

Equal Pay Amendment Bill

Government Bill

As reported from the Education and Workforce Committee

Commentary

Recommendation

The Education and Workforce Committee has examined the Equal Pay Amendment Bill and recommends that it be passed with the amendments shown.

Introduction

The purpose of this bill is to improve the process for employees to raise, progress, and resolve pay equity claims. Pay equity is the principle that work predominantly performed by women should receive the same remuneration as work that may be different, but is of equal value to work done by men. This is different from equal pay claims, the principle of which is that women and men doing the same job should be paid the same.

The bill would amend the Equal Pay Act 1972 to establish a bargaining process for pay equity claims, while still largely retaining the existing processes for equal pay and unlawful discrimination claims.

The bill would also make consequential amendments to the Employment Relations Act 2000 and repeal the Government Service Equal Pay Act 1960.

Our consideration of this bill has been wide-ranging across the policy intent of the bill. We thank submitters for sharing their views and professional and personal experiences with us through their written and oral submissions. Most submitters were supportive of the bill, particularly the low threshold for raising a claim, the lack of a hierarchy of comparators, and the incorporation of the pay equity regime into the existing Equal Pay Act. Some submitters opposed the bill's overall intent or the use of a bargaining regime, or questioned the bill's ability to achieve its stated intent.

Proposed amendments

This commentary covers the main amendments we recommend to the bill as introduced. We discuss our proposed amendments in the order they would appear in the bill. We do not discuss minor or technical amendments.

Preliminary provisions

Clause 5 of the bill as introduced would amend section 2(1) of the Equal Pay Act (the interpretation section) by inserting new definitions. We recommend adding definitions for “pay equity claim settlement” and “predominantly performed by female employees”. We discuss the purpose of these proposed new definitions later in our commentary.

Key provisions

Service or experience

Clause 7 would insert new section 2AAC into the Act to prohibit an employer from differentiating, on the basis of sex, between the rates of remuneration for employees. The prohibition would apply both to breaches of the equal pay principle (new section 2AAC(a)) and the pay equity principle (new section 2AAC(b)).

To ensure a pay equity issue is addressed, an employer would need to compare remuneration for work that is predominantly performed by female workers with remuneration for work that would be paid to male employees whose work shares similar criteria. One of the criteria is that the male employees “have the same, or substantially similar, skills, responsibility, and service”.

We consider that the term “service” tends to refer to the duration of time served at work, while “experience” is a broader and more appropriate term that encompasses not just duration of work, but also the quality of prior work experience. We believe “experience” better reflects the intent of the bill. Therefore, we recommend amending new section 2AAC(b)(i) by replacing the word “service” with “experience”.

Timing for selecting a legal avenue

Clause 9, inserting new section 2B, would clarify that if an employee considers they have a pay equity issue, they could choose one of three legal avenues. They are: to raise a pay equity claim under the Equal Pay Act, to make a complaint under the Human Rights Act 1993, or to raise a personal grievance under the Employment Relations Act.

Under the bill as introduced, if a claimant raised a personal grievance with their employer, they would then be barred from pursuing the other two legal avenues.

We think that the initial step of raising a personal grievance claim with an employer should not lock the employee into this avenue, to the exclusion of others. We consider that the employee should only be limited to a personal grievance claim if they were to take the step of lodging a personal grievance with the Employment Relations Author-

ity. We were advised this would be more consistent with the choice of proceedings provisions in the Employment Relations Act and the Human Rights Act.

Therefore, we recommend amending proposed new sections 2B(1)(c) and 2B(5) so that an employee would only be barred from the other two legal avenues if they had applied to the Authority for resolution of a personal grievance.

Pay equity claims

Clause 18 would insert new sections 13A to 13ZF into the Act setting out the process for pay equity claims.

Threshold for who may raise a pay equity claim

Proposed new section 13C(2) provides criteria to determine whether a pay equity claim is arguable.

One criterion is that the work “is predominantly performed by female employees”. The bill as introduced does not explain what the threshold is for deciding this. We are concerned that, without elaboration, “predominantly” will be interpreted by parties and the Authority or Court as a higher threshold than what is intended.

Therefore, we recommend amending clause 18 by inserting new section 13C(2A) to clarify that “predominantly performed by female employees” means work that is currently, or has historically been, performed by a workforce of which approximately 60% or more members are female. We note the inclusion of the word “approximately”, and record that a strict calculation or bright-line test is not intended as a requirement.

We also note that, as introduced, new section 13C(2)(a) would not allow parties to take into account whether an occupation had historically been predominantly performed by female employees, even if it was now evenly split or male-dominated. We consider that an occupation may no longer be predominantly performed by female employees but still be affected by historical sex-based undervaluation. Therefore, we recommend inserting “or was” into new section 13C(2)(a).

Restrictions on who may raise claims

Under proposed new section 13C(4), new pay equity claims could not be raised if there was an existing pay equity claim settlement relating to the employee’s work, and the employer had extended the benefit of that settlement to the claimant. The exception is where the Authority or Court had determined that a new claim may be raised despite such circumstances.

It is unclear in this provision whether the employer must have extended all of the terms of the settlement agreement, such as back pay (if applicable), in order to have extended the “benefit of that settlement”.

It is also unclear whether an employee could raise a pay equity claim if there was an existing pay equity settlement but that employee had not accepted the benefit extended to them.

Therefore, we recommend replacing proposed section 13C(4) as introduced with new sections 13C(4) to 13C(6) to clarify that:

- An employer choosing to extend the terms of a settlement agreement to other employees who perform work covered by that settlement must offer all of the terms of the settlement (including back pay, if applicable) to the employees who qualify for them, if they wish to bar future pay equity claims by those employees.
- Other employees (current or future) who perform work that is the subject of a pay equity claim settlement to which the employer is a party could be barred from making pay equity claims under the Act. This would apply where the settlement benefit is offered to the employee, regardless of whether they accept the benefit or not. In the situation where an employee declines the settlement, the employee would still have the right to seek a resolution under the other two legal avenues (the Human Rights Act or the Employment Relations Act). Where an employee accepts the settlement, that employee will have effectively made their choice of proceedings through the pay equity settlement and will not have the right to seek a resolution under either of the other two legal avenues (the Human Rights Act or the Employment Relations Act).

Form requirements and privacy considerations

Proposed new section 13D(1) sets out the written form requirements for a pay equity claim.

We recommend amending new section 13D(1)(c)(i) to include a requirement for an address for service for the employee. We recommend amending new section 13D(1)(c)(iv) to clarify the requirements in situations where an employee has authorised a union or any other representative to engage on their behalf.

Under proposed new section 13D(1)(d), claimants must briefly set out in their written form the elements and their “evidence” for an arguable pay equity claim. As a term used in formal court contexts, “evidence” suggests a more stringent requirement for documentation than what is envisaged in this context. We consider the word “information” more appropriate. We recommend amending new section 13D(1)(d) by replacing the word “evidence” with “information”.

Confidentiality of claimant’s name

Under proposed new section 13E, the employer would be required to give notice to other affected employees that they had received a pay equity claim. In that notice, they could not identify the claimant without their prior written consent. In the case where the employer is consolidating claims, and is issuing a joinder notice, proposed new section 13H as introduced would require the employer to specify a reasonable date by which the employees must request their details are kept confidential.

We consider it would be best to streamline this process and provide employees the explicit choice up front to either consent to sharing their details or request confidentiality.

We recommend inserting new section 13D(c)(v) to require the employee to state in their written pay equity claim whether they consent to their name and address for service being shared. To reflect this, we also recommend amending new sections 13E(4) and 13H(4). In the case of joinder notices, the employer would still be required to provide the opportunity for the employee to request confidentiality under proposed new section 13H(2).

We consider that the privacy concerns of individuals would be appropriately accommodated in this proposed change.

Employer forming view as to whether a pay equity claim is arguable

Default timeframe

Under proposed new section 13F, an employer who received a pay equity claim would be required to decide whether it is arguable as soon as reasonably practicable, and not later than 65 days after receiving the claim. They must also notify the employee of their view about whether the claim is arguable in that timeframe.

We considered whether 65 days (from the date a claim is received) is an appropriate maximum period for the employer to decide whether they consider a pay equity claim is arguable.

First, for consistency across the bill, we suggest expressing the maximum period in working days rather than calendar days. We recommend amending new section 13F to “45 working days”. The result would be similar to 65 calendar days.

We think that a maximum of 45 working days strikes a balance between efficiency and allowing employers sufficient time to make a decision about whether the claim is arguable.

Employer’s right to extend time to decide whether claim is arguable

We expect that, for the vast majority of employers, 45 working days would be long enough to decide whether they consider a pay equity claim arguable. However, we acknowledge that a small number of employers may need more time. We recommend inserting new section 13F(3A) and (3B) to allow employers to extend the time they have to decide whether a claim is arguable, but only if they have genuine reasons based on reasonable grounds. This is intended to be a high threshold, to be used in limited circumstances.

What is reasonable and genuine is highly dependent on the circumstances of each case. If there was a dispute as to the grounds for an extension, establishing what is reasonable and genuine would be determined by the Authority or the Court in each case. However, we note that as this relates only to the initial stage of whether a claim is arguable, we expect there to be limited scope to exercise this right of extension.

Pay equity bargaining process

When parties have established that a pay equity claim is arguable, the bill would provide a bargaining regime to resolve the pay equity dispute.

Matters to be assessed when resolving pay equity issue

Proposed new section 13L(1) sets out factors that the parties must assess to determine whether the employee's work is undervalued. Proposed new section 13L(2) requires those assessments to be free from gender bias.

The policy intent of the bill is for parties to pay equity bargaining to assess whether work is currently undervalued. However, we note that proposed new section 13L(1) also refers to the parties determining whether work has been historically undervalued. We regard historical undervaluation as a factor to consider when determining whether a pay equity claim is arguable. Once at the pay equity bargaining stage, parties would be required to assess whether work is currently undervalued. Historical undervaluation may be a factor that demonstrates ongoing current undervaluation, though if historical undervaluation was found to have been rectified, no further bargaining would be needed. To clarify this point, we recommend amending new section 13L(1) to remove the reference to determining whether the employee's work was historically undervalued.

Under clause 24 of the bill, regulations could be made under section 19 of the Equal Pay Act that parties may need to take into account when assessing a pay equity claim. We recommend inserting new section 13L(1)(d) to clarify that parties would be required to take into account any other matters prescribed by regulations made under section 19 of the Act when assessing whether an employee's work is currently undervalued.

Process free from gender bias

The bill as introduced would allow parties to enter into a written agreement setting out an alternative process to settle the pay equity claim, despite the matters for assessment set out in new section 13L(1) described above. We consider that, should the parties agree to an alternative process, that process must also be free from gender bias. We recommend amending new section 13L(2) accordingly.

Identifying appropriate comparators

Under clause 24 of the bill, regulations could be made under section 19 of the Equal Pay Act which parties may need to take into account when identifying comparable work under new section 13M. Proposed new section 13M specifies types of comparable work that parties could use in identifying appropriate comparators for assessing a pay equity claim. We recommend inserting section 13M(3) to include a requirement to take into account any matters prescribed by regulations when assessing comparators.

Settling pay equity claims*Terms and conditions of employment, including remuneration*

During our consideration of the bill, it became apparent that some clarification of the phrases "remuneration" and "terms and conditions of employment" would be useful. We consider that remuneration is an aspect of the terms and conditions of employ-

ment, so we recommend amending new section 13N and later sections to use the phrase “terms and conditions of employment, including remuneration”.

Review process required

For claims to be settled through agreement by the parties, a review process needs to be stipulated in the pay equity settlement agreement. A review process helps to ensure ongoing pay equity. The bill as introduced does not expressly require a settlement determined by the Authority to contain a review process. We consider that, for consistency, the Authority’s determinations should be required to contain a review process if one has not been agreed.

We recommend inserting new section 13N(1)(b)(ii)(B) to require that the Authority’s determinations include a review process if parties have not agreed on one. Consequently, we also recommend amending new section 13Z(1)(d) to reflect this.

Summary of method used

New section 13N sets out the requirements of a settlement agreement and the things it must include. We think it would be beneficial if parties were also required to include a summary of the method they used to assess the pay equity claim, and a description of any comparators used. Therefore, we recommend inserting new section 13N(3)(c).

Copy of settlement agreement to be delivered to government department

The bill as introduced does not require parties to forward a settlement agreement to a third party. We think it would be beneficial to have pay equity settlement agreements delivered to the chief executive of the responsible government department (currently the Ministry of Business, Innovation and Employment). The Employment Relations Act requires this for copies of collective agreements. Therefore, we recommend inserting new section 13NA.

We note that the pay equity settlement agreements would not be subject to the provisions of the Official Information Act 1982. This is consistent with the Employment Relations Act in that it recognises the confidentiality of the agreement to the parties involved. In addition, as with collective agreements, the settlements would be used only for statistical or analytical purposes.

Relationship between pay equity and collective bargaining

Proposed new section 13O(2) would clarify that an unsettled pay equity claim between an employee and the employer is not a genuine reason for failing to conclude collective bargaining. We consider that an uncompleted pay equity review would also not be a genuine reason for failing to conclude collective bargaining. Therefore, we recommend amending new section 13O(2) accordingly.

Facilitation

Under proposed new section 13R, any party to a pay equity claim could refer issues to the Authority for facilitation to assist in resolving the claim. Proposed section 13R(2) provides a non-exhaustive list of issues that may be referred to the Authority for

facilitation. The list includes a dispute about whether a pay equity claim is arguable (proposed section 13R(2)(a)). Given that the arguable threshold is intended to be a low threshold to proceed to bargaining, we do not see facilitation as a mandatory step for resolving disputes before accessing a determination.

We recommend amending proposed new section 13R to require all parties' agreement to refer a dispute about whether a pay equity claim is arguable to the Authority for facilitation. We note that the option of mediation over that issue would still be available.

We also recognise that facilitation may not be a necessary step for resolving all disputes for pay equity. We recommend removing the requirement for the Authority to direct parties to facilitation when considering an application for determination in proposed new section 13Z(2)(c). With this amendment, the Authority would have discretion over whether it directs parties to facilitation before investigating the matter itself.

However, in the case where the Authority is asked to decide whether a claim is arguable, we recommend amending proposed new section 13Z(2A) so that the Authority would not have any ability to direct parties to facilitation.

Limitation periods for back pay

Proposed new section 13ZD specifies time periods for the recovery of remuneration for past work, frequently referred to as back pay. We do not propose any substantive changes to these periods, but recommend the insertion of examples into new section 13ZD to assist in the interpretation and application of the sections. These examples are for illustrative purposes only.

General provisions

Notices

In the bill as introduced, "notice" is defined four separate times. For ease of reference, we propose combining the four provisions into one notice provision. Therefore, we recommend deleting proposed new sections 13D(2), 13E(5), 13F(7), and 13I(5). In clause 20, we recommend inserting new section 14A which provides requirements for "notices".

Penalties

Under the bill as introduced, the Labour Inspectorate could bring an action with the Authority against an employer to recover a penalty under new section 18. The current role of the Labour Inspectorate is to enforce minimum employment standards, and does not generally take penalties for breaches that are not related to minimum employment standards. Therefore, we propose removing the Labour Inspectorate's power to bring an action with the Authority to recover penalties in relation to pay equity by inserting new section 18(2A)(b). However, to ensure the Labour Inspectorate retains its powers in relation to equal pay and unlawful discrimination claims as they currently stand, we recommend inserting new section 18(2A)(a).

We recommend inserting new section 18A(4A) to require the Authority to take into account previous improvement notice default by a person when determining a penalty.

Transitional provisions

New schedule 1 would discontinue existing pay equity claims under the Equal Pay Act and the Government Service Equal Pay Act. The exception to this is where existing pay equity claims have had a determination made before the enactment of this bill. We were advised that the Crown Law Office was consulted in developing the transitional provisions.

Existing claimants would be able to resolve their existing pay equity issue by raising a new claim under the new regime that would be created by this bill. Alternatively, they would be able to transition their existing claim to the new regime (without raising a new claim) and continue bargaining by entering into a written pay equity bargaining agreement with the employer before the enactment of this bill.

In the latter situation, the pay equity bargaining agreement would set out the process to be followed to reach a pay equity settlement. However, we recommend amending clause 3(1) in new schedule 1 to clarify that a pay equity bargaining agreement must contain a statement that the parties consider the pay equity claim arguable.

In proposed new schedule 1, we recommend inserting definitions for “existing equal pay claim” and “existing unlawful discrimination claim” to distinguish these from the pay equity claims.

We recommend inserting clause 6 into new schedule 1 to clarify that existing equal pay claims and unlawful discrimination claims are to be determined in accordance with the provisions of the Act at the time the claims were lodged.

The bill would repeal the Government Service Equal Pay Act. We recommend amending new schedule 1 to ensure that any pay equity claim under that Act that has been filed with the Authority or Court would be considered to be an “existing pay equity claim” that would be discontinued by the bill’s enactment.

Consequential amendments to the Employment Relations Act

New schedule 2 would amend the Employment Relations Act. As mentioned, we consider that incomplete pay equity reviews are not a genuine reason for failing to conclude collective bargaining. Therefore, we recommend amending proposed new schedule 2 to insert new sections 33(2)(c) and (d) into the Employment Relations Act.

Appendix

Committee process

The Equal Pay Amendment Bill was referred to the committee on 16 October 2018. The closing date for submissions was 28 November 2018. We received and considered 596 submissions from interested groups and individuals. We heard oral evidence from 41 submitters at hearings in Wellington and Auckland.

We received advice from the Ministry of Business, Innovation and Employment and the Ministry for Women. The Regulations Review Committee reported to the committee on the powers contained in clause 24.

Committee membership

Dr Parmjeet Parmar (Chairperson)

Simeon Brown

Hon Clare Curran (from 24 October 2018)

Hon Nikki Kaye

Denise Lee

Marja Lubeck

Jo Luxton

Mark Patterson

Jamie Strange (until 24 October 2018)

Chlöe Swarbrick

Jan Tinetti

Nicola Willis

Hon Scott Simpson participated in the consideration of this bill

Equal Pay Amendment Bill

Key to symbols used in reprinted bill

As reported from a select committee

text inserted unanimously

~~text deleted unanimously~~

Hon Iain Lees-Galloway

Equal Pay Amendment Bill

Government Bill

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The Parliament of New Zealand enacts as follows:

1 Title

This Act is the Equal Pay Amendment Act **2018**.

2 Commencement

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

3 Principal Act

This Act amends the Equal Pay Act 1972 (the **principal Act**).

Part 1
Amendments to principal Act

4 New Part 1 heading inserted

After section 1, insert:

Part 1
Preliminary provisions

5

5 Section 2 amended (Interpretation)

(1) In section 2(1), insert in their appropriate alphabetical order:

employment agreement has the same meaning as in section 5 of the Employment Relations Act 2000

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equal pay claim means a claim that an employer has breached **section 2AAC(a)**

pay equity claim means a claim that an employer has breached **section 2AAC(b)**

pay equity claim settlement means a settlement of a pay equity claim that is recorded—

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(a) in a written agreement between the parties as described in **section 13N(3)**; or

(b) in a determination of the Authority or the Court as described in **section 13N(1)(b)(ii)**

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predominantly performed by female employees has the meaning set out in **section 13C(2A)**

(2) In section 2(1), definition of **employee**,—

(a) delete “; but does not include—”; and

(b) repeal paragraphs (a), (c), and (e).

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(3) In section 2(1), repeal the definitions of **agricultural workers order**, **apprenticeship order**, **award**, **first increment date**, **industrial agreement**, **instrument**, and **waterfront industry order**.

(4) In section 2(2), replace “agreement specified in paragraph (e) of the definition of the term instrument in subsection (1) made between an individual employee and an individual employer, or any decision under paragraph (f) of that definition made in respect of an individual employee, which fixes a rate of remuneration that is special to that employee” with “employment agreement that fixes a rate of remuneration that is special to an employee”.

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(5) After section 2(2), insert:

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- (3) Any term or expression used but not defined in this Act has the meaning given to it in the Employment Relations Act 2000.

6 New sections 2AAA and 2AAB inserted

After section 2, insert:

2AAA Transitional, savings, and related provisions

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The transitional, savings, and related provisions set out in **Schedule 1** have effect according to their terms.

2AAB Act binds the Crown

This Act binds the Crown.

7 New section 2AAC and Part 2 heading inserted

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Before section 2A, insert:

**Part 2
Key provisions**

2AAC Differentiation in rates of remuneration prohibited

An employer must ensure that—

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- (a) there is no differentiation, on the basis of sex, between the rates of remuneration offered and afforded by the employer to employees of the employer who perform the same, or substantially similar, work; and

- (b) there is no differentiation between the rates of remuneration offered and afforded by the employer for work that is exclusively or predominantly performed by female employees and the rate of remuneration that would be paid to male employees who—

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- (i) have the same, or substantially similar, skills, responsibility, and service experience; and

- (ii) work under the same, or substantially similar, conditions, and with the same, or substantially similar, degrees of effort.

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8 Section 2A amended (Unlawful discrimination)

Replace section 2A(2) with:

- (2) This section does not apply to a pay equity claim.

9 New section 2B inserted (Choice of proceedings)

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After section 2A, insert:

2B	Choice of proceedings	
(1)	Where the circumstances giving rise to an unlawful discrimination claim, an equal pay claim, or a pay equity claim by an employee are such that the employee would also be entitled to make a complaint under the Human Rights Act 1993, or raise <u>pursue</u> a personal grievance under the Employment Relations Act 2000, the employee may take 1, but not more than 1, of the following steps:	5
	(a) the employee may raise a claim under this Act; or	
	(b) the employee may make a complaint under the Human Rights Act 1993; or	10
	(c) the employee may raise <u>apply to the Authority for resolution of</u> a personal grievance under the Employment Relations Act 2000.	
(2)	For the purposes of subsection (1)(b) , an employee makes a complaint when proceedings in relation to that complaint are commenced by the complainant or the Human Rights Commission.	15
(3)	If an employee raises a claim under this Act, the employee may not exercise or continue to exercise any rights in relation to the subject matter of that claim that the employee may have under the Human Rights Act 1993 or under the Employment Relations Act 2000.	
(4)	If an employee makes a complaint referred to in subsection (1)(b) , the employee may not exercise or continue to exercise any rights in relation to the subject matter of the complaint that the employee may have under this Act or under the Employment Relations Act 2000.	20
(5)	If an employee raises <u>applies to the Authority for resolution of</u> a personal grievance under the Employment Relations Act 2000, the employee may not exercise or continue to exercise any rights in relation to the subject matter of that personal grievance that the employee may have under this Act or under the Human Rights Act 1993.	25
10	Section 3 amended (Criteria to be applied)	
(1)	In section 3(1), replace “Subject to the provisions of this section, in” with “In”.	30
(2)	In section 3(1), delete “or class of work payable under any instrument, and for the purpose of making the determinations specified in subsection (1) of section (4)”.	
(3)	Repeal section 3(2) and (3).	
11	Sections 4 to 8 repealed	35
	Repeal sections 4 to 8.	
12	New section 8A and Part 3 heading inserted	
	Before section 9, insert:	

Part 3

Matters relating to equal pay claims

8A Application of this Part

The provisions in this Part do not apply to—

- (a) a pay equity claim; or 5
- (b) an unlawful discrimination claim under section 2A.

13 Section 9 amended (Court may state principles for implementation of equal pay)

In section 9, replace “for the implementation of equal pay in accordance with the provisions of sections 3 to 8” with “to achieve equal pay in employment agreements”. 10

14 Section 10 amended (Approval by court or Employment Relations Authority of instruments or proposed instruments)

- (1) In the heading to section 10, replace “instruments or proposed instruments” with “employment agreements or proposed employment agreements”. 15
- (2) In section 10, replace “instrument or proposed instrument” with “employment agreement or proposed employment agreement” in each place.
- (3) In section 10, replace “proposed collective agreement” with “proposed or existing collective agreement” in each place.
- (4) In section 10, replace “meet the requirements of sections 3 to 6” with “provide for equal pay” in each place. 20
- (5) In section 10, replace “meet such of the requirements of sections 3 to 7 as are applicable” with “provide for equal pay” in each place.
- (6) In section 10(1), replace “meet such of the requirements of sections 3 to 6 as are applicable” with “provide for equal pay”. 25
- (7) In section 10(2)(b)(ii), after “and”, insert “, in the case of a proposed collective agreement,”.
- (8) In section 10(4)(b)(i), replace “meet those requirements” with “provide for equal pay”.
- (9) Replace section 10(4)(b)(ii) with: 30
 - (ii) in the case of an existing employment agreement, amend it to the extent necessary to provide for equal pay, and the employment agreement as so amended has effect accordingly.

15 Section 11 repealed (Court may make partial award)

Repeal section 11. 35

16 Section 12 amended (Further powers of Employment Relations Authority)

- (1) Repeal section 12(a) and (b).
- (2) In section 12(d), replace “instrument” with “employment agreement” in each place.

17 Section 13 amended (Recovery of remuneration based on equal pay) 5

- (1) Repeal section 13(1).
- (2) In section 13(2) and (3), replace “instrument” with “employment agreement”.

18 New Part 4 inserted

After section 13, insert:

Part 4 10
Pay equity claims

13A Purpose

The purpose of this Part is to facilitate resolution of pay equity claims, by—

- (a) setting a low threshold to raise a claim (while recognising that entry into the pay equity claim process does not predetermine an outcome); and 15
- (b) providing a simple and accessible process to progress a pay equity claim.

13B Interpretation

In this Part, unless the context otherwise requires, **employer** means an employer in relation to whom a pay equity claim has been raised.

Employee’s right to raise pay equity claim 20

13C Employee may raise pay equity claim

Who may raise claim

- (1) An employee of an employer, or a group of employees who perform the same, or substantially similar, work for an employer, may raise a pay equity claim if that employee or group of employees considers that the claim is arguable. 25
- (2) A pay equity claim is arguable if—
 - (a) the claim relates to work that is or was predominantly performed by female employees; and
 - (b) it is arguable that the work is currently undervalued or has historically been undervalued. 30

(2A) For the purposes of this Act, work is or was **predominantly performed by female employees if it is work that is currently, or that was historically, performed by a workforce of which approximately 60% or more members are female.**

- (3) In deciding whether it is arguable that work is currently undervalued or has historically been undervalued, consideration may be given to any relevant factor, including the following:
- (a) the origins and history of the work, including the manner in which wages have been set: 5
 - (b) any social, cultural, or historical factors:
 - (c) characterisation of the work as women’s work:
 - (d) that the nature of the work requires an employee to use skills or qualities that have been—
 - (i) generally associated with women; and 10
 - (ii) regarded as not requiring monetary compensation:
 - (e) any sex-based systemic undervaluation of the work as a result of the following factors:
 - (i) a dominant source of funding across the relevant market, industry, sector, or occupation: 15
 - (ii) a lack of effective bargaining in the relevant market, industry, sector, or occupation:
 - (iii) occupational segregation or occupational segmentation in respect of the work:
 - (iv) the failure by the parties to properly assess or consider the remuneration that should have been paid to properly account for the nature of the work, the levels of responsibility associated with the work, the conditions under which the work is performed, and the degree of effort required to perform the work: 20
 - (v) any other feature of the relevant market, industry, sector, or occupation. 25
- Who may not raise claim*
- (4) ~~However, despite **subsections (1) to (3)**, a pay equity claim may not be raised if it relates to work that is covered by an existing pay equity claim settlement to which the employer is a party and the employer extends the benefit of that settlement to the claimant, unless the Authority or court determines otherwise in accordance with **section 13Z(3)**.~~ 30
- (4) If work is covered by a pay equity claim settlement,—
- (a) an employee who was a party to that pay equity claim settlement, or who accepts an offer of the benefit of that settlement,— 35
 - (i) may not (unless the Authority or court determines otherwise in accordance with **section 13Z(4)**) raise a pay equity claim in respect of that work; and

- (ii) may not make a complaint under the Human Rights Act 1993 of a kind that could have been raised as a pay equity claim in respect of that work but for **subparagraph (i)**; and
 - (iii) may not apply to the Authority under the Employment Relations Act 2000 for resolution of a personal grievance of a kind that could have been raised as a pay equity claim in respect of that work but for **subparagraph (i)**; 5
 - (b) an employee who was offered, but did not accept, the benefit of that settlement—
 - (i) may not (unless the Authority or court determines otherwise in accordance with **section 13Z(4)**) raise a pay equity claim in respect of that work; but 10
 - (ii) may—
 - (A) make a complaint under the Human Rights Act 1993; or
 - (B) apply to the Authority for resolution of a personal grievance under the Employment Relations Act 2000. 15
 - (5) In **subsection (4)**, an employee is offered the benefit of a settlement, if that employee is offered—
 - (a) the same terms and conditions of employment, including remuneration, as other employees who are parties to the settlement; and 20
 - (b) the same offer of remuneration for past work, if remuneration for past work is included in the settlement and if the employee would have qualified for that offer had the employee been a party to the claim.
 - (6) **Subsections (4) and (5) override subsections (1) to (3).**
- Process to raise pay equity claim* 25
- 13D Requirements relating to pay equity claims**
- (1) A pay equity claim must—
 - (a) be in writing; and
 - (b) state that it is a pay equity claim made under the Equal Pay Act 1972; and 30
 - (c) state—
 - (i) the employee’s name and address for service; and
 - (ii) the date on which the claim is made; and
 - (iii) the employee’s occupation, position, and a brief description of the work performed by the employee; and 35
 - (iv) if the employee ~~engages~~ has authorised a union or any other representative to act on the employee’s behalf in respect of the claim, the name and address for service of that representative (see sec-

	tions 18(3) and 236(3) of the Employment Relations Act 2000); and	
	(v) <u>whether the employee—</u>	
	(A) <u>consents to their name and address for service being shared with the employer's other employees who perform work that is the same as, or substantially similar to, the work per- formed by the claimant; or</u>	5
	(B) <u>requests that their name and address for service be kept confidential (see sections 13E(4) and 13H(4)).</u>	
	(d) briefly set out the elements required for an arguable pay equity claim (see section 13C(2)), and the <u>evidence information</u> that the employee relies on in support of those elements.	10
(2)	The claim must be—	
	(a) delivered in person to the employee's employer; or	
	(b) sent to the employee's employer by any form of electronic communica- tion that is ordinarily used for formal communications; or	15
	(c) notified to the employer in any manner specified in the employee's employment agreement.	
	Compare: 1990 No 57 s 5J; 2000 No 24 s 69AAC	
13E	Employer must notify certain other employees	20
(1)	An employer who receives a pay equity claim from an employee (the claim- ant) must—	
	(a) acknowledge receipt of the claim by giving a notice of receipt to the claimant not later than 5 working days after receiving it; and	
	(b) give notice of the claim to the persons referred to in subsection (2) as soon as is reasonably practicable and not later than 20 working days after receiving it.	25
(2)	The persons are all of the employer's other employees who perform work that is the same as, or substantially similar to, the work performed by the claimant (the affected employees).	30
(3)	The notice must—	
	(a) be in writing; and	
	(b) state that a pay equity claim has been made by an employee who per- forms work that is the same as, or substantially similar to, the work per- formed by the affected employees; and	35
	(c) provide information about the steps that affected employees may take to join the claim or raise their own pay equity claim.	
(4)	The notice must not identify the claimant without the claimant's prior written consent if the claimant has requested that their name be kept confidential.	

- (5) The notice must be—
- (a) ~~delivered to the affected employee in person; or~~
 - (b) ~~sent to the affected employee by any form of electronic communication that is ordinarily used for formal communications; or~~
 - (c) ~~given in any manner specified in the affected employee’s employment agreement.~~ 5
- (6) **Subsection (1)(b)** does not apply in respect of an affected employee if—
- (a) the employer has given notice to that employee of another claim that relates to the same, or substantially similar, work; and
 - (b) that other claim has not been rejected or settled; and 10
 - (c) the claimant’s claim is to be consolidated under **section 13H** with an existing claim and the requirements of **section 13H** are complied with (which requires that a joinder notice be provided to the claimant, information about the claimant be provided to other claimants (unless confidentiality is requested), and information about other claimants be provided to the claimant). 15
- (7) Despite **subsection (1)(b)**, the employer may, by notice to the claimant, extend the time limit for notifying affected employees if the employer has genuine reasons, based on reasonable grounds, for requiring the extension.
- (8) A notice extending the time limit must— 20
- (a) be given as soon as is reasonably practicable and not later than 20 working days after the employer receives the claim; and
 - (b) specify the extended date by which the employer will notify affected employees of the claim; and
 - (c) set out the reasons and grounds for requiring the extension. 25
- 13F Employer must form view as to whether pay equity claim is arguable**
- (1) An employer who receives a pay equity claim must, as soon as is reasonably practicable and not later than ~~65 days~~ 45 working days after receiving it, decide whether, in the employer’s view, the pay equity claim is arguable.
- (2) An employer’s decision that a pay equity claim is arguable does not mean that— 30
- (a) the employer agrees that there is a pay equity issue; or
 - (b) there will be a pay equity claim settlement as a result of following the pay equity claim process.
- (3) The employer must notify the employee who made the claim of the employer’s decision under **subsection (1)** as soon as is reasonably practicable, and not later than ~~65 days~~ 45 working days after receiving the claim. 35
- (3A) Despite **subsections (1) and (3)**, the employer may, by notice to the employee who made the claim, extend the time limit for making and notifying

- the employer's decision as to whether the pay equity claim is arguable, if the employer has genuine reasons, based on reasonable grounds, for requiring the extension.
- (3B) A notice extending the time limit must—
- (a) be given as soon as is reasonably practicable and not later than 45 working days after the employer receives the claim; and 5
 - (b) specify the extended date by which the employer will notify the employee of the employer's decision; and
 - (c) set out the reasons and grounds for requiring the extension.
- (3C) The employer is deemed to have accepted that a pay equity claim is arguable if the employer fails to give notice to the employee under **subsection (3)**— 10
- (a) within 45 working days of receiving the claim; or
 - (b) by the date specified in a notice under **subsection (3A)** extending the time limit.
- (3D) If the employer decides that the claim is arguable, or is deemed to have accepted that the claim is arguable,— 15
- (a) the employer must provide the employee with a notice containing information about the pay equity bargaining process under **sections 13H to 13ZD**; and
 - (b) the employer and the employee must enter into the pay equity bargaining process. 20
- (4) If the employer decides that the claim is not arguable, the notice under **subsection (3)** must—
- (a) set out the reasons for the employer's decision; and
 - (b) provide an explanation of the steps that the employee may take to challenge the employer's decision, including advice that— 25
 - (i) the employee may seek further details of the reasons for the employer's decision:
 - (ii) the employee may refer the question of whether the claim is arguable to mediation under **section 13P**: 30
 - (iii) ~~the employee~~the parties may refer the question of whether the claim is arguable to the Authority for facilitation under **sections 13Q to 13Y**, if the employer agrees and if one or both of the grounds in **section 13S(2)** exists:
 - (iv) the employee may apply to the Authority under **section 13Z** for a determination as to whether the pay equity claim is arguable and that, if the employee does so, the Authority will first consider whether an attempt has been made to resolve the question by facilitation or mediation. 35

- (5) If the employer decides that the claim is arguable,—
- (a) the notice under ~~subsection (3)~~ must provide information about the pay equity bargaining process under **sections 13H to 13ZD**; and
 - (b) the employer and the employee must enter into the pay equity bargaining process. 5
- (6) If the employer fails, within 65 days of receiving the claim, to give notice to the employee under ~~subsection (3)~~,—
- (a) the employer is deemed to have accepted that the claim is arguable; and
 - (b) the employer must provide the employee with a notice containing information about the pay equity bargaining process under **sections 13H to 13ZD**; and 10
 - (c) the employer and the employee must enter into the pay equity bargaining process.
- (7) Notices under this section must be in writing and be—
- (a) delivered in person to the employee; or 15
 - (b) sent to the employee by any form of electronic communication that is ordinarily used for formal communications; or
 - (c) given in any manner specified in the employee’s employment agreement.
- Compare: 1990 No 57 s 5I; 2000 No 24 s 69AAE

Pay equity bargaining process 20

13G Process applies to arguable claims

Sections 13H to 13ZD apply to a pay equity claim if—

- (a) the employer decides, or is deemed to have accepted, that the claim is arguable; or
- (b) the Authority or the court determines that the claim is arguable. 25

13H Consolidation of claims by multiple employees

- (1) If, before settling a pay equity claim, the employer receives 1 or more other claims that relate to the same, or substantially similar, work, the employer must—
- (a) treat all claims as 1 joint claim for the purposes of this Act, unless the employer has genuine reasons, based on reasonable grounds, for not treating the claims as a joint claim; and 30
 - (b) notify all claimants as to whether their claims will be dealt with jointly or separately.

Joinder notice 35

- (2) A notice that a claimant’s claim will be dealt with jointly (a **joinder notice**) must—

- (a) include advice that, unless the claimant requests confidentiality, the information in respect of the claimant set out in **subsection (3)** will be provided to all other claimants; and
- (b) specify a reasonable date by which a request for confidentiality under **paragraph (a)** must be received by the employer. 5
- (3) If the employer decides to treat a number of claims jointly, the employer must provide to every claimant, as and when each new claim is added to the consolidated claim, the following information in respect of every other claimant:
- (a) the claimant's name and address for service; or
- (b) in the case of a claimant who has notified the employer of a representative under **section 13D(1)(c)(iv)**,— 10
- (i) the claimant's name; and
- (ii) the name of the claimant's representative; and
- (iii) the address for service of the claimant's representative.
- (4) Despite **subsection (3)**, if, before the date specified in the joinder notice, an employer receives a request to keep a claimant's name and address confidential, a claimant has requested that their name be kept confidential the employer— 15
- (a) must not provide the information referred to in **subsection (3)(a) and (b)(i)** to the other claimants; but 20
- (b) must advise the other claimants that a new claim has been joined and, if the claimant has notified the employer that the employee has a representative under **section 13D(1)(c)(iv)**, provide details of the name and address for service of the claimant's representative; and
- (c) must keep the claimant, or the claimant's representative, informed of all significant issues arising and steps taken in respect of the joint claim. 25
- (5) Notices to claimants under this section must be in writing and be—
- (a) delivered to the claimant in person; or
- (b) sent to the claimant by any form of electronic communication that is ordinarily used for formal communications; or 30
- (c) given in any manner specified in the claimant's employment agreement.
- Process for consolidated claims*
- (6) Claimants who have been notified that their claim will be dealt with jointly must seek to reach an agreement as to how the consolidated claim will be progressed, including— 35
- (a) whether there will be 1 or more representatives for the claimants, and who that representative or those representatives will be; and
- (b) how decisions relating to the claim will be made.

(7)	If the claimants cannot agree on how the consolidated claim will be progressed, any of them may apply to the Authority for a direction.	
(8)	The Authority may give any of the following directions that it considers appropriate:	
	(a) a direction as to representation of the claimants:	5
	(b) a direction as to how decisions relating to the claim must be made:	
	(c) any related direction that it considers useful to foster the efficient and just resolution of the claims.	
13I	Consolidation of claims against multiple employers	
	<i>Consolidation of claims by multiple employers</i>	10
(1)	If 2 or more employers receive pay equity claims made by employees who perform the same, or substantially similar, work, the employers may agree to consolidate those claims for the purposes of the pay equity bargaining process.	
	<i>Process for consolidated claims</i>	
(2)	An employer’s agreement to consolidate pay equity claims must include provisions that set out—	15
	(a) whether there will be 1 or more representatives for the employers and who that representative or those representatives will be; and	
	(b) how decisions relating to the claim will be made.	
(3)	If 2 or more employers decide to consolidate pay equity claims for the purposes of the pay equity bargaining process, each employer must provide to each employee who has made a claim against that employer—	20
	(a) the name of every other employer that is a party to the consolidated claim; and	
	(b) the name and address for service of the nominated representative of each employer.	25
(4)	At the conclusion of the pay equity bargaining process in respect of a consolidated pay equity claim, each employer must enter into a separate pay equity claim settlement with its employees who were parties to the claim.	
	<i>Notices</i>	30
(5)	Notices to claimants under this section must be in writing and be—	
	(a) delivered in person to the claimant; or	
	(b) sent to the claimant by any form of electronic communication that is ordinarily used for formal communications; or	
	(c) given in any manner specified in the claimant’s employment agreement.	35

13J Good faith in pay equity bargaining process

The duty of good faith in section 4 of the Employment Relations Act 2000 requires the parties, ~~at least, to~~ to, at least,—

- (a) follow the process set out in this section, and in **sections 13K to 13ZD**, to resolve the pay equity claim; and 5
- (b) use their best endeavours to enter into an arrangement, as soon as possible after the start of pay equity bargaining, that sets out a process for conducting the bargaining in an effective and efficient manner; and
- (c) use their best endeavours to settle the pay equity claim in an orderly, timely, and efficient manner; and 10
- (d) recognise the role and authority of any person chosen by each of the parties to be that person's representative or advocate, and not (directly or indirectly) bargain about matters relating to the pay equity claim with the person for whom a representative or advocate acts (unless the parties agree otherwise); and 15
- (e) not undermine, or do anything that is likely to undermine, the bargaining or the authority of another party in the bargaining.

Compare: 2000 No 24 s 32

13K Duty to provide information

- (1) The parties to a pay equity claim must provide to each other, on request, information that is reasonably necessary to support or substantiate claims or responses to claims made for the purposes of the bargaining. 20
- (2) A request by a party to another party for information must—
 - (a) be in writing; and
 - (b) specify the nature of the information requested in sufficient detail to enable the information to be identified; and 25
 - (c) specify the claim, or the response to a claim, in respect of which information to support or substantiate the claim, or the response, is requested; and
 - (d) specify a reasonable time within which the information must be provided. 30
- (3) A party who receives an information request may provide the information to an independent reviewer, instead of to the requesting party, if the party reasonably considers that the information requested should be treated as confidential information. 35
- (4) If information is provided to an independent reviewer, section 34(4) to (9) of the Employment Relations Act 2000 applies as if references to the union and employer were references to the parties.

Compare: 2000 No 24 s 34

13L Matters to be assessed

- (1) The parties to a pay equity claim must determine whether the employee’s work is currently undervalued, ~~or has historically been undervalued~~, by assessing—
- (a) the nature of the work to which the claim relates, and the nature of comparators, including, in each case, the following:
 - (i) the skills required:
 - (ii) the responsibilities imposed:
 - (iii) the conditions of work:
 - (iv) the terms and conditions of employment:
 - (v) the degree of effort required to perform the work:
 - (vi) the level of experience required to perform the work:
 - (vii) any other relevant work features; and
 - (b) the remuneration that is paid to the persons who perform the work to which the claim relates; and
 - (c) the remuneration that is paid to persons who perform comparable work; and
 - (d) any other matters prescribed by regulations made under section 19 for the purpose of this section.
- (1A) Despite **subsection (1)**, the parties to a pay equity claim may enter a written agreement that sets out an alternative process that they will use and that they agree is suitable and sufficient to settle the claim.
- (1B) If the parties enter a written agreement under **subsection (1A)**, they must follow the alternative process specified in that agreement to assess the claim, and **subsection (1) and section 13M** do not apply (except to the extent set out in the written agreement).
- (2) In making the assessments required by **subsection (1)**, or required by an alternative process specified in an agreement under **subsection (1A)**, the parties—
- (a) must consider matters objectively and without assumptions based on sex (and prevailing views as to the value of work must not be assumed to be free of assumptions based on sex); and
 - (b) must recognise the importance of skills, responsibilities, effort, and conditions that are or have been commonly overlooked or undervalued in female-dominated work (for example, social and communication skills, taking responsibility for the well-being of others, cultural knowledge, and sensitivity); and
 - (c) may consider the list of factors at **section 13C(3)**.

- (3) Despite **subsection (1)**, the parties to a pay equity claim may enter a written agreement that sets out an alternative process that they will use and that they agree is suitable and sufficient to settle the claim.
- (4) If the parties enter a written agreement under **subsection (3)**, they must follow the alternative process specified in that agreement to assess the claim, and **subsections (1) and (2) and section 13M** do not apply (except to the extent set out in the written agreement). 5
- 13M Identifying appropriate comparators**
- (1) For the purpose of identifying 1 or more appropriate comparators against which to assess a pay equity claim as required by **section 13L**, comparable work may include any of the following: 10
- (a) work performed by male comparators that is the same as, or substantially similar to, the work to which the claim relates:
- (b) work performed by male comparators that is different to the work to which the claim relates, if the comparators' work involves 1 or more of the following: 15
- (i) skills and experience that are the same as, or substantially similar to, those required to perform the work to which the claim relates:
- (ii) responsibilities that are the same as, or substantially similar to, those involved in the work to which the claim relates: 20
- (iii) working conditions that are same as, or substantially similar to, those involved in the work to which the claim relates:
- (iv) degrees of effort that are the same as, or substantially similar to, those involved in the work to which the claim relates:
- (c) work performed by any other comparators that the parties or the Authority or court considers useful and relevant, including comparators who perform work that has previously been the subject of a pay equity claim settlement. 25
- (2) Despite **subsection (1)**, work performed by a male comparator may not be selected for the purposes of assessing a pay equity claim under **section 13L(1)** if there are reasonable grounds to believe that the work performed by that male comparator— 30
- (a) has been historically undervalued for 1 or more of the reasons set out in **section 13C(3)(a) to (d)**; and
- (b) continues to be undervalued for the reasons set out in **section 13C(3)(e)**. 35
- (3) When identifying appropriate comparators against which to assess a pay equity claim, the parties must take into account any matters prescribed by regulations made under section 19 for the purpose of this section.

Settling pay equity claim

13N Settling pay equity claim

- (1) A pay equity claim is settled—
- (a) when—
 - (i) ~~remuneration is terms and conditions of employment, including remuneration, are determined that the parties agree—~~ remuneration, are determined that the parties agree— ~~does do not differentiate between male and female employees in the manner set out in **section 2AAC(b)**; and~~ 5
 - (ii) a process is agreed to review the employee’s terms and conditions of employment, including remuneration, to ensure that pay equity is maintained, including the agreed frequency of reviews; and 10
 - (iii) those matters are recorded in writing in accordance with **subsection (3)**; or
 - (b) when the Authority or the court—
 - (i) determines that an employee’s terms and conditions of employment, including remuneration, do not differentiate between male and female employees in the manner set out in **section 2AAC(b)**; or 15
 - (ii) issues a determination that ~~fixes terms and conditions of employment that do not differentiate between male and female employees in the manner set out in **section 2AAC(b)**.~~ 20
 - (A) fixes terms and conditions of employment, including remuneration, that do not differentiate between male and female employees in the manner set out in **section 2AAC(b)**; and
 - (B) if the parties have not agreed a review process, specifies a process to review those terms and conditions, including remuneration, to ensure that pay equity is maintained, including the frequency of reviews. 25
- (2) An employer may not reduce any terms and conditions of employment of an employee who has ~~made~~ raised or joined a pay equity claim for the purpose of settling that claim. 30
- (3) A pay equity claim settlement agreed between the parties must—
- (a) be in writing; and
 - (b) state—
 - (i) that it is a pay equity claim settlement for the purposes of this Act; and 35
 - (ii) the name of the employer; and
 - (iii) the name of the employee to whom the settlement relates; and

- (iv) the employee's occupation and position; and
 - (v) the terms and conditions of employment, including remuneration, that the parties agree do not differentiate between male and female employees in the manner set out in **section 2AAC(b)**; and
 - (vi) the process for reviewing those terms and conditions, including remuneration, to ensure that pay equity is maintained; and
 - (vii) the frequency of those reviews, which must be aligned with any applicable collective bargaining rounds; and
- (c) include a summary of the method used to assess the pay equity claim and a description of the comparators, if any, that were considered by the parties.
- (4) If the requirements of **subsections (2) and (3)** are met, a settlement agreement is a pay equity claim settlement for the purposes of this Act (regardless of whether the parties followed the processes set out in this Act to reach that settlement).

13NA Copy of pay equity claim settlement to be delivered to chief executive

- (1) This section applies if a pay equity claim settlement is reached (whether that settlement is reached by the parties recording an agreement in writing as described in **section 13N(3)** or by the Authority or the court making a determination described in **section 13N(1)(b)(ii)**).
- (2) An employer who is a party to the pay equity claim settlement must ensure that, as soon as practicable after the settlement is reached, a copy of the settlement agreement or determination (as applicable) is delivered to the chief executive of the department of State that is responsible for the administration of this Act.
- (3) The copy of the settlement delivered to the chief executive must include any document referred to, or incorporated by reference, in the settlement, unless the document is publicly available.
- (4) Nothing in the Official Information Act 1982 applies to copies of pay equity claim settlements delivered to the chief executive under **subsection (1)**.
- (5) The information contained in the copies of pay equity claim settlements delivered to the chief executive under **subsection (1)** must be used only for statistical or analytical purposes.

13O Relationship between pay equity claims and collective bargaining

- (1) The entry into a collective agreement by an employer and a union does not settle or extinguish an unsettled pay equity claim between that employer and 1 or more of the employer's employees.
- (2) The existence of an unsettled pay equity claim between an employer and an employee, or of an uncompleted review of a pay equity claim settlement, is not

a genuine reason for failing to conclude collective bargaining between that employer and a union representing the employer's employees.

Mediation

13P Parties may refer issues to mediation

- (1) Any party to a pay equity claim may refer any 1 or more issues relating to that claim to mediation services provided under Part 10 of the Employment Relations Act 2000. 5
- (2) Issues that may be referred to mediation services include, but are not limited to, the following:
 - (a) a dispute as to whether the pay equity claim is arguable (*see section 13C(2)*): 10
 - (b) a dispute as to whether an employee's claim relates to work that is the same as, or substantially similar to, work performed by another claimant for the purposes of consolidating those employees' claims under **section 13H or 13I**: 15
 - (c) a dispute as to whether work performed by others is comparable work for the purposes of the assessment required by **section 13L**: 15
 - (d) a dispute as to whether proposed terms and conditions of employment, including remuneration, no longer ~~differentiates~~ differentiate between male and female employees in the manner set out in **section 2AAC(b)** for the purposes of settling a pay equity claim. 20
- (3) If an issue relating to a pay equity claim is referred to mediation services, sections 145 to 154 of the Employment Relations Act 2000 apply, with all necessary modifications. 25

Facilitation

13Q Purpose of facilitating pay equity claim

- (1) The purpose of **sections 13R to 13Y** is to provide a process that enables 1 or more parties to a pay equity claim who are having difficulties in resolving that claim to seek the assistance of the Authority in resolving the difficulties. 25
- (2) **Sections 13R to 13Y** do not— 30
 - (a) prevent the parties from seeking assistance from another person in resolving the difficulties; or
 - (b) apply to any agreement or arrangement with the other person providing such assistance. 35

Compare: 2000 No 24 s 50A

13R Reference to Authority

- (1) Any party to a pay equity claim may refer any 1 or more issues relating to that claim to the Authority for facilitation to assist in resolving the claim.
- (2) Issues that may be referred to the Authority include, but are not limited to, the following: 5
- (a) ~~a dispute as to whether the pay equity claim is arguable (see **section 13C(2)**):~~
 - (b) a dispute as to whether an employee's claim relates to work that is the same as, or substantially similar to, work performed by another claimant for the purposes of consolidating those employees' claims under **section 13H or 13I**: 10
 - (c) a dispute as to whether work performed by others is comparable work for the purposes of the assessment required by **section 13L**:
 - (d) a dispute as to whether proposed terms and conditions of employment, including remuneration, no longer ~~differentiates~~ differentiate between male and female employees in the manner set out in **section 2AAC(b)** for the purposes of settling a pay equity claim. 15
- (2A) Despite **subsections (1) and (2)**, a dispute as to whether a pay equity claim is arguable may only be referred to the Authority for facilitation if all of the parties to the claim agree to do so. 20
- (3) A reference for facilitation must be made on 1 or ~~more~~ both of the grounds specified in **section 13S(2)**.
Compare: 2000 No 24 s 50B

13S When Authority may accept reference

- (1) The Authority must not accept a reference for facilitation unless— 25
- (a) the Authority is satisfied that facilitation may be useful to resolve the issue referred; and
 - (b) 1 or both of the grounds in **subsection (2)** exist.
- (2) The grounds are—
- (a) that a party has failed to comply with the duty of good faith in section 4 of the Employment Relations Act 2000 and the failure— 30
 - (i) was serious and sustained; and
 - (ii) has undermined the progress of the pay equity claim:
 - (b) that sufficient efforts (including mediation) have failed to resolve an issue relating to the claim. 35
- (3) The Authority must not accept a reference for facilitation in relation to a pay equity claim for which the Authority has already acted as a facilitator unless—

- (a) the earlier facilitation related only to the issue of whether the claim is arguable and the subsequent reference relates to the pay equity bargaining process; or
- (b) the circumstances relating to the pay equity claim have changed; or
- (c) the bargaining since the previous facilitation has been protracted.

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Compare: 2000 No 24 s 50C

13T Limitation on which member of Authority may provide facilitation

A member of the Authority who facilitates resolution of an issue relating to a pay equity claim must not be the member of the Authority who accepted the reference for facilitation.

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Compare: 2000 No 24 s 50D

13U Process of facilitation

- (1) The process to be followed during facilitation—
 - (a) must be conducted in private; and
 - (b) is otherwise determined by the Authority.
- (2) During facilitation, any pay equity bargaining in respect of the claim to which the facilitation relates continues subject to the process determined by the Authority.
- (3) During facilitation, the Authority—
 - (a) is not acting as an investigative body; and
 - (b) may not exercise the powers it has for investigating matters.
- (4) The provision of facilitation by the Authority may not be challenged or called in question in any proceedings on the ground—
 - (a) that the nature and content of the facilitation were inappropriate; or
 - (b) that the manner in which the facilitation was provided was inappropriate.

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Compare: 2000 No 24 s 50E

13V Statements made by parties during facilitation

- (1) A statement made by a party for the purposes of facilitation is not admissible against the party in proceedings under this Act or under the Employment Relations Act 2000.
- (2) A party may make a public statement about facilitation only if—
 - (a) it is made in good faith; and
 - (b) it is limited to the process of facilitation or the progress being made.

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Compare: 2000 No 24 s 50F

13W Proposals made or positions reached during facilitation

(1) A proposal made by a party or a position reached by parties to a pay equity claim during facilitation is not binding on a party after facilitation has come to an end.

(2) This section— 5

(a) applies to avoid doubt; and

(b) is subject to any agreement of the parties.

Compare: 2000 No 24 s 50G

13X Recommendation by Authority

(1) While assisting parties to resolve an issue related to a pay equity claim, the Authority may make a recommendation about any matter that relates to the pay equity claim, including, but not limited to, recommendations as to the following: 10

(a) whether the pay equity claim is arguable:

(b) the process the parties should follow to reach agreement: 15

(c) terms and conditions of employment, (including remuneration,) that would no longer differentiate between male and female employees in the manner set out in **section 2AAC(b)**.

(2) The Authority may give public notice of a recommendation in any manner that the Authority determines. 20

(3) A recommendation made by the Authority is not binding on a party, but a party must consider a recommendation before deciding whether to accept it.

Compare: 2000 No 24 s 50H

13Y Parties must deal with Authority in good faith

During facilitation, the parties must deal with the Authority in good faith. 25

Compare: 2000 No 24 s 50I

*Determination by Authority***13Z Parties may apply for determination by Authority**

(1) A party to a pay equity claim may apply to the Authority ~~or the court~~ for determination of any matter that relates to the pay equity claim, including, but not limited to, the following: 30

(a) a determination as to whether the pay equity claim is arguable (*see section 13C(2)*):

(b) a determination as to whether an employee's claim relates to work that is the same as, or substantially similar to, work performed by another claimant for the purposes of consolidating those employees' claims under **section 13H or 13I**: 35

- (c) a determination as to whether the work to which the claim relates is currently undervalued ~~or has historically been undervalued~~;
- (d) ~~a determination fixing terms and conditions of employment (including remuneration) that do not differentiate between male and female employees in the manner set out in **section 2AAC(b)**.~~ 5
- (d) a determination that—
 - (i) fixes terms and conditions of employment, including remuneration, that do not differentiate between male and female employees in the manner set out in **section 2AAC(b)**; and
 - (ii) specifies a process to review those terms and conditions, including remuneration, to ensure that pay equity is maintained, including the frequency of reviews. 10
- (2) Where an application is made under **subsection (1)**, the Authority ~~or the court—~~
 - (a) must first consider whether an attempt has been made to resolve the difficulties by the use of— 15
 - (i) mediation or further mediation under **section 13P**; or
 - (ii) facilitation under **sections 13R to 13Y**; and
 - (b) may direct the parties to try to resolve the difficulties by mediation or further mediation; ~~but and~~ 20
 - (c) if 1 or both of the grounds in **section 13S(2)** exist, ~~must~~ may direct that facilitation be used before the Authority ~~or the court~~ investigates the matter, unless the Authority ~~or the court~~ considers that use of facilitation—
 - (i) will not contribute constructively to resolve the difficulties; or 25
 - (ii) will not, in all the circumstances, be in the public interest; or
 - (iii) will undermine the urgent nature of the process; or
 - (iv) will be otherwise impractical or inappropriate in the circumstances.
- (2A) If an application for a determination relates to whether a pay equity claim is arguable, **subsection (2)(c)** does not apply. 30
- (3) If an application for a determination relates to whether the work to which the claim relates is currently undervalued ~~or has historically been undervalued~~, the Authority or the court may take into account the list of factors set out in **section 13C(3)**. 35
- (4) If an application for a determination relates to whether a claim may be raised despite **section 13C(4)**, the Authority or the court must make its determination—

- (a) having regard to the existing pay equity claim settlement to which the employer is a party; and
- (b) only if it is satisfied that there are exceptional circumstances.

Compare: 2000 No 24 s 50K

13ZA If Authority or court determines pay equity claim is arguable 5

If the Authority or the court determines that a pay equity claim is arguable, the parties must enter into the pay equity bargaining process in accordance with **sections 13H to 13ZD**.

13ZB Process on application to fix terms and conditions

- (1) If the Authority receives an application under **section 13Z(1)(d)** to fix terms and conditions of employment, and ~~the Authority has not previously directed the parties to try~~ the parties have not previously tried to resolve the difficulties by mediation or further mediation, the Authority must— 10
 - (a) direct the parties to try to resolve the difficulties by mediation or further mediation; or 15
 - (b) recommend another process that the parties must follow to try to resolve the difficulties.
- (2) The Authority may accept an application for a determination that fixes terms and conditions of employment only if—
 - (a) the parties have first tried to resolve the difficulties by mediation, or by any other process recommended by the Authority; and 20
 - (b) the Authority is satisfied that all other reasonable alternatives for settling the pay equity claim have been exhausted.

13ZC Determination may provide for recovery of remuneration for past work

- (1) A determination fixing terms and conditions of employment may also provide for recovery of an amount of remuneration that relates to work performed before the date of the determination (**past work**). 25
- (2) When deciding whether to provide for recovery of an amount of remuneration for past work, and the amount to provide, the Authority or the court must take into account the following factors: 30
 - (a) the conduct of the parties; and
 - (b) the ability of the employer to pay; and
 - (c) the nature and extent of resources (for example, information and advice) available to the employer and the employee in respect of the claim; and
 - (d) any other factors the Authority or the court considers appropriate. 35
- (3) *See* **section 13ZD** for the periods for which remuneration for past work can be recovered.

13ZD Limitation periods for recovery of remuneration for past work

- (1) A determination may provide for recovery of an amount of remuneration that relates to work performed in the period—
 - (a) beginning on the applicable start date for the claim to which the determination relates; and
 - (b) ending on the date of the determination.
- (2) However, no determination may provide for recovery of an amount of remuneration that relates to a period that is longer than 6 years.
- (3) The **applicable start date** for a claim is as follows:

When claim raised or notified	Applicable start date
<p>Claim notified or proceedings commenced before the date on which this section comes into force Existing pay equity claim as defined in Schedule 1, clause 1(1) (whether raised anew in accordance with clause 2(1A)(a) or progressed under clause 3 of that schedule)</p>	<p>The earlier of—</p> <ul style="list-style-type: none"> (a) the date on which the <u>existing pay equity</u> claim was notified to the employer; and (b) the date on which <u>the proceedings discontinued under Schedule 1, clause 2(1)</u> were commenced
<p>Claim raised on or after the date on which this section comes into force, but no more than 5 years after the date on which this section comes into force</p>	<p>The date on which the claim is raised</p>
<p>Claim raised more than 5 years after the date on which this section comes into force</p>	<p>The date that is 5 years after the date on which this section comes into force</p>

- (4) In this section, a claim is **notified** on the date on which the employee gives the employer notice in writing that the employee is making a claim to the effect that the employer has failed to ensure that there is no differentiation between the rates of remuneration offered and afforded by the employer for work that is exclusively or predominantly performed by female employees and the rate of remuneration that would be paid to male employees who—
 - (a) have the same, or substantially similar, skills, responsibility, and service experience; and
 - (b) work under the same, or substantially similar, conditions, and with the same, or substantially similar, degrees of effort.

Example 1

Employee A notifies their employer of a pay equity claim as set out in **subsection (4)** on 28 October 2018 (before the commencement of this section). After the commencement of this section, Employee A raises a pay equity claim by following the processes set out in **Part 4** (see **Schedule 1, clause 2(1A)(a)**). A determination of Employee A's claim may provide for recovery of an amount of remuneration for the period that runs back from the date of determination to 28 October 2018 (but with a maximum of 6 years).

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Example 2

Employee B formally files an application in respect of a pay equity claim with the Authority on 1 February 2019 (before the commencement of this section), without having first notified Employee B's employer of the claim. That claim remains unresolved on the date of commencement of this section, and it is discontinued under **Schedule 1, clause 2**. Two weeks later, Employee B raises a new pay equity claim by following the processes set out in **Part 4** (see **Schedule 1, clause 2(1A)(a)**). A determination of the new pay equity claim raised under **Part 4** may provide for recovery of an amount of remuneration for the period that runs back from the date of the determination to 1 February 2019 (but with a maximum of 6 years).

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Example 3

Employee C raises a claim 2 months after the commencement of this section, and that claim is resolved by a determination made 2 years later. That determination may provide for recovery of an amount of remuneration that relates to the 2-year period that runs back from the date of determination to the date on which the claim was raised.

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Example 4

Employee D raises a claim 4 years and 11 months after the commencement of this section, and that claim is resolved by a determination made 2 years later. That determination may provide for recovery of an amount of remuneration that relates to the 2-year period that runs back from the date of determination to the date on which the claim was raised.

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Example 5

Employee E raises a claim 6 years after the commencement of this section, and that claim is resolved by a determination made 2 years later. That determination may provide for recovery of an amount of remuneration that relates to the 3-year period that runs back from the date determination to the date that is 5 years after the date of commencement of this section.

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Example 6

Employee F raises a claim 11 years after the commencement of this section, and that claim is resolved by a determination made 1 year later. That determination may provide for recovery of an amount of remuneration that relates to the 6-year period that runs back from the date of determination (being the maximum period allowed under **subsection (2)**).

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- (5) The examples in **subsection (4)** are only illustrative and do not limit **subsections (1) to (3)**.

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*Obligation on employers to keep pay equity records***13ZE Pay equity records**

Every employer who has received 1 or more pay equity claims must keep a record showing—

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- (a) every pay equity claim lodged by an employee; and

- (b) in relation to each pay equity claim,—
 - (i) the employer’s decision as to whether the claim is arguable and the consequent notice to the employee; and
 - (ii) the outcomes of any pay equity bargaining; and
 - (iii) all notifications to affected employees under **section 13E**; and
 - (iv) any recommendation by the Authority during facilitation.

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Pay equity claims by employees of education service

13ZF Pay equity claims by employees of education service

Employees other than employees of tertiary education institutions

(1) For the purposes of a pay equity claim by 1 or more employees of the education service (other than employees of a tertiary education institution), the State Services Commissioner—

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- (a) must be treated as the employer; and
- (b) has the same rights, duties, and obligations under this Act as the Commissioner would have if the Commissioner were the employer.

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(2) If the Commissioner decides that a pay equity claim by 1 or more employees referred to in **subsection (1)** is arguable, or if the Authority or the court determines that such a claim is arguable, the Commissioner must enter into the pay equity bargaining process described in **sections 13H to 13ZD**—

- (a) with the employee or employees or their representative or representatives; and
- (b) in consultation with—
 - (i) the chief executive of the Ministry of Education; and
 - (ii) representatives of the employer or employers who will be bound by the pay equity claim settlement agreement (which representatives must be employers, or organisations of employers, of persons employed in the education service).

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(3) Every pay equity claim settlement agreement entered into between the Commissioner and 1 or more employees in the education service is binding on the employer or employers of those employees.

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(4) An employer who is bound by a pay equity claim settlement agreement under **subsection (3)** has the rights, obligations, and duties that the employer would have, in respect of that pay equity claim settlement agreement, as if that employer were a party to that agreement.

Employees of tertiary education institutions

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(5) For the purposes of a pay equity claim by 1 or more employees of a tertiary education institution, the chief executive of the tertiary education institution is responsible (either individually or jointly through an organisation of employers

of persons employed in tertiary education institutions) for determining whether the claim is arguable and, if so, entering into the pay equity bargaining process described in **sections 13H to 13ZD**.

- (6) Before entering into a pay equity claim settlement, the chief executive of a tertiary education institution, or an organisation of employers of persons employed in tertiary education institutions, must consult with the State Services Commissioner. 5

Interpretation

- (7) In this section,—
- education service** has the same meaning as in section 2 of the State Sector Act 1988 10
- State Services Commissioner** or **Commissioner** means the State Services Commissioner appointed under section 3 of the State Sector Act 1988
- tertiary education institution** means an institution within the meaning of section 159(1) of the Education Act 1989. 15

Compare: 1988 No 20 s 74

19 Section 14 repealed (Procedure and jurisdiction of Employment Relations Authority)

Repeal section 14.

20 New section 14A and Part 5 heading inserted 20

Before section 15, insert:

Part 5
General provisions

Penalties—Notices, penalties, and enforcement

14A Notices 25

- (1) A notice under this Act that is required to be given to an employee must,—
- (a) if the employee has authorised a union or any other representative to act on the employee's behalf in respect of the claim, be given to that representative at the address for service of the representative; or
- (b) if the employee has not authorised a representative to act on the employee's behalf in respect of the claim, be— 30
- (i) delivered to the employee in person; or
- (ii) sent to the employee by any form of electronic communication that is ordinarily used for formal communications; or
- (iii) notified to the employee in any manner specified in the employee's employment agreement. 35

- (2) A notice under this Act that is required to be given to an employee’s employer must be—
- (a) delivered in person to the employee’s employer; or
 - (b) sent to the employee’s employer by any form of electronic communication that is ordinarily used for formal communications; or
 - (c) notified to the employer in any manner specified in the employee’s employment agreement.

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21 Section 15 replaced (When dismissal or reduction of employee an offence)

Replace section 15 with:

15 Claimant employee must not be treated adversely

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- (1) An employer must not treat adversely any employee who raises or joins a claim under this Act.
- (2) In this section, an employer treats an employee adversely if the employer—
 - (a) refuses or omits to offer or provide to that employee the same terms and conditions of employment (including the same remuneration, conditions of work, fringe benefits, or opportunities for training, promotion, and transfer) as are offered or provided to other employees of the same, or substantially similar, qualifications, experience, or skills employed in the same, or substantially similar, circumstances; or
 - (b) dismisses that employee or subjects that employee to any detriment, in circumstances in which other employees employed by that employer on work of that description are not or would not be dismissed or subjected to such detriment; or
 - (c) retires that employee, or requires or causes that employee to retire or resign.
- (3) An employee may raise a claim against the employee’s employer or former employer for a contravention of **subsection (1)**.
- (4) A claim referred to in **subsection (3)** is to be treated as a personal grievance under section 103(1) of the Employment Relations Act 2000 and, if an employer alleges that any of the actions described in **subsection (2)** were not related to the employee’s raising of a claim but were justifiable on other grounds, section 103A of that Act applies and the employer must establish that the employer’s actions were justifiable.

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

22 Sections 16 to 17A repealed

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Repeal sections 16 to 17A.

23 Section 18 replaced (Offences)

Replace section 18 with:

18 Penalty for non-compliance

- (1) A person who fails to comply with a provision listed in **subsection (2)**, and every person who is involved in the failure to comply, is liable,—
- (a) if the person is an individual, to a penalty not exceeding \$10,000;
 - (b) if the person is a company or another body corporate, to a penalty not exceeding \$20,000. 5
- (2) The provisions are as follows:
- (a) **section 2AAC(a)** (which imposes a duty on employers to not differentiate on the basis of sex in the remuneration paid to employees who perform the same, or substantially similar, work): 10
 - (b) section 2A (which relates to unlawful discrimination):
 - (c) **section 13F(5)(b)** (which imposes a duty on an employer who decides that a pay equity claim is arguable to enter into pay equity bargaining):
 - (d) **section 13J** (which imposes a duty to deal with the Authority in good faith during ~~facilitation~~ the pay equity bargaining process): 15
 - (e) **section 13ZE** (which imposes a duty on employers to keep records relating to pay equity claims).
- (2A) Any action for the recovery of a penalty may be brought,—
- (a) in the case of a breach described in **subsection (2)(a) or (b)**, by the employee in relation to whom the breach is alleged to have taken place, or by a Labour Inspector; or 20
 - (b) in the case of a breach described in **subsection (2)(c) to (e)**, by an employee who is a claimant in the relevant pay equity claim.
- (3) For the purposes of **subsection (1)**, a person is involved in a failure to comply if the person would be treated as a person involved in a breach within the meaning of section 142W of the Employment Relations Act 2000. 25

18A Proceedings by Labour Inspector or employee concerned for penalty

- (1) An Inspector and the employee concerned are the only persons who may bring an action in the Authority against an employer to recover a penalty under **section 18**. 30
- (2) However, only a Labour Inspector may bring an action in the Authority against a person involved in a failure to comply in order to recover a penalty under **section 18**.
- (3) A claim for 2 or more penalties against the same employer may be joined in the same action. 35
- (4) A claim for a penalty may be heard in conjunction with any other claim under this Act.
- (4A) In determining whether to give judgment for a penalty, and the amount of that penalty, the Authority must consider whether the person against whom the pen-

alty is sought has previously failed to comply with an improvement notice issued under section 223D of the Employment Relations Act 2000.

- (5) After hearing an action for recovery of a penalty, the Authority may—
 - (a) give judgment for the amount claimed; or
 - (b) give judgment for an amount that is less than the amount claimed; or
 - (c) dismiss the action.
- (6) The Authority ~~or the court~~ may order payment of a penalty by instalments, but only if the financial position of the person paying the penalty requires it.
- (7) An action for the recovery of a penalty must be commenced within 12 months after the earlier of when the cause of action became known, or should reasonably have become known, to the Labour Inspector or employee concerned.
- (8) A penalty that is recovered must be paid,—
 - (a) if, and to the extent, ordered by the Authority, to any person the Authority specifies; or
 - (b) in any other case, into court and then into a Crown Bank Account.

Compare: 2003 No 129 s 76; 2000 No 24 s 135

Powers of Inspectors and procedure and jurisdiction of Employment Relations Authority and Employment Court

18B Powers of Inspectors

For the purposes of this Act, every Inspector has, in addition to any powers conferred by this Act, all the powers that the Inspector has under the Employment Relations Act 2000.

18C Procedure and jurisdiction of Employment Relations Authority and Employment Court

In performing its functions under this Act, or in respect of any breach of this Act,—

- (a) the Employment Relations Authority has all the powers and functions it has under the Employment Relations Act 2000; and
- (b) the Employment Court has all the powers and functions it has under the Employment Relations Act 2000.

Regulations

24 Section 19 amended (Regulations)

In section 19, after “administration”, insert “, including regulations for the following purposes:”, and insert:

- (a) prescribing matters that must be taken into account when assessing a pay equity claim; and

- (b) prescribing matters that must be taken into account when identifying comparable work under **section 13M**.

25 New Schedule 1 inserted

Insert the **Schedule 1** set out in **Schedule 1** of this Act as the first schedule to appear after the last section of the principal Act.

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Part 2

Related amendments and repeals

Amendments to Employment Relations Act 2000

26 Related amendments to Employment Relations Act 2000

Sections 27 to 29 amend the Employment Relations Act 2000.

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27 Section 100A amended (Codes of employment practice)

- (1) In section 100A(4), replace “this Act” with “any of the Acts specified in section 223(1) or any regulations made under those Acts”.

- (2) After section 100A(4), insert:

- (5) A code of employment practice approved under this section is not a legislative instrument but is a disallowable instrument for the purposes of the Legislation Act 2012 and must be presented to the House of Representatives under section 41 of that Act.

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28 Section 100C replaced (Authority or court may have regard to code of practice)

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Replace section 100C with:

100C Authority or court may have regard to code of employment practice

- (1) A code of employment practice is admissible in any civil or criminal proceedings as evidence of whether the enactment to which it relates has been complied with.

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- (2) The Authority or court may—

- (a) have regard to the code as evidence of compliance with the provisions of the enactment to which it relates; and
- (b) rely on the code in determining what is required to comply with those provisions.

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Compare: 2015 No 70 s 226

29 Consequential amendments to Employment Relations Act 2000

Amend the Employment Relations Act 2000 as set out in **Schedule 2**.

Repeal

30 Repeal of Government Service Equal Pay Act 1960

The Government Service Equal Pay Act 1960 (1960 No 117) is repealed.

Schedule 1
New Schedule 1 inserted

s 25

Schedule 1
Transitional, savings, and related provisions

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s 2AAA

Part 1
Provisions relating to Equal Pay Amendment Act 2018

1 Interpretation

(1) In this Part,—

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amendment Act means the Equal Pay Amendment Act **2018****existing equal pay claim** means a claim that—

(a) is to the effect that an employer has differentiated, on the basis of sex, between the rates of remuneration offered and afforded by the employer to employees of the employer who perform the same, or substantially similar, work; and

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(b) was formally commenced by lodging an application to the Authority or a court before the date on which the amendment Act came into force, but not determined by the Authority or court before that date

existing pay equity claim means a claim, whether under this Act or under the Government Service Equal Pay Act 1960, that—

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(a) is to the effect that an employer has failed to ensure that there is no differentiation between the rates of remuneration offered and afforded by the employer for work that is exclusively or predominantly performed by female employees and the rate of remuneration that would be paid to male employees who—

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(i) have the same, or substantially similar, skills, responsibility, and service; and

(ii) work under the same, or substantially similar, conditions, and with the same, or substantially similar, degrees of effort; and

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(b) either—

(i) was formally commenced by lodging an application to the Authority or a court before the date on which the amendment Act came into force, but not determined by the Authority or court before that date; or

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- (ii) was notified by an employee to an employer before the date on which the amendment Act came into force, but not formally commenced by application to the Authority or a court before that date: **existing unlawful discrimination claim** means a claim—
- (a) under section 2A of the principal Act that does not fall within the definition of an existing pay equity claim or an existing equal pay claim; and 5
- (b) that was formally commenced by lodging an application to the Authority or a court before the date on which the amendment Act came into force, but not determined by the Authority or court before that date.
- (2) In this Part, a claim is **notified** on the date on which the employee gives the employer notice in writing that the employee is making a claim to the effect that the employer has failed to ensure that there is no differentiation between the rates of remuneration offered and afforded by the employer for work that is exclusively or predominantly performed by female employees and the rate of remuneration that would be paid to male employees who— 10
- (a) have the same, or substantially similar, skills, responsibility, and service; and 15
- (b) work under the same, or substantially similar, conditions, and with the same, or substantially similar, degrees of effort.
- 2 Existing pay equity claims must transition to Part 4 process** 20
- (1) Every existing pay equity claim that was formally commenced by lodging an application with the Authority or a court before the date on which the amendment Act came into force is discontinued.
- (1A) An employee who has an existing pay equity claim (whether formally commenced and discontinued under **subclause (1)**, or notified to the employee’s employer but not formally commenced) may— 25
- (a) raise a new claim under **Part 4** of this Act, by following the processes set out in that Part; or
- (b) resolve the existing pay equity claim by following a pay equity bargaining process as required by a written pay equity bargaining agreement in accordance with **clause 3**. 30
- (2) ~~An employee whose claim is discontinued under **subclause (1)** may raise a new claim with the employee’s employer in accordance with the processes set out in **Part 4** of this Act.~~
- (3) ~~Except to the extent that **clause 3** applies, every existing pay equity claim that was notified to an employer before the date on which the amendment Act came into force, but not formally commenced before that date, must be raised in accordance with the processes set out in **Part 4** of this Act.~~ 35

- 3 Claims to which existing written pay equity bargaining agreement applies**
- (1) This clause applies to an existing pay equity claim if, before the date on which the amendment Act came into force, the parties signed a written agreement that states that the parties agree that the pay equity claim is arguable, and—
- (a) requires them to undertake a pay equity bargaining process that includes an assessment of the matters set out in **section 13L** based on comparators identified in accordance with **section 13M**; or
- (b) specifies a pay equity bargaining process that the parties will use and that they agree is suitable and sufficient to settle the claim.
- (2) If this clause applies,—
- (a) ~~the~~ a pay equity claim is deemed to have been made in accordance with the requirements of **section 13D**; and
- (b) the employer is deemed to have complied with the requirement in **section 13E(1)(a)**; and
- (c) if the employer has not already done so, the employer must give notice of the claim to other affected employees (as required by **section 13E(1)(b)**) as soon as is reasonably practicable and not later than 20 working days after the date on which the amendment Act came into force; and
- (d) the employer is deemed to have decided that the claim is arguable in accordance with the requirement in **section 13F**; and
- (e) **sections 13H to 13ZB 13ZD** apply accordingly.
- (3) Any pay equity bargaining that took place before the amendment Act came into force may be taken into account for the purposes of **sections 13S(2)(b), 13Z(2), and 13ZB(2)(b)**.
- 4 Appeals**
- (1) This clause applies to an application—
- (a) that is an existing pay equity claim that was formally commenced before the date on which the amendment Act came into force; and
- (b) in relation to which the Authority, or the court in which the application was commenced, made a determination on the application before the date on which the amendment Act came into force.
- (2) Any appeal against, or challenge to the determination must be determined in accordance with the provisions of this Act as if it had not been amended by the amendment Act, or the provisions of the Government Service Equal Pay Act 1960 as if it had not been repealed by the amendment Act (as applicable).
- 5 Existing Equal Pay Act 1972 claim settlements**
- Section 13C(4)** applies to the following:

- (a) a written settlement agreement entered into between 1 or more employers and 1 or more employees before the date on which the amendment Act came into force, if the process undertaken by the parties to reach that settlement involved—
 - (i) an assessment of the matters set out in **section 13L** based on comparators identified in accordance with **section 13M**; or
 - (ii) a pay equity bargaining process that the parties agreed in writing was suitable and sufficient to settle the claim:
- (b) a claim settled under the Care and Support Workers (Pay Equity) Settlement Act 2017.

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6 Effect of amendment Act on other existing claims

An existing equal pay claim or existing unlawful discrimination claim must be determined in accordance with the provisions of this Act as if it had not been amended by the amendment Act.

Schedule 2

Consequential amendments to Employment Relations Act 2000

s 29

Section 4

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

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- (ea) making pay equity claims, responding to pay equity claims, and participating in the pay equity claim resolution process under **Part 4** of the Equal Pay Act 1972:

Section 4A

Replace section 4A(b) with:

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- (b) the failure was intended to—
 - (i) undermine bargaining for an individual employment agreement or a collective agreement; or
 - (ii) undermine an individual employment agreement or a collective agreement; or
 - (iii) undermine an employment relationship; or
 - (iv) undermine the pay equity claim resolution process under **Part 4** of the Equal Pay Act 1972; or

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

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- (b) the requirements of **section 2AAC(a)** and 2A of the Equal Pay Act 1972:

Section 33

After section 33(2)(b), insert:

- (c) the existence of an unsettled pay equity claim under the Equal Pay Act 1972 between an employer and 1 or more employees; or
- (d) the existence of a requirement to review a pay equity claim settlement under the Equal Pay Act 1972.

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Section 50F

Replace section 50F(1) with:

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- (1) A statement made by a party for the purposes of facilitation is not admissible against the party in proceedings under this Act or under the Equal Pay Act 1972.

Section 137

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

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Section 137—*continued*

- (iiic) any terms of a pay equity claim settlement under **section 13N** of the Equal Pay Act 1972; or

Section 161

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

- (iib) under **section 18** of the Equal Pay Act 1972: 5

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

- (qd) all matters arising under the Equal Pay Act 1972 and, in particular,—
 - (i) determining equal pay claims and discriminatory treatment claims: 10
 - (ii) determining disputes as to whether a pay equity claim is arguable: 10
 - (iii) determining disputes as to whether work is comparable work for the purpose of assessing a pay equity claim:
 - (iv) determining disputes as to whether the claimant’s work is in fact undervalued:
 - (v) fixing terms and conditions, including remuneration, that is consistent with pay equity under that Act: 15
 - (vi) determining whether to provide for recovery of an amount of remuneration for past work, and the amount to provide, under **section 13ZC** of that Act:
 - (vii) determining the applicable start date for the purposes of **section 13ZD** of that Act: 20

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

Legislative history

19 September 2018
16 October 2018

Introduction (Bill 103–1)
First reading and referral to Education and Workforce Committee