

THE REACTIVATION OF PAY EQUITY IN NEW ZEALAND BY *TERRANOVA*:

Why did it take so long?

Charlotte Doyle*

The Equal Pay Act 1972 was enacted with the intention of eradicating discrimination in wages between men and women. From the very beginning, this goal included the achievement of equal pay for equal value, or “pay equity”. Yet despite the inclusion of pay equity in the legislation, for over forty years following its enactment, the Act has achieved very little in terms of implementing pay equity in New Zealand. In 2014, the Court of Appeal reactivated the Act in the Terranova decision by allowing aged care worker Kristine Bartlett to make a pay equity claim on the basis that her profession was undervalued because it is female-dominated. The Court’s finding that assessments of pay equity were possible departed radically from previous judicial interpretations and political understandings of the Act. This reactivation has elevated the implementation of pay equity into one of the most pressing legal, political, social and economic issues for gender equality in contemporary New Zealand. This article considers why progress on this important legal battleground for women has stagnated for so long, and concludes that legal mechanisms intending to progress gender equality must be supported by broader political, social and economic concerns.

I INTRODUCTION

New Zealand has earned an international reputation for being a progressive leader on issues of gender equality. According to global measures of economic participation, education and political empowerment, the gap between men and women is steadily decreasing.¹ This, however, is a slow trend, and progress has arguably stalled in recent decades. A marked gender pay gap persists in

* BA/LLB(Hons), Solicitor. Thank you to my parents for always encouraging me to think critically.

¹ See World Economic Forum *The Global Gender Gap Index Report 2017* (November 2017) at 15.

New Zealand, confronting the ways in which our society accords economic value to work performed by women, and leaving legal battlegrounds for gender equality still to be fought.²

The reasons for a lingering pay gap are diverse and complex, extending beyond simply men and women earning different wages for performing the same work. Causes of gender inequality are numerous and often deeply rooted in historical socio-economic trends and developments. While equal pay for women and men who perform the same work has largely been achieved in New Zealand, occupations predominantly performed by women continue to be paid at significantly lower rates than jobs dominated by men.³ This occupational segregation entrenches pay inequality in New Zealand's workforce and is estimated to contribute to 30 per cent of the total gender pay gap.⁴

The principle of equal pay for work of equal value, or “pay equity”, seeks to rectify this differentiation by adjusting the valuation of women's work to match that of equivalent professions dominated by men. It differs from “equal pay”, which eradicates discrimination between men and women who are performing the same work, typically under the same employer. Pay equity has long been recognised internationally as a fundamental human right.⁵ It has also been enshrined in New Zealand's legislation since the enactment of the Equal Pay Act in 1972 (the Act).

At the time of its passing, the Act was heralded as a ground-breaking piece of social legislation.⁶ “Equal pay” is broadly defined in the Act as a

2 See for example Statistics New Zealand *Labour Market Statistics (Income): June 2016 quarter* (7 October 2016) at 7, which shows that in the June 2016 quarter the gender pay gap stood at 12 per cent, compared with 9.9 per cent in the June 2014 quarter. A further marked wage gap disparity exists between Pākehā women and women of Asian, Māori and Pasifika descent who are over-represented in lower-paid occupations.

3 This article recognises the important distinction between the terms ‘gender’ and ‘sex’, and is conscious of using inclusive language. At times the use of either term in the article reflects the language used in a source referenced. All references to women include those who identify as women.

4 Ministry for Women “Occupational segregation” <www.women.govt.nz>; and Statistics New Zealand *Women at work: 1991-2013* (2015) at 7 states between 20 per cent to 40 per cent.

5 *Universal Declaration of Human Rights* GA Res 217A, III (1948) states that everyone has the right to equal pay for work of equal value. It is also a founding principle of the International Labour Organisation and is protected by the International Covenant on Economic, Social and Cultural Rights. New Zealand is a party to all of these agreements.

6 John Marshall, then Prime Minister, stated that the Bill would “be recognised as a landmark in our social history”: see (29 August 1972) 380 NZPD 2180, as cited in *Service and Food Workers Union Nga Ringa Tota Inc v Terranova Homes and Care Ltd* [2013] NZEmpC 157 at [86] [*Terranova Employment Court judgment*].

rate of remuneration for work where there is no element of differentiation between employees based on their sex.⁷ While equal pay for equal work was implemented relatively quickly, the social law reform ambitions of the Act regarding pay equity failed to be acknowledged for another 40 years after its enactment.⁸ New Zealand's delay in implementing pay equity has frequently been raised as a human rights issue,⁹ making it one of the most important contemporary legal challenges for achieving gender equality.

In 2014, the Court of Appeal in *Terranova Homes & Care Ltd v Service and Food Workers Union Nga Ringa Tota Inc (Terranova)* sought to “reactivate” the Act after this longstanding dormancy.¹⁰ Aged care worker Kristine Bartlett claimed that her profession was undervalued because the work was predominantly performed by women. This, she argued, breached her right under the Act to equal pay for work of equal value.¹¹ As I later discuss, the Court's acceptance of her claim radically departed from previous understandings, both judicial and political, of the Act's scope. The decision transformed the issue of pay equity from a political talking point into a tangible legal problem, elevating it into one of the most pressing and important issues for gender equality in contemporary New Zealand society.

The historical stagnancy of the Act was not for a lack of campaigning by women for pay equity to be implemented.¹² Broader socio-economic and political concerns had shaped resistance towards implementing pay equity, and women working in undervalued professions such as nursing, aged care work and teaching were prevented from lodging pay equity claims. Core factors that have prohibited progress include widespread perceptions held by employers and unions that the issue was too difficult, judicial refusals to interpret the Act's scope or to appropriately implement the Act, and the absence of pay equity from governmental policy under both Labour and National governments in recent

7 Section 2(1).

8 *Terranova Employment Court judgment*, above n 6, at [95].

9 For example, International Labour Organisation Committee of Experts on the Application of Conventions and Recommendations *General Report and observations concerning particular countries* (Report III: Part 1A, International Labour Conference, Session 101, 2012) [ILO 2012] at 551.

10 *Terranova Homes & Care Ltd v Service and Food Workers Union Nga Ringa Tota Inc* [2014] NZCA 516, [2015] 2 NZLR 437 at [1] [*Terranova*].

11 At [6].

12 Megan Cook *Just Wages: History of the Campaign for Pay Equity 1984–1993* (Coalition for Equal Value Equal Pay, Wellington, 1994) at 27.

decades. The Court of Appeal's radical interpretation of the Act in *Terranova*, favouring anti-discrimination rights over economic concerns, has, however, created a new opportunity for meaningful implementation of pay equity.

To assess why this opportunity was presented so recently, this article considers the history of law reform on pay equity in New Zealand by looking closely at the introduction of the Equal Pay Act in 1972 and the social goals that were intended by its enactment. The subsequent dismissive judicial and political treatment of the Act is then investigated to determine why progress on implementing pay equity under the Act stalled for so long.

After contextualising the legal framework, the article then analyses how judicial treatment of the Act by the Court of Appeal in *Terranova* elevated pay equity into a revitalised contemporary legal issue. The responses of successive governments to the findings in *Terranova* are then considered with an assessment of where responsibility for future progress lies. The article concludes that the success of legal reform that aims to achieve gender equality is contingent on the alignment of a wealth of other considerations. The current opportunity to implement effective legal reform will inevitably be similarly determined by contemporary political concerns and climates.

II CONCEPTUALISING PAY EQUITY

A *What is pay equity?*

The phrase “equal pay for work of equal value” and the term “pay equity” are used interchangeably to describe a method of valuing work that is predominantly performed by women. It is an objective assessment that compares the skills, training and responsibilities of different occupations performed predominantly by men and women.¹³ If pay equity were achieved, women would receive the same pay as men for performing a comparable job.¹⁴ This differs from “equal pay”, which compares the rates of pay of men and women performing the same work and typically under an individual employer.¹⁵ Pay equity targets occupational segregation as an important

13 Ministry of Women's Affairs *Next Steps Towards Employment Equity: A discussion document* (July 2002) at 17.

14 Ministry of Women's Affairs *Next Steps Towards Pay Equity: A background paper on equal pay for work of equal value* (September 2002) at 4.

15 Ministry of Women's Affairs *Employment Equity*, above n 13, at 17.

contributor to the gender pay gap.¹⁶ The most common occupations dominated by women continue to be those that are traditionally associated with domestic and unpaid roles.¹⁷ These include caring, cleaning, teaching and healthcare positions, generally considered as *women's work*.¹⁸ They are positions that also continue to be paid at lower rates than occupations predominantly performed by men, such as protective services (police and fire services), manual trades and technical professions.¹⁹ The pay differential largely reflects entrenched cultural perceptions regarding the relationship between skills and economic productivity, and is discrimination on the basis of sex.²⁰

Pay equity seeks to eradicate the differential by objectively evaluating the social and economic value of comparable female and male occupations. A frequent comparison is made between nursing, a female-dominated profession, and policing, a male-dominated profession.²¹ Pay differentiation would be justified according to agreed criteria rather than predicated on social biases.²² As a result, the concept of pay equity is broader than equal pay as it targets structural discrimination by undertaking a horizontal comparison across occupations.²³

B Occupational segregation in New Zealand

Occupational segregation by gender continues to be a defining feature of New Zealand's labour market.²⁴ Census data from 1991–2013 reveals that women are over-represented in lower paid positions in the healthcare, education

16 Statistics New Zealand *Women at work*, above n 4, at 7.

17 Sandra Fredman "Reforming Equal Pay Laws" (2008) 37 ILJ 193 at 195.

18 Mary Cornish and Fay Faraday *Achieving Pay and Employment Equity for Women — Human Rights and Business/Development Imperatives* (paper presented to the Pay and Employment Equity for Women Conference, Wellington, June 2004) at 2.

19 Statistics New Zealand *Women at work*, above n 4, at 7 and 11.

20 See for example Statistics New Zealand *Women at work*, above n 4, at 8, citing Sylvia Walby and Wendy Olsen *The impact of women's position in the labour market on pay and implications for productivity* (Women and Equality Unity (DTI), London, 2002).

21 Ministry of Women's Affairs *Pay Equity*, above n 14, at 16.

22 Linda Hill "Equal pay for work of equal value: making human rights and employment rights laws work together" (2004) 21 Social Policy Journal of New Zealand 1 at 5.

23 International Labour Organisation *Time for equality at work: Global Report under the Follow-up to the ILO Declaration on Fundamental Principles and Rights at Work* (Report I(B), International Labour Conference, Session 91, 2003), at [137].

24 See for example Statistics New Zealand *Women at work*, above n 4, at 7 which noted that "New Zealand's labour market has been (and remains) highly segregated by gender".

and social assistance industries,²⁵ despite being more likely to have higher formal qualifications than men.²⁶ Almost half of the labour workforce is concentrated in occupations where 70 per cent or more of the employees are of the same gender.²⁷ For example, census data reveals that 92.4 per cent of nurses and midwives, and 90.4 per cent of primary and early childhood teachers identified as women in 2013.²⁸ In the same year, 98.8 per cent of builders identified as men.²⁹ This persistent segregation based on the type of occupation is estimated to account for approximately 30 per cent of the gender pay gap.³⁰

Occupational segregation has a significant societal impact. In order to achieve the same occupational distribution for men and women, 44 per cent of women would need to change their profession.³¹ Pay equity avoids that obstacle by rectifying historical biases within the status quo. Research has also indicated that implementing pay equity has a positive economic impact on overall labour productivity and efficiency.³² Explicit acknowledgement of such segregation in equal pay legislation is generally lacking and presents a significant impediment to the achievement of pay equity.³³

C Pay equity as a human right

International human rights law has long recognised a specific right to pay equity.³⁴ Equal pay for work of equal value is a founding principle of the International Labour Organisation (ILO),³⁵ of which New Zealand is a

25 Statistics New Zealand *Women at work*, above n 4, at 19.

26 At 6 and 33.

27 At 7.

28 At 15.

29 At 15.

30 Ministry for Women, “Occupational segregation”, above n 4.

31 Statistics New Zealand *Women at work*, above n 4, at 5.

32 Philip Borkin *Closing The Gender Gap: Plenty of Potential Economic Upside* (Goldman Sachs, 9 August 2011) at 2.

33 See Rochelle Hume “Paid in Full? An Analysis of Pay Equity in New Zealand” (1993) 7 *Auckland U L Rev* 471 at 474.

34 *Universal Declaration of Human Rights*, above n 5, art 23(2) states that “[e]veryone, without any discrimination, has the right to equal pay for equal work”. It is also a founding principle of the International Labour Organisation and protected by the International Covenant on Economic, Social and Cultural Rights 993 UNTS 3 (opened for signature 16 December 1966, entered into force 3 January 1976), art 7. New Zealand is a party to these agreements.

35 Cornish and Faraday, above n 18, at 10.

member state. The ILO's Convention 100 on Equal Remuneration for Men and Women Workers of Equal Value 1951 (ILO Convention 100) requires member states to recognise the principle by implementing measures that objectively assess the value of work performed by men and women.³⁶ The Convention on the Elimination of all Forms of Discrimination Against Women (CEDAW),³⁷ which has been described as an "international bill of rights for women",³⁸ also requires governments to protect the right to pay equity. The principle of pay equity is further protected in the International Covenant on Economic, Social and Cultural Rights.³⁹

Despite having legal obligations under these conventions that are administered domestically through the Act and other statutes,⁴⁰ pay equity has been historically absent in New Zealand. This has been criticised as a human rights failure.⁴¹ In response to a report submitted by New Zealand in 1998, the CEDAW Committee expressed "serious concern at the continuing wage differential between women and men".⁴² New Zealand's report had presented a positive update on other initiatives being taken to improve the gender pay gap, and pay equity was not acknowledged. The ILO's Committee of Experts on the Application of Conventions and Recommendations has also repeatedly commented on New Zealand's failure to implement pay equity.⁴³

36 Convention (No 100) concerning Equal Remuneration for Men and Women Workers for Work of Equal Value 165 UNTS 303 (opened for signature 29 June 1951, entered into force 23 May 1953), art 3 [Convention 100].

37 Convention on the Elimination of All Forms of Discrimination Against Women 1249 UNTS 113 (opened for signature 18 December 1979, entered into force 3 September 1981).

38 United Nations Entity for Gender Equality and the Empowerment of Women *Overview of the Convention* (2007) <www.un.org>.

39 International Covenant on Economic, Social and Cultural Rights 993 UNTS 3 (opened for signature 16 December 1966, entered into force 3 January 1976), art 7.

40 Ministry of Business, Innovation & Employment *International Labour Conventions Ratified by New Zealand* (New Zealand Government, June 2015) at 71. Note that in order for legal obligations under conventions to be legally binding on New Zealand they need to be incorporated through domestic legislation and performed either through existing law or new legislation.

41 ILO 2012, above n 9, at 551; and Dr Jackie Blue, Equal Employment Opportunities Commissioner "New Horizons for Women Trust Award Ceremony" (Women Trust Award Ceremony, Premier House Wellington, July 23 2016) <www.hrc.co.nz>

42 *Report of the Committee on the Elimination of Discrimination against Women* GA Res 53/38, A/53/38Rev.1 (1998) at New Zealand [273]–[274].

43 International Labour Organisation Committee of Experts on the Application of Conventions and Recommendations *General Report and observations concerning particular countries* (Report III: Part 1A, International Labour Conference, Session 90, 2002) [ILO 2002] at 413.

In 2012, the Committee again expressed concern that New Zealand had not given full legislative effect to pay equity.⁴⁴ The only sanctions for non-compliance with these Conventions are indirect, but include negative reports from international organisations and a potential “loss of reputation in the international community”.⁴⁵

D Pushing for legal change

Pay equity has traditionally been encompassed in broad campaigns for equal pay. Legal strategies have been central to political movements for achieving economic equality for women throughout many western democracies since the 1960s,⁴⁶ including New Zealand. Campaigns for pay equity specifically tend to seek to change the way society values the economic contributions of women by establishing a particular form of legal recognition.

The goal of legally implementing pay equity is, however, shaped by the socio-economic context in which it operates and which it seeks to challenge. Adopting a socio-legal approach, which frames law as a social instrument directed at a specific goal, the history of pay equity reveals that law is politically and practically limited in providing a solution to a social problem.⁴⁷

Pay equity campaigners have adjusted their approaches to those that are most likely to achieve successful reform in the prevailing context including new legislation, government policy and the use of litigation. Over time, the efficacy of these calls for reform have been shaped by prevailing socio-economic concerns, which in turn dictate the attitudes of institutions responsible for the implementation of equal pay as well as the empowerment of those who seek to enforce it.

The history of pay equity demonstrates that, while a right to be free from sex-based discrimination may be enshrined in legislation, its success is dependent on the extent to which those implementing the law — including the government, courts and employers — are willing to uphold such a right. The various tools for reform thereby ebb and flow in efficacy, and

44 ILO 2012, above n 9, at 551.

45 Hill “Human rights”, above n 22, at 7.

46 Dorothy Chunn, Susan Boyd and Hester Lessard “Feminism, Law and Social Change: An overview” in Dorothy Chunn, Susan Boyd and Hester Lessard (eds) *Reaction and Resistance: Feminism, law and social change* (Vancouver, UBC Press, 2007) 1 at 1.

47 See, for example, Susan Armstrong “Evaluating Law Reform” (2006) 10 UWSLR 157 at 166.

the conceptualisation of pay equity as a human right is similarly shaped by prevailing economic and human rights discourses.

III AN UNFULFILLED PROMISE: PAY EQUITY IN THE EQUAL PAY ACT 1972

Discriminatory pay rates and conditions of employment are prohibited by a number of laws in New Zealand, including the Government Service Equal Pay Act 1960, the Employment Relations Act 2000, the New Zealand Bill of Rights Act 1990 and the Human Rights Act 1993. The Equal Pay Act is a core part of this anti-discrimination and human rights legislative framework. From the very beginning, the scope of the Act's application was highly contested, with the provision for pay equity being unclear.⁴⁸ This ambiguity has markedly influenced and impacted upon the ability of law reform to achieve pay equity in New Zealand.

A *Background to the Act*

Official support for equal pay legislation started to emerge in New Zealand in the 1960s.⁴⁹ The decade had seen a surge of participation of women in the labour force, a socio-economic change that altered the factual situation of male and female work.⁵⁰ As inequality became more visible and perceptions about women's economic role in society began to shift, the need for reform was suddenly apparent.⁵¹ A feminist movement that actively sought positive legal rights for women was emerging.⁵²

A Commission of Inquiry into Equal Pay (the Commission) proposed new legislation, in the form of an Equal Pay Act.⁵³ This new Act was envisaged

48 Martha Coleman "The Equal Pay Act 1972: Back to the Future?" (1997) 27 VUWLR 517 at 520.

49 Elizabeth Orr *Equal Pay for Work of Equal Value in New Zealand: A History of the 1960 and 1972 Equal Pay Acts* (paper presented to the Women's Studies Conference, Palmerston North, November 2003) at 4. Note: Elizabeth Orr was chair of the National Advisory Council for the Employment of Women (NACEW) and played an instrumental role in establishing the 1972 Equal Pay Act.

50 The Commission of Inquiry into Equal Pay *Equal Pay in New Zealand: Report of the Commission of Inquiry* (September 1971) at [1.15].

51 See, for example, Report of the Commission of Inquiry, above n 50, at [1.15], which recognised that the matter of equal pay had been brought "to the forefront".

52 Margaret Wilson "Impact of Women's Political Leadership on Democracy and Development in New Zealand" in Commonwealth Secretariat (ed) *The Impact of Women's Political Leadership on Democracy and Development: Case Studies from the Commonwealth* (Commonwealth Secretariat, London, 2013) 39 at 55.

53 Report of the Commission of Inquiry, above n 50, at [4.7].

to give effect to equal pay as it would “prohibit discrimination in pay rates on the basis of sex, lay down the principles to be followed, and establish the rights and obligations of employers and employees”.⁵⁴

The Act was heralded in Parliament as a ground-breaking piece of social legislation. The then-Prime Minister, Rt Hon John Marshall, praised the Act as:⁵⁵

... one of the most important pieces of legislation the House will have to consider this session. It is a significant forward move in the social legislation of this country, and it will be recognised as a landmark in our social history. It is in my view a matter of social justice that it should be done ...

The Commission, however, cautioned that legislative reform would only “marginally accelerate” a change in public opinion and attitudes towards equal pay, and could not achieve a comprehensive transformation.⁵⁶ It further noted that employers tended to be influenced by widely held, but often misconceived, social beliefs about women in employment including notions of “absenteeism” and disruptions caused by marriage and pregnancy.⁵⁷ Any official action, including legislative change, would be limited in its impact on changing public opinion; a change in the “deep-rooted attitudes of New Zealanders” would be needed.⁵⁸

B The Equal Pay Act 1972: was pay equity included?

When drafting the definition of “equal pay”, the Commission had explicitly rejected proposals from the New Zealand Employers’ Federation that it should exclude work predominantly or exclusively performed by women.⁵⁹ A broad definition of equal pay was adopted in the Act: “a rate of remuneration for work in which rate there is no element of differentiation between male employees and female employees based on the sex of the employees”.⁶⁰ Sex-based distinctions in rates of remuneration would be eliminated by categorising

54 At [4.7].

55 (29 August 1972) 380 NZPD 2180, as cited in *Terranova Employment Court judgment*, above n 6, at [86].

56 Report of the Commission of Inquiry, above n 50, at [1.18].

57 At [3.8].

58 At [1.6].

59 At [2.10].

60 Section 2(1).

work according to objective factors for a specific category of work.⁶¹ There are strong indications that the Commission also intended to give effect to the provisions of the ILO Convention 100 by including pay equity assessments in its recommendations.⁶² A submission from the New Zealand Federated Dental Technicians' and Assistants' Industrial Association of Workers to the Commission was even concerned that the Commission was focusing on pay equity at the expense of achieving equal pay for "similar work".⁶³

Occupational segregation was extensively discussed by the Commission and recognised as a cause of unequal pay in New Zealand.⁶⁴ It accepted undoubted evidence that occupations traditionally performed by women were paid at lower rates than those performed by men.⁶⁵ The Act was clearly intended to address occupational segregation and the economic valuation of women by implementing pay equity.⁶⁶

Despite the apparent inclusion of pay equity in the Commission's suggestions for reform, a long-standing lack of consensus over whether it was in fact provided for in the Act became a significant impediment to the realisation of pay equity in New Zealand.⁶⁷ The two concepts of equal pay for equal work and equal pay for work of equal value were not explicitly distinguished by the Commission. Instead, the principles were conflated as two different forms of implementation of the broader concept of equal pay. This left the scope of the Act ambiguous.

Two different criteria to be applied in determining equal pay are included in the Act. Section 3(1)(a) applies to work which is either dominated by men or where neither male nor female employees predominate. By contrast, s 3(1)(b) applies to work that is exclusively or predominantly performed by women. This section requires consideration of the skill, effort and responsibility required in the respective work, as well as the conditions under which it is performed — criteria which are commonly used in pay equity comparisons.

61 Report of the Commission of Inquiry, above n 50, at [1.6].

62 At 5; and Coleman, above n 48, at 524.

63 "Wage authority 'barrier to equal pay'" *The Christchurch Star* (New Zealand, 14 April 1971).

64 Coleman, above n 48, at 524; and Ian McPherson "Pay equity: the right to a fair wage" [2016] NZLJ 253 at 254.

65 Report of the Commission of Inquiry, above n 50, at [2.4]

66 Coleman, above n 48, at 519.

67 At 519–520.

Section 3(1)(b) was described by a Review Committee as “the most difficult to interpret and implement”, due to a lack of guidance in the legislation on how female-dominated professions may be compared to male-dominated ones.⁶⁸ Hypothetical comparators have been a universal difficulty for pay equity assessments in other jurisdictions,⁶⁹ and continue to be a significant impediment to implementing pay equity today.

IV THE BATTLE FOR PROGRESS: OBSTRUCTIVE JUDICIAL AND POLITICAL TREATMENT

A *Implementation of the Equal Pay Act 1972*

Equal pay was not a new legal concept and there was widespread public awareness of the change in national policy and law at the time. Yet pay equity claims under the Act have been unsuccessful from the very beginning. The courts have failed to use the Act to achieve pay equity, which has been widely attributed to consistently narrow and dismissive judicial treatment of equal pay issues. In 1979 the Review Committee expressed serious concern about judicial attitudes towards the Act and the impact this would have on its future.⁷⁰ In 1986, this concern would prove to be well founded.

1 *The Clerical Workers case*

The narrow interpretation of the Act in *New Zealand Clerical Administration IAOW v Farmers Trading Co Ltd* significantly impeded the potential of the Act to redress pay equity.⁷¹ A case was brought to the Arbitration Court after employers had declined to negotiate equal pay claims with the Clerical Workers Union.⁷² The claim was intended to test whether the Act included pay equity under s 3(1)(b). At the time, a national awards system was still operating in New Zealand and the Clerical Workers Award covered 30,000 workers, of

68 *Progress of Equal Pay in New Zealand: Report of a Committee appointed by the Minister of Labour* (Department of Labour, October 1975) at [5.71]–[5.72].

69 See Fredman, above n 17, at 200–202.

70 *Equal Pay Implementation in New Zealand: Report of a Committee Appointed by the Minister of Labour* (June 1979) at 49.

71 *New Zealand Clerical Administration IAOW v Farmers Trading Co Ltd* [1986] ACJ 203; and Mai Chen *Women and Discrimination: New Zealand and the UN Convention* (Victoria University Press, Wellington, 1989) at 22.

72 Coleman, above n 48, at 531.

which 90 per cent were women.⁷³

The Court declined to hear the case on the grounds that equal pay had already been achieved through the abolishment of separate award systems for men and women after the Act's enactment.⁷⁴ Many pay equity activists at the time argued that the Court had misinterpreted the Act and that a very different result would have been reached if the Court had performed its proper function in implementing the Act.⁷⁵

Any potential for the Act to be used to address pay equity was seriously impaired as a result because the decision fostered a widespread perception, including among government officials, that the Act did not provide for pay equity claims.⁷⁶ The case was understood to provide a definitive view on the scope of the Act.⁷⁷ Section 3(1)(b), however, remained untested and undefined.

B Further legislative reform: The Employment Equity Act 1990

The lack of progress in the courts in the 1980s diverted the focus of campaigners, most notably women's organisations, back to a longer-term campaign for further legislative reform as an avenue for achieving pay equity. Social activism in favour of pay equity gained extra vigour with a national pay equity campaign launched in 1986 by the newly formed Coalition for Equal Value Equal Pay.⁷⁸

After six years of continuous lobbying from supporters of a pay equity policy, both within and outside government, the Employment Equity Act 1990

73 *New Zealand Clerical Administration*, above n 71, at 204. Awards and agreements were negotiated by unions and employer representatives to set wages on behalf of industries in New Zealand's labour market. The awards were abolished with the introduction of the Employment Contracts Act 1991.

74 At 207.

75 Elizabeth Orr "The Arbitration Court's Role in Supervising the Equal Pay Act 1972" *Equal Pay for Work of Equal Value: A Women's Issue* (seminar paper, Centre for Continuing Education, Victoria University of Wellington, 1986) at 13, as cited in Megan Cook, above n 12, at 6.

76 See for example Orr *Equal Pay*, above n 49, at 6. See also Margaret Wilson "Old law cannot deliver pay equity today" (press release, 14 February 2004) where then-Minister of Labour Margaret Wilson stated "the Equal Pay Act 1972 was not designed to advance modern pay equity claims". See also *The Treasury Pay and Employment Equity — a framework for Analysis* (8 May 2003) at [33] — the Equal Pay Act was described to eliminate different gender pay rates for the same work and did not extend to equal pay for work of equal value. See also *Treasury Background Information for the Pay and Employment Equity Taskforce* (22 July 2003) at [16] — the Equal Pay Act was described as providing "equal pay for men and women doing the same job".

77 Frances Wright "Equal Pay and the Employment Contracts Act 1991" (1992) 7 *Auckland U L Rev* 501 at 501. Wright referred to *New Zealand Clerical Administration*, above n 71, which had held that the Act was limited because it did not provide for equal pay for work of equal value.

78 See Cook, above n 12, at 28.

was enacted.⁷⁹ The Labour Government believed that this new Act was necessary as “New Zealand did not have a legislative basis for pay equity claims”, and the prevailing belief was that the Equal Pay Act was not designed to advance pay equity claims.⁸⁰ The Employment Equity Act was intended to sit alongside the Equal Pay Act and rectify inequality in terms of both opportunities for employment and rates of remuneration between occupations predominantly performed by men and women.⁸¹ Importantly, this included redressing the “inequitable impact” of historic and current discrimination against women in the rates of remuneration paid in occupations predominantly performed by women.⁸² An Employment Equity Commissioner was established as a statutory body to conduct pay equity assessments.⁸³ Twelve pay equity claims were lodged with the Commissioner as soon as the Act was passed.⁸⁴ Before any claims could be resolved, however, the election of a new government disrupted this progress.

C A step backwards: a politically charged issue

Three months after the Employment Equity Act was enacted, the newly elected National Government repealed the Act. While the National Government was committed to equity in employment, pay equity was dismissed as an inappropriate mechanism for achieving it.⁸⁵ A political and ideological commitment to enterprise bargaining meant the National Party fundamentally differed from the Labour Party’s belief in centralised wage-fixing.⁸⁶

Pay equity did not conform to the National Government’s extensive neoliberal and ideological reform of New Zealand’s labour law frameworks at the time. This included the passing of the Employment Contracts Act 1991 (ECA), which decentralised employment relationships by abolishing the awards system and thereby abolished the method by which wages had previously been

79 Margaret Wilson “The Employment Equity Act 1990: A Case Study in Women’s Political Influence, 1984–90” in John Deeks and Nick Perry (eds) *Controlling Interests: Business, the State and Society in New Zealand* (Auckland University Press, Auckland, 1992) 113 at 129.

80 See Wilson “Old law”, above n 76.

81 Employment Equity Act 1990, long title.

82 Long title.

83 Hill “Human rights”, above n 22, at 8.

84 Linda Hill “Equal pay for equal value: the case for care workers” (2013) 27(2) *Women’s Studies Journal* 14 at 17.

85 (18 December 1990) 511 NZPD 396.

86 (18 December 1990) 511 NZPD 396.

regulated and controlled by the government.⁸⁷ The Government's neoliberal reforms sought to create an unconstrained labour market and uphold a system in which the individual was primary.

The changes had a significant impact on the ability to implement pay equity. The replacement of collective bargaining with enterprise bargaining made it more difficult to identify discrimination in a workplace as pay rates were typically shielded by confidentiality clauses.⁸⁸ The ability to compare wages both within and between companies became limited. Compulsory membership of unions had been a longstanding element of New Zealand's labour framework,⁸⁹ but the ECA introduced voluntary unionism. This limited the ability of unions to provide a collective voice for women on pay equity.⁹⁰

For the remainder of the 1990s, pay equity was excluded from the Government's policies entirely. A 1991 Working Party found that the Act would continue to provide for claims of equal pay, but pay equity claims were artificial, arbitrary and therefore not acceptable to include in the policy.⁹¹ Underlying these positions was a strong belief that a deregulated and flexible market was a fairer mechanism for achieving pay equity without government intervention.

D Softer approach: 1999–2008 Labour Government

Pay equity returned to the forefront of the political agenda with the re-election of the Labour-led coalition Government in 2002.⁹² Addressing lower levels of pay in women's occupations was officially recognised as central to lowering the gender pay gap.⁹³ In 2004, a Pay and Employment Equity Taskforce was appointed to develop an action plan on pay and employment equity in the public sector.⁹⁴

87 McPherson, above n 64, at 255.

88 At 255.

89 See Industrial Conciliation Arbitration Act 1894.

90 Laila Harré "Unions and Pay Equity in New Zealand: Organisation, Negotiation, Legislation" (2007) 18(2) *Labour & Industry* 51 at 53.

91 Department of Labour *Report of the Working Party on Equity in Employment* (January 1991) at 12.

92 Celia Briar "New Zealand Conference on Pay and Employment Equity for Women" (2004) 23 *Social Policy Journal of New Zealand* 215 at 215–216.

93 As demonstrated by the discussion document released by the Ministry of Women's Affairs: Ministry of Women's Affairs *Employment Equity*, above n 13.

94 Ruth Dyson "Launch Pay and Employment Equity Unit" (press release, 17 December 2004).

Importantly, these commitments by the Labour Government signalled that pay equity was still an issue.⁹⁵ It was, however, a significantly softened stance compared to the previous work on pay equity; it focused only on the public sector and was implemented through policy rather than legislative change.⁹⁶ With the removal of national occupational wage awards by the ECA in 1991, it became more challenging to compare pay in female-dominated occupations with their equivalent male-dominated occupations.⁹⁷ The lack of mechanisms to assess the value of work and weaknesses in collective bargaining undermined the ability of unions to tackle the issue.⁹⁸

The Labour Government continued to subscribe to an orthodox economic analysis of employment policies,⁹⁹ which influenced the development of policy on pay equity. The ECA had been replaced by the Labour Government's Employment Relations Act 2000 (ERA) as the principal framework for employment relationships. The ERA promoted good faith bargaining principles for the resolution of employment disputes, but many of the ECA's features were retained, including individualised contract arrangements and an emphasis on productive employment relationships.¹⁰⁰ This cautious approach from the Government was also in response to resistance from employers, who continued to be averse to working with unions and apathetic towards pay equity.¹⁰¹ Libertarian lobby group, the New Zealand Business Roundtable, stated that “[p]ay equity is a policy whose time has passed”.¹⁰²

95 Prue Hyman “Pay Equity and Equal Employment Opportunity: Policy, Rhetoric and Reality in the 2004 New Zealand Labour market” (2004) *Labour, Employment and Work in New Zealand* 283 at 283.

96 Ministry of Women's Affairs *Employment Equity*, above n 13, at 3.

97 Briar, above n 92, at 217.

98 Erling Rasmussen and Danaë Anderson “Between unfinished business and an uncertain future” in Erling Rasmussen (ed) *Employment Relationships: Workers, Unions and Employers in New Zealand* (2nd ed, Auckland University Press, Auckland, 2010) 208 at 218.

99 Prue Hyman “Low waged work and gender pay equity in New Zealand” (paper presented to the National Advisory Council on the Employment of Women Conference on Pay and Employment Equity for Women, June 2004) at 9.

100 Erling Rasmussen “Introduction” in Erling Rasmussen (ed) *Employment Relationships: Workers, Unions and Employers in New Zealand* (2nd ed, Auckland University Press, Auckland, 2010) at 1.

101 Hyman “Low waged work”, above n 99, at 2.

102 Letter from Norman LaRocque (Policy Advisor for New Zealand Business Roundtable) to Judy Lawrence (Chief Executive of Ministry of Women's Affairs) regarding the Ministry's discussion document *Next Steps towards pay equity* (29 November 2002).

With the election of a National Government in 2009, the policy efforts on the part of the predecessor Labour Government were to a large extent dismantled. As part of reprioritisation of government spending and broader plans to reduce the size of the public service, the Pay and Employment Equity Unit was discontinued.¹⁰³ A free market and soft policy approach, including toolkits, employer education and research, was again seen as sufficient to close the gender pay gap.¹⁰⁴

E Lack of progress: pay equity left off the political agenda

After the wide-sweeping economic restructuring of the 1980s, both Labour and National Governments were wary of any major interventions in the market.¹⁰⁵ Pay equity was a highly controversial issue,¹⁰⁶ both ideologically and practically, due to the level of government intervention required if it were to be achieved. During this time there was also a general apathy on the part of politicians and the media towards pay equity.¹⁰⁷ This was premised on a perception that the gender pay gap had already closed due to other achievements such as equal pay for the same work.¹⁰⁸

The Equal Pay Act had, however, survived “the sweeping legislative reforms” of New Zealand’s labour market in the 1980s and 1990s.¹⁰⁹ The ability to conduct pay equity assessments under s 3(1)(b) of the Act remained untested,¹¹⁰ due to a prevailing view that the Act was simply redundant. The preservation of the Act would prove to provide an essential avenue for legally elevating pay equity from political wavering to an issue that demanded attention.

103 Kate Wilkinson “Pay equity unit disestablished” (press release, 14 May 2009).

104 Judy McGregor “The human rights framework and equal pay for low paid female carers in New Zealand” (2014) 38(2) *New Zealand Journal of Employment Relations* 4 at 11; the Ministry of Women’s Affairs was given greater responsibility for this work.

105 Ministry of Women’s Affairs *Briefing to the Incoming Minister of Women’s Affairs* (2008) as cited in Prue Hyman “Pay Equity and Equal Employment Opportunity in New Zealand: Developments 2008/2010 and Evaluation” (2010) 36(1) *New Zealand Journal of Employment Relations* 65 at 66.

106 Hyman “Policy, Rhetoric”, above n 95, at 285.

107 McGregor, above n 104, at 11.

108 Hyman “Developments 2008/2010”, above n 105, at 65.

109 McPherson, above n 64, at 255.

110 Hill “The case for care workers”, above n 84, at 22.

V REACTIVATION OF THE ACT: THE *TERRANOVA* CASE

A *Background: a new political climate*

An emerging human rights-based discourse in the early 2000s promised to empower a new push for change. The prospects of bringing another test case for pay equity under s 3(1)(b) of the Equal Pay Act had never faded from the minds of campaigners. They had long foreseen that a new generation of judges, who might hold more favourable attitudes towards pay equity, would bring greater prospects of success, and it was essentially a matter of waiting for the right opportunity.¹¹¹

As predicted, judicial attitudes did start to change. A number of cases that successfully argued discrimination in employment indicated that notions of anti-discriminatory and decent working conditions were gaining sway in the courts.¹¹² A new culture of understanding had also taken hold throughout the unions, where there was increasing support for mobilising low-paid workers through legal action.¹¹³

Further momentum towards pay equity was gained through human rights frameworks.¹¹⁴ A national inquiry into the aged care sector in 2012 by the Human Rights Commission (HRC), titled *Caring Counts*, had a significant impact on the understanding of pay equity in New Zealand. The inquiry's findings revealed that the low pay rates in this sector were directly caused by historic undervaluation of what had traditionally been considered women's work.¹¹⁵ The report was widely publicised by the media.¹¹⁶ The National Government at the time accepted its findings and acknowledged that there was an issue of occupational inequality, but stated that it had insufficient resources at the time

111 See, for example, Coleman "Back to the Future", above n 48, at 534; and Trade Union History Project *Fifty Years of Struggle: The Story of Equal Pay* (proceedings of Trade Union History Project Annual Seminar, 25 October 1997) at 28.

112 For example the "Sleepovers" case, *IDEA Services Ltd v Dickson* [2011] NZCA 14, [2011] 2 NZLR 522.

113 E tū "Equal Pay" (April 2017) E tū stand tall <www.etu.nz>.

114 McGregor, above n 104, at 11–13.

115 New Zealand Human Rights Commission *Caring Counts (Tautiaki Tika)* (May 2012) at 50.

116 See, for example, McGregor, above n 104, at 4; The New Zealand Herald "Editorial: Report sheds light on needs of aged care" *The New Zealand Herald* (online ed, Auckland, 30 May 2012); David Kemeys "Undercover boss slams workers' conditions" *The Sunday Star Times* (online ed, Auckland, 27 May 2012); and Michelle Duff "Rest home spy hails saint-like workers" *The Dominion Post* (online ed, Wellington, 28 May 2012).

to rectify it.¹¹⁷ Regardless, the report had triggered renewed advocacy for pay equity and would provide an evidential basis for subsequent litigation.¹¹⁸

B Judicial treatment of the Equal Pay Act in Terranova

A social and political climate had emerged in which the Service and Food Workers Union (SFWU) felt that a pay equity case had a strong likelihood of success.¹¹⁹ In 2012, the SFWU supported aged care worker Kristine Bartlett's claim in the Employment Court against her employer Terranova Homes Ltd (Terranova), which operated a number of rest homes throughout New Zealand. Bartlett brought her claim on behalf of a number of other rest home workers, all of whom were women, employed on individual employment agreements, and members of the SFWU. Over 90 per cent of Terranova's employees were women; there were only four male employees out of 110 total caregivers. Bartlett argued that her rate of remuneration of \$14.46 an hour (less than a dollar over the minimum wage at the time) was significantly lower than it would be if the aged care sector was not dominated by female employees.¹²⁰ This was claimed to be discrimination under the criteria in s 3(1)(b) of the Act, which applies to work predominantly performed by women.¹²¹

From the outset, the Employment Court emphasised that the unprecedented nature of the litigation meant that any conclusions would potentially have broad social, financial and political implications.¹²² The case attracted a number of prominent interveners including the Council of Trade Unions, the New Zealand Aged Care Association, Business New Zealand, the Coalition for Equal Value Equal Pay and the HRC.¹²³ As the decision touched on an issue of public policy, the Attorney-General also had a right to make submissions.¹²⁴

117 Claire Trevett "Aged care pay inequality a costly fix" *The New Zealand Herald* (online ed, Auckland, 28 May 2012).

118 McGregor, above n 104, at 12.

119 Hill "The case for care workers", above n 84, at 19.

120 *Terranova Employment Court judgment*, above n 6, at [5].

121 At [16]–[17].

122 At [5].

123 See *Service and Food Workers Union Nga Ringa Tota Inc v Terranova Homes and Care Ltd* [2013] NZEmpC 51 [*Terranova interlocutory judgment*].

124 See John Burrows and Ross Carter *Burrows and Carter Statute Law in New Zealand* (5th ed, LexisNexis, Wellington, 2015) at 277.

1 *The Employment Court's decision*

The Employment Court agreed to consider and answer preliminary questions of law in the case.¹²⁵ A number of the questions raised novel issues of law under the Equal Pay Act.¹²⁶ These included whether the s 3(1)(b) requirement for equal pay for work that is performed exclusively or predominantly by female employees included equal pay for work of equal value, as a remedy for systemic undervaluation of such work by women.¹²⁷ A further issue was how to assess compliance with this requirement, that is, which comparisons could be used, and what evidence could be accepted.¹²⁸ The Court was therefore required to determine the scope of s 3(1)(b) for the first time.

The plaintiffs argued that the rates of remuneration paid by Terranova to its workers breached s 3(1)(b) of the Act, because the employees' levels of responsibility, labour and service were undervalued on the basis that it was women's work. The plaintiffs proposed that the Court's statutory interpretation needed to engage with the text and purpose of the legislation in order to uphold the anti-discriminatory nature and original goals of the Act. This would further need to be consistent with domestic human rights laws and international conventions. As evidence of the link between occupational segregation and historic undervaluation of sectors predominated by women, the plaintiffs relied on the HRC's *Caring Counts* report.¹²⁹ Supported by the industry group Aged Care Association, Terranova argued that a narrow interpretation of the Act, such as that in *Clerical Workers*,¹³⁰ in which assessments of equal pay were limited to comparisons of the same work, was the correct interpretation of the Act.

The Employment Court concluded that the Act is intended to include the concept of pay equity. Skills, responsibility, conditions of work and degrees of effort were evidence that could be taken into account. In addition, cross-sector comparisons were held to be acceptable to rectify any systemic undervaluation of the work as a result of historic or structural sex discrimination.¹³¹ The Court

125 See *Terranova interlocutory judgment*, above n 123, at [8].

126 *Terranova Employment Court judgment*, above n 6, at [6].

127 At [7].

128 At [7].

129 At [21]–[23].

130 *New Zealand Clerical Administration*, above n 71.

131 *Terranova Employment Court judgment*, above n 6, at [42]–[46].

acknowledged that differentials in cross-sector comparisons were difficult to identify and assess, however it rejected the defendant's arguments that this made a broad interpretation of s 3(1)(b) unworkable. In the Court's view, s 3(1)(b) required a comparison between "apples and oranges" whereas a narrow interpretation would consider "apples and apples".¹³² This decision radically departed from previous understandings of the scope of the Act and attracted nationwide attention from the public as a "landmark" decision for gender equality.¹³³

2 *The Court of Appeal's decision*

Terranova appealed the Employment Court's decision, challenging its determinations on the ambit of the Act and scope of comparators that could be taken into account for assessments under s 3(1)(b).¹³⁴ The Employment Court's conclusion that the Act included pay equity was not challenged, but the appellants submitted that an interpretation of s 3(1)(b) should be narrow, and evidence of systemic undervaluation could not be taken into account.¹³⁵ Terranova submitted that only in exceptional circumstances could the rates paid by other employers in the same sector be considered, and that comparisons with employers in entirely different sectors should be rejected entirely.¹³⁶ The Attorney-General also submitted that taking systemic undervaluation of an occupation into account would be a step too far as it could never be relevant to a question of law.¹³⁷

The Court of Appeal dismissed the appeal and found the Employment Court had not misinterpreted the Act. A statutory interpretation of the text and purpose of the Act had revealed that comparisons with rates paid by other employers was plainly contemplated by the Act. Internal comparisons were seen by the Court to defeat the inclusion of s 3(1)(b) as a distinct category of assessment of work predominantly performed by females, and pay equity

¹³² At [43].

¹³³ See "Landmark gender pay equality ruling appealed" *The New Zealand Herald* (online ed, Auckland, 18 September 2013).

¹³⁴ *Terranova*, above n 10, at [73].

¹³⁵ At [77].

¹³⁶ At [77].

¹³⁷ At [79].

was encompassed in the Act's broad definition of equal pay.¹³⁸ The case was subsequently directed back to the Employment Court for resolution, and an appeal by Terranova to the Supreme Court was declined in 2014.¹³⁹ The New Zealand Council of Trade Unions described the case as an “historic legal victory” for advancing the rectification of unequal pay in female-dominated occupations.¹⁴⁰

3 *A purposive approach*

Both the Employment Court and Court of Appeal's conclusions were guided by the anti-discriminatory purpose of the Equal Pay Act. Their approaches were partly attributable to a broader “shift in the balance between public and private interest”, where individual freedoms are overruled by the broader public interest intended by legislation.¹⁴¹ Under the Act, this balance is between the individual interests of employers and the social good of removing discrimination against women in employment.

The Aged Care Association argued that raising wages for carers would have a drastic economic impact on aged care providers because funding was received from the Ministry of Health on a per bed basis.¹⁴² The Employment Court, however, compared the achievement of pay equity with the abolishment of slavery and stated that the short term price of implementing pay equity did not outweigh the “unquantifiable” social cost of perpetuating discrimination against a vulnerable and undervalued social group.¹⁴³ Arguments made by Terranova about the unworkability of the Employment Court's interpretation due to cost were also rejected by the Court of Appeal; again because those arguments were outweighed by the purpose of the Act.¹⁴⁴

The interpretation of the Act in *Clerical Workers* has previously been criticised for its failure to interpret the Act according to its purpose. At the time of the 1986 decision, literal interpretations of the text without consideration

¹³⁸ At [101] and [113].

¹³⁹ See *Terranova Homes & Care Ltd v Service and Foodworkers Union Nga Ringa Tota Inc* [2014] NZSC 196, [2015] 2 NZLR 437 at [18].

¹⁴⁰ New Zealand Council of Trade Unions “Historic victory in pay equity case for carers” (press release, 23 August 2013).

¹⁴¹ Burrows and Carter, above n 124, at 237.

¹⁴² *Terranova Employment Court judgment*, above n 6, at [108].

¹⁴³ At [109]–[110].

¹⁴⁴ *Terranova*, above n 10, at [172].

of the intention behind a statute were more common.¹⁴⁵ In 1997, pay equity campaigner Martha Coleman argued that the purposive approach should be applied to the Act as an anti-discrimination law part of New Zealand's human rights framework.¹⁴⁶ She proposed that the purposive approach should be applied to the definition of discrimination under the Act, and also to the criteria in s 3 for assessing the presence of discrimination.¹⁴⁷ This interpretation would be consistent with the legislative history of the Act, the New Zealand Bill of Rights Act and New Zealand's international obligations. She predicted that jurisprudential developments in anti-discrimination law would facilitate such an interpretation in any future claims for pay equity under the Equal Pay Act.¹⁴⁸

The decisions of the Employment Court and Court of Appeal were consistent with these predictions. Each of these Courts concluded that cross-sector comparisons that took into account systemic undervaluation, as proven by historic, current or structural gender discrimination, would be consistent with the Act's purpose and definition of equal pay. The Employment Court stated that "statutes are always speaking" and an Act ought to perform in a contemporary context.¹⁴⁹ The purpose of the Act, to remove and prevent discrimination on the basis of sex in rates of remuneration, was identifiable in the long title and intentions behind its enactment.¹⁵⁰ The Employment Court noted that, because s 3 provided the mechanism by which the purposes of the Act would be achieved, the Act must be interpreted consistently with this purpose.¹⁵¹ The Court looked to the legislative history of the Act, including the 1971 Report of the Commission of Inquiry into Equal Pay and parliamentary debates that introduced the Equal Pay Bill. It also sought to interpret the Act consistently with New Zealand's human rights framework and international obligations under ILO Convention 100.

The Court of Appeal placed weight on different considerations in order to extrapolate the purpose of the Act. The Court found there was sufficient

145 Burrows and Carter, above n 124, at 248.

146 Coleman "Back to the Future", above n 48, at 536.

147 At 536.

148 At 552.

149 *Terranova Employment Court judgment*, above n 6, at [93] and [95].

150 At [31].

151 At [40].

ambiguity in the Commission’s report around pay equity such that the Employment Court had placed unjustified weight on the report to ascertain whether the Act was intended to include cross-sector comparisons.¹⁵² Rather than relying on background evidence of the intention of the law-makers behind the Act, the Court of Appeal centred its interpretation on the anti-discrimination focus of the Act. The Court noted that the definition of equal pay in the Act, which provides that it is a rate of remuneration where there is “no element” of sex-based differentiation, makes it difficult to argue that the Act was not intended by Parliament to be used to the “fullest possible extent”.¹⁵³ For the Court of Appeal, the reference to work predominantly performed by women in s 3(1)(b) also indicated the Act was intended to operate more broadly than achieving equal pay for the same work.¹⁵⁴ The Court of Appeal concluded nothing in the Act justified the exclusion of systemic undervaluation in assessments under s 3(1)(b), and the inclusion of this evidence in such assessments would uphold the anti-discriminatory purpose of the Act.¹⁵⁵

The Attorney-General submitted to the Court of Appeal that “courts should be wary of updating legislation in a way that would have extensive social, cultural and economic impacts not contemplated by Parliament”.¹⁵⁶ While the Court of Appeal acknowledged that this was not its role, it stated that the undervaluation of entire industries predominated by women was “undoubtedly something of concern to the 1972 Parliament”.¹⁵⁷ The Act had never been fully utilised;¹⁵⁸ the problem of pay inequity that the Act was intended to address remained at the time of *Terranova*. The Act’s values had not fallen out of date, but had become emboldened by a broader shift in attitudes towards discrimination and human rights. The core objective of the Act, to remove discrimination on the basis of sex in employment, was still pertinent for a contemporary interpretation.

152 *Terranova*, above n 10, at [86]–[95].

153 At [107].

154 At [101]–[102].

155 At [110].

156 At [115].

157 At [115].

158 Burrows and Carter, above n 124, at 406.

C *What next?*

The unprecedented interpretation of the Equal Pay Act in *Terranova* transformed pay equity from a political issue into a legal problem. Kristine Bartlett's success triggered a wave of claims from workers in other low-paid sectors, including from teachers,¹⁵⁹ midwives,¹⁶⁰ and social workers.¹⁶¹ Litigation does not, however, provide a sustainable solution to the issue of pay equity.¹⁶² Claims are expensive and time-consuming, with the heaviest financial and evidential burden placed on the unions and low-paid women.¹⁶³ Rather than pay equity being pursued by employers and employees as a common goal, it instead becomes a point of conflict.¹⁶⁴ The success of a case is further limited to compensating an individual or particular group of complainants, and may not change the systemic causes of the discrimination.¹⁶⁵ Unlike equal pay claims, which allege discrimination against an individual employer, pay equity targets systemic discrimination. An important contributor to this discrimination, occupational segregation, is a structural feature of the labour market,¹⁶⁶ and arguably requires a deeper level of legal intervention to eradicate the root of the problem. Further government intervention was necessary.

VI THE GOVERNMENT'S RESPONSE AND RESPONSIBILITIES

While the *Terranova* case progressed through the courts, the National Government maintained a distance from the litigation and surrounding

159 Jody O'Callaghan "Teachers' union takes legal action over gender pay gap for support workers" *Stuff* (16 October 2015). The New Zealand Educational Institute backed a claim from female support workers (teacher aids) who are seeking equal pay for their profession.

160 NZ College of Midwives "Pay equity case — New Zealand College of Midwives alleges gender discrimination under the New Zealand Bill of Rights Act 1990" (press release, 31 August 2015). The country's biggest equal pay challenge to date was filed at the High Court in Wellington against the Ministry of Health — note that this argues that there is discrimination under the Bill of Rights Act 1990 rather than the Equal Pay Act.

161 Public Service Association "Social workers launch historic equal pay claim" (press release, 16 November 2015). The New Zealand Public Services Association has filed a case alleging a breach of the Equal Pay Act 1972.

162 Fredman, above n 17, at 206.

163 At 206.

164 Pay Equity Taskforce *Pay Equity: A New Approach to a Fundamental Right* (Department of Justice Canada, 2004) at 98.

165 Fredman, above n 17, at 207.

166 Statistics New Zealand *Women at work*, above n 4, at 8.

debates on pay equity.¹⁶⁷ The Ministry of Health had been invited by the Employment Court to intervene in the case due to the Government's interest in the issue, however it declined to do so.¹⁶⁸ Faced with "mounting court cases" after the Court of Appeal's decision, the Government was no longer able to take a passive stance.¹⁶⁹

A Response

The National Government considered that reliance on the courts for the resolution of pay equity issues was undesirable and inefficient.¹⁷⁰ This sentiment was shared by employers.¹⁷¹ A Joint Working Group on Pay Equity Principles (Working Group) was created in October 2015, involving the primary stakeholders in pay equity disputes, to identify pay equity principles that could be applied across both public and private sectors and avoid the need for litigation.¹⁷²

The Working Group was a tripartite group of representatives from the government, unions and employers, established to give recommendations on how to implement pay equity. The Minister of Health confirmed a government commitment to negotiating pay rates for nearly 50,000 care and support workers.¹⁷³ While the Working Group's discussions were taking place, however, other pay equity claims under the Act were placed on hold.¹⁷⁴ Recommendations of the Working Group were required to be consistent with the Court of Appeal decision in *Terranova* and to acknowledge that pay equity is provided for in the

167 McPherson, above n 64, at 256.

168 *Terranova Employment Court judgment*, above n 6, at [108].

169 Max Towle "Govt has 'finally woken up' to gender pay gap — caregiver" *Radio New Zealand* (online ed, Wellington, 21 October 2015), referring to comments made by Alistair Duncan, spokesperson for the union E tū.

170 See for example State Services Commission *Terms of reference — Joint working group on pay equity principles* (17 November 2015) at [4], which noted that the "Government's preferred response" was for "pay equity principles that can be supported by employers ... and unions."

171 Sharon Brett Kelly "Pay equity 'could cost hundreds of millions'" *Radio New Zealand* (online ed, Wellington, 8 June 2016).

172 State Services Commission, above n 170, at [5]. Note that no representatives from women's organisations were involved. The Government was represented by the Ministry of Business, Innovation and Employment and State Services Commission, the unions were led by the New Zealand Council of Trade Unions and employers by Business New Zealand.

173 Paula Bennett (Minister of State Services) and Michael Woodhouse (Minister for Workplace Relations and Safety) "Working group to pursue pay equity principles for workplaces" (press release, 21 October 2015).

174 State Services Commission, above n 170, at [11].

Act.¹⁷⁵ Dr Jackie Blue, the Equal Employment Opportunities Commissioner, commented that the Working Group was an “historic first step to achieving a zero gender pay gap”.¹⁷⁶

The Working Group reported back in May 2016 with a list of recommendations, noting that “[p]ay equity is a complex issue, involving multiple historical and current factors”.¹⁷⁷ The recommendations focused on facilitating pay equity claims in good faith between employees and employers.¹⁷⁸ A set of principles, and a recommended process, was laid out by the Working Group that could operate within existing legal frameworks by updating the ERA and the Equal Pay Act. After the merit of a pay equity claim had been accepted, parties would be required to negotiate a resolution, using tools such as occupational assessments of the skills, responsibilities, conditions and effort required by the work predominately undertaken by women.¹⁷⁹ The Working Group suggested that the government be proactive on the issue of pay equity for the benefit of the wider community and the government itself.¹⁸⁰

The Working Group’s focus on direct negotiation with employers was welcomed by unions, including E tū,¹⁸¹ as seeming to open up an easier pathway for hundreds of thousands of women in low-paid sectors to achieve pay equity. A pathway for claiming pay equity had, however, been present in the Equal Pay Act for over 40 years but was never successfully used. The ability for low-paid women to successfully use any pathway set up for pay equity is a core issue, and the shape of any legislative amendments responding to the

175 At [3].

176 Human Rights Commission “Human Rights Commission welcomes pay equity milestone” (press release 21 October 2015).

177 Letter from Patsy Reddy (Crown Facilitator), Richard Wagstaff (New Zealand Council of Trade Unions), Phil O’Reilly (Business New Zealand), Paul Stocks (Ministry of Business, Innovation and Employment) and Lewis Holden (State Services Commission) to Paula Bennett (Minister of State Services) and Michael Woodhouse (Minister for Workplace Relations and Safety) regarding Recommendations of the Joint Working Group on Pay Equity Principles (24 May 2016) at 2.

178 At 4.

179 At Appendix 2 at [3].

180 At 4.

181 On 7 October 2015, the Service and Food Workers Union merged with the Engineers Printers and Manufacturers Union to form E tū, the largest private sector union in New Zealand. See Uni Global Union “Huge victory in New Zealand for care and support workers” (20 October 2005) <www.uniglobalunion.org> for a reproduction of E tū’s press release welcoming the announcement.

Working Group's recommendations will be crucial to the preservation of pay equity as a contestable legal right in New Zealand.

To adopt the recommendations of the Working Group, the National Government introduced new legislation: the Employment (Pay Equity and Equal Pay) Bill.¹⁸² The Bill would amend the ERA and repeal the Equal Pay Act. The Government claimed that the Bill would “make it easier for employees to file pay equity claims” by creating a process that would allow women to file claims with their employers directly rather than in the courts.¹⁸³ With a reassurance of its commitment to pay equity, the National Government stated that the Bill would support an “effective and efficient pay equity regime”.¹⁸⁴

Despite claims that the Bill would facilitate pay equity claims, a closer scrutiny of its provisions revealed that the detail of the Bill did not accord with its stated purpose, and in fact departed from *Terranova*. Employees were granted a right to make a pay equity claim, and a process for pay equity bargaining was established including requirements to act in good faith. However, in reality the Bill would have made the pathway for pay equity claims more difficult, and was labelled by some as “a wolf in sheep’s clothing”.¹⁸⁵

A core issue with the Bill was the high threshold for making a claim to trigger a bargaining process. Pay equity claims must be raised with employers in the first instance, and an employee or group of employees were only permitted to make such a claim, if it had merit.¹⁸⁶ A claim had merit if:¹⁸⁷

- i) it related predominantly to work performed by women; and
- ii) there were reasonable grounds to believe the work had been historically undervalued; and
- iii) there were reasonable grounds to believe the work continued to be subject to systemic sex-based undervaluation.

These requirements placed a heavy evidential burden on low-paid women to demonstrate that their claim was worthy of a pay equity assessment. The

182 Employment (Pay Equity and Equal Pay) Bill 2017 (284–1).

183 Michael Woodhouse “Pay Equity Bill introduced” (press release, 27 July 2017).

184 Woodhouse, above, n 183.

185 The New Zealand Public Service Association “National’s ‘pay equity’ Bill is a wolf in sheep’s clothing” (press release, 8 August 2017).

186 Employment (Pay Equity and Equal Pay) Bill 2017 (284–1), cl 14(1).

187 Clause 14(2).

Working Group had noted that the collation of evidence of a workforce's historical undervaluation is a highly arduous task that requires specialist resources.¹⁸⁸ The burden of preparing a claim, especially high for women without union support, is a strong deterrent from making claims. Further, if an employer did not agree that a claim had merit, these employees would likely be forced to revert to dispute resolution processes, with the ultimate possibility of ending up in court.

Both courts in *Terranova* found that cross-sector comparisons would be acceptable, even necessary, for pay equity assessments to uphold the anti-discriminatory purpose of the Act. The Bill, however, included a problematic hierarchy of comparators where a claim would have to first compare wages against male employees in the same business or sector before any cross-sector comparisons could be made. The government argued that it was “not bound” to the Court of Appeal’s methodology.¹⁸⁹ Requirements for internal comparisons within the same employer fail to confront occupational segregation and defeat the fundamental purpose of a pay equity assessment — to assess the devaluation of a female-dominated *profession* (nurses) against a comparable male-dominated one (police officers). As stated by the Employment Court in *Terranova*, this would be a self-defeating comparison between “apples and apples”.¹⁹⁰ The Bill placed cross-sector comparisons in the ‘too hard’ basket.

Such a narrow approach to comparators in the Bill fails to ensure that pay equity assessments would successfully eradicate discrimination against low-paid women.¹⁹¹ By repealing the Equal Pay Act, including its definition of ‘equal pay’, the Bill further subverts the anti-discriminatory interpretations of the Act by the courts in *Terranova*, thwarting the ground-breaking progress for pay equity achieved through this litigation.

The sentiment shared between the then-Opposition in Parliament,¹⁹² the

188 Letter from Patsy Reddy, above n 177, at 3–4.

189 (8 August 2017) 724 NZPD 19946–19947.

190 *Terranova Employment Court judgment*, above n 6, at [43].

191 At [53]. The Employment Court commented that a narrow approach to s 3(1)(b) “may simply perpetuate discrimination.”

192 (8 August 2017) 724 NZPD 19950. The opposition at the time was the Labour Party, Green Party, New Zealand First, and the Māori Party. All Opposition parties voted against the Bill in its first reading on 8 August 2017, which narrowly passed by a vote of 60–59.

unions,¹⁹³ and Kristine Bartlett herself,¹⁹⁴ was that the new Bill erected a road block for further pay equity claims. It was alleged that claims like Bartlett's would not be able to happen again under the new Bill.¹⁹⁵ In the wake of *Terranova*, women's organisations and pay equity campaigners expressed concern that the National Government's ideological and financial commitment to a decentralised free market would result in a watering down of the principles proposed by the Working Group,¹⁹⁶ and inhibit the progress of law reform. Under the guise of a political commitment to assisting low-paid women, the subtle subversion of *Terranova* by the Bill reveals the traditional resistance to government intervention to implementation of pay equity is justified.

With the election of a new Labour-led Government in late-2017, the Bill was withdrawn entirely.¹⁹⁷ Making pay equity an immediate priority was a core election campaign promise for the Labour Party leading up to the 2017 General Election.¹⁹⁸ The Working Group was also reconvened to consider the two key concerns with the former Bill — first, how to select male comparators when assessing female-dominated work, and second, how to determine the merit of a claim as a pay equity claim.¹⁹⁹ Reporting back in February 2018, the Working Group emphasised the importance of retaining the Equal Pay Act as the “legislative vehicle” to support implementing pay equity.²⁰⁰ Despite the apparent need for fresh strategies, *Terranova's* revelation that the Act already provides for pay equity possibly removes the need for brand new legislation, and instead

193 New Zealand Council of Trade Unions “Serious concerns with National's proposed new equal pay law” (press release, 26 July 2017).

194 Andre Chumko “Equal pay advocate Bartlett ‘let down’ by Govt” *Newsroom* (17 August 2017).

195 (8 August 2017) 724 NZPD 19948.

196 Prue Hyman “Equal Pay — the case for action now” *The New Zealand Herald* (online ed, Auckland, 9 February 2016).

197 Iain Lees-Galloway (Minister for Workplace Relations and Safety) and Julie Anne Genter (Minister for Women) “Statement on Equal Pay legislation” (press release, 1 November 2017).

198 Jacinda Ardern “Pay equity to be a priority for Labour” (press release, 12 August 2017); and Labour Party “Workplace Relations Policy” (2017) <www.labour.org.nz>.

199 Iain Lees-Galloway (Minister for Workplace Relations and Safety) and Julie Anne Genter (Minister for Women) “Joint Working Group on Pay Equity Principles Reconvened” (press release, 23 January 2018).

200 Letter from Traci Houppapa (Crown Facilitator), Richard Wagstaff (New Zealand Council of Trade Unions), Kirk Hope (Business New Zealand), Paul Stocks (Ministry of Business, Innovation and Employment), Lewis Holden (State Services Commission) to Iain Lees-Galloway (Minister for Workplace Relations and Safety) and Julie Ann Genter (Minister for Women) regarding Recommendations of the Reconvened Joint Working Group on Pay Equity Principles (27 February 2018) at 2.

the existing legal structures that enabled Kristine Bartlett's success should be preserved and strengthened. The Working Group also urged the Government to invest in support, information gathering and specialists to assist with claims.

On 19 September 2018, symbolically the 125th anniversary of women's suffrage in New Zealand, the Labour-led Government introduced a new Equal Pay Amendment Bill.²⁰¹ Rather than starting afresh, the Bill amends, not repeals, the Equal Pay Act to implement "a simple and accessible process" for making pay equity claims.²⁰² As recommended by the Working Group, this update to the existing Equal Pay Act is likely to be an effective approach for facilitating pay equity claims to provide greater clarity on the process for lodging claims while preserving the existing legal mechanisms that were successful in *Terranova*.

Fundamental differences between the Equal Pay Amendment Bill and the Bill proposed by National appear to alleviate previous concerns. Where National's Bill required claims to demonstrate 'merit', the new Bill sets the threshold for bringing a claim significantly lower, where a claim will now proceed to pay equity bargaining if the employer considers it is 'arguable'. Under s 13C(2), an 'arguable' claim is where (a) the claim relates to work predominantly performed by female employees, and (b) it is arguable that the work is currently undervalued or has historically been undervalued. The Bill does not introduce a hierarchy of comparators and instead explicitly condones the use of a comparator with work performed by males in a different sector as being appropriate. To incentivise employers to address pay equity, the Bill also permits courts to award back pay in order to address undervaluation of women's work.

There had been predictions that the sixth Labour Government would bring a new left-wing political approach, with Prime Minister Jacinda Ardern stating that the market economy had failed in recent times and government intervention was required in a number of areas.²⁰³ The Government's Equal Pay Amendment Bill indicates that this has included pay equity.

The favourable judicial interpretation in *Terranova* and the principles created by the Working Group presented significant questions to both the

201 Equal Pay Amendment Bill 2018 (103–1).

202 Equal Pay Amendment Bill 2018 (103–1), explanatory note.

203 Bryce Edwards "Political Roundup: Will Labour coalition bring radical change?" *The New Zealand Herald* (online ed, Auckland, 23 October 2017).

former National and Labour-led Governments as to how it should position itself. As demonstrated by New Zealand’s history on pay equity, the extent to which either a Labour or National Government will be proactive in pushing for law reform on pay equity is dependent on a number of considerations. The implementation of pay equity is not only a practical and legal issue, but also a political one. The enactment of new legislation is a political process, and as a result, ideology unavoidably influences the allocation of “rights, duties, powers and liabilities”.²⁰⁴

B Responsibilities

Responsibility for preserving and universally implementing pay equity now rests with the government. Throughout the lifetime of the Equal Pay Act in New Zealand there have been repeated calls for stronger and explicit dedication to implementing pay equity from the government. In 2004, for example, the Pay and Employment Equity Taskforce called for a “[c]lear and explicit public commitment” by the government to achieve pay equity.²⁰⁵ International progress towards achieving pay equity demonstrates that the government must assume responsibility for implementing change, rather than relying on free market principles to correct structural inequalities.²⁰⁶

The government bears the greatest responsibility not only as a lawmaker but also as the country’s largest employer of female workers.²⁰⁷ This means the government has the power to lead by example. The significant reallocation of financial resources required to implement pay equity means the government also bears the greatest financial burden. The New Zealand Aged Care Association estimated that it would cost the aged-care sector alone \$500 million per annum to raise the wages of caregivers to the rate proposed by the E tū Union and there have been repeated calls from the sector for government support.²⁰⁸ A wealth of research has revealed that government action on the issue of occupational segregation has significant potential to positively

204 Kenneth Keith “Philosophies of Law Reform” (1991) 7 Otago LR 363 at 377.

205 Pay and Employment Equity Taskforce *Pay and Employment Equity in the Public Service and the Public Health and Public Education Sectors* (1 March 2004) at 55.

206 At 56, referring to Susan Iversen *Analysis of Pay Equity Initiatives in the Health Sector in the UK, Ontario and New Zealand* (Taskforce on Pay and Employment Equity in the Public Service and Public Health and Education Sectors, January 2004).

207 See letter from Patsy Reddy, above n 177, at 5.

208 Brett Kelly, above n 171.

contribute to New Zealand's economy in the long term, even boosting GDP by 10 per cent.²⁰⁹ Nevertheless, while the long-term benefits of achieving pay equity are convincing, a balancing exercise between the costs and benefits of implementing pay equity will continue to be inevitable.

As the historical stagnancy has demonstrated, achieving pay equity will require proactive support from the government beyond amending the legislative framework. Government support is particularly necessary for providing pay equity to women in the private sector and in small-to-medium-sized businesses where union membership is low.²¹⁰ The Working Group emphasised the importance of government investment in regulatory and support agencies with the “skills, training, knowledge and resources” to assist the private sector in addressing pay equity issues.²¹¹ The Working Group, however, cautioned that these efforts should not be relied upon to comprehensively achieve pay equity and that legislative amendments are needed for progress.²¹²

The Working Group's initial recommendations to the National Government had strongly suggested that, as an employer, the Government needed to be proactive in reaching specific pay equity settlements in sectors dominated by female employees for which the Government is the primary funder.²¹³ The National Government finalised a \$2 billion pay equity settlement with care and support workers in April 2017 covering 55,000 workers in aged and disability residential care services.²¹⁴ This settlement has since been commended by CEDAW in the International Labour Organisation.²¹⁵ The then-Prime Minister, Rt Hon Bill English, warned that this was “unique” however, and the “hurdle would be pretty high” for any other groups making a claim for pay equity.²¹⁶ This settlement controversially excluded mental

209 Borkin, above n 32, at 2.

210 Briar, above n 92, at 217.

211 Letter from Patsy Reddy, above n 177, at 4.

212 At 3.

213 At 4.

214 Ministry of Health “Care and support workers pay equity settlement” (updated 28 March 2018) <www.health.govt.nz>.

215 International Labour Organisation Committee on the Elimination of Discrimination against Women *Concluding observations on the eighth periodic report of New Zealand* CEDAW/C/NZL/8 (2018) [ILO 2018] at [33].

216 Isaac Davison and Claire Trevett “Government announces historic pay equity deal for care workers” *The New Zealand Herald* (online ed, Auckland, 18 April 2017).

health and addiction workers. A core election promise by the Labour Party was to prioritise pay equity negotiations with these workers. Its promised negotiations commenced with 3,800 mental health and addiction workers in February 2018,²¹⁷ and a Terms of Settlement has been signed with support staff in the education sector.²¹⁸ This possibly indicates a deeper willingness to achieve universal pay equity, reflecting an ideological shift in approach.

VII LESSONS FOR ACHIEVING GENDER EQUALITY THROUGH LAW

The under-utilisation and treatment of the Equal Pay Act by lawmakers and law enforcers demonstrates that the efficacy of law reform to achieve meaningful change is reliant on a wealth of factors, influenced by a dynamic and broad set of relationships and structures. The attribution of successes and failures of pay equity law reform to either lawmakers, the government or the courts, is complex and not clear-cut.²¹⁹ The ability of both litigation and legislative change to advance a social issue such as pay equity is, to a significant degree, dependent on favourable yet evolving socio-economic and political conditions. Progress on pay equity is also reliant on the attitudes and perspectives of the lawmakers, those responsible for its implementation, and those who have the resources to support a legal claim. The use of the law as an instrument for change is ineffective if the underlying goals fail to align with prevailing social attitudes and economic structures.

Even if the tools to achieve it are enshrined in law, the implementation of gender equality is affected by fundamental transitions in contextual social discourses.²²⁰ Institutions that control reform are receptive to certain discourses at different times, which dictates the progression of reform.²²¹ Broader developments in judicial treatment of anti-discrimination laws played an important role in achieving meaningful reform at the time of the enactment of the Equal Pay Act and creating the environment in which the *Terranova* case

217 Ministry of Health “Mental health and addiction workers’ pay equity settlement” (updated 30 July 2018).

218 Jacinda Ardern (Prime Minister) and Chris Hipkins (Minister for Education) “Historic pay equity settlement for education support workers” (press release, 14 August 2018).

219 Margaret Davies “Legal theory and law reform: Some mainstream and critical approaches” (2003) 28 *Alt LJ* 168 at 170.

220 *At* 168.

221 Chunn, Boyd and Lessard, above n 46, at 19.

was brought. Whereas the widespread labour market restructuring during the 1990s stalled the advancement of pay equity reform in favour of a neoliberal ideology, in recent decades a renewed civil society interest in anti-discrimination issues has provided a boost to the issue. The value society accords to vulnerable groups in employment is increasingly being called into question;²²² low-paid women in predominantly female occupations are one such group.

While it is important to recognise that any legal reform to achieve pay equity is contextualised by broader socio-economic and political concerns, and therefore cannot provide an all-encompassing solution to a social problem, effective legislation plays an essential role.²²³ The attribution of rights and responsibilities and the recognition of collective or individual identities in legislation frames the balance of power between employers and employees in the long term. Legislative reform also has symbolic importance for marginalised groups seeking equality.²²⁴ Constitutional law experts have argued that reliance should not be placed solely on the market or courts to rectify issues of discrimination and equality.²²⁵

Experience in New Zealand and overseas has demonstrated that establishing legal requirements for stakeholders to take action on pay equity is possibly more effective at reducing gender inequality attributable to occupational segregation than relying on voluntary policies or the operation of the free market.²²⁶ For example, the Canadian Pay Equity Taskforce recommended in 2004 that proactive and explicit pay equity legislation should be enacted, supported by specialist agencies and resources.²²⁷ *Terranova* exposed the weaknesses of reduced government intervention, as indicated by the case triggering a flood of other claims from female workers in other low paid sectors when Kristine Bartlett's claim was successful.²²⁸ In response to New Zealand's 8th CEDAW report, the CEDAW Committee recommended that the principle of equal pay for work of equal value be adopted and enforced through legislation, setting out

222 Including the treatment of migrant workers, contractors, and carers for disabled family members.

223 Davies, above n 219, at 170.

224 At 170.

225 Mai Chen *Women and Discrimination: New Zealand and the UN Convention* (Victoria University Press, Wellington, 1989) at 23.

226 Ministry of Women's Affairs *Employment Equity*, above n 13, at 25–26.

227 Pay Equity Taskforce, above n 205, at 503.

228 See the claims discussed in footnotes 159, 160 and 161 above.

requirements for job classification methods, pay surveys, and regular reviews of wages.²²⁹ A duty imposed on employers to implement pay equity should be supported by additional funding and resourcing from the government, such as a statutory body to assist with assessments.

Not only are the attitudes held by institutions including the courts and government vital to reform, but perceptions of the players who utilise them, including unions and employers (the potential plaintiffs and defendants), are also key to achieving change. Union support and commitment has been an essential precondition for the achievement of pay equity because unions often act as the legal representatives of low-paid women in court claims, settlements with employers, and negotiations with the government.²³⁰ Through individualisation of employment contracts, the ECA, has, to a large extent, denied collective identities, especially by gender, from having legal recognition.²³¹ Many low-paid women in female-dominated occupations continue to face challenges in accessing union support, particularly in the private sector, where union membership remains very low.²³² In order to be successful, any further reform on pay equity must address the facilitation of the collective representation required by low-paid women.

The Ministry of Women's Affairs stated in 2002 that:²³³

... the next step towards pay equity would involve not just deciding how to measure and reward work of equal value in women's and men's different jobs. It would also require an innovative new strategy to *deliver* pay equity to women.

The socio-economic and political environment confronting the Labour-led Government in 2018 is vastly different from that when the Equal Pay Act was enacted in 1972. The prospect of meaningful progress for pay equity in the wake of *Terranova* is arguably more positive now than ever. Policies on the gender pay gap across the political spectrum emphasise principles of good faith and natural justice, and upholding human rights in not only workplace relations, but across

229 ILO 2018, above n 215, at [34(c)].

230 Harré, above n 90, at 52.

231 Margaret Wilson "The Role of the State in the Regulation of Employment Relations: The New Zealand experience" (1997) 2 FJLR 131 at 140.

232 Statistics New Zealand "Union membership and employment agreements — June 2016 quarter" (14 September 2016) at 1.

233 Ministry of Women's Affairs *Employment Equity*, above n 13, at 16 (emphasis in the original).

society. There is currently a greater balance between the prioritisation of social justice issues against fiscal obligations than in previous decades.²³⁴ There has also been a shift in the perspectives of employers who are increasingly accepting pay equity to be a new business reality.²³⁵ The legal success of aged care workers has set in place a groundswell of formal and public movements for pay equity in other sectors including education,²³⁶ nursing,²³⁷ and DHB administration staff.²³⁸

Any current and future steps in law reform that seek to achieve pay equity will require new strategies to account for New Zealand's contemporary social structures. In order to be successful, such strategies must be adaptive and responsive to future societal changes. Such an update however needs to recognise that the law co-exists and operates within broader social structures and economic constraints that similarly influence legal relationships and priorities.²³⁹ Any realisation of ambitions to achieve gender equality through legal change however relies on being in harmony with the surrounding political and social concerns. While the current Labour-led Government appears poised for stronger government intervention on the issue than in the past, practical and political challenges that require a balancing of different considerations and commitments for achieving pay equity remain. However, rights-based judicial interpretations and a favourable socio-economic environment will likely encourage legislative and policy action.

VIII CONCLUSION

Since the Equal Pay Act was enacted in 1972, efforts to achieve pay equity in New Zealand have been embroiled in a complex narrative. The enactment of the legislation was intended to remove discrimination in wages between men and women. As demonstrated by the persistent gender pay gap, these intentions were never realised. From the outset, the creators of the Act themselves had recognised that the success of the new law was contingent upon a favourable

234 McGregor, above n 104, at 14.

235 Business New Zealand *Bargaining for pay equity* (1 July 2016) Business New Zealand <www.businessnz.org.nz>.

236 NZEI Te Riu Roa "Educators join national movement for pay equity on May 5" (press release, 1 May 2018).

237 "DHB nurses to pursue pay equity" *Nursing Review* (online ed, 22 June 2017).

238 The New Zealand Public Service Association "DHB admin and clerical workers raise claim for Equal Pay" (press release, 18 April 2018).

239 Davies, above n 219, at 171.

shift in social attitudes regarding equal pay. This unfortunately did not happen for over 40 years.

The subsequent challenges to advancing pay equity in New Zealand reveal that achieving such an alignment in attitudes is reliant on a willingness for change on the part of law-makers and effective engagement with the Act by those in charge of its implementation. In the case of *Clerical Workers*, the dismissal of a pay equity claim created a widespread understanding that the concept of equal pay for work of equal value was not provided for in New Zealand's legislative framework. After the radical overhaul of New Zealand's labour framework to a decentralised free market, the high degree of investment required to achieve pay equity became incompatible with the social, economic and political interests of both employers and the then-government.

The recent interpretation of s 3(1)(b) of the Equal Pay Act in *Terranova* redefined the scope of the Act by including pay equity. A number of factors contributed to the success in the case, including a trend of favourable judicial treatment of discrimination issues in employment, union support and stronger recognition of pay equity as a human right. The resulting evolution in perceptions about the scope of the Act has been a significant driver of a broad shift in approaches to pay equity.

Neither litigation nor new legislation are able, in isolation, to provide comprehensive solutions to the social issue of pay equity. However, each continues to play a tangible role in an overall framework of change. As the different results achieved in the *Clerical Workers* and *Terranova* cases demonstrate, the courts play a core role in framing existing perceptions regarding the status quo and exposing a need for reform. With the decision in *Terranova*, the Court of Appeal served its function in providing clarification and guidance on the scope and interpretation of the Act. As a result of this reactivation of the Act, a new opportunity for meaningful reform has been presented by transforming the issue of pay equity into a legal problem that required proactive engagement.

In progressing forward however, responsibility for enacting further legal reform that will universally achieve and preserve pay equity in New Zealand rests with the government. Whether the legal and political developments in response to *Terranova* will fully tip pay equity into being a universal reality, not merely a political talking point, is yet to be seen; the Equal Pay Amendment Bill is not law yet. Shaped by the prevailing social attitudes, economic

concerns, and political priorities of the institutions that control its instigation and implementation, the story of pay equity indicates that legal progress for gender equality will never be predictable, nor clear-cut. But, if there is any time for achieving pay equity, that time seems to be now.