



Submission on the Draft Employment (Pay Equity and Equal Pay) Bill

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The Gender & Diversity Research Group at AUT leads socially relevant and high quality interdisciplinary research focusing on gender and diversity in work, organisations and society. Dr Julie Douglas' research expertise is in gender and employment relations and she is known for her work on the gendered social construction of skills. Dr Katherine Ravenswood is co-leader of the Gender & Diversity Research Group. Her research centres upon gender and employment relations and she is known for her work on gender and care/work regimes.

Summary of Submission

The Draft of the Employment (Pay Equity and Equal Pay) Bill as it stands creates barriers to women making equal pay claims, with a substantial onus on individual women to conduct research and write claims containing information that current policy makers in government and industry seldom research and write themselves. The process outlined also places greater onus on women than the employers who have discriminated against them.

The Draft Bill potentially worsens the situation for women in their struggle for equal and equitable pay and work. We recommend that at the very least substantial changes be made to the Bill, but that consideration be made to retain the Equal Pay Act 1972 instead.

We are particularly concerned about the onus of 'merit' in a claim, the comparators, and that the process appears to place employers in a more powerful position of decision making than the women making claims.

Background

As the Commentary document for public consultation (MBIE, 2017) notes, the decision in the Court of Appeal in the *Terranova Homes and Care Ltd v Service and Food Workers Union Nga Ringa Tota Incorporated* and *Kristine Bartlett* case specified that the Equal Pay Act 1972 allowed both the consideration of equal pay and pay equity. The decision meant that the way in which skills and experience are valued can be compared across occupational, professional and industry boundaries. This decision has then been the basis of the negotiations of the Joint Working Group on Pay Equity Principles.

The decision and subsequent work on equal pay and pay equity is a welcome advancement in New Zealand's social and economic development. As a country that prided itself on equality and opportunity, our progress towards equality and equity for women has been somewhat glacial (Ryan et al., 2014). Labour market statistics indicate significant differences across industries and even within industries. For example, even in female dominated industries such as retail, healthcare and social assistance, and accommodation and food, the average hourly wage for women is lower than for men (Infoshare, 2016). While there are many arguments that centre around unequal distribution of care responsibility (Ravenswood and Smith, 2017) and women's higher participation in part-time work than full-time work as an explanation for women's lower wages, recent research has clearly indicated that gender discrimination must be a key cause for otherwise unexplained gender pay gaps (Pacheco et al., 2017).

Some of this gender discrimination may possibly be attributed to organisational policy that values ideals of workers who can dedicate themselves to long hours of work without the distraction of family or other non-work commitments (Acker, 2006). Some of this is also attributed to individuals, to managers and professionals who prefer to employ people 'like them' and base decisions on an unconscious bias that men are better suited for the job. Others argue that women need to learn the skills to negotiate higher wages with their employer. However, given evidence that women do not have transparent information on wages in their occupation (McGregor et al., 2016) expecting them to bargain or argue for more is placing them in an inferior position from the outset.

At a national level, our regulatory environment favours a dedicated worker who is in paid work, and works full-time work regardless of care responsibilities for family and community (Ravenswood & Smith, 2017). These discriminatory gender regimes and norms have often been below the surface and hidden from view (Ravenswood & Markey, 2017). Indeed, discriminatory gender regimes are ingrained in every day life, even accepted (Graham-Davies et al., 2017). Gender norms that undervalue and inhibit women are so ingrained that women often accept them, or are reluctant to address and challenge them (Graham Davies et al., 2017). Any change to our law must acknowledge that women making equal pay and pay equity claims are coming from a socially and economically disempowered position.

However, while these reasons are all part of the systemic gender discrimination in the labour market and regulatory environment, they do not strictly address how gender discrimination has over a long period of time undervalued the skills that belong to any job that is carried out predominantly by women. 'Feminine' jobs have long been undermined, and the skills and experience required for them perceived to be lesser than jobs that are carried out by men (Ravenswood & Harris, 2016). This is what has been uncovered most recently during the *Terranova v Service and Food Workers Union* cases.

Care work is an example of how the very skills, competencies, experience and attributes that are required and expected of a job have been gendered feminine, and therefore valued and rewarded at a lower level than those belonging to jobs that are perceived to be more masculine. The work itself has a gendered, feminine identity (Folbre & Nelson, 2000; Nentwich & Kelan, 2014; Ravenswood & Harris, 2016). This means that whoever does this work (male or female) will receive the same low rates that the job is valued at. This is an issue not of individual discrimination, but of gender discrimination on an occupational or professional basis, and often by industry as well.

Although some may argue that, for example, job sizing software used by organisations and HR professionals to work out appropriate pay scales is an objective, merit based system these are based on traditional concepts of skill and status. These are the same concepts that have consistently devalued 'feminine' jobs and skills (Neysmith and Aronson, 1996) since the industrial revolution. The assessment of skills and their value in the labour market fails to acknowledge that these are based on the norms and expectations of employees, employers and society, such as those based on gendered stereotypes (Douglas, 2013).

Often this gendered assessment of skills fails to overlook the complexity of the job. For example, care work assessment usually neglects the judgement and knowledge required to observe and make decisions about the mental and physical health and ability of a client (England et al., 2002). Indeed a lot of the skills expected of service and care work (in which women predominate), are now termed 'soft skills'. Traditional skill assessment has favoured technical and manual skills (Bourgeault & Khokker, 2006; Wajcman, 1990) which are admittedly easier to measure, but are also more often associated with male dominated occupations and professions. This means that our tools and systems are not well suit to assessing the 'soft' skills in service and knowledge work in which women have higher participation rates.

Given long entrenched gender discrimination in our regulatory environment, organisational policy and individual decisions, in many cases it will be necessary to prepare a skill assessment with a comparator that is outside of the occupation, profession or industry that an employee raising a pay equity claim works within. Failure to look outside of her occupation or industry may indeed exacerbate and perpetuate the underlying gender discrimination enmeshed in our systems. It is also essential that transparency and accessibility of information is paramount. Finally, the draft Bill requires women to undertake full analysis of historic and current labour market conditions that have led to gender pay discrimination in order to make their claim. This is something that arguably has not yet been done by government or employers in any detail. This is an unequitable requirement and does not increase accessibility, or work towards the elimination of gender discrimination.

The following are our submissions and recommendations on amendments to be made as the Bill progresses through Parliament. We note that its introduction for submissions has been hasty with public notification allowing less than one month for consultation and submissions. This is less than ideal for something that significantly affects the working lives and livelihoods of women in New Zealand. If the Bill proceeds we expect that much more time be allowed to ensure that it does not worsen women's ability to make equal pay and pay equity claims and to address gender discrimination in their employment conditions.

Clause by Clause Submissions

Clause 8 Equal Treatment

It is essential that employers have an obligation to prevent gender discrimination occurring in the employment process, and that this obligation exists prior to any employee raising a claim under the proposed Bill. Equal Treatment must also deal with some of the less visible aspects of equal pay such as gender discrimination in skill evaluation tools, and within organisations but between different occupational groupings:

- 1) We recommend that Clause 8 includes an obligation to evaluate jobs using tools that aim to avoid gender discrimination based on gender stereotypes of skills and their value. Employers should be able to identify the software or other tool, with an explanation of how it assesses skills from a gender neutral position.
- 2) Clause 8 must specifically recognise that within some organisations, there will be gendered occupational differentiation. Employers must prevent gender discrimination between occupations (with the example of IT and archival/librarian roles within organisations such as professional and service firms). Employers must be able to show that qualification, experience and skill requirements across their organisation are evaluated and remunerated free of gender discrimination and regardless of the job title.

Clause 14

This clause does not support an accessible process for employees to address gender discrimination under equal pay and pay equity. There are two issues that need to be addressed. The first is around who can make a claim and the second is the burden of providing justification. As it currently is written, the clause does not acknowledge the imbalance of power between employees and employers (also an explicit objective in the Employment Relations Act 2000) and the labour market which has led to unequal and unequitable pay (Douglas, 2013). Systemic gender discrimination has occurred because of the biases individuals in power hold and the decisions made in the labour market and regulatory environment (Bourgeault & Khokker, 1996; Gregory & Duncan, 1981). It is inequitable to require a claimant to counteract this.

Clause 14 (1) allows 'One or more employees of an employer' to make a claim. However, Clause 19 (5) enables employers to consolidate claims if they 'receive pay equity claims made by employees who perform the same, or substantially the same, work'. This again creates an imbalance in power, contrary to the objectives of the Bill and the Employment Relations Act 2000.

Clause 14 (2) places undue burden on employees to prove gender discrimination. This involves considerable knowledge of job evaluation, the labour market and regulatory environments over a period of time. These are resources and knowledge not usually held by employees. Employers are more logically placed to hold this information as they make decisions about employment and employment policy. Indeed the decisions and policy that has discriminated against their employees. They often have more resources available. Furthermore, this burden on the claimant would defeat the purpose of the Bill to 're-enact, in an up-to-date and *accessible* form, the Equal Pay Act 1972.

We recommend that:

- 1) Clause 14 (1) be amended to allow 1 or more employees of 1 or more employers who perform the same, or substantially the same, work to make a pay equity claim.
- 2) Clause 14 be amended so that employees should not have to provide a detailed basis for their claim but that employers should have to *disprove* discrimination with a detailed response assessing

merit along the lines required in the Draft Bill in clause 14. This would ideally be done in full consultation with the claimant(s).

Clause 15 requirements relating to pay equity claims

The process set out in Clause 15 and the requirements in Clause 14 presupposes that the employee/claimant has full and accessible information on wages and salaries within their organisation. They are therefore required to undertake significant work to prove that they have been discriminated against *before* they have all the information required to lodge their claim. This appears to be counter to the purpose of the *Bill* to be accessible. It also appears to run counter to elements of Good Faith that encourage sharing of information and willingness to negotiate openly. Clause 21 deals with the duty to provide information, but this is only after the claim has been made.

We recommend changes to the process set out in Clause 15 to incorporate an obligation on the employer to provide remuneration and other related information to an employee if requested *before* any formal pay equity claim. This information would be provided in Good Faith and confidentially, and could be anonymised so that the identity of individuals and their wages etc would not be obvious.

Clause 23 (2) Identifying comparators

As is currently written Clause 23 (2) prevents the process of Good Faith in negotiating the pay equity claim by putting unnecessary constraints on the selection of a comparator(s).

We recommend that the hierarchy of where comparators are found is removed, and that multiple comparators are encouraged as part of a robust process. We recommend amendments to the wording such as:

23 (2). For the purpose of identifying at least one appropriate comparator against which to assess a pay equity claim under section 22(1), appropriate comparators may be selected by mutual agreement from any of the following (in no particular order):

- a) The employer's business
- b) Similar businesses to the employer's business
- c) From within the same industry or sector
- d) From a different industry or sector
- e) In unusual cases from businesses or industries or sectors internationally

Clause 40 Pay Equity Records

This Bill aims for greater accessibility to equal pay and pay equity claims. It also aims for an efficient and orderly process as referred to in Clause 20 (3). Greater accessibility and an efficient process would be achieved through a public record of claims made and the outcomes of said claims.

We recommend that Clause 40:

- 1) Include an obligation on employers who received 1 or more pay equity claims to provide an annual report to the Employment Relations Authority. This report would include the original claim, the employer's full decision on its merit, and a summary of any negotiated outcome.
- 2) Include provision for the Authority (or delegated ministry such as the Ministry of Business, Innovation and Employment) to provide a publicly available database (web based, for example) of all the employer annual reports on pay equity claims.

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