

Reference: 20160421

6 March 2017



Thank you for your Official Information Act request, received on 2 December 2016.
You requested the following:

- “1. Did Treasury advise Cabinet about the administrative burden experienced in Ontario’s implementation of pay equity legislation? Yes/no. If yes, please supply that advice.*
- 2. Did Treasury advise Cabinet of the effects of Ontario’s pay equity legislation on the wage gap in Ontario? Yes/no. If yes, please supply that advice.*
- 3. Regardless of whether Treasury advised Cabinet, did Treasury undertake any literature review including the effects of pay equity legislation in Ontario? Yes/no. If yes, please supply.*
- 4. Did Treasury advise Cabinet of the likely difficulties in establishing comparison occupations for pay equity claims? Yes/No. If yes, please supply.*
- 5. Did Treasury undertake any cost-benefit assessment or regulatory impact assessment of the proposed pay equity framework? Yes/No. If yes, please supply.*
- 6. Did Treasury provide comment on any other agency’s cost-benefit assessment or regulatory impact assessment of the proposed pay equity framework? Yes/no. If yes, please supply. And please supply a copy of whatever cost-benefit assessment or regulatory impact assessment was undertaken.*
- 7. Did Treasury provide advice on the quality of any other Ministry or agency’s assessment of the likely administrative burden imposed by the proposed pay equity framework? Yes/no. If yes, please supply, along with a copy of the assessment about which Treasury provided comment.*

I expect answers to the yes/no questions within the normal OIA timeframe; if it would take longer than that to assemble the additional materials, please do not delay the simple yes/no answers while waiting on those materials. ”

Treasury contacted you on Monday 19 December 2016 to clarify the timeframe that you intended your request to cover. You indicated that you were interested in all advice provided in recent policy discussions relating to the Joint Working Group on Pay Equity Principles, from 1 October 2015 to present.

We also clarified that Treasury does not usually advise Cabinet directly. You confirmed that you were happy for us to take your request for “advice to Cabinet” to mean advice to the Minister of Finance, as well as Treasury comments in Cabinet papers.

On 18 January 2017, we informed you of our decision, under section 15A of the Official Information Act, to extend the time limit for deciding on your request by an additional 30 working days. The new due date was extended to 6 March 2017. This extension was necessary because your request required searching through a high volume of information, and consultations were also needed before a decision could be made regarding your request.

As part of informing you of the extension, we also provided you with interim answers to your questions ahead of any additional information and documents being provided. As these answers remain unchanged, I have attached a copy of the extension letter of 18 January 2017, for ease of reference.

Information Being Released

Please find enclosed the following documents:

Item	Date	Document Description	Decision
1.	21 November 2014	Aide Memoire Ministerial Meeting on Response to Terranova Case	Release in part
2.	23 January 2015	Aide Memoire Further Information on Options to Address Equal Pay Case	Release in part
3.	6 March 2015	Cabinet Social Policy Committee (15) 11 Equal Pay Act 1972- Update and implications arising from a recent case	Release in part
4.	11 November 2016	SOC Briefing Response to the proposals of the Joint Working Group on Pay Equity (11 Nov)	Release in part

I have decided to release the documents listed above, subject to information being withheld under one or more of the following sections of the Official Information Act, as applicable:

- under section 9(2)(h) – to maintain legal professional privilege, and;
- confidential information, under section 9(2)(j) – to enable the Crown to negotiate without disadvantage or prejudice.

Information Publicly Available

The following information is also covered by your request and is publicly available on the Ministry of Business, Innovation and Employment website:

Item	Date	Document Description	Website Address
5.	January 2017	Government response to the proposals of the Joint Working Group on Pay Equity (Risk-Impact Statement included)	http://www.mbie.govt.nz/info-services/employment-skills/legislation-reviews/government-response-proposals-pay-equity

Accordingly, I have refused your request for the documents listed in the above table under section 18(d) of the Official Information Act – the information requested is or will soon be publicly available.

Some relevant information has been removed from documents listed in the above table and should continue to be withheld under the Official Information Act, on the grounds described in the documents.

In making my decision, I have considered the public interest considerations in section 9(1) of the Official Information Act.

Please note that this letter (with your personal details removed) and enclosed documents may be published on the Treasury website.

This fully covers the information you requested. You have the right to ask the Ombudsman to investigate and review my decision.

Yours sincerely

Kristie Carter
Team Leader – Labour Market & Welfare

Reference: 20160421



18 January 2017



Thank you for your request made under the Official Information Act, received on 2 December 2016. You requested:

- "1. Did Treasury advise Cabinet about the administrative burden experienced in Ontario's implementation of pay equity legislation? Yes/no. If yes, please supply that advice.*
- 2. Did Treasury advise Cabinet of the effects of Ontario's pay equity legislation on the wage gap in Ontario? Yes/no. If yes, please supply that advice.*
- 3. Regardless of whether Treasury advised Cabinet, did Treasury undertake any literature review including the effects of pay equity legislation in Ontario? Yes/no. If yes, please supply.*
- 4. Did Treasury advise Cabinet of the likely difficulties in establishing comparison occupations for pay equity claims? Yes/No. If yes, please supply.*
- 5. Did Treasury undertake any cost-benefit assessment or regulatory impact assessment of the proposed pay equity framework? Yes/No. If yes, please supply.*
- 6. Did Treasury provide comment on any other agency's cost-benefit assessment or regulatory impact assessment of the proposed pay equity framework? Yes/no. If yes, please supply. And please supply a copy of whatever cost-benefit assessment or regulatory impact assessment was undertaken.*
- 7. Did Treasury provide advice on the quality of any other Ministry or agency's assessment of the likely administrative burden imposed by the proposed pay equity framework? Yes/no. If yes, please supply, along with a copy of the assessment about which Treasury provided comment."*

I have decided under section 15A of the Official Information Act to extend the time limit for deciding on your request by an additional 30 working days. The new due date is 6 March 2017.



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The extension is required because your request necessitates a search through a large quantity of information, and consultations are needed before a decision can be made on your request.

Notwithstanding this extension, I will provide answers to your questions in brief as you have requested, before responding with the necessary supporting documents. I have signalled below where you should expect that additional information will be provided at a later date.

Prior to responding to your questions, I would provide a couple of clarifications:

- The Court of Appeal's decision on the *Bartlett v Terranova* case established that the Equal Pay Act provides for equal pay for work of equal value. Therefore, in the absence of the Government's recent decision on Pay Equity Principles, New Zealand already has a statutory pay equity regime. However, there was some scope within this context to determine how this regime would function. The proposals of the Government-established Joint Working Group, and agreed by Cabinet, ensure that this regime is situated within the existing framework of the Employment Relations Act.
- The work of advising the Government on options for responding to the Court's conclusion in the *Bartlett v Terranova* case that there was a statutory pay equity regime under the EPA was jointly led by the Ministry of Business, Innovation and Employment and the State Services Commission. However, Treasury has had considerable input, particularly through the cross-agency senior officials' group, and constructively challenged the work as it has been developed. In addition, Treasury has provided a number of separate briefings to specific Ministers.

Given this context, I will now respond to each of your questions in turn.

1. Did Treasury advise Cabinet about the administrative burden experienced in Ontario's implementation of pay equity legislation? Yes/no. If yes, please supply that advice.

No. Advice to Cabinet was led by the Ministry of Business, Innovation and Employment.

2. Did Treasury advise Cabinet of the effects of Ontario's pay equity legislation on the wage gap in Ontario? Yes/no. If yes, please supply that advice.

No. Advice to Cabinet was led by the Ministry of Business, Innovation and Employment.

3. Regardless of whether Treasury advised Cabinet, did Treasury undertake any literature review including the effects of pay equity legislation in Ontario? Yes/no. If yes, please supply.

No. However, the Ministry of Business, Innovation and Employment investigated other countries' regimes. I suggest you consult directly with the Ministry on this matter.

4. Did Treasury advise Cabinet of the likely difficulties in establishing comparison occupations for pay equity claims? Yes/No. If yes, please supply.

Yes. This was one of the reasons behind Treasury supporting the one modification to the Joint Working Group's recommendations, around establishing a hierarchy for choosing pay comparators. Extension applies to this documentation.

5. Did Treasury undertake any cost-benefit assessment or regulatory impact assessment of the proposed pay equity framework? Yes/No. If yes, please supply.

No, but Treasury did provide advice to Ministers on the likely economic impacts of pay equity. Extension applies to this documentation

6. Did Treasury provide comment on any other agency's cost-benefit assessment or regulatory impact assessment of the proposed pay equity framework? Yes/no. If yes, please supply. And please supply a copy of whatever cost-benefit assessment or regulatory impact assessment was undertaken.

Yes. The Treasury's Regulatory Impact Assessment Team provided comment and evaluation of the regulatory impact assessment that supported the Cabinet decision on Pay Equity Principles. Extension applies to this documentation.

7. Did Treasury provide advice on the quality of any other Ministry or agency's assessment of the likely administrative burden imposed by the proposed pay equity framework? Yes/no. If yes, please supply, along with a copy of the assessment about which Treasury provided comment.

Yes, to the extent that Treasury's Regulatory Impact Assessment Team provided comments and evaluation of the regulatory impact assessment that supported the Cabinet decision on Pay Equity Principles. However, this assessment did not quantify the likely administrative burden. Extension applies to this documentation.

This extension will also apply to the time limit for transferring your request, should this be relevant.

Notwithstanding this extension, I undertake to make a decision on your request as soon as reasonably practicable.

You have the right to ask the Ombudsman to investigate and review this decision.

Yours sincerely



Kristie Carter
Team Leader, Labour Market and Welfare

OIA 20160421

Information for release

1.	<u>Aide Memoire Ministerial Meeting on Response to Terranova Case</u>	1
2.	<u>Aide Memoire Further Information on Options to Address Equal Pay Case</u>	4
3.	<u>SOC (15) 11 Equal Pay Act 1972- Update and implications arising from a recent case</u>	8
4.	<u>SOC Briefing Response to the proposals of the Joint Working Group on Pay Equity (11 Nov)</u>	10

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Reference: T2014/1981 SH-2-2-10-2
Date: 21 November 2014
To: Minister of Finance (Hon Bill English)
Deadline: Before Ministerial meeting on 25 November



Aide Memoire: Ministerial Meeting on Response to TerraNova Case

On 25 November, you are meeting with a group of Ministers to discuss the Government's response to the Court of Appeal's recent decision in *TerraNova v Service and Food Workers Union* (the TerraNova case). This briefing provides you with information on the options that you will be presented with and the key fiscal, economic and policy issues that are raised by the case.

Outline of the TerraNova Case

In the TerraNova case, the Court of Appeal (the Court) upheld a decision of the Employment Court relating to the interpretation of the *Equal Pay Act 1972* (the Act). Essentially, the Court found that when determining if an employee is receiving equal pay under the Act:

- The pay rates for the group used as a comparator must be free from any gender bias. This bias can include those caused by current, historical or structural discrimination.
- The relevant comparator group may extend beyond the actual employee's workplace. This means that it may be appropriate to consider the pay rates of comparator groups across companies within an industry, or even between different industries where there are comparable workers.

The Court's decision has direct implications for the resolution of the issues involved in the aged care sector. But the precedent created by the decision has broader implications for the employment relations framework, as it also outlines a potential role for the Employment Court "to state general principles that will ensure substantive [pay equity] claims are able to be processed in an efficient and manageable way".

Options for Government Response

Ministers will be presented with three broad options for responding to the TerraNova Case.

Option 1 is to let the current judicial process unfold, without Government intervention. This would entail the Employment Court continuing to hear the substantive matters in the TerraNova case, and setting out principles that will guide the resolution of any future claims under the Act.

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Option 2 is for the Government to engage in a parallel process of revising legislation and negotiation with the aged care sector. This would entail officials leading a policy process that developed principles to guide employees and employers in implementing pay equity. These principles would guide the resolution of the dispute in the TerraNova case and the aged care sector. The principles would also form the basis of revisions to the Act to uphold and clarify the precedent created by the Court's decision.

Option 3 is for the Government to legislate to restrict the interpretation of pay equity under the Act. This would entail amendments to the Act that narrow the Court's interpretation of how to implement pay equity. This might involve, for example, more explicitly restricting relevant comparator groups to the same industry or employer. It also might extinguish any current and retrospective claims under the Act.

Key Issues Raised by the TerraNova Case

Any of these three options carries risks to the Government:

- **Economic Impact:** Implementing pay equity will lead to increased wage costs.

s9(2)(j)

s9(2)(j)

The actual quantum and phasing of these costs are dependent on how and when different sectors respond to the precedent created by the TerraNova case.

s9(2)(j)

- **Pay Equity Policy Objectives:** The Court criticised the current legislation for being ambiguous. The Court also noted that issues relating to the potential systemic undervaluation of female labour are complex, and that guidelines for implementing pay equity should take into account the workability of comparisons across and between sectors of the economy.
- **Judicial Uncertainty:** It is unclear how the Employment Court would go about determining principles to guide the implementation of pay equity, including how general these might be and how workable these principles would be for employment relationships. Alternatively, an amendment to the Act to narrow the definition of pay equity may lead to continued litigation challenging this interpretation, as we have seen in *Spencer v Attorney General*.

Treasury Comment

The Treasury considers that Option 2 provides the best way for the Government to manage these risks and exercise some control over the principles for the effective implementation of pay equity.

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Option 1 would allow the Employment Court considerable discretion in crafting policy principles, with more uncertain timing and fiscal and economic impacts. Option 3 may dampen immediate fiscal and economic risks, but is likely to attract criticism and could create judicial uncertainty and ongoing uncertainty in employment relationships and Government collective bargaining.

Option 2 would signal a willingness to uphold the policy direction for pay equity outlined by the courts, but allow the Government to retain more influence on how the resolution of these issues unfolded. It would engage relevant employee and employer groups in a process to create clear and workable guidelines for implementation of pay equity. It would also give the Government a process to negotiate to settle the immediate TerraNova case, understand the contours of other potential pay equity cases, and create a broadly accepted legislative framework going forward.

Option 2 would also provide a clearer way for the Government to retain some control over the total quantum of the broader economic impact and the timing of these impacts on the economy. The process of negotiation and development of pay equity principles could be designed in way that is sensitive to issues around when and how the economic burden hits employers. In the state sector there would also be choices about how these costs flow through to fiscal impacts. Option 2 also leaves open the possibility of legislative or negotiated measures to manage fiscal risks with retrospective claims.

Udayan Mukherjee, Analyst, Labour Market & Welfare, 04 917 7026

Hayden Fenwick, Team Leader, Labour Markets & Tertiary, 04 917 6969

IN-CONFIDENCE

Reference: T2015/69
Date: 23 January 2015
To: Minister of Finance (Hon Bill English)
Deadline: Before Ministerial meeting on 27 January

SH-2-2-10-2



Aide Memoire: Further Information on Options to Address Equal Pay Case

On 27 January you are meeting with a group of Ministers to discuss more detailed information about the possible options to respond to the Court of Appeal's recent decision in *TerraNova v Service and Food Workers Union* (the TerraNova case). You previously met with these Ministers to discuss the TerraNova case on 25 November, when you considered three broad options¹:

- Option 1: Let the Employment Court resolve pay equity claims under the current Equal Pay Act (the Act)
- Option 2: Review and replace the current equal pay legislation with clear pay equity legislation
- Option 3: Legislate to restrict the interpretation of the Act and extinguish current or future pay equity claims

This briefing focuses on what the Treasury considers are the key policy parameters where Ministers have choices to shape a response to the TerraNova case, if the Government chose to progress a version of Option 2. We also discuss some aspects of the detailed policy design that we believe are important to emphasise with your colleagues.

The Government's response to the TerraNova case and policy decisions about pay equity will have material fiscal consequences. Although the Crown is not a party to the TerraNova case, it is the ultimate funder for a large proportion of aged care services. Pay equity claims could also be made by other workers directly employed or indirectly funded by the Crown. As we have previously indicated, the quantum and phasing of these fiscal implications are to some extent dependent on the particular policy decisions that shape any new pay equity framework.

Key Policy Parameters

The key objective of a review of the Act would be to create a clear legislative framework that takes into account the decision of Court in the TerraNova case. The Court acknowledged that balancing the objective of achieving pay equity for employees with a workable solution for employers was an important goal.

¹ We previously briefed you on these three options in more detail. T2014/1981 refers.

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The three key policy questions where these choices arise are:

1. How strong should employers' obligations be to achieve pay equity?

- Introducing the concept of pay equity into legislation means effectively creating a new employment standard that employers are obliged to meet. But the strength of this obligation determines the extent to which it will affect the behaviour of employers.
- A weak obligation might require employers to bargain in good faith to achieve pay equity, in a manner consistent with other aspects of our employment relations framework. Stronger obligations would give employees a positive right to be receiving equitable pay, with the ability to challenge non-compliant employers through the judicial process. A strong obligation might require employers to demonstrate proactively that they are achieving pay equity by a certain date.
- Choices along this spectrum will determine both how likely it is that pay equity will be achieved, how much of an economic burden employers will be expected to shoulder, and the extent to which it will entail statutory interventions in the labour market. It can also shape what legal remedies are available.

2. What is the appropriate scope for comparators to assess pay equity?

- The narrowest possible comparators are other employees in the same workplace. The Court's interpretation of the Act was that relevant comparator groups may extend to employees in other workplaces, either within the same industry or across different industries.
- There are detailed policy choices about how far and in which circumstances any broader comparators should be applied. These involve deciding how to weigh factors like formal training, experience, labour market conditions, and industry characteristics in comparing specific employees in different jobs.
- In general, the broader the scope of the comparator is, the more widely it will apply across the economy. At the same time, the more complex the process of determining comparators is, the more difficult it will be for employers to determine exactly how they need to meet their pay equity obligations.

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3. Who should be responsible for producing information about these comparators?

- Under the previous interpretation of the Act, it was easier for individual employers and employees to access information about comparators, since they are typically within the same workplace.
- If the scope of comparators is made broader, it becomes more difficult to collect the appropriate information required to assess whether employers are meeting their obligations. Continuing to implicitly require the parties to assess this information would make meeting pay equity obligations less workable for most employers.
- Recognising that the relevant public information about structural or historical discrimination is unlikely to be available in the market, there may be a role for a public independent body with relevant expertise to analyse the information required to allow employers and employees to identify appropriate comparators.

On each of these three policy parameters, Ministers can make choices about the design of pay equity policy. We would emphasise that combinations of these fundamental choices give the Government considerable discretion about how to create a legislative regime that balances pay equity objectives with economic and fiscal objectives.

MBIE's background briefing provides more detail about the particular legislative and administrative design that would be required to implement policy decisions. This includes choices about the role of the Employment Relations Authority and the courts in any new pay equity regime. We consider these institutional design questions to be important, but more as consequences of choices on the key policy parameters we have highlighted.

Key Choices for Ministers

Any detailed decisions on the three policy parameters would benefit from a process of public consultation. This would engage key groups of employers, employees and the broader public to ensure that any pay equity policy balanced competing objectives. Importantly, **we consider that this public process should be government-led rather than an independent review.** This would allow the Government to set some parameters on the public discussion and retain control over the eventual policy recommendations.

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Another risk to consider is the transition from the previous to the new policy. In particular, **it will be important for the Government to signal its position on currently open claims under the Act, and any new claims lodged prior to the commencement of any new legislation.** In the past, there has been a reluctance to extinguish claims that have already been lodged by the time the new policy direction is announced.

Lastly, as the Supreme Court has declined TerraNova leave to appeal the Court of Appeal's decision, **it will be important for the Government to publically signal its intention about how it intends to respond to the TerraNova case.** This will reduce the uncertainty around how the Employment Court might go about developing detailed pay equity principles.

Udayan Mukherjee, Analyst, Labour Market & Welfare, 04 917 7026
Hayden Fenwick, Team Leader, Labour Market & Welfare, 04 917 6969

RELEASED UNDER OFFICIAL INFORMATION ACT

LEGALLY PRIVILEGED : SENSITIVE



Cabinet Social Policy Committee

SOC (15) 11

Copy No: 41

Summary of Paper

6 March 2015

This document contains information for the New Zealand Cabinet. It must be treated in confidence and handled in accordance with any security classification, or other endorsement. The information can only be released, including under the Official Information Act 1982, by persons with the appropriate authority.

s9(2)(h)



Sensitive

pages 19-26 deleted: s9(2)(h)

s9(2)(h)

Treasury comment

92. Implementing a statutory pay equity regime will have significant fiscal and economic costs. The Treasury considers that initial estimates of these costs are important to give a sense of the potential impact that a pay equity regime could have.

s9(2)(j)

s9(2)(j) The actual cost will depend on the extent claimants are able to demonstrate undervaluation and the comparator used.

s9(2)(j)

95. These estimates are very initial, and the actual quantum and timing of the impacts of a statutory regime will depend on decisions that the government makes on whether to allow the court process to play out or to clarify pay equity legislation.

s9(2)(h)

pages 2-17 deleted: s9(2)(h)

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Response to the proposals of the Joint Working Group on Pay Equity

Responsible Person: Kristie Carter, Labour Market & Welfare, 04 890 7287

First Contact Person: Richard Baird, Labour Market & Welfare, 04 917 6949

Purpose

1. This paper seeks Cabinet approval to recommendations in response to the proposals of the Joint Working Group on Pay Equity Principals for dealing with pay equity claims under the Equal Pay Act 1972.
2. This paper recommends agreement to all the Working Group's recommendations, with one modification that establishes a hierarchy for pay comparators (beginning within the business, similar businesses, then within the same industry or sector, before looking wider).

Comment

3. The Joint Working Group (comprising government, employer and union representation) reached agreement on a set of Pay Equity Principles, which were publically released in June 2016.
4. The Principles provide clarity on:
 - the criteria for establishing whether a pay equity claim has merit; and
 - how the pay equity claim is to be resolved, primarily through the existing employment bargaining framework (and associated mediation services), though there still remains a role for the courts to resolve a claim if all other means have been exhausted.
5. The Principles represent an improvement on the status quo – immediately directing parties to the court system to resolve a pay equity claim. The status quo is inconsistent with our modern employment bargaining framework.
6. However, the Joint Working Group could not come to an agreement on a framework for choosing comparators.
7. The Cabinet Social Policy Committee previously considered a modification to place greater emphasis on the dominant source of funding explanation when determining why an undervaluation has persisted. Dominant funding is the most likely market failure that would enable any undervaluation to persist over time. The Council of Trade Unions has confirmed that unions would not support this modification. In their view it unduly raises the burden for making a claim.
8. Treasury supports the inclusion of a hierarchy of pay comparators, as this provides further clarity for bargaining parties, without limiting any legitimate claims. However, unions may not support this change.
9. It is proposed that the Equal Pay Act be amended to reflect the modified Joint Working Group principles, with a Bill for introduction no later than April 2017.
10. It is also worth noting that to ensure compliance with the statutory Pay Equity regime, the paper proposes to replace the penalty regime in the Equal Pay Act with that set out

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in the Employment Relations Act. This represents a significant increase in the maximum penalties that could be applied to individuals and companies – \$10,000 and \$20,000, compared with \$400 and \$1,000, both respectively.

s9(2)(j)

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