

# Departmental Disclosure Statement

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Equal Pay Amendment Bill
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A revised departmental disclosure statement for a Bill the government is proposing to amend seeks to bring together in one place a range of information to support and enhance the Parliamentary and public scrutiny of that Bill in amended form.

It highlights material changes to previous disclosures relating to:

- the general policy intent of the Bill and other background policy material;
- some of the key quality assurance products and processes used to develop and test the content of the Bill;
- the presence of certain significant powers or features in the Bill that might be of particular Parliamentary or public interest and warrant an explanation.

The original disclosure statement for the Equal Pay Amendment Bill (the Bill), dated 5 September 2018, can be found at this [link](#).

This disclosure statement was prepared by the Ministry of Business, Innovation and Employment

The Ministry of Business, Innovation and Employment certifies that, to the best of its knowledge and understanding, the information provided is complete and accurate at the date of finalisation below.

16 July 2020.

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## The Main Areas of Change to the Original Disclosures

This is a revised disclosure statement for the Equal Pay Amendment Bill.

A revised disclosure statement incorporates the content of the original disclosure statement for the Bill, but also includes and highlights the changes needing to be made to the original disclosure statement to accurately reflect the Bill with the proposed government amendments incorporated.

Where the Bill now also incorporates changes made by a select committee of the House, the revised disclosure statement will note these if relevant but will not explain them further. Additions to the revised disclosure statement are made through underlined text and deletions by strikethrough.

The main areas of change to the original disclosure statement include:

- Updating the General Policy Statement to reflect changes made by the SOP to the Bill.
- Substantive updates have been made to the following sections: Regulatory Impact Analysis, International Obligations, Offences, Penalties and Court Jurisdiction, Privacy, and Retrospective Action.

## Part One: General Policy Statement

### *Introduction*

The purpose of this Bill is to improve the process for raising and progressing pay equity claims and eliminate and prevent discrimination, on the basis of sex, in the remuneration ~~and employment terms and conditions~~ for work done within female-dominated jobs. It aims to provide a simple and accessible process for claimants to progress a pay equity claim. In doing so, it also aims to promote the enduring settlement of claims relating to sex discrimination on pay equity grounds.

The Bill -

- amends the Equal Pay Act 1972 to establish a process for pay equity claims, while still retaining the rights and processes for claimants to raise equal pay and unlawful discrimination claims; and
- prohibits differentiation based on sex in the rate of remuneration, offered to employees for work that is predominately performed by women and ~~has been historically or currently~~ is undervalued; and
- enables employees to raise claims relating to sex discrimination in employment; and
- sets out the process for resolving a pay equity claim that is simple and accessible; and
- permits the courts or the Employment Relations Authority (the Authority) to award an amount of back pay in a pay equity determination.

Implementing these policies also requires amendments to the Employment Relations Act 2000

### **Process for making and resolving pay equity claims**

The Bill provides employees and unions with a new process to raise a pay equity claim. An employee ~~or group of employees~~ may raise a pay equity claim with their employer. A union may raise a pay equity claim with a single employer or across multiple employers where they have union members. The union will represent all employees doing the same or substantially similar work in that employer, unless non-union members opt out of being represented by the union. ~~or group of employers.~~ If ~~their employer or employers~~ considers the claim to be arguable then the parties will proceed to pay equity bargaining. A pay equity claim is arguable if it relates to work that is predominately performed by female employees and if the work is currently or has been historically undervalued. This reflects the policy intent that the threshold for raising a claim should be low so as to not create unnecessary hurdles for claimants, and that the process should be simple and accessible.

If a claim is arguable, this does not mean that there is a pay equity issue or that there will be a pay equity settlement. However, the employer and the employee or union ~~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. Claimants can use appropriate comparators against which to assess a pay equity claim. Appropriate comparators include any of the following:

- work that is the same or substantially similar work (but that is not predominately performed by female employees):
- work that involves the same or substantially similar skills and experience, responsibilities, working conditions, or degrees of effort:
- any other comparator that the parties, or the Authority consider useful and relevant.

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 Authority for a determination relating to whether the claim is arguable, whether the work is ~~currently, or has historically been,~~ undervalued, or fixing remuneration 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 pay equity are distinct, and entry into a collective agreement by an employer and a union does not settle or extinguish an unsettled pay equity claim between an employer and employee.

The Bill permits the courts or Authority to award back pay, in a way that balances the issues of addressing undervaluation and the structural nature of the discrimination while incentivising employers to address pay equity issues within the first 11 years following legislation being passed, with the incentives being progressively stronger after the first 5 years. The Bill also sets out factors that the courts or Authority must take into account when deciding whether to award back pay, and the amount, if any, to provide.

### **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 and to provide guidance on the application of the Employment Relations Act 2000 and other employment legislation.

## Part Two: Background Material and Policy Information

### Published reviews or evaluations

<b>2.1. Are there any publicly available inquiry, review or evaluation reports that have informed, or are relevant to, the policy to be given effect by this Bill?</b>	<b>YES</b>
<p>The Bill is part of the Government’s response to the Court of Appeal’s interpretation of the Equal Pay Act 1972 in the TerraNova case. In that case, the Court endorsed the view that the Equal Pay Act incorporates a pay equity regime for female dominated work. This means the Equal Pay Act is not just targeted at equal pay (the same pay for the same work), but also includes pay equity (the same pay for work of equal value).  <a href="https://www.employmentcourt.govt.nz/assets/Documents/Decisions/2014-NZCA-516-CA631-2013-Terranova-Homes-Care-Limited-v-Service-Food-Workers-Union-Inc-and-Bartlett.pdf?SubsiteID=1">https://www.employmentcourt.govt.nz/assets/Documents/Decisions/2014-NZCA-516-CA631-2013-Terranova-Homes-Care-Limited-v-Service-Food-Workers-Union-Inc-and-Bartlett.pdf?SubsiteID=1</a></p> <p>The Joint Working Group on Pay Equity Principles (the JWG) provided “Recommendations of the Joint Working Group on Pay Equity Principles” for the Minister of State Services, Hon Paula Bennett, and the Minister for Workplace Relations and Safety, Hon Michael Woodhouse on 24 May 2016. <a href="http://www.ssc.govt.nz/sites/all/files/pay-equity-jwg-recommendations.pdf">http://www.ssc.govt.nz/sites/all/files/pay-equity-jwg-recommendations.pdf</a></p> <p>The Joint Working Group was reconvened in November 2017 to reaffirm the principles of the original Joint Working Group and to provide further recommendations on a number of key issues. The Reconvened Joint Working Group on Pay Equity Principles reported back to the Minister of Workplace Relations and Safety, Minister Iain Lees-Galloway, and Minister Julie Anne Genter, Minister for Women on 27 February 2018.  <a href="https://www.beehive.govt.nz/sites/default/files/2018-03/RJWG%20Pay%20Equity%20Principles%20letter%20of%20transmission%20FINAL%20.pdf">https://www.beehive.govt.nz/sites/default/files/2018-03/RJWG%20Pay%20Equity%20Principles%20letter%20of%20transmission%20FINAL%20.pdf</a></p>	

### Relevant international treaties

<b>2.2. Does this Bill seek to give effect to New Zealand action in relation to an international treaty?</b>	<b>NO</b>
<p>No, although the Bill will provide a positive contribution towards New Zealand’s compliance with the International Labour Organisation (ILO) Convention 100 on Equal Remuneration as well as the United Nations Convention on the Elimination of All Forms of Discrimination against Women.</p>	

<b>2.2.1. If so, was a National Interest Analysis report prepared to inform a Parliamentary examination of the proposed New Zealand action in relation to the treaty?</b>	<b>NO</b>
<p>New Zealand ratified ILO Convention 100 in June 1983. The Ministry of Business, Innovation and Employment (and previously the Department of Labour) report regularly on New Zealand’s compliance with the Convention.</p>	

## Regulatory impact analysis

<b>2.3. Were any regulatory impact statements provided to inform the policy decisions that led to this Bill?</b>	<b>YES</b>
<p>Equal Pay Act 1972: Principles and Process, Ministry of Business, Innovation and Employment, May 2018 <u>February 2020</u>,  <a href="https://www.mbie.govt.nz/assets/5fc14e7ee0/regulatory-impact-statement-equal-pay-act-1972-principles-process.pdf">https://www.mbie.govt.nz/assets/5fc14e7ee0/regulatory-impact-statement-equal-pay-act-1972-principles-process.pdf</a> <a href="http://www.mbie.govt.nz/info-services/employment-skills/legislation-reviews/exposure-draft-employment-pay-equity-and-equal-pay-bill/documents-and-images/ris-pay-equity.pdf">http://www.mbie.govt.nz/info-services/employment-skills/legislation-reviews/exposure-draft-employment-pay-equity-and-equal-pay-bill/documents-and-images/ris-pay-equity.pdf</a>.</p>	

<b>2.3.1. If so, did the RIA Team in the Treasury provide an independent opinion on the quality of any of these regulatory impact statements?</b>	<b><u>NO</u> YES</b>
<p>The Regulatory Quality Team Panel at the Treasury MBIE has reviewed the revised Regulatory Impact Assessment (RIA) "Equal Pay Act: Principles and Processes" produced prepared by the Ministry for Business, Innovation and Employment MBIE and the Ministry for Women and dated February May 202018. The review team Panel considers that the information and analysis summarised in the Statement partially meets the Quality Assurance criteria necessary for Ministers to make informed decisions on the proposals.</p> <p>While two major stakeholders, BusinessNZ and the NZCTU, have been consulted, the Panel was concerned that other affected stakeholders, particularly small businesses, were not consulted and given the stage that the Bill is at there will be little, if any, opportunity for these stakeholders to have a say on these proposals. This means there is a risk that the impacts of these changes has not been fully considered.</p> <p>The analysis is commensurate with the scale of the issue, with the options identified and described well, and assessed against consistent criteria relative to the status quo.</p>	

<b>2.3.2. Are there aspects of the policy to be given effect by this Bill that were not addressed by, or that now vary materially from, the policy options analysed in these regulatory impact statements?</b>	<b>NO</b>

## Extent of impact analysis available

<b>2.4. Has further impact analysis become available for any aspects of the policy to be given effect by this Bill?</b>	<b>NO</b>

<b>2.5. For the policy to be given effect by this Bill, is there analysis available on:</b>	
<b>(a) the size of the potential costs and benefits?</b>	<b>YES</b>
<b>(b) the potential for any group of persons to suffer a substantial unavoidable loss of income or wealth?</b>	<b>YES</b>
<p>Analysis has been done however it will not be made publicly available because it is Sensitive while State sector claims are in the process of being negotiated.</p>	

<b>2.6. For the policy to be given effect by this Bill, are the potential costs or benefits likely to be impacted by:</b>	
<b>(a) the level of effective compliance or non-compliance with applicable obligations or standards?</b>	<b>NO</b>
<b>(b) the nature and level of regulator effort put into encouraging or securing compliance?</b>	<b>NO</b>

## Part Three: Testing of Legislative Content

### Consistency with New Zealand's international obligations

#### 3.1. What steps have been taken to determine whether the policy to be given effect by this Bill is consistent with New Zealand's international obligations?

The Ministry of Business, Innovation and Employment's Employment Relations Policy team assessed the policies against the International Labour Organisation Convention 100 - Equal Remuneration Convention, as well as the United Nations Convention on the Elimination of All Forms of Discrimination Against Women, as well as the International Covenant on Economic, Social and Cultural Rights.

#### Relevant International Labour Organisation (ILO) Conventions and Recommendations

This Bill supports New Zealand's obligations under New Zealand has ratified the ILO Convention 100 on Equal Remuneration (ILO C100) and Convention 111 on Discrimination (Employment and Occupation) Convention (ILO C111). New Zealand is obligated by Article 2(1) of ILO C100 to, "ensure the application to all workers of the principle of equal remuneration for men and women workers for work of equal value" and, by Article 2 of ILO C111 to "pursue a national policy designed to promote, by methods appropriate to national conditions and practice, equality of opportunity and treatment in respect of employment and occupation, with a view to eliminating any discrimination in respect thereof."

#### Convention on the Elimination of All Forms of Discrimination against Women (CEDAW)

This Bill supports New Zealand's obligations under the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW), notably Article 2(f) – "to take all appropriate measures, including legislation, to modify or abolish existing laws, regulations, customs and practices which constitute discrimination against women" [emphasis added] and Article 11(d) – "The right to equal remuneration, including benefits, and to equal treatment in respect of work of equal value, as well as equality of treatment in the evaluation of the quality of work". Furthermore, improving economic outcomes for women through pay equity is likely to improve women's enjoyment of other human rights required by CEDAW, such as participation in public life and access to adequate living conditions, as women will be more likely to have sufficient income to meet their needs and those of their whānau.

### Consistency with the government's Treaty of Waitangi obligations

#### 3.2. What steps have been taken to determine whether the policy to be given effect by this Bill is consistent with the principles of the Treaty of Waitangi?

The Ministry of Business, Innovation and Employment's Employment Relations team assessed the policies against the principles of the Treaty of Waitangi and found that the Bill is consistent.

### Consistency with the New Zealand Bill of Rights Act 1990

#### 3.3. Has advice been provided to the Attorney-General on whether any provisions of this Bill appear to limit any of the rights and freedoms affirmed in the New Zealand Bill of Rights Act 1990?

YES

The Ministry of Justice has undertaken an assessment of whether the Bill is consistent with the Bill of Rights Act and has provided advice to the Attorney-General. Advice provided to the Attorney-General is generally expected to be available on the Ministry of Justice's website upon the Bill's introduction.

## Offences, penalties and court jurisdictions

3.4. Does this Bill create, amend, or remove:	
(a) offences or penalties (including infringement offences or penalties and civil pecuniary penalty regimes)?	YES
(b) the jurisdiction of a court or tribunal (including rights to judicial review or rights of appeal)?	YES
<p>(a) The Bill changes the offence provisions in the Equal Pay Act (sections 15 and 18) to penalties, as well as imposing penalties in relation to pay equity. This would empower the Authority and the court to impose pecuniary penalties not exceeding \$10,000 for individuals, and not exceeding \$20,000 for companies or other corporations. The Bill still links into section 235 of the Employment Relations Act 2000 which relates to obstruction of a Labour Inspector being an offence.</p> <p>(b) The Bill removes the right of the court to state principles for pay equity under section 9 of the Equal Pay Act 1972 but leaves the right for equal pay claims.</p> <p>The Bill removes the right of appeal under the existing Equal Pay Act 1972 for certain pre-existing pay equity claims. Under Schedule 1 of the Bill, existing claims that are in substance pay equity claims are discontinued and employees may raise a new claim under the new legislation. This removes the right of appeal for those existing claims except that under Schedule 1 clause 4 any existing pay equity claims which have already <u>commenced hearings or already</u> been determined by the Authority or court may appeal under the Equal Pay Act 1972.</p> <p><u>Currently under section 10 of the Act, the Court is able to examine and vary a collective employment agreement (on its own motion or on the application of one of the parties) to ensure the collective agreement meets the requirements of sections 3-7 of the Equal Pay Act (to ensure equal pay and what is now considered pay equity). This only applies to collective agreements (individual employment agreements are limited to the Employment Relations Authority for examination and amending).</u></p> <p><u>While the Act expressly provides in section 14 that the Authority has the same powers and functions that it has in relation to the Employment Relations Act, it does not do so with the powers of the Court, this is read in via the powers and jurisdiction in the Employment Relations Act.</u></p> <p><u>The Bill <del>also</del> gives the Authority powers, including additional powers under s 161 of the Employment Relations Act to determine matters arising under the Equal Pay Act 1972. These include giving the Authority jurisdiction to determine certain claims and disputes, and fix remuneration terms and conditions (including remuneration) of employment and determine back pay in relation to pay equity claims for both individual and collective employment agreements.</u></p> <p><u>The Bill also amends the Court's powers in relation to its ability to fix remuneration in employment agreements. Section 13ZBA of the Bill would apply in a situation where there is an application for a determination of the Authority that fixes remuneration. If section 13ZBA applies, a party may not elect, under section 179(1) of the Employment Relations Act 2000, to have the matter heard by the court, unless the matter is whether the grounds exist in section 13ZB(2) for the Authority to accept the application.</u></p>	

<b>3.4.1. Was the Ministry of Justice consulted about these provisions?</b>	<b>YES</b>
The Ministry of Justice was consulted in the policy development for the Bill, <u>and specifically the penalty provisions</u> . The penalty provisions were <u>also</u> developed in line with the regime in the Employment Relations Act 2000.	

## Privacy issues

<b>3.5. Does this Bill create, amend or remove any provisions relating to the collection, storage, access to, correction of, use or disclosure of personal information?</b>	<b>YES</b>
<p><del>The Bill allows employees in a consolidated claim to request confidentiality while still being involved in the process through a representative, under clause 13H(4). Under clause 13E(4) when an employer notifies other employees of a pay equity claim the employer must not identify the claimant without the claimant's prior written consent.</del></p> <p><u>To facilitate the proposed bargaining process, employers will be required to pass on the contact information of non-union employees (who have not opted out after a set period) to the union representing them in a pay equity claim.</u></p> <p><u>The Bill stipulates several requirements for the opt-out notification to better ensure that employees understand the implications of their decision to remain in the union claim and have their contact information passed on.</u></p> <p><u>When an employer notifies other employees and unions that an individual has raised a pay equity claim the employer must not provide any identifying information relating to the claimant.</u></p>	

<b>3.5.1. Was the Privacy Commissioner consulted about these provisions?</b>	<b>YES</b>
<p><u>The Privacy Commissioner was briefed on the issue of a 'opt-out' or 'opt-in' design for the sharing of employee information with unions. The Commissioner considered that an 'opt-in' approach would better protect the privacy of individuals and that the 'opt-out' approach may infringe on individual privacy.</u></p> <p><del>The Privacy Commissioner was consulted during the development of the Bill, and suggested some changes regarding certain provisions which were taken on board and implemented.</del></p>	

## External consultation

<b>3.6. Has there been any external consultation on the policy to be given effect by this Bill, or on a draft of this Bill?</b>	<b>YES</b>
<p>The Government reconvened the Joint Working Group on Pay Equity Principles in December 2017 to make recommendations and support principles for a pay equity regime. The Reconvened Joint Working Group included union representatives, business representatives and government officials including officials from the Ministry of Business, Innovation and Employment, the State Services Commission and the Ministry for Women. Industry leader Traci Houpapa, MNZM, was the Crown-appointed facilitator.</p> <p>In addition select members from BusinessNZ and the NZ Council of Trade Unions (who were both leads on the Reconvened Joint Working Group) were consulted <u>in the drafting SOP</u> of the legislation.</p>	

## Other testing of proposals

<b>3.7. Have the policy details to be given effect by this Bill been otherwise tested or assessed in any way to ensure the Bill's provisions are workable and complete?</b>	<b>NO</b>
<p>There has been no formal testing or assessment of the policy details to be given effect by the Bill.</p>	

## Part Four: Significant Legislative Features

### Compulsory acquisition of private property

<b>4.1. Does this Bill contain any provisions that could result in the compulsory acquisition of private property?</b>	<b>NO</b>

### Charges in the nature of a tax

<b>4.2. Does this Bill create or amend a power to impose a fee, levy or charge in the nature of a tax?</b>	<b>NO</b>

### Retrospective effect

<b>4.3. Does this Bill affect rights, freedoms, or impose obligations, retrospectively?</b>	<b>YES</b>
<p>The transitional provisions contained in Schedule One of the Bill apply the new legislation to existing claims that are in substance pay equity claims. <del>For</del> Existing pay equity claims that have lodged an application with the Authority or Court before the date on which the Act comes into force will be discontinued unless the Authority or Court had begun hearing the claim before that date.</p> <p>Where there is an existing pay equity claim to which a written pay equity bargaining agreement applies that either replicates the assessment process and comparator process set out in the Bill (section 13L and section 13M) or specifies a pay equity bargaining process that the parties will use and that they agree is suitable and sufficient to settle the claim, then a pay equity claim is deemed to have been made in accordance with certain requirements in the Bill, such as that the claim must be in writing and state specific matters. <del>The existing Equal Pay Act claims, that are in substance pay equity claims that have been filed or raised with their employer, will all be discontinued and employees may raise a new claim under the provisions of the Bill when it comes into force. We consider that these provisions are necessary and justified to ensure that the policy objective of the new legislation to shift pay equity into a bargaining framework is achieved. This also pertains to, including to limiting pay equity back pay claims which do not involve individual blameworthiness on the part of the employer.</del></p>	

### Strict liability or reversal of the usual burden of proof for offences

<b>4.4. Does this Bill:</b>	
<b>(a) create or amend a strict or absolute liability offence?</b>	<b>NO</b>
<b>(b) reverse or modify the usual burden of proof for an offence or a civil pecuniary penalty proceeding?</b>	<b>NO</b>

### Civil or criminal immunity

<b>4.5. Does this Bill create or amend a civil or criminal immunity for any person?</b>	<b>NO</b>

### Significant decision-making powers

<b>4.6. Does this Bill create or amend a decision-making power to make a determination about a person's rights, obligations, or interests protected or recognised by law, and that could have a significant impact on those rights, obligations, or interests?</b>	<b>NO</b>

### Powers to make delegated legislation

<b>4.7. Does this Bill create or amend a power to make delegated legislation that could amend an Act, define the meaning of a term in an Act, or grant an exemption from an Act or delegated legislation?</b>	<b>NO</b>

<b>4.8. Does this Bill create or amend any other powers to make delegated legislation?</b>	<b>YES</b>
<p>Clause 18, section 13L and 13M 24 of the Bill includes a regulation-making power to prescribe matters to be taken into account when assessing a pay equity claim and when identifying comparable work. Regulations are not required to bring the Bill into operation.</p> <p>Clause 27 of the Bill empowers the Minister to approve codes of employment practice that are deemed to be disallowable instruments. The codes <u>may be used to</u> <del>will</del> provide guidance on the application of the Bill and other relevant employment legislation. This <u>could</u> <del>will</del> help parties understand their rights and obligations and assist with the successful implementation of legislative changes.</p>	

### Any other unusual provisions or features

<b>4.9. Does this Bill contain any provisions (other than those noted above) that are unusual or call for special comment?</b>	<b>NO</b>