

Why a Pay Equality Bill?



Equal pay and equal pay for work of equal value have been a policy issue in New Zealand and overseas since the Second World War.²¹ As an increasing number of women entered the paid workforce the question was frequently asked why women were paid less than men for doing the same work. This practice not only undermined the notion of equality but it was perceived as being unfair. After much lobbying, the issue was placed on the political policy agenda in the 1960s. Over the past 40 years New Zealand and overseas jurisdictions have tried various policy approaches but the inequality between male and female pay rates has persisted.²²

It is time for a new approach. Rather than persist with the traditional model of relying on the notion of discrimination alone to remedy an inequality, this draft bill asserts the right to equality of pay. The right to equality is the conceptual foundation of the law relating to discrimination. It is therefore appropriate that the positive right to equality be incorporated in a statutory framework. Sandra Fredman²³ in her book describes the basis for this new approach as follows:

Equality is a pivotal concept linking negative and positive human rights duties...More recently, however, the artificiality of the distinction between negative and positive duties within the equality guarantee has become increasingly evident. This is in part due to the ineffectiveness of duties of restraint in addressing discrimination and inequality. It has become clear that without a positive duty to promote equality, patterns of discrimination and social exclusion will remain unchanged...real progress can only be made through a unified approach to equality, one which includes both positive and negative duties."

The policy framework of the Pay Equality Bill differs from that taken by previous legislation. The focus in previous legislation such as the Equal Pay Act and the repealed Employment Equity Act had been on the industrial employment relations statutory framework. The underlying assumption of the legislation was that equal pay was primarily an employment matter and best resolved through employment-related concepts, procedures and institutions. While it is a fact that the payment for labour is grounded in the workplace, previous legislative attempts to make equal pay a reality have been only partially successful.

The Equal Pay Act 1972 did partially close the ordinary time hourly earnings gap from 69.9% to 78.5%.²⁴ Ten years later the hourly earnings gap remained at about 78%.²⁵ Since that time the pay gap narrowed unevenly and slowly, then stalled in the last decade.²⁶ Overall in March 2010, women's average hourly earnings were 87.4% of men, and women's average weekly full-time equivalent earnings were 81.4% of men's.²⁷ These statistics are averages and disguise considerable differences across occupations as illustrated by the recent *New Zealand Census of Women's Participation*²⁸ which reveal the gender pay gap in the public sector varied from 38.81% in Defence, 29% in Treasury, 27.2% in the Office of Prime Minister and Cabinet to 14.9% in Labour, 11% in Social Development, 1.65% in Archives and -12.0% in the Serious Fraud Office.

The New Zealand experience of only partial success in closing the pay gap between male and female employees is similar to that of comparable countries such as Canada, Australia, and the United Kingdom. The International

²¹ Corner, M. (1988) *No Easy Victory*, NZ Public Service Association

²² Report of the Director-General, ILO (2007) *Equality at Work: Tackling the Challenges: Global Report under the Follow-Up to the ILO Declaration on Fundamental Principles and Rights at Work*

²³ P 175 Fredman, S (2008) *Human Rights Transformed* Oxford University Press

²⁴ *Equal Pay Implementation in New Zealand: Report of a Committee Appointed by the Minister of Labour (1979)* Department of Labour.

²⁵ *Equal Pay Study: Phase One* (1987) Department of Labour

²⁶ http://www.hrc.co.nz/hrc_new/hrc/cms/files/documents/15-Dec-2010_12-41-06_Chapter_13.184-203.pdf

²⁷ Statistics New Zealand March 2010 *Quarterly Employment Survey (QES)*

²⁸ *New Zealand Census of Women's Participation 2010* Human Rights Commission

Labour Organisation noted that “despite phenomenal advances in their educational achievements, women continue to earn, on average, less than men in all countries”.²⁹ The Report examined the various causes and dimensions of the gender pay gap and concluded “Pay equity is about redressing the undervaluation of jobs typically performed by women and remunerating them according to their value. This is not necessarily a reflection of market forces or skill requirements, but may mirror differences in collective bargaining power, preconceived ideas about scarce skills/ market rates or the historical undervaluing of “female” jobs.”³⁰ After noting that while collective bargaining had been the principle method of introducing pay equity schemes in many countries, the change in global economic policies had witnessed a recent decline in collective bargaining. The Report therefore concluded “The more collective bargaining is decentralised, the wider the wage disparities and hence the wage gap. As the commitment to equal pay for equal work continues to advance, the social partners will need to explore new modalities to best give effect to these rights both inside and outside the collective bargaining context.”³¹

The emergence of a need for a new approach has been noted in Canada, Australia, and the United Kingdom as well as in New Zealand. This new model relies on the development of a human rights framework that incorporates the notion of equality. Mary Cornish, Chair of the Ontario Equal Pay Coalition states “the strategy for securing pay justice for women requires at a minimum pro-active equal pay for work of equal value laws along with other equality promoting laws and policies.”³² The need to position pay equality within an overall equality framework has been adopted in Canada through the Canadian Human Rights Commission project to develop a *Framework for Documenting Equality Rights*³³

This Framework’s objective is to provide reliable and policy-relevant data on equality rights in Canada by examining the social and economic

well being of groups protected under the Canadian Human Rights Act. The benchmark for the Framework is the constitutional guarantee of equality set out in section 15 of the Canadian Charter of Rights and Freedoms³⁴ that provides “Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.” Although New Zealand does not have a written constitution, in this context the Human Rights Act and the Bill of Rights Act may be considered the equivalent of section 15.

In Australia also there have been changes in the statutory framework to determine pay equality. Under the Fair Work Act 2009 it is unlawful to treat a woman less favourably in the workplace on the basis of her gender. The Act also contains a ‘modern award objective’ that provides when making an award, Fair Work Australia must take into account ‘the principle of equal remuneration for work of equal or comparable value’. Importantly also the Sex Discrimination Commissioner is entitled to refer an industrial instrument to Fair Work Australia to ensure it is non-discriminatory. Fair Work Australia has power to make ‘equal remuneration orders’ to ensure that there will be equal remuneration for work of equal or comparable value. Legislative reform has also been signalled to the Equal Opportunity for Women in the Workplace Act 1999 (EOWW Act).

The Human Rights Law Resource Centre submission to the Review of the EOWW Act noted “The interaction between the Sex Discrimination Act (SDA), the EOWW Act and the FW Act provide a strong legislative framework which can be utilised to ensure equal remuneration for work of equal value.”³⁵ The Australian Minister of the Status of Women, the Hon Kate Ellis MP recently announced in March 2011 reforms of the EOWW Act and Equal Opportunity for Women in the Workplace Agency (EPWA). These reforms include a new *Workplace Gender*

²⁹ P 73 *Equality at Work: Tackling the Challenges: Global Report under the Follow-Up to the ILO Declaration on Fundamental Principles and Rights at Work* (2007) Report of the Director-General, ILO

³⁰ P74 *ibid*

³¹ P91 *ibid*

³² Cornish, M., (2009) in a paper *New Governance Approaches to Closing the Gender Pay Gap: Perspectives from Canada* International Labour Law and Social Security XIX World Congress, Sydney, Australia)

³³ *Framework for Documenting Equality Rights* (2010) Canadian Human Rights Commission

³⁴ (Part 1 of the Constitution Act 1982)

³⁵ Human Rights Law Resource Centre Ltd, (October 2009) Melbourne, Vic, Australia,

Equality Act and Workplace Gender Equality Agency with the objects of the Act including pay equity.³⁶ Although it is too early to assess the effectiveness of this legislative framework, it is relevant in the New Zealand context because it recognises the issue of pay equality is both a human rights and an industrial issue and that the institutions responsible for the enforcement in both sectors can and should work together.

The other jurisdiction of relevance in the context of New Zealand's development of a pay equality legislative framework is the new Equality Act in the United Kingdom. While again it is too early to assess the effect of this new legislation on delivering pay equality, it does provide a new approach that has been described by Bob Hepple,³⁷ as "The shift in focus from negative duties not to discriminate, harass or victimise, to positive duties to advance equality, justify the re-invention of this branch of the law as *equality law*, of which discrimination law is an essential but not exclusive part."

In other words the Equality Act creates a positive right to equality as the starting point. While the Act sets out the right to pay equality, the provisions of the Act are supplemented by an *Equal Pay Statutory Code of Practice*³⁸ to assist the parties in the implementation and enforcement of the right to pay equality. This approach has much to commend it because a frequent criticism of equal pay and pay equity legislation is that it is complicated and difficult to implement or enforce and for this reason the parties do not attempt it.

New Zealand since 2001 has also been developing a new approach to human rights that focuses on the right to equality. Under the 2001 Amendment to the Human Rights Act 1993 an Equal Employment Opportunities Commissioner was appointed with the function to "lead discussions of the Commission about equal employment opportunities (including pay equity). The Commission established the EEO Unit and in July 2003 began work with a review of the state

of EEO in New Zealand. The review results were published in *Framework for the Future: Equal Employment Opportunities in New Zealand*³⁹ The Report found that after a benchmarking exercise with the EEO experience of Australia, the United Kingdom, Canada, and the United States that New Zealand did not compare well in terms of EEO effectiveness. It recommended that a new approach be adopted that builds on past initiatives but developed a framework that ensured EEO becomes a reality for all members of the community and that everyone may "lead the lives they have reason to value".⁴⁰

The Human Rights Commission project entitled *What Next: National Conversation about Work*⁴¹ and the *Census of Women's Participation*⁴² have also made a number of recommendations about making progress towards equality, including equality in the workplace. During the *National Conversation about Work* project the Human Rights Commission visited 16 regions of New Zealand and talked to thousands of New Zealanders about what constitutes good work and what makes for decent workplaces. They identified how work can be improved to increase productivity and profitability and at the same time enhance family life, and community well being. The material gathered by the Human Rights Commission recommended strengthening the Equal Pay Act 1972 to include equal pay for work of equal value. At a Pay and Employment Equity Roundtable organised by the Human Rights Commission in 2009, the need to review the Equal Pay Act 1972 was acknowledged and that the review needed to reflect the changes that have taken place since 1972.

If progress is to be made on pay equality then a new approach to the statutory framework is required. The human rights approach is not entirely new as the Human Rights Act recognises the right to be free from discrimination on the grounds of sex in employment matters. New Zealand and overseas experience has shown, however, that the evidential burden on the complainant has been a major obstacle to

³⁶ EOWA Reforms: E-List message, 30 March 2011

³⁷ P1 Hepple, B., *Equality The New Legal Framework* (2011) Hart Publishing

³⁸ *Equal Pay Statutory Code of Practice* (2010) Equality and Human Rights Commission

³⁹ *Framework for the Future: Equal Employment Opportunities in New Zealand* (2004) Human Rights Commission

⁴⁰ p281 Amartya Sen *Development as Freedom* (2000) New York: Anchor Books

⁴¹ *What Next: National Conversation about Work* (2010) Human Rights Commission

⁴² *New Zealand Census of Women's Participation* (2010) Human Rights Commission

pursuing a complaint. The shift in focus to a positive right to pay equality is an attempt to remove this obstacle by ensuring the information about rates of pay is enforceable through the Department of Labour Inspectorate and made available to the Authority when a complaint is filed. The move to a positive right to pay equality is logically the appropriate development when it has been legally acknowledged that women have a right to be paid equally. New Zealand has ratified the ILO Convention No. 100 Equal Remuneration and enacted both the Equal Pay Act and the Human Rights Act. The issue is not whether there is such a right but how to provide the most effective legal regime to ensure the right is implemented and enforced.

The attached draft provides a framework for a new Act to replace the 1972 Equal Pay Act. The draft is intended to indicate the approach that should be taken when new legislation is drafted. It is acknowledged that more detail will be required in any new Act but at this stage it is important to identify the principled policy approach that needs to be taken. The Pay Equality Bill is similar to the United Kingdom Equality Act 2010 in that it establishes a right to pay equality. This right is stated without the need to first identify there has been discrimination. The Bill assumes all pay is equal between men and women and that all pay systems have been subject to the Gender-Inclusive Job Evaluation Standard.⁴³ The effect of this is that the onus shifts from the individual employee to the employer to prove there is pay equality in the workplace.

The Bill acknowledges that it is often difficult for an individual to find the evidence that there is differentiation in the pay rates. The requirement for the employer to keep pay equality records and to record any differentiation in the pay records, which are subject to inspection from a Labour Inspector, is an attempt to address the evidential issue. The provision relating to confidentiality of pay rates is also intended to address the issue of access to relevant information. In effect the Labour Inspector can now access the information instead of the individual employee. Again this provision reflects the fact that the state has

endorsed the concept of pay equality through previous legislation and in effect this Bill is ensuring the enforceability of this commitment.

The Pay Equality Bill is an attempt to assert a positive right to pay equality and provide a procedure for the implementation and enforcement of that right that is clear and simple. The previous policy work on pay equity has resulted in the Gender-Inclusive Job Evaluation Standard⁴⁴ that can now be used to ensure job evaluation systems can deliver pay equality. The use of this Standard and the keeping of proper pay equality records provide an evidential basis for any complaint relating to a lack of pay equality. The inclusion of provision for the inclusion of an equality clause through collective bargaining is recognition of the need for pay equality schemes to be appropriate for the enterprise or enterprises covered by the collective agreement.

While there is a commitment for employers to pay equally through the inclusion of a pay equality clause in their employment agreements, individual and collective, the Bill makes provision for the negotiation of an equality clause through collective bargaining. This provision is an acknowledgment that collective bargaining has traditionally been the method of equal pay implementation. It also recognises that it may take time to fully implement pay equality and a timetable appropriate to the enterprise of industry can be incorporated in the collective agreement. In the past, however, the evidence would suggest that pay equality has not been a priority in collective bargaining so the Bill deems all collective agreements also have an equality clause. This is not a matter of choice for either the employer or the union. The issue under negotiation, therefore, is the form and nature of the equality clause though the scheme must conform to the Gender-Inclusive Job Evaluation Standard.

Provision has also been made in the Bill for codes of practice to be issued by both the Employment Relations Authority and the Department of Labour. The form and nature of these codes needs to be determined. It seemed appropriate, however, that the Employment Relations Authority and the Department of Labour be responsible for the development of codes of practice because over a long period of time the Department and various industrial/employment institutions have developed policy in this area.

⁴³ Standards New Zealand P8007/2006

⁴⁴ *ibid*

The Human Rights Commission has a specific responsibility under the Human Rights Act for advocacy and the provision of information and education on matters relating to human rights. It is therefore appropriate the task of advocacy and the provision of information and education on matters relating to pay equality is included within the functions and powers of the Commission.

Provision has also been made for both the Human Rights Commission and the Employment Relations Authority to issue codes of practice to ensure there is an understanding and enforcement of the Act. This mechanism has been used in both the United Kingdom and Canada to avoid drafting complicated legal provisions that essentially relate to process. The legal status of the codes is a matter to be decided. In the United Kingdom they are formal and laid before the Parliament. The Canadian Human Rights Commission also issued an Equal Wages Guideline that is published in the Canada Gazette.

Perhaps more important than the 'best practice' guidelines is the programme of information and education to be undertaken by the Human Rights Commission. Without a public understanding not only of the importance of the notion of equality to the well-being of all New Zealanders, but also an understanding of how the notion of pay equality can be implemented in a way that enhances the economy, it is unlikely to gain acceptance. While it is understandable that both employers and unions and employees may argue against and for pay equality from their own self-interest, it is essential that the argument that demonstrates pay equality is in the public interest be also placed before the community. The Human Rights Commission has the mandate to make that argument on the evidence available.

The Department of Labour is the proper agency to provide the administrative infrastructure for the operation of the Act. The Department of Labour already has responsibility for the Authority and the Labour Inspectors who have a central role in the implementation and enforcement of the pay equality provisions once a complaint is made. It is also experienced in assisting the parties with collective bargaining issues. It will be essential, however, that there is close cooperation between the Department

and the Commission in the preparation of any Codes of Practice or information material. This model of inclusion of both the Commission and the Department in the Pay Equality Bill is based on the assumption that a new agency would not be acceptable nor is it really necessary under the model outlined in the Act.

In conclusion the attached Bill is intended to indicate what is essentially a different approach to the issue of pay equality. It builds on the experience of the past in New Zealand and while working within the traditional institutional framework represents a different conceptual framework in which to locate the issue, namely, an equality framework. This new model is consistent with the experience of comparable overseas jurisdictions. Australia has taken a different pathway because it still retains an industrial relations infrastructure and a state commitment to contribute to industrial relations. New Zealand no longer has the infrastructure to sustain such a model. It is time to try a new approach. A statutory right to pay equality is the obvious way forward. It provides the opportunity to redress a major area of inequality in New Zealand.

This commentary and the Pay Equality Bill have been written by Professor Margaret Wilson, Professor of Law and Public Policy at the University of Waikato.

Article 11 of the Convention on the Elimination of Discrimination Against Women (CEDAW) signed by New Zealand in 1980 and ratified in 1985, says:

States parties shall take all appropriate measures to eliminate discrimination against women in the field of employment in order to ensure, on a basis of equality of men and women, the same rights, in particular ...

The right to equal remuneration, including benefits, and to equal treatment in respect of work of equal value, as well as equality of treatment in the evaluation of the quality of work.