



NEW ZEALAND
LAW SOCIETY

NZLS EST 1869

Equal Pay Amendment Bill

28/11/2018

Submission on the Equal Pay Amendment Bill 2018

1 Introduction

- 1.1. The New Zealand Law Society welcomes the opportunity to comment on the Equal Pay Amendment Bill (the Bill). The purpose of the Bill is to “improve the process for raising and progressing pay equity claims 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”.¹
- 1.2. The Law Society’s submission aims to assist the select committee with the workability of the Bill, rather than comment on government policy. This submission is therefore directed at provisions that may give rise to unintended consequences or fail to achieve the Bill’s objectives. The recommendations are directed at providing greater clarity and certainty for employers and employees.
- 1.3. The Law Society does not seek to be heard.

2 Part 1 – Amendments to the Equal Pay Act 1972

New Part 2: Key provisions

Proposed section 2AAC – Differentiation in rates of remuneration prohibited

- 2.1. Clause 7 inserts a new section 2AAC in the Equal Pay Act 1972 (EPA), prohibiting an employer from differentiating, on the basis of sex, between the rates of remuneration provided to employees.
- 2.2. New section 2AAC(b) contains an express prohibition against conduct giving rise to a pay equity claim — that is, a prohibition against differentiation in rates of remuneration for work performed exclusively or predominantly by female employees and work undertaken by male employees which is comparable work. Part of the comparison involves work under the same, or substantially similar, “conditions”.
- 2.3. To assist with the clarity and workability of section 2AAC, the Law Society recommends that the expression “conditions” be defined in the Act or examples included to provide the range of conditions that may be considered relevant.

New Part 4: Pay equity claims

Proposed section 13C – Employee may raise pay equity claim

- 2.4. Proposed section 13C(2) sets out when a pay equity claim is arguable, namely, when the work is predominantly performed by female employees and the work is either currently undervalued or historically undervalued. This requirement would allow a claim to be raised where work had been historically undervalued, but is not currently undervalued (i.e., any discrimination had since been resolved).
- 2.5. The principal purpose of the Bill is to eliminate current sex discrimination in remuneration and other terms and conditions of employment. If there are reasonable grounds to believe

¹ Equal Pay Amendment Bill, explanatory note, p 1.

the work is subject to current systemic sex-based undervaluation, then this should be sufficient to establish an arguable claim. Current undervaluation of the work should be the primary criterion, with historic undervaluation being a factor that may have given rise to the current undervaluation, as set out in proposed subsection 13C(3).

- 2.6. In addition, in order to meet the underlying purpose of the Bill the Law Society recommends that the undervaluation of the work be linked to sex (rather than the work being undervalued on some other ground).
- 2.7. Accordingly, the Law Society recommends that proposed subsection 13C(2) be amended to read:

A pay equity claim is arguable if—

- (a) *the claim relates to work that is predominantly performed by female employees; and*
- (b) *it is arguable that the work is currently undervalued on grounds of sex.*

- 2.8. Proposed subsection (3) could then be amended to read: *“In deciding whether work is currently undervalued on grounds of sex, consideration may be given ...”*.

Proposed section 13D – Requirements relating to pay equity claims

- 2.9. The procedural requirements set out in proposed section 13D could be simplified and improved as follows:
- 2.9.1. Section 13D should clearly state that a claim can be brought by multiple employees by simply listing the relevant employee names in a schedule to the claim, rather than by preparing separate individual claims for each employee in a group.
- 2.9.2. Subsection 13D(2) sets out the notice provisions for notifying a claim. These provisions are repeated for other parts of the claims process at sections 13E(5), 13F(7), 13I(5). For ease of interpretation, the Law Society suggests that the four notice subsections could be combined into a single “Notice” section.
- 2.9.3. Section 13E(4) provides that the employer’s notice must not identify the claimant without the claimant’s prior written consent. The pay equity claim process could be streamlined (particularly given the 20 working day deadline in section 13(1)(b)), by requiring employees to state whether they consent to their identifying details being provided to other affected employees, as an additional requirement under proposed subsection 13D(1)(c). Where the claimant does consent to their identifying details being provided, a copy of the claim should be attached to the relevant notice that the employer is required to give to affected employees.

Proposed section 13E – Employer must notify certain other employees

- 2.10. Proposed section 13E provides for employers to notify certain other employees of a pay equity claim. Employers must give notice as soon as is reasonably practicable and not later than 20 working days. However, under subsection 13E(7) an employer is permitted to extend that time period if they have genuine reasons for requiring the extension based on reasonable grounds. The Law Society suggests that the length of any such extension should

also be subject to an explicit reasonableness criterion (that is, time may only to be extended for a “reasonable” period).

Proposed section 13F – Employer must form view as to whether pay equity claim is arguable

- 2.11. Proposed section 13F requires that an employer, on receiving a pay equity claim, must form a view as to whether the pay equity claim is arguable and, if so, provide information about and enter into a “pay bargaining process”.
- 2.12. Given that the purpose of the Bill (and the current EPA) is to “make provision for the removal and prevention of discrimination, based on the sex of the employees, in the rates of remuneration of males and females in paid employment”,² the use of the term “pay bargaining”, which gives rise to principles of collective wage negotiation rather than rectification of discrimination, seems anomalous. The Law Society recommends the select committee consider whether alternative terminology, such as “pay resolution process” or “pay resolution discussions” would more closely align with the purpose of the Bill.
- 2.13. Proposed subsection 13F(1) provides that an employer has “65 days” to decide whether a pay equity claim is arguable. To provide consistency in the Bill, the Law Society recommends the time limit provided in subsections 13F(1), (3) and (6) should be expressed in working days.
- 2.14. Proposed subsection 13F(6) sets out a process that will apply if the employer fails to notify the employee under proposed subsection 13F(3) of the employer’s decision about whether, in the employer’s view, the employee has an arguable claim. The process requires (among other things) that the employer provides a pay bargaining notice to the employee and that both parties must enter into the pay equity bargaining process. The penalty provisions set out at clause 23 of the Bill do not provide for a penalty to be imposed for failure to comply with these requirements.
- 2.15. The Law Society considers that the Bill should be amended to include an enforcement process where the employer refuses to engage in the pay equity claim or pay bargaining process, including the ability to refer the matter to the Employment Relations Authority (Authority) and apply for penalties.

Proposed section 13H – Consolidation of claims by multiple employees

- 2.16. Proposed section 13H provides for the mandatory consolidation of claims by multiple employees where the claims relate to the same or substantially similar work. The Law Society recommends the following changes to improve the practical workability of this section:
 - (a) When claims are consolidated, (subject to the relevant confidentiality provisions in subsections 13H(2) and (4)) each employer should be required to provide a copy of the full consolidated claim, including all individual employee claims, to each claimant employee. Each employer should also be required to provide each claimant employee with the name of the other claimants and their representatives. It is important to ensure

² Equal Pay Act 1972.

all parties to the proceeding have common knowledge of the full extent of the consolidated claim.

- (b) Proposed subsection 13H(7) provides that claimants may apply to the Authority for a direction if they cannot agree on how a consolidated claim will be progressed. The Law Society recommends that this subsection is expanded to allow a claimant to apply to the Authority for a direction if the claimant disagrees with an employer's decision to consolidate two claims (for example, if they do not agree that the claims relate to the same or substantially similar work).

Proposed section 13O: relationship between pay equity claims and collective bargaining

- 2.17. Proposed section 13O(2) provides that the existence of an unsettled pay equity claim between an employer and employee is not a genuine reason for failing to conclude collective bargaining between the employer and a union representing the employer's employees.
- 2.18. From a practical perspective, an unsettled pay equity claim may well be a significant matter for an employer. If an employer concludes a new collective employment agreement without resolution of such a claim, the employer may face further and unbudgeted/unplanned increases in employment costs. While the mere existence of an unsettled pay equity claim may not be a genuine reason for not concluding a collective employment agreement, in practical terms an employer faced with uncertainty about projected employment costs and their affordability will have a strong incentive not to conclude collective bargaining until it knows the outcome of the pay equity claim. Large-scale pay equity claims of the type experienced in the care sector seem likely to give rise to this effect.
- 2.19. The Law Society suggests the section be amended to clarify the intended policy of the Bill on this question. Otherwise, we anticipate arguments that, while the existence of a pay equity claim is not a genuine reason for not concluding a collective employment agreement, a genuine reason nevertheless exists to withhold agreement on the grounds of potential unaffordability or inability to plan financially. The Law Society suggests that type of argument should either be excluded, or specifically provided for.

Proposed section 13S: when Authority may accept reference (for facilitation)

- 2.20. Proposed section 13S(2)(b) provides that one of the grounds for the Authority accepting a reference to facilitation is that "sufficient efforts (including mediation) have failed to resolve an issue relating to the claim".
- 2.21. This section has a parallel, in the case of facilitation of collective bargaining, in section 50C of the Employment Relations Act 2000 (ERA). The test required before a reference for facilitation of collective bargaining may be accepted is "extensive" (section 50C(1)(b)(ii)). Presumably the use of "extensive" as the test for facilitation in those circumstances, is to ensure that facilitation of collective bargaining is not embarked upon unless it is demonstrably clear that the parties have tried very hard but are nevertheless stuck. We note also that in section 50C, there is a further requirement that must be established in addition to the requirement for "extensive" efforts, namely that "the bargaining has been unduly

protracted" (section 50C(1)(b)(i)). This is conjunctive with the requirement for extensive efforts.

- 2.22. A pay equity claim is likely to be, to the parties, of at least similar importance and complexity to bargaining for a collective employment agreement. It may well be of greater importance and complexity. Therefore, the committee may wish to consider whether the parties should be required to engage in "extensive" efforts before an entitlement to obtain facilitation is triggered. Consideration may also be given to including the conjunctive requirement from section 50C of the ERA that the bargaining for the pay equity claim has been "unduly protracted".

Proposed section 13Z: Parties may apply for determination by Authority

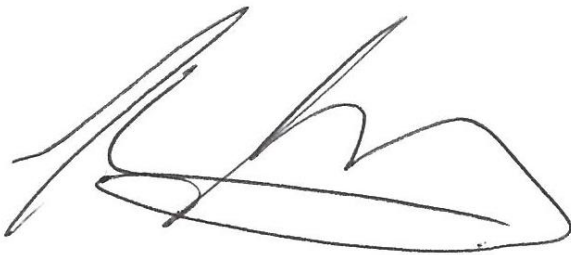
- 2.23. Under proposed section 13Z a party to a pay equity claim may apply "to the Authority or the court" for determination of any matter relating to a pay equity claim, including:
- (a) whether the pay equity claim is arguable;
 - (b) whether the claim relates to work that is the same as or substantially similar to work performed by another claimant for the purpose of consolidating those claims;
 - (c) whether the work to which the claim relates is currently or historically undervalued; or
 - (d) fixing terms and conditions of employment that do not differentiate between male and female employees.
- 2.24. However, section 13Z(3) states that in determining whether work is undervalued, only the Employment Court (court) may take into account the factors listed in section 13C(3), whereas elsewhere in section 13Z both the Authority or court are referred to.
- 2.25. Further, in the subsequent sections (section 13ZB and 13ZC) reference is made only to the Authority and not the court. The Law Society is not aware of any procedural reason why the Bill would limit the matters referred to in sections 13ZB and 13ZC to just the Authority, as the court also has the ability to hear matters de novo. Therefore, the Committee may wish to consider whether both the Authority and the court should be referred to throughout sections 13Z, ZB and ZC for consistency.

Proposed sections 13ZC and ZD: claims for remuneration for past work

- 2.26. Proposed sections 13ZC and 13ZD provide for determinations that fix terms and conditions of employment. The determinations may also provide for recovery of remuneration that ought to have been paid if pay equity had been observed for work performed before the date of the determination. Essentially, this provides for the payment of backpay.
- 2.27. For claims raised less than 5 years after the date on which the section comes into force, the date from which "backpay" may be calculated is the date upon which the claim is notified or proceedings were commenced. For claims raised more than 5 years after the date on which the section comes into force, the applicable start date for the backpay claim is 5 years after the date on which the section comes into force – in other words, there is no need for any claim to have been notified before the backpay liability begins to be incurred.
- 2.28. We note that from the date the Act comes into force, proposed new section 2AAC places an obligation on employers to ensure that there is no differentiation between rates of

remuneration as between female and male employees who have the same or substantially similar skills, responsibility and service and work under the same or substantially similar conditions and degrees of effort. This obligation will come into effect immediately once the Act comes into force.

- 2.29. On that basis the Law Society recommends that the period for the "backpay" claim should commence to run, without the need for a claim to be notified (but for a maximum of 6 years prior to the date of any claim), from the date the legislation comes into force, unless a claim has already been notified under the previous legislation. This would be consistent with the philosophy in proposed new section 2AAC which places the obligation on employers to ensure that pay equity is observed.

A handwritten signature in black ink, appearing to be 'K. Beck', written in a cursive style.

Kathryn Beck
President

28 November 2018