

Departmental Disclosure Statement

Employment (Pay Equity and Equal Pay) Bill
--

The departmental disclosure statement for a government Bill seeks to bring together in one place a range of information to support and enhance the Parliamentary and public scrutiny of that Bill.

It identifies:

- the general policy intent of the Bill and other background policy material;
- some of the key quality assurance products and processes used to develop and test the content of the Bill;
- the presence of certain significant powers or features in the Bill that might be of particular Parliamentary or public interest and warrant an explanation.

This disclosure statement was prepared by the Ministry of Business, Innovation and Employment.

The Ministry of Business, Innovation and Employment certifies that, to the best of its knowledge and understanding, the information provided is complete and accurate at the date of finalisation below.

30 June 2017

Contents

Contents..... 2

Part One: General Policy Statement..... 3

Part Two: Background Material and Policy Information 4

Part Three: Testing of Legislative Content..... 7

Part Four: Significant Legislative Features 100

Part One: General Policy Statement

The purpose of this Bill is to eliminate and prevent discrimination, on the basis of sex, in the remuneration and other terms and conditions of employment, and in doing so, promote enduring settlement of claims relating to sex discrimination on pay equity grounds.

The Bill —

- prohibits an employer from discriminating, on the basis of sex, in remuneration and other terms and conditions:
- enables employees to make claims relating to sex discrimination in employment:
- distinguishes between 3 types of claims (equal pay, unlawful discrimination on matters other than remuneration, and pay equity):
- sets out the processes for resolving the different types of claims:
- re-enacts, in an up-to-date and accessible form, the relevant provisions of the Equal Pay Act 1972.

Implementing these policies requires amendments to the Employment Relations Act 2000, and the repeal and replacement of the Equal Pay Act 1972 and the Government Service Equal Pay Act 1960.

Part Two: Background Material and Policy Information

Published reviews or evaluations

2.1. Are there any publicly available inquiry, review or evaluation reports that have informed, or are relevant to, the policy to be given effect by this Bill?	YES
<p>The Bill is part of the Government's response to the Court of Appeal's interpretation of the Equal Pay Act in the TerraNova case. In that case, the Court endorsed the view that the Equal Pay Act incorporates a pay equity regime for female dominated work. 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).</p> <p>https://www.employmentcourt.govt.nz/assets/Documents/Decisions/2014-NZCA-516-CA631-2013-Terranova-Homes-Care-Limited-v-Service-Food-Workers-Union-Inc-and-Bartlett.pdf?SubsiteID=1</p> <p>The Joint Working Group on Pay Equity (the JWG) provided "Recommendations of the Joint Working Group on Pay Equity Principles" for the Minister of State Services, Hon Paula Bennett, and the Minister for Workplace Relations and Safety, Hon Michael Woodhouse on 24 May 2016. http://www.ssc.govt.nz/sites/all/files/pay-equity-jwg-recommendations.pdf</p>	

Relevant international treaties

2.2. Does this Bill seek to give effect to New Zealand action in relation to an international treaty?	NO
<p>The Bill will provide a positive contribution to New Zealand's compliance with International Labour Organisation (ILO) Convention 100 on Equal Remuneration, which requires the application of the principle of equal remuneration for men and women workers for work of equal value (pay equity). To date, New Zealand's compliance with this Convention has primarily been via the Equal Pay Act 1972. This Bill amends the Equal Pay Act by adding explicit provisions for pay equity, whilst also preserving existing provisions for equal pay, thus strengthening New Zealand's ability to comply with the Convention.</p> <p>http://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO::P12100_ILO_CODE:C100</p>	

2.2.1. If so, was a National Interest Analysis report prepared to inform a Parliamentary examination of the proposed New Zealand action in relation to the treaty?	NO
<p>New Zealand ratified ILO Convention 100 in June 1983. The Ministry of Business, Innovation and Employment (and previously the Department of Labour) report regularly on New Zealand's compliance with the Convention.</p>	

Regulatory impact analysis

2.3. Were any regulatory impact statements provided to inform the policy decisions that led to this Bill?	YES
<p>Equal Pay Act: Principles and Process, Ministry of Business, Innovation and Employment, September 2016, http://www.mbie.govt.nz/info-services/employment-skills/legislation-reviews/pdf-library/folder-pay-equity/cabinet-paper.pdf</p>	

2.3.1. If so, did the RIA Team in the Treasury provide an independent opinion on the quality of any of these regulatory impact statements?	YES
---	------------

The Regulatory Impact Analysis Team at the Treasury 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 met the Quality Assurance criteria.

2.3.2. Are there aspects of the policy to be given effect by this Bill that were not addressed by, or that now vary materially from, the policy options analysed in these regulatory impact statements?

YES

After the RIS was completed further policy decisions were required in response to issues arising from drafting and feedback on the exposure draft of the Bill and Ministerial consultations.

These policy positions are given effect in the Bill and can be summarised as:

- 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 rather than seeking back pay for up to six years as with other employment claims
- Equal Pay Act claims that have been filed in the Employment Relations Authority or a court when the Bill comes into force, and that are awaiting a final determination, are all to be discontinued, but may be recommenced under the provisions of the Bill.

Extent of impact analysis available

2.4. Has further impact analysis become available for any aspects of the policy to be given effect by this Bill?

NO

2.5. For the policy to be given effect by this Bill, is there analysis available on:

(a) the size of the potential costs and benefits?

YES

(b) the potential for any group of persons to suffer a substantial unavoidable loss of income or wealth?

YES

The RIS acknowledged that the economy-wide costs and benefits of the potential wage adjustments are not known. No formal cost-benefit analysis was carried out for any of the proposals presented to Cabinet. Instead, qualitative judgements of the impacts (positive and negative) of the options considered were used to determine the preferred options. The Cabinet paper and RIS are available at <http://www.mbie.govt.nz/info-services/employment-skills/legislation-reviews/pdf-library/folder-pay-equity/cabinet-paper.pdf>

The status quo pay equity regime in the Equal Pay Act is likely to have significant fiscal and economic costs. It is important to recognise that the adoption of the JWG proposals is not expected to change these fiscal or economic impacts.

It remains difficult to estimate the scale of the 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 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.

Employers who are party to a successful pay equity claim will face higher ongoing labour costs. These employers will have to develop a means for affording the higher wage cost. It is also likely that where one employer is party to a successful pay equity claim, other employers of workers with the similar occupational characteristics will face pressure to increase wages to attract and retain these staff even in the absence of a pay equity claim against them.

2.6. For the policy to be given effect by this Bill, are the potential costs or benefits likely to be impacted by:	
(a) the level of effective compliance or non-compliance with applicable obligations or standards?	YES
(b) the nature and level of regulator effort put into encouraging or securing compliance?	YES
<p>a) Pay equity claims can only be settled where both parties reach an agreement or the claim is determined by the employment institutions. Non-compliance with the duty to engage in bargaining would hamper the ability for pay equity claims to proceed as intended by the Bill.</p> <p>b) The Bill promotes a bargaining process for settling pay equity claims without the need for engagement with a regulator. However, in the case of either non-compliance by employers to engage faithfully or where disputes arise in bargaining that cannot be mediated without assistance from the government, the Bill provides for the Employment Relations Authority and/or the Employment Court to adjudicate (clause 36(1) of the Bill).</p>	

Part Three: Testing of Legislative Content

Consistency with New Zealand's international obligations

3.1. What steps have been taken to determine whether the policy to be given effect by this Bill is consistent with New Zealand's international obligations?
--

The Ministry of Business, Innovation and Employment's International Strategy Team and the Ministry for Women have been consulted in the development of the Bill, given their responsibility for annual reporting on International Labour Organisation Conventions and other international treaties that have a labour-focus and a gender-focus respectively. The pay equity bargaining framework in the Bill is consistent with New Zealand's employment law framework and the primary methods for determining rates of remuneration. The MBIE International Strategy team advise that the Bill is consistent with our international obligations in respect of equal remuneration as detailed in ILO Convention 100.

Consistency with the government's Treaty of Waitangi obligations

3.2. What steps have been taken to determine whether the policy to be given effect by this Bill is consistent with the principles of the Treaty of Waitangi?

Te Puni Kōkiri officials were consulted in the policy development for the Bill. They have advised that the policy content given effect by the Bill is consistent with the principles of the Treaty of Waitangi.

Consistency with the New Zealand Bill of Rights Act 1990

3.3. Has advice been provided to the Attorney-General on whether any provisions of this Bill appear to limit any of the rights and freedoms affirmed in the New Zealand Bill of Rights Act 1990?

YES

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. Advice provided to the Attorney-General is generally expected to be available on the Ministry of Justice's website upon the Bill's introduction.

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, the Ministry considers 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.

Pay equity claims are different to equal pay claims. 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.

Offences, penalties and court jurisdictions

3.4. Does this Bill create, amend, or remove:	
(a) offences or penalties (including infringement offences or penalties and civil pecuniary penalty regimes)?	YES
(b) the jurisdiction of a court or tribunal (including rights to judicial review or rights of appeal)?	YES
<p>(a) The Bill replaces the offence regime contained within the Equal Pay Act (clauses 15 and 18) with a new penalty regime (clauses 42 and 43 of the Bill). The new penalties are consistent with the existing penalty regime in the Employment Relations Act. This would empower the Authority and the court to impose pecuniary penalties not exceeding \$10,000 for individuals, and not exceeding \$20,000 for companies or other corporations. It would also remove the offences currently contained in the Equal Pay Act.</p> <p>(b) The Bill repeals section 9 of the Equal Pay Act which enables the Court to state principles for implementation of equal pay. The Bill codifies the principles developed by the Joint Working Group, and so the Authority or Court will be guided by the Bill. Also, the Bill enables pay equity claimants to use mediation services and enables the Authority to conduct facilitation for pay equity disputes. Currently, facilitation is only available for collective bargaining.</p>	

3.4.1. Was the Ministry of Justice consulted about these provisions?	YES
<p>The Ministry of Justice was consulted in the policy development for the Bill. The penalty provisions were developed in line with the regime in the Employment Relations Act 2000. This is a modern and fit-for-purpose penalty regime which has been recently reviewed and modernised (CAB Min (15) 8/9). In this review, the Ministry of Justice and both the Chief Justice and the Chief Judge of the Employment Court were consulted extensively.</p>	

Privacy issues

3.5. Does this Bill create, amend or remove any provisions relating to the collection, storage, access to, correction of, use or disclosure of personal information?	YES
<p>Clause 19 of the Bill outlines the requirements for names and contact details of claimants to be shared by employers to other claimants to ensure multiple pay equity claims can be consolidated for bargaining where appropriate. Claimants do have the ability to request confidentiality of their name and contact details. Claimants can nominate a representative to bargain on their behalf; in this case the name and address of the representative would be shared instead.</p> <p>In the case of multi-employer claims, the Bill does not indicate that employers can share the names and contact details of each employer's employees who are claimants.</p>	

3.5.1. Was the Privacy Commissioner consulted about these provisions?	YES
<p>The Office of the Privacy Commissioner has been consulted on the provisions in the Bill related to the notification requirements for pay equity claims (as described in 3.5 above) The Office understands that the Bill provides an option for claimants to request confidentiality and to seek a representative to act on their behalf and are comfortable with the substance of the provisions.</p>	

External consultation

3.6. Has there been any external consultation on the policy to be given effect by this Bill, or on a draft of this Bill?	YES
<p>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. The Terms of Reference and the Recommendations of the JWG are publically available at http://www.ssc.govt.nz/pay-equity-working-group</p> <p>In April 2017, MBIE released an exposure draft of the Employment (Pay Equity and Equal Pay) Bill for three weeks' public consultation. MBIE received 334 submissions. The submissions were from a range of individuals, unions or worker associations, advocacy groups, employers or employer associations, and law firms. This exposure draft can be viewed at http://www.mbie.govt.nz/info-services/employment-skills/legislation-reviews/exposure-draft-employment-pay-equity-and-equal-pay-bill/consultation</p>	

Other testing of proposals

3.7. Have the policy details to be given effect by this Bill been otherwise tested or assessed in any way to ensure the Bill's provisions are workable and complete?	NO
<p>There has been no formal testing or assessment of the policy details to be given effect by the Bill. All pay equity bargaining has been undertaken within the existing Equal Pay Act framework. This framework is being amended by the Bill to provide clarity of process for future pay equity claims.</p>	

Part Four: Significant Legislative Features

Compulsory acquisition of private property

4.1. Does this Bill contain any provisions that could result in the compulsory acquisition of private property?	NO

Charges in the nature of a tax

4.2. Does this Bill create or amend a power to impose a fee, levy or charge in the nature of a tax?	NO

Retrospective effect

4.3. Does this Bill affect rights, freedoms, or impose obligations, retrospectively?	YES
<p>The existing Equal Pay Act claims that have been filed in the Employment Relations Authority or the Employment Court will all be discontinued, but may be re-instigated under the provisions of the Bill when it comes into force. Under the existing provisions in the Equal Pay Act 1972, these claims would have had the ability to agree settlements that include back pay of up to six years for claimants. Including back pay in future settlements is not provided for by the Bill. Allowing the existing claims to continue would mean they would be considered under the existing Equal Pay Act, despite its repeal. This would effectively undermine the changes made by the Bill.</p>	

Strict liability or reversal of the usual burden of proof for offences

4.4. Does this Bill:	
(a) create or amend a strict or absolute liability offence?	NO
(b) reverse or modify the usual burden of proof for an offence or a civil pecuniary penalty proceeding?	NO

Civil or criminal immunity

4.5. Does this Bill create or amend a civil or criminal immunity for any person?	NO

Significant decision-making powers

4.6. Does this Bill create or amend a decision-making power to make a determination about a person's rights, obligations, or interests protected or recognised by law, and that could have a significant impact on those rights, obligations, or interests?	YES
<p>The Bill requires that the Employment Relations Authority and the Employment Court exercise their existing decision-making powers to cases that seek to determine rights and obligations under the Equal Pay Act 1972. The Bill also provides for a code of employment practice to provide guidance on the application of the Bill (see 4.8 below for more detail).</p>	

Powers to make delegated legislation

4.7. Does this Bill create or amend a power to make delegated legislation that could amend an Act, define the meaning of a term in an Act, or grant an exemption from an Act or delegated legislation?	NO

4.8. Does this Bill create or amend any other powers to make delegated legislation?	YES
<p>Clause 45 of the Bill empowers the making of regulations to prescribe matters that must be taken into account when considering or determining whether a pay equity claim has merit; when assessing a pay equity claim; and, when identifying appropriate comparators. Clause 47 allows for the creation of a code of employment practice to provide guidance on the application of the Bill. The Authority or court will then have regard to the matters set out in the code as needed. Codes establish an accepted way of complying with an Act, without limiting other acceptable ways of complying. 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.</p>	

Any other unusual provisions or features

4.9. Does this Bill contain any provisions (other than those noted above) that are unusual or call for special comment?	YES
<p>The Bill repeals the Government Service Equal Pay Act 1960. This Act applies to public service employees and appears to have a similar objective to the subsequently enacted Equal Pay Act 1972 regarding the elimination of discrimination against women. The application of the Government Service Equal Pay Act under current employment relations settings, and the interaction between the two Acts, has not been tested. Modern employment law does not generally distinguish between the public and private sector employees. The Bill repeals and replaces the Equal Pay Act and the Government Service Equal Pay Act with legislation that applies to all employees.</p>	