IN THE HIGH COURT OF NEW ZEALAND
WELLINGTON REGISTRY

I TE KŌTI MATUA O AOTEAROA
TE WHANGANUI-A-TARA ROHE

CIV-2025-485-632
[2026] NZHC 3597

UNDER	the New Zealand Bill of Rights Act 1990, the Declaratory Judgments Act 1908 and Part 18 of the High Court Rules
IN THE MATTER	of an application for a declaration of inconsistency with the New Zealand Bill of Rights Act in respect of the Equal Pay Amendment Act 2025
BETWEEN	TŌPŪTANGA TAPUHI KAITIAKI O AOTEAROA: THE NEW ZEALAND NURSES ORGANISATION INCORPORATION First Applicant
	NEW ZEALAND PUBLIC SERVICE ASSOCIATION TE PUKENGA HERE TIKANGA MAHI INCORPORATED Second Applicant
	… continued
AND	THE ATTORNEY-GENERAL Respondent

Hearing:	4 – 6 August 2026
Counsel:	R E Harrison KC, P Cranney and K Neo for Applicants U R Jagose KC, K E E Whiting and S Cvitanovich for Respondent R A Kirkness KC, H Z Yang and A J Campbell for Human Rights Commission
Judgment:	19 November 2026

JUDGMENT OF RADICH J

… continued

NEW ZEALAND POST-PRIMARY TEACHERS ASSOCIATION INCORPORATED
Third Applicant

NEW ZEALAND TERITARY EDUCATION UNION TE HAUTU KAHURANGI O AOTEAROA INCORPORATED
Fourth Applicant

NEW ZEALAND EDUCATIONAL INSTITUTE TE RIU ROA INCOPRORATED
Fifth Applicant

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[1] Everyone has the right to freedom from discrimination on the ground of sex.[1]

[2] In addressing that right, the Equal Pay Act 1972 (the Act) sets out to make provision for the removal and prevention of discrimination in rates of remuneration of employees on the basis of sex.[2]

[3] The Act was amended in 2025. The amendments were made, under urgency, over two days. They make it harder for some groups to bring pay equity claims. In some cases, they will preclude pay equity claims being brought at all. And they discontinue the current pay equity claims of 33 separate groups of largely female employees.

[4] Can the Act itself — a measure designed to address discrimination — as it now stands be discriminatory? That is what this decision considers.

The issues

[5] The applicants are unions. Their members are employed in occupations where the work performed was and, they say, remains subject to pay inequity. They bring this proceeding because they see the Act, as it now stands, as breaching provisions in the New Zealand Bill of Rights Act 1990 (Bill of Rights Act).

[6] The overarching issues in the proceeding are these:

(a) Does the Act, following its amendment, directly or indirectly discriminate against members of the applicants on the basis of sex for the purposes of s 19(1) of the Bill of Rights Act 1990?

(b) If so, is the discriminatory treatment demonstrably justified under s 5 of the Bill of Rights Act?

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1 New Zealand Bill of Rights Act 1990 (Bill of Rights Act), s 19 and Human Rights Act 1993 (HRA), s 21(1)(a).

2 Equal Pay Act 1972 (the Act), long title.

(c) Was the decision to enact the Equal Pay Amendment Act 2025 under urgency and without prior consultation or notice unlawful, in breach of ss 27(1) and (3) of the Bill of Rights Act?

(d) Is the content of the Act, following its amendment (with a focus on its restrictions and retrospective invalidation of existing pay equity claims and proceedings) inconsistent with the rights to natural justice and to bring civil proceedings in ss 27(1) or (3) of the Bill of Rights Act?

(e) If the Act is inconsistent with ss 19 or 27 of the Bill of Rights Act, should the Court exercise its discretion to make a declaration of inconsistency in this case?

What is pay equity?

[7] Pay equity focuses on rectifying gender-based undervaluation of work.

[8] It is provided for in ss 2AAC(b) and 3(1)(b) of the Act: employers must ensure there is no differentiation on the basis of sex between the rates of remuneration paid for work that is performed exclusively or predominantly by female employees and the rates of remuneration that would be paid to male employees who have the same, or substantially similar, skills, responsibility and experience, and who work under the same or substantially similar conditions.

[9] Pay equity is distinct from pay equality. Pay equality is the principle that there should be no differentiation on the basis of sex between the rates of remuneration offered by an employer to its male and female employees who perform the same, or substantially similar, work. Pay equity looks beyond an employers' particular employees to ensure that equal pay is provided for work of equal value.

[10] Historically, work which was performed predominantly by women has tended to receive lower remuneration rates, based on — amongst many other factors — undervaluation of the skills, responsibilities, experience and effort required and brought to the work by women. Pay equity recognises the complex and historically

embedded issues of sex-based undervaluation of work performed predominantly by women which contributes to ongoing renumeration discrepancies.

[11] In short, pay equity creates a level playing field for female employees so that they are paid at the same level as that at which male employees in their positions would be paid.

A brief history of the pay equity regime in New Zealand

[12] The first piece of equal pay legislation in New Zealand was the Government Service Equal Pay Act 1960. It required equal pay for men and women in the public sector, but not in the private sector.[3]

[13] Wage fixing in the private sector was regulated primarily by the Industrial Conciliation and Arbitration Act 1954. It provided for awards and industrial agreements achieved through bargaining. Rates for female employees in the awards were invariably lower than those for male employees.

[14] The Act, in 1972, followed the report of the Commission of Inquiry into Equal Pay in 1971. Initially, the Act provided only for equal pay — that is, the same pay for the same work done for a particular employer. It improved things to a degree but it did not remedy the gender pay gap. It provided no explicit regime for raising a pay equity claim.

[15] That changed with the Court of Appeal's decision in *Terranova Homes and Care Ltd v Service and Food Workers Union Ngā Ringa Tota Inc*, which considered whether the Act was intended to provide for pay equity (equal pay for work of equal value) or whether it was limited to requiring equal pay for the same (or substantially similar) work. In finding the former to be the case, the Court found that s 3(1)(b) of the Act requires that equal pay for women, for work predominantly or exclusively performed by women, is to be determined by reference to what men would be paid to do the same work — abstracting from skills, responsibilities, conditions and degrees

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[3] The Court of Appeal in *Terranova Homes & Care Limited v Service and Food Workers Union Ngā Ringa Tota Inc* [2014] NZCA 516, [2015] 2 NZLR 437 gave a detailed historical overview of equal pay in New Zealand up to 2014, at [16]–[43] [*Terranova*].

of effort as well as from any systemic undervaluation of the work derived from current or historical or structural gender discrimination.[4]

[16] The Court of Appeal reached these conclusions without recourse to the Bill of Rights Act. On the basis of its findings, it concluded that the Act was not discriminatory; that it did not, itself, infringe s 19.[5]

[17] Following *Terranova*, the joint working group on Pay Equity Principles was established. The working group recommended amendments to legislation to allow employees to raise pay equity claims with their employers, to provide for a bargaining process to be undertaken, and to provide recourse to the Employment Relations Authority (the Authority) in the event of any impasse.

[18] In response to the recommendations, the Government introduced the Employment (Pay Equity and Equal Pay) Bill 2017. It provided for the determination of pay equity claims, being claims relating to work performed predominantly by female employees where there were reasonable grounds to believe that the work had been historically undervalued and continued to be undervalued.[6] However, the incoming government at the time withdrew the 2017 Bill and reconvened the working group, leading ultimately to the Equal Pay Amendment Bill in 2018. It was passed under urgency in 2020 as the Equal Pay Amendment Act and introduced (as relevant for the purpose of this proceeding) the key provisions in pt 2 and the machinery for pay equity claims in pt 4. Notably, it was passed unanimously.

The (amended) pay equity regime

[19] The Act describes three types of claim: unlawful discrimination claims,[7] equal pay claims,[8] and pay equity claims.[9] This proceeding is concerned with pay equity claims.

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4 At [108]–[110] and in the schedule to the Court's decision.
5 At [214].
6 Employment (Pay Equity and Equal Pay) Bill 2017, cl 14(2).
7 The Act, s 2A.
8 Section 2AAC(a).
9 Section 2AAC(b).

[20] As both currently enacted and prior to the amendments, a pay equity claim can be brought under the Act where an employer breaches its duty under s 2AAC(b) to ensure that pay inequity does not arise.

[21] Pay inequity is defined in the Act as differentiation, on the basis of sex, between remuneration rates for work "exclusively or predominantly performed by female employees" and rates which would be paid to male employees with the same, or substantially similar, skills, responsibility and experience and who work under the same, or substantially similar, conditions and required degrees of effort.[10]

[22] An employee whose circumstances would also entitle them to make a complaint under the Human Rights Act 1993 (HRA), or to pursue a personal grievance under the Employment Relations Act 2000 (ERA), may only engage one of these three procedures.[11]

[23] Part 4 of the Act regulates pay equity claims. I will outline here its essential features. Comparisons with the Act before the amendments provides essential context, but the focus in this proceeding is on the substantive effects of the Act as currently enacted.

Purpose and thresholds

[24] A preliminary, but important, effect of the Act as amended is that all existing pay equity claims were discontinued on the commencement date of the Amendment Act.[12] The pay equity claims of 33 groups of (largely female) employees come to an end as a result.[13] Any pay equity claim that had not reached settlement at that time must, if it is to proceed, start again under the pt 4 scheme as currently enacted.

[25] The purpose of pt 4 is, now, to:[14]

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10 Section 2AAC(b).
11 Section 2B(1).
12 Schedule 1, pt 2, cl 8(1).
13 Including the two most significant and advanced pay equity claims – those of care and support workers and the early childhood, primary and secondary teachers.
14 Section 13A.

> provide a process that facilitates the resolution of pay equity claims where there is evidence of systemic sex-based undervaluation of work that is predominantly performed by female employees.

[26] The purpose, before the amendments, was to:[15]

> facilitate resolution of pay equity claims, by—
>
> (a) setting a low threshold to raise a claim (while recognising that entry into the pay equity claim process does not predetermine an outcome); and
>
> (b) providing a simple and accessible process to progress a pay equity claim.

[27] In this way, the low threshold to raise a claim has been removed, as have references to a "simple and accessible" process. The Act's purpose now emphasises the provision of an evidence-based process. Parties to a claim process remain subject to the duty of good faith in the ERA.[16]

[28] Claims may be raised where an employer, or groups of employers, have breached the obligation to ensure pay equity. Individuals, unions and groups of unions may all raise claims.[17] Where unions raise claims on behalf of members, the employees concerned must perform the same or substantially similar work for the employer.[18] Claims may be raised against multiple employers or may be consolidated into a single claim where each employer employs at least one worker who performs the work to which the claim relates and is a member of one or more claimant unions.[19]

[29] A claim may not now be raised within 10 years after the date of an existing settlement if the new claim would relate to any or all of the employees and work to which the settlement relates.[20]

[30] Before the amendments, where a valid claimant or claimant group was established, the threshold to bring a claim was that it was "arguable".[21] Now, claims

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15 Section 13A, as at 20 December 2023.
16 Section 13C.
17 Section 13B, definition of "claimant".
18 Section 13E(1).
19 Section 13E(3).
20 Section 13E(6). This is subject to the Authority or Employment Court determining that it may be raised.
21 Section 13E(1), as at 20 December 2023.

may be raised only if they meet all of the requirements in s 13E and if there is evidence that the claim has "merit" under s 13F.[22]

[31] Section 13F sets out the requirements for a claim to have merit as follows:[23]

(a) It relates to work "predominantly performed by female employees";

(b) There are reasonable grounds to believe that the work has been historically undervalued for one or more reasons in s 13F(2); and

(c) The work continues to be subject to systemic sex-based undervaluation taking into account all relevant factors, including those in s 13F(3).

[32] "Predominantly performed by female employees" meant, before the amendments, work that is "currently, *or that was historically*, performed by a workforce of which approximately 60% or more members are female".[24]

[33] The term is now defined as work performed by a workforce that is at least 70 per cent female, and has been so for at least 10 consecutive years immediately before the date the claim is raised.[25] Therefore, the current definition increases the threshold for the number of women in a qualifying workforce, introduces a temporal requirement for that threshold, and requires that the work is *both* historically undervalued and continues to be subject to systemic sex-based discrimination.

[34] The factors that are relevant in assessing historical undervaluation are largely unchanged. They include historical, social, cultural and systemic reasons for undervaluation, and ongoing financial, market value and regulatory reasons for ongoing undervaluation.[26] The reasons for continued systematic sex-based undervaluation of work include "features of the relevant labour market", the way in which the market is funded, and levels of competition in the market.[27]

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22 Section 13DA.
23 Section 13F(1).
24 Section 13F(2), as at 20 December 2023. Emphasis added.
25 Section 2, definition of "predominantly performed by female employees".
26 See s 13F(2).
27 Section 13F(3).

[35] The term "relevant labour market" means:[28]

> that part of the whole labour market that comprises all workers who, as a matter of fact and commercial common sense, are substitutable because the work they perform involves—
>
> (a) the same or substantially similar skills and responsibilities; and
>
> (b) experience under the same or substantially similar conditions; and
>
> (c) the same or substantially similar degrees of effort.

[36] The procedural requirements for a pay equity claim now include the provision of "the evidence that the employee relies on" in support of "the elements required for a pay equity claim to have merit." Previously, a claimant was required to "briefly set out" the information relied on for the claim to be arguable.[29] Union claimants must now also explain how all of the employees perform the same, or substantially similar, work with evidence in support of that explanation together with evidence relied on in support of the elements that are required for a pay equity claim to have merit.[30] Previously, only a "brief description" of the work performed by the covered employees was required.[31]

[37] The Act requires certain overlapping claims to be consolidated into single multi-party employer claims.[32] In those circumstances, a single "multi-employer pay equity process agreement" must be entered into for the purpose of deciding whether all employees covered by the claim perform the same or substantially similar work.[33]

[38] Similarly, union claims must be consolidated where the claimants bring a subsequent claim against the same employer in relation to the same or similar work.[34]

[39] When a pay equity claim is made, an employer must decide, not only that it meets all of the relevant statutory requirements but whether, in the employer's view,

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28 Section 13F(4).
29 Section 13H(b), as at 20 December 2023.
30 Section 13I(1)(b) and (ba).
31 Section 13I(1)(b) and (1)(a)(iii) respectively.
32 Section 13K.
33 Section 13K(2A)(a).
34 Section 13M. And, under s 13N, where unions have raised an existing claim against one or more employers previously determined to have merit, and then subsequently raise another claim concerning the same or similar work with another employer, the claims can be consolidated with the consent of all parties.

the pay equity claim has merit.[35] That does not mean that the employer agrees that there is a pay equity issue or that a settlement will result, but it means that the negotiation process can begin.[36]

[40] By way of contrast, under the previous provisions, an employer was to decide whether, in the employer's view, the pay equity claim was "arguable" and, in doing so, it was directed to "act in a manner that is consistent with the purpose of this Part (to set a low threshold for raising a claim) by taking a light-touch approach when making the decision required under subsection (1) [that the claim was arguable]".[37]

[41] Furthermore, an additional step is now added. Before deciding, under s 13Q(1A) whether a claim has merit, an employer must decide whether, in the employer's view, the pay equity claim meets all of the requirements in s 13E including, in particular, whether all of the employees covered by a union claim perform work that is the same or substantially similar.[38]

[42] In the event that an employer decides that, in its view, the pay equity claim does not have merit, or otherwise does not meet relevant statutory requirements, then an application may be made to the Authority for a determination on the point.[39]

The process of negotiating a claim

[43] If an employer decides that a pay equity claim has merit, in the manner described, then the bargaining process will begin.

[44] In bargaining, the parties are to determine whether, and the extent to which, the work to which the claim relates has been subject to sex-based undervaluation when compared with the valuation of the work performed by appropriate comparators.[40] They do so by assessing a list of matters provided for in s 13ZD(2) and by reference

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35 Section 13Q(1A).
36 Section 13Q(3).
37 Section 13Q(2), as at 20 December 2023.
38 Section 13PB(2) and (3).
39 Section 13ZY.
40 Section 13ZD(1)(a).

to the reasons for historical undervaluation and continued systemic undervaluation in s 13F (as described in [33] above).[41]

[45] Previously, in describing the matters to be assessed, s 13ZD provided that the parties to a pay equity claim "must determine whether the employee's work is undervalued" by assessing a listed set of factors. The provision now requires the assessment to be carried out "to determine whether, and the extent to which, the work to which the claim relates has been subject to sex-based undervaluation when compared with the valuation of the work performed by appropriate comparators" and by reference to:

(a) the reasons for historical undervaluation set out in s 13F(2); and

(b) in relation to continued systemic undervaluation, all relevant matters including the reasons set out in s 13F(3).[42]

[46] In making the assessments under s 13ZD, the parties are to take into account a number of matters — including the importance of skills, responsibilities, effort and conditions that are commonly overlooked or undervalued in female dominated work. But female dominated work is now restricted to workforces that are at least 70 per cent female, and the determination under the provision may now be made "only by considering the work to which the claim relates since the time when that work came to be performed by a workforce that is at least 70 per cent female".

[47] The assessments are to be undertaken by reference to comparators. Before the amendments, the comparators were identified on the basis of those who undertook "comparable work". Comparable work could include work performed by male comparators which was the same or similar to work that was the subject of the claim or different work if it involved the same, or substantially similar, skills, responsibilities, conditions or degrees of effort as the work to which the claim

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41 Section 13ZD(1).
42 Section 13ZD(1)(a) and (b).

related.[43] It could, in addition, include work performed by any other comparators that the parties, Authority or Employment Court considered "useful and relevant".[44]

[48] As the Act now stands, the parties are to select appropriate comparators in accordance with the hierarchy provided in s 13ZE. It is a complex provision, not easily summarised. I will set it out in full.

> **13ZE Selecting appropriate comparators**
>
> (1) This section sets out how parties select appropriate comparators against which to assess a pay equity claim under section 13ZD.
>
> *Method of selection: hierarchy*
>
> (2) The parties to a pay equity claim involving 1 employer must select comparators that are most closely related to the employer by approaching the task as follows:
>
> (a) if the employer employs 1 or more comparators, the parties must select 1 or more of those comparators:
>
> (b) if the employer does not employ any comparators, the parties must select 1 or more comparators from 1 or more similar employers:
>
> (c) if neither paragraph (a) nor paragraph (b) applies, the parties must select 1 or more comparators from 1 or more other employers within the same industry or sector.
>
> (3) The parties to a multi-employer pay equity claim must select comparators that are most closely related to the employers by approaching the task as follows:
>
> (a) if 1 or more of the employers employ 1 or more comparators, the parties must select 1 or more comparators from 1 or more of those employers:
>
> (b) if none of the employers employ any comparators, the parties must select 1 or more comparators from 1 or more employers that are similar to the employers in the claim:
>
> (c) if neither paragraph (a) nor paragraph (b) applies, the parties must select 1 or more comparators from 1 or more other employers within the same industry or sector.
>
> (4) In addition to acting in accordance with subsection (2) or (3) (as applicable), the parties may, by agreement, select as a comparator the employees covered by a pay equity claim that has previously (but not

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43 Section 13ZE(1), as at 20 December 2023.
44 Section 13ZE(1)(c), as at 20 December 2023.

before the Equal Pay Amendment Act 2025 comes into force) been raised and been the subject of a pay equity claim settlement.

Method of selection: comparators perform comparable work

(5) A comparator selected under subsection (2) or (3) (as applicable) must be a male workforce that performs—

(a) work that is the same as, or substantially similar to, the work to which the claim relates; or

(b) work that is different to the work to which the claim relates, but that involves 1 or more of the following:

(i) skills and experience that are the same as, or substantially similar to, those required to perform the work to which the claim relates:

(ii) responsibilities that are the same as, or substantially similar to, those involved in the work to which the claim relates:

(iii) working conditions that are the same as, or substantially similar to, those involved in the work to which the claim relates:

(iv) degrees of effort that are the same as, or substantially similar to, those involved in the work to which the claim relates.

Exclusions

(6) Despite subsections (2) and (3), the parties may not select a comparator if there are reasonable grounds to believe that the work performed by that comparator—

(a) has been historically undervalued in the way described in section 13F(1)(b)(i); and

(b) continues to be subject to systemic sex-based undervaluation in the way described in section 13F(1)(b)(ii).

(7) Despite subsections (2) to (4), the parties may not select as a comparator a workforce that is too small to allow a meaningful comparison between its work and the work to which the claim relates.

Other prescribed considerations

(8) When selecting comparators, the parties must take into account any additional matters prescribed by regulations.

[49] The first port of call, then, when selecting an appropriate comparator, is the employer itself. It is only if the employer does not employ one or more comparators that one moves on through the hierarchy. As counsel for the applicants say, it is in

many ways just a pay equality assessment at this level. But in any event, the use of comparators is no longer permitted outside the claimant group's "industry or sector".

[50] Curiously, s 132E(5) now requires a comparator selected under s 132E(2) or (3) to be a "male workforce". What is the nature of a "male workforce" which must be used for the purpose of the comparison? Must it have been 70 per cent male for at least 10 years (i.e. the inverse of the definition of work "predominantly performed by female employees")? It is not clear.

[51] In addition, a comparator workforce may not now be selected if, in terms of s 132E(7), it is too small to allow a meaningful comparison. Once more, the scope of the exercise is narrowed.

[52] As was the case previously, a pay equity claim is settled when remuneration is determined that the parties agree does not differentiate between male and female employees in the manner set out in s 2AAC(b).[45] However, under the provisions as amended, an employer may have up to three years to increase remuneration to that level.[46] And now the parties "may not agree to review, or agree on a process for the review of, a pay equity claim settlement".[47] Similarly, existing pay equity review clauses, or terms and conditions of employment agreements based upon them. Are now of no effect.[48]

Opportunities for employers to discontinue and opt out of claims

[53] Following the amendments, employers may make decisions which have the effect of discontinuing pay equity claims. They may do so at four different points in the course of a pay equity process:

(a) If an employer decides that a claim does not meet all of the underlying requirements before going on to decide whether the claim has merit.[49]

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45 Section 13ZH(1)(a)(i).
46 Section 13ZH(1)(a)(ii).
47 Section 13ZH(2A).
48 Schedule 1, pt 2, cl 10.
49 See s 13PB(4), referring back to the requirements in s 13E which provide for the circumstances in which unions and employees may raise pay equity claims. A notice under s 13PB(4) that the

(b) If an employer decides that a claim does not have merit under s 13Q.[50]

(c) If an employer decides that there are no appropriate comparators available for selection under the new comparator hierarchy.[51]

(d) If an employer decides that, in the employer's view, the employees covered by a union claim do not all perform work that is the same or substantially similar.[52]

[54] In addition, employers may now opt out of multi-employer pay equity claims at any time by giving notice to its employees, and without the need for reasons, while unions wishing to opt out may do so only if they "have genuine reasons, based on reasonable grounds, to do so".[53] Unlike decisions to discontinue a claim, an employer's decision to opt out may not be challenged in the Authority.

A summary of the amendments

[55] By way of summary then, the amendments have changed the statutory scheme in five primary ways:

(a) by terminating all existing pay equity claims immediately;

(b) by precluding some previously available claims from being brought again by raising the threshold of "female dominated" from 60 per cent to 70 per cent for the last 10 years;

(c) by preventing pay equity issues from being identified and addressed for 10 years following a settlement (both through the 10-year bar and the

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requirements are not met "has the effect of discontinuing the pay equity claim" – s 13PB(5). The discontinuance does not prevent the making of a new application.

50 A notice by an employer of its decision that a pay equity claim does not have merit has the effect of discontinuing the pay equity claim – s 13S(3A).

51 Section 13ZEA. Again, a notice of an employer's decision to that effect discontinues a pay equity claim – s 13S(3A).

52 Section 13ZEB. Once more, a notice to that effect will discontinue the pay equity claim – s 13ZEB(5). A decision of this type can be given at any time and even if an employer has decided under s 13PB on a different occasion that employees covered by the claim perform work that is the same or substantially similar – s 13ZEB(2) and (4).

53 Section 13L(1), (3) and (4).

ban on remuneration reviews in settlements, requiring settled claimants to wait 10 years before bringing another claim);

(d) by preventing the use of comparators outside a claimant group's industry or sector;

(e) by making the process generally more burdensome for claimants pursuing qualifying claims — for example by requiring evidence of merit, allowing employers the power to discontinue and allowing employers in multi-employer claims to opt out without reasons.

How is the right advanced in this proceeding to be expressed?

[56] Section 19(1) of the Bill of the Rights Act is in the following terms:

> Everyone has the right to freedom from discrimination on the grounds of discrimination in the Human Rights Act 1993.

[57] The prohibited ground of discrimination relied on here is sex.[54] Direct discrimination involves treatment that differentiates, expressly, on the basis of a prohibited ground, while indirect discrimination involves other treatment which, while not apparently in contravention of the right, has the effect of treating people differently on the basis of a prohibited ground.[55]

[58] The rights contained in the Bill of Rights Act, generally, are regarded as being negative obligations. During the hearing,[56] counsel for Kāhui Tika Tangata | the Human Rights Commission promoted the argument that s 19 might go further and impose a positive right, requiring the State to take active steps to eliminate existing discrimination, even if the State was not itself the cause of that discrimination.

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54 HRA, s 21(1)(a).

55 Indirect discrimination is defined in s 56 of the HRA as:

> Where any conduct, practice, requirement or condition that is not apparently in contravention of any provision of this Part has the effect of treating a person or group of persons differently on 1 of the prohibited grounds of discrimination in a situation where such treatment would be unlawful under any provision of this Part other than this section, that conduct, practice, conditions or requirement shall be unlawful under that provision unless the person whose conduct or practice is in issue, or who imposes the condition or requirement, establishes good reason for it.

56 Te Kāhui Tika Tangata | The Human Rights Commission was granted leave to intervene in the proceeding.

Counsel for the Commission referred to United Nations Human Rights Committee General Comments which provide that, where the general conditions of a certain part of the population prevent or impair their human rights, the State should take specific action to correct those conditions; steps that amount to legitimate positive differentiation.[57] While there is something to be said for the argument, the applicants do not advance their case on that basis and so I take the point no further.

[59] How, then, is the right to be defined here? The Bill of Rights Act is to be given a generous interpretation to provide individuals with the full measure of its rights and freedoms.[58] It is a statute of constitutional significance, intended to be "woven into the fabric of New Zealand law".[59]

[60] Against that backdrop — and reading the s 19(1) right alongside the relevant provisions of the HRA, to which it cross-refers, together with the international instruments that I come to shortly — I can only agree with the applicants that s 19(1) is capable of including the right to be free from pay inequity.

[61] That negative obligation comes to the fore because, by enacting the Act and the pay equity scheme, the State has stepped into this area and has regulated the position.[60] As counsel for the Commission put it, it may well be that a provision that claws back positive steps taken to eliminate discrimination is, by definition, discriminatory, since making a form of discrimination harder to eliminate will necessarily have a disproportionate and adverse effect on those suffering from that discrimination. And that group has already been identified by Parliament as requiring legal protection in a free and democratic society through its inclusion in the list of prohibited grounds.

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57 United Nations Human Rights Committee *CCPR General Comment No. 18: Non-Discrimination* (10 November 1989) at 10 and United Nations Human Rights Committee *CCPR General Comment No. 28: Article 3 (The Equality of Rights Between Men and Women)* CCPR/C/21/Rev,1/Add.10 (29 March 2000) at 4.

58 *Fitzgerald v R* [2021] NZSC 131, [2021] 1 NZLR 551 at [41] per Winkelmann CJ [*Fitzgerald*].

59 *Fitzgerald*, above n 58, at [41] per Winkelmann CJ, citing *R v Goodwin* [1993] 2 NZLR 153 (CA) per Cooke P.

60 *New Zealand College of Midwives Inc v The Attorney-General* [2026] NZHC 405 at [479] [*Midwives*].

[62] As is clear from the statutory language, and the historical background to the pay equity scheme, pay inequity exists because of differential treatment on the basis of sex. The right is to be free of differential treatment of that sort. It is expressed in s 2AAC(b) of the Act and is given voice through the pay equity scheme and, alternatively, through the right provided in the Act to pursue a claim for pay inequity under the HRA on the basis of sex as a ground of prohibited discrimination.[61]

[63] A right to be free from pay inequity is on all fours with New Zealand's international obligations. International instruments which express those obligations, while not binding domestically, influence the interpretation of the rights protected in the Bill of Rights Act.[62] Unless there is clear evidence to the contrary, it is assumed that Parliament intends to legislate in line with its international obligations.[63]

[64] The Bill of Rights Act affirms New Zealand's commitment to the International-Covenant on Civil and Political Rights.[64] In its General Comment No. 18 on non-discrimination, the Office of the High Commissioner for Human Rights interprets "discrimination" as involving:[65]

> any distinction, exclusion or restriction or preference which is based on any ground such as … sex … and which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise by all persons, on an equal footing, of all rights and freedoms.

[65] Article 23 of the Universal Declaration of Human Rights affirms the right, without any discrimination, to equal pay for equal work and to just and favourable remuneration.[66] Article 7(a) of the International Covenant on Economic, Social and

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61 The Act, s 2B. Such a claim under the HRA could be brought under ss 22 and 65: employment discrimination and indirect discrimination, respectively. A claim under s 65 would be open under pt 2 of the HRA to the extent that the indirect discrimination relates to unlawful employment discrimination conduct: see 21A(1)(a) and (b).

62 See *Tavita v Minister of Immigration* [1994] 2 NZLR 257 (CA) and the commentary in Dame Sian Elias "The Impact of International Conventions on Domestic Law" (Address to the Conference of International Association of Refugee Law Judges, Auckland, 10 March 2000).

63 *New Health New Zealand Inc v South Taranaki District Council* [2018] NZSC 59, [2018] 1 NZLR 948 at [292]; *Cropp v Judicial Committee* [2008] NZSC 46, [2008] 3 NZLR 774 at [26] and *R v Secretary of State for the Home Department, ex parte Simms* [2001] 2 AC 115 (HL) at 130.

64 Bill of Rights Act, long title. New Zealand has ratified the International Covenant on Civil and Political Rights and has chosen not to enter a reservation to any of the anti-discrimination articles — arts 2(1), 3 and 26.

65 United Nations Human Rights Committee *General Comment No. 18: Non-discrimination*, above n 57, at [7].

66 *Universal Declaration of Human Rights* GA Res 217A (1948), art 23.

Cultural Rights recognises the right to just and favourable work conditions, including remuneration on fair and equal bases between men and women.[67] The Convention on the Elimination of all Forms of Discrimination Against Women, art 11(1), requires state parties to eliminate discrimination against women in employment to ensure the right to equal remuneration.[68] Further, New Zealand is party to two International Labour Office Conventions — the Equal Remuneration Convention and the Convention Concerning Discrimination in Respect of Employment and Occupation. These conventions recognise the right to equal remuneration between men and women, and the right to equality of opportunity and treatment in employment and the need to eliminate any discrimination from sex-based remuneration discrepancies.[69]

[66] Clearly then, these international instruments support a negatively-framed right to freedom from pay inequity and there is nothing, whether in the legislative history or otherwise, which suggest an intention that the Bill of Rights Act would not protect that right.

[67] In this way, pt 4 of the Act provides a regime to give effect to the s 2AAC(b) obligations to eliminate any pay inequity and s 19(1) is capable of protecting that right. The undervaluation of jobs dominated by female employees is discrimination.

Framework for the s 19 analysis

[68] The framework for finding unlawful discrimination established in *Ministry of Health v Atkinson,*[70] as applied in *New Zealand College of Midwives Inc v The Attorney-General*, is as follows:[71]

> (a) Is there differential treatment or effects as between persons or groups in analogous or comparable situations ("the comparator group") on the basis of a prohibited ground of discrimination?

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67 *International Covenant on Economic, Social and Cultural Rights* GA Res 2200A (1966), art 7(a).

68 New Zealand is a party to the Optional Protocol to the Convention on the Elimination of all Forms of Discrimination Against Women, signed and ratified on 7 September 2000.

69 International Labour Office Equal Renumeration Convention (ILO 100) M1951/10 (opened for signature 29 June 1951, entered into force 3 June 1984) and the International Labour Office Discrimination (Employment and Occupation) Convention (ILO 111) M1958/19 (opened for signature 15 June 1960, entered into force 3 June 1984).

70 *Ministry of Health v Atkinson* [2012] NZCA 184, [2012] 3 NZLR 456 [*Atkinson*].

71 *Midwives*, above n 60, at [475].

(b) If there is, has it resulted in a material disadvantage for the person or group differentiated against?

(c) If it has resulted in material disadvantage, can the discrimination be justified under s 5 of the Bill of Rights Act?

[69] The onus is on the applicants to establish differential treatment in comparable situations which results in material disadvantage. If that onus is met, the burden then shifts to the Crown to justify the discrimination under s 5. Justifications and value judgements about the nature of any potential discrimination do not enter the analysis under the first stage in the process, which requires an assessment of whether there has been discrimination and a material disadvantage from it. Justifications and value judgements fall to be assessed only at the second, s 5, stage.

First *Atkinson* issue — differential treatment, by comparison, on the basis of a prohibited ground of discrimination

Is there differential treatment?

[70] In this case, the "treatment" in issue is the effects of the Act, as it now stands. As mentioned earlier, treatment can be on the basis of a prohibited ground either directly or indirectly. For example, the policy of not paying family members of disabled individuals for their care and support in *Atkinson* was a direct discrimination claim. By contrast, a policy that differentiates, for example, on the basis of height could, indirectly, amount to differential treatment on the basis of sex as women, generally speaking, are shorter than men and may be impacted disproportionately by a policy of that type.[72] In this way, there can be treatment on the basis of a prohibited ground, even where the prohibited ground is not the reason for the treatment. As was said in *Ministry of Health v Atkinson*, "measures may of course be introduced with the best of intentions but nonetheless, on analysis, comprise prima facie discrimination".[73]

[71] Ms Jagose KC submits that the Act is not capable of compelling sex-based discrimination because it responds to an existing inequity, rather than creating it. She

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72 This has been called a "textbook example of indirect discrimination"— see for example *Fehling v Appleby* [2015] NZHC 75, [2015] NZAR 547 at [85].

73 Above n 70 at [132].

emphasises the proposition that there is no positive obligation on the Government to introduce legislation responding to inequality, and its decision to do so cannot render the Act immutable from further amendments. The point is made that a finding to the effect that a regime, designed to address discrimination, engages the Bill of Rights Act would create a chilling effect on future governments addressing discrimination.

[72] For the Attorney-General, reference is made to *Ferrell v Ontario (Attorney-General)* where the Court of Appeal for Ontario considered whether the Legislative Assembly's repeal of 1993 pay equity legislation violated the Canadian Charter of Rights and Freedoms' equality guarantee.[74] The provisions in question were replaced with a set of new provisions focused on equal opportunity in employment. The Court found that it would be ironic if legislative initiatives, such as those in question, could, once enacted, "become frozen into provincial law and susceptible only to augmentation and immune from curtailing amendment or outright appeal without s 1 justification".[75]

[73] However, in each case, it is a matter of considering the nature and effect of the particular legislative measure in question. For example, in *Quebec (Attorney-General) v Alliance du personnel professionnel et technique,* amendments to the pay equity regime were found to have a discriminatory impact.[76] The argument for the appellant unions in that case that, once a pay equity regime was enacted, it could not be modified, was rejected. But the case turned on the nature of the amendments. They changed the pay equity obligation on employers to one that was "partial and episodic". They had a discriminatory impact in their own right because the impugned provisions themselves "perpetrate the pre-existing disadvantage of women"; they disadvantaged claims by the very group the legislation sought to protect.[77]

[74] The same principles are on point here. If Parliament legislates to address systemic discrimination for a particular group of people, it could not properly be the case that it would then be immune from any challenge to the underlying legislative

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74 *Ferrell v Ontario (Attorney-General)* (1998) 168 DLR (4th) 1 (ONCA).
75 At [36]–[37].
76 *Quebec (Attorney-General) v Alliance du personnel professionnel et technique de la santé et des services sociaux* (2018) SCC 17, [2018] 1 SCR 464.
77 At [32]–[33].

scheme, even if that scheme was intended to address discrimination. Rather than creating a chilling effect, Parliament might be incentivised to legislate to address discrimination in such a way as to render itself free from challenge. Again, the question turns on the substantive effect of the legislation as enacted, not its intentions. Parliament's intentions in enacting it fall to be assessed when considering the Crown's justification burden under s 5. Arguments directed towards Parliament's intentions cannot operate to prevent an analysis of the Act's potential discriminatory effect at all.

[75] The short point under this head is that the effects of the Act, in its current form, impact only those who would seek to bring a pay equity claim under the pay equity provisions. They treat differentially those in female dominated workforces and those who are not. In this way, the Act treats women in female dominated workforces differently than other people in gender-balanced or male-dominated workforces.

[76] Accordingly, the relevant provisions, following amendment, discriminate directly on the prohibited ground of sex.

[77] Looked at another way, the impact of the amendments falls on women disproportionately, since those in workforces dominated by female employees who have either brought or will be likely to bring pay equity claims are predominantly women. As a result, treatment on the basis of belonging to a workforce that is dominated by female employees is, indirectly, treatment on the basis of sex.

[78] Under the *Atkinson* analysis, that differential treatment or effect must be considered as between people and groups in analogous or comparable situations.

Who are the people or groups unanalogous or comparable situations?

[79] A "comparator analysis" is a tool used by the Court to consider whether a "person or group is being treated differently to another person or group in comparable circumstances" on the basis of a prohibited ground.[78]

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78 *Atkinson,* above n 70 at [60].

[80] New Zealand courts have not developed a particular methodology to ascertain an appropriate comparator in any given case. It would be wrong to do so. As Gwyn J said in *The New Zealand College of Midwives Inc v The Attorney-General*:[79]

> The comparator exercise is "simply a tool" and is not to be treated "as a formula". The exercise involves the comparison with a group "whose treatment is *logically relevant* to the personal group alleging discrimination. A comparator may be a real person or a hypothetical person. It is not necessary to fix a single conclusive comparator. The exercise must not become "circular", producing an "inevitable answer" favourable to the Crown. And, finally, the comparator exercise should take its proper place in the overall discrimination inquiry with it being important that the exercise does not "effectively cut out the inquiry into potential discriminatory action too soon".

[81] As the Court of Appeal said in *Child Poverty Action Group Inc v Attorney-General*, "[w]hat the Court is trying to do by reference to the comparator is to sort out those distinctions which are made on the basis of a prohibited ground."[80]

[82] As I see it, the appropriate comparator group in this case is those in workforces who are not subject to sex-based undervaluation and who do not rely on legislative frameworks to assess their right to be free from pay inequity.

[83] The underlying point is that women in undervalued female-dominated workforces are reliant on pt 4 of the Act to meaningfully access their right to be free from pay inequity.[81] The Act as it operates at present imposes barriers on many, if not most, women in this position from accessing that right. They are barriers that are not placed before employees in gender-balanced or male-dominated workforces.

[84] I do not believe that the fact that female employees in gender-balanced or male-dominated workforces would not be directly affected by the Act, as amended, makes those groups inapt comparators. The comparator group can readily comprise people sharing the protected characteristic.[82] That is particularly the case here given the importance of ensuring that the analysis considers the Act's effects on the

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79 Above n 60 at [485] (footnotes omitted).

80 *Child Poverty Action Group Inc v Attorney-General* [2013] NZCA 402, [2013] 3 NZLR 729 at [51].

81 While there are alternative pathways to bring a pay equity claim, through the HRA or the ERA, for reasons I will come on to discuss, I do not see them as providing the same meaningful access to be free from pay inequity as a settlement under the Act.

82 *Midwives,* above n 60 at [497]–[498].

applicants on the basis of their sex as compared with female workers in different fields. Engaging in a search for a comparator group that contains no women would be circuitous and would circumvent the purpose of the Court's role in determining consistency with the Bill of Rights Act.

[85] To this point, then, I have found, in terms of the first stage in the *Atkinson* analysis, that there is differential treatment or effects as between persons or groups in analogous or comparable situations on the basis of a prohibited ground of discrimination. I turn to the second *Atkinson* question of whether that differential treatment has resulted in a material disadvantage for the person or group differentiated against.

Second *Atkinson* issue — differential treatment that has resulted in a material disadvantage

[86] The question is whether the Act, in its present form, materially disadvantages workforces dominated by female employees, when viewed in context.

[87] The focus is on the statutory scheme as it now stands. However, as Mr Kirkness KC says, it would be artificial to ignore the previous position under the Act. The effect of the 2025 amendments cannot properly be understood without looking at what was amended. The amendments make it harder, not easier, for pay equity claims to be brought and, in many cases, prevent them from being brought at all.

[88] The question for the Court though is not just the nature of the amendments enacted, but whether the amendments place women in female-dominated workforces in a materially worse position than people in gender-balanced or male-dominated workforces doing similar work.

[89] As I said, in looking at the essential features of the statutory scheme in [55] above, there are five broad categories of impacts created by the amendments. To recap, the impacts are these:

(a) terminating all existing pay equity claims immediately;

(b) precluding previously available claims by raising the threshold of "female dominated" from 60 per cent to 70 per cent for the last 10 years;

(c) preventing pay equity issues from being identified and addressed for 10 years following a settlement;

(d) preventing the use of comparators outside the claimant groups' industry or sector;

(e) making the process more burdensome for claimants pursuing qualifying claims.

[90] I look at each of these potential impacts in considering whether the differential treatment has resulted in a material disadvantage.

Terminating all existing pay equity claims

[91] Claimants who were in the process of negotiating pay equity claims under the previous regime had their claims terminated immediately and without notice as a result of the amendments to the Act. The terminated claims included those with which each of the applicants were involved.[83]

[92] Stephanie Mills, for the fifth applicant, New Zealand Educational Institute Te Riu Roa Inc (NZEI), referred to the amendments having cancelled five education sector pay equity claims — on the part of teachers, special education advisers, psychologists, service managers and kindergarten administrators. She referred to the teachers' claim being the largest pay equity claim, covering around 110,000 teachers across early childhood, primary, secondary, kindergarten and related education settings. Approximately 300 teacher interviews and additional supervisor interviews had been completed and the parties were close to finalising key components of the claim when it was cancelled.

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[83] Affidavit evidence was given from representatives of each of the applicant organisations.

[93] Glenda Alexander, for Tōpūtanga Tapuhi Kaitiaki o Aotearoa: The New Zealand Nurses Organisation Inc, described the District Health Board/Te Whatu Ora Nurses' pay claim, raised in 2017 and eventually settled through a mediated outcome in August 2013, and the agreed review of that settlement that the Amendment Act prevents.

[94] She has also described several active claims affected by the Amendment Act: including the Plunket nurses, Plunket administrators, hospice nurses, healthcare assistants, primary practice and urgent care claims involving approximately 800 employees.

[95] Joanna Brunskill, for the New Zealand Post-Primary Teachers Association Inc (PPTA), gave evidence of a claim for secondary teachers and principals in 2020 which was then consolidated with NZEI's claim for early childhood, primary, kindergarten and other teachers. The consolidated claim covered approximately 95,000 teachers and leaders and more than 500 early childhood employers. It has been terminated through the Amendment Act.

[96] Alexandra Davies, for the New Zealand Public Service Association Te Pūkenga Here Tikanga Mahi Inc (PSA), explained that, at the start of 2025, the PSA had 14 active pay equity claims, all of which were terminated through the Amendment Act. They included claims for care and support workers, care and support managers and coordinators, social service workers, university library and administration workers, probation officers, Corrections psychologists, public service administration and clerical workers, local government library workers, residential school workers, Artificial Limb Service workers and Awanui Laboratory workers.

[97] Megan Morris for the New Zealand Tertiary Education Union Te Hautū Kahurangi o Aotearoa Inc (TEU) gave evidence of the TEU having raised two multi-union pay equity claims in September 2022 against all eight New Zealand universities. One claim covered university clerical and administrative workers and the other covered library workers. Ms Morris spoke in her evidence of the Amendment Act having brought to an end what had been a thorough and constructive process bringing unions and employers together to address gender-based pay discrimination.

[98] It is evident that there has been material disadvantage under this head.

The 70 per cent for 10 years threshold

[99] There are a number of claims which do not now meet the 70 per cent female for 10 consecutive years threshold. To take two examples:

(a) Ms Brunskill, for the PPTA, explained that the Amendment Act now prevents the PPTA from raising a pay equity claim because secondary teachers and principals do not meet the new requirement that the workforce be at least 70 per cent female for 10 consecutive years.

(b) Ms Davis, for the PSA, explained that claims from probation officers, residential school workers and Artificial Limb Service workers are now excluded because their workforces do not consistently meet the new 70 per cent female for 10 years threshold.

[100] This new threshold prevents women in many workforces which are female-dominated but which fluctuate in gender composition from accessing pay equity.

Preventing pay equity issues from being addressed for 10 years and removing review clauses

[101] Preventing pay equity issues from being identified and addressed for 10 years following a settlement removes protections against reemerging discrimination to the extent that it occurs within the 10-year period.

[102] The Act's removal of remuneration review clauses from existing settlements imposes a material disadvantage for women reliant on the clauses for ongoing pay equity. To take one example, Ms Mills of NZEI gave evidence of the amendments having cancelled remuneration reviews of existing pay equity settlements — including for teacher aides, support workers, school administration staff, Kaiārahi i te Reo staff, librarians, science technicians and therapists. NZEI analysis in 2024 showed that, in the 2020 teacher aide settlement, up to a 17.19 per cent upward adjustment was needed

to maintain pay equity. These women are unable to raise a new claim to achieve ongoing pay equity until 2030.

Preventing the use of comparators outside the complainant group's industry or sector

[103] The type of discrimination that is often at issue in pay equity cases involves an entire sector being undervalued because its members are predominantly female employees. To prevent the use of comparators outside of a workforce's sector may, in cases of that sort, serve to undermine the pay equity scheme and to prevent the elimination of discrimination in those workforces.

[104] In cases of that sort, it is necessary to compare a sector with jobs that are different in content but equivalent in terms of effort, skill, responsibility and working conditions.

[105] The way in which the new comparator hierarchy in s 13ZE works is such that the first port of call, if the employer employs one or more comparators, is one or more of those comparators. Take, as an example, the case of nurses where women make up well above 70 per cent of the workforce.[84] A group of nurses bringing a claim against a single employer, if the employer employed a male nurse, would need to select that nurse as the comparator. Comparison between remuneration rates and terms in those circumstances would reveal very little in determining whether the work has been subject to sex-based undervaluation.[85] It is essentially an equal pay assessment only. It would not allow an assessment of pay inequity.

[106] A requirement to draw a comparison directly to co-workers or other people in a similar industry limits in material ways the right to be free from pay inequity. Material disadvantage arises at a consequence.

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84 This fact is supported by the evidence of Glenda Alexander, the Senior Pay Equity Practitioner for the New Zealand Nurses Organisation and the report of The Nursing Council of New Zealand *The New Zealand Nursing Workforce: A profile of Nurse Practitioners, Registered Nurses and Enrolled Nurses 2018-2019* (Te Kaunihera a Tapuhi o Aotearoa | Nursing Council of New Zealand, June 2024).

85 Section 13ZD(1)(a).

Making the process more burdensome

[107] There are several features of the Act as it now stands that make the process more burdensome. One is the requirement that a claim includes the evidence relied upon at the outset. Evidence must be provided on "how all of the employees to be covered perform work that is the same or substantially similar"[86] and on the "elements required for a pay equity claim to have merit".[87]

[108] In order to provide evidence of "the elements required for a pay equity claim to have merit" there must be evidence on all of the s 13F requirements: on the reasons for the historical undervaluation of the work in question[88] and on the reasons for "continued systemic sex-based undervaluation of work".[89]

[109] While larger unions may have the resources to assemble the evidence that is necessary to address those factors, it will be difficult for smaller organisations and for individual employees it will likely be a largely insurmountable task. It is a task that is to be contrasted with the requirement that was in place previously for employers to take a "light-touch" approach and to recognise a "low standard" to raise a claim.

[110] Another feature is the ability of employers to discontinue claims. As discussed in [53] above, employers may discontinue claims if of the view that a claim does not have merit, that employees covered do not perform the same or substantially similar work, that there are no appropriate comparators, or that a claim does not meet all of the requirements in 13PB. These powers on the part of an employer will undoubtedly result in a material disadvantage. While decisions to discontinue can be challenged, a challenge will come at considerable cost to employees in terms of time, resources and funds.

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86 Section 13I(1)(b).

87 Section 13I(1)(ba).

88 Section 13F(2) — which are largely socio-historical and require access to substantial resources to be able to address.

89 Section 13F(3) — which, as described in [33] above, sets out a number of reasons that would need to be addressed in evidence, including the features of the relevant market, industry, sector or occupation (including funding, a lack of effective bargaining, market share, lack of competition, lack of power and occupational segregation) and failures on the part of parties in a pay equity claim to consider the further factors mentioned in 13F(3)(b) which relate to a potential failure on the part of the parties to a pay equity claim to properly assess the remuneration that should be paid to account for the nature of the work, levels of responsibility, the conditions and the degree of effort required.

[111] Another feature that makes the process more burdensome is the ability of employers to opt out of multi-employer claims, now without any given reason. It is a feature which has the potential to fragment claims and to reduce the bargaining power of employees. Decisions can be made at any stage until a final settlement is reached. Employers who opt out to pursue a single employer claim cannot be challenged before the Authority for that decision, even for a lack of good faith.[90] If an employer opts out in this way, employees lose access to potential union resources and representation and a risk arises that workers within similar industries will not be assessed consistently.

[112] It seems to me, for all of these reasons, that — in terms of the second stage of the *Atkinson* test — the differential treatment has resulted in a material disadvantage for the person or group differentiated against.

Do alternative pay equity routes mean that pt 4 of the Act cannot have a discriminatory effect?

[113] For the Attorney-General it is said that the pay equity process provided for in pt 4 of the Act cannot have a discriminatory effect because pt 4 is not the only route through which a pay equity claim can be brought. Employees affected by pay inequity may choose, instead, to bring a claim under the HRA (for unlawful discrimination) or under the ERA (for a personal grievance). In those circumstances, it is said that the terms of pt 4 do not prevent women from accessing pay equity. I do not accept that to be the case.

[114] Under s 2B of the Act, three routes are provided to address equal pay or pay equity claims. Section 2B is in the following terms:

> **2B Choice of proceedings**
>
> (1) Where the circumstances giving rise to an unlawful discrimination claim, an equal pay claim, or a pay equity claim by an employee are such that the employee would also be entitled to make a complaint under the Human Rights Act 1993, or pursue a personal grievance under the Employment Relations Act 2000, the employee may take 1, but not more than 1, of the following steps:
>
> (a) the employee may pursue a claim under this Act; or

[90] Section 13L(10).

(b) the employee may make a complaint under the Human Rights Act 1993; or

(c) the employee may apply to the Authority for resolution of a personal grievance under the Employment Relations Act 2000.

[115] However, the three avenues are only available where an employee "would also be entitled" to make a complaint under the HRA or to apply to the Authority under the ERA. Pay equity claims and the circumstances giving rise to them are distinct from unlawful discrimination and equal pay claims under the Act, and the pathways under the HRA and ERA.

[116] An employee can only bring an unlawful discrimination claim against their employer under s 22(1)(b) of the HRA for less favourable employment terms if the claimant is paid less than another actual employee of that employer by reason of sex-based discrimination. This is an equal pay claim, not a pay equity claim. In any event, the Human Rights Review Tribunal can order damages or compensation for past lost wages but does not have the jurisdiction to set an equitable salary.[91]

[117] Differential pay on the basis of sex-based discrimination may give rise to a personal grievance under the ERA.[92] However, personal grievances must be raised within 90 days of the alleged "action" giving rise to the claim,[93] and are not intended to address remuneration.[94] The Authority does not have jurisdiction to make a determination on new terms and conditions of employment.[95]

[118] These alternative pathways cannot facilitate meaningful access to a female employee's right to be free from pay inequity. The point rather speaks for itself because, as discussed, Parliament enacted pt 4 in 2020 precisely because the alternative routes identified here could not deliver equal pay for work of equal value.

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91 See HRA, s 91I. The Tribunal can order that the defendant perform specified acts to redress any loss or damage suffered by the complainant under s 91I(3)(d), but it cannot (without further referral to the High Court) award damages which would exceed the monetary limits of the District Court's jurisdiction, which is usually awards of up to $350,000. See s 92Q(2) of the HRA and ss 74–79 of the District Court Act 2016.

92 Employment Relations Act 2000, s 103(3)(c).

93 Section 114(7)(b).

94 Section 101(d).

95 Section 161(2)(b).

[119] Furthermore, claims under the HRA or the ERA can only be brought by an individual employee in relation to their own terms of employment. No provision is made for union or class discrimination.

Does s 19(2) apply — were the measures taken in good faith to assist those disadvantaged because of discrimination?

[120] Section 19(2) of the Bill of Rights Act is in the following terms:

> Measures taken in good faith for the purpose of assisting or advancing persons or groups of persons disadvantaged because of discrimination that is unlawful by part 2 of the Human Rights Act 1993 do not constitute discrimination.

[121] Generally, the provision is understood to apply to cases of "reverse discrimination"; cases in which a group, protected under the HRA, complains that a measure designed to address discrimination extends a protection or advantage to another protected group, but not to them and, as a result, the measure discriminates against them.

[122] A recent example of the application of the provision is provided in *Hoban v Attorney-General.*[96] Mr Hoban complained that s 61 of the HRA — which deals with hate speech — was inconsistent with s 19 of the Bill of Rights Act because it only prohibited hate speech based on colour, race or ethnic or national origin, but not hate speech based on sexual orientation. Applying the *Atkinson* test, the Court of Appeal found that the absence of protection from hate speech on the ground of sexual orientation constituted "differential treatment causing a disadvantage because no statutory remedy is provided for the unprotected group", meaning that "prima facie discrimination" had been established.[97]

[123] However, the Court went on to find that s 19(2) applied because the provision was intended to make it clear that measures designed to give positive advantages to those who have been, or might in the future be, discriminated against, did not breach s 19(1).[98]

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96 *Hoban v Attorney-General* [2025] NZCA 644, [2026] 2 NZLR 215. An appeal in the Supreme Court was heard in October this year.

97 At [63]–[64].

98 At [75].

[124] The respondent says that at least part of the unlawful discrimination alleged by the applicants is that pt 4, as it now stands, is under-inclusive. Reference is made to the purpose of pt 4, set out in s 13A, of providing a process to facilitate the resolution of pay equity claims. And, the respondent says, the applicants have not provided any evidential foundation for an assertion that the Amendment Act was not a good faith measure.

[125] However, the measures that are challenged here are the amendments to the pay equity scheme. As discussed already, the amendments have made pay equity claims harder to bring, have precluded some claims entirely and have discontinued substantive claims without notice.

[126] As Gwyn J said in the *Midwives* case — in response to the Crown's reliance on s 19(2) there — "Once the Crown steps into an area and regulates the position, then discrimination analysis is relevant".[99] That is a proposition that resonates here. As Mr Kirkness says, s 19(2) should be read purposefully so as not to undercut the s 19(1) right. This point follows from the general principle that the rights protected in the Bill of Rights Act should be interpreted generously.[100] It would not be a generous reading of the discrimination right, and it would not be consistent with New Zealand's international obligations, if s 19(2) operated to insulate the Crown from implementing amendments that make it harder or impossible to bring pay equity claims in a way that leaves women in female-dominated workforces substantively worse off than those who are not in workforces of that type.

[127] Accordingly, this is not as I see it a case of reverse discrimination. It is a case in which a scheme as a whole — as recalibrated — discriminates.

[128] Accordingly, s 19(2) has no application here.

Conclusions to this point

[129] To this point, I have found — in terms of the first two stages of the *Atkinson* test — that there has been differential treatment as between persons or groups of

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99 *Midwives,* above n 60, at [479].
100 See for example *Fitzgerald*, above n 58, at [41] per Winkelmann CJ.

people in analogous or comparable situations on the basis of a prohibited ground of discrimination. And I have found that it has resulted in a material disadvantage for the person or group differentiated against.

[130] I turn now to consider the third stage in the *Atkinson* assessment: whether the discrimination can be justified under s 5 of the Bill of Rights Act.

Third *Atkinson* issue — are the limits demonstrably justified?

The structured proportionality assessment

[131] Section 5 of the Bill of Rights Act provides that: "[s]ubject to s 4, the rights and freedoms contained in this Bill of Rights may be subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society". Whether a limit can be demonstrated to be justified, in terms of s 5, is a mixed question of fact and law.[101]

[132] It is the respondent who bears the burden of demonstrating that justification. As the Supreme Court of Canada said in *RJR-MacDonald Inc v Canada (Attorney-General)*:[102]

> … the state must show that the violative law is "demonstrably justified". The choice of the word "demonstrably" is critical. The process is not one of mere intuition, nor is it one of deference to Parliament's choice. It is a process of demonstration. This reinforces the notion inherent in the word "reasonable" of rational inference from evidence or established truths.

[133] In assessing whether the respondent has demonstrated reasonable limits to be justified in terms of s 5, a proportionality assessment is undertaken; an assessment of the proportionality of the limit on a protected right compared with the objective of that limit.

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101 *Moncrief-Spittle v Regional Facilities Auckland Ltd* [2022] NZSC 138, [2022] 1 NZLR 459 at [84].

102 *RJR-MacDonald Inc v Canada (Attorney General)* [1995] 3 S.C.R. 199 at [128] (emphasis in original).

[134] In *Attorney-General v Chisnall,* the Supreme Court confirmed the application of the structured analysis set out in *R v Hansen*, which it summarised as follows:[103]

> (a) does the limiting measure serve a purpose sufficiently important to justify curtailment of the right or freedom?
>
> (b) is the limiting measure rationally connected with its purpose?
>
> (c) does the limiting measure impair the right or freedom no more than is reasonably necessary for sufficient achievement of its purpose?
>
> (d) is the limit in due proportion to the importance of the objective?

[135] However, the Supreme Court went on to make the point that, while the *Hansen* methodology breaks the proportionality exercise down into steps, the s 5 issue is not amenable to a paint-by-numbers exercise and it is important to acknowledge, in particular, that the final step draws together for consideration the earlier matters addressed at (a)–(c).[104]

[136] When undertaking a *Hansen* assessment, an overarching question tends to arise: what weight should be given to Parliament's reasons for adopting particular amendments, or to Parliament's institutional capacity to deal with complex social issues? The notion of "weight" in this context is sometimes referred to as "deference" or as giving a "margin of appreciation" to Parliament. I agree with counsel for the Commission that the term "weight" is to be preferred, as "deference" might suggest an abdication of a role to another and "margin of appreciation" is a phrase that is associated with the doctrine developed by the European Court of Human Rights in delineating its relationship with the domestic legal systems of the European Council's member states.

[137] There is no one defining measure that can determine how much weight should be ascribed in circumstances such as those which arise here. As the Supreme Court said in *Chisnall*, the circumstances in which the issue of weight will arise are so varied that it would be incautious to attempt some formulation or scheme.[105] Regard should

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103 *Attorney-General v Chisnall* [2024] NZSC 178, [2024] 1 NZLR 768 at [195] [*Chisnall*] and *R v Hansen* [2007] NZSC 7, [2007] 3 NZLR 1 at [64] [*Hansen*].

104 At [197].

105 At [250].

be had to Parliament's institutional capacity to deal with social issues and it is appropriate for courts, when dealing with legislation, to acknowledge that it has already been enacted by a democratically elected body, such that a finding of inconsistency with affirmed rights is not to be made lightly.[106] However, as the Court in *Chisnall* went to say:[107]

> Ultimately, Parliament has imposed on the courts the duty to undertake the s 5 analysis, and the courts cannot shirk the responsibility to address issues of rights consistency. As the Human Rights Commission submits, it cannot be the case that the courts must assume that a pressing social need and the compatibility of means chosen to pursue it are justified just because Parliament has adopted them.

[138] In this sense, nothing about this Court carrying out the s 5 assessment interferes in any inappropriate way with Parliament's legislative agenda or choices. Rather, it is a matter of the courts giving effect to Parliament's statutory requirement that it carry out the assessment, as expressed in the Bill of Rights Act.

[139] Against that background, I go on now to consider the justifications advanced for the rights-inconsistent legislation.

The basis upon which the amendments were made.

[140] On 27 November 2023, a coalition of the National, ACT and New Zealand First parties formed a coalition government. A briefing paper for the incoming Minister of Workplace Relations and Safety noted concerns about "the processes for decision-making and the fiscal consequences of pay equity settlements in the public sector and the publicly funded sector".[108]

[141] On 12 December 2023, a Treasury briefing for the Minister of Finance noted that there were 24 pay equity claims in progress, but that 80 per cent of the potential

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106 At [252].
107 At [252].
108 The public sector comprises government employers while the publicly funded sector is a reference to employers to provide services to the government on contract.

cost of pay equity settlements was located in two claims — the combined teachers' claim and the care and support claim.[109]

[142] On 14 December 2023, a briefing paper for the Minister of Workplace Relations and Safety, the Minister of Finance and the Minister for the Public Service was prepared containing options "for changing the Government's approach to pay equity to support fiscal management of claims". It referred to there having been 11 pay equity settlements leading to pay corrections for about 158,000 employees. It referred to the current forecasted cost of pay equity claims being approximately $10 billion and to concerns that the way in which funding for settlements had been accounted for (through open ended forecasts rather than budget allowances) meant "employers ha[d] not faced trade-offs as a result of pay equity settlements in the same way as other expenditure".

[143] Options presented as "levers for change" were non-legislative and included removing the "funded sector framework", changing the "fiscal management approach" and "changing expectations" about settlements being fully funded. It added that: "in the longer term, it would be open to the Government to change the legislation if it considers the fiscal costs of following the current legislation are too high".

[144] The Minister for Workplace Relations and Safety, in a letter to the Prime Minister on 29 January 2024, said that, while she supported "equal rights" in the workplace, she questioned the "robustness and reliability of comparing remuneration between different professions in a bargaining framework" and said that the "pay equity bargaining system has resulted in significant labour market distortions and high costs to the Crown".

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[109] A July 2024 Cabinet paper shows that the actual and reasonably expected public sector pay equity claims over the following 18 months were claims from teachers; tertiary sector administration and clerical workers; probation officers; psychologists (Department of Corrections); public service administration and clerical workers; education advisers; tertiary sector librarians and library assistants; psychologists (Ministry of Education); early intervention teachers; and education service managers. Actual and reasonably expected funded sector pay equity claims over the following 18 months were identified as being claims from care and support workers, early childhood education teachers, nurses, non-governmental organisations social service workers, kindergarten teachers, allied and technical health workers, health sector administration and clerical workers and midwives in primary birthing units.

[145] Minutes from a Treasury meeting on pay equity on 13 February 2024 record that, if the Public Service Commission's then current guidance on the funding of pay equity claims was rescinded, "it is likely that Treasury will be able to credibly book a saving of approximately $150 million per year from 2025/26 for the Budget Economic and Fiscal Update".

[146] A Public Services Commission report for the Minister for the Public Service and the Minister of Finance on 27 February 2024 referred to the Minister having decided on "a reset of the system" to "better manage financial implications of pay equity settlements". The "reset" was a non-legislative policy change which involved managing the costs of claims and disbanding the Pay Equity Taskforce.[110]

[147] Cabinet agreed to the "pay equity reset" in April 2024. Among the changes were the creation of the "public sector pay equity contingency" and the "funded sector pay equity contingency". Guidance was put in place about how money would be available in each contingency to support pay equity obligations.

[148] In the Cabinet paper for that April meeting, the Minister of Finance and Minister for the Public Service promoted the change on the basis that "the current approach that has been taken by the government as employer and funder is no longer fit for purpose and pay equity costs to the Crown have become significant". The paper went on to say that the current governance settings were no longer fit for purpose and that Treasury would implement guidance on a new approach to the fiscal management of pay equity settlements.

[149] The Minister said:

> I consider the current fiscal management approach has weakened the negotiating incentives on agencies. By managing costs fully outside of allowances, agencies are not required to trade off claim costs against other Government priorities through Budget process, which differs to how the Government manages costs associated with collective agreement negotiations.

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[110] The Pay Equity Taskforce was established within the Public Service Commission. It oversaw pay equity claims processes within and across the public sector, supporting pay equity bargaining under the Act. It also ran the pay gap action plan programme to help address the various contributing factors to the gender pay gap across the public sector.

[150] Accordingly, a "new fiscal management approach" was recommended. It was implemented through the "reset" brought about through the new "pay equity contingencies" referred to above.

[151] A Public Service Commission and Treasury paper in May 2024 on pay equity changes described the budget implications of the reset. In it, it is said that there would be $450 million of pay equity savings ($150 million per annum from 2025/26) in the 2024 Budget, which "reflects an anticipated reduction in public sector pay equity settlement costs from the cumulative effects of the Pay Equity Reset".

[152] A number of Treasury and Cabinet papers over the balance of 2024 spoke in positive terms of the reset and of expectations that all pay equity claims could be managed within the new framework with its attendant savings in settlement costs. As Mr Harrison KC for the applicants put it, there had been no suggestion at this time that the then current process, as was reset, was not working.

[153] A Treasury report to the Minister of Finance on 30 October 2024 would appear to be the first time that the prospect of legislative change is raised. It refers to there being merit "in exploring legislative options to ensure pay equity settings are fit for purpose on an ongoing basis", adding that "[i]t is also possible that changes can be made in time to affect the outcomes of the teachers and care and support workers' claims".

[154] On 6 November 2024, a meeting of the Ministerial Employment Relations Forum took place. The Minister of Finance and Minister for the Public Service, the Attorney-General, the Minister for Workplace Relations and Safety, the Minister of Health and the Associate Minister of Finance attended the meeting, along with a range of officials.

[155] There are no minutes of the meeting, but its content is reflected in a paper by the Public Service Commission and the Treasury entitled "Strategic discussion on the Government's approach to Pay Equity" which picks up on the legislative change option. Its focus is entirely financial. It records that the costs of all settlements to date had reached $1.75 billion per annum over the forecast period. It provides that the pay

equity reset had changed funding settings to assist with the better fiscal management of claims, but that it was uncertain whether the changes would result in significant reductions in settlement costs. It further says that legislative intervention would be required if a further cost reduction was sought.

[156] The paper set out a range of options, all of which retained a level of commitment to the concept of pay equity, but which acknowledged the structural deficit in the Government's finances. The options included minor and major legislative amendments to the Act.

[157] In a Treasury paper to the Minister of Finance on 12 November 2024, reference is made to the authors' understanding that "you are concerned about the quantum of funding set aside in the contingencies, the inability to trade off that funding against other priorities and transparency concerns of not disclosing these contingencies publicly". Options presented in the paper were reductions in funding contributions or in the size of the contingencies, or a "change to legislative settings". The former was presented as the preferred option.

[158] A Treasury report on 28 November 2024 to the Minister of Finance was described as providing "an overview of options for progressing changes to pay equity settings to better align the current system with your preferred approach". It referred to an upcoming meeting between the Minister and Cabinet colleagues on 3 December 2024, which was referred to as providing an opportunity "to test your colleagues' appetite for changes to the pay equity system from the options presented, ranging from removing pay equity legislation entirely to more marginal non-legislative changes". It went on to refer to the current teachers' and care and support workers' claims representing 90 per cent of the public sector and 82 per cent of the funded sector costs, and said that any "changes to these claim outcomes or funding decisions will have outsized impacts on reducing the pay equity fiscal costs".

[159] The paper went on to say that it had been drafted "with consideration of managing the cost of achieving pay equity, not on the merits of pay equity as a government objective" and then went on to outline options for adjusting the approach and reducing costs in the current pay equity claims.

[160] At the 3 December 2024 Cabinet Strategy Committee meeting, the Minister for Workplace Relations and Safety noted that the pay equity reset had made some progress towards improving the incentives for public and funded sector employees but asked whether further change was needed. The Committee directed officials from the Public Service Commission, Treasury and Crown Law, with assistance from the Ministry of Business, Innovation and Employment (MBIE), to report back to Cabinet by early 2025 with options for dealing with current pay equity claims and a future approach to pay equity.

[161] An MBIE briefing for the Ministers of Finance and Workplace Relations and Safety on 24 February 2025 provided the advice sought. It referred to discussions at the Cabinet Strategy Committee meeting, including concerns that the pay equity process was not well aligned with the underlying employment relations framework; that the entry threshold was too low; and that the process steps were open to interpretation such that publicly funded sector parties took a "cooperative approach to meeting legal obligations" which "may not have minimised fiscal costs." It referred also to a concern that, once a pay equity claim is agreed to be "arguable", there was no opportunity for it to be revisited. It went on to say that:

> The concern was that if no change is made, the current claims would result in pay equity settlements that were larger than the public's perception of any sex-based discrimination issues, particularly for the teachers and care and support workers given pay adjustments that had occurred in the past for those workforces.

[162] The paper presented four pathways: repeal the pay equity process altogether; impose a specific legislative solution for teachers' and care and support workers' claims and design a new legislated pay equity process; use a "legislative pause" for current claims and design a new pay equity process; or allow current claims to proceed under the status quo for the mean time, but "quickly develop specific legislative changes to the current framework which will apply retrospectively with a view to having those claims proceed through the new legislative process". It was the latter approach that prevailed.

[163] Things started to speed up further from this point. On 28 February 2025, a paper from the Minister for Workplace Relations and Safety to the Cabinet Legislation

Committee addressed an "Equal Pay Amendment Bill". It referred to changes in the Bill as addressing "issues that have created perverse incentives or led to unintended consequences in the current legislation". Examples were given of the threshold for entry into the pay equity process being too low, a lack of specificity in key definitions such as "same or substantial similar work" and the "ability to use any comparators".

[164] Then, a few days later on 3 March 2025, a joint Public Service Commission, MBIE and Treasury paper sought agreement "to make the immediate amendment to the Equal Pay Act" and recommended doing so "immediately… in time for Budget night legislation". It said that doing so would remove pay equity costs from the fiscal forecast. A range of proposed legislative changes to pay equity settings were proposed as follows:

(a) raise the entry threshold to consider claims;

(b) narrow the scope of claims;

(c) provide clear rules on the choice of comparators;

(d) clarify treatment of terms and conditions;

(e) provide clear rules on the comparison methodology;

(f) provide for phasing of settlements in the Act and consider adding an affordability criterium;

(g) remove the provision for back dating; and

(h) remove the review of settlements.

[165] A Treasury report to the Minister of Finance on 7 March 2025 records the Minister as having met with Ministerial colleagues on 4 March and having then agreed to pass a set of amendments to the Act. The memorandum refers to the Minister having sought advice about the impact of the changes on the dollar value that had been set for the public sector pay equity contingency. The answer provided was that

"approximately $675 million per annum from 2025/26 could be transferred into the Budget 2025 allowance or used to improve the fiscal outlook". A set of fiscal management options for the adjusted pay equity cost estimates were then provided.

[166] On 14 March 2025, an MBIE paper provided a response to the request from the Cabinet Strategy Committee for options for "navigating current pay equity claims and a future approach to pay equity". The paper recorded the intention as being "to pass any changes ahead of Budget 2025, which requires Cabinet agreement to the amendments on 31 March 2025, and Cabinet approval and introduction of the Bill in early May". The paper goes on to say that:

> There has been limited testing and analysis of the policy proposals in this paper due to the short timeframe to develop proposals and we will continue to work on refining them ahead of Cabinet consideration. It might be necessary to amend some Cabinet decisions before the Bill is introduced. There remains the risk of the changes not achieving the policy intent and unintended consequences arising once the Bill has passed.

[167] The paper referred to the "proposed transitional arrangements" as being likely to be contentious "as they will retrospectively remove and alter people's rights and override and remove some aspects of existing settlements". However, it was said "without such transitional provisions, it is likely that the amendments will not achieve the policy objective" and that, potentially, a number of claims could be filed and determined under the existing Act.

[168] What, then, was "the policy objective"? The primary "policy decision" referred to in the paper was recorded in the following terms:

> Agree to amend the Equal Pay Act so that the purpose aligns with the intent that the pay equity regime provides for a legislative process to facilitate the resolution of pay equity claims where there is evidence of sex-based undervaluation, and to align the requirements that apply when an employer considers a new claim with the new purpose.

[169] The three other policy decisions identified in the report relate to raising the entry thresholds for pay equity claims, amending the definition of "predominantly performed by female employees" to apply where, for the last 10 years, at least 66 per

cent of the employees performing the work are and have been female;[111] and to increasing the timeframe that employers have to consider whether a claim has merit from 45 to 60 working days.

[170] The Chief Executive of MBIE, Mr Blakeley,[112] has defined the "Ministers' objectives" at the time of this paper as "keeping a pay equity claim system but making it better suited to ensuring settlements were related to sex-based differences in remuneration and which were feasible within the timeframes we were working to".

[171] On 19 March, Ministers met to discuss the 14 March advice. They provided feedback to officials, following which a final Cabinet paper was produced. In the 31 March 2025 Cabinet paper, the Minister for Workplace Relations and Safety said, in introductory paragraphs, that "a suite of legislative changes" were proposed "that maintain a process to raise and resolve pay equity claims, while providing a better framework for parties to use to assess whether there is sex-based undervaluation". The Minister went on to say that the changes included ensuring a robust process for raising a claim, that further "clarity and guidance" would be provided in the Act on the appropriateness of comparators, that employers are "able to meet their pay equity obligations in a manner that is sustainable", and that parameters for the Authority relating to fixing remuneration would be clarified. It was then said:

> The changes will significantly reduce the direct and indirect costs of pay equity to the Crown. At the request of the Minister of Finance, I propose that the *funded sector pay equity* tagged contingency is closed and returned to Budget allowances, and that the *public sector pay equity* tagged contingency is significantly reduced. These decisions will return approximately $12.8 billion over the forecast period to Budget 2025 allowances and leaves [$ redacted] to meet the Government's residual obligations in the public sector.

[172] The Cabinet paper then identifies "problems across each part of the regime that need to be addressed", including propositions that the legislation provided insufficient guidance to choose comparators, that it included too much scope for non-sex-based factors to be considered, and that parameters given to the Authority relating to fixing

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111 While the recommendation was that the proportion be 66 per cent, at the Cabinet meeting that followed, it was increased to 70 per cent.

112 Nicholas Blakeley gave evidence through an affidavit and was cross-examined on defined topics. See: *Tōpūtanga Tapuhi Kaitiaki o Aotearoa: The New Zealand Nurses Organisation Incorporation v The Attorney-General* [2026] NZHC 1878.

remuneration do not provide the right incentives. The proposed measures then described in the paper include increasing the threshold for raising a pay equity claim and the timeframe for response, a requirement that unions provide evidence to demonstrate claims that are made, options for employers to opt out, changes to the hierarchy of comparators, adding further prescription to the comparison methodology, the removal of review clauses, a provision for the phasing of pay equity settlements, changes to the way in which the Authority can fix remuneration and award back pay.

[173] As with the previous paper, it is said in the Cabinet paper that, because it was developed in a short timeframe "with limited time to assess implications and unintended consequences, with narrow and targeted consultation", there was a risk that the amendments would have unintended consequences.

[174] The Cabinet paper then went on to discuss the financial implications for the proposals. They included closing and reducing the tagged contingencies, such as to produce a return of $12.8 billion to Budget 2025 operating and 2025 capital allowances.

[175] Cabinet agreed to the proposals in the Cabinet paper at its meeting on 31 March 2025. The minute of the Cabinet decision said that "the policy intent of the proposals outlined in the [Cabinet paper] is to maintain a process to raise and resolve pay equity claims, while providing a better framework".

[176] On 16 April 2025 speech notes were provided to the Minister for Workplace Relations and Safety, simultaneously, for the first, second and third readings of the Bill. In the notes for the first reading, it was said that the Bill was being progressed under urgency "because we have to move quickly to make the changes to the Act to ensure the system is workable and sustainable" and that the proposed changes would benefit people who work in female-dominated occupations and who face systemic sex-based undervaluation of their remuneration, while meeting the Government's commitment to improve the quality of the regulation.

[177] MBIE's Departmental Disclosure Statement was completed on 1 May 2025. In its "general policy statement" it said that:

> The purpose of this Bill is to achieve a better regulatory framework for parties to a pay equity claim to assess whether there is sex-based undervaluation, by ensuring that there are: a robust process for raising claims; clarity on the appropriateness of comparators to assess sex-based undervaluation; sustainability for employers to meet their obligations; and the right incentives to encourage parties to resolve pay equity claims.

[178] The statement recorded that the size of the financial implications for the public sector had been assessed but that, "due to Ministerial time constraints, no analysis on the potential impact of the Bill on specific group [sic] of persons was undertaken".

[179] The final Cabinet paper is dated 5 May 2025. It sought approval of the Amendment Bill for introduction the following day. It begins by saying that the "permissive settings in the Act have resulted in the pay equity framework not working as intended" and that Cabinet had, as a result, agreed to a suite of legislative changes "that maintain a process to raise and resolve pay equity claims, while providing a better framework for assessing whether there is sex-based undervaluation". The proposed amendments are then set out with a recommendation that the Bill be introduced and passed under urgency on 6 May 2025. Cabinet agreed to proceed accordingly.

[180] The Bill was passed by Parliament, following all three readings taking place consecutively, on 6 May 2025.

Can the limits be demonstrably justified?

[181] The first element of the *Hansen* assessment looks to the purpose of the limiting measure. Is that purpose sufficiently important to justify curtailment of the right? Is the limiting measure rationally connected with the purpose?

[182] In submissions for the Attorney-General it is said that the overarching objective of the legislative amendments was to secure the long-term sustainability of the pay equity framework in New Zealand. It is said that, previously, the system resulted in significant public funds committed outside the scrutiny of the yearly budget process. It is said that Ministers were clear that they wanted to achieve pay equity but with a fiscally disciplined system.

[183] With that overarching purpose in mind, it is said that the policy objective was to focus the pay equity process in pt 4 of the Act on responding to historical and current pay inequity. Ministers' concerns were that the previous version of pt 4 had seen low thresholds, a lack of guidance, broadly scoped claims and reviews so frequent as to make it difficult to distinguish between sex-based discrimination and other factors which may have impacted remuneration rates.

[184] Descriptions of this sort align with the way in which Mr Blakeley put it in concluding his affidavit evidence. He said:

> I conclude by emphasising my view that the changes introduced by the 2025 Amendment Bill were designed to make the process of raising and resolving pay equity claims more robust, workable and sustainable. The changes made drew on pay equity work done in the past, as well as experience with the pay equity regime enacted in 2020.

[185] Under cross-examination, Mr Blakeley adjusted that evidence to say that this was not in fact his personal view but, rather, was a restatement of the way it had been expressed in the Cabinet papers which underpinned the decision to introduce the amendments.

[186] However, when the relevant departmental and Ministerial papers — as described above — are considered holistically, it becomes clear that there was more to the purpose than that.

[187] The papers describe the way in which the "pay equity reset" came to be. It will be recalled that the "reset" saw the creation of separate funds — with caps for each — as part of Budget allowances for both public sector and funded sector pay equity claims, rather than leaving the fiscal consequences of pay equity claim outcomes essentially at large. The reason for the "reset" was strictly financial. The 12 December 2023 Treasury briefing paper raised particular concerns about the fact that 80 per cent of the potential cost of pay equity outcomes came from the combined teachers' claim and the care and support claim. The 14 December 2023 briefing paper referred to the cost of pay equity claims being $10 billion and to the fact that public and funded sector employers were not sufficiently accountable for this cost.

[188] This, in turn, led Treasury to say in the minutes of the 13 February 2024 meeting that, if the current arrangements for funding pay equity claims were rescinded, a saving of approximately $150 million per year could be booked in the 2025/2026 Budget.

[189] The reset the followed was, as the Public Service Commission's 27 February 2024 report provides, decided upon by the Minister to "better manage the financial implications of pay equity settlements".

[190] In the Cabinet paper for Cabinet's April 2024 meeting, the Minister of Finance and the Minister for the Public Service explained the changes in fiscal management terms, and the Public Service Commission and Treasury paper that followed in May 2024 identified $450 million in savings as a consequence — $150 million per annum from 2025/26.

[191] However, the record of a meeting of relevant Ministers (as the "Ministerial Employment Relations Forum") on 6 November 2024 shows that, even with the reset, concerns about the costs of meeting pay equity claims remained. Pay equity claim costs of $1.75 billion over the forecast period were identified, and uncertainty was expressed about whether the changes would result in sufficient reductions in settlement costs.

[192] The Treasury paper and report that followed in November 2024 identified options to address the Minister's concerns — concerns described as being focused on the cost and funding of pay equity claims — and it referred to the "outsized impacts" to be achieved through reducing pay equity costs.

[193] Papers over the following months began to look at options, leading promptly to a proposed Equal Pay Amendment Bill in February 2025, a measure that would, as described in the 3 March 2025 Public Service Commission, MBIE and Treasury paper, "remove pay equity costs from the fiscal forecast". As discussed, the legislative changes that would achieve that were the amendments altering the Act under consideration in this proceeding — an Act that has, at the very least, the effects

outlined in this decision on women in female-dominated workforces. Effects which are, for the reasons I have given, discriminatory.

[194] The changes were "valued" in the 7 March 2025 Treasury memorandum on the basis that $675 million per annum, from 2025/26 could be transferred into the Budget 2025 allowance or used to improve the fiscal outlook.

[195] The papers that followed soon afterwards emphasised the intention of passing the amendments ahead of Budget 2025 and, in order to achieve that, the need to have Cabinet agreement on 31 March 2025 and approval and introduction of the Bill in early May under urgency.

[196] Having set this agenda in order to achieve those Budget outcomes, the rationale for the amendments was, from this point onwards, framed on the basis that a pay equity regime was to be maintained but within a more robust and sustainable framework. The explanation became that the old framework was unworkable.

[197] This new rationale can be seen repeated throughout the relevant documents from March 2025 until the introduction of the Bill in May. It is repeated alongside counterfactual criticisms of the then existing regime. It is the same rationale as that given by Mr Blakeley, as referred to above.

[198] However, there is nothing tangible in the relevant materials to support the proposition that the previous system was not working as it should. To the contrary, in the 14 March 2025 MBIE paper and in the 31 March 2025 Cabinet paper referred to above, the point was made that, due to the speed with which the new measures were being progressed, there had been limited time to assess implications. The documents, viewed as a whole, show that the main driver was fiscal, that the amendments stemmed from that driver and that the proposed amendments then led to a public explanation that a pay equity process was being maintained, but that it needed to be more robust.

[199] When the relevant evidence is considered holistically in this way, it cannot readily be said — in terms of the first and second *Hansen* questions — that the rights-inconsistent measures serve a purpose that is sufficiently important to justify the

curtailment of the underlying right or that the limiting measures are rationally connected with the stated purpose of maintaining pay equity but making it more robust.

[200] That is particularly so when regard is had to the importance of both the right to be free from pay inequity and the rights of the pay equity claimants and beneficiaries, which were essentially removed through the new regime. Its effect was, retrospectively, to remove all (then) present pay equity claims against the public sector or publicly funded employers.

[201] The third question in *Hansen* is whether the limiting measure impairs the right no more than is reasonably necessary for sufficient achievement of its purpose. On this point, the Attorney-General says that the Act does not limit relevant rights any more than is reasonably necessary. The submissions for the Attorney-General then identify each of the relevant rights-limiting measures contained within the Act and explain why it is said that the changes were needed. Very much by way of summary, it is said that:

(a) The discontinuance of all pay equity claims on foot was necessary to meet the Government's stated objectives (as I have described them).

(b) Raising the entry threshold for pay equity claims better targets the pay equity system.

(c) Requiring more upfront information and enabling employers to opt out are responses to the broad nature of the previous scheme.

(d) Changing the available comparator selections and methodology ensures that comparators are more appropriately proximate.

(e) Enabling new remuneration to be phased in over time allows employers to better adjust to wage cost increases and may help avoid unnecessarily prolonged bargaining.

(f) Removing the Authorities' power to order back pay reduces the prospect of unaffordable back pay determinations.

(g) Prohibiting review clauses removes the difficulty in determining whether remuneration issues were arising as a result of pay inequity or other external factors.

(h) Not allowing claimants to raise further pay equity claims for ten years enables parties to better determine whether remuneration issues were arising as a result of pay inequity or other factors.

[202] However, while this analysis provides a commentary on the new provisions, it does not establish that there could not be less rights-limiting measures in the circumstances. In the case of each of the measures identified, there are any number of ways in which the right could be impacted less. Just to take some examples, transitional measures could have been put in place for existing claims to avoid discontinuance, entry thresholds could have been lower, comparators approached differently and reviews allowed more frequently. Several of these options were actively considered in the ministerial papers outlined above, such as setting the gender percentage threshold at 66 per cent. The 70 per cent threshold would appear to have been induced very late in the piece and without explanation as to why a less rights-limiting figure was not adopted.

[203] Moreover, the regime as it now stands should be appropriately considered in terms of its overall effect. Individual provisions should not be assessed in silos. There are any number of legislative changes — on the continuum of those available — which could have been less rights-intrusive in achieving the stated objective of maintaining a pay equity system but making it more robust and sustainable.

[204] I turn to the final consideration identified in *Hansen*. Equally, and for the same reasons, I do not see that it could be concluded that the limit is in due proportion to the importance of the objective. More proportionate changes could have been used to achieve a pay equity system that was more robust, workable and sustainable. The

measures may achieve the Budget savings that the lead-in papers estimated, but they are not proportionate to the stated objectives.

[205] For these reasons, I am of the view that the discrimination brought by the Act cannot, under s 5 of the Bill of Rights Act, be demonstrably justified in a free and democratic society.

[206] Furthermore, in terms of s 6 of the Bill of Rights Act, I do not see that a meaning can be given to the relevant provisions that is consistent with the rights and freedoms contained in the Bill of Rights Act, such that a meaning of that type should be preferred. The intended meaning and effect of the changes, and the operation of pt 4 as a whole, is sufficiently clear and I do not see a rights-consistent interpretation that might mitigate those effects.

[207] Accordingly, I find that the Act breaches s 19(1) of the Bill of Rights Act.

Was the decision to enact the Amendment Act under urgency and without prior consultation or notice unlawful in breach of ss 27(1) and (3) of the Bill of Rights Act?

[208] The applicants say that, in the lead up to the passage of the amendments to the Act, the Crown, essentially, held the status of being the respondent or defendant party in many of the then existing pay equity proceedings, and also to the pay equity settlements already reached. As such, the applicants say, it owed duties of good faith, as employer, in the cases in which it had the status of employer under s 13C of the Act. These duties, the applicants say, required it to at least follow the processes set out in the former pt 4 to resolve pay equity claims and, in the words of s 13C(2)(g), "not [to] undermine, or do anything that is likely to undermine, the bargaining…". The applicants refer also to the duty of good faith owed as an employer through s 4(4)(ea) of the ERA.

[209] Against that backdrop, the applicants say that those duties were breached having regard to:

(a) The amount of time, money and effort that had been expended on both sides of the pay equity claim process and the advanced stage that many of those claims had reached, as outlined in detailed affidavit evidence given for the applicant; and

(b) The "secretive process undertaken by the Executive and in particular Cabinet and the Executive".

[210] The respondent objects to the breach of a duty of good faith argument being advanced in circumstances in which it was not pleaded. However, for completeness, the Attorney-General submits that a distinction must be drawn between government agencies as employer or funder of other employers' workforces, and the Government undertaking its constitutional role of policy development and law making. The duty is not, it is said, on the Government qua executive government, but on each employer or claimant in an employment relationship.

[211] There is a good case for the Attorney-General to resist an argument framed as a breach of a duty of good faith. The claim must be considered as it was pleaded and as it was framed through the agreed issues set out in [6] above. All steps in the proceeding have been taken on that basis. But, in any event, I do not see that the notion of good faith adds to, or detracts from, the pleaded issue on whether ss 27(1) and (3) of the Bill of Rights Act have been breached.

[212] Sections 27(1) and (3) are in the following terms:

> **27 Right to justice**
>
> (1) Every person has the right to the observance of the principles of natural justice by any tribunal or other public authority which has the power to make a determination in respect of that person's rights, obligations, or interests protected or recognised by law.
>
> …
>
> (3) Every person has the right to bring civil proceedings against, and to defend civil proceedings brought by, the Crown, and to have those proceedings heard, according to law, in the same way as civil proceedings between individuals.

[213] Under this head, the applicants do not seek a declaration that the Act is inconsistent with the Bill of Rights Act. Rather, they seek a declaration that the Executive acted inconsistently with the Bill of Rights Act in amending it. If the Court was to find that the Executive had acted unlawfully, then any declaration would be one of unlawfulness, not of inconsistency.

Relevant background

[214] The steps in the process leading to the introduction of the Bill that put the amendments in question in place have been outlined earlier. By way of summary — for the purposes of considering this issue — from the end of 2023, Ministers received advice on decisions about the funding of pay equity settlements. In April 2024, Cabinet agreed to the "pay equity reset". However, the reset was effectively regarded as an insufficient measure and, by December 2024, officials gave advice on "high-level legislative options for future claims".

[215] In February and March 2025, officials gave Ministers further advice on the possible changes, including repealing the 2020 amendments, designing a new process for large claims, or pausing current claims while further work was carried out.

[216] When, on 4 March 2025, the Prime Minister, the Minister of Finance, the Minister for Workplace Relations and Safety and the Minister for the Public Service met to discuss potential changes, the Ministers asked officials to develop an amendment option in time for Cabinet to approve the changes on 31 March 2025 so that any financial implications could be reflected Budget 2025 forecasts.

[217] Cabinet decided to amend the Act on 31 March 2025. It agreed, among other changes, to increase the threshold for raising a claim, to introduce a hierarchy of comparators and to discontinue pending claims. The details of the changes have been explained in greater detail earlier in this decision.

[218] The Amendment Act was introduced on 6 May 2025, read for the first and second time that day, reported without amendment by the Committee of Whole House on 6 May 2025 and then read immediately a third time. The Amendment Act received Royal Assent on 13 May 2025.

Some fundamental points

[219] The principles of natural justice have roots that go down to the very core of public administration in our society, and its branches overhang the rights and expectations of all who are affected by exercises of public power. Those fundamental principles have led to the s 27(1) right. But, in choosing to express that right to justice in the Bill of Rights Act, it is given enhanced protection. In this sense, expressed as a Bill of Rights Act right, it stands apart from general administrative law privileges. All state actors must be assessed against the rights and standards established in the Bill of Rights Act, and in the manner required by the Bill of Rights Act.

[220] With that in mind, s 27(1) needs to be given a generous interpretation. A process involving changes to applicants' actual or available proceedings under the Act, and the status of settled pay equity claims, have a sufficiently direct impact on rights such as to warrant their determination by this Court under the Act. That is precisely what s 27 is there for.

[221] However, there is no right at common law, or under s 27(1), to be consulted prior to the Executive introducing legislation. And there can be no legitimate expectation or other procedural expectation that a statute will not be amended.

[222] In this sense, there is no natural justice right over a government's decision to promote legislation that changes an existing legal position, even when that position is based upon contractual rights.[113]

[223] In the same way, there is no authority for a proposition that the Executive must consult before introducing primary legislation, unless a statutory scheme provides otherwise.[114]

[224] As the Supreme Court in *Ngāti Whātua Ōrākei Trust v Attorney-General* said on the principle of non-interference in parliamentary proceedings:

> [36] Some propositions as to the scope of the principle are not challenged. The first is the proposition, accepted in *Te Runanga o Wharekauri Rekohu Inc*

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113 *Ngāti Whātua Ōrākei Trust v Attorney-General* [2018] NZSC 84, [2019] 1 NZLR 116 at [41]-[42].
114 *ALT New Zealand Ltd v Attorney-General* [2025] NZCA 344, [2025] 3 NZLR 60 at [84]–[86].

> *v Attorney-General (Sealords)*, that a court would not make an order to prevent the introduction of a Bill to the House of Representatives. The second is the proposition that the courts should not try to "dictate, by declaration or a willingness to award damages or any other form of relief, what should be placed before Parliament".

[225] That principle does not go so far as to suggest that the fact that a decision may, potentially, be the subject of legislation would always suffice to take the advice leading up to that decision out of the reach of supervision by the courts.[115] That would, as the Supreme Court said, be to ignore the function of the courts to make declarations as to rights.[116] But this is not a case of that type. It is a pleaded cause of action that focuses directly on the introduction of legislation. I do not think it is right to say, as counsel for the Commission has in this case, that the decision challenged is temporally remote from parliamentary proceedings. The fact that this proceeding was filed after the legislative process leading to an enactment, rather than before, does not change the fact that the challenge here is squarely to the Executive's process.

[226] In addition, the fact that the Act has been enacted and the outcome of this proceeding could, at most, be a declaration does not mean that fundamental principles underpinning noninterference upon the introduction of legislation do not apply. Certainly, the principle should not extend back in time to all decisions connected with the development of policy that eventually leads to legislation. However, the decision in this case — due in part to the speed at which the process moved — related directly to the introduction of legislation and so it is not a decision that requires consideration of where a line should be drawn.

[227] Moreover, a motion to accord urgency, and the decision to accord urgency, are parliamentary proceedings that cannot be criticised or called into question by a court.

[228] For these reasons, the Executive did not act inconsistently with s 27(1) in introducing the Bill to Parliament.

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115 *Ngāti Whātua Ōrākei,* above n 113, at [46].
116 At [46].

[229] I turn to look at s 27(3). It is a provision that affirms the right to bring civil proceedings against the Crown in the same way as against individuals. It is concerned with procedural parity in litigation; not on preserving substantive causes of action. As the Court of Appeal said in *Christian Congregation of Jehovah's Witnesses*, while:[117]

> … s 27(3) is a right to sue the Crown… [i]t does not guarantee the content of the substantive law that is to be applied in such proceedings.

[230] The applicants say that it does not follow from this principle that, where legislation purporting to abolish existing causes of action and determinate existing proceedings is the subject of challenge, the s 27(3) right cannot be brought to bear, both at a substantive right to justice level and at a procedural right to justice level. However, the argument is, in my view, somewhat circular. The declaration sought would be to the effect that it was unlawful for the Government to promote an enactment without consulting. That would provide a substantive right under s 27(3) to the effect that legislation under which they are bringing claims or have existing rights will not change. That is not a sustainable proposition for the reasons given.

Is the content of the Act, following its amendment, inconsistent with the rights to natural justice and to bring civil proceedings in ss 27(1) or (3) of the Bill of Rights Act?

[231] The applicants seek a declaration that the Act as amended is inconsistent with the rights in ss 27(1) and (3) of the Bill of Rights Act. This cause of action is concerned with the content of the Act, as amended, rather than the process leading to the passage of the amendments.

[232] In particular, it is alleged in the statement of claim that s 27 includes a right that the legislature would not enact legislation that:

(a) makes the substantive changes to the former enactment which are in issue; or

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[117] *Christian Congregation of Jehovah's Witnesses (Australasia) Limited v Royal Commission of Inquiry into Historical Abuse in State Care and in the Care of Faith-Based Institutions* [2024] NZCA 128, [2024] 2 NZLR 534 at [57].

(b) retrospectively invalidates and bars existing pay equity claims in civil proceedings (including proceedings against the Crown); or

(c) replaces pt 4 with an amended pt 4.

[233] As I have discussed in considering the previous issue, s 27(3) does not guarantee that the substantive law will not be amended. But, in a substantive way, it is the retrospectivity with which the applicants are concerned, primarily, under this head of claim.

[234] Retrospective legislation is generally considered as being contrary to the rule of law. However, that is not to say that all retrospective legislation is inherently objectionable. And s 27(1) and (3) do not expressly prohibit retrospective legislation, unlike s 26(1) in the context of criminal penalties.

[235] The Attorney-General says that the legislation as a whole is not retrospective and that it operates prospectively. The Attorney-General accepts that the removal of existing rights, agreed to as part of pay equity settlements, does have a backward reaching effect in that it alters an existing right, but says that the fundamental norm that the law under which people operate should not, with retrospective effect, be changed to adverse effect is not engaged here.[118]

[236] Counsel for the Commission puts it on the basis that it is a clear breach of natural justice for Parliament to intervene in ongoing proceedings to alter their outcome or to deny, retrospectively, litigants the fruits of their litigation. It refers to the United Nations Human Rights Committee having previously said in a decision that the discontinuance of proceedings by legislation can be a violation of art 14(1) of the International Covenant on Civil and Political Rights,[119] and refers to decisions of the European Court of Human Rights which have held repeatedly that retrospective

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118 With reference to ss 12 and 33 of the Legislation Act 2019.

119 Human Rights Committee *Apirana Mahuika et al v New Zealand* CCPR/C/70/D/547/1993 (27 October 2000) at [9.10].

legislative interference in proceedings can be a breach of art 6(1) of the European Convention on Human Rights absent compelling grounds of general interest.[120]

[237] The Commission refers also to the decision of the Court of Appeal of England and Wales in *Reilly*, which concerned legislation that validated retrospectively the imposition of sanctions on claimants seeking a job seekers allowance.[121] The Court of Appeal held that the retrospective legislation in that case was incompatible with the rights of claimants who had already appealed against the sanctions imposed. The rights in questions were those under art 6 of the Convention, which reflects s 27(3) of the Bill of Rights Act.

[238] However, I am not content with the notion of taking s 27(1) that far. As the Court of Appeal said recently in *Wairarapa Moana Ki Pouākani Inc* — in relation to a Treaty Settlement Act that deemed the appellants' claim to be settled retrospectively — s 27(3) does not prohibit legislation which alters, invalidates, or extinguishes rights, including rights that are the subject of existing litigation.[122] The Court made the point that s 27(3)'s concern is procedural equity in litigation, not the preservation of substantive causes of action or remedies.

[239] As is said for the Attorney-General, claimants bringing claims under the Act are still entitled to a natural justice right from the body determining them and pay equity claimants can still bring claims against Crown employers. Moreover, if previous pay equity claimants wish to commence their claims again, they may do so — albeit in the context of a different set of criteria.

[240] For these reasons, the Act as amended is not in my view inconsistent with ss 27(1) or (3) of the Bill of Rights Act.

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120 For example in *Zielinski v France* (1999) 31 EHRR 532 (Grand Chamber, ECHR) at [57] and *Scordino v Italy* (2006) 45 EHRR 207 (Grand Chamber, ECHR) at [126].

121 *Regina (Reilly) v Secretary of State for Work and Pensions (No 2)* [2016] EWCA Civ413, [2017] QB 657.

122 *Wairarapa Moana Ki Pouākani Incorporation v Attorney-General* [2026] NZCA 255 at [90]–[91].

Should the Court exercise its discretion to make a declaration of inconsistency in this case?

[241] I have found that the Act is inconsistent with s 19(1) of the Bill of Rights Act and that the limits on the s 19(1) right cannot be demonstrably justified in a free and democratic society.

[242] Once a legislative inconsistency with the Bill of Rights Act has been established, declarations should be made unless there are strong reasons not to do so. That is part and parcel of the courts' role in "declaring the law",[123] and it gives effect to Parliament's intention that declarations of inconsistency form part of the "dialogue" between branches of the government.[124]

[243] In this case, a declaration recognises the rights of the women the applicants represent; women who work within undervalued female dominated workforces. They have, for the reasons I have given, been the subject of unjustified discrimination on the basis of their sex. A declaration vindicates their positions. They deserve to have the importance of the right, and the fact of its breach, recognised by the Court.[125]

Declaration of inconsistency

[244] I make a declaration that the Equal Pay Act 1972, as amended by the Equal Pay Amendment Act 2025, is inconsistent with the right in s 19(1) of the Bill of Rights Act to be free from discrimination on the ground of sex.

Costs

[245] The applicants are entitled to costs. I am inclined to think that costs would be calculated, most appropriately, on a 3B basis. I will leave it to the parties to discuss costs in the first instance and encourage them to do so purposefully in order to arrive at a mutually acceptable outcome. If that does not prove possible, then the applicants

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123 *Make It 16 Inc v Attorney-General* [2022] NZSC 134, [2022] 1 NZLR 683 at [68].

124 New Zealand Bill of Rights (Declarations of Inconsistency) Amendment Bill (2020–2) (select committee report) at 2. See also the discussion in *B v Attorney-General* [2026] NZHC 2179 at [57]–[111] for a survey of the case law and literature concerning the discretion to grant a declaration of inconsistency.

125 *Attorney-General v Taylor* [2018] NZSC 104, [2019] 1 NZLR 213 at [56], per Ellen France J and [101]–[102] per Elias CJ.

may file a memorandum within 20 working days of the date of this decision and the respondent may file any memorandum in response within a further 10 working day period. Any such memoranda should be no longer than seven pages in length (including schedules).

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Radich J

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