

15 July 2020

Hon David Parker, Attorney-General

## **Consistency with the New Zealand Bill of Rights Act 1990: Equal Pay Amendment Bill Supplementary Order Paper**

### **Purpose**

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1. The Minister for Workplace Relations and Safety and the Minister for Women are seeking to present the House with a Supplementary Order Paper on the Equal Pay Amendment Bill ('the Bill').
2. There is no statutory requirement for Supplementary Order Papers moved after a Bill's introduction to be formally vetted for consistency with the New Zealand Bill of Rights Act 1990 ('the Bill of Rights Act'). However, it is possible for the Attorney-General to bring the House's attention to relevant matters under Standing Order 372(1), and you have requested that this Supplementary Order Paper be formally vetted.
3. Therefore, we have considered whether the Equal Pay Amendment Bill Supplementary Order Paper ('the SOP') is consistent with the rights and freedoms affirmed in the Bill of Rights Act. The Bill was vetted prior to introduction in 2018 and found to be consistent with the Bill of Rights Act.
4. We have not yet received a final version of the SOP. This advice has been prepared with the latest version of the SOP (PCO 20938-1/10.0). We will provide you with further advice if the final version of the SOP includes amendments that affect the conclusions in this advice.
5. We have concluded that the SOP appears to be consistent with the rights and freedoms affirmed in the Bill of Rights Act. In reaching that conclusion, we have considered the consistency of the SOP with section 14 (freedom of expression) and section 17 (freedom of association) of the Bill of Rights Act. Our analysis is set out below.

### **The SOP**

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6. The Bill amends the Equal Pay Act 1972 to introduce a new system which allows employees to pursue pay equity claims. Pay equity claims aim to identify undervalued work which is or has been predominantly performed by female employees, and to address systemic sex-based discrimination by fixing remuneration that does not differentiate between male and female employees who do work of equal value.
7. The SOP seeks to amend the Bill to more closely align the pay equity bargaining framework with the framework for collective and individual bargaining under the Employment Relations Act 2002 ('the ERA'). It does this by:
  - a. removing the requirement to consolidate all pay equity claims for the same or substantially similar work within an employer, to allow individual and union claims to progress separately;

- b. automatically joining non-union employees who perform the same or substantially similar work for the same employer to union pay equity claims, unless they choose to opt out;
- c. providing protection against unfair bargaining for employees who choose to bargain individually;
- d. requiring employers to offer the terms of any union pay equity settlement to other affected employees; and
- e. enabling unions to raise a pay equity claim across multiple employers.

## **Consistency of the SOP with the Bill of Rights Act**

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### **Section 17 – Freedom of association**

- 8. Section 17 of the Bill of Rights Act provides that everyone has the right to freedom of association. This provision recognises that persons should be free to enter into consensual arrangements with others and to promote the common interests and objectives of the associating group. By protecting the right of individuals to decide freely whether they wish to associate with others, it also includes the right not to associate.
- 9. Proposed new s 13FF automatically joins non-union employees to union pay equity claims against their employer that cover the type of work they perform, unless they choose to opt out under proposed new s 13FH. This *prima facie* limits the right to freedom of association, as employees must take proactive steps if they do not wish to be included in a union's pay equity claim. This also has access to justice implications as, absent exceptional circumstances, employees who do not opt out of a union claim become bound by any resulting pay equity settlement and lose their right to bring an individual claim.
- 10. A provision found to limit a particular right or freedom may nevertheless be consistent with the Bill of Rights Act if it can be considered reasonably justified in terms of s 5 of that Act. The s 5 inquiry asks whether the objective of the provision is sufficiently important to justify some limitation on the freedom of association; and, if so, whether the limitation is rationally connected and proportionate to that objective and limits the freedom of association no more than reasonably necessary to achieve that objective.<sup>1</sup>
- 11. We understand that the opt out procedure in proposed new ss 13FF and 13FH seeks to maximise the coverage of union pay equity claim settlements. We accept that this objective is sufficiently important to justify some limitation on the freedom of association. Unions will usually be in a better position than individuals to secure an advantageous outcome to a pay equity claim, and maximising the coverage of their settlements will help to ensure that as many employees as possible enjoy the benefits of improved remuneration and conditions.
- 12. We further accept that an opt out approach is rationally connected to the objective of maximising the coverage of union pay equity claim settlements. Research suggests that fewer affected employees can be expected to opt out of a union pay equity claim than

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<sup>1</sup> *Hansen v R* [2007] NZSC 7, [2007] 3 NZLR 1 at [123].

could be expected to positively opt in, if that was required.<sup>2</sup> This recognises that regardless of whether an opt out or an opt in approach is adopted, a proportion of employees will fail to take any positive action on being notified of a claim, including for reasons unconnected with their assessment of whether it is in their interests to participate.<sup>3</sup>

13. We further consider that proposed new ss 13FF and 13FH limit the freedom of association no more than is reasonably necessary to achieve its objective. In reaching this view, we note that there are several safeguards and notification requirements which ensure that employees who wish to opt out can do so:
  - a. employers are required to give affected employees detailed notice of the fact that an arguable pay equity claim has been made, the fact that the employee has been automatically joined, the consequences of being joined, and how to opt out (proposed new s 13FE and Part 2 of Schedule 2);
  - b. affected employees' ability to opt out continues throughout the bargaining process, until a settlement is agreed or the union applies to the Employment Relations Authority ('the Authority') for a determination fixing remuneration (proposed new s 13FH(2));
  - c. unions are required to establish a process by which both union and non-union employees can vote on whether to approve or decline a proposed pay equity claim settlement (proposed new s 13MA);
  - d. a union that wishes to apply to the Authority for a determination fixing remuneration must notify joined employees of their intention to do so, and of the date by which they must opt out in order to preserve their ability to bring an individual claim (proposed new s 13ZAAA); and
  - e. new penalties apply to employers that do not notify employees that they will be joined to a union claim and unions that do not undertake the new endorsement process (proposed new s 18(2AAA)).
14. Further safeguards seek to ensure that the potential advantages of being covered by a union pay equity claim outweigh any prospect of disadvantage:
  - a. employees covered by a pay equity claim will only be bound by any resulting settlement to the extent that any new remuneration exceeds the amount specified in their existing employment agreement, and any new terms and conditions are more favourable (proposed new s 13NC(2));
  - b. the Authority or court may allow an employee who is covered by an existing settlement to raise a further pay equity claim in respect of the work to which the settlement relates if satisfied that exceptional circumstances apply (proposed new s 13Z(4)); and

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<sup>2</sup> See *Ross v Southern Response Earthquake Services Limited* [2019] NZCA 431 at [69] (leave to appeal to the Supreme Court granted: [2019] NZSC 140 (9 December 2019)).

<sup>3</sup> Above at [98].

- c. the duty of good faith in s 4 of the ERA is extended to the relationship between a union and non-union employee who is joined to the union's claim (proposed new s 13BA(3)).
15. In the circumstances outlined above, we are satisfied that the access to justice benefits of an opt out approach outweigh both the limit on the freedom of association and any cost in terms of access to justice arising from the fact that employees covered by a pay equity settlement generally lose the right to bring an individual claim.
  16. For these reasons, we conclude that any limits to the freedom of association imposed by the SOP are justified under s 5 of the Bill of Rights Act.

#### **Section 14 – Freedom of expression**

17. A number of new sections proposed by the SOP, including the notice requirements discussed above, limit the freedom of expression as affirmed by s 14 of the Bill of Rights Act by compelling the provision of certain information. We consider any limitations arising from these provisions to be justified under s 5 of the Bill of Rights Act, for the reasons given at paragraphs 13 and 14 of our previous advice on the Bill.<sup>4</sup>

#### **Conclusion**

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18. We have concluded that the SOP appears to be consistent with the rights and freedoms affirmed in the Bill of Rights Act.

Jeff Orr  
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**Office of Legal Counsel**

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<sup>4</sup> Our previous advice concluded that the aims to promote enduring settlement of pay equity claims and the elimination of sex discrimination in employment are sufficiently important objectives to justify limiting the right to freedom of expression, which is impaired no more than is reasonably necessary and in due proportion to the importance of the objectives. The provisions are the minimum required to ensure parties can participate, or choose whether to participate, in a claim.