

**Constance Emily Minett**

**THE STATUTE SPEAKS AGAIN  
AN ASSESSMENT OF NEW ZEALAND'S JOURNEY  
TOWARDS PAY EQUITY: THE DIFFICULTIES  
AND IMPLICATIONS OF AN EQUITABLE  
SOLUTION.**

Faculty of Law  
Victoria University of Wellington

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*In 1893 women won the right to vote. Since then, women have been calling for pay equal to that of men. This work evaluates the latest and first successful equal pay claim made under the Equal Pay Act 1972: Service and Food Workers Union Nga Ringa Tota Inc v Terranova Homes and Care Ltd [Terranova]. Terranova redefined the Act's requirements for the implementation of equal pay and ended four decades of legislative fossilisation. The scope of the requirement of equal pay for female employees for work exclusively or predominantly performed by them contained in s 3 was interpreted broadly. The potential fiscal implications of Terranova created a situation ripe for political action. The Joint Working Group on Pay Equity Principle was established by the Government and negotiations between the Government and residential care industry began. However, this paper's conclusion is that effective implementation of equal pay is unlikely. The financial cost of the decision is the most significant barrier. There are significant structural barriers to implementation and deeper issues of systematic gender discrimination remain. Viewed correctly, Terranova does not signify attainment of equal pay; rather it is the start of a journey towards successful implementation.*

*Key words*

*Equal Pay Act 1972; Service and Food Workers Union Nga Ringa Tota Inc v Terranova Homes and Care Ltd; Terranova; equal pay; residential care.*

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## Introduction

In 2012 the aged care sector was the subject of an inquiry by the Human Rights Commission. The Commissioner reported that:<sup>1</sup>

In my time as Equal Employment Opportunities Commissioner there has seldom been the degree of unanimity about a work-related issue than there is about the low pay of [aged] carers...

...Carers are one of the lowest paid groups in the country, with many receiving the minimum wage for physically, mentally and emotionally demanding work... The low value placed on care work and its consequent low remuneration is “*undoubtedly gendered.*”

The Equal Pay Act (the Act) was passed in 1972 to address this very issue of gender discrimination in remuneration rates within employment, yet 40 years later the problem still persisted. *Service and Food Workers Union Nga Ringa Tota Inc v Terranova Homes and Care Ltd*<sup>2</sup> is the first successful equal pay claim made under the Act. It is a claim from the residential care sector: Christine Bartlett, a residential aged care worker and her union<sup>3</sup> which has opened a new conversation on pay equity in New Zealand. A statute considered obsolete has now spoken again; it has the potential to address pay inequity and systematic discrimination based on sex in employee remuneration rates. In the Court of Appeal judgment French J pertinently states: “Statutes are always speaking, and the Equal Pay Act is no exception, despite the fact that it has remained largely mute for the past 41 years.”<sup>4</sup>

The objective of this opinion is to examine New Zealand’s journey towards the current legal and political framework and considers implications for pay equity in the future.

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<sup>1</sup> Human Rights Commission *Caring Counts, Tautiaki Tika: Report of the Inquiry into the Aged Care Workforce* (May 2012) at 50.

<sup>2</sup> *Service and Food Workers Union Nga Ringa Tota Inc v Terranova Homes and Care Ltd* [2013] NZEmpC 157.

<sup>3</sup> On the 7th of October 2015, the Service and Food Workers Union merged with the Engineers Printers and Manufacturers Union to become E tū.

<sup>4</sup> *Terranova Homes & Care Ltd v Service and Food Workers Union Nga Ringa Tota Inc* [2014] NZCA 516 [Terranova] at [95].

## Chapter I

### The historical case for change

In 1893 women won the right to vote. Since then, women have been calling for pay equal to that of men.<sup>5</sup> Many thought that in 1972 the Equal Pay Act would finally enable this to occur.<sup>6</sup> The Act was heralded as a significant piece of social legislation, the Prime Minister of the day, the Rt Hon J R Marshall, referring to it as:<sup>7</sup>

... one of the most important pieces of legislation the House will have to consider this session. It is a significant forward move in the social legislation of this country, and it will be recognised as a landmark in our social history. It is in my view a matter of social justice that this should be done.

As a result of the legislation women were moved onto men's pay scales in occupations that employed both sexes, and initially some women's work rates improved relative to male dominated occupations.<sup>8</sup> The early optimism however was not sustained and unfortunately a sizeable gap between male and female remuneration rates remained.<sup>9</sup>

If there was any hope that the Act would address pay inequity this was largely extinguished in 1986 by the case of *New Zealand Clerical IAOW v Farmers Trading Co.*<sup>10</sup> In this case, a union of clerical workers, 90 per cent of which were female, negotiated a National Employment Collective Agreement. They challenged their award on the basis that compared to awards of comparable worth in industries dominated by men, they received lower remuneration. The Court held:<sup>11</sup>

[i]t is thus our view that the choice of the Equal Pay Act 1972 as the vehicle for remedy of the perceived problems in the present case is an

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<sup>5</sup> Linda Hill, "The Politics of Pay Equity." (1993). 9(2) Women's Studies Journal 87 at 92.

<sup>6</sup> Linda Hill, "Equal Pay for Equal Value: The Case for Care Workers" (2013) 27 Women's Studies Journal 14 at 15.

<sup>7</sup> (29 August 1972) 380 NZPD 2180.

<sup>8</sup> Hill, above n 6, at 15.

<sup>9</sup> At 15.

<sup>10</sup> *New Zealand Clerical Administrative etc IAOW v Farmers Trading Co Ltd* [1986] ACJ 203.

<sup>11</sup> *NZ Clerical Administrative etc IAOW v Farmers Trading Co Ltd*, above n 10, at 207.

error of law. The Equal Pay Act ... gives no powers to the Court to do what the union asks.

The case illustrated the limited ability of the Act to redress pay equity. The Court took a narrow view of pay equity and held that in order for a claimant to get relief, the comparator must have done "the same or similar work" to the extent that they were covered by the same industrial award.<sup>12</sup> This interpretation was unable to address issues of entrenched, historical and cultural prejudice in gendered allocation of employment, as the Court was unable to compare awards in two different industries. Some industries, notably the caring industries were almost exclusively female; even the males within the industry were treated as doing "women's work." As a result there were no appropriate comparators within the industry. Outer-sector comparisons were not appropriate according to the Court's interpretation, which restricted any relief that women in female dominated, or exclusively female industries could receive. To those who felt they were being disadvantaged because they were in female dominated industries the possibility of legal remedy seemed remote.

The 1987 report on Equal Pay, commissioned by the Department of Labour, highlighted the issue. It concluded that the Act had failed to reduce the gender pay gap significantly and provide pay equity for New Zealand women.<sup>13</sup> Calls for a review of the Act commenced<sup>14</sup> as low wages, pay inequality and inequity still persisted in female dominated industries despite legislative change.<sup>15</sup>

The June 2012 New Zealand Income Survey reported that average hourly earnings stood at \$22.00 for men and \$19.95 for women, with a difference of \$2.05 per hour.<sup>16</sup> Many felt disillusioned, as the Act had failed to provide the relief that they had believed it would deliver.

Progress in pay equity had stalled and change was needed.

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<sup>12</sup> Rochelle Hume, "Paid in Full? An Analysis of Pay Equity in New Zealand" (1993) 7 Auckland UL Rev 471 at 475.

<sup>13</sup> PJ Hyman and A Clark "Equal Pay Study Phase One Report" (Department of Labour, 1987) at 35-41.

<sup>14</sup> *Terranova*, above n 4 at [33].

<sup>15</sup> *Caring Counts*, above n 1, at 60.

<sup>16</sup> Statistics New Zealand "New Zealand Income Survey: June 2012 quarter" (press release, 4 October 2012) at 2.

## Chapter II

### Barriers and enablers to change

Despite public sympathy for those in low paid female dominated industries, up until 2013 there had been no successful claims under the Equal Pay Act. This was despite an increasingly pay equity friendly environment. In 1990 the Labour Government implemented the Employment Equity Act,<sup>17</sup> a further attempt to implement pay equity, which was repealed by the incoming National Government five months later. It can be speculated that the significant fiscal implications of implementing pay equity would have influenced this decision. International legislation such as the International Labour Organisation's Convention Concerning Equal Remuneration for Men and Women Workers of Equal Value (ILO 100),<sup>18</sup> that aimed to eliminate all forms of discrimination in the payment of workers based on sex, affirmed public opinion around change.<sup>19</sup> The public and international mood around pay equity had strengthened further since 1972; the Act increasingly appeared rooted in the past.

The Act was widely regarded as obsolete largely due to the Court's interpretation of pay equity claims in *New Zealand Clerical Workers*.<sup>20</sup> Change required a trigger; a challenge by an organisation of employers or employees to inequitable remuneration rates under the Equal Pay Act. A new claim before the Courts would enable a new approach to be taken with a broader interpretation of pay equity within the Act.

That claim came in the form of two proceedings filed in the Employment Court in 2013: the first by Kristine Bartlett and the second by the Service and Food Worker's Union: *Service and Food Workers Union Nga Ringa Tota Inc v Terranova Homes and Care Ltd*.<sup>21</sup> These claims were amalgamated by the Employment Court. Bartlett was paid \$14.46 per hour as a residential care worker employed by Terranova Homes, a residential elder care provider

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<sup>17</sup> Employment Equity Act 1990.

<sup>18</sup> International Labour Organisation's Convention Concerning Equal Remuneration for Men and Women Workers of Equal Value 1951.

<sup>19</sup> *Service and Food Workers Union v Terranova Homes and Care Ltd*, above n 2, at [66]-[67].

<sup>20</sup> *NZ Clerical Administrative etc IAOW v Farmers Trading Co Ltd*, above n 10.

<sup>21</sup> *Terranova*, above n 4.

relatively typical of those in New Zealand.<sup>22</sup> Terranova employed 106 female and four male caregivers, all received care giver rates of between \$13.75<sup>23</sup> and \$15 per hour.<sup>24</sup>

The parties claimed that female caregivers employed by Terranova were subject to discrimination based on sex, as they were being paid a lower rate of pay than would be the case if caregiving of the aged were not substantially female dominated.<sup>25</sup> The union requested a statement, pursuant to s 9 of the Act, of the general principles to be observed for the implementation of equal pay. This was the claim that was needed to bring pay equity into the 20th century.

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<sup>22</sup> *Service and Food Workers Union v Terranova Homes and Care Ltd*, above n 2 at [1].

<sup>23</sup> The minimum wage, on 22 August 2013, was \$13.75. Employment New Zealand “Previous minimum wage rates” <[www.employment.govt.nz](http://www.employment.govt.nz)>

<sup>24</sup> *Service and Food Workers Union v Terranova Homes and Care Ltd*, above n 2, at [1].

<sup>25</sup> At [5].

## Chapter III

### Terranova: the case law

The key issue that faced the Courts was determining the scope of the requirement of “equal pay” for female employees for work exclusively or predominantly performed by them and how compliance with this requirement was to be assessed.<sup>26</sup> There were two key sections within the judgment. Section 3 deals with the criteria to be applied when assessing equal pay whilst s 9 concerns the Court’s jurisdiction to state general principles for the implementation of equal pay.

#### *I. Section 3*

##### *A. The Employment Court*

Section 3 contained the criteria to determine whether differentiation in the rate of remuneration based on sex existed. Section 3 provides:<sup>27</sup>

- (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:

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<sup>26</sup> *Terranova*, above n 4 at [95].

<sup>27</sup> Equal Pay Act 1972, s 3.

(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.

The section distinguished between work that was not exclusively or predominantly performed by female employees, and that which was.<sup>28</sup> Section 3(1)(b) set out the criteria that was to be applied for work which is exclusively or predominantly performed by female employees.

There were two possible interpretations of s 3(1)(b).<sup>29</sup> The first was a narrow interpretation where an appropriate comparator had to be identified within the workplace itself.<sup>30</sup> The plaintiffs argued for a broader approach; that the Court may consider all probative evidence as to what a similar male employee would be paid, including those not engaged in the sector concerned.<sup>31</sup> The Court found that the rate of remuneration must be compared with the rate that would be paid to male employees with the same or substantially similar skills, responsibility and service, working conditions and degree of effort.<sup>32</sup> This was substantially broader than the interpretation taken in 1986 in *New Zealand Clerical Workers*<sup>33</sup> and the key reason for the following legal pivot. The Employment Court commented that *Clerical Workers* “was given relatively short shrift, without detailed analysis. The judgment does not amount to a definitive view on the scope of the Act.”<sup>34</sup>

The Court based its conclusions on the “well established principles of statutory interpretation”.<sup>35</sup> It began its analysis with s 5 of the Interpretation Act 1999, noting Tipping J’s comment that: “text and purpose [are] the key drivers of statutory interpretation. The meaning of an enactment must be

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<sup>28</sup> *Service and Food Workers Union v Terranova Homes and Care Ltd*, above n 2, at [13].

<sup>29</sup> At [26].

<sup>30</sup> At [17].

<sup>31</sup> At [25].

<sup>32</sup> At [15].

<sup>33</sup> *NZ Clerical Administrative etc IAOW v Farmers Trading Co Ltd*, above n 10.

<sup>34</sup> *Service and Food Workers Union v Terranova Homes and Care Ltd*, above n 2, at [72].

<sup>35</sup> At [26].

ascertained from its text and in light of its purpose.”<sup>36</sup> The Act’s purpose was “plain”<sup>37</sup> as it is defined within the long title of the Act as intending “to remove and prevent discrimination based on the sex in the rates of remuneration of males and females in paid employment”.<sup>38</sup> A narrow interpretation would be contrary to the legislation’s purpose. As Colgan J commented:<sup>39</sup>

It would be illogical to use a small percentage of men as a comparator group if they are paid less because they are undertaking “women’s work.” Such an approach would distort the analysis required under s 3(1)(b) and fall well short of meeting the dual purposes of the Act.

A narrow interpretation failed to remove or prevent the effects of sex based discrimination on women’s rates and perpetrated historic, structural and current discrimination.<sup>40</sup> *McAlister* made a similar observation.<sup>41</sup>

...a comparator is not appropriate if it artificially rules out discrimination at an early stage of the inquiry. By artificially I mean that the comparator chosen fails to reflect the policy of the legislation.

Consequently, a broad approach was preferred, an interpretation supported by the wording of s 3(1)(b). The use of the phrase “would be” in s 3(1)(b) was also indicative of a hypothetical analysis as “would” is the subjunctive tense and indicative of the theoretical.<sup>42</sup> In a female dominated industry there are no, or few, male workers with whom remuneration rates may be compared. Therefore the comparison by necessity must be hypothetical.<sup>43</sup> When searching for an appropriate comparator the Court was entitled to look more broadly to employment positions, that using gender neutral criterion, could be

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<sup>36</sup> *Commerce Commission v Fonterra Co-operative Group Ltd* [2007] NZSC 36 at [22].

<sup>37</sup> *Service and Food Workers Union v Terranova Homes and Care Ltd*, above n 2, at [31].

<sup>38</sup> At [39].

<sup>39</sup> At [42].

<sup>40</sup> At [40].

<sup>41</sup> *McAlister v Air New Zealand Ltd* [2009] NZSC 78 at [51].

<sup>42</sup> *Service and Food Workers Union v Terranova Homes and Care Ltd*, above n 2, at [36].

<sup>43</sup> At [36].

judged to be of similar value in other industries.<sup>44</sup> Remuneration paid to men in the same workplace or sector was relevant if their pay is “uninfected by current, historical or structural gender discrimination”.<sup>45</sup>

Relevant provisions of the New Zealand Bill of Rights Act 1990 and the Human Rights Act 1993, international instruments and legislative history also fortified the Court’s interpretation of s 3.<sup>46</sup> The broader interpretation was consistent with s 19 of the Bill of Rights Act and the purpose of eliminating both direct and indirect discrimination against women.<sup>47</sup> As the Court noted, “while international obligations cannot affect the meaning of statutory words that are clear, they may influence the interpretation adopted where [statutory words] are open to different meanings”.<sup>48</sup> The Court noted that when Parliament ratified the ILO 100 it intended to become compliant with its articles, namely the requirement that all employees should receive equal pay, for equal work of equal value.<sup>49</sup> The cumulative effect of these observations persuaded the Court to adopt a broader interpretation of pay equity.

### *B. Court of Appeal*

Two points of the Employment Court’s judgment were appealed to the Court of Appeal. The points were interrelated<sup>50</sup> and both concerned the interpretation of s 3(1)(b)’s requirements when assessing whether women were receiving equal pay when performing work predominantly or exclusively performed by females.<sup>51</sup>

#### *1. Point one*

The issue was whether s 3(1)(b) involved:<sup>52</sup>

- a. Identifying what the rate of remuneration would be if the work was not exclusively or predominantly performed by women, by comparing the

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<sup>44</sup> At [46].

<sup>45</sup> *Service and Food Workers Union v Terranova Homes and Care Ltd*, above n 2, at [46].

<sup>46</sup> At [47].

<sup>47</sup> At [55].

<sup>48</sup> At [56].

<sup>49</sup> At [70].

<sup>50</sup> *Terranova*, above n 4, at [15].

<sup>51</sup> At [11].

<sup>52</sup> At [70].

actual rate with that paid to a notional man if it were not a female dominated industry, or

- b. Was limited to what a male employee would be paid if employed to perform the work.

The Employment Court favoured the first interpretation<sup>53</sup> which was affirmed by the Court of Appeal.<sup>54</sup> The reason for adopting this approach lay firstly in the creation of two categories in s3(1), which is the section's "ultimately decisive feature".<sup>55</sup> The section categorised work into that which was exclusively or predominantly performed by women, and that which was not. The creation of two categories was plainly deliberate and any interpretation must make the distinction meaningful.<sup>56</sup> If all that was required was for an employer to point to what it pays male employees doing work predominantly performed by women, there would be no point in having predominantly female workforces as part of the second distinct category. They would be subsumed within the first category.<sup>57</sup> The Court of Appeal drew the same conclusion to the Employment Court on the wording of s 3(1)(b). The use of the phrase "would be" indicated that the comparator was intended to be hypothetical and not limited to actual pay rates paid to males employed by the employer.

The requirement of an external comparison was enforced by the structure and wording of s 3.<sup>58</sup> As of necessity the comparison in an exclusively female workforce must be external.<sup>59</sup> An internal comparison would be impossible as there would be no men with which to compare. In s 3(1)(b) exclusively and predominantly female industries were treated as one category. To be clear, the legislation did not distinguish between them. It follows that if the test that was applied to an exclusively female industry must involve an external comparison, then the test applied to a predominantly female industry must also be external. It follows when considering remuneration rates in predominantly female

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<sup>53</sup> At [12].

<sup>54</sup> At [103].

<sup>55</sup> At [98].

<sup>56</sup> At [98].

<sup>57</sup> At [102].

<sup>58</sup> At [100].

<sup>59</sup> At [101].

industries, and exclusively female industries, that an external comparison with males outside the industry was intended.

## 2. *Point two*

The second point concerned whether evidence of rates paid by other employers and systematic undervaluation was permissible when determining what would be paid to the notional man in s 3(1)(b).<sup>60</sup> The Court held that it was.<sup>61</sup>

Section 3 (1)(b) placed no restrictions on the evidence that could be brought to prove what a hypothetical male with the same, or substantially similar skills and responsibility would be paid.<sup>62</sup> The Court concurred with the Employment Court; in the absence of restrictions or guidelines the purpose of the Act and the definition of Equal Pay became particularly important.<sup>63</sup> The definition within the Act of equal pay was “a rate of pay for work in which rate there was “no element” of sex-based differentiation”.<sup>64</sup> The use of “no element” implied that Parliament intended the Act’s purpose to be applied to the fullest extent possible.<sup>65</sup> There was nothing in the Act’s language to justify exclusion of evidence of male rates in other sectors or evidence of systematic undervaluation<sup>66</sup> and “good reason to admit it in terms of the purpose and definition of equal pay”.<sup>67</sup>

## II. *Section 9*

### A. *Employment Court*

Section 9 confers a broad jurisdiction<sup>68</sup> on the Court to state general principles for the implementation of equal pay:<sup>69</sup>

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<sup>60</sup> At [104].

<sup>61</sup> At [110].

<sup>62</sup> At [105].

<sup>63</sup> At [106].

<sup>64</sup> At [106].

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

<sup>66</sup> At [109].

<sup>67</sup> At [110].

<sup>68</sup> *Service and Food Workers Union v Terranova Homes and Care Ltd*, above n 2, at [116].

<sup>69</sup> Equal Pay Act, s9.

The court shall have power from time to time, of its own motion or on the application of any organisation of employers or employees, to state, for the guidance of parties in negotiations, the general principles to be observed for the implementation of equal pay in accordance with the provisions of sections 3 to 8.

A live issue between parties was not a prerequisite for the exercise of the power.<sup>70</sup> The Court held that it was not possible to define the ambit of their jurisdiction but they were not confined to restating or summarising the existing law.<sup>71</sup> That would be of limited assistance and it cannot have been intended that the Court's powers were to be constrained in this way.<sup>72</sup>

### *B. Court of Appeal*

The Court's power to provide guidance in the form of principles for the implementation of equal pay rates was "important"<sup>73</sup> and "very open-ended".<sup>74</sup> The intended function of the powers was "unclear"<sup>75</sup> as little attention was given to the section by Parliament, the Select Committee that reviewed the Bill or the materials that accompanied the Act.<sup>76</sup> The Court directed the Employment Court to formulate the principles before deciding the substantive claim.<sup>77</sup>

### *III. Judicial criticism*

Although the Employment Court and Court of Appeal reached the same conclusion regarding ss 3 and 9 the judgments differed in the method in which they arrived at the decision. The Court of Appeal considered the issues to be "more finely balanced than the Employment Court's decision suggested" though found that the Employment Court had not misinterpreted the Act.<sup>78</sup> The Court of Appeal placed greater reliance on the statute and was critical of the weight attributed by the Employment Court to purpose, pointing

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<sup>70</sup> At [117].

<sup>71</sup> At [116].

<sup>72</sup> At [116].

<sup>73</sup> *Terranova*, above n 4, at [56].

<sup>74</sup> At [155].

<sup>75</sup> At [156].

<sup>76</sup> At [159].

<sup>77</sup> At [173].

<sup>78</sup> At [81].

out that only in the absence of express guidelines and restrictions is the purpose of the Act and definition of Equal Pay particularly important.<sup>79</sup> Much of their decision was devoted to the reasons why international conventions and other legislation should not have attracted the weight the Employment Court gave them.<sup>80</sup>

The Court of Appeal was critical that the Employment Court combined the two separate appeals by Bartlett and the Union and commented that “the lack of clarity [was] regrettable”.<sup>81</sup> An individual claim, such as the one by Bartlett should have resulted in the determination of a substantive matter, whilst the union’s claim should have resulted in a statement of s 9 principles.<sup>82</sup> The Employment Court did not explain how it envisaged the s 9 application would be conducted, or how it would differ from the determination of a substantive claim.<sup>83</sup>

The Court of Appeal highlighted that the Royal Commission of Inquiry into Equal Pay’s report was ambiguous as all the parties in the case were able to identify passages that supported their competing interpretations.<sup>84</sup> The Employment Court placed significant weight on the report even where “the intention [was not] clear”.<sup>85</sup> There was no comprehensive discussion of the United Kingdom position before it was rejected.<sup>86</sup> When relying on the commission’s finding that women crowded into occupations that had lower rates of pay there was no mention of an earlier statement that claimed this was because women were less likely to find employment in higher paying fields.<sup>87</sup> An analysis based on ambiguous documents cannot be said to be robust and the weight placed on the report was “not justified”.<sup>88</sup>

The reliance placed on the New Zealand Bill of Rights was critiqued. Different interpretations of s 3 simply provided more or less protection for

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<sup>79</sup> At [106].

<sup>80</sup> At [176] and following.

<sup>81</sup> At [61].

<sup>82</sup> At [57]-[59].

<sup>83</sup> At [59].

<sup>84</sup> At [86].

<sup>85</sup> At [89].

<sup>86</sup> At [88].

<sup>87</sup> At [87].

<sup>88</sup> At [95].

employees against discrimination; it did not infringe the right contained in s 19 of the Bill of Rights Act: the right to freedom from discrimination.<sup>89</sup> It follows that s 6, which stipulates that an interpretation consistent with the Bill of Rights is to be preferred, could not be engaged as there could be no initial finding that Parliament's intended meaning was inconsistent with a right or freedom.<sup>90</sup> The Court was also critical of the Employment Court's reliance on international instruments, pertinently the ILO 100 which required governments to ensure equal pay for equal work of equal value; the broader concept of pay equity. Whether New Zealand ever complied with the ILO 100 was "confused"<sup>91</sup> and the significance of the Government's ratification was unclear, therefore its usefulness as an interpretative aid was limited.<sup>92</sup>

Finally, The Court of Appeal applied more merit to arguments based on the 1990 Pay Equity Act; "the Employment Court was too dismissive of them".<sup>93</sup> The Court of Appeal considered that the 1990 Act could be taken into account but the assistance that can be derived from it was limited.<sup>94</sup>

#### *IV. The Supreme Court*

The Court directed the parties to address it on whether the issue was interlocutory and whether the interests of justice required a determination of the issue before the proceeding had concluded. It would be doing so in the abstract before the principles concerning s 9 of the Act were set and before the facts were established.<sup>95</sup>

The application was dismissed, but without prejudice for the appellant's ability to challenge the findings on the preliminary issues.<sup>96</sup> Although the decision was not interlocutory it was an appeal on preliminary questions and therefore subject to the Court's discretion to decline leave. The Court held

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<sup>89</sup> At [213].

<sup>90</sup> At [214].

<sup>91</sup> At [226].

<sup>92</sup> At [226].

<sup>93</sup> At [198].

<sup>94</sup> At [199].

<sup>95</sup> *Terranova Homes & Care Ltd v Service and Food Workers Union Nga Ringa Tota Inc* [2014] NZSC 196 at [7].

<sup>96</sup> At [18].

setting the principles under s 9 was a priority and the application for leave to appeal was premature.<sup>97</sup>

The Supreme Court judgment was of little significance to the law surrounding pay equity as it declined to make substantive remarks before the substantive proceedings in the Court of Appeal had been concluded.

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<sup>97</sup> At [20].

## Chapter IV

### The key legal changes

Colgan J in the Employment Court stated that “statutes are always speaking”<sup>98</sup> and this has proven true for *Terranova*<sup>99</sup>. After four decades of undesirable “legislative fossilisation”<sup>100</sup> *Terranova*<sup>101</sup> had transformed the Court’s application of the Act and provided the first significant step towards realising the social justice that was envisaged by the original legislators.<sup>102</sup> Colgan J further commented:<sup>103</sup>

Legislative fossilisation is undesirable, and that is particularly so in the context of employment relations which are dynamic, the subject of changing social attitudes and values, and ongoing development over time.

As Burrows and Carter suggest, “It would be a pity if undue concentration on the past prevented a statute from developing and doing new jobs with the passage of time.”<sup>104</sup> *Terranova*<sup>105</sup> has returned the potential that the Act could influence progress towards pay equity.

The key legal change resulting from *Terranova*<sup>106</sup> was the Court’s adoption of the broad interpretation of equal pay. There were two possible interpretations of “equal pay”. The first was that the Act intended the meaning to be equal pay for equal work of equal value; the broader concept of pay equity.<sup>107</sup> Pay equity requires that work assessed as needing similar overall levels of skill, responsibility, service, effort and working conditions should be paid equally.<sup>108</sup> The other possibility was that equal pay was limited to requiring

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<sup>98</sup> *Service and Food Workers Union v Terranova Homes and Care Ltd*, above n 2 at [95].

<sup>99</sup> *Terranova*, above n 4.

<sup>100</sup> Lorraine Skiffington, “Heralding in a New Era of Pay Equity” [2013] ELB 123 at 124.

<sup>101</sup> *Terranova*, above n 4.

<sup>102</sup> Skiffington, above n 100, at 124.

<sup>103</sup> *Service and Food Workers Union v Terranova Homes and Care Ltd*, above n 2 at [93].

<sup>104</sup> JF Burrows and RI Carter *Statute Law in New Zealand* (4th ed, LexisNexis, Wellington, 2009) at 254.

<sup>105</sup> *Terranova Homes*, above n 4.

<sup>106</sup> *Terranova Homes*, above n 4.

<sup>107</sup> At [113].

<sup>108</sup> Alka Dhar, “Pay Equity in New Zealand” (21 January 2016) Hui E Community Aoeteroa <[www.huie.org.nz](http://www.huie.org.nz)>.

equal pay for the same, or substantially similar, work; the narrower concept of pay equality.<sup>109</sup>

Both the Employment Court and the Court of Appeal reached the same conclusion holding that a broad interpretation of pay equity was to be preferred. There was a wealth of evidence to suggest that a broad interpretation was intended by the original legislators.<sup>110</sup> At its second reading, National's Minister of Labour made clear that the Bill would apply to "all work performed by women, including work in female intensive industries, where very few males are engaged".<sup>111</sup> A narrow interpretation of equal pay would have negligible impact on structurally entrenched discrimination based on sex and arguably fail to fulfil the purpose of the Act. It follows that a narrow approach to equal pay cannot have been intended.

The fact that both Court's preferred a broad interpretation of equal pay is of key importance as it has changed the legal landscape surrounding pay equity. The combined judicial weight behind the decision has the potential to be the catalyst for change in pay equity within the political sphere.

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<sup>109</sup>*Terranova*, above n 4, at [7].

<sup>110</sup> *Service and Food Workers Union v Terranova Homes and Care Ltd*, above n 2, at [35]

<sup>111</sup> *Hill*, above n 6, at 21.

## Chapter V

### Political and fiscal implications

#### I. *The quandary*

*Terranova*<sup>112</sup> has placed the Government in a quandary. Changes in the legal framework regarding pay equity created a new fiscal and political situation. The potential fiscal implications of *Terranova*<sup>113</sup> created a situation ripe for political action.

The Government is the largest employer in New Zealand, as well as the funding agency for many female dominated employers in the private sector, therefore it has both a political interest and a fiscal interest in the implications of the *Terranova*<sup>114</sup> decision.<sup>115</sup> The financial implications of raising the wage of aged care providers within the residential care industry, and potentially in other female dominated sectors are significant. These salary increases carry the risk that wages margins may be eroded in female dominated industries leading to further fiscal implications. The issues facing the Government have likely prompted action on an issue that has lain dormant for the last 44 years.

The Government must balance multiple interests: that of employees, their employers, trade unions and interest groups within the restrictions of their budget. The government is answerable to the tax payer and sensitive to public opinion, particularly when involved in an issue that has the potential to be highly emotionally charged. There is a vested interest in controlling the political and fiscal outcomes of *Terranova*.<sup>116</sup> This is particularly because *Terranova*<sup>117</sup> and the residential aged care sector, have the potential to act as a manageable case study exemplifying the potential effects of raised wages. If the raising of wages within the residential aged care sector can be successful

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<sup>112</sup> *Terranova*, above n 4.

<sup>113</sup> *Terranova*, above n 4.

<sup>114</sup> *Terranova*, above n 4.

<sup>115</sup> Letter from Dame Patsy Reddy (Crown Facilitator) to Hon Paula Bennett (Minister of State Services) and Hon Michael Woodhouse (Minister for Workplace Relations and Safety) regarding the Recommendations of the Joint Working Group on Pay Equity Principles (24 May 2016) at 4.

<sup>116</sup> *Terranova*, above n 4.

<sup>117</sup> *Terranova*, above n 4.

and fiscally viable for the government, there is hope that this will flow on to other industries. This goes some way to explaining why this case has attracted Governmental interest.

## *II. Macro implications*

Both the Employment Court and Court of Appeal judgments indicated that the outcome of the case has “potentially far reaching implications, not only for the residential aged care sector, but for other predominantly female-intensive occupations as well”.<sup>118</sup> The decision is important for all who work in typically female industries; especially those that involve skills of caring, nurturing, mothering, and emotional labour.<sup>119</sup> Tens of thousands of other caregivers in the disability and homecare sectors, teacher-aides and other school support workers, hotel housekeepers and social workers could all potentially use the case as a precedent for court action. Mai Chen, the lawyer acting for the New Zealand College of Midwives who filed a pay-parity discrimination case on the basis of gender, has commented that the prospect is likely: “In future, we are likely to see more challenges against unlawful discrimination on the basis of a combination of prohibited grounds such as race and gender.”<sup>120</sup> The sectors which are most likely to be affected are health and education; movement is already being seen in the health sector. It has been recognised by these interested parties that the issue of pay equity is not exclusively the concern of the Government. All interested parties have delayed action to attempt to negotiate a political settlement.

The College of Midwives made a pay equity claim in the High Court on 31 August 2015 alleging discrimination on the basis of gender in breach of s 19 of the Bill of Rights Act.<sup>121</sup> The claim argued that midwives were not receiving the same levels of remuneration as those in an analogous or comparable situation based on their difference in gender. The claim identified the appropriate comparator group as mechanical engineers, a group which

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<sup>118</sup> *Terranova*, above n 4 at [7]: *Service and Food Workers Union v Terranova Homes and Care Ltd*, above n 2, at [5].

<sup>119</sup> Hill, above n 6, at 28.

<sup>120</sup> “Perspectives: Mai Chen” (2015) 877 LawTalk 13.

<sup>121</sup> New Zealand College of Midwives “The Claim” (press release, 31 August 2015).

earns 60% more than midwives based on annual gross income after expenses.<sup>122</sup> Shortly following, the New Zealand Education Institute lodged a pay equity claim with the Employment Relations Authority on behalf of three education support workers. The claim alleged that the workers earn \$8 less than a comparable male dominated job; a male corrections worker.<sup>123</sup> *Terranova*<sup>124</sup> may trigger a snowball effect with increasing numbers of pay equity claims. At the heart of the issue is pay relativity. It is unlikely that a teacher will accept that an educational support worker's salary is higher than their own, or a midwives increase in salary may prompt similar action within the nursing industry, whose salary was previously on par with that of a midwife.<sup>125</sup>

### III. *The residential care industry*

Private providers of residential care, such as *Terranova*, receive a per bed care subsidy via District Health Boards at a rate set annually by Government under the Social Security Act.<sup>126</sup> Since 2000, subsidy levels had been based on Ministry of Health modelling which had low remuneration rates for carers.<sup>127</sup> The subsidy has to cover costs of capital, supplies and labour, and largely determines wages. Because of the funding structure Government funding acts as a ceiling on the amount that care worker's salaries can be increased. An increase in wages of aged care workers will place pressure on these subsidies, specifically on the Ministry of Health, who administers them.

The potential economic cost of *Terranova*<sup>128</sup> is significant. Aged Care Association chief executive Martin Taylor estimated *Terranova*<sup>129</sup> could cost \$120 million to \$140 million a year for the 33,000 workers in residential aged

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<sup>122</sup> Chris Hutching "Midwife 'discrimination' gives birth to class action" *The National Business Review* (New Zealand, 31 August 2015).

<sup>123</sup> New Zealand Educational Institute "NZEI supports moves to life pay for thousands of working women" (press release, 20 October 2015).

<sup>124</sup> *Terranova*, above n 4.

<sup>125</sup> Statistics New Zealand "New Zealand Average Hourly Earnings March 2016" <[www.statistics.govt.nz](http://www.statistics.govt.nz)> and Careers New Zealand "Midwife" <[www.careers.govt.nz/](http://www.careers.govt.nz/)>.

<sup>126</sup> Hill, above n 6, at 24.

<sup>127</sup> At 24.

<sup>128</sup> *Terranova*, above n 4.

<sup>129</sup> *Terranova*, above n 4.

care.<sup>130</sup> Change in carer's wages may also affect the remuneration rate expected by other staff employed within the industry, who would expect existing relativities to be maintained. Most of the residential care sector is made up of standalone small or medium enterprises or not-for-profit providers. Martin Taylor, New Zealand Aged Care's Chief Executive, stated that many facilities would likely face bankruptcy if caregiver wages rose by 15 per cent without a supporting increase in Government funding.<sup>131</sup>

Recent Australian case law is an example of the situation that could face the New Zealand Government. In *Australian Municipal, Administrative, Clerical and Services Union v Australian Business Industrial*<sup>132</sup> the Federal Government committed at least \$2 billion to pay for pending pay increases after a successful pay equity claim. The case concerned social, community, home care and disability services workers; a similar position to that held by Bartlett and her colleagues. The decision will result in increases of between 19 and 41 per cent of the minimum wage, which will be phased in over an eight year period.<sup>133</sup> If a similar pattern was followed in New Zealand this would create wage increases of between \$2.75 and \$6 per hour.

#### IV. *Political ramifications*

The potential for large fiscal effects has incentivised the National Government to take political control of the issue. Public interest and the proximity of the next parliamentary election in 2017 are likely to further influence the degree of Government action on the issue. At least 2,500 claims from workers employed in residential care were filed with the Employment Relations Authority in 2015<sup>134</sup> which shows the willingness of those affected to ensure that practical measures are implemented. The additional presence of subsequent claims from the health and education sector suggests that the public will not allow the issue of pay equity to rest. 19.2 per cent of the

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<sup>130</sup> Hill, above n 6, at 28.

<sup>131</sup> New Zealand Aged Care Association "Equal Pay Case" <[www.nzaca.org.nz](http://www.nzaca.org.nz)>.

<sup>132</sup> *Australian Municipal, Administrative, Clerical and Services Union v Australian Business Industrial* [2012] FWAFB 1000.

<sup>133</sup> Andrew Stewart "The first case of equal remuneration on the basis of gender under the Fair Work Act and its implications" Alderman Piper 24 February 2012.

<sup>134</sup> Christie Hall, "Where Next For Equal Pay" *Stuff Business Day* (online ed, New Zealand, 19 January 2015).

working population are employed in the health and education sectors<sup>135</sup> and women comprise 50.8 per cent of the population.<sup>136</sup> If those affected by *Terranova*<sup>137</sup> are dissatisfied with the Government's response, this could be made clear at the next election; a fact that the Government is likely to be aware of.

The next section deals with the political response to the fiscal and political changes.

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<sup>135</sup> Statistics New Zealand "Labour Market Statistics: March 2016 Quarter" <[www.stats.govt.nz](http://www.stats.govt.nz)>.

<sup>136</sup> Statistics New Zealand "Population estimates: Estimated Resident Population (Mean Quarter Ended) by Sex 2016" <[www.stats.govt.nz](http://www.stats.govt.nz)>.

<sup>137</sup> *Terranova*, above n 4.

## Chapter VI

### Government action

#### I. *Open courses of action*

The next section outlines the options that were open to the Government in light of the position in which it has been placed in by *Terranova*.<sup>138</sup> If the Government did not take affirmative action, the responsibility would fall to the Court to state the s 9 principles and equal pay claims would naturally progress through the courts. To leave control exclusively to the Courts would have left the Government in a position where they were unable to influence the outcomes of changes within pay equity. Cases would pass unregulated through the Courts with the government carrying significant fiscal risk. Inaction was an undesirable option. The possible options open were to legislate, negotiate with interest groups or form an inquiry.

Legislating, to state the s 9 principles, is an action that carried benefits and risks. Having the responsibility of stating the principles ensured that Government had control over the outcome. However, any negative criticism of the principles would be attributed to Government.

Legislating to modify the Equal Pay Act was, and still is, possible as the Act is “certainly not nearly as fit for purpose as it could be”.<sup>139</sup> It would not be the first time that case law has prompted legislative change. In 2013 the Government rapidly implemented legislation within the caring sector in reaction to *Ministry of Health v Atkinson*.<sup>140</sup> The New Zealand Public Health and Disability Amendment Bill (No 2) was passed under urgency which allowed relatives of persons aged 18 or older to be paid for disability support services.<sup>141</sup> The legislation excluded spouses of disabled adults and parents of disabled children from receiving compensation and prevented carers from

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<sup>138</sup> *Terranova*, above n 4.

<sup>139</sup> Safety Minister Woodhouse, Stacey Kirk and Sam Sachdeva “Government to Address Pay Equity, Caregiver Wages” *Stuff Business Day* (online ed, New Zealand, 20 October 2015).

<sup>140</sup> *Ministry of Health v Atkinson* [2012] NZCA 184.

<sup>141</sup> Julia Caldwell “Public Health & Disability Amendment Bill (No 2) and restricting judicial review - June 2013” (5 June 2013) MinterEllisonRuddWatts <[www.minterellison.co.nz](http://www.minterellison.co.nz)>.

taking legal action on grounds of discrimination.<sup>142</sup> As Hill comments, “it seems the hardest equality...to achieve is one that costs employers, and governments, money.”<sup>143</sup> Precedents such as the previous suggest legislative change is not unlikely.

Negotiating with those whom the decision will affect ensures that the public feel that they have been included in the democratic process. The success of negotiations depends on the strength of the union, public input or pressure and the Government’s willingness and ability to provide settlements.

## *II. Actions taken*

The Government has taken two major courses of action in response to *Terranova*.<sup>144</sup> Both involve consultation and negotiation perhaps reflecting the need to seek the input of interested groups when dealing with a topic that has wide public interest and the potential to elicit strong responses.

The Government’s primary course of action was to establish the Joint Working Group on Pay Equity Principles (JWG). The JWG comprised of employer, union and Government representatives and recommended principles to Government that provided practical guidance to employers and employees in implementing pay equity.<sup>145</sup> The course of action allowed the Government to retain an appropriate level of control whilst also allowing groups interest groups to have influence over the recommendations, which were released on 7 June 2016. The principles were required to be consistent with the Court of Appeal *Terranova*<sup>146</sup> decision, Equal Pay Act and “New Zealand’s employment relations framework and a well-functioning labour market”.<sup>147</sup> The Government was able to maintain control over the outcome of these

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<sup>142</sup> The New Zealand Public Health and Disability Amendment Bill (No 2) 2013.

<sup>143</sup> Hill, above n 6, at 29.

<sup>144</sup> *Terranova*, above n 4.

<sup>145</sup> State Services Commission, “*Terms of Reference - Joint Working Group on Pay Equity Principles*” (17 November 2015).

<sup>146</sup> *Terranova*, above n 4.

<sup>147</sup> *Terms of Reference - Joint Working Group on Pay Equity Principles*”, above n 145.

recommendations as any recommendations of the JWG will need to be implemented through legislation.<sup>148</sup> The principles are as follows.

Pay equity claims may be made by any employee to their employer, with the view to resolve issues at the earliest time possible.<sup>149</sup> Employers are required to inform all employees who may be affected by the claim. The JWG recommends implementing a new legislative obligation on the employer who receives a pay equity claim to respond within a reasonable amount of time.<sup>150</sup> If the claim has merit the parties will bargain to resolve the claim. For a meritorious claim the work must be predominantly performed by women and be affected by segregation or segmentation. Also relevant is whether work has been historically or systematically undervalued.<sup>151</sup>

If the employer does not accept that there is a valid claim, or an impasse in bargaining is reached the employee is entitled to recourse through existing dispute resolution processes, including determinations from the Employment Relations Authority.<sup>152</sup> The JWG recommended amending the Employment Relations Act to lower the threshold to access facilitation.<sup>153</sup> The Authority will be able to fix provisions in employment agreements when all other reasonable alternatives have been exhausted.<sup>154</sup>

The JWG placed emphasis on the assessment of the claim being thorough and objective: it must be free from assumptions based on gender and fully recognise the importance of skills commonly undervalued in female dominated work such as “social and communication skills, responsibility for the wellbeing of others, emotional effort and sensitivity.”<sup>155</sup> The recommendations note that it is open to the Government to respond more widely to the issue by engaging in equal pay settlements in female dominated industries where the Government is the primary funder. “As the largest

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<sup>148</sup> *Terms of Reference - Joint Working Group on Pay Equity Principles*, above n 145.

<sup>149</sup> Recommendations of the Joint Working Group on Pay Equity Principles, above n 115, at 2.

<sup>150</sup> At Appendix 1

<sup>151</sup> At Appendix 2

<sup>152</sup> At 2.

<sup>153</sup> At 3.

<sup>154</sup> At 3.

<sup>155</sup> At Appendix 2.

employer in the country, the Government is well placed to develop and showcase good practices in all aspects of employment.”<sup>156</sup>

The biggest deficiency in the recommendations is the absence of guidance on how to identify the appropriate comparators.<sup>157</sup> Without clear principles as to whom is an appropriate comparator protracted bargaining and impasses are likely outcomes. This highlights the structural difficulties inherent in implementing equal pay.

In addition to establishing the JWG, on October 20 2015 the Government announced that it will negotiate over the pay rates for care and support workers.<sup>158</sup> Minister Jonathan Coleman said the negotiations with unions would cover the wages and salaries of about 50,000 workers in aged and disability residential care, and home and community services.<sup>159</sup> These negotiations are continuing, and there, as of yet, no substantive results.

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<sup>156</sup> At 5.

<sup>157</sup> At 3.

<sup>158</sup> Jonathan Coleman “Government to enter negotiations over pay for care and support workers” (20 October 2015) Beehive, the official website of the New Zealand government. <[www.beehive.govt.nz](http://www.beehive.govt.nz)>.

<sup>159</sup> Coleman, above n 158.

## Chapter VII

### The implementation of pay equity

This section is concerned with uncovering why, despite a strong positive public reaction to the decision and government response, the implementation of pay equity has largely failed. Optimistic statements heralding a new era abounded:<sup>160</sup>

This decision leaves no doubt that over all sectors of the New Zealand labour market all employees have a right to enjoy equal pay, irrespective of their gender when they have skills that are the same or substantially similar. Equal pay for work of equal value has arrived!

However, as of yet, meaningful change regarding pay equity has not been seen. There has been no change in the remuneration rates of aged care workers since the government negotiations were announced on October 20 2015. The June 2015 New Zealand Income Survey reported that the gender wage gap was back to a six-year high. Average hourly earnings stood at \$29.44 for men and \$25.25 for women, with a difference of \$4.09 per hour.<sup>161</sup> Bartlett's substantive case has not yet been decided by the Employment Court and any following principles that are developed will take five years or more to have any impact.<sup>162</sup> As Skiffington comments, "there is still some distance to go".<sup>163</sup>

#### I. *Discriminatory barriers*

*Terranova*<sup>164</sup> highlights the systematic and historic devaluation of "women's work" in employment; arguably the most robust barrier to meaningful implementation of pay equity. There is ample evidence of such devaluation in western society, both present and historic.<sup>165</sup> As The Commission of Inquiry

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<sup>160</sup>Skiffington, above n 98, at 123.

<sup>161</sup> Statistics New Zealand "New Zealand Income Survey: June 2015 quarter" (press release, 31 August 2015)

<sup>162</sup> Hill, above n 6, at 28.

<sup>163</sup> Skiffington, above n 100, at 124

<sup>164</sup> *Terranova*, above n 4.

<sup>165</sup> Rayna Reiter, *Toward an Anthropology of Women* (Monthly Review Press, New York, 1975).

into Equal Pay notes: “the origins of inequalities between the rewards of men and women in paid employment are deeply rooted in the conventions and behaviour patterns of our society.”<sup>166</sup>

The 1987 Department of Labour report noted that:<sup>167</sup>

...the lower level of earnings in many female-dominated occupations was discriminatory... attributable to historical factors...and to the undervaluation of skills needed in female-intensive jobs. Such skills were undervalued because they were seen as innate... and as an extension of women’s unpaid work in the home.

Systematic undervaluation of women’s work, the base mischief that the Act tries to correct, was well understood before the Act was passed. Less well understood, were the height and endurance of the historical and systematic barriers to gender equality.<sup>168</sup> Over 40 years have passed since this legislation was enacted and little change has been seen in that time. Changing the public perception of the value of women’s work is essential to effecting reform and is notoriously difficult to do. *Terranova*<sup>169</sup> is the first step in mitigating discrimination based on sex as it brings the issue of pay equity in the caring sector to public and Government attention. It is the first step towards breaking down these barriers, but it would be overly optimistic to say that they have been removed.

## II. *The difficulty of implementation*

The assessments required to process a pay equity claim are complicated. In a pay equity claim the body administering the claim must compare the employment position in question with another of similar worth and ensure that the two receive equal remuneration rates. First the employment position in question is evaluated. For a pay equity claim to succeed two jobs must

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<sup>166</sup> Commission of Inquiry into Equal Pay *Equal Pay in New Zealand* (September 1971) at [1.1]–[1.5].

<sup>167</sup> Hyman and Clark, above n 13, at 17-22.

<sup>168</sup> Susan Robson “*Terranova Homes & Care Ltd v Service and Food Workers Union Nga Ringa Tota Inc*”, [2014] ELB 120, at 122.

<sup>169</sup> *Terranova*, above n 4.

evaluated as being of equal worth to the employer.<sup>170</sup> Once evaluated, a comparator must be identified and parity of remuneration rates ensured. The claims are liable to become slow bureaucratic processes and there is concern over the size of the administrative burden needed to effectively deal with the number of pay equity claims.<sup>171</sup> As a result the progress of pay equity is hampered, as the magnitude of implementation deters Governments and organisations from doing so.

#### A. *Financial cost*

Implementing pay equity measures may come at considerable cost. At the commencement of their first term in 2009 the current National Government discontinued the Pay and Employment Equity Office, accompanying facilitating Job Evaluation Scheme and the Employment Equity Act 1990 created by the previous Labour Government. The Government described the measures as “unaffordable in the current economic and fiscal environment”.<sup>172</sup>

However, objections to implementation based on financial grounds are not looked upon kindly by the Employment Court. As Colgan J comments:<sup>173</sup>

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

Overemphasising financial implications overlooks the unquantifiable cost, including the social cost, of perpetuating discrimination against a significant and vulnerable group of the community.<sup>174</sup> Notwithstanding strong judicial comments the financial cost of the decision may still act as a brake on the implementation of equal pay. Ultimately it is the Government that controls the allocation of state funds on behalf of the tax payer.

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<sup>170</sup> Hume, above n 12, at 473.

<sup>171</sup> Hill, above n 6, at 29.

<sup>172</sup> Skiffington, above n 100, at 124.

<sup>173</sup> *Service and Food Workers Union v Terranova Homes and Care Ltd*, above n 2, at [110].

<sup>174</sup> At [109].

There are concerns over the availability of information. As Business New Zealand submitted to the Employment Court; a considerable amount of information relating to remuneration is not publicly available and may be difficult to access.<sup>175</sup> However, the Court of Appeal did not consider these difficulties to be “insurmountable”<sup>176</sup> and noted that in a 2011 report, that there was an equitable evaluation tool was available for employers on the Department of Labour website.<sup>177</sup> However the current JWG recommendations note that resources are “only available in a limited sense and some of [them] are now out of date”.<sup>178</sup>

*B. Job evaluation and identification of a comparator*

Job evaluation attributes value to the employment position. The theory is that job evaluation provides an objective measure for determining the worth of jobs. However evaluators are susceptible to including underlying prejudices and unconscious biases in the evaluation. This is particularly apparent in childcare or eldercare, at issue for the claimants in *Terranova*.<sup>179</sup> It is often assumed that it is natural for women to perform caring work, overlooking the requirement for qualifications or training.<sup>180</sup> This is relevant to the claimants in *Terranova*<sup>181</sup> and once again links to the underlying issues of the low value attributed to “women’s work.”

Finding a suitable comparator for a pay equity claim can for enterprises with less than ten employees may be challenging in New Zealand as the number of employees is not high enough to provide statistically significant results.<sup>182</sup> It is difficult to prove that any pay differentiation includes discriminatory factors.<sup>183</sup> One in three New Zealand workers are employed in small businesses and 900,000 workers are employed by enterprises with 20 or less

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<sup>175</sup> At [104].

<sup>176</sup> At [172].

<sup>177</sup> International Labour Organisation Committee of Experts on the Application of Conventions and Recommendations *Observation: Equal Remuneration Convention*, 1951 (No 100) – New Zealand (adopted 2011, published 101st ILC session, 2012).

<sup>178</sup> Recommendations of the Joint Working Group on Pay Equity Principles, above n 115 at 3.

<sup>179</sup> *Terranova*, above n 4.

<sup>180</sup> Hume, above n 12, at at 474.

<sup>181</sup> *Terranova*, above n 4.

<sup>182</sup> Hume, above n 12, at 478.

<sup>183</sup> At 478.

staff.<sup>184</sup> However large businesses are still dominant<sup>185</sup> and the Government is New Zealand's largest employer.<sup>186</sup> Although not relevant to the aged care sector it is likely to become relevant if pay equity claims spread.

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<sup>184</sup> Ministry of Business, Innovation and Employment "The Small Business Sector Report 2014" (September 2014) <[www.mbie.govt.nz](http://www.mbie.govt.nz)>.

<sup>185</sup> Ministry of Business, Innovation and Employment "Small Businesses in New Zealand" (July 2015) <[www.mbie.govt.nz](http://www.mbie.govt.nz)>.

<sup>186</sup> Recommendations of the Joint Working Group on Pay Equity Principles, above n 115 at 4.

## Conclusion

*Terranova*<sup>187</sup> has catapulted pay and employment equity law into the employment law landscape of the 21st century.<sup>188</sup> At the core of the decision is the reinterpretation of the scope of equal pay. The broad interpretation is now favoured; equal pay is interpreted to the standard of pay equity, meaning equal pay for equal work of equal value. Without this pivot in interpretation the Act would be limited to correcting wage differentials between women and men employed in the same, or substantially similar, position of employment. The deeper issues of systematic gender discrimination would remain unaddressed. The Act has been transformed from being of little significance to being the first significant step towards realising the social justice that was envisaged by the original architects.<sup>189</sup>

The new legal landscape that *Terranova*<sup>190</sup> ushered in brought with it the potential for large financial implications, both within the residential care sector, and outside. Snowballing claims and the magnitude of the cost of raising wages influenced Government action. The role of the Court, though significant in provoking the initial change, will be secondary in the impact on citizens' day to day lives. What will become a practical reality largely depends on the degree and course of Government action, and at the core of that, whether, or to what extent, the recommendations of the JWG are implemented.

At the core of the difficulties facing successful implementation of pay equity lies in the magnitude of the task of changing ingrained gender based stereotypes. "Care work is predominantly done by women, it is seen as women's work and has traditionally been unpaid work."<sup>191</sup> This can perhaps go some way to explain why, for the last 44 years, there has been no meaningful Government action on pay equity. To increase the rate of remuneration of women's work will be financially costly and difficult to implement. The current structure of our society, and value that we attribute to

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<sup>187</sup> *Terranova*, above n 4.

<sup>188</sup> Skiffington, above n 100, at 124.

<sup>189</sup> At 124.

<sup>190</sup> *Terranova*, above n 4.

<sup>191</sup> *Caring Counts*, above n 1, at 50.

skills, has been in place for hundreds of years. It is overly optimistic to suggest that this structure will change in any other way than incrementally. *Terranova*<sup>192</sup> has been successful in that it has prompted action on an issue that has lain dormant and may provide the framework for the Government to take the first steps in implementing pay equity. Viewed correctly, Terranova does not signify attainment of equal pay; rather it is the start of a journey towards successful implementation.

### ***Word count***

The text of this paper (excluding table of contents, footnotes, and bibliography) comprises approximately 7,815 words.

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<sup>192</sup> *Terranova Homes & Care Ltd v Service and Food Workers Union*, above n 1.

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