CEVEP...coalition for equal value equal pay
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Submission to the Education and Workforce Committee on the Equal Pay Amendment Bill

Coalition for Equal Value Equal Pay

1. 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. Our members' expertise and experience spans the breadth and history of this important policy issue. CEVEP has campaigned for effective pay equity policy and legislation since 1986. In 2013, CEVEP was invited to be an 'intervening' party to the pay equity test case taken under the Equal Pay Act 1972 by rest home caregiver Kristine Bartlett and the Service & Food Workers Union (now E Tu).

Introduction

2. Pay equity is about achieving fundamental human rights for women. Government action on 'equal pay for work of equal value' by women and men is required under the UN Convention on the Elimination of Discrimination Against Women (CEDAW) and International Labour Organisation Convention 100 on Equal Remuneration, both ratified by New Zealand. In the 2013 *Bartlett vs Terranova* case, the courts examined the purposes and key criteria of the Equal Pay Act 1972, confirming its legislative intention to address not only equal pay for women and men in the same job, but also for work done predominantly by women. In the wake of this test case, progress is being made on a number of pay equity claims.

3. The Equal Pay Act 1972 supports women's claims to equal pay and equal pay for work of equal value treatment by providing ready access to the Employment Relations Authority ('the Authority') or Employment Court ('the Court') and the right to claim back pay. These were the levers that enabled Kristine Bartlett to settle her claim. They are vital tools that help redress the inherent inequality of power in employment relationships.

4. The stated purpose of the Equal Pay Amendment Bill is:

> "to improve the process for raising and progressing pay equity claims, and to eliminate and prevent discrimination on the basis of sex in the remuneration and employment terms and conditions for work done within female-dominated jobs."

5. In CEVEP's view, this Bill to update the 1972 Act and to incorporate Joint Working Group Principles:
   - Undermines women's current rights and access to determination by the Authority or Court;
   - Treats pay equity claims like personal grievances, requiring them to be 'raised' with the employer who is breaching women's rights;
   - Adds snakes and ladders processes that will slow claims down, benefitting employers and further disadvantaging vulnerable women;
   - Makes pay equity just another bargaining issue; and
   - Discriminates against women by reducing their right to back pay.

6. The Bill does this by imposing an inappropriate market-bargaining model on complaints-based human rights legislation, and making it far harder for parties to access the Authority and Court.

7. This Amendment Bill needs major changes if it is to achieve the government's policy goals for New Zealand women. These changes are listed briefly here, with full explanation in the next section.

8. As at present, pay equity claims should be filed with the Employment Relations Authority (i.e. a judicial agency), not raised with the employer, against whom the claim is being made.

9. Any extension of pay equity claims or of claim outcomes to other employers and their employees should require the agreement of those affected, not a unilateral decision by employers. (13I)

10. If employers and claimants cannot agree at the initial stage of the claim process, they should seek mediation *on the whole claim*, not any/every issue. If employers and claimants still cannot agree, the whole claim must go to the Authority for determination, as at present. (13P and 13Z) (Facilitated bargaining is not appropriate to determine questions about suitable comparators or for that matter setting an equitable rate of pay, and should be dropped.)

11. The core of the Equal Pay Act is assessment of 'skills, responsibilities, experience, effort and conditions of work' in work done by women and comparison with those same factors and pay levels in male work (13L). This is 'objective appraisal' as required by ILO 100, not 'bargaining'. Amendments that allow assessment and comparison to be sidestepped must be dropped.

12. In the *Bartlett* litigation, the courts said male comparators are not appropriate if their pay may also be affected by the gender bias affecting female-dominated workplaces and sectors. To ensure this is avoided, female-dominated work should be compared with male-dominated work in male-dominated sectors. (13M).

13. Transparency requires full records of claims, assessments and comparisons to be filed with the Authority, and kept by employers for 6 years like other wage records (13N). This will support the extension of claims to other groups of workers, as well as policy evaluation.

14. Women are currently entitled to claim and be awarded 6 years' back pay, the same as for all other wage claims and commercial claims. Reducing this right for women pay equity claimants, both in phasing in the full 6 year period over 11 years and making back pay discretionary (taking into account factors including affordability), is gender discrimination (13ZD). See Appendix 1 for recent Canadian judgments relevant to the New Zealand Bill of Rights Act.

15. All claims already under way should continue. The reason this Bill makes them start again from scratch is simply to reduce women's right to back pay.

16. To ensure efficient progress on pay equity, an **Expert Advisory Unit** (or Commission) needs to be established and well-resourced to support all parties to equal pay and pay equity claims, as recommended by Dame Patsy Reddy, chair of the Joint Working Group on Principles on Implementing Equal. We are concerned that the Mediation Service and/or Authority lacks resources and expertise for this additional very specialist workload.

17. This independent Expert Advisory Unit can provide advice and training in the use of the State Services Commission's Equitable Job Evaluation system, work with IRD to make job level hourly wage data publicly available, monitor gender and ethnicity pay gaps and generally promote equity at work. (CEVEP presented a paper to the Ministers on this issue in December 2017.) Claimants and employers need to be able to go to one independent source of information and assistance, rather than reinventing the wheel, wasting time and resources finding, briefing and fighting about expert evidence.

18. CEVEP also urges the government to make progress on its project to obtain and publish hourly wage data by sex and ANZSCO job-level category. This will be an invaluable support to women, and to fair pay policy.

19. The following sections provide a full explanation of the key changes needed, and other points for improvement to the Bill. **Appendix 1** presents detailed argument on the Bill's discriminatory treatment on back pay, together with recent relevent Canadian Supreme Court rulings. **Appendix 2 provides a clause-by-clause analysis** with recommendations for wording deletions and additions.

Human rights determination, not market-based bargaining

20 The Equal Pay Act is equal rights, complaints-based legislation, as is the Human Rights Act. A claim is a complaint based on a breach of an employer's responsibilities for equal treatment of women employees, now clearly stated in 2AAC of the Bill. This Act provides criteria – confirmed by the courts - for achieving the specific human rights purpose of the Act: pay rates with no differentiation by sex, based on comparison with work carried out by males. The principal Act gives women direct access to a determination of their claim by a judicial body (the Authority or the Court). This is because the New Zealand government has a direct responsibility for equal pay and equal pay for work of equal value under international conventions, with regular reporting. That is, the government is responsible for ensuring *outcomes* under the Act: pay rates that have no element of differentiation by sex.

21 The Employment Relations Act 2000 (ERA 2000) complies with UN conventions on the right of association and the right to strike, but these are part of the framework for enterprise-based wage bargaining that this Act creates. Bargaining outcomes are left to the parties to negotiate; i.e. to the market. Since 1991, the relative fairness of wages has not been a goal of employment relations legislation. Employees have access to the courts regarding personal grievances or a breach of collective or individual employment agreement, but no access to the courts on bargaining outcomes – that is, on the content of the employment agreements, including wage rates. The government's only intervention in bargaining outcomes is through the Minimum Wage Act – and the until now very underused Equal Pay Act.

22 Equal pay and pay equity for women are human rights, not simply matters for wage bargaining. The criteria and purpose of the Equal Pay Act are not met by bargaining for a best-outcome settlement. Yes, it is possible for the Equal Pay Act and the Employment Relations Act to share institutional arrangements such as the Mediation Services, Authority and Court. But this Bill constantly conflates the two legislative models in ways that are totally inappropriate: in its language, in its processes and in the unilateral decision-making powers it gives the employers against whom claims of breach are being taken. The Bill introduces new layers and loops of slow process that will *prevent* easy access to a determination that women have a right to under the principal Act. These will put the cost of pursuing claims beyond most employees, especially in the largely non-unionised private sector.

23 The Government wants to reduce the gender pay gap and other labour market inequalities. The success of this rests in large part on claimants coming forward to a government agency or court that backs them, not one that sends them off to make direct accusations of discrimination against the person they rely on for income in a tight labour market. The Ministers are right: women shouldn't have to go to court. Yet in all the years since 1972, or since the 2013 *Bartlett* claim, how many employers have taken up the challenge and applied available gender-neutral job evaluation tools to female-dominated work? This has not happened even in the state sector.

24 Putting time-consuming and potentially expensive procedural and evidential obstacles in the way of claimants, making the Authority and Court deliberately inaccessible, will be a significant disincentive to under-valued women bringing a claim. Taking away the 'stick' of a potential determination or judgment removes a powerful incentive on employers (and claimants) to negotiate and agree a realistic equitable pay rate. That was what got the *Bartlett* parties around the table and ensured an efficient resolution for now 60,000+ low paid workers.

Clear onus on employers

25 We are pleased the Bill uses the s.3 criteria from the principal Act to establish a much clearer onus on employers (2AAC). Claims are against breaches of 2AAC. 2B requires claimants to choose between proceeding under this Act, or under the Human Rights Act, or taking a personal grievance under ERA 2000.

26 Strangely, the Bill precludes pay equity claimants from coverage by 2A of the principal Act, Unlawful Discrimination. 2A was added in 1991 to ensure New Zealand's compliance with ILO 111 Equal Employment Opportunity, and examined by the court in *Bartlett vs Terranova* in regard to legislative purposes. Like the State Services Commission's Gender Pay Principles, 2A covers both remuneration and non-remuneration issues, some of which may come under 13C reasons for filing a pay equity claim. Rather than leaving it hanging, it would be logical to include 2A(1) as sub-section (c) of 2AAC. An employee could then take a claim against a breach of 2AAC under any of (a), (b) or (c), as appropriate to her situation.

27 13A lays out Purposes for Part 4: Pay Equity, which relate only to processes. We suggest adding a Purpose about the desired outcome:

> "(c) establishing a rate of pay in which there is no element of differentiation by sex."

File claims with ERA, not employer

28 The stated purpose of the pay equity processes under the Bill is:

> "'to facilitate resolution of pay equity claims, by—
> (a) setting a low threshold to raise a claim (while recognising that entry into the pay equity claim process does not predetermine an outcome): and
> (b) providing a simple and accessible process to progress a pay equity claim."

29 CEVEP considers the provisions will not achieve the purpose.

30 The 2C threshold for an employer to accept a claim (or a determination that the claim should proceed), that it must be established or accepted by the employer as 'arguable', is highly unusual. It is a lower threshold than the 2017 Bill's 'has merit' but is still an extraneous requirement. It is not required for any other employment or human rights claim: the employee raises or files a claim, and it is either held to be established on the balance of probabilities, or not. Or the employer settles it in negotiation or mediation because that is in their best interests. In civil jurisdiction, a failure to make out an arguable claim may result in an application for a strikeout, which is not the usual process for employment and human rights claims.

31 The 2C criteria for filing a claim, based on Joint Working Group's Principle 2 into the Bill, are now sufficiently flexible to address prima facie reasons and factors that may have led to a breach of equal treatment for various kinds of female-dominated work. The word '**arguable'** (13F) is likely to require testing in court, but can be easily reworded throughout the Bill.

32 All claims should simply be filed with the Authority, not 'raised' with the employer against whom the claim is being made. This requirement is lifted from the ERA personal grievance provisions. We know of no other human rights, regulatory or common law in which the plaintiff must take a breach of the law directly to the defendant, rather than file it with a court or state agency. Personal grievances need to be raised with the employer within 90 days. This is a specific requirement to ensure actions by an employer to an employee's disadvantage are brought to the employer's attention within a reasonable time of them occurring, to preserve evidence and try to resolve employment disputes early and at a low level. That is a very different scenario to a pay equity claim.

33 Moreover, if the employer refuses to accept that the claim is 'arguable' – which should not take 65 days – the claimant is required to go into mediation with the employer, and potentially facilitated bargaining about whether there is even an arguable claim, before being able to access her current right to determination by the Authority. This is unreasonable. The criteria for acceptance are laid out in 2C; they are not matters for mediation or facilitated bargaining.

34 We appreciate the Joint Working Group on Principles recommended utilising the existing mechanisms for dispute resolution under the Employment Relations Act, and stated it is preferable for parties to sort out a pay equity claim without *having* to go to court to prove it. We agree that aim is laudable, but making access to justice far harder and more time consuming is not the right way to achieve it. Making it easy to bring a claim to the Authority, then providing excellent resources and mediation support to help the parties agree a fair rate, if possible, is a better way to achieve this goal.

35 The Bill's language, processes and timeframe suggest the approach goes beyond utilising the mechanisms under the Employment Relations Act. Filing with the Authority or court does not

prevent the parties from talking or negotiating if they wish to do so; it provides an incentive to get around a table, or else a decision maker will do it for you.

36 There is a similar issue when the claim is resolved. In the interests of transparency, a settlement document required under 13N should include information about assessment and comparison processes followed (or not) and be registered with the Authority. See further discussion of Transparency issues below.

37 **Pay equity claims should be filed with the ERA as at present. CEVEP strongly opposes the requirement to raise an arguable claim with the employer in the first instance. For transparency, all claims (2C) and all settlement documents (13N) should be filed with the Authority (or Expert Advisory Unit responsible for employment equity). Providing well-resourced independent pay equity expertise and mediation services would help the parties agree a rate, if that is possible. Claimants themselves should decide whether claims should be consolidated.**

Multi-employer processes must have agreement of those affected

38 In the event that more than one claim is made to the same employer for the same or similar female-dominated work, the claims are automatically consolidated, which is appropriate. However, if similar claims are made to more than one employer, the claimants get no say at all in whether the claims should be consolidated. Claims against different employers should be consolidated *by the claimants*. A claim should cover all employees doing the named work.

39 However, the Bill gives unilateral decision-making power to an employer (who is being claimed against) to opt for a multi-employer process, whether or not the claimant sees the other employer's work as 'same or similar work'. About the consolidation itself, neither claimants nor other employees affected will even be asked.

40 The Bill gives the same unilateral decision-making power to employers to extend pay equity settlements – whether or not they are based on the full assessment and comparison requirements of 13L and 13M. Claimants must go to the Authority to prove "exceptional circumstances" before they can raise a pay equity claim where one has previously been taken.

41 We can foresee a couple of undervalued women in a small clothing shop suddenly finding themselves ranged against employers and lawyers from the largest retail corporations in Australasia. Or they may find themselves covered, without informed consent, by a less-than-equitable mid-process settlement pushed on other undervalued claimants by employers and lawyers from that largest corporation in Australasia. They are unlikely to even hear about back pay entitlement.

42 The Bill removes claimants from decisions about their own claim. This is entirely inappropriate to complaints-based legislation. It is even contrary to theoretical equality of the parties in wage bargaining under ERA 2000.

43 At the very least, decisions about the consolidation of claims should be mutually agreed. Claimants should invite other employers, claimants and affected employees to join the claim on the basis of full information and full participation.

Snakes and ladders processes

44 While Principle 2 (2C) no longer presents a major barrier, 13F (employer's right to deny a claim is arguable) and sections on mediation and facilitation certainly do: in slow time frames, repetiative processes, and decision-making powers given to employers, reinforcing inherent power imbalances.

45 Disappointingly, this bill retains the convoluted processes of the 2017 Bill, although more succinctly written. If the parties do not agree, they are required to go to mediation, with 13P listing all the separate issues that can be referred to mediation. We note that the stated Purpose of the Mediation Service in the ERA 2000 is settlement; whereas the purpose of the Equal Pay Act is – or should be – setting an equitable pay rate. The assistance of an **Expert Advisory Unit** to help progress the parties through the pay equtiy process would be more appropriate than the formal mediation required by the Bill.

46 If the parties still do not agree, they appear to be required to also seek facilitation by the Authority. The threshold for accessing facilitation (which is actually facilitated bargaining in the current ERA model) is too high, and the process is convoluted. In facilitation, the Authority can make non-binding recommendations only, rather than a determination.

47 If the parties still cannot agree, the claimant can finally have access to a determination by the Authority, which may then be appealed to the Court. Potentially, a claim could go up and down these layers five times: on whether a claim is arguable, consolidation of claims for same or similar work, selecting appropriate male comparators, assessments of work, setting of pay rate. Disputes about alleged breaches of good faith, provision of information, informing other potential parties etc and legal interpretation arguments may also be taken through the various dispute resolution processes.

48 This snakes and ladders process is one of the main reasons Labour, the Greens and New Zealand First opposed the 2017 Bill and dropped it on becoming the government. Yet here it is in this new Bill.

49 In the experience of CEVEP members, the Authority has a very high threshold for facilitating collective bargaining, under the ERA 2000. This process is normally reserved for irretrievably broken down collective bargaining, or where there have been serious and sustained breaches of good faith. Applications for facilitation are often declined, even when the parties make a joint application.

50 Under cl.13S of this Bill, the threshold is serious and sustained bad faith which has impacted on the claim, and/or sufficient efforts including mediation have failed to resolve it. In practice, the Authority will look for both. Facilitation is not at all suited to the various stages of a pay equity claim, as this Bill proposes, but is an additional step making women's right to determination more difficult to access. Mediation and facilitation, perhaps more than once, must be navigated, and other restrictive criteria met, before an application for a determination will be accepted (13Z and ZB). Determination becomes remote and inaccessible, requiring claimants to navigate multiple loops on multiple issues. We note also it is unclear under 13Z whether the first instance jurisdiction is with the Authority or whether claimants can file with either the Authority or the Court; that should be clarified.

51 If Kristine Bartlett had raised a pay equity claim under the provisions of this Bill, she'd probably still be waiting. Terranova would have rejected the arguable claim (saying it paid men in the

caregiver role the same rate of pay). Given the approach Terranova took, it would have litigated every stage of the claim, and appealed questions of law, etc.

52 These processes reduce women's access to their current rights and push them towards accepting an early, lower settlement. This may dissuade women from making claims at all, particularly if they are not supported by a union. Moreover, everything new will be up for interpretation – taken to the Authority, to the Employment Court and, on questions of law, the Court of Appeal and, with leave, the Supreme Court. Litigation will only be undertaken by parties that can afford it.

53 **Instead, the pay equity claim filed in the Authority should be treated as a whole. Parties can try to negotiate a resolution, but if they cannot agree within a reasonable, short timeframe, the whole claim should go to mediation. If the parties cannot agree in mediation, the whole claim should go for determination by the Authority. Facilitated bargaining is inappropriate to a pay equity claim, as well as a significant barrier; 13Q to 13W should be deleted (together with other references to facilitation).**

Skills, responsibility, experience, effort, conditions

54 The core of the Equal Pay Act is the requirement to remove and prevent any element of pay differentiation by sex through the 'objective appraisal' required by ILO 100 on Equal Remuneration. That appraisal is based on an evaluation of the skills, responsibilities, experience and effort that is required to do the job, and the conditions of work (13L). For a pay equity claim, that involves comparing these factors with the same factors required by different work done by men, and then seeing whether the pay rates are fair based on that comparison. 13L is based on the s.3(1)(b) criteria for female-dominated work, as confirmed by the courts in *Bartlett vs Terranova*.

55 Subsections 13L (3) and (4) say the parties may make a written agreement to *bypass this core requirement of the Act altogether.*

56 It is not possible to privately contract out of compliance with any law – and certainly not with human rights law. 13L (3) and (4) must be dropped from the Bill, together with 13N(4) which allows any settlement to be described as a pay equity settlement even if the processes of the Act have not been followed. Women will not even know if there has been a proper process underpinning a fair outcome, because, as noted above, the Bill does not require settlement documents to include information about assessment and comparison. Yet the Bill allows such settlements to be imposed on other claimants.

57 This is not acceptable. These small amendments allowing the core requirement to be bypassed make nonsense of the principal Act and judgments, and of government policy on pay equity. If parties are able to negotiate an agreed pay equity rate, it should be subject to some form of oversight and validation by an independent body, e.g. the Expert Advisory Unit or the Authority.

58 **13L(3) and (4), and 13N(4) must be deleted as they allow the core assess-and-compare remedies of the Act to be by-passed**

Appropriate male comparators

59 The selection of male comparators was the issue on which E Tu was about to apply to the Employment Court when the parties were diverted into an SSC-facilitated Joint Working Group to settle the *Bartlett* claim. It is the issue on which that Working Group was unable to come to much agreement, despite being asked a second time. Principle 11 requires avoiding any risk of comparing the claimant's work with male work that is also undervalued, but failed to take up the Court's suggestion for resolving this. The *Bartlett vs Terranova* Employment Court judgment said at para.46:

> "If a comparator that is uninfected by gender bias cannot be found in the workplace or sector, it may be necessary to go look more broadly, to jobs to which a similar value can be attributed using gender neutral criteria."

60 A practical and efficient way of doing this has been used in the past, in the repealed 1990 Employment Equity Act and in policy work in 2004-2008. The risk of comparing the claimant's pay with male rates that are also affected by gender bias is easily avoided by comparing with two or more male-dominated jobs in male-dominated sectors. Clearly, predominantly or exclusively male work will not suffer from society's undervaluation of women and their work.

61 There are other problems with the way the Bill rewrites this Principle in 13M of its Pay Equity section. Firstly, 13M(a) describes equal pay, not pay equity and should be deleted. It would allow exactly the argument by that the Courts rejected in *Bartlett vs Terranova*: that 120 women carers in a 94% female-dominated occupation were receiving equal pay because Terranova paid four males the same low rate. 13M(c) requires evidence that the male comparators' work was *not historically* as well as currently undervalued. Historical male pay is quite irrelevant to the assessment of a *current* equitable pay rate for the claimant. And it doubles the burden of proof required of the claimant.

62 The starting point for women contemplating a pay equity claim will be to look at pay for male dominated work that seems to require similar levels of skill and responsibility. Current practice would be for the claimant to nominate male comparators - as has happened for the Bartlett settlement. If the employer does not agree the nominated male comparator(s) are appropriate, they can provide argument or evidence as to why they are not appropriate and come up with their own suggested comparators. There could be a rebuttable presumption that the comparators are suitable unless proven otherwise, i.e. putting the burden of proving a comparator is unsuitable on the employer. This allocates the burden of proof more fairly.

63 **These problems can be resolved by replacing 13M with the following wording:**

> **(1) For the purpose of identifying pay differentiation by sex, the claimants shall agree on appropriate male work for assessment and comparison with the claimant's work under 13L.**
>
> **(2) In filing the claim, the claimant may propose 2 or more appropriate male comparators .**
>
> **(3) If the employer does not agree on reasonable grounds that these are appropriate comparators, the employer may propose alternative appropriate male comparators.**
>
> **(4) A male comparator is not an appropriate comparator if there is a risk that his remuneration may also be affected by gender bias in a female-dominated sector or industry.**

(5) To avoid this risk, comparison should be made with at least 2 comparators in different male-dominated jobs in 2 different male-dominated sectors or industries.

Transparency

64 We are pleased that transparency issues addressed in the 2011 Private Member's Bill are included. The parties to a claim are required to provide information to each other in good faith (13K). The Bill does not yet provide a way for women to request information from employers before the claim is accepted – to help them decide whether they should make a claim. Nor is there yet any way to request information from employers who are not party to the claim – that is, employers of male comparators in other workplaces and sectors, as suggested in the court judgments.

65 Women need information about wage rates by sex and occupation *before* they file a claim, in order to know whether they should consider it. We support the emphasis that the Human Rights Commission's submission puts on this issue. We note that this is addressed by employer reporting requirements in Australia, the UK and Canada. We strongly support the government's proposal to add 'hours work', 'sex' and more precise ANZSCO occupational categories to the pay and tax information that all employers already report to Inland Revenue. An Expert Advisory Unit or other agency could then make average hourly wage rates by sex and occupation readily available. This would be invaluable for informing women, helping employers to meet their gender equity obligations, and assisting parties to claims in their selection of comparators and job assessments. It would also provide accurate data to assist government in monitoring the gender pay gap, and labour market issues such as compliance with the miniumum wages. We strongly urge the government to move forward on this.

66 Employers are required to keep records of all pay equity claims (13ZE), but this section is strangely incomplete. It does not include records of assessment and comparisons under 13L and 13M, or settlement documents required in 13N – and 13N should also specify information about assessments and comparisons or whether the parties settled before reaching this stage of the pay equity process. These records should be kept for at least 6 years, as for wage and time records (s.120 ERA 2000).

67 However, it is important that claim settlement documents (13N) also be filed with the Employment Relations Authority, along with claims. Records kept just by the employer will not achieve transparency. The Bill requires settlement agreements to be documented (13N), and required to be kept by the employer (13ZE). This is not transparency. Employers' filing cabinets are not easily accessed by women employed later, or by other union members, or by women doing the same or similar work for other employers to whom the settlement may be extended. In current pay equity claims, moreover, state employers are insisting on all information and outcomes being treated as confidential. This is inconsistent with effective pay equity policy.

68 The pace of pay equity policy implementation will be greatly increased if information and experiences on assessment and comparisons is shared. If any claim or settlement is to be taken as a model, we must know that it has been done right, by objective appraisal. Government will need that information to evaluate policy effectiveness, and to inform New Zealand's ILO and CEDAW reports. All this requires that both claims and settlement documents with full information to be filed with the Authority or an expert advisory agency.

69 **Greater transparency to support the government's pay equity policy can be achieved by:**
(a) requiring both claims and settlement documents to be filed with the Authority and/or Expert Advisory Unit;
(b) including in 13K a requirement for all employers to provide pay equity claimants with wage information on male-dominated work on request.
(c) obtaining improved data on hourly wage by sex and occupation through income tax reporting, and making this publicly available.

Equal rights to back pay

70 The 1972 Equal Pay Act currently provides the right to claim back pay for up to six years before the date the claim is filed (s.13(2)(2)). This is the same entitlement and limitation as for all wage claimants under the Employment Relations Act 2000, and for other commercial claims.

71 The Bill's 13ZD clause removes or reduces this right for pay equity claimants only. In its place are transition provisions that, for five years after enactment, allow back pay to be awarded only back to the date the claim was notified to employer. After that, back pay is possible but not for any period prior to the five year anniversary of this section coming into force. This means that pay equity claimants will not regain their current six year entitlement for 11 years. This treats pay equity claimants for work done 'exclusively or predominantly by women' differently from other claimants who are not. This is gender discrimination.

72 So too is the provision which gives the Authority discretion over back pay, based on the conduct of the parties, the ability of the employer to pay, the nature and extent of information and advice, or anything else the Authority thinks appropriate (cl 13ZC). Good faith and other subjective factors might be relevant to damages for humiliation and distress, but not to back pay the claim for which is based on a contractual entitlement. Further as the Employment Court in the *Bartlett* judgment made clear, affordability cannot justify injustice (ECJ at [108]-[110]). These discretionary factors are a further example of different and discriminatory treatment applying only to women.

73 A more comprehensive discussion of these discrimination arguments, and of revelevent recent rulings by the Canadian Supreme Court, are presented in **Appendix 1**.

74 **The delay to women's right to back pay in pay equity claims is discriminatory. 13ZD should be removed in its entirety. Cl.13ZC should also be removed in its entirety for the same reason. S.13 (2) and (3) of the principal Act must be retained for both equal pay and pay equity.**

Transitional arrangements

75 Like the 2017 bill, this Bill requires all pay equity claims that are currently in progress to start again under the amended legislation. All claims already filed should continue. The only reason we can deduce for this Bill making them start again from scratch is to reduce women's right to back pay. CEVEP strongly opposes this unreasonable and time-wasting requirement for claims already under way. This provision is contrary to the **Legislation Advisory Committee Guidelines.** Guideline 11.1 provides that legislation should not have direct retrospective effect and

Guideline 11.4 states that legislation should not pre-empt matters that are currently before Courts.

76 Existing claims are already following the process outlined in and attached to the Joint Working Group principles. Incorporating those Principles into the Equal Pay Act is purportedly the reason for this Amendment Bill, so is not the reason to discontinue existing claims.

77 CEVEP assumes the reason is to ensure that the new discriminatory clauses reducing pay equity claimants' right to claim 6 years' back pay. This is not acceptable. It suggests a conflict of interests between government as legislator and government as employer.

Clause by clause recommendations for text changes

78 **Apprendix 1** provides the discrimination arguments on back pay and revelevant recent Canadian Supreme Court rulings. **Appendix 2** applies the above analysis and recommendations to the text of the Bill. The left hand column of the table presents the current text with proposed deletions struck through and proposed additions in red. The right hand column has CEVEP's comments on that section of text.

APPENDIX 1

Recent Canadian judgments on pay equity and discrimination

1. Pay equity claims can be made under the Equal Pay Act 1972 in its current form. The current Act also expressly permits the right to claim back pay for up to six years before commencing proceedings (s 13(2)(2)). The Bill proposes to remove this for pay equity claimants. In its place are transition provisions under which restricts the rights of pay equity claimants for eleven years over which time a full right to six years back pay is slowly realised (cl 13ZD). This provision is discriminatory.

2. So too is the provision which makes back pay discretionary, with the factors determining whether back pay will be ordered, including the conduct of the parties, the ability of the employer to pay, the nature and extent of resources such as information and advice along with any other factors (cl 13ZC). Currently, back pay is treated as a contractual right and, having established a breach of the contractual obligation, is mandatory.

3. The rationale for both sections according to the Explanatory Note is that it incentivises employers to address pay equity issues within the first eleven years. It does this by immunising all claims raised within the first five years from attracting any back pay. After that, back pay can be claimed but only back to five years past the date on which the legislation came into force. This means the current right to six years back pay will not be realised for eleven years.

4. The 5 September 2018 advice to the Attorney General from the Ministry of Justice about the Bills compliance with the New Zealand Bill of Rights Act 1990 concludes that the provision does not make a distinction based on gender because the distinction is between different kinds of claims (like work and pay equity) and therefore is not based on a different treatment between men and women. It further says that like work claims are a form of direct discrimination whereas pay equity claims are designed to redress historic pay inequalities (at paragraphs 24-25). It also concludes that even if there were a difference in treatment based on gender, it is nonetheless justified for two reasons. First, the Bill aims to implement a pay equity bargaining framework to address historic and systematic discrimination, and second, it may be unfair for employers to be held responsible for systemic social and historical issues (at paragraph 26).

5. This advice is wrong. It fails to apply established discrimination law jurisprudence and is directly contrary to very recent Canadian Supreme Court authority which the advice does not refer to. Canadian authority while not binding on New Zealand courts is persuasive given the similarities between the non-discrimination right under the Canadian Charter of Rights and Freedoms and the New Zealand Bill of Rights Act.

6. *Quebec (Attorney General) v Alliance du personnel et technique de la santé et des services sociaux et al* (2018 SCC 17) involved a claim that the failure to require back pay under the Quebec Pay Equity Act was discriminatory. Under that Act, employers were required to conduct pay audits every five years. Following the outcome of those audits, pay was adjusted going forward. However there was no requirement to pay back pay for any period of underpayment

during the preceding five years unless the employee was able to establish the employer had acted in bad faith or in an arbitrary or discriminatory manner.

7. A majority of the Canadian Supreme Court held it was discriminatory. In so doing, the Court expressly rejected the same arguments now being relied on for saying the provisions in the current Bill are not discriminatory.

8. Relevantly Abella J, who wrote for the majority, said that while the scheme of the Act purported to address systemic discrimination in fact it codified the denial of a benefit which men routinely received, namely the right to have their pay tied to the value of their work. Men were entitled to receive such compensation as a matter of course while women could be expected to endure periods of pay inequity unless they could meet the heavy burden of establishing improper conduct by the employer. In this way Abella J said the legislation tolerated the undervaluation of women's work even when the outcome of the pay audits demonstrates women have a right to pay equity. Her Honour held the scheme privileged employers, reinforcing one of the key drivers of pay inequity: the power imbalance between employers and female workers (at [38]). For these reasons the legislation was said to have a discriminatory impact on women. As in Canada, a discriminatory impact is part of the legal test for discrimination under the New Zealand Bill of Rights Act.

9. The majority equally held the discriminatory impact of the legislation was not justified. The Government argued that the reason for denial of back pay was to improve compliance by making the scheme more "realistic" by taking into account the difficulties inherent in the ongoing obligation to maintain pay equity. Abella J responded that the challenge was not to the periodic nature of the audits but to the fact that what was revealed by them cannot be retroactively remedied. There was no rational connection therefore between the stated objective and the rights infringing measure (at 47]). The need for there to be a rational connection is similarly part of New Zealand law. If there is no rational connection the infringement on the right is not justified.

10. Abella J also considered a more specific objective that limiting back pay was a compromise that avoided financial and administrative burdens on employers. She accepted that reducing the employer's obligations might be rationally connected to increased employer compliance. Nevertheless she held the failure to require back pay did not minimally impair the right of women workers to pay equity and was not justified for that reason. The Judge said there was no evidence that other means of encouraging employer compliance, such as utilising other provisions in the Act to enforce compliance, would be ineffective. Abella J further held that eliminating those obligations did not impair female employees' equality rights as little as reasonably possible (again the same legal test applying in New Zealand) as the evidence of employer compliance was speculative. Importantly, Abella J concluded it was not constitutionally permissible to suspend the equality rights of women workers so as to encourage employers to fulfil their legal anti-discrimination obligations. She said it wrongly sends a message to employers that defiance of legal obligations will be rewarded with a watering down of those obligations (at [47]-[56]).

11. That reasoning applies equally to the provisions of this Bill. The Equal Pay Act 1972 has required pay equity now for over 40 years. There is no evidence that suspending that obligation will promote employer compliance. As currently drafted, an employer can with impunity continue

to refuse to meet its obligations for the next five years knowing that if it does receive a claim no back pay will follow. Even after five years, there is no incentive. The clock only then starts to run and slowly at that.

12. The Explanatory Note states that the Bill is designed to promote the negotiation of pay equity. That is an important objective. However, eliminating any right to back pay for five years and then limiting the entitlement to back pay for a further six years following that does not promote that objective. It undermines it.

13. Employers are more likely to settle pay equity claims, and at a reasonable level, if by doing so they can avoid or limit back pay that would otherwise be payable. Women workers also benefit because they get certainty going forward; they may get more by going to court but, equally, they may get less. There is nothing in the current Act that prevents settling claims on this basis. Indeed, this is what happened following the *Bartlett* case under the current statutory scheme which permits back pay. However, if the Act already provides for "no back pay" that bargaining lever is withdrawn from women/unions trying to settle pay equity claims. Furthermore, the ability of women workers to negotiate fair pay equity outcomes is reduced. Put simply, there is no incentive at all to settle claims in the first five years and limited incentive after that. The restriction on back pay is not rationally connected to the purpose of the legislation and therefore is not justified.

14. The restriction on back pay is also overbroad. While promoting negotiated settlements may be an important goal, realistically this model will be effective only for those who are unionised. As this is a minority of the female workforce; the objective is not minimally impairing for that reason. Other measures such as penalties for non-compliance would be more effective.

15. On the same day as the Canadian Supreme Court delivered its judgment in the Quebec case referred to above, it also delivered a judgment in a companion case, *Centrale des syndicats du Quebec et al v Attorney General of Quebec* 2018 SCC 18. This too concerned the Quebec Pay Equity Act as originally enacted. The provisions under challenge in this second case related to those which deferred the introduction of the right to claim pay equity for those without male comparators in the workplace. This was because the methodology for dealing with such cases had not been determined by the time the legislation was passed. The legislation provided that once determined that methodology would be brought into force by regulation. For a variety of reasons there was a considerable delay in the methodology being finalised.

16. One of the arguments made in this case was the same as that raised in the Ministry of Justice advice, that the different treatment of back pay between pay equity claimants and other claimants for equal pay was not a distinction based on sex. It was rejected by a majority of the Canadian Supreme Court which held that the two categories of women workers (those with and those without male comparators in the workplace) were inextricably related to sex. Both categories were expressly defined by the presence or absence of men in the workplace and were set up to address the difference in pay between women and men. Abella J, again writing for the majority, said the argument was no different to saying that discrimination against pregnant women was not based on gender because not all women got pregnant (at [25-[28]). New Zealand has similarly rejected such a formalistic approach to discrimination (*Ministry of Health v Atkinson and Ors* [2012] NZCA 184).

17. Importantly Abella J also held that the delayed access to pay equity singled out for inferior treatment those women whose pay has been most markedly impacted by their gender. She further said it was no answer to a discrimination claim to point to another group of women who have had their gender pay inequality remedied more promptly (at [29], [33], [35]).

18. Unlike the first of the Canadian cases, a majority held that the challenged provisions, namely the delay in providing pay equity to those without male comparators in the workplace, was reasonable in the circumstances. However, there are important differences between that case and the present Bill which means that conclusion is readily distinguishable here.

19. Unlike under the Quebec Act, in New Zealand the right to claim and the obligation to meet pay equity has been in effect since 1977. The Act already sets out the criteria to be applied. The Employment Court in *Barlett v Terranova* upheld the continued operation of those provisions in June 2013. Some employers may have believed the Act was no longer operable but that does not excuse non-compliance in other areas of law and should not here. Furthermore, those employers have been on notice now for over five years that view of the law is wrong. Women should not be expected to bear the burden of pay inequality any longer. Yet that is what will happen if full back pay is not retained.

20. Full back pay includes removing cl 13ZC which permits the Authority discretion over the extent to which any back pay once the right to back pay is no longer suspended completely. These factors are themselves discriminatory. Discrimination can occur whether or not an employer intends it. Lack of good faith might be relevant to damages for humiliation and distress but not for back pay. Ability to pay and/or knowledge on the part of the employer is equally irrelevant. The Employment Court in the *Bartlett* case was clear that affordability cannot justify perpetuating an injustice (at [108]-[110]). These kind of factors do not immunise an employer from meeting other minimum obligations such as meeting minimum wage rates or employment agreement rates and should not immunise and employer from its pay equity obligations either. This is a further example of different and discriminatory treatment applying only to women. The clause should be removed.

Equal Pay Amendment Bill

Text of the bill, with original page and line numbers, including suggested ~~deletions~~ or additions to specific wording	**CEVEP's clause-by-clause comments and recommendations**
The Parliament of New Zealand enacts as follows: **p.4** 1 Title This Act is the Equal Pay Amendment Act 2018. 2 Commencement This Act comes into force on the day after the date on which it receives the 5 Royal assent. 3 Principal Act This Act amends the Equal Pay Act 1972 (the principal Act). Part 1 Amendments to principal Act 10 4 New Part 1 heading inserted After section 1, insert: Part 1 Preliminary provisions 5 Section 2 amended (Interpretation) p.5 (1) In section 2(1), insert in their appropriate alphabetical order: employment agreement has the same meaning as in section 5 of the Employment Relations Act 2000 equal pay claim means a claim that an employer has breached section 5 2AAC(a) pay equity claim means a claim that an employer has breached section	

2AAC(b) (2) In section 2(1), definition of employee,— (a) delete "; but does not include—"; and (b) repeal paragraphs (a), (c), and (e). (3) In section 2(1), repeal the definitions of agricultural workers order, apprenticeship order, award, first increment date, industrial agreement, instrument, and waterfront industry order. (4) In section 2(2), replace "agreement specified in paragraph (e) of the definition of the term instrument in subsection (1) made between an individual employee and an individual employer, or any decision under paragraph (f) of that definition made in respect of an individual employee, which fixes a rate of remuneration that is special to that employee" with "employment agreement that fixes a rate of remuneration that is special to an employee". (5) After section 2(2), insert: (3) Any term or expression used but not defined in this Act has the meaning given to it in the Employment Relations Act 2000. 6 New sections 2AAA and 2AAB inserted After section 2, insert: 2AAA Transitional, savings, and related provisions The transitional, savings, and related provisions set out in Schedule 1 have effect according to their terms. 2AAB Act binds the Crown This Act binds the Crown. 7 New section 2AAC and Part 2 heading inserted	

Before section 2A, insert: **2AAC Differentiation in rates of remuneration prohibited** **p.6** An employer must ensure that— (a) there is no differentiation, on the basis of sex, between the rates of remuneration offered and afforded by the employer to employees of the employer who perform the same, or substantially similar, work; and (b) there is no differentiation between the rates of remuneration offered and afforded by the employer for work that is exclusively or predominantly performed by female employees and the rate of remuneration that would be paid to male employees — who have-- (i) ~~have~~ the same, or substantially similar, skills, responsibility and service; and (ii) work under the same, or substantially similar, conditions, and with the same, or substantially similar, degrees of effort. (c) 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. **8 Section 2A amended (Unlawful discrimination)** ~~Replace section 2A(2) with:~~ ~~(2) This section does not apply to a pay equity claim~~.	**2AAC**: CEVP stronly supports this clearer onus on employers, using the criteria in the current Act that have been confirmed and interpreted by the courts in *Bartlett vs Terranova*. **2AAC:** The wording of the current Act, examined by the courts, refers to skills, responsibilities etc as the criteria that the employer should use for ensuring no differentiation for both equal pay for women and men doing the same job and for pay equity for female-dominated work. The slight change of wording we propose ensures that (i) and (ii) apply to both (a) and (b), as at present. **Add 2A(1) Unlawful Discrimination to 2AAC as sub-section (c),** and drop subclauses 2A(2) and 8(a)(b) which deal with 2A(1) incorrectly in regard to 2B Choice of Proceedings below. **S.2A** was added to the Act in 1991 under National to ensure that NZ is compliant with ILO 111 Equal Employment Opportunity. In Bartlett vs Terranova, it was one of the sections examined by the courts in regard to the legislative purposes of the Act. Rather than leaving it hanging, it is logical to add 2A(1) into this Bill's much clearer writing of the onus on employers. An employee may then take a claim against a breach of 2AAC under any of (a), (b) or (c), as appropriate to her situation. We note the the State Services Commission's 2018 Gender Pay Principle addresses all contributing factors to pay differentiation by

	sex. We note that EEO aspects of unequal treatment could in any case be brought to notice under 13C(3(e)(v). We see no reason at all why this Bill would exclude a Purpose like 2(A) from applying to pay equity claimants, and the commentary gives no clue. We note the wide definition of remuneration in the principal Act. For example, we hear of one department in which women wish to address (i) pay inequality in the same job, (ii) the lower pay of women in differently titled but similar work to that done by males, and (ii) why the women doing that differently titled but comparable work have no access to training or promotion. It is would be reasonable for them to make a claim under each of (a), (b) and (c) of 2AAC and for the parties to deal with these issues at the same time.
9 New section 2B inserted (Choice of proceedings) After section 2A, insert: **2B Choice of proceedings** (1) Where the circumstances giving rise to an unlawful discrimination claim, an equal pay claim, or a pay equity claim by an employee are such that the employee would also be entitled to make a complaint under the Human Rights Act 1993, or raise a personal grievance under the Employment Relations Act 2000, the employee may take 1, but not more than 1, of the following steps: (a) the employee may raise a claim under this Act; or (b) the employee may make a complaint under the Human Rights Act 1993; or (c) the employee may raise a personal grievance under the Employment Relations Act 2000. (2) For the purposes of subsection (1)(b), an employee makes a complaint when proceedings in relation to that complaint are commenced by the complainant or the Human Rights Commission. (3) If an employee raises a claim under this Act, the employee may not exercise or continue to exercise any rights in relation to the subject matter of that claim that the employee may have under the Human Rights Act 1993 or under the Employment Relations Act 2000. **P.7** (4) If an employee makes a complaint referred to in subsection (1)(b), the	**2B** spells out **s.2A(2)** in the principle Act more clearly. But it does not explain why 2A(1) Unlawful discrimination should not apply to pay equity claimants, as 2A(1) and pay equity are both under the Equal Pay Act. See comment above.

employee may not exercise or continue to exercise any rights in relation to the subject matter of the complaint that the employee may have under this Act or under the Employment Relations Act 2000. (5) If an employee raises a personal grievance under the Employment Relations Act 2000, the employee may not exercise or continue to exercise any rights in relation to the subject matter of that personal grievance that the employee may have under this Act or under the Human Rights Act 1993. **10 Section 3 amended** (Criteria to be applied) (1) In section 3(1), replace "Subject to the provisions of this section, in" with "In". (2) In section 3(1), delete "or class of work payable under any instrument, and for the purpose of making the determinations specified in subsection (1) of s.(4)". (3) Repeal section 3(2) and (3). 11 Sections 4 to 8 repealed Repeal sections 4 to 8. 12 New section 8A and Part 3 heading inserted Before section 9, insert: Part 3 **Matters relating to equal pay claims** 8A Application of this Part The provisions in this Part do not apply to— (a) a pay equity claim; or ~~(b) an unlawful discrimination claim under section 2A.~~ 13 Section 9 amended (**Court may state principles for implementation of equal pay)** In section 9, replace "for the implementation of equal pay in accordance with the provisions of sections 3 to 8" with "to achieve equal pay in employment agreements".	**Delete proposed 8A(b):** See comments above under 2AAC and 2B re inapprorpiate treatment of 2A(a) Unlawful Discrimination in the bill's amendments to new 2B Choice of Proceedings. The **s.9** right to apply to the court for guiding principles for implementation was confirmed in *Bartlett vs Terranova.* It is retained here for equal pay claims, but is not included for pay equity. In its place, the Bill amends s.19 Regulations to allow pay equity matters related to assessment and comparable work to be

14 Section 10 amended (Approval by court or Employment Relations Authority of instruments or proposed instruments) (1) In the heading to section 10, replace "instruments or proposed instruments" with "employment agreements or proposed employment agreements". (2) In section 10, replace "instrument or proposed instrument" with p."employment agreement or proposed employment agreement" in each place. **p.8** (3) In section 10, replace "proposed collective agreement" with "proposed or existing collective agreement" in each place. (4) In section 10, replace "meet the requirements of sections 3 to 6" with "provide for equal pay" in each place. (5) In section 10, replace "meet such of the requirements of sections 3 to 7 as are applicable" with "provide for equal pay" in each place. (6) In section 10(1), replace "meet such of the requirements of sections 3 to 6 as are applicable" with "provide for equal pay". (7) In section 10(2)(b)(ii), after "and", insert ", in the case of a proposed collective agreement,". (8) In section 10(4)(b)(i), replace "meet those requirements" with "provide for equal pay". (9) Replace section 10(4)(b)(ii) with: (ii) in the case of an existing employment agreement, amend it to the extent necessary to provide for equal pay, and the employment agreement as so amended has effect accordingly. **15 Section 11 repealed (Court may make partial award**) Repeal section 11. **16 Section 12 amended (Further powers of Employment Relations Authority**) (1) Repeal section 12(a) and (b). (2) In section 12(d), replace "instrument" with "employment agreement" in each place.	addressed via Order in Council. This change will probably be useful and certainly faster – although it is unusual for powers under Regulations to be so specific.

17 Section 13 amended (Recovery of remuneration based on equal pay)
(1) Repeal section 13(1).
(2) In section 13(2) and (3), replace "instrument" with "employment agreement".

18 New Part 4 inserted
After section 13 insert:

Part 4
Pay equity claims

13A Purpose
The purpose of this Part is to facilitate resolution of pay equity claims, by—
(a) setting a low threshold to raise a claim (while recognising that entry into the pay equity claim process does not predetermine an outcome); and
(b) providing a simple and accessible process to progress a pay equity claim. **P.9**
(c) establishing a rate of pay for the claimant in which there is no element of differentiation by sex.

13B Interpretation
In this Part, unless the context otherwise requires, employer means an employer in relation to whom a pay equity claim has been ~~raised~~ notified.

Employee's right to ~~raise~~ file a pay equity claim

13C Employee may ~~raise~~ file a pay equity claim
(1) An employee of an employer, or a group of employees who perform the same, or substantially similar, work for an employer, may ~~raise~~ file a pay equity claim with the Employment Relations Authority.~~if that employee or group of employees considers that the claim is~~

S.13 (2) and (3): CEVEP strongly opposes removing or reducing women's right to claim back pay. The principal Act gives all claimants the same right to back pay as wage claimants under s.121 of the Employment Relations Act, limited to a maximum of 6 years. This right also exists for all commercial non-payments or under-payments, provided by the Limitations 2010. It is retained here for equal pay claims only. See 13ZD below for this Bill's discriminatory treatment of women pay equity claimants in regard to back pay entitlement.

13A: **Purposes should include establishing an equitable pay rate**, as required by 2AAC(b). At present the purposes are just about the process, not the outcome.

See also comments above in regard to s.2A Unlawful Discrimination being one of the section examined by the courts to establish the legislative purpose of the Act. CEVEP recommends

13C: Claims under the principal Act must continue to be filed with the Employment Relations Authority. Pay equity is a human rights issue for which the state is responsible. It is governments that have signed ILO 100 and CEDAW which require *governments* to take action – which NZ did in 1983 having passed the Equal Pay Act. Government policy relies for its effectiveness on complaints being made – to the state. We know of no other regulatory, civil or common law where non-compliance (2A and 2AAC) is dealt with by requiring the plaintiff to take their case directly to the defendant.

	The language 'raising a claim' suggests that the writers consider women's human rights to equal pay for work of equal value under international Conventions as merely an individual personal grievance under the ERA 2000. But personal grievances are also filed with the Authority. (A union may notify the employer at once because ERA 2000 puts a time constraint on this, and getting a hearing with the Authority may take longer.)
(2) A pay equity claim ~~is arguable~~ may be filed if— (a) the claim relates to work that is predominantly performed by female employees; and (b) ~~it is **arguable** that~~ the work may be currently undervalued or has historically been undervalued. (3) In deciding whether ~~it is arguable that~~ the work may be currently undervalued or has historically been undervalued, consideration may be given to any relevant factor, including the following: (a) the origins and history of the work, including the manner in which wages have been set: (b) any social, cultural, or historical factors: (c) characterisation of the work as women's work: (d) that the nature of the work requires an employee to use skills or qualities that have been— (i) generally associated with women; and (ii) regarded as not requiring monetary compensation: (e) any sex-based systemic undervaluation of the work as a result of the following factors: (i) a dominant source of funding across the relevant market, industry, sector, or occupation: (ii) a lack of effective bargaining in the relevant market, industry, sector or occupation: (iii) occupational segregation or occupational segmentation in respect of the work: (iv) the failure by the parties to properly assess or consider the remuneration	**3C(2) and (3): 'Arguable'** is an unusual term in law that is best avoided, as it is highly likely to be contested in the courts. See CEVEP's suggestions for rewording in red. We suggest similar wording changes throughout the Bill. **3C(3):** CEVEP is pleased that the Ministers have softened the level of requirement in the Joint Working Group's Principle 2 so that it no longer presents daunting barriers to filing a claim (as it did in the 2017 Bill). It is now a list of factors that suggest the work may be undervalued and the claim reasonable. However, this bill does raise barriers and discourage claimants through the long timeframes and decision-making power given to the employer in the processes that follow the initial claim.

that should have been paid to properly account for the nature of the work, the levels of responsibility associated with the work, the conditions under which the work is performed, and the degree of effort required to perform the work: (v) any other feature of the relevant market, industry, sector, or occupation. **p.10**	
~~(4) However, despite subsections (1) to (3), a pay equity claim may not be raised if it relates to work that is covered by an existing pay equity claim settlement to which the employer is a party and the employer extends the benefit of that settlement to the claimant,~~ ~~unless the Authority or court determines otherwise in accordance with section 13Z(3).~~	**Delete 3C(4).** See comments in **13I** below about the Bill giving unilateral decision-making power to employers over extension of pay equity claims or settlements. All extensions of claims or settlements to other groups must be agreed to by those affected. This is human rights: every women has the right to make a claim. That right should not be unilaterally removed by the employer being claimed against; or unless 'exceptional circumstances' are recognised by the Authority under **13Z**.
Process to file a pay equity claim	
13D Requirements relating to pay equity claims (1) A pay equity claim must— (a) be in writing; and (b) state that it is a pay equity claim made under the Equal Pay Act 1972; and (c) state— (i) the employee's name; and (ii) the date on which the claim is made; and (iii) the employee's occupation, position, and a brief description of the work performed by the employee; and (iv) if the employee engages a union or any other representative to act on the employee's behalf in respect of the claim, the name and address for service of that representative; and (d) briefly set out the elements ~~required for an arguable~~ of the pay equity claim ~~(*see* section~~ under 13C(2)) ~~and the evidence that the employee relies on in support of those elements.~~and 13C(3), and proposals for appropriate male comparators under 13M.	**13D(1)(d):** Our deletions and additions reflect the Ministers' softening of the requirement levels in Principle 2, now 13C. It can be expected that additional information will be obtained from employers under 13K Duty to provide information and other sources. This Bill has a tendency to require evidence in advance of investigation. But claims will arise because women start making rough comparisons between their own work and pay and male work and pay. This is the alleged breach to be investigated. It is logical for the claimant to nominate appropriate male comparators at this point – but see **13M** for the full selection process. **13E(1)(b):** These are notices to the employer's own employees. It is unlikely to require 20 days.

(2) On receiving notice that the claim has been accepted by the Authority, the clamant must ensure that the claim is ~~must be —~~ (a) delivered in person to the employee's employer; or (b) sent to the employee's employer by any form of electronic communication that is ordinarily used for formal communications; or (c) notified to the employer in any manner specified in the employee's employment agreement; (b) the claimants and the employer must enter into the pay equity assessment and bargaining process. Compare: 1990 No 57 s 5J; 2000 No 24 s 69AAC **13E Employer must notify certain other employees** (1) An employer who receives a pay equity claim from an employee (the claimant) must— (a) acknowledge receipt of the claim by giving a notice of receipt to the claimant not later than 5 working days after receiving it; and (b) give notice of the claim to the persons referred to in subsection (2) as soon as is reasonably practicable and not later than **20 working days** after receiving it. (2) The persons are all of the employer's other employees who perform work that is the same as, or substantially similar to, the work performed by the claimant (the affected employees). (3) The notice must— (a) be in writing; and (b) state that a pay equity claim has been made by an employee who performs work that is the same as, or substantially similar to, the work performed by the affected employees; and (c) provide information about the steps that affected employees may take to join the claim or raise their own pay equity claim. (4) The notice must not identify the claimant without the claimant's prior written consent. (5) The notice must be— (a) delivered to the affected employee in person; or	**p.11**

(b) sent to the affected employee by any form of electronic communication that is ordinarily used for formal communications; or (c) given in any manner specified in the affected employee's employment agreement. (6) Subsection (1)(b) does not apply in respect of an affected employee if— (a) the employer has given notice to that employee of another claim that relates to the same, or substantially similar, work; and (b) that other claim has not been rejected or settled; and (c) the claimant's claim is to be consolidated under section 13H with an existing claim and the requirements of section 13H are complied with (which requires that a joinder notice be provided to the claimant, information about the claimant be provided to other claimants (unless confidentiality is requested), and information about other claimants be provided to the claimant).	
~~(7) Despite subsection (1)(b), the employer may, by notice to the claimant, extend the time limit for notifying affected employees if the employer has genuine reasons, based on reasonable grounds, for requiring the extension.~~ ~~(8) A notice extending the time limit must—~~ ~~(a) be given as soon as is reasonably practicable and not later than 20 working days after the employer receives the claim; and~~ ~~b) specify the extended date by which the employer will notify affected employees of the claim; and~~ ~~(c) set out the reasons and grounds for requiring the extension.~~	**Delete (7) and (8).** The employer already has 20 working days to notify other employees in same firm. These are just notices. (7) and (8) allow unreasonable and timewasting delays.
~~**13F Employer must** form view as to whether pay equity claim is arguable **decide whether to accept the claim**~~ ~~(1) An employer who receives a pay equity claim must, as soon as is reasonably practicable and not later than 65 days after receiving it, decide whether, in the employer's view, the pay equity claim is arguable to accept the claim.~~ ~~(2) An employer's decision to accept the claim that a pay equity claim is arguable does not mean that—~~ ~~(a) the employer agrees that there is a pay equity issue; or~~	**Delete 13F. See 13C above. Claims must be filed with the Authority as at present**, based on the criteria in amendment 13C of this Bill. Other aspects of 13F are now dealt with in 13C or in 13H.

~~(b) there will be a pay equity settlement as a result of following the pay equity claim process.~~ ~~(3) The employer must notify the employee who made the claim of the employer's decision under subsection (1) as soon as is reasonably practicable, and not later than 65 days 20 days after receiving the claim.~~ ~~(4) If the employer decides that the claim is not arguable does not accept the claim, the notice under subsection (3) must—~~ ~~(a) set out the reasons for the employer's decision; and~~ ~~(b) provide an explanation of the steps that the employee may take to challenge the employer's decision, including advice that—~~ ~~(i) the employee may seek further details of the reasons for the employer's decision:~~ ~~(ii) the employee may refer the question of whether the claim is arguable to mediation under section 13P:~~ ~~(iii) the employee may refer the question of whether the claim is arguable to the Authority for facilitation under sections 13Q to 13Y, if one of the grounds in section 13S(2) exists:~~ ~~(iv) the employee may apply to the Authority under section 13Z for a determination as to whether the pay equity claim meets the criteria for lodging a claim under s.13C and 13D. is arguable and~~ ~~that, if the employee does so, the Authority will first consider whether an attempt has been made to resolve the question by facilitation or mediation.~~ (5) If the ~~employer decides that~~ the claim ~~is arguable (a) the notice under subsection (3) must provide information about any extension of the pay equity claim bargaining process under sections 13H and 13I to 13ZD; and~~ **p.35** ~~(b) the employer and the employee must enter into the pay equity assessment and bargaining process.~~ ~~(6) If the employer fails, within 65 **20 days** of receiving the claim, to give~~ p.13 ~~notice to the employee under subsection (3),—~~ ~~(a) the employer is deemed to have accepted that the claim is arguable; and~~ ~~(b) the employer must provide the employee with a notice containing information about the pay equity bargaining process under sections 13H to 13I ZD; and~~	**13F(3): 65 days** is unreasonable and time-wasting, inconsistent with a 'simple and accessible process' for claimants, as are other aspects of this section. 'Arguability' and the time frames in 13F have considerable potential for abuse and unwarranted delays. Moreover, **13F (5) and (6)** allows the employer to make all process decisions unilaterally - agenda, meetings and timeframes The claimant does not need 'information about the bargaining process' from the employer; they and or their union/lawyer can read that for themselves in the legislation. Anything further should be mutually agreed between the parties. **13F (5) and (6) must be rewritten** to allow any extensions of claims or claim outcomes **to be made by the claimant(s) themselves.** 13F(5) and (6) are inconsistent with both women's current rights under the principal Act. They are even inconsistent with the equal

~~(c) the employer and the employee must enter into the pay equity bargaining process.~~ ~~(7) Notices under this section must be in writing and be—~~ ~~(a) delivered in person to the employee; or~~ ~~(b) sent to the employee by any form of electronic communication that is ordinarily used for formal communications; or~~ ~~(c) given in any manner specified in the employee's employment agreement.~~ Compare: 1990 No 57 s 5I; 2000 No 24 s 69AAE	standing of negotiating parties under the ERA 2000 (e.g. affected employees have the right to ratify or reject wage offers). We agree that a pay equity claim and its outcome must cover all employees doing the same or similar work *for the same employer* (13H), but any other employees (and other employers) must be **invited by the claimant** to join the claim and have the right to accept or decline or exercise their own right to lodge a claim, and similarly accept or decline any final rate or settlement (cf ratification of collectively bargained agreements under ERA 2000.)
Pay equity ~~bargaining~~ process **~~13G Process applies to arguable~~ ~~accepted~~ ~~claims~~** ~~Sections 13H to 13ZD apply to a pay equity claim if—~~ ~~(a) the employer decides, or is deemed to have accepted, that~~ ~~accepts~~ ~~the claim is arguable; or~~ ~~(b) the Authority or the court determines that accepts the claim is arguable.~~	**Delete 13G.** Claim to be accepted by the Authority under the criteria in 13C.
13H Consolidation of claims by multiple employees (1) If, before settling a pay equity claim, the employer receives 1 or more other claims that relate to the same, or substantially similar, work, the ~~employer~~ claimants must— (a) treat all claims as 1 joint claim for the purposes of this Act, (b) notify all ~~claimants~~ employees doing the same or substantially similar work ~~as to whether~~ that their claims will be dealt with jointly ~~or separately~~. unless--- ~~the employer has~~ (a) any of the parties has ~~genuine reasons, based on~~ reasonable grounds for not treating the claims as a joint claim; or (b) in the case of disagreement that the grounds are reasonable, the claimant may apply to the Authority for a direction as to whether the claim should be treated jointly or separately.	**13H** applies only to more than 1 claim for the same or similar female-dominated work for the same employer. The wording is slightly confused. As (1) says 'must' treat as one claim, (b) and (3) should say that claims *will* be treated jointly. It is logical and efficient for 1 or more claims for the same or similar female-dominate work for the same employer to be treated jointly. However, **it is the right of the claimant (not the employer**) **to take or consolidate a claim** and, if necessary, to apply to the Authority for a determination. As at present, it is the Authority that should accept or reject the claim under 13C and therefore. In the case of disagreement, whether claims are accepted jointly or separately. (Cf. 13H (f) below which also allows claimants to apply to the Authority for a direction.)

Joinder notice (2) A notice that a claimant's claim will be dealt with jointly (a joinder notice) must ~~(a) include advice that, unless the claimant requests confidentiality , the information in respect of the claimant set out in subsection (3) will~~ be provided to all other claimants. ~~and~~ ~~(b) specify a reasonable date by which a request for confidentiality under paragraph (a) must be received by the employer.~~ (3) ~~If the employer decides to treat a number of claims jointly~~ The employer must provide to every claimant, as and when each new claim is added to the consolidated claim, the following information in respect of every other claimant: (a) copies of each written claim provided by the claimant under 13D; (~~a~~) the claimant's name and address for service; or (b) in the case of a claimant who has notified the employer of a representative under section 13D(1)(c)(iv),— (i) the claimant's name; and (ii) the name of the claimant's representative; and (iii) the address for service of the claimant's representative ~~(4) Despite subsection (3), if, before the date specified in the joinder notice, an employer receives a request to keep a claimant's name and address confidential, the employer—~~ ~~(a) must not provide the information referred to in subsection (3)(a) and (b)(i) to the other claimants; but~~ ~~(b) must advise the other claimants that a new claim has been joined and, if the claimant has notified the employer that the employee has a representative under section 13D(1)(c)(iv), provide details of the name and address for service of the claimant's representative; and~~ (~~c~~ 4) The employer and ~~must keep~~ and the claimant, or the claimant's representative, must been each other informed of all significant issues arising and steps taken in respect of the joint claim. (5) Notices to claimants under this section must be in writing and be— (a) delivered to the claimant in person; or (b) sent to the claimant by any form of electronic communication that is	**Delete sub-clauses (2)(a) and (b) and (4)** about keeping claimants' contact details confidential from each other. How can claimants possibly participate jointly in a joint pay equity claim process without knowing who the other claimants and their representatives are, and being able to get in touch? (If the intention is merely that the claimants' contact details will be not made public, or not shared with employees or employers who are not parties to the claim, then this section needs rewriting.)

ordinarily used for formal communications; or (c) given in any manner specified in the claimant's employment agreement. *Process for consolidated claims* (6) Claimants who have been notified and agree that that their claims will be dealt with jointly must seek to reach an agreement as to how the consolidated claim will be progressed, including— (a) whether there will be 1 or more representatives for the claimants, and who that representative or those representatives will be; and (b) how decisions relating to the claim will be made. (7) If the claimants cannot agree on how the consolidated claim will be progressed, any of them may apply to the Authority for a direction. (8) The Authority may give any of the following directions that it considers appropriate: (aa) a direction as to whether on reasonable grounds a claim should be treated separately; (a) a direction as to representation of the claimants; (b) a direction as to how decisions relating to the claim must be made; (c) any related direction that it considers useful to foster the efficient and just resolution of the claims. **13I Consolidation of claims against multiple employers** *Consolidation of claims by multiple employers* (1) If 2 or more employers receive pay equity claims made by employees who perform the same, or substantially similar, female-dominated work, the claimants and employers may agree to consolidate those claims for the purposes of the pay equity bargaining process. *Process for multi-employer consolidated claims* (2) An ~~employer~~ claimant who wishes to join together 1 or more other employers and their pay equity claimants into 1 consolidated pay equity process must obtain the written agreement of: (a) each employer, and	**13I: Consolidation of claims be initiated by the claimants and agreed to by all parties.** If women have the right to claim under this Act, they surely have the right to participate in decisions about the form of their claim. Instead, this Bill gives decision-making powers over the pay equity process to the very employers who have failed to 'ensure no element of differentiation by sex' in their pay rates. The Bill presents consolidated claims as an entirely employer-driven decision and process. This is inappropriate for a process that results from a claim against employers under 2AAC. The

(b) each claimant. (3) An employer against whom no claim has been filed who wishes to join the consolidated pay equity process shall notify all employees performing the same or similar work as in 13H. *Process for a multi-employer consolidated claim* (4) An agreement to consolidate pay equity claims must include provisions that set out (a) the written claims provided by claimants under 13D. (~~a~~ b) whether there will be 1 or more representatives for the employers and who that representative or those representatives will be; (c) whether there will be 1 or more representatives for the claimants and who that will be: and (b) an agreement as to how decisions relating to the claim will be made. (3) If 2 or more claimants and employers ~~decide to~~ agree to consolidate pay equity claims for the purposes of the pay equity ~~bargaining~~ process, each employer must provide to each employee who has made a claim against that employer— (a) A copy of the consolidation agreement; (~~a~~ ~~b~~) the name of every other employer that is a party to the consolidated claim; and (~~b~~ c) the name and address for service of the nominated representative of each employer. (d) the name and address of the nominated representative of each claimant group; (4) At the conclusion of the pay equity ~~bargaining~~ process in respect of a consolidated pay equity claim, each employer must enter into a separate pay equity claim settlement with its employees who were parties to the claim. *Notices* (5) Notices to claimants under this section must be in writing and be— (a) delivered in person to the claimant; or (b) sent to the claimant by any form of electronic communication that is	changes in red aim to make it **a claimant-initiated and mutually agreed decision and process.**

ordinarily used for formal communications; or (c) given in any manner specified in the claimant's employment agreement.	
13J Good faith in pay equity ~~bargaining~~ process The duty of good faith in section 4 of the Employment Relations Act 2000 requires the parties, at least, to— (a) follow the process set out in this section, and in sections 13K to 13ZD, to resolve the pay equity claim; and (b) use their best endeavours to enter into an arrangement, as soon as possible after the ~~start~~ acceptance of the pay equity ~~bargaining~~ claim, that sets out a process for conducting ~~the bargaining~~ assessment and comparison of the work in an effective and efficient manner; and (c) use their best endeavours to ~~settle~~ resolve the pay equity claim in an orderly, timely, and efficient manner; and (d) recognise the role and authority of any person chosen by each of the parties to be that person's representative or advocate, and not (directly or indirectly) bargain about matters relating to the pay equity claim with the person for whom a representative or advocate acts (unless the parties agree otherwise); and (e) not undermine, or do anything that is likely to undermine, the ~~bargaining or~~ the authority of another party ~~in the bargaining~~ to the claim. Compare: 2000 No 24 s 32	**3J:** We suggest moving this good faith section to General Provisions, where it can cover equal pay claims as well pay equity and incorporate also **13V** good faith in dealing with the Authority and presumably the mediation service. **Delete the word "bargaining' throughout**. The claim process 13G to 13K, and the assessment and comparison stages 13L and M, are laid out in this Bill. They are criteria and processes for meeting the criteris; they are not matters for 'bargaining'. The word is inappropriate at this stage and indicates slippage between two different models of law.
13K Duty to provide information (1) The parties to a pay equity claim must provide to each other, on request, information that is reasonably necessary to support or substantiate claims or responses to claims made for the purposes of ~~the bargaining~~ assessment and comparison. (b) An employer of a male comparator selected under 13M in a pay equity process must provide, on request, information that is reasonably necessary for the purposes of assessment and comparison under 13L. (2) A request by a party to another party for information must— (a) be in writing; and	**13K:** The Bill does not yet include a way for claimants to obtain information from employers of male comparators in other workplaces or sectors, who are not party to the claim. This is important for 13M Selection of appropriate male comparators, in order to avoid comparing the claimant's wage rate with male rates also affected by gender bias and undervaluation in female-dominated workplaces, industries or sectors (see *Bartlett vs Terranova*, the Joint Working Group's Principle 11 and section 13M below).

(b) specify the nature of the information requested in sufficient detail to enable the information to be identified; and (c) specify the claim, or the response to a claim, in respect of which information to support or substantiate the claim, or the response, is requested; and (d) specify a reasonable time within which the information must be provided. (3) A party who receives an information request may provide the information to the Authority, or to an independent reviewer instead of to the requesting party, if the party reasonably considers that the information requested should be treated as confidential information. (4) If information is provided to an independent reviewer, section 34(4) to (9) of the Employment Relations Act 2000 applies as if references to the union and employer were references to the parties. Compare: 2000 No 24 s 34	
13L?? Matters to be assessed (1) The parties to a pay equity claim must determine whether the employee's work is currently undervalued, ~~or has historically been undervalued~~, by assessing— (a) the nature of the work to which the claim relates, and the nature of comparators, including, in each case, the following: (i) the skills required: (ii) the responsibilities imposed: (iii) the conditions of work: (iv) the terms and conditions of employment: (v) the degree of effort required to perform the work: (vi) the level of experience required to perform the work: (vii) any other relevant work features; and (b) the remuneration that is paid to the persons who perform the work to which the claim relates; and (c) the remuneration that is paid to ~~persons who perform comparable work~~ appropriate male comparators selected who perform different work involving comparable levels of skill, responsibility, experience, effort and conditions of work.	**Note:** It would be more logical for Selecting Male Comparators to precede Matters to be Assessed. **13L (1):** Historical undervaluation of the claimant's work may be among reasons for filing a pay equity claim, but is irrelevant to the assessment of current work and current pay in this section. **13L (c) is wrongly worded** on two counts. Males, not 'persons' – this Act is about pay differentiation by sex. Comparison with males who 'perform comparable work' is an equal pay claim under SAAC(a), not a pay equity claim under this section.

(2) In making the assessments required by subsection (1), the parties— (a) must consider matters objectively and without assumptions based on sex (and prevailing views as to the value of work or existing or previous job assessments must not be assumed to be free of assumptions based on sex); and (b) must recognise the importance of skills, responsibilities, effort, and conditions that are or have been commonly overlooked or undervalued in female-dominated work (for example, social and communication skills, taking responsibility for the well-being of others, cultural knowledge, and sensitivity); and (c) may consider the list of factors at section 13C(3). ~~(3) Despite subsection (1), the parties to a pay equity claim may enter a written agreement that sets out an alternative process that they will use and that they agree is suitable and sufficient to settle the claim.~~ ~~(4) If the parties enter a written agreement under subsection (3), they must follow~~ ~~the alternative process specified in that agreement to assess the claim, and subsections (1) and (2) and section 13M do not apply (except to the extent set out in the written agreement).~~	**13L(2)(a):** A commonly used job sizing tool, Hay, is not satisfactory for evaluating caring or interpersonal skills or emotional labour. The State Services Commission has been developing a gender neutral job evaluation tool, based on work done under the previous Labour government and on recent experience of job evaluation in Canada. It needs to be made available and required to be used. **Delete 13L(3) and (4).** 13L provides the legislation's core criteria for pay equity, as confirmed by the courts. Yet 13L (3) and (4) allow the parties to side-step this completely. **Human rights laws (and other regulatory laws) cannot be avoided by privately contracting out of them.** **Note:** It would be more logical to put 13M on selection of comparators before 13L on Matters to be Assessed in comparisons.
13M Identifying appropriate comparators **Please read CEVEP comments and replace with the fully rewritten section recommended below.**	**13M is not yet fit for purpose**, on several counts. We can surely do better. 13M re-writes Joint Working Group's Principle 11 in a way that does not fully incorporate the Bartlett judgments and that requires evidence that the male comparators' work was *not* both historically and currently undervalued before the claimant can then offer evidence that her own work was. This doubles the burden on the claimant. Historical male pay is quite irrelevant to the assessment of a current equitable pay rate for the claimant.

(1) For the purpose of identifying pay differentiation by sex, the claimant may nominate 2 or more appropriate comparators against which to assess a pay equity claim as required by section 13L. If the employer does not agree that these are appropriate comparators, the employer may present evidence to the contrary.	The starting point for women contemplating a pay equity claim will be to look at comparable male work and pay (just as an equal pay claim arises from comparison with male colleagues). It would be normal practice for any claimant to nominate male comparators in the claim filed under 2C (as has happened in the Bartlett claim and other current claims). If the employer does not agree the nominated male comparators are appropriate, they can provide argument or evidence as to why they are not. This allocates the burden of proof more fairly.
(2) For the purpose of identifying appropriate comparators, **comparable work** may include ~~any of the following:~~ ~~(a) work performed by male comparators that is the same as, or substantially similar to, the work to which the claim relates:~~	**Delete 13M(~~1~~ 2)(a).** It **describes equal pay, not pay equity** (which are now in separate sections). Retained here, it would allow exactly the argument by that the Courts rejected in *Bartlett vs Terranova* for female-dominated work under s.3(1)(b): that 120 other women carers in a 94% female-dominated occupation were receiving equal pay for care work because Terranova paid four males the same rate.
~~(b)~~ (a) work performed by male comparators that is different to the work to which the claim relates, ~~if the comparators' work involve 1 or more of the following:~~ ~~(i) skills and experience that are the same as, or substantially similar to, those required to perform the work to which the claim relates:~~ ~~(ii) responsibilities that are the same as, or substantially similar to, those involved in the work to which the claim relates:~~ ~~(iii) working conditions that are same as, or substantially similar to, those involved in the work to which the claim relates:~~ ~~(iv) degrees of effort that are the same as, or substantially similar to, those involved in the work to which the claim relates~~:	13M(~~1~~ 2)(~~b~~ a): Yes, pay equity requires comparison of men's and women *different* work, but then (i) to (iv) require as a criteria for selection what has yet to be established through a job assessment process. Cart before horse. These subsections are unnecessary anyway; no claimant is likely to nominate male comparators unless they think they have a prima facie case of unequal treatment under the **criteria in 2C**, which are the criteria that the Authority will consider in accepting the claim.
~~(c)~~ (b) work performed by any other male comparators that the parties or the Authority or court considers useful and relevant, ~~including~~ provided the male	**13M (c) is too loose on several counts**: - It could allow the parties to side-step the core other parts of this section. Terranova no doubt considered its four male carers useful and relevant.

comparators who perform work that has previously been the subject of a pay equity ~~settlement,~~ assessment under 13L.	- It does not state that comparators are male. This Act is about unjustifiable differentiation by sex. - CEVEP has no objection to re-using male work already assessed and compared in a previous claim, if appropriate. Provided the work has undergone full assessment under 13L, not merely been whatever female rate emerges from a bargained settlement for other work without full assessment and comparison. - Taken together with the 13L (3) and (4) sidestep, however, the looseness in this subsection could reduce equity and women's human rights to whatever bargained outcome the employer can push through.
~~(2) Despite subsection (1), work performed by a male comparator may not be selected for the purposes of assessing a pay equity claim under section 13L(1) if there are reasonable grounds to believe that the work performed by that male comparator—~~ ~~(a) has been historically undervalued for 1 or more of the reasons set out in section 13C(3)(a) to (d); and~~ ~~(b) continues to be undervalued for the reasons set out in section 13C(3)(e).~~ **CEVEP recommends the following wording for 13M.** **13M Identifying appropriate comparators** (1) For the purpose of identifying pay differentiation by sex, the parties shall agree on appropriate male work for assessment and comparison with the claimant's work under 13L. (2) In filing the claim, the claimant may proposed 2 or more appropriate male comparators .	**Delete 13M(2).** (2)(a): *Historical* undervaluation of the work of a male comparator is entirely irrelevant to establishing the current appropriate pay equity rate for a female-dominated occupation. (2)(b) repeats the task to be undertaken in 13L above. The whole clause rewrites Principle 11 in a way that greatly increases the burden of proof, which we anticipate will fall on the claimant. It doesn't take full account of the *Bartlett* judgment on comparators or move us forward to a practical way of selecting appropriate male comparators. Principle 11 requires avoiding any risk of comparing the claimant's work with male work that is also undervalued, but fails to take up the Courts' suggestion for resolving this. The *Bartlett vs Terranova* Employment Court Judgment (at [46]): "If a comparator that is uninfected by gender bias cannot be found in the workplace or sector, it may be necessary to go look more broadly, to jobs to which a similar value can be attributed using gender neutral criteria."

(3) If the employer does not agree on reasonable grounds that these are appropriate comparators, the employer may propose alternative appropriate male comparators. (4) A male comparator is not an appropriate comparator if there is a risk that his remuneration may also be affected by gender bias in a female-dominated sector or industry. (5) To avoid this risk, comparison should be made with at least 2 comparators in different male-dominated jobs in 2 different male-dominated sectors or industries.	This is the issue past which the *Bartlett* case did not progress in court (E Tu was awaiting a court date to seek Principles on comparators in particular when the Joint Working Group was established). It is also the point on which the Joint Working Group was unable to reach useful agreement, despite being asked to look again by the current Ministers. As written, this clause of the Bill will lead to further applications for court interpretation. **It is important to legislate an efficient, workable solution for selecting appropriate male comparators.** CEVEP recommends the wording in red, which is consistent with the judgments and with past policy approaches (Employment Equity Act 1990; Pay & Employment Equity Office 2004-2008).
Settling pay equity claim **13N Settling pay equity claim** (1) A pay equity claim is settled— (a) when— (i) remuneration is determined that the parties agree does not differentiate between male and female employees in the manner set out in section 2AAC(b); and (ii) a process is agreed to review the employee's terms and conditions of employment to ensure that pay equity is maintained, including the agreed frequency of reviews; and (iii) those matters are recorded in writing in accordance with subsection (3); or (b) when the Authority or the court— (i) determines that an employee's terms and conditions of employment do not differentiate between male and female employees in the manner set out in section 2AAC(b); or (ii) issues a determination that fixes terms and conditions of employment that do not differentiate between male and female employees in the manner set out in section 2AAC(b). (2) An employer may not reduce any terms and conditions of employment of any employee ~~who has made a pay equity claim~~ for the purpose of settling a ~~that~~	The deletion in **13N(2)** ensures that this prohibition applies also to the terms or conditions of any male comparators. (Note that this 13N(2) prohibition also appears in the General Provisions s.15 where it covers both equal pay and pay equity claims.)

claim. (3) A pay equity claim settlement must— (a) be in writing; (b) be filed with the Employment Relations Authority; (b) state— (i) that it is a pay equity claim settlement for the purposes of this Act; and (ii) the name of the employer; and (iii) the name of the employee to whom the settlement relates; and (iv) the employee's occupation and position; and (v) the male comparators selected; and (vi) a short account of the assessment of the claimant's and compators' work as required by 13L matters to be assessed; or (vii) information about at what stage in the process settlement was reached; (vii) the terms and conditions of employment, including remuneration, that the parties agree do not differentiate between male and female employees in the manner set out in section 2AAC(b); and (ix) the process for reviewing those terms and conditions to ensure that pay equity is maintained; and (x) the frequency of those reviews, which must be aligned with any applicable collective bargaining rounds.	**13N(3) additions.** It is important that claim processes and settlements are fully transparent to all the parties, whether directly involved in negotiations or not. In particular, it is important that the basis of any settlement extended to other groups of employees or to other female-dominated occupations is transparent. Transparency information about pay equity claim outcomes, filed with the Authority (or an Expert Advisory Unit), is important for government or researchers to be able to evaluate policy effectiveness.
~~(4) If the requirements of subsections (1), (2) and (3) are met, a settlement agreement is a pay equity claim settlement for the purposes of this Act (regardless of whether the parties followed the processes set out in this Act to reach that settlement).~~	**Delete 13N(4).** Any settlement agreement should surely meet (1), not just (2) and (3)! CEVEP has no objection to settlement of a claim at any point in the process – as with any other claim or case in law, anyone can settle on the court house steps. However, New Zealand women are surely entitled to know whether any new pay offer (or subsequent review) is based on the 13L and 13M 'objective appraisal' objectives of the Equal Pay Act or whether it has been reached by settlement before that point. (Note that 13N(4) addresses an issue that CEVEP raised in 2017, by doing exactly the opposite.)

13O Relationship between pay equity claims and collective bargaining (1) The entry into a collective agreement by an employer and a union does not settle or extinguish an unsettled pay equity claim between that employer and 1 or more of the employer's employees. (2) The existence of an unsettled pay equity claim between an employer and an employee is not a genuine reason for failing to conclude collective bargaining between that employer and a union representing the employer's employees.	
Mediation **13P Parties may refer issues to mediation** (1) Any party to a pay equity claim may refer ~~any 1 or more issues relating to that~~ the claim to mediation services provided under Part 10 of the Employment Relations Act 2000. (2) Issues ~~that~~ on which the claim may be referred to mediation services include, but are not limited to the following: ~~(a) a dispute as to whether the pay equity claim is arguable (*see* section 13C(2)):~~ ~~(b) a dispute as to whether an employee's claim relates to work that is the same as, or substantially similar to, work performed by another claimant for the purposes of consolidating those employees' claims under section 13H:~~ (a) a dispute as to whether a male comparator is an appropriate comparator under 13M; (~~c~~ b) a dispute as to whether work performed by others is comparable work for the purposes of the assessment required by section 13L: (~~d~~ e) a dispute as to whether proposed remuneration no longer differentiates	**13P:** If the parties can't agree, the *whole* claim should go to mediation (once) before Determination, not potentially repeatedly for each issue or stage in the process, in never-ending loops. **Delete 13P(2)(a).** This Bill legislates clear criteria for filing a claim, based on Principles agreed by employers and unions. As argued above, the claim should be filed with the Authority, who will accept or reject it based on 2C. This is not a matter for mediation and negotiation between the parties. **Delete 13P(b):** As argued above, whether a claim meets the criteria for a claim in 2C is not an appropriate matter for bargaining between the parties, or for mediation. The Authority should accept or reject the filing of the claim based on 2C. The Bill should allow the parties to extend claims under 13H and 13I by agreement. But if they do not agree, the right of the claimant to file a human rights complaint still obtains, so this aspect of claim-filing is a matter to be decided by the Authority. **Add 13P(a).** This is matter on which the parties may well disagree. The omission is surprising.

between male and female employees in the manner set out in section 2AAC(b) for the purposes of settling a pay equity claim.

(3) If ~~an issue relating to~~ a pay equity claim is referred to mediation services, sections 145 to 154 of the Employment Relations Act 2000 apply, with all necessary modifications.

~~*Facilitation*~~

~~**13Q Purpose of facilitating pay equity claim**~~

~~(1) The purpose of sections 13R to 13Y is to provide a process that enables 1 or more parties to a pay equity claim who are having difficulties in resolving that claim to seek the assistance of the Authority in resolving the difficulties.~~

~~(2) Sections 13R to 13Y do not —~~

~~(a) prevent the parties from seeking assistance from another person in resolving the difficulties; or~~

~~(b) apply to any agreement or arrangement with the other person providing such assistance.~~

Compare: 2000 No 24 s 50A

~~**13R Reference to Authority**~~

~~(1) Any party to a pay equity claim may refer any 1 or more issues relating to that claim to the Authority for facilitation to assist in resolving the claim.~~

~~(2) Issues that may be referred to the Authority include, but are not limited to, the following:~~

(a) ~~a dispute as to~~ whether the pay equity claim ~~is arguable (*see* section 13C(2)):~~

~~(b) a dispute as to whether an employee's claim relates to work that is the same as, or substantially similar to, work performed by another claimant for the purposes of consolidating those employees' claims under section 13H~~

~~(c) a dispute as to whether work performed by others is comparable work for the purposes of the assessment required by section 13L:~~

~~(d) a dispute as to whether proposed remuneration no longer differentiates between male and female employees in the manner set out in section 2AAC(b) for the purposes of settling a pay equity claim.~~

Delete all clauses related to Facilitation, and all other references to facilitation.

The inclusion of the facilitation process from ERA 2000 in pay equity legislation is inappropriate. The Equal Pay Act is a complaints-based arbitration model. Facilitation is a process suitable only to broken-down collective bargaining.

Moreover, this Bill as written would result in three stages to be navigated by pay equity claimants compared to two for regular wage claims. Making it harder for claimants to access arbitration will make it less likely, not more likely, that the parties will resolve the issues among themselves. Imposing these extra layers to be negotiated is a considerable reduction of women's current right to arbitration under the principal Act. It is highly likely to reduce women's current progress on pay equity.

CEVEP recommends continuing the current framework, with the addition of mediation services. That is:

- Lodgement of equal pay and pay equity claims with the Employment Authority
- Claimant to nominate, and the parties to reach agreement, on appropriate male comparators
- The parties to work together on assessment and comparison of the work and settlement of the claim;
- If the parties cannot agree, either party can request the assistance of the Mediation Services on the whole claim;

~~(3) A reference for facilitation must be made on 1 or more of the grounds specified in section 13S(2).~~ ~~Compare: 2000 No 24 s 50B~~ **~~13S When Authority may accept reference~~** ~~(1) The Authority must not accept a reference for facilitation unless—~~ ~~(a) the Authority is satisfied that facilitation may be useful to resolve the issue referred; and~~ ~~(b) 1 or both of the grounds in subsection (2) exist. 5~~ ~~(2) The grounds are—~~ ~~(a) that a party has failed to comply with the duty of good faith in section 4 of the Employment Relations Act 2000 and the failure—~~ ~~(i) was serious and sustained; and~~ ~~(ii) has undermined the progress of the pay equity claim: 10~~ ~~(b) that sufficient efforts (including mediation) have failed to resolve an issue relating to the claim.~~ ~~(3) The Authority must not accept a reference in relation to a pay equity claim for which the Authority has already acted as a facilitator unless—~~ ~~(a) the earlier facilitation related only to the issue of whether the claim is 15 arguable and the subsequent reference relates to the pay equity bargaining process; or~~ ~~(b) the circumstances relating to the pay equity claim have changed; or~~ ~~(c) the bargaining since the previous facilitation has been protracted.~~ ~~Compare: 2000 No 24 s 50C 20~~ **~~13T Limitation on which member of Authority may provide facilitation~~** ~~A member of the Authority who facilitates resolution of an issue relating to a pay equity claim must not be the member of the Authority who accepted the reference for facilitation. Compare: 2000 No 24 s 50D 25~~ **~~13U Process of facilitation~~** ~~(1) The process to be followed during facilitation—~~ ~~(a) must be conducted in private; and~~ ~~(b) is otherwise determined by the Authority.~~	• If the parties cannot agree with the assistance of mediation, either party can refer whole claim to Determination by the Employment Authority.

~~(2) During facilitation, any pay equity bargaining in respect of the claim to which the facilitation relates continues subject to the process determined by the Authority.~~

~~(3) During facilitation, the Authority—~~

~~(a) is not acting as an investigative body; and~~

~~(b) may not exercise the powers it has for investigating matters.~~

~~(4) The provision of facilitation by the Authority may not be challenged or called in question in any proceedings on the ground—~~

~~(a) that the nature and content of the facilitation were inappropriate; or~~

~~(b) that the manner in which the facilitation was provided was inappropriate.~~

~~Compare: 2000 No 24 s 50E~~

~~13V Statements made by parties during facilitation~~

~~(1) A statement made by a party for the purposes of facilitation is not admissible against the party in proceedings under this Act or under the Employment Relations Act 2000.~~

~~(2) A party may make a public statement about facilitation only if—~~

~~(a) it is made in good faith; and~~

~~(b) it is limited to the process of facilitation or the progress being made.~~

~~Compare: 2000 No 24 s 50F~~

~~13W Proposals made or positions reached during facilitation~~

~~(1) A proposal made by a party or a position reached by parties to a pay equity claim during facilitation is not binding on a party after facilitation has come to an end.~~

~~(2) This section—~~

~~(a) applies to avoid doubt; and~~

~~(b) is subject to any agreement of the parties.~~

~~Compare: 2000 No 24 s 50G~~

13X Recommendation by Authority

(1) While assisting parties to resolve an issue related to a pay equity claim, the Authority may make a recommendation about any matter that relates to the pay equity claim, including, but not limited to, recommendations as to the following:

(a) whether the pay equity claim is arguable:

Move 13X to include it in the next part on Arbitration, after 13Z Parties may apply for determination by Authority.

(b) the process the parties should follow to reach agreement: (c) terms and conditions of employment (including remuneration) that would no longer differentiate between male and female employees in the manner set out in section 2AAC(b). (2) The Authority may give public notice of a recommendation in any manner that the Authority determines. (3) A recommendation made by the Authority is not binding on a party, but a party must consider a recommendation before deciding whether to accept it. Compare: 2000 No 24 s 50H	
13Y Parties must deal with Authority in good faith ~~During facilitation,~~ The parties must deal with the Authority in good faith. Compare: 2000 No 24 s 50I	**Move 13Y** to include it together with other good faith clauses in General Provisions, so that good faith requirements apply to all claims under the Equal Pay Act.
Determination by Authority	
13Z Parties may apply for determination by Authority (1) A party to a pay equity claim may apply to the Authority or the court for determination of any matter that relates to the pay equity claim, including, but not limited to, the following: (a) a determination as to whether the pay equity claim ~~is arguable~~ meets the criteria in ~~(*see* section 13C(2))~~: (b) a determination as to whether an employee's claim relates to work that is the same as, or substantially similar to, work performed by another claimant for the purposes of consolidating those employees' claims under section **13H** or 13I: (c) a determination as to whether a male comparator is appropriate; (~~c~~ d) a determination as to whether the work to which the claim relates is currently undervalued ~~or has historically been undervalued~~: (~~d~~ e) a determination fixing terms and conditions of employment (including remuneration) that do not differentiate between male and female employees in the manner set out in section 2AAC(b).	**Query:** Is the first instance jurisdiction with the Authority or can you elect to file either the Authority or the court? **13A(c):** As noted under 13P Mediation, this may well be an issue on which the parties do not easily agree. **13Z(~~c~~ d)** Historical undervaluation may be a contextual reason for filing a claim but is irrelevant to establishing a current equitable pay rate for the claimants.

(2) Where an application is made under subsection (1), the Authority or the court— (a) must first consider whether an attempt has been made to resolve the difficulties by the use of— (i) mediation ~~or further mediation~~ under section 13P; or ~~(ii) facilitation under sections 13R to 13Y;~~ and (b) may direct the parties to try to resolve the difficulties by further mediation; ~~but~~ ~~(c) if 1 or both of the grounds in section 13S(2) exist, must direct that facilitation be used before the Authority or the court investigates the matter, unless the Authority or the court considers that use of facilitation—~~ ~~(i) will not contribute constructively to resolve the difficulties; or~~ ~~(ii) will not, in all the circumstances, be in the public interest; or~~ ~~(iii) will undermine the urgent nature of the process; or~~ ~~(iv) will be otherwise impractical or inappropriate in the circumstances.~~	**13Z (2):** Deletions remove the Facilitation layer and other unwarranted loops in the process.
(3) If an application for a determination relates to whether the work to which the claim relates is currently undervalued ~~or has historically been undervalued~~, the Authority or court must take acount of 13L Matters to be Assessed and may consider the list of factors set out in section 13C(3).	**13Z(3):** The Bartlett judgements allowed that claimants 'may' present 'historical, social and structural factors' in their evidence or argument. The Bill includes this in the reasons that '*may*' be presented in filing the claim. The purpose of a determination, however – and of a claim - is to arrive at whether the work is *currently* undervalued. That is the sole focus of the current Act.
~~(4) If an application for a determination relates to whether a claim may be raised despite section 13C(4), the Authority or the court must make its determination—~~ ~~(a) having regard to the existing pay equity claim settlement to which the employer is a party; and~~ ~~(b) only if it is satisfied that there are exceptional circumstances.~~ Compare: 2000 No 24 s 50K	**13Z(4) Delete.** Arbitration on matters related to consolidation of claims is covered by adding '13I' to the end of 13A(1)(b) above. 13C(4) gives the employer unilateral power to consolidate claims, and CEVEP has recommended above that this clause be deleted. Although consolidation may be a good idea, women claimants should retain the right to accept or decline an offer of consolidation. The law should support (i) women's right to make a pay equity claim (ii) their right to mutual agreement on any consolidation of claims, including consolidation of claims against other employers in regard to the same work. (Note that ERA 2000

	supports mutual agreement in collective or multi-employer agreements.)
~~**13ZA If Authority or court determines pay equity claim is arguable** 5~~ ~~If the Authority or the court determines that a pay equity claim is arguable accepted, the parties must enter into the pay equity bargaining process in accordance with sections 13H to 13ZD.~~	**13ZA** is surely superfluous. If the EPA or court says the claim is accepted, then sections 13H to 13ZD already tell the parties what to do.
~~**13ZB Process on application to fix terms and conditions**~~ ~~(1) If the Authority receives an application under section 13Z(1)(d) to fix terms 10 and conditions of employment, and the Authority has not previously directed the parties to try to resolve the difficulties by mediation or further mediation, the Authority must—~~ ~~(a) direct the parties to try to resolve the difficulties by mediation or further mediation; or 15~~ ~~(b) recommend another process that the parties must follow to try to resolve the difficulties.~~ ~~(2) The Authority may accept an application for a determination that fixes terms and conditions of employment only if—~~ ~~(a) the parties have first tried to resolve the difficulties by mediation, or by 20 any other process recommended by the Authority; and~~ ~~(b) the Authority is satisfied that all other reasonable alternative for settling the pay equity claim have been exhausted.~~ ~~(3) *See* section 13ZD for the periods for which remuneration for past work can be recovered.~~	**13ZB** is repetition – it is already covered in 13Z.
13ZC Determination may provide for recovery of remuneration for past work (1) A determination fixing terms and conditions of employment may also 25 provide for recovery of an amount of remuneration that relates to work performed before the date of the determination (**past work**).	**13ZC:** The recovery of remuneration for past work can be addressed by retaining s.13(2) and (3) of the principal Act, which link to standard back pay claims procedures under the Employment Relations Act.

~~(2) When deciding whether to provide for recovery of an amount of remuneration for past work, and the amount to provide, the Authority must take into account the following factors:~~ ~~(a) the conduct of the parties; and~~ ~~(b) the ability of the employer to pay; and~~ ~~(c) the nature and extent of resources (for example, information and advice) available to the employer and the employee in respect of the claim; and~~ ~~(d) any other factors the Authority considers appropriate~~. ~~(3) *See* section 13ZD~~	**S.13(2) and (3)** should be included in General Provisions so as to cover all claims. **Delete 13ZC(2)(a)(b) and (d):** These criteria undermine women's right to equal treatment (and are subjective. 13ZC(2)(b): 'The ability of the employer to pay': the *Bartlett vs Terranova* judgment explicitly excluded cost/ability to pay as a justification for differentiation by sex ([2013] NZEmpC 157/ARC 63/12 paras.108-110).
13ZD Limitation periods for recovery of remuneration for past work **Retain s.13 of the principle Act, under General Provisions.** ~~(1) A determination may provide for recovery of an amount of remuneration that relates to work performed in the period—~~ ~~(a) beginning on the applicable start date for the claim to which the determination relates; and~~ ~~(b) ending on the date of the determination.~~ ~~(2) However, no determination may provide for recovery of an amount of remuneration that relates to a period that is longer than 6 years.~~ ~~(3) The **applicable start date** for a claim is as follows:~~ ~~**When claim raised or notified Applicable start date**~~ ~~Claim notified or proceedings commenced before the date on which this section comes into force The earlier of—~~ ~~(a) the date on which the claim was notified to the employer; and~~ ~~(b) the date on which proceedings were commenced~~ ~~Claim raised on or after the date on which this section comes into force, but no more than 5 years after the date on which this section comes into force:~~ ~~The date on which the claim is raised~~ ~~Claim raised more than 5 years after the date on which this section comes into force:~~ ~~The date that is 5 years after the date on which this section comes into force.~~	**13ZD must be deleted, and s.13 (2) and (3) of the principal Act retained, for both equal pay and pay equity. 13ZD is discrimination against women.** The Equal Pay Act allows for back pay for a maximum of 6 years before the date the equal pay or pay equity claim is lodged. This is the long-established standard limitation for all unpaid or under-paid wages under ERA 2000 and also for commercial claims. The 2017 Bill removed the right to back pay entirely for pay equity claimants. CEVEP's had prepared a submission pointing out that this was discriminatory, when that Bill was withdrawn – in part because of that point. This Bill proposes a shifting entitlement related to settlement date and the date of enactment – this is discriminatory treatment of women. It is based on poor Bill of Rights advice. This amendment by government would leave it open to a Bill of Rights claim. See Appendix 1 above. CEVEP notes that the right to back pay being awarded is a vital negotiation tool for women, that provides leverage to achieve negotiated equitable outcomes quickly.

~~(4) In this section, a claim is **notified** on the date on which the employee gives the employer notice in writing that the employee is making a claim to the effect that the employer has failed to ensure that there is no differentiation between the rates of remuneration offered and afforded by the employer for work that is exclusively or predominantly performed by female employees and the rate of remuneration that would be paid to male employees who—~~ ~~(a) have the same, or substantially similar, skills, responsibility and service; and~~ ~~(b) work under the same, or substantially similar, conditions, and with the same, or substantially similar, degrees of effort.~~ *Obligation on employers to keep pay equity records* **13ZE Pay equity records** (1) All records related to an employer's actions to ensure equal pay and pay equity under 2AAC shall be kept for a period of **6 years**. (2) Every employer who has received 1 or more pay equity claims must keep a record showing— (a) every pay equity claim lodged by an employee; and (b) in relation to each pay equity claim,— (i) the employer's decision as to whether the claim is ~~arguable~~ accepted and the consequent notice to ~~the~~ employees; and (ii) the outcomes of any pay equity bargaining; and (iii) all notifications to affected employees under section 13E; and (iv) any recommendation or Determination by the Authority or court ~~during facilitation~~. (v) all settlement documents required by 13N(3). *Pay equity claims by employees of education service* **13ZF Pay equity claims by employees of education service** *Employees other than employees of tertiary education institutions*	**Delete 13ZC and D, and retain the principal Act's s.13 Recovery of remuneration based on equal pay to apply for both equal pay and pay equity claimants.** **13ZE: 6 years**, as required for all wage and time records under s.130 of ERA 2000.

(1) For the purposes of a pay equity claim by 1 or more employees of the education service (other than employees of a tertiary education institution), the State Services Commissioner— (a) must be treated as the employer; and (b) has the same rights, duties, and obligations under this Act as the Commissioner would have if the Commissioner were the employer. (2) If ~~the Commissioner decides that a pay equity claim by 1 or more employees referred to in subsection (1) is arguable, or if~~ the Authority or the court determines that such a claim is arguable, the Commissioner must enter into the pay equity bargaining process described in sections 13H to 13ZD— (a) with the employee or employees or their representative or representatives; and (b) in consultation with— (i) the chief executive of the Ministry of Education; and (ii) representatives of the employer or employers who will be bound by the pay equity claim settlement agreement (which representatives must be employers, or organisations of employers, of persons employed in the education service). (3) Every pay equity claim settlement agreement entered into between the Commissioner and 1 or more employees in the education service is binding on the employer or employers of those employees. (4) An employer who is bound by a pay equity claim settlement agreement under subsection (3) has the rights, obligations, and duties that the employer would have, in respect of that pay equity claim settlement agreement, as if that employer were a party to that agreement. *Employees of tertiary education institutions* (5) For the purposes of a pay equity claim by 1 or more employees of a tertiary education institution, the Authority is responsible for determining whether to accept the claim and ~~is~~ the chief executive of the tertiary education institution is responsible (either individually or jointly through an organisation of employers of persons employed in tertiary education institutions) for ~~determining~~	**13ZF(2) and (5):** As above, it is inappropriate for the employer against whom a claim is being taken to decide whether the claim meets the 2C criteria.

~~whether the claim is arguable~~ ~~accepted~~ ~~and, if so,~~ entering into the pay equity ~~bargaining~~ process described in sections 13H to 13ZD. (6) Before entering into a pay equity settlement, the chief executive of a tertiary education institution, or an organisation of employers of persons employed in tertiary education institutions, must consult with the State Services Commissioner. *Interpretation* (7) In this section,— **education service** has the same meaning as in section 2 of the State Sector Act 1988 **State Services Commissioner** or **Commissioner** means the State Services Commissioner appointed under section 3 of the State Sector Act 1988 **tertiary education institution** means an institution within the meaning of section section 159(1) of the Education Act 1989. Compare: 1988 No 20 s 74 **19 Section 14 repealed (Procedure and jurisdiction of Employment Relations Authority)** ~~Repeal section 14.~~ **Part 5** **General provisions** *Penalties and enforcement* **21 Section 15 replaced (When dismissal or reduction of employee an offence)** Replace section 15 with— **15 ~~Claimant~~ Employees must not be treated adversely** (1) An employer must not treat adversely any employee who raises a claim under this Act. (2) An employer may not reduce any terms and conditions of employment, of any male employee for the purpose of settling a equal pay or pay equity claim; or subsequently change terms and conditions of male employees or for work done predominantly by males in order to maintain or restore differentials by sex.	**Cl.15:** This issue is already addressed for pay equity claimants under 13N(2) above, but we agree it is better as a General Provision that covers all claims under this Act. **15(2) is added** to address possible changes to the remunerations, conditions etc. of any male comparator in order to achieve gender equity, or subsequently to 'restore relativities' – as occurred in some cases in the 1970s.

(~~2~~3) In this section, an employer treats an employee adversely if the employer- (a) refuses or omits to offer or provide to that employee the same terms and conditions of employment (including the same remuneration, hours or overtime, conditions of work, fringe benefits, or opportunities for training, promotion, and transfer) as are offered or provided to other employees of the same, or substantially similar, qualifications, experience, or skills employed in the same, or substantially similar, circumstances; or (b) dismisses that employee or subjects that employee to any detriment, in circumstances in which other employees employed by that employer on work of that description are not or would not be dismissed or subjected to such detriment; or (c) retires that employee, or requires or causes that employee to retire or resign. (~~3~~ 4) An employee may raise a claim against the employee's employer or former employer for a contravention of subsection (1). (~~4~~ 5) A claim referred to in subsection (~~3~~ 4) is to be treated as a personal grievance under section 103(1) of the Employment Relations Act 2000 and, if an employer alleges that any of the actions described in subsection (2) were not related to the employee's raising of a claim but were justifiable on other grounds, section 103A of that Act applies and the employer must establish that the employer's actions were justifiable. Compare: 1990 No 57 s 5K; 2000 No 24 s 67F **22 Sections 16 to 17A repealed** Repeal sections 16 to 17A. **23 Section 18 replaced (Offences)** Replace section 18 with: 15 **18 Penalty for non-compliance** (1) A person who fails to comply with a provision listed in subsection (2), and every person who is involved in the failure to comply, is liable,— (a) if the person is an individual, to a penalty not exceeding $10,000:	Note that **21(~~2~~ 3)** includes issues covered by **s.2A** which equal pay and pay equity claimants are strangely prevented from raising by this Bill's amendments re choice of proceedings and 2A Unlawful discrimination. See CEVEP's comments above. The addition to 15(3) of 'hours or overtime' is important, as a reduction in hours or shifts is response to employee assertiveness or the resulting labour cost increase. S.18 needs to be reviewed and re-drafted. **18(1)(b): Inadequate as a deterrent**. This should be $20,000 for each person affected in (a), (b) and (c).

(b) if the person is a company or another body corporate, to a penalty not exceeding $20,000.	Note that the annual pay increase received by *each* of Terranova's 124 carers was about $10,000. So by fighting the claim for four years, Terranova saved itself around $5 million. Or rather $7.5 million, as Terranova successfully negotiated out of its liability for six years' back pay.
(2) The provisions are as follows: (a) section 2AAC(a) (which imposes a duty on employers to not differentiate on the basis of sex in the remuneration paid to employees who perform the same, or substantially similar, work): (b) section 2AAC(b) (which imposes a duty on employers not to differentiate on the basis of sex in remuneration for work performed by predominantely female employees);	**18(2)** imposes a penalty for failing to comply with equal pay (plus standard liability for back pay) and for unlawful discrimination (see discussion of 2A above) (plus standard liability for back pay under the ERA 2000). But there is no penalty for failing to comply with 2AAC(b) on female-dominated work and/or with a pay equity agreement.
(b) section 2A (which relates to unlawful discrimination): (c) section 13F(5)(b) (which imposes a duty on an employer ~~who decides that a pay equity claim is arguable~~ to enter into the pay equity process once a claim is accepted; (d) section 13J which requires the parties to deal in good faith in the pay equity process and section 13Y which imposes a duty to deal with the Authority and mediation service in good faith ~~during facilitation~~): (dd) section 13N (a breech of a pay equity settlement agreement (e) section 13ZE (which imposes a duty on employers to keep records relating to pay equity claims). (3) For the purposes of subsection (1), a person is involved in a failure to comply if the person would be treated as a person involved in a breach within the meaning of **section 142W** of the Employment Relations Act 2000.	**18(2)(d):** We suggest consolidating both good faith sections into General Provisions and revising 18(2)(d) according.
18A Proceedings by Labour Inspector or employee concerned for penalty (1) An Inspector and the employee(s) concerned are the only persons who may bring an action in the Authority against an employer to recover a penalty under section 18.	**8A is unclear**. Is (1) to ask the Authority to impose a penalty under s.18 or is it to recover the penalty that has been decided by the Authority? If the former, does that mean a union may not represent the employee(s) concerned? If not, why not? A union (if

(2) However, only a Labour Inspector may bring an action in the Authority against a person involved in a failure to comply in order to recover a penalty under section 18. (3) A claim for 2 or more penalties against the same employer may be joined in the same action. (4) A claim for a penalty may be heard by the Authority in conjunction with any other claim under this Act. (5) After hearing an action for recovery of a penalty, the Authority may— (a) give judgment for the amount claimed; or (b) give judgment for an amount that is less than the amount claimed; or (c) dismiss the action. (6) The Authority or the court may order payment of a penalty by instalments, ~~but only if the financial position of the person paying the penalty requires it~~. (7) An action for ~~the recovery of~~ ? a penalty must be commenced within 12 months after the earlier of when the cause of action became known, or should reasonably have become known, to the Labour Inspector or employee concerned. (8) A penalty that is recovered must be paid,— (a) if, and to the extent, ordered by the Authority, to any person the Authority specifies; or (b) in any other case, into court and then into a Crown Bank Account. Compare: 2003 No 129 s 76; 2000 No 24 s 135 25 *Powers of Inspectors and procedure and jurisdiction of Employment Relations Authority and Employment Court* **18B Powers of Inspectors** For the purposes of this Act, every Inspector has, in addition to any powers conferred by this Act, all the powers that the Inspector has under the Employment Relations Act 2000. **18C Procedure and jurisdiction of Employment Relations Authority and Employment Court**	employees are members), is more likely to know how to go about this than the employee(s). **18(3):** Is this a 'person' as under s.142 of the ERA 2000? And again, is this taking the non-compliance/breach to the Authority or chasing recovery of the penalty imposed by the Authority? **18A(6):** In *Bartlett vs Terranova* the court stated clearly that *Terranova* judgment explicitly rejected cost/ability to pay as a justification for injustice ([2013] NZEmpC 157/ARC 63/12 [108-110]). This is discussed above in relation to **13ZC(2)** discretionary factors to be considered by the Authority in awarding back pay. Nor should affordability be a defence against a penalty for non-compliance with law prohibiting pay differentiation by sex in 18A(6).

In performing its functions under this Act, or in respect of any breach of this Act,— (a) the Employment Relations Authority has all the powers and functions it has under the Employment Relations Act 2000; and (b) the Employment Court has all the powers and functions it has under the Employment Relations Act 2000.	
Regulations **24 Section 19 amended (Regulations)** In section 19, after "administration", insert ", including regulations for the following purposes:", and insert: (a) prescribing matters that must be taken into account when assessing a pay equity claim; and (b) prescribing matters that must be taken into account when identifying comparable work under section 13M.	**S.19.** This presumably replaces the s.9 right to apply to the Court for Principles for implementing equal pay, which appears to have disappeared for pay equity claimants. It is more specific than is usual for Regulations clauses. This may be a faster and more efficient way of providing further guidelines. However, how it is used very much depends on the attitude of the government of the day. We have a long history of pay equity being treated as a political football.
25 New Schedule 1 inserted Insert the Schedule 1 set out in Schedule 1 of this Act as the first schedule to appear after the last section of the principal Act.	
Part 2 **Related amendments and repeals** *Amendments to Employment Relations Act 2000*	
26 Related amendments to Employment Relations Act 2000 Sections 27 to 29 amend the Employment Relations Act 2000. **27 Section 100A amended (Codes of employment practice)** (1) In section 100A(4), replace "this Act" with "any of the Acts specified in section 223(1) or any regulations made under those Acts". (2) After section 100A(4), insert: (5) A code of employment practice approved under this section is not a legislative instrument but is a disallowable instrument for the purposes of the Legislation	

Act 2012 and must be presented to the House of Representatives under section 41 of that Act.

28 Section 100C replaced (Authority or court may have regard to code of practice)

Replace section 100C with:

100C Authority or court may have regard to code of employment practice

(1) A code of employment practice is admissible in any civil or criminal proceedings
as evidence of whether the enactment to which it relates has been complied with.

(2) The Authority or Court may -

(a) have regard to the code as evidence of compliance with the provisions of the enactment to which it relates; and

(b) rely on the code in determining what is required to comply with those provisions.

Compare: 2015 No 70 s 226 5

29 Consequential amendments to Employment Relations Act 2000

Amend the Employment Relations Act 2000 as set out in Schedule 2.

Repeal

30 Repeal of Government Service Equal Pay Act 1960

The Government Service Equal Pay Act 1960 (1960 No 117) is repealed.

Shedule 1
New Schedule 1 inserted
Schedule 1
Transitional, savings, and related provisions

s 2AAA

Part 1
Provisions relating to Equal Pay Amendment Act 2018

1 Interpretation (1) In this Part,— **amendment Act** means the Equal Pay Amendment Act 2018 **existing pay equity claim** means a claim that— (a) is to the effect that an employer has failed to ensure that there is no differentiation between the rates of remuneration offered and afforded by the employer for work that is exclusively or predominantly performed by female employees and the rate of remuneration that would be paid to male employees who— (i) have the same, or substantially similar, skills, responsibility, and service; and (ii) work under the same, or substantially similar, conditions, and with the same, or substantially similar, degrees of effort; and (b) either— (i) was formally commenced by lodging an application to the Authority or a court before the date on which the amendment Act came into force, but not determined by the Authority or court before that date; or (ii) was notified by an employee to an employer before the date on which the amendment Act came into force, but not formally commenced by application to the Authority or a court before that date. (2) In this Part, a claim is **notified** on the date on which the employee gives the employer notice in writing that the employee is making a claim to the effect that the employer has failed to ensure that there is no differentiation between the rates of remuneration offered and afforded by the employer for work that is exclusively or predominantly performed by female employees and the rate of remuneration that would be paid to male employees who— (a) have the same, or substantially similar, skills, responsibility, and service; and (b) work under the same, or substantially similar, conditions, and with the same, or substantially similar, degrees of effort. **2 Existing pay equity claims must transition to Part 4 process** (1) Every existing pay equity claim that was formally commenced by lodging an	

application with the Authority or a court before the date on which the amendment Act came into force is discontinued. (2) An employee whose claim is discontinued under subclause (1) may raise a new claim with the employee's employer in accordance with the processes set out in Part 4 of this Act. (3) Except to the extent that clause 3 applies, every existing pay equity claim that was notified to an employer before the date on which the Amendment Act came into force, but not formally commenced before that date, must be raised in accordance with the processes set out in Part 4 of this Act. **3 Claims to which existing written pay equity bargaining agreement applies** (1) This clause applies to an existing pay equity claim if, before the date on which the amendment Act came into force, the parties signed a written agreement that— (a) requires them to undertake a pay equity ~~bargaining~~ process that includes an assessment of the matters set out in section 13L based on comparators identified in accordance with section 13M; or (b) specifies a pay equity ~~bargaining~~ process that the parties will use and that they agree is suitable and sufficient to settle the claim. (2) If this clause applies,— (a) the pay equity claim is deemed to have been made in accordance with the requirements of section 13D; and (b) the employer is deemed to have complied with the requirement in section 13E(1)(a); and (c) if the employer has not already done so, the employer must give notice of the claim to other affected employees (as required by section 13E(1)(b)) as soon as is reasonably practicable and not later than 20 working days after the date on which the amendment Act came into force; and (d) the employer is deemed to have decided that the claim is arguable in accordance with the requirement in section 13F; and (e) sections 13H to 13ZB apply accordingly.	**Transition: CEVEP strongly opposes this unreasonable and time-wasting requirement** for claims already under way to start again under the amended legislation. This is **contrary to the Legislation Advisory Committee Guidelines.** Guideline 11.1 provides that legislation should not have direct retrospective effect and Guideline 11.4 states that legislation should not pre-empt matters that are currently before Courts. Existing claims are already following the process outlined in and attached to the Joint Working Group principles. Incorporating those Principles into the Equal Pay Act is purportedly the reason for this Amendment Bill, so is not the reason to discontinue existing claims. CEVEP assumes the reason is to ensure that the new discriminatory clauses reducing pay equity claimants' right to claim 6 years' back pay. This is not acceptable.

(3) Any pay equity bargaining that took place before the amendment Act came into force may be taken into account for the purposes of sections 13S(2)(b), 13Z(2), and 13ZB(2)(b).

4 Appeals

(1) This clause applies to an application—

(a) that is an existing pay equity claim that was formally commenced before the date on which the amendment Act came into force; and

(b) in relation to which the Authority, or the court in which the application was commenced, made a determination on the application before the date on which the amendment Act came into force.

(2) Any appeal against, or challenge to the determination must be determined in accordance with the provisions of this Act as if it had not been amended by the amendment Act.

5 Existing Equal Pay Act 1972 claim settlements

Section 13C(4) applies to the following:

(a) a written settlement agreement entered into between 1 or more employers and 1 or more employees before the date on which the amendment Act came into force, if the process undertaken by the parties to reach that settlement involved—

(i) an assessment of the matters set out in section 13L based on comparators identified in accordance with section 13M; or

(ii) a pay equity bargaining process that the parties agreed in writing was suitable and sufficient to settle the claim:

(b) a claim settled under the Care and Support Workers (Pay Equity) Settlement Act 2017.

Schedule 2

Consequential amendments to Employment Relations Act 2000

s 29

Section 4

After section 4(4)(e), insert: (ea) making pay equity claims, responding to pay equity claims, and participating in the pay equity claim resolution process under Part 4 of the Equal Pay Act 1972:	s.4 Good faith
Section 4A Replace section 4A(b) with: (b) the failure was intended to— (i) undermine bargaining for an individual employment agreement or a collective agreement; or (ii) undermine an individual employment agreement or a collective agreement; or (iii) undermine an employment relationship; or (iv) undermine the pay equity claim resolution process under Part 4 of the Equal Pay Act 1972; or	s.4A Penalty for breaches of good faith
Section 5 In section 5, definition of **employment standards**, replace paragraph (b) with: (b) the requirements of section 2AAC(a) and 2A of the Equal Pay Act 1972:	
Section 50F ~~Replace section 50F(1) with:~~ ~~(1) A statement made by a party for the purposes of facilitation is not not admissible against the party in proceedings under this Act or under the Equal Pay Act 1972.~~	S.50F Unnecessary if clauses related to facilitation are deleted.
Section 137 After section 137(1)(a)(iiib), insert: (iiic) any terms of a pay equity claim settlement under section 13N of the Equal Pay Act 1972; or	
Section 161 After section 161(1)(m)(iia), insert: (iib) under section 18 of the Equal Pay Act 1972:	S.161 Jurisdiction of Authority

After section 161(1)(qc), insert: (qd) all matters arising under the Equal Pay Act 1972 and, in particular,— (i) determining equal pay claims and discriminatory treatment claims: (ii) determining disputes as to whether to accept a pay equity claim ~~is arguable~~: (iii) determining disputes as to whether work is comparable work for the purpose of assessing a pay equity claim: (iv) determining disputes as to whether the claimant's work is in fact undervalued: (v) fixing terms and conditions, including remuneration, that is consistent with pay equity under that Act: (vi) determining whether to provide for recovery of an amount of remuneration for past work, and the amount to provide, under section 13ZC of that Act: ~~(vii) determining the applicable start date for the purposes of section 13ZD of that Act~~: 15 In section 161(2), replace "and (f)" with "(f), and (qd)". Wellington, New Zealand: Published under the authority of the New Zealand Government—2018	**Delete s.161(vii)** : Retain normal right to 6 years' back pay as for all other wage and commercial claims.