benefits of pay equity regulation - Administrative costs are ultimately borne by employees and employers, eroding any net benefit of pay equity

Regulatory impact analysis

51. In addition to the status quo, four options, all of which achieve pay equity, have been identified as being in the feasible set.

Option 1

52. Option 1 involves implementing the RJWG recommendations through voluntary adoption by employers and employees for pay equity claims. This is likely to be supported by agreements that are entered into to adopt and apply these principles and to withdraw action under the Equal Pay Act and to bargaining using the principles instead. Government adoption of the principles in bargaining would influence pay equity practices in the wider labour market as Government is a significant labour market participant. Any court decision on the section 9 principles would influence pay equity bargaining.

53. This option is likely to achieve pay equity as it is very similar in practice to the status quo although it may encourage parties, at least initially, to bargain using the JWG principles. This option reduces uncertainty about principles to apply in a pay equity process. However, it retains the uncertainty that litigation may begin at any point and the court may or may not decide to adopt the same or similar principles.

54. Option 1 potentially avoids some court related costs for bargaining parties in the short run. However, the process of establishing a voluntary process and encouraging its use will involve some costs to government, business and unions.

Option 2

55. Option 2 involves implementing the RJWG recommendations in legislation through amendments to the Equal Pay Act and the Employment Relations Act, either as recommended by the RJWG (Option 2a) or:

    a. modified to include a hierarchy of comparators used in the pay equity process starting from comparators close to the employer, then the industry before other comparators are used.(Option 2b), or

    b. modified further to require pay equity claims to have a dominant source of funding across the occupation, industry or sector to access the pay equity regime (Option 2c).

56. Options 2a, 2b and 2c achieve pay equity as a result of establishing:

    a. guidance on when a pay equity claim is present. This includes the work being female as well as consideration being given to factors that could have driven systemic gender discrimination resulting in historic and ongoing

undervaluation - this guidance may have to be tailored to New Zealand's labour market context, with particular regard to the needs of low-paid and/or vulnerable women-dominated workforces that may have experienced gendered and intersecting forms of discrimination

b. establishes an accessible, gender neutral process for groups or individuals to request pay equity and an obligation upon the employer to respond to such a request

c. principles and a process to guide bargaining without having to refer to the court for this direction

d. resolves pay equity through the current employment relations framework

e. improves and enhances access mediation and facilitated bargaining for pay equity.

57. Establishing a process to request pay equity is important for groups affected by situations where there is an imbalance in the bargaining relationship due to the employer being the dominant source of funding in an industry (that is, monopsony).

58. The initial JWG was silent on whether there should be a hierarchy of comparators for establishing pay equity. Under Option 2a, parties would agree where (within the employer, the industry or more widely) a comparator group is drawn from for the purposes of addressing pay equity.

59. Option 2b would establish a hierarchy of comparators. This means that, when parties are in bargaining over a pay equity rate, they would draw male-dominated comparator occupations from the employers or groups within the industry, before other comparators outside the employer or industry are considered.

60. Before the RJWG had the opportunity to learn from the experiences of those parties who had gone through pay equity bargaining, officials considered a hierarchy of comparators could reduce some uncertainty in a bargaining process and create efficiencies. However, since the initial recommendations of the original JWG, employers and unions have participated in pay equity bargaining using those principles. Many parties involved in applying the principles to the State sector used a bundle of comparators between them, rather than a single comparator. Lessons from current claims have shown that a hierarchy could in fact create inefficiencies in the process by requiring parties to look at comparators that may be subject to gender undervaluation. In practice, parties do not need to agree on each comparator they bring to the table, and will each bring a number of comparators. This information, together with an assessment of the work, would be used to inform bargaining.

61. Therefore, the RJWG was clear that the hierarchy of comparators was not necessary, as parties found that it had the potential to create an inefficient bargaining process. In light of this new information, we consider that option 2b may be less effective at achieving pay equity than option 2a. Option 2a would provide a more permissive process for parties to choose which comparators they want to bring into pay equity bargaining.

62. Option 2c adds further specification to the factors proposed by the JWG for determining whether a pay equity claim has merit to proceed to bargaining and other remedies.

63. The original JWG principles required pay equity claims to have evidence of both historical and ongoing undervaluation in order to proceed to bargaining. However, the RJWG proposed that pay equity claims must include evidence in relation to current or historic undervaluation and *may* have evidence on continuing undervaluation.

64. The RJWG has been clear that the threshold for parties to enter bargaining should

be low so as to contribute to a collaborative bargaining process and should only require evidence that the occupation is female-dominated and there is a light touch assessment of current or historical undervaluation. This also helps to ensure that a claims-based pay equity process is accessible to both individual and unionised employees.

65. The JWG's proposed sub-factors for determining whether there is ongoing undervaluation are cast broadly. This includes:

    a. features of the market, industry, sector or occupation which may have resulted in continued undervaluation of the work, including but not limited to a dominant source of funding across the market, industry or sector; or the lack of effective bargaining

    b. the failure by the parties to properly assess or consider the remuneration that should be paid to properly account for the nature of the work, the levels or responsibility associated with the work, the conditions under which the work is performed, and the degree of effort required to perform the work

    c. any other relevant work features.

66. Option 2c modifies the JWG's proposed sub-factors in relation to ongoing undervaluation to require claims to have a dominant source of funding across the market, industry or sector.

67. While the requirement to have a dominant source of funding would effectively restrict access to the pay equity regime to primarily government employed or funded occupations, there is insufficient information to indicate that this would result in a different outcomes in practice compared to Option 2b. As noted in paragraph 22, competitive market forces should, in theory, reduce or eliminate discrimination, including systemic gender discrimination, that creates economic inefficiencies. We have not identified any female dominated occupations in which the restricted mobility of workers or availability of information would have allowed wages to remain undervalued where there is not also a dominant source of funding.

68. However, we note that there is considerable uncertainty regarding the identification of occupations which may have pay equity issues and explanations for market imperfections that may allow undervaluation to occur (data and information gaps may exacerbate this). As such, we acknowledge that the requirement for pay equity claims to have a dominant source of funding has the potential to restrict valid pay equity claims at the margin. As a result, Option 2c may be marginally less effective at achieving pay equity than the status quo.

69. The additional requirement is, however, likely to improve certainty about the conditions under which occupations can raise pay equity claims, which may help minimise unnecessary costs and delays by preventing misuse of the regime by claims related to pay issues other than gender pay equity. However, this requirement would effectively undermine the consensus of the RJWG by requiring evidence of ongoing undervaluation.

Option 3

70. Option 3 involves amending the Equal Pay Act so that it provides for only equal pay for equal work, not the broader concept of pay equity. This would remove any ability to use comparators in establishing a claim except men performing the same job, undermining the RJWG process to develop a pay equity regime.

71. As a result of repealing this aspect of the Act, or as a deliberate policy decision to allow claims to be filed under the existing legislation, a 'one-off' window would be left open for a period that allowed pay equity claims to be filed, and depending on the how the amendment is structured, to settle pay equity claims under the status quo Equal Pay Act.

72. This option will involve some pay equity issues being addressed, particularly in the short-term. This arises from:

    a. settlement of any claims during the period when the Equal Pay Act can still be accessed for addressing pay equity matters

    b. bargaining over pay equity between parties:

        a. while the claims "window" is open to avoid litigation or to settle out of court

        b. under the Employment Relations Act, as would have occurred prior to the TerraNova decision.

73. The impact of this option in addressing pay equity would diminish over time (eg if systemic discrimination gradually depresses wages in female dominated occupations). As was the case prior to the TerraNova decision, those groups affected by unequal power in the employment relationship (i.e. monopsony) would find addressing pay equity difficult once the claims window closes. In addition, groups or individuals, that are not be ready to file claims, or may not be able to access a court-based process, affected by unequal bargaining power, will not have access to pay equity through the claims window. This may be especially acute for individual women claimants, women working in or representing low-paid and/or vulnerable workforces and other women in industries without a strong union presence.

74. Option 3 could entail an intensive period of using the Equal Pay Act, which is misaligned with the current employment relations framework, to address pay equity. This is likely to involve a heightened period of uncertainty as it will not be clear when litigation may start up until the claims window closes.

75. In the longer-term, for those parties who are able to bargain to settle pay equity, Option 3 will result in pay equity being bargained within the current employment relations framework. A benchmark for pay equity may have been established during the claims 'window', but updating or enforcing it may be difficult except for those parties who are able to bargain to update the pay equity rate on the same basis as they would have been able to prior to the TerraNova decision.

Option 4

76. Option 4 involves implementing the RJWG recommendations in legislation through amendments to the Equal Pay Act and the Employment Relations Act, It also proposes including an option on a limitation period for back pay in respect of pay equity claims in legislation. Options for back pay can be combined with the regime outlined in option 2.

77. Options 4a and 4c achieve pay equity as they:

    a. enable back pay to be used as part of the negotiating process and result in leverage for negotiating higher pay equity rates than would have resulted with the ability to award more limited back pay

    b. create incentives for employers to address pay equity sooner and proactively, once possible issues are identified

    c. create incentives for employers to assess the existence of pay equity issues on an ongoing basis, and consistently address systemic gender discrimination in a proactive, rather than reactive, way.

78. Options 4a and 4c could also include a 'sub-option' to provide discretion to the court when deciding whether to award back pay. This would provide some recognition that employers are not blameworthy in relation to a pay equity issue occurring (this is explained further in paragraph 81).

79. Option 4b also achieves pay equity as it incentivises employers to continue to

progress a pay equity negotiation and settlement once a claim has been raised (ie there is no advantage in delaying the progress of negotiations in order to avoid financial liability by delaying the commencement of paying a new pay equity rate to employees).

80. The three options differ in terms of:

    a. the element of blameworthiness on the part of the employer

    b. the incentives on employers to address pay equity

    c. financial or fiscal exposure for employers.

81. Option 4b is MBIE's preferred option as it recognises that structural gender discrimination resulting in the undervaluation of female dominated jobs is a systemic issue that cannot be attributed to any particular action of an employer but that employers are effectively on notice when they receive a claim. MBIE considers that, while employers are required to bargain in good faith, this option also provides appropriate incentives for employers to engage with employees on pay equity claims by enabling the courts to require employers to provide back pay to the date of the claim. This option also ensures that any financial or fiscal risks are more limited than the other options. Employees' use of potential back pay liability as leverage under this option will be less effective than under options 4a and 4c where employers could potentially incur back pay liability for much higher amounts. If bargaining power was skewed towards employees due to significant leverage relating to back pay liability, this could distort pay equity wage rates, or result in the award of large sums of back pay (particularly if multiplied across a large workforce). Both of these situations could lead to firms being unable to meet the costs of higher wages, and possibly result in increased displacement of workers.

82. The Ministry for Women sees merit in options 4a and 4c. This is because any change to an existing right should treat those affected equally if possible. Setting back pay to the date that new legislation is passed is more likely to treat all affected women employees equally and to be seen to do so by affected women employees and any new law should ensure universal treatment for everyone affected by it. The Ministry for Women notes that certain workforces (state sector, unionised) are more likely to be in a position to initiate claims earlier than non-unionised employees, and therefore option 4b (back pay to be awarded to the date the claim is made) would have differentiated impacts across all affected employees. The Ministry for Women also notes that options 4a and 4c provide more clarity for the establishment of the back pay obligation and are less likely to incentivise parties to challenge the date of initiating the claim in dispute resolutions processes or the courts.

83. MBIE considers that it is not clear that the benefits of implementing options 4a,(ie increasing incentives for employers to address pay equity issues sooner, would outweigh the potential costs such as:

    a. the compression of the timeframe for achieving pay equity which may lead to significant short term displacement effects for some employees.

    b. SMEs being at the greatest risk of suffering shock impacts from large wage adjustments

    c. creating leverage for claimants in bargaining that could lead to distorted wage rates that do not result in either an increase in productivity or equal bargaining power – as outlined above, this could lead to firms being unable to meet the costs of higher wages, which could result in increased displacement of workers

    d. incentivising employers to review whether pay equity issues exist in their workforce on an ongoing basis..

84. MBIE considers that option 4c involves similar costs and benefits to option 4a but

that some compression effects are likely to be mitigated by the five year lead in time before broader back pay liability commences. MBIE also considers that the Ministry for Women's concern about whether the law treats women equally is largely mitigated by the RJWG's recommendations that create a low threshold so that employees can easily access the pay equity bargaining regime. This means employees do not need to meet strict criteria in order to work collaboratively with their employer through the bargaining process.

All options

85. As noted earlier, all options address pay equity. It is likely that all options will increase the propensity for pay equity to be raised in bargaining but it is not known whether there will be significant differences in the number of claims raised under the different options. For example, mandating a process to require bargaining is likely to increase bargaining, as would the status quo with incentives to avoid early recourse to courts.

86. It is expected that nesting a pay equity process within the bargaining framework in the Employment Relations Act (Options 2, 3 and 4) is likely to result in an increased likelihood of agreed pay equity outcomes in bargaining. This may be undermined by the early and significant recourse to the courts that is a feature of the status quo under the Equal Pay Act.

87. It is unclear which option will provide a more efficient process (in terms of time and cost) for reaching pay equity resolutions. For example, court decisions can establish precedent that can 'short-circuit' bargaining in similar cases. The process efficiency of an early court process compared to a standard bargaining process depends on court decisions, which are highly uncertain at this stage, and how court decisions would be applied, in practice, to other bargaining situations.

88. Table 2 takes the options identified in the feasible set and assesses these options against the criteria developed above relative to the status quo.

Table 2: Assessment of options

	Status Quo	Option 1: Implement Joint Working Group recommendations regarding principles without legislation	Option 2a: Implement Joint Working Group recommendations in legislation	Option 2b: Implement Joint Working Group recommendations in legislation with a modification: to include a hierarchy of comparators	Option 2c: Same as option 2b but with an additional requirement for pay equity claims to have a dominant source of funding	Option 3: Restrict the pay equity sections of the Equal Pay Act to equal pay only	Option 4a: Back pay to be awarded to the date the pay equity legislation is passed, with a six year limitation	Option 4b: Back pay to be awarded to the date the claim is made	Option 4c: Delay the commencement of the date from which employers are held liable for back pay or employers back date claims to the date the claim is made (whichever is soonest)
Description of the option	There would be no amendment to existing legislation. The courts and labour market would determine how pay equity claims are resolved, with possible reference to the JWG principles.	There would be no amendment to the existing legislation (i.e. option 1) but the JWG recommendations (primarily the principles) would be implemented through voluntary adoption by employers and employees.	Amendments to the Equal Pay Act and the Employment Relations Act to implement the recommendations of the JWG.	The JWG recommendations would be put into legislation. A hierarchy of pay equity comparators would be included in legislation starting with comparators within the employer, then the industry before other comparators are used.	As in option 2b, the JWG recommendations would be put into legislation and a hierarchy of comparators would be included in legislation, starting with comparators within the employer, then the industry before other comparators are used. In addition, pay equity claims would be required to have a dominant source of funding across the occupation, industry or sector to proceed to pay equity bargaining or other remedies.	Amend the Equal Pay Act to remove any ability to use comparators in establishing a claim except men performing the same job. This would have the effect of limiting rights to equal pay only (that is, where it is the same job then men and women must be paid the same). A window would be left open for a period for new pay equity claims to be filed under the existing Equal Pay Act.	Amendments to the Equal Pay Act and the Employment Relations Act to implement the recommendations of the JWG. Under this option, back pay could be awarded by the courts back to the date new legislation is passed, with a six year limitation.	The JWG recommendations would be put into legislation. Under this option, back pay could be awarded by the courts back to the date a claim is made with a six year limitation.	The JWG recommendations would be put into legislation. Under this option, the effective date of employers being on notice would be five years after the introduction of legislation. Employers would be liable to back date claims to that point with a six year limitation.
Effective at achieving pay equity	Likely to achieve pay equity. There may be incentives to bargain to avoid litigation. Established court-precedent will provide a benchmark for future pay equity bargaining.	- n/c (no change) Same as the status quo. This option may encourage more claims than the status quo initially, with some settlements reached using the principles without use of court processes. In the long-term, this option is no different from the status quo.	- n/c The effectiveness of the JWG regime compared to the status quo depends on how court decisions shape the status quo pay equity regime.	- n/c Same as option 2a.	May be marginally less effective While the requirement to have a dominant source of funding would effectively restrict access to the pay equity regime to primarily government employed or funded occupations, there is insufficient information to indicate that this would result in different outcomes in practice compared to Option 2b. As noted in paragraph 22, competitive market forces should, in theory, reduce or eliminate	**X** May not achieve pay equity, compared to the status quo, in the longer-term	✓ This option will be effective at achieving pay equity as it will: - enable back pay to be used as leverage - create incentives for employers to address pay equity sooner. However, it could skew bargaining power towards employees, depending on the existing employer/employee relationships.	- n/c This option provides appropriate incentives for employers to engage with employees on pay equity claims by enabling the courts to require employers to provide back pay to the date of the claim. The availability of up to six years back pay under the Equal Pay Act 1972 for pay equity has not been tested.	✓ Same as option 4a.

					discrimination that creates economic inefficiencies. We have not identified any female dominated occupations in which the restricted mobility of workers or availability of information would have allowed wages to remain undervalued where this is not also a dominant source of funding.				
Supports productive employment relationships consistent with modern bargaining frameworks (e.g. the ERA)	An early and significant role of the court is not consistent with modern bargaining frameworks.	- n/c Same as the status quo.	✓ Nesting a pay equity process within the bargaining framework in the Employment Relations Act supports productive employment relationships through mutual trust and confidence as compared to the status quo where these relationships may be undermined by early recourse to the court.	**X** The experiences of parties to pay equity bargaining using the JWG principles have shown that the hierarchy of comparators may actually increase disputes in bargaining compared to option 2a, whereby parties can each bring the occupations they think are most relevant and use those for bargaining	**X** Same as option 2b. The experiences of parties to pay equity bargaining using the JWG principles have shown that the additional requirement to have a dominant source of funding may be difficult evidence for employees to obtain, and would not support a collaborative process between employers and employees early on in the process. This could fail to support productive employment relationships.	**X** This option is inconsistent with modern bargaining. It strongly incentivises use of the court processes during the claim filing period.	? This option may not be as effective at supporting a collaborative bargaining process if back pay was used disproportionately as leverage, or if it incentivised employees to test back pay liability in the court. However, it 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.	✓ ✓ This option will support productive employment relationships by providing an incentive for employers and employees to progress pay equity bargaining. It also recognises that employers are only on notice for pay equity issues once they have been made aware of them by an employee raising a claim (ie reflects the lack of blameworthiness on the part of an employer if a pay equity issue has arisen).	? Same as option 4a.
Supports a better functioning labour market	Court determined pay equity rates can signal scarcity and productivity but the court is restricted to setting a pay rate whereas the parties may have bargained both pay and conditions that better suit their	- n/c Similar to the status quo.	✓ Improvement on the status quo The parties closest to the employment relationship are directly involved in resolving pay equity, including settling on options, including pay equity rates, that best suit	✓ Same as option 2a.	✓ Same as option 2b. As noted above, there is insufficient information to indicate that the additional requirement would have any impact on the scope of occupations that would access the regime to address pay equity.	? During the period the claims window is open, there may be an intensive court-based process where pay equity rates are established. However, there may be incentives to settle to avoid litigation. Once the claims window	✓ This option may incentivise employers to investigate and address any pay equity issues in their workplace sooner. However, if back pay was used disproportionately as leverage, wage rates	✓ ✓ This option provides an incentive for employers to engage in pay equity bargaining once a claim is raised, but not proactively, although this is not precluded. As potential back pay	✓ Same as option 4a.

	circumstances.		the parties.			closes, the situation reverts in time to the pre-TerraNova decision environment for new claims and any updating of settlements.	could be distorted, resulting in displacement of workers. Large awards of back pay could also result in displacement.	liability would be less than under options 4a and 4c, there would be less fiscal or financial exposure for employers.	
Provides certainty	There is initial uncertainty about pay equity principles until the court makes a determination in this area. On an ongoing basis, there will be uncertainty for both parties during bargaining as litigation may start at any time.	n/c Same as the status quo.	✓ Similar to the status quo. However, the principles and pay equity process may provide some certainty for parties addressing pay equity claims as a result of bargaining using the current bargaining framework	✓ Similar to as the status quo. Same as option 2a. The experiences of parties who have bargained using the pay equity principles proposed by the RJWG have found that a hierarchy of comparators is not necessary as they use a bundle of comparators to guide bargaining.	✓✓✓ Same as option 2b. Additional requirement on pay equity claims is likely to provide greater certainty by clarifying the conditions under which pay equity issues can be raised. However, the RJWG was clear that the threshold for employees to raise a claim and for employers to accept a claim should be low, and should not require an assessment of market features. Adding this requirement could undermine this consensus. It is possible to provide clarification on the conditions under which pay equity issues can be raised within the bounds of the RJWG recommendations.	n/c Same as the status quo There is short term uncertainty for parties taking a claim through the Equal Pay Act process, until precedent has been set and until claims window closes.	**x** Under this option, there would be a back pay provision in legislation with similar parameters to the status quo, but the provision would not have been tested by the court, creating uncertainty for employers as to how much back pay they could be liable for.	✓ ✓ While this back pay option would also not have been tested, the risk of fiscal or financial exposure would be less than the status quo, creating greater certainty for employers.	**x** Same as option 4a.
Minimises unnecessary costs	A court-based process is likely to involve significant legal costs initially. Costs may be lower once precedent has been established for both court-based processes and bargained solutions.	**?** Same as the status quo. This option potentially avoids some court costs but is likely to revert to the status quo after a period. This option is likely to involve some cost to government, business and unions, to set up and encourage its use.	**?** Same as the status quo. Bargaining costs may be more complex in order to resolve complex pay equity issues. Access to employment institutions is made easier for parties addressing pay equity. There is potential recourse to litigation on the same basis as for other employment	**?** Same as the status quo. As with Option 2a, bargaining may be more complex, there is easier access to employment institutions and potential recourse to litigation. The experiences of parties who have bargained using the JWG principles have found that a hierarchy of comparators could	✓ Assuming the additional requirement does not practically impact the scope of occupations that would access the regime to address pay equity, it may help to minimise costs by clarifying the conditions under which pay, therefore preventing misuse of the regime by claims related to pay issues other than gender pay equity.	**?** Same as the status quo but may involve intense use of the court, and associated costs, while access to pay equity via the Equal Pay Act remains open.	**x** Bargaining may be more complex, there is easier access to employment institutions and potential recourse to litigation. There may be appetite by employees to test liability for back pay if they consider there is a possibility of being awarded a substantial amount.	**?** Same as the status quo. Bargaining may be more complex, there is easier access to employment institutions and potential recourse to litigation.	**x** Same as option 4a.

			relations issues.	reduce the efficiency of the process by requiring parties to look at comparator occupations that are subject to gender undervaluation. This may lead to more disputes that would need to access the disputes resolution process.					
Summary	Depending on the approach the court takes to determining an equal pay rate to apply in the TerraNova case, the status quo will become less uncertain over time. However, it will continue to be misaligned and sit uncomfortably within current employment relations processes and institutions.	Overall, this option is the same as the status quo as it is essentially the status quo with a period where pay equity principles are voluntarily tested in bargaining. This option will require considerable effort to establish, apply and sustain. Beyond the short term, this option would be no different than the status quo.	This option is an improvement on the status quo. This option reduces initial principle and process uncertainty and results in a better match between the ER Act and the Equal Pay Act.	This option is an improvement on the status quo. This option reduces principle and process uncertainty and results in a better match between the ER Act and the Equal Pay Act. However, the hierarchy of comparators may increase disputes in bargaining compared to 2a, where parties can choose the comparator occupations they think are most relevant. Parties who have gone through pay equity bargaining suggest that a hierarchy is not necessary.	This option is an improvement on the status quo. This option reduces principle and process uncertainty and results in a better match between the ER Act and the Equal Pay Act. Based on the available information, there is insufficient information to indicate that this would result in a different outcomes in practice compared to Option 2b. However, there is considerable uncertainty regarding the identification of occupations which may have pay equity issues, and explanations for market imperfections that may allow undervaluation to occur. As such, requirement for pay equity claims to have a dominant source of funding has the potential to restrict valid pay equity claims at the margin. As a result, Option 2c may be marginally less effective at achieving pay equity than the status quo. The additional requirement is likely to improve certainty about the conditions under which occupations can raise	This option does not improve on, and may be less desirable than, the status quo. This option encourages the use of court-based processes in the short-term. However, it addresses the misalignment of the current pay equity process by removing the misaligned process after a period. This means that pay equity would need to be bargained under the same conditions that applied prior to the TerraNova case. This will mean that some parties that were not ready to file claims, or for some groups (that is, for those groups with limited or little bargaining power) will find it difficult to access pay equity should new pay equity issues arise after the window has closed.	This option is an improvement on the status quo. However, providing for potential employer liability for a significant amount of back pay over time, may provide disproportionate leverage for claimants during bargaining. This could result in increased litigation to test liability for back pay and increased fiscal or financial exposure for employers, potentially resulting in increased displacement of employees.	This option is an improvement on the status quo. This option reduces principle and process uncertainty and results in a better match between the ER Act and the Equal Pay Act.	Same as option 4a.

					a pay equity claim, which may help minimise unnecessary costs by preventing misuse of the regime by claims related to pay issues other than gender pay equity. However, the RJWG was clear that the threshold for employees to raise a claim and for employers to accept a claim should be low, and should not require an assessment of market features. Adding this requirement could undermine this consensus.				

Consultation

89. The JWG broadly considered options for addressing pay equity. The JWG was comprised of representatives from unions (New Zealand Council of Trade Unions, the Public Service Association, E tū, FIRST Union, the New Zealand Nurses Organisation and the New Zealand Educational Institute), businesses (Business New Zealand and the Employers and Manufacturing Association) and government (the Ministry of Business Innovation and Employment and the State Services Commission).

90. Union and business parties to the JWG also consulted with various parts of their membership on the final recommendations. No significant concerns were raised during this consultation.

91. Note that the JWG members have not been consulted on options 4a, 4b and 4c.

92. Consultation took place with the State Services Commission, The Treasury, ACC, Ministry of Health, Crown Law, the Ministry of Education, the Ministry for Women, the Ministry of Justice, the Ministry of Pacific Island Affairs, Te Puni Kokiri and the Ministry of Social Development. The RIS reflects this feedback.

Conclusions and recommendations

93. The options assessed range from continuing with the status quo, through to clarifying the status quo in legislation (with clarification of comparators), to options that reinstate the situation that was understood to have existed prior to Court of Appeal interpretation of the Equal Pay Act to removing the Equal Pay Act, relying on the Employment Relations Act and the Human Rights Act to provide for equal pay and pay equity.

94. Our assessment is that all the options achieve pay equity to some extent. In terms of consistency with existing bargaining framework in the Employment Relations Act, Option 2 (a, b and c) provide access to mechanisms that are consistent with modern employment bargaining practices, where the parties closest to the employment relationship determine pay rates, but have access to dispute resolution processes and the court if this is required. Option 2a is preferable to Option 2b and 2c, because parties to pay equity bargaining using the RJWG principles have found that a hierarchy of comparators could create inefficiencies in bargaining by requiring parties to look at occupations that may be subject to gender undervaluation, leading to an increase in disputes from the status quo. As a result, option 2b may be less efficient in achieving pay equity than option 2a.

95. Further, the RJWG has been clear that the threshold for parties to enter bargaining should be low so as to contribute to a collaborative bargaining process and should only require evidence that the occupation is female-dominated and there is a light touch assessment of historical undervaluation. Further, option 2c may restrict some valid pay equity claims at the margin. As a result, Option 2c may be marginally less effective at achieving pay equity than the status quo.

96. The status quo is a way of resolving pay equity, but it is inconsistent with modern employment bargaining processes, the way in which current employment institutions operate, and has costs associated with the uncertainty in the short term while the Court decides how it will respond to pay equity cases. Option 1 provides initial relief to parties with claims regarding the principles that may apply but is likely to be unstable and difficult to implement. Option 3 provides a window for access to addressing pay equity using the status quo process that then closes. This will concentrate the effects of the status quo for a period and then rely on bargaining to resolve any future pay equity claims. This is likely to result in some groups (those with limited bargaining power), being unable to access to effective processes to resolve pay equity.

97. MBIE also recommends option 4b in relation to back pay, because this option:

- recognises that structural gender discrimination resulting in the undervaluation of female dominated jobs is a systemic issue that cannot be attributed to any particular action of an employer but that employers are effectively on notice when they receive a claim
- provides appropriate incentives for employers to engage with employees on pay equity claims by enabling the courts to require employers to provide back pay to the date of the claim
- ensures that any financial or fiscal risks are more limited than the other back pay options.

Implementation

98. The status quo requires no further action. There is potential for increased pressures on the Employment Court. This may be temporary, in part, as further equal pay claims are made to clarify the application of the Court of Appeal's interpretation of the Equal Pay Act. While there are reports that up to 2,500 caregivers have lodged pay equity claims with the Employment Relations Authority, Employment Court decisions may set precedent for similar claims.

99. One of the key drivers of new equal pay claims in the Employment Court may be the number of different occupations with possible claims. As shown in Appendix 1, there are around 65 occupations (ANZSCO level 6), excluding occupations already involved in the care and support worker negotiations, that have over 60 per cent female participation. There may also be significant occupational variation within each ANZSCO occupation.

9(2)(f)(iv)

104. Option 3 also requires a process for addressing claims that have already been submitted under the Equal Pay Act.

105. Option 3 will involve legislation and may involve the need for the court to be ready for a potential increase in the number of cases being filed and needing to be heard.

106. Option 4 will also involve legislation.

Monitoring, evaluation and review

107. There are a number of existing sources of information about the labour market that can be used to monitor the implementation of pay equity. These sources include Statistics New Zealand, Integrated Data Infrastructure (IDI), Victoria University's Centre for Labour, Employment and Work (CLEW), and MBIE's administrative data.

108. MBIE is currently developing a new system for managing cases with Mediation Services and the Employment Relations Authority. In principle, the new system will be able to provide, for a 12 month period:

    a. the number of cases addressed by Mediation Services and the Employment Relations Authority in relation to disputes under the Equal Pay Act
    b. the average length of time taken by these cases in the mediation or Authority process (that is, the average number of dates from when a case is filed to when it ends)
    c. the total number of individual employees and employers involved in Equal Pay Act cases filed with Mediation Services and the Employment Relations Authority.

109. MBIE will also track the number and types of queries to the MBIE contact centre, the labour inspectorate and our websites (business.govt.nz and employment.govt.nz) in relation to the Equal Pay Act.

110. MBIE runs an annual survey of employers from across New Zealand. We will undertake cognitive testing on the feasibility of including pay equity related questions including whether employers have received a pay equity claim and, if so, how it was resolved and how long resolution took.

111. MBIE will discuss with CLEW the feasibility of amending the collective agreements database to track how many pay equity claims are settled as part of collective bargaining and whether any other pay equity related clauses become common in collective agreements (eg agreements to set up working groups to investigate claims). We will also discuss with Statistics New Zealand the feasibility of identifying pay equity related changes in their labour market statistics.

112. If existing data sources or surveys are unable to accurately capture pay equity related claims, MBIE will investigate procuring new pay equity related research. This research could include:

    a. identifying the length (in days from an initiation of a claim) and the estimated costs of resolving pay equity claims
    b. econometric gendered analysis of wage changes for occupations most likely to have pay equity issues compared to those that do not
    c. identifying whether there are cases that have become stuck in the problem resolution system once an option has been implemented, and investigating what is causing any difficulty in progressing claims to resolution.

113. The Ministry for Women undertakes regular research on gender pay gap matters. We will continue to engage with them on their research programme to identify potential synergies and areas for collaboration. . The Ministry for Women, with SSC, is supporting agencies to implement the Gender Pay Principles in the public service, and to implement a strategy involving actions to accelerate progress on closing the gender pay gap in the public service, with a view to ensuring that the public and private sectors are on a similar pathway.

114. The State Services Commission (SSC) oversees bargaining outcomes in the Public Service. To monitor the implementation of pay equity, SSC will request information from agencies on pay equity claims made through collective bargaining. This information will be used to monitor and review patterns of pay equity claims and understand their impact. Further insights will be provided through SSC's

engagement with Public Service agencies who receive pay equity claims.

115. We will also use our regular engagements with the social partners for insights into their members' experience of pay equity in practice.

116. MBIE will regularly, for example annually, use the above information sources to monitor the implementation of pay equity. This information will be used to identify any problem areas that need to be explored in more depth and advice will be provided to Ministers as needed.

117. A report summarising pay equity trends could be made available on a 5 yearly basis, when there is sufficient data to provide evidence of the policy implications. This may further assist employers, employees and their representatives with the implementation of pay equity. This analysis is unlikely to be set against a counterfactual, although historic settlement of pay equity claims prior to the implementation of the option could be used as a base case.

Appendix 1: Occupations with female dominated workforces

The occupations identified below are female-dominated (over 60 per cent female participation), of significant size[5], and exclude occupations involved in the negotiation process to address pay and associated workforce issues for care and support workers[6].

The inclusion (or omission) of a particular occupational group does not reflect any expectation or assessment of undervaluation due to systemic gender discrimination.

	Occupation[7]	Total female employees	Total employees
Primarily public sector	Primary School Teacher	24,561	28,542
	Early Childhood (Pre-primary School) Teacher	22,107	22,686
	Teachers' Aide	10,821	11,754
	Community Worker	5,388	7,203
	Social Worker	4,884	6,132
	Child Care Worker	4,491	4,848
	Welfare Worker	3,594	4,941
	Librarian	3,576	4,164
	Physiotherapist	2,409	3,147
	Counsellors not elsewhere classified	1,908	2,580
	Education Adviser	1,725	2,424
	Occupational Therapist	1,641	1,797
	Special Needs Teacher	1,632	1,917
	Library Assistant	1,653	2,025
	Clinical Psychologist	1,401	1,878
	Medical Laboratory Technician	1,206	1,554
	Health Promotion Officer	1,038	1,266
	Medical Laboratory Scientist	1,023	1,449
Primarily private sector	Sales Assistant (General)	51,417	83,949
	General Clerk	31,446	38,496
	Sales Representatives (not classified elsewhere)	23,997	39,852
	Commercial Cleaner	20,733	29,865
	Receptionist (General)	19,266	20,379
	Accounts Clerk	15,807	17,742
	Waiter	10,272	12,852
	Checkout Operator	8,739	10,557
	Personal Assistant	8,532	8,733

[5] Significant size is defined as over 1,000 women employees.

[6] Other occupations excluded include managerial roles, professional roles, and roles determined as largely 'self-employed', e.g. fashion designer. Midwives and nursing roles have also been removed from the table due to the 2004/05 "pay jolt" that raised wages for DHB-employed workers in these occupations.

[7] Level 6 ANZCOv12.5 occupational data is used.

	Hairdresser	7,722	8,880
	Kitchenhand	7,029	11,373
	Secretary (General)	6,810	7,260
	Bank Worker	6,402	8,898
	Cafe Worker	5,598	6,768
	Cook	4,239	6,066
	Sewing Machinist	3,678	4,176
	Beauty Therapist	3,552	3,618
	Barista	3,510	4,875
	Sales Demonstrator	3,501	4,497
	Travel Consultant	3,072	3,888
	Payroll Clerk	2,775	3,123
	Data Entry Operator	2,724	3,444
	Survey Interviewer	2,604	3,711
	Nanny	2,538	2,604
	Office Cashier	2,517	3,405
	Dental Assistant	2,484	2,526
	Commercial Housekeeper	2,457	2,730
	Retail Supervisor	2,397	3,147
	Medical Receptionist	1,986	2,007
	Call or Contact Centre Operator	1,836	2,607
	Pharmacy Technician	1,794	1,920
	Finance Clerk	1,755	2,526
	Legal Secretary	1,758	1,773
	Music Teacher (Private Tuition)	1,692	2,649
	Bookkeeper	1,683	1,818
	Laundry Worker (General)	1,653	2,118
	Legal Executive	1,431	1,500
	Veterinary Nurse	1,428	1,479
	Hotel or Motel Receptionist	1,410	1,794
	Flight Attendant	1,407	1,974
	Massage Therapist	1,398	1,698
	Swimming Coach or Instructor	1,392	1,824
	Insurance Consultant	1,365	2,073
	Word Processing Operator	1,341	1,392
	Pharmacy Sales Assistant	1,275	1,335
	Retail Pharmacist	1,158	1,914
	Domestic Cleaner	1,026	1,167
	Total	**389,664**	**503,289**

Source: Census 2013 data

Appendix 2: Proposals of the Joint Working Group on Pay Equity

1. In May 2016, the JWG provided its proposals to the government. The JWG's proposals are included in the attached letter (Annex 1). The JWG proposals nest the process for making a pay equity claim within the bargaining framework of the Employment Relations Act. Under this framework, parties aim to resolve pay equity concerns through bargaining, with some support from government provided by mediation and the Employment Relations Authority (the Authority) to assist in resolving disputes.
2. Substantive legislative changes to the Equal Pay Act and the Employment Relation Act would be needed to implement the JWG's proposals,

Summary of the Joint Working Group proposals

3. The key elements of the JWG's proposed process for dealing with pay equity claims are:
    a. **Employee raises a claim:** Any employee may raise a pay equity claim with their employer.
    b. **Determining the merit of the claim as a pay equity claim:** The claim must be for work predominantly performed by women and must have merit as a pay equity claim (i.e. that there is gender-bias in remuneration) based on historical undervaluation and is subject to systemic discrimination.
    c. **Employer notifies similar employees:** The employer must then notify its other employees who might be affected by (or benefit from) the claim about the claim.
    d. **Employer decides whether to enter pay equity bargaining:** The employer must decide whether to accept or refuse to enter pay equity bargaining on the claim. The employer may refuse the claim if it does not relate to work predominantly performed by women or if the employer considers that the claim does not have merit as a pay equity claim. The employer's decision to refuse can be challenged by the employee. The employer and the employer would enter the employment dispute resolution process, which could result in the Authority or Court determining that employer must accept to enter pay equity bargaining.
    e. **Employee and employer enter pay equity bargaining:** The employee and employer bargain to resolve the claim. Bargaining is guided by guidance about how a pay equity rate is established. This includes an examination of the work and the work of suitable comparator occupations. The parties may agree to a bargained outcome at any point.
4. Where bargaining reaches an impasse, the JWG proposes that that the existing employment dispute resolution system is available to assist. This includes:
    a. **Mediation:** Parties may access existing government provided employment mediation services.
    b. **Facilitation:** Where mediation is unable to resolve the dispute, existing facilitated bargaining is available from the Authority. The JWG proposes lowering existing thresholds for pay equity claims to enhance access to facilitation.
    c. **Determinations:** The JWG proposes retaining a role for the Authority (and subsequently the Court) to resolve impasses in pay equity bargaining, which may involve setting pay equity rates, if it is the only effective remedy when all

other reasonable alternatives for reaching agreement on pay equity claims have been exhausted (e.g. mediation, facilitation) within a reasonable period.

5. This process is set out in the simplified diagram below. Further details on key aspects of the JWG's proposals are set out in the following sections.

Simplified pay equity process