Employment (Pay Equity and Equal Pay) Bill

Submission to the Ministry of Business, Innovation and Employment

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Contact

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About the New Zealand Nurses Organisation

NZNO is the leading professional nursing association and union for nurses in Aotearoa New Zealand. NZNO represents over 47,000 nurses, midwives, students, kaimahi hauora and health workers on professional and employment related matters. NZNO is affiliated to the International Council of Nurses and the New Zealand Council of Trade Unions.

NZNO promotes and advocates for professional excellence in nursing by providing leadership, research and education to inspire and progress the profession of nursing. NZNO represents members on employment and industrial matters and negotiates collective employment agreements.

NZNO embraces te Tiriti o Waitangi and contributes to the improvement of the health status and outcomes of all peoples of Aotearoa New Zealand through influencing health, employment and social policy development enabling quality nursing care provision. NZNO's vision is *Freed to care, Proud to nurse*.

EXECUTIVE SUMMARY

1. The New Zealand Nurses Organisation (**NZNO**) welcomes the opportunity to comment on the Draft Employment (Pay Equity and Equal Pay) Bill 20 April 2017 (**the Bill**).

2. NZNO has consulted its Employment Law and Industrial Advisory Staff in the preparation of this submission.

3. NZNO believes significant amendment is required to clauses 14, 17, 23 and 29 of the Bill to best ensure that the Bill's provisions align with the stated intent. NZNO further recommends a number of additional amendments to better facilitate the objective of workable and practicable legislation.

4. NZNO has a long and extensive history of advocating for, promoting, and championing equal pay for women. Pay equity issues are key for the female dominated occupations that make up NZNO's membership.

5. NZNO has been a party to the Joint Working Group on Pay Equity Principles (JWG) and also to the Care and Support Workers (Pay Equity) Settlement Agreement as signed on 2 May 2017.

6. In addition, NZNO represents a significant number of members in the public health sector where employers are under a statutory obligation

to have a policy requiring identification and elimination of gender inequality[1].

DISCUSSION

Submission Framework

7. The Ministry of Business, Innovation and Employment (MBIE) seeks written submissions on any issues of workability arising from the construction of the Bill – and whether the Bill effectively achieves its purpose as stipulated and as set out in the relevant Cabinet paper[2].

8. The Cabinet Paper has been released in a redacted form and may be seen to have a number of different objectives. NZNO notes the following objectives as referred in the Cabinet Paper:

   8(i): clear legislation which reflects the intent of the JWP "*in a workable and practical manner*"[3].

   8(ii): statutory 'entry criteria' for pay equity claims which help clarify the circumstances in which pay equity issues may arise "***without limiting access to the regime for reasonable pay claims***" [4] (emphasis added) .

   8(iii): that the features of the market contained in paragraph 2(c) of the JWP principles are framed in such a way that the criteria "*are clear in intent, unambiguous and workable*"[5].

   8(iv): that the hierarchy of potential comparators accords with "*what the Employment Court and the Court of Appeal* (in *Terranova v Service and Food Workers Union*) *envisaged*"[6].

9. While MBIE has welcomed specific feedback on clauses 8, 14 and 24 this submission also addresses a number of other clauses in order to better quantify the Bill's 'workability' as currently drafted in light of its

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[1] Employment Relations Act 2000 Schedule 1B; New Zealand Public Health and Disability Act 2000 Section 6(1); Crown Entities Act Section 118.

[2] http://www.mbie.govt.nz/mbie/info-services/employment-skills/legislation-reviews/exposuredraft-employment-pay-equity-and-equal-pay-Bill.

[3] Cabinet Paper at paragraphs [6] and [23].

[4] Cabinet Paper at paragraph [32].

[5] Cabinet Paper at paragraph [34].

[6] Cabinet Paper at paragraphs [41]-[42].

purpose as stipulated and as set out in the Cabinet Paper as referred above.

The Bill

10. Clause 3 – Purposes

The stated purposes of the Bill at clause 3(a) refers to settlement of claims regarding gender *discrimination*.

However the Court of Appeal stated that in essence the definition of equal pay concerns 'a rate of pay for work in which there is "*no element*" of sex-based differentiation'[7].

To better accord with the approach adopted by the Court of Appeal submit that current reference at 3 (a) to "*gender discrimination*" be replaced with "*sex-based differentiation*" with consequential amendments as may be required to any other clauses addressing pay equity claims referencing "*discrimination*".

This amendment would better align clauses 3 (a) and 8(1) (b) which as presently drafted utilise differing terminology. While reference to '*discrimination*' may be apposite in terms of an equal pay claim, it may or may not be apposite in context of a pay equity claim on the basis that a focus on '*discrimination*' may serve to limit a true pay equity enquiry as envisaged by the Employment Court and the Court of Appeal (refer paragraph 8 (iv) above) and as further addressed at the submission on clause 23 of the Bill (refer paragraph 20 below).

11. Clause 8 – Equal Treatment

The apparent tension between the language utilised in Clause 3 (a) and Clause 8 has been noted.

Clause 8 otherwise appears to differentiate between equal pay and pay equity claims and further accords with the Bill's stated purpose of re-enacting the relevant provisions of the Equal Pay Act 1972 – refer Bill at Clause 3 (d).

12. Clause 12 – Limitation period for equal pay claims

The language of the proposed clause repeats that of the Equal Pay Act 1972[8].

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[7] Court of Appeal *Terranova v Service and Food Workers Union* paragraph [106]; see also JWP Appendix 2 paragraph 12.

[8] Equal Pay Act; section 13 (3).

The wording of the general limitation as stated at section 142 of the Employment Relations Act 2000 (**the principal Act**) is to be preferred as better according with the stated purpose of an up-to-date re-enactment of the relevant provisions of the Equal Pay Act 1972[9].

NZNO questions the requirement for a separate limitation period relating to equal pay or pay equity claims under the Bill. There is no reason put forward in the Cabinet Paper for any differential as between the two types of claims – nor was the matter addressed in the JWG principles. This matter is further discussed at paragraph 22 below.

13. Clause 14 – Employee may make pay equity claim

Provision is made at subclause 1 for claims to be brought in circumstances where such "*claim has merit*". If it is deemed to be necessary to find a claim has 'merit' as a condition precedent to any pay equity bargaining (per clause 18) then the following points are noted in regards to the subclause. While the language of "having merit" was a feature of the recommended JWP process[10] the question is asked whether such language is best replicated in a Bill which reflects the non-prescriptive bargaining processes provided for under the principal Act. For example, under the Bill's processes the Employment Relations Authority/Employment Court may determine that an employee's claim does '*have merit*' without any surety of either an agreed bargaining outcome or that the Authority will fix terms and conditions under Clause 38. As it stands a finding of '*merit*' may raise employees' expectations without provision of meaningful remedy. Submit that reference to a claim '*having merit*' might better be couched in terms '*a reasonable basis for the claim*'.

Subclause (2) (a) would better reflect a pay equity claim under Clause 8(1) (b) if the words "*exclusively or*" were added before "*predominantly*" – "*the claim relates to work that is exclusively or predominantly performed by female employees*".

The additional '*threshold*' conditions for making a pay equity claim as provided at subclauses 2(b) and (c) do not provide for clear legislation reflecting the intent of the JWP principles in a '*workable and practical manner*' (refer paragraph 8 (i) above). The JWP principles do not treat such '*threshold conditions*' as a cumulative test[11].

It is relevant to note that the Court of Appeal addressed the issue of current, historical or structural gender discrimination in the context of

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[9] Bill; clause 3(d).

[10] JWP Recommendations Appendix 1.

[11] JWP Recommendations Appendix 2 (b) – (c).

the (inter-related) answers given to Questions 1 and 2 as formed the basis of the appeal from the Employment Court[12]. It followed from the Court's analysis of existing current, historical or structural undervaluation that the argument for the employer that appropriate comparators might only be drawn from the same workplace (or in exceptional circumstances outside the same workplace but within the same industry) could not be sustained. The Court was concerned to discuss such undervaluation in a '*non-cumulative*' sense – "*systemic undervaluation of the work derived from current **or** historical **or** structural gender discrimination*'[13] (emphasis added).

Submit that the final "and" in subclause (2) (b) is deleted.

Further that subclause (2) (c) is deleted in its present form and replaced with – "*there are reasonable grounds to believe that the work is currently subject to systemic gender-based undervaluation, taking into account any relevant matters, including but not limited to, any of the reasons for undervaluation set out in subsection 4 as may apply*". This amendment would better ensure implementation of pay equity as envisaged by the Court of Appeal[14] and that the threshold requirements will be capable of being addressed in a '*workable and practical manner*'[15].

Consequential amendments would necessarily follow for subclause (4) – "*The reasons for current systemic gender-based undervaluation referred to in subsection (2) (c) may include –*."

The '*features*' as referred subsection 4 (a) are too technical and complex to accord with the objective of '*workable and practical*' legislation.[16] As currently drafted such '*features*' fall to be addressed not only in the assessment as to '*merit*' but potentially as part of the employee's written pay equity claim under Bill clause 15 (1) (d). Note the principal Act's objective of acknowledging and addressing the inherent inequality of power in employment relationships, and the Employment Relations Authority's role as an investigative body charged with determining the substantial merits of the case without due regard to technicalities[17]. Submit the features as currently drafted may present an unintended obstacle to the making of any pay equity

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[12] *Terranova v Service and Food Workers Union* Court of Appeal paragraphs [12]-[15].

[13] Ibid paragraph [37].

[14] Cabinet Paper paragraph [42].

[15] Cabinet Paper paragraph [85].

[16] Ibid and also Cabinet Paper paragraph [34].

[17] Employment Relations Act 2000; section 3(a) (ii); section 157 (1).

claim and potentially a complex '*evidential web*' hindering effective dispute resolution processes.

The limitations of the market theory economic principles as summarised by the Regulatory Impact Statement accompanying the Cabinet Paper are a matter of record[18], but the focus in subsection 4 (a) on '*relevant labour market*', '*dominant sources of funding*', '*lack of competition from other employers*', and '*market share of the employer*'[19] risk "*limiting access*"[20] for reasonable claims to the pay equity regime due to the overly technocratic nature of such entry criteria. For example, "*dominant source*" or monopsony funding may be seen as limiting claims to Government employed or funded occupations[21] not only limiting the remedial scope of the legislation but also having unintended consequences for potential claimants at the upper end of the '*monopsony remuneration scale*'. Such features as referred – subsection (4)(a) reference to "*relevant labour market*"; subsection 4(a)(i), 4(a)(iii) and 4(a)(iv) – should be removed from the subsection to better ensure alignment with the Cabinet Paper's purpose of clear 'entry criteria' for pay equity claims (refer paragraph 8 (ii) above). Consequential deletion of subsection 5 follows.

Further, the reference to "*by the parties*" in subsection 4(b) would appear superfluous to the objective of the sub-clause.

14. Clause 15 – Requirements relating to equal pay claims

Question whether there is a need for a mandatory requirement that the written pay equity claim include a position description in addition to stating the employee's position[22] - given that job descriptions will presumably be put forward as evidence in due course.

More significantly the further mandatory requirement for factors relied on as evidence[23] would appear unnecessary at such an early stage in the pay equity claim process. Given that an employer's response under Clause 17 (5) need only '*set out reasons*' a comparable requirement to '*set out the factors that the employee relies on to support the pay equity claim*' would be more equitable as between employer and employee and further mitigate against potential

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[18] Regulatory Impact Statement paragraph 24.

[19] Bill; Clause 14 (4) (a) (i) (iii) and (iv).

[20] Cabinet Paper'; paragraph 32.

[21] Regulatory Impact Statement; Table 2.

[22] Bill; Clause 15(1) (c) (iii).

[23] Bill; Clause 15 (1) (d).

confusion on the part of pay equity claimants as to the degree of specification required.

15. Clause 16 – Employer must notify certain other employees

The principal Act requires that following receipt of a s 42 notice an employer must notify employees of the existence of bargaining within 10 days (or 15 days for multi-employer bargaining)[24].

To facilitate efficient and effective processing of pay equity claims the time-frame for notice under subsection (1) (b) might be better amended to align with section 43 of the principal Act (10 days) and the provisions for extension under subsection (3) – (5) may be deleted.

16. Clause 17 – Employer must form view as to whether pay equity claim has merit

The express limitation period in subsection (1) and (2) – "*as soon as reasonably practicable* ***and*** *not later than 90 days*" – risks the establishment of a 90 day '*default position*' for employer decisions following receipt of a pay equity claim. Given the possibility that a (potentially) significant number of claims may fall to be made in the context of collective bargaining[25] a 90 day limitation period risks the process for establishing equal pay being "*needlessly prolonged*"[26]. Submit that the 90 day period be reduced to a 14 day period with consequential amendments to subclause (7).

While the Cabinet Paper notes that equal pay bargaining and collective bargaining are conceptually separate and delays in one should not necessarily affect the other, the employment relations reality is that rates of remuneration are typically central to both and pay equity claims may well be made at the same time as initiation of collective bargaining. As a matter of practice the employee's assessment of the claimed gender based differentiation in rates of remuneration for the former is likely to inform the claimed remuneration increase in the latter. If it is accepted that the ninety day limitation period in sub-clause (1) risks needlessly prolonging pay equity claims, the ability under subsections (3) and (4) for an employer to further extend the period for response risks frustrating the '*workable and practicable*' processing of pay equity claims,

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[24] Employment Relations Act 2000; section 43.

[25] JWP Principles; Appendix 1 'Bargaining to resolve pay equity' – "Settlement of a collective agreement…"

[26] JWP Principles; Appendix 2 paragraph 15.

increasing the likelihood of litigation and potential for industrial action[27].

Note also the internal tension within the Bill between these subclauses as currently drafted and the requirement of good faith in the pay equity bargaining process provided under Bill clause 20[28].

Submit subsections (3) and (4) be deleted.

17. Clause 19 – Consolidation of claims

In the interests of 'workable and practical' legislation consideration may be given to providing for consolidation of claims in the context of simultaneous pay equity bargaining and collective bargaining; given the Bill's acknowledgment that pay equity claims are as a matter of practice likely to arise in the context of collective bargaining (refer Bill clause 24 (3) (vi); Bill clause 25).

18. Clause 21 – Duty to provide information

To facilitate efficient and effective resolution of claims the duty to provide information should be expressly stated to apply to all matters addressed under Subpart 3 of the Bill.

19. Clause 22 – Matters to be assessed

To better align with the JWP recommendations[29] insert new clause 22(1) (a) (vii) – "*any other relevant work features*".

20. Clause 23 – Identifying appropriate comparators

The issue of identifying appropriate comparators was a key aspect of both the Employment Court and the Court of Appeal decisions which in turn have resulted in the promulgation of the current Bill.

The Courts discussion of the existence of systemic undervaluation in the setting of female rates of remuneration led the Court of Appeal to the view that "*one of the most effective ways of reducing the gender pay gap would be to apply an equal value principle in wage fixing*"[30].

The Court of Appeal further stated that once it is accepted that the inquiry as to appropriate comparators may be extended beyond the

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[27] Cabinet Paper; paragraph 50.

[28] Bill; clause 20 (b) '*enter into an arrangement as soon as possible after the start of pay equity bargaining*; clause 20 (c) '*settle the claim in an orderly and efficient manner*'.

[29] JWP; Appendix 2 paragraph 8 (vi).

[30] Court of Appeal; paragraph [38].

particular workplace (due to the existence of systematic undervaluation) it is no longer properly justifiable to exclude evidence of male wage rates in other sectors[31].

The Court of Appeal noted that one of the concerns underlying the introduction of the Equal Pay Act 1972 was the existence of '*entire industries underpaid because they are female dominated*'[32]. There is nothing in the Cabinet Paper suggesting that this situation has been remediated since that time (with the notable exception of the 2017 Care and Support Workers (Pay Equity) Settlement Agreement).

The argument advanced by the Human Rights Commission "*that comparators are a means to an end*" was expressly approved by the Employment Court[33]. If the '*ends*' as set out at Clause 3 of the Bill are to be obtained as regards pay equity claims then significant amendments will be required to the scheme as currently provided under subclause (2).

The "*hierarchy of comparators*"[34] as provided under the sub clause is intended to "*reduce some uncertainty*"[35] in pay equity bargaining and potentially "*reduce disputes in bargaining*"[36] that might otherwise arise under the JWP recommendations[37]. Yet given the Cabinet Paper's discussion of systemic undervaluation[38] the question may be asked as to whether any of the potential benefits claimed for the '*hierarchy of comparators*' will in fact outweigh the significant curtailment to the scope of pay equity bargaining such a hierarchy entails – militating against the Bill's own stated purpose[39].

The potentially vexed issue of identifying comparators has been addressed by New Zealand statute in the past[40], however if a

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[31] Ibid paragraph [110].

[32] Ibid paragraph [115].

[33] Employment Court (Full Court); paragraph [37].

[34] Cabinet Paper paragraph 41.

[35] Regulatory Impact Statement paragraph 56.

[36] Ibid Table 2 (Option 2(b)).

[37] Ibid Table 2 (Option 2 (a)).

[38] Cabinet Paper paragraph 9.

[39] Bill; clause 3(a).

[40] Government Service Equal Pay Act 1960, section 3 (1) (b): "*where female employees perform work of a kind that is exclusively or principally performed by women and there are no corresponding scales of pay for men to which they can fairly be related, regard shall be had to scales of pay for women in other sections of employment where the principle of equal pay for equal work has been implemented*" – as referred Court of Appeal paragraph [92].

'*hierarchy of comparators*' approach is deemed more relevant today any such hierarchy must be non-prescriptive to better facilitate realisation of the Bill's stated purpose[41]. Given that Bill effectively '*pre-empts*' the Court of Appeal's direction for the Employment Court to set out a statement of principles identifying appropriate comparators[42], a non-prescriptive approach will best accord with the Employment Court view that identification of appropriate comparators entails "*comparing apples with oranges*" and not "*apples with apples*"[43].

Any residual concerns as to whether such an approach would give rise to uncertainty or potential disputes[44] might be addressed by expressly empowering the Authority under Bill clause 28 (2) (b) to exclude any evidence if its probative value is outweighed by the risk that the evidence will needlessly prolong the proceeding[45].

Applying the principle that comparators are a means to an end propose the following amendments:

- subsection (2): "…*under section 22(1), comparators that are related to the employer's business may be selected as follows*:"
- subsection 2 (a): "*if one or more appropriate comparators exist within the employers business, that comparator or those comparators may be selected for the assessment*."
- subsection 2 (b): "*if one or more appropriate comparators exist in similar businesses to the employer's business, that comparator or those comparators may be selected for the assessment*."
- subsection 2 (c): "*if one or more appropriate comparators exist within the same industry or sector, that comparator or those comparators may be selected for the assessment*."
- subsection 2 (d): "*if one or more appropriate comparators exist in a different industry or sector, that comparator or those comparators may be selected for assessment*."

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[41] Bill's clause 3 (a).

[42] Court of Appeal paragraph [239].

[43] Employment Court paragraph [43].

[44] Regulatory Impact Statement (Option 2(b)) and paragraph 56.

[45] Evidence Act 2006 section 8 as discussed by Court of Appeal paragraph [169].

Subsection 3 (a) and (b) should not be a cumulative test – (replace linking "*and*" with "*or*") – and amend subsection 3 (b) to provide for '*current undervaluation*' not '*continuing undervaluation*' (refer earlier discussion on Bill clause 14 at paragraph 13 above).

21. Clause 31 – Process of facilitation

It would better accord with the JWG intent of establishing equal pay in an "*orderly and efficient way*"[46] for the prohibition on the Authority acting as an investigative body at subclause 3 to be deleted.

22. Clause 39 – Limitation period where pay equity claim is resolved by determination

In essence under this clause while an employer may agree to recovery of arrears as a result of pay equity bargaining, an employer cannot be required to provide any back-dated arrears where the pay equity claim is resolved by fixing of the terms (Bill clause 36 (1) (b)).

As noted earlier there is no rationale provided either by the JWG principals or the Cabinet Paper as to why a claim to fix terms and conditions as accepted by the Authority should then be treated differently in this context from any other claim as may be brought either via Bill clause 10 (equal pay claim), Bill clauses 18-23 (pay equity bargaining process) or under section 131 of the Employment Relations Act. Refer submission at paragraph 12 above.

23. Clause 42 – Penalty for non-compliance

It is unclear why a lesser penalty has been specifically provided for failure to comply with Bill clause 17 (6) (b) and Bill clause 40. Submit all breaches should be subject to the same penalty maximum, with the appropriate level in any given instance to be determined on the facts of the particular case.

24. Clause 44 – Regulations

The three areas referred are key to the objective of the legislation reflecting the JWG intent in a workable and practicable manner (refer paragraph 8 (i) above). Such matters would best be clearly enumerated and addressed as a further Code appended by way of Schedule to the principal Act and subject to public consultation by way of due Select Committee process.

[46] JWG Appendix 2 paragraph 15 and Cabinet Paper paragraph 6.

CONCLUSION

NZNO recommends that you:

- **Note** our submission**;**
- **Agree to** amendment clauses 14, 17, 23 and 29 of the Bill to best ensure that the Bill's provisions align with the stated intent; and
- **Note our** recommendation for a number of additional amendments to better facilitate the objective of workable and practicable legislation.

Jock Lawrie

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