CEVEP...coalition for equal value equal pay
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Submission to MBIE on Designing a Fair Pay Agreements System

The Coalition for Equal Value Equal Pay (CEVEP) is a voluntary organisation committed to reducing the gender pay gap in New Zealand through policy and initiatives to advance pay equity in general and equal pay for work of equal value in particular. CEVEP has campaigned for effective pay equity policy and legislation since 1986.

CEVEP strongly supports the Government's goal of addressing inequality and poverty in New Zealand. We believe one of the best ways to do this is through policies and legislation that support employees to bargain collectively for fairer wages and working conditions. The Employment Relations Act's Objectives acknowledge the 'inherent inequality of power in employment relationships' in the labour market. In addition, the market-led policy approaches of recent decades have led employers to compete on wages costs, rather than on the purpose and quality of their business. We all need a level playing field, not a downward spiral.

CEVEP strongly supports policy and legislation to support Fair Pay Agreements between employers and unions that apply across all employers of the designated occupation or in the designated sector, because:

- They will provide a more effective form of collective bargaining, particularly for people on low wages in different workplaces but doing the same work or working in the same low paid sector;
- They will help meet the Government's gender equity goals by providing a mechanism for delivering pay equity settlements widely and efficiently, instead having to pass an Act each time to apply the settlement to multiple employers.

New Zealand has a problem

The right to organise and to bargain collectively are Fundamental Rights at Work under International Labour Organization Conventions ratified by New Zealand.[1] There is international and New Zealand evidence that bargaining collectively achieves better wages and work conditions. For example, New Zealanders on collective employment agreements are twice as likely to get a pay rise as those on individual agreements.[2] The Employment Relations Act offers both employers and employees the choice of bargaining collectively – on paper, but it's not working too well on the ground.

[1] International labour Office, *Fundamental Rights at Work and International Labour Standards,* Geneva, 2003.

[2] B. Rosenberg, State of the Unions, CTU presentation, 17 May 2016, slide 16, and Inequality in wages and self-employment 1998-2015, CTU presentation 6 December 2017, slides 41 and 42.

The Consultation Document graphs a significant decline from the early 1990s in employees covered by collective bargaining – from nearly 70% in the late 1970s to now less than 20%.[3] The contrast with Australia is marked. New Zealand's collective bargaining coverage is now sixth lowest of 34 OECD countries. Only Turkey, Korea, Mexico, and Poland, and our model for employer-only bargaining, the USA, are lower. This decline followed changes in New Zealand's legislation which made collective agreements with private sector employers hard to achieve (with union membership now below 10%), and multi-employer agreements (MECAs) extremely rare.

In the private sector, as well as a limited number in the care and support sector, there are a handful of MECAs in commercial cleaning, plastics and engineering which are in fact structured around the holdings of publicly listed companies that operate their subsidiaries as separate companies. The for-profit commercial cleaners MECAs cover a largely female workforce, with wages currently just 35 cents an hour above the statutory minimum wage. As MECAs are a legacy from the Employment Contracts Act days it is arguable that they have contributed to holding women's pay down.

Over the same period, the share of national income going to labour also fell well below the OECD median, despite productivity increases – with the lowest income deciles receiving least.[4]

In an economy of mainly small-to-medium businesses, who often require small numbers of different occupations, the removal of historically strong legislative supports for multi-employer bargaining meant the collapse of union representation for scattered and vulnerable workers. This particularly affected women, especially Māori and Pasifika women, isolated from others doing the same work, or in part-time or shift work, which makes the logistics of representation and collective bargaining difficult.[5] Low pay for women partly reflects these logistics, as well as until the 1970s the partly legally-permitted lower female pay rates– which have still not been fully redressed. From the 1990s the Minimum Wage Act has grown in importance, particularly for women. It puts a low floor under wages, but does not address an increasing variability in work hours and insecure employment, particularly in the various jobs for which Māori and Pasifika women and many new immigrants are employed, contributing to low household incomes and child poverty.[6]

Fixing the problem

CEVEP strongly agrees with the Minister Lees-Galloway's statement that many working New Zealanders are not receiving their fair share. Nor are they getting their fair share of help to bargain for fair wages and conditions. We agree that policy and legislative changes should support collective bargaining for Fair Pay Agreements that apply to all employers in sectors, or employing people in occupations, 'that need extra help to lift wages and conditions'.

This Consultation Document seems ambivalent between setting policy purposes and leaving it all to the negotiating parties, as the Employment Relations Act does. Although we agree all parties to negotiations should have the right to initiate a Fair Pay Agreement (see below), the government has

[3] Rosenberg, State of the Unions, slide 2.

[4] B. Rosenberg, Inequalit… 2017; Rosenberg, State of the Unions, 2016.

[5] L. Hill, Feminism and unionism in NZ: Organising the markets for women's work, PhD, University of Canterbury, 1995.

[6] Rosenberg, Inequality…, slide 7; G. Pacheco, C. Li and B. Cochrane, *Empirical evidence of the gender pay gap in New Zealand*¸ Ministry for Women, March 2017; S. Groot, C Van Ommen, B. Masters-Awatere and N. Tassell-Matamua, *Precarity,* Massey University Press, 2017..

the labour market data and other available research to know which occupations and sectors need helping. We already know which social groups are being left behind, we know the gender/ethnicity pay gaps, and who is most vulnerable to the churn of precarious work and unemployment. As well as allowing negotiating parties to initiate Fair Pay Agreement, the government needs to identify certain occupations and sectors – but also certain social groups – and direct the first rounds of Fair Pay Agreements to these.

Delivering pay equity

ILO Fundamental Rights at Work includes women's right to equal pay and equal pay for work of equal value.[7] In *Terranova vs Bartlett,* the courts confirmed that the Equal Pay Act 1972 supported claims for pay equity as well as for equal pay. The then government established a working group of employers and unions to assess and settle Kristine Bartlett's claim for equal pay for work of equal value for caregivers, promising that the outcome would be applied to all carers in all state-funded residential care homes. The outcome of that negotiation was an increase from Kristine Bartlett's $14.46 an hour in 2013 to pay scales increasing to $21.50-$27 an hour by July 2021 for around 60,000 people. To do that the government had to pass the Care and Support Worker Pay Equity Settlement Act 2017, to cover all residential care employers, not just Kristine's own boss or other residential care bosses at the negotiating table. The current Employment Relations Act doesn't provide for what we used to call 'blanket coverage'. But compliance by all residential care employers was needed if Terranova, finally giving its carers the same pay for their skill, responsibility, experience, effort and conditions of work as for comparable men's work, was not to be undercut on wage costs by other rest home operators. As Minister Lees-Galloway puts it, a 'level playing field where good employers are not disadvantaged by providing reasonable wages and conditions.

A series of pay equity claims are currently under way in the Public Service, Health and Education, some of which will involve – thanks to the funder-provider splits of the 1990s – multiple state-funded employers and contractors of various kinds. As with carers, legislation may need to be passed in order to implement each settlement. Applying Fair Pay Agreements to multiple employers in the private sector would similarly require separate legislation to implement each registered Agreement, unless that capacity has already been provided for by amending the Employment Relations Act.

Currently, claimants and their unions file pay equity claims under the Equal Pay Act, or unions are able to raise equal pay and pay equity issues in their collective bargaining round - but may negotiate that separately (to allow time for job assessments). Unions should similarly be able to raise equal pay and pay equity issues in negotiations for Fair Pay Agreements. Where this occurs, whether pay equity issues are resolved as part of or in parallel with Fair Pay Agreement negotiations, the Fair Pay Agreement should be used to apply the pay equity outcome across all employers mandatorily covered by the Agreement. The Employment Relations Act should be amended to provide this power.

[7] ILO, 2003.

Fair Pay Agreements must cover all forms of employment

CEVEP endorses the recommendations of the Working Group, except for the proposal from employers that employer compliance with ratified Fair Pay Agreements be voluntary. This proposal is disingenuous. Collective bargaining has been 'voluntary' for employers since 1991, resulting in the decline discussed above. In consequence, a very large proportion of the workforce – and half of all Māori women and Pasifika women – are now paid less than the Living Wage.[8] A Minimum Wage, until recently very much lower, is required of employers by law – and even this is having to be monitored and enforced.

The policy purposes of Fair Pay Agreements are a level playing field and wide coverage of better wages and conditions. Fair Pay Agreements will not work unless they apply to ***all* employers** in the sector or all employers of the kind of work, ***regardless of the form of employment***. That includes small companies, new entrants, franchises and, in particular, subcontractors and labour agencies. Their contracts with their principal company must specify the Fair Pay Agreement wage rates, hours of employment, work conditions, etc.

Fair Pay Agreements will not meet the government's policy purposes if MBIE postpones thinking about dependent or independent contractors till later. Exemptions or phasing-in-later will re-create the downward spiral in the labour market that has resulted in low wages, inequality and household poverty. The main point of sub-contracting work and using labour agencies in the last few decades has been to squeeze down wage rates, hours of employment and other employer obligations, and therefore the cost of labour to the principal company. They are part of the problem that Fair Pay Agreement are trying to fix.

The government is aware of this. At the last election, Labour promised to be a responsible employer and provide state sector rates and standards of employment to all tax-payer funded employment, whether direct or through contractors. Contracting-out in order to cut costs, thereby depressing wages, hours and conditions, is now common in all sectors of our economy.

Allowing exemptions for some forms of employment will rapidly increase the number and use of these forms. It must be a level playing field across *all* employers and sub-contractors from the start, or Fair Pay Agreements will be set up to fail.

Feedback on other issues

The comments below address the issues listed by MBIE in its Summary consultation document.

Initiation

Initiating Parties. The Working Group recommends that only employees and their unions should have the right to initiate Fair Pay Agreements. We agree in principle and expect to see a strong role for unions written into the legislation. We anticipate that Fair Pay Agreements will be enacted as a section of the Employment Relations Act, which already allows collective bargaining to be initiated by one or more unions or by one or more employers. Fair Pay Agreements are a multi-employer form of collective bargaining, but with the addition of wider application *by law* across all employers for an occupation or sector, once negotiated by the parties.

[8] Living Wage 2019: $21.15 an hour. Median hourly wage June 2019: $24.29. Median for women $23.02; for Māori women $20.5; for Pasifika women $19.89. Minimum wage $17.70.

Under the Employment Relations Act, employers as well as unions can initiate multi-employer employment agreements and MBIE suggests this for Fair Pay Agreements. It seems to us unlikely that employers would in fact initiate Fair Pay Agreements if they had the right, given that Working Group employer representatives want Fair Pay Agreements to be voluntary and so many employers have imposed their preference for individual employment agreements on their employees. However, we remember with hope that it was employers who restarted multi-employer wage bargaining after the downward spiral of the 1930s Depression.

We note that there is no 10% representative threshold for the right to bargain collectively under the Employment Relations Act – the ILO would surely consider that unusual! However, if the Working Group has agreed that a 10% show of employee support will get everyone to the negotiating table, CEVEP supports it.

CEVEP does not support a 'public interest' test as a hurdle to initiating Fair Pay negotiations. It should be sufficient to state the policy objectives of the Fair Pay Agreements section of the Act. We see no need for 'public interest' or 'merit' tests or other barriers to stem a possible flood. That is, the final Agreement should meet the Objectives to qualify for application to all relevant employers, not to initiate a Fair Pay Agreement claim.

Unions will correctly identify some occupations or sectors in which 'extra help' is needed. But they are likely to target those occupations or sectors in which they already have membership. These may or may not be the occupations or sectors that need help most or first, from a policy perspective. As discussed above, the government has the labour market and social data to identify the occupations and sectors in which workers are most disadvantaged, and should find a way to make sure these are targeted for attention first – but not as a test or hurdle for raising a Fair Pay Agreement claim.

In CEVEP's view, it is time for policy intervention in the labour market, not just another exercise in providing a framework for 'the market' to fix itself. A vaguely worded public interest test will be a hurdle for initiating parties, not a help (and lead to Business NZ-funded test cases). **MBIE should provide an initial list of occupations and sectors** that it has identified as needing the 'extra help' of a Fair Pay Agreement. If necessary, funding should be provided to unions to increase representation in sectors with 'harmful labour market conditions'.

In CEVEP's view, it is always in the public interest for all people to be paid a fair, living wage with minimum standards on matters like hours of work, overtime, redundancy, etc. The new section of the Employment Relations Act should state Objectives which Fair Pay Agreements should meet in order for the Agreement to apply occupation- or sector-wide to all relevant employers. These should be clear but broad 'and/or' policy objectives, not a long list of barriers to be surmounted (as in the Equal Pay Amendment Bill). These objectives could include the wide delivery of 'equal pay for work of equal value' pay adjustments.

Identifying occupations and sectors. The Working Group proposed the following criteria:

- historical lack of access to collective bargaining,
- high proportion of temporary and precarious work,
- poor compliance with minimum standards,
- high fragmentation and contracting out rates,
- poor health and safety records,
- migrant exploitation,
- lack of career progression,

- occupations where a high proportion of workers suffer 'unjust' conditions and have poor information about their rights or low ability to bargain for better conditions
- occupations with a high potential for disruption by automation.

This is how it happens, rather than who it happens to. CEVEP recommends that the **social structure of the labour market also be considered to identify occupations and sectors** to target. Labour market statistics on pay and employment since the 1980s have shown highly disproportionate numbers of Māori and Pasifika women in low paid occupations, and in low paid hard to organise sectors, with high levels of casualisation and unemployment. Even in the public service, EEO and Human Resource Capability reports since 1997 have shown Māori and Pasifika women 'clustered' into particular lower-paid jobs, with no remedial action taken. Recent research on precarity[9] similarly identifies Māori and Pasifika women and also new immigrants as most disadvantaged. Their households are most at risk of poverty. The Mana Wāhine claim under the Treaty of Waitangi is raising these issues of inequality and lack of government action, as is the Human Rights Commission.

Notification. The initiating party should formally notify all relevant other unions and employers of the initiation of Fair Pay Agreement bargaining. All employers should then formally notify all employees likely to be affected: they know who they are. Initiation of Fair Pay Agreement negotiations should be registered with the Employment Relations Authority. Finally-negotiated Fair Pay Agreement documents should be registered with the Authority, who should then notify all employers now covered by the Fair Pay Agreement and its start date.

Coverage

Refining/defining coverage. Having identified appropriate occupations and/or sectors as CEVEP proposes above, using ANZSCO and ANZSIC categories to refine definition of the chosen occupations or sectors seems a good idea. It would be good to ensure that employers are in fact using ANZSCO job categories in their pay period reports to IRD. This would be useful in identifying all employers who should be notified that a registered Fair Pay Agreement now applies to them and their employees. CEVEP strongly supports the future use of this data source for labour market analysis and average wage information.

No exemptions. There should be no exemptions for new entrants, or small to medium businesses, who together employ a very large proportion of the labour force.[10] See discussion above: unless Fair Pay Agreements cover all employers and all forms of employment for the designated occupation or sector, they will be being set up to fail.

Renegotiating coverage. We see no problem with negotiating parties extending or changing the occupation or sector covered, and notifying the Authority of the change.

Regional differences can be negotiated within a national Fair Pay Agreement, if appropriate. For example, an 'Auckland weighting'. Negotiating regional Fair Pay Agreement separately might risk

[9] Groot, S., D. Van Ommen, B. Masters-Awatere and N. Tassell-Matamua, *Precarity: Uncertain, insecure and unequal lives in Aotearoa New Zealand*, Massey University Press, 2017; NZ Council of Trade Unions, *Under Pressure: Insecure work in New Zealand*, Wellington, 2013.

[10] 100,662 employers have fewer than 5 employees; 22,000 have 6-9 employees; 18,507 have 10-19 employees. I.e. in total between 417,732 and 952,224 people. 10,536 have 20-49 employees, i.e a further 210,720 to 516,264 people. Total workforce: 2,646,900. Statistics NZ Business Demography tables, 2019.

employees in some localities falling behind on other terms of employment, or risk Fair Pay Agreements actually increasing regional differences.

Contractors must be included. Fair Pay Agreements should apply to all contractors – both contractors as employers and contractors as, in fact, employees who are required to establish themselves as self-employed in order to get the work. We agree with the Working Group that if the system only applies to those directly employed, it will incentivise some employers to define work outside of employment to avoid Fair Pay Agreement obligations.

This already happens with existing employment obligations, as a way of avoiding non-wage employment costs and obligations, and transferring equipment costs, downtime and business risks to workers. This is also the purpose of using labour hire agencies. For Fair Pay Agreements to work for policy purposes, they must apply to all the people who do the work and to all employers who benefit from the work, regardless of the form of employment. In this way, they may help reduce employment relations avoidance through contracting out, rather than increase it. Fair Pay Agreement negotiators will know their sectors and whether a contractor is an employer or really a dependent but 'distanced' employee.

Bargaining

Scope. Currently there are no mandatory topics in collective bargaining under the Employment Relations Act – even in the state sector, some collective employment agreements have continued for years without including pay scales or agreed hours of work. In CEVEP's view, all employment contracts including Fair Pay Agreement should include, but by no means be limited to, rates of pay, agreed hours of work, overtime and leave provisions, conditions of work, security of employment, and redundancy provisions. 'Rates of pay' should require including pay equity adjustments where these have been established for a female-dominated occupation. Matters such as training, skills and career progression should be included as appropriate to the occupation or sector. Agreements should make reference to, possibly extend, but not reduce employment standards in other legislation (e.g. parental leave, zero hours contracts, health and safety).

Representation. CEVEP strongly supports union representation, and union bargaining for collective agreements and Fair Pay Agreements. However, today's reality is that less than 10% of the private sector workforce is unionised and many employers are less than union-friendly. The need to form or find a union should not become a barrier to a group of employees initiating or participating in a Fair Pay Agreement. Employees and employers should have the right to nominate their own representatives or negotiators, as proposed by the Working Group. The language should be **'employees and their unions or representatives; employers and their organisations'.**

Costs and support. Costs should not fall on the low-paid employees that the Fair Pay Agreements are intended to benefit. Unions are funded by their members, and are over-stretched. The best way to reduce costs is for Fair Pay Agreement negotiations to be made as efficient and effective as possible through the help of an expert government agency that can provide information, lead processes, mediate between the parties and, if necessary, arbitrate. CEVEP has long called for such agency support for the large state sector pay equity claims currently in process. A **'navigator service'** is a good term for what is needed. As noted above, government should identify particular occupations and sectors most in need of help, and considering funding support for union organising and representation for negotiating a Fair Pay Agreement.

Good faith. A Fair Pay Agreement section of the Employment Relations Act should refer to its sections on good faith bargaining (as recent Equal Pay Amendment bills have).

Communication. The Employment Relations Act covers representation and notification, and should be utilised for Fair Pay Agreements. In CEVEP's view, employers should be responsible for and bear the costs of all formal notifications to employers, and give unions/representatives access to all employees, including written communication and paid stop work meetings. Both employers and unions will want to communicate fully with the people they represent.

Dispute resolution. As we expect the Fair Pay Agreement will be included in the Employment Relations Act, the usual mediation services, labour inspectors, processes of personal grievance, breach of contract law and access to the courts need to be available on Fair Pay Agreements. The 'navigator service' can guide processes and advise when formal mediation or arbitration is needed.

Right to arbitration. The government has stated that there will be no right to strike in support of Fair Pay Agreement bargaining. It *must* therefore provide a right to arbitration by the Employment Relations Authority. The Fair Pay Agreement as arbitrated would be final. The current Equal Pay Amendment Act, the 1988 version of the State Services Act and much labour history provide the working model for that. CEVEP strongly supports the right to arbitration on Fair Pay Agreements and swift access to the Employment Authority and the courts on any breach of Fair Pay Agreements.

Evaluation. As CEVEP has proposed, a specialist advisory unit on pay equity, a 'navigator service' for Fair Pay Agreements, could not only make negotiations more efficient and therefore cheaper for the parties, it could also have a role in assessing 'market impacts' or (our preferred term) policy effectiveness.

MBIE has the wrong hat on in worrying that Fair Pay Agreement might cause 'anti-competitive behaviour'. The government's policy purpose here is to address and remedy the increasing levels of inequality and poverty that downward spirals of *competitive* behaviour on labour costs have created. Fair Pay Agreements are intended to provide 'a level playing field'.

Policy evaluation against stated government goals is a good idea. CEVEP is delighted that, after 28 years, labour market policy evaluation has suggested the need for Fair Pay Agreements.

Concluding Fair Pay Agreements

Ratification of Fair Pay Agreement by the various parties should follow s.51 of the ERA for collective bargaining; i.e. at the start of negotiation, all parties involved should notify each other (and their members) about their ratification processes and the time needed. 50% + 1 is the current minimum for ratification by union members and could be required for all parties, who would otherwise follow their own organisational procedures.

Enactment. The legal mechanism that would bring a Fair Pay Agreement into force, and make it enforceable, is a new section in the Employment Relations Act that requires all employers covered by a Fair Pay Agreement to comply with its requirements.

On ratification, Fair Pay Agreements should be registered with the Employment Relations Authority, together with a list of all employers now covered to whom it should be sent (or MBIE can look them up from Inland Revenue data). All Fair Pay Agreements should be made available online (by ERA or MBIE) so that all employees can see their entitlements. Advice on any loopholes, lack of clarity or

inconsistency with other laws would be the on-going role of the 'navigator service' in the course of negotiations, but the Authority can also check and advise before accepting registration.

Agreements could be attached as Schedules to the Act and publicised by MBIE. Cabinet does not currently intervene in collective employment agreements; i.e. ratified legal agreements to which it is not a party. It would be inappropriate for Cabinet to alter a legal agreement between parties. It should be sufficient to set clear legislated Objectives, provide policy direction on which occupations/sectors should be targeting for best effect, legislate some base requirements but allow flexibility on Agreement content, and provide advice and overview by the navigator service and the Employment Relations Authority.

Enforcement will be the job of labour inspectors (and we will need more), the unions, lawyers and the courts. Right of access to wage and time records will be important. The model here is collective agreements; a Fair Pay Agreement will be a legal agreement under the Employment Relations Act. Incorrect payments or other non-compliance will trigger recovery of wages or personal grievances procedures by employees and unions. Any differences in interpretation will be matters to be taken to the Employment Relations Authority or the courts, as with collective agreements.

Costs. Government should bear the costs of policy evaluation. Funding should be made available to employees and unions negotiating fair pay agreements in some occupations or sector targeted to meet government policy objectives. Employers, as beneficiaries until now of low wages, can share their own costs.

In conclusion thank you for this opportunity to make a submission on the Design of a Fair Pay Agreements System. CEVEP strongly supports Fair Pay Agreements as an important tool that, along with other policies, will help reduce the gender and gender/ethnicity pay gaps and growing household income disparities.

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