

5 April 2017

Hon Christopher Finlayson QC, Attorney-General

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

### **Purpose**

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1. We have considered whether the Equal Pay Amendment Bill ('the Bill'), a member's Bill in the name of Jan Logie MP, 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 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 of the Bill of Rights Act (freedom of expression). Our analysis is set out below.

### **The Bill**

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3. The main purpose of the Bill is to remove discrimination in pay rates between men and women in the same jobs by making publicly available the statistical information relating to their rates of remuneration. The Bill amends two Acts, the Equal Pay Act 1972 and the Employment Relations Act 2000.
4. The key operative provisions in the Bill seek to:
  - a. require every employer to deliver annually the information they collect under s 130(1) of the Employment Relations Act to the Ministry of Business, Innovation and Employment ('MBIE') for publication in statistical form
  - b. enable employees to demand this information from their employer
  - c. provide that if an employer considers that the information cannot be provided in a manner that maintains the confidentiality of that information, the employer must give the information to an independent reviewer, and
  - d. provide that any employer who fails or refuses to modify or eliminate pay rates or practices in contravention of the Equal Pay Act would be in breach of the good faith requirement under s 4 of the Employment Relations Act.

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

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#### **Section 14 – Freedom of Expression**

5. 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 has also been interpreted as including the right not to be compelled to say certain things or to provide certain information.<sup>1</sup>

6. Clause 5 of the Bill introduces provisions to the Equal Pay Act compelling the disclosure of information. The Bill requires every employer to keep a record of the matters listed in s 130(1) of the Employment Relations Act (including gender) for at least six years, and to send those records each year to MBIE for publication in statistical form. Employers must also, at the request of an employee or an employee's representative, disclose the aggregated data showing the pay and gender of all employees doing the same kind of work.
7. Clause 5 of the Bill also provides that failure to keep or produce records can be brought before the court under s 18 of the Equal Pay Act. Clause 6 of the Bill increases the maximum penalty for a breach of the Equal Pay Act from \$400 to \$5,000 for an individual or from \$1,000 to \$10,000 for a company or other corporation.
8. The penalties associated with failure to disclose the information introduce an element of compulsion that, prima facie limits the right to freedom of expression affirmed in s 14 of the Bill of Rights Act.

*Is the limitation justified and proportionate under s 5 of the Bill of Rights Act?*

8. 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. The s 5 inquiry may be approached as follows:<sup>2</sup>
  - a. does the provision serve an objective sufficiently important to justify some limitation of the right or freedom?
  - b. if so, then:
    - i. is the limit rationally connected with the objective?
    - ii. does the limit impair the right or freedom no more than is reasonably necessary for sufficient achievement of the objective?
    - iii. is the limit in due proportion to the importance of the objective?
9. The purpose of the Equal Pay Act is to provide for the removal and prevention of discrimination based on sex in the rates of remuneration of men and women employed in the same job. Discrimination in pay rates can be more clearly identified if information about rates of remuneration for men and women in the same job is collected and published in statistical form. Compelling employers to provide this information therefore appears to be sufficiently important, and the limit on freedom of expression appears rationally connected to this objective.
10. The information required by the Bill does not seem excessive. The information provided to MBIE is factual in nature, will only be published in statistical form and, where requested by an employee, aggregated data will only be disclosed if confidentiality of

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

<sup>2</sup> *Hansen v R* [2007] NZSC 7 [123].

the information can be maintained. For these reasons, the provisions limit the right to freedom of expression no more than is reasonably necessary.

11. Further, while the maximum penalties for failing to produce records appear much higher, a sentencing judge would exercise discretion in imposing an appropriate penalty in proportion to the particular offending at hand. The amendment also aligns the penalties in the Equal Pay Act with the more recent Employment Relations Act. The limit on the right to freedom of expression therefore appears in due proportion to the importance of the objective.
12. The Bill therefore appears to be consistent with the right to freedom of expression affirmed in s 14 of the Bill of Rights Act.

## **Conclusion**

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13. 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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