‘EQUITY’, CLAIMS THE EPA: A CRITICAL FEMINIST ANALYSIS OF THE EQUAL PAY ACT 1972

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Introduction

"The main criterion for determining the success or failure of reforms should be the impact of the changes made on the lives of women involved."[1]

The Equal Pay Act (EPA) was introduced in 1972, promising the removal of sex-based discrimination in rates of pay for women in paid employment. Despite almost 50 years of this legislation, women in Aotearoa still earn an average of 91 cents to every dollar earned by men.[2]

In an attempt to remedy the Act's failure to close the gender pay gap, the EPA was amended late last year to implement a new bargaining-focussed framework for raising and settling pay equity claims. While this new process could perhaps be an improvement on the previous court-based complaints system, it is still unlikely to create any real economic advancement for women. This latest reform will likely continue to minimally impact the lives of women in Aotearoa.

This dissertation will argue that the amendments made to the EPA will be unable to eliminate the gender pay gap. The inefficacy of the Equal Pay Amendment Act 2020 will be explored throughout the dissertation which will highlight both specific and broad shortfalls. Equal pay legislation in Aotearoa has failed to recognise the underlying causes that drive the unjustified, 'unexplained' economic disparity between men and women, such as deeply ingrained social attitudes and unconscious bias.[3] Legislation has the power to address these issues but until such time as it does, the current mechanisms will continue to produce little positive effect.

It is not enough to make small alterations to an existing equal pay Act that has shown its inability to create economic equality for women. This dissertation will conclude that, ideally, an entirely new process should be established that recognises the need for new legislation that is prescriptive, proactive, and effective in reversing a system that has consistently kept women at the bottom of the employment ladder.

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[1] Laureen Snider, "Feminism, Punishment and the Potential of Empowerment" (1994) 9 Can.J.L.& Society 75 at 76.
[2] Ministry for Women *Annual Report for the year ended 30 June 2020* (31 October 2020) at 5.
[3] Ministry for Women "Gender pay gap" (20 August 2021) <www.women.govt.nz>.

Methodology

This dissertation has adopted Guy Davidov's purposive approach to labour law. Davidov's methodology consists of two parts: (1) understanding and articulating the goals of the law, and (2) reconsidering our means to achieve those goals.[4] In examining these parts, this dissertation draws on ideas of feminist critical legal theory, with a focus on intersectional feminism. Part one of the approach will use feminist theory as a backdrop for understanding the normative goals of pay equity law, and part two will rely on the theory in order to provide critiques on the legislation.

Structure of dissertation

Chapter I will provide some background by setting out the historical and legal context of pay equity laws in Aotearoa. It will give a brief overview of the journey that was taken to get to the Equal Pay Amendment Act 2020 (the amendments) which is the object of this critique.

Chapter II will be focussed on part one of Davidov's purposive approach, understanding and articulating the goals of the law. This chapter will set out the standard that the legislation should be held to, which chapters III and IV will use as a framework for assessing the amendments against.

Chapters III and IV will be where the substance of the critique lies and will address part two of Davidov's approach. The critique will consist of a two-tiered approach. The first tier (chapter III) will offer specific critiques within the new framework itself. The second tier of the critique (chapter IV) will dive deeper into the root causes for the remaining gender pay gap and critique the ability of a framework such as the one we have currently to sustain real change in this area.

Lastly, chapter V will put forward some suggestions for law reform that could improve the pay equity situation in Aotearoa. Part A of this chapter will consider some quick solutions

[4] Guy Davidov *Purposive Approach to Labour Law* (Oxford University Press, Oxford, 2016).

that could be implemented to make our current framework (the bargaining process) slightly more conducive to favourable pay equity outcomes. Part B, however, will look at a more radical approach that will likely be necessary for achieving pay equity, but that would require a whole new system to be implemented. This chapter will complete the argument that the current legislation will be insufficient for achieving economic equality, and that the best way to address this would be to introduce a new system.

I Historical and Legislative Context

This chapter will analyse the pay equity journey in Aotearoa from pre-EPA to the current legal position with the Equal Pay Amendment Act 2020.

A History of the Gender Pay Gap in Aotearoa

1 ILO Convention

The first noteworthy occurrence in the story of equal pay came in 1951 when the International Labour Organisation (ILO) released a convention establishing the principle of equal remuneration for work of equal value between men and women (meaning pay equity).[5] This convention was initially rejected by the New Zealand government on the basis that wage-setting at the time was a matter for the Arbitration Court alone, as the labour market was heavily regulated by the Industrial Conciliation and Arbitration Act 1894.[6]

2 NZPSA case 1956

In 1956, the *NZPSA* took a test case of women's rights to the Arbitration Court on Jean Parker's behalf.[7] Ms Parker was in the Class VI salary scale in the clerical division of the public service.[8] The 'initial maximum' for female clerks was 600 which they could not pass unless they were promoted, whereas the maximum for male clerks was 735 which they would reach automatically through pay rises each year.[9] Ms Parker had managed to be promoted to 695 (one step below the male maximum), so when her appeal against the male cadets who had been automatically appointed on salaries of 460 was 'allowed', her salary ended up being reduced to 460 as well, along with her responsibilities.[10] This decision resulted in public outcry and motivated the equal pay campaign.[11] Protests for women public servants were

[5] International Labour Organisation C100 Equal Remuneration Convention 1951 (No.100) (open for signature 29 June 1951, entered into force 23 May 1953).
[6] Jane Parker and Noelle Donnelly "The revival and refashioning of gender pay equity in New Zealand" (2020) 62 JIR 560 at 563.
[7] At 563.
[8] Margaret Corner *No Easy Victory: Towards Equal Pay for Women in the Government Service 1890-1960* (New Zealand Public Service Association, Wellington, 1988) at 52.
[9] At 49.
[10] At 54.
[11] Parker and Donnelly, above n 6, at 563.

organised asking for "the Government to take action to remedy this grave injustice to women" and saying "An Injury to ONE is the Concern of ALL."[12]

3 First pieces of equal pay legislation

The equal pay campaigns led to the establishment of the Council for Equal Pay and Opportunity 1957 which eventually resulted in the enactment of Aotearoa's first piece of equal pay legislation, the Government Service Equal Pay Act 1960.[13] This legislation afforded equal pay to women in Jean Parker's situation stating, "women shall be paid the same salaries or wages as men where as Government employees they do equal work under equal conditions."[14]

This requirement for equal pay was extended to the private sector 12 years later with the passing of the Equal Pay Act 1972.

B Equal Pay Act 1972

The EPA was intended to remove and prevent sex-based discrimination in the rates of remuneration paid to males and females.[15] Equal pay is defined in the Act as being "a rate of remuneration for work in which there is no element of differentiation between male employees and female employees based on the sex of the employee."[16]

1 New Zealand Clerical Administrative etc IAOW v Farmers Trading Co Ltd

The first significant case to test the EPA was *New Zealand Clerical Administrative etc IAOW v Farmers Trading Co Ltd* in 1986.[17] The case was put to the Arbitration Court to confirm whether s 3(1)(b) of the Act (which focussed on work predominantly performed by females) was intended to create a right to equal pay for work of equal value, or in other words, a right to pay equity.[18]

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[12] Mark Prebble "State services and the Public Service Commission – The merit principle" (20 June 2012) Te Ara – The Encyclopedia of New Zealand <www.teara.govt.nz>.
[13] Parker and Donnelly, above n 6, at 563.
[14] Government Service Equal Pay Act 1960, s 3(1)(a).
[15] Equal Pay Act 1972, long title.
[16] Equal Pay Act 1972, s 2.
[17] *New Zealand Clerical Administrative etc IAOW v Farmers Trading Co Ltd* [1986] ACJ 203.
[18] Ian McPherson "Pay equity: the right to a fair wage" (2006) August NZLJ 253 at 254.

The case was brought by the Clerical Workers Union, 90% of which were women.[19] These women were working jobs that had historically been characterised by low rates of pay due to being performed by women, and their employers had refused to negotiate the issue.[20] Despite this characterisation, the Court decided that the EPA did not confer any power on the Court to address issues of pay equity.[21] Finnigan J stated that "[t]he Court can take no action and that must be the end of the matter."[22]

This ruling confirmed that the EPA was only equipped to undertake claims relating to equal pay for performing the exact same work, rather than pay equity.

C The Necessary Shift from Equal Pay to Pay Equity

1 Relevance of feminist critical legal studies

It is helpful to look at the history of equal pay in Aotearoa within the context of emerging feminist critical legal studies. In order to discuss feminist legal theory, it is also necessary to first establish the distinction between formal and substantive equality and explain why a focus on substantive equality is important.

Formal equality is the idea that men and women are the same, and as such, law should not be enacted which aims to treat them differently.[23] This is contrasted with substantive equality which aims to create equity by enacting laws that treat women differently and recognise that they live distinct lives to men.[24] MacKinnon explains the need for differential treatment by noting that equality has historically only been granted to women when they meet the male standard.[25]

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[19] At 254.
[20] Linda Hill "Equal pay for equal value: The case for care workers" (2013) 27(2) Women's Studies Journal 14 at 16.
[21] McPherson, above n 18, at 254.
[22] Hill, above n 20, at 16, quoting from *New Zealand Clerical Administrative etc IAOW v Farmers Trading Co Ltd*, above n 17.
[23] Robin West, "Relational feminism and law" in Robin West and Cynthia G. Bowman (ed) *Research Handbook on Feminist Jurisprudence* (Edward Elgar Publishing Limited, Cheltenham, 2019) 65 at 66-67.
[24] Elisabeth McDonald "Feminist legal theory in Aotearoa New Zealand: The impact of international critical work on local criminal law reform" (2014) 28 Women's Studies Journal 68 at 70.
[25] Chao-ju Chen "Catherine A. MacKinnon and equality theory" in Robin West and Cynthia G. Bowman (ed) *Research Handbook on Feminist Jurisprudence* (Edward Elgar Publishing Limited, Cheltenham, 2019) 44 at 44.

The EPA aimed to remove discriminatory economic treatment of men and women in the same job, which is based on the idea of formal equality. This is unsatisfactory because it means that the EPA would only grant equality to women once they can prove that they are the same as the males performing the exact same work. In other words, all women who are considered different to men or who have been restricted in their ability to secure the same jobs as men, are denied any chance of real equality.

The ineffectiveness of a formal equality model, such as the EPA, was highlighted by a 1987 Department of Labour report. This report recognised that one of the leading causes for the remaining pay gap was the high levels of segregation of women into occupations with low pay rates.[26] A substantive equality model for equal pay law in Aotearoa would acknowledge the need for reinforcing differences in some instances and addressing the ubiquitous undervaluation of women's work as a whole.[27]

It is necessary, therefore, to create pay equity law based on a substantive equality model. This will be discussed in more detail in chapter II, where the normative goals of the legislation will be outlined.

The importance of substantive equality, emerging from the rise of critical feminist legal studies, shed light on why the EPA had been incapable of dealing with the stubborn gender pay gap. Focussing on pay equity, as opposed to equal pay, creates an ability to target systemic discrimination rather than just individual employers.[28] Largescale pay inequality can rarely be accredited to the actions of single employers and is more often due to structural features of the labour market that can be better addressed by pay equity laws.[29]

[26] *Terranova Homes & Care Limited v Service and Food Workers Union Nga Ringa Tota Incorporated* [2014] NZCA 516 at [35].
[27] Judy McGregor and Sharyn Graham Davies "Achieving pay equity: Strategic mobilization for substantive equality in Aotearoa New Zealand" (2018) 26 GWO 619 at 620.
[28] Charlotte Doyle "The Reactivation of Pay Equity in New Zealand by *Terranova*: Why did it take so long?" (2018) 2 NZWLJ 129 at 153.
[29] At 153.

2 Pay equity legislation

The need for equal pay for work of equal value (pay equity) was recognised by the 1987 Department of Labour report discussed above. [30]

Following the report, a Working Group on Equal Pay and Equal Opportunity was established which provided a draft statutory framework.[31] The Group recommended enacting new legislation to address pay equity and equal opportunity for women and other minorities.[32] The Employment Equity Act 1990 was then passed which sought to "establish procedures that have as their purposes the achievement of employment equity."[33] However, this Act was only in force for three months and was immediately repealed by the incoming National government who claimed it was unnecessary for achieving equity for women in employment.[34]

The National government then introduced the Employment Contracts Act 1991 (ECA) which significantly deregulated the labour market in Aotearoa and provided more 'freedom' to employment relations.[35] The Act created a shift from collectivism towards individualism and reduced backing for unions, halving their memberships.[36] This shift caused female workers to suffer the most[37] as union claims and pay equity campaigns were hindered.[38] It was understood that unionisation and government regulation was part of the solution for closing the gender pay gap, so the implementation of the ECA essentially "removed the possibility of across-the-board changes [for women]."[39]

After coming into power in 1999, the fifth-Labour government enacted the Employment Relations Act 2000 (ERA) to replace the ECA. This Act aimed to promote collective

[30] *Terranova Homes & Care Limited v Service and Food Workers Union Nga Ringa Tota Incorporated*, above n 26, at [39].
[31] Parker and Donnelly, above n 6, at 566.
[32] Prue Hyman "Equal pay for work of equal value – job evaluation issues" (1988) 13 NZJIR 237 at 238.
[33] Employment Equity Act 1990.
[34] Parker and Donnelly, above n 6, at 564.
[35] Employment Contracts Act 1991.
[36] Andrew Morrison *The Employment Contracts Act and Its Economic Impact* (New Zealand Parliamentary Library, 1 November 1996) at 14.
[37] Kevin Hince and Raymond Harbridge (1993) "The Employment Contracts Act: An Interim Assessment" (1994) 19 NZJIR 235 at 245.
[38] Parker and Donnelly, above n 6, at 566.
[39] Jane Parker and James Arrowsmith "Collective Regulation and Working Women in New Zealand and Fiji" (2014) 69 RI/IR 388 at 403.

bargaining and recognise the inherent power imbalance in employment relationships; it also saw the introduction of good faith bargaining between employers, employees, and unions.[40] The ERA included personal grievances as a route to address equal pay by claiming discrimination in pay or employment opportunity on the basis of sex.[41] However, few employees actually used this pathway and it was difficult to settle the grievances without the help of litigation which was costly and time-consuming.[42] While the ERA changed the employment law landscape in Aotearoa, the focus of the EPA was still very much on equal pay rather than pay equity.

In 2012, the New Zealand Human Rights Commission led a statutory inquiry into workers' conditions in the aged care industry which included research into real women's stories and their "lived subjective realities."[43] This inquiry was said to be a catalyst for litigation to achieve pay equity for care workers[44] as the report said that the pay inequality was an "injustice grounded in historical undervaluation of the role."[45] Before preparing the report, the EEO commissioner went undercover to experience working as an unpaid trainee carer and described it as being a "form of modern day slavery", saying that it "exploits the goodwill of women" and "we can claim neither ignorance nor amnesia."[46] After several days of stepping into the shoes of aged carers, the commissioner noted that their roles involved a gruelling combination of time, effort, technique, physical stamina, social skills, emotional inputs and stress,[47] all for an average wage of approximately $1.40 above the minimum wage.[48] This report caused a significant mobilisation on the campaign for pay equity.[49] The report was also a likely cause of the pay equity ruling in *Terranova Homes & Care Limited v Service and Food Workers Union Nga Ringa Tota Incorporated* two years later.[50]

3 Terranova Homes & Care Limited v Service and Food Workers Union

[40] Employment Relations Act 2000, s 3(a).
[41] Employment Relations Act 2000, ss 104 and 105.
[42] Parker and Donnelly, above n 6, at 568.
[43] McGregor and Graham Davies, above n 27, at 622-623.
[44] McGregor and Graham Davies, above n 27, at 622.
[45] Human Rights Commission *Caring Counts, Tautiaki Tika: Report of the Inquiry into the Aged Care Workforce* (May 2012) at 60.
[46] At 132.
[47] At 129.
[48] At 45.
[49] McGregor and Graham Davies, above n 27, at 623.
[50] *Terranova Homes & Care Limited v Service and Food Workers Union Nga Ringa Tota Incorporated*, above n 26.

(a) Overview

Terranova was a landmark case for pay equity in Aotearoa that saw a realisation of the EPA's scope for covering pay equity claims, resulting in a settlement of over $2 billion.[51] The claim was brought by Service and Food Workers Union (SFWU) on behalf of Kristine Bartlett who was an aged care worker for Terranova Homes & Care and argued that care work as an entire industry was undervalued as it has predominantly been performed by women.[52]

The New Zealand Court of Appeal ruled that the EPA, as it stood, allowed for pay equity claims and this decision constituted a repurposing of the Act.[53] The recognition of this capacity of the Act influenced other female-dominated areas (such as social workers, midwives, and early childhood educators) to file pay equity claims as well.[54] The case revealed the weakness of reduced government involvement in the labour market and showed the necessary reliance on pay equity law if we want to close the gender pay gap.[55]

(b) The case

The case was an appeal from Terranova against a ruling by the Employment Court that had been made in favour of Ms Bartlett.

SFWU argued that the wage rates Ms Bartlett was being paid by her employer (Terranova) did not reflect the definition of 'equal pay' that was provided in the Act.[56] Bartlett's claim was not that she was being paid less than her male colleagues performing the same job (the traditional meaning of equal pay), but that both the female and the male employees (4 out of 110) were being paid a lower rate than they would be if caregiving had been a job predominantly performed by males.[57]

[51] *Terranova Homes & Care Limited v Service and Food Workers Union Nga Ringa Tota Incorporated*, above n 26.
[52] *Terranova Homes & Care Limited v Service and Food Workers Union Nga Ringa Tota Incorporated*, above n 26.
[53] Parker and Donnelly, above n 6, at 569.
[54] Parker and Donnelly, above n 6, at 569.
[55] Doyle, above n 28, at 163.
[56] Equal Pay Act 1972, s 2.
[57] *Terranova Homes & Care Limited v Service and Food Workers Union Nga Ringa Tota Incorporated*, above n 26, at [46].

A central question on appeal was whether the Court was entitled to have regard to what is paid to males in other industries (i.e., looking outside of the industry in question). In the initial ruling, the Employment Court had said they may have regard to other industries if it would be inappropriate to look solely at other employees from the same employer or the same industry.[58] On appeal, Terranova argued that looking to other industries was not necessary because they had male employees, and even if they did not, that other aged care facilities could be looked at as a comparator.[59] The Court of Appeal dismissed this argument and agreed with the Employment Court's ruling. They said the words "*would be* paid to male employees" implied that the comparator was intended to be a hypothetical one and so is not limited to the actual rates paid to the employer's male employees.[60]

The ability to look beyond the specific industry in question opens doors for pay equity claims because it recognises that whole professions can be underpaid based on gender discrimination. It is not helpful in a lot of these cases to simply look at other companies within the same industry because that would fail to expose the undervaluation of female-dominated sectors.

The Court of Appeal ruled that evidence of systemic undervaluation of aged care work should be taken into account in determining what equal pay should look like and said it would be difficult to justify the exclusion of evidence of male rates in other sectors to support this point.[61] The court dismissed the employer's appeal on the basis of the language and the purpose contained in the Act itself, proving that, despite the ruling in the *Clerical Workers* case, pay equity was always provided for by the EPA.[62]

4 The Equal Pay Amendment Act

The change in focus of equal pay laws from equal pay to pay equity was solidified by the ruling in *Terranova*. The decision was followed by an inpouring of claims from women in other low-paid industries and the inefficiency of litigation as the primary route to settle the

[58] At [70].
[59] At [79].
[60] At [99].
[61] At [108].
[62] At [236].

pay equity claims became apparent.[63] This led to the need to reconsider the legislation and establish a new process.

In 2015, the Government formed a Joint Working Group on Pay Equity Principles (JWG) which was comprised of government, employer, and union representatives.[64] The JWG was established soon after the influx of equity claims, and was tasked with developing guiding principles for implementing a new pay equity framework in Aotearoa.[65] The JWG recommended a good faith bargaining process to settle claims and supplied principles for the implementation.[66] The recommendations of the JWG will be discussed in more detail in chapter II.

It should be noted that the National government in 2017 (pre-election) introduced the Employment (Pay Equity and Equal Pay) Bill which was not reinstated by the incoming Labour-led government later that year.[67] The Bill proposed to replace the Equal Pay Act 1972 and set up a bargaining process for settling pay equity claims.[68] The JWG was then reconvened in 2018 to give a further report following the 2017 Bill that recommended clarifying and simplifying the claims process through an amendment of the existing Equal Pay Act.[69]

The Labour-led government took the JWG Principles and further recommendations into account and the Equal Pay Amendment Bill was introduced in September 2018, with the Amendment Act coming into force in November 2020.[70] The Act codified the decision in *Terranova* regarding the ability to raise pay equity claims under the EPA and introduced a new framework for raising and settling such claims.

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[63] Doyle, above n 28, at 153.
[64] Te Kawa Mataaho | Public Service Commission *Pay Equity in New Zealand: Context and Principles* (November 2020) at 4.
[65] At 4.
[66] Letter from Patsy Reddy (Crown Facilitator) and others to Paula Bennett (Minister of State Services) and Michael Woodhouse (Minister for Workplace Relations and Safety) regarding the Recommendations of the Joint Working Group on Pay Equity Principles (24 May 2016) at Appendix 2.
[67] Ministry of Business, Innovation & Employment "Equal Pay Amendment Act" (5 November 2020) <www.mbie.govt.nz>.
[68] John McSoriley "Employment (Pay Equity and Equal Pay Bill 2017)" (26 July 2017) New Zealand Parliament <www.parliament.nz>.
[69] Beehive "Government to consider recommendations for pay equity principles" (05 March 2018) Beehive.govt.nz <www.beehive.govt.nz>.
[70] Equal Pay Amendment Act 2020.

The process draws on the existing collective bargaining mechanism that was established by the ERA.[71] Employees can raise a pay equity claim directly with their employer if they perform work that is female-dominated and has factors that show it has been historically undervalued.[72] If the employer decides the claim is arguable, then the parties proceed to the bargaining process where the work is assessed and suitable comparators are identified.[73] If the pay equity claim is legitimate, the parties will then negotiate to reach a settlement which will result in the pay equity outcome.[74] If the employer does not agree that the claim is arguable, or the parties reach an impasse at any stage in the negotiation, the process will be directed to mediation, facilitation, or determination by the Employment Relations Authority or the Court on certain issues, before being referred back to the bargaining process.[75]

D Chapter Conclusion

The Equal Pay Amendment Act was enacted after a long journey of fighting for legislative recognition of pay equity. The Amendments removed litigation as the primary avenue for settling pay equity claims and created a more familiar process for employees and employers to resolve the issues in good faith. While this new process is likely an improvement on the one it replaced, it comes with significant issues which will be discussed in chapters III and IV that make it unlikely to be effective in closing the gender pay gap.

[71] Employment Relations Act 2000.
[72] Equal Pay Act 1972, s 13E.
[73] Sections 13 ZD and 13 ZE
[74] Section 13H.
[75] Ministry of Business, Innovation & Employment, above n 67, at 2.

II Articulating the Goals of Pay Equity Law

"The goals of the law are the basic yardstick by which we have to examine whether it is going to work or not."[76]

This chapter will focus on part one of Davidov's approach, understanding and articulating the goals of the law.[77] It will outline the standard that the EPA should be held to in order to provide a basis for the critique in the following chapters. Davidov points out that this task of articulating goals is a *normative* one,[78] so this chapter will consider what the goals of the EPA *ought* to be and what it should be aiming to achieve.

According to Davidov, the main issues with labour law lie in the mismatch between the goals and the means.[79] The overarching goal of pay equity laws should be to close the gender pay gap, so this chapter will break down that goal further to see what the legislation would need in order to align with this goal. Importantly, Davidov notes that labour law goals should not include the interests of the employer,[80] so the goals of the EPA should be purely focussed on achieving the best outcome for the employees who need protection in the form of law reform.

To better understand both the descriptive and normative goals of a specific piece of legislation, Davidov notes that it is helpful to look at the purpose statements, the relevant legislative documents, and then to theoretical explorations of the law.[81] This chapter will consider both the descriptive and the normative goals of the EPA, including an explanation of the relevance of critical legal theory in uncovering these goals.

A Understanding the Goals

1 Descriptive goals

The original EPA and the Amendment Act include purpose sections that are helpful to use in understanding the descriptive goals.

[76] Davidov, above n 4, at 15.
[77] Davidov, above n 4.
[78] At 27.
[79] At 2.
[80] At 22.
[81] At 29.

Originally, the purpose of the EPA was seen as being to achieve equal pay for women and men who were performing the same jobs.[82] However, as we saw in chapter I, this goal has now progressed to be focussed on achieving pay equity after the decision in *Terranova* and the enactment of the Equal Pay Amendment Act.[83]

The Amendment Act inserted a new Part 4 into the EPA which includes a new purpose section.[84] It states that the purpose of Part 4 Pay equity claims is to facilitate resolution of pay equity claims, by – (a) setting a low threshold to raise a claim (while recognising that entry into the pay equity claim process does not predetermine an outcome), and (b) providing a simple and accessible process to progress a pay equity claim.[85] This does not form the entire basis for assessing the legislation against, but it provides a minimum benchmark that the legislation should at least be achieving.

2 Normative goals

(a) Joint Working Group Principles

To determine what the goals of the Amendment Act ought to be, we can examine the Principles developed by the Joint Working Group (JWG) that were set up to provide guidance on the legislation.[86] These Principles reveal what the goals of the amendments were at least intended to be, or what was advised at the time.

One of the key focusses of the Principles is to recognise the complexity of pay equity issues and provide mechanisms to deal with that complexity.[87] The report produced by the JWG states, "It will be essential that parties bargaining on pay equity matters have ready access to adequate information and resources to assist them in their deliberations."[88] They go on to state that these resources should be free of cost, and that regulatory and support agencies

[82] Equal Pay Act 1972; and *New Zealand Clerical Administrative etc IAOW v Farmers Trading Co Ltd*, above n 17.
[83] *Terranova Homes & Care Limited v Service and Food Workers Union Nga Ringa Tota Incorporated* above n 26; and Equal Pay Amendment Act 2020.
[84] Equal Pay Act 1972, s 13A.
[85] Equal Pay Act 1972, s 13A.
[86] Reddy and others, above n 66.
[87] At 3.
[88] At 3.

should have "the necessary skills, training, knowledge, and resources to effectively support the resolution of pay equity issues."[89]

The JWG also recognised in their recommendations that there are broader issues in the workplace that can cause a gender pay gap, including unequal opportunity in employment.[90] The JWG went on to say that while these are not within the scope of their discussions, they are important issues that will require the government to pay adequate attention to.[91]

(b) Other normative goals

The Amendment Act was passed in order to respond to a change in societal views and the need for gender equality in the workforce,[92] and consequently, its main goal should be achieving that equality. Prior to the proposal of the Amendment Bill, Masselot and Reilly noted that to close the gender pay gap, law must be enacted that provides a pay equity system where barriers to women entering male-dominated occupations are addressed, and effective mechanisms are implemented to prevent gender bias in the workplace.[93] This means that effective pay equity law in Aotearoa should aim to achieve a framework that addresses the broader underlying causes of the gender pay gap, such as gender bias and lack of female representation in high-paying roles. These broader root causes will be discussed further in chapter IV.

B The role of theory in understanding the (normative) goals

This dissertation is exploring a feminist critique on the EPA, which means that the effectiveness of the legislation should be assessed against a critical feminist backdrop. This section will draw on critical legal theory, as well as intersectional feminism in order to create a deeper understanding of what the goals of the pay equity law should be, and the standard against which the law should be assessed.

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[89] At 4.
[90] At 4.
[91] At 4.
[92] Davidov, above n 4, at 14 points out that some of the reasons for introducing law reform are to respond to changes in the labour market and to respond to changing societal views.
[93] Amanda Reilly and Annick Masselot "Women in the Workforce: Still Unequal after all these Years?" in Gordon Anderson (ed) *Transforming Workplace Relations in New Zealand 1976–2016* (Victoria University Press, Wellington, 2017) 149 at 167.

1 Feminist critical legal theory

This section will return to the importance of establishing a system that draws on substantive equality ideas, as discussed in chapter I. The argument from feminist critical legal theory will be fleshed out to show that pay equity legislation must be focussed on substantive equality, rather than formal.

In *Jurisprudence and Gender,* Robin West notes that the values that have characterised women's lives are not reflected in the law since (historically) the law has been made by men, for men.[94] Thus far, women have largely lacked the ability to enact law that protects their interests and takes their experiences seriously.[95] West says that feminist jurisprudence consists of two tasks; the first is "unmasking and critiquing the patriarchy behind purportedly ungendered law" and the second is to undergo reconstructive jurisprudence that recognises that "feminist law reform has been based on characterising and analogising women's injuries and needs to those suffered and longed for by men."[96] This means that feminist jurisprudence needs to articulate women's goals in a way that shows their origin in the experiences of women, rather than trying to situate those goals in the context of the existing masculine legal system.[97]

In terms of understanding the goals of the pay equity law, the feminist jurisprudence discussed above shows that we need to be aiming to create the required space to advance the economic needs of women, rather than trying to adapt those needs to fit within the current framework. To assess the efficacy of the EPA in creating economic equality for women, the legislation should be (and will be in further chapters) examined against these critical legal theory ideas to ensure it will be able to respond to the specific needs of women.

The EPA does create a distinction between women and men with its purpose of eliminating pay discrimination between the two, so it is important to consider whether this is a helpful distinction. In legal contexts, such as with the EPA, analysis should be focussed on whether a

[94] Robin West "Jurisprudence and Gender" in Katherine T. Bartlett and Rosanne Kennedy (ed) *Feminist Legal Theory Readings in Law and Gender* (Routledge, New York, 1991) 201 at 230.
[95] At 231.
[96] At 231-232.
[97] At 232.

legal recognition of such a distinction is likely to reduce gender disparities or whether it will ultimately reinforce them.[98] Because of the obvious pay gap between men and women, the distinction between the two is more likely to reduce economic disparities, as it recognises that the labour market has historically been dominated by men, and we cannot expect that the existing masculine framework will work for women who have had vastly different experiences in the workforce.

Feminist critical legal theory confirms that pay equity law should be assessed against the standard of substantive equality. Contrary to formal equality, substantive equality recognises that the assumption that men and women are the same is incorrect.[99] At the very least, it is clear that women and men have had different societal experiences. West critiques formal equality in favour of substantive quality and argues that "To treat women the same as men in all legal spheres will most benefit women who are already the most like men."[100] It is important that pay equity legislation is based on a substantive equality model rather than formal equality to recognise and account for the social differences between men and women.

Sex segregation exists as part of our understanding of the labour force.[101] There is significant occupational segregation between men and women in Aotearoa,[102] and our society has created a strong distinction between "men's work" and "women's work."[103] The EPA should recognise the difference in men's and women's experience in work so far to allow for women to have their unique experiences taken seriously and the inequality addressed. Chao-ju Chen pointed out that "equality is granted to women when they meet the male standard" and is denied to women when they are considered different from men, [104] so we cannot expect the gender pay gap to close by simply legislating in a traditional way and continuing to situate the necessary reform within the masculine context.

As a way of achieving the overarching goal of closing the gender pay gap, the pay equity laws should be focussing on creating substantive equality for women. As will be discussed

[98] Deborah L. Rhode "Feminist Critical Theories [1990]" in Katherine T. Bartlett and Rosanne Kennedy (ed) *Feminist Legal Theory Readings in Law and Gender* (Routledge, New York, 1991) 333 at 336.
[99] West, above n 23, at 66.
[100] At 67.
[101] Vicki Shultz "Telling Stories About Women and Work" in Katherine T. Bartlett and Rosanne Kennedy (ed) *Feminist Legal Theory Readings in Law and Gender* (Routledge, New York, 1991) 124 at 124.
[102] Ministry for Women "Occupation Segregation" (09 August 2012) <www.women.govt.nz>.
[103] Shultz, above n 101, at 124.
[104] Chen, above n 25, at 44.

further in chapter IV, there are various causes for the gender pay gap that are deeply rooted in our society and its views on women in work, so addressing these underlying issues should be a significant goal for the EPA.

2 Intersectional feminism

When considering the normative goals of a piece of legislation, it is important to think about the groups of people that it will affect the most. Wāhine Māori and Pasifika women suffer a gender pay gap of over 15% compared with all men, whereas European women experience a gap of around 7%.[105] This means that the EPA should have these further disadvantaged women at the forefront of its consideration. Pay equity legislation that wants to close the gender pay gap absolutely must include the goal of creating sustained change for marginalised women.

Intersectional feminism recognises the fact that women experience inequality differently depending on the way gender intersects with their other identities.[106] This means that women have unique experiences of the gender pay gap, and analysis of women that ignores race and other considerations will subscribe only to patterns of white (and cis, straight, abled, etc.) women.[107] As such, law reform that aims to advance the position of women that only includes gender considerations will have a limited impact because it does not address the different situations of many women.[108]

Social categories do not stand alone, and while it is important to take a feminist approach (as discussed above), it is even more important that it is understood that women are not a unified group of people with shared experiences and thoughts.[109] Creating an overarching category of "women" in law can sometimes help in terms of simplifying the different experiences. However, it often denies the experiences of those who are the least privileged, which is suboptimal as they are the women who need that legal protection the most.[110] If pay equity

[105] Ministry for Women, above n 2, at 5.
[106] Marika Morris with Bénita Bunjin *Using Intersectional Feminist Frameworks in Research* (Canadian Research Institute for the Advancement of Women, 2006) at 9.
[107] Irene Browne and Joya Misra "The Intersection of Gender and Race in the Labor Market" (2003) 29 Annu. Rev. Sociol. 487 at 487.
[108] Morris with Bunjin, above n 106, at 14.
[109] At 6-7.
[110] Rhode, above n 98, at 334.

legislation ignores the further contributing factors of oppression, it will fail to provide adequate protection to the women who actually suffer from pay disparity and will do little to close the gender pay gap.

Intersectional feminism is highly relevant in analysing pay equity laws because gender and race (in particular) intersect in important ways when sorting individuals into jobs (eg. men and women into different industries).[111] Pay equity legislation recognises the need to address the fact that entire industries can be underpaid on the basis of sex, and these other factors, like race, can play an important role in establishing those categories and can further disadvantage some women.[112] This means that any laws enacted to achieve pay equity must aim to focus on these intersecting categories of oppression.

The JWG Gender Pay Principles also recognised the need to achieve equitable outcomes for Māori women, further emphasising the need for pay equity legislation to be aiming to provide for systemic change for these women.

Deborah L. Rhode sums up the importance of an intersectional feminist approach aptly when she says, "Any framework adequate to challenge sex-based oppression must simultaneously condemn the other forms of injustice with which it intersects."[113]

C Articulating the Goals

This section will now articulate and set out the goals uncovered above to form the specific standards that the law will be held to in the following chapters.

1 What an effective system would need to close the gender pay gap

The overarching goal of the pay equity legislation has been identified in the preceding sections as closing the gender pay gap. However, the chapter also revealed some more specific goals that would need to be accomplished in order to achieve the ultimate goal of closing the gap. This section will now articulate those more explicit goals.

[111] Browne and Misra, above n 107, at 498.
[112] At 498.
[113] Rhode, above n 98, at 337.

Based on an assessment of the legislation itself, the JWG Principles, and feminist theory, the goals for the pay equity framework, if it wants to close the gap, *should* be:

(a) Creating a simple and accessible process.
(b) Addressing the underlying causes of the gender pay gap through legislation.
(c) Recognising the experiences that women have had in the labour market.
(d) Providing extra protection for women with added layers of oppression.

For the EPA to achieve an elimination of the gender pay gap, it must be aligned with these goals. The following chapters will consider the extent to which these goals are reflected in the legislation.

III Reconsidering our Means; Specific Critiques on the EPA

The current legislation is at odds with the goals identified in the previous chapter. This chapter will focus on step two of Davidov's purposive approach, reconsidering our means. Using the goals outlined in chapter II as a basis (most significantly, goal (a) of creating a simple and accessible process, and the overarching goal of closing the gender pay gap), this chapter will highlight where the EPA fails to meet the necessary standard. The substance of the critique will begin here and will focus on tier-one issues with the legislation, which are issues that exist *within* the pay equity bargaining framework itself. This chapter will argue that when looking through a critical feminist lens, there are specific issues with the EPA that will diminish the potential for it to close the gender pay gap in Aotearoa in any meaningful way.

A No Requirement for Pay Transparency

The first major failing of the new process for pay equity claims is the lack of requirement for pay transparency. The legislative silence as to pay transparency means that women are having to bargain for a level of remuneration that is reflective of males performing work of a similar value, whilst lacking a key piece of information: what those males are being paid.

In cases where female workers are bargaining for pay equity in relation to male employees of the same employer, the inherent power imbalance between employer and employee is fuelled by this lack of transparency.[114] One party to the negotiation (the employer) will have knowledge of what each employee is being paid, whereas the other side (the employee) will not.

On a broader scale, women who are negotiating for pay that is reflective of outside male-dominated industries are missing significant data on pay scales to give them any bargaining power with their employer. Considering the fact that comparison with other pay rates is the primary bargaining tool in pay equity negotiation, the lack of available data to compare salaries between males and females is a huge obstacle.[115] Pay transparency could also assist in

[114] Amanda Reilly "Why New Zealand Employers Should be Subject to Mandatory Pay Transparency" (2019) 12 JALAA 86 at 90.
[115] Saunoamaali'i Karanina Sumeo "It's time to end the secrecy over unequal pay" (8 March 2019) Stuff <www.stuff.co.nz>.

decreasing the need for pay equity bargaining in the first place as the added scrutiny of pay could encourage employers to comply with their obligations and set appropriate and equal rates.[116]

Reilly notes that pay transparency has been recognised as effective and crucial for closing gender pay gaps.[117] Dyhrberg also argues that greater transparency about pay would be a useful mechanism for the bargaining process.[118] Furthermore, the need for transparency is reflected in the Gender Pay Principles which states "transparency and accessibility is essential to the sustainable elimination of gender pay gaps"[119] yet the government has not taken any active steps towards effecting a pay transparency requirement in the new pay equity framework.[120]

The New Zealand Human Rights Commission is currently calling on the government to pass pay transparency legislation.[121] New Zealand has a duty under domestic human rights law to provide equal pay for work of equal value, and this duty is being thwarted by the absence of any transparency laws.[122] Additionally, the Commission is seeking the establishment of an independent body to provide information and resources in order to assist with transparency in reporting about pay equity.[123] The commission argues that "women must not be left to bargain without the tools they need" which is currently the case as the law stands.[124]

The prevailing secrecy regarding pay is misaligned with both the specific purpose of implementing an easy process for pay equity settlements and with the overarching goal of closing the gender pay gap.

[116] Reilly, above n 114, at 92.
[117] At 87.
[118] Steph Dyhrberg "One step forward and two steps back for pay equity" (2017) 907 LawTalk 32 at 34.
[119] Ministry for Women *Gender Pay Principles* (2 July 2018) at 2.
[120] Reilly, above n 114, at 88.
[121] "Demand an independent pay transparency agency to close the gender pay gap" (2019) NZ Human Rights <www.hrc.co.nz>.
[122] Above n 121.
[123] Above n 121.
[124] Above n 121.

B Lack of Guidance on Identifying Suitable Comparators

Terranova saw the realisation of the ability to compare female-dominated areas with male-dominated ones for the purpose of uncovering historical undervaluation on the basis of sex.[125] The Amendments codified this decision yet did not provide any detailed guidance as to how this comparator should be produced and/or used. As mentioned in chapter II, the JWG acknowledged that the principles they provided were silent as to the extent that guidance on identifying comparators should be available,[126] but it is nevertheless an important issue.

Section 13ZE of the EPA can be considered an attempt to provide guidance on identifying appropriate comparators, however, it falls short of giving any concrete assistance to bargaining parties.[127] The section says that comparable work may include work performed by males that is different to the work to which the claim relates, if that work involves substantially similar skills, responsibilities, working conditions, and/or degrees of effort.[128] This gives some indication as to the factors to consider when producing a comparable male-dominated area, but it does not give detailed instructions on how to weigh these different factors or how to find evidence of such similarities.

The lack of guidance in the legislation can lead to damaging results as negotiating parties can place emphasis on certain factors to the exclusion of others. As a way of disproving the similarities between the industries offered, an employer could potentially highlight differences in the level of responsibility between the two roles, for example, yet neglect to recognise that the lack of responsibility is made up for in terms of the skills required.

The Public Service Commission developed a Pay Equity Claimant and Comparators Process Guide that does elaborate on the process and offer some guidance.[129] The Guide provides information and templates to help identify comparators, obtain relevant information, and compare the work and remuneration of the claimant and comparators.[130] While this is a useful

[125] *Terranova Homes & Care Limited v Service and Food Workers Union Nga Ringa Tota Incorporated* above n 26.
[126] Reddy and others, above n 66, at 3.
[127] Equal Pay Act 1972 s 13ZE.
[128] Equal Pay Act 1972 s 13ZE.
[129] Te Kawa Mataaho | Public Service Commission *Pay Equity Claimant and Comparator Process Guide* (November 2020).
[130] At 3.

resource for the bargaining process, it still places a large burden on women to gather the information and go through all the steps necessary to produce comparators. Along with working and other obligations, this can present an unnecessary hurdle and cause added strain on the claimant that could be avoided. Furthermore, the document itself includes a disclaimer that parties must seek their own legal advice in respect of the guide which diminishes its usefulness and reliability.[131]

C Bargaining Assistance?

The legislation does not currently provide an independent body to assist women and unions with the issues that can arise out of collective bargaining. As previously outlined, there are significant hurdles in the bargaining framework (such as the absence of pay transparency laws and the lack of guidance to produce comparators) that can burden women and decrease their likelihood of achieving a successful pay equity settlement. The effects of these legislative flaws are not mitigated at all by an establishment of a body to give assistance, resources, and general guidance and direction when conducting the bargaining process. The lack of any independent facilitation throughout the whole process to place any checks and balances necessary means the power tends to stay on the side of the employer.

The overall absence of assistance falls short of the specific, descriptive goal outlined by the JWG to provide mechanisms and ready access to resources that help deal with the complexities of a pay equity issue.[132] This sort of assistance is provided in Australia by the Workplace Gender Equality Agency, [133] but there is no equivalent in Aotearoa. The idea of an independent agency will be discussed in further detail in chapter V, but note for now that the lack of help provided to bargaining parties is a failure of a key goal of the legislation (goal (a) outlined in chapter II, being to create a simple and accessible process).

[131] At 2.
[132] Ministry for Women, above n 119, at 3.
[133] Workplace Gender Equality Agency <www.wgea.gov.au>.

D The appropriateness of the bargaining process for women

In addition to the unnecessary complexities within the process, the whole concept of settling pay equity claims through bargaining may not be the most appropriate avenue for many women in terms of the capacity for success.

As a practice in the labour market, bargaining has historically been very masculine and has been based on the idea of workers being male breadwinners.[134] Within the context of considering the effect of a free market on women, Hammond and Harbridge state that "[t]o argue that women will achieve freedom and equal bargaining status in a predominantly masculinist bargaining process is to disregard the structural impediments that women face in pursuing equality in the labour market."[135]

In 2017, the Ministry for Women published research on the gender pay gap.[136] The report referenced research from Australia that was conducted in 2016 and found that while women were just as likely as men to ask for a pay rise and negotiate their pay, men were 25% more likely to get the result they were asking for.[137] This suggests that the negotiation framework may not be the most fitting route for women, especially given the unconscious bias that can be at play in these situations (which will be explained further in chapter IV).

The power to award a pay rise under the new framework remains with the employer, which means women must be able to contend their position well enough for the employer to agree with their point of view. Furthermore, it relies on women having the confidence and resources to open the conversation up and begin the process of seeking out a pay equity claim. Because of the way women have been socialised, they often struggle to place enough value on themselves and self-promotion can be seen as unbecoming.[138] While the process relies on this, women can often suffer prejudice from the very fact of them displaying this courage and can be disadvantaged for initiating negotiation.[139]

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[134] Suzanne Hammond and Raymond Harbridge "The Impact of the Employment Contracts Act on Women at Work" (1993) 18 NZJIR 15 at 17.
[135] At 17.
[136] Ministry for Women "Research on the gender pay gap in New Zealand" (27 February 2017) <www.women.govt.nz>.
[137] Above n 136.
[138] Reilly, above n 114, at 91.
[139] At 91.

Two different explanations for why women do not often get what they ask for in a negotiation is that women are too tame and fail to assert their wants, or that women are too assertive and 'aggressive' and suffer a backlash from this.[140] This puts women in a catch-22 situation. A lack of assertion leads to not being taken seriously or not getting a claim lifted off the ground, whereas a display of assertion leads to unfavourable results because it is seen as an inappropriate way for a woman to act.[141] Women are having to strike the perfect balance and are held responsible for how the other party receives their pleas.

A study by the *Journal of Applied Psychology* found that backlash from assertion was a major issue for women in negotiation and contributed to the less favourable outcomes that women experience in bargaining.[142] A separate study found too that females were less likely to be successful in negotiation when they violated gender norms.[143] In other words, women who act contrary to expected feminine behaviour are more susceptible to adverse outcomes in bargaining processes. Pay negotiations and the unconscious bias that causes differences in the perception of male negotiators versus female negotiators has been seen as a large contributor to the gender pay gap.[144]

Having a legislative framework built on the premise that women must assert their rights and bargain against their employer despite the higher likelihood of their negotiation being ineffective is an oversight that asks too much of women.

E Critique from Human Rights

The final specific critique of the new legislative framework is that it reduces a human right to something that women must bargain for in order to have recognised.[145]

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[140] Kim Elsesser "Why Women Fall Short In Negotiations (It's Not Lack Of Skill)" (21 January 2021) Forbes <www.forbes.com>.
[141] Above n 140.
[142] J. E. Dannals, J. J. Zlatev, N. Halevy, and M. A. Neale "The Dynamics of Gender and Alternatives in Negotiation" (2021) *Journal of Applied Psychology*.
[143] Maria Recalde and Lise Vesterlund *Gender Differences in Negotiation and Policy for Movement* (National Burea of Economic Research, 2020) at 4.
[144] Sabrina L. Brown "Negotiating around the Equal Pay Act: Use of the Factor other than Sex Defense to Escape Liability" 78 Ohio St. L.J 471 at 492.
[145] Parker and Donnelly, above n 6, at 572.

Pay equity is a human right under the ILO convention[146] and the United Nations Declaration on the Elimination of All Forms of Discrimination against Women[147] which were both ratified in Aotearoa in the 1980s.[148] The ILO Convention established the principle of equal pay for work of equal value between men and women and requires signatories to ensure its application to all workers through wage-setting methods.[149] However, the fact that recognition of this human right is the ultimate goal of the new bargaining process means that it is not automatically granted to women. Women are having to initiate bargaining and then negotiate with their employers to be treated in the way that is required by human rights law. Converting the human right of pay equity into the goal of negotiation means that women who are unable to bargain for whatever reason are essentially being denied a human right.

Furthermore, the need to bargain for a human right will likely limit the possibility of achieving widespread equality because while one woman enforcing her rights can potentially solve an individual instance of discrimination, it will rarely advance the position of other women.[150] The framework created by the Amendment Act places the onus on women to enforce their rights and bargain for their recognition, which is unsuitable for many women and unlikely to create positive change.

While the right to pay equity is contained in the ILO conventions, we can see that, in practice, this does not guarantee its application to all people. Human rights law and labour law are often seen to be a dichotomy[151] as the inherent inequality between employer and employee creates a paradox whereby the people are deemed to be equal, yet the employee is subordinate to the employer in the employment relationship.[152] When considering human rights in the context of the labour market, some even view the signing of an employment contract as an act of waiving those rights.[153]

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[146] International Labour Organisation C100, above n 5.
[147] United Nations Convention on the Elimination of (All Forms of) Discrimination against Women 1249 UNTS 13 (open for signature 18 December 1979, entered into force 3 September 1981).
[148] Prue Hyman *Hopes Dashed? The Economics of Gender Inequality* (Bridget Williams Books Limited, Wellington, 2017) at 79.
[149] International Labour Organisation C100, above n 5.
[150] McDonald, above n 24 at 75.
[151] Janice R. Bellace and Beryl ter Haar "Perspectives on Labour and Human Rights" in Janice R. Bellace and Beryl ter Haar (ed) *Labour Law Research Handbook* (Edward Elgar Publishing Limited, Cheltenham, 2019) 2 at 2.
[152] At 8.
[153] At 3.

However, we have significantly moved on from the times of master and servant and employees are now treated as people first, meaning they should be afforded human rights even when in that employment context. One way to ensure that a human right, such as the right to pay equity, is recognised to its full extent is to fully incorporate it into legislation.[154]

The legislation (the EPA) is currently weakening the right to pay equity in an employment relationship by requiring women to bargain for its recognition, rather than strengthening it. This is particularly damaging given the existing power imbalance and the fact that the ILO convention on its own is already insufficient to protect female employees' rights.

The new bargaining framework has the effect of undermining female workers' human rights which is unacceptable in the current labour market and contrary to the goal of closing the gender pay gap.

F Chapter Conclusion

The bargaining framework implemented by the Amendment Act contains many flaws that will make it difficult to achieve an elimination of the gender pay gap. The shortfalls outlined in this chapter have illustrated that the EPA is misaligned with the goals established in chapter II (particularly goal (a) of creating a simple and accessible process).

[154] Grégoire Webber, Paul Yowell, Richard Ekins, Maris Köpcke, Bradley W. Miller and Francisco J. Urbina *Legislated Rights: Securing Human Rights Through Legislation* (Cambridge University Press, Cambridge, 2018) at 1-2.

IV Reconsidering our Means; Beyond the Legislation

This chapter will discuss the tier-two issues with the pay equity framework within Aotearoa, being the broader concerns with the EPA. The causes behind the gender pay gap are incredibly complex and involve a lot of deeply ingrained societal views. This chapter will explain some of these root causes and argue that the EPA does not address these issues adequately which diminishes its ability to close the gap.

Where the previous chapter focussed on failures of goal (a) (creating a simple and accessible process), this second level of critique will look more in-depth at failures of the last three goals identified in chapter II; (b) addressing the underlying causes of the gender pay gap through legislation (c) recognising the experiences that women have had in the labour market, and (d) providing extra protection for women with added layers of oppression.

Suggestions to fix these issues will, admittedly, be a lot more complex than the tier-one critiques, but it is nevertheless crucial to expose these issues which the legislation has failed to address. While a lot of the issues this chapter will discuss are social ones, it is important to remember that legislation can have a significant role in shaping discourse and the way we think about these social issues, so it is necessary to discuss them within the context of the EPA.

Before explaining how the EPA falls short of addressing the root causes, it is first necessary to outline what some of those underlying contributing factors to the gender pay gap are.

As discussed in previous chapters, a leading cause of the gender pay gap in Aotearoa is the heavily sex-segregated labour market. Not only does Aotearoa have a high level of occupational segregation where males and females tend to be separated into different job sectors, but we also have a male-dominated vertical segregation within occupations, where males are over-represented in high-paying positions.[155] In the 2020 Ministry for Women annual report, it was stated that women held just 23.7% of board roles on NZX-listed companies.[156] Despite this, 64% of those who gained bachelor degrees or higher were

[155] Ministry for Women, above n 102.
[156] Above n 2, at 5.

women.[157] On average, women in Aotearoa are more educated than men, yet only receive an average of 91% of their earnings and still struggle to be awarded or promoted to those high paying jobs.

The lack of representation of women in positions of senior management etc. cannot be attributed to a lack of qualification, which begs the question of what is driving this disparity. A comprehensive study on the drivers of the gender wage gap conducted by Isabelle Sin also revealed that the gender pay gap cannot be attributed to differences in productivity between men and women.[158] Instead, the study concluded that "sexism on the part of employers [is] a major driver of the unexplained wage gap."[159] This chapter will delve deeper into this sexism and look at how the EPA has failed to address this, even though it is a primary cause of the pay gap.

This chapter will start by explaining some assumptions that are held by society at large that contribute to the sexist attitudes maintaining the gender pay gap and are not addressed by the EPA which is a failure of goal (b) (addressing the underlying causes of the gender pay gap through legislation). It will then look at some further barriers that women experience in the paid workforce and argue that the legislation does not acknowledge these which is inconsistent with a substantive equality model and a failure of goal (c) (recognising the experiences that women have had in the labour market). Lastly, this chapter will critique the EPA for failing to remedy the unequal burden on Māori and Pasifika women, which is at odds with goal (d) (providing extra protection for women with added layers of oppression).

A Assumptions Not Addressed by the EPA

One of the deeper causes of the remaining gender gap is the fact that there are certain assumptions held by society that have not been eliminated by the EPA or its subsequent amendments. These assumptions contribute to the underlying sexism which has been identified as a driver behind the pay disparity between men and women.[160]

[157] Above n 2, at 5.
[158] Isabelle Sin, Steven Stillman and Richard Fabling *What drives the gender wage gap? Examining the roles of sorting, productivity differences, and discrimination* (Motu Economic and Public Policy Research, Motu Working Paper 17-15, August 2017) at 20.
[159] Isabelle Sin, Steven Stillman and Richard Fabling *What Drives the Gender Wage Gap? An Executive Summary of Working Paper 17-15* (Motu Economic and Public Policy Research, August 2017) at 6.
[160] At 6.

The 2020 amendments actually addressed the fact that certain gendered assumptions may be contributing to the pay gap.[161] Section 13ZD(2) says that in making assessments, parties must consider matters objectively and without assumptions based on sex (and prevailing views as to the value of work must not be assumed to be free of assumptions based on sex).[162] This is certainly a positive step but unfortunately, many of these assumptions are deeply ingrained and simply noting that parties must not make these sex-based assumptions does not go far enough in eradicating biases and stereotypes. The failure of the EPA to draw sufficient attention to these assumptions and create adequate compliance measures is a big shortfall in terms of goal (b) which is addressing the underlying causes of the gender pay gap through legislation.

This part will now discuss three main assumptions that contribute to women continuing to suffer economic disparity in the labour market.

1 Assumption one: Women form their own career aspirations

Vicki Shultz notes that one of the common assumptions is that women form stable job aspirations prior to joining the workforce, rather than having their goals crafted for them by the types of opportunities that have historically been available to them.[163] She says, "judges have placed beyond the law's reach the structural features of the workplace that gender jobs and people, and disempower women from aspiring to higher-paying non-traditional employment."[164] The myth that women choose to perform and want to aspire to low-paying jobs, ignores the struggles they have endured to try to achieve better pay and the fact that female-dominated professions have been undervalued.[165]

External societal factors can have a strong influence on the types of careers that women tend to aspire to, but the legal system is also involved in this process because women form job preferences in response to employer's practices which are helped by court decisions.[166] Shultz

[161] Equal Pay Act 1972, s 13ZD.
[162] Equal Pay Act 2020 1972, s 13ZD.
[163] Shultz, above n 101, at 135.
[164] At 125.
[165] Pat Armstrong *Pay Equity Lessons on Canada* (Paper prepared for the New Zealand Conference on Pay and Employment Equity for Women, Victoria University of Wellington, June 2004) at 5.
[166] Shultz, above n 101, at 135.

explains that "[j]udge's decisions are embedded in the fabric of organizational life through which women's hopes and dreams as workers are woven."[167] This assumption is damaging because it creates the misconception that women choose these lower-paying roles for themselves and that they always have the option to strive for different occupations.

2 Assumption two: Gendered roles exist

Another harmful assumption that can be unconsciously present in employers (and others), is that men and women are sorted into jobs that reflect certain characteristics held in virtue of belonging to a particular gender.

In a case about unequal employment opportunities in the US called *EEOC v. Sears, Roebuck & Co*, the court made a distinction between men and women in terms of their job preferences and the roles they would be suited for.[168] The case assessed a company's promotion structure after a claim was raised that it was discriminatory against women.[169] The court in this case held that the promotion structure was not discriminatory on the basis that women would find the job unappealing.[170] Being a sales commission role, it relied on aggressive and competitive characteristics which were said to not generally be exhibited by women.[171] Women were coined as being friendly and non-competitive, meaning unsuitable for such a role, which was based on a heavily generalised and unfounded assumption.[172] Not only did it assume that no women are competitive, it also assumed that women are all the same and that they choose these stereotyped roles for themselves.

Justice Susan Glazebrook also discussed this assumption in her *Gender Myths* article. She said that research was undertaken in 2007 about the challenges faced by professional women, and it concluded that people associate men and women with different traits and link leadership characteristics with men.[173] Some women may, in fact, display different managerial styles to men, but this is generally perceived as a weakness and a sign of

[167] At 141.
[168] Shultz, above n 101, at 125; and *EEOC v. Sears, Roebuck & Co.*, 628 F. Supp. 1264 (N.D. Ill. 1986).
[169] *EEOC v. Sears, Roebuck & Co.*, above n 168.
[170] *EEOC v. Sears, Roebuck & Co.*, above n 168.
[171] Shultz, above n 101, at 125.
[172] At 125.
[173] Susan Glazebrook "Gender Myths and the Legal Profession" (2016) 22 CantaLR 171 at 186.

ineffective leadership purely because it deviates from the male standard.[174] This shows that we have set the standard for leadership against the backdrop of it being a 'man's job'. As such, women are now criticised for not fitting that mould which further reinforces the argument discussed in previous chapters for the need for a substantive equality model. This kind of association of leadership with males (whether conscious or unconscious) can affect women's perceived ability to perform leadership roles, which can have a flow-on effect regarding the level of pay they receive.

The assumption that women inherently possess characteristics that make them appropriate (or not) for certain types of roles contributes heavily to the pay gap. This is a deeply ingrained assumption that affects the kind of occupations and roles that women can enter into in the first place, so is not something that can be solved by just stating that matters must be assessed "objectively" in the bargaining stage (as s 13ZD would suggest).

3 Assumption three: Pay is all based on merit

It is a common misconception that what workers are paid, and the roles they are selected for, is entirely based on merit.[175]

Glazebrook J takes an example separate from the law profession or labour market to illustrate the falseness of this merit assumption.[176] She points out that in the US in the 1970s there was a large increase in women being selected for orchestras, and that this was accredited to the fact that auditions began being held behind a screen so the gender of the performer was unknown.[177] This same thing happens in the workplace, whether people are aware of it or not, and the bias is usually present in both men and women.[178] As discussed above, people tend to associate leadership qualities with men, and this results in people unconsciously perceiving men to be a better fit for such roles.

[174] Catherine Fox "The higher you go, the wider the gap" in *Women in Leadership: Understanding the gender gap* (2013, CEDA) 21 at 27-28.
[175] Glazebrook, above n 173, at 186.
[176] At 185.
[177] At 185.
[178] At 186.

The idea of homophily (explained further in part B) comes into play here and can contribute to debunking the myth of meritocracy. Prue Hyman explains:[179]

> The problem with the merit-only argument is that merit and skills are often at least partly in the eye of the beholders, who may be inclined to see more clearly the merit of people very like themselves.

The idea that workplaces are meritocracies is inaccurate and damaging as it provides a justification for doing nothing about the lack of diversity within top-paid roles.[180]

The EPA recognises the need to legislate against basing economic assessments off of assumptions,[181] but it does not go far enough in considering the deeper effects that certain assumptions can have and the way they can limit opportunities altogether. This is a clear failure of goal (b) (addressing the underlying causes of the gender pay gap through legislation).

B Failures to Address Barriers Faced by Women

This next part will focus on how the EPA has failed to achieve goal (c) which is recognising the experiences that women have had in the labour market. This critique ties into the fact that the segregation of the labour market is a big contributor to the gender pay gap, as explained in the introduction to this chapter. As noted in chapter II, if we want legislation to effectively close the gender pay gap, we need to be addressing the obstacles that hinder women from being adequately represented in high-paying occupations and roles. This part will argue that the EPA currently does not address this.

The EPA has recognised a need to consider the historic undervaluation of jobs that are predominantly performed by women.[182] However, this only recognises the downstream effects of job segregation rather than addressing the historical experiences of women in the labour market and the barriers that have existed which have forced them into those low-paying jobs in the first place. It is arguable that certain factors cannot be addressed or

[179] Hyman, above n 148, at 77.
[180] Fox, above n 174, at 24-25.
[181] Equal Pay Act 1972, s 13ZD.
[182] Equal Pay Act 1972, s 13F.

changed by legislation alone and there will need to be a shift in social perspectives in order to fully eliminate the pay gap.[183] Nevertheless, this dissertation argues that if the legislation was more prescriptive as to the broader concerns, it could shape the way we think about the gender pay gap and create the necessary social change.

This part of the critique will discuss some of the different factors that women can experience in the labour market that contribute to maintaining the gap and are not addressed by the legislation.

1 Lack of representation

The legislation currently prohibits pay discrepancies based on gender considerations, and now also requires recognition of historical undervaluation,[184] but it still fails to account for the apparent sexist views that lead to the segregation of women and men in the workplace in the first place. While an employer cannot pay a man more than a woman for performing a job of substantially similar value, the EPA does not include any requirement for a fair distribution of senior roles between genders. In other words, this legislation does nothing for the issue of vertical segregation in Aotearoa which limits its ability to close the gender pay gap.[185]

One example of the negative effects of both horizontal and vertical segregation can be seen in the healthcare sector in Aotearoa.[186] Women make up the majority of the healthcare sector but they are severely underrepresented in leadership positions within the field, meaning they and their interests are often overlooked in decision-making processes.[187] Instead of being seen in the senior positions within the healthcare system, women are more likely to be found in nursing and care work which have been characterised as low-paying jobs.[188] The prevalence of women within the one occupation (and being at the lower end of the pay scale within that sector) fuels the gender pay gap because women are not the ones who are setting the wages and making the important decisions about their work.

[183] Doyle, above n 28, at 130.
[184] Equal Pay Act 1972.
[185] Ministry for Women, above n 102.
[186] Annick Masselot and Maria Hayes "Exposing Gender Inequalities: Impacts of Covid-19 on Aotearoa" (2020) 45 New Zealand Journal of Employment Relations 57 at 58.
[187] At 58.
[188] At 59.

The lack of representation of women in high-paying jobs creates a vicious cycle. Women are underrepresented in leadership roles, meaning they are not in the hiring and promoting positions which, in turn, means that other women are less likely to be hired and promoted. In the *Gender Myths* article, Glazebrook discusses homophily with reference to this representation issue and how it can contribute to the gender pay gap.[189] Homophily is the idea that people like people who are similar to them, meaning that in the workplace, people are likely to favour, reward, and give opportunities to those who are similar to them in important respects such as gender, race, and ethnicity.[190] This is one explanation for the continued lack of women in senior positions which encourages the pay disparities between men and women and yet is not addressed at all by the EPA.

As discussed in chapter II, Masselot and Reilly pointed out that effective legislation would need to address the barriers that women face to entering sectors that are dominated by males.[191] Unfortunately, the EPA as it stands today does not adequately address these obstacles, so there is a mismatch between that goal and the means we have to achieve it.

2 Inadequacy of purely legal opportunity

The sexist views that are often behind the segregation of the labour market can also be found in the legal system itself. It is not enough for the EPA to provide a legal remedy without considering the social views that may also come into play when deciding whether that remedy is granted (or not).

The EPA provides a legal opportunity for women to argue against pay inequity *after* the fact of the discriminatory treatment. While legal opportunity is important in remedying the effects of discrimination, addressing societal stereotypes is also hugely significant[192] and these views can, unfortunately, be present in legal decisions as well. It is important to realise that the law does not operate in a vacuum separate from society[193] and we need to look at the contributing social factors as well as just legal redress.

[189] Glazebrook, above n 173, at 186.
[190] At 186.
[191] Reilly and Masselot, above n 93, at 167.
[192] McGregor and Graham Davies, above n 27, at 625.
[193] McGregor and Graham Davies, above n 27, at 625.

The connection between social views and legal outcomes is highlighted by the decision in *Terranova*. This decision recognised that the EPA had always allowed for pay equity claims, yet almost 30 years earlier, the *Clerical Workers Union* case ruled that there was no jurisdiction for considering a claim based on historical undervaluation using the very same Act.[194] The journey we have seen of pay equity thus far in Aotearoa shows that the success of legislation of this kind is highly dependent on the attitudes of those enforcing the law, and how willing they are to uphold it.[195] Despite best efforts, legal interpretations are often influenced by social perspectives of judges at the time, meaning that real equity cannot be created by law reform alone unless that law reform prompts a shift in societal views as well.

Terranova very much illustrates how the effect of a piece of legislation can be conditional on the way it is interpreted by the courts. A US example of this as well can be seen in the court's interpretation of Title VII (of the Civil Rights Act 1964, relating to Employment Opportunity).[196] This legislation promised change for women in the workforce, but it ended up being interpreted by the courts, either consciously or unconsciously, using the same assumptions that have historically permitted the economic disparity faced by women.[197] These assumptions have been discussed in part A of this chapter. Title VII created little practical change for working women because its success was so dependent on the way the courts were willing to apply it, which again comes down to prevailing social views of the time.

The Amendments to the EPA are at risk of ending up this same way because, in part, of the lack of emphasis being placed on the broader social issues that continue to reinforce the economic disadvantage faced by women. The legislation will need to go a lot further to pierce the historical views that have become so embedded in our ways of thinking.

Furthermore, as Morris and Bunjin point out, "[l]egal protection is never enough if access to legal protection is restricted by income, geography, or biases on part of police, court systems and professionals."[198] The EPA now offers legal protection in the form of raising a pay equity claim with an employer, but it fails to consider the broader obstacles that may be in the way

[194] *Terranova Homes & Care Limited v Service and Food Workers Union Nga Ringa Tota Incorporated* above n 26, and *New Zealand Clerical Administrative etc IAOW v Farmers Trading Co Ltd*, above n 17.
[195] Doyle, above n 28, at 136.
[196] Civil Rights Act of 1964 Pub L No 88-352, Title VII, 78 Stat 241 at 253 (1964).
[197] Shultz, above n 101, at 125.
[198] Morris with Bunjin, above n 106, at 14.

of achieving this justice such as inequality of bargaining power, continued employer biases, and a reliance on women actually putting themselves out there to seek a pay equity claim.

Lastly, the route to address pay equity afforded by the EPA will need to be backed up by proactive support from the government that goes further than just creating a new base framework.[199] Achieving pay equity will incur a large financial burden that will often be beyond the employer's ability to provide.[200] In order to maximise the potential for this Act to close the gender pay gap, the government should not only allow an opportunity for women to raise a claim, but should also back this up with the means for them to achieve an adequate pay equity settlement.

C Unequal Burden on Māori and Pasifika Women

This part of the chapter will draw on the intersectional feminism ideas discussed in chapter II, to argue that the legislation has failed to meet goal (d), being to provide extra protection for women with added layers of oppression. As referenced in chapter II, the gender pay gap experienced by wāhine Māori and Pasifika women is over 15% compared with the overall gap of 9%.[201] The EPA neglects to put measures in place that adequately provide for the greater level of inequality faced by Māori and Pasifika which is clearly incompatible with goal (d).

As pointed out in chapter II, it is crucial to look at the groups of people that the legislation in question will affect the most when analysing the effectiveness of the law. This critique has taken a feminist focus so far as women are the ones who are on the wrong side of the pay gap. However, Pasifika women and wāhine Māori (and other minority groups) bear the brunt of the gender pay gap, so it is even more important that the wider critique recognises these groups within the overarching group of 'women' that will experience this pay equity legislation to a harsher effect.

The EPA has a purpose of removing and preventing discrimination on the basis of sex,[202] but the law fails to recognise the intersectional discrimination that many wāhine Māori (and other

[199] Doyle, above n 28, at 160-161.
[200] Doyle, above n 28, at 160-161.
[201] Above n 2, at 5.
[202] Equal Pay Act 1972, long title.

marginalised women) will experience in the labour sector in Aotearoa.[203] The legislation currently makes no mention of the need for further protection of women with added layers of oppression, or recognition that these women fare far worse than otherwise privileged women. This shortfall will significantly limit the Act's ability to close the gender pay gap because enacting legislation that advances the position of only those women who are not oppressed in other ways will ignore the essence of the problem.

In the Waitangi Tribunal *Mana Wāhine Kaupapa Inquiry,* claimants submitted that there had been a failure of the Crown in relation to employment and equal pay by denying mana and iho of wāhine.[204] The economic disadvantage suffered by wāhine Māori in the workforce is inconsistent with Te Tiriti principles.[205] The Crown need to be honouring their Tiriti agreements by putting mechanisms in place to address the inequality faced by these wāhine.

A lack of diversity in senior roles may contribute to the increased gender pay gap for ethnic minority women, as is seen when looking at underlying causes for the overall gender pay gap.[206] A further submission in the *Mana Wāhine Kaupapa Inquiry* was that there had been an undermining of leadership and governance capability of wāhine Māori.[207] To minimise the pay gap, it would be necessary to address the causes and remedy the effects of such underrepresentation, and therefore, the legislation is failing by not including any of these measures in the pay equity process. Suggestions for how the legislation could achieve this will be discussed further in the following chapter.

Talking in the context of anti-discrimination laws in Aotearoa, Mai Chen has emphasised the need for greater awareness and recognition in law of the effects of intersectional discrimination, "so that such cases are determined in a manner that takes into account the real and lived experience of complainants."[208] Within this same context, Reilly notes that, "[a]t the very least, a legislative requirement to take account of the needs of Māori women which explicitly references the impact of intersectional disadvantage and discrimination, may be

[203] Amanda Reilly "Māori Women, Discrimination and Paid Work: The Need for an Intersectional Approach" (2019) 50 VUWLR 321 at 323.
[204] Waitangi Tribunal *Mana Wāhine Kaupapa Inquiry* (Wai 2700, 2020).
[205] Reilly above n 203, at 322.
[206] Above n 2, at 5.
[207] *Mana Wāhine Kaupapa Inquiry*, above n 204, at 2.
[208] Mai Chen *The Diversity Matrix: Updating What Diversity Means for Discrimination Laws in the 21st Century* (Super Diversity Centre, 2017) at 25.

appropriate."[209] The same can be said for pay equity laws and the EPA is currently failing the women it should be helping the most by neglecting to include any recognition of this. This is an obvious failure of goal (d).

D Chapter Conclusion

The EPA does not go far enough in stamping out widely held assumptions, unconscious biases, and the greater suffering of minority women. The legislation would need to be reformed in order to address the underlying causes of the gender pay gap that were discussed in this paragraph, such as the sexist views that lead to market segregation and a lack of diversity. Some options for how these issues could be managed will be discussed in the coming chapter.

[209] Reilly above n 203, at 338.

V Recommendations

This chapter will examine some potential recommendations for pay equity law reform in Aotearoa. In order for legislation to be most effective in closing the gender pay gap, it would need to meet all of the goals outlined in chapter II, and therefore would need to correct the failures that have been identified in both chapters III and IV.

However, this chapter will be split into two parts where part A will mainly focus on addressing the critiques in chapter III and consider some smaller changes that could be made *within* the existing bargaining framework that could increase the effectiveness of the process in some way. Part B, on the other hand, will contemplate a more radical suggestion that would require a whole new framework, but that would acknowledge the critiques in chapter IV and likely result in more significant outcomes for closing the gender pay gap. As such, a whole new process (discussed in part B) would be more favourable.

A Changes Within the Current Framework

The previous chapters have highlighted some critiques on the legislation itself as well as pointing out some broader concerns with the system. While the issues are extensive, there are some potentially simple tweaks that could be made to the process that could have an impact nevertheless. Tackling these tier-one issues could have a flow-on effect of mitigating the broader problems as well. Fixing these will likely not close the gender pay gap entirely, but it would be a step in the right direction if we wanted to stay within the current framework and alter it to be more effective.

1 Enforce pay transparency requirements

As discussed in chapter III, the lack of pay transparency will significantly reduce the success of the Act. The EPA could therefore be amended to require that employers report on their gender pay information and have this data available to employees as well.

In 2017, a Member's Bill was introduced to Parliament (but was not passed) with the purpose of making publicly available "statistical information relating to the rates of remuneration of

men and women in the same jobs in order to remove discrimination based on gender."[210] It aimed to expand on the requirements already existent in s 130(1) of the Employment Relations Act 2000 which provides that every employer must keep a wages and time record for each employee.[211] This Bill would have added to this section the requirement to collect information about the gender of the employee, and also would provide that employers send all of this information to the Ministry for Business, Innovation and Employment and disclose the data to any employee or representative on request.[212] Since this would just be an extension of an already existing requirement, it would not increase the costs or efforts to the employer much, if at all.

An amendment such as the one outlined above would not necessarily achieve the goal of closing the gender pay gap since it is not focussed as much on equal pay for equal value. However, the Bill did highlight the fact that it would be relatively easy to implement these added requirements for employers, and it would increase employers' awareness of their own pay inequalities which could help to address unconscious bias. Gender reporting requirements in Australia saw an increase of women on the boards of ASX200 listed companies from 8% to 14%.[213] Annick Masselot says that "transparency could also help reduce the inequalities that emerge from unequal starting salaries, secrecy agreements and other unchecked managerial decisions."[214] In addition, transparency requirements would give employees a quick avenue for obtaining relevant data for their bargaining, which could help to address the comparator issues in the current framework.

While it is unlikely to fix the issue at large, requiring pay transparency can be a key step in a range of efforts to raise awareness of the problem and promote gender pay equality.[215]

[210] John McSoriley "Equal Pay Amendment Bill 2017 (Member's Bill – Jan Logie)" (20 April 2017) New Zealand Parliament <www.parliament.nz>.
[211] McSoriley, above n 210.
[212] McSoriley, above n 210.
[213] Jennifer Whelan and Robert Wood "Increasing gender diversity through targets with teeth" in *Women in Leadership: Understanding the gender gap* (2013, CEDA) 33 at 35.
[214] Mark Smith, Annick Masselot, Jill Rubery, and Petra Foubert "Will pay transparency close the gender pay gap? The EU thinks so" (6 July 2021) The Conversation <www.theconversation.com>.
[215] Smith, Masselot, Rubery and Foubert, above n 214.

2 Create a separate agency to provide assistance

Another mechanism to help make the current bargaining framework more effective could be to establish a separate body to provide assistance and resources to both employees and employers. As discussed in chapter III, the lack of support can make it hard for parties to identify suitable comparators and have a clear direction in the bargaining process in order to reach the most equitable outcome. The EPA could be amended to directly respond to the complexity of pay equity issues by establishing a body that is dedicated entirely to helping with the pay equity claims process as a whole. Pat Armstrong notes that in relation to the pay equity process, "an independent, accessible source of expertise is required."[216]

As mentioned in chapter III, Australia established a Workplace Gender Equality Agency which was created by the Workplace Gender Equality Act 2012.[217] Their website states that they are "charged with promoting and improving gender equality in Australian workplaces."[218] The Agency's staff are workplace gender equality specialists, and they work with employers by providing tools, advice, and resources in order to help them comply with their reporting obligations as well as to help them improve their overall gender performance.[219]

In Ontario, Canada, a Pay Equity Commission was established to provide assistance to both employees and employers in understanding their rights and responsibilities under the Pay Equity Act.[220] The Commission's website includes answers to frequently asked questions for employees and employers. Under the employers' section, it sets out in a clear fashion the activities that an employer would need to carry out in order to meet their obligations under the Act.[221] As Armstrong points out, it is important that assisting bodies create strategies to reduce the technical complexity that is often present in legislation and deliver them in a way that can be understood by the largest number of people (both employees and employers).[222] The website also provides research, resources, and guides on "How To Do Pay Equity."[223]

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[216] Armstrong, above n 165, at 5.
[217] Workplace Gender Equality Act, 2012 (Cth), s 8A.
[218] Workplace Gender Equality Agency <www.wgea.gov.au>.
[219] Workplace Gender Equality Agency "What we do" <www.wgea.gov.au>.
[220] Pay Equity Office "What We Do" <www.payequity.gov.on.ca>.
[221] Pay Equity Office "I Hire in Ontario" <www.payequity.gov.on.ca>.
[222] Armstrong, above n 165, at 6.
[223] Pay Equity Office "Our Guides and Tools" <www.payequity.gov.on.ca>; and Pay Equity Office "Research and Resources" <www.payequity.gov.on.ca>.

Establishing an agency or commission similar to those of Australia and Ontario would be a relatively simple process that could improve the effectiveness of the current system immensely. It could help employers to understand their obligations and raise awareness of their potential biases and could also draw attention to intersectional discrimination.[224] Relevant to the current bargaining process, pay transparency obligations could also assist employees and unions in bringing their pay equity claims by guiding their bargaining and helping them to produce suitable comparators.

B Whole New Process

While part A considered some 'easy' solutions to the specific critiques within our current pay equity framework, this section will explore the possibility of creating an entirely new process that could better address the broader issues discussed in chapter IV (as well as some of the issues outlined in chapter III). We have seen that continuing to make small changes to an existing system has failed to substantially close the gender pay gap, and it is clear now that "not only time but action is required to advance feminist legal objectives."[225]

1 Positive duties

As discussed previously, there are considerable issues with the fact that the current framework is structured around women needing to initiate a pay equity bargaining process. While there are ways to mitigate the effects of this process, there is also the possibility of changing the system entirely to completely eliminate these concerns. One way to do this would be to impose positive duties on employers to proactively promote and implement equality in their workplaces.[226] Sanders and others point out that if we want to address the gender imbalance in the workforce, we will need to use significantly different methods than we have used in the past.[227] We need to go beyond a few minor tweaks if we want to create real change.

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[224] Reilly, above n 203, at 335.
[225] John Dawson "Sex Equality and the Law of Employment" (1992) 17 NZJIR 149 at 159.
[226] Amanda Reilly "Equality and family responsibilities: a critical evaluation of New Zealand law" (2012) 37 NZJER 161 at 163.
[227] Melanie Sanders, David Zehner, Jenny Fagg and Meredith Hellicar *Creating a positive cycle: Critical steps to achieving gender parity in Australia* (Bain & Company, 6 February 2013) at 4.

The root causes of the gender pay gap, outlined in chapter IV, highlight that inequality is rarely an individual experience and is largely institutional, so imposing these positive duties could work to eliminate that systemic inequality.[228] This system would also alleviate some of the strain that the current system places on the victim to make their claims heard.[229]

This system of imposing positive duties on employers was endorsed by the Canadian Pay Equity Taskforce in their report containing their recommendations.[230] The Taskforce found that a complaints-based model (such as the one we have currently) "is not an adequate means of reinforcing with all employers their [equal pay] obligation."[231] Similarly to the issues pointed out in previous chapters with our pay equity process, it was found to be inadequate because of the uncertainty, tension, and frustration which has been felt by victims using the complaints-based system.[232]

In a paper on lessons learned from Canada prepared for the New Zealand Conference on Pay and Employment Equity for Women, Pat Armstrong noted that the first lesson was that a systemic issue like pay inequity, requires a systemic solution.[233] The report elaborates on this to say that regulations must be pro-active, and that complaints-based initiatives ask too much of women (such as knowledge of the legislation, confidence that their claim can succeed, research to defend their claim, and time).[234]

The Pay Equity Act in Ontario states that "[e]very employer shall establish and maintain compensation practices that provide for pay equity in every establishment of the employer."[235] Pro-active legislation could be implemented in New Zealand that would positively require all employers to have pay equity plans in place which are monitored and enforced with appropriate penalties.[236]

[228] Reilly, above n 226, at 163.
[229] At 163.
[230] Sandra Fredman "Reforming Equal Pay Laws" (2008) 37 ILJ 193 at 211.
[231] At 211.
[232] At 211.
[233] Armstrong, above n 165, at 1.
[234] At 2.
[235] Pay Equity Act, RS O 1990, c P-7, s 7.
[236] Armstrong, above n 165, at 2-3.

A positive approach to pay equity that takes some of the burden away from women and places it on the employer would be a step in the right direction for closing the gender pay gap. As Armstrong says:[237]

> It recognizes equal pay as a fundamental right that cannot be bargained away or left to another day. It recognizes the evidence on the systemic and pervasive nature of pay discrimination. It recognizes that discrimination need not be intended or consciously produced.M

2 Quotas/targets?

As discussed in chapter IV, one of the causes of the stubborn gender pay gap is the lack of diversity in senior positions. This affects women in general, but it affects women with added layers of oppression even more so. One potential strategy that could be implemented by the legislation (in keeping with a positive duty approach) could be to impose certain gender (and other) quotas or targets on companies to improve their diversity and representation within senior positions in their organisations.[238] The EPA could be amended to provide for quotas, which are mandatory requirements for a certain percentage of women in specific roles/levels within an organisation, that are enforced through regulations and penalties for non-compliance.[239]

(a) Targets

Voluntary targets are a potential strategy for companies to adopt where they can set their own challenging goals as to gender diversity and allow for flexibility within their specific organisation.[240] While this may work in some instances, the lack of enforceability and accountability would likely fail to address the existing issues of unconscious bias in the workforce, and would be unlikely to significantly affect the existing gender pay gap.

[237] At 2.
[238] Whelan and Wood, above n 213, at 35.
[239] At 36.
[240] Whelan and Wood, above n 213, at 40.

McGregor points out that "softer voluntary policy responses" such as targets have not resulted in any significant improvement for the representation of women in governance.[241] It is likely that a 'harder' approach (such as mandatory quotas) is necessary at this point.

(b) Quotas

Introducing legislative quotas has been seen as controversial, and has been argued against on the basis that it undermines meritocracy in hiring and promotion processes.[242] Masselot notes that New Zealanders tend to maintain a strong belief in the 'merit' concept, and often argue that not enough women are sufficiently qualified despite females dominating the statistics in university graduates.[243] The myth of these processes being based on merit in the first place has been debunked in chapter IV, and quotas are arguably more likely to reflect the merit principle given that women are just as qualified (if not more so) than men for these positions. On the contrary, quotas can ensure that qualified women are not overlooked and passed over for these senior roles based on their gender (rather than their merit).[244] While there is a deeply entrenched misconception held in Aotearoa as to the legitimacy of our employment practices, "interventions such as legislated quotas need to be debated, endorsed and implemented"[245] if we want to see any real change to the gender pay gap.

Quotas have been commonly used in European countries in particular to increase diversity in the public sector.[246] In 2006, Norway extended this requirement and implemented quota legislation requiring 40% female representation on public listed companies' boards by 2008.[247] The legislation saw an increase of women on boards from 6% in 2002, to 40% in 2008.[248] This is a clear increase in female representation, but it was unclear whether more women were actually being appointed to boards, or whether companies worked to reduce

[241] Judy McGregor "New Zealand's boardroom blues: time for quotas" (2014) 28 Women's Studies Journal 4 at 19.
[242] Güler Turan "Why quotas work for gender equality" (2015) OECD <www.oecd.org>; Whelan and Wood, above n 213, at 37.
[243] Annick Masselot and Timothy Brand "Diversity, quotas and compromise in the boardroom: tackling gender imbalance in economic decision-making" (2015) 26 NZULR 535 at 543-545.
[244] Turan, above n 242.
[245] McGregor, above n 241, at 19.
[246] Jae-Hee Chang *Improving gender diversity in company boards* (International Labour Organization, September 2020).
[247] At 6.
[248] At 6.

their board sizes or delist from the stock exchange to avoid obligations.[249] Because of this, if quotas were to be implemented in Aotearoa, it would be important to ensure that the legislation was very carefully drafted to ensure it produces the desired effect.

While there are certain issues and concerns with legislated gender quotas that would need to be mitigated by thorough drafting, ultimately it seems a necessary step to address the gendered vertical segregation present in Aotearoa. Quotas could also address the intersectional issue by including mechanisms to increase diversity in other areas beyond gender. The implementation of legislative quotas would align much better with the substantive equality goals set out in chapter II, as they aim to use corrective justice strategies rather than relying on traditional formal equality measures.[250]

Allowing maximum flexibility for employers has proven to keep the representation of women in leadership positions low, which in turn has maintained the gender pay gap. It may be time to consider placing constraints on that freedom which will ultimately place constraints on gender biases and work towards closing the gap.

C Chapter Conclusion

It is time for Aotearoa to consider doing away with the complaints-based equal pay framework that has been in place for almost 50 years and is yet to close the gender pay gap. A whole new process, as outlined in part B, that draws on positive duties for employers is likely to be the best option available. However, even if a new system was not implemented, there are certain recommendations offered in part A of this chapter that could, nevertheless, improve the current pay equity bargaining framework and make for a more effective process.

[249] At 6.
[250] Masselot and Brand, above n 243, at 547.

Conclusion

This dissertation has argued that much like the pay between men and women, there is a significant gap between the goals of pay equity legislation and the means. The history of equal pay in Aotearoa has illustrated that women in the paid workforce are advancing towards equality in small increments, without ever fully reaching it. The latest attempt to eliminate the stubborn gender pay gap is the Equal Pay Amendment Act 2020, but the arguments in this dissertation have contended that, like the previous attempts, it will be unsuccessful in achieving full economic equality.

The bargaining-focussed framework created by the Amendments has specific shortfalls that will hinder its ability to achieve the stated goals of the legislation. These flaws included an omission of pay transparency requirements, a lack of recognition of the disadvantages women can face in bargaining in general, and an absence of any independent body to provide guidance and resources for women in an inherently complex process.

In addition, the new process will likely also fail on a broader level to meet the normative goals of pay equity legislation (the ultimate goal being to close the gender pay gap). Legislation has the power to shape societal views and provide for systemic change, but the Amendment Act fails to consider the deeper issues that are at play in the gender pay gap and the root causes of the economic inequality suffered by women. The Act provides no recognition for the unconscious biases and assumptions that contribute to women's negative experience in the workforce and most importantly, it fails to provide any protection for those women who are further disadvantaged (such as Māori and Pasifika women in particular). Pay equity legislation that refuses to focus on the people who are most harmed by the *in*equity, cannot be successful in closing the gender pay gap.

A more radical approach to the gender pay inequity in Aotearoa is imperative. If we are serious about eliminating gender pay disparity in Aotearoa, we need legislation that demands positive action from employers, takes the burden off victims, and seriously considers the use of quotas and other mechanisms to address the broader concerns of both horizontal and vertical segregation.

It is no longer enough to continue on the journey towards equality in small and insignificant steps, relying on time or other ineffective means to close the gap for us.

Bibliography

A Cases

1 New Zealand

New Zealand Clerical Administrative etc IAOW v Farmers Trading Co Ltd [1986] ACJ 203.

New Zealand Post Primary Teachers' Association Incorporated v Secretary for Education [2021] NZEmpC 87.

Service and Food Workers Union Nga Ringa Tota Inc v Terranova Homes and Care Ltd [2013] NZEmpC 157, [2013] ERNZ 504.

Terranova Homes & Care Limited v Service and Food Workers Union Nga Ringa Tota Incorporated [2014] NZCA 516.

Terranova Homes & Care Limited v Service and Food Workers Union Nga Ringa Tota Incorporated [2014] NZSC 196.

Waitangi Tribunal *Mana Wāhine Kaupapa Inquiry* (Wai 2700, 2020).

2 United States of America

EEOC v. Sears, Roebuck & Co., 628 F. Supp. 1264 (N.D. Ill. 1986).

B Legislation

1 New Zealand

Employment Contracts Act 1991.

Employment Equity Act 1990.

Employment Relations Act 2000.

Equal Pay Act 1972.

Equal Pay Amendment Act 2020.

Government Service Equal Pay Act 1960.

Human Rights Commission Act 1977

Industrial Conciliation and Arbitration Act 1894.

Minimum Wage Act 1945.

2 Australia

Workplace Gender Equality Act 2012 (Cth).

3 Canada

Pay Equity Act, RS O. 1990, c P-7.

4 Iceland

Act on Equal Status and Equal Rights Irrespective of Gender, No. 150/2020.

Standard ÍST 85 2017.

5 United States of America

Civil Rights Act of 1964 Pub L No 88-352, Title VII, 78 Stat 241 at 253 (1964).

C International Conventions

International Labour Organisation C100 Equal Remuneration Convention 1951 (No.100) (open for signature 29 June 1951, entered into force 23 May 1953).

United Nations Convention on the Elimination of (All Forms of) Discrimination against Women 1249 UNTS 13 (open for signature 18 December 1979, entered into force 3 September 1981).

D Books and Chapters in Books

Janice R. Bellace and Beryl ter Haar "Perspectives on Labour and Human Rights" in Janice R. Bellace and Beryl ter Haar (ed) *Labour Law Research Handbook* (Edward Elgar Publishing Limited, Cheltenham, 2019) 2.

Barbara Brookes *A History of New Zealand Women* (Bridget Williams Books, Wellington, Wellington, 2016).

Chao-ju Chen "Catherine A. MacKinnon and equality theory" in Robin West and Cynthia G. Bowman (ed) *Research Handbook on Feminist Jurisprudence* (Edward Elgar Publishing Limited, Cheltenham, 2019) 44.

Mai Chen *The Diversity Matrix: Updating What Diversity Means for Discrimination Laws in the 21st Century* (Super Diversity Centre, 2017).

Margaret Corner *No Easy Victory: Towards Equal Pay for Women in the Government Service 1890-1960* (New Zealand Public Service Association, Wellington, 1988).

Guy Davidov *Purposive Approach to Labour Law* (Oxford University Press, Oxford, 2016).

Lisa Davies and Natalie Jackson *Women's Labour Force Participation in New Zealand : the past 100 years* (The Agency, Wellington, 1993).

Catherine Fox "The higher you go, the wider the gap" in *Women in Leadership: Understanding the gender gap* (2013, CEDA) 21.

Prue Hyman *Hopes Dashed? The Economics of Gender Inequality* (Bridget Williams Books Limited, Wellington, 2017).

Marika Morris with Bénita Bunjin *Using Intersectional Feminist Frameworks in Research* (Canadian Research Institute for the Advancement of Women, 2006).

Amanda Reilly and Annick Masselot "Women in the Workforce: Still Unequal after all these Years?" in Gordon Anderson (ed) *Transforming Workplace Relations in New Zealand 1976–2016* (Victoria University Press, Wellington, 2017) 149.

Amanda Reilly and Jonathan Barrett "Business and labour, and human rights in New Zealand" in Janice R. Bellace and Beryl ter Haar (ed) *Labour Law Research Handbook* (Edward Elgar Publishing Limited, Cheltenham, 2019) 130.

Deborah L. Rhode "Feminist Critical Theories [1990]" in Katherine T. Bartlett and Rosanne Kennedy (ed) *Feminist Legal Theory Readings in Law and Gender* (Routledge, New York, 1991) 333.

Vicki Shultz "Telling Stories About Women and Work" in Katherine T. Bartlett and Rosanne Kennedy (ed) *Feminist Legal Theory Readings in Law and Gender* (Routledge, New York, 1991) 124.

Grégoire Webber, Paul Yowell, Richard Ekins, Maris Köpcke, Bradley W. Miller and Francisco J. Urbina *Legislated Rights: Securing Human Rights Through Legislation* (Cambridge University Press, Cambridge, 2018).

Robin West "Jurisprudence and Gender" in Katherine T. Bartlett and Rosanne Kennedy (ed) *Feminist Legal Theory Readings in Law and Gender* (Routledge, New York, 1991) 201.

Robin West *Normative Jurisprudence: An Introduction* (New York, Cambridge University Press, 2011).

Robin West, "Relational feminism and law" in Robin West and Cynthia G. Bowman (ed) *Research Handbook on Feminist Jurisprudence* (Edward Elgar Publishing Limited, Cheltenham, 2019) 65.

Jennifer Whelan and Robert Wood "Increasing gender diversity through targets with teeth" in *Women in Leadership: Understanding the gender gap* (2013, CEDA) 33.

E Journal Articles

Sabrina L. Brown "Negotiating around the Equal Pay Act: Use of the Factor other than Sex Defense to Escape Liability" 78 Ohio St. L.J 471.

Irene Browne and Joya Misra “The Intersection of Gender and Race in the Labor Market” (2003) 29 Annu. Rev. Sociol. 487.

J. E. Dannals, J. J. Zlatev, N. Halevy, and M. A. Neale “The Dynamics of Gender and Alternatives in Negotiation” (2021) *Journal of Applied Psychology*.

John Dawson “Sex Equality and the Law of Employment” (1992) 17 NZJIR 149.

Charlotte Doyle “The Reactivation of Pay Equity in New Zealand by *Terranova*: Why did it take so long?” (2018) 2 NZWLJ 129.

Steph Dyhrberg “One step forward and two steps back for pay equity” (2017) 907 LawTalk 32.

Sandra Fredman “Reforming Equal Pay Laws” (2008) 37 ILJ 193.

Susan Glazebrook “Gender Myths and the Legal Profession” (2016) 22 CantaLR 171.

Suzanne Hammond and Raymond Harbridge “The Impact of the Employment Contracts Act on Women at Work” (1993) 18 NZJIR 15.

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

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

Kevin Hince and Raymond Harbridge (1993) “The Employment Contracts Act: An Interim Assessment” (1994) 19 NZJIR 235.

Prue Hyman “Equal Pay for Women after the Employment Contracts Act: Legislation and Practice - the Emperor with No Clothes?” (1993) 18 NZJIR 44.

Prue Hyman “Equal pay for work of equal value – job evaluation issues” (1988) 13 NZJIR 237.

Prue Hyman “Pay Equity Developments in Five Countries – what can we learn from the different approaches?” (1992) 9 Victoria Economic Commentaries 15.

Annick Masselot “Employment law” (2020) 21 NZ L Rev 257.

Annick Masselot and Timothy Brand "Diversity, quotas and compromise in the boardroom: tackling gender imbalance in economic decision-making" (2015) 26 NZULR 535.

Annick Masselot and Maria Hayes “Exposing Gender Inequalities: Impacts of Covid-19 on Aotearoa” (2020) 45 New Zealand Journal of Employment Relations 57.

Elisabeth McDonald “Feminist legal theory in Aotearoa New Zealand: The impact of international critical work on local criminal law reform” (2014) 28 Women’s Studies Journal 68.

Judy McGregor “New Zealand’s boardroom blues: time for quotas” (2014) 28 Women’s Studies Journal 4.

Judy McGregor and Sharyn Graham Davies “Achieving pay equity: Strategic mobilization for substantive equality in Aotearoa New Zealand” (2018) 26 GWO 619.

Ian McPherson “Pay equity: the right to a fair wage” (2006) August NZLJ 253.

Melanie Nolan “Unstitching the New Zealand State: Its Role in Domesticity and its Decline” (2000) 45 IRSH 251.

Jane Parker and James Arrowsmith “Collective Regulation and Working Women in New Zealand and Fiji” (2014) 69 RI/IR 388.

Jane Parker and Noelle Donnelly “The revival and refashioning of gender pay equity in New Zealand” (2020) 62 JIR 560.

Sarah Proctor-Thomson, Noelle Donnelly and Jane Parker “Bargaining for gender equality in Aotearoa New Zealand: Flexible work arrangements in collective agreements, 2007–2019” (2021) 63 IJR 614.

Amanda Reilly “Equality and family responsibilities: a critical evaluation of New Zealand law” (2012) 37 NZJER 161.

Amanda Reilly “Māori Women, Discrimination and Paid Work: The Need for an Intersectional Approach” (2019) 50 VUWLR 321.

Amanda Reilly “Why New Zealand Employers Should be Subject to Mandatory Pay Transparency” (2019) 12 JALAA 86.

Ben Smith "Intersectional Discrimination and Substantive Equality: A Comparative and Theoretical Perspective" (2016) 16 The Equal Rights Review 73.

Laureen Snider, "Feminism, Punishment and the Potential of Empowerment" (1994) 9 Can.J.L.& Society 75.

Patricia Todd and Alison Preston “Gender Pay Equity in Australia: Where Are We Now And Where Are We Heading?” (2012) 38 ABL 251.

Ines Wagner “Equal Pay for Work of Equal Value? Iceland and the Equal Pay Standard” (2020) Social Politics.

Margaret Wilson "Making and repeal of the Employment Equity Act" (1993) 9 Women's Studies Journal 68.

F Reports

Pat Armstrong *Pay Equity Lessons on Canada* (Paper prepared for the New Zealand Conference on Pay and Employment Equity for Women, Victoria University of Wellington, June 2004).

Jae-Hee Chang *Improving gender diversity in company boards* (International Labour Organization, September 2020).

Human Rights Commission *Caring Counts, Tautiaki Tika: Report of the Inquiry into the Aged Care Workforce* (May 2012).

Ministry for Women *Annual Report for the year ended 30 June 2019* (October 2019).

Ministry for Women *Annual Report for the year ended 30 June 2020* (31 October 2020).

Ministry for Women *Gender Pay Principles* (2 July 2018).

Andrew Morrison *The Employment Contracts Act and Its Economic Impact* (New Zealand Parliamentary Library, 1 November 1996).

Te Kawa Mataaho | Public Service Commission *Pay Equity in New Zealand: Context and Principles* (November 2020).

Gail Pacheco, Chao Li and Bill Cochrane *Empirical evidence of the gender pay gap in New Zealand* (Ministry for Women, March 2017).

Maria Recalde and Lise Vesterlund *Gender Differences in Negotiation and Policy for Movement* (National Burea of Economic Research, 2020).

Melanie Sanders, David Zehner, Jenny Fagg and Meredith Hellicar *Creating a positive cycle: Critical steps to achieving gender parity in Australia* (Bain & Company, 6 February 2013).

Isabelle Sin, Steven Stillman and Richard Fabling *What drives the gender wage gap? Examining the roles of sorting, productivity differences, and discrimination* (Motu Economic and Public Policy Research, Motu Working Paper 17-15, August 2017).

Isabelle Sin, Steven Stillman and Richard Fabling *What Drives the Gender Wage Gap? An Executive Summary of Working Paper 17-15* (Motu Economic and Public Policy Research, August 2017).

Statistics New Zealand *Measuring the gender pay gap* (2014).

Statistics New Zealand *Women at Work: 1991-2013* (2015).

Te Kawa Mataaho | Public Service Commission *Pay Equity Claimant and Comparator Process Guide* (November 2020).

G Internet Resources

Beehive "Government to consider recommendations for pay equity principles" (05 March 2018) Beehive.govt.nz <www.beehive.govt.nz>.

Kim Elsesser "Why Women Fall Short In Negotiations (It's Not Lack Of Skill)" (21 January 2021) Forbes <www.forbes.com>.

John McSoriley "Employment (Pay Equity and Equal Pay Bill 2017)" (26 July 2017) New Zealand Parliament <www.parliament.nz>.

John McSoriley "Equal Pay Amendment Bill 2017 (Member's Bill – Jan Logie)" (20 April 2017) New Zealand Parliament <www.parliament.nz>.

Ministry of Business, Innovation & Employment "A new framework for pay equity in New Zealand" (5 November 2020) (Factsheet) <www.mbie.govt.nz>.

Ministry for Women "Occupation Segregation" (09 August 2012) <www.women.govt.nz>.

Ministry for Women "Research on the gender pay gap in New Zealand" (27 February 2017) <www.women.govt.nz >.

NZ Human Rights Commission "Demand an independent pay transparency agency to close the gender pay gap" (2019) NZ Human Rights <www.hrc.co.nz>.

Pay Equity Office "I Hire in Ontario" <www.payequity.gov.on.ca>.

Pay Equity Office "Our Guides and Tools" <www.payequity.gov.on.ca>.

Pay Equity Office "Research and Resources" <www.payequity.gov.on.ca>.

Pay Equity Office "What We Do" <www.payequity.gov.on.ca>.

Mark Prebble "State services and the Public Service Commission – The merit principle" (20 June 2012) Te Ara – The Encyclopedia of New Zealand <www.teara.govt.nz>.

Mark Smith, Annick Masselot, Jill Rubery, and Petra Foubert "Will pay transparency close the gender pay gap? The EU thinks so" (6 July 2021) The Conversation <www.theconversation.com>.

Ministry for Women "Gender pay gap" (20 August 2021) <www.women.govt.nz>.

Stats NZ "Gender pay gap unchanged" (18 August 2021) <www.stats.govt.nz>.

Saunoamaali'i Karanina Sumeo "It's time to end the secrecy over unequal pay" (8 March 2019) Stuff <www.stuff.co.nz>.

Güler Turan "Why quotas work for gender equality" (2015) OECD <www.oecd.org>.

Workplace Gender Equality Agency <www.wgea.gov.au>.

Workplace Gender Equality Agency "What we do" <www.wgea.gov.au>.

H Other Resources

(16 October 2018) 733 NZPD 723.

Letter from Patsy Reddy (Crown Facilitator) and others to Paula Bennett (Minister of State Services) and Michael Woodhouse (Minister for Workplace Relations and Safety) regarding the Recommendations of the Joint Working Group on Pay Equity Principles (24 May 2016).