

Employment (Pay Equity and Equal Pay) Bill

Government Bill

Explanatory note

General policy statement

Introduction

The purpose of this Bill is to eliminate and prevent discrimination, on the basis of sex, in the remuneration and other terms and conditions of employment, and in doing so, promote enduring settlement of claims relating to sex discrimination on pay equity grounds.

The Bill—

- prohibits an employer from discriminating, on the basis of sex, in remuneration and other terms and conditions:
- enables employees to make claims relating to sex discrimination in employment:
- distinguishes between 3 types of claims (equal pay, unlawful discrimination on matters other than remuneration, and pay equity):
- sets out the processes for resolving the different types of claims:
- re-enacts, in an up-to-date and accessible form, the relevant provisions of the Equal Pay Act 1972.

Implementing these policies requires amendments to the Employment Relations Act 2000, and the repeal and replacement of the Equal Pay Act 1972 and the Government Service Equal Pay Act 1960.

Types of claim

The Bill distinguishes between equal pay, unlawful discrimination on matters other than remuneration, and pay equity claims.

The Bill sets out the processes for making and resolving each type of claim as follows:

- equal pay claims are treated as claims for recovery of wages under section 131(1)(b) of the Employment Relations Act 2000:
- unlawful discrimination (non-remuneration) claims are treated as claims of discrimination under section 103(1)(c) of the Employment Relations Act 2000:
- pay equity claims are made and resolved in accordance with *subpart 3 of Part 2* of the Bill.

Process for making and resolving pay equity claims

The Bill provides employees with the right to make a pay equity claim. A pay equity claim has merit if it relates to work predominantly performed by women and there are reasonable grounds to believe that the work has been historically undervalued and continues to be undervalued.

If a claim has merit, the employer and employee must enter into a pay equity bargaining process to agree on an enduring settlement comprising remuneration and terms and conditions of employment. Pay equity bargaining ordinarily must involve an assessment of the nature and remuneration of the work and comparable work, and must be undertaken free from assumptions based on sex.

The Bill provides for a dispute resolution process based on the existing processes in the Employment Relations Act 2000. The Bill also enables parties to apply to the Employment Relations Authority for a determination that fixes terms and conditions of employment if all other reasonable alternatives for settling the pay equity claim have been exhausted.

The Bill states that collective bargaining and the pay equity claim process are distinct. This means the provisions in the Employment Relations Act 2000 relating to collective bargaining do not apply to pay equity claims made under the Bill.

Enforcement

The Bill includes a penalty regime for non-compliance consistent with other employment legislation.

Amendments to Employment Relations Act 2000

The Bill provides for codes of employment practice to be approved to provide guidance on the application of the Employment Relations Act 2000 and other employment legislation.

Departmental disclosure statement

The Ministry of Business, Innovation, and Employment is required to prepare a disclosure statement to assist with the scrutiny of this Bill. The disclosure statement provides access to information about the policy development of the Bill and identifies any significant or unusual legislative features of the Bill.

A copy of the statement can be found at <http://legislation.govt.nz/disclosure.aspx?type=bill&subtype=government&year=2017&no=284>

Regulatory impact statement

The Ministry of Business, Innovation, and Employment produced a regulatory impact statement on 7 September 2016 to help inform the main policy decisions taken by the Government relating to the contents of this Bill.

A copy of this regulatory impact statement can be found at—

- <http://www.mbie.govt.nz/info-services/employment-skills/legislation-reviews/exposure-draft-employment-pay-equity-and-equal-pay-bill>
- <http://www.treasury.govt.nz/publications/informationreleases/ris>

Clause by clause analysis

Clause 1 is the Title clause.

Clause 2 is the commencement clause. It provides that the Act comes into force on the day after the date on which it receives the Royal assent.

Part 1

Preliminary provisions

Clause 3 sets out the purposes of the Bill. There are 4 purposes—

- to provide for—
 - the elimination of existing sex discrimination in remuneration and other terms and conditions of employment; and
 - the prevention of future sex discrimination in remuneration and other terms and conditions of employment:
- to promote enduring settlement of pay equity claims:
- to set out the processes by which employees may make claims relating to sex discrimination:
- to re-enact, in an up-to-date and accessible form, the Equal Pay Act 1972.

Clause 4 sets out an overview of the Bill. The substantive part of the Bill is *Part 2*, which is divided into 4 subparts that deal with the following matters:

- *subpart 1* establishes that employers have a duty not to discriminate on the basis of sex in remuneration or other terms and conditions of employment, and provides for claims of 2 kinds—
 - equal pay claims and unlawful discrimination (non-remuneration) claims; and
 - pay equity claims:
- *subpart 2* sets out the process for employees to make an equal pay claim or an unlawful discrimination (non-remuneration) claim:
- *subpart 3* sets out the process for employees to make a pay equity claim:

- *subpart 4* deals with enforcement-related matters, and provides for offences, penalties, and regulations.

Clause 5 is the interpretation provision. Many expressions used in the Bill are defined in the Employment Relations Act 2000 and have the same meaning as in that Act. Other terms that are novel in this Bill are defined, including equal pay claim, merit, pay equity claim, and unlawful discrimination (non-remuneration) claim.

Clause 6 and *Schedule 1* provide for transitional, savings, and related provisions (*see* the explanation of *Schedule 1*).

Clause 7 provides that the Bill binds the Crown.

Part 2

Discrimination on basis of sex

Clause 8 establishes an employer's duty not to discriminate between employees based on sex. The duty is described in 2 paragraphs as follows:

- *clause 8(1)(a)* applies to employees who perform the same, or substantially similar, work. In this situation an employer must not discriminate on the basis of sex in either remuneration or any other terms or conditions of employment. This is the same as the duty imposed by sections 2A and 3(3) of the Equal Pay Act 1972:
- *clause 8(1)(b)* applies to employees who perform work that is exclusively or predominantly performed by female employees. In this situation an employer must ensure that the remuneration paid for that work contains no element of sex-based differentiation.

Clause 8(3) elaborates on the meaning of sex-based differentiation. It provides that a rate of remuneration has an element of sex-based differentiation if it is less than the rate of remuneration that would be paid to male employees—

- with the same, or substantially similar, skills, responsibilities, and experience; and
- performing work under the same, or substantially similar, conditions; and
- performing work that involves the same, or substantially similar, degrees of effort.

Clause 9 describes the types of claim that can be made if an employee considers they have been discriminated against on the grounds of sex. A claim of discrimination under *clause 8(1)(a)* is called an equal pay claim if it relates to remuneration, or an unlawful discrimination (non-remuneration) claim if it relates to other terms and conditions of employment. A claim under *clause 8(1)(b)* is called a pay equity claim.

The processes for making and determining claims are set out in *subparts 2 and 3* and differ depending on the type of claim as follows:

- *subpart 2* applies to equal pay claims and unlawful discrimination (non-remuneration) claims:

- *subpart 3* applies to pay equity claims.

Clause 10 provides that an employee cannot make both a complaint under the Human Rights Act 1993 and an equal pay, unlawful discrimination (non-remuneration), or pay equity claim, in relation to the same matter. This continues the equivalent restriction in section 2A(2) of the Equal Pay Act 1972 insofar as equal pay and unlawful discrimination (non-remuneration) claims are concerned, and provides for the same choice of proceeding to be made in the case of pay equity claims.

Clause 11 describes the process for making an equal pay claim or an unlawful discrimination (non-remuneration) claim. An equal pay claim is treated as a claim for the recovery of wages under the Employment Relations Act 2000. An unlawful discrimination (non-remuneration) claim is treated as a personal grievance claim of sex discrimination under section 103 of that Act.

Clause 12 establishes a 6-year limitation period for equal pay claims. It means that remuneration that relates to a period more than 6 years before a claim is filed cannot be recovered. This continues the equivalent restriction in section 13(3) of the Equal Pay Act 1972.

Clause 13 sets out the criteria to be applied when considering claims under *clause 11*. It provides that the Employment Relations Authority (the **Authority**) or the Employment Court (the **court**) must consider the following factors when determining whether work is the same, or substantially similar:

- whether the work calls for the same, or substantially similar, skills, degrees of skill, effort, experience, and responsibility from male and female employees; and
- whether the conditions under which the work is to be performed are the same, or substantially similar, for male and female employees.

These criteria are based on the criteria set out in section 3(1) of the Equal Pay Act 1972.

Clause 14(1) provides that 1 or more employees may make a pay equity claim if they consider that the claim has merit.

Clause 14(2) goes on to set out what it means for a claim to have merit. A claim has merit if—

- the claim relates to work that is predominantly performed by female employees; and
- there are reasonable grounds to believe that the work has been historically undervalued (for 1 or more of the reasons in *subclause (3)*); and
- there are reasonable grounds to believe that the work continues to be undervalued, taking into account all relevant matters (including the reasons set out in *subclause (4)*).

Clause 14(3) elaborates on the reasons for historical undervaluation of work, which are—

- the origins and history of the work, including the manner in which wages have been set:
- any social, cultural, or historical factors:
- characterisation of the work as women’s work:
- that the nature of the work requires an employee to use skills or qualities that have been—
 - generally associated with women; and
 - regarded as not requiring monetary compensation.

Clause 14(4) elaborates on the reasons for continued undervaluation of work, which are—

- features of the relevant labour market, industry, sector, or occupation (including a dominant source of funding, lack of effective bargaining, the market share of the employer, a lack of competition from other employers, and any other feature of the relevant labour market, industry, sector, or occupation); and
- failure by the parties to properly assess or consider the remuneration that should be paid to properly account for the work.

Clause 14(5) defines relevant labour market for the purposes of *clause 14(4)*. The relevant labour market is that part of the labour market that comprises all workers who are substitutable because their work involves—

- the same, or substantially similar, skills and responsibilities; and
- experience under the same, or substantially similar, conditions; and
- the same, or substantially similar, degrees of effort.

Clause 14(6) states that a claim does not have merit if it relates to work that is covered by an existing pay equity claim settlement to which the employee is a party (unless the Authority or court determines otherwise).

Clause 15 sets out the process for making a pay equity claim, including a requirement that the claim must be in writing and must set out the factors that the employee relies on as evidence that the claim has merit.

Clause 16 provides that an employer who receives a pay equity claim must—

- acknowledge receipt of the claim within 5 working days; and
- give notice of the claim to 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 notice must be given as soon as is reasonably practicable and not later than 20 working days after the employer receives the claim. (This does not apply if the employer has already given notice of another claim that relates to the work.)

Clause 17 provides that an employer who receives a pay equity claim must decide whether, in the employer’s view, it has merit. The decision must be made and the claimant must be notified of the decision as soon as is reasonably practicable, and not

later than 90 days after the employer receives the claim. However, the employer may extend the time limit for making the decision if the employer has genuine reasons, based on reasonable grounds, for doing so.

If the employer decides the claim does not have merit, the notice to the employee must set out the reasons for that decision and provide information about the steps the employee may take to challenge it.

If the employer decides the claim does have merit, the notice to the employee must provide information about the pay equity bargaining process.

If an employer fails, within 90 days of receiving the claim, to give notice to an employee who has made a pay equity claim (either of the employer's decision or extending the time limit), the employer is deemed to have accepted that the pay equity claim has merit. In addition, if the employer gives notice of an extension of the time limit without having genuine reasons, based on reasonable grounds, the employee's claim is deemed to have merit.

Clause 18 provides that the provisions relating to the pay equity bargaining process apply to a pay equity claim in the following 2 circumstances:

- if the employer decides the claim has merit:
- if the Authority or the court determines the claim has merit.

Clause 19 relates to the consolidation of claims by employees of the same employer, as follows:

- if an employer receives multiple claims that relate to the same, or substantially similar, work, the employer must treat those claims as 1 claim (unless the employer has genuine reasons, based on reasonable grounds, not to do so). The employer must notify all claimants of one another's names and addresses for service (except where a claimant has requested confidentiality). If a claimant has nominated a person to act as their representative, the name and address for service of that representative must be provided to other claimants.
- the claimants must seek to reach agreement as to how the consolidated claim will be progressed, including who will represent them and how decisions will be made. If they cannot agree, any of them may apply to the Authority for a direction.

Clause 20 relates to the consolidation of similar claims against multiple employers, as follows:

- if multiple employers receive pay equity claims from employees who perform the same, or substantially similar, work, those employers may consolidate the claims for the purposes of the pay equity bargaining process. In that case, the employers must agree who will represent them and how decisions relating to the claim will be made.
- the employers must provide to each of their employees who has made a claim—

- the name of every other employer that is a party to the consolidated claim; and
 - the name and address for service of the nominated representative of each of those other employers.
- at the conclusion of the pay equity bargaining process, each employer must enter into a separate pay equity claim settlement with their employees.

Clause 21 requires the parties to a pay equity bargaining process to act in good faith, in accordance with section 4 of the Employment Relations Act 2000.

Clause 22 requires the parties to a pay equity claim to provide information to one another that is reasonably necessary to support the claims or responses to claims, if that information is requested in writing. It also enables confidential information to be provided, instead, to an independent reviewer.

Clause 23 sets out the matters that must be assessed for the purposes of pay equity bargaining. They are—

- the nature of the work to which the claim relates and the nature of comparable work (including the skills required, responsibilities imposed, working conditions, terms and conditions, degree of effort, and level of experience required to perform the work):
- the remuneration paid to persons who perform the work:
- the remuneration paid to persons who perform comparable work.

The clause provides that the assessment must be undertaken objectively and without assumptions based on sex, and must recognise the importance of skills, responsibilities, effort, and conditions that have traditionally been overlooked or undervalued in female-dominated work.

Clause 24 sets out how appropriate comparators must be identified for the purposes of assessing a pay equity claim. *Clause 24(1)* provides that comparable work is work that is the same as, or similar to, the work to which the claim relates. It may include—

- work performed by male comparators that is the same as, or substantially similar to, the work to which the claim relates, in circumstances in which the male comparators' work is not predominantly performed by female employees; or
- work performed by male comparators that is different to the work to which the claim relates, if the comparator's work involves the same, or substantially similar, skills and experience, responsibilities, working conditions, or degrees of effort; or
- work performed by any other comparators that the parties or the Authority consider useful and relevant, including comparators who perform work that has previously been the subject of a pay equity settlement.

Clause 24(3) establishes a hierarchy for selecting appropriate comparators. Comparators that are most closely related to the employer's business must be selected on the following basis:

- if 1 or more appropriate comparators exist within the employer's business, that comparator or those comparators must be selected for the assessment:
- if no appropriate comparator exists within the employer's business, 1 or more comparators from similar businesses must be selected for the assessment:
- if neither of the above applies, appropriate comparators from within the same industry or sector must be selected for the assessment:
- comparators from a different industry or sector may only be selected for the assessment if no other appropriate comparators exist.

However, *clause 24(4)* clarifies that a male comparator may not be used if the work performed by that male comparator is work that is predominantly performed by women and there are reasonable grounds to believe it has been historically undervalued and continues to be undervalued.

Clause 25 sets out when a pay equity claim is settled. In particular, it provides for written agreement as to remuneration and a review process.

Clause 25(2) provides that an employer may not reduce any of an employee's terms and conditions of employment for the purpose of settling a pay equity claim made by that employee.

Clause 26 describes the relationship between pay equity claims and collective bargaining. It states that—

- entry into a collective agreement does not settle or extinguish an unsettled pay equity claim; and
- the existence of an unsettled pay equity claim is not a justification for failure to conclude collective bargaining.

Clause 27 provides that the parties to a pay equity claim may refer any issue relating to that claim to mediation services. The provisions of the Employment Relations Act 2000 that relate to mediation apply to pay equity claim issues that are referred for mediation.

Clauses 28 to 36 provide for the parties to a pay equity claim to refer any issue relating to the claim to the Authority for facilitation. The clauses are based on sections 50A to 50I of the Employment Relations Act 2000 (being the provisions that govern facilitated bargaining for collective agreements).

Clause 28 provides that the purpose of the facilitation provisions is to provide a process for the parties to seek help from the Authority to resolve difficulties they are having in relation to a pay equity claim. It also provides that the provisions do not prevent the parties seeking assistance from another person to resolve their difficulties.

Clause 29 sets out the process to refer an issue relating to a pay equity claim to the Authority. It gives the following examples of the sorts of issues that could be referred:

- a dispute about whether a claim has merit:
- a dispute about whether work is comparable work:

- a dispute about whether proposed remuneration no longer discriminates on pay equity grounds.

Clause 30 sets out the circumstances in which the Authority may accept a reference for facilitation. They are—

- when the Authority is satisfied that its expertise may be useful to resolve the issue; and
- when 1 or both of the following grounds exist:
 - a party has failed to comply with the duty of good faith, in a way that is serious and sustained and has undermined the progress of the claim;
 - sufficient efforts (including mediation) have failed to resolve an issue relating to the claim.

Clause 30(3) sets limits on the circumstances in which the Authority may accept a subsequent reference for facilitation in relation to the same pay equity claim.

Clause 31 provides that a member of the Authority who accepts a reference for facilitation must not then be a member of the Authority who facilitates resolution of the issue.

Clause 32 sets out the process to be followed during facilitation. The key aspects are that—

- facilitation is conducted in private;
- the process is determined by the Authority;
- pay equity bargaining continues during facilitation, subject to the process determined by the Authority;
- the Authority is not acting as an investigative body during facilitation;
- the provision of facilitation may not be questioned in proceedings on the ground that the nature and content of the facilitation, or the manner in which it was provided, were inappropriate.

Clause 33 provides that statements made by the parties during facilitation are not admissible against that party in proceedings under the Bill or the Employment Relations Act 2000. It also provides that public statements about facilitation may only be made in good faith and must be limited to the process of facilitation or the progress being made.

Clause 34 provides that proposals made by a party, or positions reached by the parties, during facilitation are not binding after the facilitation ends. However, this is subject to any agreement between the parties.

Clause 35 enables the Authority to make a recommendation about any matter relating to a pay equity claim. Recommendations are not binding but must be considered by the parties. Examples of the sorts of recommendations that the Authority might make are recommendations as to—

- whether a claim has merit:

- the process the parties should follow to reach agreement:
- terms and conditions of employment (including remuneration) that would no longer discriminate on pay equity grounds.

Recommendations may be publicly notified.

Clause 36 requires the parties to a facilitation to deal with the Authority in good faith.

Clause 37 provides that a party to a pay equity claim may apply to the Authority or the court for determination of any matter that relates to the claim. Examples of the sorts of determinations that may be sought from the Authority or the court are—

- a determination as to whether a claim has merit:
- a determination fixing terms and conditions of employment (including remuneration) that do not discriminate on pay equity grounds.

Before considering an application for a determination, the Authority or the court must first consider whether an attempt has been made to resolve the difficulties by mediation or facilitation, and the Authority or the court may direct the parties to try those options. If any of the grounds in *clause 30(2)* exist (which relate to a serious and sustained failure to comply with the duty of good faith and failure to make sufficient efforts to resolve the claim), the Authority or the court must direct that facilitation be used before investigating, unless the Authority or court considers facilitation will not help, is not in the public interest, will undermine the urgency of the process, or is otherwise impractical or inappropriate.

Clause 37(3) relates to applications for a determination that a claim has merit despite *clause 14(6)* (which provides that claims that relate to work that is covered by an existing settlement do not have merit unless the Authority or court determines otherwise). When determining applications of this kind, the Authority or court must have regard to the existing pay equity claim settlement and make an order only if it is satisfied that there are exceptional circumstances.

Clause 38 provides that if the Authority or the court determines that a pay equity claim has merit, the parties must enter into the pay equity bargaining process.

Clause 39 relates to applications to the Authority to fix terms and conditions of employment. It provides that if the Authority has not already directed the parties to try to resolve the difficulties by mediation, it must do so, or recommend another process that the parties must follow. The Authority may accept an application for a determination to fix terms and conditions only if the parties have first tried mediation, or another process recommended by the Authority, and the Authority is satisfied that all other reasonable alternatives for settling the claim have been exhausted.

Clause 40 establishes a limitation period for equal pay claims in cases where the Authority fixes terms and conditions of employment. It has the effect that the Authority cannot issue a determination awarding arrears of wages under section 131 of the Employment Relations Act 2000 in respect of a period that is earlier than the date on which an employee's pay equity claim is delivered to an employer. (This does not prevent the parties to a pay equity claim from reaching a negotiated settlement that

includes back pay to a date before the date on which the employee's pay equity claim was delivered to the employer.)

Clause 41 obliges employers to keep certain records in respect of pay equity claims.

Clause 42 provides that an employer must not treat adversely an employee who makes a claim under the Bill. The provision is based on equivalent provisions in the Employment Relations Act 2000 and the Shop Trading Hours Act 1990. Such an employee who considers that they have been adversely treated may bring a personal grievance claim against their employer.

Clause 43 sets penalties for failure to comply with specified duties in the Bill. The penalty for a breach of 1 of the following duties is a maximum penalty of \$10,000 for an individual or \$20,000 for a body corporate:

- the duty under *clause 8(1)(a)* to not discriminate on the basis of sex between employees who perform the same, or substantially similar, work in remuneration (equal pay) or any other terms or conditions of employment (unlawful discrimination (non-remuneration));
- the duty on employers who decide a pay equity claim has merit to enter into pay equity bargaining;
- the duty to act in good faith during facilitation;
- the duty on employers to keep records relating to pay equity claims;
- the duty not to adversely treat an employee who has made a claim.

Clause 44 establishes a process for employees of the education service to make pay equity claims to the State Services Commissioner, and provides for the State Services Commissioner to have the rights, duties, and obligations of an employer in the process of settling the claim. It also provides for any pay equity claim settlement agreement reached with the Commissioner to be binding on affected employers in the education service, and for those employers to be represented in the pay equity bargaining process.

Clause 45 empowers the making of regulations to prescribe matters that must be taken into account—

- when considering or determining whether a pay equity claim has merit;
- when assessing a pay equity claim;
- when identifying appropriate comparators.

Part 3

Related amendments and repeals

Clauses 46 to 48 make amendments to sections 100A and 100C of the Employment Relations Act 2000. Those sections currently enable the Minister to approve codes of employment practice to provide guidance on the application of the provisions of that Act.

The amendments in *clause 47* empower the Minister to also approve codes of employment practice to provide guidance on the application of this Bill (once enacted) and other Acts specified in section 223(1) of the Employment Relations Act 2000 (being the Holidays Act 2003, the Home and Community Support (Payment for Travel Between Clients) Settlement Act 2016, the Minimum Wage Act 1983, the Parental Leave and Employment Protection Act 1987, the Volunteers Employment Protection Act 1973, and the Wages Protection Act 1983), or any regulations made under them.

A *new section 100A(5)* is also added that provides that a code of employment practice is not a legislative instrument but is a disallowable instrument for the purposes of the Legislation Act 2012.

Clause 48 provides that the Authority or a court may have regard to a code of employment practice as evidence of compliance with the provisions of the enactment to which it relates, and may rely on the code in determining compliance with those provisions.

Clause 49 and *Schedule 2* make consequential amendments to the Employment Relations Act 2000.

Clause 50 repeals the Equal Pay Act 1972 and the Government Service Equal Pay Act 1960.

Schedule 1 sets out transitional provisions. In particular,—

- *clause 1* defines an Equal Pay Act claim as meaning any claim (whether or not formally commenced by an application) that alleges a breach of a provision in the Equal Pay Act 1972:
- *clause 2* provides that, after the Bill commences,—
 - no new claims may be made under the Equal Pay Act 1972; but
 - new claims may be made under this Bill that relate to conduct that would have breached the Equal Pay Act 1972:
- *clause 3* relates to Equal Pay Act claims that have been filed in the Authority or a court when the Bill comes into force and that are awaiting determination. Those claims are all discontinued, but they may be recommenced under the provisions of the Bill.
- *clause 4* sets out the following limitation provisions that apply if a claim is discontinued and recommenced:
 - in the case of equal pay claims, the 6-year limitation period that applied at the date on which the claimant's original claim was filed is preserved for the purposes of the recommenced claim:
 - in the case of pay equity claims, however, any determination that fixes terms and conditions of employment must not provide for recovery of an amount in respect of any loss or damage that occurred before either:
 - the date on which the original claim was filed, if that date was before 26 July 2017; or

- the date on which the Bill comes into force, if the original date of filing was on or after 26 July 2017.
- *clause 5* provides that any Equal Pay Act claim that has been determined before the date the Bill comes into force may be appealed under the provisions of the Equal Pay Act 1972:
- *clause 6* applies if, before the Bill commences, the parties to a pay equity claim have entered into a written pay equity bargaining agreement that includes an assessment of the matters in *clause 23* of the Bill. It provides that any determination that fixes terms and conditions of employment must not provide for recovery of an amount in respect of any loss or damage that occurred before—
 - the date on which the parties entered into the written agreement, if that date was before 26 July 2017; or
 - the date on which the Bill comes into force, if the written agreement was entered into on or after 26 July 2017.

The clause also enables any pay equity bargaining that takes place before the Bill comes into force to be taken into account when the Authority is considering whether sufficient efforts have been made to resolve an issue in the context of an application for facilitation or for a determination:

- *clause 7* provides for certain written settlement agreements that are entered into before the Bill commences to be treated as existing pay equity claim settlements for the purposes of *clause 14(6)* (being the clause that establishes a presumption that a claim does not have merit if it is subject to an existing pay equity claim settlement).

Schedule 2 makes consequential amendments to the Employment Relations Act 2000.

Hon Michael Woodhouse

Employment (Pay Equity and Equal Pay) Bill

Government Bill

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The Parliament of New Zealand enacts as follows:

1 Title

This Act is the Employment (Pay Equity and Equal Pay) Act **2017**.

2 Commencement

This Act comes into force on the day after the date on which it receives the Royal assent. 5

Part 1

Preliminary provisions

Purpose and overview

3 Purposes

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The purposes of this Act are to—

- (a) provide for—

- (i) the elimination of existing sex discrimination in remuneration and other terms and conditions of employment; and
 - (ii) the prevention of future sex discrimination in remuneration and other terms and conditions of employment; and
 - (b) promote enduring settlement of claims regarding sex discrimination on pay equity grounds; and 5
 - (c) set out the different processes by which employees may make claims relating to sex discrimination; and
 - (d) re-enact, in an up-to-date and accessible form, the relevant provisions of the Equal Pay Act 1972. 10
- 4 Overview of Act**
- (1) This Act is divided into 3 parts.
 - (2) This Part (**Part 1**) deals with preliminary matters, including definitions of terms used in this Act, transitional, savings, and related provisions, and a provision that this Act binds the Crown. 15
 - (3) **Part 2** is divided into 4 subparts, as follows:
 - (a) **subpart 1** establishes an employer's duty not to discriminate in remuneration or other terms and conditions of employment on the basis of sex. It provides for the following kinds of claim:
 - (i) equal pay claims and unlawful discrimination (non-remuneration) claims: 20
 - (ii) pay equity claims:
 - (b) **subpart 2** sets out the processes for employees to make equal pay claims and unlawful discrimination (non-remuneration) claims. The processes that are used to enforce other employment standards under the Employment Relations Act 2000 are adopted: 25
 - (c) **subpart 3** sets out the process for an employee to make pay equity claims. The process is similar to the process to resolve an employment relationship problem under the Employment Relations Act 2000. If a pay equity claim has merit, the employer and employee must enter into a pay equity bargaining process. The subpart also provides for mediation, facilitation, and the referral of issues in pay equity claims to the Authority for determination: 30
 - (d) **subpart 4** deals with enforcement-related matters, including prohibiting adverse treatment of employees who make a claim under **subpart 2 or 3**, and provides for offences, penalties, and regulations. 35
 - (4) **Part 3** deals with amendments to other enactments.
 - (5) This section is only a guide to the provisions of this Act.

Interpretation and transitional provision

- 5 Interpretation**
- (1) In this Act, unless the context otherwise requires,—
- adverse treatment claim** means a claim made under **section 42**
- equal pay claim** means a claim described in **section 9(1)(a)** 5
- has merit**, in relation to a pay equity claim, means that the claim meets the test in **section 14**
- pay equity claim** means a claim described in **section 9(1)(c)**
- pay equity grounds** means discrimination that is contrary to **section 8(1)(b)**
- predominantly performed by female employees**, in relation to any work, 10
means that, of the employees in New Zealand performing that work, at least 66% are female
- remuneration**, in relation to an employee, means the salary or wages payable to that employee and includes—
- (a) any piecework payment, overtime, bonus, allowance, fee, commission, 15
or special payment:
- (b) any other monetary or non-monetary benefits
- unlawful discrimination (non-remuneration) claim** means a claim described in **section 9(1)(b)**.
- (2) Any other expression used in this Act that is defined in the Employment Relations Act 2000 has the same meaning as in that Act. 20
- 6 Transitional, savings, and related provisions**
- The transitional, savings, and related provisions set out in **Schedule 1** have effect according to their terms.
- 7 Act binds the Crown** 25
- This Act binds the Crown.

Part 2**Discrimination on basis of sex**

Subpart 1—Types of claim

- 8 Equal treatment** 30
- (1) An employer must ensure that—
- (a) the rate of remuneration paid, and the terms and conditions provided, to an employee do not, on the basis of sex, discriminate between employees who perform the same, or substantially similar, work; and

- (b) for work that is exclusively or predominantly performed by female employees, the rate of remuneration paid for the work contains no element of sex-based differentiation.
- (2) Without limiting **subsection (1)(a)**, the employer's obligation under that subsection includes the obligation not to discriminate with regard to conditions of work, fringe benefits, or opportunities for training, promotion, or transfer. 5
- (3) For the purpose of **subsection (1)(b)**, a rate of remuneration has an element of sex-based differentiation if it is less than the rate of remuneration that would be paid to male employees—
- (a) with the same, or substantially similar, skills, responsibilities, and experience; and 10
- (b) performing work under the same, or substantially similar, conditions; and
- (c) performing work that involves the same, or substantially similar, degrees of effort. 15

Compare: 1972 No 118 ss 2A(1), 3(1), (3)

9 Types of claim

- (1) A claim under **section 8**—
- (a) is an equal pay claim if it is a claim of discrimination in respect of remuneration contrary to **section 8(1)(a)**: 20
- (b) is an unlawful discrimination (non-remuneration) claim if it is a claim of discrimination in respect of terms and conditions of employment other than remuneration contrary to **section 8(1)(a)**:
- (c) is a pay equity claim if it is a claim in respect of remuneration under **section 8(1)(b)**. 25
- (2) An equal pay claim or an unlawful discrimination (non-remuneration) claim may be made in accordance with **subpart 2**.
- (3) A pay equity claim may be made in accordance with **subpart 3**.

10 Choice of proceedings

- (1) Where the circumstances giving rise to an equal pay claim, an unlawful discrimination (non-remuneration) claim, or a pay equity claim, by an employee are also such that the employee would be entitled to make a complaint under the Human Rights Act 1993, the employee may take 1, but not both, of the following steps: 30
- (a) the employee may make a claim under this Act; or 35
- (b) the employee may make a complaint under the Human Rights Act 1993.
- (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 makes 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.
 - (4) If an employee makes a complaint referred to in **subsection (1)(b)**, the 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. 5
- Compare: 1972 No 118 s 2A(2); 2000 No 24 s 112

Subpart 2—Claim process for equal pay claims and unlawful discrimination (non-remuneration) claims

11 Equal pay or unlawful discrimination (non-remuneration) claims 10

Equal pay claims

- (1) An employee may make an equal pay claim to the Authority against an employer for remuneration that the employee ought to have received from the employer but did not receive because of discrimination contrary to **section 8(1)(a)**. 15
- (2) An equal pay claim is to be treated as a claim for the recovery of wages under section 131(1)(b) of the Employment Relations Act 2000.

Unlawful discrimination (non-remuneration) claims

- (3) An employee may make an unlawful discrimination (non-remuneration) claim to the Authority, relating to discrimination in the terms and conditions of employment (other than remuneration) contrary to **section 8(1)(a)**. 20
 - (4) An unlawful discrimination (non-remuneration) claim under this Act is to be treated as a claim of discrimination under section 103(1)(c) of the Employment Relations Act 2000. 25
- Compare: 1972 No 118 s 13(2)

12 Limitation period for equal pay claims

An employee may not, in an equal pay claim, recover remuneration related to any period that is more than 6 years before the date on which the claim is filed in the Authority.

Compare: 1972 No 118 s 13(3) 30

Criteria to be applied

13 Criteria to be applied

For the purposes of determining whether work is the same, or substantially similar, work, the Authority or court must consider whether—

- (a) the work calls for the same, or substantially similar, skills, degrees of skill, effort, experience, and responsibility; and 35

- (b) the conditions under which the work is to be performed are the same, or substantially similar.

Compare: 1972 No 118 s 3(1)

Subpart 3—Pay equity claims

Employee's right to make pay equity claim 5

14 Employee may make 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 make a pay equity claim if that employee considers, or those employees consider, that the claim has merit.
- (2) A pay equity claim **has merit** if— 10
- (a) the claim relates to work that is predominantly performed by female employees; and
- (b) there are reasonable grounds to believe that the work has been historically undervalued for 1 or more of the reasons set out in **subsection (3)**; and 15
- (c) there are reasonable grounds to believe that the work continues to be subject to systemic sex-based undervaluation, taking into account all relevant matters (including the reasons for undervaluation set out in **subsection (4)**).
- (3) The reasons for historical undervaluation of work referred to in **subsection (2)(b)** are— 20
- (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: 25
- (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.
- (4) The reasons for continued systemic sex-based undervaluation of work referred to in **subsection (2)(c)** are— 30
- (a) features of the relevant labour market, industry, sector, or occupation, including—
- (i) a dominant source of funding across the relevant labour market, industry, sector, or occupation: 35
- (ii) a lack of effective bargaining in the relevant labour market, industry, sector, or occupation:

- (iii) the market share of the employer as an employer in the relevant labour market:
- (iv) a lack of competition from other employers seeking to employ persons in the relevant labour market:
- (v) a lack of power on the part of employees to influence the relevant labour market: 5
- (vi) any other feature of the relevant labour market, industry, sector, or occupation (including any features that are prescribed in regulations); and
- (b) failure by the parties to properly assess or consider the remuneration that should be 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. 10
- (5) In **subsection (4), relevant labour market** means that part of the whole labour market that comprises all workers who, as a matter of fact and commercial common sense, are substitutable because the work they perform involves— 15
 - (a) the same, or substantially similar, skills and responsibilities; and
 - (b) experience under the same, or substantially similar, conditions; and 20
 - (c) the same, or substantially similar, degrees of effort.
- (6) A claim does not have merit 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 37(3)**. 25

Process to make pay equity claim

15 Requirements relating to pay equity claims

- (1) A pay equity claim must—
 - (a) be in writing; and
 - (b) state that it is made under **sections 8(1)(b) and 14**; and 30
 - (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 description of the work performed by the employee; and 35
 - (iv) if the employee has a union or other representative to act on behalf of the employee in respect of the claim, the name and address for service of that representative; and

- (d) set out the elements required for a pay equity claim to have merit (*see section 14*), and the evidence that the employee relies on in support of those elements in the employee's case.
- (2) The claim must be—
- (a) delivered in person to the employee's employer; or 5
 - (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. 10
- Compare: 1990 No 57 s 5J, 2000 No 24 s 69AAC
- 16 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 15
 - (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**). 20
- (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 25
 - (c) provide information about the steps affected employees may take to join the claim or make their own pay equity claim.
- (4) The notice must be—
- (a) delivered to the affected employee in person; or 30
 - (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.
- (5) **Subsection (1)(b)** does not apply in respect of an affected employee if— 35
- (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 19** with an existing claim and the requirements of **section 19** 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). 5
- (6) Despite **subsections (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.
- (7) A notice extending the time limit must— 10
 - (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. 15
- 17 Employer must form view as to whether pay equity claim has merit**
- (1) An employer who receives a pay equity claim must, as soon as is reasonably practicable and not later than 90 days after receiving it, decide whether, in the employer’s view, the pay equity claim has merit.
- (2) The employer must notify the employee who made the claim of the employer’s decision as soon as is reasonably practicable, and not later than 90 days after receiving the claim. 20
- (3) Despite **subsections (1) and (2)**, the employer may, by notice to the employee, extend the time limit for making and notifying the employer’s decision as to merit if the employer has genuine reasons, based on reasonable grounds, for requiring the extension. 25
- (4) A notice extending the time limit must—
 - (a) be given as soon as is reasonably practicable and not later than 90 days after receiving the claim; and
 - (b) specify the extended date by which the employer will notify the employee of the employer’s decision; and 30
 - (c) set out the reasons and grounds for requiring the extension.
- (5) If the employer decides that the claim does not have merit, the notice under **subsection (2)** must—
 - (a) set out the reasons for the employer’s decision; and 35
 - (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 has merit to mediation under **section 27**;
 - (iii) the employee may refer the question of whether the claim has merit to the Authority for facilitation under **sections 28 to 36**, if one of the grounds in **section 30(2)** exists: 5
 - (iv) the employee may apply to the Authority under **section 37** for a determination as to whether the pay equity claim has merit 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. 10
- (6) If the employer decides that the claim has merit,—
- (a) the notice under **subsection (2)** must provide information about the pay equity bargaining process under **sections 19 to 40**; and
 - (b) the employer and the employee must enter into the pay equity bargaining process. 15
- (7) An employer is deemed to have accepted that a pay equity claim has merit if the employer—
- (a) fails, within 90 days of receiving the claim, to give notice to the employee under either **subsection (2) or (3)**; or
 - (b) gives notice under **subsection (3)** without having genuine reasons, based on reasonable grounds, for requiring the extension. 20
- (8) 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 25
 - (c) given in any manner specified in the employee's employment agreement.

Compare: 1990 No 57 s 5I; 2000 No 24 s 69AAE

Pay equity bargaining process

18 Process applies to claims that have merit

Sections 19 to 40 apply to a pay equity claim if— 30

- (a) the employer decides it has merit; or
- (b) the Authority or the court determines it has merit.

19 Consolidation of claims by multiple employees

- (1) If, before settling a claim that has merit, the employer receives 1 or more other claims that relate to the same, or substantially similar, work, the employer— 35

- (a) must treat all claims as 1 joint claim for the purposes of this Act, unless the employer has genuine reasons, based on reasonable grounds, for not treating the claims as a joint claim; and
- (b) must notify all claimants as to whether their claims will be dealt with jointly or separately. 5
- 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 10
- (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: 15
- (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 15(1)(c)(iv)**,—
- (i) the claimant's name; and 20
- (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— 25
- (a) must not provide the information 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 of a representative under **section 15(1)(c)(iv)**, provide details of the name and address for service of the claimant's representative; and 30
- (c) must keep the claimant, or the claimant's representative, 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— 35
- (a) delivered to the claimant in person; or
- (b) sent to the claimant by any form of electronic communication that is ordinarily used for formal communications; or
- (c) given in any manner specified in the claimant's employment agreements.

Process for consolidated claims

- (6) Claimants who have been notified that their claim 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 5
 - (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: 10
- (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. 15

20 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, work, the employers may agree to consolidate those claims for the purposes of the pay equity bargaining process. 20

Process for consolidated claims

- (2) An employer's agreement to consolidate pay equity claims must include provisions that set out—
- (a) whether there will be 1 or more representatives for the employers and who that representative or those representatives will be; and 25
 - (b) how decisions relating to the claim will be made.
- (3) If 2 or more employers decide 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) the name of every other employer that is a party to the consolidated claim; and 30
 - (b) the name and address for service of the nominated representative of each employer.
- (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. 35

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 ordinarily used for formal communications; or
- (c) given in any manner specified in the claimant's employment agreement.

21 Good faith in pay equity bargaining process 5

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 22 to 40**, to resolve the pay equity claim; and
- (b) use their best endeavours to enter into an arrangement, as soon as possible after the start of pay equity bargaining, that sets out a process for conducting the bargaining in an effective and efficient manner; and 10
- (c) use their best endeavours to settle the pay equity claim in an orderly 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 15
- (e) not undermine, or do anything that is likely to undermine, the bargaining or the authority of another party in the bargaining. 20

Compare: 2000 No 24 s 32

22 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. 25
- (2) A request by a party to another party for information must—
 - (a) be in writing; and
 - (b) specify the nature of the information requested in sufficient detail to enable the information to be identified; and 30
 - (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 reasonably considers that the information requested should be treated as confidential information may, instead of providing the information to the requesting party, provide it to an independent reviewer. 35

- (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 32
- 23 Matters to be assessed** 5
- (1) The parties to a pay equity claim must assess—
- (a) the nature of the work to which the claim relates, and the nature of comparable work, including, in each case, the following:
 - (i) the skills required:
 - (ii) the responsibilities imposed or assumed: 10
 - (iii) the working conditions:
 - (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; and
 - (b) the remuneration that is paid to the persons who perform the work to which the claim relates; and 15
 - (c) the remuneration that is paid to persons who perform comparable work.
- (2) The assessments required by **subsection (1)** must—
- (a) be undertaken objectively and without assumptions based on sex (and prevailing views as to the value of work must not be assumed to be free of assumptions based on sex); and 20
 - (b) recognise the importance of skills, responsibilities, effort, and conditions that commonly are or have been 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). 25
- (3) Despite **subsection (1)**, the parties to a pay equity claim may enter a written agreement that sets out an alternative method that they will use to assess the claim.
- (4) If the parties enter a written agreement under **subsection (3)**, they must follow the alternative method set out in that agreement to assess the claim, and **subsections (1) and (2) and section 24** do not apply. 30
- 24 Identifying appropriate comparators**
- (1) For the purpose of identifying 1 or more appropriate comparators against which to assess a pay equity claim, **comparable work** may include— 35
- (a) work performed by male comparators that is the same as, or substantially similar to, the work to which the claim relates; and

- (b) work performed by male comparators that is different to the work to which the claim relates, if the comparators' work involves 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: 5
 - (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; and 10
- (c) work performed by any other comparators that the parties or the Authority or court considers useful and relevant, including comparators who perform work that has previously been the subject of a pay equity settlement. 15
- (2) For the purposes of this section, work is **performed by male comparators** if, of the employees in New Zealand performing that work, more than 50% are male.
- (3) For the purpose of identifying 1 or more appropriate comparators against which to assess a pay equity claim under **section 23(1)**, comparators that are most closely related to the employer must be selected as follows: 20
- (a) if 1 or more appropriate comparators are employed by the same employer, that comparator or those comparators must be selected for the assessment:
 - (b) if no appropriate comparator is employed by the same employer, 1 or more comparators from similar employers must be selected for the assessment: 25
 - (c) if neither **paragraph (a)** nor **paragraph (b)** applies, appropriate comparators from within the same industry or sector must be selected for the assessment: 30
 - (d) comparators from a different industry or sector may be selected for the assessment only if no other appropriate comparators exist.
- (4) Despite **subsections (1) to (3)**, work performed by a male comparator may not be selected for the purposes of assessing a pay equity claim under **section 23(1)** if the work performed by that male comparator is work that there are reasonable grounds to believe— 35
- (a) has been historically undervalued for 1 or more of the reasons set out in **section 14(3)**; and
 - (b) continues to be undervalued for the reasons set out in **section 14(4)**.
- (5) **Subsections (3) and (4)** prevail over **subsection (1)**. 40

*Settling a pay equity claim***25 Settling pay equity claim**

- (1) A pay equity claim is settled—
- (a) when—
- (i) remuneration is determined that the parties agree does not discriminate on pay equity grounds; and 5
- (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 10
- (b) when the Authority or the court—
- (i) determines that an employee’s terms and conditions of employment do not discriminate on pay equity grounds; or
- (ii) issues a determination that fixes terms and conditions of employment that do not discriminate on pay equity grounds. 15
- (2) An employer may not reduce any terms and conditions of employment of an employee who has made a pay equity claim for the purpose of settling that claim.
- (3) A pay equity claim settlement must— 20
- (a) be in writing; and
- (b) state—
- (i) that it is a pay equity 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 25
- (iv) the employee’s occupation and position; and
- (v) the terms and conditions of employment, including remuneration, that the parties agree do not discriminate on pay equity grounds; and
- (vi) the process for reviewing those terms and conditions to ensure that pay equity is maintained; and 30
- (vii) the frequency of those reviews, which must be aligned with any applicable collective bargaining rounds.
- (4) If the requirements of **subsections (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). 35

26 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 justification for a failure to conclude collective bargaining between that employer and a union representing the employer's employees. 5

*Mediation***27 Parties may refer issues to mediation**

- (1) Any party to a pay equity claim may refer any 1 or more issues relating to that claim to mediation services provided under Part 10 of the Employment Relations Act 2000. 10
- (2) Issues that may be referred to mediation services include, but are not limited to, the following:
- (a) a dispute as to whether the pay equity claim has merit (*see section 14*): 15
 - (b) a dispute as to whether work performed by others is comparable work for the purposes of the assessment required by **section 23**:
 - (c) a dispute as to whether proposed remuneration no longer discriminates on pay equity grounds 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. 20

*Facilitation***28 Purpose of facilitating pay equity claim**

- (1) The purpose of **sections 29 to 36** 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. 25
- (2) **Sections 29 to 36** do not—
- (a) prevent the parties from seeking assistance from another person in resolving the difficulties; or 30
 - (b) apply to any agreement or arrangement with the other person providing such assistance.

Compare: 2000 No 24 s 50A

29 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. 35

- (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 has merit (*see* **section 14**):
 - (b) a dispute as to whether work performed by others is comparable work for the purposes of the assessment required by **section 23**: 5
 - (c) a dispute as to whether proposed remuneration no longer discriminates on pay equity grounds for the purposes of settling a pay equity claim.
- (3) A reference for facilitation must be made on 1 or more of the grounds specified in **section 30(2)**. 10
Compare: 2000 No 24 s 50B

30 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. 15
- (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; or 20
 - (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 had merit and the subsequent reference relates to the pay equity bargaining process; or 25
 - (b) the circumstances relating to the pay equity claim have changed; or
 - (c) the bargaining since the previous facilitation has been protracted. 30
- Compare: 2000 No 24 s 50C

31 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 35

32 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.
- (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. 5
- (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— 10
 - (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
- 33 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. 15
- (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. 20

Compare: 2000 No 24 s 50F
- 34 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. 25
- (2) This section—
 - (a) applies to avoid doubt; and
 - (b) is subject to any agreement of the parties.

Compare: 2000 No 24 s 50G
- 35 Recommendation by Authority** 30
- (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 has merit: 35
 - (b) the process the parties should follow to reach agreement:

- (c) terms and conditions of employment (including remuneration) that would no longer discriminate on pay equity grounds.
- (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. 5
- Compare: 2000 No 24 s 50H

36 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

10

Determination by Authority

37 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: 15
- (a) a determination as to whether the pay equity claim has merit (*see section 14*):
- (b) a determination fixing terms and conditions of employment (including remuneration) that do not discriminate on pay equity grounds.
- (2) Where an application is made under **subsection (1)**, the Authority or the court— 20
- (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 27**; or
- (ii) facilitation under **sections 28 to 36**; and 25
- (b) may direct the parties to try to resolve the difficulties by mediation or further mediation; but
- (c) if 1 or both of the grounds in **section 30(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— 30
- (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. 35

- (3) If an application for a determination relates to whether a claim has merit despite **section 14(6)**, 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. 5
- Compare: 2000 No 24 s 50K
- 38 If Authority determines pay equity claim has merit**
- If the Authority or the court determines that a pay equity claim has merit, the parties must enter into the pay equity bargaining process in accordance with **sections 19 to 40**. 10
- 39 Process on application to fix terms and conditions**
- (1) If the Authority receives an application under **section 37(1)(b)** to fix terms 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— 15
- (a) direct the parties to try to resolve the difficulties by mediation or further mediation; or
 - (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— 20
- (a) the parties have first tried to resolve the difficulties by mediation, or by any other process recommended by the Authority; and
 - (b) the Authority is satisfied that all other reasonable alternatives for settling the pay equity claim have been exhausted. 25
- 40 Limitation period where pay equity claim is resolved by determination**
- A determination that fixes terms and conditions of employment may also provide for recovery of an amount in respect of arrears of wages under section 131 of the Employment Relations Act 2000, but only in respect of a period that starts on the date on which the employee’s pay equity claim was delivered, sent, or notified to the employer in accordance with **section 15(2)**. 30

Subpart 4—General provisions

Obligation on employers to keep pay equity records

- 41 Pay equity records**
- Every employer who has received 1 or more pay equity claims must keep a record showing— 35

- (a) every pay equity claim lodged by an employee:
- (b) in relation to each pay equity claim,—
 - (i) the employer’s decision as to whether the claim has merit and consequent notice to the employee:
 - (ii) the outcomes of any pay equity bargaining: 5
 - (iii) all notifications to affected employees under **section 16**:
 - (iv) any recommendation by the Authority during facilitation.

Prohibition of adverse treatment of claimants

42 Employee who makes claim must not be treated adversely

- (1) An employer must not treat adversely an employee who makes an equal pay claim, an unlawful discrimination (non-remuneration) claim, or a pay equity claim. 10
- (2) In this section, an employer treats an employee adversely if the employer—
 - (a) refuses or omits to offer or afford to that employee the same terms of employment, conditions of work, fringe benefits, or opportunities for training, promotion, and transfer as are made available for other employees of the same, or substantially similar, qualifications, experience, or skills employed in the same, or substantially similar, circumstances; or 15
 - (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 20
 - (c) retires that employee, or requires or causes that employee to retire or resign. 25
- (3) An employee may make a claim against the employee’s employer or former employer for a contravention of **subsection (1)**.
- (4) A claim referred to in **subsection (3)** 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 making 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 so justifiable. 30

Compare: 1990 No 57 s 5K; 2000 No 24 s 67F

Enforcement

35

43 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:
- (b) if the person is a company or other body corporate, to a penalty not exceeding \$20,000.
- (2) The provisions are—
 - (a) **section 8(1)(a)** (which imposes a duty not to discriminate on the basis of sex between employees who perform the same, or substantially similar, work, in remuneration or in any other terms or conditions of employment): 5
 - (b) **section 17(6)(b)** (which imposes a duty on an employer who decides that a pay equity claim has merit to enter into pay equity bargaining): 10
 - (c) **section 36** (which imposes a duty to deal with the Authority in good faith during facilitation):
 - (d) **section 41** (which imposes a duty on employers to keep records relating to pay equity claims):
 - (e) **section 42** (which prohibits adverse treatment of discrimination claimants). 15
- (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.
- (4) An employee who alleges that a failure to comply referred to in **subsection (1)** has occurred in relation to them may, alone or in conjunction with any other claim under this Act, claim for the recovery of a penalty. Section 135 of the Employment Relations Act 2000 applies, with any necessary modifications, to the claim as if it were an action brought under that section. 20
- (5) A Labour Inspector may bring an action for the recovery of a penalty for a failure to comply referred to in **subsection (1)**. Section 135 of the Employment Relations Act 2000 applies, with any necessary modifications, as if the action had been brought under that section. 25

Compare: 1972 No 118 s 15

Pay equity claims by employees of education service 30

44 Pay equity claims by employees of education service

- (1) For the purposes of a pay equity claim by 1 or more employees of the education service, 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. 35
- (2) If the Commissioner decides that a pay equity claim by 1 or more employees of the education service has merit, or if the Authority or the court determines that

such a claim has merit, the Commissioner must enter into the pay equity bargaining process described in **sections 19 to 40**—

- (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. 10
- (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. 15
- (5) In this section,—
- education service** has the same meaning as in section 2 of the State Sector Act 1988 20
- State Services Commissioner** or **Commissioner** means the State Services Commissioner appointed under section 3 of the State Sector Act 1988.
- Compare: 1988 No 20 s 74

Regulations

- 45 Regulations** 25
- The Governor-General may, by Order in Council, make regulations for 1 or more of the following purposes:
- (a) prescribing matters that must be taken into account when considering or determining whether a pay equity claim has merit under **section 14**;
 - (b) prescribing matters that must be taken into account when assessing a pay equity claim under **section 23**; 30
 - (c) prescribing matters that must be taken into account when identifying appropriate comparators under **section 24**.

Compare: 1972 No 118 s 19

Part 3

Related amendments and repeals

- 46 Related amendments to Employment Relations Act 2000**
Sections 47 and 48 amend the Employment Relations Act 2000.
- 47 Section 100A amended (Codes of employment practice)** 5
- (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. 10
- 48 Section 100C replaced (Authority or court may have regard to code of practice)**
- Replace section 100C with: 15
- 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 or not the enactment to which it relates has been complied with.
- (2) The Authority or court may— 20
- (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 25
- 49 Consequential amendments to Employment Relations Act 2000**
 Amend the Employment Relations Act 2000 as set out in **Schedule 2**.
- 50 Repeals**
- (1) The Equal Pay Act 1972 (1972 No 118) is repealed.
- (2) The Government Service Equal Pay Act 1960 (1960 No 117) is repealed. 30

Schedule 1

Transitional, savings, and related provisions

s 6

Part 1

Provisions relating to this Act as enacted

5

1 Interpretation

In this Part of this schedule, **Equal Pay Act claim** means any claim (whether formally commenced by way of application to the Authority or a court or not) that alleges a breach of a provision in the Equal Pay Act 1972.

2 New claims

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(1) After the commencement of this Act, no new Equal Pay Act claim may be commenced.

(2) However, a claim may be made under **section 8** of this Act in respect of conduct that occurred before the commencement of this Act that breached the equivalent provisions of the Equal Pay Act 1972.

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(3) **Subclause (2)** is subject to **section 12** of this Act.

3 Existing claims at commencement of Act discontinued but may be recommenced

(1) This clause applies to any application, or part of an application, if—

(a) it is an Equal Pay Act claim; and

20

(b) it was formally commenced by way of application to the Authority or a court before the date on which this Act came into force; and

(c) the Authority or court has not made a final determination of the application before the date on which this Act came into force.

(2) An application to which this clause applies is discontinued, but may be recommenced under—

25

(a) **section 11(1)**, if the claim comprises an allegation of discrimination in respect of remuneration contrary to **section 8(1)(a)**; or

(b) **section 11(3)**, if the claim comprises an allegation of discrimination in respect of terms and conditions of employment other than remuneration contrary to **section 8(1)(a)**; or

30

(c) **section 14**, if the claim comprises an allegation of discrimination in respect of remuneration contrary to **section 8(1)(b)**.

- 4 Limitation periods applicable to recommenced claims relating to remuneration**
- (1) If an Equal Pay Act claim is discontinued and then recommenced in accordance with **clause 3(2)(a)**,—
- (a) **section 12** does not apply to the recommenced claim; but 5
- (b) the claimant may not recover remuneration related to any period that is more than 6 years before the original date of filing.
- (2) If an Equal Pay Act claim is discontinued and then recommenced in accordance with **clause 3(2)(c)**, any determination that fixes terms and conditions of employment must not provide for recovery of an amount in respect of any loss or damage (whether under section 131 of the Employment Relations Act 2000 or otherwise) that occurred before— 10
- (a) the original date of filing, if that date was earlier than **26 July 2017**; or
- (b) the date on which this Act came into force, if the original date of filing was on or after **26 July 2017**. 15
- (3) In this clause, **original date of filing** means the date on which the application that was discontinued was originally filed in the Authority or, if the application was not filed originally in the Authority, the date on which the application was originally filed in the court.
- 5 Appeals** 20
- (1) This clause applies to any application, or part of an application, if—
- (a) it is an Equal Pay Act claim; and
- (b) the Authority or court in which the application was commenced has made a determination on the application before the date on which this Act came into force. 25
- (2) Any appeal against, or challenge to, a determination of an application to which this clause applies must be determined in accordance with the provisions of the Equal Pay Act 1972, as if that Act had not been repealed by this Act.
- 6 Claims to which an existing written pay equity bargaining agreement applies** 30
- (1) This clause applies to an Equal Pay Act claim if—
- (a) the parties to the claim are 1 or more employees (or their representatives) and 1 or more employers (or their representatives); and
- (b) before the date on which this Act came into force, the parties signed a written agreement that requires them to undertake a pay equity bargaining process that includes an assessment of the matters set out in **section 23**. 35
- (2) If this clause applies,—

-
- (a) a pay equity claim under **sections 8(1)(b) and 14** is deemed to have been made in accordance with the requirements of **section 15**; and
- (b) the employer is deemed to have decided that the claim has merit in accordance with the requirement in **section 17**; and
- (c) **sections 19 to 39** apply accordingly; and 5
- (d) any determination that fixes terms and conditions of employment must not provide for recovery of an amount in respect of any loss or damage (whether under section 131 of the Employment Relations Act 2000 or otherwise) that occurred before—
- (i) the date on which the parties entered into the written agreement, if that date was earlier than **26 July 2017**; or 10
- (ii) the date on which this Act came into force, if the date on which the parties entered into the written agreement was on or after **26 July 2017**.
- (3) Any pay equity bargaining that took place before this Act came into force, may be taken into account for the purposes of **sections 30(2)(b), 37(2), and 39(2)(b)**. 15
- 7 Existing Equal Pay Act claim settlement agreements**
- A written settlement agreement entered into between 1 or more employers and 1 or more employees before the date of commencement of this Act must be treated as an existing pay equity claim settlement for the purposes of **section 14(6)**, if the process undertaken by the parties to reach that settlement involved an assessment of the matters set out in **section 23**. 20

Schedule 2
Consequential amendments to Employment Relations Act 2000

s 49

Section 4

After section 4(4)(e), insert: 5

- (ea) making claims, responding to claims, and bargaining under **subpart 3 of Part 2 of the Employment (Pay Equity and Equal Pay) Act 2017** (which relates to pay equity claims):

Section 4A

Replace section 4A(b) with: 10

- (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 15
 - (iii) undermine an employment relationship; or
 - (iv) undermine bargaining for a pay equity claim; or

Section 5

In section 5, definition of **employment standards**, replace paragraph (b) with:

- (b) the requirements of **sections 8(1)(a) and 11 to 13 of the Employment (Pay Equity and Equal Pay) Act 2017**: 20

Section 50F

Replace section 50F(1) with:

- (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 (Pay Equity and Equal Pay) Act 2017**. 25

Section 137

After section 137(1)(a)(iiib), insert:

- (iiic) any pay equity claim settlement under the **Employment (Pay Equity and Equal Pay) Act 2017**; or 30

Section 161

After section 161(1)(m)(iia), insert:

- (iib) under **section 43 of the Employment (Pay Equity and Equal Pay) Act 2017**:

After section 161(1)(qc), insert: 35

Section 161—*continued*

- (qd) all matters arising under the **Employment (Pay Equity and Equal Pay) Act 2017** and, in particular—
- (i) determining equal pay claims and unlawful discrimination (non-remuneration) claims made under **section 11** of that Act:
 - (ii) determining disputes as to whether a pay equity claim has merit under **section 14** of that Act: 5
 - (iii) determining disputes as to whether work is comparable work for the purposes of the assessment required by **section 23** of that Act:
 - (iv) fixing terms and conditions of employment (including remuneration) that do not discriminate on pay equity grounds under **section 37(1)(b)** of that Act: 10

In section 161(2), replace “and (f)” with “(f), and **(qd)(ii) to (iv)**”.

Section 223

In section 223(1)(b), replace “Equal Pay Act 1972” with “**Employment (Pay Equity and Equal Pay) Act 2017**”. 15

Section 236

In section 236(4)(c), replace “Equal Pay Act 1972” with “**Employment (Pay Equity and Equal Pay) Act 2017**”.