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CEVEP Policy Points for Draft Pay Equity Legislation, March 2017

The government has announced plans to 'update' the 1972 Equal Pay Act, 'to make it easier for women to file claims with their employers' (*Stuff* 24.1.17).

CEVEP greets this with some caution. Some sections and terms in the Act are no longer relevant under the present bargaining regime; a tidy-up may be useful. However, key concepts, definitions and criteria in the Act have recently been interpreted by the Courts, confirming that claims for 'equal pay for work of equal value' for predominantly female jobs can indeed be made, as well as claims for women and men doing the same job. These aspects of the 1972 Act must be retained. We do not want to go to the courts again to test new, different wording, or some new approach.

1. Purposes and definitions in EPA 1972 to be retained

The following key purposes and definitions were examined at length by the Employment and Appeal Courts in 2013-14, and confirmed as reflecting legislative intentions at the time of enactment to meet New Zealand's obligations under ILO 100 and 111 and CEDAW. They must be retained.

> Long title: 'An Act **to make provision for the removal and prevention of discrimination**, based on the sex of the employees, in the rates of remuneration of males and females in paid employment.'
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> **'s.2…..Equal pay means** a rate of remuneration for work in which rate there is no element of differentiation between male employees and female employees based on the sex of the employees.'
>
> **'s.2A Unlawful discrimination**
> (1) No employer shall refuse or omit to offer or afford any person the **same terms of employment, conditions of work, fringe benefits, and opportunities for training, promotion, and transfer** as are made available for persons of the same or substantially similar qualifications employed in the same or substantially similar circumstances on work of that description by reason of the sex of that person.'
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> Application **'under any instrument'** (see s.3, as defined in s.2) (i.e. all collective or individual employments agreements, contracts, or written or verbal hiring statement)

2. Criteria to be retained

Section 3 of the Act may not be the most wonderful wording in the world but it has the virtue of having recently been thoroughly reviewed, interpreted and confirmed by the Courts. We therefore see no reason to rework this section in an updated Act.

In particular, to comply with international conventions, it is important that there be **two distinct criteria sub-sections** for work performed by both women and men (equal pay for the same job) and work performed predominantly by women (equal pay for work of equal value).

In comparing women's work and pay to men's, the aspects of the jobs to be examined are the levels of '**skill, responsibly, service, effort and conditions',** as in s.3. Evidence was presented in Bartlett vs Terranova that the approach embodied in these concrete, measurable criteria was chosen in explicit contrast to vaguer wording in Australian and British legislation.

In view of a recent statistical analysis[1] showing that women's average hourly pay does not reflect their years in the labour force (but men's does), it is important that the concept of experience ('service') not be omitted.

> **'S.3 Criteria to be applied**
> (1) Subject to the provisions of this section**, in determining whether there exists an element of differentiation, based on the sex of the employees**, in the rates of remuneration of male employees and female employees for any work or class of work payable under any instrument, and for the purpose of making the determinations specified in subsection (1) of section 4 of this Act, the following criteria shall apply:
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> (a) For work which is **not** exclusively or **predominantly performed by female** employees—
> (i) The extent to which the work or class of work calls for the same, or substantially similar, degrees of skill, effort, and responsibility; and (ii) The extent to which the conditions under which the work is to be performed are the same or substantially similar:
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> (b) For work which is exclusively or **predominantly performed by female employees**, the rate of remuneration that would be paid to male employees with the same, or substantially similar, **skills, responsibility, and service** performing the work under the same, or substantially similar, **conditions** and with the same, or substantially similar, **degrees of effort.'**

3. Comparators selected for purpose, not for 'hierarchy'

The Act's criteria about *what* should be compared are clearly stated above; just ***who*** the 'hypothetical male' comparators should be is not. The Act dates from an era when relativities between male jobs were well understood and central to the collective bargaining system. Negotiators compared, for example, clerical workers with carpenters, without guidance from the Act itself.

[1] Pacheco, G, C. Li, B. Cochrane (2017) *Empirical evidence of the gender pay gap in NZ.* Ministry for Women. March.

The Joint Working Group's Principles advance us only a little on appropriate selection of comparators.

It was the judgment of both the Employment Court [44] and the Appeal Court [35] that, within female-dominated work or sectors, a male whose remuneration was likely to be distorted by the systemic undervaluation of 'women's work' would not be an appropriate comparator. This is restated in the Principles. As the Employment Court stated, it may be necessary to look more broadly, to jobs to which a similar value can be attributed using gender neutral criteria [46], and the Appeal Court agreed that it may be relevant to consider evidence of wages paid by other employers or sector [147], and that appropriate comparators be determined on an evidential case by case basis [134].

For this reason, we strongly disagree with the Government's supplementary principle 'to require that comparators be drawn from within the business, similar businesses, or the same industry or sector when available and appropriate (i.e. that there would be a *hierarchy* of potential comparators)' (our italics). We understand the Joint Working Group had already considered and rejected this, as male carers within the same business had been firmly rejected as comparators by the Courts in the *Bartlett* case. For highly female-dominated work in female dominated sectors, having to work through a 'hierarchy' of comparisons that includes males in the same workplace or sector would be unnecessarily time-consuming, and therefore expensive for all parties.

We strongly recommend that an appropriate and more efficient approach would be **job comparisons between the female job or job class and at least two named comparators in different male jobs in two or more different male dominated sectors or industries.**

If the employer wishes to use male comparators other than those presented by the claimant, the onus must be on them to demonstrate that the males' pay rates are unlikely to be 'distorted by systemic undervaluation'.

Any formal job assessment or pay review systems used must be objective and free of assumptions based on gender. Appropriate gender neutral tools could be made available via Standards NZ.

4. Onus on employers for pay transparency

A strong onus must be placed on employers to demonstrate that their pay systems are equitable. The Act requires employers not to discriminate (2A added in 1991), and there was a requirement to provide employees with information during the mid-70s implementation period (4(2)A). The Equal Pay Act has been ineffective in maintaining pay levels for female dominated occupations since then because it is a complaints-driven system, requiring a woman (or her union, if she has one) to herself find the evidence that she is being discriminated against and to take action, perhaps at the risk of her employment.

To be more effective, the amended Act must greatly increase the onus on all employers to prove the gender neutrality of their pay systems and to justify the rates paid to employees. The 'good employer' requirements of CEOs and EEO programmes under the State Sector Act (s.56, 58) must be formally extended to require each state-funded agency to **'undertake annual gender neutral pay reviews, to make this information publicly available, and take steps to address any element of differentiation by gender or ethnicity'**. This is monitored by the State Services Commission (s.6).

Amendments to the Employment Relations Act (and other legislation as required) must extend this to registered companies and other organisations with more than 25 employees, to be posted in the workplace and included in annual returns and financial statements, with penalties for failure to file or incorrect information. (The Companies Act already requires disclosure of salary bands over $100,000 a year for private sector companies.)

Pay transparency is fundamental to equal pay. Government policy cannot succeed unless it requires transparency on pay systems, and allows employees, unions and labour inspectors open access to full information on employers' systems for remuneration, recruitment and advancement.

The 1972 Act was written at a time when occupational award rates and public service rates were known to all. Since 1991, however, terms of remuneration have increasingly become opaque and many individual employment contracts include confidentiality clauses.

A private member's bill on this issue is already in the House; it can be incorporated into legislative changes. Confidentiality clauses in individual employment agreements must be declared invalid.

5. State support and monitoring role

As the Joint Working Committee's recommended, it is essential that parties bargaining on pay equity matters have ready access to resources, as well as information, to assist them, and cost should not be an inhibiting factor in achieving equity for women. Employers and unions believe there is a role for government in providing additional support. It will be necessary for all regulatory, support and monitoring agencies to have essential skills, training, knowledge, and resources, which will also require some specific investment by government.

Expert support and resources can ensure claims are resolved quickly at the most appropriate level. We suggest **a unit with pay equity expertise be located in the Labour Inspectorate**, alongside the Mediation Service.

Government as employer

The government, itself New Zealand's largest employer of women, must take active steps to ensure that New Zealand women are not undervalued and underpaid for their skills, responsibilities, service, effort and conditions of work as required by the Equal Pay Act 1972, and by international conventions we have ratified.

Contact CEVEP: rsb@xtra.co.nz
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