

# ***EQUAL PAY FOR WORK OF EQUAL VALUE: MAKING HUMAN RIGHTS AND EMPLOYMENT RIGHTS LAWS WORK TOGETHER***

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## **Abstract**

This paper backgrounds the policy issues concerning equal pay for work of equal value and offers some thoughts on how human rights and employment rights could work together to ensure pay equity. Renewed interest in pay equity in New Zealand has links to international agendas in that New Zealand has ratified conventions on employment equity for women that are viewed as fundamental rights by the International Labour Organisation (ILO) and the United Nations. Nevertheless, New Zealand has come under criticism for lack of compliance on "equal pay for work of equal value". This paper addresses the question of how an effective policy for equal pay for work of equal value could be delivered under our current legislative frameworks.

## **INTRODUCTION**

**Our goal is to build an innovative economy. That means making the most of all our skills and talents... The decisions of our daughters and grand-daughters should not be constrained by out-moded ideas about what women and the work we do are worth. (Laila Harré, Minister of Women's Affairs, July 2002)**

Pay equity is once again on the agenda of government after 12 years tucked at the back of party policies. A discussion document *Next Steps Towards Pay Equity* was released in July 2002 (Ministry of Women's Affairs 2002a). In October 2002 an additional Human Rights Commissioner was appointed with responsibility for equal employment opportunities, including pay equity. In May 2003, a Taskforce was appointed to develop an action plan on pay and employment equity in the Public Service and education and health sectors.

This renewed interest in pay equity has links to international agendas. As an active participant in the international community, New Zealand has ratified conventions on employment equity for women that are viewed as fundamental rights by the International Labour Organisation (ILO) and the United Nations. New Zealand legislation prohibits gender discrimination in employment and requires equal pay for

women and men employed for the same job. Equal employment opportunities are required by law in the public sector and promoted in the private sector.

In recent years, however, New Zealand has come under criticism for lack of compliance on “equal pay for work of equal value”. This principle addresses the fact that women and men tend to be employed in different occupations, with work typically done by women rewarded at a lower average rate than work typically done by men.

Equal pay for work of equal value and gender pay gaps were last addressed in 1990 by the short-lived Employment Equity Act, but there have been considerable changes in the employment relations system since then. Can an effective policy for equal pay for work of equal value be delivered under our current legislative frameworks? This paper backgrounds the policy issues and offers some thoughts on how human rights and employment rights could work together to ensure pay equity.

## EXPLAINING GENDER PAY GAPS

The gap between women’s and men’s average hourly earnings has been monitored by Statistics New Zealand since the Equal Pay Act 1972 was passed.<sup>1</sup> By 1977 the removal of all separate male and female pay scales had narrowed the gender pay gap six percentage points (Wilson 1993). There has been just under 9 percentage points improvement in the 25 years since then.

The June 2003 Income Survey showed that women’s average earnings per hour were 87.1% those of men (Statistics New Zealand 2003). Annual figures since 1997 show a gender and ethnicity earnings gap. Pākehā women earned on average 85.3% of Pākehā men’s earnings in 2002. Māori women earned 89.2% of Māori men’s average earnings, 85.7% of Pākehā women’s and 73.1% of Pākehā men’s. Pacific women earned 99.2% of Pacific men’s average earnings, 81.3% of Pākehā women’s and 69.4% of Pākehā men’s.

A Department of Labour study (Dixon 2000) has identified four contributory factors to the gender pay gap:

- the presence of dependent children in household (responsible for approximately 10% of the gap)

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<sup>1</sup> Average hourly earnings is the preferred measure for pay equity, as this does not reflect gender differences in hours worked. Women’s average weekly earnings are 77% those of men (Statistics New Zealand 2002), reflecting the high proportion of women employed for short hours (Statistics New Zealand 2001 Tables 37 and 37a). The Census 2001 median annual income for women (from all sources including investments and benefits) was 58% that of men, partly reflecting casual or insecure employment in some sectors employing many women.

- differences in level of educational attainment (0-10%)
- differences in the number of years in the workforce (15-50%)
- occupational segregation between women and men (20-40%).

This leaves between 10% and 50% of the gender pay gap unexplained. Some progress has been made regarding the first three of these contributory factors, but there is a policy gap when it comes to addressing the fourth factor of occupational segregation.

Policies such as increased childcare provision and the recent legislation on paid parental leave will go some way towards addressing the gender pay gap where there are dependent children in the household. A more equal sharing of responsibilities within households would also help in this respect.

Women's gains in education have also narrowed the gender pay gap since the 1980s (Dixon 2000). Nevertheless, Census 2001 and 1996 data show that at all levels of educational attainment women earn less than men. After five years in the labour market, the gender pay gap across all disciplines was around \$10,000 a year (NZ Vice Chancellors Committee 1998, 1999, 2001). As most women graduates are young, this differential is being created *before* career breaks for childbearing. Investment in education is not offering women the same returns as men, and total cost may be higher for women, as student debt is likely to be paid off more slowly from their lower average earnings (NZ Nurses Organisation 2002, Gordon and Morton 2000). The NZ University Students Association believes this could add 10% to the gender gap in income experienced by the current generation of women students (NZ University Students Association 2002).

It cannot be assumed, then, that the gender pay gap will close as educated young women gain years of experience in the workforce. There are smaller wage differentials by gender among younger workers (Dixon 2000), but research in other countries shows these increase and stabilise in middle age. This pattern is fairly consistent across all levels of educational attainment (McCann 1994, Crampton et al. 1997).

Educational levels continue to be an important factor in the lower earnings of Māori and Pacific people, but within these communities there is no gender difference in educational attainment. Those Māori and Pacific women and men who reach tertiary level perform well. It is in the labour market that gender and ethnicity disparities emerge. Among full-time workers, both Māori and Pākehā women with tertiary education earn considerably less than tertiary-educated men in full-time work, and Māori men earn less than Pākehā men (Maani 2000, Census 2001 data). The Department of Labour study attributed most of the difference between Māori and Pākehā women's pay to the fact that proportionately more Māori women are concentrated in lower-paid

female occupations; that is, to occupational differences (Dixon 2000). Māori men are also disproportionately in lower-paying but typically male occupations.

Equal opportunities policies aim to address occupational differences between women and men, and are slowly contributing to desegregation. A 1998 study of trends showed that an even distribution of women and men across the labour market might be achieved in about 75 years (Barnett and Briggs 1998). The Department of Labour study and the graduate surveys show lower earnings in the occupations, professions and sectors in which women are most likely to be employed. This allows women's subject preference to be offered as an explanation of later lower earnings. Recent preference theories focus on work and family balance issues (Blackburn et al. 2002, Hakim 2002), but do not investigate or explain why it is that female-dominated occupations and professions should be worth less than those that employ mainly men, as shown by the Department of Labour.

No current policy directly addresses the link between occupational differences and lower pay for women. This was the policy gap identified in *Next Steps Towards Pay Equity* (Ministry of Women's Affairs 2002a, 2002b).

#### EQUAL PAY FOR WORK OF EQUAL VALUE

Why is it that the kind of work women do is worth less per hour on average than the work that men do?

ILO research shows that occupational segregation by sex is an extensive and enduring feature of labour markets, and a major source of market rigidity and economic inefficiency (Anker 1997, 1998). Other studies show that the higher the proportion of women or of an ethnic minority employed in an industry, an occupation, a firm, or even a work team, the lower the average pay (Pocock and Alexander 1999, Lapidus and Figart 1998, McCann 1994). The 2001 Census showed the 10 most common occupations for women (sales assistant, general clerk, secretary, registered nurse, primary teacher, cleaner, caregiver, information clerk/receptionist, accounts clerk, and retail manager) employed 30% of all New Zealand women, while 21% of men were employed in the 10 most common occupations for men (sales assistant, general manager, truck driver, builder/contractor, crop/livestock farmer/worker, labourer, dairy farmer/worker, retail manager, and slaughterer). There were similar concentrations of Māori and Pacific women and men in somewhat different sets of most common jobs, with the four top jobs employing a quarter of all Pacific women (Ministry of Women's Affairs 2002b).

Equal employment opportunity policies may help counter this crowding effect, but do not address the fact that jobs commonly done by women are routinely considered to be worth less than the jobs men typically do. Many occupations in which women are

concentrated reflect women's traditional roles in the family: responsibility for children, caring for the sick or elderly, cleaning, cooking and sewing, emotional support and maintaining family relationships. Because of the unpaid nature of women's family roles, their abilities may be seen as "natural" female characteristics, rather than work skills essential to many jobs in the health, education, hospitality and service sectors. What is recognised as a work skill often depends on social power, including union strength (Daune-Richard 2000, Steinberg 1990, Phillips and Taylor 1980).

The principle of equal pay for work of equal value addresses the occupational differences component of the gender pay gap at the point at which it occurs: when pay rates are set in an occupation. The aim is to look closely at the value placed on skills, responsibilities, effort and other job components and to ensure that any pay differentials between women and men are justifiable, not based on social assumptions (Burton et al. 1987, Burns and Coleman 1991). Gender-neutral job evaluations in other countries have uncovered consistent patterns of under-valuation in a wide range of women's jobs (Killingsworth 2002, McCann 1994, England 1992). A few American states and cities have also investigated ethnic wage gaps among employees. Pay equity wage claims are currently being made in Australia. In 2002 the wages of New South Wales librarians were raised following a comparison of their skills and responsibilities with those of geologists (Industrial Relations Commission 2002).

Lower pay in occupations that predominantly employ women or ethnic minorities has been recognised as indirect or structural discrimination by the United States Supreme Court in the 1974 case of *Corning Glassworks v. Brennan* (England 1992) and the British House of Lords in the case of *Ratcliffe* ([1994] IRLR 342, cited in McColgan 1997; also see McColgan for discussion of United Kingdom and European Union law). These cases held that, given laws against discrimination, "market forces" arguments (termed "other material factors" in the United Kingdom) were acceptable as defence only to the extent that their impact on pay was gender neutral. Supply and demand may lead to short-term wage fluctuations, but do not explain wage patterns by gender and ethnicity that persist over decades (England 1992).

#### WOMEN'S EMPLOYMENT RIGHTS ARE INTERNATIONAL HUMAN RIGHTS

New Zealand has ratified the principles of equal pay and equal pay for work of equal value under United Nations and International Labour Organisation conventions – that is, as both human rights and employment rights.

In 1978 New Zealand ratified the United Nations Covenant on Economic, Social and Cultural Rights (1951), which provides all workers with fair wages and "equal remuneration for work of equal value without distinction of any kind" (Article 7(a)). In January 1985 the United Nations Convention on the Elimination of (All Forms of)

Discrimination against Women (CEDAW) (1979) was ratified. CEDAW requires governments to take action to ensure equal employment opportunity, training and promotion for women and:

**... the right to equal remuneration, including benefits, and to equal treatment in respect of work of equal value, as well as equality of treatment in the evaluation of the quality of work... (Article 11)**

CEDAW is described as an international bill of rights for women (Division for the Advancement of Women 2003). It was developed in the United Nations' Human Rights Division and adopted by the General Assembly. The 1995 Platform for Action adopted by the United Nations World Conference on Women at Beijing included equal pay for work of equal value and occupational segregation. Progress was reviewed by a Special Session of the General Assembly in 2000. Countries that ratify CEDAW are then legally bound to put its provisions into practice.

In 1983 New Zealand ratified the International Labour Organisation Convention 100 on Equal Remuneration (1951) and Convention 111 on Discrimination (Employment and Occupation) (1958). ILO 100 is short, and specific to equal pay for work of equal value, requiring member countries to:

**... ensure the application to all workers of the principle of equal remuneration for men and women workers for work of equal value... Where such action will assist in giving effect to the provisions of this convention, measures shall be taken to promote objective appraisal of jobs on the basis of the work to be performed. (Articles 2 and 3)**

Governments that have ratified the above conventions are required to report regularly under them. New Zealand's 1998 CEDAW report received the following critical response from the CEDAW Committee:

**The Committee expresses serious concern at the continuing wage differential between women and men, which was not expected to narrow under current trends... and at the impact of the repeal of the Pay Equity Act for women's equal pay rights. The Committee recommends that further efforts, including through legislation and innovative policies, be made to reduce the gender wage differential... The Government should also consider developing an "equal pay for work of comparable value" strategy, and reinstate respective legislation. (CEDAW Committee 1999)**

In 1998 the ILO included Conventions 100 and 111 in a Declaration of Fundamental Principles and Rights at Work. Government action on these fundamental principles is considered to arise "from the very fact of membership" of the ILO (Article 2 of ILO

1998, Kellerson 1998, Anderson 2002). In response to New Zealand's 2000 report under ILO 100, the Committee of Experts noted that all legislation, including the Employment Relations Act 2000, relates to equal pay in the "same or substantially similar" jobs, not to equal pay for work of equal value:

**The Committee once again asks the government to indicate the measures taken to ensure the observance of the Convention and its application in practice. (ILO 2001)**

It is clear that both committees consider New Zealand to be currently non-compliant with our obligations under the conventions. The only sanctions available under international conventions are negative reports, such as those above, and loss of reputation in the international community. Embarrassment can sometimes be an effective tool for change, however. In 1986 Japanese women sued a major corporation over its discriminatory career paths. These were not illegal, although Japan had ratified CEDAW, so the women took their case directly to the United Nations CEDAW committee, with maximum publicity. The law was amended the following year (Liu and Boyle 2001).

#### FROM UNION RIGHTS TO INDIVIDUAL RIGHTS

At the time the above conventions were ratified it was believed that New Zealand legislation addressed both equal pay and equal pay for work of equal value (Orr 2003). Twelve years after the Government Service Equal Pay Act 1960 abolished separate male and female pay rates in the public sector, the Equal Pay Act 1972 extended this to the private sector. The Equal Pay Act 1972 supported the principle of equal pay for work of equal value in that it provided for equal pay under the following circumstances:

**For work which is exclusively or predominantly performed by female employees, the rate of remuneration that would be paid to male employees with the same, or substantially similar, skills, responsibility, and service performing the work under the same, or substantially similar, conditions and with the same, or substantially similar, degrees of effort. (s.3(1)(b))**

With ILO 100 ratified, the Clerical Workers Union made a wage claim on this basis in 1985. This was rejected first by employers, then by the Arbitration Court. The Court ruled that it had no further "need or power" to consider this issue, since registration of adjusted award rates during the 1973-1977 implementation period of the Equal Pay Act indicated a de facto acceptance that equal pay, as defined in the Act, had been achieved. Since the question was not reopened, the definition above was never considered by the Court. This ruling was not appealed. As ILO 111 required that equal employment opportunities also be addressed, a working party recommended new

legislation that could take a two-pronged approach to these closely related issues (Wilson 1988:22).

The Employment Equity Act 1990 extended state sector equal employment opportunity programmes to large employers in the private sector. An Employment Equity Commissioner was appointed, one of whose functions was to conduct pay equity assessments. These could be instigated by a union or 20 women lodging a claim for a female-dominated (over 70% female) occupation to be compared with “comparators” in two male-dominated occupations. A method for gender-neutral job assessments was developed (Burns and Coleman 1991). Ten claims were lodged, but the Act was repealed following a change of government before assessments were undertaken (Labour Relations Amendment Act 1990, s.4, Wilson 1994, Hill 1993, Hyman 1994). Any pay adjustments were to have been included in negotiations for the occupational wage award. In April 1991, collective bargaining for occupational wage rates was replaced by individual or enterprise bargaining under the Employment Contracts Act 1991 (and also under the current Employment Relations Act 2000). The fragmentation of bargaining across thousands of small firms de-unionised many low-paid workers. This particularly affected unions that had led the way on women’s employment issues (Hill and du Plessis 1993, Hill 1994).

This change in the bargaining framework was a policy shift away from collective rights towards individual rights. In line with this, the personal grievance procedures against discrimination in award documents were included in the Employment Contracts Act, and later in the current Employment Relations Act. New human rights legislation in 1993 also allowed individual complaints against employment discrimination by sex and ethnicity (as well as other grounds).

The Equal Pay Act 1972 continues in force but under the Employment Relations Act it no longer delivers equal pay for women across an occupational labour market as originally intended. Equal pay for women in the current bargaining environment means equal pay to a man in the same job if one is employed within the same firm. The possibility of comparing the pay of “exclusively or predominantly” women employees to a “notional” male rate under s.3(1)(b) above remains an untested legal question.

The remedy for employment discrimination (including pay) under the Equal Pay Act, the Employment Relations Act and the Human Rights Act is for the individual affected to lodge a complaint. In the two years to 30 June 2002 no formal cases were taken under the Equal Pay Act or the Employment Relations Act, and only four complaints of gender-based pay discrimination were taken under the Human Rights Act (Department of Labour 2002). Employment and human rights laws now have very similar mediation processes to help resolve such issues. Under all three Acts, the onus



is on the employee to identify the problem and instigate the complaint. It is against the law for employers to discriminate, but there is no requirement for employers to ensure or demonstrate that pay systems are equitable. This current situation contrasts with a 1989 European Court of Justice ruling that, if a pay system lacked transparency, the burden of proof was on the employers to show that it was not discriminatory (Danfoss [1989] cited in Gregory et al. 1992).

Lack of information about wage rates was an issue raised in public submissions on *Next Steps Towards Pay Equity* (Dyson 2003). Many submitters recommended against adopting a complaints-based policy to address equal pay for work of equal value because they felt the current complaints-based equal pay and anti-discrimination laws were ineffective. With over 80% of employees on individual agreements (many with confidentiality clauses), it was reported that women did not know what colleagues in the same job were being paid, so could not tell if they were getting equal pay under the law, or how much to ask for at job interviews. Union officials can access wage books for collective bargaining purposes only and may not pass information on to their members (Employment Relations Act s.32, s.34). Lack of market information, it was suggested, may be contributing to the gender pay gap. In the public service, for example, equal numbers of men and women are on individual employment agreements, but in 2001 these men had an “earnings advantage” over the women of 9.4%, after controlling for other factors (Gosse 2002). Unions and many women’s organisations strongly supported requiring all employers to be proactive in ensuring that their pay systems are equitable, and for the government to lead by example for all publicly funded employment (Dyson 2003, NZ Council of Trade Unions 2002, Public Service Association 2002, NZ Nurses Organisation 2002).

## DESIGNING POLICY FOR A STRUCTURAL PROBLEM

Equal pay or equal opportunity cases allege direct discrimination against an individual by an employer. Equal pay for work of equal value addresses a problem of a different order. Occupational segregation and low pay for typically female jobs are *structural* features of the labour market. Historical social patterns have shaped market rates for different kinds of work to the disadvantage of women and/or minority ethnic groups. When women do move into traditionally male areas of work in sizeable numbers, the higher pay and/or career structures often deteriorate (Austrin 1992, Reskin and Roos 1990).

A variety of policies in other countries, based on employment or human rights laws, have had varying levels of impact on gender pay gaps. Evaluations of policy experiences show that the pay gap arising from occupational differences between women and men is not adequately addressed by workplace-based policies alone,

whether complaints-based or requiring reviews of pay and occupations within a single organisation (Cassidy et al. 2002, Gunderson 2002, Gunderson and Lanoie 2002, Kidd and Goninon 2002, Kovach 1997, McColgan 1997, England 1992, Hallock 1992).

Equal pay for work of equal value requires looking at the skills, responsibilities, effort and work conditions of jobs typically done by women *and their value to the market* and making a comparison with wage rates *already being paid* for similar skills, levels of responsibility and other aspects of jobs typically done by men. Cross-firm, cross-occupational comparisons will therefore need to be part of an effective policy.

The distinction between direct and structural discrimination is also relevant to wage adjustments. Remedying direct pay discrimination brings an individual's wage into line with other employees and, it can be argued, removes an unfair wage-cost advantage for that employer compared to other employers in the same occupational market. On the other hand, if all employers are paying a "going rate" that undervalues skills and responsibilities in jobs done by women, or the cultural skills needed for certain functions or services, it is the "good employer" that is disadvantaged. As in 1972 when male and female rates were removed, labour market adjustments would require careful implementation processes involving government, industry organisations and unions.

The high proportion of small firms in New Zealand is also relevant to the design of pay equity policy and its implementation. In 2002 around 92% of firms had fewer than 10 staff, but together employed just over a third of the workforce. These small workplaces will include many women in common female occupations who could benefit from gender equity assessments. Experience of pay equity policies in Ontario, where small employers demonstrated low levels of compliance with pay equity assessment requirements (Baker and Fortin 2000), suggests that what is asked of these employers should be kept to a minimum.

Debate for and against policy on equal pay for work of equal value often focuses on the technicalities of job evaluation, such as how to ensure the systems used are gender neutral, how different job components should be rated, how to avoid subjective assessment, and whether outcomes are consistent across different organisations. However, the best international expertise on this can be obtained when needed, including the latest methods for assessing caring and human relations skills.

The real challenge at this stage is broad policy design and institutional arrangements, given the radical changes in labour market regulation since 1990. The key questions now are: what measures would be needed for policy to be effective, and what legislative and institutional arrangements could deliver that in a decentralised labour market?

## SIX POLICY INGREDIENTS

To meet New Zealand's obligations for government action under the CEDAW and ILO conventions, equal pay for work of equal value needs to be clearly established in law, together with mechanisms for implementation.

If legislation is to deliver equity goals, there needs to be clarity on what a policy would need to do to be effective in narrowing the occupational part of the gender pay gap. Work by the Ministry of Women's Affairs and Department of Labour, together with principles developed by the Canadian Human Rights Commission (2001) and public submissions on *Next Steps Towards Pay Equity*, already take us some way towards this. A great deal of debate and policy development work is still needed. As a contribution to this debate I offer six ingredients that would, in my view, be required for policy effectiveness.

The first two ingredients focus policy action at the heart of the problem – the structural inequalities in earnings that reflect the way the labour market is patterned by gender and race.

- 1. Make comparisons of women's occupations with men's across the whole labour market, looking at skills, qualifications, responsibilities, effort and conditions of work.**
- 2. Make comparisons for the most common occupations for women, together with the most common occupations of Māori and Pacific women.**

The Department of Labour statistical study identified inequalities in pay at the level of occupational groups. Cross-firm comparisons of skills and responsibilities in male and female occupations would allow investigation at the point where wage rates for different jobs are actually set. An effective starting point would be evaluations of women's most common occupations, because this could deliver policy outcomes quickly for a large number of women, and also address concerns that Māori and Pacific women are particularly disadvantaged. Equal pay for work of equal value in common female-dominated jobs would also benefit men employed in those occupations.

Three further ingredients address consistency and implementation. These ingredients separate specialist expertise on pay equity issues from responsibility for wage adjustments, while allowing the possibility of evaluations to be undertaken by large employers or unions.

**3. Establish centralised responsibility for (doing or approving) equal pay for work of equal value comparisons with an independent expert agency.**

Vesting authority in an independent agency – “at arms-length from government and other interests” – is one of five principles<sup>2</sup> recommended by the Canadian Human Rights Commission (2001) for effective pay equity legislation. It was also New Zealand’s own policy choice in 1990. Giving an independent specialist agency responsibility for investigating the most common occupations for women could ensure a focused, contained exercise with maximum impact on the gender pay gap. It would minimise requirements for small employers. These evaluations, together with others initiated by state agencies, large employers or unions, could provide a databank of skill assessments and benchmark wage rates to be drawn on by any employer, union or individual. A specialist agency could also undertake further investigation of New Zealand’s ethnic pay gaps and occupational segregation.

**4. Develop a single officially approved gender-neutral methodology for comparing skills, responsibilities, effort and work conditions in women’s and men’s occupations.**

The importance of using a standard methodology was demonstrated in the United States, where comparisons for the same occupation by different public employers resulted in different pay adjustments; for example, for librarians in different cities (Rhoads 1993). A standard methodology developed by an independent agency for its own use could also maximise the technical credibility and consistency of comparisons undertaken by large employers or unions as part of wage bargaining. The unions are keen to address equal pay for equal work through collective bargaining, but also support comparisons being carried out by a centralised agency, as many women and men in small workplaces are no longer covered by collective bargaining (NZ Council of Trade Unions 2002).

**5. Impose a positive duty on all employers to ensure that their wage system is equitable.**

All employers should be required to ensure that pay systems are equitable, and to demonstrate to employees that gender equity is a feature of wage setting in their organisation. This ingredient is crucial to ensuring that policies on equal pay and equal

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<sup>2</sup> The other four are: required steps with stipulated time frames; clear aims and definitions of what work may be compared and how adjustments will be calculated and integrated into wages; constructive involvement of employees and unions; and provision of user-friendly materials, expert advice and training, reducing costs to employers.

pay for work of equal value are delivered to employees. The possibility of different expectations of employers by size or sector is left open for debate. Requirements could in some way include taking account of official occupational evaluation comparisons as outcomes become available. How this is required is an area of policy development that government agencies and key stakeholders will want to work through together.

The final ingredient, and my further comments below, relate to the infrastructure for policy delivery.

## **6. Build on existing legislative frameworks and institutional arrangements.**

Current legislation needs to be amended and the roles of state and judicial agencies reviewed to provide for equal pay for work of equal value, in line with international standards. Equal pay and equal pay for work of equal value are part of ongoing policy development towards a fair standard of living for all New Zealanders in an innovative economy and inclusive society.

These six policy ingredients leave a great deal more to be discussed, particularly in regard to employer obligations and pay equity claims as part of collective bargaining. I will focus here on the sixth ingredient – the kinds of institutional and legislative arrangements that would best meet our international obligations.

### MAKING HUMAN RIGHTS AND EMPLOYMENT RIGHTS WORK TOGETHER

As well as the shift from collective rights to individual rights over the 1990s, human rights were used as a political alternative to employment rights. This is not unusual. When progress in labour negotiations and labour laws is slow, or meets political reversals, it may be advocates rather than opponents who shift the debate on pay equity towards human rights. This may widen the grounds and the audiences for support (Figart and Khan 1997). Both approaches have limitations and possibilities that vary between countries (Ministry of Women's Affairs 2002b).

The outcome in New Zealand has been that the human rights and employment rights systems currently run in parallel. Both offer very similar processes for individual redress, which the complainant must choose between. Both now focus on mediation to resolve complaints or personal grievances, although both have tribunals with decision-making power. As I have argued, neither currently offers an effective mechanism for redress against structural discrimination in pay that reflects gender, ethnicity and occupation segregation.

Both employment relations and human rights perspectives are useful in thinking about pay equity policy. Human rights philosophies introduce values of respect and dignity,

but have tended to focus on the individual, rather than social groups and collective action. International discussion of human rights has recently taken up a human capabilities approach that is relevant not only for collective rights but for economic development. The argument is that women, social groups or peoples have the basic human right to be “all that they can be”. This has aspects specific to the individual (personal safety, health care) but also requires external conditions that allow people to fully utilise their capabilities (Nussbaum 1999). This perspective has been adopted in the United Nations Development Programme because the underemployment of women, occupational discrimination and pay inequalities are seen as matters of social justice, but also an under-utilisation of human resources, with implications for economic development and international competitiveness (Griffin and McKinley 1992). At this point the argument feeds into the Human Capabilities Framework currently used to think about developing the skills of the New Zealand workforce (Department of Labour 1999). Under this Framework, consideration also needs to be given to whether existing skills in typical female occupations are being under-recognised and under-rewarded (Ministry of Women’s Affairs 2002b: 55-57).

At present, employment relations and human rights policies both have a certain fluidity that could provide a unique opportunity. There could be a way forward on equal pay for work of equal value that allows the employment rights and human rights systems to work together to address structural inequalities, rather than functioning as two parallel but ineffective avenues for complaint. Policy could be developed that sits across the jurisdiction of both Acts, drawing on the strengths of each.

In 2001 the Human Rights Act was amended to include more policy-orientated functions and to appoint a new Commissioner with specific responsibility for equal employment opportunities (including pay equity). The inclusion of pay equity was proposed, and supported by Parliament, at the final reading of the Amendment Bill. The Human Rights Commission now has the power to undertake a general inquiry into any matter that may involve an infringement of human rights. It may evaluate the role of legislation, guidelines and voluntary codes of practice and provide advice and leadership about equal employment opportunity, including pay equity. The Commission sees its primary role as advocacy and the promotion of rights, not as regulatory. In this role, it is developing a national plan of action which will raise the profile of human rights protections in New Zealand, including the right to equity in employment.

The Employment Relations Act 2000 included new requirements for “good faith” between the parties and aimed to encourage collective bargaining. Employment legislation provides a framework for bargaining but also lays down laws and minimum standards. Despite “good faith” requirements and increased mediation to resolve personal grievances and collective bargaining disputes, the Employment Relations Act is a regulatory framework. Cases of non-compliance with collective

agreements or with labour laws can be taken to the Employment Tribunal and Employment Court, which have powers of sanction. This has led to a body of precedent-setting case law which is widely reported and encourages future compliance with employment standards.

The Employment Relations Act is an appropriate framework for policy that seeks to address structural inequality in the labour market and to deliver collective, rather than individual, remedies. Pay equity claims in union bargaining and a requirement for employers to ensure equitable wage systems would put aspects of the implementation of an equal pay for work of equal value policy squarely under the employment relations framework. The current Mediation Service, Employment Tribunal and Employment Court dispute processes would be available to address any difficulties arising in pay equity negotiations or in later compliance, supported by the watchdog roles of labour inspectors and union representatives.

Figure 1 Institutional infrastructure

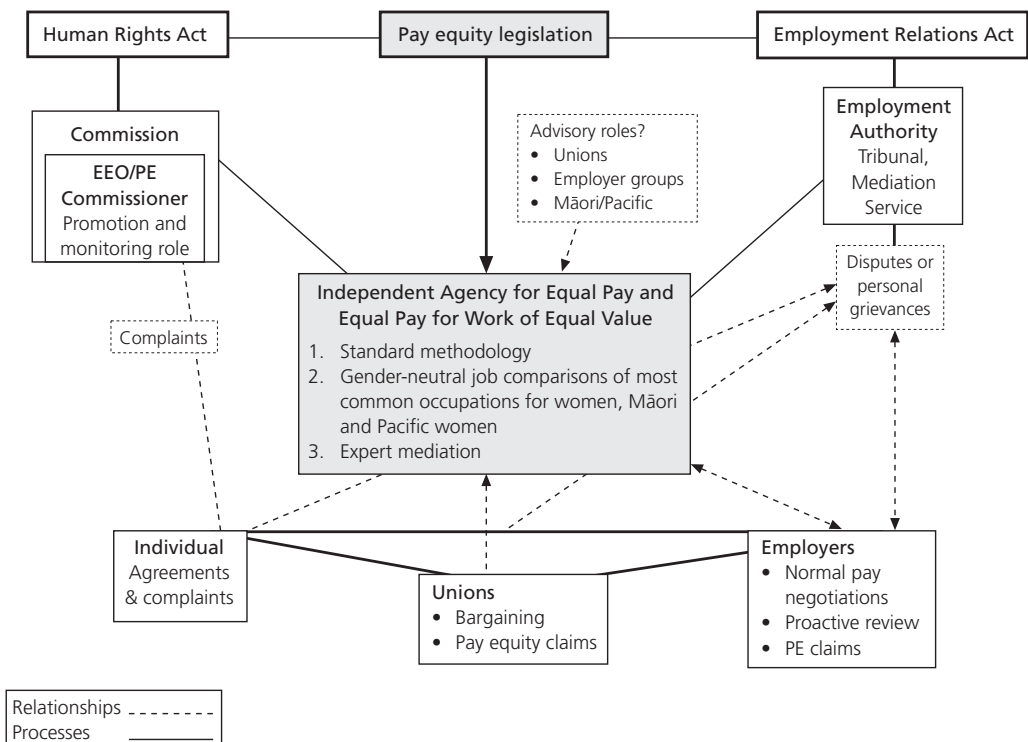


Figure 1 shows how the above human rights and employment relations frameworks could work together. On the left, under the Human Rights Act, existing human rights institutions focus on information, expertise and overview. On the right, under the

Employment Relations Act, which sets the bargaining environment, the employment relations institutions focus on compliance with labour laws and the employment agreements that result from bargaining. The solid lines are ongoing relationships; the dotted lines indicate avenues for redress if a problem arises.

At the centre of the figure is legislation on pay equity. Ideally, separate new legislation would be enacted to address equal pay for work of equal value and to bring equal pay for the same job under a “positive duty” employer obligation, replacing the outdated Equal Pay Act. The legislation would provide definitions and lay out principles, processes and institutional responsibilities. It would establish the expertise agency and the formal relationships that it would have with institutions under the Human Rights and Employment Relations Acts, as well as its relationship with employers, unions and individual employees. The legislation should be process oriented, granting the agency sufficient authority to make rulings and recommendations about comparison processes and to adjust methods or systems should this be necessary (Ayres and Braithwaite 1992).

Alternatively, an expert agency could have its institutional base with either the Human Rights Commission or the Employment Tribunal and Mediation Service, with functions and processes linking across the two. It may be that the government chooses to amend the existing Equal Pay, Employment Relations, and State Sector Acts and begins work on pay equity on that basis, rather than embarking on the slower process of passing entirely new legislation. An Employment Relations Act amendment would in any case be required to establish a positive duty on employers. In my view, however, the degree to which the specialist agency is tucked under one framework (and its culture) or the other may tend to dictate the powers it is given and the way it is able to operate. Separate dedicated legislation would ensure greater independence from either framework than might otherwise be the case, allowing innovation, yet be useful in linking the two very different frameworks and cultures through the sharing of specialist expertise (for example, with the Mediation Service or Tribunal). An independent agency would nevertheless come under the EEO Commissioner’s broad overview of progress on EEO and pay equity. New legislation could also provide opportunities for innovations, such as involving key stakeholders in an advisory role.

In the schema suggested by Figure 1, equal pay for work of equal value claims could become part of collective bargaining, including dispute resolution. These could be based on equal value investigations of key occupations by the expert agency, or by the parties themselves using a standard methodology. Employers could be required to review their pay systems and address gender equity, in the same way as they are required to address workplace health and safety issues, or meet labour standards on leave or the minimum wage. If an employer did not demonstrate compliance with requirements and equity standards, employees who do not have a collective agreement could take a complaint or grievance under one of the Acts, with mediation, as at



present. An important difference would be that the onus would be on the employer to prove pay equity. An official equal value investigation of a female-dominated occupation, resulting in a public recommendation for a benchmark wage rate, would set the standard that employees could expect.

## CONCLUSION

Gender pay gaps can be narrowed by policy action. This is demonstrated by past action on equal pay in New Zealand and by pay equity policies in the United States and Canada (Kovach 1997, Hartman and Aaronson 1994). It cannot be assumed that long-standing structural inequalities in the labour market will correct themselves. The current range of government policies will help, but there is a policy gap in addressing the occupational component of women's lower average hourly earnings that reflects an historical undervaluing of work typically done by women.

An equal pay for work of equal value policy, if adopted by government, could no longer be delivered through occupational wage awards as in the 1990 legislation or in recent Australian wage claims (Industrial Relations Commission 2002). But most examples of equal pay for work of equal value (or "comparable worth") come from jurisdictions with decentralised labour markets like New Zealand's (Ministry of Women's Affairs 2002b). In most, the principle – though not always the practice – applies across all employers and all sectors. The task for New Zealand policymakers will not be an easy one. Perhaps the silver lining of slow compliance on ILO 100 and CEDAW is that there is now 25 years of other countries' policy experiences to draw on in designing the policy that will work best for New Zealand.

This paper has contributed some thoughts on the essential ingredients and possible mechanisms for an effective pay equity policy. Women's employment rights are human rights, and New Zealand's employment relations and human rights legislation could work together to ensure that women's paid work is fully valued.

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