VERSION I.

THE EQUAL PAY SCENE REVISITED

THE PURPOSE OF THIS PAPER

This paper is an account of the attempt to apply the equal pay principle in the private sector of the New Zealand economy between 1970 and the present. Such an account is essential to enable us to determine whether the limited progress achieved over this period resulted from weaknesses in the 1972 legislation, or from the attitudes and actions of the various groups and institutions responsible for implementing the Act, or both. Only an understanding of what happened before, during and since the implementation period will enable us to identify what steps now need to be taken to ensure further progress towards equality of earnings between men and women - or, which is equally important, to protect what progress has already been made.

FORMULAS FOR IMPLEMENTING THE EQUAL PAY FOR WORK OF EQUAL VALUE PRINCIPLE

In 1951 the ILO recognized in Convention 100 that the achievement of equal pay depends on the equal pay for work of equal value principle, under which all women, including those employed in predominantly or exclusively female occupations shall receive "remuneration established without discrimination based on sex."[1] Much early equal pay legislation covered only equal pay for equal work, or the same pay for the same work. Both New Zealand's acts covered the broader principle, but each used a different formula for achieving it.

Before we consider the New Zealand legislation it may be helpful to set out the NZ formulas and some of those which have been employed around the world to implement the equal pay for work of equal value principle.

1. "where women as Government employees perform work of a kind which is exclusively or principally performed by women and there are no corresponding scales of pay for men to which they can fairly be related, regard shall be had to scales of pay for women in other sections of employment where the principle has been or is being implemented."
Section 3(1)(b), the NZ Government Service Equal Pay Act 1960

2. For work which is exclusively or predominantly performed by female employees the rate of remuneration that would[2] be paid to male employees with the same, or substantially similar, skills, responsibility, and service performing the work under the same, or substantially similar, conditions and with the same or substantially similar degrees of effort.
Section 3(1)(b), NZ Equal Pay Act 1972

3. The principle requires that female rates be determined by work value comparisons without regard to the sex of the worker. (They) should wherever possible be made between female and male classifications within the award... But where such comparisons are unavailable or inconclusive, as may be the case where work is performed exclusively by females, it may be necessary to take into account comparisons of work value between female classifications within the award and/or comparisons of work value between female classifications in different awards. In some cases comparisons with male classifications in other awards may be necessary.

The value of the work refers to value in terms of award wage or salary fixation, not worth to the employer.

This is a composite quotation made up of phrases from the Australian Conciliation and Arbitration Commission's judgement of February 1986 on the Private Hospitals' and Doctors' Nurses (A.C.T.) Award 1972.

4. The comparable worth concept refers to the value of the work in terms of its worth to the employer. Typically it involves the comparison of all or selected jobs in a predominantly female occupation (often defined as 70% or more female) with comparable jobs in one or more predominantly male occupations (again the 70% figure may apply), all the workers concerned having the same employer although they may be employed in more than one workplace.

A precis of American and Canadian experience, which has basically involved state, provincial and local governments.

5. Equal value is to be determined by examining the work in terms of factors like effort, skill and decision-making, and evaluating women's jobs and those of men. An independent expert, appointed by an industrial tribunal, carries out the evaluation and reports to the tribunal which then determines whether the work has equal value.

Precis from 'Bargaining Report', June 1986, on the 1983 U.K. Regulations on Equal Pay.

THE EQUAL PAY ACT 1972, AN EQUAL PAY FOR WORK OF EQUAL VALUE ACT

For their own different reasons both employers and unions are currently asserting that the 1972 Act did not embody the equal pay for work of equal value principle. These claims should be examined against the strong evidence that an equal value approach has been official policy since 1972, with the initial steps towards its adoption being taken as early as 1960.

Some of the reasons for the view that the 1972 Act was intended to embody the equal pay for work of equal value principle are:

1. the fact that the Government Service Equal Pay Act 1960 provided both for women employed on the same work as men, and those employed on work predominantly or exclusively performed by women to receive equal pay, and that this same two-pronged approach reappears in the 1972 Act;

2. the instructions in the terms of reference of the 1971 Commission of Inquiry into Equal Pay that it 'receive representations upon, inquire into, and report up on the following matters:
i. A suitable formula to be adopted in giving effect to the principle of equal pay, having regard, inter alia, to the provisions of the International Labour Organization Convention 100.[3]

3. the recommendations in the Report of the Commission of Inquiry into Equal Pay, and in particular such statements as 'we found ourselves unable to accept the proposition that the "principle of equal pay for male and female employees". ..... did not include the removal of any element of sex discrimination from the rates of pay for work exclusively or predominantly performed by women. We do not believe these groups of workers can be "swept under the carpet" and left to have their position clarified and determined by market forces and potential conflict.'[4]

'It is our recommendation that equal pay apply to every rate of remuneration however fixed.'[5]
'For work which is now exclusively or predominantly performed by women the remuneration should be fixed as though a male with similar skills, responsibility, and service were performing that work.'[6]

4. The incorporation in the 1972 Act, almost without change, of the Commission's recommendations.

5. The Employers Federation's reaction to the scope of the legislation, and their interpretation of it in their journal, 'The Employer'. The following comment comes from the June 1972 issue of 'The Employer'. 'The advent of equal pay will have important consequences for the wage structure of many awards. The concept of equal pay calls for employees, regardless of sex, to receive equal rates of pay for jobs of equal value. Therefore while men and women performing the same work will be paid equally this does not mean that men doing traditionally male work and women doing traditionally female work will be paid equally. The concept requires that the value of the traditonally male and female work be determined before rates of pay are adjusted accordingly.'

6. New Zealand's ratification of Convention 100 in 1983. Since the 'accepted position of the New Zealand Government (is) that it does not ratify an international convention....or...any other international agreement unless it is satisfied without any doubt that its laws and, as appropriate, its practices, comply with the terms of the Convention'[7] the ratification of this convention confirms the view that the New Zealand acts provide for equal remuneration for men and women workers for work of equal value.

Unfortunately, as this paper will presently make clear, the intention of the legislature and of the government is only one of the factors which determine the outcome of an equal pay act. The nature of the industrial relations system to which that act applies, the attitudes of the parties to the wage-fixing process and the legal interpretation and supervision of the act are equally important.

THE IMPLEMENTATION PROCESS: THE FINDINGS OF THE EQUAL PAY REVIEW COMMITTEE

The 1972 Act required equal pay to be implemented between October 1973 and 1 April 1977. Half way through the implementation process, and again on its completion, an Equal Pay Review Committee investigated progress towards equal pay. The Committee was appointed by the then Minister of Labour to represent the FOL, the Employers' Federation, women's organizations and the Labour Department. At that time little academic research had been done on the equal pay issue, and few international statistics on male and female earnings were available. The review thus took the form of an official enquiry, which received submissions from 28 organizations. Evidence was given by the Labour Department, employers, unions and women's organizations. The input of the Employers' Federation was by far the most substantial, because they had the resources for producing facts and figures.

A number of the unions and women's organizations which appeared before the Review Committee expressed unease about the wording of the Act and the implementation process. Everyone agreed there were some problem areas, notably above award payments, but hard evidence of breaches of the Act, particularly of a systemic kind, were almost entirely lacking. This situation lies behind the Committee's statement in its first report 'In much of the evidence..... there was a lack of precision and an absence of quantification.'[8]

While the Review Committee was by no means complacent about the implementation period, or, equally important, what would happen after April 1 1977, it seemed appropriate in the light of the evidence before it for the Committee to state that it was satisfied 'real progress (had) been achieved in the growth of female earnings relative to male earnings as covered in the ratios shown in the above tables, and that this development (was) substantially attributable to the equal pay programme.'[9] The figures used by the Committee[10] showed that the female/male earnings gap had closed by 8.6% with respect to ordinary time hourly earnings, 9% with respect to ordinary time weekly earnings and 9.8% with respect to gross weekly earnings. While all three statistical series are compatible the hourly earnings figure appears the most valid measure of the change in women's earnings and will be used in this paper for making international comparisons.

In view of what was to happen to the Clerical Union test case in 1986 it is significant that the issue on which the Review Committee expressed gravest concern was the attitude of the Arbitration Court towards the 1972 Act. It also identified a potentially serious problem over Section 2(2) of the Act, the wording of which raised the possibility that no case on behalf of an individual woman worker could ever be taken successfully before the Court. Lastly it should be noted that the Committee took legal advice on whether the Act required the equal pay principle to be observed after 1 April 1977, and was informed that there was an on-going requirement. No action was subsequently taken by the then government to amend Section 2(2) or on the problem of the spent clauses relating to the 1973-7 period.

THE EQUAL PAY SCENE REVISITED IN 1986

I now return to the question raised at the beginning of this paper: was the limited progress towards equality of earnings following the passing of the 1972 Act caused by weaknesses in the Act or other factors. In my view both the Act and the implementation procedures were at fault, though for reasons which may not be generally understood. I was unaware of them in May of this year when I began a systematic enquiry into what happened from 1969 onwards.

The starting points of my enquiry were:

1. A comparison of the outcome of our equal pay exercise with what had been achieved in three other English-speaking countries and

2. Information on the Australian implementation experience gained during a visit to Melbourne and Canberra.

SOME INTERNATIONAL COMPARISONS AND WHAT THEY TELL US

In 1986 the availability of data on male/female earnings ratios from a number of developed countries and the work of academic researchers enables us to compare the effects of the New Zealand equal pay strategy with those of several comparable economies, that is the UK, Australia and the USA.

Rather different strategies were adopted in these four countries for the period under review (1960 to 1980). The USA passed a number of state and federal acts covering equal pay, equal opportunity and affirmative action. Australia introduced equal pay through two decisions of the Commonwealth Conciliation and Arbitration Commission, the first providing for equal pay for equal work (1969) and the second for equal pay for work of equal value (1972). The New Zealand Equal Pay Act 1972 purported to cover all women in private sector employment, and to be based on the equal pay for work of equal value principle, whereas the 1970 U.K. Equal Pay Act was largely relevant only to equal work and applied directly to only 41% of the industrial agreements in that country.[11] In 1983 the European Court of Human Rights required the British Government to broaden the scope of their legislation, but that development is irrelevant to the present discussion.

It might have been expected from this description that the most significant closure in male/female earnings for the period under review would have occurred in the USA and the least significant in the U.K. In fact the results were quite different.

In the USA over the years when the most important federal legislation was being enacted, and was being implemented with relative enthusiasm, the gap between average male and female earnings did not close at all. It widened slightly. In the other three countries in contrast it closed significantly during the respective implementation periods - and only during those implementation periods - but to quite different degrees. The Australian earnings gap closed by 18.7%, the British one by 12.3%[12] and the most relevant New Zealand one, that for ordinary time hourly earnings, by 8.7%.

These very different outcomes suggest that the effectiveness of equal pay strategies does not depend primarily upon the intent of a particular legislature or court. Other factors, usually described as structural or institutional, are of as much or more importance. Thus the very different outcomes in the USA and the three Commonwealth countries we are considering can be explained by the fact that the U.K., Australia and New Zealand all possessed labour market structures well suited to implement official policies related to women's pay, whereas the USA did not. In all three Commonwealth countries there is a large degree on unionization, and, even more important, the British have an extensive network of national wage agreements while Australia and New Zealand both have a national award system.[13] In the USA unions tend to be weak and wages are largely set in individual establishments. Large numbers of women are employed on the minimum wage, especially in the peripheral service industries.

If the national award system and wide union coverage account for New Zealand's equal pay legislation being considerably more effective than the range of measures taken in the USA how are we to explain our poor performance in relation to the U.K. and to Australia?

LOW WAGES IN TRADITIONAL FEMALE OCCUPATIONS/Section 3(1)(b) of the 1972 Act

Part of the difference may be accounted for by the factor which Dr Robert Gregory of ANU[13] has suggested is mainly responsible for the success of the Australian experience relative to that in Great Britain, that is the level of male earnings in traditional female occupations. In Australia pay relativities are largely determined by a network of state and federal tribunals which have traditionally set most award rates by using the concept of a man's wage - 'that which (is) necessary to support a man, his wife and children living in a civilized community' - and adding a margin for the work value of the occupation.[14] As a result in Australia in 1981 Dr Gregory found that the average male wage in female dominated occupations was 96.2% of the mean male wage for the economy as a whole, whereas the comparable figure for Britain in 1982 was as low as 82% of the national mean.

Dr Gregory's hypothesis is that the Australian labour market with its uniformly high male wages provided favourable pay norms as the basis for adjusting female award rates following the Arbitration Commission's 1972 decision. Only much lower norms were available in Great Britain. They would have placed a relatively low ceiling on the pay increases available to British women employed in 'women's' occupations.

When we turn to the New Zealand scene it appears that women in a number of occupations may have been just as disadvantaged as their counterparts in the U.K. by low levels of male earnings in so-called female industries. A basic rate for adult male workers, incorporating a formula similar to that used by the Australian Arbitration Commission, was introduced into New Zealand wage-fixing for a period in 1936, but it appears to have had little impact on the spread of male rates in the skilled trades and clerical area. As early as 1919 rates in entirely male occupations were higher than male rates in occupations where women were employed and this pattern seems never to have changed. Thus a preliminary examination of male earnings using the February 1983 Labour Department figures for ordinary time earnings in eighteen private sector industries employing substantial numbers of women showed the average male earnings in these industries as being slightly under 80% of the male average for all industries. The earnings of males in men's and women's hairdressing was approximately 60% of the male average earnings.

Obviously a more careful study than I have undertaken of male earnings and the changes in the relevant awards will be necessary to determine just what effect the level of male wages in traditional female occupations had on our equal pay exercise, but it does appear as if the 'Gregory factor' would explain part of the difference between the Australian and New Zealand outcomes.

It also raises the possibility that the formula in Section 3(1)(b) of the 1972 Act, described at the time as radical, innovative and extremely difficult to implement, in practice led to women's rates in predominantly female occupations being raised by rather low amounts. It must have been almost inevitable for employers to look to the rates paid male employees in their industry when required 'For work which is exclusively or predominantly performed by females (to set) the rate that would be paid to male employees with the same or substantially similar skills, responsibility and service performing the work under the same or substantially similar conditions and with the same or substantially similar degrees of effort'.[15] The unions on the other hand argued that Section 3(1)(b) provided for a 'notional male rate' arrived at by averaging out a number of the actual male rates paid in a particular region.[16] The majority of the Review Committee did not accept the union view, but their recommendation that the term "notional male rate" be replaced by "the equal pay rate" was based primarily on a concern that a notional rate could be "critised and derided for the implication that it relates to a mythical male worker or a legal fiction or a straw man."

JOB EVALUATION AND CLASSIFICATION

Low male wages in predominantly female occupations cannot fully explain New Zealand's poor performance, especially since the U.K. shares this phenomenon. There has to be a second factor. It appears to be linked to the very different attitude towards equal pay displayed by employers in Australia and New Zealand respectively.

In Australia the Commonwealth Arbitration Commission carefully enunciated a set of principles for the guidance of the parties when it sanctioned equal pay for work of equal value, but those instructions seem to have been largely ignored. Instead, in a period of boyant economic activity, it appears to have been decided 'to give the girls a fair go', and to move women on to men's scales in a somewhat rough and ready manner. The situation in this country could not have been more different. Articles in 'The Employer' and comments in the Report of the Commission of Inquiry into Equal Pay suggest that at a very early stage the Employers Federation had decided on a strategy to minimize the effect of the equal pay movement... if it could not bring it to a halt. That strategy centered on job evaluation and classification.

Canadian and American women are convinced that equal pay for work of equal value cannot be achieved without job evaluation, and I agree with this view. Yet it cannot be overstressed that sex bias, and indeed other types of bias, can distort every stage of a job evaluation exercise. Even where employers and job evaluation consultants (usually male) set out to treat all employees fairly the unconscious nature of much sex discrimination means that women in predominantly female occupations or with responsibilities which are perceived as feminine may well end up having their work undervalued.

The Employers Federation claimed before the Equal Pay Review Committee that they were using the equal pay exercise to make a significant, praiseworthy improvement in New Zealand's pay-fixing procedures, and they may have done so. But they could at the same time have been minimising the effect of the 1972 Act, as the 1971 Commission of Inquiry feared could happen.[17] The impression that employers may have been frustrating the Act arises from reading the guidelines on the Act which the Employers Federation published for their members in 'The Employer' of February 1973. In the job classification section of the guidelines are set out various ways of implementing the Act which appear potentially discriminatory. For example there is the creation of a career scale (for males or largely for males) alongside what are in effect women-only scales. There is the device of introducing new rates - in effect women's rates - below the pre-1972 male rate, and changing job titles to distinguish work done by women from that done by men... where in fact no substantial difference may exist. [See Appendix I.]

The most worrying aspect of the guidelines is however the pervasive emphasis on consultation among employers, across industries, and with the Federation's working party on equal pay. Obviously this consultation was aimed at protecting the interests of employers, not those of their female employees. In 1975 the Review Committee was told of at least one industry where the relevant union was consulted, but extensive participation by unions in job evaluation and classification appears to have been rare. The Federation of Labour and most of the unions who appeared before the Review Committee were strongly opposed in principle to job evaluation and classification. For this reason, or because of a lack of resources, unions tended to take the line of least resistance and to allow employers to proceed with job evaluation and classification exercises into which they had a minimal input. We now know that not only unions but employees of different ages, both sexes and, within the workplace of a large employer, various occupations must be involved at every stage of a job evaluation exercise if it is to have validity.[18]

It is probably impossible to quantify with any precision the effect of the classification process during the implementation period, but given the relative ineffectiveness of our Act it is likely to have been a major one. In 1975 the Employers Federation supplied the Review Committee with information on progress towards equal pay in 52 awards and industrial agreements, and of the 52 at least 20 appear to have involved a classification exercise of some significance. Job classification was contemplated, indeed required under Section 4(1)(a) of the Act, but it is open to abuse. The process is illustrated here by what happened to the NZ Clerical Award. This award, it should be noted, is not analysed in this paper because it is seen as more open to criticism than others, but, because the Clerical Union has been more active in seeking to remedy the weaknesses in the award and so has drawn attention to it. Also it is a major award. Some 27,000 women are employed under it.

THE NEW ZEALAND CLERICAL AWARD

For a period of nearly thirty years there was a relativity, established by the Arbitration Court in 1943, between the adult male rate in the Clerical Award and skilled trades rates, notably the unindentured core rate in the N.Z. Building and Related Industries Tradesmen and Other Workers Award. In 1971 the Court set the Clerical rate for males 22 years and over at $60 per week and the core trades rate in the Building Trades Award at $60.40, or one cent an hour more. Clearly the Court saw clerical work as work very similar in value to that in a number of trades.

In view of this background one would have expected that the equal pay rate for clerical workers, based on the equal pay for work of equal value principle, would have been close to the core rate in the building trades at 1 April 1977, and would still be about that figure. Since evaluation of some kind was required under the 1972 Act it might be rather more or rather less. In fact, under the Clerical Award registered in March by the Arbitration Court, the Grade III figure, which is the old pre-1972 male rate, is only 86.16% of the most comparable core trade rate. It would appear to be a depressed female rate of precisely the kind which the Equal Pay Act 1972 was intended to eliminate.

But this is only one of several questionable rates in the Clerical Award. In 1971 all adult women employed under the Clerical Award (except for certain new entrants) earned 75% of the male rate - and hence about 75% of other male rates of comparable value. Since women on Grade III now earn 86.16% of the core trades rate after one year's service they could be said to be somewhat better off than they would have been in 1971, but what about those women on Grades II and I? These grades were created in 1973 under an equal pay classification exercise and Grade I workers now receive only 73.7% of the core trades rate. They appear to be worse off.

There are also the very lowest adult rates in the award. They are for new entrants who have 'not had prior clerical experience or... less than one year's clerical experience in the past eight years'. In 1971 such women were entitled to 71% of the core trade rate after one year. Today they are at best on 75% of that rate - even if they have tertiary qualifications and some years partially relevant experience.

Then there are the qualifications which a clerical worker is supposed to have to be placed on Grade V of the NZ Clerical Award: the examination of the NZ Society of Accountants and five years accountancy experience; the B.Com. degree and three years experience; the LLB and three years legal experience.... These workers are entitled to be appointed at 93% of the core trade rate, or $16,059.16. After ten years with the same employer they will still not have attained the core rate.

The only rational explanation for this curious document is that it was designed to ensure that despite the Equal Pay Act clerical rates for females, while no longer labelled female, would remain depressed wherever employers pay award rates. Meantime most men in clerical work have come to be paid above the award rates, and so to move out of union coverage. I am informed by The Clerical Union that almost all

the men now employed under the Clerical Award - some 10% of their membership of 30,000 employees - are young males who will pass out of award coverage at age 20 or 21, retired men or those suffering some handicap. They suggest that when union organizers visit workplaces they often find that where men and women are doing similar work the women are union members under the award while the men are outside it because they are earning higher salaries. It is therefore possible that many women paid under the Clerical Award are now receiving less when compared with men in clerical work than before the 1972 Act, and indeed it could be said that this has happened as a direct result of the equal pay exercise. Quite large numbers of women with skills in short supply, notably typists, are on above award wages, but this is thanks to the marketplace, not the 1972 Act.

Two other points must be made. This discussion does not imply the use of the unindentured core trades rate in the Building Trades Award as a benchmark around which a new Clerical Award should be constructed. Employment conditions in building are too different for that to be defensible.[19] Rather I have used the core rate as a touchstone to see whether rates in the clerical award have risen to become male type equal pay rates, or are still depressed female rates. The reasons for choosing the core trades rate are that building is clearly a male occupation, that this particular rate is paid to workers whose skills have been gained by five years experience on the job (like many clerical workers) not formal qualifications, and because the Arbitration Court used this rate for so many years for setting male clerical rates. Lastly it is a public figure, whereas the salaries of typical male clerical workers, being above the Award, are not.

Finally the importance of award wages must be reiterated. Employers may argue that the award figures I have quoted do not matter for equal pay purposes because of the number of women on above award wages. There are two answers to this objection. One is that in 1982 the Clerical Union carried out a survey of its members and found that 67% of the women respondents were on the three lowest steps of the award. The second and more important is that the national figures for male and female earnings collected by the Labour Department show conclusively that women's wages have only risen in relation to men's when awards were adjusted under the Equal Pay Act 1972. Further significant improvement is thus most likely to occur through further adjustments to award rates affecting women.

THE ARBITRATION COURT AND THE EQUAL PAY ACT 1972

Earlier I mentioned the importance to the success of an equal pay strategy of the structure of the national industrial relations system. In New Zealand the Arbitration Court has for many years been responsible for the supervision and interpretation of our industrial legislation, so it was natural that it be given the task of supervising and interpreting the Equal Pay Act 1972. That decision created what has proved to be the gravest weakness in the New Zealand approach to equal pay. The weaknesses in the Court's approach were recognized by the Review Committee in its second report, but no attempt was made to remedy them.[20]

Since 1972 the Court has brought down ten decisions, nine of them before April 1979 and the last this year. This situation reflects the fact that by 1979, both unions and the inspectorate and Legal Division of the Department of Labour had realized that taking equal pay cases to the Court was not of great utility. Behind the Clerical Union's case in February of this year, taken (most commendably) to test whether the Act was still relevant to implementing equal pay in awards and whether it covered the equal pay for work of equal value principle, can be detected a suspicion that the Court would find the Act inoperative.

The Court's decision that it had no jurisdiction to hear the case confirmed that suspicion. This is unfortunate, since it could deflect attention from the role of the Court to the weaknesses in the Act. The most important lesson provided by the judgement in the Clerical Union case, examined in the context of the 14-year history of the Arbitration Court's supervision of the 1972 Act, is what it says about the suitability of the Court as the judicial body with the responsibility of overseeing our equal pay legislation.

My paper on 'The Arbitration Court's Role in Supervising the Equal Pay Act 1972'[21] summarises the Court's record on equal pay cases between 1972 and 1986 as follows:

1. The Court failed to provide a set of principles or guidelines under Section 9, and gave minimal guidance when asked for assistance.

2. It registered a number of awards and collective agreements which did not comply fully with the Act.[22]

3. It failed to identify and remedy discrimination in awards, including fairly obvious discrimination in rates and the structure of a scale, except in one case where the breach was an inconsistency on the face of the document and six unions protested at the inconsistency.

4. It did not find discrimination in any of the four cases brought on behalf of individual women or groups of women, three of these cases being brought by inspectors of the Labour Department.

5. The Court assisted with setting one set of equal pay rates, but only after four hearings on the matter.

6. Even if some of the decisions referred to above were correct the grounds given by the Court were often open to criticism.

7. It fulfilled its responsibilities for interpreting the Act under Section 12(d) by reading the central section of the Act, Section 3(1), in such a way as to render the Act more or less inoperative.

Such a record speaks for itself. It might however be noted that this treatment by a New Zealand court of a piece of legislation relating to women's rights is not without precedent. It could be said that the then Supreme Court and the Court of Appeal treated the Matrimonial Property Act 1963 in a similar fashion. Just as the decision in the Clerical Union case has rendered the Equal Pay Act 1972 largely inoperative, necessitating new legislation if the equal pay principle is to be preserved, so the Court of Appeal's decision in E. and E. 1871 NZLR 859 made necessary the Matrimonial Property Act 1976.

According to the advice of senior counsel another judicial tribunal could have adopted an interpretation of the Act quite different from that of the Arbitration Court in the Clerical Union case.[23] This would have kept the equal pay principle alive, but it would not have dealt with the problems already referred to in this paper, or the basic limitations of an act drafted in terms of removing and preventing discrimination in rates of pay rather than of requiring equal treatment of the sexes in pay matters.

EQUAL PAY AND EQUAL OPPORTUNITY

By the conclusion of its 1878-79 deliberations the Equal Pay Review Committee had come to the view that equal pay and equal opportunity are often so inextricably intertwined that they ought to be dealt with in the same act. Although they did not make any firm recommendation on the form of new legislation, seeing that as the task of a further review to be taken not later than 1982, they did envisage the disappearance of the 1972 Act in its present form. They recognised, as does U.N. Convention 111, that it is not sufficient to eliminate sex bias from rates of remuneration. Of equal importance is the process of placing men and women on rates and scales and their promotion up scales.

This was the problem raised by the Hospital Board Clerical Workers Award scales, which are discussed by the Review Committee on page 72 of their second report. The Committee doubted whether the Hospital Board scales were in breach of the Equal Pay Act, since the salaries of the women employees - typists and clerical assistants for example - were almost identical with those for the lower paid administrative assistants, but it did consider that the series of scales involved - on one of the models in the Employers guidelines - might well contravene the Human Rights Commission Act. It recommended that the Human Rights Commission investigate the application of hospital clerical awards in a number of hospitals with a view to clarifying the respective requirements of the Equal Pay Act and the Human Rights Commission Act.[24]

When the Human Rights Commission took no action (for whatever reason) on this recommendation a group of clerical staff sought a job evaluation of hospital administrative and clerical staff in the X region. The story of that job evaluation exercise is most instructive.

Christchurch.

First the exercise is valuable for the evidence it provides on the need to look at equal pay and equal opportunity as a single issue, and hence at the desirability of strengthening the role of the Human Rights Commission in the equal pay area. In particular it points up the advantages of the Human Rights Commission formulating job evaluation guidelines, as proposed by the Review Committee in 1979.

Secondly the evaluation exercise is useful as an illustration of how women who demand their rights are victimized, and helps explain why so few women brought complaints under the Equal Pay Act.* It provides good reasons for the Human Rights Commission to be given wider powers and the resources to undertake more general enquiries into discriminatory practices affecting women.[25]

* The women who promoted the exercise lost her job and never worked again

THE ROLE OF THE DEPARTMENT OF LABOUR

In 1975 and 1978 the Equal Pay Review Committee examined the role of the Labour Department, and in particular that of the Department's inspectorate, in depth. The Committee considered that despite the appointment of more inspectors following the 1975 review the inspectorate had been unable to supervise the implementation of equal pay as closely as was desirable because of staff shortages and other tasks to which the Department accorded higher priority. What of the future responsibilities of the inspectors?

It has been apparent for some time that eliminating all sex discrimination in pay rates - for example in above award rates - is a complex affair. Identifying and dealing with this kind of discrimination does not appear an appropriate part of the routine duties of the inspectorate, however these are redefined over the next year or so. In any case as the Act now stands inspectors would appear to have no equal pay role.

Insofar as the Department of Labour has a general responsibility for overseeing conditions of employment it must continue to take an interest in the implementation of equal pay, but its main role could (perhaps) shift from being a supervisory agency to being a source of research and statistical information on progress towards equal pay. Or lack of progress.

The information which the Labour Department could provide, through its statistical series of male and female earnings and from periodic special reviews like the one it is currently organizing, could be seen as the essential basis for further action on equal pay. The action might be legislative changes in industrial relations system promoted by the Department itself, negotiations undertaken by individual unions, or general enquiries initiated by the Human Rights Commission.

SOME CONCLUSIONS AND SUGGESTIONS

The attitudes and events described in this paper suggest that achieving further progress in eliminating pay discrimination against women in this country will not be easy or rapid, although the limited success of the 1972-7 equal pay exercise means that identifiable discrimination still exists. Indeed it could increase, and the earnings gap between men and women grow, if the national award system is dismantled.

The prospect is disturbing, and not only because women are entitled to wage justice. Today many heads of household are women. The feminization of poverty, a term coined in the USA where women's average gross annual earnings are 40% of those of men,26 has implications for the social welfare system, the health services and above all for the well-being of children.

In the eighteen months or more before the Labour Department's current review is completed and made public what can be done to protect the position of women workers?

Three approaches seem worth exploring:

1. Legislative change to permit women and their unions to use the industrial relations system to negotiate equal pay for work of equal value. Should the proposed Labour Relations Act be used for this purpose?

2. An attempt to use the Human Rights Commission and its act to cover the deficiency created by the Arbitration Court's decision in the Clerical Union case.

Should an attempt be made to clarify the coverage of Section 15 in relation to equal pay for private sector workers? What is the effect now of the requirement that equal pay cases be referred to the Labour Department? Do the Commission's existing powers enable it to prepare guidelines on job evaluation? Should it be asked to develop a view on the interface between equal pay and equal opportunity, as the Equal Pay Review Committee imagined would happen in the 1982 review which failed to eventuate?

[It would seem that changes are needed in the Human Rights Commission Act whatever other legislative changes are brought forward, but it seems unlikely they will be able to be included in the legislative programme of the present government.]

3. A continuing programme for educating unions, employers and the public on the value of equal pay and opportunity is an essential accompaniment of any legislative or adminisrative efforts. Both public agencies and private organizations need to be active in contributing to such a programme. What organizations could take new initiatives here?

Elizabeth W. Orr

November, 1986.

NOTES

1. From Article 1 (b), I.L.O. Equal Remuneration Convention 1951 (No. 100).

2. My underlining. This word is presumably responsible for the concept of the notional male rate.

3. "Equal Pay in New Zealand", Report of the Commission of Inquiry, Wellington, September 1971, p. 5.

4. Ibid., p. 20.

5. Idem.

6. Ibid., p. 22.

7. Ibid., p. 14. Quotation from the evidence of the then Deputy Secretary of Labour to the Commission of Inquiry.

8. "Progress of Equal Pay in New Zealand". Report of a Committee appointed by the Minister of Labour, Wellington, October 1975, p. 13.

9. "Equal Pay Implementation in New Zealand", Report of a Committee appointed by the Minister of Labour, Wellington, June 1979, p. 17.

10. Unfortunately the first Labour Department's half-yearly survey to collect separate payroll data for men and women was not taken until 15 October 1973, 14 days after the final date for the first step of equal pay. Accordingly the Review Committee relied for its October 1972 figures on a payroll survey carried out by the Employers' Federation and checked for accuracy by the Department of Labour's Research Division.

    While the use of these estimated figures is not entirely satisfactory it is likely to be more accurate than ignoring the movement which would have occurred in a number of awards prior to the Department's first survey. See also "Progress of Equal Pay in New Zealand", pp. 64-65.

11. A Tale of Two Countries : Equal Pay for Women in Australia and Britain by R.G. Gregory, A. Daly and V. Ho, Australian National University, Canberra, Australia, p. 16.

12. Ibid. Table 3. The Australian ratio is the adult average weekly earnings for full-time (more than 30 hours) non-managerial employees in the private sector. Source: Gregory et. al., 1985.

    The British ratio is the relative hourly earnings of full-time manual workers. Source: Tzannatos and Zabalze, 1984.

13. The national male/female earnings ratio most favourable for women is almost certainly that for Sweden, another country where national wage agreements are an important part of wage fixing.

14. A Tale of Two Countries : Equal Pay for Women in Australia and Britain by R.G. Gregory, A. Daly and V. Ho, Australian National University, Canberra, Australia, p. 14.

15. See Equal Pay Implementation in New Zealand, p. 10 and 'Equal Pay', published by the Department of Labour, Wellington, 1981, p. 18.

16. "Progress of Equal Pay in New Zealand", p. 83-85.

17. "Equal Pay in New Zealand", Report of the Commission of Inquiry, Wellington, September 1971, p. 46.

18. 'Pay Equity and Job Evaluation' guidelines prepared by the Pay Equity Bureau, Manitoba, Canada, March 1986, p. 13.

19. The unindentured core rate in the Building Trades award used in this discussion has three elements: the basic rate per hour, the industry allowance of $1.00 per hour payable after one year, and the industry service payment of 0.250 per hour payable after one year. It is therefore compared with two clerical award rates payable after one year.

    From the discussion of Section 3(1)(b) on page 7 it will be evident that in my view the 1972 Act required regard to be paid in the first instance to male clerical work + rates when setting female clerical scales, but that in some circumstances other male rates would have been relevant. Some of these circumstances are described on p. 10 of Equal Pay Implementation in New Zealand. Especially if job evaluation was being undertaken and a single large employer was involved regard should have been paid to a range of male rates including tradesmen's rates. Again the Manitoba guidelines advert to this requirement.

20. "Equal Pay Implementation in New Zealand", June 1979, pp. 46-52.

21. Paper given at a seminar, "Equal Pay For Work of Equal Value: A Women's Issue", organised by The Centre for Continuing Education at Victoria University of Wellington in April 1986 and published by the Centre.

22. The N.Z. Harbour Boards' Employees Award dated 5.6.85 contains a "female" rate - for cafeteria attendants - at p. 6783.

23. "The Arbitration Court's Role in Supervising The Equal Pay Act", p. 13.

24. Equal Pay Implementation in New Zealand, pp. 68-74.

25. Ibid., p. 71.

26. See Table 4 in Changes in the Structure of Earnings Inequality by Race, Sex and Industrial Sector, 1960-1980 by Patricia A. Taylor, Patricia A. Gwartney-Gibbs and Reynolds FARLEY; a revised version of a paper presented at the 1981 ASA meetings in Toronto. The American figure most often quoted is for year round full-time workers, but in 1982 they were only 47.7% of female workers. [The Population of the United States, Donald Bogne, 1985.]

ıe function of interpreting the legisla-
ɔn if and when a dispute over its
eaning or intention arises. The power
ın be exercised by the Court either on
s own motion or on the application of
ıy organisation of employers or
orkers.

ovisions of any proposed award will be
ıbject to scrutiny by the Court to en-
ıre that the requirements of the Equal
ıy Act are met. If the Court is not
tisfied, it may refer the proposed
vard back to the parties for reconsidera-
ɔn and amendment and in doing so
ay state principles for the guidance of
ıe parties, or it may itself amend the
oposed provisions so that they meet
ıe requirements of the Act. The Court
ıs similar powers in respect to any in-
rument not made under the Industrial
ɔnciliation and Arbitration Act.

ɛfore 1 April 1974 the Court will not
fer any instrument back to the parties
it is satisfied that reasonable progress
wards the implementation of equal pay
being made.

any case, the Court shall not exercise
ıy of these powers without giving the
ırties the right to be heard.

here the parties to a dispute agree on
l matters except those relating to the
ıplementation of equal pay, the Court
ay make a partial award embodying
at agreement and reserving the question
equal pay. Subsequently it may amend
e partial award to include any settle-
ent of the equal pay question reached
tween the parties. If no such settle-
ent is reached within three months of
e making of the partial award then the
ɔurt itself may determine the matters
dispute and amend the award accord-
gly.

/AGES RECOVERY

oceedings may be taken against any
ıployer for the recovery of remunera-
ɔn for any period commencing on or
ter the first increment date on the
ɔunds that the employer has not imple-
ɛnted equal pay in accordance with the
:t.

ɔte: Where the remuneration alleged to
payable is prescribed in a collectively
gotiated agreement or individual con-
ct of service fixing rates in excess of
ɔse laid down in an award, the recov-
action may only be initiated by an
spector or by the union of which the
imant is a member.

wever, no such claim may be com-
ɛnced in any Court before 1 April
74, nor be for remuneration that is
ɛged to have become payable more
ın two years before the date on which
proceedings commenced.

ıere any recovery action is taken in a
gistrate's Court, any party to the
ion will have a right of appeal to the
urt of Arbitration against the Magis-
te's decision.

FFENCES

ere are three main types of offences
out in the Equal Pay Act. Maximum
ıalties for breaches are $400 for indi-
uals and $1000 for bodies corporate.

combination with others, to do any act in contravention of the Equal Pay Act or in contravention of any regulations made under it, or to fail to comply with any provision of the Act or such regulations, or to do any act with the intention of defeating the provisions of the Act or such regulations.

2 It is an offence wilfully to obstruct or hinder an Inspector in the performance of his duties, to refuse or fail to comply with any of his requirements provided for in the Act, to refuse or fail to answer to the best of the employer's knowledge any question asked by an Inspector, or knowingly to give any Inspector a false or misleading answer.

3 Every employer commits an offence who dismisses an employee or alters the position of an employee to the prejudice of the employee if in the preceding twelve months the employee had been involved in a claim against any employer under this Act. It will be a defence for the employer if he can prove that the dismissal or alteration was for any reason other than the employee's involvement in the claim against the employer.

Note: It is important to note that this provision goes outside the individual employment relationship and involves the employee being concerned in a claim against any employer.

The Act gives Labour Department inspectors wider powers than they have under the Industrial Conciliation and Arbitration Act, this extension being the result of the wider definitions given 'employer' and 'employee' by the Equal Pay Act.

An inspector of factories is able during normal business hours to enter any workplace or place where an employer's business is transacted or his records kept. He may require an employer, or any officer or employee of a company, to produce for examination any records and to verify any entries in those records that refer to employees.

However, no person will be obliged to answer any question that might tend to be incriminating, and the inspector is forbidden, except for the purposes of the Act, to disclose any information he obtains in exercising these powers.

RECORDS

All employers, whether bound by an award or agreement made under the Industrial Conciliation and Arbitration Act or not, are obliged under the Equal Pay Act to maintain proper wage records.

These records must be retained for the full period of equal pay implementation, and for at least two years after implementation is complete. Records relating to any subsequent period must be kept for at least two years after that period ends.

Job classification

The Equal Pay Act requires employers to introduce appropriate salary and wage classifications based on work performed in which there is no differentiation based on sex, but in which any differentiation may be justified in terms of skill, effort, responsibility, and similarity of working conditions. The obligation to classify applies at two levels; for an industry as a whole in its awards and collective agreements, and for each employer in his own establishment in relation to his actual salary and wage structure.

INDUSTRY LEVEL

Implementing equal pay at an industry level is the collective responsibility of employers and should be undertaken through their employer organisation. An industry must examine all its awards and agreements to check whether amendments or additions are needed.

The extent to which any class of work calls for the same or substantially similar degrees of skill, effort and responsibility should be carefully assessed. Mere similarity in the names given male and female classifications may not be enough to establish that the work performed is the same. To avoid being misled by similarities in name, a fresh evaluation of jobs and classifications may need to be done.

As far as possible, classifications should not be of a generic nature covering a wide variety of work. The practice of grouping together into one classification in an award a large number of persons who may perform a wide variety of work differing in content, skill, responsibility, conditions and other factors, and the fixing of a common rate make it extremely difficult to implement equal pay in terms of the Act.

Careful consideration must be given to the necessary or desirable extent or complexity of the classification required in industry awards and agreements. As a general principle it can be stated that classification at industry level should not be overextensive nor more complex than is warranted to comply with the Act. It must be remembered that industry classifications must inevitably relate to positions which are common within the industry and definitions must be of a generally applicable nature. Such classifications are intended to provide a minimum prescription of wage rates based on the minimum requirements for adequate performance of the job.

Due regard must be paid to the need for flexibility and interchange of workers according to operational requirements. It is undesirable to introduce classifications so rigorous that flexibility is impaired and demarcation difficulties arise.

A number of different types of awards can be identified where different ap-

proaches to classification may be required. First, there are the so-called 'career' awards with lengthy salary scales based on sex and years of service. Such scales do not classify workers in relation to the level of work performed or the skill, effort or responsibility involved. The elimination of a female scale and the application to women of a male career scale may be inappropriate for non-career positions. Serious consideration should be given by industries concerned with career scales to introducing classified positions or gradings according to levels of skill and responsibility qualifications. The career concept can be preserved by providing the opportunity for a career path for advancement from one grade or classification to higher levels based on the skill and responsibility acquired.

The second class of awards in which a classification decision is required is where detailed classifications are provided for male workers but where female rates are based on age without classification of the work performed. The task here is to classify female jobs and slot them into the male classification scale at levels appropriate to the degree of skill, effort and responsibility required for the work. Unless the comparable male level can be readily identified it would be advantageous to apply a job evaluation system to female classifications in relation to benchmark male classifications.

A third class of awards to be considered is where no classification exists for either men or women, but merely a minimum adult rate is prescribed for each sex. In such cases it would seem unnecessary to provide any greater degree of classification for women than is provided for men in the award. However, if it is common within the industry to pay differential rates to men over and above the award according to the work performed, the industry may find it desirable to reflect such differentiation by introducing appropriate classifications into the award. If it is decided to leave the award with a minimum degree of classification it must be remembered that this simply transfers the problem of equal pay implementation and the justification for differential payments from the industry to the individual establishment level.

Where an industry is nationally organised and has a national award, the task of equal pay implementation can best be undertaken by setting up a committee on a national basis to list, define, evaluate and rank the jobs in the industry and to draft proposals to amend the award to incorporate the desired classifications and definitions.

It is very important that such industry committees should coordinate their activities in consultation with the New Zealand Employers Federation and its regional divisions. Competent advice and assistance can be rendered through our advocates on job classification and valuation procedures. The Employers Federation has considerable research knowledge and practical experience in this field and has prepared a job evaluation system which has already been used to assist a number of industries in equal pay implementation.

COMPANY LEVEL

As previously noted, the obligations created by the Act apply not merely to minimum wages prescribed in awards and collective agreements but extend to actual remuneration in individual contracts of service. This means that in every establishment each employer must ensure that his pay structure is reviewed to bring it in conformity with the Act in accordance with the timetable prescribed.

In order to assist individual employers we set out a number of recommendations on the action which should be taken within each establishment.

1 Examine very carefully your existing pay structure, the number of men and women you employ and the jobs they do, paying particular attention to the duties of each employee.

2 Prepare job descriptions of each individual job in terms of the skill, effort and responsibility called for by the work and the working conditions under which it is performed.

3 Be specific on any details that determine differentials between jobs.

4 Familiarise yourself with award pay scales. Check any award classifications with your own definitions and note any differences.

5 Have regard to any action being taken to reclassify awards to comply with the Act. Keep in touch with the Employers Association to check policy. Be sure that the action you propose is consistent with what is considered suitable for the industry as a whole.

6 Where your job classifications are not unique to the establishment but are common to a particular industry, ask your Employers Association to convene a meeting of employers concerned to determine a common approach to implementation.

7 Decide whether to introduce a suitable job evaluation system to assist in creating a common classification scale and an equitable pay structure.

8 If you believe that all or some of the male jobs in the lowest grade for pay purposes in fact involve greater responsibility or require more effort or skill or are performed under more difficult working conditions than any of the female jobs, then you may feel obliged to re-grade the male jobs. This implies using some form of job evaluation because without it the justification might be hard to prove. Remember that every time one job is compared with another to determine relative rates of pay a form of job evaluation is taking place, however crude and arbitrary. Formal job evaluation aims to establish on a logical and systematic basis the relative values for each job and to reduce subjective judgement and arbitrariness. Be sure that you are able to justify differentials in pay based on your job descriptions and classifications.

9 Review your job titles. Similar job titles can be used for very different jobs and the use of the same title for a male job and a female job invites comparisons which could be invalid. The titles should identify the job and different jobs should have different titles.

10 The objective must be to appraise the content of each job, i.e. the requirements, responsibilities and conditions which distinguish that job from others and determine its relative worth and thus establish equitable pay relationships between all of the jobs under consideration.

11 Note that the purpose of the exercise is to determine classifications and pay scales for jobs or positions rather than for individual workers. The procedure is designed to establish an appropriate rate for the job or a salary range for the class of work. The Act does not require all workers within a particular job classification to receive an identical rate of pay. It will not be unlawful for an employer to pay to individual workers differential rates or to fix their remuneration within a salary range having regard to special qualifications, experience or other qualities possessed by those employees (such as performance, capability, motivation etc.) provided that there is no discrimination based on the employee's sex. If you pay differential rates based on standards of performance, merit or other factors be sure that the same standards are applied equally to both men and women who fulfil those qualifications.

12 Note also that the problem of equal pay does not arise with the specialised position which is unique to an individual worker but rather to the classes of work in which numbers of workers may be employed and in which comparisons between men and women can be drawn as to degrees of skill, effort and responsibility.

CONCLUSION

With careful study of the above principles and observations and application of the principles, employers will be able to prepare their pay structures for equal pay implementation after determining for each classification the rates of remuneration that would represent equal pay, and the minimum percentage by which female employees' remuneration must be increased upon each of the five increment dates. This Act will oblige employers to formalise and improve their salary and wage administration procedures. If an employer is arbitrary in his pay treatment of men in relation to women or women in relation to men, he will have difficulty in defending enforcement actions brought against him under the Act on behalf of female employees. It is therefore in the employer's interests to ensure that differences in pay treatment can be objectively jusififed.

The regional divisions of the Employers Federation will be pleased to assist and advise individual employers on specific implementation problems at both award level and establishment level.

This guide has been prepared by the Research and Information Services Division of the New Zealand Employers Federation P.O. Box 1786 Wellington. Extra copies are available on application to the Employers Federation.

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