



## Care and support pay equity claim- An assessment of risks and options

<b>Date:</b>	31 August 2023		
<b>To:</b>	Hon Jan Tinetti, Minister for Women		
	Hon Andrew Little, Minister for the Public Service		
<b>Action Sought:</b>	Agree/disagree	<b>Due Date:</b>	4 September 2023
<b>Report No:</b>	2023-0256		
<b>Contact:</b>	Gráinne Moss Chief Executive and System Lead Pay Equity 9(2)(a) [REDACTED] Amy Ross, Manager Pay Equity Taskforce [REDACTED]		
<b>Encl:</b>	No	<b>Priority:</b>	High
<b>Security Level:</b>	IN CONFIDENCE		

### Executive Summary

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1. The care and support pay equity claim is at the stage where sex-based undervaluation has been identified in line with the Equal Pay Act 1972 (the Act).
2. There are some presenting risks to Ministers and parties to the claim, being:
  - a conflation of fiscal management responsibilities with the pay equity process. These legally need to operate separately;
  - involvement of parties outside of the employment relationship, risking complaints of interference in that relationship.
3. Te Kawa Mataaho recommends steps are taken to mitigate these risks, ensure the pay equity process can progress in line with the Act and Ministers can legally manage fiscal challenges.

## Recommended Action

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We recommend that you:

- a **note** the risks to the current process and possible mitigations set out in this advice and forward it to the Minister of Health and Minister of Finance

*Refer/not referred.*

- b **note** that legal and technical advice on any further progress in the care and support worker pay equity claim is available from the pay equity taskforce and can be made available to all relevant Ministers.

*Noted*

- c **agree** that this briefing is not proactively released due to the free and frank nature of the advice and as it contains bargaining sensitive material.

*Agree/disagree.*

Hon Minister Tinetti  
**Minister for Women**

Hon Andrew Little  
**Minister for the Public Service**

## Care and support pay equity claim- An assessment of risks and options

### Purpose of Report

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4. This report outlines the key risks to the pay equity process of the approach to the care and support workers' pay equity claim and identifies mitigations for these risks.

### Analysis:

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#### *Background*

5. A pay equity claim was raised for care and support workers on 1 July 2022. This claim covers care and support workers in 15 employers (representing 29 percent of the workforce).
6. The claim has been progressing under the Framework for Oversight and Support of pay equity claims in the Funded Sector (Funded Framework) [GOV-MIN 20-0033 refers]. This means progress is reported to an oversight group at key milestone points. The role of an oversight group in the Funded Framework is tightly prescribed to ensure the function is aligned with the Act and provides assurance of the pay equity process. Its role is not to consider fiscal, operational or relativity risks. The Pay Equity Taskforce has supplied technical and legal advice to this oversight group to support them to undertake this role, as mandated by Cabinet [GOV-MIN 20-0033 refers].
7. The parties to the care and support claim evidenced the existence of undervaluation and the likely quantum (Milestone 4) in June 2023. This was endorsed by the oversight group, along with the work assessment and analysis (Milestone 3) on 7 June 2023. Written confirmation of the endorsement of both Milestones was sent to the employers on 13 June 2023.
8. The employers presented their bargaining strategy (Milestone 5) to the oversight group on 11 July 2023. The Pay Equity Taskforce provided technical and legal advice to the oversight group indicating that the strategy was in line with the Act.
9. The employers engaged constructively with the oversight group at all stages, including providing detailed written answers to questions when requested. The Pay Equity Taskforce advised that all the criteria required at Milestone 5 had been met.
10. The parties were on track at this time in terms of the timeline Te Whatu Ora and the Ministry of Health had set to have a contingency paper at Cabinet on 28 August 2023.
11. The oversight group did not endorse Milestone 5 although the advice from the Pay Equity Taskforce was that the criteria for this milestone had been met.
12. Recent engagements between the Ministry of Health and Te Whatu Ora with the parties, attempting to settle the claim, are outside of the oversight framework and risk non-compliance with the Act.

#### *Current situation*

13. Te Kawa Mataaho understands that an offer was made in the week of 21 August 2023 direct to the unions and employers to expedite a pay equity settlement. The offer was based on a high-level estimate of costs of \$205 million per annum. The 2022 Cabinet paper which obtained an in-principle agreement to fund for care and support did not set aside a tagged contingency.

14. The \$205m per annum offered does not correspond with the evidence established in the pay equity process as to the amount of undervaluation. This places the parties at risk of being in breach of their obligations under the Equal Pay Act, should they agree to the settlement.
15. We understand Te Whatu Ora requested additional comparators (Health Care Assistants and Mental Health Assistants) be considered, after the parties to the claim had completed the comparator process. This presents a further risk of breach of the Act.
16. The two risks described above also create an additional risk that Te Whatu Ora could be deemed to be the employer or to have interfered in the employment relationship between the parties.
17. Te Whatu Ora has shared with the parties its analysis of how the parties could settle the claim within the amount offered. This could be used as evidence to support a claim of breaching the Act.

*Conflation of issues*

18. There are multiple Government priorities that need to be managed at any given time. This includes fiscal management and planning. The care and support workers' pay equity claim does carry a significant fiscal cost to settle and it is likely Cabinet will need to consider whether a settlement will be extended to the wider sector to ensure that services can continue across the country.
19. The Crown has options in terms of how it funds any pay equity settlement in order to manage fiscal priorities. Ministers have choices as to the level and type of funding provided, particularly when it comes to the funded sector. Pay equity outcomes, however (i.e the actual result of an evidence-based assessment to identify sex-based undervaluation) cannot be altered to address affordability concerns.
20. Further detail of the risks discussed above, and possible mitigations, are set out in the table below:

<b>Action</b>	<b>Risk</b>	<b>Mitigation</b>
Te Whatu Ora and Ministry of Health offering ‘tagged contingency’ outside the established process.	<ul style="list-style-type: none"> <li>• Te Whatu Ora being deemed employer.</li> <li>• The Government being seen to be acting outside of the process outlined in Funded Framework.</li> <li>• Legal risk that a resulting settlement would not be in line with the Act.</li> </ul>	<ul style="list-style-type: none"> <li>• Request independent costings are developed based on the elements identified by the parties as subject to sex-based undervaluation.</li> <li>• Note that if there any concerns about the pay equity process undertaken to establish undervaluation specialist legal and technical advice is available from the Pay Equity Taskforce.</li> <li>• Direct officials to return to the Funded Framework process and provide Cabinet a paper seeking contingency as a matter of priority.</li> </ul>
An offer being made to ‘expedite’ a settlement that does not connect to the evidence gathered and agreed by the parties to the claim.	<ul style="list-style-type: none"> <li>• Ministers and officials being seen to unlawfully influence and alter the findings of an evidence-based process in response to affordability concerns.</li> <li>• The parties to the claim being seen to be in breach of their good faith obligations</li> </ul>	<ul style="list-style-type: none"> <li>• Direct officials to create a clear separation of roles and ensure that no further offers are made outside the established Funded Framework process.</li> <li>• Direct officials to provide a Milestone 5 Cabinet paper reflecting the likely costs of the settlement based on evidence as a matter of priority.</li> <li>• Note that if there any concerns about the pay equity process undertaken to establish undervaluation specialist legal and technical advice is available from the Pay Equity Taskforce.</li> <li>• Convene a meeting of relevant Ministers to work through fiscal options and planning.</li> </ul>

Te Whatu Ora instructing the parties to add in comparators late in the process	<ul style="list-style-type: none"> <li>• Te Whatu Ora overreaching role and potentially acting unlawfully.</li> </ul>	Direct the Pay Equity Taskforce to inform the parties that utilising this extra information is at the discretion of the parties.
Milestone points which have been endorsed under the Funded Framework process being relitigated	<ul style="list-style-type: none"> <li>• Loss of trust in the Funded Framework process which is well supported.</li> <li>• Officials overreaching their process oversight role and acting as a party to the claim.</li> <li>• Pay equity claims being subject to different standards leading to judicial review.</li> </ul>	Note that if there any concerns about the pay equity process specialist legal and technical advice is available from the Pay Equity Taskforce.

## Next Steps

21. We recommend Ministers consider progressing a Cabinet paper outlining the costs of settlement (as evidenced by the pay equity process) and seeking a contingency as a matter of priority. This will ensure consideration of costs, funding and implementation are appropriately considered.
22. Ministers may wish to seek independent costings of the elements agreed by the parties to be subject to sex based undervaluation to inform the costs presented in the Cabinet paper.
23. We recommend Ministers consider directing officials to create a clear separation of roles and ensure that no further offers are made outside the established Funded Framework process.
24. To mitigate legal risks and challenges, we consider that the pay equity ministers (Minster Tinetti and Minister Little) along with Minster Verrall would benefit from coordinated technical and legal advice on any progress in the claim from the Pay Equity Taskforce at Te Kawa Mataaho. This will ensure the integrity of the pay equity process.
25. Ministers may want to have a separate discussion, including the Minister of Finance, about the fiscal management of any potential outcome and any possible extension of the settlement to the wider sector.