

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 Issues and Approval for Introduction

Proposal

- 1 This paper seeks Cabinet approval for additional outstanding policy proposals for the Equal Pay Amendment Bill (the Bill) and to the introduction of the Bill to the House of Representatives.

Executive Summary

- 2 The Bill implements Cabinet's May 2018 decisions to change the *Equal Pay Act 1972* (the *Equal Pay Act*) to improve the pay equity regime, as recommended by the Joint Working Group on Pay Equity Principles (JWG) and the Reconvened Joint Working Group (RJWG). Key elements of the JWG and RJWG proposals for pay equity claims are outlined in Annex 1.
- 3 The Bill amends the *Equal Pay Act*, repeals the *Government Service Equal Pay Act 1960*, and amends the *Employment Relations Act 2000* (the *Employment Relations Act*). It sets out a practical and fair process for employees working in jobs predominantly performed by women to investigate if they are being paid what their job is worth due to systemic sex-based discrimination, together with their employers within a bargaining framework.
- 4 To enable the Bill to be finalised for introduction, we seek Cabinet decisions on outstanding policy issues:
 - a. limitation period for back pay
 - b. transitional provisions
 - c. alternative avenues to take claims
 - d. penalty provisions.
- 5 This paper also outlines the main changes to the *Equal Pay Act*, necessary to make the pay equity regime accessible and workable alongside other aspects of the *Equal Pay Act*.
- 6 We seek Cabinet approval to introduce the Bill in September 2018 for referral to the Education and Workforce Committee.

9(2)(f)(iv)

Background

- 8 In May 2018 the Government accepted the JWG and RJWG proposals to amend the *Equal Pay Act* to improve the pay equity system in New Zealand and align it with New Zealand's employment relations framework [CAB Min 18/0250 refers] (see Annex 1 for the key elements of the proposed pay equity regime).
- 9 The Bill implements Cabinet's decisions. It sets out a practical and fair process for employees working in jobs predominantly performed by women to investigate if they are being paid what their job is worth due to systemic sex-based discrimination, together with their employers within a bargaining framework. The Bill repeals the *Government Service Equal Pay Act 1960* and amends the *Employment Relations Act*.
- 10 In May, the Ministry of Business, Innovation and Employment (MBIE) consulted with the leads of the RJWG and their legal teams on the draft Bill and they were broadly comfortable.
- 11 There are outstanding policy issues that require Cabinet decisions before the Bill can be finalised. To enable the Bill to be finalised for introduction, we seek Cabinet decisions on the following outstanding policy issues:
 - a. limitation period for back pay
 - b. transitional provisions
 - c. alternative avenues to take claims
 - d. penalty provisions.

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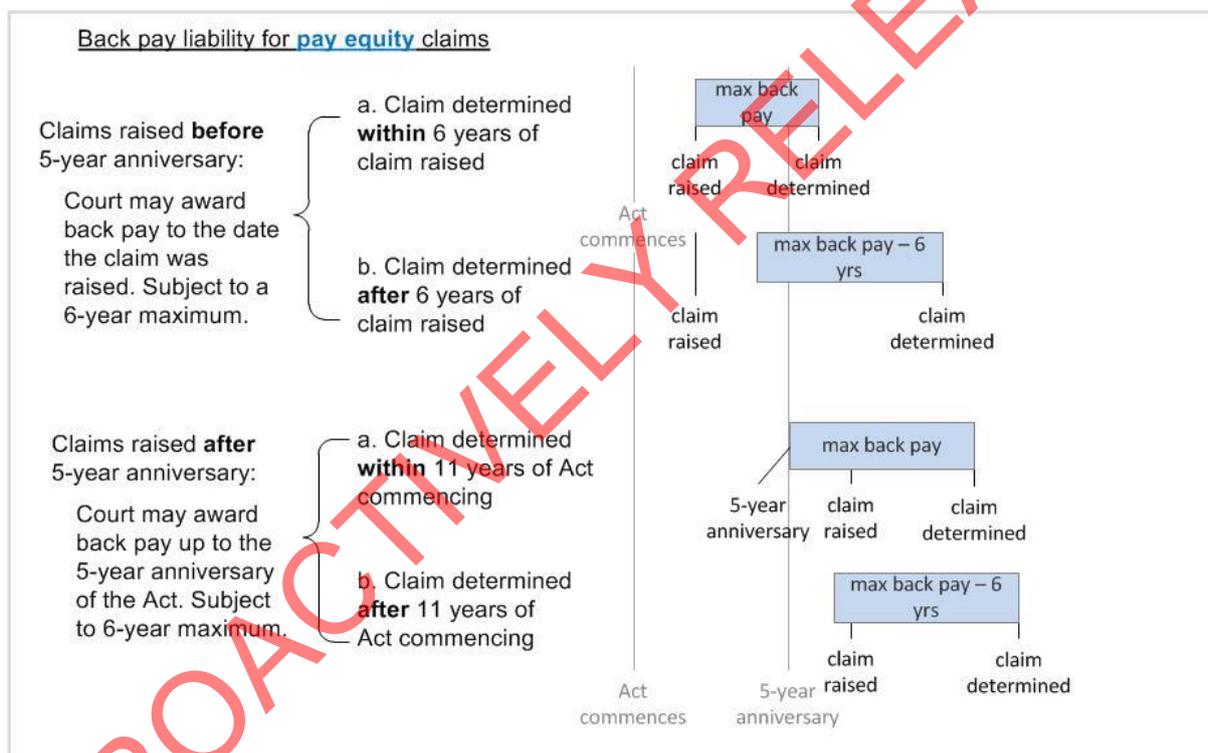
Limitation period for back pay

- 13 The status quo for claims made under the Equal Pay Act is a six-year limitation period for arrears for equal pay and pay equity claims back from the date of filing (section 13). We intend to retain the status quo six-year limitation period for equal pay claims.
- 14 Outside the Court, parties may come to any agreement, including in relation to back pay (i.e. even if the Court has the ability to award back pay, parties to negotiation may decide to leave it out entirely), but the ability of the Courts to award back pay will influence the bargaining position of the parties and any settlement. Under the Bill, the Court only has the ability to award back pay when making a determination to fix terms and conditions, and after other reasonable alternatives (such as mediation and facilitation) to settle the claim have been exhausted.
- 15 Given the special nature of pay equity claims, which involve systemic discrimination relating to female-dominated workforces, we propose treatment for back pay that is different to that for an equal pay claim (recognising that back pay only comes into

play when negotiations have failed and the Authority or Court is in the position of making a determination to fix terms and conditions). Because the new pay equity regime recognises that pay equity is an employment relations issue rather than a minimum standard, there is uncertainty about whether (and to what extent) a Court would award back pay. It is possible that the Authority or the Court will, in some circumstances, decide not to award back pay at all.

16 We propose that for pay equity claims:

- a. first raised within the first five years after legislation comes into force, the Authority or Court can award back pay from determination back to the date the claim was raised (subject to a six year maximum)
- b. first raised on or after the five year anniversary of the legislation coming into force, the Authority or Court can award back pay from determination back to the five year anniversary (subject to a six year maximum), thereby increasing the potential amount of back pay that could be awarded.



17 The proposed treatment of back pay for pay equity claims under this Bill recognises that structural sex-based discrimination resulting in historical and continued undervaluation of female-dominated occupations cannot be attributed to any action taken by an employer. However, increasing awareness about pay equity issues puts employers on notice about the possibility of pay equity issues within their workforce, and a responsibility for employers to take action to address it.

18 This treatment of back pay for pay equity claims therefore balances the structural origins of pay equity with the responsibility of employers to address pay equity issues. Increasing the limit on back pay over time, incentivises employers to address pay equity issues within the first 11 years following legislation being passed, with the incentives being potentially progressively stronger after the first five years.

19 The extent to which this may incentivise both State and private sector employers to identify and address any pay equity issues is uncertain, but a five year period before the commencement of a more generous back pay provision could significantly mitigate these effects. 9(2)(j), 9(2)(f)(iv)

20 Unionised workforces may be more likely to have claims filed on their behalf before the five year anniversary date than women in smaller, non-unionised or vulnerable workforces.

21 There are financial exposure risks for both the private sector and for government. This will encourage employers to review the existence of any pay equity issues on a regular basis in any female-dominated workforce that they employ. The longer the legislation has been force and the greater the number of claims raised, the more notice and opportunity an employer has to review their pay structures for systemic undervaluation.

We propose that the Employment Relations Authority (the Authority) or Courts must take into account certain factors when determining an award for back pay

22 We propose to provide guidance to the Courts considering a possible award of back pay by way of a list of factors the Authority or Court must take into account when exercising its discretion to award back pay for pay equity claims. We propose the following factors:

- a. the conduct of the parties
- b. the ability of the employer to pay
- c. the nature and extent of resources (for example, information and advice) available to the employer and the employee in respect of the claim
- d. any other factors the Authority considers appropriate (note that “any other matters the Court considers relevant” clauses are often narrowly interpreted).

23 We propose that these factors should apply to all back pay determinations for pay equity claims.

24 We intend to undertake further work and seek feedback through the select committee process to ensure these factors appropriately capture the circumstances we intend the Courts to consider and the workability of the back pay section as a whole.

Transitional provisions

25 Cabinet made decisions in May 2018 [CAB Min 18/0250 refers] on how existing claims filed with the Authority or Court, or that are simply being negotiated (i.e. that have not been filed), can be transitioned to the new regime once the Bill comes into force.

26 We have reworked the transitional provisions to incorporate the decisions on back pay and to ensure they are fit for purpose.

27 A diagram explaining how the transitional provisions will affect existing claims is attached at Annex 2.

Equal pay and unlawful discrimination claims

28 Existing claims filed under the current *Equal Pay Act* with the Authority or the Court in relation to equal pay and unlawful discrimination will be dealt with under the *Equal Pay Act* as it was prior to the amendment. This is because the Bill only changes the *Equal Pay Act* to the extent necessary to make the equal pay and unlawful discrimination regimes workable alongside a pay equity regime. There is no strong policy reason to disturb these claims.

29 A provision of the *Equal Pay Act* that remains available to claimants who have filed equal pay or unlawful discrimination claims is the ability of the Court to develop principles in relation to those claims. The Court may be asked to do this in relation to any current equal pay or unlawful discrimination claims but the Bill will be clear that the Court will no longer have the ability to develop principles for pay equity. 9(2)(j)

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Settled pay equity claims

30 Any settlements made under the *Equal Pay Act* before the Bill comes into force are to be recognised as pay equity settlements for the purposes of the amended *Equal Pay Act*. The pay equity settlement for care and support workers will also be recognised. This provision will apply whether or not claims have been filed with the Authority or the Court. For parties currently undertaking pay equity bargaining, certain form and process requirements will be required for a settlement to be recognised for the purposes of the amended *Equal Pay Act*.

Existing and potential unresolved pay equity claims

31 Existing and potential pay equity claims under the *Equal Pay Act* filed with the Employment Relations Authority or the Employment Court will be discontinued and will be able to become claims under the regime in the Bill, effective from the commencement of the Act.

32 The provisions will allow parties to legally recognise existing progress in bargaining under the new Bill where they have entered into a formal written agreement prior to the Act commencing. The written agreement will recognise their existing progress in bargaining under the new Act and agree a process to settle their pay equity claim, thus not forcing such parties to initiate their claims again. Such agreements would be relevant where disputes arose that lead to the involvement of the Authority or Court.

33 Where parties cannot come to such an agreement, they will need to adhere to all the provisions of the new pay equity process and initiate their claims again. This

9(2)(j)

provision will apply to all current claims, *whether or not they have been filed with the Authority or the Court.*

Limitation period for back pay for pay equity claims under the transitional provisions

34 Further decisions are also required to determine how the proposed back pay provisions apply to existing pay equity claims (claims made prior to the amendment Act commencing).

35 We propose that, when making a determination in relation to an existing pay equity claim, the Authority or Court can award back pay from determination back to the date of an employee's original written notification of a pay equity issue to their employer, or the date of filing the claim in the Authority or Court (whichever is earlier), subject to a six year maximum limitation. This aligns with the provision for back pay after the Act commences. This may incentivise claimants to notify or file pay equity claims following the introduction of the Bill.

The transitional provisions may be contentious

36 In May, Cabinet noted that the proposed transitional provisions are likely to be contentious, particularly in relation to transitioning claims to be dealt with under the new legislation once it is enacted [CAB Min 18/0250 refers]. This is largely because of the principle against retroactively applying legislation.

37 The transitional provisions will require existing and potential pay equity claims under the *Equal Pay Act* to be dealt with under the proposed new regime rather than under the current framework. We consider this is a necessary and justified departure from the Legislative and Design Advisory Committee 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 may be contentious.

38 The transitional provisions are necessary and justified to meet the policy objective of shifting pay equity from a litigious framework (which can be expensive and time-consuming) to a bargaining framework. Without such transitional provisions, there is likely to be an incentive to file potential pay equity claims under the existing *Equal Pay Act*. This could involve the Employment Court being asked to issue a statement of principles (as is provided for under section 9 of the *Equal Pay Act*) to provide a framework for parties to bring pay equity claims before the Court. This is a potentially significant policy-making role for the Courts (for example, the statement of principles may provide guidance on how to adduce evidence of comparator groups or issues relating to systemic undervaluation), and risks departing from the JWG principles. Part of the initial rationale for establishing the JWG was that it would be preferable for the Government, in consultation with employers and unions, to set policy for pay equity rather than the Courts.

39 Most of the current claims in the state sector are already being progressed under a bargaining framework. 9(2)(j)



██████████ The transitional provisions mitigate the risk of the current unfiled claims being converted to litigation.

- 40 We have taken into account the overall fairness of the transitional provisions. In particular, the transitional provisions create a potential loss of benefit and detriment to employees (ie potentially limiting an existing right that has not yet been tested). However, this is balanced by the fact that the nature of pay equity is that it is a systemic issue resulting in the undervaluation of female-dominated occupations. The way that back pay has been limited reflects that the undervaluation cannot be attributed to any single action taken by any one employer, but that they will have more notice of the issue over time after the Act commences and as publicity increases. The transitional provisions are also necessary to ensure that current and future claims are dealt with within a bargaining framework, rather than to enable some claimants to continue claims through the Court for a period of time.
- 41 The transitional provisions will impact existing unresolved pay equity claims. Current State sector pay equity claims are outlined in Annex 3.

Alternative avenues for claims

- 42 A claim for discrimination on the ground of sex can be taken via the *Human Rights Act 1993* (the *Human Rights Act*) and also the *Employment Relations Act*. It is clear, under the *Equal Pay Act*, that a claim under section 2A for unlawful discrimination can be taken under the *Human Rights Act*, or the *Equal Pay Act*, but not both.
- 43 We propose that employees can take claims for equal pay, pay equity or unlawful discrimination under this Bill, the *Human Rights Act*, or the *Employment Relations Act* but that they must choose one avenue only. This is similar to the approach taken to claims which fall within the jurisdiction of both the personal grievance provisions of the *Employment Relations Act* and the complaints procedure under the *Human Rights Act*. Section 112 of the *Employment Relations Act* requires employees to choose one of the procedures to follow.
- 44 Even though the claims under each Act may be similar, the different legislative avenues have different outcomes and remedies. Claimants would need to choose which avenue was likely to be most beneficial. For example, the remedy for an equal pay claim under the Bill would be for back pay in wages and the conduct is subject to the penalty regime under the *Equal Pay Act*. An equal pay claim under the *Human Rights Act* would seek to address the harm caused by discrimination by way of compensation. An employee taking a personal grievance under the *Employment Relations Act* could also seek compensation.
- 45 This approach would allow for three different avenues to exist for pay equity claims. Under each avenue, the same facts of the case would need to be established before the Court would decide whether to award a remedy. However, the nature of what the remedy would address would differ under each avenue. A pay equity claim under the Bill would be to address undervaluation caused by systemic sex-based discrimination where the remedy would be an increase in remuneration that addresses the pay equity issue. A complaint under the *Human Rights Act* would be

to remedy the harm caused by the discrimination by way of compensation or a declaration (neither of these are available under the Bill). There would be no ability to set pay rates going forward, although, once settled, employers would be incentivised to fix the pay rate as otherwise they may be liable for future claims. Similarly, a personal grievance taken under the *Employment Relations Act* would aim to remedy the harm caused by the discrimination through remedies such as compensation.

- 46 We propose this course because the intent of the Bill is to retain the *Equal Pay Act* to the greatest extent possible - the *Equal Pay Act* provides for a choice of proceedings for unlawful discrimination under that Act. In addition, removing a course of action for pay equity claimants under the *Human Rights Act* or *Employment Relations Act* may be seen as removing protections against discrimination on the basis of sex (a potential issue under the New Zealand *Bill of Rights Act 1990* (the *Bill of Rights Act*), the International Labour Organisation Convention No 111 on Discrimination (Employment and Occupation) and the United Nations Convention on the Elimination of All Forms of Discrimination against Women (CEDAW).

Penalty provisions

- 47 The *Equal Pay Act* sets out a number of offences in section 18. This includes two umbrella provisions, ie failure to comply with any provision in the Act or to act with the intention to defeat any provision in the Act (for example, not providing for equal pay). The other offences relate to the obstruction and conduct towards Labour Inspectors. A person who commits an offence under the Act is liable on conviction to a fine.
- 48 Cabinet agreed in May to replace the penalty regime of the *Equal Pay Act* for both pay equity and non-pay equity claims, (conviction and fines of up to \$400 for individuals and \$1,000 for companies) with penalties of up to \$10,000 for individuals and up to \$20,000 for companies or other body corporates, to align with the penalty levels of the *Employment Relations Act* [CAB Min 18/0250 refers].
- 49 The May Cabinet paper also stated that MBIE was working with the Ministry of Justice on the structure of new penalty provisions.
- 50 The Bill repeals the umbrella offence provisions under the *Equal Pay Act*, as the behaviour associated with compliance with the Bill is not of the nature that would normally be subject to criminal liability, and instead is more aligned with the type of conduct subject to penalties under the *Employment Relations Act*. It would also be unclear how umbrella offence provisions would apply alongside the more specific offence and penalty provisions, as well as exactly the type of conduct an offence would apply to. The Bill instead sets out a penalty regime that applies to listed behaviour in relation to claims.
- 51 The Bill also repeals the offence under the *Equal Pay Act* relating to adverse treatment of an employee where they have raised a claim under the Act. This provision is aligned to the *Employment Relations Act*, allowing an employee to take a personal grievance against the employer for the same behaviour that was an offence under the *Equal Pay Act*.
- 52 The conduct under the *Equal Pay Act* relating to wilful obstruction of Labour Inspectors is liable to an offence under that Act. This behaviour will still be treated as an offence under the Bill. The other behaviour outlined in the *Equal Pay Act*, in

relation to Labour Inspectors, will also be aligned with the *Employment Relations Act* powers of inspectors.

Consolidation of claims within a single employer

53 The May Cabinet paper proposing a new pay equity regime [CAB Min 18/0250 refers] recommended that an employer ‘may’ consolidate pay equity claims for the ‘same’ work. This does not align with the policy intent that an employer ‘must’ consolidate claims for the ‘same, or substantially similar work’. Accordingly, the relevant provision in the Bill has been drafted to give effect to the policy intent.

State sector pay equity claims

54 The State Sector Act review currently proposes a role for the Commissioner in respect of State sector pay equity claims that is akin to the Commissioner’s role in collective bargaining in the State sector (which includes the Public Service, health and education sectors). The State Sector Act review, including the proposal about the Commissioner’s role in respect of State sector pay equity claims, will shortly be the subject of public consultation [CAB Min 18/0386 refers]. 9(2)(j)

Estimated financial and economic impacts of pay equity

55 The Court decision in TerraNova acknowledged that workers under the *Equal Pay Act* have a right to pay equity. The Crown as an employer faces an obligation under the *Equal Pay Act* to address systemic sex-based discrimination that leads to pay inequity. Addressing pay equity means that wages will increase for some predominantly female, many of which are lower paid.

56 As a significant employer or funder of female-dominated workforces, this also means the Crown currently faces a potentially significant financial liability.

57 It is important to recognise that adoption of the JWG and RJWG proposals is not expected to materially change the scale of these financial impacts as these would likely have arisen in any case via a Court-based regime under the status quo.

58 To date, the anticipated financial liability has primarily only been reflected as an unquantified risk to the Treasury’s economic and fiscal forecasts. However, it will eventually need to be accounted for in forecasts and against Budget allowances.

Estimated fiscal impacts

59 At the request of the Minister of Finance, the Treasury has undertaken further analysis to estimate the financial and economic liability of pay equity, using a broad range of assumptions. 9(2)(j)

9(2)(j)

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64 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.

Key caveats to the Treasury's analysis

9(2)(j)

65 Despite several pay equity claims having been raised (and some already settled) in the State sector, there is still considerable uncertainty about:

- a. which other workforces will raise claims, when they will be raised, and how long they will take to be investigated and addressed (if required)
- b. the likelihood of success of additional claims and the size of any settlements
- c. the implications of the potential to claim back pay (see paragraph 55 above)
- d. the implications of future pay equity settlement reviews.

66 The financial and economic estimates are the Treasury's best judgment, 9(2)(j)

[Redacted]

[Redacted]

68 The economic impact estimates largely depend on how businesses respond to wage increases in the rest of the economy.

69 Further details on the financial and economic impacts of pay equity are provided in Annex 4.

9(2)(f)(iv)

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Next steps

80 If Cabinet agrees to the proposals in this paper, the Bill will be finalised for introduction. We intend to introduce the Bill and for it to be available for its first reading in September.

Financial Implications

81 The Crown faces fiscal liability under the current Court-based pay equity regime and this liability will remain in the proposed pay equity legislation. It is uncertain how the proposed regime may change this financial liability relative to the status quo.

82 Under the current *Equal Pay Act*, back pay liability is untested; though the current Act allows employees to claim back pay of up to six years. The proposed regime changes the ability to claim back pay for pay equity as outlined in paragraph 17. However it is highly uncertain how back pay may be successfully leveraged in bargaining, and how the Courts may award back pay, if it is awarded.

9(2)(j)

Human Rights

85 The *Equal Pay Act* allows the Court to award back pay up to six years before the date the claim is filed. This paper proposes additional limits on pay equity claims:

- a. for those first raised within the first five years after legislation comes into force, the Authority or Court can award back pay from determination back to the date the claim was raised (subject to a six year maximum)
- b. for those first raised on or after five years after legislation comes into force, the Authority or Court can award back pay from determination back to the five year anniversary of the legislation coming into force (subject to a six year maximum).

9(2)(j)

- 86 For existing pay equity claims, the Authority or Court can award back pay from determination back to the date of an employee's original written notification of a pay equity issue to their employer, or the date of filing the claim in the Authority or Court (whichever is earlier), subject to a six year maximum limitation.
- 87 As pay equity claims, by definition, relate to work exclusively or predominantly performed by women, the limitation on back pay for such claims disproportionately affects women. In particular, limiting back pay for pay equity claims, and not for other claims, disadvantages women experiencing discrimination resulting in historical and continuing undervaluation of their work.
- 88 The limitation will apply equally to all existing and undetermined pay equity claims. It will also likely impact non-unionised employees, claimants from low-paid and vulnerable workforces and women who face particular barriers to making and progressing pay equity claims. As such, it could be argued that the proposal relating to back pay limits the right to be free from discrimination on the prohibited grounds of sex affirmed in section 19(1) of the *Bill of Rights Act*.
- 89 In our view, however, any such limitation is justified under section 5 of the *Bill of Rights Act* because:
- a. it is a necessary restriction for the implementation of a scheme which aims to address the systemic discrimination against women in the workplace through an accessible bargaining framework;
 - b. back pay has been limited to the date of lodging the claim or to ensure the process is balanced and fairly reflects the nature of the grievance (pay equity grievances reflect systemic social issue involving structural undervaluation of female-dominated occupations and do not involve the same blameworthiness by the individual employer when compared to direct discriminatory practices); and
 - c. the limit is in due proportion to the importance of the objective and does not limit section 19(1) of the *Bill of Rights Act* any more than reasonably necessary.
- 90 We note that this limitation is consistent with accepted jurisprudence that the rights affirmed by the *Bill of Rights Act* 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."⁷ We note that the proposals in this paper are particularly directed at addressing structural discrimination that prevent full participation in society. The proposals in this paper aim to address those structural barriers in a way that is most likely to see meaningful change.

Compliance with the *Bill of Rights Act* 1990

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

⁷ *R v B* [1995] 2 NZLR 172, 182 (CA).

92 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

93 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, will likely generate substantive gender implications for employees and employers. These implications may be especially acute for both 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. Any tools and resources should be tailored to be accessible to all claimants.

94 Women employees in 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 and other women, whose circumstances should be considered by a pay equity regime. The regime includes a pay equity law, any regulations and guidance including Codes of Practice, and the work of a unit to support parties to claims.

95 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

96 Despite limited data, women with disabilities 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.

97 People with disabilities 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, employers with disabilities responding to pay equity claims may require accessible assistance and information to respond to claims.

98 There will be many women working in the disability sector in a range of roles which may involve pay equity issues.

Impact analysis

99 A Regulatory Impact Statement (RIS) was prepared in accordance with the necessary requirements, and was submitted at the time that the Economic and Development Committee approved the policy relating to the Bill in May 2018 [DEV Min 18/0104 refers].

100 The Regulatory Impact Analysis Team at the Treasury reviewed the Regulatory Impact Statement *Equal Pay Act 1972: Principles and Process* produced by MBIE and dated 16 May 2018. The reviewers considered that the information and analysis summarised in the RIS meet the QA criteria.

Compliance

- 101 The Bill complies with each of the following:
- a. the principles of the Treaty of Waitangi
 - b. 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)
 - c. the disclosure statement requirements
 - d. 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.
 - e. relevant international standards and obligations including CEDAW and the International Labour Organisation Equal Remuneration Convention
 - f. the LDAC Guidelines on the Process and Content of Legislation (2018 edition), which are maintained by the Legislation Design and Advisory Committee (LDAC). 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. We 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 back pay 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

- 102 Consultation took place on the policy decisions in this Bill as part of the JWG process in 2015 to 2016 and the 2018 RJWG process.
- 103 The JWG was comprised of representatives from unions (the CTU, the Public Service Association, E Tū, FIRST Union, the New Zealand Nurses Organisation and the New Zealand Educational Institute), businesses (BusinessNZ and the Employers and Manufacturing Association) and government agencies (MBIE and SSC). The RJWG also included the Ministry for Women.
- 104 We have consulted with the RJWG leads during the legislative drafting process.
- 105 The proposed Equal Pay Amendment Bill was referred to the Legislation Design and Advisory Committee for design advice.
- 106 The Treasury, the Department of Prime Minister and Cabinet (Policy Advisory Group), 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, the Ministry of Education and the Crown Law Office were consulted on the proposals in this paper.

Binding on the Crown

107 Cabinet previously decided that the Bill will be binding on the Crown [CAB Min 18/0250 refers]. The legislation does not create a new agency or amend law relating to existing agencies.

Allocation of decision-making powers

108 The Bill does not allocate decision-making powers between the Courts, the executive and tribunals.

Associated regulations

109 The Bill includes a regulation-making power to prescribe matters to be taken into account when assessing a pay equity claim and when identifying comparable work. Regulations are not required to bring the Bill into operation.

Other instruments

110 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.

Commencement of legislation

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

Parliamentary stages

112 We intend to introduce the Bill in September. We will propose that the Bill be referred to the Education and Workforce Committee.

Publicity

113 If approved by Cabinet, we intend to issue a joint media statement at the time the Bill is introduced.

114 MBIE plans to proactively release this paper on its website subject to any necessary redactions.

115 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:

- 1 **note** that the Equal Pay Amendment Bill holds a category 5 priority (to be referred to a Select Committee in 2018) on the 2018 Legislation Programme
- 2 **note** that the Bill implements Cabinet's May 2018 decisions to address pay equity claims within the existing employment relations bargaining framework [CAB Min 18/0250 refers]
- 3 **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
- 4 **agree** that the Bill remove redundant provisions of the *Equal Pay Act 1972* and amend relevant provisions of the *Equal Pay Act 1972* to make them fit-for-purpose to enable the regime covered by the Bill to work as a whole
- 5 **note** that the Bill repeals the *Government Service Equal Pay Act 1960*, and amends the *Employment Relations Act 2000*

Limitation period for back pay

- 6 **agree** to limit back pay for pay equity claims so that:
 - 6.1 for those first raised within the first five years after legislation comes into force, the Authority or Court can award back pay from determination back to the date the claim was raised (subject to a six year maximum); and
 - 6.2 for those first raised on or after five years after legislation comes into force, the Authority or Court can award back pay from determination back to the five year anniversary of the legislation coming into force (subject to a six year maximum).
- 7 **agree** that the Employment Relations Authority or the Court must take the following factors into account when exercising its discretion to determine back pay for a pay equity claim:
 - 7.1 the conduct of the parties
 - 7.2 the ability of the employer to pay
 - 7.3 the nature and extent of resources (for example, information and advice) available to the employer and the employee in respect of the claim
 - 7.4 any other factors the Authority or the Court considers appropriate

Transition to the new regime

- 8 **note** that claims filed with the Authority or the Court in relation to equal pay and unlawful discrimination will be dealt with under the previous *Equal Pay Act 1972* regime

- 9 **note** that the transitional provisions for pay equity 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 by 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
- 10 **agree** that the following claims will be transitioned to the regime in the Bill (either to the start of the regime, or to a more advanced stage by written agreement) when the Bill comes into force:
- 10.1 claims for pay equity that have been filed in the Employment Relations Authority or the Employment Court
- 10.2 claims for pay equity that have not been filed but are unresolved at the time of the commencement of the Act
- 11 **agree** that the Authority or Court can award back pay subject to a six-year limitation, to the date of an employee's formal written notification of a pay equity issue to their employer, or to the date on which they filed the claim in the Authority or Court (whichever is earlier) for the following claims:
- 11.1 claims for pay equity that have been filed in the Employment Relations Authority or the Court
- 11.2 claims for pay equity that have not been filed but are unresolved at the time of the commencement of the Act
- 12 **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 back pay claims as outlined in recommendation 6

Alternative avenues for claims

- 13 **agree** that employees can choose to take a claim for equal pay, pay equity or unlawful discrimination under only one of the following avenues:
- 13.1 this Bill
- 13.2 the *Employment Relations Act 2000*
- 13.3 the *Human Rights Act 1993*

Penalties

- 14 **agree** to repeal the offence provisions of the *Equal Pay Act 1972* and align conduct in relation to Labour Inspectors with the *Employment Relations Act 2000*
- 15 **agree** to a fit-for-purpose penalty regime outlining specific behaviour that is subject to penalties under the *Equal Pay Amendment Bill*, including duties to enter into pay equity bargaining if a claim is arguable and not to provide different remuneration on the basis of sex for the same, or substantially similar work

- 16 **note** that Cabinet agreed [CAB Min 18/0250 refers] that the *Equal Pay Amendment Bill* provide for penalties for non-compliance which are consistent with the *Employment Relations Act 2000* by empowering the Employment Relations Authority and the Courts to impose pecuniary penalties not exceeding \$10,000 for individuals, and not exceeding \$20,000 for companies or other corporations

Estimated financial liability for pay equity

- 17 **note** that the proposed legislation adopting the JWG and RJWG principles is not expected to materially change the scale of financial impacts as these would likely have arisen otherwise via the status quo Court-based regime

9(2)(j)

9(2)(f)(iv)

Publicity

- 25 **note** that the Minister for Workplace Relations and the Minister for Women will issue a media statement at the time the Bill is introduced

- 26 **note** that the Ministry of Business, Innovation and Employment and the Ministry for Women plan to proactively release this paper on their websites, subject to any necessary redactions

Approval to introduce the Equal Pay Amendment Bill

- 27 **note** that the Bill has been drafted to provide for the proposals in this paper, in advance of Cabinet's decisions, with the consent of the Attorney-General
- 28 **approve** the Equal Pay Amendment Bill for introduction, subject to the final approval of the government caucus and sufficient support in the House of Representatives
- 29 **agree** that the Bill be introduced in September 2018
- 30 **authorise** the Minister for Workplace Relations and Safety to make changes to the Bill prior to introduction, in consultation with the Minister for Women, consistent with the policy framework in this paper and Cabinet's May 2018 decisions to address pay equity claims within the existing employment relations bargaining framework [CAB Min 18/0250 refers]
- 31 **agree** that the Government propose that the Bill be referred to the Education and Workforce Committee for consideration.

Hon Iain Lees-Galloway
Minister for Workplace Relations and Safety

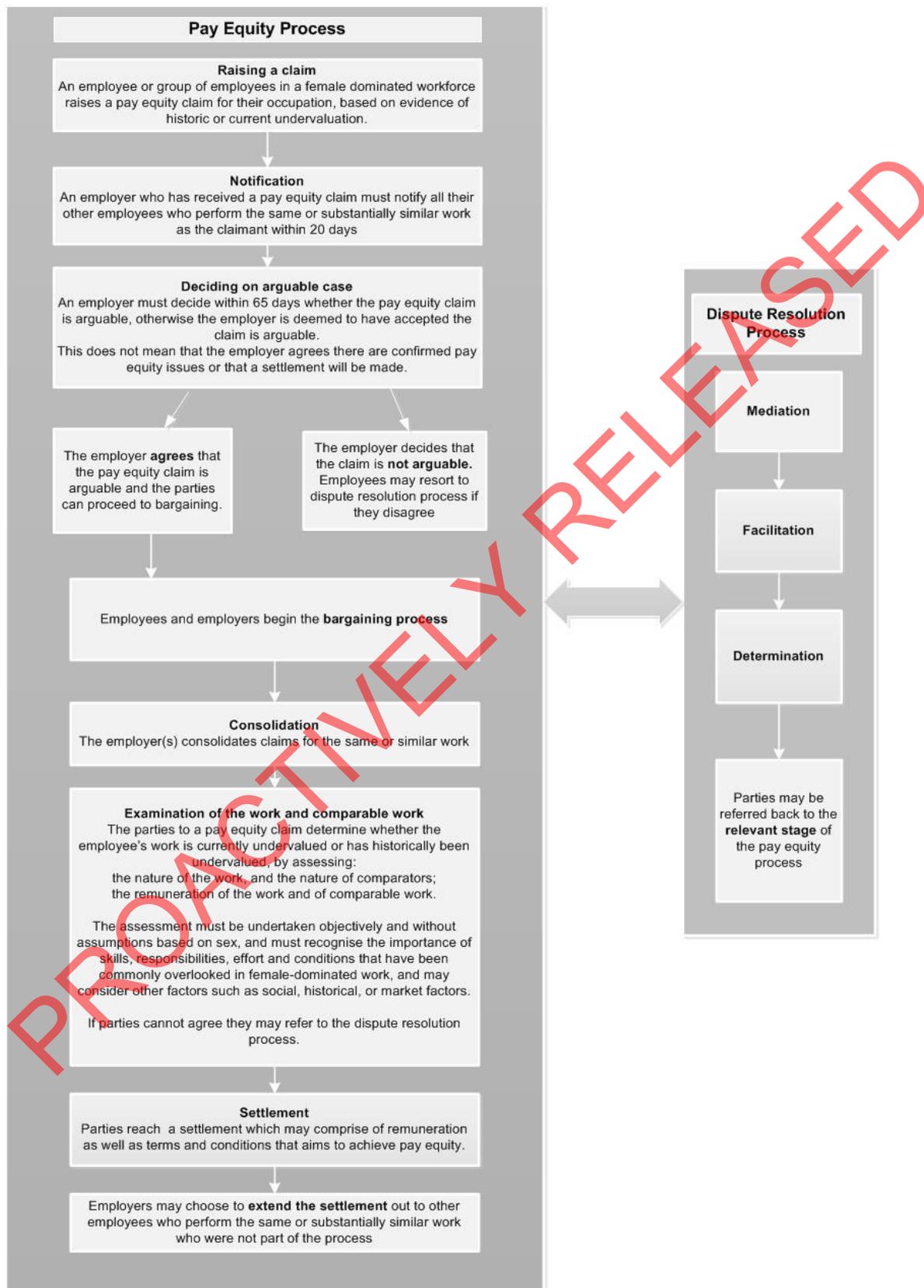
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Hon Eugenie Sage
Acting Minister for Women

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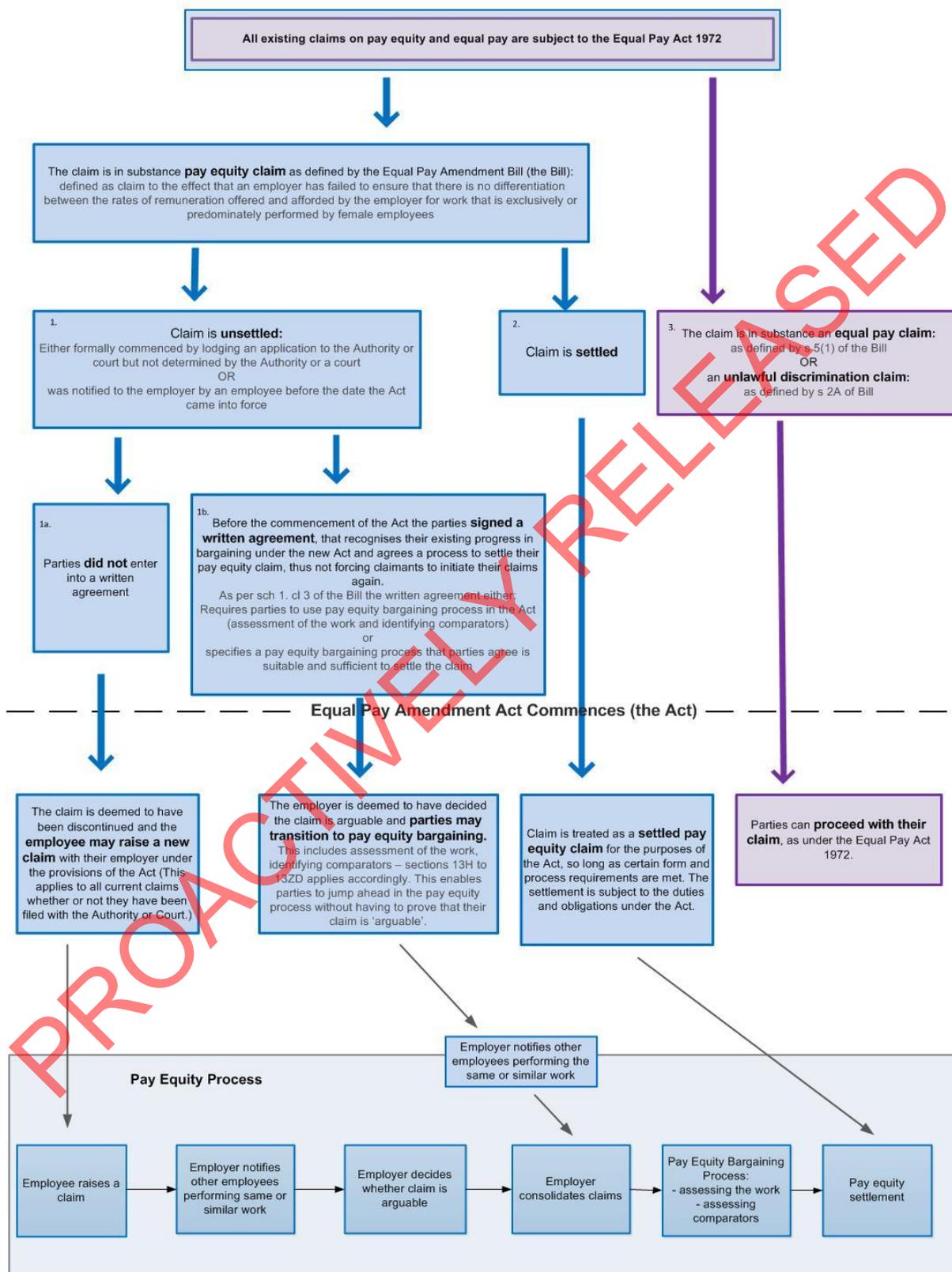
PROACTIVELY RELEASED

Annex 1: Key elements of the JWG and RJWG proposals for pay equity claims



Annex 2: Transitional provisions

Transitional Provisions Flowchart



Annex 3: Summary of State sector pay equity claims

In November 2017, following approval from Ministers, the State Services Commission/New Zealand Council of Trade Unions (SSC/CTU) agreed to apply the Joint Working Group (JWG) Principles to pay equity claims in the State sector ahead of pending legislation. The Pay Equity Principles can guide pay equity claims through New Zealand's employment relations framework, instead of through the Court. The SSC and the CTU meet regularly to maintain oversight of progress made by agencies and unions.

There are currently 12 pay equity claims in the State sector being progressed under the SSC/CTU agreement. These claims cover both direct State sector employees and State sector funded services and are summarised below.

Workforce	Claim	Status
Filed in the Employment Relations Authority (ERA) or the Employment Court		
Education support workers employed by the Ministry of Education, covering approximately 330 employees	Claim filed by New Zealand Educational Institute (NZEI) Te Riu Roa in the ERA on 14 October 2015	The Terms of Settlement were signed on 14 August. If it is ratified, it will be the first pay equity claim to be settled by applying the Pay Equity Principles process.
Social workers employed by Oranga Tamariki covering approximately 2,000 employees	Claim filed by the Public Service Association (PSA) in the ERA on 16 November 2015	The parties have undertaken the assessment stages and appear close to reaching agreement on a pay equity settlement.
Part-Time Secondary Teachers employed by school Boards of Trustees	Claim raised in the Employment Court under grounds of Pay Equity by the New Zealand Post Primary Teachers' Association (PPTA)	9(2)(h) [REDACTED] [REDACTED] [REDACTED]
Raised with employer under CTU/SSC joint agreement		
Support staff in schools employed by school Boards of Trustees, starting with Teacher Aides. Approximately 21,600 (15,800 FTEs) employees	Claim raised by the NZEI in collective agreement negotiations in early 2017	The parties have an agreed Terms of Reference to guide the application of the Principles and are currently at the stage of assessing the work done by teacher aides within the wider school support staff group.
Nurses and Midwives employed by District Health Boards (DHBs) covering approximately 22,300 FTEs	Claim raised by the New Zealand Nurses Organisation (NZNO) in the 2017 collective agreement negotiations	The recent settlement saw a commitment to implementing a pay equity settlement by December 2019.
Midwives employed by DHBs who are members of Midwifery Employment Relations Advisory Service (MERAS)	Claim formally raised by MERAS and provided to DHBs on 15 June 2018	This claim relates to the NZNO nurses and midwives claim and the management of this will need to be discussed.
Clerical workers employed by DHBs who are members of the PSA, covering approximately 6,800 FTEs	Claim formally raised by the PSA on 18 April 2018	At initial stages.

Support Officers employed by the Ministry of Primary Industries (MPI), covering approximately up to 165 employees	Claim notified by the PSA to the MPI in December 2017, following completion of collective agreement negotiations	9(2)(j) [REDACTED]
Nurses employed by three Auckland DHBs	Claim raised by the PSA on 24 July 2018	9(2)(j) [REDACTED]
Nurses employed by the non-Auckland DHBs		
Allied & Technical Health Workers employed by three Auckland DHBs		
Allied & Technical Health Workers employed by the non-Auckland DHBs		
Other		
Teachers in private early childhood centres that are covered by the Early Childhood Education Agreement of Aotearoa New Zealand	Claim raised by NZEI	NZEI has reached an agreement with the Early Childhood Council on a Terms of Reference. These employers are funded in part through Vote Education.

PROACTIVELY RELEASED

Annex 4: Additional information on the analysis of financial implications of pay equity

1 This section provides further detail on the financial estimates provided in the paper.

9(2)(j)

PROACTIVELY RELEASED

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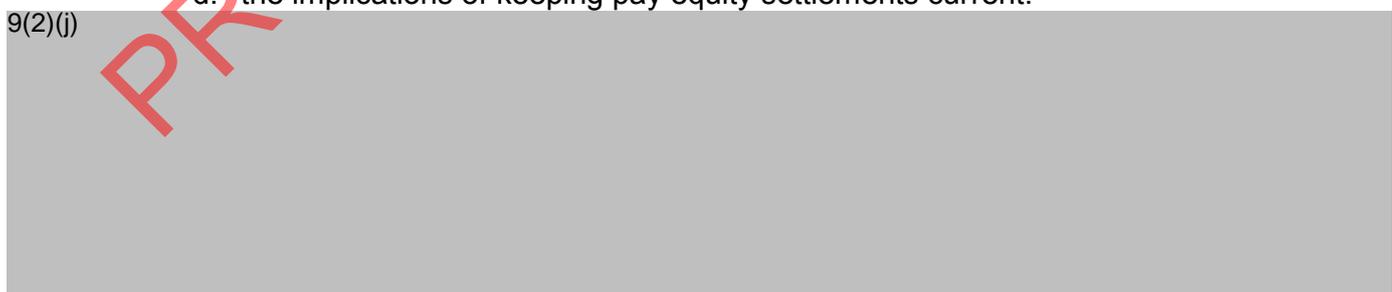
9(2)(j)



Uncertainties and caveats

- 5 Several pay equity claims have been raised (and some already settled) in the State sector, however, there is still considerable uncertainty about:
 - a. which other workforces will raise claims, when they will be raised, and how long they will take to be investigated and addressed (if required)
 - b. the likelihood of success of additional claims and the size of any settlements
 - c. the degree and means of influence of back pay, and
 - d. the implications of keeping pay equity settlements current.

9(2)(j)



7 The financial and economic estimates are the Treasury's best judgement. 9(2)(j)



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Uncertainties relating to economic analysis

10 The economic impact estimates largely depend on how businesses respond to wage increases in the rest of the economy. 9(2)(j)

Broadly speaking, firms could either:

- a. absorb higher wage costs through lower profits but no change in activity
- b. pass on higher wage costs to the consumer through higher prices, or

- c. attempt to minimise the impact of higher wage costs by reducing any increases to employment or investment in the future.

9(2)(j)



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