# PSA Submission: Draft Employment (Pay Equity and Equal Pay) Bill

**11 May 2017**

PSA
For a better working life
New Zealand Public Service Association
Te Pūkenga Here Tikanga Mahi

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For further information, please contact:


Dairne Grant
Policy Advisor
New Zealand Public Service Association
PO Box 3817
Wellington 6140
Email: dairne.grant@psa.org.nz

# Introduction

The New Zealand Public Service Association Te Pūkenga Here Tikanga Mahi (the PSA) is the largest trade union in New Zealand with over 63,000 members. We are a democratic organisation representing members in the public service, the wider state sector (the district health boards, crown research institutes and other crown entities), state owned enterprises, local government, tertiary education institutions and non-governmental organisations working in the health, social services and community sectors.

The PSA has been advocating for strong, innovative and effective public and community services since our establishment in 1913. People join the PSA to negotiate their terms of employment collectively, to have a voice within their workplace and to have an independent public voice on the quality of public and community services and how they're delivered.

One of the PSA's four strategic goals is to close the gender pay gap by 2024. Equal pay is a human right and has been a longstanding concern of the PSA. Our first conference passed the following resolution in 1914:

> *That female employees of equal competence with male employees shall receive equal treatment as to pay and privileges.*

The PSA requests an opportunity to discuss our submission with the Ministry of Business, Innovation and Employment.

# Overall comments

This Bill is crafted to reduce women's equal pay rights.

The PSA's starting point is the Equal Pay Act 1972, and case law resulting from the Kristine Bartlett case which upheld that the notion of equal pay includes equal pay for work of equal value. The Equal Pay Act 1972 is a well-crafted, fully debated and important development in New Zealand's human rights law. A lengthy commission of inquiry preceded it. We oppose its repeal and replacement with this Bill, which would mark a significant backward step for women in New Zealand.

We welcomed the opportunity to participate in the tripartite Joint Working Group (JWG) which reached a historic consensus to recommend "principles to Government that provide practical guidance to employers and employees in implementing pay equity."[1] The JWG recommendations included pay equity principles and a process by which employers, employees and unions could resolve pay equity claims in an orderly and efficient way utilising the existing employment relations framework.[2] The JWG pay equity principles are consistent with the Equal Pay Act 1972 and the case law established by the Kristine Bartlett case.

The PSA opposes the draft Employment (Pay Equity and Equal Pay) Bill as it is a significant backward step from the Equal Pay Act 1972, the determinations of the courts in respect of the Kristine Bartlett case, and the JWG pay equity principles and process. The draft Bill would weaken women's human rights in respect of equal pay, due to the complexity of making and assessing claims, and the new higher tests at Clauses 14 and 23 which would operate to reduce those rights. Our specific concerns and recommendations are outlined below. If these cannot be accommodated, it would be

[1] http://www.ssc.govt.nz/pay-equity-working-group-terms-reference
[2] http://www.ssc.govt.nz/sites/all/files/pay-equity-jwg-recommendations.pdf

preferable to retain the existing Equal Pay Act and amend it and the Employment Relations Act 2000 to incorporate the JWG principles as was recommended by the JWG.

Our most significant concerns are with:

- Clause 14: Employee may make a pay equity claim – which proposes a test for merit that is too onerous and will make it more difficult for women to make a claim for equal pay for work of equal value:
    - all factors, including historical undervaluation, must be satisfied rather than considered
    - additional factors regarding current systemic undervaluation that were not agreed to by the JWG, including the compulsory reference to the relevant labour market and the definition of it at cl 14 (4).
- Clause 23: Identifying appropriate comparators – which proposes a rigid hierarchy of comparators that undoes the fundamental findings of the courts in the Kristine Bartlett case and would make it impossible for future claimants to reach pay equity settlements
- Clause 44: Regulations – which would allow Cabinet to make changes to core aspects of the JWG Principles as embedded in the Bill, without recourse to a Parliamentary process
- Transitional arrangements – which propose that existing pay equity claims would be addressed under the new law, even if initiated under the Equal Pay Act. This would be inconsistent with constitutional legislative principles concerning the extinguishment of existing human rights and retrospectivity.

Our submission address these fundamental concerns first. The PSA would continue to oppose any future iteration of this Bill that did not address our concerns with these clauses. The remainder of the submission outlines our other comments.

The PSA supports the submission made by the New Zealand Council of Trade Unions.

# Clause 14: Employee may make a pay equity claim

## All factors, including historical undervaluation, must be satisfied to make a pay equity claim

Principle 2 of the JWG outlined three factors which must be <u>considered</u> when determining the merit of an equal pay claim:

- The work <u>must</u> be shown to be predominantly performed by women (Principle 2A)
- The work <u>may</u> have been historically undervalued due to various criterion which are listed (Principles 2B)
- Whether gender-based systemic undervaluation has affected the remuneration of the work due to various criterion which are listed (Principle 2C).

Clause 14(2) as it is currently drafted (with "and" at the end of each sub-clause) means that all of the three factors identified by the JWG at Principle 2 must be met in order for a pay equity claim to have merit. However, JWG Principle 2B is clear that the work "may" have been historically undervalued, this is not a requirement. Further the factors in Principle 2A are not an exhaustive list, they are not linked by "and" – each must be considered, but not all must be satisfied. This imposes a barrier to accessing pay equity.

The reference to "continued undervaluation" in JWG Principle 2Ci is misplaced at the start of Clauses 14(2)(c) and 14(4). In JWG Principle 2Ci, "continued undervaluation" is in connection to the sub-factors listed under Principle 2Ci (i.e. a dominant source of funding across the market, industry or sector, and the lack of effective bargaining). Clauses 14(2)(c) and 14(4), however, misplace "continued undervaluation" into the opening sentence of those clauses and in doing so incorrectly connects "continued undervaluation" with historical undervaluation.

The Employment Court in the Kristine Bartlett case refers to "current or historical or structural undervaluation" (not current and historical) throughout its determination.[3]

The current drafting and structure of clause 14 would mean that female dominated occupations that are currently undervalued but either have not historically been female dominated or undervalued, would not pass the merit test. Those women could lose access to equal pay for work of equal value.

There is now a wealth of evidence that the value of previously male dominated occupations declines when they are feminised. For example, a study of USA census data from 1950 to 2000, found that when women enter an occupation in large numbers, that job begins to pay less, even after controlling for a range of factors such as skill, race and geography.[4] The study found evidence of devaluation – that a higher proportion of women in an occupation leads to lower pay because of the discounting of work performed by women.

Women working in recently feminised occupations would effectively be excluded from making pay equity claims, despite any clear evidence of current gender-based pay differentiation.

## The labour market is disproportionately favoured by the factors for gender-based systemic undervaluation

Clause 14(4) includes new criterion in addition to those recommended by the JWG at Principle 2C. The additional criterion are Clauses 14(4)(iii) to (vi) and they do not reflect the consensus reached by the JWG and make it more difficult for women and unions to make pay equity claims. The JWG did accept the presence of a dominant funder, and a lack of effective bargaining but not qualified in terms of the relevant labour market as the draft Bill does. The definition of "relevant labour market" at Clause 14(5) is not part of the JWG principles and is unclear and subjective – what is meant by "as a matter of fact and commercial common sense, are substitutable because the work they perform involves …" and who will determine this?

Nor did the JWG agree on the other market issues that have been included at sub-clauses 14(4)(iii) to (vi). The union parties in the JWG actively opposed the inclusion of these market issues, so the PSA is disappointed to see them included in the draft Bill anyway. It undermines our confidence in the efficacy of any future tri-partite approaches to policy which are critical to a healthy participatory democracy.

These innovations in the draft Bill are additional hurdles to be overcome by claimants. These additions create points at which the process to resolve a pay equity claim could become bogged down in technical debate rather than focus on the assessment of the claim, consideration of appropriate comparators, agree a rate with reference to the comparators, and a mechanism for maintaining currency of the rate. The establishing of the equal pay rate is an analytical, evidence based process and should be orderly and efficient.

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[3] Service and Food Workers Union Nga Ringa Tota Inc Vs Terranova Homes and Care Limited. 2013

[4] A Levanon, P England, P Allison, "Occupational Feminization and Pay: Assessing Causal Dynamics Using 1950-2000 U.S. Census Data", *Social Forces*, 88:2, December 2009, pages 865-892. http://statisticalhorizons.com/wp-content/uploads/2012/01/88.2.levanon.pdf

The functioning of the labour market is itself distorted by gender-based discrimination, to the extent that labour market currently profits from and exploits such discrimination. The functioning of the paid labour market relies on the fact that women are still predominantly responsible for the care of children and other family members, even though this unpaid labour is a vital and significant contribution to the functioning of the economy.[5] [6] New Zealand's economic growth in recent decades has been achieved mainly off the back of increased labour market participation, which in turn has largely been as a result of a significant increase in women's participation and their heavily discounted wage bill.

Statutory human rights, including those expressed by the Equal Pay Act, protect individual women from bearing unjust costs arising from the continuation of discriminatory elements of the operation of the state and the market.

To quote from the original decision in the Terranova case:

> History is redolent with examples of strongly voiced concerns about the implementation of anti-discrimination initiatives on the basis that they will spell financial and social ruin, but which prove to be misplaced or have been acceptable as the short term price of the longer term social good. The abolition of slavery is an old example, and the prohibition on discrimination in employment based on sex is both a recent and particularly apposite example.[7]

### Recommendations:

- Amend Clause 14 is for consistency with JWG Principle 2. In particular, that historical undervaluation is not a pre-requisite that must be met in order to establish the merit of a pay equity claim, it is a factor for consideration.
- Clause 14(3)(d) – amend the language to more closely reflect the language of JWG Principle 10.iv, "any social, cultural or historical phenomena whereby women are considered to have "natural" or "inherent" qualities not required to be accounted for in wages paid."
- Clause 14(4)(a) – insert "but not limited to" at the end of the first sentence, for consistency with JWG Principles 2Ci
- Remove Clauses 14(4)(iii) to (vi)
- Remove Clause 14(5).

# Clause 23: Identifying appropriate comparators

Clause 23 introduces a rigid hierarchy of proximate comparators that undoes the fundamental findings of the courts in the Kristine Bartlett case. The proposed comparator regime would make it impossible for future claimants to reach a settlement like the one recently achieved by unions, their members, employees, employers and the government in respect of 55,000 care and support workers.

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[5] Statistics New Zealand (2001) *Measuring Unpaid Work in New Zealand 1999*, Wellington, http://www.stats.govt.nz/browse_for_stats/income-and-work/employment_and_unemployment/measuring-unpaid-work-in-nz-1999.aspx

[6] M Waring (1998) *Counting for Nothing: What Men Value and What Women are Worth*, Wellington

[7] Sec 110 Service and Food Workers Union Nga Ringa Tota Inc Vs Terranova Homes and Care Limited. 2013

The essence of the Kristine Bartlett case was that section 3 of the Equal Pay Act provides that female employees in work predominantly or exclusively performed by women must be paid as though the work was performed by a fictional male employee to ensure that women's rates of pay are not reduced by gender-based differentiation. To determine such a pay rate, the courts found that female employees in work predominantly or exclusively performed by women could compare themselves with an appropriate male comparator with the same or substantially similar skills, responsibility, conditions and degrees of effort, and that the rate of pay of the male comparator must be "uninfected by current or historical or structural gender discrimination."[8] Furthermore, female employees must be able to select male comparators from different sectors and industries to be able to make such comparisons. This is fundamental to retain access to equal pay for work of equal value.

The following quotes from the Employment Court in the Kristine Bartlett case are pertinent:

> The potential for discriminatory distortion of any comparator used underpins the arguments advanced in favour of a broader interpretation of s3(1)(b).[9]
>
> Further, the fact that express provision is made for work performed by women in female intensive industries tells against an interpretation that would require no more than an intra-award/workplace analysis. Such an interpretation would render s3(1)(b) inoperative in cases involving exclusively female workplaces.[10]
>
> It would be illogical to use a small percentage of men as a comparator group if they are paid less because they are undertaking "women's work". Such an approach would distort the objective analysis required under s3(1)(b) and fall well short of meeting the dual purposes of the Act.[11]
>
> In essence the comparator to be identified must be free from any gender bias affecting the rate of pay if the purposes of the Act are to be achieved.[12]

Requiring women and unions to firstly identify comparators within the employer's business or prove that no such appropriate comparator exists, before they can then look to similar businesses, and only then to same industry or sector, and then only to a different industry or sector undermines the essential precedent set by the Kristine Bartlett case. Clause 23 sets up an unworkable set of hoops that women and unions must jump through in the attempt to reach a pay equity settlement. Clause 23 is inconsistent with JWG Principle 15 that the "process of establishing equal pay should be orderly, efficient, kept within reasonable bounds and not needlessly prolonged."[13]

The wording of "must be selected" throughout Clause 23(2) has the effect of requiring agreement between parties on the male comparators to be selected. However, "comparators are a means to and end".[14] Agreement between parties on comparators is not required to reach a pay settlement. We note that the recent Care and Support pay equity negotiations were not subject to the comparator regime as proposed by the draft Bill, and these negotiations were successful.

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[8] Ibid, Sec 46
[9] Sec 24. Service and Food Workers Union Nga Ringa Tota Inc Vs Terranova Homes and Care Limited. 2013
[10] Sec 35. Service and Food Workers Union Nga Ringa Tota Inc Vs Terranova Homes and Care Limited. 2013
[11] Sec 40. Service and Food Workers Union Nga Ringa Tota Inc Vs Terranova Homes and Care Limited. 2013
[12] Sec 44. Service and Food Workers Union Nga Ringa Tota Inc Vs Terranova Homes and Care Limited. 2013
[13] http://www.ssc.govt.nz/sites/all/files/pay-equity-jwg-recommendations.pdf
[14] Sec 37 Service and Food Workers Union Nga Ringa Tota Inc Vs Terranova Homes and Care Limited. 2013

Indeed, how is the concept of proximate comparators at all relevant to establishing equal pay for work of equal value? The Equal Pay Act and courts are clear that all that is required to identify gender-based differentiation in pay is a simple comparison between female employees in work performed exclusively or predominantly by women and an appropriate male comparator (uninfected by gender discrimination) with the same or substantially similar skills, responsibility, service, conditions and degrees or effort. The PSA can only surmise that the purpose of the proposed hierarchy of comparators is to protect the gender-based differentiation in wage rates paid to women which has subsidised the functioning of the labour market throughout New Zealand's history to this day. This Bill sets up a scheme which appears to have been deliberately designed to leave women to bear the burden of discriminatory wage rates. It is designed to shield employers from the financial cost of paying wages which do not discriminate against women at the expense of a fundamental women's right.

### Recommendations:

- Clause 23(1) opening sentence – remove the references to "same as, or similar to, the work …" to enable comparisons to be made between different work, consistent with the Kristine Bartlett determinations.
- Clause 23(2) – remove entirely.

## Clause 44: Regulations

The PSA is very concerned about the proposal that the Governor General, by Order in Council, will be able to make regulations in relation to: the matters which must be taken into account when considering or determining whether a pay equity claim has merit (section 14); the matters that must be taken into account when assessing a pay equity claim (sections 22); and matter which must be taken into account when identifying appropriate comparators (section 23).

These matters are the core of the pay equity principles recommended the tri-partite joint working group after long and careful deliberation. These matters are germane to the implementation of fundamental human rights in respect of pay equity.

Therefore, any changes to the matters/sections listed in clause 44 should be considered by Parliament to enable a full, transparent and public debate about those matters.

### Recommendation:

Delete Clause 44.

## Transitional arrangements

The PSA is very concerned with the proposed aim that pay equity claims made under the Equal Pay Act before the passage of this Bill should be transferred to be addressed under the new legislation. Several women have claims filed in the Employment Relations Authority and the Employment Court, which are on hold whilst we pursue these claims using the JWG principles and process agreed by the Government. However, we reserve the right pursue those claims in the Authority or Court and are entitled to do so under the current Equal Pay Act and precedent set by the Kristine Bartlett case. We would not wish to pursue our claims under a regime proposed by this Bill which removes the current entitlement to equal pay and replaces it with a vastly inferior right.

Furthermore the retrospective application of inferior legislative amendment to existing human rights is entirely inconsistent with Legislation Design and Advisory Committee Guidelines (2014), and in particular the LAC principles concerning human rights and retrospective laws.[15]

We are concerned that the human rights implications of this proposal does not appear to have been considered by the supporting Cabinet paper. Further it is not clear whether the requirements of section 7 of the New Zealand Bill of Rights Act 1990 have been met.

### Recommendation:

That claims made before the enactment of the Employment (Pay Equity and Equal Pay) Bill are to be addressed under the current legal framework i.e. Equal Pay Act 1972 and case law established by the Kristine Bartlett case.

# Other comments

## Clause 8: Equal treatment

Clause 8 largely reflects the purpose of the Equal Pay Act as expressed in the long title of the Act, and section 3 of the Act which outlines the criteria that apply when determining whether any element of sex based differentiation exists in the rates of remuneration between male and female employees.

However, we note that clause 8(1)(a) of the draft Bill refers to "employees who perform the same or substantially the same work", in contrast to the equivalent language in the Equal Pay Act (s.3(1)(a)) which uses "the same or substantially similar". This language of the Equal Pay Act is now well understood and we are concerned that the proposed language in the draft Bill will be used to limit equal pay claims.

### Recommendation:

Amend Clause 8(1)(a) using the language of the Equal Pay Act at s.3(1)(a), "the same or substantially similar", and throughout the Bill where applicable.

## Clause 13: Criteria to be applied

The wording of Clause 13 is clumsy and unclear. We note that this clause appears to be the equivalent of section 3(1)(a) of the Equal Pay Act. Our recommendations are outlined below:

### Recommendations:

- Opening sentence - amend to:

  "For the purposes of determining whether work is the same or substantially <u>similar</u> work <u>for section 8(1)(a)</u>, the Authority must consider whether-".

  Our suggested changes are underlined. The first change is consistent with our comment above about clause 8 and the use of "the same or substantially similar" instead of the "same or substantially the same work". The second change clarifies that the criteria applies only to section 8(1)(a), and not to pay equity claims.

[15]Legislation Design and Advisory Committee Guidelines (2014) http://ldac.org.nz/guidelines/lac-revised-guidelines/

- Clause 13(a) – amend to:

  "the work calls for the same or substantially similar degrees of skill, effort and responsibility; and"

  The first change is consistent with our comments on Clause 8. The second change deletes "skills" which was listed twice, and deletes "experience" which is not part of section 3(1)(a) of the Equal Pay Act. Our changes also delete, "from employees of any gender" because comparisons can only be made between female and male employees for equal pay claims and unlawful discrimination claims.

- Clause 13(b) – amend to:

  "the conditions under which the work is to be performed are the same or substantially similar."

  The first change is consistent with our comments on Clause 8. Our changes also delete, "for employees of any gender" because comparison can only be made between female and male employees for equal pay claims and unlawful discrimination claims.

## Clause 15: Requirements relating to pay equity claims

We note the proposed requirement that a position description must include the employee's position description. Position descriptions cannot be relied on to assess the merit of a pay equity claim. Many employees do not have a position description. Job descriptions that do exist are often out-of-date, and are not a true reflection of the skills, responsibilities, effort and tasks expected of employees in their work. Job descriptions are notoriously infected by gender-based undervaluation of work.

Clause 15(1)(d) refers to the "factors that the employee relies on as evidence that the pay equity claim has merit". Imposing evidential requirements on employees and unions at the outset of the process will make it unreasonably more difficult and onerous for women and unions to make pay equity claims. This evidential requirement is at odds with JWG Principle 15 that the "process of establishing equal pay should be orderly, efficient, kept within reasonable bounds and not needlessly prolonged".

The JWG envisaged that "Any employee or group of employees may raise a claim at any time" (JWG process flow chart) and that after a claim was accepted, employers and employees and unions would then work together to assess the claim, each bringing evidence at that point to assess the claim.

Clause 15(1)(d) is in contrast to the lesser requirement on employers at Clause 17(5)(a), which requires employers to set out the "reasons" for their decision that a claim does not have merit. Employers are not required to set out the "evidence" for this decision. For fairness and consistency, employees/unions must be required to set out their "reasons" in support of a pay equity claim, and employers to set out their "reasons" if they decide that a claim does not have merit.

### Recommendations:

- Remove the mandatory requirement for job descriptions from Clause 15.
- Amend Clause 15(1)(d) to: "Set out the reasons that the employee relies on that the pay equity claim has merit (*see* **section 14**)."

## Clause 22: Matters to be assessed

Clause 22 largely reflects the JWG Principles 3 to 8 regarding the assessment of a pay equity claim. There are some differences though where the rationale is not clear or the change would have a limiting effect on the assessment of claims. The differences are:

- Clause 22 (1)(a)(iv) the terms and conditions of employment – this is in addition to the JWG principles and the reason for its inclusion is unclear.
- Clause 22(1)(a) – is missing "any other relevant work features" that was part of JWG Principle 8. Including this would negate the need to specify "terms and conditions of employment' whilst allowing the parties to consider other relevant work features when assessing a claim.
- Clause 22(2)(b) – refers to the skills and responsibilities etc. that "have traditionally been" overlooked in female dominated work. JWG Principle 6 refers to the skills and responsibilities etc. that "are commonly" overlooked in female dominated work. The wording of the clause excludes the consideration of female dominated occupations that are currently undervalued but were not undervalued in the past. It is now well evidenced that when mixed or male dominated occupations become feminised, that the wages paid for that work also drop. Please see our comments in this respect on clause 14.
- Clause 22(2)(b) – is missing the reference to "emotional effort" that is in JWG Principle 6.

### Recommendations:

- Clause 22(1)(a)(iv) – delete this clause
- Clause 22(1) – add "any other relevant work features" as a sub-clause
- Clause 22(2)(b) – reword as follows (changes are underlined):

"recognise the importance of skills, responsibilities, effort, and conditions that <u>are commonly</u> overlooked or undervalued in female-dominated work (for example, social and communication skills, taking responsibility for the well-being of others, <u>emotional effort</u>, cultural knowledge, and sensitivity)."

## Clause 39: Limitation period where pay equity claim is resolved by determination

The PSA is concerned with the proposal to limit the backdating of pay equity settlements from when the claim was sent to the employer, where these claims are resolved by determination. We acknowledge that this does not prohibit employers and employees/unions from reaching agreement themselves to backdate settlements. However Clause 39 effectively prohibits the Authority from ordering backdating as a part of settling a pay equity claim, which is a fundamental weakening of the remedies available for a breach of human rights.

We are concerned that the human rights implications of this proposal do not appear to have been considered by the supporting Cabinet paper. Further it is not clear whether the requirements of section 7 of the New Zealand Bill of Rights Act 1990 have been considered.

We are concerned that this inability to access back pay for a breach could work as an incentive for employers to breach this important human right.

### Recommendation:

Amend Clause 39 to enable the backdating of pay equity settlement for up to six years, consistent with Clause 12.

## Clause 40: Pay equity records

Clause 40 appears to restrict employees' access to information until after they or their union have already made a pay equity claim. Clause 40 is also restricted to pay equity claim and unlawful discrimination claims

It will be essential for employees and their unions to be able to access pay information disaggregated by sex in order for them to be able to identify in the first instance whether a pay equity, equal pay or unlawful discrimination issue exists, and if so to inform making a claim. Much of this information will be held by employers.

Section 130 of the Employment Relations Act requires employers to keep records on the type of work, hours and pay of each employee, but the sex of employees is not captured. Based on currently required records, full (disaggregated) employee anonymised information could be provided to Statistics NZ or MBIIE each year and form the basis of publicly available 5-digit occupational pay data by sex. Data at the level of actual jobs would assist both employers and employees to address pay equity.

### Recommendations

Improve the transparency of information about rates of pay so that gender based discrimination and differentiation relating to pay can be identified. Employers are already required to maintain wage and time records for each employee. The draft Bill and the Employment Relations Act 2000 should be amended to require that:

- Wage and time records include the sex of each employee
- Wage and time records by sex are provided annually to Statistics New Zealand or MBIE for publication in statistical form
- An employer must disclose aggregated pay data by sex for all employees doing the same or substantially similar work on the request of any employee.