PPTA
NEW ZEALAND POST PRIMARY TEACHERS' ASSOCIATION
TE WEHENGARUA
www.ppta.org.nz

SUBMISSION

to the

Ministry of Business, Innovation and Employment

on the

Consultation Draft

Employment (Pay Equity and Equal Pay) Bill

May 2017

About PPTA

1. PPTA represents the majority of teachers engaged in secondary education in New Zealand, including secondary teachers, principals, and manual and technology teachers. Currently, approximately 60% of the secondary teaching workforce is women and approximately 80% of permanent part-time secondary teachers are women.

2. Under our constitution, all PPTA activity is guided by the following objectives:
   - To advance the cause of education generally and of all phases of secondary and technical education in particular;
   - To uphold and maintain the just claims of its members individually and collectively; and
   - To affirm and advance Te Tiriti O Waitangi.

3. We are available to meet with officials to discuss the comments in our submission.

Process

4. PPTA supports the work that has been undertaken through the tripartite equal pay working group process and recommends that the Government adopts the tripartite process as business as usual during the development of employment policy in future. A tripartite process is recognised best practice by the International Labour Organisation and, like all good consultation, is more likely to lead to lasting, long-term policy as each perspective (government, unions and business) are able to be considered and reflected.

Drafting and Risks

5. We are concerned about the relatively short timeframe for responding to the consultation draft Employment (Pay Equity and Equal Pay) Bill ("**the draft Bill**") in what proposes to be a wholesale repeal and replacement of the Equal Pay Act 1972 ("**the Act**").

6. While we support the principle of modernising the language in the Act and accessibility of the law in plain English, we would not want to see a rushed process leading to any weakening of the current provisions, which may inadvertently happen if there is not enough time to consider and compare the language proposed. We will be recommending to the political parties that the Select Committee has a longer timeframe for the consideration of the final proposed Bill when it goes through Parliament to help ensure that this does not happen.

7. We also reflect the concerns in CEVEP's submission that creating a brand new Act may remove or decrease the precedent value of the *Bartlett v Terranova* decision and other cases that are currently filed in the Employment Relations Authority for resolution.

General principles underpinning the Bill

8. We agree that there should be a low cost, accessible method of resolving equal pay and pay equity disputes but that this needs to be done in a way that actually achieves those objectives. Any system also needs to be supported by:

- clear and accessible information about pay rates and the allocation of any allowances, bonuses, incentive payments within an organisation – this transparency should be a statutory requirement; and

- a free public service that can assist parties to identify appropriate comparators. The group that was within the former Pay and Employment Equity Unit at the Department of Labour needs to be re-established but given independence to prepare this information, free from political interference.

Preliminary Provisions

9. We agree with the recommendations made in CEVEP's submission that:

    - The definition of "equal pay" be amended to reflect the wording in the current Act that there should be "no element of differentiation between male employees and female employees based on the sex of the employees". As CEVEP has noted, this wording was stressed by the Court of Appeal in the *Bartlett* case; and

    - The order of the wording in the clause 3 purpose be reversed so that it starts with the principle that the Act is intended to achieve "the elimination and prevention of gender discrimination in pay".

10. We also recommend that the purposes clause also explicitly includes reference to this Act being interpreted in a way that is consistent with our international obligations including those under the Convention on the Elimination of All Forms of Discrimination Against Women ("**CEDAW**"), which is what the current Act was intended to give effect to.

11. We support that the Act binds the Crown.

Transitional Provisions

12. We note that there are currently no transitional provisions outlined in the draft Bill. We are very concerned to know how cases that are filed under the current Act will be treated retrospectively if this new legislation becomes law. The fact that this detail is currently missing from the draft Bill is a huge concern and adds uncertainty for thousands of women who are impacted by the cases that are currently filed / about to be filed.

13. We note that such an approach also has the potential to unduly influence the Authority members / Judges involved in these cases, and is in breach of the basic constitutional principles stated in the Legislation Design and Advisory Committee's Guidelines (2014)[1]:

    "Judicial independence and impartiality: Certain decisions must be made by judges independent of the Government. Judges interpret legislation and are the source of the common law. They decide disputes between individuals and between individuals and the Government. Courts are the only institutions that can impose criminal convictions or sentence people to imprisonment.

[1] Chapter 3, http://www.ldac.org.nz/guidelines/lac-revised-guidelines/chapter-3/ (last accessed 11/05/2017).

To properly perform these functions and to maintain public confidence in the judicial system, judges must be impartial in respect of the matter before them, and be independent of the executive and legislature. Legislation that affects a judge's appointment, tenure in office, or financial security will potentially affect judicial independence. Measures that create evidentiary presumptions, minimum or mandatory penalties, **or restrict remedies also affect judicial independence and must be considered with care."**

[Emphasis added]

14. The Guidelines state that the general principle is that legislation should not have retrospective effect. Chapter 11 of the Guidelines goes into this in more detail.

"The separation of powers and the independence of the judiciary require that the executive and legislative branches of government do not interfere with the judicial process. However, in some cases ongoing or prospective litigation may identify an area of the law that requires amendment or new legislation, and it would be inappropriate for the Government to await the outcome of the litigation before taking action.

In these cases it is **important that any new legislation is explicit that the new law will not apply to any cases currently before the court or act to deprive those parties (or previously successful parties) from any benefit they have gained or might gain from a decision of the court. This is sometimes called preserving the "fruits" of the litigation.**

If the new legislation is intended to do either of the above, the legislation must contain clear words setting out this intention."

[Emphasis added]

15. We are particularly concerned about the potential that the transitional provisions will have given the proposal in the substantive part of the Bill to remove the ability to claim back pay for pay equity claims. This is a clear remedy that is being denied to women workers which is available in other monetary claims in civil / employment law – discussed in more detail below.

Clause 10: Equal pay or unlawful discrimination (non-remuneration) claims

16. We note the proposal for an equal pay claim to be treated as recovery of wages under section 131(1)(b) of the Employment Relations Act 2000 and that this sits alongside the proposed limitation period of 6 years under clause 12 of the draft Bill.

17. Further thought needs to be given to the issue of claimants being taxed significant amounts on the recovered money beyond what would have happened had they been paid at the appropriate equal pay rate at the time they earnt the money. They should not be disadvantaged financially by this.

Clause 11: Choice of proceedings

18. We support this clause as drafted, so that it keeps open the choice of an employee to take a section 10 unlawful discrimination case in either forum (i.e. through the employment process or the human rights process).

Clause 14: Pay equity claims

19. We support the comments made by the New Zealand Council of Trade Unions ("**NZCTU**") in respect of the inclusion of labour market factors and the definition in clauses 14(4) and 14(5).

Clause 17: Employer may form view as to whether pay equity claim has merit

20. We support the point made by the NZCTU in its submission that 90 days is much too long as the default period for an employer to respond to whether a pay equity claim has merit. We agree that this should be reduced to 30 days.

Clause 21: Duty to provide information

21. We support the point made by the NZCTU in its submission that it should be made clear that the duty to provide information applies prior to the merits assessment in clause 14.

Clause 22: Matters to be assessed

22. We note and are concerned that:
    - Clause 22(1)(a) is missing "any other relevant work features" that was included in the JWG principles;
    - Clause 22(1)(b) excludes the consideration of female dominated occupations that are currently undervalued, but were not undervalued in the past.

Clause 23: Identifying appropriate comparators

23. The Bill sets out a limiting mechanism for comparators by establishing a hierarchy which tries to keep comparators as close as possible to the equal pay claimants' workplace. The hierarchy would mean comparators would have to be selected as follows:
    1. Comparators within the same business, or if not then
    2. Comparators from within a similar business, or if not then
    3. Comparators from within the same industry/sector, or if not then
    4. Comparators from a different industry or sector.

24. We agree with the NZCTU that this clause needs to be rewritten so that the legal test is instead focussed on finding the "most appropriate comparator" for their particular role rather than having their own industry and sector as a starting point. This helps to remove what is otherwise an unnecessary barrier for women achieving pay equity, especially where the whole sector tends to be predominantly women and undervalued as a result.

Clause 39: Limitation period where pay equity claim is resolved by determination

We are seriously concerned about the nature of this clause, which seeks to prevent claimants for pay equity seeking back-pay prior to the delivery of their claim. This is a considerable disadvantage when compared to the current legislative framework that would arguably allow claimants to claim pay for a prior of 6 years prior to the delivery of

their claim and, in fact, equal pay claimants are permitted to claim remuneration for unfair wage rates for up to 6 years prior to filing their claim in the Authority under this draft Bill. This clause needs to be amended and redrafted consistently with the limitation period specified in clause 12.

Clause 42: Penalty for non-compliance

25. We agree with NZCTU that the penalties proposed in clause 42 are too low and will not be a sufficient deterrent for non-compliance with the requirements in the proposed legislative scheme.

Clause 43: Pay equity claims by employees of education service

26. We support the State Services Commissioner being treated as the employer for the purposes of pay equity claims taken by employees of the education service. They will have a team with dedicated expertise, which will make this process more efficient and effective. It also helps to ensure that teachers can access this dispute resolution process under the new legislative scheme.

27. We would like clarity about who was envisaged as being the "representatives of the employer or employers" as cited in clause 43(2)(b)(ii). We assume this refers to the board of trustees of the employing schools of the secondary teachers rather than a separate and autonomous advocacy body that is not the actual employer?

Clause 44: Regulations

28. We are concerned about the wide scope of the regulation-making power. Any "matters that must be taken into account when considering or determining whether a pay equity claim has merit", "matters that must be taken into account when assessing a pay equity claim", and "matters that must be taken into account when identifying appropriate comparators" should either be explicit in the Act or developed and agreed as part of the tripartite process and then codified through regulations or an Order in Council.

29. These matters are too important and have the potential to significantly skew the likelihood of a claim and they should be subject to either consensus agreement or the higher level of scrutiny that is achieved through the parliamentary process.

30. At the very least, these regulations should be published / made publicly available, deemed to be disallowable instruments for the purposes of the Legislation Act 2012 and presented to Parliament under section 41 of that Act.