

Departmental Disclosure Statement

Equal Pay Amendment 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.

5 September 2018.

Contents

Contents.....	2
Part One: General Policy Statement.....	3
Part Two: Background Material and Policy Information	5
Part Three: Testing of Legislative Content.....	7
Part Four: Significant Legislative Features	10

Part One: General Policy Statement

Introduction

The purpose of this Bill is to improve the process for raising and progressing pay equity claims and eliminate and prevent discrimination, on the basis of sex, in the remuneration and employment terms and conditions for work done within female-dominated jobs. It aims to provide a simple and accessible process for claimants to progress a pay equity claim. In doing so, it also aims to promote the enduring settlement of claims relating to sex discrimination on pay equity grounds.

The Bill-

- amends the Equal Pay Act 1972 to establish a process for pay equity claims, while still retaining the rights and processes for claimants to raise equal pay and unlawful discrimination claims; and
- prohibits differentiation based on sex in the rate of remuneration, offered to employees for work that is predominately performed by women and has been historically or currently undervalued; and
- enables employees to raise claims relating to sex discrimination in employment; and
- sets out the process for resolving a pay equity claim that is simple and accessible; and
- permits the courts or the Employment Relations Authority (the Authority) to award an amount of back pay in a pay equity determination.

Implementing these policies also requires amendments to the Employment Relations Act 2000

Process for making and resolving pay equity claims

The Bill provides employees with a new process to raise a pay equity claim. An employee or group of employees may raise a pay equity claim with their employer or group of employers. If their employer considers the claim to be arguable then the parties will proceed to pay equity bargaining. A pay equity claim is arguable if it relates to work that is predominately performed by female employees and if the work is currently or has been historically undervalued. This reflects the policy intent that the threshold for raising a claim should be low so as to not create unnecessary hurdles for claimants, and that the process should be simple and accessible.

If a claim is arguable, this does not mean that there is a pay equity issue or that there will be a pay equity settlement. However, the employer and employee must enter into a pay equity bargaining process to agree on an enduring settlement comprising remuneration and terms and conditions of employment. Pay equity bargaining ordinarily must involve an assessment of the nature and remuneration of the work and comparable work, and must be undertaken free from assumptions based on sex. Claimants can use appropriate comparators against which to assess a pay equity claim. Appropriate comparators include any of the following:

- work that is the same or substantially similar work (but that is not predominately performed by female employees):
- work that involves the same or substantially similar skills and experience, responsibilities, working conditions, or degrees of effort:

- any other comparator that the parties, or the Authority consider useful and relevant.

The Bill provides for a dispute resolution process based on the existing processes in the Employment Relations Act 2000. The Bill also enables parties to apply to the Authority for a determination relating to whether the claim is arguable, whether the work is currently, or has historically been, undervalued, or fixing terms and conditions of employment if other reasonable alternatives for settling the pay equity claim have been exhausted.

The Bill states that collective bargaining and pay equity are distinct, and entry into a collective agreement by an employer and a union does not settle or extinguish an unsettled pay equity claim between an employer and employee.

The Bill permits the courts or Authority to award back pay, in a way that balances the issues of addressing undervaluation and the structural nature of the discrimination while incentivising employers to address pay equity issues within the first 11 years following legislation being passed, with the incentives being progressively stronger after the first 5 years. The Bill also sets out factors that the courts must take into account when deciding whether to award back pay, and the amount, if any, to provide.

Enforcement

The Bill includes a penalty regime for non-compliance consistent with other employment legislation.

Amendments to Employment Relations Act 2000

The Bill provides for codes of employment practise to be approved and to provide guidance on the application of the Employment Relations Act 2000 and other employment legislation.

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). 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> <p>The Joint Working Group was reconvened in November 2017 to reaffirm the principles of the original Joint Working Group and to provide further recommendations on a number of key issues. The Reconvened Joint Working Group on Pay Equity Principles reported back to the Minister of Workplace Relations and Safety, Minister Iain Lees-Galloway, and Minister Genter, Minister for Women on 27 February 2018. https://www.beehive.govt.nz/sites/default/files/2018-03/RJWG%20Pay%20Equity%20Principles%20letter%20of%20transmission%20FINAL%20.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>No, although the Bill will provide a positive contribution towards New Zealand’s compliance with the International Labour Organisation (ILO) Convention 100 on Equal Remuneration as well as the United Nations Convention on the Elimination of All Forms of Discrimination against Women.</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 1972: Principles and Process, Ministry of Business, Innovation and Employment, May 2018, http://www.mbie.govt.nz/info-services/employment-skills/legislation-reviews/exposure-draft-employment-pay-equity-and-equal-pay-bill/documents-and-images/ris-pay-equity.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
<p>The Regulatory Quality Team at the Treasury has reviewed the revised Regulatory Impact Assessment (RIA) "Equal Pay Act: Principles and Processes" produced by the Ministry for Business, Innovation and Employment and dated May 2018. The review team considers that it meets the Quality Assurance criteria.</p> <p>The analysis is commensurate with the scale of the issue, with the options identified and described well, and assessed against consistent criteria relative to the status quo.</p>	

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?	NO

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
<p>Analysis has been done however it will not be made publicly available because it is Sensitive while State sector claims are in the process of being negotiated.</p>	

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?	NO
(b) the nature and level of regulator effort put into encouraging or securing compliance?	NO

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 Employment Relations team assessed the policies against the International Labour Organisation Convention 100- Equal Remuneration Convention as well as the United Nations Convention on the Elimination of All Forms of Discrimination Against Women.

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?

The Ministry of Business, Innovation and Employment's Employment Relations team assessed the policies against the principles of the Treaty of Waitangi and found that the Bill is consistent.

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.
--

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 changes the offence provisions in the Equal Pay Act (sections 15 and 18) to penalties, as well as imposing penalties in relation to pay equity. 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. The Bill still links into section 235 of the Employment Relations Act 2000 which relates to obstruction of a Labour Inspector being an offence.</p> <p>(b) The Bill removes the right of the court to state principles for pay equity under section 9 of the Equal Pay Act 1972 but leaves the right for equal pay claims.</p> <p>The Bill removes the right of appeal under the existing Equal Pay Act 1972 for certain pre-existing pay equity claims. Under Schedule 1 of the Bill, existing claims that are in substance pay equity claims are discontinued and employees may raise a new claim under the new legislation. This removes the right of appeal for those existing claims except that under Schedule 1 clause 4 any existing pay equity claims which have already been determined by the Authority or court may appeal under the Equal Pay Act 1972.</p> <p>The Bill also gives the Authority powers, including additional powers under s 161 of the Employment Relations Act to determine matters arising under the Equal Pay Act 1972. These include giving the Authority jurisdiction to determine certain claims and disputes, and fix terms and conditions (including remuneration) of employment and determine back pay in relation to pay equity claims.</p>	

3.4.1. Was the Ministry of Justice consulted about these provisions?	YES
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.	

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
The Bill allows employees in a consolidated claim to request confidentiality while still being involved in the process through a representative, under clause 13H(4). Under clause 13E(4) when an employer notifies other employees of a pay equity claim the employer must not identify the claimant without the claimant's prior written consent.	

3.5.1. Was the Privacy Commissioner consulted about these provisions?	YES
The Privacy Commissioner was consulted during the development of the Bill, and suggested some changes regarding certain provisions which were taken on board and implemented.	

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 reconvened the Joint Working Group on Pay Equity Principles in December 2017 to make recommendations and support principles for a pay equity regime. The Reconvened Joint Working Group included union representatives, business representatives and government officials including officials from the Ministry of Business, Innovation and Employment, the State Services Commission and the Ministry for Women. Industry leader Traci Houpapa, MNZM, was the Crown-appointed facilitator.</p> <p>In addition select members from BusinessNZ and the NZ Council of Trade Unions (who were both leads on the Reconvened Joint Working Group) were consulted in the drafting of the legislation.</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.</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 transitional provisions contained in Schedule One of the Bill apply the new legislation to existing claims that are in substance pay equity claims. The existing Equal Pay Act claims, that are in substance pay equity claims that have been filed or raised with their employer, will all be discontinued and employees may raise a new claim under the provisions of the Bill when it comes into force. We consider that these 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.</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?	NO

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 24 of 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.</p> <p>Clause 27 of the Bill empowers the Minister to approve codes of employment practice that are deemed to be disallowable instruments. The codes will provide guidance on the application of the Bill and other relevant employment legislation. This will help parties understand their rights and obligations and assist with the successful implementation of legislative changes.</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?	NO