**BUDGET-SENSITIVE**

**NEGOTIATIONS-SENSITIVE**

Office of the Minister for Workplace Relations and Safety

Cabinet

# Reviewing policy settings

## Proposal

1 This paper seeks agreement to proposals to ensure the Equal Pay Act 1972 (the Act) provides a pay equity framework that is workable and sustainable. It also seeks agreement to apply the proposals retrospectively.

## Relation to government priorities

2 This Government is committed to improving the quality of regulation, reducing complexity and costs. The proposed changes to the Act provide a better regulatory framework for a pay equity process.

## Executive Summary

3 Pay equity means women and men are paid the same for work that is different but of equal value. The Act provides a process to raise and resolve claims of systemic sex-based undervaluation in remuneration in female-dominated occupations.

4 This Government is committed to maintaining a process to raise and resolve pay equity claims, but it is imperative that the system is workable and sustainable.

5 I consider that the 2020 amendments to the Act have made it harder for parties to have confidence that a “pay equity” assessment is identifying and correcting for differences in remuneration that are the result of sex-based discrimination. This is particularly as a result of the low entry threshold and insufficient guidance in the Act for comparator choice and comparison methodology.

6 I propose a suite of legislative changes that maintain a process to raise and resolve pay equity claims, while providing a better framework for parties to use to assess whether there is sex-based undervaluation, including by ensuring:

6.1 the process for raising a claim is robust, by requiring claims to have merit, and providing further tools to help ensure they are appropriately scoped;

6.2 there is further clarity and guidance in the Act on the appropriateness of comparators used in assessments of sex-based undervaluation and comparison methodology;

6.3 employers are able to meet their pay equity obligations in a manner that is sustainable; and

6.4 the parameters for the Employment Relations Authority (the Authority) relating to fixing remuneration provide the right incentives to resolve pay equity claims.

7 I propose that these changes apply retrospectively to existing claims, and existing settlements with review clauses. While this departs from the presumption that legislation will not be applied retrospectively, it is justified to meet the policy objectives of the new legislation. I propose that the Equal Pay Amendment Bill be introduced and passed under urgency in May 2025.

8 Confidential advice to Government

Confidential advice to Government, Negotiations

## Background

9 In 2014, the Court of Appeal held that the Act required equal pay for work of equal value (pay equity), not simply the same pay for the same work (equal pay).

10 To minimise litigation over pay equity, the Government began work on a more orderly way of facilitating pay equity negotiations between employers and employees. A Bill providing a framework for raising and resolving pay equity claims was introduced into Parliament in 2017 (the 2017 Bill). A substantially reworked Bill was passed into law in 2020.

11 New Zealand's pay equity regime is an outlier internationally. The Act allows employees and unions to raise pay equity claims and to bargain a pay equity settlement with multiple employers. In comparable jurisdictions, mostly individuals (or groups of individuals) raise pay equity claims against their employer or there is a positive statutory duty on employers to take steps to achieve pay equity.

12 Pay equity claims have been concentrated in the public sector, with a recent increase in the number of claims in the publicly funded sector. Costs to the Crown have become significant, with the costs of all settlements to date totalling $1.55 billion per year.

13 In April 2024, Cabinet agreed to reset the approach to pay equity (the Pay Equity Reset) to place a greater emphasis on fiscal management, and

reinforce employer and employee responsibility for reaching settlements, while maintaining the Crown's commitment to meet its obligations under the Act [CAB-24-MIN-0136].

14 Current pay equity claims include two large unresolved claims (teachers and care and support workers). Confidential advice to Government, Negotiations [redacted] Confidential advice to Government [redacted]

15 I outlined for the Prime Minister in early 2024 that reviewing the approach to pay equity was one of my five priorities in the Workplace Relations and Safety portfolio. In December 2024, Cabinet Strategy Committee asked for a report back by early 2025 with options for navigating current pay equity claims and a future approach to pay equity [STR-24-MIN-0021].

## The pay equity framework under the Equal Pay Act needs to be workable and sustainable

16 The Act establishes a pay equity regime that includes processes for raising a pay equity claim, assessing the claim and bargaining if there is a pay equity issue, and establishing requirements for pay equity settlements. The regime is supported by a dispute resolution process.

17 This Government is committed to maintaining a process to raise and resolve pay equity claims, but it is imperative that the system is workable and sustainable. This is currently not the case.

### *The Act's settings do not give confidence that pay equity issues have been correctly identified*

18 I consider that the permissive settings of the Act have resulted in the pay equity framework not working as intended. The legislative settings that are contributing to the workability issues are a low entry threshold, limited tools for employers to contest broadly scoped claims, and insufficient guidance in the Act for comparator choice and comparison methodology. These settings have resulted in:

18.1 claims progressing through the entry threshold without strong evidence of undervaluation, e.g., the Public Service administration and clerical claim was accepted as arguable but employers considered, after a considerable amount of work was undertaken during the assessment process, that there was limited undervaluation;

18.2 claims being raised that cover a broad scope of work, making it difficult to attribute differences in remuneration to sex-based undervaluation, e.g., the District Health Board Allied/Technical claim covered more than 90 occupations, representing work as diverse as pharmacy assistant, wheelchair technician and psychologist;

18.3 the same comparators (e.g., fishery officers, corrections officers) being used repeatedly across several claims despite substantial differences in working environment and conditions from the claimant employers' workforces. While working conditions are supposed to be taken into account in the work assessment, the weighting for this factor may not fully recognise the diversity of situations. The more diverse the arrangements, the more judgements that are needed when comparing the work of the claimant and comparator;

18.4 review clauses in some settlements have sought to consider factors that may not have been connected to whether sex-based undervaluation had returned (e.g. the Consumers Price Index);

*The system needs to be sustainable, and support employers to manage the implementation of pay equity*

19 There have been a number of public sector pay equity claims that have involved large workforces (e.g., around 75,000 people for the teachers claim). Where undervaluation is found, the fiscal cost of settling these claims can be significant. Providing funding for settlements in the public sector means that the Government must make trade-offs in terms of the quality or quantity of service provision in other areas. This means that it is essential that the pay equity process provides the confidence that settlements are based on differences in remuneration due to systemic sex-based discrimination, rather than being due to other non-sex-based factors.

20 Addressing pay equity issues in a timely way is important but there needs to be recognition of the disruption that can happen when costs shift unexpectedly. Whether it is a government or private sector employer, implementing a pay equity settlement means that the employer needs to determine how to factor in the additional cost in both the short and longer term. Some employers may be able to absorb the cost in the short-term through a reduction in profits. Others may need to find efficiencies in the workforce, offer fewer hours or reduce the number of staff in order to accommodate the resulting higher labour costs. These changes could involve trade-offs in service quality or service provision. In addition, pay equity settlements can create differences in remuneration across a sector that can change incentives across employers and employees, and create pressure or expectations for pay parity.

21 Over the longer term, employers have more choices about how to adapt to higher input costs: they can raise prices or renegotiate service contracts (therefore the ability to phase settlements is important, which is one of the proposals in this paper).

**There are problems across each part of the regime that need to be addressed**

22 I have identified several problems across each part of the regime which need to be addressed.

*Raising and progressing a pay equity claim: The threshold is too low and claims can have wide scope*

23 The threshold for raising a pay equity claim under the Act is low, with claims only needing to be 'arguable' and for there to be either historical or current sex-based undervaluation (not both). Claims can be wide in scope covering multiple occupations across one or more employers. There is a high threshold for employers to opt out of a multi-employer claim (and continue with a single employer claim).

24 The low entry threshold enables claims to go through to the assessment process even when there is no strong evidence of undervaluation. This can result in parties incurring significant administrative costs, much of which could have been avoided by a more robust entry threshold.

25 The wide scope of some claims has meant that claims have captured work that was not intended to be covered by the Act (for example, in practice female employees could bring a pay equity claim for workforces that have been male-dominated), making it difficult to assess sex-based undervaluation.

*Assessment and bargaining: The legislation provides insufficient guidance to choose comparators*

26 If the claim is arguable, the parties then assess whether the work is undervalued, including by considering whether the work of the claimant(s) is undervalued compared to appropriate comparator work. If there is undervaluation, parties bargain for remuneration that does not differentiate on the basis of sex.

27 The Act provides insufficient guidance to choose comparators. This can lead to comparators being chosen even where the context of the comparators' work is very different to the claimant. The more similar the context (i.e., the closer the comparator is to the claimant's employer), the fewer judgements are needed to undertake the assessment.

28 The Act is also not clear on how to take into account relevant factors (i.e., market factors) that have contributed to differences in remuneration for reasons other than sex-based discrimination.

*Pay equity settlements: Current review requirement provides too much scope for non-sex-based factors to be considered*

29 Pay equity settlements are required to include a review process to ensure pay equity is maintained, either aligned with collective bargaining rounds, or at least every three years. The short timeframe of the review cycle makes it difficult to determine whether any remuneration differences are due to pay equity issues having re-emerged, or to short-term labour market dynamics. There is insufficient guidance in the Act on what factors to consider in reviews which can make it difficult to understand if differences are due to sex-based discrimination. Regular reviews are also resulting in unnecessary administrative costs. Aligning the timing of reviews with collective bargaining

rounds can risk conflation of pay equity and collective bargaining issues – they are distinct and address different issues.

*Dispute resolution: The parameters for the Authority relating to fixing remuneration do not provide the right incentives*

30 If parties cannot come to an agreement, disputes may be brought in the employment jurisdiction (mediation, the Authority, and the Employment Court (the Court)). The current legislative parameters the Authority must apply relating to fixing remuneration do not provide the right incentives to resolve pay equity claims.

31 While backpay is not required in settlements, the Authority has the discretion to order up to six years' worth of backpay when fixing remuneration.[1] However, unlike an equal pay claim, which arises from active discrimination by an individual employer, pay equity relates to systemic social issues and takes account of historical discrimination against an occupation. It may not be considered appropriate for an employer to be held liable for backpay and therefore be held responsible for an issue that is a result of historical societal inequality.

32 Bargaining may be unnecessarily prolonged if employers are reluctant to seek Authority assistance because of uncertainty about the potential impact on their wage costs due to the Authority fixing a rate of remuneration that it would need to pay straight away, rather than being able to phase in settlements over time.

33 In addition, the Act allows the Authority to fix remuneration (i.e., set the pay rates) in a pay equity settlement, provided all reasonable alternatives have been exhausted, or a reasonable period of time has elapsed (as well as requiring mediation or another process recommended by the Authority). Allowing for a reasonable period of time to have elapsed as a factor relating to an application to fix determinations can result in an incentive to prolong bargaining in order to lodge a claim with the Authority (however, good faith obligations still apply).

**I propose a suite of legislative changes to maintain a process to raise and resolve pay equity claims, while providing a better framework for assessing whether there is sex-based undervaluation**

34 I propose a suite of legislative changes to address the current problems with the Act. The proposed changes to the Act will:

34.1 maintain a process to raise and resolve pay equity claims; and

34.2 provide a better framework for assessing whether there is sex-based undervaluation.

[1] The Act provides for specific rules depending on when a claim was raised.

*Raising a pay equity claim: Increase the threshold for raising a pay equity claim and the timeframe for response*

35 I propose increasing the threshold for raising a pay equity claim by:

35.1 requiring claims to have 'merit', meaning the claim relates to work that is predominantly performed by female employees, and there are reasonable grounds to believe that the work has been historically undervalued and that the work continues to be subject to systemic sex-based undervaluation; and

35.2 raising the threshold of "predominantly performed by female employees" from 60 percent to 70 percent and require that this has been the case for at least 10 years.

36 I propose to amend the purpose of Part 4: Pay Equity Claims to reflect the renewed emphasis on addressing pay inequities where there is evidence of sex-based undervaluation.

37 To reflect that the 'merit' test requires a more considered decision, I propose to increase the time employers have for considering whether a claim has merit from 45 to 60 working days (consistent with the 2017 Bill).

38 These changes will better target the system by requiring a more considered assessment of whether a pay equity issue exists, although elements of the 'merit' test will still be judgement-based.

*Raising a pay equity claim: Ensure an appropriate scope of claims*

39 To support employers to determine whether the scope of a claim is appropriate when raised, I propose to require that unions must provide evidence to demonstrate how the work covered by a pay equity claim is the same or substantially similar. I propose that this be supported with a power to make regulations that prescribe the evidence claimants are required to provide.

*Assessment and bargaining: Ensure an appropriate scope of claims*

40 I propose to ensure an appropriate scope of claims (i.e., where the claim only covers work that is the same or substantially similar) by making it clear that:

40.1 employers can provide notice to claimants that they consider that the work that is the subject of the claim is not the same or substantially similar (employers could only do this once); and

40.2 this can be done after the merit threshold and up until the end of the assessment phase[2]; and

40.3 the claim would be discontinued and a new rescoped claim(s) (where each claim is grouped so it covers work that is the same or

[2] The assessment phase refers to the process under section 13ZD of the Act.

substantially similar) would need to be raised. Employers would then need to redetermine if the rescoped claim(s) have merit.

41 These changes will make clear the tools available to employers if they receive a claim with a wide scope and wish to require claimants to rescope so that the work that is the subject of the claim is the same or substantially similar. There is a risk of gaming by employers, but I consider this risk is low due to the associated administrative costs. Good faith obligations will still apply.

42 I also propose to allow employers to opt out of a multi-employer claim raised by a union(s) without needing to provide a reason, and that this choice could not be challenged in the Authority.

*Assessment and bargaining: Introduce a hierarchy of comparators*

43 I propose to introduce a hierarchy of comparators (similar to that proposed in the 2017 Bill):

43.1 if one or more appropriate comparators are employed by the same employer, one or more of those comparators must be selected for the assessment;

43.2 if no appropriate comparator is employed by the same employer, one or more comparators from similar employers must be selected for the assessment;

43.3 if neither of the above applies, appropriate comparators from within the same industry or sector must be selected for the assessment.

44 Parties will be able to agree, where they both consider it is appropriate, to include a claim that has been settled under the amended Act (i.e., following the passing of this Bill) as a comparator.

45 I also propose that the factors used to exclude a comparator from being appropriate include the size of the workforce.

46 If an appropriate comparator is not available within the hierarchy of comparators, the pay equity claim will not be able to proceed.

47 Choosing comparators in close proximity to the employer reduces the level of judgement that needs to be applied to compare claimant and comparator work and remuneration. For this reason, I do not propose that comparators from a different industry or sector be included in the hierarchy. I consider that using comparators from a different industry or sector would make it too difficult to determine whether differences in remuneration are due to sex-based discrimination or due to non-sex-based factors. Although such comparators could be used in the 2017 Bill, in other jurisdictions, such as the United Kingdom and Ireland, only comparators that work for the same or an associated employer are allowed.

*Assessment and bargaining: Add more prescription to comparison methodology*

48 When assessing whether the claimants' work is undervalued, I propose to:

48.1 make it clearer that parties must assess market factors which affect remuneration but are not related to sex-based undervaluation; and

48.2 require parties to only assess whether that workforce has experienced sex-based undervaluation since the work became predominantly performed by females.

49 These changes will signal that factors that do not contribute to sex-based differences should be appropriately accounted for.

*Pay equity settlements: Remove the ability for a settlement to include a review clause and limit when claims can be re-raised*

50 I propose to remove the ability (and requirement) for settlements to include a review clause; and restrict the ability to re-raise a claim so that a claim can only be re-raised 10 years after a settlement (unless there are exceptional circumstances) and only if it meets the entry threshold again. This will mitigate the risk of regular reviews ratcheting settlement amounts (without the confidence that they are addressing sex-based discrimination), while providing a safeguard if new sex-based discrimination develops over time. Applying a 10-year limit before a new claim can be raised is intended to enable parties to determine whether any concerns regarding remuneration reflect a re-emergence of sex-based undervaluation rather than being due to other market factors.

51 Legal professional privilege

*Pay equity settlements and dispute resolution: Provide for phasing of pay equity settlements*

52 I propose to allow employers and employees to agree on phasing in pay equity settlements, in any circumstances. If phasing is agreed, the new remuneration must be fully phased in within a maximum of three years from the date of settlement.

53 If the parties have agreed on the new remuneration but not on phasing, I propose that disputes related to phasing may be heard by the Authority. The Authority may determine if phasing will apply and, if so, how the remuneration can be phased within a maximum three-year period. In making its determination, the Authority must consider:

53.1 the conduct of the parties; and

53.2 the ability of the employer to pay (which will bring an element of affordability into consideration); and

53.3 the size of the increase in remuneration; and

53.4 any other factors the Authority considers appropriate.

54 The ability to phase pay equity settlements will enable employers to meet their obligations with less disruption to their operations which should benefit all parties. Employers will be able to better manage significant increases in their wage costs, and any trade-offs with the delivery of services or improving productivity (e.g., investing in training or technology). This could be seen as delaying access to a right. Restricting the phasing to a maximum of three years may help mitigate this risk.

*Dispute resolution: Changes to when and how the Authority can fix remuneration*

55 I propose to remove the factor for applying to the Authority to fix remuneration, relating to a reasonable period of time having elapsed, and return to the 2017 Bill criteria which does not include this factor. This will make the threshold slightly higher.

56 Where there is prolonged bargaining on remuneration, and parties are unable to agree on remuneration, an Authority determination may be needed to break this impasse. I propose that, when the Authority fixes remuneration, the new remuneration must be phased-in in equal yearly instalments across the three years from the date of the determination (i.e., a third each year). This will allow employers to better manage increases in their wage costs. This may increase the incentives for employers to seek a determination but would be balanced by the uncertainty regarding determined rates.

57 Legal professional privilege

58 I consider that staging increases in employers' wage costs allows them to better manage their operations, reducing the potential risks to an employer's financial viability which may lead to a reduction in employment or in the quality or quantity of services provided.

*Dispute resolution: Remove provision for the Authority to award backpay*

59 I propose to remove the current ability for the Authority to award backpay when it is fixing remuneration. Parties would still be able to reach an agreement on backpay on their own but could no longer rely on the Authority if they are unable to agree.

60 There is a risk that employers prolong bargaining if there is no ability for the Authority to determine backpay (if asked to fix remuneration) but good faith obligations will still apply.

## Transitional provisions

61 I propose the following transitional provisions to address how different types of claims should be dealt with under the new pay equity regime:

61.1 *Existing pay equity claims*: All claims that have been raised with an employer, or lodged with the Authority or the Court, and have not been finally settled or determined, will be discontinued. Claimants can raise a new claim under the amended Act, if they meet the new entry requirements.

61.2 *Settled pay equity claims with review clauses*: All review clauses under existing settlement agreements will become unenforceable. All settled claims (including those that were treated as a pay equity settlement under the Act when it was amended in 2020) will be able to raise a new pay equity claim 10 years post settlement if the claim meets the new entry requirements under the amended Act.

62 The transitional provisions depart from the default approach in the Legislation Design and Advisory Committee Guidelines by applying new legislation to matters that are the subject of ongoing or potential litigation and preventing a person from relying on a right or defence that existed at the time they undertook the conduct that those rights or defences related to. They are also inconsistent with the general principle against retrospective application of legislation.

63 The transitional provisions are necessary and justified to meet the policy objective of maintaining a process to raise and resolve pay equity claims, while providing a better framework for assessing whether there is sex-based undervaluation. Without such transitional provisions, it is likely that there could be a large number of claims filed and potentially determined under the existing Act. However, as the transitional provisions engage important legal principles, they are likely to be contentious and receive public comment from stakeholders.

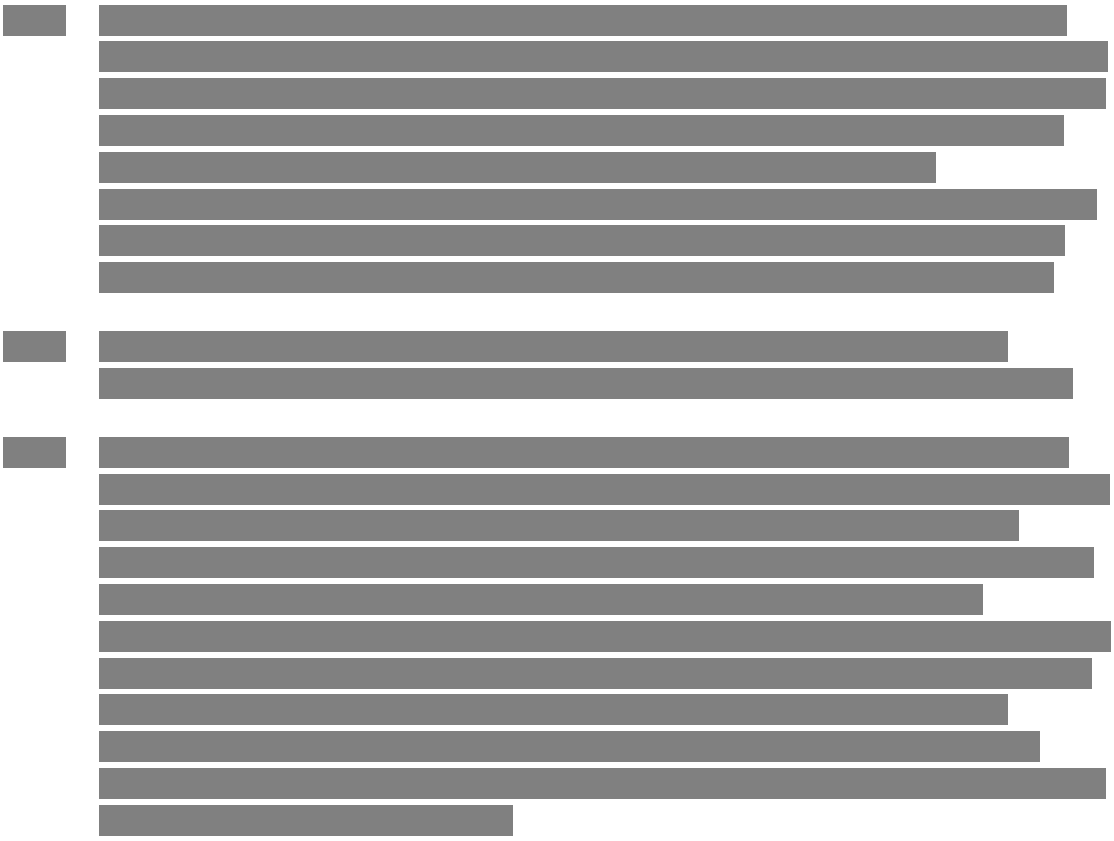
## Risks

64 The proposals in this paper have been developed in a short timeframe with limited time to assess implications and unintended consequences, with narrow and targeted consultation (with the Ministry of Education and Health New Zealand). There is a risk that the amendments to the Act have unintended consequences, and further legislative change is required to rectify any issues. I seek Cabinet's delegation to make further policy decisions if any issues arise before introduction of the Bill.

65 The precise legal effect and outcome of bargaining as a result of the proposals will be impacted by the degree to which decision-makers change their behaviour following the legislative changes.

*Legal Risk*

66 Legal professional privilege



## Implementation

67 The Public Service Commission and Treasury are working with the key agencies with claims (the Ministry of Education and Health New Zealand) to ensure they are ready to implement the new regime in relation to any new claims that are submitted once the Bill is passed. Most notably, officials are working on the approach to the revised entry threshold, the scope of claims, and consideration of the choice of comparators.

68 To give effect to the decisions in this paper, the Public Service Commission will make whatever adjustments are needed to the Commissioner's delegations to chief executives.

69 The Ministry of Business, Innovation and Employment will update its guidance and website content to reflect the changes to the Act.

## Cost-of-living Implications

70 The proposals in this paper are intended to ensure a pay equity regime which provides a better framework for assessing whether there is sex-based undervaluation. This will benefit people who work in female-dominated

occupations and face systemic sex-based undervaluation of their remuneration.

## Financial Implications

71 Pay equity has both direct and indirect fiscal implications:

71.1 The Government has a legal obligation to fund the outcome of pay equity claims in the public sector.

71.2 Service providers subject to a pay equity settlement will face higher pay equity costs, potentially requiring the Government to trade off providing additional funding or accepting reduced service provision.

72 Confidential advice to Government

73 Confidential advice to Government, Negotiations

Confidential advice to Government, Negotiations

74 Confidential advice to Government, Negotiations

75 Confidential advice to Government, Negotiations

Confidential advice to Government

76 Confidential advice to Government

## Legislative Implications

77 An amendment Bill amending the Act will be required to give effect to these changes, which I propose to introduce and pass under urgency in early May 2025. I am seeking a priority category Confidential advice in the 2025 Legislation Programme for this Bill.

78 Legal professional privilege

## Impact Analysis

### Regulatory Impact Statement

79 Cabinet's impact analysis requirements apply to this proposal, but there is no accompanying Regulatory Impact Statement and the Ministry for Regulation has not exempted the proposal from the impact analysis requirements. Therefore, it does not meet Cabinet's requirements for regulatory proposals.

80 I will consider if a post-implementation review is appropriate at a later date.

## Population Implications

81 The proposals in this paper are intended to ensure a pay equity regime which provides a better framework for assessing whether there is sex-based undervaluation. This will benefit people who work in female-dominated occupations who face systemic sex-based undervaluation of their remuneration.

## Human Rights [*Legally privileged*]

82 Legal professional privilege

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## International obligations

91 New Zealand has pay equity obligations under the International Labour Organization (ILO) Equal Remuneration Convention, 1951 (No. 100), and the United Nations Convention on the Elimination of All Forms of Discrimination against Women and International Covenant on Economic, Social and Cultural Rights. The proposed pay equity model will continue to ensure employees receive equal pay for work of equal value. The ILO Supervisory Committee (the Committee) has noted that the Equal Remuneration Convention allows flexibility in the measures to be taken, but "allows no compromise regarding the objective to be pursued." It would be for the Committee to determine whether the changes are in line with the Equal Remuneration Convention.

International relations

92 Legal professional privilege

## Treaty of Waitangi analysis

93 I consider that the proposals in this paper are consistent with the Government's Treaty of Waitangi obligations.

## Consultation

94 This paper was developed by the Ministry of Business, Innovation and Employment, the Treasury, and the Public Service Commission. The Department of the Prime Minister and Cabinet, Ministry of Foreign Affairs and Trade, and Crown Law Office were consulted on the paper. The Ministry of Education and Health New Zealand were consulted on the proposals in the paper.

## Communications

95 I do not intend to make any announcement on the changes to the Act until the Bill is introduced. I am cognisant of the risk that announcing the changes before introducing the Bill could prompt pay equity claims being filed and potentially determined by the Authority under the existing Act.

Legal professional privilege

## Proactive Release

96 This paper will be proactively released (subject to redactions in line with the Official Information Act 1982) within 30 business days of the Bill being introduced to Parliament.

## Recommendations

The Minister for Workplace Relations and Safety recommends that Cabinet:

1 **note** that, in December 2024, the Cabinet Strategy Committee asked for a report back by early 2025 with options for navigating current pay equity claims and a future approach to pay equity [STR-24-MIN-0021];

2 **agree** that the policy intent of the proposals in this paper is to maintain a process to raise and resolve pay equity claims, while providing a better framework for assessing whether there is sex-based undervaluation;

### *Policy proposals*

*Raising a pay equity claim: Increase the threshold for raising a pay equity claim and the timeframe for response*

3 **agree** to amend the Equal Pay Act 1972 (the Act) so that the purpose aligns with the intent that the pay equity regime provides for a legislative process to facilitate the resolution of pay equity claims where there is evidence of sex-based undervaluation, and to align the requirements that apply when an employer considers a new claim with the revised purpose;

4 **agree** to raise the entry threshold (by basing it on the entry threshold in the 2017 Employment (Pay Equity and Equal Pay) Bill) so that a pay equity claim has merit when:

4.1 the claim relates to work that is predominantly performed by female employees; and

4.2 there are reasonable grounds to believe that the work has been historically undervalued; and

4.3 there are reasonable grounds to believe that the work continues to be subject to systemic sex-based undervaluation;

5 **agree** to amend the definition of “predominantly performed by female employees” to apply where, for at least 10 years, at least 70 percent of the employees performing the work are and have been female;

6 **agree** to increase the timeframe that employers have to consider whether a claim has merit from 45 working days to 60 working days;

*Raising a pay equity claim: Ensure an appropriate scope of claims*

7 **agree** that unions must provide evidence to demonstrate how the work covered by a pay equity claim is the same or substantially similar;

8 **agree** to include an empowering provision to enable regulations to be made that prescribe the evidence unions are required to provide to demonstrate how the work set out in a pay equity claim is the same or substantially similar and for individual employees, the information about the work performed;

*Assessment and bargaining: Ensure an appropriate scope of claims*

9 **agree** that an employer can give notice (once) to a claimant, after the merit threshold and up until the end of the assessment phase, that the work that is the subject of the claim is not considered to be the same or substantially similar;

10 **agree** that if the employer, or the Employment Relations Authority (the Authority), considers the work that is the subject of the claim is not the same or substantially similar, the claim will be discontinued and will need to be raised again;

11 **note** that a claimant can apply to the Authority for a determination on whether the work is the same or substantially similar (following a notice from the employer that it is not);

12 **agree** to provide employers with the choice of being able to opt out of multi-employer pay equity claims without providing a reason;

13 **agree** to specify that the Authority cannot make a determination in relation to an employer's decision to opt out of a multi-employer pay equity claim;

*Assessment and bargaining: Introduce a hierarchy of comparators and add more prescription to comparison methodology*

14 **agree** to introduce the following hierarchy for identifying appropriate comparators:

14.1 if one or more appropriate comparators are employed by the same employer, one or more of those comparators must be selected for the assessment:

14.2 if no appropriate comparator is employed by the same employer, one or more comparators from similar employers must be selected for the assessment:

14.3 if neither of the above applies, appropriate comparators from within the same industry or sector must be selected for the assessment;

15 **agree** that if an appropriate comparator is not available within the hierarchy of comparators, that the pay equity claim cannot proceed;

16 **agree** to allow parties to use work that has previously been the subject of a pay equity settlement (where the claim is settled after the commencement of the amended Act) as a comparator, if both parties agree;

17 **agree** to require a comparator to be excluded from being an appropriate comparator if the size of the workforce would not allow a meaningful comparison that can identify to what degree any differences in remuneration are due to sex-based undervaluation;

18 **agree** to make it clearer that when assessing whether the claimant's work is undervalued, parties must assess whether there are any current and historical market conditions affecting remuneration which are not related to sex-based undervaluation;

19 **agree** to require parties, when assessing a claimant workforce which was previously not female dominated, to only assess whether that workforce has experienced sex-based undervaluation since the time it became female dominated;

*Pay equity settlements: Remove the ability for a settlement to include a review clause and limit when claims can be re-raised*

20 **agree** to remove the requirement for settlements to include a review clause and remove the ability for parties to agree to (or the Authority to determine) a review clause;

21 **agree** to amend the requirements for raising a new claim where there is a pay equity settlement so that:

21.1 a new claim covering the work of a settled pay equity claim cannot be raised for at least 10 years following the settlement date; and

21.2 parties can raise a claim during the 10-year period following the pay equity settlement if the Authority determines there are exceptional circumstances;

*Pay equity settlements and dispute resolution: Provide for phasing of pay equity settlements*

22 **agree** that the parties may agree to phasing in the new remuneration in the pay equity settlement across a maximum period of three years;

23 **agree** that if the parties are unable to reach an agreement on phasing (and they have reached an agreement on remuneration) they may ask the Authority to determine if phasing will apply and how the full rate of remuneration will be achieved across a maximum period of three years;

24 **agree** that in determining whether the employer may phase in the new remuneration that the parties have agreed to, the Authority must consider:

24.1 the conduct of the parties; and

24.2 the ability of the employer to pay; and

24.3 the size of the increase in remuneration; and

24.4 any other factors the Authority considers appropriate;

*Dispute resolution: Remove provision for the Authority to award backpay and changes to when and how the Authority can fix remuneration*

25 **agree** to remove the ability for the Authority to, under any circumstances, provide for the recovery of remuneration for past work (i.e., backpay) prior to the date of determination where settled;

26 **agree** to raise the threshold to apply to the Authority to fix the terms and conditions of a pay equity settlement by removing the ability to apply to fix if 'a reasonable period has elapsed within which the parties have used their best endeavours to identify and use reasonable alternatives to settle the pay equity claim';

27* **agree** that when the Authority fixes the terms and conditions of a pay equity claim, the new renumeration must be phased-in in equal yearly instalments over three years from the date of the determination (i.e., a third each year);

*Transitional provisions for claims initiated or settled before the new changes take effect*

28 **agree** that all pay equity claims made under the Act that have been raised with the employer, or that have been filed in the Authority or the Employment Court when the Bill comes into force and that are not settled or not yet finally determined, be discontinued, but may be re-raised under the provisions of the Bill;

29 **agree** in relation to any pay equity settlement under the Act:

29.1 all review clauses, including those incorporated into employment agreements, have no effect and are unenforceable; and

29.2 any proceedings that have been filed in the Authority or the Employment Court in relation to the interpretation or enforcement of such a review clause are discontinued;

30 **agree** that claims that were settled before the 2020 amendments to the Act can be re-raised in line with the new provisions based on the date that their claim was settled (i.e., 10 years post settlement);

31 **note** that, if recommendation 30 above is agreed to, this would also apply to the care and support worker claim, meaning a new claim could be raised in 2027;

32 **note** that any claims that are raised, but not settled or fixed, will continue to have a choice of proceedings (status quo);

* Cabinet has agreed to amend recommendation 27 to: "when the Employment Relations Authority fixes remuneration of a pay equity claim, the new remuneration must be phased-in, in three equal installments, a year apart from each other, starting from the date of the determination"

### *Approval for drafting*

33 Legal professional privilege

34 **authorise** the Minister for Workplace Relations and Safety to make decisions, consistent with the policy in this paper, on any issues that may arise during the drafting;

35 **agree** to a priority category Confidential advice for this Bill in the 2025 Legislative Programme Confidential advice to Government

36 **note** that the Bill should be introduced in early May 2025;

### *Financial recommendations*

37 Confidential advice to Government

38 Confidential advice to Government

39 Confidential advice to Government

Confidential advice to Government

40 Confidential advice to Government

Confidential advice to Government, Negotiations

41 Confidential advice to Government

42 Confidential advice to Government

Confidential advice to Government

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Confidential advice to Government

Hon Brooke van Velden

Minister for Workplace Relations and Safety