FROM EQUALITY TO EQUITY:
THE PURSUIT OF PAY EQUITY UNDER THE EQUAL PAY ACT 1972

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Abstract:

In 2014, the Court of Appeal considered if pay equity was also protected under the Act. In this paper I analyse and critique that decision. It seeks to answer two fundamental questions about the case and wider issues surrounding pay equity. First, it asks whether a mandate does exist under the Act requiring the provision of pay equity. Is the Act restricted to a narrow pay equality interpretation, or is it wide enough to encapsulate pay equity? The conclusion will be reached that little light is shed on the position of pay equity from an interpretation of the statute. Both the inclusion and exclusion of pay equity remain open interpretations. A realist explanation will argue a policy decision, in the absence of an interpretative answer, is driving factor of the Court of Appeal’s findings.

The second question looks to the natural continuation of the current case and asks what should be the avenue through which pay equity is pursued. This is a normative inquiry. Litigation will be considered under both a traditional and strategic approach. The alternate solutions of a legislative and an unregulated market will also be investigates. It will be argued that judicial inclusion of pay equity under the Equal Pay Act is undesirable. Instead, dedicated legislation would prove the most effective means of achieving pay equity.

Key words: Terranova v Service and Food Workers Union, pay equity, pay equality, statutory interpretation.
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I Introduction

New Zealand has had a long history of promoting and protecting the rights of women. The first country with suffrage for women, and the first to have the highest governing offices simultaneously filled by women.¹ These achievements are embedded in the national memory and New Zealand views itself as world leader in the area of women’s rights.² However, these instances do not represent a complete victory over gender discrimination. Amongst others, pay disparity remains a live issue today. The gender pay gap in New Zealand has remained around 10 per cent for the last five years.³ Disparity in pay is the result of many complex, and often intertwined, factors. Social structure, equality of opportunity and discrimination all contribute to the gap.⁴

Under New Zealand legislation pay equality is expressly protected in the Equal Pay Act 1972 (the Act). There must be equal pay for equal work.⁵ However, disparity can still exist where there is equality. In 2014, the Court of Appeal considered if pay equity was also protected under the Act.⁶ Equity requires equal pay for work of equal value. The Court found that pay equity fitted within the scope of the Act.⁷ The Court also gave general direction towards the criteria to be applied when assessing a potentially discriminatory rate of remuneration.⁸

In this paper I analyse and critique that decision. I seek to answer two fundamental questions about the case and wider issues surrounding pay equity. First, I ask whether a mandate does exist under the Act requiring the provision of pay equity. Is the Act restricted to a narrow pay equality interpretation, or is it wide enough to encapsulate pay equity? This question is answered by embarking on an exercise in statutory interpretation. The generally accepted method of statutory interpretation is identified and analysed against the process of the Court of Appeal. The conclusion will be reached that little light is shed

¹ “Famous Firsts” History Group of the New Zealand Ministry for Culture and Heritage <www.nzhistory.net.nz>; and “Silvia Cartwright becomes governor-general” History Group of the New Zealand Ministry for Culture and Heritage <www.nzhistory.net.nz>.
² “New Zealand women” Ministry for Women <women.govt.nz>.
⁵ Equal Pay Act 1972, s 3.
⁷ At [237].
⁸ At [147] and [174].
on the position of pay equity from an interpretation of the statute. Both the inclusion and exclusion of pay equity remain open interpretations. A realist explanation will show a policy decision, in the absence of an interpretative answer, is driving factor of the Court of Appeal’s findings.

The second question looks to the natural continuation of the current case and asks what avenue should be now used to pursue pay equity. This is a normative inquiry. Both the ability and appropriateness of the courts to provide for pay equity will be questioned. Litigation will be considered under both a traditional and strategic approach. The alternate solutions of a legislative response and an unregulated market will also be investigated. It will be argued that judicial inclusion of pay equity under the Equal Pay Act is undesirable. Instead, dedicated legislation would prove the most effective means of achieving pay equity.

II Basis of the Claim and Procedural History

Terranova v Service and Food Workers Union Nga Ringa Tota is the most recent decision in a line of cases beginning with a claim lodged with the Employment Relations Authority.9 This claim was brought by Ms Kristine Bartlett, an aged-care worker. Her claim is that her employer, Terranova, is not providing her a rate of pay consistent with the requirements under the Equal Pay Act. She argues that the entire aged-care sector is paid less because it is dominated by women.10

The Service and Food Workers Union Nga Ringa Tota, of which Ms Bartlett is a member, brought a similar claim seeking a general statement from the Employment Court about the general principles involved in implementing equal pay.11 Because of the potentially wide-reaching implications of this case, the Employment Court considered both claims and answered six preliminary questions of law.12 The Court of Appeal was then asked to review the answers to questions one and six.13 Question one asks what factors the courts

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9 Bartlett v Terranova Homes and Care Ltd [2012] NZERA Wellington 141.
10 At [3].
12 At [118].
13 See Appendix One
can consider when determining if there is a discriminatory rate of pay. Question six looks to the boundaries of relevant evidence for finding a discriminatory rate. Together, both the questions are asking what is the scope of the Equal Pay Act 1972. Is it capable of providing for pay equity? It is the appeal of these questions to the Court of Appeal that is the subject of this paper.

The scope of the Equal Pay Act is of crucial importance to the issue before the courts. If the Act is limited to providing for equal pay then the claims cannot proceed. However, if the Act is wide enough to allow for pay equity then the claim can proceed to a factual determination. Ensuring a mandate for pay equity exists is an exercise in statutory interpretation. It is not a straightforward task. The 1975 report into the progress of equal pay instigated by the Minister of Labour described the section in question as, “the most difficult [section] to interpret.”¹⁴ This is section 3. Section 3 sets out the criteria for determining if an element of discrimination exists in a rate of remuneration.

III Interpretation of the Equal Pay Act 1972

While the public interest in this case lies with its treatment of pay equity, the Court’s decision is essentially an exercise in statutory interpretation. The interpretation of the statute is the determinative factor in the progression of the claim. How the Court approached the exercise is therefore vital in any analysis of the case. This analysis must be grounded in an understanding of the nature and accepted methodology of statutory interpretation. The Court of Appeal’s approach can then be compared and analysed against this yardstick.

Statutory interpretation is far from being devoid of contention. There is debate surrounding the scope, nature and theoretical underpinning of the task set for the courts.¹⁵ However, messiness and multiplicity in method is not a unique phenomenon within the law.¹⁶ The experience of law, in common law jurisdictions, is not that of a code rigidly applied
without input from the adjudicator. Law generally, as with statutory interpretation, is not
capable of scientific precision. Rather, it can be seen as an art form capable of dealing with
discretion and variation. Carter and McHerron show that statutory interpretation is
therefore able to operate effectively within the muddled theoretical context.17 The borders
of interpretation have been marked and a generally accepted practice has been developed
by the courts. This approach will frame the analysis of the Court of Appeal’s reasoning.

A Accepted Method of Statutory Interpretation

1 Text

The starting point for an investigation into interpreting legislation is the text of the statute
itself.18 Section 5(1) of the Interpretation Act 1999 highlights the primacy of text,
requiring the meaning of an enactment to be deduced from the text in light of its
meaning.19 The text sets the boundaries of meanings that are open to interpretation so that
“purpose is constrained by text.”20 A solely text based approach was evident at the genesis
of statutory interpretation.21 However, Graham argues that textualism per se let a
“darkness spread across the face of the law.”22 A textual approach is therefore only the
starting point for an interpretive exercise. Parliament has spoken through the statutory
language. However, pure reliance on this may not provide a conclusion due to ambiguous,
vague and imprecise wording.23 A strict interpretation also has the potential to subvert the
legislative purpose. A further step is therefore required in the process of statutory
interpretation.

2 Purpose

17 At 4.
18 Sir Rupert Cross, John Bell and Sir George Eagle Statutory Interpretation (3rd ed, Butterworths,
London, 1995) at 49.
19 Interpretation Act 1999, s 5(1).
20 Carter and McHerron, above n 16, at 28.
21 Graham, above n 15, at 1.
22 At 1.
23 Colin Manchester and David Salter Exploring the Law: The Dynamics of Precedent and Statutory
Ascertaining the legislative purpose has become this second step. Just as text constraints purpose, purpose enlarges the text.\textsuperscript{24} The legislative purpose gives colour to the statutory wording. While the purposive approach has become an important part of statutory interpretation, it remains subservient to text as noted in s 5(1) of the Interpretation Act 1999. A balance must be reached between text and purpose. Application of the legislative purpose must not go so far as to push the meaning outside of that which is capable on the wording. However, as mentioned, text must be viewed in light of the target of the legislation to prevent the frustration of Parliament.\textsuperscript{25} Purpose can be extracted from a variety of materials. Often the most authoritative statement of purpose will be an internal express description made through purpose provisions.\textsuperscript{26}

3 \hspace{1cm} \textit{Context and values}

Textualism and purpose are the key drivers of statutory interpretation. However, the courts have also found it useful to refer to context, both internal and external, and the values to be drawn from other statutes and international agreements.\textsuperscript{27}

Text does not exist in isolation. Surrounding text provides context from which meaning can be drawn. Extrinsic aids can also act as useful pointers. These include materials relating to legislative history, section seven reports and other existing law including common law.\textsuperscript{28}

In this paper I argue the contextual analysis may extend beyond the temporal bounds set under an orthodox approach to statutory interpretation. The orthodoxy states that context and extrinsic aids can only be relevant before the enactment of the legislation.\textsuperscript{29} To attribute meaning to materials after the fact subverts the idea that meaning and purpose of the legislation is that created by Parliament. However, there is already one accepted exception to this position. Subsequent legislation can be considered to maintain harmony in the statute book.\textsuperscript{30} It is argued a further exception should exist. Clear and consistent government practice in administering an Act can be useful to discovering meaning,

\begin{itemize}
    \item \textsuperscript{24} Carter and McHerron, above n 16, at 28.
    \item \textsuperscript{25} At 29.
    \item \textsuperscript{26} At 39.
    \item \textsuperscript{27} At 133 to 134.
    \item \textsuperscript{28} At 72.
    \item \textsuperscript{29} Terranova v SFWU, above n 6, at [193].
    \item \textsuperscript{30} Carter and McHerron, above n 16, at 73.
\end{itemize}
particularly where an ambiguity exists. Consideration of government practice should be open to the courts. This proposition has support from Carter and McHerron. 31

Values and obligations under the New Zealand Bill of Rights Act 1990, Te Tiriti o Waitangi and international instruments can be used by courts when interpreting statutes. Reference to these materials is justified through presumptions recognised by the courts. The courts presume that Parliament does not intend to legislate inconsistently with the Treaty, the Bill of Rights or international obligations. 32 It is presumed Parliament will not ratify an international agreement until it is compliant. 33 These presumptions are not indefeasible. An express parliamentary intention to the contrary will remove the presumption.

B Court of Appeal’s Analysis and Critique

Statutory interpretation is the result of some failing in the relevant statute. The legislation is imprecise or fails speak to all eventualities. However, formulating statutes without such defects is as desirable as it is unrealistic. The key problem with interpreting the Equal Pay Act in this case is ambiguity. It is unclear whether the Act caters for pay equity or whether it is limited to providing for pay equality. The Court of Appeal applied much of the accepted statutory interpretation process. Each aspect of the interpretation is laid out and analysed.

I Text

The Court of Appeal’s first focus was the statutory text. First, the Court noted that s 3(1) is separated out into two categories in paragraphs (a) and (b). 34 Paragraph (a) sets out the criteria to be applied when work is not exclusively or predominantly performed by female employees. Paragraph (b) then sets out the criteria for work performed predominantly or exclusively by women. The Court viewed the creation of this distinction as suggesting something wider than strict pay equality was intended at the drafting stage. 35 When work is predominantly or exclusively performed by females there is potential for pay inequity.

31 At 85.
32 At 107, 108 and 112.
33 Terranova v SFWU, above n 6, at [227].
34 At [98].
35 At [102].
Pay equality is an unlikely, though not impossible, claim as the usual argument is that the entire workforce has been discriminatingly undervalued due to its gender imbalance. The distinction therefore seems amenable to a wide interpretation by acknowledging two different circumstances where discrimination can exist.

The Court identified a further argument in favour of the Act being widely stated. This is the placement of the criteria for work predominantly performed by women. This could have been situated in either paragraph in s 3(1). Work that is not dominated by a female workforce is unlikely to be subject to an equity claim. Pay equality is what will be argued under the first paragraph. Men are doing the same work in such industries and therefore if discrimination exists a claim can be brought on an equality basis. If work that is predominantly performed by women had been placed in this first category the likely implication is that only pay equality could be brought for this category. Work performed exclusively by women would have, out of necessity, been placed in its own paragraph. Pay equality is not possible when no men do the same work. Therefore, the Court acknowledged the inclusion of work largely performed by women, with that which is exclusive to women, gives an indication something more than equality is intended in paragraph (b).

The Court of Appeal also noted that the drafting is of a poor standard. It is ambiguous and uses circular reasoning at times. The Court relied upon this lack of precision to defeat arguments that the use of definite articles confined the Act to comparisons of the same work. However, the Court did not question the standard of drafting relating to the construction of s 3. The aforementioned textual indications in favour of a wider meaning were not subject to the same scepticism of drafting. By undercutting the quality of the drafting in certain areas it seems to weaken the strength of any textual arguments made.

A textual argument, in favour of a wide reading, remains. This was not considered or identified by the Court. This regards the criteria in paragraphs (a) and (b). The criteria for work performed predominantly by women and the criteria for work without a gender imbalance is the same in all but one instance. Work that is not exclusively or predominantly performed by women has an extra requirement in determining if

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36 At [101].
37 At [101].
38 At [146].
39 At [146].
discrimination exists. The evidence of higher wages must come from the same work or class of work. This constraint is not imposed for work that is performed largely by women. If it was, it would likely prove fatal to any attempt to claim inequity. Equity claims argue that the entire sector has been undervalued and therefore inter-sector comparisons are needed. Therefore, not placing this constraint on paragraph (b) signals, at the very least, pay equity has not been prevented by the text of the Act.

As demonstrated in the accepted method of statutory interpretation, text acts as a boundary. It constrains the extent to which purpose and context can operate. Here no boundaries are drawn. No clear distinction is made between equity and equality. There are tentative indications from the construction of the text that a wider meaning is possible. These indications go beyond those identified by the Court. However, the limitations of these signals must be recognised. There is nothing explicit and they must be weighted accordingly.

2 Purpose and context

The Court of Appeal then sought to uncover the legislative purpose. The purpose is the reason for the enactment of the Equal Pay Act. Deducing this purpose has the potential to resolve the ambiguity by colouring the statutory language. Several different materials were used in an attempt to draw out the legislation’s purpose. These were parliamentary debates, commissioned reports and subsequent legislation.

While the purposive approach has taken its place in the generally accepted principles of statutory interpretation, there are aspects of ascertaining purpose that remain in a more tenuous position. The main debate surrounds the idea of parliamentary intent. Parliamentary intent is the reasoning and motive attributed to House of Representatives in enacting the relevant piece of legislation. Parliamentary debates are often used as evidence of this intent. The debate on parliamentary intent is relevant to the discussion of the Court of Appeal’s analysis. The Court attempted to uncover parliamentary intent through

40 Equal Pay Act, s 3(1)(a).
41 Terranova v SFU, above n 6, at [104].
43 At 30.
44 Carter and McHerron, above n 16, at 97.
an investigation of the parliamentary debates. The leading opposition views the notion of ‘parliamentary intent’ as an artificial construct. Proponents of this view argue that Parliament is institutionally incapable of forming intent. It is a body made up of many constituent parts and therefore cannot form a single mental state. The artificial product is to be valued more for its linguistic convenience than its depiction of reality. In response, Ekins has argued that Parliament is capable of forming an intention, in what he terms ‘legislative intent’. He conceives that an intention is formed when legislators jointly act on a proposal. Through majority vote Parliament chooses the proposal as one body. This view sits conceptually better with the constitutional role of Parliament. The majority of the body elects to take action by passing an Act of Parliament. In the current proceedings the Court acknowledged the capacity for Parliament to form intent. Parliamentary debates were examined for any enunciation of reason or intent. However, there was none. The Court found that the speeches failed to speak to the ambiguity. For the most part this is an accurate summation of the debates. The speeches engaged with the general idea of discriminatory rates of pay but did not examine the scope of the proposed remedy.

However, there is one aberration. During the First Reading the Hon Hugh Watt, Deputy Leader of the Opposition, gives the clearest statement in favour of pay equity evident in the entire statutory interpretation exercise. “We welcome the introduction of a Bill that provides for equal pay for people doing equal work…” Equal work as opposed to the same work is the essence of any pay equity issue. This sentiment is not repeated at any stage in the parliamentary debates by Watt, nor is it evident in the speech of any other member. This raises a further aspect to the debate of parliamentary, or legislative, intent. Can Watt’s view be attributed to Parliament as a whole and form the intent from which the courts can deduce purpose? It asks whether the actions of one can inform the judicial understanding of the actions of the whole. Ekins argues it cannot. Individual motive is capable of being distinguished from the intent of the Legislature. The intent of the Legislature manifests when Parliament acts as a whole. Watt’s statements do not constitute

45 Terranova v SFWU, above n 6, at [86].
47 At 5.
48 At 231.
49 At 230.
50 Terranova v SFWU, above n 6, at [86].
51 At [203].
52 (29 August 1972) 380 NZPD 2178.
53 Ekins, above n 46, at 230.
the choice of Parliament to act on a proposal and instead should be viewed solely as the views of an individual. Therefore, from repeated judicial examination of parliamentary debates, the accepted method of statutory interpretation acknowledges the institutional competence of Parliament to form an intention. Parliament has not formed an evidenced intention that distinguishes between equity and equality.

The Court of Appeal continued its purposive investigation with the 1971 Commission of Inquiry report into equal pay.54 This report was the platform used to introduce the Equal Pay Bill into the House.55 The report did not attract much focus from the Court of Appeal. Within the report passages were identified at times supporting, and at other times rejecting, the inclusion of pay equity. This lack of consistency was the reason given for not engaging with the report more deeply.56

Inconsistent and ambiguous is a fair representation of the report. It is clear that the report advocated for pay equality but its intent towards pay equity is not so apparent. Equal pay is defined but not in a way that explicitly rules pay equity in or out.57 The Commission accepted that gender discrimination manifests in both pay inequality and inequity and acknowledged the premise of equal pay for work of equal value.58 However, acknowledging the problem exists does not mean the report recommended action to be taken. There is no explicit statement that pay equity should be addressed in any subsequent legislation. The Commission rejected the implementation of a universal job evaluation tool that assesses work on an objective basis.59 This type of assessment is commonly, though not exclusively, used in pay equity investigations.60 Therefore, the report does not clarify the purpose of the Act. The same substantive conclusion as the Court is reached.

Perhaps a further unarticulated reason for not engaging in depth with the report is the nature of the information itself. Under an orthodox approach to statutory interpretation there is generally reluctance from the judiciary to investigate departmental and policy materials such as this report.61 However, in this paper I argue that there should be greater

54 Equal Pay in New Zealand (Commission of Inquiry, September 1971).
55 Terranova v SFWU, above n 6, at [18].
56 At [86].
57 Equal Pay in New Zealand, above n 54, at 20.
58 At 19.
59 At 47.
61 Carter and McHerron, above n 16, at 96.
judicial engagement with this type of material due to the constitutional setting. The justification for the orthodox approach is that the locus of legislative power lies with parliament.62 Parliamentary intent cannot be found in departmental documentation. In a Westminster system, Parliament is giving the role of legislating. The formulation of policy is the purview of the Executive. However, in this constitutional set up the government holds a majority in the House of Representatives.63 The government, along with its coalition partners or allies, therefore has the potential to give effect to its policies directly. The input of the parliamentary process, particularly Select Committee, must not be overlooked. However, the department policy can remain a key driver in the enactment of legislation. It can be a rich source for illuminating the purpose of the legislation. The argument is that it can be artificial in certain cases to refer only to parliamentary intent. Where executive policy has been driven through the House it may be useful to recognise the departmental purpose. The implication of this argument is not that intent or purpose does not exist. Rather, that because the locus of that intent lies elsewhere, different materials may be relevant in determining this purpose. Greater judicial access to departmental and policy-based materials may be more useful to uncovering than those provided by Parliament. There are close links with the report and the Act with instances of recommended drafting being closely replicated in the statute. The policy and intent behind the report is therefore of direct relevance in ascertaining the purpose of the Act.

An action that was carefully deliberated by the Court is the enactment of the Employment Equity Act 1990.64 The Court of Appeal did acknowledge that this factor weighed in favour of a narrow conception of the Equal Pay Act.65 The purpose of the 1990 Act was to provide for pay equity.66 It established the machinery for dealing with claims where work of equal value was not attracting an equal rate of remuneration. The purpose of enacting this statute is therefore directly relevant to the current inquiry. If the 1990 Act was seen as a novel step in providing for pay equity by Parliament then there is a strong implication that it was not provided for in the 1972 legislation. The Equal Pay Act is restricted to pay equality. However, if the 1990 Act was merely providing the machinery for the framework of its predecessor, or somehow augmenting the existing regime, then the wider conception is more appropriate. The Court of Appeal was correct to identify that the reports leading to

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62 At 56.
63 This may be a single-party majority, coalition or other governance agreement.
64 Employment Equity Act 1990.
65 Terranova v SFWU, above n 6, at [198].
66 At [184].
the Act and the parliamentary materials themselves are inconclusive.\textsuperscript{67} Statements support both reasons for enacting the legislation.

However, there is one report which is clear and should arguably have been given more weight by the Court. This report was entitled “Towards Employment Equity” and was produced by the Government Working Group on Equal Opportunities and Equal Pay.\textsuperscript{68} It was of the view that pay equity was not provided for in legislation as it stood in 1988. The report definitively states, “The Working Group agrees that the present Equal Pay Act 1972 does not provide a remedy based upon a claim of equal pay for work of equal value.”\textsuperscript{69}

This report deserves to be given significant weight. Part Two of the report proposes draft legislation to be enacted to address the pay equity problem.\textsuperscript{70} The suggested drafting is a close representation of what was enacted in the 1990 Act. The three parts bear identical titles and the broad approach is the same. It is clear the report played a large role in producing the Employment Equity Act 1990. From a variety of reports since the 1972 Act there is a general consensus that something more is needed for pay equity to be remedied.\textsuperscript{71} The reports work on the assumption that further legislative intervention is necessary.

The orthodox position is that occurrences after the passage of an Act do not affect its meaning.\textsuperscript{72} This includes the formation of a generally held working understanding of how the Act operated. As has been argued, an exception to the orthodoxy should exist where government practice and working knowledge has been built upon a particular understanding. This is particularly desirable where ambiguity persists. The working understanding of the Act which has been generally accepted for four decades, evidenced by the enactment of the 1990 Act, should be given weight. The current proceedings are the biggest challenge designed to test that working assumption.

Purpose and context have been intertwined in this analysis. The Court of Appeal mainly attempted to deduce the purpose through the employment of extrinsic contextual aids

\textsuperscript{67} At [186].
\textsuperscript{68} Towards Employment Equity, above n 4.
\textsuperscript{69} At 15.
\textsuperscript{70} At 25.
\textsuperscript{72} Terranova v SFWU, above n 6, at [177].
including reports and parliamentary debates. This is hardly surprising for two key reasons. First, the main purposive aids set out in the accepted method of statutory interpretation did not exist at the passage of the Equal Pay Act 1972. Purpose provisions and explanatory notes have been a comparatively recent development. In their place the Long Title does little to speak to the distinction at issue in this case. Second, extrinsic contextual aids, particularly legislative history materials, are closely connected with purpose. While the accepted method of statutory interpretation draws a line between the two, the two concepts are not mutually exclusive. The extrinsic aids can be relevant to both purposive and contextual inquiries. A degree of overlap exists between the inquiries.

3 Values

The Court gave considerable focus to New Zealand’s international obligations, particularly under the International Labour Organisation’s (ILO) Convention Concerning Equal Remuneration for Men and Women Workers of Equal Value. This convention requires signatories to provide for equal pay including for work of equal value. Pay equity clearly comes under the ambit of this instrument. The focus on the international dimension was in response to the Employment Court’s decision that placed considerably more emphasis on these obligations than required. The Court took a more restricted view on the relevance of the international context to the interpretation of the statute.

The Court of Appeal was right to draw little interpretive help from New Zealand’s ratification of the convention. Parliament waited to ratify the convention until after the enactment of the Equal Pay Act in 1983. The Equal Pay Act is the most likely piece of legislation in existence at the time to fulfil this requirement. However, there is little evidence to suggest the Act was passed to ensure compliance. Furthermore, if New Zealand had legislated solely for pay equality in 1972 this would not be inconsistent with the ILO Convention. Both narrow and wide conceptions are consistent with the Convention. A narrow view would simply represent a partial implementation of the

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73 At [113].
74 Carter and McHerron, above n 16, at 132 and 133.
75 Terranova v SFWU, above n 6, at [216].
76 Convention Concerning Equal Remuneration for Men and Women Workers of Equal Value (opened for signature 29 June 1951, entered into force 23 May 1953), art 2(1).
77 Terranova v SFWU, above n 6, at [231].
78 At [231].
79 At [228].
requirements. However, the limits of this argument need to be acknowledged. There is little evidence to link the Act with ratification.

4 The findings on interpretation

The Court decided on balance that the textual, purposive, contextual and value factors weighed in favour of the Act providing for pay equity. The Court did acknowledge this was a finely weighted decision. In no area was there a clear, or even persuasive, reason to adopt a particular meaning. The text is the strongest of all factors and yet it fails to make any clear demarcations.

This analysis of the Court of Appeal’s reasoning does not show any great divergence with the generally accepted method. The differences are relatively minor and their impact minimal. However, while the reasoning is similar, the conclusions reached by the Court and this paper are significantly different. It is my assertion that an exercise in statutory interpretation does not provide a satisfactory answer. The majority of the investigation is characterised by the materials failing to engage with the ambiguity. Those that do provide such weak arguments it is difficult to justify a balancing exercise. Despite the attempted interpretation the scope of the Act remains unclear. The question of the inclusion or exclusion of pay equity remains unanswered.

A possible explanation of the divergence in conclusions can be seen when viewing the Court of Appeal’s decision through a lens of legal realism. Legal realism refutes the claim that legal reasoning is an autonomous process guided solely by law. Instead it looks to social and political factors that impact on the outcome. With the failing of the interpretive exercise the Court was left with a policy choice between two options: providing for pay equity under the Act, or not. The decision to include pay equity was an unarticulated policy decision.

While statutory interpretation is not the focus of this paper, the application of the accepted approach to interpretation has identified some inadequacies within the orthodoxy. In particular the debate surrounding parliamentary intention remains an active source of discussion. The relevance of departmental documents and consideration of subsequent

80 At [237].
81 At [236].
occurrences are ways in which the orthodox approach could be strengthened. However, this has not impeded the ability of the courts to adopt a purposive approach. Using the language of ‘purpose’ as opposed to ‘parliamentary intent’ has insulated the debate to some degree. Purpose is simply stated as what Parliament was trying to achieve.83

IV Continuing the Path to Equity

The Court of Appeal’s decision has made it possible to litigate pay equity claims under the Equal Pay Act. There are two ways litigation could be used to achieve pay equity. First, litigation is traditionally conceived as two parties seeking judicial resolution of the relevant dispute. The claimants would be asking the Court to provide judgment, create precedent and hear future claims on a case by case basis. Alternately, the court action could also be used for strategic positioning. The possibility of an unfavourable judicial ruling creates pressure to resolve the issue through settlement. However, each of these approaches exhibits some degree of ineptitude in providing a desirable solution. Alternate avenues remain open outside of the courts. An unregulated market and a legislative response also potentially have the capacity to provide an equitable pay result. Considering litigation and the alternate methods leads to a wider discussion about what is the appropriate avenue for achieving equity. This is a normative inquiry. It asks what path is the most effective in reaching the desired outcome. I will argue that a legislative response would be the most desirable progression in achieving pay equity.

A Litigation

As established there are two ways litigation could be used to achieve a solution favourable to pay equity. First, litigation could be used to create precedent for future claims. In this way the judicial verdict would provide the solution. It would be resolution by litigation. Second, litigation could be used strategically to pressure an extrajudicial agreement. This would be resolution by strategic litigation.

83 Carter and McHerron, above n 16, at 29.
Resolution by litigation

By making these applications Ms Bartlett and the Union are effectively asking the Court to create precedent for pay equity under the Act. The Court is being asked to resolve the current dispute and create precedent for future claims to be brought. Litigation provides the solution. The Employment Court recognised it was deciding on a novel point of law. However, there are strong arguments against courts attempting to cater for pay equity.

One reason the courts may not be the preferred avenue for addressing pay equity is the inherent practical difficulties in addressing the highly complex issue. If the current proceedings were to continue there are three key areas that may prove challenging. These areas are finding a comparator group, establishing causation and obtaining guidance from the courts.

(a) Finding a comparator group

First, a comparator group to the claimant would need to be identified. Comparator groups are used where it is deemed inappropriate to gather evidence from within the female-dominated industry. It appears that comparator groups will largely be used where the claim is of systemic undervaluation of the entire industry. Comparator groups represent work of equal value and would be used as evidence of what would be paid to a man in the claimant’s position. The Court of Appeal stopped short of giving detailed directions about how to find such a group in the preliminary hearing but the need for such a group is addressed generally. The Court of Appeal referred to tools that are used to calculate the size of a job. These are known as job evaluation systems. Job evaluation systems weigh up a variety of factors to measure the magnitude of the work. These factors include knowledge needed, physical exertion, emotional demands and working conditions. The Department of Labour devised an equitable job evaluation tool, known as the EJE, for the express purpose of removing any gender-based discriminatory assumptions and biases when assessing a job. However, the EJE is not the only tool available. Other tools include a Position Analysis Questionnaire and a non-analytical system. These tools

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84 SFWU v Terranova, above n 11, at [7].
85 Terranova v SFWU, above n 6, at [72].
86 At [63].
87 At [165].
88 “Equitable Job Evaluation”, above n 60.
89 Robert Madigan and David Hoover “Effects of Alternative Job Evaluation Methods on Decisions
approach the task of assessing a job in different ways. Factors deemed relevant change depending on the system in place. An empirical investigation was carried out examining various tools used within the United States. It acknowledged the difficulties that arise when equitable evaluation tools are not regulated, “because universal norms of worth do not exist, the concept of worth incorporated in different job evaluation plans is likely to vary.”90 Their study showed that the size of job, relative to another, was likely to be a reflection of the particular tool used. This is a highly undesirable outcome. Justice will not be seen to be done if the result is dependent on procedural matters and not the existing discrimination.

Of course this difficulty could be overcome if a single system was adopted. In a 2009 report by the Department of Labour it appears the EJE is still favoured.91 The Department acknowledged that a review of the tool’s usability would need to be carried out. While this review did take place there was no detailed conclusion on the usability point.92 It was acknowledged that the tool has been used infrequently at best but there was no discussion about the reasons for this.

(b) Causation

The comparator group, once found, is evidence of what men would be paid to perform the same work as the claimant. However, any differences in two groups that carry out work of equal value are not necessarily the product of gender discrimination. This is the inherent difficulty in treating unlike as like. This was not discussed in the Court of Appeal decision, but it is not necessarily an omission in a preliminary hearing. It is more likely to be considered during factual determination. However, causation will be a relevant consideration at that stage. The difference in pay must be caused by gender discrimination. Wages in an industry are the result of a variety of factors. The value of the work alone is not determinative. Empirical evidence shows that good performance by an industry has a direct impact on wage levels.93 High demand within an industry can also inflate wages.

90 At 85.
91 Equitable Job Evaluation Project Overview Report (Department of Labour, September 2009) at 17.
92 At 17.
This has been evident in the construction sector during the Christchurch rebuild. Furthermore, the funding structure of an industry can be of influence. In the aged-care sector, the focus of the current litigation, there is a difference in the rate of remuneration between what is paid to aged-carers carrying out their roles in public hospitals and carers carrying out the same tasks in private rest-homes receiving government subsidies. These various influences demonstrate that the quantum of a wage is more than the sum total of the value of the work.

These factors impact on the rate of remuneration but in no way are attributable to gender discrimination. If causation is not required when assessing comparator groups then the claimant group is effectively being saddled with an advantages or disadvantages of the comparator industry. However, if the claim if brought under the Equal Pay Act it is clear causation must be established. The Act is limited to providing for non-discriminatory pay as defined in s 2. This highlights that wages can only be corrected to the extent that discrimination is responsible.

Causation in this context is difficult to prove. The 1971 Commission of Inquiry acknowledged that, “to put the point simply, pay rates are not based solely on equal job content or on equal value of what is done.” In each new factual scenario, it will require a comprehensive investigation. It will be necessary to determine which part of the comparator’s wage reflects the value of the work and which is the result of other factors. It is also not clear if a positive causal link is necessary. It may be enough that there is an unexplained discrepancy in rate of remuneration.

(c) Guidance

The Court of Appeal has recommended that the next step in the current proceedings is for the Employment Court to provide a statement of principles under s 9 of the Act. Section 9 allows the Court to state general principles for the implementation of equal pay.

94 “Where the jobs are: New Zealand’s high skill industries drive staffing demand” Hays Specialist Recruitment Pty Ltd <www.hays.net.nz>.
96 Equal Pay Act, s 2.
97 Equal Pay in New Zealand, above n 54, at 45.
98 Terranova v SFWU, above n 6, at [239].
99 Equal Pay Act, s 9.
However, from the potential practical problems, arising from first trying to find a comparator and then prove causation, it appears more detailed directions may be needed. In the United Kingdom the Employment Tribunal was able to give such precise instructions in *Hartley v Northumbria Healthcare NHS Foundation Trust*.\(^{100}\) This 2009 decision provided in-depth guidance on pay evaluation systems. Without a similar level of judicial direction as to the appropriate job evaluation tool procedural inconsistencies are likely to result in the New Zealand jurisdiction. Causation is such a complex investigation that parameters would be useful to limit the scope of inquiry.

While this detailed direction would undeniably be helpful in pay equity cases brought under the Act, it seems to fall outside the power given in s 9. There is a tension between the detailed direction needed and the general power given. Fitting the required detailed framework within s 9 seems to be stretching that provision beyond its capabilities. The 1975 Progress of Equal Pay in New Zealand report acknowledged the need for further guidance.\(^{101}\) However, s 9 was not identified as the appropriate method of supplying these guidelines. Instead of the courts, it was seen as the purview of the government.\(^{102}\)

While none of these practical difficulties are insurmountable, it does highlight significant practical difficulties in trying to achieve an equitable result through litigation. There is the potential for the claimant to be saddled with an onerous burden, or the courts with a cumbersome task, in identifying a comparator and causal link. It does not appear that the Court is able to mitigate these difficulties by providing an appropriate level of direction. Furthermore, from a utilitarian perspective there is little evidence to show that litigation is able to solve the wider problem of pay equity. In no country monitored by the OECD has pay inequity been completely eliminated.\(^{103}\) Countries such as the United States and the United Kingdom that hear pay equity claims in the courts have not seen any meaningful change in pay gap statistics.\(^{104}\) Evidence in the United States shows that the majority of progress has been made through industry-led deals and legislation.\(^{105}\) When the difficulties

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\(^{100}\) *Hartley and others v Northumbria Healthcare NHS Foundation Trust* [2009] Newcastle Employment Tribunal.

\(^{101}\) *Progress of Equal Pay in New Zealand*, above n 14, at 33.

\(^{102}\) At 33.

\(^{103}\) “Gender wage gap” (2014) OECD <www.oecd.org/>.

\(^{104}\) “Gender wage gap”, above n 103.

of judicially prescribed pay equity are viewed in light of the expected outcome it becomes a less attractive option.

Creating a case by case approach to pay equity also has the disadvantage of increasing workload of the courts. The scope for pay equity claims in New Zealand may be wide reaching. The Chief Executive of the New Zealand Aged Care Association views pay equity as impacting the New Zealand workforce in its entirety. The efficiency of engaging in a case by case system is a further detractor of resolution by litigation.

2 Resolution by strategic litigation

In Terranova the claimants could use litigation to place pressure on the aged care sector to resolve the dispute extra-judicially. The unknown nature of a judicial finding and inconveniences of the litigation process can create pressure to reach a settlement. This is known as strategic litigation. The current proceedings have been openly acknowledged as a test case. Ms Bartlett and the union are trying to achieve pay equity and are testing to see if the existing legislation is capable of providing this. There is also the potential for the positive ruling in the Court of Appeal to be used outside of the courts in the commercial sector. Litigation, or the threat of it, can be used to change behaviour within the commercial sector. McCann explains how this has been used in the pay equity context:

The principal contribution of courts if the provision of a background of norms and procedures, against which negotiations and regulations in both private and governmental setting takes place. The character of these effects thus has very little to do with judicial policy competence or enforcement capacity, and very much more to do with the tactical designs, skills, and resources of citizens deploying judicial endowments to gain position in social venues often far removed from the courts.

Thus industries may wish to take proactive steps when the courts have declared pay equity is provided for under the Act. The decision can also be used as a point of leverage in negotiations between industries and employees or the representative unions. The desired outcome, pay equity, may be furthered without following the full legal procedure. Harlow

106 “Fears government will legislate over pay equity case” Insite Magazine (New Zealand, 10 February 2015) <www.insitemagazine.co.nz>.
107 “Kristine Bartlett and Service & Food Workers Union, above n 95.
108 McCann, above n 105, at 178.
and Rawlings have focussed on this idea of proactive strategic litigation.\textsuperscript{109} This tactic is used by actors and interest groups wishing to bringing about change. It has been frequently employed particularly in the European and American jurisdictions.\textsuperscript{110} Actors within New Zealand such as employee unions and CEVEP, Campaign for Equal Value, Equal Pay, certainly fit the description of an interest group. Their aim is to protect anti-discrimination rights by ensuring pay equity exists. It may be that the pressure generated by the current litigation is the most effective means of achieving their end goal.

While the pressure created by litigation may provide a solution in relation to this claim, the limits of this method must be recognised. Settlements and other agreements reached through strategic litigation do not enjoy the ability to create a precedent for future claims. The problem of pay equity would not be conclusively solved but subdued in this scenario.

\textbf{B \ The Market}

Critics of judicial and legislative steps argue an unfettered market will correct the current disparity.\textsuperscript{111} This argument is based on free-market ideology. Equity will be the by-product of a market free from union pressure and judicial and legislative constraints. Indeed the 1971 report from the Commission on Inquiry recommended that imposing any broad scheme should be avoided.\textsuperscript{112} It was felt any universally applicable scheme was not desirable because of the inherent practical difficulties. Instead it was deemed that industry and the private sector was capable of making progress.\textsuperscript{113} Realistic appraisals of job worth during employment negotiations could achieve pay equity. Those within an industry are best placed to identify and weigh the various factors that affect pay.

There are several factors that cast a doubtful shadow over these claims. First, Melvin argues that even a market free from formal constraints is still subject to the underlying biases and assumptions of society.\textsuperscript{114} In this way the ingrained social attitudes that create

\textsuperscript{110} At 7.
\textsuperscript{111} At 7.
\textsuperscript{112} Equal Pay in New Zealand, above n 54, at 47.
\textsuperscript{113} At 47.
systemic gender discrimination will be perpetuated, albeit unconsciously, by the market.\textsuperscript{115} History has shown that government intervention has been necessary to mitigate the effects of discrimination left untouched by the market.\textsuperscript{116} Second, there have been few formal requirements placed upon the market in relation to pay equity in New Zealand. The broad power under the Equal Pay Act has not been acknowledged until the current litigation.\textsuperscript{117} Despite this prolonged period of freedom there has been no significant correction in the market. The pay gap has remained largely unchanged for over a decade. It therefore seems an unfettered market is not the appropriate avenue for pay equity. Some form of intervention is necessary.

\textit{C Legislation}  

A third way that equity could be provided for is with legislation. Even if equity fits within the Equal Pay Act there is arguably room for a dedicated statute that sets out more defined parameters. Government reports from 1975 and 1987 have recommended the implementation of pay equity legislation.\textsuperscript{118}

For a short period of time New Zealand did have such legislation. The Employment Equity Act was enacted in 1990. The purpose of the Act was to establish procedures for achieving pay equity.\textsuperscript{119} It created a statutory officer to oversee the implementation of pay equity and provided the machinery needed to do so.\textsuperscript{120} Claims were to be lodged with the Commissioner for assessment. However, one of the Act’s strengths was not its longevity. Within a year it was repealed by the incoming National Government. It was repealed due to different political ideologies regarding regulation of employment.

Enacting legislation similar to this is a strong option to be considered. The continuing existence of the 1990 Act would render the current proceedings void. Pay equity would clearly be provided for. There are a variety of forms this new legislation could take. A revival of the 1990 regime is one these options. Changes in the employment context since

\begin{footnotesize}
\begin{itemize}
    \item\textsuperscript{115} At 9.
    \item\textsuperscript{116} At 9.
    \item\textsuperscript{117} Terranova v SFWU, above n 6, at [56].
    \item\textsuperscript{118} Progress of Equal Pay in New Zealand, above n 14, at 33; Towards Employment Equity, above n 4, at 25.
    \item\textsuperscript{119} Terranova v SFWU, above n 6, at [184].
    \item\textsuperscript{120} Employment Equity Act, s5.
\end{itemize}
\end{footnotesize}
1990 necessitate some changes to the original Act. The way in which employment agreements are conducted has moved on. Awards are no longer used and collective bargaining is not so pervasive. Instead individual employment contracts have come into vogue. Consequently Melvin recommends provision in any future statute is made to allow individuals to bring claims on their own behalf.

There are inherent advantages in dedicated legislation. In this paper I argue it is the most desirable method of providing for pay equity. It is able to address the issue with a sufficient degree of detail. The ability to establish a framework is a key reason why this path is to be preferred over a general statement by the courts under s 9. Legislation would also remove the need for interest groups to lobby and pursue strategic litigation in the future. Instead these groups and individuals would be provided with a firm foundation upon which to demand equitable payment. Legislation provides an end solution, removing the continuing uncertainty produced by market and strategic litigation methods. As well as being a highly desirable outcome, a legislative response may also be a more likely response. In the current case government interests are directly affected as a major funder of the aged care sector. There have been signals that the Government is considering taking such a step.

V Conclusion

The issue of pay equity is far from straightforward. Pay equity claims often involve complex evidence and nuanced arguments. To aid with this process, a straightforward statutory scheme is highly desirable. However, the Equal Pay Act 1972 does not provide this particular framework. Interpretation of the statute shows the scope of the Act is not clearly delineated. It is not readily apparent if the Act is limited to providing for pay equality or if it can extend to pay equity. In Terranova v Service and Food Workers Union the Court of Appeal found that the wider meaning was permissible. While this is an open interpretation, the finding is better seen as a result of a policy decision by the Court as opposed to the outcome of statutory interpretation.

121 Melvin, above n 114, at 17.
122 At 17.
123 Two separate Government source have provided information to Insite Magazine to that effect; “Fears government will legislate over pay equity case”, above n 106.
The Court of Appeal’s decision has made it possible to litigate pay equity claims under the Equal Pay Act. However, proceeding with the claim for pay equity under the Act highlights wider normative questions that arise when dealing with pay equity. Resolution through litigation is impeded by practical difficulties. The general power in the Act does not give, or allow for, the required specificity of direction needed in these complex claims. Other avenues for addressing pay equity are open. These are strategic litigation, a legislative response and an unregulated market. The most desirable path open is that of legislation. It is able to give clear, precise direction, cutting across any unconscious social biases.

Equality between genders is a protected right. It is a right the law has recognised and protected in a broad sense.\textsuperscript{124} Pay inequity remains as a source of discriminatory disparity between genders. Pay equity deserves clear protection, best provided for in legislation.

\textsuperscript{124} Equal Pay Act; New Zealand Bill of Rights Act 1990, s 19.
Question 1

In determining whether there is an element of differentiation in the rate of remuneration paid to a female employee for her work, based on her sex, do the criteria identified in s 3(1)(b) of the Equal Pay Act require the Court to:

(a) Identify the rate of remuneration that would be paid if the work were not work exclusively or predominantly performed by females, by comparing the actual rate paid with a notional rate that would be paid were it not for that fact; or 

(b) Identify the rate that her employer would pay a male employee if it employed one to perform the work?

Answer: Section 3(1)(b) 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, responsibility, conditions and degrees of effort as well as from any systemic undervaluation of the work derived from current or historical or structural gender discrimination.

Question 6

In considering the s 3(1)(b) issue of “…the rate of remuneration that would be paid to male employees with the same, or substantially similar, skills, responsibility, and service, performing the work under the same, or substantially similar, conditions and with the same or substantially similar, degrees of effort”, is the Authority or Court entitled to have regard to what is paid to males in other industries?

Answer: They may be if those enquiries of other employees of the same employer or of other employers in the same or similar enterprise or industry or sector would be an inappropriate comparator group.
Appendix Two

Equal Pay Act 1972, s 3

3 Criteria to be applied

(1) Subject to the provisions of this section, in determining whether there exists an element of differentiation, based on the sex of the employees, in the rates of remuneration of male employees and female employees for any work or class of work payable under any instrument, and for the purpose of making the determinations specified in subsection (1) of section 4, the following criteria shall apply:

(a) for work which is not exclusively or predominantly performed by female employees—
   (i) the extent to which the work or class of work calls for the same, or substantially similar, degrees of skill, effort, and responsibility; and
   (ii) the extent to which the conditions under which the work is to be performed are the same or substantially similar:

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

(2) In determining whether there exists an element of differentiation, based on the sex of the employees, in the rates of remuneration for male employees and female employees for any work or class of work, no account shall be taken of any provision in any Act or Order in Council which limits the work female employees may perform.

(3) Subject to any such provision in any Act or Order in Council and to sections 4 to 8, no instrument coming into force after 31 March 1973 shall contain classifications of work that differentiate, on the basis of the sex of the employees, in the work which male employees or female employees may perform.
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