

29 June 2017

Hon Christopher Finlayson QC, Attorney-General

## **Consistency with the New Zealand Bill of Rights Act 1990: Employment (Pay Equity and Equal Pay) Bill 2017**

### **Purpose**

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1. We have considered whether the Employment (Pay Equity and Equal Pay) 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 with the latest version of the Bill (PCO 19861/24.0). We will provide you with further advice if the final version of the Bill includes amendments that affect the conclusions in this advice.
3. 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**

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4. The Bill repeals and replaces the Equal Pay Act 1972 and the Government Service Equal Pay Act 1960. It also makes amendments to the Employment Relations Act 2000.
5. The purpose of the Bill is to:
  - a. promote enduring settlement of claims regarding sex discrimination on pay equity grounds
  - b. provide for the elimination of existing and prevention of future sex discrimination in remuneration and other terms and conditions of employment
  - c. set out the different processes by which employees may make claims relating to sex discrimination, and
  - d. re-enact, in an up-to-date form, the relevant provisions of the Equal Pay Act.
6. To that end, the Bill sets up processes for employees to make the following claims:
  - a. equal pay claims, which are claims alleging that the rate of remuneration paid discriminates on the basis of sex between employees who perform the same or substantially similar work

- b. unlawful discrimination (non-remuneration) claims, which are claims alleging that the terms and conditions of employment (other than remuneration) discriminate on the basis of sex between employees who perform the same or substantially similar work, and
- c. pay equity claims, which are claims that for work that is exclusively or predominantly performed by female employees, the rate of remuneration paid for the work contains an element of sex-based discrimination.

## **Consistency of the Bill with the Bill of Rights Act**

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### **Section 14 – Freedom of expression**

- 7. 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.<sup>1</sup>
- 8. Parties to a pay equity claim who are having difficulties in resolving that claim may seek the assistance of the Employment Relations Authority in resolving those difficulties, through a process called facilitation. Clause 33(2) of the Bill provides that a party to facilitation may only make a public statement about facilitation if it is made in good faith, and limited to the process of facilitation or the progress being made. The clause therefore appears to limit s 14 of the Bill of Rights Act.
- 9. 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.
- 10. We consider that the limitation arising from cl 33(2) is justified under s 5 of the Bill of Rights Act. First, the objectives of promoting enduring settlement of pay equity claims and eliminating sex discrimination in employment are sufficiently important. Further, we consider a requirement that parties to facilitation maintain confidentiality in that process is rationally connected to those objectives.
- 11. As cl 33(2) still allows for public statements to be made about facilitation processes and progress, we consider it impairs the right to freedom of expression no more than is reasonably necessary. Further, given the importance of confidentiality to the use of facilitation to resolve employment claims, the limits are in due proportion to the importance of the objective. In particular, we are advised that settlement is more likely to be achieved if parties to facilitation can make representations in a confidential and without prejudice manner.
- 12. A number of clauses in the Bill also compel the provision of certain information:
  - a. clause 16 provides that an employer who receives a pay equity claim must notify other employees, doing the same work, that a pay equity claim has been made
  - b. clause 17 requires employers to give notice to an employee of whether they view the employee's pay equity claim as having merit

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

- c. clause 19 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. clause 22 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
  - e. clause 41 requires employers to keep records about pay equity claims, with failure to do so attracting a penalty of up to \$2,000.
13. We consider any limitations arising from these provisions to be justified under s 5 of the Bill of Rights Act. First, 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. The requirement that parties provide relevant information to each other is also rationally connected to those objectives.
14. The provisions relate to information that is 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 the 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.<sup>2</sup>
17. The key questions in assessing whether there is a limit on the right to freedom from discrimination are:<sup>3</sup>
- 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 and, if so,
  - b. 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.<sup>4</sup> The distinction analysis takes a purposive and

<sup>2</sup> Human Rights Act 1993, s 21(1)(a).

<sup>3</sup> 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.

<sup>4</sup> *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].

untechnical approach to avoid artificially ruling out discrimination.<sup>5</sup> Once a distinction on prohibited grounds is identified, the question of whether disadvantage arises is a factual determination.<sup>6</sup>

#### *Limitation on back pay in pay equity claims*

19. Monetary claims (for example equal pay claims under both the Equal Pay Act and the Bill, and minimum wage claims) generally have a six year limitation on back pay. Clause 40 provides that, where the Employment Relations Authority determines a pay equity claim, the back pay awarded may only be paid in respect of the period beginning with the date the claim was lodged, instead of six years prior. This limitation does not apply to pay equity settlements negotiated between employers and employees. It also does not apply to other types of claims under the Bill, such as equal pay claims.
20. Pay equity claims by definition relate to work exclusively or predominantly performed by women, so the limitation on back pay in such claims disproportionately affects women. The Equal Pay Act, which is repealed by this Bill, allows for back pay to six years. We note that all existing and undetermined pay equity claims brought under the Equal Pay Act will be discontinued under the Bill in accordance with the transitional provisions at Schedule 1, and recommenced under the provisions of the Bill. Accordingly, this change will also impact on those existing unresolved pay equity claims.
21. We therefore consider the material effect of cl 40 disproportionately affects women, and therefore that the Bill limits the right to be free from discrimination on the prohibited grounds of sex affirmed in s 19(1) of the Bill of Rights Act.
22. In our view, the limitation is justified under s 5 of the Bill of Rights Act because:
  - a. the Bill aims to implement a pay equity bargaining framework, to address historical discrimination against predominately female professions
  - b. back pay has been limited to the date of lodging the claim to ensure the process is balanced and fairly reflects the nature of the grievance
  - c. it is a necessary restriction for the implementation of a scheme which aims to address the systemic discrimination against women in the workplace and therefore does not limit s 19(1) any more than reasonably necessary, and
  - d. the limit is in due proportion to the importance of the objective.
23. In our consideration, we have also noted that a pay equity claim is substantially different from an equal pay claim. Equal pay claims involve direct discrimination from an individual employer. Through actual intent or unconscious bias, the employer has caused discrimination against the employee. Pay equity relates to a systemic social issue. It takes account of historical discrimination against an occupation, and therefore is not caused by the individual employer. The employer in a pay equity dispute has paid the market wage in good faith, and is therefore less blameworthy.

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<sup>5</sup> *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].

<sup>6</sup> 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.

24. We therefore conclude that the limitation on the right to be free from discrimination is reasonably justified.

*Language distinguishing between the sexes*

25. We have also considered whether the distinctions based on sex throughout the Bill constitute a limit on the right to be free from discrimination. For example, cl 8 of the Bill provides that pay equity claims relate to work that is exclusively or predominantly performed by female employees.
26. However we consider the Bill is covered under s 19(2), 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.

**Conclusion**

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27. 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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