EMERGING CHALLENGES IN THE IMPLEMENTATION OF PAY EQUITY LAW IN NEW ZEALAND[†]

Megan Vant[*]

In 2018, Charlotte Doyle wrote a thought-provoking article published in this Journal on the "reactivation" by the Court of Appeal of the concept of pay equity.[1] *Ms Doyle concluded that the legal mechanisms intended to progress gender equality must be supported by broader political, social and economic concerns. Three years on from Ms Doyle's article, and a year after the enactment of the new legislation, she has so far been proven right. Political support enabled the enactment of new pay equity legislation, but without social support for the concept of pay equity, change will be slow. The law alone cannot "fix" pay inequities.*

I INTRODUCTION

For generations, "women's work" has been undervalued. The New Zealand Public Service Association Te Pūkenga Here Tikanga Mahi has campaigned for pay and employment equality for women since 1913.[2] We are now well past the time when it was permissible to openly pay women less than men performing the same role simply because they were women.

It is only recently that there has been judicial and then statutory acknowledgement of the fact that skills generally associated with women have commonly been overlooked, undervalued or not considered to require monetary compensation, and that this should be corrected. Judicial acknowledgement

† Parts of this article have appeared in two previous works: Kylie Dunn and Megan Vant "Pay equity: the past informs the future" (paper presented at the Employment Law — Justice at Work? Conference, Wellington, 22 October 2020); and Megan Vant "Pay equity — the emerging challenges six months on" (2021) 2 ELB 30.

* Megan Vant is a Senior Associate at Dundas Street Employment Lawyers. She has a special interest in the developing area of pay equity and its application. She has advised on a number of significant pay equity claims and been involved in pay equity litigation.

1 Charlotte Doyle "The Reactivation of Pay Equity in New Zealand by *Terranova*: Why did it take so long?" [2018] NZWLJ 129.

2 See the New Zealand Public Service Association Te Pūkenga Here Tikanga Mahi "Campaigning for Equal Pay" (23 January 2020) <www.psa.org.nz>.

came with the *Terranova* line of cases and led to legislative reform through amendments to the Equal Pay Act 1972 (EPA), which came into force on 6 November 2020.[3] The purpose of these amendments is to facilitate resolution of pay equity claims by providing "a simple and accessible process to progress a pay equity claim".[4]

At a high level, the EPA now provides a relatively straightforward, step-by-step process for managing and resolving pay equity claims. It is now easy for employees, or unions acting on behalf of their members, to raise a pay equity claim with an employer. Further, the legislative scheme requires good faith collaborative relationships between the parties involved in a pay equity claim in a manner consistent with New Zealand's existing collective bargaining framework.[5]

This article provides some brief background and context to the undervaluation of women's work and the concept of pay equity. The main focus of the article is on the new legislation and the challenges likely to be faced in its implementation. The requirements of the claim process are set out step-by-step, demonstrating how pay inequities can be redressed by the law. Experience suggests that there may be significant teething issues with the claim process as parties come to grips with the implementation of the EPA. Further, redressing pay equity is about more than having the right process, and consideration is given to whether the new legislation has any chance of resolving the complex underlying issues that it seeks to address.

II TERMINOLOGY

It is important to understand the different, but related concepts, that are used when talking about sex-based pay. [6]

A Equal pay

A legal obligation to ensure "equal pay" has existed in New Zealand since 1961 for the public service,[7] and since 1972 for the private sector.[8] Equal pay is the

3 Equal Pay Amendment Act 2020.
4 Equal Pay Act 1972, s 13A(b).
5 Section 13C; see also Employment Relations Act 2000, pt 5.
6 I use the term "sex" rather than "gender" as this is the terminology used in the Equal Pay Act. See for example s 2AAC(b): "An employer must ensure that there is no differentiation, on the basis of sex …".
7 Government Service Equal Pay Act 1960, s 3. Repealed on 6 November 2020 by the Equal Pay Amendment Act, s 34.
8 Equal Pay Act, s 4.

requirement that men and women working in the same job under the same conditions (and typically for the same employer) should be paid the same.[9] Establishing equal pay involves an assessment of whether the jobs are the same. If they are, the pay should be the same too.

B Pay equity

"Pay equity" is a different concept from equal pay. Rather than requiring the same pay for the same job, it requires the same pay for work of equal value.[10] Work of equal value is work that involves substantially similar skills, responsibilities, working conditions and degrees of effort.[11] Men and women performing work of equal value should be paid the same. Establishing pay equity involves assessing whether the work is of equal value. If it is, the pay should be equal too.

C The gender pay gap

The gender pay gap is a basic indicator that compares the median hourly earnings of men and women.[12] Statistics New Zealand calculates New Zealand's official gender pay gap as the difference between the median hourly earnings of women and men in full- and part-time work, and measures the difference between the pay of men and women over time.[13] New Zealand's gender pay gap has been trending down and has decreased from a gap of 16.2 per cent in 1998 to 9.1 per cent in 2021.[14]

The resolution of pay inequities using the pay equity process in the EPA will not eliminate the gender pay gap, although it will reduce it. The gender pay gap is a broader and more complex issue than pay equity, which only deals with the value of work. In a recent research report commissioned by the Manatū Wāhine Ministry for Women, authors Gail Pacheco, Chao Li and Bill Cochrane note that previous studies have attributed a substantial proportion of the historical gender pay gap to factors such as differences in education, the occupations and industries that men and women work in, and to the fact that women are more likely to work part-time.[15] However, Pacheco, Li

9 See s 2 definition of "equal pay"; and s 2AAC(a).
10 See s 2AAC(b).
11 Section 2AAC(b).
12 Statistics New Zealand *Organisational gender pay gaps: Measurement and analysis guidelines (second edition)* (July 2020) at 5.
13 Statistics New Zealand *Measuring the gender pay gap* (June 2015, updated August 2021) at 3.
14 Statistics New Zealand "Gender pay gap unchanged" (18 August 2021) <www.stats.govt.nz>.
15 Gail Pacheco, Chao Li and Bill Cochrane *Empirical evidence of the gender pay gap in New Zealand*

and Cochrane assess that these factors only explain around 20 per cent of the current gender pay gap.[16]

Pacheco, Li and Cochrane attribute the remaining 80 per cent of the gender pay gap to "unexplained" factors.[17] These are harder to measure, but the Ministry for Women considers that they include conscious and unconscious bias (impacting negatively on women's recruitment and pay advancement) and differences in men's and women's choices and behaviours.[18]

The resolution of pay equity claims is likely to directly affect the gender pay gap by increasing the median hourly earnings of women. Further, having the concept of sex-based discrimination and the value placed on women's work more widely talked about and understood may assist in bringing conscious and unconscious bias out into the open and thereby indirectly assist in further decreasing the gender pay gap.

III THE UNDERVALUATION OF THE WORK OF WOMEN

The work of women has traditionally been undervalued. Women have long been subject to structural and systemic discrimination arising from the historical and structural features of the labour market.[19] Further, the traditional and historic position of women in the paid workforce continues to have an impact on the value placed on work performed predominantly by women today. Historically, women were not expected to compete with men for work. Men were perceived as the breadwinners who supported families with their earnings. A woman may work temporarily as a "stopgap until marriage", but her wages would reflect the fact that society valued her work less and that it was "not deserving of higher earnings".[20] Once a woman was married, her role was to look after the home and children, not to go out to work. Of course, this ignores the reality for widows and other women who were not financially supported after marriage.

(Ministry for Women, Research Report, March 2017) at 12.

16 At 20.

17 At 7–8.

18 Manatū Wāhine Ministry for Women "Gender pay gap" (10 September 2012, updated 20 August 2021) <www.women.govt.nz>.

19 *Service and Food Workers Union Nga Ringa Tota Inc v Terranova Homes and Care Ltd*, [2013] NZEmpC 157, (2013) 11 NZELR 80 [*Terranova* EmpC] at [44] and [118].

20 *Terranova Homes & Care Ltd v Service and Food Workers Union Nga Ringa Tota Inc* [2014] NZCA 516, [2015] 2g NZLR 437 [*Terranova* CA] at [36].

The term "women's work" is generally used to refer to work traditionally undertaken by women and tends to focus on the traditional domestic role of the wife and mother, including caring for the home and family.[21] Where women's work extends beyond the home, it involves using many of the same domestic skills in the paid workforce, including caregiving, child raising, nurturing, patience, empathy, and caring for others etc. These skills have long been considered as natural or innate skills of women, as opposed to acquired skills, and therefore less valuable.[22] Because these skills are associated with the domestic role, they are not considered to be deserving of the recognition of remuneration, reflecting the entrenched cultural perceptions as to the relationship between skills and economic productivity. Domestic and caring roles were not viewed as being economically productive, so have historically been considered less valuable and therefore, less worthy of remuneration.

Gender stereotypes and biases also meant that even when the skills performed were not of a caregiving or homemaking nature, they were still regarded as less skilled and less valued when they were predominantly performed by women (for example, typing).

Prior to the enactment of the EPA and Government Service Equal Pay Act 1960, the New Zealand labour market was characterised by an industrial awards system.[23] Awards (which set out minimum pay rates and conditions of employment for an industry or sector) often expressly provided for women to receive a lower rate of pay than male employees.[24] In some awards, different job titles were allocated to men and women undertaking substantially the same work — with the women receiving lower rates of pay.[25]

The undervaluation of women's work in today's market is due to gender stereotypes, cultural norms, and historic discriminatory labour practices. Pay equity requires an objective consideration of the value of work undertaken by women, actively rejecting the social biases and discrimination that have led to systemic undervaluation.

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21 *Oxford English Dictionary* (online ed, Oxford University Press), definition of "women's work".

22 *Terranova* CA, above n 20, at [36].

23 At [20]–[21].

24 Commission of Inquiry into Equal Pay *Equal Pay in New Zealand* (September 1971) at [1.5] and [1.12] as cited in *Terranova* CA, above n 20, at [22].

25 Ministry of Women's Affairs *Report on the Effectiveness of the Equal Pay Act 1972* (September 1994) at [30]–[34]; and Urban Research Associates, PJ Hyman and A Clark *Equal Pay Study Phase One Report* (Department of Labour, 1987) at 35–41, as cited in *Terranova* CA, above n 20, at [22].

IV THE GENDER LEGACY

In the recent case of *New Zealand Post Primary Teachers' Association Inc v Secretary for Education*, the Employment Court suggested that gender domination in a workforce can leave a legacy.[26] Although this case was heard prior to the legislative reforms coming into effect, the concept of a gender legacy is likely to have relevance in the area of pay equity.

The case involved a claim from the union that part-time secondary school teachers were unlawfully discriminated against on the basis of sex. This was because of the way they were paid under the collective agreement which was different from the way full-time teachers were paid under the same collective agreement.[27] The union considered full-time teachers to be an appropriate comparator for part-time teachers on the basis that male teachers had historically dominated the teaching profession and that this had manifested itself in the collective agreement.[28] This was despite acceptance that female full-time teachers had outnumbered male full-time teachers for the last 20 years.[29] The Court concluded that the union had failed to establish that the collective agreement created a detriment for part-time teachers and therefore there was no inequity.[30]

The Court considered whether the legacy of male gender incumbency ("the male legacy") continued to influence the terms and conditions of the secondary teaching profession despite the profession no longer being male dominated.[31] However, the Court determined that it did not have sufficient evidence to make such a determination.[32] Therefore, the Court concluded: "We would not conclude that the teaching profession today could reliably be said to retain the trappings of male domination evident from many years ago."[33]

The Court accepted that "the trappings of male domination" can work their way out of the system over time.[34] This means that a profession that has

26 *New Zealand Post Primary Teachers' Association Inc v Secretary for Education* [2021] NZEmpC 87 at [174].
27 At [19]–[29].
28 At [120].
29 At [128].
30 At [185]–[186].
31 At [134].
32 At [134]–[135] and [159].
33 At [162].
34 At [162].

been historically male dominated but is now female dominated, may no longer be subject to undervaluation on the basis of gender. This concept of a gender legacy and whether it continues to influence the remuneration of a profession will be a relevant consideration in assessing a pay equity claim and establishing whether there is an undervaluation in pay based on sex.

V THE PATH TO PAY EQUITY IN NEW ZEALAND

A The Terranova litigation

In 2012, Kristine Bartlett and a number of other aged care workers claimed that the wages paid by Terranova Homes and Care Limited (Terranova) to aged care workers did not constitute "equal pay" within the meaning of the EPA as it stood at that time.[35] This was not because they were paid less than men doing the same work — which was traditionally understood to be the limit of the scope of that EPA.

Rather, Kristine Bartlett's argument was one of pay equity — that the systemic undervaluation of work historically performed by women meant that aged care workers were paid less than roles with similar skills and responsibilities which were traditionally performed by men.[36] The claim was that the pay rate of $13.75– $15.00 per hour was significantly lower than it would be if the aged care sector was not a female dominated sector.[37]

The Employment Court agreed with the pay equity argument, referring to the "dual" or "twin" purposes of the EPA and concluding that the EPA was intended to include the concept of pay equity as well as that of equal pay.[38]

The Employment Court considered that men in the same workplace or sector could be an appropriate comparator if their pay was "uninfected by current or historical or structural gender discrimination".[39] If a comparator "uninfected by gender discrimination" could not be found within the workplace or the sector, the Employment Court acknowledged that it may be necessary to look more broadly, to jobs to which a similar value could be attributed using gender neutral criteria.[40] Abstracting from skills, responsibility, conditions and degrees of effort, as well as from any systemic undervaluation of the work

35 *Terranova* EmpC, above n 19.
36 At [5].
37 At [3] and [5].h
38 At [42] and [44].
39 At [46].
40 At [46].

derived from current or historical or structural gender discrimination, the pay for work predominantly performed by women was to be determined by reference to what men would be paid to do the same work.[41]

The Employment Court's decision was a landmark one for pay equity — radically departing from the previous understanding of the scope of the EPA.

Terranova appealed the Employment Court's decision and the Court of Appeal was required to determine whether the answers given by the Employment Court to the two questions based on the premise that the EPA provides for pay equity were wrong in law.[42] The Court of Appeal held that the Employment Court had not misinterpreted the EPA and had correctly answered the two questions.[43] The case was subsequently directed back to the Employment Court for resolution.[44] Terranova sought leave to appeal to the Supreme Court, which was declined in 2014.[45] A Crown settlement resolved the financial issue so that further litigation was unnecessary. However, critically, both the Employment Court and the Court of Appeal had determined that the EPA as it stood at that time could include a claim for pay equity.

This decision was momentous and led to the establishment of a Joint Working Group on Pay Equity Principles, which in turn, led to legislative reform.

B Legislative reform

Although the Courts had determined that the EPA could include a claim for pay equity, both the National and Labour parties considered legislative reform was appropriate to provide a process for raising and resolving pay equity claims that would not require immediate resort to litigation. The EPA was therefore amended to specifically prohibit differentiation on the basis of sex between the rate of remuneration for work that is predominantly performed by women and the rate of remuneration that would be paid to men who have the same, or substantially similar, skills, responsibility, experience, conditions of work, and degree of effort.[46]

The EPA now explicitly incorporates this concept of pay equity, although

41 At [118].
42 *Terranova* CA, above n 20, at [69] and [71].
43 At [81].
44 At [239]–[240].
45 *Terranova Homes and Care Ltd v Service and Food Workers Union Nga Ringa Tota Inc* [2014] NZSC 196, [2015] 2 NZLR 437 at [18]–[19].
46 See the Equal Pay Amendment Act, which came into force on 6 November 2020.

it has retained its original title, which refers solely to equal pay.[47] Employees or unions are now able to raise pay equity claims under the prescribed regime set out in the EPA and seek to resolve the pay inequity with the employer without recourse to litigation.[48] The purpose of the reformed EPA is to set a low threshold for raising a claim and provide a "simple and accessible process to progress a pay equity claim".[49] In effect, the legislation makes pay equity a common goal to be pursued by employers and employees working together.

VI THE PAY EQUITY CLAIM PROCESS

The pay equity claim process is comprised of three key parts — raising a claim, assessing the claim, and settling the claim. The stages that make up each of these parts of the claim process are addressed below.

A Raising a pay equity claim

Either unions or employees are able to raise a pay equity claim.[50] A pay equity claim must be in writing, state that it is a pay equity claim made under the EPA and (among other required information) include a brief description of the work to which the claim relates.[51] Under the EPA, unions play a crucial role in the raising, assessing and settling of pay equity claims. Although individual employees are entitled to raise a claim, it is clearly anticipated that in general it will be unions who work with employers to progress pay equity claims on behalf of an entire workforce or sector. It is likely through sector-wide union-raised claims that systemic undervaluation will be most effectively redressed on a significant scale.

1 Arguability

Once an employer receives a pay equity claim, they have 45 working days (unless extended) to determine whether the claim is arguable.[52] A claim is arguable if:[53]

47 Equal Pay Amendment Act, s 18. Section 18 inserted a new part 4 to the EPA titled "Pay equity claims".
48 Equal Pay Act.
49 Section 13A.
50 Section 13E.
51 Sections 13G–13I.
52 Section 13Q(1). See also section 13J which requires the employer to acknowledge receipt of the claim and give notice of the claim to every union with members who perform work the same as, or substantially similar to, that referred to in the claim no later than five working days after receiving the claim.
53 Section 13F(1).

i) it relates to work that is or was predominantly performed by female employees; and

ii) it is arguable that the work is currently undervalued or has historically been undervalued.

The employer is required to take a "light-touch approach" to this assessment as the purpose of the legislation is to set a low threshold for raising a claim.[54] The EPA assists by defining the meaning of work "predominantly performed by female employees" as being "work that is currently, or that was historically, performed by a workforce of which approximately 60% or more members are female".[55] In considering whether it is arguable that work is currently undervalued or has historically been undervalued, any relevant factor can be taken into account, including the following, non-exhaustive list of factors set out in section 13F(3) of the EPA:[56]

i) The origins and history of the work, including the manner in which wages have been set;

ii) Any social, cultural, or historical factors;

iii) Characterisation of the work as women's work;

iv) That the nature of the work requires an employee to use skills or qualities that have been generally associated with women and regarded as not requiring monetary compensation; and

v) Any sex-based systemic undervaluation of the work as a result of a dominant source of funding, a lack of effective bargaining, occupational segregation or failure to properly assess or consider the remuneration that should have been payable to account for the nature of the work, the levels of responsibility associated with the work, the conditions under which the work is performed and the degree of effort required to perform the work.

Deciding that a pay equity claim is arguable does not mean that the employer agrees that there is a pay equity issue or that there will be a pay equity claim

54 Section 13Q(2).
55 Section 13F(2).
56 Section 13F(3)(a)–(e).

settlement as a result of following the pay equity claim process.[57] Rather, it is simply an acknowledgement by the employer that there may be an issue, and the parties can enter the pay equity process to determine whether undervaluation exists.

If an employer determines that a claim is not arguable, it must notify the claimant of that decision, and provide the claimant with information on how to challenge that decision.[58] The claimant may seek further details from the employer as to the reasons for the decision.[59] Fully understanding the employer's justification for rejecting the claim as "not arguable" may assist the claimant in subsequently raising a claim that will be accepted. For instance, if the employer has rejected the claim on the basis that it is too broad and does not cover an identifiable workforce, the claimant may be able to narrow the claim — and thereby meet the threshold of arguability.

If an employer determines that a claim is arguable, it must notify the claimant of that decision, provide information about the pay equity bargaining process, and enter into the pay equity bargaining process with the claimant.[60]

2 *Affected employees*

The employer must give notice of an arguable claim to all affected employees.[61] "Affected employees" are employees who perform work that is the same as, or substantially similar to, the work covered by the pay equity claim.[62] The information that must be provided to affected employees in relation to a union-raised claim is extensive and is set out in pt 2 of sch 2 to the EPA.[63] This information must be given in writing and expressed in plain language.[64]

For union-raised pay equity claims, all affected employees are automatically covered by the claim.[65] Furthermore, the duty of good faith in s 4 of the Employment Relations Act 2000 applies to the relationship between the union

57 Section13Q(3).
58 Section 13S(3). To challenge the arguability decision, the claimant is able to refer the question of arguability to mediation, the parties may together refer the question to the Authority for facilitation, or the claimant may apply to the Authority for a determination as to whether the claim is arguable.
59 Section 13S(3)(b)(i).
60 Section13S(2).
61 Sections 13U and 13V.
62 Section 13B.
63 Schedule 2, pt 2.
64 Section 13V(3)(c).
65 Section13W(1). See also section 13ZA which provides that all new employees performing work covered by a union-raised pay equity claim will also be automatically covered by the claim and must be given notice of the claim when they commence employment.

and all employees covered by the union-raised pay equity claim (including those who are not members of that union).[66] This represents a significant departure from the way the good faith duty usually applies to unions. Unions are expected to be active and constructive in establishing responsive and communicative relationships with non-union member employees.

Despite the fact that unions are required to involve non-union members covered by the claim in the process, they are not able to require fees to be paid, although they are able to request a voluntary contribution towards the costs of bargaining.[67] It is likely that the new pay equity process will put significant pressure on unions, without the corresponding advantage of additional resources or revenue.

For individual-raised pay equity claims, all employees performing the same, or substantially similar, work must be notified of the claim and how they can raise their own claim, but they are not automatically joined to the claim or covered by the claim.[68]

3 *Opting out*

Although affected employees are automatically covered by a union-raised claim, non-union member employees are entitled to opt out of that coverage by giving notice in writing.[69] Union member employees are unable to opt out while remaining a member of the union but may opt out if they cancel their union membership first.[70] Employees can opt out of the pay equity claim right up until the point at which the vote is taken to determine whether a proposed settlement is approved or declined (including union member employees if they resign from the union first).[71]

The most obvious reason for an employee to opt out is if they are not comfortable with the direction of the pay equity process, the proposed settlement the parties have negotiated, or both. They may wish to reserve their rights to raise their own pay equity claim in the future or to raise a discrimination claim under the Employment Relations Act or the Human Rights Act 1993.

66 Section13C(3).
67 Section 13X.
68 Section 13V.
69 Section 13Y(1).
70 Section 13Y(3).
71 Section 13Y(2)(a)

4 *Multi-employer claims*

Unions are able to raise pay equity claims with more than one employer for substantially similar work. Such claims must be dealt with as a multi-employer claim.[72] The employers must enter into a single multi-employer pay equity process agreement (between the employer parties) to decide whether the claim is arguable and to then work through the pay equity bargaining process together with the union(s).[73] The duty of good faith requires the employers to use their best endeavours to enter into that agreement in an effective and efficient manner.[74]

Individual employers are able to opt out of a multi-employer claim if they have genuine reasons, based on reasonable grounds, to do so.[75] The claim against that employer must then be progressed as a separate claim.[76]

5 *Multi-union claims*

If more than one union raises a pay equity claim with the same employer for the same, or substantially similar, work, those claims must be consolidated by the unions.[77] The duty of good faith requires the unions to use their best endeavours to agree on how they will progress the consolidated claim.[78] However, unlike in relation to multi-employer processes, there is no requirement for the unions to enter into a written agreement setting out how this will occur.

B Assessing a pay equity claim

Once an employer has determined that a claim is arguable, the duty of good faith requires the parties to use their best endeavours to enter into an arrangement setting out a process for conducting the bargaining in an effective and efficient manner.[79] However, there is no obligation on the parties to enter into a written bargaining process agreement or terms of reference-type document. This is similar to the collective bargaining framework, in which the parties are required to use their best endeavours to enter into an arrangement setting out a

72 Section 13K(2).
73 Section 13K(2).
74 Section 13C(2)(d).
75 Section 13L(1).
76 Section 13L(2).
77 Section 13M(1)–(2).
78 Section 13C(2)(c).
79 Section13C(2)(d). This applies both to a pay equity claim raised by a union and a pay equity claim raised by an individual. For an individual-raised claim, the bargaining process agreement would be negotiated and agreed between the individual and the employer.

process for conducting the bargaining in an effective and efficient manner, but a written agreement is not actually required.[80] It will be best practice to have a written agreement between the parties setting out the process for conducting pay equity bargaining, as it is for collective bargaining. However, even if such an agreement is not reached, the parties will still be required to engage in the pay equity process in good faith.

The pay equity process requires the parties to undertake an assessment to determine whether, and to what extent, the relevant work is undervalued when considered against appropriate comparators.[81] This assessment is the most substantive part of the pay equity process. It is where the parties consider and determine the value of the work in order to ensure pay equity — in other words, to ensure that employees receive the same pay for work of equal value.

Only three sections of the EPA are devoted to explaining the assessment process despite the fundamental importance of this step in the process to pay equity outcomes: s 13ZC deals with the provision of information between parties, s 13ZD deals with what matters the parties must assess during the assessment phase, and s 13ZE deals with the identification of appropriate comparators.[82] Very little guidance is provided as to how the assessment process will occur or how comparators will be identified. Rather, these vital matters are left to the parties to manage between themselves. For a pay equity claim raised by an individual, the parties managing the assessment process are the individual employee and the employer; for union-raised claims, the parties are the union(s) and the employer(s).[83]

The EPA does require that all assessments must be objective and free from assumptions based on sex. It specifically states that it must not be assumed that prevailing views as to the value of work are free from such sex-based assumptions.[84] The point of the pay equity process is to remove undervaluation due to sex-based discrimination. A work assessment process that is not gender-neutral and cognisant of the fact that prevailing views may not be gender-neutral risks the work remaining undervalued, thereby defeating the purpose of the pay equity process.

Te Kawa Mataaho Public Service Commission (Te Kawa Mataaho) has

80 Employment Relations Act 2000, s 32(1)(a).
81 Equal Pay Act, s 13ZD.
82 Sections 13ZC–3ZE.
83 Section 13B definitions of “claimant” and “party”; and s 13ZD.
84 Section 13ZD(2).

produced a paper entitled "Pay Equity Work Assessment Process Guide", which provides some guidance as to how work assessments could occur.[85] Te Kawa Mataaho recommends a "factor-based analysis" of work which involves separating the work into its constituent parts (the factors) which describe elements of what the work entails, including skills used, responsibilities undertaken and the conditions and demands placed on someone who is carrying out the work.[86]

Te Kawa Mataaho also recommends one of three gender-neutral work assessment tools be used to assess the work covered by the claim and the work of potential comparators.[87] This involves gathering information about the relevant roles, particularly via interviews of those who perform the work, and then analysing that information using the gender-neutral tool.[88]

Using a purpose designed gender-neutral tool is a part of ensuring that gender-bias and historical or prevailing views as to the value of work are not reflected in the outcome. One interesting example Te Kawa Mataaho refers to is that in most traditional job evaluation systems, the only consideration for the factor involving people leadership is whether someone has direct reports.[89] The creation of gender-neutral work assessment tools recognises that the traditional job evaluation approach overlooks the hidden or undervalued skills more commonly the purview of women. For example, a gender-neutral tool is likely to consider whether workers must lead without authority, therefore requiring them to be skilled influencers and consensus builders.[90]

In undertaking the assessment process, the parties need to actively consider the so-called "soft-skills", or skills or qualities that have generally been associated with women. Section 13ZD of the EPA specifically refers to recognising the importance of skills, responsibilities, effort, and conditions that are or have been "commonly overlooked or undervalued in female-dominated work".[91] Some examples provided include social and communication skills, taking responsibility for the well-being of others, cultural knowledge, and

85 Te Kawa Mataaho Public Service Commission *Pay Equity Work Assessment Process Guide* (November 2020).
86 At 5.
87 At 5.
88 At 6–7.
89 At 6.
90 At 6.
91 Equal Pay Act, s 13ZD(2)(b).

sensitivity.[92] Section 13F must also be taken into account in the assessment process, and refers to the characterisation of work as "women's work".[93] The point of the pay equity process is to ensure that these skills are suitably valued and, ultimately, remunerated.

All parties must actively and consciously set aside any bias or subjective views as to the value of certain roles if they wish to achieve pay equity. This is true even when using a gender-neutral work assessment tool. The assessment process is also no place for advocacy if the goal is pay equity. Unions and employees are likely to have strong views on the value of the work that is the subject of the claim (and employers may also). However, those strong views need to be disregarded to enable an objective consideration of the information that has been collected during the interview process and the analysis of that information by way of the gender-neutral work assessment tool.

If subjectivity, personal views, and bias creep into the work assessment process then the value of the work will not be properly ascertained, and any pay equity outcome will not reflect the principles of pay equity or the purpose of the EPA.

The gender-neutral work assessment process is used for both the work covered by the claim and for potential comparator workforces. Potential comparators must be identified and information gathered for analysis. The goal is to find male comparators who are doing work of equal value to that covered by the pay equity claim. What may be considered to be the work of "male comparators" is not defined in the legislation.

Comparable work can include the same, or substantially similar work, performed by male comparators, or different work performed by male comparators but requiring substantially similar skills, experiences, responsibilities, working conditions and degrees of effort to the work under investigation.[94] The parties may also consider work performed by any other comparators that they consider to be useful and relevant.[95]

Choosing comparators and assessing them against the applicable workforce is likely to be the most labour-intensive part of the pay equity process. To

92 Section 13ZD(2)(b).

93 Section 13ZD(2)(c) provides that in making the assessments required s 13ZD(1), the parties must consider the list of factors in s 13F(3). Section 13F(3)(c) provides that a relevant factor will be the "characterisation of the work as women's work".

94 Section 13ZE(1)(a) and (b).

95 Section 13ZE(1)(c).

determine whether a workforce is an appropriate comparator, substantial information is required from and about that workforce. There is no compulsion in the legislation for this to be provided, rather employers are relying upon the good will of other employers to enable staff to attend interviews, complete surveys, and provide information. While this may be relatively smooth in the public sector due to the overarching expectations of Te Kawa Mataaho, it may be difficult to persuade non-public sector employers to assist other employers in the process.

The Ministry of Business, Innovation and Employment has created a central repository of pay equity data and information about pay equity claimants and comparators, where parties have agreed to share this information.[96] The ability to access relevant data from previous pay equity processes, rather than the parties to each claim needing to undertake the entire process from scratch, may enable claims to be assessed more easily. In addition, it may prevent comparator fatigue where data can be reused rather than potential comparator organisations being requested to work through the process numerous times. Data should only be used from the central repository if it matches closely with the process that the parties are using for the collection of new data to ensure that there is consistency in the process used and data gathered within the claim.

As an example of comparators, the Teacher Aide Pay Equity Claim that was settled between the Ministry of Education Te Tāhuhu o te Mātauranga and the New Zealand Education Institute Te Riu Roa in May 2020, prior to the amendments to the EPA, assessed comparator workforces including Corrections Officers, Customs Officers, Oranga Tamariki Youth Workers, and School Caretakers.[97] Clearly, these comparator roles perform significantly different work from each other, and from Teacher Aides. However, the knowledge, skills, responsibilities, demands, and working conditions were assessed as having similarities in certain areas — and consequently, the roles were considered to be suitable comparators.[98]

Once the work covered by the claim and the work of appropriate comparators has been considered, the parties are able to establish whether the work covered by the claim is undervalued on the basis of sex. The remuneration of the comparator roles has been determined by market forces but as the work

96 Employment New Zealand "Pay equity" (29 July 2021) <www.employment.govt.nz>.

97 Ministry of Education Te Tāhuhu o te Mātauranga *Teacher Aide Pay Equity Claim Report — Processes, evidence and information for assessing pay inequity for teacher aides* at 18 and 25–27.

98 At 28.

is predominantly performed by male employees, it is highly unlikely that it has been negatively affected or undervalued by sex-based discrimination. The remuneration of comparator workforces can therefore be compared with the remuneration of the workforce covered by the claim to establish whether undervaluation exists.

Terms and conditions of employment other than remuneration can also be compared and factor into the determination of whether the work covered by the claim has been undervalued.[99]

C Settling a pay equity claim

If the assessment process establishes that the work that is the subject of a pay equity claim is undervalued, the parties are able to turn their minds to correcting that undervaluation.[100] The comparison of the rates of remuneration and terms and conditions of employment of comparator workforces, with the rates of remuneration and terms and conditions of the work covered by the claim, provides a good starting point for negotiations.

In order to settle a pay equity claim — and achieve pay equity — the parties must agree on a rate of remuneration that ensures there is no differentiation on the basis of sex.[101] A pay equity settlement must also include agreement on a process to review remuneration, including the agreed frequency of reviews, to ensure that pay equity is maintained.[102] This requirement recognises that the gender stereotypes and biases which may have historically led to undervaluation have not been entirely eliminated. A pay equity claim settlement may also include terms and conditions of employment other than remuneration, if the parties agree, but an employer may not reduce any terms and conditions of employment of an employee who has raised a pay equity claim when settling that claim.[103] This means that there can be no trade-offs in bargaining, which is appropriate given that the purpose of a pay equity claim settlement is to redress an undervaluation.

Prior to settling a union-raised claim, the union is required to obtain a mandate to settle from the employees covered by the claim.[104] This includes

99 Equal Pay Act, s 13ZD(1)(b) and (c).

100 If undervaluation is not established, the pay equity process concludes on the basis that there is no sex-based discrimination needing correction.

101 Equal Pay Act, s 13ZH(1)(a)(i).

102 Section 13ZH(1)(a).

103 Section13ZH.

104 Section 13ZF.

both union members and non-union member employees who have not opted out of the claim.[105] Once a proposed settlement has been reached, to obtain the mandate, the union must arrange for a vote to take place, enabling all covered employees to vote on whether to approve or decline the proposed settlement.[106] The votes of union and non-union employees covered by the claim are of equal value.[107] If the outcome of the vote is that a simple majority of those who voted approve the proposed settlement, then the union must sign it.[108] Non-union member employees are entitled to opt out of the process right up until the final date by which their vote must be cast.[109]

D Implementation

Once signed, a pay equity settlement is implemented by way of automatic variation to all relevant employment agreements.[110] In this regard, the employment agreement, whether individual or collective, of an employee covered by a pay equity claim settlement is deemed to be varied to take account of the settlement.[111] This includes the new remuneration and any other terms or conditions of employment more favourable to the employee that were agreed in the pay equity claim settlement.[112] Although this sounds easy, it may be challenging in practice for large-scale union-raised claims where many different employment agreements are required to be automatically varied by the same settlement agreement.

In practice, as well as amending employment agreements, an employer must ensure that it has processes and procedures in place to give effect to the new rates of pay and any other terms and conditions agreed to. In addition, the benefits of a union-raised pay equity claim settlement must be offered to all other employees performing the work covered by the claim.[113] This includes employees who had previously opted out of coverage of the claim and all new employees employed to perform the work to which the settlement relates. Offering the benefit of a pay equity claim settlement requires that the same remuneration and other terms and conditions covered by the settlement are

105 Section 13ZF(1)(b).
106 Section 13ZF(5).
107 Section 13ZF(4)(a).
108 Section 13ZF(4)(c)(iv).
109 Section 13Y(2)(a).
110 Section 13ZM(3).
111 Section 13ZM(2).
112 Section 13ZM(2)(a) and (b).
113 Section 13ZL(2).

offered, including any back pay that is part of the settlement.[114] Employees must be informed that accepting the offer will have the effect of barring the employee from raising their own claim in relation to pay equity.[115] An employee could refuse such an offer with a view to pursuing their own claim if they consider that the offered settlement does not appropriately redress the undervaluation.

However, employees are prevented from double-dipping. Employees who are pursuing an unlawful discrimination complaint under the Human Rights Act or an unlawful discrimination personal grievance under the Employment Relations Act, are not entitled to any benefits obtained as part of a pay equity claim settlement.[116] Similarly, employees who have already settled a pay equity claim with the employer or accepted the benefit of a pay equity claim settlement from the employer are not entitled to the benefits of another pay equity claim settlement.[117]

The legislative requirement to pass on the benefit of a pay equity claim settlement relates to union-raised pay equity claims only. The benefit of the settlement of a pay equity claim raised by an individual employee may be offered to other employees performing the work to which the claim relates, but this is not a requirement.[118]

However, it is important to remember that pay equity is not simply about negotiating an increase to pay rates. Rather, it is about ensuring employees are appropriately remunerated for the value of the work that they perform, and that they are not discriminated against on the basis of sex. This means that when an employer settles a pay equity claim (with a union or with an individual employee), it is on the basis that undervaluation of the work due to sex-based discrimination has been established and that the new agreed rate of pay corrects that undervaluation.

The EPA requires that an employer ensures there is no differentiation on the basis of sex, between the rate of remuneration for work that is predominantly performed by women and the rate of remuneration that would be paid to men who have the same, or substantially similar, skills, responsibility, experience,

114 Section 13ZL(1)(a) and (b).
115 Section 13ZL(1)(c).
116 Section 13ZL(2)(c)
117 Section 13ZL(2)(d).
118 Section 13ZL(4).

conditions of work, and degree of effort.[119] Not offering the benefit of an individual-raised pay equity claim settlement to other employees therefore leaves the employer in the position of knowingly discriminating on the basis of sex against its other employees performing that work as the employer knows (due to having undertaken the pay equity assessment) that the work is undervalued. This could leave the employer exposed to a personal grievance claim for discrimination under the Employment Relations Act[120] or a complaint under the Human Rights Act.[121]

Consequently, although the EPA does not require the benefit of the individual-raised claim settlement to be passed on, it may be prudent for employers who have worked through an individual-raised claim and established undervaluation to act to ensure that undervaluation is corrected for all its employees who perform the same or substantially similar work. To not do so means that the employer leaves itself open to future discrimination claims. In addition, employees who accept the benefit of such an offer will be barred from raising their own claim, so passing on the benefit may prevent the employer from having to undertake the same pay equity exercise in relation to other employees performing the same work.

1 New employees

An employer who is party to a pay equity claim settlement with a union must offer the benefit of that settlement to new employees at the same time as they are offered employment.[122] Accepting the benefit of that offer prevents the employee from raising their own pay equity claim in respect of that work (unless the Authority or court determines otherwise in accordance with s 13ZY(5) which requires exceptional circumstances).[123] New employees must be employed pursuant to the 30-day rule where there is an applicable collective

119 Section 2AAC(b).

120 Employment Relations Act, s 103(1)(c).

121 Human Rights Act 1993, s 76(2)(a) provides that a member of the Human Rights Commission has the ability to receive and assess a complaint alleging that there has been a breach of pt 1A or pt 2, or both, of the Act. Section 22(1)(b), which forms part of pt 2, provides that it shall be unlawful for an employer, or any person acting or purporting to act on behalf of an employer to offer or afford the applicant or the employee less favourable terms of employment, conditions of work, superannuation or other fringe benefits, and opportunities for training, promotion, and transfer than are made available to applicants or employees of the same or substantially similar capabilities employed in the same or substantially similar circumstances on work of that description by reason of any of the prohibited grounds of discrimination, one of which is discrimination on the basis of sex.

122 Equal Pay Act, s 13ZL(5) and (6).

123 Section 13E(6).

agreement, which requires that they are employed on the terms and conditions in the collective agreement and any additional terms and conditions mutually agreed to.[124] They therefore effectively have no choice but to accept the benefit of the pay equity claim settlement if they want to accept employment with the employer (as the collective agreement will have been varied to include the terms of the settlement).[125]

Accepting employment on the basis of these terms and conditions means they are immediately barred from raising their own pay equity claim. Existing employees have a choice whether to be covered by a pay equity claim settlement, and consequently can choose to give up their right to raise their own pay equity claim. New employees do not get that choice. They were not part of the pay equity process but by accepting employment with the employer, they automatically give up their right to raise their own claim. Their only choice is whether to accept employment with the employer, and thereby be covered by the settlement and give up the right to raise their own claim, or not to accept the offer of employment at all.

2 *Reviewing and maintaining pay equity*

A pay equity settlement must include agreement on a process to review remuneration to ensure that pay equity is maintained, including the frequency of those reviews.[126] Reviews must be aligned with any applicable collective bargaining rounds or, if no collective bargaining round applies, must be at least every three years.[127]

A requirement to review is intended to ensure that where undervaluation has been redressed, that undervaluation is not permitted to creep back in over time. Reviewing pay equity is not going to require the parties to work through the full pay equity process every three years. While the EPA is silent on what process should be followed, the parties may choose to first look at the comparator workforces that were chosen for the claim and consider any movement in these pay rates since the claim was settled. The parties will also need to consider any reasons for such movement and whether these reasons may be entirely disconnected from the value of the work. For example, a shortage in the sector may have led to a marked increase in pay rates to attract

124 Employment Relations Act, s 62(3).
125 Equal Pay Act, s 13ZM(2).
126 Section 13ZH(1)(a)(ii).
127 Section 13ZH(3)(b)(ix).

employees. However, this does not mean the value of the work itself in terms of required skills, responsibilities, experience, working conditions, and degrees of effort has changed since the time the pay equity settlement was reached. In this scenario, the pay rate has increased disproportionately for other reasons.

E Judicial assistance and dispute resolution

There are many points in the process set out above when the parties may find themselves with opposing or conflicting views. Mediation is available to the parties to assist them in working through such disagreements.[128] If mediation is insufficient, the parties can refer disputes to the Employment Relations Authority for facilitation,[129] or apply for a determination.[130] The Authority is entitled to consider any matter relating to a pay equity claim and importantly, can make a determination that fixes (that is, determines) remuneration, ensuring pay equity for the parties.[131]

VII CHALLENGES FACING PAY EQUITY

The process of raising, assessing, and settling a pay equity claim is intended to be straightforward and accessible. However, parties working through the process are likely to face some significant challenges.

A Changing societal norms

Work typically performed by women has been, and still is, systemically undervalued due to social, cultural, and historical factors. Naturally, this has affected the remuneration paid for that work and resulted in fundamental pay inequities. The "market rate" for people working in traditionally female dominated occupations may not be a fair or equitable rate. A free-market economist might say that it is for the market — a deregulated and flexible market — to solve this undervaluation. In a perfect world, such undervaluation ought to work its way out of the system through the market forces of supply and demand. A proponent for the free market would likely argue that this would be a fairer mechanism for achieving pay equity, as it negates any need for government intervention.

However, the market pays "women's work" less than it would if it was work performed by men because "women's work" is less valued by society.

128 Section 13ZO.
129 Section 13ZQ.
130 Section 13ZY.
131 Section 13ZY(1)(d)(i).

The market reflects and reproduces the societal sex-based discrimination and unconscious bias against women, and it takes a long time for the ingrained views of society to change. To counter this, pay equity legislation attempts to force that change in the market.

Parliament can enact legislation to influence the free market to target systemic sex-based discrimination, but it cannot forcibly alter ingrained societal norms, cultural understandings or unconscious bias. In this regard, pay equity is a social issue, and legislation has limited ability to advance a social issue or be an instrument for social change. Changing the law does not automatically change prevailing social attitudes, but it may play an essential role in driving that change over time.

1 Unconscious bias

It is important that the parties implementing pay equity legislation actively consider their own potential biases and the impact societal norms may have on their perspective when working through the pay equity process. As an example, one of the comparators used for the settlement of the Teacher Aide Pay Equity Claim (prior to the enactment of the current legislation) was Corrections Officers.[132] The instinctive reaction may be one of surprise that the work of Teacher Aides and that of Corrections Officers were considered by the parties to be of equal value. However, the question is whether this instinctive reaction comes from an unconscious, ingrained view of the value of the role of a Teacher Aide, a view that is likely shaped by the fact that it is a role predominantly performed by women.

To properly assess pay equity claims, it is necessary for all parties to put aside, or at least question, any instinctive reaction as potentially being influenced by ingrained societal norms or unconscious bias. This can be hard and uncomfortable. Parties should explore, rather than ignore, the value that society has traditionally put on such work. Parties working together to resolve pay equity claims should be talking about why it is that "soft skills" or "women's work" are generally considered to be of less value and worthy of lower remuneration. It is only through airing these hard questions that parties will be able to put aside any societal sex-based discrimination and get to the true value of the work itself.

The EPA is intended to guide parties towards these discussions, directing

132 Ministry of Education Te Tāhuhu o te Mātauranga, above n 97.

the parties away from an acceptance of the status quo and towards a new understanding of the value of work and how we attribute value. Nonetheless, it is still up to the parties themselves to consciously question and remove any unconscious bias.

2 The effect of the law

It is not a new idea that changes in the law may not change the public mindset. Changing societal norms happens in the hearts and minds of the people, and it is a much slower and more personally challenging process than the enactment of legislation.

Ms Doyle's article in the 2018 edition of this Journal, prior to the introduction of the current legislation, concluded that the legal mechanisms intended to progress gender equality must be supported by broader political, social and economic concerns.[133] Effectively, the law alone is not enough to engender social change. Nonetheless, there is hope that the law can be used as a tool to increase the remuneration for "women's work" via the resolution of pay equity claims, which may eventually increase the social value of that work. Over time, if the undervaluation of "women's work" is driven out of the market, the social attitude towards the value of that work is likely to change also. In addition, once the work of female dominated workforces is more highly remunerated and valued by society, these roles may become more attractive to men which in turn will help with changing social attitudes to the work.

The EPA attempts to resolve discrimination in pay on the basis of sex only. It does not consider the impact of ethnicity on pay, and specifically, where gender and ethnicity intersect, even though such intersectionality has the potential to result in intensified undervaluation. However, by reducing the undervaluation of women overall, the appropriate resolution of pay equity claims for female-dominated workforces should also make progress towards reducing the undervaluation of women in minority groups.

3 Maintaining relativities

Relativities exist within the market. Pay equity necessarily disrupts these relativities and this can be a challenging concept. As an example, male-dominated Workforce A is used to earning more than female-dominated Workforce B. However, following female-dominated Workforce B's pay equity

133 Doyle, above n 1, at 166–167.

claim, Workforce B is assessed as performing work of equal value to Workforce A. As part of the settlement of the pay equity claim, Workforce B's pay rate is lifted to be equivalent to Workforce A's pay rate. Workforce A becomes disgruntled to learn that Workforce B now earns the same amount as them, always having considered themselves to be a higher paid workforce. Workforce A considers that they should be paid more than Workforce B, and therefore that their pay should increase. However, maintaining the relativities between the workforces defeats the goal of removing undervaluation. If Workforce A's pay rate is lifted, Workforce B once again falls behind and earns less than a workforce assessed as doing work of equal value. It is important to appreciate that an increase in remuneration due to the settlement of a pay equity claim is not a pay rise. Rather, it is a correction of an historical undervaluation.

This is not a challenge faced by the parties progressing a pay equity claim, but a challenge faced by society to accept the outcome of those claims. A change to the law is unable to change the public mindset. A mindset shift is required for people to understand that when the undervaluation of a role is corrected, this does not mean that other roles should receive the same pay adjustment to maintain existing relativities.

B Funding and affordability

Pay equity is a common goal that should be pursued by employers and employees working together. However, only the employer party will be required to fund the outcome of a pay equity claim settlement. Although there may be a general acceptance against sex-based discrimination in pay, employers may not be quite so magnanimous when the principle of pay equity is applied to their own workplace and balance sheets.

In *Service and Food Workers Union Nga Ringa Tota Inc v Terranova Homes and Care Limited*, the Employment Court considered the cost to employers of achieving pay equity but determined that such concerns were overshadowed by "the unquantifiable cost (including societal cost)" of perpetuating discrimination.[134] The Court stated:[135]

> History is redolent with examples of strongly voiced concerns about the implementation of anti-discrimination initiatives on the basis that they will spell financial and social ruin, but which prove to be misplaced or have

134 *Terranova* EmpC, above n 19 at [109].

135 At [110].

> been acceptable as the short term price of the longer term social good. The abolition of slavery is an old example, and the prohibition on discrimination in employment based on sex is both a recent and particularly apposite example.

The Court of Appeal also considered the cost issue, stating that an employer's source of revenue or ability to pay, could not form part of the "conditions" that could be taken into account when considering pay equity.[136] The EPA does not allow affordability to be a consideration for pay equity. Pay equity is not based on an employer's ability to pay, but the level of pay that an employee's work deserves. Employers must accept the requirement to pay a higher rate of pay in occupations undervalued on the basis of sex, not in the expectation of greater output, but because it is the fair, lawful, and just thing to do.

It is possible for a pay equity settlement to put an employer out of business. While regrettable, the law considers it to be more important to pay women in accordance with the value of the work they are performing than to protect employers from increased wage costs. This is the tension between social justice and fiscal constraints.

1 Government funding

The vast majority of pay equity claims that have been raised to date are for workforces either within the public sector or in the Government-funded sector. In determining whether a pay equity claim is arguable, an employer may have regard to any sex-based undervaluation that may have resulted from (among other factors) a dominant source of funding across the relevant market, industry, sector, or occupation, or a lack of effective bargaining in the relevant market, industry, sector, or occupation.[137]

By enacting the EPA, Parliament appears to be seeking to "fix" the Government's and the funded sector's undervaluation of women's work brought about by the desire to keep public and funded sector wage costs down. Despite the anticipated cost, the New Zealand Government considers achieving pay equity to be a priority.[138] In fact, the Public Service Pay Guidance 2021 makes

136 *Terranova* CA, above n 20, at [174].

137 Equal Pay Act, s 13F(3)(e)(i) and (ii).

138 Te Kawa Mataaho State Services Commission and the Ministry for Women *Eliminating the Public Service Gender Pay Gap 2018-20: Action Plan Progress Report* (July 2020) at 4.

it clear that although the Government is in a time of fiscal constraint, the importance of addressing gender and ethnic pay inequities is unaffected.[139]

2 *Affordability for unions*

The significant time and resource that will be required from unions to progress a pay equity claim means that unions are also likely to see increased cost under the new legislation. As explained above, under the new legislative framework unions are expected to represent their fee-paying members and also ensure that the views of non-union members are taken into account. The legislation does not go as far as requiring unions to represent non-union members, but it does create a good faith relationship between unions and non-union members covered by a claim.[140] However, non-union members cannot be required to assist in funding the cost to the union of progressing the claim, although they can be asked to make a voluntary contribution.[141] Unions may find themselves facing an additional high workload but with nowhere to fund it from. If substantial resources are directed toward pay equity claims, unions run the risk of not being able to progress other critical issues or business as usual.

C The high-level nature of the legislation

The new legislation has been in force for nearly a year and during that time, many questions have been raised as to how to implement the new provisions. Unfortunately, the legislation does not provide mechanisms for dealing with the detail, despite appearing straightforward and process-based. In some respects, the legislation is highly prescriptive but in others, it is silent or unclear. For example:

> i) Does an employee who resigns their employment remain covered by a pay equity claim, and therefore remain able to vote on any proposed outcome and receive any backpay?
>
> ii) What happens to a union-raised claim if all employees covered by that claim opt out?
>
> iii) Can an employee who has opted out of a claim subsequently opt back in?

139 Te Kawa Mataaho Public Service Commission *Public Service Pay Guidance 2021* (May 2021) at 1.
140 Equal Pay Act, s 13C(3).
141 Section 13X.

iv) What might constitute a genuine reason based on reasonable grounds enabling an employer to opt out of a multi-employer claim?

v) What makes work "substantially similar" to other work?

vi) Should a claim cover a specific role or occupation, or can it be broader, encompassing a common purpose within a large number of different roles?

vii) How do employer parties progress a multi-employer claim when another employer party does not engage in the process?

Further, the legislation does not provide the mechanics for how a claim will be assessed and settled as it is limited to outlining the process that must be followed. As an example, unions are expected to "consolidate" their claims when more than one union raises a claim for the same work with the same employer.[142] This can happen at any point in the pay equity process. No guidance is provided as to how unions should go about this other than that they owe each other a duty of good faith and must use their best endeavours to agree on how they will progress the consolidated claim.[143]

1 *Multiple employers*

A claim that involves multiple employers must be managed collaboratively by the employers with whom that claim has been raised.[144] Ultimately, the legislation presumes a high level of co-operation between all parties who may be involved in a pay equity process. This is also the case with collective bargaining, but it is becoming apparent that large-scale pay equity claims are likely to include substantially more employers, and potentially more unions, in the same process than collective bargaining tends to. The level of collaboration required will be difficult to achieve on a practical level and time-consuming.

There are claims currently progressing through the pay equity process involving multiple employers as well as multiple unions, and it is becoming clear that the anticipated level of collaboration is not occurring. It is one thing for legislation to state that multiple employer parties or multiple union parties will work together, but it is quite another for those employer parties or union parties to demonstrate such cooperation.

142 Section 13M(1)–(2).
143 Section 13C(2)(c).
144 Sections 13C(2)(b) and 13K.

The legislation is necessarily complex due to the complex nature of the problem it seeks to address, and there is no perfect answer or solution. This leaves the parties to each claim to resolve questions and complexities, either through collaboration and cooperation, or litigation. Given that the legislation leaves some matters either open to negotiation or unaddressed, litigation is likely to be necessary to guide parties in how to apply the legislation and embed its implementation.

D The broad scope of claims

The legislation aims to enable pay equity across workforces or occupations rather than simply within the workplaces of individual employers. To this end, unions have the ability to raise claims with multiple employers at the same time, and the employers must work together to assess and process the claim. To make the most of this workforce or sector approach, unions are raising large-scale pay equity claims to redress the potential undervaluation of the work of large groups of their members. However, umbrella claims that cover vast workforces, such as the claim from the New Zealand Public Service Association Te Pūkenga Here Tikanga Mahi (PSA) to the public service for clerical and administrative work, are potentially unwieldy. The PSA's claim for clerical and administrative staff covers over 100 roles at over 40 different government departments, agencies and entities.[145] Roles named in the claim include Payroll Officers, Legal Secretaries, Human Resource Coordinators, Logistical Support Officers, Weathertight Administrators, and Transport Officers — to name just a few.[146]

The complexity of large-scale pay equity claims raises difficult questions. For example, whilst the roles named in the PSA claim all fall under the umbrella of clerical and administrative work, it is presumably questionable whether these employees (and the 100 other named roles) all do the same or substantially similar work. Even if the work is similar, it is highly likely that the pay structure and terms and conditions for these staff will be diverse. Reaching a settlement that achieves pay equity for so many different positions is likely to be challenging, time consuming, costly, and potentially result in

145 Template letter from Kerry Davies (National Secretary of the New Zealand Public Service Association Te Pūkenga Here Tikanga Mahi regarding the claim for the implementation of equal pay on behalf of PSA members who predominantly perform clerical and administrative work (31 October 2019). Departments, agencies and entities subject to the claim are listed in Appendix 1; indicative roles included in the claim are listed in Appendix 2.

146 Appendix 2.

some groups being disadvantaged. In addition, under the new legislative framework employment agreements are deemed to be automatically varied from the date the parties enter into a pay equity claim settlement.[147] Reaching a pay equity claim settlement that results in the variation of a number of different employment agreements, while achieving pay equity for all employees concerned, will be a complex operation.

It will be essential to keep settlements as simple as possible. Having settlements solely focused on remuneration rather than amending other terms and conditions is likely to be the most practical approach, although the legislation does provide for the amendment of other terms and conditions of employment in achieving pay equity.[148] Even amendments to remuneration will need to be straightforward, perhaps providing for minimum pay rates, in order to ensure the settlement can easily be incorporated into a variety of different structures. The more roles a claim covers, the more complex the settlement and variation is likely to be.

VIII CONCLUSION

Following the decisions of the Employment Court and Court of Appeal in the *Terranova* cases, pay equity became an operative concept in New Zealand. The EPA was amended to incorporate the concept of pay equity more clearly into the existing legislation with the intention of making pay equity simple and accessible.[149] Despite this intention, the legislation is complex, which is not surprising given the inherent complexity and ingrained nature of the issue that it seeks to address. Since the new pay equity legislation came into force, the challenges inherent in attempting to redress sex-based discrimination in pay are being felt.

Although the law has changed, that does not automatically change societal views on the value of women's work. Changes in the hearts and minds of the people may be slower to materialise. Regardless, the change in the law and each settled claim will assist in moving us towards a society where "women's work" is valued despite, or even because of, its traditional association with women. The natural result of legislating to "fix" an issue as complex and deep-seated as sex-based discrimination in pay is that it will take substantial time, effort,

147 Equal Pay Act, s 13ZM(2).
148 Section 13ZH(2).
149 Equal Pay Amendment Act.

collaboration, and ultimately judicial clarification to achieve progress. Despite the challenges, this author considers it to be a step in the right direction.