In Confidence

Office of the Minister for Workplace Relations and Safety

Chair, Cabinet Social Policy Committee

Employment (Pay Equity and Equal Pay) Bill: Outstanding Issues and Approval for Introduction

Proposal

1 This paper seeks approval for additional outstanding policy proposals for the Employment (Pay Equity and Equal Pay) Bill and approval to introduce the Bill to the House of Representatives.

Executive Summary

2 The Employment (Pay Equity and Equal Pay) Bill implements Cabinet's November 2016 decisions to address pay equity claims within the existing employment relations bargaining framework [CAB-16-Min-0620].

3 The Bill sets out a practical and fair process for employees working in jobs predominantly performed by women to follow if they believe they are not being paid what their job is worth due to systemic sex-based discrimination. Further information on the process is set out in Annex 1.

4 The Bill repeals and replaces the *Equal Pay Act 1972* and the *Government Service Equal Pay Act 1960*, and amends the *Employment Relations Act 2000*.

5 To enable the Bill to be finalised for introduction, I seek Cabinet decisions on outstanding policy issues, including:

5.1 Back pay: I recommend limiting back pay for pay equity claims to the period after a pay equity claim is made to an employer;

5.2 Transitional provisions: I recommend that existing *Equal Pay Act* claims that have been filed in the Employment Relations Authority or the Employment Court all transferred to be recommenced under the provisions of the Bill;

5.3 Interaction between back pay and transitional provisions: I recommend that,

5.3.1 for claims filed in the Employment Relations Authority or Employment Court under the *Equal Pay Act* prior to 26 July 2017, back pay may be awarded to the original date of filing;

5.3.2 for employees that have not filed claims but where the employer and employee have entered into a written agreement prior to 26 July 2017 to enter pay equity bargaining, back pay may be awarded to the date of that written agreement;

5.4 Regulation making power and code of employment practice: I recommend enabling regulations in relation to three key aspects of the Bill and enabling employment codes of practice for all relevant employment legislation.

6 The outstanding policy issues are likely to be contentious, as are the existing provisions in the Bill regarding the merit of claims and the proximity principle which favours jobs closer to the claimant when bargaining for pay equity rates. These issues are outlined in the following sections of this paper.

7 I seek Cabinet approval to introduce the Employment (Pay Equity and Equal Pay) Bill in July 2017 for referral to the Transport and Industrial Relations Committee prior to the dissolution of Parliament in August 2017.

Background

Interpretation of the Equal Pay Act 1972

8 Court of Appeal decisions in 2014 endorsed the view that the *Equal Pay Act* incorporates a pay equity regime for women in jobs predominantly performed by women. 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).

Pay equity and equal pay

9 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 sex – where an employer pays people differently solely because of their sex.

10 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.

11 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 a thorough assessment of the skills, responsibilities, effort and conditions of work.

A pay equity regime may have significant effects on parts of 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 (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 and historical sex-based discrimination.

13 The Employment Relations Authority (the Authority) and the Employment Court have a more determinative role in setting wages for such claims under the *Equal Pay Act* than they do in other areas of employment law. Specifically, 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.

14 It is difficult to estimate the specific impacts of the Court of Appeal's decision on the labour market. Resolving pay equity will directly benefit the women and men working in jobs predominantly performed by women that have been undervalued by raising their incomes. However, increasing wages can put pressure on businesses that have been operating with wage costs below a pay equity rate. The extent of the wage adjustments required will depend on:

14.1 the existence and degree of undervaluation due to sex-based discrimination (which is difficult to determine);

14.2 the number and timing of pay equity claims that are pursued (which is in the hands of the parties);

14.3 when any wage increases arising from pay equity claims may come into effect.

Joint Working Group on Pay Equity

16 Following the Court's decisions on the interpretation of the *Equal Pay Act*, the Government established the Joint Working Group on Pay Equity Principles (the JWG) in November 2015 to make recommendations for dealing with pay equity claims. 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 BusinessNZ[1]. In parallel, Cabinet agreed to a negotiation process as part of the response to the *TerraNova* case that resulted in the recent care and support worker settlement.

17 The JWG reported to Ministers in May 2016 and 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:

17.1 *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 sex-based discrimination;

17.2 *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;

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

17.3 *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 or courts to resolve impasses, which may involve setting pay equity rates.

18 Further information on the process is set out in Annex 1.

Government response to the Joint Working Group: Employment (Pay Equity and Equal Pay) Bill

19 In November 2016, Cabinet accepted the recommendations of the JWG to address pay equity claims within the existing employment relations bargaining framework [SOC-16-Min-0168]. The JWG was unable to reach agreement on whether the principles should guide parties in terms of industry or sectoral proximity to the employees in the pay equity claim. Cabinet decided to strengthen the JWG's proposals by requiring that comparator jobs be drawn from within the business, similar businesses or the same industry or sector when available and appropriate. If there is no comparator available within the employer, then the parties would be able to look more broadly to find an appropriate comparator.

20 Legislative change is required to implement Cabinet's decisions, place pay equity within a bargaining framework and modernise and make fit-for-purpose the remaining provisions of the *Equal Pay Act* to the extent that they are still relevant. At the time Cabinet decided to accept the JWG recommendations in November 2016, it invited the Minister for Workplace Relations and Safety to issue drafting instructions to Parliamentary Counsel Office to give effect to the policy proposals. Cabinet asked the Committee of Ministers on State Sector Employment Relations (CMSSER) to continue to oversee pay equity matters related to the state sector, the development of legislation and engagement with stakeholders on pay equity matters.

21 The Employment (Pay Equity and Equal Pay) Bill implements Cabinet's decisions. The Bill sets out a practical and fair process for employees working in jobs predominantly performed by women to follow if they believe they are not being paid what their job is worth due to systemic sex-based discrimination. The Bill repeals and replaces the *Equal Pay Act* and the *Government Service Equal Pay Act*, and amends the *Employment Relations Act*.

Consultation on exposure draft of the Bill

22 In April 2017, I approved the release of an exposure draft of the Employment (Pay Equity and Equal Pay) Bill for three weeks' public consultation. A total of 334 submissions were received, made up of submissions from 294 individuals, 13 unions or worker associations, 13 advocacy groups, seven employers or employer associations and five law firms.

23 Most submitters supported the broad policy intent to provide a fair and efficient bargaining process for addressing pay equity concerns. However, submitters raised concerns about whether the Bill as a whole achieves this intent. Key issues included:

23.1 the requirement for pay equity claims to have merit based on historic and continuing undervaluation of the work due to systemic sex-based discrimination

23.2 the proximity principle which requires comparators be drawn from within the business, similar businesses, or the same industry or sector when available and appropriate

23.3 the limitation on arrears for pay equity

23.4 the transition of existing claims under the *Equal Pay Act* to the new legislation.

24 Further information on submitters' concerns and my proposed response to each of these issues is discussed in the next section of this paper.

25 Submissions also raised a number of other issues, generally of a minor and technical nature to clarify the existing policy intent. As a result, I have made some changes to the Bill consistent with the pay equity policy framework approved by Cabinet.

Outstanding policy issues

Merit of a pay equity claim

26 Under the proposed process in the Bill, employees must make a pay equity claim to their employer in the first instance and set out the factors the employees rely on as evidence that the claim has merit as a pay equity claim. To establish merit, employees need to undertake a thorough enquiry into the reasons for historical undervaluation and continued systemic sex-based undervaluation. The provisions regarding the establishment of merit as a pay equity claim are intended to clarify the circumstances in which pay equity issues may arise.

27 After receiving a claim, an employer must then decide whether the claim has merit as a pay equity claim. If the employer agrees that the claim has merit, the employer and the employee must enter into the pay equity bargaining process to conduct an assessment of the work and comparable work (including the skills required, responsibilities imposed, working conditions, terms and conditions of employment, degree of effort and level of experience required to perform the work). Alternatively, the employer may decide that the claim does not have merit as a pay equity claim and refuse to enter pay equity bargaining. Employees can challenge an employer's decision through existing employment dispute resolution mechanisms including mediation, facilitation and a determination from the Employment Relations Authority.

28 Submitters raised concerns that the requirement for pay equity claims to have merit creates an unnecessary barrier to addressing pay equity claims in bargaining, that the threshold is too high and places the evidential onus on employees making the claim.

29 To help address this, I have asked the Ministry of Business, Innovation and Employment to develop guidance, potentially in the form of a pay equity code of employment practice, to provide information about the kind of evidence that could be used to support the merit of a claim as a pay equity claim. Further information on guidance and tools is outlined in paragraphs 78-79.

30 Submitters also raised concerns that requiring employers to decide whether a claim has merit may pre-judge the outcome of bargaining. This could have the effect of driving all substantive pay equity bargaining into the merit phase as employers may want to know the implications of accepting a claim on likely pay equity settlement costs.

31 Feedback from E Tu, Morrison Kent, the National Council of Women, Graduate Women of New Zealand, Judy McGregor, the New Zealand Educational Institute Te Riu Roa,

the New Zealand Council of Trade Unions and the New Zealand Nurses Organisation on the exposure draft Bill suggested removing the requirement for an employer to formally agree that a claim has merit as a pay equity claim before proceeding to bargaining. This was dismissed because it would not create a strong incentive on employers and employees to establish merit as a pay equity claim before proceeding to bargaining. This is also contrary to the JWG recommendations regarding merit. Pay equity bargaining is only intended to be used for pay equity claims in which there is a reasonable case for sex-based undervaluation.

32 In addition, the Bill does not prevent parties from discussing and sharing information in relation to merit prior to the employer deciding whether the claim has merit. I would expect such engagement between parties as part of an active and constructive approach to maintaining productive employment relationships. The Bill is clear that good faith applies to making claims, responding to claims and pay equity bargaining.

Related issue: Defining “predominantly performed by women”

33 One of the criteria of the merits test is that the occupation is predominantly performed by women. Several submitters commented that the merits process would be more efficient if ‘predominantly’ were clearly defined. Including a bright-line test that stipulates the meaning of ‘predominantly performed by women’ would be useful because it reduces possible litigation over what the appropriate proportion is.

34 I recommend a threshold of 66 per cent. Under the Bill, this means work is predominantly performed by women if that occupation is at least 66 per cent performed by women.

35 Selecting a higher threshold (eg 70 per cent) would have the effect of excluding claims that are at risk of historical and ongoing undervaluation, but do not meet the required threshold. This could create an ineffective regime that does not capture all occupations subject to undervaluation based on sex of the employees. The main risk associated with choosing a lower threshold is that claims that should be dealt with under general wage bargaining might gain access to the pay equity regime. However, the need for claims to meet all three criteria means there is a low risk associated with this option. I consider that 66 per cent appropriately balances these risks and ensures the regime captures work at risk of undervaluation on the basis of sex.

The proximity principle for identifying comparator occupations

36 Comparator occupations are a method for identifying undervaluation on the basis that male occupations would not be subject to sex-based discrimination leading to undervaluation of the work.

37 A key part of the Court of Appeal’s interpretation of the *Equal Pay Act* in the *TerraNova* case 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.

38 In November 2016, Cabinet decided to strengthen 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). If there is no comparator available within the employer, then the parties would be able to look more broadly to find an appropriate comparator.

39 The provisions in the Bill relating to comparators were the most significant issue for many submitters. Employee groups and women's interest groups were strongly against a proximity principle in general due to concerns that it introduced an impractical and inefficient process, required consideration of comparators that are likely to be subject to systemic sex-based discrimination, and gave preference to comparators from the same employer which may have no relevance in terms of comparability. Employers generally supported the proximity principle on the basis that it ensured a thorough analysis of the extent of any undervaluation and took account of employer-specific context.

40 I consider that the proximity principle approved by Cabinet and contained in the Bill is appropriate. This requires that comparators that are most closely related to the employer's business must be selected if available and appropriate. Closer occupations are likely to be more readily comparable and provide better quality information for making comparisons. This is consistent with the Court of Appeal's decision in the TerraNova case, and with pay equity regimes in other jurisdictions, which generally limit comparators to be within the same workplace or employer.

41 If there is no comparator available within the employer, then the parties would be able to look more broadly to find an appropriate comparator within similar employers or the wider industry or sector. If there is still no available comparator, then the parties would be able to look more broadly for comparators in other industries.

Related issue: Defining appropriate comparators

42 After an employer agrees a claim has merit as a pay equity claim, the parties to a claim enter a pay equity bargaining process. One of the key steps in the bargaining process is identifying comparators with the same or similar skills, experience, responsibilities, conditions of work and degrees of effort as the claim. The comparators inform an understanding of what would be paid to males if they performed the work of the claimant(s). Therefore, it is necessary that the comparator occupation is free from systemic sex-based discrimination itself.

43 I propose defining what it means to be a 'male comparator' as stated in the Bill. This will create a bright-line threshold for determining whether a comparator is appropriate, and may mitigate concerns raised in submissions that the existing comparator provisions will result in parties being able to select comparators from a workforce that is predominantly women.

44 I recommend a threshold of more than 50 per cent. Under the Bill, this means that a male comparator must be more than 50 per cent performed by men. Irrespective of the comparator used in bargaining, the Bill is clear that if there are reasonable grounds to believe the comparator is undervalued due to systemic sex-based discrimination, it cannot be used as a comparator (even if it meets the threshold).

45 The main risk associated with selecting a threshold for male comparators is that it excludes comparators that may otherwise be useful in bargaining. However, the risk of such comparators existing below the 50 per cent threshold is low.

Limitation on claiming arrears for pay equity

46 When considering the JWG proposals in November 2016, Cabinet paper did not explicitly consider back pay. The Committee of Ministers on State Sector Employment Relations considered this issue in March 2017 and decided to limit back pay for pay

equity claims such that the Employment Relations Authority may only provide for the recovery of arrears for pay equity for the period after the pay equity claim was made to the employer. The Bill does not prevent employers and employees from reaching a pay equity settlement that involves back pay.

47 The limitation on back pay was one of the most significant issues raised in submissions on the exposure draft. Many submitters' views were that it removes an existing ability to claim for back pay under the *Equal Pay Act*, is inconsistent with the six year limitation on other monetary claims (eg equal pay, minimum wages), and may lessen incentives on employers to settle or proactively address pay equity issues.

48 I believe the limitation on arrears in the Bill is appropriate and reflects the forward-looking nature of the pay equity negotiating framework recommended by the JWG.

49 Pay equity is different to equal pay. Equal pay relates to direct and objectively identifiable discrimination between specific individual employees of a single employer. There is an identifiable element of blameworthiness on the part of the particular employer about that discrimination. This may be actual intent to discriminate or a case of unconscious bias. Equal pay cases allow the employee to seek recovery of arrears from the employer at fault.

50 Pay equity is about addressing a systemic issue. It is about historic discrimination in relation to a whole occupation or group of people that has persisted in today's society and labour market. Pay equity does not involve individual blameworthiness on the part of the employer in the same way as equal pay. Employers have engaged in the labour market and (in good faith) paid the market rate. The existence of pay inequity is not capable of objective identification by an individual employer. It is not possible for an individual employer to know there is a pay equity issue until the merit of a claim is established. The employer therefore is only clearly on notice about it from the date the claim is made.

51 I recommend that Cabinet agrees to limit arrears for pay equity claims to the date the pay equity claim is made. I expect this issue will continue to be contentious throughout the legislative process.

Transition from the Equal Pay Act to the new regime

52 The November 2016 Cabinet paper outlined options for transitioning to the new pay equity regime, but did not seek policy decisions given the need to give further consideration to the issues; particularly existing claims in State sector employed and funded workforces.

53 The Committee of Ministers on State Sector Employment Relations subsequently agreed to address current and any new pay equity claims in the period leading up to the new pay equity legislation by applying the pay equity principles in bargaining. Further information on current claims is outlined in Annex 2.

54 The Committee also approved transitional provisions for the Bill on the basis that *Equal Pay Act* claims that have been filed in the Employment Relations Authority or the Employment Court when the Bill comes into force, and that are awaiting a final determination, all be transferred so that they are recommenced under the provisions of the Bill. If the Bill is silent, existing pay equity claims filed with the Authority or Employment Court would be considered under the *Equal Pay Act*, despite its repeal. This would effectively undermine the changes made by the Bill.

55 Consistent with this broad principle, the transitional provisions address how different types of claims should be dealt with under the new pay equity regime.

55.1 Equal pay claims: Claims in relation to equal pay will be transferred to, and dealt with under, the new regime. However, I do not expect any adverse implications for these cases as the process and remedies under the Bill largely replicate those under the *Equal Pay Act;*

55.2 Settled pay equity claims: Settled claims include settlements made between employers and employees under the auspices of the *Equal Pay Act* before the new Bill comes into force. Any such settlements are to be recognised as pay equity settlements for the purposes of the Bill. Pay equity issues for care and support workers in the health sector have been settled by the Care and Support Worker (Pay Equity) Settlement Act;

55.3 Existing and potential unresolved pay equity claims: The transitional provisions in the Bill require existing and potential pay equity clams under the *Equal Pay Act* filed with the Employment Relations Authority or the Employment Court to be transferred so that they may be recommenced under the regime in the Bill. The provisions aim to recognise existing progress in bargaining under the new Bill by allowing parties to have a formal written agreement to bargain, thus not forcing parties to re-establish merit.

56 The proposed transitional provisions are contentious, particularly in relation to discontinuing existing claims under the Equal Pay Act. Submitters were concerned that the transitional provisions breach constitutional principles and the Legislation Design and Advisory Committee (LDAC) guidelines. Submitters recommended that claims continue under the Equal Pay Act.

57 LDAC guidelines state that new legislation should not pre-empt matters that are currently before the courts or deprive successful litigants the benefit of any court decision in their favour. LDAC guidelines also state that legislation should not have retrospective effect, which includes legislation that prevents a person from relying on a right or defence that existed at the time they undertook the conduct that those rights or defences related to. This extends to remedies that existed at the relevant time.

58 The main implication of discontinuing such claims and recommencing them under the Bill is that it removes the potential for employees to seek recovery of arrears for any loss or damage (including back pay) that occurred up to six years prior to filing the claim. This is a potential remedy for pay equity claims under the Equal Pay Act.

59 This has the potential to deprive employees to those claims from any benefit they might gain from a decision of the court under the *Equal Pay Act* and has a detrimental impact on the rights and situations established in reliance on the *Equal Pay Act*, which is on the spectrum of retrospectivity. The potential loss of benefit and detriment primarily relates to:

59.1 limiting the existing ability in the *Equal Pay Act* to seek arrears of up to six years for pay equity,

59.2 limiting direct access to determinations from the Authority or courts by introducing additional steps and dispute resolution processes.

60 The LDAC guidelines acknowledge that there may be situations in which Parliament may consider it necessary to apply new legislation to matters that are the subject of ongoing or potential litigation or to prevent a person from relying on a right or defence that existed at the time they undertook the conduct that those rights or defences related to. If the new legislation is intended to do either of the above, the legislation must contain clear words setting out this intention.

61 The transitional provisions require existing and potential pay equity clams under the *Equal Pay Act* to be transferred so that they may be recommenced under the regime in the Bill. I consider this is a necessary and justified departure from the LDAC guidelines regarding applying new legislation to matters that are the subject of ongoing or potential litigation and preventing a person from relying on a right or defence that existed at the time they undertook the conduct that those rights or defences related to. The justification for the transitional provisions is finely balanced, complex and is likely to be highly contentious.

62 The transitional provisions are necessary and justified to ensure that the policy objective of the new legislation to shift pay equity into a bargaining framework is achieved, including to limit pay equity arrears claims which do not involve individual blameworthiness on the part of the employer. Without such transitional provisions, it is likely that all potential pay equity claims will be filed and determined under the existing *Equal Pay Act* (as it does not limit the ability to seek arrears or access to determinations from the Authority or courts).

63 I have taken into account the overall fairness of the transitional provisions. In particular, while the transitional provisions create a potential loss of benefit and detriment to claimants, it is balanced by a potentially unfair loss and detriment to employers under the *Equal Pay Act* as there is no individual blameworthiness on the part of the employer for pay equity matters.

64 The transitional provisions will impact existing unresolved pay equity claims. These claims are outlined in Annex 2.

Interaction between back pay for existing pay equity claims and the transition to the new regime

65 The Bill also addresses how back pay for the period after the start of a claim under the *Equal Pay Act* will be managed for existing pay equity claims.

66 I propose that only pay equity claims already filed with the Employment Relations Authority or Employment Court prior to the introduction of the Bill be eligible to be awarded back pay to the date of filing. All other claims filed after introduction would be eligible for back pay dated from the commencement of the Bill.

67 Without this threshold for back pay, there are risks that there could be a rush of new claims from employees in the Employment Relations Authority and Employment Court to preserve back pay for a period prior to the commencement of the Bill, regardless of the eventual merit of those claims. The threshold also ensures that the rights of claimants who have already filed with the Employment Relations Authority or Employment Court are not unfairly extinguished.

68 This arrangement is designed to preserve the rights of these existing claims as much as possible, without creating perverse incentives on employees and employers in the transitional period that would undermine the policy intent of the Bill to encourage good faith

69 I consider this limitation is justified and balanced as it addresses back pay implications of existing claims, while preventing unintended consequences while the Bill progresses through the House.

70 I also recommend that this proposal be supplemented to allow for back pay for claims where parties have entered into a written agreement to enter pay equity bargaining prior to the introduction of the Bill. This would support claims where parties have entered into written agreements to recognise that there is a reasonable case of undervaluation that extends to the period before the new regime comes into force.

Methods for conducting an assessment of the work and comparable work

71 Comparator occupations are a method for identifying undervaluation on the basis that male occupations would not be subject to sex-based undervaluation. Therefore, pay differences between comparable male and female occupations may indicate undervaluation due to systemic sex-based discrimination. Cabinet agreed in November 2016 that bargaining on pay equity must include an examination of the work performed by, and remuneration paid to, appropriate comparators.

72 To provide further flexibility to parties, I propose an exception to allow parties to enter into a written agreement that sets out an alternative method that they will use to conduct an assessment of the work and comparable work. This will support parties to use the best method to suit their circumstances. Where agreement cannot be reached, parties would be required to assess the work performed by, and remuneration paid to, appropriate comparators.

Regulation making power and guidance

73 The Bill sets out matters that must be taken into account when considering three key aspects of pay equity claims. These are:

73.1 considering or determining whether a claim has merit,

73.2 bargaining to resolve the claim, which includes conducting an assessment of the work and comparable work in the bargaining process, and identifying appropriate comparators.

74 To provide further detail, I propose including an empowering provision in the Bill to enable the development of regulations to include additional matters to be taken into account when considering or determining whether a pay equity claim has merit, conducting an assessment of the work and comparable work in the bargaining process, or identifying appropriate comparators.

75 I believe the regulation-making power is necessary and justified to ensure the Bill is flexible to adapt to the changing context of the labour market and the nature of work. This will ensure the regime is enduring and fit for purpose.

Code of employment practice

76 In developing its recommendations, the JWG recommended that the Government give further consideration to providing guidance on the application to the Bill. Such guidance will help parties understand their rights and obligations and assist with the successful implementation of the legislative changes. This is important given the highly detailed and technical nature of some of the matters envisaged by the legislation.

77 I believe that a code of employment practice is an appropriate method for providing guidance on the application of the Bill. Codes can provide guidance on the application of an Act and allow the Authority or court to have regard to the matters set out in the code. Codes establish an accepted way of complying with an Act, without limiting other acceptable ways of complying. Codes are more likely to be complied with than a voluntary standard, but are still not mandatory. As such, a code will help explain some of the nuances that were raised during the Joint Working Group process that are not easily suited to rule making given the nuanced nature of these factors.

Application of codes of employment practice

78 Sections 100A-100C the *Employment Relations Act* enables the creation of approved codes of employment practice. However, there is currently no provision for developing codes for the *Equal Pay Act* (or other employment legislation). This means that while codes may be developed for matters regulated by the *Employment Relations Act*, codes cannot be developed for matters addressed by other employment legislation.

79 I recommend that the power to approve codes of practice under the *Employment Relations Act* be broadened to allow codes of practice to be approved for the purposes of the pay equity legislation. In addition, this legislative change is an opportunity to further broaden the application of codes for the purposes of all other relevant employment legislation. This will ensure that codes could be used for pay equity matters, and any other matters in employment legislation if useful. The codes of practice would continue to be subject to the procedural requirements in the *Employment Relations Act*, including consultation with affected parties, approval by the Minister and notification in the Gazette.

Status of codes of employment practice

80 To ensure that the guidance in the code is given due consideration by parties to bargaining, the code must have sufficient status in any pay equity proceedings in the Authority or court.

81 The existing provision in the *Employment Relations Act* regarding codes of employment practice is not explicit on the admissibility of codes as evidence in Authority or court proceedings, or the ability of the Authority or court to rely on a code in determining the issues to which the code relates. This is in contrast to the provisions regarding approved codes of practice in the *Health and Safety at Work Act 2015*.

82 I recommend that the status of employment codes be brought into line with the code provisions in the *Health and Safety at Work Act* to clarify that the codes of employment practice are admissible as evidence in Authority or court proceedings and may be relied on by the Authority or court when determining the issues to which the code relates. This will help raise the standing of the code to ensure that parties consider the code when bargaining over pay equity matters.

83 If approved by Cabinet, I will direct the Ministry of Business, Innovation and Employment to develop a code

Tools and guidance

84 In addition to codes of employment practice for pay equity, there may be value in a second tier of guidance, tools and information that do not require the statutory status of a code of employment practice. Such guidance, tools and information would primarily be intended to help parties undertake effective bargaining and minimise compliance costs. For example, job evaluation tools could be useful to facilitate bargaining.

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.

85 In conjunction with the work on the pay equity code of employment practice, I will direct the Ministry of Business, Innovation and Employment to report to me on options for government-provided information and guidance on the Bill. This may include job evaluation tools and detailed information on pay rates by occupation and qualification.

Financial Implications

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

87 It remains difficult to estimate the scale of the fiscal impacts given there is no simple way to establish which occupational groups may be affected by, and the extent to which current wage and salary rates reflect, systemic sex-based undervaluation. The State Services Commission and the Treasury, in consultation with the Ministry of Business, Innovation and Employment, are scoping further work to assess the flow-on and relativity impacts from successful pay equity settlements, such as the care and support settlement, and will report to the Committee of Ministers on State Sector Employment Relations.

88 In addition to the direct fiscal impact, 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). Budget 2017 provided $5.3 million to provide for the adequate resourcing of dispute resolution services for pay equity issues. Prompt and effective mediation for pay equity cases will benefit employers and employees by reducing time and costs associated with protracted employment disputes, leading to more productive employment relationships.

Human Rights

89 The limitation on claiming arrears for pay equity may be discrimination under section 19 of the *Bill of Rights Act* as it disproportionately affects women. However, section 5 of the *Bill of Rights Act* allows for justifiable limitations on rights. In this respect, I consider that the limitation is a necessary restriction for the implementation of a scheme which aims to address the systemic discrimination against women in the workplace and therefore does not limit section 19(1) of the *Bill of Rights Act* any more than reasonably necessary.

90 As outlined in paragraphs 49-50, pay equity is different to equal pay. Pay equity claim is different to equal pay. Equal pay claims involve direct discrimination from an individual employer. Through actual intent or unconscious bias, the employer has caused discrimination against the employee. Pay equity relates to a systemic social issue. It takes account of historical discrimination against an occupation, and therefore is not caused by the individual employer. The employer in a pay equity dispute has paid the market wage in good faith, and is therefore less culpable. Therefore, back pay has been limited to the date of claim to ensure the process is balanced and fairly reflects the nature of the grievance.

91 The Ministry of Justice has contributed to the development of this human rights implications statement. The Ministry of Justice has undertaken an assessment of whether the Bill is consistent with the Bill of Rights Act and has provided advice to the Attorney-General.

Gender Implications

Ministry for Women comment

92 The Ministry for Women considers the Bill has significant positive gender implications as its sole purpose is to enable the rectification of undervaluation of work that has been predominantly performed by women.

93 The Ministry for Women supports the intent of the JWG principles, that the initial determination of merit as a pay equity claim is one of merit to proceed. The bargaining process would then enable consideration of a pay equity claim (ie the assessment of work and comparable work) before determining:

93.1 whether there is in fact historical and continuing undervaluation of the work; and

93.2 whether any adjustment in remuneration is needed as a result of the assessment of the claim.

94 Any future code and guidance should clearly reflect the intent of the JWG, otherwise there may be unintended negative gender implications for:

94.1 individual women claimants, especially employees in industries that are not unionised or organised, and

94.2 women claimants who lack access to information to assess whether they are experiencing historical and continued undervaluation on the basis of gender discrimination, especially vulnerable employees who lack bargaining power.

Disability Perspective

95 There are no specific implications for people with disabilities.

Regulatory impact analysis

96 A Regulatory Impact Statement was prepared in accordance with the necessary requirements, and was submitted at the time that Social Policy Committee approval of the policy relating to the Bill was sought in November 2016 [SOC-16-Min-0168].

97 The Regulatory Impact Analysis Team at the Treasury (RIAT) 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 considered that the information and analysis summarised in the RIS **meets** the QA criteria.

Compliance

98 The Bill complies with each of the following:

98.1 the principles of the Treaty of Waitangi;

98.2 the rights and freedoms contained in the *New Zealand Bill of Rights Act 1990* and the *Human Rights Act 1993* (refer to the Human Rights section for further information);

98.3 the disclosure statement requirements;

98.4 the principles and guidelines set out in the *Privacy Act 1993* The Bill allows employees in a consolidated claim to request confidentiality while still being involved in the claim process through a representative. The Privacy Commissioner was consulted during the development of the Bill;

98.5 relevant international standards and obligations including the United Nations Convention on the Elimination of All Forms of Discrimination against Women and the International Labour Organisation Equal Remuneration Convention;

98.6 the LDAC Guidelines on the Process and Content of Legislation (2014 edition), which are maintained by the Legislation Design and Advisory Committee. The transitional provisions in the Bill depart from the default approach in the guidelines by applying new legislation to matters that are the subject of ongoing or potential litigation and preventing a person from relying on a right or defence that existed at the time they undertook the conduct that those rights or defences related to. I consider that the transitional provisions are necessary and justified to ensure that the policy objective of the new legislation to shift pay equity into a bargaining framework is achieved, including to limit pay equity arrears claims which do not involve individual blameworthiness on the part of the employer. The justification for the departure is finely balanced, complex and is likely to be highly contentious. The Bill has been to LDAC for design advice and assistance with Guidelines matters. LDAC was concerned about the departures from the default approaches in the Guidelines, even if there are policy justifications. LDAC's focus is on design and consistency with the Guidelines and does not comment on the adequacy of policy justifications.

Consultation

99 Consultation took place on the policy decisions in this Bill as part of the JWG process in 2015-2016.The following groups were consulted:

99.1 government departments including The Treasury, the State Services Commission (SSC), 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. The Department of Prime Minister and Cabinet was informed.

99.2 private sector organisations including 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) and business associations (BusinessNZ and the Employers and Manufacturers Association).

100 Public consultation on an exposure draft of the Bill took place in April and May 2017 for three weeks. A total of 334 submissions were received, made up of submissions from 294 individuals, 13 unions or worker associations, 13 advocacy groups, seven employers or employer associations and five law firms.

Binding on the Crown

101 Cabinet previously decided that the Bill will be binding on the Crown [SOC-16-Min-0168]. The legislation does not create a new agency or amend law relating to existing agencies

Allocation of decision making powers

102 The Bill does not allocate decision making powers between the courts, the executive and tribunals.

Associated regulations

103 The Bill includes a regulation making power to prescribe additional matters to be taken into account when determining the merit of a claim, conducting an assessment of the work and comparable work in the bargaining process and identifying appropriate comparators (refer paragraphs 67-69). Regulations are not required to bring the Bill into operation.

Other instruments

104 The Bill includes a provision empowering the Minister to approve codes of employment practice that are deemed to be disallowable instruments. The codes will provide guidance on the application to the Bill and other relevant employment legislation. The explanatory note to the Bill sets out this reason. This will help parties understand their rights and obligations and assisting with the successful implementation of the legislative changes. This is important given the highly detailed and technical nature of some of the matters envisaged by the legislation.

Definition of Minister/department

105 The Bill does not contain a definition of Minister, department (or equivalent government agency), or chief executive of a department (or equivalent position).

Commencement of legislation

106 The Bill will come into force on the day after the date of Royal assent.

Parliamentary stages

107 I intend to introduce the Bill in July 2017. I expect the Bill will be passed in due course.

108 I will propose that the Bill be referred to the Transport and Industrial Relations Committee.

Publicity

109 If approved by Cabinet, I intend to issue a media statement at the time the Bill is introduced.

110 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 for Workplace Relations and Safety recommends that the Committee:

1 **note** that the Employment (Pay Equity and Equal Pay) Bill holds a category 3 priority (to be passed if possible in the year) on the 2017 Legislation Programme;

111 **note** that the Bill implements Cabinet's November 2016 decisions to address pay equity claims within the existing employment relations bargaining framework [SOC-16-Min-0168];

112 **note** that the Bill sets out a practical and fair process for employees working in jobs predominantly performed by women to follow if they believe they are not being paid what their job is worth due to systemic sex-based discrimination;

113 **note** that the Bill also modernises and makes fit-for-purpose the remaining provisions of the *Equal Pay Act 1972* to the extent that they are still relevant;

114 **note** that the Bill repeals and replaces the *Equal Pay Act 1972* and the *Government Service Equal Pay Act 1960*, and amends the *Employment Relations Act 2000*;

Outstanding policy issue: Definitions

115 **agree** that predominantly performed by female employees means that, of the employees in New Zealand performing that work, at least 66% are female;

116 **agree** that work is performed by male comparators if, of the employees in New Zealand performing that work, more than 50% are male;

Outstanding policy issue: Limitation on arrears for pay equity claims

117 **agree** to limit arrears for pay equity claims such that the Employment Relations Authority may only provide for the recovery of arrears for pay equity for the period after a pay equity claim is made to an employer;

Outstanding policy issue: Transition from the Equal Pay Act to the new regime

118 **note** the transitional provisions in the Bill depart from the default approach in the Legislation Design and Advisory Committee Guidelines by applying new legislation to matters that are the subject of ongoing or potential litigation and preventing a person from relying on a right or defence that existed at the time they undertook the conduct that those rights or defences related to;

119 **agree** that the transitional provisions are necessary and justified to ensure that the policy objective of the new legislation to shift pay equity into a bargaining framework is achieved, including to limit pay equity arrears claims which do not involve individual blameworthiness on the part of the employer;

120 **agree** to the transitional provisions in the Bill, including the requirement that *Equal Pay Act* claims that have been filed in the Employment Relations Authority or the Employment Court when the Bill comes into force, and that are awaiting a final determination, all be transferred so that they may be recommenced under the provisions of the Bill;

Interaction between back pay for existing pay equity claims and the transition to the new regime

121 **agree** that, for claims filed in the Employment Relations Authority or Employment Court under the *Equal Pay Act* prior to 26 July 2017, back pay may be awarded back to the original date of filing;

122 **agree** that, for claims where the parties have entered into a written agreement to enter into pay equity bargaining prior to 26 July 2017, back pay may be awarded back to the date on which that written agreement was entered;

123 **agree** that, for claims filed with the Employment Relations Authority or Employment Court under the *Equal Pay Act* on or after 26 July 2017, back pay may be awarded back to the date of commencement of the Bill;

124 **agree** that, for claims where the parties have entered into a written agreement to enter into pay equity bargaining on or after 26 July 2017, back pay may be awarded back to the date of commencement of the Bill;

Outstanding policy issue: Methods for conducting an assessment of comparable work

125 **note** that in November 2016 the Cabinet Social Policy Committee agreed [SOC-16-Min-0168] that bargaining on pay equity must include an examination of:

125.1 the work being performed and the remuneration paid to those performing the work, and

125.2 the work performed by, and remuneration paid to, appropriate comparators;

126 **agree** to an exception to the decision referred to in recommendation 14 if parties enter into a written agreement that sets out an alternative method that they will use to nature and remuneration of the work and comparable work

Outstanding policy issue: Regulation making power and guidance

127 **agree** to empower the making of regulations to prescribe matters that must be taken into account when considering or determining whether a pay equity claim has merit, conducting an assessment of the work and comparable work in the bargaining process and identifying appropriate comparators;

128 **agree** to amend the *Employment Relations Act 2000* to empower the Minister to approve codes of employment practice to provide guidance on the application to the Bill (once enacted) and other relevant employment legislation (including the *Holidays Act 2003*, the *Minimum Wage Act 1983*, the *Parental Leave and Employment Protection Act 1987*, and the *Wages Protection Act 1983*).

Approval to introduce the Employment (Pay Equity and Equal Pay) Bill

129 **approve** the Employment (Pay Equity and Equal Pay) Bill for introduction, subject to the final approval of the government caucus and sufficient support in the House of Representatives;

130 **authorise** the Minister for Workplace Relations and Safety to make minor and technical changes to the Employment (Pay Equity and Equal Pay) Bill, in line with the policy framework in this paper, prior to introduction;

131 **authorise** the Minister for Workplace Relations and Safety to make changes to the Employment (Pay Equity and Equal Pay) Bill prior to introduction to reflect Cabinet's intent regarding decisions on the transitional provisions of the Bill;

132 **agree** that the Bill be introduced in July 2017;

133 **agree** that the Government propose that the Bill be referred to the Transport and Industrial Relations Committee for consideration.

Authorised for lodgement

Hon Michael Woodhouse

Minister for Workplace Relations and Safety

Annex 1: Summary of the process for pay equity claims

1 The key elements of the process in the Bill for dealing with pay equity claims are:

1.1 **Employee raises a claim:** Any employee may raise a claim with their employer if they consider that the claim has merit as a pay equity claim.

1.2 **What it means for a claim to have merit:** The employee's claim must set out the factors and evidence the employee relies on as evidence that the claim has merit as a pay equity claim. A claim has merit as a pay equity claim if:

1.2.1 the claim relates to work that is predominantly performed by female employees; and

1.2.2 there are reasonable grounds to believe that the work has been historically undervalued; and

1.2.3 there are reasonable grounds to believe that the work continues to be undervalued, taking into account all relevant matters (including the matters elaborated on in the Bill relating to features of the labour market, industry, sector or occupation (including a dominant source of funding, lack of effective bargaining, the market share of the employer, a clack of competition from other employers).

1.3 **Employer notifies similar employees:** An employer who receives a pay equity claim must give notice of the claim to the employer's other employees who perform work that is the same, or substantially similar, as the work performed by the claimant.

1.4 **Employer decides whether the claim has merit as a pay equity claim:** An employer who receives a pay equity claim must decide whether, in the employer's view, it has merit as a pay equity claim. If the employer agrees the claim has merit as a pay equity claim, the employer must enter pay equity bargaining process with the employee to conduct an assessment of the work and comparable work (including the skills required, responsibilities imposed, working conditions, terms and conditions of employment, degree of effort and level of experience required to perform the work). If the employer decides the claim does not have merit as a pay equity claim, the employer may refuse pay equity bargaining. 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 Employment Court determining that the claim does have merit and the parties must enter pay equity bargaining.

1.5 **Parties enter pay equity bargaining:** Parties bargain to resolve the claim. Parties must assess the nature of the work to which the claim relates and the nature of comparable work (including the skills required, responsibilities imposed, working conditions, terms and conditions, degree of effort and level of experience required to perform the work) and the remuneration paid. Comparators that are most closely related to the employer's business must be selected if available and appropriate (referred to as the proximity principle).

1.6 **Pay equity settlement:** A pay equity claim is settled when remuneration is determined that the parties agree does not discriminate on pay equity grounds, a

process is agreed to review the employee's terms and conditions of employment to ensure pay equity is maintained and those matters are recorded in writing.

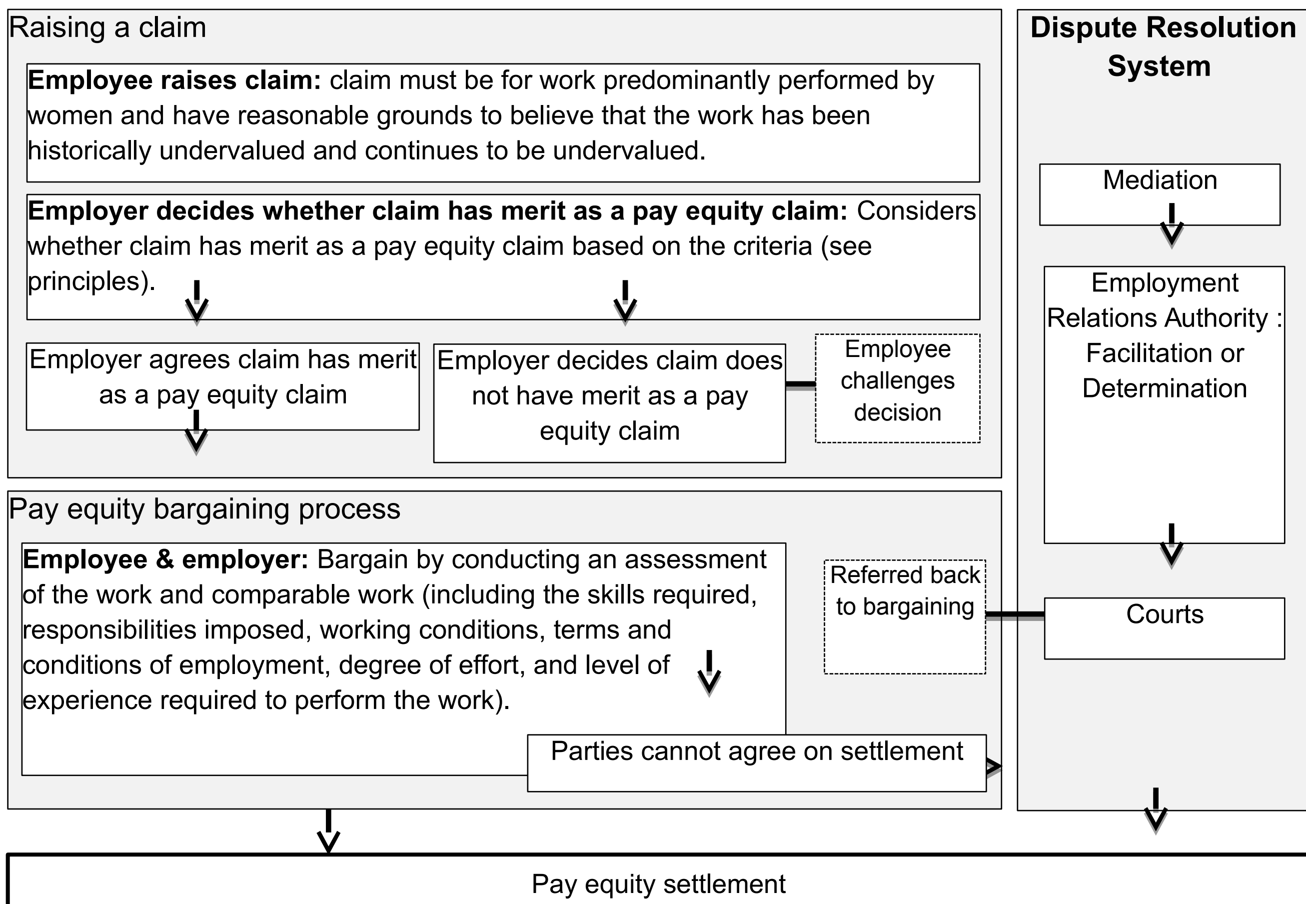
2 Where bargaining reaches an impasse, the existing employment dispute resolution system is available to assist. This includes:

2.1 **Mediation:** Parties to a pay equity claim may access existing government provided employment mediation services.

2.2 **Facilitation:** Where mediation is unable to resolve the dispute, the parties may request facilitated bargaining from the Employment Relations Authority.

2.3 **Determinations:** The Authority (and subsequently the courts) may resolve impasses in pay equity bargaining. A party to a pay equity claim may apply to the Authority for a determination on any matter that relates to the claim, including a determination fixing terms and conditions of employment (including remuneration) that do not discriminate on pay equity grounds. Before considering an application for determination, the Authority must first consider whether an attempt has been made to resolve the difficulties by mediation or facilitation, and the Authority may direct parties to try those options. The Authority may only accept an application for a determination to fix terms and conditions only if the parties have first tried mediation, or another process recommended by the Authority, and the Authority is satisfied that all other reasonable alternatives for settling the claim have been exhausted.

3 This process is set out in the simplified diagram below.



Annex 2: Pay equity claims

Background

In November 2016 the Committee of Ministers on State Sector Employment Relations agreed to address current and any new pay equity claims in the period leading up to the new pay equity legislation by applying the pay equity principles in bargaining, including the proximity principle.

In February 2017 SSC and the Council of Trade Unions (CTU) agreed via an exchange of letters to apply the pay equity principles in bargaining (as agreed by CMSSER). This agreement included an expectation that current and any new pay equity claims that are lodged in court are placed 'on hold' to enable the claim to be progressed in bargaining.