Regulatory Impact Statement

Equal Pay Act 1972: Principles and Process

Agency Disclosure Statement

This Regulatory Impact Statement has been prepared by the Ministry of Business, Innovation and Employment (MBIE) and the Ministry for Women (MfW). It analyses proposed changes to the process for raising pay equity claims and bargaining pay equity issues set out in the Equal Pay Amendment Bill (the Bill). The Equal Pay Amendment Bill is currently awaiting Second Reading.

There has been no change to the policy objective of the Bill which is to provide a process to enable employees to raise pay equity claims with their employer and to negotiate to address pay equity issues in employment. The proposed changes are to the process set out in the Bill which arose as a result of post-Select Committee consultation with the Business NZ and the NZ Council of Trade Unions (NZCTU) requested by the Minister for Workplace Relations and Safety and the Minister for Women.

No formal cost-benefit analysis has been carried out for any of the options. Instead, qualitative judgements of the impacts (positive and negative) of the options considered have been used to determine the preferred options. This is due both to the short period of time available for undertaking the analysis but also because of the inherent uncertainty about the potential costs and benefits. In part the impacts of the options will depend on how people respond to the processes enabled in the options. Given this is a new process it is difficult to predict in advance what that response may be.

The update of the analysis has been undertaken in a short period of time. There has been some consultation on the issues with Business NZ and NZCTU (as well as the Coalition for Equal Value Equal Pay and Martin Jenkins) and a limited number of public sector agencies. We have not had the mandate to consult with further organisations.

Note this RIS presents an updated analysis from the version submitted in September 2016 and updated in May 2018 to support the policy decisions which led to the Equal Pay Amendment Bill introduced in September 2018. The May 2018 version reflected the analysis of the changes made to the Joint Working Group (JWG) Pay Equity Principles, recommended by the Reconvened Joint Working Group[1] in February 2018, and also further policy proposals.

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Ministry of Business, Innovation and Employment 5 February 2020

[1] The Reconvened Joint Working Group included the Ministry for Women.

Executive Summary

1. This Regulatory Impact Statement provides an analysis of further options for amending the pay equity regime proposed in the Equal Pay Amendment Bill (the Bill).

2. The Bill creates an obligation on employers to ensure pay equity and specifies a process for enabling employees to raise claims and progress bargaining with employers to address pay equity issues.

3. The Bill is intended to replace the current situation where employees can raise pay equity issues directly with the Employment Court. The status quo provides an early and potentially significant role for the Employment Court in setting wages which is not consistent with the current bargaining approach to employment relations.

4. Subsequent to the Select Committee report back on 14 May 2019, Business NZ and NZCTU identified that the process specified in the Bill contains some significant differences to the bargaining processes under the Employment Relations Act 2000 (the ER Act). They believed a better alignment between the pay equity process and the processes in the ER Act would make it more efficient and effective. Ministers are proposing to make changes to the process outlined in the Bill to address the feedback received. The main changes are: (1) to remove the requirement to consolidate claims raised by employees with the same employer and (2) to enable multi-employer claims to be raised by unions with multiple employers at the outset.
5. With respect to the first main change, MBIE and MfW prefer to retain the process in the Bill – that is the requirement to consolidate claims raised by employees within the same employer. This option would result in a more structured and efficient pay equity bargaining process across all types of workplaces.

6. With respect to the second main change, MBIE prefers to retain the process in the Bill where the employer decides whether to consolidate claims across multiple employers. This option will address pay equity issues in a way that is consistent with existing bargaining relationships and maintain labour market flexibility. Ministers and MfW prefer the new proposal to enable multi-employer claims to be raised by unions with multiple employers at the outset. This option will result in fewer, larger, and more complex, pay equity bargaining processes and more consistent pay equity rates across the market but it may create risks for existing bargaining relationships and labour market flexibility and functionality.

7. There are also a number of other changes to the proposed pay equity process being considered by Ministers. Looking at the process as a whole (with any of the variants), the analysis reaffirms that a new legislative process is a better option than either the status quo or the voluntary adoption of pay equity principles.

Background

8. Prior to 2014 employees had no legislative mechanism for raising claims for pay equity – the concept that the remuneration for workers in predominately female roles should be equal to the remuneration paid to workers in predominately male roles that involve work of similar effort and skill.

9. In October 2014, a Court of Appeal decision in *TerraNova v Service and Food Workers Union* (now E tū) endorsed the view that pay equity claims could be made using the Equal Pay Act 1972 (the Equal Pay Act). The Court of Appeal's decision means that the Equal Pay Act does not just include equal pay (the same pay for the same work), but also includes pay equity (the same pay for work of equal value).

10. The Government took the view that direct application to the Employment Court under the Equal Pay Act to set a pay equity rate was not consistent with the current employment relations framework which uses bargaining as the main mechanism for setting remuneration with recourse to the Courts as a last resort. It set up the Joint Working Group in 2016 to advise on the principles that should be used as the basis for legislation to create a pay equity bargaining framework. These principles were endorsed with some changes in 2017 by the Reconvened Joint Working Group (see Appendix One).

11. The Equal Pay Amendment Bill is the legislative mechanism to give effect to those principles to ensure employees' pay is free from gender discrimination. It is intended to replace the current situation where employees are able to make pay equity claims directly to the Employment Court under the Equal Pay Act. The Bill has to tread a fine line between ensuring that the individual claims based approach of the Equal Pay Act is maintained while ensuring the process addresses a systemic issue. Balancing these two objectives has underpinned many of the judgements about how the bargaining process works and explains why the pay equity bargaining process can be similar but not the same as the collective bargaining process.

12. The Bill creates an obligation on employers to ensure there is no differentiation between rates of remuneration for work performed by predominately female employees and male employees who have similar skills, responsibility and experience and work under similar conditions. It also enables employees to raise pay equity claims with their employer and sets out a process that enables claimants and employers to bargain to address any pay equity issues identified. It sets out how parties are able to access the employment dispute resolution system to help when agreement cannot be reached.

13. After the Bill was reported back from the Education and Workforce Committee, Business NZ and NZCTU wrote to Ministers to stating that that the process set out in the Bill was not consistent with some of the key elements of our current employment relations framework. Consistent with this feedback, Ministers are proposing changes to the pay equity process in the Bill.

14. The purpose of this regulatory impact analysis is to present and evaluate variants of a legislative pay equity model based on the concerns raised by Business NZ and NZCTU. It also assess whether the choices about key design features of that process would impact the decision to create a new legislative pay equity process.

Problem definition: Misalignment of a court-based pay equity process with the current employment relations framework

15. A pay equity process using the Equal Pay Act involves a significant and early role for the Court in determining pay rates for pay equity claimants. While this would not have been out of place with the highly centralised wage setting arrangements that existed in the 1970s when the Equal Pay Act was passed in 1972, it is inconsistent with the current approach to employment relations as set out in the ER Act.

16. A court-based approach which requires legal representation also makes it administratively difficult and expensive for employees in predominately female occupations to raise pay equity claims.

17. The purpose of the ER Act is to build productive employment relationships through the mutual obligations of trust and confidence, encouraging low-level dispute resolution, and reducing the need for judicial intervention. Early recourse to the Court is not consistent with these purposes.

18. There are very limited circumstances under the ER Act where the Court can make a determination of employment conditions (including pay). The bargaining framework in the ER Act (and associated dispute resolution mechanisms) is considered to be more economically efficient as employers and employees are best placed to know about their particular circumstances and agree on the optimal mix of wages and conditions to reflect productivity and the needs of business and employees, recognising that employers, employees, and unions, may have different access to information, particularly in relation to pay equity before a claim has been raised and they start working together.

19. Increasing court involvement in wage setting decisions could undermine existing relationships and the processes used to develop them. It may also lead to wages being set without reference to the circumstances of the business and the preferences of employees. However, a court-based claims process does have the benefit of providing access to pay equity for those parties who may be unable to address such a claim through normal bargaining processes. While it is not possible to quantify the benefits and costs of the status quo (ie pay equity claims being determined by the courts) in monetary terms, in relative terms the status quo process:

    - creates uncertainty as a result of an interpretation of the Equal Pay Act that is new. This means that it is not clear what principles will be used to assess pay equity or to set pay equity rates, nor whether court decisions in these areas will be applicable to other pay equity claims. Once the court has established precedent in this area, this aspect of uncertainty will be reduced.
    - involves a court-based process to establish a pay rate that can be expected to be costly for the parties involved, making it a poor fit with modern bargaining processes. The status quo requires the parties to operate in a process that is out-of-date and inconsistent with other employment relations processes, including having to deal with the challenges that the Court of Appeal noted in regard to the Equal Pay Act.
    - creates uncertainty for bargaining parties as litigation under the Equal Pay Act may start at any time. Under the ER Act, parties are likely to have participated in facilitation or mediation before employment relations issues are heard by the court.

Effect of a pay equity regime on the labour market

20. The Court of Appeal's interpretation of the Equal Pay Act means that any employee performing work predominantly performed by women, irrespective of their level of pay (whether they are low, moderately or highly paid), may bring pay equity claims under the Equal Pay Act. The claims would allege that the work would have been paid more (that is, that the work is undervalued) were it not predominantly performed by women.

21. The specific effects of the Court of Appeal's decision upon the labour market (including the extent to which any pay rate adjustments reduce employment) will depend on:

- the existence and degree of undervaluation due to systemic sex-based discrimination (which is difficult to determine), and
- the number and timing of pay equity claims that are raised by employees or their representatives / unions and when any wage increases come into effect.

Government response to the Court of Appeal decision

22. To address the concerns raised about the use of the Equal Pay Act for dealing with pay equity claims, the Government introduced the Equal Pay Amendment Bill in September 2018. The Bill sets out a process to address pay equity consistent with the current employment relations framework in line with the principles recommended by the Joint Working Group for Pay Equity Principles (JWG) and reconvened Joint Working Group (RJWG).

23. The pay equity bargaining process proposed in the Bill is not identical to the bargaining processes contained in the ER Act. These differences reflect the different objectives of the processes to address pay equity and for collective bargaining. The differences also reflect a range of judgements made about how to operationalise the high level principles developed by the JWG and RJWG within a bargaining framework that draws on the current system but is tailored to the objective of addressing pay equity.

24. After the Education and Workforce Committee reported back on the Bill on 14 May 2019, Business NZ and the NZCTU wrote to Ministers to say that the divergences between the pay equity and ER Act bargaining processes were significant and their preference was for greater consistency between the two approaches. They believed that making changes to the pay equity bargaining process to make it more like the ER Act bargaining processes would make it more efficient and effective. They remain of the view that a bargained approach is better than a court-based approach but believe further amendments would improve outcomes for employees and employers using the bargaining process.

25. Two of the key differences identified were:

    (1) single employer claims - the pay equity bargaining process set out in the Bill required all claims made by employees performing the same or similar work within an employer to be consolidated into a single bargaining process – this is different to the ER Act where union and non-union bargaining progresses separately, and

    (2) multi-employer claims - that the decision to combine claims across multiple employers lies solely with employers – the ER Act contains provisions that enable unions to initiate multi-employer bargaining.

26. These design choices will impact on the way in which bargaining for pay equity will be structured with a potential impact on the costs of bargaining and bargaining power.

27. Ministers have accepted the arguments put forward by Business NZ and the NZCTU about the benefits of changes to make the proposed changes to the pay equity bargaining process to align with the bargaining process under the ER Act. These changes are reflected as the "new" variants of option 2 below.

Options to address the misalignment of the status quo pay equity process with the current bargaining framework

28. The following options to address pay equity issues have been identified as feasible. This includes a "do nothing more" option (i.e. the status quo). All of the options considered achieve pay equity and do not seek to overturn the Court of Appeal decision in TerraNova or extinguish claims under the Equal Pay Act.

Status quo, claims being raised directly with the Employment Court under the Equal Pay Act	The Equal Pay Act would remain unchanged. Pay equity claims would continue to be raised directly with the Employment Court under the Equal Pay Act. The courts and the labour market would determine how pay equity claims are resolved and the government would not set the policy direction. The Employment Court would set principles under section 9 of the Equal Pay Act (which may be influenced by the JWG's principles), and may determine the substantive matters in pay equity cases. Any new pay equity cases would be dealt with through the courts and existing collective bargaining processes.
Option 1: Implement the recommendations of the JWG without legislation	There would be no amendment to the existing Equal Pay Act but the JWG recommendations (primarily the principles) would be implemented through voluntary adoption by employers and employees for pay equity claims. This is likely to be supported by agreements to adopt and apply these principles and to withdraw action under the Equal Pay Act and to bargain using the principles instead. Government adoption of the principles in bargaining would influence pay equity practices in the wider labour market as Government is a significant labour market participant. Bargaining parties would only be able to access dispute resolution support as currently provided. Any court decision on the section 9 principles would influence pay equity bargaining.
Option 2: Legislate for a new pay equity obligation and create a process for raising and addressing claims	To ensure pay equity claims are dealt with in a bargaining framework, legislation is required to create a new pay equity obligation and create a process for raising and addressing claims. The Equal Pay Amendment Bill is intended to be that legislation. Feedback has been received about two key design features which will change how the process operates and will change key judgements about the impacts

	of the regime. The two key design choices relate to the process for dealing with single employer claims and with multi-employer claims. Any regime would need a variant of both of these design features. These key design choices are analysed as sub-options within Option 2. For each design choice there are two options assessed. There is: • the **current** provisions in the version of the Equal Pay Amendment Bill that has been reported back from Select Committee; • the **new** proposals developed after consultation with CTU and Business NZ. So in total there are four elements assessed within this broader option: Option 2: single-employer (current) Option 2: single-employer (new) Option 2: multi-employer (current) Option 2: multi-employer (new) These are described in more detail below.
Option 2 single-employer current: *legislate and consolidate similar claims within a single employer*	When a claim is raised, the employer must give notice of the claim to other employees who perform the same work. Claims within the employer are consolidated and claimants must agree on representation and decision-making for the claim. Consolidation within an employer ensures that there are not concurrent claims and multiple negotiations for pay equity taking place for the same occupation within an employer.
Option 2 single-employer new: *legislate and remove the requirement for union and non-union claims within a single employer to be consolidated*	This option would mean that unions could raise pay equity claims on behalf of their members, while non-union employees could only raise claims individually. In unionised workforces, all employees would be represented by the union, unless they chose to opt out. Individuals who opt out can choose to progress a separate claim. Claims in non-unionised workforces would not be consolidated.
Option 2 multi-employer current: *legislate and employers decide whether to consolidate pay equity claims across multiple employers*	Employers can decide whether to consolidate pay equity claims for the same work across multiple employers. Claimants do not have a say in whether multiple employers consolidate and they do not have the ability to require employers to do so. This decision point occurs after each employer confirms a claim is arguable.
Option 2 multi-employer new: *legislate and allow unions raise claims directly with multiple employers*	Unions would have the ability to raise claims directly with multiple employers and request they deal with the claim together. Employers would be required to undertake multi-employer bargaining unless they had genuine reasons based on reasonable grounds not to (this is a high threshold). The employers joined to the claim would need to make a joint assessment as to whether a claim is arguable. It is likely this option would lead to large, complex claims spanning many employers.

29. Officials presented further options to Ministers relating to the consolidation of claims within a single employer – to require the consolidation of non-union claims within an employer which would be bargained separately from a union claim, or to require consolidation only where there is no union presence. Officials did not recommend these options and Ministers did not prefer them. Requiring the consolidation of non-union claims alongside union claims would still result in the potential for employers to progress multiple claims at once, and multiple settlements for the same work within a workplace. Requiring consolidation only where there is no union presence would create different rules for union and non-union workplaces.

Objectives/criteria

30. The criteria for identifying which options address the misalignment of the Equal Pay Act process with modern employment relations are identified in the following table. The criteria for assessing options that carry most weight in the process of assessment have been highlighted in green.

Table 1: Criteria for assessing options

Criteria	What does this mean?	Why is it important?
Effective at achieving pay equity	The process is effective at addressing systemic sex-based discrimination.	- Freedom from discrimination is viewed as important to society and is provided for in law. - Discrimination is economically inefficient.
Supports productive employment relationships consistent with modern bargaining frameworks	The objective of the ER Act is to build productive employment relationships through the promotion of good faith in all aspects of the employment environment and of the employment relationship. Employees and employers can openly and constructively engage on employment matters. Employees and employers are able to find innovative, mutually acceptable working arrangements to suit their particular circumstances over time. Mediation is the dispute resolution mechanism with reduced need for judicial intervention.	- Mutual trust and good-will are an important part of productive working relationships. - Employees and employers have the most information about their preferences, increasing the chance of finding mutually beneficial working arrangements at least cost. - Solutions can be found for different circumstances/problems over time.
Supports a better functioning labour market	A well-functioning labour market is able to signal relative labour scarcity and productivity, informing employee and employer decisions (e.g. skills investment, labour/capital mix), but targeted interventions may be needed to ensure it supports desired outcomes, such as the removal of discrimination.	- Market signals are provided about the most productive use of labour and capital (allocative efficiency). - Markets can influence decisions that support future productivity, e.g. investment and innovation (dynamic efficiency). - Interventions can be targeted at the problem in order to address issues in the labour market. - Interventions are based on

		considering whether the expected benefits outweigh the expected costs. - Because pay equity is somewhat subjective, it is beneficial to address it through bargaining. - Settlement rates address pay equity (or are close to it).
Provides certainty	Rights and obligations (process and/or outcomes) are clear and predictable to labour market participants.	- Certainty is important to minimise the risk of unintended consequences (i.e. not achieving pay equity).
Minimises unnecessary costs	Includes: - compliance costs incurred by employers and employees in the process of exercising or meeting their rights and obligations - administrative costs incurred by labour market institutions.	- Compliance costs decrease any potential net benefits of pay equity regulation. - Administrative costs are ultimately borne by employees and employers, eroding any net benefit of pay equity.

Regulatory impact analysis

31. No formal cost-benefit analysis has been carried out for any of the options. Instead, qualitative judgements of the impacts (positive and negative) of the options considered, relative to the status quo and based on the criteria above (as shown in the tables following), have been used to determine the preferred options.

Option 1

32. Option 1 involves implementing the JWG recommendations through voluntary adoption by employers and employees for pay equity claims. This is likely to be supported by agreements to adopt and apply these principles and to withdraw action under the Equal Pay Act and to bargain using the principles instead. Government adoption of the principles in bargaining would influence pay equity practices in the wider labour market as Government is a significant labour market participant. Any court decision on the section 9 principles would influence pay equity bargaining.

Options 2 (all variants)

33. All of these options involve implementing the JWG recommendations in legislation through amendments to the Equal Pay Act and ER Act. This would achieve pay equity as a result of:

- providing guidance on when a pay equity claim is present. This includes the work being predominantly performed by females as well as consideration being given to factors that could have driven systemic gender discrimination resulting in historic and ongoing undervaluation
- establishing an accessible, gender-neutral process for groups or individuals to request pay equity and an obligation upon the employer to respond to such a request
- establishing principles and a process to guide bargaining without having to refer to the court for this direction
- resolving pay equity through a process that aligns with the current employment relations framework

- improving and enhancing access to mediation and facilitated bargaining for pay equity.

34. An assessment of the options considered, relative to the status quo and based on the criteria above is given in the following tables.

Table 2: Assessment of options

	Status Quo (claims raised direct with Employment Court under the Equal Pay Act)	**Option 1: Implement the Reconvened Joint Working Group recommendations regarding principles without legislation**	**Option 2 single-employer (current):** legislate and consolidate similar claims within a single employer	**Option 2 single-employer (new):** legislate and remove the requirement for union and non-union claims within a single employer to be consolidated	**Option 2 multi-employer (current):** legislate and employers decide whether to consolidate pay equity claims across multiple employers	**Option 2 multi-employer (new):** legislate and allow unions to raise claims directly with multiple employers
Description of the option	There would be no amendment to existing legislation. The courts and labour market would determine how pay equity claims are resolved, with possible reference to the JWG principles.	There would be no amendment to the existing legislation but the JWG recommendations (primarily the principles) would be implemented through voluntary adoption by employers and employees.	Legislate a new pay equity process. When a claim is raised, the employer must give notice of the claim to other employees who perform the same or substantially similar work. Claims for the same or substantially similar work must be consolidated. Claimants must then agree on representation and decision-making for the claim.	Legislate a new pay equity process Unions are able to raise claims on behalf of their members, and non-union employees can raise individual claims. Each claim is to be progressed separately. However, where there is a union, all employees will be deemed to join that claim unless they opt out. And once a settlement is reached, they must be offered the terms of the settlement unless they opt out.	Legislate a new pay equity process Employers can decide whether to consolidate pay equity claims for the same work across multiple employers. Claimants (individual employees or union and their members) do not have a say in whether multiple employers consolidate, and they do not have the ability to require employers to do so. At the conclusion of consolidated bargaining, employers are required to enter into separate settlement agreements with their claimant employees.	Legislate a new pay equity process Unions are able to raise claims for the same or similar work with multiple employers and request they deal with them as a consolidated claim. Employers would be required to undertake multi-employer bargaining unless they had genuine reasons based on reasonable grounds not to (this is a high threshold). Where a claim has been raised with a single employer, unions or employers are able to request the consolidation of claims across multiple employers with the ability to opt out if there are genuine reasons based on reasonable grounds.
Effective at achieving pay equity	Could achieve pay equity for those with resources to take a court-based claim. There may be incentives to bargain to avoid litigation. Established court-precedent will provide a benchmark for future pay equity bargaining but could take time to filter through the labour market.	- n/c (no change) Same as the status quo. This option may encourage more claims than the status quo initially, with some settlements reached using the JWG principles without use of court processes. In the long-term, this option is no different from the status quo.	✓ Enabling claims in a bargaining process should make pay equity more accessible than in a court-based system. Consolidation of similar claims within a single-employer may lower the average costs of dealing with claims but may increase co-ordination costs for employees.	**Workplaces where there is a union** ✓ There may be little practical difference to consolidation in *option 2 single-employer current* because unions are expected to raise most claims and non-union employees can join the union claim, but the risk of multiple processes remains. **Workplaces where there is no union presence** ✗ Pay equity claims will be progressed individually with no formal coordination mechanism. This may be a barrier for individual employees to raise claims, given the substantial amount of time and resources required to work through the pay equity assessment process.	✓ Pay equity likely to be addressed employer by employer in more instances. This could mean more bargaining processes but each could be simpler as it avoids the need to consider differences in types of work between employers. This option is likely to reduce the instances where employees could work together to resolve a similar pay equity issue across multiple employers compared with *option 2 multi-employer new*.	✓✓ Pay equity likely to be addressed by a smaller number of more significant bargaining processes. Large, complex claims may take longer to work through than those at an enterprise level but this will depend on the approach taken by the parties.

Supports productive employment relationships consistent with current bargaining frameworks (e.g. the ER Act)	An early and significant role of the court in employment relations is not consistent with current bargaining frameworks.	- n/c Same as the status quo.	✓ It means there is only one bargaining process per workforce per employer. It will allow parties to agree on a single set of comparators and an assessment process to cover the work of the claim. It would also reduce the risk of a situation where employees negotiate different settlements for the same work within the same employer. Could incur delays to the bargaining process as multiple claimants need to make joint decisions. Potential for unions not to effectively engage with non-union claimants (or vice versa) creating tension between unions and employers. Could be seen to undermine the role of unions as recognised employee representatives.	**Workplaces where there is a union** ✓ This would be the most efficient option for unions. It also aligns with the status of unions granted under the ER Act, and their role as employee representatives. However, there is potential for tension for those who do not want to be represented by the union (and therefore need to proactively opt-out). **Workplaces where there is no union presence (approximately 80 percent of the workforce is non-unionised)** × While consistent with the ER Act, there would be no mechanism for individuals to bargain together with their employer to identify and address pay equity as a systemic issue. Given the significant process requirements, making a claim may be intimidating for individuals without the ability to join others.	✓✓ Depends on bargaining structure and the alignment of employer and employee preferences, i.e. if employers and claimants already undertake MECA bargaining then it is likely that the multi-employer bargaining structure is one that employers would choose. Currently, there are 71 MECAs in total, with 41 in the private sector (2018/19). It is likely that an employer would choose a bargaining structure for pay equity that is consistent with their existing bargaining structure.	× ✓ Depends on bargaining structure and the alignment of employer and employee preferences. The costs of coordination across multiple employers where they would normally bargain separately, especially for those in different locations and of various sizes, may outweigh any collaborative gains of requiring them to consolidate. Unions are likely to have a preference for more co-ordinated bargaining so are likely to raise claims across multiple employers that cross existing bargaining structures.
Supports a better functioning labour market	Court-determined pay equity rates can signal scarcity and productivity, but the court is restricted to setting a pay rate whereas the parties may have bargained both pay and conditions that better suit their circumstances.	- n/c Similar to the status quo.	- n/c	- n/c	✓ Businesses have more flexibility and control over decision-making and are likely to make decisions on consolidation that align with existing bargaining structures. This would ensure that any pay equity settlement reflects each employer's operational environment and is consistent with their overall approach to employee terms and conditions.	× ✓ Having an agreed approach to pay across multiple employers would emphasise competition on non-pay characteristics. Employers may be resistant to having a key business input determined in a separate process from other business decisions. If employers are involved in a multi-employer settlement that does not suit their needs or circumstances, or those of their employees, this may result in reduced hours for staff or changes in responsibilities which can have a negative effect for some staff (see AUT's research *The Value of Care*)[2]

[2] https://workresearch.aut.ac.nz/__data/assets/pdf_file/0019/258130/Pay-Equity-Report_Digital_final.pdf

Provides certainty	There is initial uncertainty about pay equity principles until the court makes a determination in this area. On an ongoing basis, there will be uncertainty for both parties during bargaining as litigation may start at any time.	n/c Same as the status quo.	✓ Provides more certainty than *option 2 single-employer new* as one settlement would be negotiated across multiple claimants within an employer.	× Provides less certainty than *option 2 single employer current* by creating a risk of potential inconsistencies in the terms and conditions of settlement for different workers, and potential inequities in the rate offered to future employees. This may result in pay parity and equal pay issues. The timing of claims raised may also affect the settlements reached (e.g. if an individual settled a claim earlier than a union this could undermine the union position in bargaining).	**Employers** ✓ Employers have more control, thus greater certainty over the process and settlement terms. **Employees** × However, there also may be greater variance in settlements for the same or similar work between employers so employees have less certainty.	**Employers** ×If there are multiple employers involved in a claim they will need to agree on how they will be represented. Each employer will have less direct influence over the decision points in the process, so there is less certainty around what the final outcome of the process and settlement will be. **Employees** ✓ There is likely to be less variance in settlements for the same or similar work between employers so employees have more certainty.
Minimises unnecessary costs	A court-based process is likely to involve significant legal costs initially. Costs may be lower once precedent has been established for both court-based processes and bargained solutions.	? Same as the status quo. This option potentially avoids some court costs but is likely to revert to the status quo after a period. This option is likely to involve some cost to government, business and unions, to set up and encourage its use.	✓ Creates coordination costs for employees to negotiate claims with other claimants but reduces compliance costs for employers in processing identical pay equity claims separately.	**Workplaces where there is a union** ×✓ In workplaces where there is a union presence, compliance costs for *employers* dealing with multiple claims may be mitigated by enabling employees to join a union claim. *Non-union claimants* taking individual claims would not have the benefit of being able to share information and expertise with union claimants, increasing the effort it may take to progress a claim. **Workplaces where there is no union presence** × There could be compliance costs for employers, who may have to deal with multiple pay equity claims for the same work through separate negotiations. Again, claimants may have a reduced ability to share information.	Depends on bargaining structure. If pay equity bargaining is conducted in line with existing arrangements (which is more likely under this option) then costs will are likely to be similar to those incurred during collective bargaining. **Employers** ✓ The employer would incur the same bargaining costs according to how they normally conduct their bargaining with employees (ie at an enterprise or multi-employer level). **Unions** × Costs could increase for unions if they are required to engage in separate pay equity bargaining processes for workers performing similar work with different employers.	**Employers** ×✓ Could increase compliance costs as any scope issues relating to the claim (i.e. whether the work that is the subject of claims across multiple employers is the same or substantially similar), or any issues relating to the arguable threshold, would be need to worked through across employers, rather than in advance of consolidation. If bargaining is more consolidated than an employer's existing bargaining arrangements (which is more likely under this option, as there is a high threshold to opt out) then bargaining costs will be spread across more employers but coordination costs will increase. The overall effect will depend on the actions of the parties. Could increase likelihood of disputes (including from parties that wish to leave consolidated bargaining) leading to higher dispute costs. **Unions** ✓ The costs of negotiating settlements are minimised.

Summary	A court-based regime would require claims to be dealt with individually until precedents were set and had an influence in the labour market. This could involve significant costs for early claimants. Court precedents could take time to filter through the market and create uncertainty about how and where they apply.	Overall, this option is the same as the status quo as it is essentially the status quo with a period where pay equity principles are voluntarily tested in bargaining. This option will require considerable effort to establish, apply and sustain. Beyond the short term, this option would be no different than the status quo.	This option is an improvement on the status quo by establishing an accessible, gender-neutral process for groups or individuals to request pay equity. Including a requirement to consolidate claims within an employer will result in a single bargaining process which will be less costly and result in more consistent pay equity processes within employers. However, it could be seen as undermining the role of unions.	This option is an improvement on the status quo by establishing an accessible, gender-neutral process for groups or individuals to request pay equity. Claims can be progressed by either unions or individuals. Design features of this option mean that in workplaces with a union presence, it is likely to result in consolidated union-led bargaining. So in practice, the outcomes from this option are likely to be similar to *option 2 single employer current*. However, the process to arrive at that outcome will add complexity to an already complex process. And there is a risk that individuals will opt out meaning multiple bargaining processes. In workplaces without a union presence, individuals will progress claims separately which may raise barriers for individual claimants compared to *option 2 single-employer current.*	This option is an improvement on the status quo by establishing an accessible, gender-neutral process for groups or individuals to request pay equity. This option is likely to result in more pay equity bargaining occurring at a single employer level compared to *option 2 multi-employer new.* It is expected that employers would choose to conduct pay equity bargaining using similar bargaining structures to their collective bargaining. More bargaining processes mean there could be multiple pay equity outcomes for the similar workforces across the labour market.	This option is an improvement on the status quo by establishing an accessible, gender-neutral process for groups or individuals to request pay equity. This option is likely to result in more consistent pay equity outcomes for similar workforces than under *option 2 multi-employer current*. However, it could lead to more complex claims that will take longer and involve more disputes as pay equity multi-employer bargaining structures are less likely to coincide with existing bargaining structures.

Conclusions and Recommendations

35. Some form of **Option 2 – to legislate** for a new pay equity obligation and create a process for raising and addressing claims is preferred over Option 1 or the Status Quo. Allowing claims to be raised in a bargaining framework that is familiar to both employers and employees should make it more accessible for employees and preferred by employers to a court-based determination.

36. In terms of the design choices within Option 2, there are differences of view.

For Option 2 – single employer claim design

37. MBIE and MfW prefer *option 2 single-employer current* as this option would result in a more structured and efficient pay equity bargaining process across all types of workplaces. *Option 2 single-employer new* is the Ministers' preferred option.

38. In practice the distinction between the two single-employer claim options is unlikely to lead to significantly different overall impacts for the regime in workplaces where there is a union presence. There could be more divergence in workplaces without union presence as progressing a claim individually may be a barrier to raising and progressing a claim. This may change the bargaining power dynamics which could determine the outcome of claims.

39. *Option 2 single-employer new* is consistent with the International Labour Organisation's (ILO) view that unions are the primary bargaining agent for workers. The ILO's jurisprudence identifies a risk that collective bargaining involving both unions and individuals or non-union organisations could undermine the role of unions. However, the concept of pay equity bargaining is different to collective bargaining because of its origination as an individual-based claim. The Equal Pay Amendment Bill develops a framework in a way that preserves the ability for individuals to raise claims while enabling a bargained outcome. MBIE and MfW believe this makes pay equity bargaining sufficiently different to normal collective bargaining to justify a different approach.

40. MBIE and MfW believe *Option 2 single-employer new* could lead to multiple pay equity bargaining situations within the same workplace. In workplaces where there is a union presence, there could be individuals who opt out of union representation of their claim. In workplaces without a union presence, employees will have to bargain each claim individually. Employees bargaining individually would each face the cost involved in progressing a claim (such as information collection and potentially legal costs) and would have less bargaining power than if they were able to bargain collectively. For employers, this would lead to higher compliance costs, and the potential for inconsistent claim settlements for the same work within the same employer. Some of the design features of *Option 2 single-employer new* will mitigate these risks to some extent but do not eliminate them.

For Option 2 – multi-employer claim design

41. The multi-employer claims design options have different strengths.

42. MBIE prefers *Option 2 multi-employer current* because it is the option most likely to result in pay equity bargaining situations involving the same bargaining parties as those involved in existing bargaining under the ER Act. This is important because it provides the highest confidence that the work being assessed is the same or similar. If claims cover roles with different characteristics (even if they have the same job title), the complexity of scoping and assessing the claim increases which could increase the overall cost of the processing the claim. While MBIE expects this option to result in the need for more bargaining situations than *option 2 multi-employer current*, the lower complexity of each bargaining situation is likely to mean the additional overall cost is lower. The systemic pay equity issues will be addressed but in a manner consistent with the objective of ensuring a greater alignment with the bargaining structures favoured under the current employment relations framework.

43. Ministers' preferred option is *Option 2 multi-employer new*. The Ministry for Women also prefers *Option 2 multi-employer new*.

44. MfW's view is that this option would reflect pay equity as a systemic issue, and enables employees to have a voice. This option is likely to result in more pay equity bargaining occurring at the multi-employer level. This option is expected to result in lower overall bargaining costs for unions than *Option 2 multi-employer current*. It is more likely to achieve consistent outcomes for women affected by pay equity issues (e.g. it may be more beneficial for women working across all the franchises of a business to bring a claim, compared with having the employees of each individual franchise bring a separate claim). However, it may take longer to reach settlements due to the complexity of multi-employer claims and could involve bargaining occurring between different parties than under the ER Act (ie. result in more multi-employer pay equity bargaining compared with collective bargaining) which may be less consistent with promoting good employment relationships. Labour market flexibility and functionality could be reduced by bargaining for a key element of remuneration occurring outside the existing bargaining relationships, so that an individual employer will have less ability to have their individual circumstances reflected in the outcome of multi-employer bargaining.

Implementation

45. The status quo requires no further action. There is potential for increased pressures on the Employment Court. This may be temporary, in part, as further equal pay claims are made to clarify the application of the Court of Appeal's interpretation of the Equal Pay Act.

46. The implementation of a new pay equity obligation (under any of the option 2 options) would involve legislation. Options single employer current and multi-employer current are reflected in the current Equal Pay Amendment Bill. Options single employer new and multi-employer new would require further changes to the Bill.

47. The new pay equity process may create additional work for the ER Act and the Employment Court but this is difficult to predict in advance. Funding was received in Budget 2017 to enable additional mediators and ER Authority members to be hired to cover the expected increase in workload.

48. The overall settlement costs of pay equity are large and uncertain, as the level of sex-based undervaluation in a workforce is not known until key parts of the process have been met. Two large drivers of this uncertainty come from the ambiguity of the scope of the work included in a pay equity claim with a risk that some claims may involve a range of roles or occupations that only have some similar elements, as well as around the use of evidence for the comparators and estimation of undervaluation. There will be commensurate benefits for workers in female dominated occupations and flow-ons to their communities as a result of settlements.

49. A range of tools and guidance will be needed to support the implementation of the legislation including the development of a mechanism for collecting copies of pay equity settlements. MBIE received $1 million in Budget 2019 to fund the development of these tools and guidance.

Monitoring, evaluation and review

50. There are a number of existing sources of information about the labour market that can be used to monitor the implementation of pay equity. These sources include Statistics New Zealand, Integrated Data Infrastructure (IDI), Victoria University's Centre for Labour, Employment and Work (CLEW), and MBIE's administrative and survey data.

51. MBIE is currently developing a new system for managing cases with Mediation Services and the Employment Relations Authority. In principle, the new system will be able to provide, for a 12 month period:

    - the number of cases addressed by Mediation Services and the Employment Relations Authority in relation to disputes under the Equal Pay Act
    - the average length of time taken by these cases in the mediation or Authority process (that is, the average number of dates from when a case is filed to when it ends)
    - the total number of individual employees and employers involved in Equal Pay Act cases filed with Mediation Services and the Employment Relations Authority.

52. MBIE will also track the number and types of queries to the MBIE contact centre, the Labour Inspectorate and our websites (business.govt.nz and employment.govt.nz) in relation to the Equal Pay Act.

53. There is a requirement in the Bill for all pay equity settlements to be sent to the Chief Executive of MBIE. It will be possible to use this information for statistical and analytical purposes.

54. The Ministry for Women undertakes regular research on gender pay gap matters. The Ministry for Women, with the State Services Commission (SSC), is supporting agencies to implement the Gender Pay Principles in the public service, and to implement a strategy involving actions to accelerate progress on closing the gender pay gap in the public service, with a view to ensuring that the public and private sectors are on a similar pathway.

55. The SSC oversees bargaining outcomes in the Public Service. To monitor the implementation of pay equity, SSC will request information from agencies on pay equity claims made through collective bargaining. This information will be used to monitor and review patterns of pay equity claims and understand their impact. Further insights will be provided through SSC's engagement with Public Service agencies who receive pay equity claims.

Appendix 1: Combined JWG and RJWG principles

1. Any employee or group of employees can make a claim.

2.

A. To determine whether to proceed with the claim as a pay equity claim the work must be predominantly performed by women. In addition, it should be arguable that:

B. The work is currently or has been historically undervalued (due to the same factors under 2B in the original JWG Principles).

C. Consideration may also be given to whether gender-based systemic undervaluation has affected the remuneration for the work (due to the same factors under 2C in the original JWG Principles **plus** areas where remuneration for this work may have been affected by any occupational segregation and/or any occupational segmentation).

D. Agreeing to proceed with a pay equity claim does not in and of itself predetermine a pay equity outcome.

3. A thorough assessment of the skills, responsibilities, conditions of work and degrees of effort of the work done by the women must be undertaken.

4. The assessment must be objective and free of assumptions based on gender.

5. Current views, conclusions or assessments of work value are not to be assumed to be free of assumptions based on gender.

6. Any assessment must fully recognise the importance of skills, responsibilities, effort and conditions that are commonly over-looked or undervalued in female-dominated work such as social and communication skills, responsibility for the wellbeing of others, emotional effort, cultural knowledge and sensitivity.

7. To establish equal pay, there should be an examination of:

i. the work being performed and the remuneration paid to those performing the work; and

ii. the work performed by, and remuneration paid to, appropriate comparators.

8. An examination of the work being performed and that of appropriate comparators requires the identification and examination of:

i. the skills required;

ii. the responsibilities imposed by the work;

iii. the conditions of work;

iv. the degree of effort required in performing the work;

v. the experience of employees;

vi. any other relevant work features.

9. An examination of the work and remuneration of appropriate comparators may include:

i. male comparators performing work which is the same as or similar to the work at issue in circumstances in which the male comparators' work is not predominantly performed by females; and/or

ii. male comparators who perform different work all of which, or aspects of which, involve skills and/or responsibilities and/or conditions and/or degrees of effort which are the same or substantially similar to the work being examined; and

iii. any other useful and relevant comparators.

10. The work may have been historically undervalued because of:

i. any relevant origins and history of the work and the wage setting for it;

ii. any social, cultural or historical factors which may have led to undervaluing or devaluing of the work and the remuneration paid for it;

iii. there is or has been some characterisation or labelling of the work as "women's work";

iv. any social, cultural or historical phenomena whereby women are considered to have "natural" or "inherent" qualities not required to be accounted for in wages paid.

11. A male whose remuneration is itself distorted by systemic undervaluation of “women’s work” is not an appropriate comparator.
12. Equal pay is remuneration (including but not limited to time wages, overtime payments and allowances) which has no element of gender-based differentiation.
13. Equal pay must be free from any systemic undervaluation, that is, undervaluation derived from the effects of current, historical or structural gender-based differentiation.
14. In establishing equal pay, other conditions of employment cannot be reduced.
15. The process of establishing equal pay should be orderly, efficient, kept within reasonable bounds and not needlessly prolonged.
16. Any equal pay established must be reviewed and kept current.