

5 September 2018

Hon David Parker, Attorney-General

Consistency with the New Zealand Bill of Rights Act 1990: Equal Pay Amendment Bill

Purpose

1. We have considered whether the Equal Pay Amendment Bill ('the Bill') is consistent with the rights and freedoms affirmed in the New Zealand Bill of Rights Act 1990 ('the Bill of Rights Act').
2. We have not yet received a final version of the Bill. This advice has been prepared in relation to the latest version of the Bill (PCO 20938/20.0). We will provide you with further advice if the final version includes amendments that affect the conclusions in this advice.
3. We note that the Bill is similar to a previous Government Bill – the Employment (Pay Equity and Equal Pay) Bill 2017 ('the previous Bill'), which lapsed on 22 August 2017. However, this Bill amends the Equal Pay Act 1972, rather than repealing and replacing it like the previous Bill.
4. As with the previous Bill, we have concluded that the Bill appears to be consistent with the rights and freedoms affirmed in the Bill of Rights Act. In reaching that conclusion, we have considered the consistency of the Bill with s 14 (freedom of expression) and s 19 (freedom from discrimination). Our analysis is set out below.

The Bill

5. The Bill amends the Equal Pay Act 1972 and repeals the Government Service Equal Pay Act 1960 to put in place a pay equity regime in line with the recommendations of the Reconvened Joint Working Group on Pay Equity Principles. It also makes amendments to the Employment Relations Act 2000.
6. The purposes of the Bill are to:
 - a. improve the pay equity system and eliminate and prevent discrimination, on the basis of sex, in the remuneration and employment terms and conditions for work done within female-dominated jobs;
 - b. provide a simple and accessible process for claimants to progress a pay equity claim; and
 - c. promote the enduring settlement of claims relating to sex discrimination on pay equity grounds.
7. To that end, the Bill:
 - a. establishes a process for pay equity claims, while still retaining the rights and processes for claimants to raise equal pay and unlawful discrimination claims;

- b. prohibits differentiation based on sex in the rate of remuneration and in the terms and conditions of employment for work that is predominantly performed by women and has been historically and/or is currently under-valued;
- c. enables employees to raise claims relating to sex discrimination in employment;
- d. sets out the process for resolving a pay equity claim that is simple and accessible; and
- e. permits the courts or Employment Relations Authority ('the Authority') to award an amount of back pay in a pay equity determination.

Consistency of the Bill with the Bill of Rights Act

Section 14 – Freedom of expression

- 8. Section 14 of the Bill of Rights Act affirms the right to freedom of expression, including the freedom to seek, receive, and impart information and opinions of any kind in any form. The right to freedom of expression has also been interpreted as including the right not to be compelled to say certain things or to provide certain information.¹
- 9. Parties to a pay equity claim who are having difficulties in resolving that claim may seek the assistance of the Authority in resolving those difficulties, through a process called facilitation. New s 13V of the Bill provides that a party to facilitation may make a public statement about facilitation only if it is made in good faith and is limited to the process or the progress being made. The clause therefore appears to limit s 14 of the Bill of Rights Act.
- 10. Where a provision is found to limit a particular right or freedom, it may nevertheless be consistent with the Bill of Rights Act if it can be considered a reasonable limit that is justifiable in terms of s 5 of that Act.
- 11. We consider that the limitation arising from new s 13V is justified under s 5 of the Bill of Rights Act as:
 - a. the objectives of promoting enduring settlement of pay equity claims and eliminating sex discrimination in employment are sufficiently important;
 - b. the requirement that parties maintain confidentiality in that process is rationally connected to those objectives. We understand that settlement is more likely to be achieved if parties to facilitation can make representations in a confidential and without prejudice manner; and
 - c. the right to freedom of expression is impaired no more than is reasonably necessary as the Bill still allows for public statements about facilitation processes and progress. Given the importance of confidentiality to resolving employment claims, the limits are in due proportion to the importance of the objective.

¹ *RJR MacDonald v Attorney-General of Canada* (1995) 127 DLR (4th) 1.

12. A number of new sections in the Bill also compel the provision of certain information:
 - a. s 13E provides that an employer who receives a pay equity claim must notify other employees, doing the same or substantially similar work, that a pay equity claim has been made;
 - b. s 13F requires employers to give notice to an employee of whether they view the employee's pay equity claim as being arguable;
 - c. s 13H requires employers, where pay equity claims have been consolidated, to provide all claimants with one another's names and addresses (except where a claimant has requested confidentiality);
 - d. s 13I requires employers, where pay equity claims against multiple employers have been consolidated, to provide all claimants with the name of, and name and address of representatives for, every employer party to the claim;
 - e. s 13K requires parties to a pay equity claim to provide each other information that is reasonably required to support or substantiate the claim or a response to the claim; and
 - f. s 13ZE requires employers to keep records about pay equity claims, with failure to do so attracting a penalty of up to \$20,000.
13. We consider any limitations arising from these provisions to be justified under s 5 of the Bill of Rights Act. The provisions form part of a mechanism that aims to promote enduring settlement of pay equity claims and the elimination of sex discrimination in employment. We consider these objectives to be sufficiently important. Requiring employers to keep records and to provide information about claims and other claimants to employees is rationally connected to those objectives, as is the requirement that parties provide relevant information to each other.
14. The provisions relate to information that will often be factual in nature, and there are safeguards in cases where claimants request confidentiality. We therefore consider the provisions impair the right to freedom of expression no more than is reasonably necessary in order to achieve the objectives, and the limits are in due proportion to the importance of those objectives.
15. For these reasons, we conclude that any limits to freedom of expression imposed by the Bill are justified under s 5 of the Bill of Rights Act.

Section 19 – Freedom from discrimination

16. Section 19 of the Bill of Rights Act affirms that everyone has the right to freedom from discrimination on the grounds set out in the Human Rights Act 1993, including sex.²

² Human Rights Act 1993, s 21(1)(a).

17. The key questions in assessing whether there is a limit on the right to freedom from discrimination are:³
- a. does the legislation draw a distinction on one or more of the prohibited grounds of discrimination under s 21 of the Human Rights Act?
 - b. if so, does the distinction involve material disadvantage to one or more classes of individuals?
18. In determining if a distinction arises, consideration is given to whether the legislation proposes that two comparable groups of people be treated differently on one or more of the prohibited grounds of discrimination.⁴ The distinction analysis takes a purposive and untechnical approach to avoid artificially ruling out discrimination.⁵ Once a distinction on prohibited grounds is identified, the question of whether disadvantage arises is a factual determination.⁶

Language distinguishing between the sexes

19. We have considered whether the distinctions based on sex throughout the Bill constitute a limit on the right to be free from discrimination. For example, new s 13C of the Bill provides that a pay equity claim is arguable if the claim relates to work that is predominantly performed by female employees, and it is arguable that the work is currently undervalued or has historically been undervalued.
20. Ultimately, we consider that s 19(2) of the Bill of Rights Act applies, which provides that measures taken in good faith for the purpose of assisting or advancing disadvantaged persons do not constitute discrimination. The Bill provides a scheme to address systemic workplace discrimination on the basis of sex. It is therefore necessary to make some distinctions based on sex.

Back pay in pay equity claims

21. Where the parties apply for a determination in relation to a pay equity claim, the courts or the Authority can award back pay. Other monetary claims under the Equal Pay Act have a six-year limitation on back pay. In contrast to the previous Government Bill, this Bill applies a six-year limitation for pay equity claims, but is subject to an 11-year transitional period to incentivise employers to address pay equity issues as soon as possible after the Bill comes into force.

³ See, for example, *Atkinson v Minister of Health and others* [2010] NZHRRT 1; *McAlister v Air New Zealand* [2009] NZSC 78; and *Child Poverty Action Group v Attorney-General* [2008] NZHRRT 31.

⁴ *Quilter v Attorney-General* [1998] 1 NZLR 523 (CA) at [573] per Tipping J (dissenting), relied on in *Atkinson v Minister of Health and others* [2010] NZHRRT 1 at [199]; *McAlister v Air New Zealand* [2009] NZSC 78 at [34] per Elias CJ, Blanchard and Wilson JJ and at [51] per Tipping J; and *Child Poverty Action Group v Attorney-General* [2008] NZHRRT 31 at [137].

⁵ *Atkinson v Minister of Health and others* [2010] NZHRRT 1 at [211]-[212]; *McAlister v Air New Zealand* [2009] NZSC 78 at [51] per Tipping J; and *Child Poverty Action Group v Attorney-General* [2008] NZHRRT 31 at [137].

⁶ See for example *Child Poverty Action Group v Attorney-General* [2008] NZHRRT 31 at [179]; and *McAlister v Air New Zealand* [2009] NZSC 78 at [40] per Elias CJ, Blanchard and Wilson JJ.

22. New s 13ZD sets out the transitional period, which applies different back pay periods by reference to the date five years after commencement (**Transition Date**):
 - a. Claims brought before the Transition Date will have their back pay period start at the date of the claim. Claims brought before the Bill is in force must be progressed under the amended Act (part 1, cl 2 of Schedule 1) and will have a similar limitation.
 - b. Claims brought after the Transition Date will have their back pay period start at the Transition Date. Accordingly, the eligible back pay period will gradually increase up until 11 years following commencement, when the full six-year period will apply.
23. This transitional period means that for the first 11 years in which pay equity claims are available, they will have a reduced entitlement to back pay compared with other claims under the Equal Pay Act. As pay equity claims relate primarily to addressing disadvantages faced by women, we have considered whether this difference can amount to discrimination. However, our analysis is that the difference does not qualify as discrimination under the Bill of Rights Act and, even if it did, would be justifiable under s 5 of the Act.
24. Discrimination under the Bill of Rights Act requires two comparable groups to be treated differently on the basis of a prohibited ground. As discussed above, there is a difference in the Equal Pay Act between the back pay awardable to pay equity claimants and (for example) equal pay claimants. However, this is a distinction between two quite different kinds of claims, and is not based on a prohibited ground (i.e. different treatment of women compared to men).
25. Pay equity claims are a unique type of claim specifically designed to address historic pay inequalities facing women, while other claims within the Equal Pay Act relate to more 'direct' forms of discrimination and are resolved via different processes. There is no clear comparator group that can be drawn on the basis of the sex of the claimant, and we note that other types of claims under the Equal Pay Act are also likely to apply predominantly to women. Accordingly, we do not consider that the difference in back pay gives rise to a distinction on a prohibited ground.
26. Even if the limitation on the available back pay period were to be regarded as constituting discrimination, as per our advice on the previous Government Bill, we consider it would be justified under s 5 of the Bill of Rights Act:
 - a. The Bill aims to implement a pay equity bargaining framework, to address historical and systematic discrimination against work that is predominantly performed by women;
 - b. 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. We recognise that it may be unfair for employers to be held liable for a longer period of back pay, and therefore held responsible for historical societal inequality. The limit on back pay balances the employees' grievance with the impact on employers.

- c. The gradually increasing back pay period following commencement balances issues arising from the Bill. The provision addresses undervaluation and the structural nature of discrimination while incentivising employers to address pay equity issues within the first 11 years following legislation being passed, with the incentives becoming stronger after the first 5 years.
 - d. The Bill does not prevent the parties to a pay equity claim from reaching a negotiated settlement that includes back pay to a different date.
27. In summary, we do not consider that the limitation on the back pay period qualifies as discrimination and, even if it did, it would be justified. We therefore do not consider s 19 is properly engaged or infringed by new s 13ZD.

Conclusion

28. We have concluded that the Bill appears to be consistent with the rights and freedoms affirmed in the Bill of Rights Act.

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