NEW ZEALAND COUNCIL OF TRADE UNIONS
Te Kauae Kaimahi

Submission of the
New Zealand Council of Trade Unions
Te Kauae Kaimahi

to the

Education & Workforce Select Committee

on the

Equal Pay Amendment Bill 2018

P O Box 6645
Wellington
28 November 2018

Summary

- The NZCTU supports the amendment of the Equal Pay Act 1972 to include the recommendations of the Joint Working Group on Pay Equity Principles. This includes the use of the term “arguable” as opposed to “merit” as recommended by the Reconvened Joint Working Group.

- The NZCTU particularly supports measures which strengthen a collective approach to pay equity negotiations and measures which provide the parties with flexibility and choice in relation to comparator(s)**.**

- The NZCTU supports the retention of the 1972 Act, in particular sections 3(1)(a) and 3(1)(b).

- The NZCTU supports the abandonment of the hierarchy of comparators that was proposed in the previous Government’s Bill.

- The NZCTU considers that the process for accessing a determination by the Employment Relations Authority should be simplified. The NZCTU considers that this would support the progress of bargaining.

- The NZCTU considers that facilitation should only be used appropriately during the substantive bargaining process.

- The NZCTU considers that employees should have a say over whether their claim is joined with those of other employees and the mechanism to determine if their claim is joined with claims of employees working for other employers.

- The NZCTU considers that the provisions for recovery of remuneration of past work are unduly complex, onerous and do not as currently drafted achieve the stated policy intent (of encouraging settlement).

1. Introduction

1.1. This submission is made on behalf of the 27 unions affiliated to the New Zealand Council of Trade Unions Te Kauae Kaimahi (NZCTU). With over 310,000 members, the NZCTU is one of the largest democratic organisations in New Zealand.

1.2. The NZCTU acknowledges Te Tiriti o Waitangi as the founding document of Aotearoa New Zealand and formally acknowledges this through Te Rūnanga o Ngā Kaimahi Māori o Aotearoa (Te Rūnanga) the Māori arm of Te Kauae Kaimahi (NZCTU) which represents approximately 60,000 Māori workers.

1.3. The NZCTU and the trade union movement in New Zealand has a long history of fighting for women's rights to equal pay and for pay equity. Trade Unions were pivotal in the implementation of the Government Service Equal Pay Act 1960 and the Equal Pay Act 1972.

1.4. The recent focus on equal pay and pay equity has been a direct result of the landmark Court decisions of *Bartlett & SFWU v Terranova* where it was established that the Equal Pay Act 1972 could be used to bring pay equity claims. This legal challenge was brought by E tū (formerly the Service and Food Worker's Union) and their member Kristine Bartlett.

1.5. In 2017, E tū, NZNO and the PSA reached a pay equity settlement with the then Government covering over 55,000 care and support workers. Following this, a settlement was reached with the 3000 care and support workers employed by the Ministry of Social Development and Oranga Tamariki. This was followed by a settlement for 4000 mental health support workers employed by District Health Boards.

1.6. Trade Unions were key participants in the Joint Working Group on Pay Equity Principles (JWG) that released its findings in June 2016 which were supported by trade unions, and also participated and played a key role in the Reconvened Joint Working Group that reported to the Minister of Workplace Relations and Minister for Women in February 2018.

1.7. In 2018, by applying the JWG Principles NZEI Te Riu Roa negotiated a pay equity settlement for 329 Ministry of Education support workers. The PSA also negotiated a pay equity settlement for 1300 social workers employed by Oranga Tamariki.

1.8. The NZCTU and our affiliates therefore have a significant interest on ensuring that the gains that have been hard-won for women and the current successful JWG principles based approach to addressing pay equity are maintained and strengthened through this proposed legislation.

1.9. The NZCTU would welcome the opportunity to make an oral submission to the select committee.

2. Improvements on previous proposals

2.1. Generally, this Bill is supported by the NZCTU and compares favourably to the Employment (Equal Pay & Pay Equity) Bill introduced under the last Government on 26 July 2017 and then re-introduced as a Private Member's Bill by Denise Lee in 2018.

2.2. In our submission under the previous Bill we stated that new legislation should reflect the provisions in:

2.2.1. the Equal Pay Act 1972;

2.2.2. the *Bartlett v Terranova* decisions; and

2.2.3. the Joint Working Group principles as released in June 2016.

2.3. We can now also add to this list the Reconvened Joint Working Group principles released in February 2018.

2.4. Any provisions that are inconsistent with the above are not supported by the NZCTU, however we understand for practical reasons the out-of-date provisions of the 1972 Act may need to be removed or updated.

2.5. The main improvements from the previous proposed legislation are:

2.5.1. The abandoning of the flawed "hierarchy of comparators". Adopting this provision would have made it very difficult for claimants to raise claims and it would have limited the nature and type of comparator that could be selected. This was NZCTU's primary objection to the previous proposed legislation.

2.5.2. The removal of the "merit" threshold for raising a claim. This followed the recommendations of the Reconvened Joint Working Group on Pay Equity Principles to the Minister of Workplace Relations and Safety on 27 February

2018 that this term be removed and replaced with “arguable” because the initial assessment was intended to be a light touch assessment rather than the determination of the merit of the substantive claim. We support the inclusion of establishing a claim as “arguable” as the lowest possible threshold in to initiating a pay equity claim.

2.5.3. The Equal Pay Act 1972 has been retained and amended rather than repealed. The NZCTU supports this move. This has allowed the retention of the key definitional sections of 3(1)(a) and (b) and the unlawful discrimination section 2A. We also agree with inclusion of 2AAC retaining the requirement for equal pay and pay equity by employers.

2.5.4. Like the previous Bill, this Bill attempts to incorporate the Principles agreed by the JWG into law. This Bill also incorporates the recommendations of the Reconvened Joint Working Group that suggested improvements to the agreed Principles based on how they had been applied in actual pay equity bargaining. The NZCTU supports consistency with the agreed Principles in all contexts.

2.5.5. This Bill also provides greater scope in general for the Authority or the Courts to award compensation for past work. Under the previous proposed Bill, compensation for past work was limited to the time between filing or delivering the claim and the determination of the claim. These new provisions will eventually allow compensation for past work of up to 6 years, even if the period of time between raising the claim and the determination of the claim is shorter than 6 years. We consider the ideal would have been to match the existing provisions and civil jurisdiction norm of 6 year’s recovery of remuneration. We also object to the onerous considerations in clause 13ZC and think that these provisions direct the Court or the Authority towards unfair considerations, e.g. the conduct of the parties or the employer’s ability to pay.

3. Areas that could be improved

3.1. Although this Act is a significant improvement on the previous proposals, there are too still too many barriers to access to the Authority or the Courts. Easy access to the Authority or the Courts can assist the bargaining process and it is not always a good use of time and resources for parties to be required to attend mediation and facilitation prior applying for a determination. While mediation and facilitation will sometimes assist bargaining parties, there will be occasions when this is a waste of

time and a determination or ruling is needed in order for the bargaining to continue. The place for facilitation in this proposed Act should be revisited. Facilitation is useful for the resolution of the substantive bargaining but may not be as beneficial when determining preliminary matters, e.g. whether a pay equity claim is "arguable". Facilitation is especially useful when parties agree to it and in those contexts, it should be accessible and available. However, it should not be mandatory to attend prior to having access to a determination or ruling of the Authority or the Courts.

3.2. The Bill needs to better reflect a balance between employee and employer rights. Examples where changes could be made to improve this in the current Bill are:

3.2.1. The removal of the unlimited period that an employer can request an extension in 13E(7)

3.2.2. Employees whose claim are consolidated with claims against another employer should be able to have a say as to whether this is appropriate or not, currently there is not a provision to allow this. A requirement should be inserted into clause 13I. It is not acceptable to the NZCTU that a group of claimants has no right to object or participate in decisions in relation to consolidation of claims with another employer.

3.3. The rights contained in the Equal Pay Act 1972 should be maintained and not unnecessarily weakened. An example of when this has not occurred is that there are fewer restrictions on claiming past remuneration for equal pay claims when compared to pay equity claims, currently under the 1972 Act they are arguably treated in the same way.

4. Clause-by-clause analysis of the proposed new sections

4.1. In clause **2AAC**, differentiation in rates of remuneration is prohibited and this clause is supported by the NZCTU. However, clause **2AAC(b)(i)** mentions "service" instead of "experience"[1] which is the term used by the JWG on Pay Equity Principles. As previously stated, it is the view of the NZCTU that there should be consistency with the agreed principles wherever possible. The words "offered and afforded" are also problematic and potentially confusing. We agree with the submission of the PSA when they state that these words should be replaced with the word "paid".

[1] Appendix 2 bullet point 8.5 of the letter to the Minister of State Services and the Minister for Workplace Relations and Safety on 24 May 2016.

4.2. In clause **2B** claimants that may have an unlawful discrimination claim, an equal pay claim or a pay equity claim must make a choice of the proceedings they wish to use. This can be under this proposed Act, the Human Rights Act 1993 or the employee may raise a personal grievance under the Employment Relations Act 2000. In **2B(5)** if an employee raises a personal grievance under the Employment Relations Act 2000 they may not exercise or continue to exercise any rights under this proposed Act or the Human Rights Act 1993. We disagree that raising a personal grievance in relation to unlawful discrimination should prohibit a claimant from then choosing the decision-making body best suited their needs at a later date. Raising a personal grievance is often done informally and addressed between the employer and the employee directly at first instance. This process allows dialogue between the parties and an opportunity for resolution, it should not then prohibit the claimant from taking legal action outside of the Employment Relations Act at such an early stage. We consider this provision should be amended. We also note that this proposed section would be a departure from the current law.

4.3. Under normal statutory interpretation rules the singular also includes the plural. The amended Interpretation section (section 2 of the 1972 Act) should include that the plural includes a group of employees who are members of a trade union and/or whose claim is raised on behalf of a group of employees who are trade union members in the name of that trade union. Unions should be able to raise pay equity claims on behalf of groups of employees in the name of the union.

4.4. The NZCTU supports the majority of the provisions in clause **13C** because it implements the JWG Principles under Schedule 2 – Raising the Claim.

4.5. Clause **13C** also implements the agreed principles from the Reconvened Joint Working Group in the definition of the word “arguable”. We support this definition as a low threshold for bringing a claim.

4.6. Clause **13D(d)** requires not only the elements required for an arguable pay equity claim but in addition the *evidence* (our emphasis) that the employee relies on in support of those elements. It is unusual to be required to provide the evidence that a party relies on at this early stage, usually a Claimant would plead their case and then be required to prove the elements of their claim by way of evidence at a later date.

4.7. Clause **13E(1)(a)** requires that an employer must acknowledge a claimant's claim within 5 working days. This appears to be an unnecessary step in the process. In clauses **13E(1)(a)** and **(b)** we consider it would be fairer to have the time period (if there must be a specified time period) as 5 days and 10 days, rather than "working days". We support the submission of E tū union in relation to these time limits.

4.8. Clause **13E(7)** needs to include a limit on the extension that employers can implement in relation to providing notice to affected employees of a claim. There is currently no limit on employers right to extend apart from the employer needing a "genuine reasons based on reasonable grounds" to do so. This should be strengthened. There is potential for unjustified delay or delaying tactics if this clause is not amended.

4.9. Under clause **13F(1)**, it is submitted that 65 days is too long for an employer to respond as to whether they consider the claim is arguable. We would suggest that it is limited to 20 to 30 days.

4.10. In relation to clause **13F(4)(b)(iii)** this would allow the issue of whether the claim is arguable to be referred to facilitation. Although this provision may be utilised by employees, failure to make this application should not be counted against a claimant if they do not wish facilitation to take place at this early stage.

4.11. In relation to **13H** and **13I** we support the submission of NZCTU affiliate E tū union when they submit that these sections should be re-written to allow workers carrying out the same work or substantially similar work with multiple employers to be able to raise their claim with a group of employers and for those employers to be required to bargain with them as a group. E tū uses the example of the cleaning industry which is a predominantly female industry and many women carry out the same work for multiple employers. Forcing these female cleaners to raise separate claims and bargain with each employer separately (if the employers don't decide to consolidate the claims) goes against the purpose of this Bill which is to allow easy access pay equity bargaining.

4.12. If these clauses are not re-written, at minimum in clause **13I** employees should have a say or be able to object to the consolidation of claims on reasonable grounds. Employees should also have the opportunity to apply for their claims to be joined. It is our view that employee rights in this regard should be consistent with

both employer rights and with ballots of workers which are held regarding multi-employer collective bargaining.

4.13. We support the application of Good Faith to the pay equity bargaining process as outlined in clause **13J**.

4.14. In clause **13K** there is a duty to provide information. In order to progress claims, information may also be required from organisations that hold information in relation to comparators. There should be provision under this proposed legislation for a requirement that this information be provided to the negotiating parties if a request is properly made under this proposed Act. Comparators are likely to come from external organisations, there should be a provision to require that reasonable and easily obtained de-personalised information on comparators is provided if requested under this Bill.

4.15. Clause **13L(1**) reflects the Assessing the Claim section of the JWG Principles however clauses **13L(1)(iv)** (terms and conditions of employment) and clauses **13L(1)(vi)** (the level of experience required to perform the work) appear to have been added. We refer to our comments above that the legislation wherever possible should reflect the JWG principles.

4.16. Clause **13L(3)** and **(4)** provides for parties to agree to an alternative process for settling a claim. This appears to be contrary to the importance and significance of the process agreed in the JWG Principles.

4.17. Clause **13M(1)(c)** is supported because this provision allows the selection of comparators that "the parties or the Authority or Court considers useful and relevant". This is a significant improvement on the proposals under the previous proposed legislation.

4.18. Clause **13N** requires a review process for the maintenance of pay equity. Clause **13N(3)(iv)** should make it clear that the review for the purposes of maintaining pay equity apply to all claims whether determined or decided by the Authority or Court or settled between the parties.

4.19. We support the inclusion of **13N(2)** that provides that terms and conditions of employment of an employee who has made a pay equity claim cannot be reduced in order to settle that claim. We also consider that the proposed Act should provide that

other employees terms and conditions should not be reduced as a result of a pay equity claim.

4.20. Clause **13N(3)(b)(iii)** should be amended to state: employee, employees or union representing a group of employees.

4.21. Clause **13N(3)(b)(vi)** provides that pay equity claims should be reviewed. We support the flexibility in relation to the nature of the review, however reviews should occur and have been provided for all of the settlements reached to date.

4.22. We support the inclusion of clause **13O** that that a collective agreement does not settle or extinguish a pay equity claim and that the existence of such a claim is not a genuine reason for failing to conclude bargaining. This provision also reflects the JWG principles.

4.23. In relation to clause **13R**, we refer to our comments in relation to facilitation above.

4.24. We recognise that clause **13S** provides a slightly lower threshold to facilitation "sufficient efforts" rather than "extensive efforts" as required by 50C(1)(b)(ii) of ERA 2000. This is consistent with the findings of the JWG.

4.25. We consider that the provision in clause **13ZB(2)(b)** that "all other reasonable alternatives for setting the pay equity claim have been exhausted" is too high a threshold to access a determination to fix terms and conditions. We strongly object to the inclusion of this requirement and consider that it may hamper access to justice for pay equity claimants. We consider that this provision goes further than the intention of the JWG's recommendations.

4.26. We also consider that the provisions of clause **13ZC** provides too high a threshold for the provision of recovery of remuneration for past work and direct the Authority to look at considerations that it would not usually be required to make e.g. the ability of employer to pay and the conduct of the parties.

4.27. Clause **13ZD** limits the period for recovery of remuneration for past work for pay equity claims. The NZCTU does not support limiting the period of recovery for remuneration. We echo the concerns raised by unions and women's groups that limitation of the recovery of remuneration may affect women in a discriminatory manner and prevent female dominated groups from access to a remedy while other groups are not subject to such restrictions.

4.28. We would add that the scheme developed for the recovery of remuneration for past work for pay equity claims is unnecessarily complex and does not achieve the stated policy objective of providing a key incentive for employers to engage in settling claims in the first 5 years after the passage of this legislation.

4.29. We would suggest replacing in clause **13ZD(4)** "service" with "experience" to be consistent with the agreed principles.

4.30. Clause **13ZF** covers employees of education services. The NZCTU supports the State Services Commissioner becoming the employer and being directly responsible for pay equity negotiations in this area.

4.31. We support the provision in clause **15** that an employee must not be treated adversely for making a claim.

4.32. In clause **18,** while we support the inclusion of penalties the financial penalties appear to us to be too low to provide a meaningful deterrent.

4.33. We support the retention of the powers of the Labour Inspectorate as restated in clause **18A.**

4.34. We strongly object to the proposals under the transitional provisions to discontinue existing claims as outlined in **Schedule 1**. This is not fair to claimants who have existing claims under the current legislation that have taken significant time, resource and expense to progress. Claims should continue under law in place at the time they were filed or notified or claimants should be provided with a choice as to how their claim proceeds.

4.35. We also do not support the requirement in **Schedule 1(5)** that existing settlements should have to comply with criteria in Act. These matters are settled and should not be re-opened except for review to ensure the maintenance of pay equity. Most settled cases have provisions for review in any event.

5. More minor clarifications

5.1. Clause **10(3)** refers to deleting subsections 3(2) and 3(3) (suggest inserting "3" before (3)) so it is clear that section 3 of the principal Act is not being deleted.

5.2. Clause **13B(4)** refers to section 13Z(3). Possibly this should read 13Z(4)?

5.3. In **13K(3)** there is mention of an independent reviewer. This term should be defined in the interpretation section.

5.4. Clause **13M(1)(a)** relates to a pay equity assessment but seems quite similar to the definition of equal pay.

5.5. Suggest clarifying that **13S(3)** refers to a reference for facilitation (add facilitation after "reference" in first line).

5.6. Clause **13ZC(3)** is unusual drafting, suggest amending.

5.7. Clause **17(2)** purports to replace terms in section 13(3) of the 1972 Act. Section 13(3) in the principal Act appears not to exist. It appears to have been replaced by section 6(2) of the Equal Pay Amendment Act 1991.

6. **Other matters**

6.1. Both the initial Joint Working Group and the Reconvened Joint Working Group stated that there would need to be resources provided to assist claimants.[2] Despite two different Governments accepting this recommendation there does not appear to be provision for significant additional resources to be provided to claimants. We would recommend that the issue of resourcing is re-visited by the Government as a matter of priority.

6.2. The NZCTU strongly considers that we need greater transparency provisions in relation to discovering pay differentiation between men and women. Transparency legislation should follow the passing of this legislation to ensure that New Zealand maintains its reputation as a world leader in women's rights. A significant number of other countries have already implemented mandatory transparency provisions and this has assisted in drawing inequalities to light and allowing them to be addressed.

6.3. We support the submission of the Public Service Association that due to pay disparities being greater for Māori and Pasifika women that there also be disclosure requirements based on ethnicity.

[2] See page 3 last paragraph of 4 May 2016 letter and page 3 second paragraph in 27 February 2018 letter.

7. Conclusion

7.1. We thank the select committee for their consideration of our submissions as outlined above and look forward to engaging in discussion as part of our oral presentation.