

**Combating the Undervaluation of Women's Work:  
Why New Zealand Should Have Pay Equity Legislation**

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## I Introduction

There are villages in which men fish and women weave, and in which women fish and men weave, but in either type of village the work done by the men is valued higher than the work done by the women.

– Margaret Mead, cultural anthropologist.<sup>1</sup>

The systemic undervaluation of women’s work<sup>2</sup> is a global phenomenon which results in lower wages for female employees worldwide.<sup>3</sup> Systemic undervaluation refers to the fact that female-dominated occupations are consistently paid less, for the very reason they are performed mostly by women.<sup>4</sup> Such occupations are subject to historic and structural gender bias, and thus wage rates are “artificially depressed relative to what those wages would be if these jobs were being performed by white males.”<sup>5</sup> This injustice represents a barrier which must be overcome before gender equality can be realised.

Overseas, the systemic undervaluation of women’s work is mitigated in many countries through pay equity, an approach that New Zealand has so far failed to implement. Fortunately, pay equity in New Zealand is up for debate again due to the recent Court of Appeal case *Terranova Homes and Care Ltd v Service and Food Workers Union Nga Ringa Tota Inc (Terranova)*, which held that the Equal Pay Act 1972 (EPA) does provide for pay equity.<sup>6</sup> Now that the Government has intervened, New Zealand is at a crossroads.<sup>7</sup> It could choose to back away from pay equity, it could make a half-hearted policy attempt to try rectify the undervaluation of women’s work, or it could fully implement new pay equity legislation to prevent the further exploitation of women. This dissertation argues for the third option, and asserts that New Zealand should have pay equity legislation.

A major hurdle faced by pay equity is the ambiguity and lack of understanding attached to both what it aims to do, and how it aims to do it. Pay equity, also known as comparable worth, stands for the principle that women should get equal pay for work of equal value.

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<sup>1</sup> Maya Altman *Comparable Worth: Every Woman's Right* (Albany, New York, 1983) at 1.

<sup>2</sup> “Women’s work” as a phrase is not being used to suggest that there is work that is more suitable for women to carry out, but rather is referring to the fact that there are jobs which are dominated by females and historically always have been.

<sup>3</sup> Jill Rubery *Pay equity, minimum wage and equality at work: theoretical framework and empirical evidence* (International Labour Office, Working Paper 19, 2003) at 1.

<sup>4</sup> Ronnie J. Steinberg “A Want of Harmony”: Perspectives on Wage Discrimination and Comparable Worth” in Helen Remick (ed) *Comparable Worth and Wage Discrimination: Technical Possibilities and Political Realities* (Temple University Press, Philadelphia, 1984) at 4.

<sup>5</sup> At 4.

<sup>6</sup> *Terranova Homes and Care Ltd v Service and Food Workers Union Nga Ringa Tota Inc* [2013] NZCA 575 [*Terranova*].

<sup>7</sup> Paul Roth “Employment Law” [2016] NZ L Rev (forthcoming) at 5.

This is distinct from pay equality, which stands for the concept that men and women should get equal pay for doing equal jobs. Pay equity instead is targeted at achieving equal pay for women doing work which is of equal value to men's work. While pay equality targets direct discrimination by employers, pay equity tackles systemic discrimination which has arisen from historical and structural features of the labour market.<sup>8</sup>

Pay equity's relationship with the gender wage gap is also often misinterpreted. While the gender pay gap is focused on earning differentials between men and women, pay equity is focused on the wage differential between men's and women's work.<sup>9</sup> It is aimed at removing only that portion of the overall gender wage gap which relates to occupational segregation, and even then only where a predominately female job is found to be undervalued in comparison to men's work.<sup>10</sup> The scope of pay equity is therefore relatively limited, and it alone cannot eliminate the gender wage gap. Rather, it has a narrow focus to fix a particular problem in society.

Typically, pay equity laws follow similar generic steps but differ greatly in specifics and implementation.<sup>11</sup> Generally, the first step is to identify male- and female-dominated occupations, and then to determine the value of these jobs by using a gender-neutral job evaluation scheme.<sup>12</sup> Next, comparisons are made to determine whether equally ranked female and male jobs are paid similarly. Finally, pay adjustments are made where predominately female jobs are found to be undervalued, usually resulting in a wage increase for undervalued female jobs.<sup>13</sup>

This dissertation will begin by highlighting the need for pay equity in New Zealand. Chapter One establishes that the prerequisite condition for pay equity exists in New Zealand, namely, the undervaluation of women's work. This provides the initial justification for the enactment of pay equity legislation, as it demonstrates that there is a problem that needs to be addressed. The reasons why female-dominated occupations are undervalued are also discussed.

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<sup>8</sup> 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 at 8.

<sup>9</sup> Pat Armstrong "Pay Equity Lessons from Canada" (paper presented to New Zealand Conference on Pay and Employment Equity for Women, Wellington, June 2004) at 4.

<sup>10</sup> At 4.

<sup>11</sup> Elaine Sorensen *Comparable Worth: Is it a Worthy Policy?* (Princeton University Press, New Jersey, 1994) at 57.

<sup>12</sup> Morley Gunderson *Comparable Worth and Gender Discrimination: An International Perspective* (International Labour Organisation, Geneva, 1994) at 31.

<sup>13</sup> At 31.

Chapter Two then explores pay equity's unsuccessful history in New Zealand, and evaluates its current uncertain status. In doing so, Chapter Two sets the scene for Chapter Three, by putting pay equity into the New Zealand context, and by demonstrating that although New Zealand has come close to achieving equal pay for work of equal value, it has not yet succeeded. Chapter Two will also discuss what pay equity mechanisms have been ineffective in the past and why, coming to the conclusion that if pay equity is to be attempted again, it should be done through comprehensive new legislation.

Finally, Chapter Three argues that New Zealand should have pay equity legislation. It considers the common arguments made against its implementation, before demonstrating that such criticisms are overstated, incorrect or misguided. Chapter Three then advances the arguments in favour of pay equity legislation, coming to the conclusion that New Zealand should have equal pay for work of equal value as a matter of simple fairness, for the benefit of women and the economy, and to ensure that New Zealand meets its international obligations.

## *II Chapter One - The Undervaluation of Women's Work in New Zealand*

[W]omen are paid less because they are in women's jobs, and women's jobs are paid less because they are done by women.

Sharon Shepela and Ann Viviano<sup>14</sup>

Pay equity is based on the premise that female-dominated occupations are often undervalued by the labour market, and hence underpaid for the skills, conditions, responsibilities and effort involved. Pay equity seeks to rectify this by lifting remuneration to that of male-dominated occupations identified as comparable through job evaluations. This chapter validates the claim that women's work is undervalued in New Zealand, and therefore establishes the justification for using pay equity to remedy it. It then examines the historical, cultural and social roots of this undervaluation in a bid to better understand how it may be rectified through pay equity. It will become clear that skill evaluation and pay are in part social constructs and are influenced by history and social norms, rather than being based on objective measurements, and thus are prone to minimising the value in women's work.<sup>15</sup>

### *A Establishing the Undervaluation of Women's Work*

Establishing that the systemic undervaluation of women's work does occur in New Zealand and that it is a live problem is the first step in justifying pay equity.

#### *1 Occupational Segregation*

Occupational segregation is the term used to describe the fact that different groups in society, for example women or minorities, are commonly grouped in certain occupations. Pay equity focuses on occupational gender segregation, specifically horizontal segregation, which describes the fact men and women generally work in different occupations. Vertical segregation, on the other hand, is a term used to describe the fact that men are commonly found in higher hierarchical positions than women, an equally important issue which is not solved by pay equity.<sup>16</sup>

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<sup>14</sup>Sharon Toffey Shepela and Ann T. Viviano "Some Psychological Factors Affecting Job Segregation and Wages" in Helen Remick (ed) *Comparable Worth and Wage Discrimination: Technical Possibilities and Political Realities* (Temple University Press, Philadelphia, 1984) at 47.

<sup>15</sup> Prue Hyman "Low Waged Work and Gender Pay Equity in New Zealand" (paper presented to New Zealand Conference on Pay and Employment Equity for Women, Wellington, June 2004) at 4.

<sup>16</sup> Stephanie Steinmetz *The Contextual Challenges of Occupational Sex Segregation: Deciphering Cross-National Differences in Europe* (VS Verlag für Sozialwissenschaften, Germany, 2012) at 18.

Occupational segregation is intrinsically related to pay equity, as both a precondition and a consequence of the undervaluation of women's work. It acts as a precondition as without occupational gender segregation, there would not be predominantly female occupations, characterised as women's work, to be subsequently undervalued as a result of these gender labels.<sup>17</sup> Occupational segregation is also continually entrenched due to the undervaluation of female-dominated occupations, as it limits job options and creates hiring norms that make it harder for women to work in men's jobs and vice versa. Additionally, the low remuneration common in women's work discourages men from choosing to work in female-dominated jobs.<sup>18</sup> It is therefore probable that where a pay equity policy is successful, occupational segregation will decrease.<sup>19</sup>

New Zealand's labour market is highly segregated by gender. Nearly half of all female workers are employed across the 20 most common occupations for women, whereas the corresponding number for men is only 37%.<sup>20</sup> This reveals that women are concentrated in a much narrower range of occupations than men. The ten occupations containing the largest percentage of women workers are sales assistants, general clerks, registered nurses, caregivers, primary school teachers, cleaners, early childhood teachers, technical representatives, information clerk/receptionists and administration managers.<sup>21</sup> While sales assistant is the most common occupation for women (5.6% of all employed women), for men the most common occupation is a general manager (3.9%).<sup>22</sup>

The most heavily female-dominated occupations are secretaries and keyboard operating clerks, nursing and midwifery professionals, primary and early childhood teaching professionals, client information clerks, personal care workers, and special education teaching professionals.<sup>23</sup> These occupations range from 93.6% to 84.4% female.<sup>24</sup> Furthermore, these statistics have only decreased slightly since 1991, indicating that occupational segregation has become a constant feature of New Zealand's labour market.<sup>25</sup>

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<sup>17</sup> Paula England "Socioeconomic Explanations of Job Segregation" in Helen Remick (ed) *Comparable Worth and Wage Discrimination: Technical Possibilities and Political Realities* (Temple University Press, Philadelphia, 1984) at 29.

<sup>18</sup> Steinmetz, above n 16, at 19.

<sup>19</sup> Helen Remick "Preface" in Helen Remick (ed) *Comparable Worth and Wage Discrimination: Technical Possibilities and Political Realities* (Temple University Press, Philadelphia, 1984) at xii.

<sup>20</sup> Statistics New Zealand *Women at Work: 1919-2013* (October 2015) at 13.

<sup>21</sup> At 13.

<sup>22</sup> At 13.

<sup>23</sup> At 15.

<sup>24</sup> At 15.

<sup>25</sup> At 10.

## 2 Lower Remuneration for Female-Dominated Occupations

Having demonstrated that the New Zealand labour market is highly segregated, this section will illustrate that predominately female occupations are often paid less than male-dominated jobs. A recent study carried out by Statistics New Zealand found that the median annual income for those working in the most common male-dominated jobs was, on average, \$3,600 more than those in female-dominated occupations.<sup>26</sup> The study also found that the five lowest paying occupations were all predominately female occupations.<sup>27</sup> Other studies confirm these findings, concluding that income tends to be lower for women in female-dominated occupations, and that they are paid less than comparable male-dominated occupations.<sup>28</sup>

Furthermore, the Statistics New Zealand report is likely to have underestimated the real wage disparity between predominately male and predominately female work, as it restricted its analysis to adults working 30 hours or more per week.<sup>29</sup> This has likely resulted in an underestimation because 36% of employed women work part-time;<sup>30</sup> they are much more likely than men to work part-time (70.4% of people who work part-time are women).<sup>31</sup> These part-time jobs are also most “commonly concentrated in the female-dominated service and community sectors, at low rates of pay.”<sup>32</sup> This means that a large proportion of the lowest paid women were not taken into account. If they had been, the discrepancy between female- and male-dominated occupations would have likely increased.

Assessing the estimated effect of occupational segregation (female-dominated occupations) on the gender pay gap is another way to demonstrate the existence of pay discrepancy between male- and female-dominated occupations. In New Zealand, the gender pay gap is currently estimated at 11.8%.<sup>33</sup> It is estimated that occupational segregation accounts for about one third of the 11.8% gender pay gap.<sup>34</sup> This provides

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<sup>26</sup> At 28.

<sup>27</sup> At 30.

<sup>28</sup> Prue Hyman “Pay Equity and Equal Employment Opportunity in New Zealand: Developments 2006/2008 and Evaluation” (2008) 33(3) *New Zealand Journal of Employment Relations* 1 at 2.

<sup>29</sup> Statistics New Zealand *Women at Work*, above n 20, at 28.

<sup>30</sup> National Advisory Council on the Employment of Women *Critical Issue for New Zealand Women’s Employment, Now and in the Future* (Department of Labour, June 2008) at 13.

<sup>31</sup> Statistics New Zealand “2013 Census QuickStats about work and unpaid activities: Work and labour force status of adults in New Zealand” (31 March 2015) [www.stats.govt.nz/](http://www.stats.govt.nz/) at figure 3.

<sup>32</sup> Ministry of Women’s Affairs *Next Steps Towards Pay Equity: A background paper on equal pay for work of equal value* (September 2002) at 10.

<sup>33</sup> Ministry for Women “Gender Pay Gap” <[www.women.govt.nz/](http://www.women.govt.nz/)>.

<sup>34</sup> Ministry for Women “Occupational Segregation” <[www.women.govt.nz/](http://www.women.govt.nz/)>.

further evidence for the fact that predominately female occupations tend to be lower paid than those dominated by men.

## ***B Why Women's Work is Undervalued***

The undervaluation of women's work is often referred to as the systemic or historic undervaluation of female-dominated occupations. It is accepted that this undervaluation is not caused by conscious discrimination or active choices, but rather it is a symptom of cultural norms, gender stereotypes, and historical discriminatory labour practices.<sup>35</sup> Due to the unintended nature of the undervaluation of women's work, it is much harder to combat than deliberate discrimination and pay equality issues.

### *1 Historical Factors*

The Lord spoke to Moses and said 'Speak to the Israelites in these words. When a man makes a special vow to the Lord which requires your valuation of living persons, a male between twenty and fifty years old shall be valued at fifty silver shekels, that is shekels by the sacred standard. If it is a female, she shall be valued at thirty shekels.'

Leviticus 27:1-4

Since biblical times, women have been paid less than men, and women's work has been undervalued.<sup>36</sup> Women have traditionally been seen as secondary players in the labour market. The subsequent undervaluation of their work in contemporary society is partially derived from this fact, and partly from the interconnected history of legal discrimination and discriminatory pay practices.<sup>37</sup> Until the Government Service Equal Pay Act of 1960 and then the EPA of 1972, it was legal to discriminate by gender for pay in New Zealand, a fact that was fully taken advantage of by employers. This has had lingering effects on the labour market. Deeply rooted practices, such as pay structures, still reflect traditional, rather than contemporary, valuations of skills and performance, resulting in lower pay for female-dominated occupations. The residue of historical practices also affects modern perceptions of the cultural appropriateness of particular kinds of work, contributing to occupational segregation.

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<sup>35</sup> Ministry of Women's Affairs *Next Steps Towards Pay Equity: A background paper on equal pay for work of equal value*, above n 32, at 4.

<sup>36</sup> Morley Gunderson "Male-Female Wage Differentials: How Can That Be?" (2006) 39(1) *The Canadian Journal Economics* 1 at 2.

<sup>37</sup> Rosemary Du Plessis Novitz and Nabila Jaber "Pay equity, the 'free' market and state intervention" (1990) 15 *New Zealand Journal of Industrial Relations* 251 at 252.

Prior to World War II (WWII), women were essentially confined to working in either domestic services, shop work, sewing, nursing or teaching, and were expected to stop working once they were married.<sup>38</sup> The commencement of WWII, however, changed women's involvement in the labour market worldwide. For a change, women became key players in the labour market and were expected to take up the jobs left by soldiers to contribute to the war effort.<sup>39</sup> Once the war was over, it was deemed women had earned their place in the labour market, thus it was socially acceptable for married women to work. Despite this progress, women's legal minimum wage was still limited to 70% of the male rate following the end of the war.<sup>40</sup>

Moreover, several laws, and health and safety regulations, actively limited women's participation in the labour market.<sup>41</sup> For example, the Machinery Act 1950 discriminated against women by not allowing them to operate engines or clean machinery until they were 20 years old, while their male counterparts were allowed at the age of 18.<sup>42</sup> The Shops and Offices Act 1955 also discriminated against women, by not allowing them to work at certain hours of the day, and by limiting the total number of hours they could work.<sup>43</sup> The Factories Act 1946 likewise limited the total hours women could work, and women were only permitted to work at certain times.<sup>44</sup>

The industrial awards system, which characterised the New Zealand labour market up until the enactment of the Employment Contracts Act in 1991, also inevitably disadvantaged women workers. Awards were set by an arbitration court, which had the power to adjust the minimum wage and working conditions for occupations as a result of industrial disputes led by unions.<sup>45</sup> However, even if women did the same job as men, awards expressly provided for lower rates for female employees.<sup>46</sup> Women also had less power and representation in the unions, which meant that women's interests were secondary to men's when it came time to negotiate awards.<sup>47</sup> Although discriminatory awards were deemed unlawful under the Government Service Equal Pay Act 1960 and the EPA, the residual

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<sup>38</sup> Megan Cook "Women's labour organisations – Women's unions and associations, 1878 to 1939" (5 May 2011) Te Ara – the Encyclopedia of New Zealand <[www.teara.govt.nz/](http://www.teara.govt.nz/)>.

<sup>39</sup> Coalition for Equal Value Equal Pay "1940s to 1960s" (February 2004) <[www.cevep.org.nz/](http://www.cevep.org.nz/)>.

<sup>40</sup> Coalition for Equal Value Equal Pay, above n 39.

<sup>41</sup> Steinmetz, above n 16, at 21.

<sup>42</sup> (29 August 1972) 380 NZPD 2181.

<sup>43</sup> At 2181.

<sup>44</sup> At 2181.

<sup>45</sup> Mark Derby "Strikes and labour disputes – The Industrial Conciliation and Arbitration Act" (1 March 2016) Te Ara – the Encyclopedia of New Zealand <[www.teara.govt.nz/](http://www.teara.govt.nz/)>.

<sup>46</sup> *Terranova*, above n 6, at [22].

<sup>47</sup> Marie-Thérèse Chicha *A comparative analysis of promoting pay equity: models and impacts* (International Labour Office, Working Paper 49, September 2006) at 7.

effects are still evident in today's labour market, through the undervaluation of women's work.

## 2 *Societal and Cultural Factors*

The underpayment of women's work also has foundations in societal and cultural norms, some of which are historic and some that are still operative today. One of the the most obvious gender stereotypes that has influenced how women are seen as employees is the traditional role of wife and mother. The doctrine of separate spheres meant that women were confined to the 'private' sphere of the household and domesticity, while men's role in the 'professional' sphere was to work and act as the breadwinner for the family.<sup>48</sup> This was the social norm for a long time, and arguably still is. It was only in the necessity of WWII that it became socially acceptable for married women to work, but still only as a supplementary, less important source of income. Women were also still confined to roles deemed 'appropriate' for women, as "stereotypes in society about appropriate roles for women and men are replicated in the labour market."<sup>49</sup>

Women were paid less in part because it was deemed they did not need to earn a living wage, as they would already be supported by their husband or family.<sup>50</sup> Anything that women earned was seen as 'pin money', to be used on non-essential items. Clearly little of this rationale for paying women less survives today, however it can still be perceived in the pay structures of some occupations, resulting in the undervaluation of women's work. It is theorised that these gender biases have translated into modern pay structures in the following way:<sup>51</sup>

Often jobs would attract and employers would seek women because the task was stereotyped as "female" and thus employers thought women more appropriate. In these cases, we speculate that they set wages lower both because women were thought to need and deserve lower wages than men...and because the cultural devaluation of women had "rubbed off" onto female-typed tasks....After these initial causal effects of sex composition on wages or vice versa, institutional inertia could freeze the relationship in. Institutional economists' and industrial psychologists' studies of wage

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<sup>48</sup> Steinmetz, above n 16, at 21.

<sup>49</sup> At 42.

<sup>50</sup> Michael McCann *Rights at Work: Pay Equity Reform and the Politics of Legal Mobilization* (University of Chicago Press, Chicago, 1994) at 26.

<sup>51</sup> Paula England and others "Does Bad Pay Cause Occupations to Feminize, Does Feminization Reduce Pay, and How Can We Tell with Longitudinal Data?" (paper presented to annual meeting of the American Sociological Association, San Francisco, August 2004) at 29-30.

systems emphasize that hierarchies of the relative pay levels of jobs are surprisingly rigid.

### 3 *The Undervaluation of Women's Innate Skills*

A further reason that women's work is undervalued is because the skills utilised in women's work are undervalued. This is because such skills are often seen as innate or natural skills (as opposed to acquired skills), and as an extension of women's unpaid work in the home.<sup>52</sup> The historic undervaluation of these skills has not been reassessed, hence the need for pay equity.

Women are most commonly employed in service and care work, which rely on skills such as patience, interpersonal and emotional skills, attention to detail and fine motor skills.<sup>53</sup> Such skills are overlooked when valuing jobs, and are deemed lower in value due to the fact they are seen as innate women's skills.<sup>54</sup> As remuneration is partially based on the skill and characteristics an employee is seen to bring to the job, the low regard for women's skills results in lower wages.<sup>55</sup> Consequently, women's work is undervalued. For example, while men are remunerated for heavy lifting on construction sites, the lifting of children or patients by kindergarten teachers or nurses is characterised as natural 'women's work', and hence not valued.<sup>56</sup> Further, little worth is attached to the responsibility of caring for children or the elderly, yet caring for equipment or resources in men's work is highly valued.<sup>57</sup>

Attributes and characteristics that are seen as intrinsic to women are also undervalued. For example, the psychological attribute of agreeableness (being "trusting, straightforward, altruistic (warm), compliant, modest, and sympathetic") is more common in women than in men.<sup>58</sup> However this attribute is not awarded extra value in female employees, but rather is expected. For men the reverse is true, as the characteristic of being disagreeable is often considered valuable, but it is not for women. Thus "the gender difference in agreeableness

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<sup>52</sup> Ministry of Women's Affairs *Next Steps Towards Pay Equity: A background paper on equal pay for work of equal value*, above n 32, at 4.

<sup>53</sup> Chicha, above n 47, at 6.

<sup>54</sup> Shepela and Viviano, above n 14, at 47.

<sup>55</sup> At 47.

<sup>56</sup> New Brunswick's Wage Gap Reduction Initiative "Wage Gap Contributor: Under-valuation of Traditional Female Occupations" <[www.gnb.ca](http://www.gnb.ca)>.

<sup>57</sup> New Brunswick's Wage Gap Reduction Initiative, above n 56.

<sup>58</sup> Francine D. Blau and Lawrence M. Kahn *The Gender Wage Gap: Extent, Trends, and Explanations* (Institute for the Study of Labour, Discussion Paper No. 9656, January 2016) at 39.

contributed to the gender earnings gap both because men were considerably more disagreeable than women, but also because only men were rewarded for this trait.”<sup>59</sup>

#### 4 *Models of Discrimination*

Two different economic models of discrimination, the crowding hypothesis and the institutional model, seek to explain why female-dominated occupations are undervalued, taking into account the factors discussed above. For the purposes of these models, discrimination means “the pay difference between two groups of workers that is not accounted for by productivity differences.”<sup>60</sup> Although it is hard to gauge their accuracy, both models are useful to add to understanding about why women’s work is undervalued.

The institutional theory of labour market discrimination argues that:<sup>61</sup>

...certain firms develop internal labor markets. Within these labor markets the determination of wages and the allocation of workers are governed by a set of rules and customs rather than direct supply and demand...Societal norms and prejudices influence management’s view...Firms with internal labor markets incorporate and reinforce these norms by using gender to assign individuals different occupations. They also pay “women’s work” less than they would if it were performed by men, simply because “women’s work” is less valued by society. Thus, internal labor markets reflect and reproduce societal discrimination against women.

It is suggested that such internal labour markets are more common in large firms and in the public sector.<sup>62</sup> This theory is helpful for explaining how societal and cultural norms become embedded in pay structures, and also why normal market forces of supply and demand have failed to reset the value of women’s work according to the skill involved, and therefore have kept the pay for these jobs artificially depressed. This has important implications for pay equity in New Zealand, as it suggests that pay equity could remedy the many undervalued female-dominated occupations within the public sector, including care work.

The crowding hypothesis also considers occupational segregation and the undervaluation of women’s work to be crucial, as it argues that:<sup>63</sup>

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<sup>59</sup> At 39.

<sup>60</sup> Sorensen, above n 11, at 43.

<sup>61</sup> At 47-48.

<sup>62</sup> At 48.

<sup>63</sup> At 48.

...employers discriminate against women by excluding them from occupations considered to be ‘men’s work’. Since these jobs are reserved for men, relatively few women are hired into these positions. Given that the demand for women in these jobs is limited, they are crowded into other occupations, typically referred to as ‘women’s work’. The supply of women accordingly increases for ‘women’s work’, which in turn reduces their wage.

The crowding hypothesis is more relevant in the private sector, and places more direct blame on employers for their role in occupational segregation.<sup>64</sup> This theory also provides valuable insights as to why women’s work is undervalued, and helps explain the relationship between occupational segregation and lower wages. Barbara Bergmann additionally argues that because low wages are associated with women, even when women move into male jobs they are paid less, as employers know that their alternative option, women’s work, is poorly paid.<sup>65</sup>

### *C Summary*

It is clear that in New Zealand women’s work is undervalued. This undervaluation does not arise due to differences in productivity, or valid skill assessments, but rather is due to socially determined wage structures which have been influenced by past discrimination and deeply-rooted social norms. Further, studies have shown that the relationship between women’s work and low pay is deeply entrenched, and has experienced “institutional inertia”, signifying that without invention, the problem will persist.<sup>66</sup> This provides the justification, and demonstrates the need for pay equity legislation in New Zealand, in order to eliminate past prejudices from the remuneration of women’s work. This is important to ensure that women are being equally valued in society as employees, not merely as housewives.

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<sup>64</sup> At 48.

<sup>65</sup> Rubery, above n 3, at 8.

<sup>66</sup> England and others, above n 51, at 31.

### *III Chapter Two – The History and Current State of Pay Equity in New Zealand*

In Australia, one of the most frequently cited quotes on pay equity is from Justice Mary Gaudron, who stated “[w]e got equal pay once, then we got it again, and then we got it again, and now we still don’t have it.”<sup>67</sup> In a New Zealand context, it could be argued that pay equity was achieved in 1972 with the EPA, then again in 1990 with the Employment Equity Act 1990 (EEA), and then again in 2015 with the Court of Appeal ruling in *Terranova*, and yet these events have still fallen short of an effective pay equity remedy. This chapter sets out the history of pay equity in New Zealand, and demonstrates that the various attempts made so far to secure pay equity, be it legislation or policy, have failed to achieve justice for women. It further demonstrates that the current recommendations, albeit an improvement from the status quo, are not the best way forward, as the uncertainty and subsequent ineffectiveness of the EPA makes it ill-suited as an instrument to implement pay equity in New Zealand. If New Zealand is going to pursue pay equity, it should be done properly with a comprehensive new Act which adequately addresses the complexities involved, in order to give pay equity the best chance of success.

#### ***A The Equal Pay Act 1972***

Pay equity first became a real possibility in 1972 under the EPA. Although the EPA clearly provided women in the private sector with equal pay for equal work,<sup>68</sup> it was unclear at the time it was first implemented whether it also provided for pay equity. The wording of s 3(1)(b) permits a potential interpretation requiring equal pay for work of equal value, as it states that when determining the equal pay rate, the following criteria be applied:

...for work which is exclusively or predominantly performed by female employees, the rate of remuneration that would be paid to male employees with the same, or substantially similar, skills, responsibility, and service performing the work under the same, or substantially similar, conditions and with the same, or substantially similar, degrees of effort.

This phrasing seems to suggest that for female-dominated occupations, comparisons may be made to male employees doing similar work where the skills, responsibility, conditions and effort are substantially similar. Although this could be interpreted as allowing for pay equity, it could also just be seen as an attempt by the legislature to thwart awards and

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<sup>67</sup> Barbara Pocock “Equal Pay Thirty Years On: The Policy and Practice” (1999) 32(3) *The Australian Economic Review* 279 at 279.

<sup>68</sup> This had already been achieved in the public sector via the Government Services Equal Pay Act 1960.

employers who paid men more for doing substantially the same work as women, but under a different job title.<sup>69</sup> For example, an employer could call male administrative staff “office assistants” and female administrative staff “secretaries”, even though they did the same job. The cumbersome and ambiguous wording of s 3(1)(b) of the EPA means that the section has long been the subject of much contention.<sup>70</sup>

### 1 *Legislative Intention*

It is unclear what the actual intentions of the legislators were when drafting the Act. Elizabeth Orr, who was a member of the Equal Pay Review Committee in 1975 and 1979, is of the opinion that Parliament did intend the EPA to act as pay equity legislation.<sup>71</sup> She first analyses the 1971 Commission of Inquiry into Equal Pay<sup>72</sup>, as it is from this report that the EPA was based.<sup>73</sup> She contends the Commission advocated fully for implementing the legislative recommendations of the International Labour Organisation’s (ILO) Convention Concerning Equal Remuneration for Men and Women Workers of Equal Value (Convention 100)<sup>74</sup>, which means they were recommending pay equity legislation, and that this advice was followed by the legislators with only minor variations.<sup>75</sup>

Regardless of the Commission’s intentions, the report itself contains many inconsistencies, and does not explicitly recommend the adoption of equal pay for work of equal value. The report does recognise that wage differences often arise from a degree of occupational segregation, even noting that while men are paid as individuals, “women are paid as members of a category of lesser economic worth” which is “based on tradition and is without justification.”<sup>76</sup> It also acknowledged the existence of the concept of equal pay for jobs where “the work, effort, skill, responsibility, etc.” were equal, but fails to conclude on whether this should be included in the scope of “equal pay”.<sup>77</sup> The report does however

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<sup>69</sup> Kirsten Slatter “Towards pay equity in New Zealand? A study of the Employment Equity Act 1990” (BA(Hons) Dissertation, University of Otago, 1990) at 10.

<sup>70</sup> *Terranova*, above n 6, at [82]-[85].

<sup>71</sup> Elizabeth Orr “Equal Pay for Work of Equal Value in New Zealand: A History of the 1960 and 1972 Equal Pay Acts” (paper presented to the Women’s Studies Conference, Palmerston North, November 2003) at 6.

<sup>72</sup> Commission of Inquiry into Equal Pay *Equal Pay in New Zealand* (A. R. Shearer, Government Printer, H. 54, September 1971).

<sup>73</sup> Orr, above n 71, at 5.

<sup>74</sup> International Labour Organisation Convention Concerning Equal Remuneration for Men and Women Workers of Equal Value (No 100) 165 UNTS 303 (opened for signature 29 June 1951, entered into force 23 May 1953). Article 2 states that “Each Member shall...ensure the application to all workers of the principle of equal remuneration for men and women workers for work of equal value.”

<sup>75</sup> Orr, above n 71, at 5.

<sup>76</sup> Commission of Inquiry into Equal Pay, above n 72, at 12.

<sup>77</sup> At 19.

cite the difficulties in establishing criteria for job evaluation, an integral step in implementing pay equity, and says that it should not be attempted.<sup>78</sup> It also comes to the conclusion that its “task was not to replace the present complex basis of wage determination”, which is what pay equity legislation must do to remedy systemic undervaluation.<sup>79</sup> As Justice French was later to note in *Terranova*, “[t]he ambiguity in the Commission report is such that all parties in this case were able to identify passages that supported their competing interpretations.”<sup>80</sup>

Orr also relies on parliamentary debates to support her contention that the EPA was created as a piece of pay equity legislation, but these too are fraught with contradiction and inconsistency.<sup>81</sup> She refers to the speech from the Minister of Labour, David Thomson, who claims the Bill will eliminate gender wage discrimination more so than legislation in any other country, and that it will cover female intensive occupations.<sup>82</sup> But again, this is inconclusive, as such statements can apply to both pay equality and pay equity. Hugh Watt, Deputy Leader of the Opposition, welcomed “the introduction of a Bill that provides for equal pay for people doing equal work”, which suggests that he interpreted the Bill as being one of pay equality.<sup>83</sup> On the other hand, Robert Muldoon, the Minister of Finance, recognised the difficulty in “determining just what is equal pay for equal tasks”, which could indicate a pay equity approach.<sup>84</sup> Overall, it is impossible to draw any certain conclusions surrounding the parliamentary intent of the EPA. This ambiguity at the EPA’s inception, as well as the awkwardness of its drafting, is arguably what is responsible for its subsequent lack of success and limited impact.

## 2 *Subsequent Interpretation by the Courts*

Notwithstanding the ambiguous wording and unclear parliamentary intent, when the first test case for pay equity was finally brought in 1986 by the Clerical Workers Union, the Arbitration Court held that it did not have the jurisdiction to hear equal pay for work of equal value cases under the EPA.<sup>85</sup> The Clerical Workers Union, who represented 30,000 members, 90% of them women, argued that their wage award was lower than awards for comparable, male-dominated occupations, and thus was a “depressed female rate” in

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<sup>78</sup> At 19.

<sup>79</sup> At 20.

<sup>80</sup> *Terranova*, above n 6, at [86].

<sup>81</sup> At [86].

<sup>82</sup> Orr, above n 71, at 5.

<sup>83</sup> (29 August 1972) 380 NZPD 2178.

<sup>84</sup> At 2178.

<sup>85</sup> *New Zealand Clerical Administrative etc IAOW v Farmers Trading Co Ltd* [1986] ACJ 203.

breach of the EPA.<sup>86</sup> The decision to reject the Union's case effectively closed the door on pay equity under the EPA for some time. The Ministry of Women's Affairs went so far as to say that the EPA was now rendered redundant.<sup>87</sup> Pay equity activists instead shifted their focus, and began advocating for new comprehensive legislation.

### ***B The Employment Equity Act 1990 and its Aftermath***

The advocates were successful, and after a comprehensive report,<sup>88</sup> the EEA was passed. The EEA provided for pay equity, equal employment opportunities and the establishment of an Employment Equity Office, with an Employment Equity Commissioner to oversee the performance and enforcement of the EEA. Ten claims were lodged from groups including practice nurses (to be compared to uniformed police), medical receptionists (compared to hospital electrical workers) and cosmetic saleswomen (compared to auto-parts salesmen).<sup>89</sup> All alleged that their male counterparts earned around \$100 more than them per week.<sup>90</sup> A gender-neutral job evaluation system was also developed.<sup>91</sup>

Regrettably, after only three months, the EEA was repealed by the incoming National Government, as it conflicted with their policy for a less regulated labour market.<sup>92</sup> Thus pay equity, and any claims made under the EEA, were banished from the political agenda. National then introduced the Employment Contracts Act 1991, which transformed the employment landscape from the old awards system to one dominated by individual employment agreements.<sup>93</sup>

This move has made the implementation of any future pay equity policy far more complicated. Under the awards system, pay equity comparisons would have been reasonably straightforward between the easily accessible awards of female- and male-

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<sup>86</sup> Linda Hill "Equal pay for equal value: The case for care workers" (2013) 27(2) *Women's Studies Journal* 14 at 16.

<sup>87</sup> Ministry of Women's Affairs *Report on the Effectiveness of the Equal Pay Act 1972* (September 1994) at 19.

<sup>88</sup> Margaret Wilson *Towards Employment Equity: Report of the Working Group on Equal Employment Opportunities and Equal Pay* (Working Group on Equal Opportunities and Equal Pay, 1988).

<sup>89</sup> Ministry of Women's Affairs *Next Steps Towards Pay Equity: A background paper on equal pay for work of equal value*, above n 32, at 33.

<sup>90</sup> At 33.

<sup>91</sup> At 36.

<sup>92</sup> Lisa Davies and Natalie Jackson *Women's Labour Force Participation in New Zealand: The Past 100 Years* (paper prepared for the Population Studies Centre, University of Waikato, 1993) at 14.

<sup>93</sup> Hill, "Equal pay for equal value: The case for care workers", above n 86, at 17.

dominated occupations.<sup>94</sup> In the age of individual employment contracts, there is much less transparency, and job comparisons have become much more complex.<sup>95</sup>

In addition, under the Employment Contracts Act 1991, union membership became non-compulsory and membership plummeted, especially among women.<sup>96</sup> As Prue Hyman notes, studies have shown that “[h]igh levels of female unionisation and centralised bargaining are strongly associated in cross-country comparisons with a lower gender pay gap and lower differentials generally.”<sup>97</sup> Lower union membership meant that collective bargaining efforts were weakened, and any attempt from unions to bargain for pay equity was very difficult.<sup>98</sup> There was some success using equity type arguments by the Nurses Union and by midwives, but these were limited and hard won.<sup>99</sup>

In 2003, the Government decided to try address pay equity through policy, rather than through legal means. The Taskforce on Pay & Employment Equity in the Public Service, Public Education and Public Health was formed, which led to the development of the Pay and Employment Equity Unit under the Department of Labour.<sup>100</sup> Under this unit, extensive pay equity assessments were carried out in the public sector, which uncovered the undervaluation of social workers and special education support workers.<sup>101</sup> Unfortunately, the abolition of the Pay and Employment Equity Unit by the incoming National Government in 2009 and economic pressure prevented the undervaluation from being addressed, thus the documented discriminatory pay rates were left in place.<sup>102</sup> For this reason, pay equity policies have been “criticised for developing into slow bureaucratic processes”, and without the force of law, success depends wholly on “employers’ willingness to accept pay equity principles and negotiate.”<sup>103</sup>

### ***C The Terranova Case***

After the disbandment and failure of yet another pay equity initiative, the Service & Food

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<sup>94</sup> Celia Briar, “New Zealand Conference on Pay and Employment Equity for Women” (2004) 23 Social Policy Journal of New Zealand 215 at 217.

<sup>95</sup> Hill, “Equal pay for equal value: The case for care workers”, above n 86, at 17.

<sup>96</sup> Prue Hyman “Is Active Intervention Still Needed to Improve the Position of Women in the New Zealand Labour Market? If so, what can be done?” (2015) 11(1) Policy Quarterly 3 at 6-7.

<sup>97</sup> At 7.

<sup>98</sup> Hill, “Equal pay for equal value: The case for care workers”, above n 86, at 17.

<sup>99</sup> Prue Hyman “All the way for Equal Pay” (2013) 19(8) Kai Tiaki: Nursing New Zealand 13 at 14.

<sup>100</sup> Hyman “Pay Equity and Equal Employment Opportunity in New Zealand: Developments 2006/2008 and Evaluation”, above n 28, at 2.

<sup>101</sup> Prue Hyman “Pay Equity and Equal Employment Opportunity in New Zealand: Developments 2008/2010 and Evaluation” (2010) 36(1) New Zealand Journal of Employment Relations 65 at 68.

<sup>102</sup> Hill, “Equal pay for equal value: The case for care workers”, above n 86, at 18.

<sup>103</sup> At 28-29.

Workers Union (SFwu), partly fuelled by the Human Rights Commission Inquiry *Caring Counts*, deemed that in 2013 the time was right to bring a new pay equity test case under the EPA.<sup>104</sup> The case was spear headed by Kristine Bartlett, an aged care worker who argued that her employer, Terranova Homes and Care, did not provide equal pay as required under the EPA because aged care work is predominately performed by females, and thus undervalued.<sup>105</sup> SFwu applied under s 9 of the EPA for the Court’s interpretation of the general principles for the implementation of equal pay.<sup>106</sup>

In the Court of Appeal, the main issue in contention was whether s 3(1)(b) provided for pay equity type comparisons.<sup>107</sup> After deeming the issue “finely balanced”, the Court of Appeal confirmed the Employment Court’s finding that s 3(1)(b) does allow for equal pay for work of equal value.<sup>108</sup> The Court was quick to point out “that the Act is very poorly worded...[t]he syntax is cumbersome and the drafting elliptical”<sup>109</sup>, and that the “unfortunate reality is that it is simply not possible to read the Act as a carefully drafted and well thought-out piece of legislation.”<sup>110</sup>

Justice French considered that the 1971 Commission report was too vague to help determine the correct interpretation of the EPA, and that the arguments over the workability of pay equity were overstated.<sup>111</sup> She also found that the past interpretations were not binding, and that the New Zealand Bill of Rights Act 1990 and international obligations were of little help in identifying the correct interpretation of s 3(1)(b). Likewise, the argument made by Terranova that the EPA was never intended to provide for pay equity, hence the enactment of the EEA, was not considered to be determinative.<sup>112</sup> Instead Justice French placed the most emphasis on the scheme of the EPA itself, the language and the purpose of the EPA, and confirmed that the Act provided for pay equity.<sup>113</sup> The Supreme Court upheld this decision.<sup>114</sup>

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<sup>104</sup> At 19.

<sup>105</sup> *Terranova*, above n 6, at [2]-[6].

<sup>106</sup> At [54].

<sup>107</sup> At [65].

<sup>108</sup> At [81].

<sup>109</sup> At [83].

<sup>110</sup> At [163].

<sup>111</sup> At [95] and [172].

<sup>112</sup> At [200].

<sup>113</sup> At [147].

<sup>114</sup> *Terranova Homes and Care Ltd v Service and Food Workers Union Nga Ringa Tota Inc* [2014] NZSC 196.

The Court of Appeal then recommended that the case go back to the Employment Court to determine the pay equity principles for the substantive case to be tried under, since the EPA lacks any real guidelines.<sup>115</sup>

#### ***D Government Intervention***

Before this could happen however, the Government intervened by setting up a working group to develop principles for pay equity in New Zealand, taking the responsibility away from the Employment Court and putting on hold the Union's legal action.<sup>116</sup> The Joint Working Group was established in October 2015, and was made up of representatives from the Government, unions and employer groups.<sup>117</sup> The Terms of Reference defined their task as being to “recommend principles to Government that provide practical guidance to employers and employees in implementing pay equity.”<sup>118</sup> However these recommendations were required to be within the scope of the EPA and the *Terranova* decision, and had to be consistent with the existing employment framework, which limited their scope substantially.<sup>119</sup>

The Joint Working Group reported back in May 2016. The emphasis of its recommendations were on good faith collective bargaining between the employee and employer, within the scope of the Employment Relations Act 2000 (ERA), in order to achieve pay equity.<sup>120</sup> Where bargaining is unsuccessful, recourse may be had to the Employment Relations Authority, who will be given the power to alter employment agreements, including pay levels.<sup>121</sup> For a claim to have merit, it must be found that the work is predominately performed by females, and that it has been historically undervalued.<sup>122</sup> After that is determined, the principles state that a gender-neutral evaluation must take place, but the recommendations are vague and do not give a procedure for how this may be done.<sup>123</sup> Frustratingly, the principles mimic the wording of s 3(1)(b) of the EPA, continuing to use the confusing phrase “same or substantially similar” for

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<sup>115</sup> *Terranova*, above n 6, at [239].

<sup>116</sup> Stacy Kirk and Sam Sachdeva “Government to address pay equity, care giver wages” *Stuff* (online ed, New Zealand, 20 October 2015).

<sup>117</sup> Paula Bennet and Michael Woodhouse “Pay equity meeting an important milestone” (17 November 2015) The official website of the New Zealand Government <[www.beehiv.govt.nz](http://www.beehiv.govt.nz)>.

<sup>118</sup> Joint Working Group on Pay Equity Principles “Terms of Reference” (17 November 2015) State Services Commission <[www.ssc.govt.nz/](http://www.ssc.govt.nz/)> at 1.

<sup>119</sup> At 7.

<sup>120</sup> 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 Recommendations of the Joint Working Group on Pay Equity Principles (24 May 2016) at 2.

<sup>121</sup> At 3.

<sup>122</sup> At Appendix 2, 1.

<sup>123</sup> At Appendix 2, 2-3.

identifying comparators. No material guidance is given for how a pay equity claim may be continued and resolved. These steps will involve amendments to both the ERA and the EPA, although the recommendations do not clearly specify what these will be.<sup>124</sup>

This is a very different approach from the one taken in the EEA, which set up an independent Employment Equity Commissioner who was responsible for responding to pay equity claims and conducting pay equity assessments. It also does not follow the classic model of most pay equity legislation, outlined in the Introduction. Employees must jump through many more hoops, for example attempts at good faith bargaining, before any assessment may be carried out. Although this focus on collective bargaining sounds like a positive step to reduce costly and lengthy litigation while maintaining good faith relationships, given “that collective bargaining over pay equity issues has not worked in the past, it is somewhat optimistic to accept it will work in the future.”<sup>125</sup>

Furthermore, the recommendations regrettably give no detail on how a pay equity determination will be carried out by the Authority; specifically, no information is included on how comparators will be identified and assessed. Also, due to the limited Terms of Reference, recommendations only involve amendments to existing legislation, including the EPA, which even Workplace Relations and Safety Minister Michael Woodhouse admitted was “certainly not...fit for purpose.”<sup>126</sup>

This means that instead of recommending the enactment of clear, purpose built legislation for the implementation of pay equity, the report would have the EPA be the main instrument. As has already been established, the EPA is an archaic, confusing and poorly written statute with a contentious history. It is unclear whether the EPA was designed with pay equity in mind; there has been no consensus over what it stands for; and until *Terranova*, it had lain dormant for nearly 30 years. Moreover, it was enacted in a completely different environment of labour relations, and mainly aimed at the 1972-77 implementation period. The EPA has played an invaluable role in reinvigorating the pay equity debate, but it is not an ideal instrument for the execution of pay equity in the future.

Currently, the Government is considering the Joint Working Group’s recommendations, with Michael Woodhouse stating, “it’s important we take the time to get it right.”<sup>127</sup> It is unclear what the Government intends to do at present and what the future of pay equity in

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<sup>124</sup> At 3.

<sup>125</sup> Roth, above n 7, at 5.

<sup>126</sup> Kirk and Sachdeva, above n 116.

<sup>127</sup> Paula Bennet and Michael Woodhouse “Pay equity working group reports back” (7 June 2016) The official website of the New Zealand Government <[www.beehive.govt.nz](http://www.beehive.govt.nz)>.

New Zealand may look like. The Union E Tū has suggested that it “would be a brave government that rejected the working group’s recommendations or tried to meddle, given it represents a rare meeting of the minds of business, unions and government officials.”<sup>128</sup> However Professor Paul Roth has suggested that this may all be “just another delay in the way of paying a fair wage to...New Zealand's lowest-paid workers.”<sup>129</sup>

Overseas commentators have noted that in a decentralised labour market, government policies, such as the Pay and Employment Equity Unit, and complaints-based pay equity legislation are at risk of being ineffective.<sup>130</sup> Rather, what is needed to secure results is proactive, purpose built legislation which will tackle the undervaluation of women’s work head-on.<sup>131</sup> It is clear that in New Zealand, pay equity policy and collective bargaining has failed to achieve results. It remains to be seen whether the proposed changes to the EPA will be enacted, let alone effective.

### ***E Summary***

New Zealand is at a crossroad. Depending on Government action, it is possible that in wake of *Terranova*, New Zealand now has pay equity legislation in the form of the EPA. However, it is equally possible that action will be taken to halt progress, as has happened time and time again, so that pay equity is exiled into the political backwaters once more. While Chapter Three will substantively argue why pay equity should be implemented, this chapter contends that New Zealand needs to learn from its past mistakes when looking to the future. Pay equity has failed to gain a foothold thus far in New Zealand, due to ill-planned and poorly drafted legislation, political reluctance, insubstantial government policy and a decentralised labour market which has made collective bargaining difficult. Recent recommendations contend that the EPA should continue to be used and revamped to provide more directly for pay equity. Although this would be an improvement on the status quo, this chapter has argued that the EPA is ill equipped to deal with the complexities of pay equity. Therefore in order to give pay equity in New Zealand the best chance of success, comprehensive new legislation would be the best option.

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<sup>128</sup> Jonathan Underhill “Unions and business come together in a fair pay plan” *New Zealand Listener* (online ed, New Zealand, 7 July 2016).

<sup>129</sup> Eileen Goodwin “Recommendation over pay may just be ‘delay’” *Otago Daily Times* (online ed, Dunedin, 9 June 2016).

<sup>130</sup> Mary Cornish “Securing Pay Equity for Women’s Work – Everyone Benefits – The International Experience” (paper presented to the International Seminar, Equal Pay for Work of Equal Value, convened by the ILO Southern Cone Sub-regional Office, Santiago, Chile, August 25 2008) at 10.

<sup>131</sup> At 10.

#### *IV Chapter Three - Should New Zealand have Pay Equity?*

The laws of supply and demand are just the accumulation of all the interventions into the market place. To argue that equal pay for comparable worth disrupts this system is just displaced hysteria about the role of women...Any economist will argue that discrimination in wages is not economically efficient, so pay equity laws are only one more measure to make the economy more efficient, and simultaneously to give women monetary recognition for the work they perform.

- H. Hartman, Economist, National Academy of Sciences, Washington, D.C.<sup>132</sup>

Thanks to the decision of *Terranova*, pay equity is back on the political agenda in New Zealand. However, the future of pay equity is far from secure. As a controversial and complex issue, it has attracted much debate, and has both advocates and critics. This chapter debunks the common arguments made against pay equity, as well as offering arguments in its support, consequently concluding that New Zealand should have pay equity legislation.

#### ***A Arguments Against Pay Equity***

New Zealand's labour market is one of the least regulated in the world.<sup>133</sup> Consequently, negative reactions to intervention in the market in the form of pay equity are to be expected. Business New Zealand for example, in its role as intervener in *Service and Food Workers Union Nga Ringa Tota Inc v Terranova Homes and Care Ltd*,<sup>134</sup> had many concerns about the feasibility of pay equity, and submitted that it would be "unworkable and unduly onerous on employers", as well as inconsistent with New Zealand's current labour market.<sup>135</sup> To get a laypersons point of view, one only has to look at the comments on pay equity articles on the New Zealand Herald website, which are resoundingly negative and uninformed.<sup>136</sup> One commenter called aged care workers "glorified babysitters", while another termed pay equity "a slippery slope to communism."<sup>137</sup> Overseas, pay equity has also faced considerable resistance, with one American commentator calling it "the looniest

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<sup>132</sup> Coalition for Equal Value Equal Pay "Submission to the Working Party on Employment Equity" (December 1990) at 1.

<sup>133</sup> Hyman "Is Active Intervention Still Needed to Improve the Position of Women in the New Zealand Labour Market? If so, what can be done?", above n 96, at 7.

<sup>134</sup> *Service and Food Workers Union Nga Ringa Tota Inc v Terranova Homes and Care Ltd* [2013] NZEmpC 157, [2013] ERNZ 504.

<sup>135</sup> Hill, "Equal pay for equal value: The case for care workers", above n 86, at 24-25.

<sup>136</sup> See Prue Hyman "Equal pay – the case for action now" *New Zealand Herald* (online ed, New Zealand, 9 February 2016); and Catriona MacLennan, Vicky Mee and Judy McGregor "Opinion: NZ should legislate to promote pay equality" *New Zealand Herald* (online ed, New Zealand, 10 June 2016).

<sup>137</sup> Hyman "Equal pay – the case for action now", above n 136.

idea since Looney Tunes.”<sup>138</sup> However, most arguments levelled against pay equity are overstated and misguided. As Helen Remick has noted, often:<sup>139</sup>

Each of these arguments rests on a powerful truism as well as on a distorted understanding of both the measurement of wage discrimination and of eliminating it through the implementation of a comparable worth policy.

## 1 Free Market Ideology

### (a) The critics

The free market is often cited by sceptics as an argument against pay equity. The basic contention is that an unregulated labour market is theoretically free from all discrimination, as the wage of workers is determined by supply and demand, and a worker’s productivity.<sup>140</sup> Moreover any discrimination that does exist (due to government regulation and trade union action) will be eroded by the workings of the free market itself, as employers are motivated to achieve optimal productivity, which is hindered by discrimination.<sup>141</sup> This is backed by the assumption that the free market is the most legitimate way to determine wages, and the most efficient.<sup>142</sup> The more regulated a market is, the less productive it will be in allocating resources.<sup>143</sup>

It is claimed that pay equity will disrupt this type of free market wage system, and that “[g]overnment intervention will sabotage the invisible hand.”<sup>144</sup> Not only does pay equity place restrictions on the labour market to make it less efficient, it also seeks to replace its role in setting wages. Many sceptics take issue with the fact that pay equity seeks to adjust wages to bring them up to their perceived intrinsic ‘value’ via the process of job evaluation.<sup>145</sup> Rather they argue that the value of a job, and thus its wages, should be determined by the market forces of supply and demand.<sup>146</sup> This search for a ‘just price’

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<sup>138</sup> McCann, above n 50, at 32.

<sup>139</sup> Helen Remick and Ronnie J. Steinberg “Technical Possibilities and Political Realities: Concluding Remarks” in Helen Remick (ed) *Comparable Worth and Wage Discrimination: Technical Possibilities and Political Realities* (Temple University Press, Philadelphia, 1984) at 288.

<sup>140</sup> Novitz and Jaber, above n 37, at 252.

<sup>141</sup> Catherine Holst “Institutional Variation and Normative Theory: Lessons from a Local Equal Pay Controversy” in Fredrik Engelstad and Anniken Hagelund (ed) *Cooperation and Conflict the Nordic Way: Work, Welfare, and Institutional Change in Scandinavia* (De Gruyter, Warsaw, 2015) at 120.

<sup>142</sup> Remick and Steinberg, above n 139, at 289.

<sup>143</sup> Holst, above n 141, at 121.

<sup>144</sup> Remick and Steinberg, above n 139, at 289. The “invisible hand” is a metaphor used to describe free market forces.

<sup>145</sup> Penelope Brook *The Inequity of ‘Pay Equity’: Comparable Worth Policy in New Zealand* (The New Zealand Centre for Independent Studies, Auckland, 1990) at 10.

<sup>146</sup> Gunderson *Comparable Worth and Gender Discrimination: An International Perspective*, above n 12, at 25.

based on intrinsic value is described by some as a chimera, and as “the intellectual black hole at the centre of comparable worth.”<sup>147</sup> It is argued that there is no such thing as the intrinsic value of work, as value is derived from the perception of skill, which in turn is derived from utility, which is determined by market forces of supply and demand.<sup>148</sup> An example cited by Michael Levin is that of an arrow-catcher, who can throw arrows into the air and catch them with their teeth.<sup>149</sup> Although it may be a job that requires a lot of skill and training, there is no demand for it, as no one wants to hire a relatively useless arrow-catcher, thus though skilful, and perhaps with intrinsic value, the occupation is worthless.<sup>150</sup> It is contended therefore that pay equity is “a frontal assault on *any* form of economic liberty.”<sup>151</sup>

### (b) Response

A key error in the free market arguments made against pay equity is the assumption that the market operates in a neutral and fair way. Rather, as was shown in Chapter One, the market absorbs and reflects societal and cultural norms, resulting in artificially depressed rates of pay for women’s work, embedded in pay structures.<sup>152</sup> This means that the ‘market rate’ for predominately female jobs often results in discriminatory pay.<sup>153</sup> Supply and demand are likewise not immune to influence, and are also affected by gender power relations, which result in lower pay for female-dominated occupations.<sup>154</sup> Contrary to the claims of neoclassical economics, the market “is not independent of the values and customs of those who participate in it.”<sup>155</sup> Thus instead of distorting the labour market as claimed by critics, pay equity seeks to rectify it and to even the playing field.

A further erroneous assumption is that a free, unregulated market will produce the best outcome. In an article titled “Why a Free Market Wage System Doesn’t Work”, Michael Sharp argues that in New Zealand, the current decentralised labour market is inefficient and that this inefficiency has caused a massive increase in the income gap between the rich and poor since the removal of broad based collective bargaining in the 1990s.<sup>156</sup> This is because the current market system is based on a neoclassical economic model which

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<sup>147</sup> Michael Levin “The Feminist Road to Socialism” (1984) 78(3) Commentary 13 at 16.

<sup>148</sup> Brook, above n 145, at 10.

<sup>149</sup> Levin, above n 147, at 16.

<sup>150</sup> At 16.

<sup>151</sup> At 17.

<sup>152</sup> Rubery, above n 3, at 2.

<sup>153</sup> Chicha, above n 47, at 7.

<sup>154</sup> Steinmetz, above n 16, at 43.

<sup>155</sup> Novitz and Jaber, above n 37, at 254.

<sup>156</sup> Michael Sharp “Why a Free Market Wage System Doesn’t Work” (5 March 2015) Briefing Papers <[www.briefingpapers.co.nz](http://www.briefingpapers.co.nz)>.

requires unrealistic “perfect market conditions... that rarely exist.”<sup>157</sup> The same conclusion is echoed in international research, where it has been found that high levels of centralised bargaining and government intervention in the labour market actually result in a smaller wage differential and a lower gender pay gap.<sup>158</sup>

Finally, critics misunderstand the central aim of pay equity wage adjustments. Job evaluations are not seeking to attach a dollar value to certain skills and occupations. Rather the aim is to lift the artificially reduced price of predominately female occupations to match the market rate of male jobs deemed to be comparable via job evaluation. The pay for predominately male jobs is determined by market forces, but unlike female-dominated occupations, male jobs are not negatively affected by discriminatory societal and cultural norms resulting in undervaluation.<sup>159</sup> Thus job evaluation ensures that both female- and male-dominated jobs are paid on the same basis. This refutes arguments based on the impossibility of finding the intrinsic ‘value’ of jobs as irrelevant, as wages for female-dominated occupations are set by market forces, albeit indirectly through comparison with male-dominated occupations.

## 2 *Flaws in Job Evaluation Systems*

Job evaluation is almost always a crucial step in pay equity assessments, used at both the assessment and remedial stage. Once it has been determined that a female-dominated occupation has been affected by systemic undervaluation, the next step is to use a gender-neutral job evaluation tool to establish a non-discriminatory wage rate based on a comparable male-dominated occupation.<sup>160</sup> Job evaluation tools must therefore develop a way of accurately comparing different occupations to assess whether they require similar skills, training, experience, responsibilities and conditions.<sup>161</sup> This is often done by a points system, where these factors are awarded different scores depending on how ‘valuable’ the job is assessed to be.<sup>162</sup> Occupations with the same, or similar total of points are found to be comparable for the purposes of pay equity. This process is made up of four distinct steps.<sup>163</sup>

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<sup>157</sup> Sharp, above n 156.

<sup>158</sup> Hyman “Is Active Intervention Still Needed to Improve the Position of Women in the New Zealand Labour Market? If so, what can be done?”, above n 96, at 7.

<sup>159</sup> Armstrong, above n 9, at 4.

<sup>160</sup> Brook, above n 145, at 12.

<sup>161</sup> McCann, above n 50, at 28.

<sup>162</sup> Levin, above n 147, at 14.

<sup>163</sup> Pay and Employment Equity Unit *Gender Bias in Job Evaluation: A Resource Collection* (Department of Labour, April 2008) at 32.

- the accurate collection of job information;
- deciding on the mechanism or tool to determine how the value will attach to the job information;
- applying the mechanism to determine the value of the work performed; and
- making the comparisons (evaluations).

(a) The critics

As critics are keen to point out, there are concerns about job evaluation systems. They are unavoidably subjective, procedurally complicated, and, if not done properly, can fail to remove gender bias. Moreover, some argue that the overall goal of job evaluation for the purposes of pay equity, to find comparable male- and female-dominated occupations, is inherently flawed and impossible.

One of the biggest criticisms levelled at job evaluation systems is that there is no ‘correct’ or universally agreed upon job evaluation system. Job evaluation tools differ greatly from one another, in both complexity and measurement of job worth, so that even experts disagree as to what system and criteria to use.<sup>164</sup> Although the same type of factors (skills, training, experience, responsibilities and work conditions) are used universally, the weighting and assignment of points to these factors varies depending on what job evaluation tool is being used.<sup>165</sup> These tools have to determine how to weigh years of education against levels of responsibility, and to determine skill points for completely different occupations, such as librarians versus police officers. There is no right or wrong answer to these decision, consequently a level of subjectivity is unavoidable. Thus job evaluation cannot be seen as a rational science, as it is not possible to objectively determine the value of jobs. Critics argue that this subjectivity makes many job evaluation schemes “arbitrary and unreliable”, as the same job could be rated differently under different schemes.<sup>166</sup>

Job evaluation schemes can also be extremely complicated, expensive and lengthy. They require the collection of a lot of job information, as well as experts to compile and assess

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<sup>164</sup> McCann, above n 50, at 32.

<sup>165</sup> June Ellenoff O’Neill “The Concise Encyclopedia of Economics: Comparable Worth” (2002) Library of Economics and Liberty <[www.econlib.org/](http://www.econlib.org/)>.

<sup>166</sup> McCann, above n 50, at 32.

the data.<sup>167</sup> This added cost and difficulty was recognised by the Joint Working Group on Pay Equity in their recommendations, who commented that lack of resources could hinder parties wishing to raise a claim, and impact the success of a pay equity assessment.<sup>168</sup>

At the end of an evaluation, there is a danger that some gender bias will persist. Many job evaluation systems were first designed in the 1930s as a tool to determine pay structures within male-dominated firms.<sup>169</sup> Some of these original systems have not been adequately re-evaluated since women joined the work force, and serve to preserve and validate the status quo and existing gender bias, by not according weight to specific skills found in women's work.<sup>170</sup> Gender bias can also be found in the implementation stages and design of job evaluation tools.<sup>171</sup> Even in schemes which claim to be gender-neutral, there is a risk that innate female skills (such as those discussed in Chapter One) will continue to be overlooked and undervalued.<sup>172</sup>

Conversely, other critics such as Maeve Quaid have argued there is a danger that gender-neutral job evaluation tools are prejudiced, and place too much emphasis on aspects of female jobs.<sup>173</sup> This results in "cooking the books", which manipulates the weighting of factors in favour of women so that "the technique will 'automatically' yield higher scores for those occupations normally held by 'marginalized' women."<sup>174</sup> She argues that job "evaluation does not evaluate. Rather, job evaluation must be seen as a device that disguises cultural values and political action within the context of a rational technique."<sup>175</sup>

At a more fundamental level, some critics also challenge the end goal of job evaluation – finding comparable occupations. They say that comparing male and female occupations is akin to comparing apples and oranges, in that they are too dissimilar to find truly comparable qualities.<sup>176</sup> Thus critics argue that the "entire logic of job evaluation itself is erroneous."<sup>177</sup>

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<sup>167</sup> Judith A McDonald and Robert J Thornton "Comparable Worth/Work of Equal Value" in Nancy A Naples (ed) *The Wiley Blackwell Encyclopedia of Gender and Sexuality Studies* (Wiley Blackwell, 2016) at 349.

<sup>168</sup> Reddy, above n 120, at 4.

<sup>169</sup> Chicha, above n 47, at 6.

<sup>170</sup> Chicha, above n 47, at 6.

<sup>171</sup> Maeve Quaid *The Myth of Equitable Job Evaluation* (University of Toronto Press, Toronto, 1993) at 72.

<sup>172</sup> Chicha, above n 47, at 6.

<sup>173</sup> Quaid, above n 171, at 49.

<sup>174</sup> At 49.

<sup>175</sup> At 76.

<sup>176</sup> Remick and Steinberg, above n 139, at 288.

<sup>177</sup> McCann, above n 50, at 32.

(b) Response

Even though job evaluation schemes are an imperfect tool, this does not mean they are useless for the purposes of pay equity assessments. Although they are unavoidably subjective, a job assessment scheme does provide a consistent way to analyse different jobs using the same criteria. Such evaluations also have the benefit of being transparent, so that all parties are aware of how and why an occupation is rated.<sup>178</sup> Thus job evaluations are an improvement on market forces determining wages, which are obscure and not open to scrutiny. Job evaluations are necessarily a “more political and institutional process” but this is appropriate given that labour is not merely a commodity but is also the “means by which people are able to sustain themselves and their families.”<sup>179</sup> Furthermore, although job evaluation tools do differ in criteria, they have consistently found women’s jobs to be undervalued when compared to similarly scoring male-dominated jobs.<sup>180</sup> Even Maeve Quaid, who is highly critical of job evaluations as a rational science, admits that for the purposes of pay equity, “job evaluation itself, as a technique does not achieve change, but, rather, is a vehicle through which desired change can be achieved.”<sup>181</sup>

It is also important to emphasise that job evaluation comparisons do not automatically result in women’s wages being increased to match those of their male comparator. Instead the male wage rate is often used as a starting point for ongoing discussion between the parties to negotiate an adequate new wage rate.<sup>182</sup> Job evaluation results are used as an indication, not as a definitive answer, therefore the fact that they are not always consistent is not a deal breaker.

There are also many resources available to parties to help them carry out gender-neutral job evaluations. Both the ILO and the New Zealand Government have produced resources and step-by-step guides for implementing gender-neutral job evaluations.<sup>183</sup> Although it is accepted that not all job evaluation techniques will succeed in removing all aspects of gender bias, they at least strive to reduce gender discrimination and are a substantial improvement on older job evaluation systems.<sup>184</sup> It is unfortunately unavoidable that job evaluations will take time and come at some expense, but this burden can be minimised by

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<sup>178</sup> Prue Hyman “Equal pay for work of equal value – job evaluation issues” (1988) 13 *New Zealand journal of industrial relations* 237 at 241.

<sup>179</sup> Rubery, above n 3, at 2.

<sup>180</sup> Hyman “Equal pay for work of equal value – job evaluation issues”, above n 178, at 241.

<sup>181</sup> Quaid, above n 171, at 78.

<sup>182</sup> McCann, above n 50, at 31.

<sup>183</sup> See Marie-Thérèse Chicha *Promoting equity: Gender-neutral job evaluation for equal pay: A step-by-step guide* (International Labour Organisation, 2008) and Pay and Employment Equity Unit *Gender Bias in Job Evaluation: A Resource Collection*, above n 163.

<sup>184</sup> Novitz and Jaber, above n 37, at 258.

government support and resources. For example, both Sweden and Quebec, Canada have a specialised body to provide technical support for pay equity claims.<sup>185</sup> In New Zealand, such a body could look like the Employment Equity Office that was to be established under the EEA.<sup>186</sup>

Critics who allege that the goal of pay equity to compare male- and female-dominated occupations is invalid are ignoring the fact that the practice of comparing different occupations through job evaluation is already widespread in both public and private sectors in New Zealand.<sup>187</sup> As Helen Remick points out:<sup>188</sup>

It is surprising, then, that the same employer groups that have supported job evaluation systems when they have been used to create and justify an existing organisational hierarchy and wage structure contend that such systems cannot be used to compare male-dominated and female-dominated jobs within that wage structure.

### 3 *Workability Concerns*

#### (a) The critics

The implementation of pay equity is inevitably complex. Some opponents therefore challenge the workability of pay equity as a whole, and argue that it is too expensive and will actually result in higher rates of unemployment for women.<sup>189</sup> Aside from the various implementation costs of pay equity, critics contend that the overall cost of pay adjustments for employers is unsustainable and unfair, and will negatively affect the whole economy.<sup>190</sup>

Looking at a concrete example in New Zealand, it was alleged during the Court of Appeal case that Terranova should not have to “shoulder the burden of rectifying society-wide structural discrimination.”<sup>191</sup> Moreover, the New Zealand Aged Care Association has commented that even though their members would like to pay carers more, they are “hamstrung” by the lack of Government funding, and thus are unable to do anything unless the Government acts first.<sup>192</sup> They say that if they were to pay carers more, then costs would

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<sup>185</sup> Chicha, above n 47, at 26.

<sup>186</sup> Ministry of Women’s Affairs *Next Steps Towards Pay Equity: A background paper on equal pay for work of equal value*, above n 32, at 36.

<sup>187</sup> Novitz and Jaber, above n 37, at 257.

<sup>188</sup> Remick and Steinberg, above n 139, at 289.

<sup>189</sup> Ministry of Women’s Affairs *Report on public submissions to Next Step Towards Pay Equity: A Discussion Document* (May 2003) at 10.

<sup>190</sup> Marie Dwyer “The Economic Rationales for Narrowing the Gender Gap” (paper presented to the National Advisory Council on the Employment of Women, June 2016) at 25.

<sup>191</sup> *Terranova*, above n 6, at [149].

<sup>192</sup> New Zealand Aged Care Association “Equal Pay Case” <[www.nzaca.org.nz/](http://www.nzaca.org.nz/)>.

rise, and their services would become unaffordable for consumers, who pay for most aged care through government subsidies.<sup>193</sup> The New Zealand Aged Care Association allege that a wage rise from \$15.30 to \$26.00 an hour would result in needing an additional \$500 million annually to fund the sector, an amount that they argue is unsustainable and would result in homes going out of business.<sup>194</sup> The Health Minister Jonathan Coleman has declined to accept any responsibility, and has replied that “providers must decide how they allocate their money.”<sup>195</sup> Many female-dominated occupations are either directly or indirectly funded by government agencies, such as those that can be found in the health, care and education sectors.<sup>196</sup> Therefore it is the Government who will bear a large proportion of the costs associated with wage adjustments in order to fund adequate wages for undervalued women’s work.<sup>197</sup>

Critics also argue that pay equity will actually cause the unemployment of women working in predominately female jobs. This is because employers who are forced to pay their employees non-discriminatory rates will be unable to afford the same number of workers, and so will have to employ fewer staff.<sup>198</sup> It is also hypothesised that higher wages could attract more skilled men to the jobs, who would take the jobs of less skilled women.<sup>199</sup> Additionally, critics allege that the high cost of implementing pay equity would result in inflation and a rise in consumer prices, and be bad for the economy in general.<sup>200</sup>

#### (b) Response

Although unmanageable costs and unemployment seem like very serious drawbacks of implementing pay equity, they are over stated and there is little evidence to back up the contentions. Similar arguments were made before the implementation of both the EEA and the EPA.<sup>201</sup> Although the EEA did not last long enough to implement any pay equity assessments, it has been noted that the introduction of the EPA and its implementation of equal pay over five years did not have any catastrophic long term effect on the economy.<sup>202</sup> Between 1972 and 1977, there was a gender wage gap narrowing of 7-10%, which resulted in an 6.8% wage bill increase, but only contributed to a 3% increase to the consumer price

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<sup>193</sup> New Zealand Aged Care Association, above n 192.

<sup>194</sup> New Zealand Aged Care Association, above n 192.

<sup>195</sup> Hyman “Is Active Intervention Still Needed to Improve the Position of Women in the New Zealand Labour Market? If so, what can be done?”, above n 96, at 9.

<sup>196</sup> Dwyer, above n 190, at 26.

<sup>197</sup> At 26.

<sup>198</sup> Brook, above n 145, at 15.

<sup>199</sup> O’Niell, above n 165.

<sup>200</sup> McCann, above n 50, at 35.

<sup>201</sup> Wilson, above n 88, at 13.

<sup>202</sup> At 13.

index during that time.<sup>203</sup> Similarly, the implementation of any pay equity measure would not happen overnight, as has been assumed by critics.<sup>204</sup> If done in stages, pay equity processes should not have the dire effects of high inflation and unemployment prophesied by its opponents.<sup>205</sup>

Further, studies on the implementation of pay equity policies overseas have shown them to be manageable, with no significant negative short or long term costs.<sup>206</sup> In New South Wales, it was found that the introduction of pay equity resulted in minor short term decreases in national GDP and employment, but a rise over the long term.<sup>207</sup> Further, studies in Ontario, Canada also suggest that there will be no dire consequences following the implementation of pay equity. In Ontario, the increase in the total private sector wage bill was only 0.5%, and 2.2% in the public sector.<sup>208</sup> As Jill Rubery points out, economic arguments can be turned on their head, as arguably pay equity, by paying women an adequate wage rate, will improve productivity, as well as the quality of the work being done.<sup>209</sup>

Finally, the fact that pay equity may cost money is not a good enough reason to deter action and accept the undervaluation of women's work. As it was so eloquently put by Judge Christina Inglis in the Employment Court:<sup>210</sup>

History is redolent with examples of strongly voiced concerns about the implementation of anti-discrimination initiatives on the basis that they will spell financial and social ruin, but which prove to be misplaced or have been acceptable as the short term price of the longer term social good. The abolition of slavery is an old example, and the prohibition on discrimination in employment based on sex is both a recent and particularly apposite example.

#### *4 It's a Matter of Choice*

##### (a) The critics

Many opponents of pay equity still argue that the gender wage gap does not really exist, or that it is vastly exaggerated, and that women's work is not actually undervalued. They

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<sup>203</sup> At 13.

<sup>204</sup> Remick and Steinberg, above n 139, at 290.

<sup>205</sup> At 292.

<sup>206</sup> Dwyer, above n 190, at 25.

<sup>207</sup> At 25.

<sup>208</sup> Chicha, above n 47, at 41.

<sup>209</sup> Rubery, above n 3, at 18-19.

<sup>210</sup> *Service and Food Workers Union Nga Ringa Tota Inc v Terranova Homes and Care Ltd*, above n 134, at [110].

contend that women are free to choose where to work and that lower wages in female-dominated occupations are justified by the choices that women make.<sup>211</sup> Critics argue that women pick work which will give them more flexibility and that require less skill, and thus are paid less for this trade off.<sup>212</sup> Women are equally free to decide to work in higher paid male or mixed jobs, but instead prefer less demanding jobs which are “mother-friendly” and that will allow women to combine work with motherhood.<sup>213</sup> The New Zealand Business Roundtable used this kind of argument when justifying why predominately female jobs have lower pay, as it “simply reflects women’s job preferences, and men and women’s generally differing approaches to paid work.”<sup>214</sup>

(b) Response

The above simplistic and antiquated view ignores the realities of the current labour market and the aims of pay equity. Pay equity seeks to overcome the undervaluation of occupations based on job requirements; it is not based on the behaviour of the people who commonly occupy that job, which is what the critics focus on.<sup>215</sup> They argue that women flock to certain jobs because they are seen to be advantageous and to provide good working conditions that are suitable for raising a family. They rationalise that these jobs are paid less because they provide these compensating advantages. This ignores the evidence presented in Chapter One. It is in fact these incorrect assumptions, sourced in social and historic norms, which caused the initial undervaluation of female-dominated occupations. Institutional inertia has frozen the relative pay rate so that these gender stereotypes are still present in pay structures today.<sup>216</sup>

Furthermore, the allegation that women are completely free to choose where to work and that they prefer low-paid women’s work is overly simplistic. Women are constrained, not only by social expectations and cultural gender stereotypes, but also by the labour market’s preference for employing men.<sup>217</sup> The crowding theory discussed in Chapter One supports this idea; as women’s options are limited, they are forced into fewer and lower paid

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<sup>211</sup> Brook, above n 145, at 6.

<sup>212</sup> McCann, above n 50, at 33.

<sup>213</sup> England and others, above n 51, at 6.

<sup>214</sup> Ministry of Women’s Affairs *Report on public submissions to Next Step Towards Pay Equity: A Discussion Document*, above n 189, at 12.

<sup>215</sup> Armstrong, above n 9, at 4.

<sup>216</sup> England and others, above n 51, at 29-30.

<sup>217</sup> Megan Gerecke *A policy mix for gender equality? Lessons from high-income countries* (International Labour Organisation, 2013) at 25.

occupations. This is compounded by the fact that few men want to do women's work, due to its low pay.<sup>218</sup>

Critics also incorrectly assume that women choose these jobs because they are happy to earn less money, which completely ignores the history of women struggling for better pay and working conditions.<sup>219</sup> Female-dominated occupations represent essential labour in the community, be it aged care work, nursing or childcare.<sup>220</sup> Women should therefore not be penalised for carrying out these jobs merely because a distorted market has failed to accurately account for their value.<sup>221</sup>

## ***B Arguments in Favour of Pay Equity***

As critical legal scholar Michael McCann has argued, law in "its official guise, surely is a force that sustains hierarchical order, but...it can be, in the hands of defiant citizens, a source of disorder and egalitarian reordering."<sup>222</sup> Pay equity is one such law that if harnessed correctly, will result in benefits for many members of society and greater equality in the labour market. However it is important to emphasise that pay equity is not the answer to all wage inequity but rather is "a prescription for a specific illness that has to do with certain jobs being undervalued."<sup>223</sup> Many advocates of pay equity argue that it is just one of a number of strategies that need to be implemented to achieve equality for women in the labour market, but this does not mean that "it is dismissible because it does not do everything."<sup>224</sup>

### *1 It's a Matter of Justice and Fairness*

A strong argument in favour of pay equity is that it should be implemented as a basic social justice concern. It is not fair or just that an occupation is paid less because it is dominated by one sex. Society needs to recognise the valuable skills involved in women's work, and rectify discriminatory underpayment by giving women fair remuneration.<sup>225</sup> Many predominately female jobs have substantial social and economic importance which should be adequately reflected in their wage rate.<sup>226</sup> Pay is often seen as an indication of status and

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<sup>218</sup> Armstrong, above n 9, at 4-5.

<sup>219</sup> At 4-5.

<sup>220</sup> Claudia Mills "Paying Women What They Are Worth" in Claudia Mills (ed) *Values & Public Policy* (Harcourt Brace Jovanovich College Pub, 1992) at 386.

<sup>221</sup> At 386.

<sup>222</sup> McCann, above n 50, at ix.

<sup>223</sup> Novitz and Jaber, above n 37, at 259.

<sup>224</sup> At 260.

<sup>225</sup> Holst, above n 141, at 121-122.

<sup>226</sup> Ministry of Women's Affairs *Next Steps Towards Pay Equity: A background paper on equal pay for work of equal value*, above n 32, at 4.

is closely related to a person's sense of self-worth, therefore accurately recognising the worth of women and their contributions is a key step in recognising the equal status of women in modern day New Zealand society.<sup>227</sup> Pay equity also represents a step in the right direction towards achieving greater gender equality.

Some supporters even go so far as to view equal pay for work of equal value as an essential human right.<sup>228</sup> The concept of pay equity was first recognised in 1919 in article 427 of the Treaty of Versailles, which established the ILO and founded its core constitution.<sup>229</sup> Since then, pay equity has been recognised in several other international treaties, which seek to establish it as a fundamental human right (this will be discussed in the New Zealand context in more depth below). Mary Cornish, Chair of the Ontario Equal Pay Coalition, has argued that rights rhetoric for pay equity is crucial in order to establish its status as non-negotiable and “essential for human dignity and respect.”<sup>230</sup> In addition, seeing equitable pay as a human right means that there is potential to develop a similar scheme for other types of occupational segregation, for example racial minorities, who have also been shown to experience lower pay.

## 2 *Decreased Inequality is Better for Everyone*

### (a) Better for women and their families

Higher wages for women as a result of pay equity have many positive implications for both them and their loved ones, especially in lower socioeconomic families. Overseas, pay equity outcomes have resulted in pay increases of up to 15% or more.<sup>231</sup> Greater pay promotes financial security and independence, and leads to women having more autonomy in their life choices.<sup>232</sup> It also decreases the risk of poverty, especially for households with a single mother, and reduces the pressure to work multiple jobs.<sup>233</sup> Long term benefits include less dependence on social benefits, as well as improving retirement incomes, which reduces poverty among older women.<sup>234</sup>

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<sup>227</sup> Holst, above n 141, at 121-122.

<sup>228</sup> Martin Oelz, Shauna Olney and Manuela Tomei *Equal Pay: An Introductory Guide* (International Labour Organisation, Geneva, 2013) at 2.

<sup>229</sup> At 2.

<sup>230</sup> Cornish, above n 130, at 5.

<sup>231</sup> Chicha, above n 47, at 44.

<sup>232</sup> Ministry of Women's Affairs *Next Steps Towards Pay Equity: A background paper on equal pay for work of equal value*, above n 32, at 3.

<sup>233</sup> Oelz, Olney and Tomei, above n 228, at 4.

<sup>234</sup> Chicha, above n 47, at 44.

The Ministry of Woman’s Affairs predicts that pay equity would be especially beneficial to Māori and Pacific women, who have the lowest hourly earnings and annual incomes.<sup>235</sup> This is due in part to the fact that Māori and Pacific women experience higher proportions of occupational segregation in low paying female jobs.<sup>236</sup> Māori and Pacific women would therefore greatly benefit from pay equity assessments which resulted in pay increases for female-dominated occupations.<sup>237</sup> As the Ministry has acknowledged, the “personal earnings of Māori women are of vital importance not only to whānau, hapū and iwi, but to New Zealand’s aspirations of building a more inclusive society.”<sup>238</sup>

Additionally, there is clear evidence from Canada that pay equity is instrumental in helping women obtain significant wage adjustments. Professor Pat Armstrong, an expert on pay equity in Canada, argues that pay equity is worth it because it works, and it has resulted in better pay for many women.<sup>239</sup> In Quebec for example, a “2006 pay equity settlement gave 327,000 Quebec Government workers substantial pay adjustments and \$1.5 billion in back pay.”<sup>240</sup> Ontario has experienced similar successes, with wage increases for women working in nursing homes and child care centres.<sup>241</sup> However it is important to note that these victories did not come easy, and that there are still high levels of non-compliance with the pro-active pay equity legislation in both Quebec and Ontario.<sup>242</sup> Nonetheless there is a lot that New Zealand can learn about pay equity by following the example set by Canada.

(b) Better for employers and the economy

It has also been shown that employers and the economy also benefit from pay equity. Such benefits include greater job satisfaction from employees, higher productivity, and reduced absenteeism.<sup>243</sup> Furthermore, employers who implement pay equity become more competitive in the market, as they offer fair rates of remuneration and increase their reputation and attractiveness by being employers who comply with modern social and legal standards.<sup>244</sup> A survey carried out in Ontario found that 65% of organisations which had implemented pay equity were seeing positive effects from it, as there was an improved

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<sup>235</sup> Ministry of Women’s Affairs *Next Steps Towards Pay Equity: A background paper on equal pay for work of equal value*, above n 32, at 22.

<sup>236</sup> At 28.

<sup>237</sup> At 28.

<sup>238</sup> At 25.

<sup>239</sup> Armstrong, above n 9, at 6.

<sup>240</sup> Cornish, above n 130, at 8.

<sup>241</sup> At 8.

<sup>242</sup> At 8.

<sup>243</sup> Chicha, above n 47, at 44.

<sup>244</sup> At 47.

work environment and better understanding of job content.<sup>245</sup> The overall economy also benefits from increased productivity and better efficiency once discrimination is removed, as there is a maximisation of human capital.<sup>246</sup> A research report carried out by Goldman Sachs in 2011 also found that the equalising of male and female labour participation would benefit the New Zealand economy and improve GDP by 10%.<sup>247</sup>

### 3 *International Obligations*

A further argument for why New Zealand should have pay equity is to meet its international obligations in both human and employment rights. Both the ILO Convention 100 and the United Nations Convention on the Elimination of (All Forms of) Discrimination against Women (CEDAW)<sup>248</sup> have been signed and ratified by New Zealand.<sup>249</sup> Both require the implementation of equal pay for work of equal value, and both are currently being contravened by New Zealand.<sup>250</sup> New Zealand was called on by the CEDAW committee in 2012 to actively enforce pay equity through legislation in order to meet its international obligations.<sup>251</sup> Despite this, the Government remained inactive until the advent of *Terranova*. It is argued therefore that New Zealand should enact legislation for pay equity, so that its domestic law is in line with its international obligations. If not, then it is alleged that New Zealand will lose its status as a global leader in both human rights and gender equality.<sup>252</sup>

### **C Summary**

Pay equity is a contentious and complex policy, however this does not make it unworthy of implementing. As this chapter has shown, many of the criticisms aimed at pay equity are exaggerated, are not backed up by evidence, or are based on a misunderstanding of pay equity itself. It is understandable that market intervention will be met with resistance, however this fear should not allow the undervaluation of women's work to be continued.

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<sup>245</sup> Armstrong, above n 9, at 6.

<sup>246</sup> Cornish, above n 130, at 6.

<sup>247</sup> Philip Borkin *Closing the Gender Gap: Plenty of Potential Economic Upside* (Goldman Sachs, August 2011) at 1.

<sup>248</sup> United Nations Convention on the Elimination of (All Forms of) Discrimination against Women 1249 UNTS 13 (opened for signature 18 December 1979, entered into force 3 September 1981), art 11.

<sup>249</sup> CEVEP "UN Conventions" (24 September 2013) CEVEP – campaign for equal value equal pay <[www.cevepnz.org.nz/](http://www.cevepnz.org.nz/)>.

<sup>250</sup> Ministry of Women's Affairs *Next Steps Towards Pay Equity: A background paper on equal pay for work of equal value*, above n 32, at 31.

<sup>251</sup> Hyman "Is Active Intervention Still Needed to Improve the Position of Women in the New Zealand Labour Market? If so, what can be done?", above n 96, at 8.

<sup>252</sup> Judy McGregor, Sylvia Bell and Margaret Wilson *Fault Lines: Human Rights in New Zealand* (AUT University, Auckland, 2015) at 85.

There is a strong case that pay equity does work to increase the wages of some of the least privileged workers in New Zealand, and that it can remedy the systemic undervaluation of women's work. Once the arguments are evaluated, it becomes clear that New Zealand should have pay equity legislation.

## *V Conclusion*

New Zealand is at point where crucial decisions must be made concerning the future of pay equity. These decisions will have far-reaching consequences for the many women and the few men working in undervalued female-dominated occupations, as well as for employers and the economy at large. This dissertation argues that the way forward is new pay equity legislation. The systemic undervaluation of women's work has persisted in New Zealand's labour market for too long, and should not be permitted to endure unchallenged. Female-dominated occupations continue to be paid lower wages which do not adequately reflect the skill, responsibility and effort involved in women's work. All past efforts to install pay equity in New Zealand have been unsuccessful, leading to the conclusion that any future attempt should be in the form of pro-active, purpose built legislation, which will have the best chance of success in New Zealand's current deregulated labour market. Finally, there are clear, convincing arguments in favour of pay equity legislation to support its implementation, while the arguments against pay equity fail to stand up under scrutiny.

Women like Kristine Bartlett want to continue to work in the occupations they love. As she has explained:<sup>253</sup>

I'm obsessed with my work...It's really hard, tiring, exhausting work. You've got to have compassion and empathy to be a carer. I've nursed people in their last days on Earth and we comfort their families as well. It isn't just showers and wiping bottoms.

Women just want to receive fair remuneration for the jobs that they do, and have society acknowledge that women's work is valuable and crucial to the running of New Zealand.

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<sup>253</sup> Underhill, above n 128.

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