MINISTRY OF BUSINESS, INNOVATION & EMPLOYMENT
HĪKINA WHAKATUTUKI

COVERSHEET

Minister	Hon Andrew Little	**Portfolio**	Workplace Relations and Safety
Title of Cabinet paper	**Equal Pay Amendment Bill: Outstanding Policy Issues** **Equal Pay Amendment Bill: Approval for Submission of a Supplementary Order Paper**	**Date to be published**	7 September 2020

List of documents that have been proactively released		
Date	**Title**	**Author**
17 February 2020	Equal Pay Amendment Bill: Outstanding Policy Issues	Office of the Minister of Workplace Relations and Safety Office of the Minister for Women
17 February 2020	Cabinet Minute – Equal Pay Amendment Bill: Outstanding Policy Issues (CAB-20-MIN-0031.01)	Cabinet Office
21 July 2020	Equal Pay Amendment Bill: Approval for Submission of a Supplementary Order Paper	Office of the Minister of Workplace Relations and Safety Office of the Minister for Women
21 July 2020	Cabinet Legislation Committee Minute – Equal Pay Amendment Bill: Supplementary Order Paper (LEG-20-MIN-0110)	Cabinet Office

Information redacted **YES**

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Some information has been withheld for the reasons of:

- confidential advice to Government
- free and frank opinions.

Sensitive

Office of the Minister for Workplace Relations and Safety

Office of the Minister for Women

Chair

Cabinet Economic Development Committee

Equal Pay Amendment Bill: Outstanding Policy Issues

Proposal

1. This paper seeks Cabinet approval for policy decisions in response to issues raised in post-Select Committee consultation on the Equal Pay Amendment Bill (the Bill).

Executive summary

2. The Bill amends the *Equal Pay Act 1972* (the *Act*) to introduce a new regime that allows employees to pursue a pay equity claim in line with New Zealand's existing employment relations framework.

3. This is world-leading legislation that sets out a practical and fair process for employees working in jobs predominantly performed by women to investigate whether their work is undervalued due to systemic discrimination. The Labour and Green Party Confidence and Supply Agreement commits the Government to make significant progress towards eliminating the gender pay gap in the core public sector this term, and to ensure that the wider public sector and private sector are on a similar pathway. We have been making significant progress towards this target. Robust and accessible pay equity processes are a critical tool in closing the gender pay gap across the economy.

4. The Education and Workforce Committee (the Committee) reported back to the House on the Bill on 14 May 2019. The Minister for Workplace Relations and Safety and the Minister for Women asked officials to seek further views from the social partners New Zealand Council of Trade Unions (NZCTU) and Business New Zealand (BusinessNZ), alongside other key stakeholders.

5. The NZCTU and BusinessNZ have jointly approached Ministers asking that so far as possible, the pay equity bargaining framework should mirror the framework for collective and individual bargaining under the *Employment Relations Act 2000* (the ERA). This highlights an inherent tension in the Bill between a bargaining framework (where a deal is negotiated between the parties) and a rights-based framework (where a solution is decided by the process of inquiry, often by the courts). The changes we seek to make move the Bill closer to a bargaining framework.

6. We seek Cabinet approval to make two systemic changes to the Bill. There are a number of other changes needed to enable these changes to be

realised. We also propose a number of smaller changes. We have tested the proposed changes at a high level with the NZCTU and Business NZ.

First systemic change: Removing requirement to consolidate claims

7. We propose to alter the bargaining structure enabled by the Bill, by **removing the requirement to consolidate all pay equity claims within the employer:** union and individual pay equity claims may be raised with an employer, but may be progressed separately. It would also retain a mechanism for individuals to bargain individually for pay equity where there is no union, or where employees choose not to be represented by a union. We propose to make the following changes to the Bill to implement this proposal:

    - Enable unions to raise pay equity claims on behalf of their members within an employer, without needing to individually name them and obtain their individual authorisation

    - Employees performing the same or substantially similar work within the same employer will be included as part of the union claim unless they opt out

    - Require multiple unions that raise a claim for employees that perform the same or substantially similar work within the same employer to consolidate their claims

    - Require employers to automatically offer the terms of a union pay equity settlement to other employees

    - Change the threshold for raising a separate pay equity claim. Employees who do not accept the offer of a settlement should retain the right to raise a claim related to the same work.

Second systemic change: Enable unions to seek multi-employer consolidation

8. We propose to amend the Bill to **provide the ability for unions to request consolidation of pay equity bargaining across multiple employers**. In addition:

    - employers and unions will have the ability to opt out of multi-employer consolidated bargaining if there are genuine reasons, based on reasonable grounds

    - there would be no formal mechanism for employers or employees to be able to consolidate non-union, individual claims across multiple employers

    - the default outcome of a multi-employer bargaining scenario will be the settlement of a multi-employer pay equity agreement.

Other Issues

9. **There are a range of other, more discrete and technical changes, we are proposing to make to the Bill. These include:**

    - Changes to the procedural timeframes for deciding when a claim is arguable and for notifying affected employees

    - Removing the ability to use an alternative process in assessing the claim

    - Changes to the review process requirements, including providing a timeframe for the review of individual settlements

    - Lowering the threshold for transitional claims to continue under the Act, from being 'determined' to when they are being 'heard'

    - Allowing individual claimants to challenge pay equity settlement agreements on the basis that the bargaining process was unfair, to align with the ERA

    - Allowing for the *Official Information Act 1982* to apply to pay equity settlement agreements collected by the Ministry of Business, Innovation and Employment (MBIE)

    - Ensuring that certain provisions in the Bill reflect the existing policy intent, including that the threshold to enter pay equity bargaining requires only a "light-touch" assessment of arguability.

Background

10. In September 2018, the Government introduced the *Equal Pay Amendment Bill 2018* which amends the *Equal Pay Act 1972* (the Act) to improve the pay equity regime, as recommended by the Joint Working Group on Pay Equity Principles (the JWG) and reconfirmed in a slightly amended form by the Reconvened Joint Working Group on Pay Equity Principles (the RJWG) [CAB Min 18/0453 refers]. The pay equity regime set out in the Bill enables:

    - employees to raise a pay equity claim with their employer

        - for work predominantly performed by women, and

        - where it is arguable that there is current or historical sex-based undervaluation of that work

    - claims to progress to pay equity bargaining. This includes a thorough objective assessment, free of gender-based assumptions, examination of the work that is the subject of the claim and the work of comparators, and

    - use of the employment relations disputes resolution process to assist in resolving any disputes relating to the claim.

11. The Education and Workforce Committee (the Committee) reported back to the House on the Bill on 14 May 2019. The Committee proposed some amendments which included inserting a definition for 'predominantly performed by females' and removing the requirement for parties to use facilitation in the dispute resolution process, except when fixing terms and conditions.

12. At the end of May, the Minister for Workplace Relations and Safety and the Minister for Women asked officials to consult with the NZCTU and BusinessNZ, and other stakeholders, on two issues raised with the Bill (multi-employer consolidation and requirements for raising union claims). During this consultation, the NZCTU raised a number of additional concerns they had with the Bill.

13. The NZCTU's overarching concern, supported by BusinessNZ, is that the proposed pay equity bargaining process does not sufficiently align with the collective bargaining regime under the ERA. This reflects their view of the intent of the JWG processes. The NZCTU and BusinessNZ wrote to Ministers setting out this view and their commitment to a bargaining framework for pay equity. Their letter is attached at Appendix 1.

14. We have proposed a number of changes that will move pay equity bargaining closer to existing collective bargaining processes, while maintaining distinctions where necessary. This paper seeks Cabinet agreement to policy proposals responding to issues raised by the social partners.

15. The proposals in this paper will be reflected in a Supplementary Order Paper (SOP) for the Bill, introduced prior to its second reading in the House. A diagram of the proposed new pay equity process is attached at Appendix 2.

First systemic change: Removal of the requirement to consolidate all pay equity claims within an employer

16. To further align pay equity bargaining with existing bargaining processes, we propose to remove the requirement to consolidate all pay equity claims for the same work within the employer, and allow individual and union claims to progress separately. Under the current provisions in the Bill, when a claim is raised, the employer must give notice of the claim to other employees who perform the same or substantially similar work. Arguable claims for the same work within the employer must be treated as one joint claim (unless the employer has genuine reasons, based on reasonable grounds, not to consolidate them). Claimants must then agree on representation and decision-making for the claim. The intent of consolidation was to reduce compliance costs for employers by preventing multiple pay equity settlements being negotiated for the same work within the same employer.

17. Removing the requirement to consolidate all claims would make the bargaining process more efficient for unions, as they would not need to liaise with non-union employees or their representatives to progress a pay equity claim. It would reflect the principle, underlying the existing employment relations framework, that it is primarily the role of unions to represent

employees collectively. It would also retain a mechanism for individuals to bargain for pay equity where there is no union, or where they choose not to be represented by a union.

18. Employers may be required to enter into multiple pay equity bargaining processes for employees doing the same or substantially similar work. This may result in different settlements for pay equity claims for the same work. Inconsistencies arising from these multiple processes would be reduced by providing non-union employees the opportunity to join the union claim or be offered the benefits of that settlement (discussed below).

Consolidation of multiple union claims

19. We recommend that multiple union claims raised for the same work within the employer must still be consolidated. This would reduce some of the potential inefficiencies created by moving from consolidation of all pay equity claims, while acknowledging the role of unions as recognised bargaining representatives. It would entail that, where more than one union has raised a claim that relates to the same or substantially similar work, they would be required to collectively agree on how the claim would progress.

Enabling unions to raise claims

20. We propose to make it simpler for unions to raise pay equity claims on behalf of their members, by removing the requirement that they obtain each individual member's authorisation to take a claim. We consider this will enable a more efficient process for raising claims that will benefit both employees and employers, and align with existing bargaining practices.

Require union representation of non-union employees

21. Under this proposal, non-union employees performing the same or substantially similar work within the employer will be included as part of a union pay equity claim, unless they choose to opt out. The process to opt-out will need to include a mechanism for sufficient advice to be provided to the non-union employee so they could make an informed decision on whether to be represented by the union in the pay equity claim.

22. This will ensure that, where there is a union, non-union employees benefit from union representation in pay equity bargaining. It will make it more efficient than individual bargaining for non-union employees that seek to participate in a union claim. It is also likely to reduce compliance costs raised for employers due to removing the requirement to consolidate all claims for the same work, and produce more consistent pay equity outcomes for employees within the employer. The social partners have indicated that they are broadly comfortable with this approach.

Amendments to the notification and settlement provisions

23. To facilitate the proposed bargaining structure, new processes would need to be included in the notification and settlement provisions of the Bill. The

employer will be required to both notify affected non-union employees that a union has raised a pay equity claim, and provide them with an "opt-out" method if the employee does not consent to authorising the union to represent them in bargaining. Where an individual has raised a claim at the same time as the union or was already in bargaining, the employer would also be required to notify them that there is a possibility for them to join the union claim.

24. The design of the opt-out method is important, to ensure that employees understand the implications of their decision to opt out of the union claim. Safeguards will need to be placed on the uses of personal employee information shared between the employer and the union. This process will raise privacy issues, which will need to be consulted on with the Privacy Commissioner.

25. An individual who chooses to opt out of the union claim would preserve their right to raise an individual pay equity claim or pursue an alternate legal avenue. Employees could opt out of the union claim until the ratification of the settlement or until the union filed an application for a determination to fix terms and conditions with the Employment Relations Authority (the Authority) - at which point the employees would be considered to have made their choice of proceedings (see section on proposed changes to the timing of the choice of proceedings below).

26. Where a union is acting on behalf of non-union claimants for the purposes of pay equity bargaining, we propose that union representatives would have a duty of good faith to non-union members.

Extension of a pay equity claim settlement

Automatic offer of a union pay equity settlement to affected employees

27. We propose an amendment to the Bill to require that employers must offer any pay equity settlement negotiated by a union to other affected employees.[1] All employees performing the work relating to the claim would be offered the terms of the settlement, with the ability to decline if they wish to retain their right to raise a separate pay equity claim and settle it individually.

28. The Bill is currently silent on the 'extension' of a pay equity claim settlement, leaving it to the employer's discretion. This is because claims for the same work must be consolidated, and there is an incentive for the employer to offer the benefits of the settlement reached to other current and future employees, to prevent new claims being raised for the same work. The employer must offer the full settlement package to an employee to bar a new claim being raised for the same work. Existing settlements in the State sector have been extended to non-employees to date without issue.

29. If the Bill remains silent on extension, and there are multiple settlements (individual and union) negotiated for the same work, it would be up to the

[1] Such as non-union employees who had either opted out of the union claim or joined the workplace at a later date.

employer to decide which settlement to offer to other current and future employees. This may mean, for example, that only some terms of a union settlement are passed on to non-union members, or that a union settlement does not get extended to non-union employees at all. If it is an individual settlement that is offered to other employees and there is a collective agreement in place, the employer would need to offer the settlement to the union to accept or decline on behalf of their members in accordance with processes for varying the collective agreement (under the ERA, unions and employers are parties to the collective agreement).

30. An individual who has already settled an individual pay equity claim will have lost their right to raise a new claim. This means that they will not be able to join onto a subsequent union claim or to be included in the ratification of a union settlement for the same work. They would also be excluded from any offer of extension.

31. Although this does not exactly mirror the pass-on provisions under the ERA, it recognises pay equity as an issue of systemic discrimination, affecting both union and non-union members. As such, where a union settlement has addressed sex-based undervaluation in the remuneration for the work, it should be offered to all employees performing that work within the employer. For both employees and employers it also makes sense to have consistent pay rates, and to reduce the costs of concluding multiple settlements.

Lower threshold to raise a separate pay equity claim where there is already a settlement covering the work

32. We propose to amend the Bill so that claimants who do not accept the offer of a settlement retain the right to raise a claim for the same work. Under the current provisions, once the benefit of a settlement is offered to an employee, they can no longer raise a pay equity claim for the same work, unless there are “exceptional circumstances” (section 13Z(4)).

33. Under the proposed bargaining structure, unions will need to be able to raise a claim with an employer, irrespective of individuals having settled individual claims (and vice versa). If the offer of a prior settlement alone can bar the right to raise a new claim, as under the current provisions, this would preclude unions from exercising a right to raise their own claim.

34. As there is no requirement to consolidate claims within an employer, there is also a risk that a pay equity settlement negotiated with a single, vulnerable individual will be offered to other employees. Providing an ability to decline a settlement and raise a separate pay equity claim gives some protection to employees. It would also incentivise employers to offer a settlement that is likely to be accepted by the majority of employees, in order to mitigate the risk that further claims will be raised for the same work. Unions would be incentivised to take a claim earlier, to ensure that the union claim is settled first and is the settlement that is offered by the employer.

Second systemic change: Consolidation of claims across multiple employers

35. We propose to amend the Bill so that, if either employees or employers seek to consolidate across multiple employers, the other party may opt out only if they have genuine reasons based on reasonable grounds for doing so.

36. Under the current provisions of the Bill, employers can decide whether to consolidate pay equity claims for the same work across multiple employers. Claimants do not have a say in whether multiple employers consolidate, and they do not have the ability to require employers to do so. At the conclusion of consolidated bargaining, employers are required to enter into separate settlement agreements with their claimant employees.

37. Several submitters throughout the Select Committee process sought a more balanced employer and employee 'voice' in the multi-employer consolidation of pay equity claims. On 6 March 2019, the Cabinet Economic Development Committee deferred a decision on whether to amend the provisions in the Bill relating to consolidation of pay equity claims across multiple workplaces [CAB Min 19/0073 refers].

38. In consultation, the social partners expressed the view that multi-employer pay equity bargaining should be more closely aligned with the multi-employer collective agreement (MECA) bargaining processes under the ERA. This change would also more closely align with the removal of the requirement to consolidate claims within an employer.

39. In addition, we propose to enable unions to raise a pay equity claim across multiple employers where they have members performing the work that is the subject of the claim, in advance of the claim being agreed to be arguable. This will give a greater ability for unions to request consolidation, compared with employers, as they will be able to request consolidation at the same time as they raise a claim. We propose that the ability to add subsequent employers into the negotiations would only be possible by agreement of the original parties to the multi-employer bargaining – this would work in a similar way to multi-employer bargaining under the ERA. This proposal will also be reflected in the transitional provisions to the Bill (current multi-employer claims will transition over with their existing parties and new parties may only be added by mutual agreement).

40. Employers will only be able to request consolidation where a union has raised a claim in advance of seeking consolidation. There will be no formal mechanism for employers or employees to request the consolidation of non-union claims across multiple employers.

41. The implication of this proposal is that pay equity bargaining may result in bargaining structures that are broader than existing multi-employer collective agreement boundaries. Free and frank opinions , and private sector employers that would usually enter into single-employer agreements may be required to bargain across multiple employers. This proposal may also result in

employers being involved in bargaining multi-employer union claims at the same time as non-union claims for the same work within their workforce.

42. In order to implement these changes, we propose that:

- individual non-union claimants would not be involved in any multi-employer bargaining, but would be offered the opportunity to join the claim as per the process described above for single employer claims
- as in the case of claims within a single employer, if there is more than one union that raises a claim for the same, or similar, work across multiple employers, those claims would be consolidated
- further design considerations will need to be worked through, in line with the policy intent, to operationalise the multi-employer consolidation process.

43. The Ministries of Education and Health would prefer that consolidation is at the employer's discretion. Free and frank opinions These agencies have indicated a preference for the status quo where consolidation is at the employer's discretion. Free and frank opinions

There are a number of changes that flow on from the proposed multi-employer consolidation process

Timeframe for determining whether a claim consolidated across multiple employers is arguable, and the extent of information provided in raising the claim

44. We recommend that, for union claims that are raised across multiple employers from the outset:

- employers are able to extend the timeframe to determine 'arguable' (i.e. after the 45 working day timeframe) up to a maximum of 80 working days, with a possibility to extend for a longer period if parties to the bargaining agree;[2] and
- there should be an amendment to the provisions on raising a claim, to require unions to provide more specificity of the work that is the subject of the claim, e.g. unions may be required to provide a description of how the employees' work that is the subject of the claim is the same, or substantially similar, if multiple roles are included in the claim.

[2] Even with this extension period, some employers may find it difficult to meet any set timeframe. For example, over 2,000 health sector employers could potentially be impacted by a single claim raised against multiple employers, making it difficult to predict how much time they would need to adequately consider the claim.

45. Multi-employer claims have the potential to be more complex and larger than single-employer claims. They may also involve disparate employers across different regions. Particularly for large, complex claims, there may not be enough time to work through any initial scope issues across multiple employers (especially for broadly scoped claims) and any processes to make a determination as to whether a claim is arguable.

46. Under the current provisions of the Bill, an employee or group of employees raise a claim with their employer. The claim must set out the employee's occupation, position, and a brief description of the work performed by the employee. Based on the information that the employer has been given, they will decide which other employees perform the same or similar work which they will then be obliged to notify. The description of the work in the claim also forms the basis of the decision as to whether the claim is arguable.

47. If unions are able to raise claims across multiple employers from the outset, they are likely to raise broad claims, where the scope of the work of the claim is not clearly defined. We have observed this in practice with two recent claims for administration and clerical staff in both the health and public sectors. Such broad claims covering multiple occupations and roles, would make it difficult for employers to determine their scope and whether they are arguable within the prescribed notification timeframes in the Bill. For example, some State sector claims have taken between one and one and a half years to scope. It may also make it more difficult for employers to determine at an earlier stage whether they have genuine reasons based on reasonable grounds for opting out of multi-employer consolidated pay equity bargaining.

Settling a multi-employer pay equity agreement

48. Currently under the Bill, if multiple employers settle they must enter into separate pay equity settlement agreements at the conclusion of multi-employer bargaining. In aligning further with the MECA bargaining approach, we propose to amend the Bill to provide that the default outcome of a multi-employer bargaining situation is the settlement of a multi-employer pay equity agreement (with an ability for employers to opt out if they have genuine reasons, based on reasonable grounds). This would ensure more consistent terms of settlement for a workforce that was the subject of the consolidated claim. It would still be possible for multi-employer pay equity settlements to include variations for different employers, taking into account the possibility that there may be employers with different characteristics who may not have a significant voice at the bargaining table.

Other Changes

Timing of the choice of proceedings

49. We propose to amend the Bill to allow claimants to retain their right to a choice of proceedings until they file an application for a determination to fix terms and conditions with the Authority, or when settlement of the claim is achieved. Under the current provisions of the Bill, *raising* a pay equity claim has the effect of extinguishing an employee's right to pursue a personal

grievance under the ERA, or make a complaint of unlawful discrimination under the *Human Rights Act 1993* (the HRA), relating to the same circumstances.

50. The choice of proceedings provisions in the Bill were designed to align with the policy intent behind section 112 of the ERA and section 79A of the HRA. The intent is to prevent venue shopping, overlapping proceedings about the same issue, and an unsuccessful applicant in one jurisdiction having an opportunity to try again, in relation to the same set of circumstances.

51. However, under the ERA and HRA, claimants do not extinguish their right to take a claim under an alternate legal avenue until the point of *filing proceedings* (with the Employment Relations Authority or Human Rights Tribunal, respectively). In other words, the choice of proceedings is not exercised until proceedings are filed. Under the current provisions in the Bill, pay equity claimants effectively make a choice of proceedings at an earlier point (i.e. at the point of raising), than individuals pursuing other discrimination claims.

52. Where the facts of a claim give rise to multiple avenues, it is important that the employee assesses their likelihood of success and is informed about what the claim types are, and the possible outcomes of each of the avenues, before they proceed. The threshold for raising a pay equity claim is lower than that for making an application for relief to the Authority or the Human Rights Review Tribunal, and it is possible that individuals could raise a pay equity claim (and therefore make an election under the Bill) prior to obtaining advice regarding their options or appreciating their best course of action.

53. If we amend the Bill to allow claimants to retain the right to a choice of proceedings until the end of the bargaining process, this will more closely align the Bill with the timing of the choice of proceedings under the ERA and HRA, and give claimants more time to assess their likelihood of success under the pay equity bargaining process. However, it may mean that parties expend considerable time and resources in pay equity bargaining, only to have to deal with the same issue under an alternate legal avenue.

54. The implication of a union settling a claim, or filing an application for a determination with the ERA to fix terms and conditions, is that the union's members will lose the ability to pursue alternate legal avenues relating to the same circumstances.

Timeframe for determining whether a claim within an employer is arguable

55. We propose to specify a maximum extension period of 20 working days for a single employer to make a decision on whether the claim is arguable. Under the current provisions of the Bill, after receiving a claim, the employer has 45 working days to form a view as to whether the claim is arguable, before it is deemed to be so by default. The Committee decided to amend the Bill to provide employers with the ability to extend this timeframe if they have genuine reasons, based on reasonable grounds.

56. The ability to extend for an indefinite period presents the risk that an employer may unnecessarily delay the commencement of pay equity bargaining. Given that the threshold for entering bargaining is intended to be low and to require only a 'light-touch' assessment, the majority of employers should not need more than 45 working days to consider whether a claim for an occupation in their workplace meets the arguable threshold. We therefore propose to specify a maximum extension period of 20 working days.

57. This change to the timeframe poses risks for large employers that receive multiple, complex claims. State sector employers have encountered extensive resource pressure created by dealing with multiple or complex claims. Similar problems may arise in the private sector, particularly for employers that have little experience with pay equity issues. A maximum of 65 working days may not be sufficient for these situations..

58. These risks are exacerbated further when there are multiple employers involved so we have proposed a longer maximum extension period for employers involved in multi-employer consolidated bargaining (as recommended in paragraph 44).

Timeframe for notifying affected employees

59. We propose to specify a maximum extension timeframe of 25 working days for an employer to notify affected employees that a claim has been raised. Under the current provisions of the Bill, an employer has 20 working days to scope the occupation for which a pay equity claim is raised, and notify employees who perform work that is the same as, or substantially similar to, the work performed by the claimant. The Committee decided to amend the Bill to provide employers with the ability to extend this timeframe if they have genuine reasons, based on reasonable grounds.

60. We consider that setting a maximum period for extension will mitigate the risk of employers using the ability to extend to delay the start of bargaining. It will allow those employers that have reason to extend their time to do so, while balancing the need for an expedient pay equity process for employees. This may however lead to the over- or under- notification of employees if employers have been unable to adequately scope the work of the claim within the 45 total working days available.

Ability to re-open settlement agreements where the bargaining process was unfair

61. We propose to allow individual employees to challenge pay equity settlement agreements on the basis that the bargaining process was unfair, where unfairness is based on section 68 of the ERA (which considers undue influence and duress, etc). Under the Bill, an employee cannot raise a pay equity claim for work that is already covered by a pay equity settlement to which the employer is a party, unless the Authority or Court is satisfied that there are 'exceptional circumstances' (likely to be a high threshold). The Bill does not provide a bespoke mechanism for re-opening unfairly negotiated settlements.

62. We consider that there is a gap in the regime in relation to the protection of vulnerable, non-unionised employees in situations of individual bargaining where there is no union presence. There is a risk that vulnerable employees may be induced into agreeing to terms and conditions of a pay equity settlement which are unfair, due to the imbalance in bargaining power between employers and employees. The most appropriate way to address this gap is to provide a protection against unfair bargaining that is similar to that provided for in the ERA.

63. Section 68 of the ERA states that bargaining for an individual employment agreement is unfair if the employer is aware that certain factors are present, such as the diminished capacity of the employee, the presence of undue influence or duress, or the lack of opportunity to seek advice. If proven, the Authority is able to award a range of remedies such as awarding compensation, cancelling or varying an agreement or any other order it thinks necessary. This change should improve protections for vulnerable employees and allow those subject to an unfair settlement to raise a new claim.

The settlement review process

64. We propose to provide greater guidance in the Bill for the settlement review process. Pay Equity Principle 16 states that any equal pay established must be reviewed and kept current. The review process, as part of the settlement terms and conditions, is intended to provide a process to ensure that pay equity is maintained over time.

65. Under the Bill, a pay equity settlement must include a process for reviewing the remuneration and employment terms and conditions to ensure that pay equity is maintained. It also must specify the frequency of those reviews. However, the Bill does not currently specify how parties must undertake a review or what the review must entail.

Content of reviews

66. We propose to provide that parties may have regard to any matters contained in sections 13L (assessment) and 13M (comparators) that they mutually consider relevant to reviewing the settlement. This would signal to parties to turn their minds to the same matters they considered when first assessing whether the occupation was undervalued. This will provide some protection against parties agreeing to a review process that does not maintain pay equity.

Frequency of reviews

67. Under the Bill, reviews of pay equity settlements must be aligned with any applicable collective bargaining rounds. However there is no specified frequency for reviewing claims where there is no applicable collective bargaining round (i.e. for individual pay equity claim settlements). This may pose the risk that parties will not review the settlement agreement consistently to ensure that pay equity is maintained. We consider that three years is a reasonable maximum time period that balances the compliance costs on both

parties and the ongoing duty of the employer to provide for pay equity. It will also be similar to the frequency of the reviews that are aligned with collective bargaining rounds.[3]

Alternative processes

68. We propose to remove the ability for parties to use an alternative process in assessing a pay equity claim. Under the current provisions, parties to a pay equity claim may enter a written agreement that sets out an alternative process from that in section 13L, that they agree is suitable and sufficient to reach a pay equity settlement.

69. The option to undertake an alternative process presents the risk that core requirements of the pay equity assessment process, as determined by the JWG, can be by-passed. An alternative process could result in employees agreeing to inadequate or unfair processes that undermine reaching a just and equitable settlement. It could tempt parties to settle for less than equitable pay increases to save time. We therefore propose that parties should be required to follow the full assessment process as set out in the Bill (section 13L).

70. There is a small risk that some claims (of which we are not aware) currently being progressed in the private sector are using an alternative process (or that existing settlements have used an alternative process). Removing the alternative process would mean that any settlement agreements for claims that followed an alternative process prior to the Bill's enactment may not be treated as pay equity settlement agreements for the purposes of the Bill. This would allow claimants to raise a new claim under the Bill with parties having to go through the full pay equity process from the beginning.

Reference to undervaluation and consideration of matters at the assessment stage

71. Under the current assessment provisions (section 13L) in the Bill, parties to a pay equity claim must determine whether the employee's work is *currently* undervalued. The Select Committee removed the words "*or has historically been undervalued.*" We propose to additionally remove the word "currently" so that the provision states that parties "must determine whether the employee's work is undervalued," (while retaining the policy intent that the purpose of assessment is to identify current undervaluation).

72. The policy intent of the assessment process is to determine whether, and the degree to which, the work is currently undervalued as the basis for requiring bargaining intended to address it. However, the NZCTU perceives that the removal of the words "or has historically been undervalued," in the reference to undervaluation may signal to parties that they cannot use evidence of historical undervaluation in assessing the real value of women's work. To address this concern, we propose to remove the word "currently" and instead

[3] The maximum permissible term of a collective agreement is three years.

state that parties “must determine whether the employee’s work is undervalued.”

73. There is a risk that this change in wording would be seen to signal a shift in policy intent – the removal of “currently” could increase ambiguity over whether undervaluation should be read as something other than current (i.e. historical undervaluation alone).

74. In addition, under the current Bill, parties ‘may’ consider section 13C matters (undervaluation factors that may be considered at the arguable stage – origins of the work; social, cultural, historical factors, etc.) at the assessment stage (s13L). We propose to amend the provision at s13L to make it mandatory to consider the matters in s13C (origins of the work; social, cultural, historical factors, etc). This could better ensure that parties conduct a thorough assessment of the value of the work.

The regulation-making power

75. We propose to amend the terms of clause 24 to specify that the regulation-making power cannot be used to insert a hierarchy of comparators. Under the current provisions of the Bill (clause 24), regulations can be made to prescribe matters that must be taken into account when assessing a pay equity claim, or identifying comparable work.

76. The regulation-making power affords some flexibility so matters relevant to assessment and comparable work can be added, removed and amended as the legislation imbeds. However, there is a risk that the regulation-making power could be used to insert a hierarchy of comparators, i.e. provide that certain comparators must be looked at in priority to others. Regulations requiring too onerous an assessment process would not be consistent with the purpose of the Bill.

The threshold in the transitional provisions for claims to continue under the *Equal Pay Act*

77. We recommend lowering the threshold from a case having been ‘determined’ to allow those claims which are in the process of being ‘heard’ by the Authority or Court, by the time of enactment, to continue undisturbed by the Bill. Under the current provisions of the Bill, every existing pay equity claim that was formally commenced in the Authority or Court before the date on which the amendment Act came into force is discontinued, and must transition to the new pay equity regime. The definition of ‘existing pay equity claim’ excludes any claims that were determined by the Authority before the Bill is enacted.

78. We recommend lowering the threshold to recognise that there may be claims that have made substantial progress by the time the Bill is enacted, an eventuality that was not foreseen when the transitional provisions were first drafted.

Dispute resolution process for deciding whether there are 'exceptional circumstances' to raise a claim

79. We propose to align the dispute resolution process for the 'exceptional circumstances' threshold with the dispute resolution process for the arguable threshold. Under section 13Z(4) of the Bill, a claimant cannot re-raise a claim for work that is already covered by an existing pay equity settlement, unless the Authority or courts are satisfied that there are 'exceptional circumstances.' However, the current drafting of the Bill is unclear whether parties must go through mediation and facilitation before seeking a determination from the Authority as to whether there are 'exceptional circumstances.'

80. We consider that the dispute resolution process for the 'exceptional circumstances' threshold should be aligned with the dispute resolution process for the arguable threshold, as both are threshold issues. This means that the Authority would consider whether mediation (or further mediation) had been undertaken, when considering an application for determination on the question of 'exceptional circumstances'. Parties could also use facilitation where they both agree it would be useful (the Authority would not be able to direct parties to facilitation).

Threshold for fixing of conditions

81. We propose, in line with the JWG recommendation, to insert the wording 'within a reasonable period' after the requirement to exhaust 'all other reasonable alternatives' before applying for a determination to fix terms and conditions. Currently under the Bill, the Authority can only accept an application for a determination that fixes terms and conditions if parties have first tried to resolve difficulties by mediation and the Authority is satisfied that all other reasonable alternatives have been exhausted.

82. In their original letter of recommendations (24 May 2016), the JWG stated that, for fixing terms and conditions, the Authority must be satisfied that all reasonable alternatives for reaching agreement have been exhausted within a reasonable period.

83. Amending the Bill to reflect the JWG recommendation would allow the Authority or court the discretion to look at the individual circumstances of each case, to decide what a reasonable period would be for those parties to spend in the bargaining process. This would mitigate the risk that disputes are dragged out where parties cannot come to an agreement.

Access to settlement agreements

84. To better facilitate access to information about past settlements, we recommend allowing pay equity settlement agreements to be accessed under the *Official Information Act 1982* (the OIA). This will facilitate parties to access some information that may be useful to their claim. The release of information would be subject to the usual application of the OIA withholding grounds, as assessed on a case by case basis.

85. Under the Bill as reported back from Select Committee, copies of all pay equity settlement agreements must be sent to the Chief Executive of MBIE and that these would only be useable for statistical or analytical purposes. We are strengthening access to these agreements.

86. The JWG and the RJWG stressed the importance of access to information that would support employers and employees to progress pay equity claims.

87. A previous cabinet paper outlined further policy work needed to develop a pay transparency model. We intend to progress this work following the passage of the Bill. Enabling parties to access settlement information under the OIA will provide an interim assistance to employers and employees while this work is underway.

Light-touch nature of the arguable threshold

88. Concerns have been raised that the arguable provisions are being applied in an onerous way. This would be counter to the policy intent that the threshold to enter pay equity bargaining requires only a "light-touch" assessment of arguability. We therefore propose to strengthen the Purpose Statement for Part 4 of the Bill to clarify the light-touch nature of the arguable threshold.

Scope of 'remuneration' and 'terms and conditions of employment' and employer obligations under the Bill

89. We are continuing to do further work on the scope of the meaning of 'remuneration' and 'terms and conditions of employment' under the Bill and may bring a separate paper to Cabinet on this issue in early 2020.

Guidance and support will be required

90. It will be important for parties to have guidance and support where needed to work through the pay equity process, including any disputes that may arise. This support includes guidance and tools, including tailored information for employees and employers. Greater levels of support to employers and employees will be required as pay equity relies on understanding and rectifying the systemic discrimination against female-dominated occupations as a group, not just against individual women.

91. The Employment Relations Authority and the Mediation Service received funding in Budget 2017 to increase capacity for pay equity dispute resolution. MBIE received an appropriation of $1 million in Budget 2019 to develop guidance, tools and data for people making pay-equity claims and for employers who consider those claims.

92. Confidential advice to Government

93. Individual employees in non-unionised workplaces in the private sector have particular vulnerabilities, requiring support and access to information. Assisting these individuals and ensuring the gender element of this wider policy issue is represented is important to ensure fairness across all possibly affected employees in New Zealand.

94. This funding would complement pay equity resources and services provided by MBIE and SSC, and would be one part of a larger work programme towards closing the gender pay gap.

Consultation

95. This paper was prepared by the Ministry of Business, Innovation and Employment and the Ministry for Women. The following agencies were consulted on this paper: the Department of the Prime Minister and Cabinet, the Treasury, the Ministry of Health, the Ministry of Social Development, Te Puni Kōkiri, the Inland Revenue Department, Ministry for Primary Industries, the Ministry for Pacific Peoples, Statistics New Zealand, Oranga Tamariki, the State Services Commission, the Ministry of Justice, and the Ministry of Education. Feedback received from these agencies has been reflected in the paper.

96. Te Puni Kōkiri has provided the following feedback:

Wāhine Māori are highly represented among occupation groups that have already raised pay equity claims, and in occupation groups that we anticipate may raise pay equity claims in future. The systemic underpayment of wāhine Māori has been noted as a significant issue in statements of claim as part of the Mana Wāhine Kaupapa Inquiry. As a Treaty partner, the Crown has a responsibility to ensure that the Bill will deliver a system to remove the undervaluation of work predominantly performed by Māori women, rather than further entrenching existing inequalities between groups of women.

The gender pay gap is closely interrelated with other forms of discrimination such as racism – Māori women and Pacific women experience significantly worse pay gaps than European women. Some of the proposals in this paper (such as automatic inclusion of non-unionised employees in union-led claims, and allowing individual claimants to challenge pay equity settlement agreements on the grounds of an unfair bargaining process) are specifically intended to minimise the risk of unfair outcomes for employees who have limited resources or bargaining power. We also intend that tools and resources developed to support the implementation of the Bill will recognise that women have a diverse range of needs and priorities, and as such we must go beyond a one-size-fits-all approach, to provide targeted assistance that will ensure the most vulnerable groups of women can progress claims if they wish to do so.

Financial implications

97. The Crown faces fiscal liability under the current court-based pay equity regime and this liability will remain in the proposed pay equity legislation. However, the changes to the existing legislative provisions proposed in this

paper may change the Crown's financial liability relative to the current provisions. It is uncertain how this financial liability might change, although we consider it is likely to increase.

98. Free and frank opinions

99. There may be further long term economic benefits associated with addressing pay equity issues, such as a marginal improvement in productivity and reduced turnover, and through increased wages, but these impacts would be difficult to quantify.

100. Ambiguity in the wording of the legislation can also create fiscal risks as it creates more room for dispute between the parties. These risks can be mitigated by ensuring the wording matches the policy intent.

Risks

101. Risks of the proposed changes are highlighted throughout the paper. The key risks of the changes to the bargaining structure include:

- employers could be required to enter into multiple pay equity bargaining processes for employees doing the same or substantially similar work
- there may be different settlements for pay equity claims for the same work within the same employer
- enabling unions to seek consolidation of claims across multiple employers Free and frank opinions could result in large and complex claims that take a long time to progress, with significant fiscal risks
- the opt-out of union representation proposal may raise significant privacy issues

102. Inconsistencies arising from these multiple processes could be reduced by providing non-union employees the opportunity to join the union claim (opt-out) or be offered the benefits of that settlement. Officials will also consult with the Privacy Commissioner on the mitigation of any privacy issues.

Legislative implications

103. The Bill was referred to the Education and Workforce select committee in September 2018. The select committee reported back to Parliament on the Bill in May 2019, expressing unanimous support for the Bill.

104. The decisions in this paper will form the basis of a supplementary order paper to be presented when the Bill progresses to second reading, in mid-2020.

Human rights

105. The proposal that requires non-union members to 'opt-out' of union representation poses some freedom of association issues, as employees would be obliged to take action to not be represented by the union and retain their individual right to take a claim (up to the point that the settlement is ratified). This limitation on the freedom of association is justified given the assumption that a union will be better equipped to represent pay equity claimants in bargaining, and this is likely to secure more consistent and robust pay equity outcomes for employees. This proposal assumes that most employees would wish to be part of the union claim, so the choice to 'opt-out' would involve less compliance costs than one to actively 'opt-in.'

106. In our view any such limitation on the freedom of association is justified under section 5 of the New Zealand Bill of Rights Act 1990 (the BORA) because:

- It is a necessary restriction to implement a scheme to address the systemic undervaluation of women's work through an accessible bargaining framework:

- The limit is in due proportion to the importance of the objective and does not limit section 19(1) of the BORA any more than reasonably necessary. Specifically, it does not require non-union employees to become union members in order to benefit from a union-negotiated pay equity claim settlement, and provides an avenue for them to opt out of union representation

- It provides an individual avenue for bargaining the claim, rather than requiring all claimants to consolidate their claims into a single process within the employer (as per the status quo)

- It provides an individual avenue for bargaining the claim, rather than requiring all claimants to be consolidated into a single process within the employer).

107. This limitation is consistent with accepted jurisprudence that the rights affirmed in the BORA are not absolute and may be subject to reasonable limits. The courts have recognised that "individual freedoms are necessarily limited by membership of society and by the rights of others."[4] We note that the proposals in this paper are particularly directed at addressing structural discrimination that prevents full participation in society. The proposals in this paper aim to address those structural barriers in a way that is most likely to see that sex-based discrimination leading to the undervaluation of female-dominated work is addressed.

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

[4] *Bill of Rights Act s5*

109. 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.

Gender implications

110. Amending pay equity legislation will have significant gender implications. Updating the Equal Pay Act to implement pay equity and shift it from a litigation framework to a bargaining framework in line with the Employment Relations Act and other law, may have gender implications for employees and employers. These implications may be larger for individual and small group pay equity claimants including low-paid or vulnerable employees, and SMEs. Information, guidance and support will be important for parties to identify and progress pay equity claims.

111. Women employees in undervalued female-dominated jobs, especially women facing intersecting forms of discrimination, may encounter barriers to raising and progressing pay equity claims. These include: Māori and Pacific women, disabled women, older women, rural women, lesbian, bisexual and trans women and others. These circumstances should be considered and addressed by a pay equity regime. The regime includes a pay equity law, any regulations and guidance, and other tools and information.

112. Elements of the legislation may be contentious with some stakeholders, especially in relation to the possible limitations on back pay and the transitional provisions.

Disability perspective

113. With the limited data available it is likely that disabled women may be especially affected by pay equity issues. Disabled women tend to have lower rates of employment and labour market participation than other women, and may be overrepresented among low-paid employees including in female-dominated workforces. There will be many women working in the disability sector in a range of roles which may involve pay equity issues.

114. Disabled people doing work that is predominantly done by women need accessible assistance, guidance and services to enable them to fully participate in a claims-based pay equity regime. Likewise, disabled employers responding to pay equity claims may require accessible assistance and information to respond to claims.

115. The threshold (i.e. a claim must be arguable) for entering the pay equity bargaining process is intended to be low which will make it easier for claimants, including disabled people, to make a claim. In addition, the range of accessible formats for Employment Services products will be available for products relating to pay equity, including PDFs that are readable by web browsers.

Impact analysis

116. MBIE's Regulatory Impact Analysis Review Panel has reviewed the attached Regulatory Impact Statement prepared by MBIE and the Ministry for Women. The Panel considers that the information and analysis summarised in the Statement partially meets the criteria necessary for Ministers to make informed decisions on the proposals in this paper. While two major stakeholders, BusinessNZ and the NZCTU, have been consulted, the Panel was concerned that other affected stakeholders, particularly small businesses, were not consulted, and given the stage that the Bill is at, there will be little, if any, opportunity for these stakeholders to have a say on these proposals. This means there is a risk that the impacts of these changes have not been fully considered.

117. Note that a Regulatory Impact Analysis (RIA) was prepared in accordance with the necessary requirements and submitted at the time that the Economic and Development Committee approved policy relating to the Bill in May 2019 [DEV Min 18/0104 refers]. RIAs regarding related policy choices for the Bill are available on the MBIE website.

Publicity

118. There is no publicity associated with the proposals in this paper.

Proactive release

119. The Ministry for Business, Innovation and Employment plans to proactively release this paper on its website subject to any necessary redactions.

120. The Ministry for Women may also proactively release this paper on its website, subject to any necessary redactions.

Recommendations

The Minister for Workplace Relations and Safety and the Minister for Women recommend that the Committee:

First systemic change: Removal of the requirement to consolidate all pay equity claims within an employer

1. **Agree** to enable unions to raise pay equity claims on behalf of their members within an employer

2. **Agree** to rescind the decision [CAB Min 18/0250 refers] that a single employer may combine multiple claims for the same work into a single pay equity bargaining process and settlement

3. **Agree** to remove the existing requirement that employers consolidate all pay equity claims for the same or substantially similar work

4. **Agree** to require multiple unions that raise a claim for employees that perform the same, or substantially similar work, within an employer, to consolidate their claims

5. **Agree** to require unions to represent non-union employees for the purposes of pay equity bargaining, unless employees choose to opt out

6. **Agree** to require employers to offer the terms of a union pay equity settlement to other employees who perform the same or substantially similar work

7. **Agree** that employees who have accepted the offer of a pay equity settlement are not able to raise a pay equity claim for the work that is the subject of that settlement

Second systemic change: Consolidation of claims across multiple employers

8. **Agree** that if either unions or employers seek to consolidate pay equity claims across multiple employers, the other party may opt out of multi-employer consolidated bargaining only if they have genuine reasons based on reasonable grounds

9. **Note** that there will be no formal mechanism for employers or employees to request the consolidation of non-union pay equity claims across multiple employers

10. **Agree** that unions have an ability to request consolidation across multiple employers at the point of raising a claim, and in advance of the employer making a decision about whether the claim is arguable

11. **Agree** to specify a maximum extension timeframe of 80 working days for deciding whether a claim is arguable in the context of multi-employer bargaining, and longer if both parties agree

12. **Agree** to provide that unions can be required to provide more specific information about the employees' work that is the subject of a claim raised across multiple employers

13. **Agree** that the default outcome of a multi-employer bargaining scenario will be the settlement of a multi-employer pay equity agreement (with an ability for individual employers to opt out and agree separate settlements, if they have genuine reasons, based on reasonable grounds)

Other changes

14. **Agree** to allow claimants to retain their right to a choice of proceedings until they file an application for a determination to fix terms and conditions with the Authority, or when settlement of the claim is achieved

15. **Agree** to specify a maximum extension timeframe of 20 working days for deciding whether a claim is arguable within an employer

16. **Agree** to specify a maximum extension timeframe of 25 working days for notifying affected employees that a claim has been raised

17. **Agree** to make it mandatory that parties consider section 13C matters (origins of the work; social, cultural, historical factors etc) at assessment

18. **Agree** to provide that parties must exhaust all other reasonable alternatives within a reasonable period to be able to apply for a determination to fix terms and conditions

19. **Agree** to remove the ability for parties to use an alternative process when assessing the claim

20. **Agree** to lower the threshold of the application of the transitional provisions from a case having been 'determined' to allow those claims which are in the process of being 'heard' by the time of enactment to continue

21. **Agree** that a review process will allow parties to agree the matters in sections 13C (undervaluation factors), 13L (assessment of the work) and 13M (assessment of comparators) that they consider relevant when reviewing the settlement

22. **Agree** that, where there is no applicable collective bargaining round parties must review the pay equity settlement agreement at least every three years

23. **Agree** to insert a provision allowing parties to challenge pay equity settlement agreements on the basis that the bargaining was unfair, where unfairness is based on section 68 of the ERA (which considers undue influence and duress, etc)

24. **Agree** to amend the regulation-making power so that it cannot be used to reinsert a hierarchy of comparators

25. **Agree** to allow for the Official Information Act 1982 to apply to pay equity settlement agreements collected by the Ministry of Business, Innovation and Employment

26. **Note** that officials intend to work with Crown Law and the Parliamentary Counsel Office to ensure that certain provisions in the Bill reflect the policy intent, including that the arguable threshold requires only a 'light-touch' assessment

27. **Note** that ministers are working through the issue of remuneration and the scope of terms and conditions of employment, and may bring a separate paper to Cabinet in early 2020

28. **Note** the wording in section 13L will be amended to remove "currently" so parties must determine whether work "is undervalued" but that this change is not intended to change the current policy intent

29. **Note** these changes will have an impact on the Crown as an employer. The changes proposed to the structure of pay equity bargaining are likely to have financial implications

30. **Note** that pay equity claims are proceeding alongside the development of the Bill in accordance with the Pay Equity principles and that any significant deviation from these principles may affect claims in process**.** Officials will monitor this and provide advice as needed

31. Confidential advice to Government

32. **Agree** that a supplementary order paper be drafted to amend the Bill to give effect to the policy proposals in this paper

33. **Invite** the Minister for Workplace Relations and Safety and Minister for Women to issue drafting instructions to Parliamentary Counsel Office giving effect to the policy decisions in this paper

34. **Authorise** the Minister for Workplace Relations and Safety and the Minister for Women to make decisions, consistent with the policy proposals in this paper and recommendations, on any issues that arise during the drafting process.

Authorised for lodgement
Hon Iain Lees-Galloway
Minister for Workplace Relations and Safety

Authorised for lodgement
Hon Julie Anne Genter
Minister for Women

Appendix 1: Social partners' expectations for development of new Equal Pay Act

Appendix 2: Flow chart of proposed pay equity process

5 September 2019

Hon. Iain Lees Galloway – Minister of Workplace Relations and Safety

Hon. Julie- Anne Genter – Minister for Women

Via email

Dear Ministers Lees Galloway and Genter,

Re: Social partners' expectations for development of new Equal Pay Act

This is to convey to the Government the voice of the social partners – Business New Zealand (Business NZ) and the New Zealand Council of Trade Unions (NZCTU) – on our expectations in relation to the development of the new Equal Pay Act.

Business NZ and the NZCTU both participated fully in the Joint Working Group on Pay Equity Principles and in the Reconvened Join Working Group. In doing so, we agreed on a sensible framework for negotiating and settling pay equity claims within the current New Zealand context. While there was a single issue of disagreement concerning the use of comparators in the original report, aside from that, we reached full agreement. The report of the Reconvened Joint Working Group contained only unanimous recommendations, which built on the original report.

Given the level of consensus between the social partners in this process, it is our expectation that the drafting and adoption of a new Equal Pay Act would be relatively straight forward and would align very closely to the Joint Working Group / Reconvened Join Working Group reports. We are concerned that officials may be promoting something different.

In particular, we are concerned that there is a move away from a central element of the proposed framework – the primacy of bargaining in accordance with the existing framework under the Employment Relations Act 2000 (ER Act). This is in contrast to the (R)JWG, where we established a shared expectation and commitment to the primacy of existing bargaining

processes. This understanding and commitment was evident from the start of the process and throughout.

From the beginning, the formal Terms of Reference (TOR) for the Joint Working Group on Pay Equity Principles said under the section headed 'Parameters and Scope', that the JWG was asked to recommend principles that are '7.b. Consistent with New Zealand's existing employment framework, legislation, roles and institutions'.

During and throughout our discussions in the Working Group(s), there was a strong and clear reference to existing individual and collective bargaining approaches as per the ER Act without any suggestion otherwise from participants. There are multiple references in JWG documents confirming this. In 2015 the official materials record "considerable commonality especially around commitment to working within mechanisms available through the existing employment framework and the value of improving the efficiency of current processes" in alignment to the ER Act. In 2016 the NZCTU formal written proposal for resolving pay equity issues said "an individual employee or union raises a concern" to which the official records state the Government "agree".

The Government representatives submitted a draft pay equity proposal to the JWG which stated that legislation/guidance for initiation of a claim should provide for "a specific right for an employee/union to request pay equity and a consequent obligation on their employer to respond". This was to be "guided by current bargaining provisions: for collective bargaining, parties make best endeavours to agree on process for conducting bargaining in an effective and efficient manner, meet from time to time, etc, for individuals, general good faith provisions or could consider other options to improve the effectiveness of bargaining".

At no time was there any mention about the concept of any other approaches to claiming, negotiating or settling claims outside of the ER Act. It was agreed that there is a need to amend the ER Act, especially in relation to referral to the Authority/Court in instances that could not be negotiated, but not in a way that would interfere with the fundamental process of individual or collective bargaining and the role of unions.

Further evidence in support of our understanding is clear in the recommendations of the JWG (as adopted by the Government) which explicitly stated that pay equity would be implemented "using the existing good faith bargaining arrangements of the Employment Relations Act 2000 as the platform".[1]

In addition the JWG recommended that the Government adopt the process that was illustrated in Appendix 1 attached to the recommendations. Appendix 1 states that bargaining between the parties would be "guided by the current ER Act conditions for bargaining. The public statements by both MBIE and the Ministry for Women were consistent with the above agreements. The Amendment Bill would "allow workers to make a pay equity claim within New Zealand's existing bargaining framework".

[1] JWG Recommendations 24 May 2016 pg 2.

There is a strong logic to using the existing employment framework, legislation, roles and institutions as the TOR established. These are well established rules, practices and processes that don't need to be reinvented. Creating alternatives is time consuming and adds complexity with multiple potential unintended consequences. This is an untested system. The JWG was clear that they wanted to stick to bargaining as we know it as set out in the ER Act.

So it is concerning to Business NZ and the NZCTU that officials appear to be moving away now from our core understandings of the JWG and entertaining concepts such as other forms of collective bargaining that do not involve existing rules or unions. We would add that moving away from the established bargaining framework increases the chance of litigation. This runs counter to what we were all trying to achieve.

Business NZ and the NZCTU would like to meet with you at your earliest convenience to discuss these issues.

We look forward to your response.

Yours sincerely,

Kirk Hope

Business NZ Chief Executive

Richard Wagstaff

NZCTU President

Raising a claim

Within an employer

An employee or union in a female dominated workforce raises a pay equity claim with their employer, based on evidence of historic or current undervaluation

Across multiple employers

A union may raise a claim across multiple employers where they have members performing the work that is the subject of the claim, based on evidence of historic or current undervaluation. Multiple unions must consolidate their claims. Employers may also seek to consolidate union claims across employers after they have been raised. Parties may opt-out of multi-employer bargaining if they have genuine reasons, based on reasonable grounds.

Notification

An employer who has received a pay equity claim must notify all their other employees who perform the same or substantially similar work as the claimant within 20 days. If it is a union claim, all employees will be represented in the claim unless they choose to opt-out.

Decision on arguable

An employer must decide within 45 working days whether a pay equity claim is arguable (with an ability to extend for 20 working days), otherwise the employer is deemed to have accepted the claim as arguable. This does not mean that the employer agrees there are confirmed pay equity issues or that a settlement will be made. In the case of multi-employer bargaining, employers may extend the 45 working day timeframe to a maximum of 80 working days.

Bargaining process

If the employer agrees that the pay equity claim is arguable, the parties begin the bargaining process. If the employer deems the claim to be not arguable, employees may use the dispute resolution process.

Examination of the work and comparable work

The parties to a pay equity claim determine whether the employee's work is undervalued by assessing: the nature of the work and the nature of the work done by comparators; and the remuneration of the work and of comparable work.

Settlement

Parties reach a settlement which comprises of remuneration that the parties agree does not differentiate between male and female employees on pay equity grounds (they can include other terms and conditions in the settlement if they agree).

In the case where a pay equity claim has been bargained across multiple employers, parties must settle a multi-employer pay equity agreement (with an ability to opt-out, and agree separate employer-based settlements, if they have genuine reasons, based on reasonable grounds).

Employees who have accepted the offer of a settlement cannot raise a new pay equity claim for the same work.

Employers **may** choose to **offer** the terms of an individual-negotiated settlement to other employees who perform the same or substantially similar work who were not part of the process

Employers **must offer** the terms of a union-negotiated pay equity settlement to employees who perform the same or substantially similar work who were not part of the process