

OFFICE OF THE MINISTER OF STATE SERVICES
OFFICE OF THE MINISTER FOR WORKPLACE RELATIONS AND SAFETY

Chair
Cabinet Social Policy Committee

Response to the proposals of the Joint Working Group on Pay Equity

Proposal

- 1 This paper seeks Cabinet approval to recommendations in response to the proposals of the Joint Working Group on Pay Equity Principles (the JWG) for dealing with pay equity claims under the Equal Pay Act 1972.

Executive Summary

- 2 Recent court decisions endorsed the view that the Equal Pay Act incorporates a pay equity regime. This means the Equal Pay Act is not just targeted at equal pay (the same pay for the same work), but also includes pay equity (the same pay for work of equal value).
- 3 The Government established the Joint Working Group on Pay Equity Principles to make recommendations for dealing with pay equity claims. In parallel, Cabinet agreed to a negotiation process to address pay and associated workforce issues for care and support workers as part of the response to the TerraNova case.
- 4 The JWG proposed that pay equity claims be resolved within the existing employment relations bargaining framework, rather than directing parties straight to court. The key elements of the JWG proposals are:
 - a. *Criteria for raising a pay equity claim:* Pay equity claims must be for work predominantly performed by women and have merit as a pay equity claim based on historic and continuing undervaluation of the work due to systemic gender-based discrimination.
 - b. *Rules and principles for pay equity bargaining:* Parties would be required to bargain over pay equity, in the first instance, in accordance with a set of rules and principles for establishing pay equity rates. This would involve a thorough assessment of the skills, responsibilities, conditions of work and degrees of effort of the work.
 - c. *Dispute resolution process:* The JWG proposed an enhanced process for resolving pay equity disputes, based on the existing processes in the Employment Relations Act. This includes mediation, greater access to facilitated bargaining and a role for the Authority of courts to resolve impasses, which may involve setting pay equity rates.
- 5 The JWG was unable to reach agreement on guidance for identifying comparators in terms of industry or sectoral proximity to the employees in the pay equity claim. We recommend supplementing the JWG proposals to require that comparators be drawn

Sensitive

from within the business, similar businesses, or the same industry or sector when available and appropriate.

- 6 Overall, we consider that the JWG's proposals present a better approach to addressing pay equity than the current regime. We recommend that Cabinet accept the JWG's recommendations and make legislative changes to the Equal Pay Act and the Employment Relations Act to give effect to the proposals. We intend to introduce a Bill to Parliament by mid-2017. The legislative process will be important for ensuring that the wording in the legislation is clear, and reflects the JWG's intent in a workable and practical manner.

Background

Defining pay equity and equal pay

- 7 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 there is no difference in remuneration to a male drainlayer and a female drainlayer based on gender. 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. Until the Equal Pay Act was enacted in 1972, it was legal to set separate rates of pay for men and women, and exclude women from certain types of work.
- 8 The term **pay equity** is commonly used to refer to the principle that women and men should receive the same remuneration for doing different jobs that are of equal value. For example, a drainlayer receives the same pay as a police officer if the 'value' of the work is determined to be the same.
- 9 Pay equity is a way to address systemic discrimination in the labour market, where jobs that have traditionally been performed by women are paid less than if that job had been traditionally performed by men. This involves making judgements about the relative 'value' of different skills, responsibilities, effort and conditions of work in abstract from the market-set value.
- 10 Pay equity has been recognised as an issue in many developed nations. Legislative pay equity obligations are common to many overseas jurisdictions including Canada, the United Kingdom and Australia. More information regarding international comparisons is attached in Annex 3.

Court decisions have endorsed a statutory pay equity regime in New Zealand

- 11 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 contains a pay equity regime. As a result of this decision, the Court of Appeal recommended that the Employment Court set principles to provide a workable framework for the resolution of the pay equity claim. These principles should allow the parties to bring that claim before the court in an orderly and manageable way.
- 12 The Court of Appeal's decision endorses a broader interpretation of the Equal Pay Act than was previously understood to be the position. The decision means that the Equal Pay Act is not just targeted at equal pay (the same pay for the same work), but also establishes a statutory pay equity (the same pay for work of equal value) regime for work that is exclusively or predominantly performed by women.

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A pay equity regime may have significant effects on parts of the labour market

- 13 The interpretation of the Equal Pay Act means any employee performing work predominantly performed by women, irrespective of whether they are a low or high paid group, may bring pay equity claims under the Equal Pay Act. The claims would allege that the work would have been paid more (ie 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, historical or structural gender discrimination.
- 14 The Employment Court has a more determinative role in setting wages for such claims under the Equal Pay Act than it does in other areas of employment law. Specifically, the Employment Relations Authority (the Authority) and the Employment Court may determine what a “pay equity rate” is for a particular job. These rates could effectively become minimum rates in bargaining. This can mean that where there are disputes about the applicability of court decisions, there is likely to be prolonged bargaining or further court cases.
- 15 It is difficult to estimate the specific impacts of the Court of Appeal’s decision upon the labour market. Resolving pay equity will directly benefit the women and men working in jobs that have been undervalued by raising their incomes, although higher wage costs can put pressure on businesses that have been operating with wages costs that reflect wages below a pay equity rate. The extent of the adjustments required will depend on:
 - a. the existence and degree of undervaluation due to gender discrimination (which is difficult to determine)
 - b. the number and timing of pay equity claims that are pursued (which is in the hands of the parties)
 - c. when any wage increases may come into effect.

16 s 9(2)(g)(i)

Government response to the Court of Appeal decision

- 17 Following the Court of Appeal decision, in October 2015 the Government established a Joint Working Group on Pay Equity Principles (the JWG), facilitated by Dame Patsy Reddy, to make recommendations for dealing with claims of pay equity under the Equal Pay Act. Rather than relying on the Courts to address pay equity matters, the JWG was established to propose pay equity principles that can be supported by employers (both private and public sector) and unions. Union and business representatives were led by the New Zealand Council of Trade Unions and BusinessNZ¹. The Government was represented by officials from the Ministry of Business, Innovation and Employment and the State Services Commission

¹ The Consultation section of this paper provides more information on the membership of the JWG.

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(representing the interests of the state sector and the wider economy). Cabinet asked the Committee of Ministers on State Services Employment Relations² (CMSSER) to oversee this work.

- 18 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.

s 9(2)(j), s 9(2)(g)(i)

Other pay equity claims

- 19 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 for equal pay principles in respect of the wider public service. Pay equity has also been raised in bargaining for school support workers employment by the Ministry for Education.

Relationship between pay equity and the gender pay gap

- 20 The proposals to address pay equity are likely to be discussed in a wider context of addressing the gender pay gap³. Pay equity may go some way to reducing the gender pay gap but only to the extent that the gender pay gap reflects a degree of systemic gender-based discrimination. While pay equity may lift pay rates in some female dominated occupations, it will not affect the main drivers of the gender pay gap, such as the career progression of women into higher paid roles. Other actions by firms, individuals and government will continue to remain relevant to addressing the gender pay gap.

Proposals of the Joint Working Group

- 21 In May 2016, the JWG provided its proposals to the Government. The JWG's proposals are included in the attached letter (Annex 2). The JWG's 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 services and the Employment Relations Authority (the Authority) to assist in resolving disputes.

- 22 A table summarising the JWG's proposals and the Government response to each is included in Annex 1.

² Comprising the Ministers of Finance, Tertiary Education, Skills and Employment, State Services, Health, Workplace Relations and Safety, Women, and the Attorney-General.

³ New Zealand's gender pay gap is currently 12 per cent (based on median hourly earnings), up from 11.8 per cent in the previous year.

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23 The JWG's proposals sought to provide high-level policy direction for legislative amendments to the pay equity regime, acknowledging that the precise wording of any legislative amendments would be subject to the legislative process. Substantive legislative changes to the Equal Pay Act and the Employment Relations Act would be needed to implement the JWG's proposals. The legislative process will be important for ensuring that the wording in the legislation is clear, and reflects the JWG's intent in a workable and practical manner.

Summary of the Joint Working Group's proposals

24 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 in relation to both historical undervaluation and current and continuing gender-based systemic discrimination.
- c. **Employer notifies similar employees:** The employer must then notify their other employees who might be affected by (or benefit from) the claim.
- d. **Employer decides whether it accepts that the claim has merit as a pay equity claim and agrees 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. In this case, parties would enter the employment dispute resolution process, which could result in the Authority or Court determining that the employer must accept to enter pay equity bargaining.
- e. **Parties enter pay equity bargaining:** Parties bargain to resolve the claim. Bargaining is guided by principles on how a pay equity rate is established. This involves an examination of the work and the work of suitable comparator occupations. The parties may agree to a bargained outcome at any point.

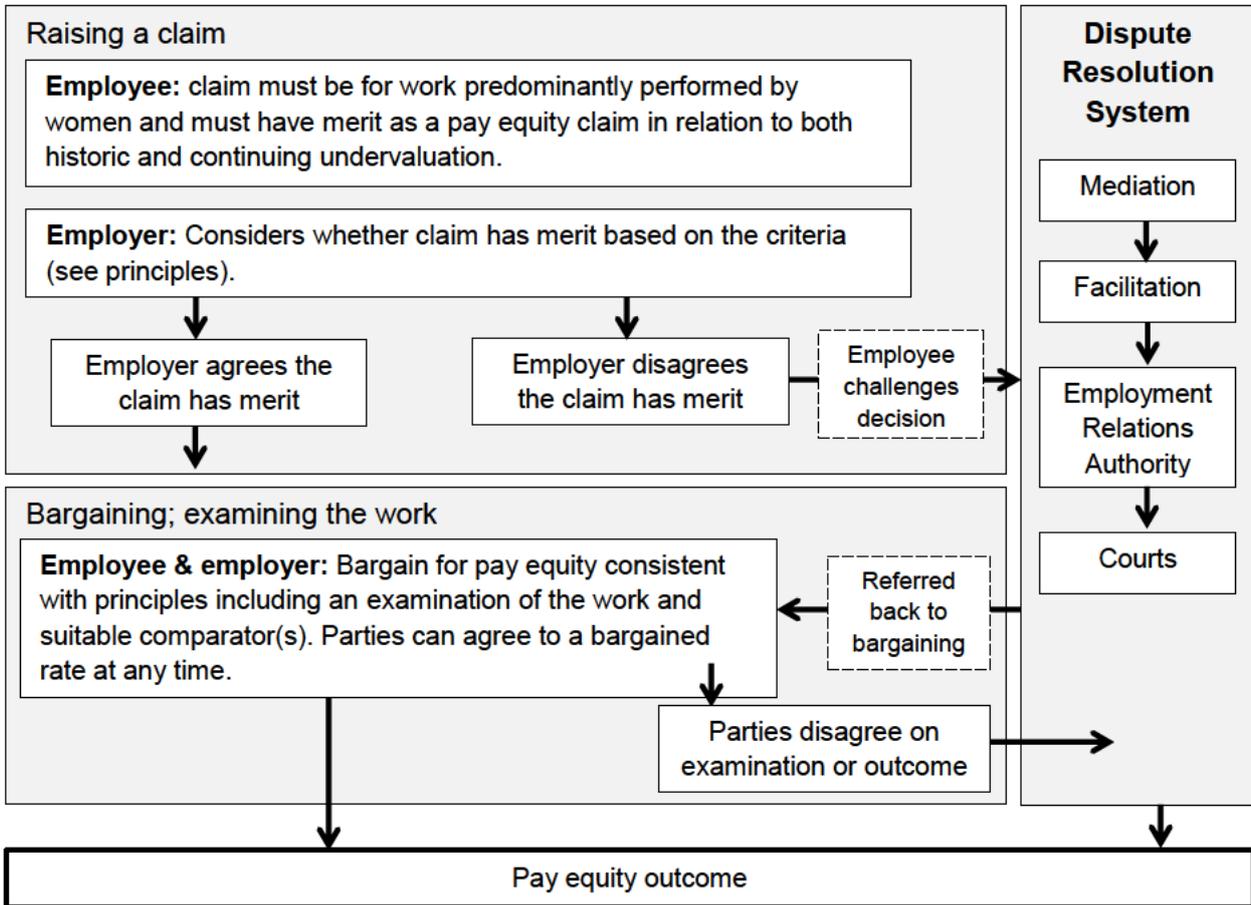
25 Where bargaining reaches an impasse, the JWG proposes that the existing employment dispute resolution system is available to assist. This includes:

- 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 to enhance access to facilitation for pay equity claims.
- 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

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

26 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.



Criteria for raising a pay equity claim

27 The JWG proposed that a pay equity claim must have merit in relation to a set of criteria.

28 Under the JWG’s proposals, the employer initially determines whether a claim has merit (ie whether it satisfies the criteria). The employer may refuse to enter pay equity bargaining if the employer disagrees the claim has merit. Employees are able to challenge an employer’s decision through the employment dispute resolution mechanisms including mediation and a determination from the Employment Relations Authority.

JWG’s proposed criteria for raising a pay equity claim

29 The JWG proposes that a pay equity claim must:

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- a. be for work predominantly performed by women⁴, and
- b. have merit as a pay equity claim in relation to the following factors:
 - i. the work has been **historically** undervalued, and
 - ii. there is **continued** undervaluation of the work.

30 The first factor is whether the work has been **historically** undervalued because of:

- a. any relevant origins and history of the work and the wage setting for it
- b. any social, cultural or historical factors that may have led to undervaluing of the work and the remuneration for it
- c. a characterisation or labelling of the work as “women’s work”
- d. 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.

31 The second factor is whether gender-based systemic undervaluation has **continued** to affect the remuneration for the work due to:

- 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; 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.

Approach to the entry criteria

32 We consider that the criteria for raising a pay equity claim are an important aspect of the overall pay equity regime. Broadly speaking, the entry criteria should help clarify the circumstances in which pay equity issues may arise, but without limiting access to the regime for reasonable pay equity claims.

33 We agree with the JWG’s proposal that valid pay equity claims must be for work predominantly performed by women and must have a reasonable case for historic and continuing gender-based systemic undervaluation.

34 In agreeing to the recommendations of the JWG, we note the importance of the legislative process in defining the features of the market contained in paragraph 2(c) of the JWG’s principles. It will be important to ensure that the wording in the

⁴ The JWG does not define “predominantly performed”. However, other jurisdictions’ pay equity regimes generally apply to workforces that are 60-70 per cent women.

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legislation is framed in such a way that the criteria are clear in intent, unambiguous, and workable.

- 35 Consideration was given to relative weightings of the individual variables for determining whether systemic undervaluation has continued to affect the remuneration for the work. This is not recommended and the variables should be considered in totality to determine current undervaluation. However the threshold for establishing continued undervaluation on the basis of gender discrimination as distinct from other factors should be a high one.

Pay equity bargaining

- 36 The JWG has proposed that pay equity bargaining must involve an examination of the work and a comparison of this work with an appropriate comparator occupation based on the skills, responsibilities, experience, conditions of work and degrees of effort. Examinations of the work must be objective and free of assumptions based on gender, and current views, conclusions or assessments of value of the work may not be assumed to be free of assumptions based on gender.

Appropriate comparators

- 37 Comparator occupations are a method for identifying undervaluation on the basis that male occupations would not be subject to gender-based undervaluation. Therefore, pay differences between comparable male and female occupations may indicate undervaluation due to systemic gender discrimination. The JWG proposes comparator occupations may include male comparators who perform different work, but with skills, responsibilities, conditions or degrees of effort which are the same or substantially similar to the work being examined.
- 38 A key part of the Court of Appeal's interpretation of the Equal Pay Act is that parties may look beyond the immediate employer or industry for comparators if an appropriate comparator does not exist in the immediate employer or industry. In this regard, the JWG was unable to reach agreement on whether the principles should guide parties in the use of comparators from outside an employer's industry.
- 39 One option the JWG considered was for the principles to state that the process for identifying comparators should start within the same or similar employers, and expand to other industries only if an appropriate comparator is unavailable. Another option was to place no limitation on the use of comparators other than relevance.
- 40 Generally, pay equity regimes in other jurisdictions limit comparators to be within the same workplace or employer (Annex 3 provides further information on the use of comparators in other jurisdictions). In this case parties generally have access to comparable information on other occupations from the same workplace, which would reduce costs associated with gathering information to inform assessments in bargaining. It also reduces the potential for non-gender based factors that may explain some or all of the differences in rates of pay (eg geographical labour market factors).
- 41 In line with this, we propose supplementing the JWG proposals to require that comparators be drawn from within the business, similar businesses, or the same industry or sector when available and appropriate (ie that there would be a hierarchy of potential comparators). Where comparators within the business, similar

Sensitive

businesses, or those within the same industry or sector are not available, comparators in other industries may be used.

- 42 We consider that this will provide practical guidance to employees and employers in implementing pay equity and is what the Employment Court and the Court of Appeal envisaged.

Access to the dispute resolution system

- 43 The JWG propose that parties engaging in bargaining for equal pay be able to access employment mediation services and facilitated bargaining to help resolve disputes which may arise in the process. For example, parties may disagree regarding the merit of a claim when the request to enter bargaining is first raised.
- 44 The JWG propose that parties must first access mediation services, to avoid the dispute going directly to courts in the first instance. This may improve the efficiency of the system, as many disputes may be able to be resolved in mediation.
- 45 The JWG also recommend that access to facilitated bargaining with the Authority be extended to allow parties bargaining for equal pay under both collective employment agreements and individual employment agreements. The grounds for accessing facilitation in the Employment Relations Act are specific and relatively onerous. Facilitation is also only available for matters that arise under bargaining for collective agreements. We consider that parties bargaining for pay equity should be able to access facilitation more easily, and without regard for whether they are under a collective or individual employment agreement.
- 46 Where the issue cannot be resolved in mediation or facilitation, parties could then apply to the Authority for a determination as to whether the parties have complied with their obligations in relation to pay equity, including the merit of the request as a pay equity claim.

Other matters

- 47 There are three further proposals that we recommend to ensure a pay equity bargaining system functions well.

Interaction between pay equity bargaining and other bargaining

- 48 The first matter regards the relationship between collective bargaining and bargaining for pay equity. The JWG has suggested that although equal pay bargaining matters may arise during collective bargaining, they are conceptually separate and delays or issues arising in one should not negatively affect the other.
- 49 The JWG proposed establishing a clear separation between the two matters, so that the settlement of a collective agreement does not settle or extinguish an unresolved pay equity claim, and failure to settle a pay equity claim is not a justification for not concluding collective bargaining. This ensures that, while they might occur simultaneously, parties are clear about the conclusions each process reaches.
- 50 Under the current Employment Relations Act, industrial action (strikes and lockouts) can occur in relation to bargaining for collective agreements. No new ability for industrial action is proposed.

Penalties

51 The second matter we would recommend consideration of is how to establish an appropriate penalty regime to ensure compliance with these proposals. The JWG was silent regarding this matter. We suggest the offense regime contained within the Equal Pay Act be replaced with a new penalty regime consistent with the existing penalty regime in the Employment Relations Act. This is a modern and fit-for-purpose penalty regime which has been recently reviewed and modernised. This would empower the Authority and the court to impose pecuniary penalties not exceeding \$10,000 for individuals, and not exceeding \$20,000 for companies or other corporations. It would also remove the offences currently contained in the Equal Pay Act.

52 In line with this, we consider that it is necessary to update the language and legislative design of the Equal Pay Act. This would modernise the language of this Act overall.

Resourcing matters for government to consider

Government support for information to assist the implementation of pay equity

53 Business and union representatives on the JWG recommended that the Government give further consideration to supporting information to assist in the implementation of pay equity.

54 There are a range of different types of information to support the implementation of pay equity. The types of information, when they are used and some examples are summarised below.

Guidance	Tools	Codes	Pay equity data	Pay equity reviews
<ul style="list-style-type: none"> • Plain English explanation of rights and obligations • Aids understanding & compliance • eg fact sheets, web info, contact centre, public pay data including from Statistics NZ 	<ul style="list-style-type: none"> • Templates or tools to assist with compliance • Reduces compliance costs • eg employment agreement builder 	<ul style="list-style-type: none"> • Good practice guidance • Provides “safe harbours” for compliance • eg code of good faith for collective bargaining 	<ul style="list-style-type: none"> • Centralised, publicly available information • Informs bargaining positions • eg agreed or determined pay equity rates 	<ul style="list-style-type: none"> • Research and evaluations to support bargaining on appropriate comparators and pay equity rates • eg contestable fund for pay equity information

55 At a minimum, we consider that the government should provide guidance on pay equity. This would help parties understand their rights and obligations and assist with the successful implementation of the legislative changes. Officials also consider that job evaluation tools could be useful to facilitate bargaining, if they could be developed easily. Guidance will be particularly important for providing practical access to pay equity for employees on low incomes and small business employers who do not have specialist skills in employment matters. We have asked officials to

Sensitive

continue to explore what tools may be feasible. However, we do not consider it appropriate to provide a centralised database of settled pay equity rates.

Resourcing pressures on the employment relations system

56 The JWG proposals are expected to lead to increased demands on the employment relations system to address disputes arising from the pay equity bargaining process (eg an increase in the volume of pay equity cases being referred to mediation, facilitated bargaining and Authority determinations).

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s 9(2)(g)(i)

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s 9(2)(j), s 9(2)(g)(i)

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s 9(2)(j), s 9(2)(g)(i)

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s 9(2)(g)(i), s 9(2)(f)(iv)

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s 9(2)(g)(i), s 9(2)(f)(iv)

Government response to equal opportunity employment issues

62 The JWG recognised that there are other workplace issues, outside the scope of the JWG discussions that can lead to the existence of the gender pay gap. The JWG invited the government to give further consideration to these issues. The government supports equal employment opportunities for women and has already taken a range of actions in this space.

Sensitive

63 The State Services Commission (SSC) has a sector-wide focus on addressing the gender pay gap in the public service. Supported by the Ministry for Women, SSC is leading work to promote diversity and inclusion and reduce the public service gender pay gap by:

- a. promoting flexible workplace initiatives across agencies
- b. providing better statistical and best practice information to enable agencies to identify and address specific pay gaps where these occur
- c. strengthening the leadership pipeline to better support the development of women leaders
- d. express incorporation of attention to the gender pay gap in chief executive performance expectations and relevant priorities
- e. leading a Diversity and Inclusion Network as a community of practice, regularly connecting practitioners in over 20 agencies
- f. encouraging unconscious bias awareness training and refreshing wider recruitment and talent supply practices to reflect emerging research.

64 Recent legislative changes should also address some of the contributors to the national gender pay gap including:

- a. extending the right to request flexible working arrangements to all employees, reducing barriers to employment for women and encouraging greater work life balance for both men and women
- b. introducing 'Keeping In Touch' days to Paid Parental Leave provisions for parents taking leave. This is intended to increase women's access to career development opportunities that might be affected by parental leave, given women employees take the majority of parental leave.

65 The Ministry for Women has worked with employers, training providers and communities to increase the number of women in high demand non-traditional occupations, and to encourage more women into leadership roles.

s 9(2)(g)(i)

66 Negotiations for care and support workers in the health sector continue and we expect will be concluded prior a new regime being enacted.

67 In May 2016, E tū filed a memorandum with the Employment Court seeking a date for a hearing to set principles for the TerraNova case and the Employment Court has advised that it shortly will give directions as to the scope and extent of the hearing. It is likely that E tū will seek to resolve its claim in the Employment Court by seeking agreement to general principles (on the basis of the JWG's proposals) for the application of pay equity under section 9 of the Equal Pay Act to Ms Bartlett's claim. Then, if further care and support workers negotiations fail, E tū could progress Ms Bartlett's case as a test case for care and support workers and the Court could set an equal pay rate, using the JWG's principles.

Sensitive

s 9(2)(g)(i), s 9(2)(j)

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s 9(2)(g)(i), s 9(2)(j)

s 9(2)(g)(i), s 9(2)(j)

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s 9(2)(g)(i), s 9(2)(j)

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s 9(2)(g)(i), s 9(2)(j)

s 9(2)(g)(i), s 9(2)(j)

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s 9(2)(g)(i), s 9(2)(j)

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s 9(2)(g)(i), s 9(2)(j)

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s 9(2)(g)(i), s 9(2)(j)

Next steps

74 If Cabinet agrees to our proposed legislative response, we intend to introduce legislation to Parliament by mid-2017.

Consultation

75 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).

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- 76 Union and business parties to the JWG also consulted with various parts of their membership on the final JWG recommendations. No significant concerns were raised during this consultation.
- 77 The JWG members have been consulted on the proposal to supplement the JWG's principles for pay equity bargaining by requiring that comparators be drawn from within the business, similar businesses, or the same industry or sector when available and appropriate (ie that there would be a hierarchy of potential comparators). The union parties on the JWG did not support this change.
- 78 The proposed Employment (Pay Equity) Bill will be referred to the Legislation Design and Advisory Committee for design advice.
- 79 The Treasury, the Ministry of Health, the Ministry of Social Development, Te Puni Kōkiri, the Accident Compensation Corporation, Crown Law, the Ministry for Women, the Ministry for Pacific Peoples and the Ministry of Education were consulted on the proposals in this paper. The Department of Prime Minister and Cabinet was informed.

Financial implications

- 80 The status quo pay equity regime under the Equal Pay Act is likely to have significant fiscal costs as a number of female dominated occupations are in, or funded by, the public sector. It is important to recognise that adoption of the JWG proposals is not expected to change these fiscal impacts.

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s 9(2)(g)(i)



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s 9(2)(g)(i)



Human rights

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83 Implementing pay equity principles will be likely to have implications for human rights.

Legislative implications

84 Substantive legislative changes to the Equal Pay Act and the Employment Relations Act would be needed to implement the JWG's proposals. The Minister for Workplace Relations and Safety will submit a bid for the 2017 legislative programme for a bill regarding the proposed changes to the pay equity regime in this paper.

85 The legislative process will be important for ensuring that the wording in the legislation is clear, and reflects the JWG's intent in a workable and practical manner. A full select committee process will help ensure the wording in the draft legislation is thoroughly considered.

Binding on the Crown

86 Cabinet agreed in 2001 that Cabinet must decide whether new legislation or substantially revised Acts will state that the Crown will be bound by the proposed Act. The Equal Pay Act is silent on whether it is binding on the Crown. The general principle is that the Crown should be bound by Acts unless the application of a particular Act to the Crown would impair the efficient functioning of the Government. As such, we proposed that the amendments to the Equal Pay Act include an express provision that it applies to the Crown.

Timeline

87 We anticipate the following timeline for the legislative process.

<i>Step</i>	<i>Proposed date</i>
Drafting legislation	s 9(2)(g)(i)
Date for introduction of the Bill	Mid – 2017
Date of report back from select committee	s 9(2)(g)(i)
Date of enactment	s 9(2)(g)(i)
Date of commencement	s 9(2)(g)(i)

Regulatory impact analysis

88 The Regulatory Impact Analysis Team at the Treasury (RIAT) has reviewed the Regulatory Impact Statement "Equal Pay Act: Principles and Processes" produced by the Ministry of Business, Innovation and Employment and dated 7 September 2016. The reviewers consider that the information and analysis summarised in the RIS **meets** the QA criteria.

Gender Implications

89 Amending pay equity legislation is likely to have gender implications, as per the discussion above regarding the gender pay gap.

Compliance with ILO Convention 100

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90 International Labour Convention 100 requires equal remuneration to be paid to both men and women for work of equal value without discrimination based on sex. In effect, the purpose of this Convention is to eliminate discrimination in the workplace and reduce differences in remuneration attributable to discrimination.

91 The JWG proposals are in line with Convention 100. Establishing processes and principles to resolve pay equity claims at the earliest time and at the most appropriate level support its implementation.

92 The JWG proposals provide a clearer process for parties to bargain over pay equity.

Compliance with the Bill of Rights Act 1990

93 The proposals in this paper are in accordance with section 19 of the Bill of Rights Act, which states that everyone has a right to freedom from discrimination on a number of grounds, including gender.

94 Providing practical guidance on how matters of pay equity can be raised and developing clear pay equity processes will minimise pay discrepancies based on gender discrimination.

Publicity

95 If approved by Cabinet, we intend to issue a media statement (including the summary of the response to the JWG proposals in Annex 1) on the decision to implement the JWG's proposals in legislation. We will discuss Cabinet's decisions with the JWG parties prior to any announcement.

96 The Ministry of Business, Innovation and Employment will also publish this paper on its website, subject to any deletions that would be justified if the information had been requested under the Official Information Act 1982.

Recommendations

The Minister of State Services and the Minister for Workplace Relations and Safety recommend that Cabinet:

- 1 **Note** that the current Equal Pay Act provides a statutory pay equity regime (the same pay for work of equal value) regime which allows employees performing work predominantly performed by women to bring pay equity claims against their employer.
- 2 **Note** the Joint Working Group on Pay Equity Principles (JWG) has made recommendations for dealing with pay equity claims under the *Equal Pay Act* and these have been publicly released.
- 3 **Agree** to support the JWG's proposals in accordance with the recommendations in this Cabinet paper.

Initiating a pay equity claim

- 4 **Agree** to create a statutory process for any employee to make a pay equity claim.
- 5 **Agree** to set requirements on the form of a pay equity claim.

Sensitive

- 6 **Agree** to place a duty on employers to notify all other employees of the employer who perform the same or similar work and who might be affected by (or benefit from) a pay equity claim.
- 7 **Agree** to set requirements on the form of employers' response to a pay equity claim, including a requirement to respond within a reasonable timeframe.

Recommendations relating to the JWG principles

Criteria for determining the merit of a claim as a pay equity claim

- 8 **Agree** that a pay equity claim must be shown to be for work predominantly performed by women and must have merit as a pay equity claim (ie that there is a reasonable basis for claiming that there is gender-bias in remuneration) in relation to the following factors:
 - 8.1 whether the work has been **historically** undervalued because of:
 - 8.1.1 any relevant origins and history of the work and the wage setting for it
 - 8.1.2 any social, cultural, or historical factors that may have led to undervaluing of the work and the remuneration for it
 - 8.1.3 a characterisation or labelling of the work as “women’s work”
 - 8.1.4 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, and
 - 8.2 Whether gender-based systemic undervaluation has **continued** to affect the remuneration for the work due to:
 - 8.2.1 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, the lack of effective bargaining
 - 8.2.2 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
 - 8.2.3 any other work features.

Pay equity bargaining

- 9 **Agree** to place a duty on employers to enter into bargaining on pay equity, following a pay equity claim, if the employer determines that the claim:
 - 9.1 relates to work predominantly performed by female employees, and
 - 9.2 has merit as a pay equity claim.

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- 10 **Agree** that bargaining on pay equity must include an examination of:
- 10.1 the work being performed and the remuneration paid to those performing the work, and
 - 10.2 the work performed by, and remuneration paid to, appropriate comparators.
- 11 **Agree** that the examination of the work being performed must include a thorough assessment of the work on the following basis:
- 11.1 the assessment must be objective and free of assumptions based on gender, and
 - 11.2 current views, conclusions or assessments of work value are not to be assumed to be free of assumptions based on gender, and
 - 11.3 the 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.

Appropriate comparators

- 12 **Agree** that the examination of the work being performed and that of appropriate comparators must include the identification and examination of the:
- 12.1 skills required, and
 - 12.2 responsibilities imposed by the work, and
 - 12.3 conditions of work, and
 - 12.4 degree of effort required in performing the work, and
 - 12.5 experience of employees.
- 13 **Agree** that the examination of appropriate comparators may include the identification and examination of the:
- 13.1 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,
 - 13.2 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,
 - 13.3 any other useful and relevant comparators.
- 14 **Agree** that a male whose remuneration is itself distorted by systemic undervaluation of "women's work" is not an appropriate comparator.

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- 15 **Note** that the JWG was unable to reach agreement on guidance for identifying comparators in terms of industry or sectoral proximity to the employees in the pay equity claim.
- 16 **Agree** to supplement the JWG proposals to require that comparators be drawn from within the business, similar businesses, or the same industry or sector when available and appropriate (ie that there would be a hierarchy of potential comparators).

Settling a claim

- 17 **Agree** to clarify that the settlement of a collective agreement does not settle or extinguish an unresolved pay equity claim, and failure to settle a pay equity claim is not justification for not concluding collective bargaining.
- 18 **Agree** that pay equity is remuneration (including but not limited to time wages, overtime payments and allowances) that has no element of gender-based differentiation.
- 19 **Agree** that pay equity must be free from any systemic undervaluation derived from the effects of current, historical or structural gender-based differentiation.
- 20 **Agree** that in establishing pay equity, other conditions of employment cannot be reduced.
- 21 **Agree** that any established pay equity must be reviewed and kept current.

Access to the dispute resolution system

- 22 **Agree** that parties may access employment mediation services where they believe the other party has not fulfilled their duties relating to pay equity including decisions about the merit of the claim as a pay equity claim.
- 23 **Agree** that, only where mediation and facilitation have not resolved the issue, parties may apply to the Authority for a determination as to whether the parties have complied with their obligations in relation to pay equity, including the merit of the request as a pay equity claim.
- 24 **Agree** that disputes in relation to pay equity claims and pay equity bargaining, for both collective agreements and individual employment agreements, may be referred by either party to the Employment Relations Authority for facilitation.
- 25 **Agree** that, for pay equity matters relating to individual employment agreements and collective agreements, the Authority may only accept reference for facilitation if:
- 25.1 the existing grounds for facilitation in the Employment Relations Act are satisfied, or
- 25.2 sufficient efforts at bargaining have failed to resolve the pay equity claim and Authority expertise would assist in resolving the claim.

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- 26 **Agree** that a party to bargaining for pay equity for an individual employment agreement or a collective agreement may apply to the Authority for a determination fixing the provisions of the agreement being bargained for.
- 27 **Agree** that the Authority may fix the provisions of an individual employment agreement or a collective agreement being bargained for, only to the extent necessary to ensure the agreement meets pay equity requirements, and only if it is satisfied that:
- 27.1 all other reasonable alternatives for reaching agreement on pay equity claims have been exhausted within a reasonable period, and
- 27.2 fixing the provisions of the agreement is the only effective remedy.
- 28 **Note** that the Minister of State Services and the Minister for Workplace Relations and Safety will give further consideration to options for information provision.

Applying good faith to pay equity bargaining

- 29 **Agree** that all pay equity bargaining must be in good faith, consistent with the elements of section 4 and 32 of the Employment Relations Act.
- 30 **Note** that good faith bargaining for pay equity may include the following elements:
- 30.1 it is orderly and efficient
- 30.2 it is kept within reasonable bounds
- 30.3 it is not needlessly prolonged.

Penalties

- 31 **Agree** to penalties for non-compliance which are consistent with the Employment Relations Act by empowering the Authority and the court to impose pecuniary penalties not exceeding \$10,000 for individuals, and not exceeding \$20,000 for companies or other corporations, and replace the penalty regime of the Equal Pay Act.

Approval for drafting

- 32 **Invite** the Minister for Workplace Relations and Safety to issue drafting instructions to Parliamentary Counsel Office to make changes that give effect to these policy recommendations.
- 33 **Agree** that supplementary and consequential amendments should be made to modernise the law in the Equal Pay Act and ensure it is fit-for-purpose.
- 34 **Authorise** the Minister for Workplace Relations and Safety to make changes, consistent with the policy framework in this paper on any issues that arise during the drafting process.
- 35 **Invite** the Committee of Ministers on State Sector Employment Relations to continue to oversee pay equity matters related to the state sector and the

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development of legislation and engagement with stakeholders on pay equity matters.

36 s 9(2)(g)(i)



37 **Note** that the Minister for Workplace Relations and Safety will submit a bid for the 2017 legislative programme for a bill regarding the proposed changes to the pay equity regime in this paper.

Binding on the Crown

38 **Agree** that the amended Equal Pay Act should include a provision stating that the Act will bind the Crown.

Other matters

39 **Note** that the Government is undertaking a range of actions to support equal employment opportunities for women and to address contributors to the gender pay gap.

Publicity

40 **Note** that a media statement will be released confirming Cabinet's support for the recommendations.

41 **Note** that the Minister for Workplace Relations and Safety intends to publish this paper and related Cabinet decisions online, subject to consideration of any deletions that would be justified if the information had been requested under the Official Information Act 1982.

Hon Paula Bennett
Minister of State Services
____/____/____

Hon Michael Woodhouse
Minister for Workplace Relations and Safety
____/____/____

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Annex 1: Summary of Response to Joint Working Group on Pay Equity Principles

This note summarises the Government response to the Joint Working Group on Pay Equity Principles' (JWG's) proposals.

JWG recommendations	Response
<i>General</i>	
Any employee or group of employees can make a claim.	Agree
Equal pay is remuneration (including but not limited to time wages, overtime payments and allowances) which has no element of gender-based differentiation.	Agree
Equal pay must be free from any systemic undervaluation, that is, undervaluation derived from the effects of current, historical or structural gender-based differentiation.	Agree
<i>Criteria for determining the merit of a claim as a pay equity claim</i>	
In determining the merit of the claim as an equal pay claim, the following factors must be considered:	
i The work must be shown to be predominantly performed by women and may also include areas where remuneration for this work may have been affected by: <ul style="list-style-type: none"> a any occupational segregation; b any occupational segmentation; 	Agree
ii The work may have been historically undervalued because of: <ul style="list-style-type: none"> a any relevant origins and history of the work and the wage setting for it; b any social, cultural or historical factors which may have led to undervaluing or devaluing of the work and the remuneration paid for it; c there is or has been some characterisation or labelling of the work as "women's work"; d 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; 	Agree
iii Whether gender-based systemic undervaluation has affected the remuneration for the work due to: <ul style="list-style-type: none"> a Features of the market, industry or sector or occupation which may have resulted in continued undervaluation of the work, including but not limited to: <ul style="list-style-type: none"> i. a dominant source of funding across the market, industry or sector; ii. 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 	Agree

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<p>with the work, the conditions under which the work is performed, and the degree of effort required to perform the work.</p> <p>c Any other relevant work features.</p>	
<i>Pay equity bargaining</i>	
A thorough assessment of the skills, responsibilities, conditions of work and degrees of effort of the work done by the women must be undertaken.	Agree
The assessment must be objective and free of assumptions based on gender.	Agree
Current views, conclusions or assessments of work value are not to be assumed to be free of assumptions based on gender.	Agree
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.	Agree
<p>To establish equal pay, there should be an examination of</p> <ul style="list-style-type: none"> 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. 	Agree
<p>An examination of the work being performed and that of appropriate comparators requires the identification and examination of:</p> <ul style="list-style-type: none"> 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. 	Agree
<p>An examination of the work and remuneration of appropriate comparators may include:</p> <ul style="list-style-type: none"> 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 	Agree with supplementary principle to require that comparators be drawn from within the business, similar businesses, or the same industry or sector when available and appropriate (ie that there would be a hierarchy of potential comparators).

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comparators.	
<p>The work may have been historically undervalued because of:</p> <ul style="list-style-type: none"> i. any relevant origins and history of the work and the wage setting for it; ii. any social, cultural or historical factors which may 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”; <p>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.</p>	Agree
<i>Appropriate comparators</i>	
A male whose remuneration is itself distorted by systemic undervaluation of “women’s work” is not an appropriate comparator.	Agree
<i>Settling a claim</i>	
Any equal pay established must be reviewed and kept current.	Agree
In establishing equal pay, other conditions of employment cannot be reduced. The process of establishing equal pay should be orderly, efficient, kept within reasonable bounds and not needlessly prolonged.	Agree
<i>Access to the dispute resolution system</i>	
If parties reach an impasse on an aspect of bargaining over pay equity (or a dispute over whether a claim has merit) recourse is available through existing dispute resolution processes, including mediation, facilitation and determinations from the Employment Relations Authority.	Agree
Providing improved access to facilitation for bargaining over collective and individual collective and individual employment agreements on pay equity by applying less restrictive grounds for applications for facilitation.	Agree
The Authority will be able to make determination to fix provisions in employment agreement, including pay, when all other reasonable alternatives have been exhausted within a reasonable period.	Agree
<i>Applying good faith to pay equity bargaining</i>	
The process of establishing equal pay should be orderly, efficient, kept within reasonable bounds and not needlessly prolonged.	Agree

24 May 2016

Hon Paula Bennett
Minister of State Services
Parliament Buildings
Wellington

Hon Michael Woodhouse
Minister for Workplace Relations and Safety
Parliament Buildings
Wellington

Dear Ministers

Recommendations of the Joint Working Group on Pay Equity Principles

The Joint Working Group on Pay Equity Principles (JWG) has completed its work and is now pleased to provide you with its recommendations.

The Government established the JWG in 2015, following a Court of Appeal decision in *Terranova v Service and Food Workers Union and Bartlett* (the "Terranova case"). That decision held that the *Equal Pay Act 1972* required equal pay for work of equal value (pay equity), not simply the same pay for the same work. This changed the way the Act was understood to have applied in the past. The JWG, facilitated by Dame Patsy Reddy and consisting of government, employer and union representatives, was tasked with recommending universally applicable pay equity principles for consideration by Government.

Government indicated that its preferred response to addressing pay equity issues was to determine pay equity principles that could be supported by employers (private and public) and by unions.

Since its establishment the JWG has been meeting to identify principles to recommend to Government which:

- Guide the implementation of pay equity for government, private and public sector employers, employees and unions, and
- Provide practical and specific guidance on how and in what circumstances matters of pay equity can be raised and the processes for progressing pay equity, and the nature and scope of evidence that may assist the process.

The JWG met on ten occasions and has agreed to a set of pay equity principles and the process through which pay equity claims may be addressed.

Approach

Pay equity is a complex issue, involving multiple historical and current factors.

The recommended approach therefore is based upon the notion of the parties to a pay equity claim resolving these issues at the earliest time at the most appropriate level, using the existing good faith bargaining arrangements of the *Employment Relations Act 2000* as the platform. The benefit of this approach is that it uses the existing good faith provisions in the law, and where necessary, the Employment Relations Authority and the Court to assist parties in settling pay equity claims.

Having pay equity claims treated as grievances addressed solely by the courts was not seen as conducive to good faith reconciliation of this type of employment issue.

Our preferred approach may be summarised as having the parties who would benefit from the claim bargain in good faith, using a set of principles designed to identify and confirm, assess and resolve a claim.

Main elements

The process and principles envisaged by the JWG are attached as Appendices 1 and 2. The main elements are:

- Pay equity claims may be made by any employee(s) to their employer at any time. The merit of the claim as a pay equity claim involves consideration of whether the work is predominantly performed by women, may have been historically undervalued and subject to systemic undervaluation.
- Employers receiving claims will be required to immediately notify those of their employees that might also be affected by (or benefit from) the claim.
- Once accepted as a pay equity claim the parties will bargain to resolve the claim, with guidance from the pay equity principles, including:
 - A thorough assessment of the skills, responsibilities, conditions and degrees of effort must be undertaken.
 - The assessment must be objective, free of assumptions based on gender and fully recognise the importance of skills, responsibilities, effort and conditions that are commonly overlooked or undervalued in female dominated work.
 - Comparators may be used so long as the comparator is not distorted by also being undervalued due to systemic undervaluation due to being “women’s work”.
- If the employer does not accept it is a pay equity claim within an established timeframe of receiving the claim the employee(s) raising the claim may test its merit as a pay equity claim with the Employment Relations Authority or revise their claim.

- Settlement of a collective agreement does not settle or extinguish an unresolved pay equity claim and failure to settle a pay equity claim is not a justification for not concluding collective bargaining.
- If parties reach an impasse on an aspect of bargaining over pay equity (or a dispute over whether a claim has merit) recourse is available through existing dispute processes, including mediation, facilitation and determinations from the Employment Relations Authority.
- Our recommended process includes enhancements to these mechanisms to ensure they are appropriate to address important and complex pay equity issues. This includes:
 - Providing improved access to facilitation for employees with pay equity claims.
 - Improving access to facilitation for bargaining over collective and individual employment agreements on pay equity by applying less restrictive grounds for applications for facilitation.
 - Providing the Authority with clear jurisdiction to make determinations on pay equity points of dispute.

The Authority will be able to make determinations to fix provisions in employment agreements, including pay, when all other reasonable alternatives for reaching agreement on pay equity claims have been exhausted within a reasonable period.

While the JWG has reached broad consensus on the process outlined above, one area that we have not resolved is the extent to which the principles provide guidance on identifying comparators in terms of industry or sectoral proximity to the employees in the pay equity claim. The attached principles are currently silent on this issue.

Legislative amendments

If the JWG's recommendations are accepted, it will be necessary to amend the *Employment Relations Act 2000* to recognise the special characteristics of pay equity claims. This includes setting appropriate processes and criteria for access to the various levels of jurisdiction should recourse to the authorities become necessary, including a lower threshold than currently exists to access facilitation. It will also be necessary to amend the *Equal Pay Act 1972* to accommodate the principles.

Resources

Recognising that pay equity is a complex matter, it will be essential that parties bargaining on pay equity matters have ready access to adequate information and resources to assist them in their deliberations. We know some information and resources exist, much of it in the form of proprietary pay surveys, past job evaluation methodologies, current job sizing tools based on the Court decision in the Terranova case, and research into the nature and history of sector or industry or occupational pay rates. However, it is fair to say that this is only available in a limited sense and some of it is now out of date.

Furthermore, some of the information is not free of cost, which may be an inhibiting factor in addressing some pay equity issues. Employers and unions believe there is a need for additional support, as much as anything to provide a readily accessible "shop front" for information and resources, including any possible financial implications of successful claims in order to assist employers to plan. We suggest that government give further consideration to its role in supporting pay equity information.

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

The parties did not envisage the process leading to protracted settlements of pay equity claims, and stress that a timely and efficient resolution to matters will be more likely with additional specialist resources such as information, research and subject matter experts.

Other issues

The JWG recommendations focus on the matters set out in the terms of reference for the Group. However during our discussions it was recognised that there are other associated matters that we felt warranted further comment.

Government as employer

As New Zealand's largest employer, it is of course open to the government to respond more broadly to this issue, for both its own benefit and that of the wider employment community. A range of options could be considered, such as engaging, participating and leading in reaching equal pay settlements in female dominated workforces for which the government is the monopsony or primary funder (such as is currently underway in the care and support workforce negotiations) ranging down to enterprise-based processes which may be more common in the private sector.

Equal employment opportunity

During our discussions the JWG recognised that there are other workplace issues that can lead to the existence of a gender wage gap.

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

While these are important issues in their own right, they were not considered to be within the scope of the JWG discussions.

That said, the parties accept that these are serious issues and we invite you to consider means of ensuring appropriate attention is paid to such issues in the future.

We note that, as the largest employer in the country, the government is well placed to develop and showcase good practices in all aspects of employment.

Recommendations of the JWG on pay equity

The JWG recommends that the government:

1. Adopts the process for addressing pay equity claims as illustrated in Appendix 1 that supports the parties to reach a bargained resolution while retaining the ability to access the authority or courts to ultimately resolve any impasses.
2. Adopts the set of principles as attached, to guide parties to identify, assess and resolve pay equity claims.

Conclusion

Overall, this has been a fascinating and challenging exercise. All the participants have worked constructively and positively together to reach the consensus reflected in the recommendations. We believe that we have identified a sustainable and workable approach that will serve well into the foreseeable future and we commend it to you.

Yours sincerely



Dame Patsy Reddy
Crown Facilitator



Richard Wagstaff
New Zealand Council of Trade Unions
Lead Union Representative



Phil O'Reilly
Business New Zealand
Business Lead Representative

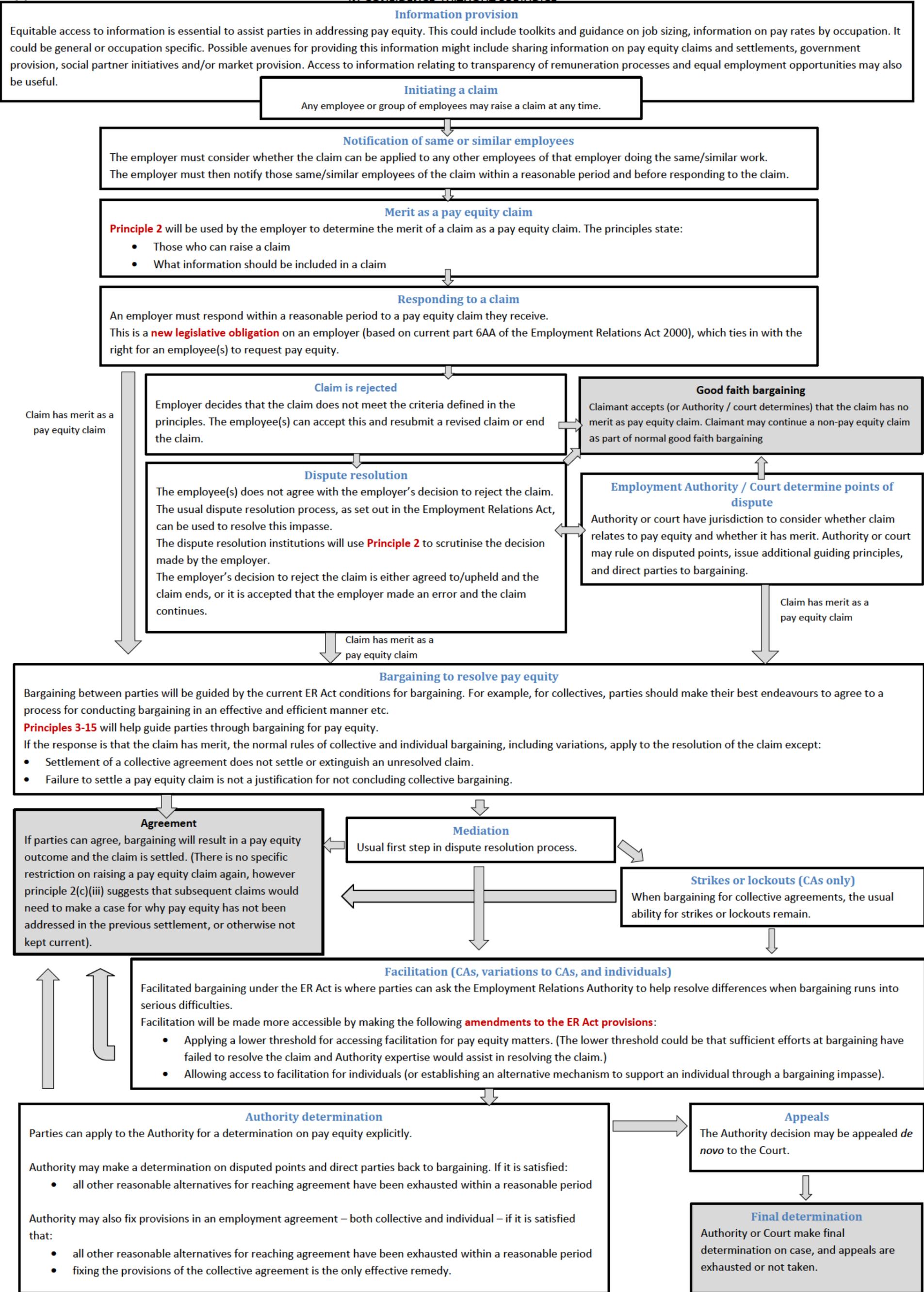


Paul Stocks
Ministry of Business, Innovation and
Employment
Co-Lead Government Representative



Lewis Holden
State Services Commission
Co-Lead Government Representative

Appendix 1



Appendix 2

PRINCIPLES FOR THE IMPLEMENTATION OF EQUAL PAY

RAISING A CLAIM

1. Any employee or group of employees can make a claim.
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 and may also include areas where remuneration for this work may have been affected by:
 - i. any occupational segregation;
 - ii. any occupational segmentation;
 - 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 which may 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;
 - 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:
 - 2.i.1. a dominant source of funding across the market, industry or sector;

- 2.i.2. 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 required to perform the work.
- iii. Any other relevant work features.

ASSESSING THE CLAIM

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.
4. The assessment must be objective and free of assumptions based on gender.
5. Current views, conclusions or assessments of work value are not to be assumed to be free of assumptions based on gender.
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.
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.
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.
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.
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 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.

SETTLING A CLAIM

12. Equal pay is remuneration (including but not limited to time wages, overtime payments and allowances) which has no element of gender-based differentiation.

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.
14. In establishing equal pay, other conditions of employment cannot be reduced.
15. The process of establishing equal pay should be orderly, efficient, kept within reasonable bounds and not needlessly prolonged.
16. Any equal pay established must be reviewed and kept current.

Annex 3: International pay equity systems

Jurisdiction	Approach
<p>European Union</p>	<ul style="list-style-type: none"> • Article 157 of the Treaty on the Functioning of the European Union provides that each member state shall ensure that “the principle of equal pay for male and female workers for equal work or work of equal value is applied”. • The comparator is, <i>in principle, restricted to the workplace or company</i> where the individual works or where the same collective agreement applies. A comparison across sectors and businesses with different collective agreements is, as a rule, not permitted. • According to the Court of Justice of the European Union (CJEU), it must be possible to attribute differences in the pay conditions of workers of different sex performing equal work or work of equal value to a single source, as otherwise there is no body which is responsible for the inequality and which could restore equal treatment.
<p>United Kingdom</p>	<ul style="list-style-type: none"> • The United Kingdom is an example of a similar wage-setting system to New Zealand which allows for collective and individual bargaining. The United Kingdom take a complaints based approach. • The scope of comparators is generally <i>confined to within the same employment</i>. • EU law allows a woman to compare herself to a man who is not in the same employment but where the difference in pay is attributable to a single source which has the power to rectify the difference. As the UK is part of the EU, it can allow this. • If there is no comparator doing work, an employee can use a hypothetical comparator. • Job evaluations are promoted as the best way to compare whether work is rated as equivalent. A job evaluation must be non-discriminatory and not influenced by gender stereotyping or assumptions about men’s and women’s work. • Possible defences an employer may raise in response to an equal pay claim are that the difference in pay is genuinely due to a material factor, not related to the sex of the jobholders. A material factor has to be proven to be: <ul style="list-style-type: none"> ○ the real reason for the difference in pay ○ causative of the difference in pay ○ material; that is significant and relevant ○ not involving direct or indirect discrimination.
<p>Australia</p>	<ul style="list-style-type: none"> • Australia is another example of a complaints-based approach. However, Australia’s wage-setting system differs to New Zealand. • The scope of comparators has been set through case law. • A male comparator group is not required (but it may make it easier to establish a claim). • It’s <i>conceivable that comparators in a different industry could be used but this has not been tested</i>. The one completed case under the Fair Work Act, the Social and Community Services (SACS) case, used pay rates within the same industry to establish pay equity rates. • An applicant needs to establish that there is not equal remuneration and that the undervaluation is based in some way on the gender of the employees. Applicants do not need to establish that rates have been set on a discriminatory basis. The Fair Work Commission has not prescribed a method by which applicants should establish undervaluation. • In the SACS case, the applicants used econometric regression analysis for

Sensitive

	<p>the labour market (looking at what proportion of the gender pay gap cannot be explained by differences in education, training, experience, industry characteristics etc) as a base for demonstrating that undervaluation exists and a study that identified the proportion of the job that involved ‘caring work’ as a proxy for gender based undervaluation.</p>
<p>Quebec, Canada</p>	<ul style="list-style-type: none"> • Quebec is an example of a proactive approach to pay equity. Employers with 10 or more employees have a statutory obligation to carry out a review to identify and correct systemic gender discrimination. A government-funded body assists employers to develop pay equity plans, monitor compliance and mediate disputes. • The scope of comparators is generally confined to within the same enterprise. Comparisons must be made between ‘predominantly female’ and ‘predominantly male’ job classes. Differences can be assessed on an individual-job or overall basis. • Jobs are grouped together into a job class which have the following common characteristics: <ul style="list-style-type: none"> ○ similar duties or responsibilities ○ similar required qualifications ○ the same remuneration, that is, the same rate or scale of compensation. • If there is no predominantly male job class in the enterprise, a proxy comparator can be used. In this situation, the Pay Equity Commission approves the use of a comparator from another organisation with similar characteristics. • For jobs of equal value, pay differences are allowable where it is shown to be due to a number of factors, including: <ul style="list-style-type: none"> ○ regional variations ○ seniority systems ○ merit pay ○ a shortage of skilled workers.
<p>California, USA</p>	<ul style="list-style-type: none"> • The state of California recently passed new pay equity legislation. This has been heralded by US media as one of the strongest initiatives to achieve pay equity in the US. • While this legislation is new and relatively untested, it appears that it is largely directed at pay inequities within the same employer. It limits wage differentials between occupations doing substantially similar work to differentials based upon one or more of the following factors: <ul style="list-style-type: none"> ○ a seniority system ○ a merit system ○ a system that measures earnings by quantity or quality of production ○ a bona fide factor other than sex, such as education, training, or experience. This factor shall apply only if the employer demonstrates that the factor is <ul style="list-style-type: none"> ▪ not based on or derived from a sex-based differential in compensation ▪ is job related with respect to the position in question, and ▪ is consistent with a business necessity. • Given the Act only came into force this year, it is not clear whether the Courts would envisage adopting comparators from beyond the workplace. However, from a plain reading of the legislation, it appears to solely focus on pay inequities created by the same employer.

Sensitive

Regulatory Impact Statement

Equal Pay Act: Principles and Process

Agency Disclosure Statement

This Regulatory Impact Statement has been prepared by the Ministry of Business, Innovation and Employment and the State Services Commission.

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 of potential pay equity wage adjustments is not known. 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.

Jivan Grewal
Manager, Employment Relations Policy
Ministry of Business, Innovation and Employment

7 September 2016

Regulatory Impact Statement

7 September 2016

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

2. 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.
3. 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.
4. The Court of Appeal's decision means that the Equal Pay Act is not just targeted at 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

5. 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.
6. 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.
7. 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. This involves making judgements about the relative value of skills, responsibilities, effort and conditions of work in abstract from the market-set pay.

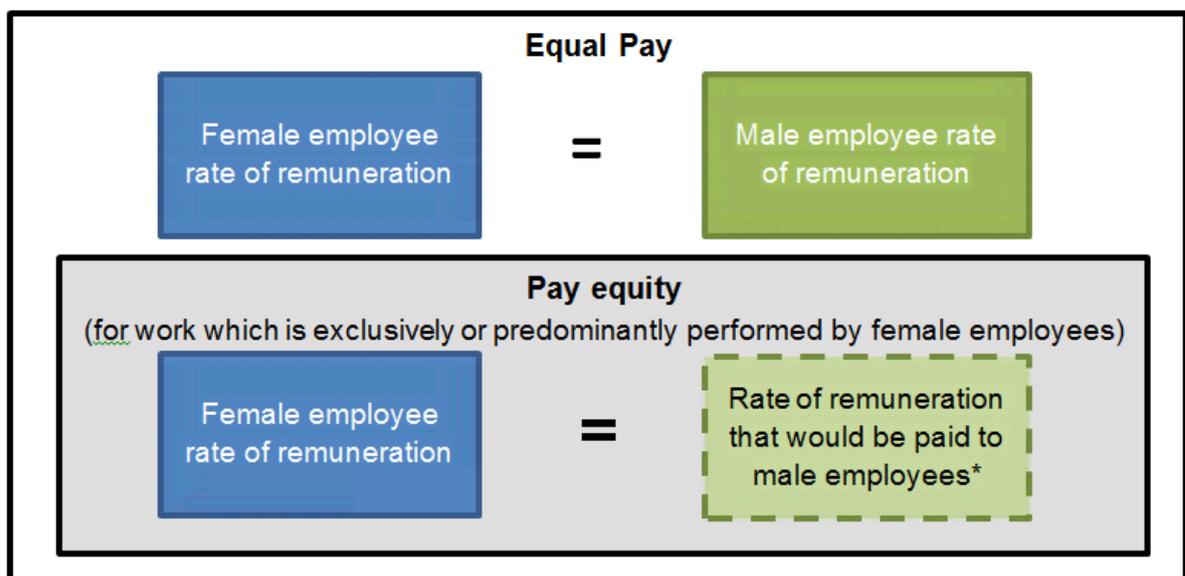
Application of equal pay and pay equity in the Equal Pay Act

8. Figure 1 below provides a simplified representation of how the concepts of equal pay and pay equity are applied in the Equal Pay Act.
9. 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.

10. 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.
11. 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

12. The interpretation of the Equal Pay Act means any employee performing work predominantly performed by women, irrespective of whether they are a low or high paid group, 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.
13. 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 gender discrimination (which is difficult to determine), and

- b. the number and timing of pay equity claims that are pursued¹ and when any wage increases come into effect.

The existence and degree of undervaluation due to gender discrimination

14. There is no direct empirical evidence on the extent to which systemic gender discrimination is occurring and, if it is occurring, the extent to which it is depressing pay in female dominated 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 as 'women's work'), and
 - b. the 'unexplained' portion of the gender pay gap.

Occupational segregation

15. Parts of New Zealand's labour market are highly segregated by gender: 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 60 per cent 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.
16. 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 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).

Unexplained gender pay gap

17. The gender pay gap is a high level indicator of the difference between women and men's earnings. Statistics New Zealand measures the gender pay gap by comparing the median hourly earnings of women and men in full and part-time work. As of June 2015, there was a gender pay gap of 11.8 per cent, which while increased from 9.9 per cent in the previous year but has been steadily trending downwards since the late 1990s.
18. Research consistently identifies an 'unexplained' portion of the gender pay gap. The unexplained portion is generally considered to include unconscious bias 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 the 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.

¹ The state sector is expected to be the early focus of pay equity claims given the nature of the State sector labour markets (including concentration of certain female dominated occupations, greater level of union organisation and collective bargaining, larger employers) and the expectations generated from previous policy initiatives.

19. 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.
20. Sin, Stillman and Fabling (unpublished 2016) 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 evidence of discrimination.
21. 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.

Systemic discrimination as a market failure

22. 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.
23. 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.
24. 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 work opportunities. 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 monopsony employer 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.
25. 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

26. s 9(2)(g)(i)

27. 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.

28. s 9(2)(g)(i)

Government response to the Court of Appeal decision

29. 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, including a summary, are 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.
30. 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.
31. 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.

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

Summary

33. 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 JWG's principles) and may determine the substantive matters in the TerraNova case (if not settled). 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.

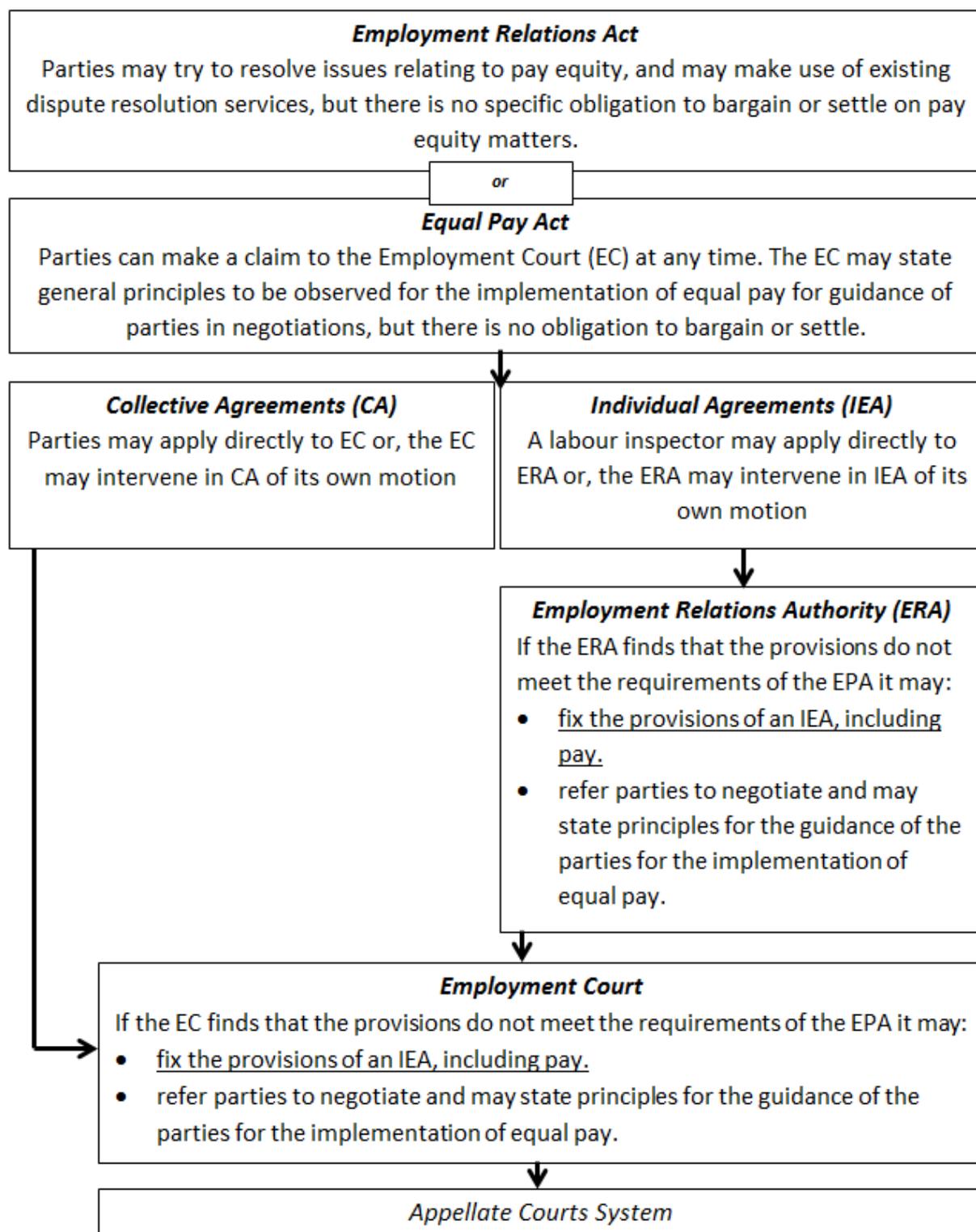
Problem definition: Misalignment with existing employment relations framework

34. 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.
35. 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.
36. 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.
37. 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.
38. 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.
39. 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.

40. 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.
41. 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.

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



Other issues

42. 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

43. 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.
44. To date, a small number of pay equity cases have been filed following the TerraNova decision. This suggests a degree of confidence in the court-based approach to settling pay equity, at least for those groups that are able to resource a claim being taken through the court process.
45. While it is not possible to quantify the benefits and costs of the status quo 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 an equal 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

46. 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.
47. The following options have been identified in the feasible set. This includes a “do nothing more” option (i.e. the status quo):

<p><i>Status quo, including allowing Courts to determine equal pay rates</i></p>	<p>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.</p> <p>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.</p>
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<p><i>Option 1: Implement the recommendations of the Joint Working Group on Pay Equity without legislation</i></p>	<p>There would be no amendment to the existing legislation (i.e. option 1 above) but the JWG 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.</p> <p>Bargaining parties would only be able to access dispute resolution support as currently provided.</p> <p>Any court decision on the section 9 principles would influence pay equity bargaining.</p>
<p><i>Option 2a: Implement the JWG recommendations in legislation without modification</i></p>	<p>Amendments to the Equal Pay Act and the Employment Relations Act to implement the recommendations of the JWG. As the JWG 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.</p>
<p><i>Option 2b: Implement the JWG recommendations in legislation with a modification to include a hierarchy of comparators</i></p>	<p>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.</p>
<p><i>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</i></p>	<p>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).</p>
<p><i>Option 3: Restrict the pay equity sections of Equal Pay Act to equal pay by restricting comparators to the same work</i></p>	<p>Amend the Equal Pay Act to remove any ability to use comparators in establishing a claim except men performing the same job.</p> <p>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.</p> <p>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.</p>

Objectives/criteria

48. 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.	<ul style="list-style-type: none"> - Freedom from discrimination is viewed as important to society - Discrimination is economically inefficient.
Supports productive employment relationships consistent with modern bargaining frameworks	<p>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.</p> <p>Employees and employers can openly and constructively engage on employment matters.</p> <p>Employees and employers are able to find innovative, mutually acceptable working arrangements to suit their particular circumstances over time.</p> <p>Mediation is the dispute resolution - mechanism with reduced need for judicial intervention.</p>	<ul style="list-style-type: none"> - 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.	<ul style="list-style-type: none"> - 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: <ul style="list-style-type: none"> - 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 	<ul style="list-style-type: none"> - 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

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

Option 1

50. Option 1 involves implementing the JWG recommendations (primarily the pay equity principles) 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.
51. 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.
52. 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

53. Option 2 involves implementing the JWG recommendations in legislation through amendments to the Equal Pay Act and the Employment Relations Act, either as recommended by the JWG (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).
54. 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

- historic and ongoing undervaluation
 - b. establishes a 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.
55. Establishing a process to request pay equity is important for groups affected by situations where there is an imbalance in the bargaining relationship (that is, monopsony).
 56. The JWG were silent on whether there should be a hierarchy of comparators for establishing pay equity. This means that Option 2a would involve the parties agreeing where (within the employer, the industry or more widely) a comparator group is drawn from for the purposes of addressing pay equity. Option 2b would establish a hierarchy of comparators with comparators drawn from the employers or groups within the industry, before other comparators are considered. To this extent, Option 2b may reduce some uncertainty in a pay equity bargaining process.
 57. 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.
 58. The JWG proposed that pay equity claims must have merit in relation to historic and continuing undervaluation. 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.
 59. 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.
 60. 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 23, competitive market forces should, in theory, reduce or eliminate 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.
 61. 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. 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.

62. 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 by preventing misuse of the regime by claims related to pay issues other than gender pay equity.

Option 3

63. 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.
64. 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.
65. This option will involve some pay equity 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:
 - i. while the claims "window" is open to avoid litigation or to settle out of court
 - ii. under the Employment Relations Act, as would have occurred prior to the TerraNova decision.
66. 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.
67. 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.
68. 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.

All options

69. 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.
70. It is expected that nesting a pay equity process within the bargaining framework in

the Employment Relations Act (Options 2 and 3) is likely to result in an increased likelihood of agreed 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.

71. 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.
72. 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
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.
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 23, competitive market forces should, in theory, reduce or eliminate 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.	X May not achieve pay equity, compared to the status quo, in the longer-term
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	✓ Same as option 2a. The hierarchy of comparators may further reduce disputes in bargaining compared to option	✓ Same as option 2b. The additional requirement to have a dominant source of funding may reduce disputes by	X This option is inconsistent with modern bargaining. It strongly incentivises use of the court processes during the claim filing

			trust and confidence as compared to the status quo where these relationships may be undermined by early recourse to the court.	2a.	providing further clarity about the conditions under which pay equity issues can be raised.	period.
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 circumstances.	- 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 the parties.	✓ 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 closes, the situation reverts in time to the pre-TerraNova decision environment for new claims and any updating of settlements.
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. Additional guidance on the use of comparators in other industries may improve certainty about the process and likely comparators.	✓✓✓ 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.	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.
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 relations issues.	? 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. . However, the hierarchy of comparators may reduce bargaining and dispute resolution costs as options closer to the employer are selected in the first instance. This may reduce the need to argue that comparators drawn more widely are more appropriate.	✓ 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.

<p>Summary</p>	<p>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.</p>	<p>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.</p>	<p>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.</p>	<p>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.</p> <p>The hierarchy of comparators may reduce disputes in bargaining and enhance the ability of employment relations institutions (including the court) to make decisions.</p>	<p>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.</p> <p>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.</p> <p>The additional requirement is likely to improve certainty about the conditions under which occupations can raise 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.</p>	<p>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.</p>
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Consultation

73. 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).
74. 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.
75. Note that the JWG members have not been consulted on the variations to the JWG's proposals in Options 2b and 2c. The union parties on the JWG are unlikely to support these variations.
76. Consultation took place with the State Services Commission, The Treasury, ACC, Ministry of Health, Crown Law, the Ministry of Education, the Ministry for Women and the Ministry of Social Development. The RIS reflects this feedback.

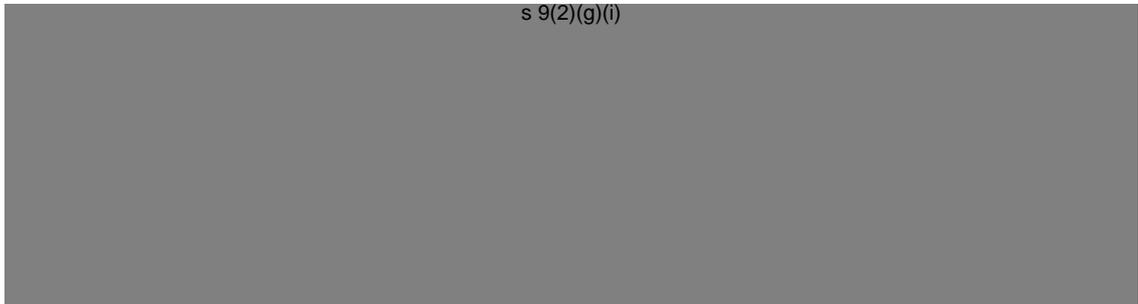
Conclusions and recommendations

77. 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.
78. 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 2b and 2c are preferable to Option 2a as they potentially reduce some unnecessary transaction costs associated with pay equity resolution though the hierarchy of comparators. Option 2c further specifies the conditions under which occupations can raise pay equity claims. This improves certainty and may minimise unnecessary costs by preventing misuse of the regime by claims related to pay issues other than gender pay equity. However, 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. As such, we consider the preference between options 2b and 2c to be finely balanced given the available information.
79. 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.

Implementation

- 80. 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.
- 81. 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.

82. s 9(2)(g)(i)


83. s 9(2)(g)(i)


84. s 9(2)(g)(i)


85. s 9(2)(g)(i)


- 86. Option 3 also requires a process for addressing claims that have already been submitted under the Equal Pay Act.
- 87. 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.

Monitoring, evaluation and review

88. 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, the Centre for Labour, Employment and Work (CLEW), and MBIE's administrative data.
89. 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.
90. 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.
91. 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.
92. 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.
93. 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 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.
94. 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.
95. 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.
96. We will also use our regular engagements with the social partners for insights into their members' experience of pay equity in practice.

97. 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.
98. 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 size², and exclude occupations involved in the negotiation process to address pay and associated workforce issues for care and support workers³.

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

	Occupation ⁴	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

² Significant size is defined as over 1,000 women employees.

³ 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.

⁴ Level 6 ANZCOV12.5 occupational data is used.

	Personal Assistant	8,532	8,733
	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 employee 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.

- 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

