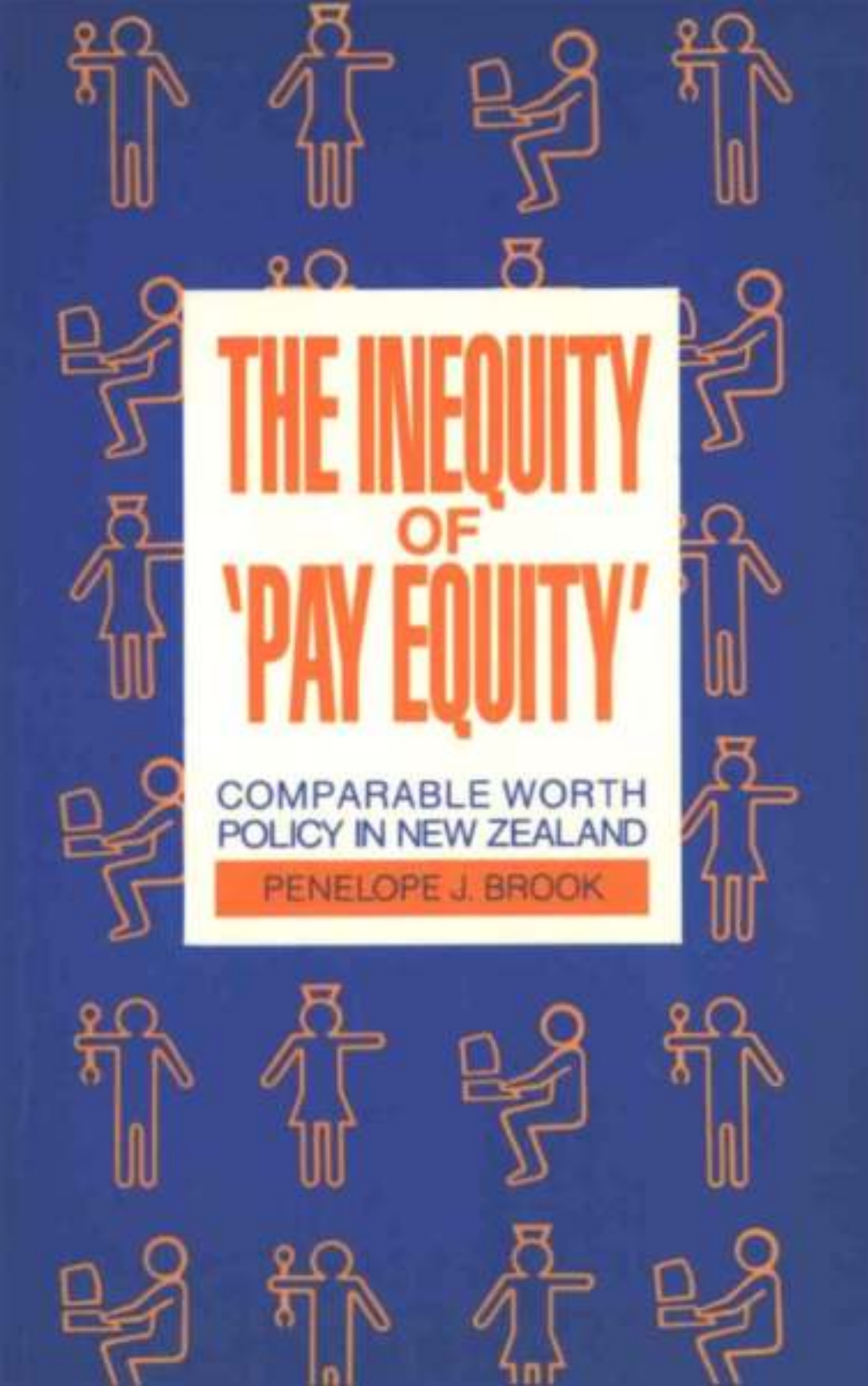

THE INEQUITY OF 'PAY EQUITY'

COMPARABLE WORTH POLICY IN NEW ZEALAND

PENELOPE J. BROOK

The New Zealand Centre for Independent Studies

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Comparable Worth Policy in New Zealand

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Comparable Worth Policies in New Zealand

Penelope J. Brook

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Foreword

One of the major social changes in the later 20th century has been women's greater participation in paid employment and in public life. Public debates have shifted over time. Argument about whether equity requires a 'rate for the job' irrespective of whether it is held by a man or a woman has given way to debate over what processes and institutions are needed to ensure fair relative rewards for occupations that are held predominantly by one gender. Arguments about nondiscrimination against women in recruitment and promotion policies have given way to debate about which policies ensure that women have fair career prospects despite their greater contribution to child-rearing. Arguments are gradually shifting from concern about representation of women on significant decision-making bodies to recognition that women may define important issues differently from men.

In this monograph, Dr Penelope Brook concentrates on the current debate in the first of these components of social change, though there are implications for the other aspects too. Dr Brook's approach is uncompromisingly intellectual. She is guided by a feminist perspective in that she wants public policy to contribute to the social change by which women have a better chance of achieving their objectives. She draws on her understanding as an economist of how people interact. From these starting points she proceeds by rigorous logic; her arguments owe nothing to sentiment, wishful thinking, or the interests of any group other than society in general.

It is not uncommon to hear suggestions that economic and social policies need to be 'integrated'. Dr Brook shows that this can be more than a mere slogan, but that while many popular discussions and statements of particular points of view (or 'perspectives') mistake either an economic or a social aspect for the whole of a policy issue, that is not true of work at the frontiers of economic and social policy. Dr Brook insists on looking at the unintended as well as the intended effects of policy interventions, and she knows that while governments can redistribute resources they cannot create new ones. Her argument may therefore seem to be concerned only with narrow economic concerns, but that would be a misreading. She engages all aspects of comparable worth as it relates to a major social change.

There is room for argument about some of Dr Brook's suggestions. She relies heavily on the ability of people to look after their own interests. This does not mean that she assumes a society of selfish materialistic

individuals; she assumes only that people can form groups of any kind when they want to do so. Nor does it mean that she assumes that people have perfect information; what are required is that people can get access to adequate information if they are prepared to pay what it costs society as a whole for that information to be available. It may, however, be argued that our institutions for guaranteeing freedom of association need some strengthening in the case of women seeking to use their choice of negotiating instrument, and there may be a case for some collective contribution to disseminating information about what is involved in different kinds of work. Nevertheless, arguments like these are far from a simplistic assertion of the need for paternalistic compulsion as part of the process whereby women achieve genuine equity.

It is never easy to know when a general attitude becomes a public value that should be enforced by law. Long-established ones pose little problem: we can readily agree that there should be no slavery or even indentured labour, for example. But how do new ones become established? When does a right to a car or a telephone become as well-based as a right to some kind of house? Societies have in the past redistributed rights between creditors and shareholders (through instituting limited liability), and they have elected to redistribute income in favour of particular groups such as the elderly. When would we recognise that a society has decided that there should be a redistribution in favour of occupations that are predominantly filled by women?

If such a decision is made, there are many issues to be resolved. Although comparable worth would then be argued for as a deliberate redistribution rather than as a correction of a perceived market failure, we could not ignore the side-effects of whatever means are used to achieve the end.

The great value of Dr Brook's work is that she challenges readers to think about such issues. There are no short cuts. Both those who are sympathetic to current proposals for comparable worth legislation and those who are opposed to them will find themselves challenged by this study. It is a significant contribution to a major policy debate.

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Synopsis

In New Zealand as in many other Western countries, pressure for women's groups has increased in recent years for the introduction of 'equal pay for work of equal value', or 'comparable worth', as a means of eliminating the gap observed between the earnings of women and men. This gap is thought to indicate continuing discrimination against women in the workplace. Comparable worth policies aimed at closing the gap are seen as eliminating this discrimination. Such policies are designed to promote equity not by countering discrimination directly, i.e. by promoting equality of opportunity in the workplace, but by equalising incomes.

That men on average receive higher incomes than women does not in itself tell us anything about the existence of discrimination in the labour market. There are a number of reasons why women might earn less than men in the absence of discrimination. These stem from the greater (if not necessarily desirable) role of women in child-rearing: a role that means that their work experience is more likely to be broken than men's, and that their employment options are more likely to be limited by the need to find jobs that are compatible with child-rearing.

But the fact that these factors may 'explain' a large part of the 'wage gap' tells us very little about whether discrimination exists in employment. Differences in wages across occupations of themselves do not indicate whether workers are being treated fairly. Instead, attention should be focused on the institutional structures within which wages are determined, to determine whether these foster discrimination.

Where wages are set by the market — by free contract between workers (or voluntary association of workers) and employers — there is little scope for discrimination. Where employers must compete for workers, and must compete with one another for the favours of consumers, unfair treatment of workers, including consistently underpaying according to sex or race, is a losing game. For this reason, laws aimed at making markets work well will greatly reduce the scope for discrimination. Discrimination becomes a problem where markets are constrained: where employers don't go out of business if they treat workers unfairly.

Comparable worth policies are not aimed at making markets work better by eliminating structural barriers to fair play. Instead, they are aimed at further constraining the activities of markets, by replacing wage negotiations with wage levels set by the courts or a central bureaucracy. This might be acceptable if it led to society as a whole, and women in

particular, being made better off. But this is not the case.

Comparable worth policies, by mandating increased minimum wages for 'women's' occupations, have a number of pernicious effects. They have the potential to harm productivity, and therefore growth prospects, incomes and job security. An employer faced with a higher wage bill has three options: to increase prices, to reduce other employment costs by demanding increased work effort or trimming employee benefits, and to cut employment. In New Zealand's competitive environment, the first of these options is likely to be unsustainable. The second option is more likely to be adopted, but is a no-win option for workers and may still lead to lay-offs. Given the rigidity of many employment conditions under New Zealand's system of national awards, the third option is the most likely to be adopted. In short, comparable worth will cost jobs.

Those most likely to lose their jobs (or be denied access to the workforce altogether) are the least advantaged among women: those with low skills and broken work experience, those who live in relatively depressed regions or work in companies where job security is low, and those from disadvantaged ethnic communities. Any benefits of comparable worth will, in contrast, accrue to highly-skilled, articulate women in relatively 'safe' employment. By penalising women who are already disadvantaged, comparable worth will exacerbate income disparities between women. In this sense, comparable worth policies are not only inefficient but also inequitable.

To condemn comparable worth policies as both inefficient and inequitable is not, however, to condone the status quo. There is much in New Zealand's existing system of regulation that protects discriminatory behaviour and limits the options of relatively vulnerable groups of workers. These regulatory barriers to fair treatment must be tackled if employment equity is to be promoted.

New Zealand's labour market law is of primary (but not unique) importance here. This law has suppressed the freedom of workers in their relationships both with employers and with unions. It has been inimical to the interests of many women. For example, protected unions have had little incentive to seek work conditions that, by making more occupations compatible with child-rearing, would expose their male members to more competition from women. Reforming our labour law to give women the freedom to form their own unions, or to join any union prepared to pursue their interests, or to negotiate directly with employers, would go a long way towards reducing discrimination in employment — and raising women's incomes.

Other regulations should be scrutinised, like the town and country

planning laws, which, by placing unnecessary restrictions on the provision of childcare facilities at or near the workplace, constrain the employment options of working mothers.

Policies aimed at reducing these and other regulatory barriers to the employment and promotion of women will need time to take effect. However, the introduction of policies such as comparable worth in the name of 'hastening history' should be resisted, not only because of the harm they can cause to employment prospects, but because they may divert attention from the underlying causes of inequity and so perpetuate them.

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Chapter 1

The Meaning of Comparable Worth

THE sustainability of any relationship depends on the belief that it delivers some benefit for each of the parties involved, and that it does so with a modicum of fairness. This is as true of economic relationships as of personal or political ones, and it holds as strongly as anywhere in the case of employment relationships.

Comparable worth legislation aims to equalise pay across occupations deemed to be of 'equal value' according to job requirements and working conditions. The basic premise of arguments in favour of such legislation is that, in practice, employment relationships are inherently unfair. The 'evidence' for this unfairness rests in the existence of a 'wage gap' — a difference in incomes or hourly earnings between women and men — and in the concentration of female workers into a relatively small number of low-paid occupations. At its most simple, it is claimed that it is unfair — inequitable — for wages to differ systematically between women and men. The underlying accusation is that women's pay reflects exploitation by a male system. A more developed version of the argument is that differences in wages or incomes reflect systematic discrimination against women, a discrimination that crowds them into certain occupations, which are then low-paid, not so much because they are crowded but because they are identified as 'female'. In this case, outcomes — both in wages and in career opportunities — are regarded as inequitable because they are the result of unfair treatment: discrimination.

In both cases, however, the proposed solution is the same: to alter outcomes until equality is achieved; to 'close the wage gap'. Lip service may be paid to the notion that equity is more usefully viewed as requiring fair treatment or equality of opportunity (the countering of discrimination), but either this objective is sacrificed to the (typically incompatible) objective of equalising outcomes, or 'equality of opportunity' is reinterpreted to mean the potential for achieving equal outcomes. In other words, any process that yields unequal outcomes is interpreted as inequitable.

Equity, Processes and Outcomes

To define 'equity' in this way requires a particular view of the way in which the world works, and a particular view of the task of governments. It reflects a utopian vision, a belief that if 'the good and the wise' are given dictate over social, political and economic arrangements society as a whole can be made better off. It is suspicious of the pursuits of people left to their own devices, of old wisdoms and of custom, and, most of all, of the 'circuitous and uncontrolled' workings of 'the market'. It is this vision of the world that has guided variations on a theme of socialism through the present century, not only in the Eastern bloc, but throughout the Western world. Nowhere has its influence been so pervasive as in the legislation that has surrounded employment relationships. Pressure for comparable worth legislation is a late manifestation of this vision.

The debate over comparable worth is not a debate about whether we want employment relationships to be fair or to promote social well-being, but about what fairness means, and about how the highest possible level of social well-being can be achieved. In particular, it is a debate about whether fairness is delivered by a system that dictates that outcomes shall be as near equal as possible, or by a system predicated on fairness of **process** that has very little to say about **outcomes**. Put another way, it is a debate about whether voluntary exchange and the operation of markets can serve as a basis for a fairer, more prosperous society than can be created by government or bureaucratic decree.

In one sense this is a question that can be answered only in grand terms and by grand comparisons. The purpose of this monograph is more modest. Working from the premise that markets do, in fact, perform a significant function in ensuring that resources, including labour services, are used as well as they can be (and that there is nothing either miraculous or sinister about this), it addresses the arguments for comparable worth legislation on their own terms: Is there a problem? If so, is this problem correctly specified? Will the proposed solution actually work? Will the benefits of this solution outweigh the costs? It then suggests that, in so far as there is an underlying problem, there are more direct and satisfactory ways of resolving it than by means of comparable worth legislation. These involve tackling existing barriers to the fair treatment of women and disadvantaged minorities that have arisen as a result of a long history of government intervention in the labour market and in activities impinging on the labour market. The way to equity in employment, it argues, lies not in new regulations, but in the reform of existing regulation.

State Attitudes to Women's Pay

Legislation promoting such goals as 'equal pay for comparable work' or 'equal pay for work of equal value' is not at all new. Since biblical times attempts have been made to determine the value of women's labour: in Leviticus 27:3-4 it is stipulated that a woman's value should be assessed at three-fifths of a man's. Zafiris Tzannatos (1987) has shown that state involvement in women's pay in more recent centuries has reflected a similar evaluation of women's work. Shortly before World War I a British government memorandum asserted that there were some sorts of work for which women were 'specifically suited' and for which they should receive a 'single' wage worth between 30 and 35 per cent less than the 'family wage' that men should receive. As recently as 1970, the British government was applying a similar philosophy in its role as employer: police regulations drafted in that year provided for different rates of pay for male and female constables and sergeants.

In view of this record, it may be thought that times have changed and that the 'equal pay for equal work' legislation introduced in many countries during the 1970s indicates that the state has stopped trying to hold women's wages below their market levels and is now willing to improve the relative economic position of women. The fact that such legislation has not (as yet) led to a complete closing of the alleged 'wage gap' has, however, led to calls for further legislation, aimed not at 'equal pay for equal work', but at 'equal pay for work **of equal value**', often referred to as 'comparable worth' or (in a blatant corruption of the language) as 'pay equity'. But the case for such legislation is very much in doubt. In practice, the persistence of such a gap tells us much more about the effects of state involvement in the marketplace than about the effects of legislation for equal pay for equal work. Such legislation requires individuals to be paid according to their productivity rather than their sex. This is, of course, identical to the outcomes that emerge from free markets: provided there are no intrusions into the marketplace, employers will pay workers a wage commensurate with their productivity, and will wish to hire the most productive workers regardless of their sex. This may well lead to women being substituted for men in some jobs, which in turn would raise the relative earnings of women and narrow the wage gap.

Thus, where labour markets are relatively free, as in the United States, legislation for equal pay for equal work has had little effect on the wage gap: wage levels already reflect worker productivity since they are determined principally by market forces. Where labour markets are more regulated, however, such legislation has had a significant impact

on the wage gap: in Britain, for example, women's pay rose by about 15 per cent relative to men's pay in the mid-1970s (Tzannatos, 1987:28). However, it does not follow from this that yet more legislation is necessary to reduce the wage gap further. The lesson rather is that less labour market regulation would enable employers to pay wages that more closely reflected productivity, thus rendering equal pay legislation unnecessary. But comparable worth legislation proposes the opposite: that wages should be determined less by market forces and more by regulation.

Comparable Worth vs Equal Pay for Equal Work

At this point it would be useful to set out clearly and unambiguously the differences in meaning and implication that exist between the doctrines of 'comparable worth' and 'equal pay for equal work'. The doctrine of equal pay for equal work embodies the principle that all persons who are equally productive should receive equal payment for their labour services from their employers. As noted above, market processes tend to produce this outcome: in competitive labour markets employers who attempted to 'discriminate' against persons on any basis other than productivity by attempting to pay them less than their marginal product would soon find themselves unable to hire **any** workers. This is because other employers would be willing to pay such workers slightly more than they were receiving from the discriminating employer. This process would continue until the workers received wages reflecting the full value of their labour to their employers. And while it is of course true that competition in labour markets is coloured by union activity and certain kinds of government intervention, there nevertheless exists sufficient competition to create a strong **tendency** for workers to receive wages equalling the value of their labour to their employers. Walter Williams (1986) has argued that it was the powerful, colour-blind tendency of the market to reward workers in line with their productivity that prompted white South African workers to support apartheid. For example, in 1924 black workers had their right to negotiate removed by the Industrial Conciliation Act, and in the following year the Wages Act introduced rate-for-the-job and minimum wages explicitly intended to exclude non-whites from certain jobs.

Equal pay for equal work legislation thus focuses on discriminatory employment **practices** as opposed to the **outcomes** of those practices: on equality of opportunity rather than equality of results. In contrast, the 'comparable worth' doctrine is concerned with results. It proceeds from the assumption that the value of work can be assessed according to

certain intrinsic qualities (such as skill requirements and work conditions) quite distinct from the demand for that work from employers. Karl Marx's labour theory of value embodies this assumption: it claims that all work can be measured in terms of units of 'labour' whose value is independent of the wage levels that emerge in competitive labour markets. Modern advocates of comparable worth do not normally make use of the labour theory of value. But, in the words of Ellen Paul (1989:112), they are striving to find 'some identifiable, objective qualities that are transferable from job to job and that everyone could, at least theoretically, agree on'. In practice this search has yielded the idea of an 'index' on which each occupation is measured in terms of the others: wage outcomes that do not reflect the 'comparable worth' of occupations so indicated are to be adjusted accordingly. In this sense, comparable worth focuses on wage outcomes rather than wage-determination processes: however fair those processes may be, their outcomes still have to be assessed by reference to comparable worth.

The basic intellectual weakness of comparable worth is its blindness to the fact that the value of work stems entirely from the demand for it expressed by employers, not in putative objective qualities that can be transferred from one job to another. The search for true pay equity must therefore concentrate exclusively on the processes by which wages are determined. However, this does not mean that 'equal pay for equal work' legislation is to be uncritically accepted as a means of ensuring such equity. If the job categories within which the concept applies are too widely defined, employers may be prevented from paying individual workers according to their productivity, which would tend to reduce employment opportunities. As noted in the previous section, the less regulated the labour market is, the more closely it tends to set wage levels according to productivity, thus rendering 'equity' legislation of any kind unnecessary.

The remaining chapters of this monograph argue for a less regulated and more equitable labour market. Chapter 2 examines the arguments that have been advanced to explain the 'wage gap'. In Chapter 3, the procedures of comparable worth legislation are examined and their unintended (and often harmful) consequences brought to light. In Chapter 4, regulatory hindrances to pay equity are identified, and a new labour market regime advocated in which the law affirms the right of individual workers to benefit from their labour and protects their freedom to enter labour contracts.

Finally, an Appendix summarises and compares comparable worth legislation in the United States, Canada and New Zealand.

Chapter 2

The 'Wage Gap' and What It Indicates

THE Working Group on Equal Employment Opportunities and Equal Pay concluded that:

> inequality of treatment in employment exists in New Zealand. The inequality takes the form of inequality of earnings between males and females, and the lack of employment opportunities for women, Maori, Pacific Island peoples and other ethnic minorities, and people with disabilities. (Wilson, 1988:6)

There is some confusion in this statement between equality of treatment and equality of outcome. Such confusion is at the heart of the comparable worth debate.

Some Explanations of the Wage Gap

Since the passage of the Equal Pay Act in 1972, mandating equal pay for equal work, the ratio of women's to men's average, ordinary-time, hourly earnings rose from an estimated 69.9 per cent to 81.1 per cent in February 1989. It is this gap in earnings — for all that it is shrinking — that is the concern of proponents of comparable worth policies, mainly because it is assumed to indicate continuing discrimination on the part of employers, discrimination that cannot be countered by the simple requirement to reward equal work with equal pay.

But does the existence of a 'wage gap' necessarily indicate groundless discrimination against women? (Conversely, if there were no gap, could we rest assured that no one was being discriminated against for no good reason?) In practice, there are a number of ways of explaining why women's earnings tend to be lower than men's, not only in New Zealand, but throughout the Western world. These include differences in their work experience and in the continuity of their work records, the tendency for work patterns in highly-paid jobs to be incompatible with child-rearing, differences in the educational qualifications of women

and men, and differences in access to on-the-job training and promotion.

A significant intermediate manifestation of these factors is the tendency for women to be concentrated in a small number of occupations, on the whole relatively compatible with child-rearing, and at the lower end of these occupations. In New Zealand, the 1986 Census indicated that over half of all women in the full-time labour force were involved in just six occupational classifications: clerical, sales, teaching, medical, typing and book-keeping. Even within these 'female' occupations, men tend to dominate the better-paid positions. For example, while women made up 57.6 per cent of the teaching profession at the 1981 Census, they contributed only 14.6 per cent of school principals and 13.5 per cent of school inspectors. In clerical work, women tend to be concentrated in areas requiring keyboard skills, while men predominate in managerial clerical positions (Hyman & Clark, 1987).

A major factor underlying the distribution of both women's employment and women's pay prospects is their departure from the workforce to bear and raise children. This is reinforced by the uneven sharing of child-raising responsibilities by most couples. This affects women's earnings capacity in a number of ways. Because skills that are not constantly in use or not constantly being updated lose value over time, women re-entering the workforce after an absence may face lower earnings prospects than when they left. This, together with the differing compatibility of jobs with child-rearing (through the availability of part-time employment or flexible hours, or the proximity of the workplace to the home, for example), affects the kinds of occupations chosen by women, and the amount and kind of training in which they are willing to invest. As a result, the pattern of employment and pay will to some extent be self-reinforcing.

Evidence from other countries suggests that marital status and child-bearing offer a major explanation of the 'wage gap'. Sowell (1987:92) estimates that single women in the United States earned 91 per cent of the income of men in 1984, compared with 59 per cent for the population as a whole. Data gathered in Canada as early as 1971, when on a national average women earned only 37.4 per cent of the incomes of men, showed that women who had never been married earned 99.2 per cent as much as men who had never been married (Block, 1982:112). There is an important lesson in this evidence about the importance of comparing like with like. It indicates that in so far as we can learn anything about whether **comparable** individuals are treated equally by looking at aggregate data, the problem is less than some relatively crude measures of the 'wage gap' might suggest.

Structural Impediments to Pay Equity

But in practice the debate does not stop here. Some comparable worth proponents are concerned not so much to compare like with like, but to ensure equality of outcomes regardless of underlying differences. For others, the very factors that can be used to explain away the wage gap are themselves regarded as embodying discrimination. This latter argument is more serious, since it directs our attention away from attempts to identify some portion of the wage gap as the result of discrimination to assessment of the extent to which more basic social or economic structures foster unfair treatment. This not only has implications for how we think about the 'problem'; it also alters our perspective on appropriate solutions.

To answer the argument that explaining away the wage gap neither proves nor disproves the existence of unfair treatment one must search for social, economic and political arrangements that foster unfair treatment. Does our education system wittingly or unwittingly channel girls into an inappropriately limited range of occupations (recent evidence having suggested that most children have made up their minds about their careers by the age of eleven)? Does the concentration of women in a narrow range of occupations reflect something more than free choice? For example, does it reflect unnecessary barriers to access to jobs that have long been the territory of men? Is the availability of on-the-job childcare or job-sharing (major factors in determining how long women are out of the workforce, the hours they can work, and where they can work) unduly constrained? And what is the role of 'the market' in all this?

In answering these questions, we must recognise that employers' decisions about employment, promotion and remuneration that **appear** to be discriminatory may in fact have a number of causes. They may reflect the employer's personal preferences, but they need not. They may instead reflect employers' attempts to reduce the costs of making personnel decisions by using rules of thumb, and they may reflect recognition of differences that are truly relevant to how well a person can perform a job. They may also reflect pressures from other employees (voiced, for example, through a male-dominated union), or from consumers. In each case, some deeply rooted intuitions may of course be at play. The ideology of sexual identity is impressed on children at an early age from a great variety of sources, and can create substantial tensions when an individual chooses work traditionally performed by the other sex, foster the unconscious use of stereotypes, and create hostility or sexual harassment by other workers, so discouraging at-

tempts to diverge from accepted social norms. (It is notable that comparable worth would do little to counter this process.)

But the fact that such an 'ideology' can be eroded only slowly, whether through direct attempts at education or the development of contrasting role models, does not create the capacity for a discriminatory free-for-all on the part of employers. Employers are not, unless commercially suicidal, free to hire, fire, promote or pay at will. They are instead, other than in the most extreme cases, subject to the constraints of the market. They must supply their customers with goods of a quality and price that match their competitors'. They must perform sufficiently well to persuade their shareholders to keep on investing. And they must develop relationships with their employees that make it worthwhile for those employees to stick around. The central requirement of the market is that a relationship must be of mutual benefit to survive. This is a requirement which can make unfair treatment very costly indeed.

Employers who make employment, promotion or remuneration decisions according to their personal preferences will, if they must compete for workers, lose good workers to employers who make these decisions according to merit. Because employers' success in competing for consumers depends on their ability to promote productivity and innovation, which in turn depends on the quality of their workforce and workplace relations, unfair treatment and ill-advised discrimination — including persistent under-payment — will work against their interests, both through the loss of good workers and through the general decline in commitment and work effort associated with poor employment relations. In other words, where employers face competition for both workers and markets, they are unlikely to be able to afford to discriminate persistently against workers on the basis of factors that are not relevant to productivity. This is not simply an argument about the ability of employers to survive competition in the short term. It is arguably even more important where a longer-term perspective is taken, requiring an approach to career patterns and employment conditions that can accommodate the special needs of valued workers. This can be seen in such developments as competition by employers in the United Kingdom in terms not only of pay, but also of childcare, maternity/paternity leave packages, job-sharing and flexible hours (Gapper, 1988).

Are Markets Unfair?

Proponents of comparable worth typically respond to this kind of argument by asserting that markets are inherently unfair, or that if they were fair women would be paid more than they currently are. They

make a distinction between the 'market rate' for a job and the 'value' of work. This in effect it is part of a long history of attempts to reward labour in terms of some intrinsic value, defined by Thomas Aquinas in terms of a 'just price' and by Karl Marx in terms of a 'labour theory of value.' But the notion that 'intrinsic worth' can provide a feasible guide for remuneration cannot survive the requirement that labour services, like other goods and services, receive returns that reflect the value that they create for other people: for the consumers that workers are when they are at home. As Paul (1989:53) argues:

> A good's price has no independent meaning, for it merely reflects the ebb and flow of its performance in the market. In search of this 'chimera' of intrinsic value ... the comparable worth forces are willing to supplant the market price of labor, and this means that they are willing to override the 'liberty of exchange, association and contract expressed by market prices'.

A related argument is that where market factors are allowed as part of the wage-fixing process, past discriminations will be perpetuated. But this involves endowing the market with attitudes, rather than viewing it as a spontaneous order, filtering, and in some cases penalising, the attitudes of the individuals who use it. It involves viewing market relationships as coercive and adversarial — a struggle between capital and labour, or corporation and consumer, rather than based on mutual benefit. As Tuerck (1986:521) counters:

> The problem with this argument is that it confuses the market place with the attitudes — admittedly the sometimes sexist attitudes — that enter into people's market decisions. The market for labor services must accommodate the preferences of millions of workers, employers, and consumers. To suggest that the process by which it accommodates these preferences is reducible to some gender-based class struggle is, at best, naive.

This does not mean, however, that there will be no circumstances in which positions of market power can be used to pander to the attitudes of privileged groups. In particular, where a single firm is the sole available source of employment — where would-be employees have no meaningful options — it will be possible for the employer to discriminate unfairly in employment, promotion or remuneration. In practice, however, the potential for such 'monopsony' power to arise is

small, and the 'exploitation' that it makes possible is being rendered increasingly unsustainable as information flows about employment options and the mobility of workers improve. Such monopsony power as remains is instead largely the result of **statutory** privilege — government regulation which protects employers and unions from the penalties that the market imposes on unfair behaviour. As Williams (1979:48) argues with respect to the position of blacks in the United States:

> The basic problem that blacks now face in the United States is not one of malevolent racial preferences per se, though it may have been that in the past. It is, rather, one of government restrictions on voluntary exchange. These restrictions arise because powerful political groups are able to use the coercive powers of government to subvert market competition, to eliminate the relative parity of the marketplace, and to make rules that redistribute wealth in their favor. To the extent that emotionally charged words such as exploitation and racism are to have an economic meaning, they should refer to the myriad of collusive agreements, backed by the government, whereby disadvantaged minorities are subjected to a continuing disadvantage.

In such cases discrimination is **protected** by inappropriate statutory barriers to entry in the labour market. These include government-backed union rules that make hours or work conditions gratuitously inimical to working mothers, occupational licensing requirements designed not so much to guarantee quality as to protect exorbitant earnings, or town and country planning by-laws that make it unduly costly to provide workplace childcare facilities. The effect of such barriers is to increase the cost of accommodating the work needs and preferences of women with children (or men wishing to share more fully in the raising of their children), and thus to reduce their employment options and earnings potential. Such barriers will not be reduced — and their adverse effects may, indeed, be reinforced — by raising pay rates under a comparable worth program.

Chapter 3

The Processes and Consequences of Comparable Worth

IF the wage gap in itself is not a problem, but there may none the less be some underlying problem in the sense that barriers to entry in labour markets allow prejudice to be accommodated, might a comparable worth policy provide a solution? In other words, even if comparable worth proponents have mis-specified the problem, might there be some residual value in their proposals? Would the benefits outweigh the costs?

The Procedures of Comparable Worth

Legislative comparable worth policies operate by establishing procedures through which women in occupational classes in which they outnumber men can have their pay evaluated relative to the pay of some 'comparable' male-dominated occupational class, and adjusted accordingly. This evaluation is by means of some 'gender-neutral' scheme which takes account of such factors as the skill, effort and responsibility normally required in a job, and the conditions under which it is performed. Such policies thus differ fundamentally from 'equal pay for equal work' policies in that they require the equalisation of pay **across**, rather than **within**, job categories, a process that may operate at the expense of equal treatment.

Comparable worth legislation, as proposed in New Zealand, aims not to **modify** the market (for example, by correcting market outcomes that are the result of poor information flows or the abuse of market power), but to **replace** the market — at least in its role in determining remuneration packages — with a government bureaucracy (in New Zealand's case, an 'Employment Equity Commission' in tandem with the existing Arbitration Commission). This fact would not be altered by instructions to the bureaucracy to take account of regional differences, 'extraordinary working conditions' and 'recruitment and retention differences', and 'the overall costs of the employers and the Government of New Zealand', as proposed in the Employment Equity Bill. Bureaucratic

decisions about what factors 'count', and for how much they count, are fundamentally anti-market: any central planning system has just such preoccupations. 'Special circumstances' will inevitably mean something quite different to a bureaucrat charged with evaluating jobs, a union (particularly a national one), and an employer (and his or her workers) facing the harsh reality of serving consumers who will happily spend their money elsewhere if wage increases are passed into prices. In contrast, a key characteristic of market adaptation to skill shortages or surpluses or different regional needs is that these factors are not necessarily articulated at all. All that matters to the individual employer is the remuneration package that must be offered in order to attract employees of the kind needed, and this can be gauged without recourse to a bunch of statistics on the output of educational institutions or the health of the regional economy. It is discovered simply by entering the market.

The Pitfalls of Job Evaluation

Of course, many employers, especially those employing large numbers of workers, do not rely solely on the market signals provided by prevailing wage rates but already use job evaluations to assist in determining remuneration packages for their workforce. Employers typically commission job evaluations not as a justification for overriding the market, but to enhance their ability to put prices on jobs where market information is thin (for example, where the jobs involved are highly individualised). Such evaluations are seldom applied rigidly. Where there is a clear difference between the results of an evaluation process and the prevailing rates of pay, employers will typically defer to the market.

But in a comparable worth context deference to the market, except in 'special circumstances', is effectively seen as deference to discrimination: the relevance of 'market factors' becomes the exception, not the rule. 'Instead of using job evaluations as large firms traditionally have used them — that is, as one tool toward achieving internal equity for a whole host of jobs that do not have directly correlating jobs in the marketplace — the comparable worth forces wish to use it as **the** tool' (Paul, 1989:53, emphasis in original).

Problems inevitably arise from the subjectivity of job evaluations. (Critics will counter that the market is subjective too, but market outcomes are only as subjective as the regulations that surround them permit.) The measurement and weighting of job requirements is inevitably arbitrary; different schemes will yield different rankings, even under a common goal of 'gender neutrality'. For example, in the US,

librarians rank above nurses, photographers and social workers in Minnesota and below them in Vermont (MacKenzie, 1987). It is better to be a secretary than a data entry operator or a laundry worker in Washington and Iowa, but worse than both in Minnesota and Vermont (Burr, 1986). And things grow more complicated:

> In Minnesota, for instance, a registered nurse, a chemist, and a social worker all have equal values and would be paid the same. However, Iowa's study finds the nurse worth 29 percent more than the social worker, who is in turn worth 11 percent more than the chemist. While the chemist also receives the lowest point score of the three positions in the Vermont study, the social worker and the nurse reverse rankings. The social worker is valued about 10 percent more that the nurse, who is worth 10 percent more than the chemist. (Burr, 1986:73)

A market in job evaluation programs is in the making, creating strong incentives for workers to migrate between States so as to subvert the attempts of bureaucracies to tell them what is good for them.

Two key factors that are absent from job evaluation processes are workers' preferences for different jobs, and the value that they place on the non-pecuniary rewards to employment. The Working Group recognised that women pay if anything more attention to the availability of childcare and flexible work schedules than to pay in deciding where to work, but did not seem to think that there might be some trade-off between these sources of convenience or satisfaction and pay. It did not deny that work that is relatively low-paid but compatible with child-raising may be freely chosen by many women, but appeared to see this as a decision deserving monetary compensation — if anything reinforcing job 'segregation' rather than breaking down barriers to the compatibility of 'male' occupations with child-raising. As Williams (1988) notes in the Australian context: 'The view that women should move into non-traditional areas has been challenged recently, with some women's groups claiming women should not be pushed out of their traditional spheres of work and that pay rates for those areas should instead be lifted'.

Likely Unintended Consequences of Comparable Worth

The problems with comparable worth proposals are not limited to the administrative difficulty of generating consistent and 'neutral' job valuations. Nonsenses and inconsistencies at this level might be forgiven if

the results, once applied, were of genuine benefit to society: if employment relationships worked better, and more equitably, as a result. The evidence, however, suggests strongly that they would not.

Disemployment effects. The result of a 'successful' comparable worth claim would be a requirement that the wages for a particular job should rise. Under the New Zealand proposals, this could apply to the wages of all workers covered by a union in a female-dominated occupation (i.e. one in which 60 per cent or more of the workforce is female), or to a group of 20 or more such workers making a claim where there is no union or the existing union is unwilling to file a claim. Regardless of the scope of the wage decree, the effect is the same: a new minimum wage is created above the level that would be paid to equate the supply of and demand for the labour service concerned.

Raising the wages in an occupation will encourage more people, both men and women, to seek this kind of work. At the same time, it will raise the level of productivity that an employer will require of any worker he or she employs. Faced with a higher wage bill, he or she will essentially face a choice between retaining all workers, incurring higher costs and losing competitiveness, market share and profits, or maintaining competitiveness and profitability by laying off less productive workers, substituting capital for labour, or compensating for wage increases through reductions in other forms of remuneration and conditions of employment. The more intense the competition faced in product markets, the more likely is the choice of the second option; the first option is unlikely to be viable beyond the short run.

The size of the effect on employment will depend on the responsiveness of the demand for and supply of labour to changes in the wage rate for a given occupation: that is, on the elasticities of demand and supply. The available evidence on these elasticities, both at a national level and for individual occupations, is limited, but the unambiguous implication is that a wage increase will, other things being equal, reduce employment opportunities. In New Zealand, a recent Reserve Bank study has estimated that a 1 per cent increase in real wages would lead to a reduction in employment of between 0.75 and 0.9 per cent (or 0.6 percent within one year and 0.8 percent within two years). O'Neill et al. (1989), analysing data from the State of Washington, found both that the share of employment in occupations receiving comparable worth adjustments was reduced, and that the returns to training (and hence the incentives to train) were diminished. Bonnell (1987), simulating the effect of applying equal pay policies in Australia, estimates an underlying reduction in employment of 5.76 per cent for men and 5.94 per cent for women. The significance of these reductions has been masked in

practice by increasing workforce participation for women: both wages and employment have been increasing. However, the implication of Bonnell's work is that employment opportunities for women have been increasing more slowly than they would have in the absence of comparable worth, so that some women who would have liked to work were unable to. This finding is reinforced by Gregory and Duncan (1981), who estimate that equal pay policies in Australia were reducing the rate of growth of female employment by about 1.3 per cent per year relative to the rate of growth of male employment — equivalent to around one-third of the rate of growth of female employment in the period that they studied.

Such disemployment effects are unlikely to be evenly distributed. As with any minimum wage, they are likely to fall most heavily on the relatively low-skilled: those with the fewest and poorest employment options. Thus, in the United States, for example, minimum wage laws have been found to be most detrimental to the employment prospects of young, unskilled, black males: denying not only income but work experience and the associated development of self-worth that is so essential if differentials in welfare are to be eroded over time (Moore, 1971). In the case of comparable worth policies, those most adversely affected are likely to be the lowest-skilled, school-leavers, women attempting to re-enter employment after raising a family, Maori women already disadvantaged in the workplace, and women in relatively depressed regions: precisely those women whom such policies are purportedly intended to assist.

Drift to uncovered occupations. The distribution of the costs (and benefits) of comparable worth policies will depend on the nature of coverage. Where increased wages reduce employment opportunities in 'covered' occupations, displaced workers are likely to turn to 'uncovered' occupations in search of jobs. In other words, the demand for employment will be increased in firms or occupations where comparable worth claims are for some reason considered infeasible, potentially depressing wages in those occupations. Smith (1988:238) has produced evidence for the United States that suggests that this effect may be sizeable:

> [T]he women whose wages are most likely to be adjusted by the comparable worth remedy (those in female-dominated, non-teaching, government jobs) are fewer in number, much better paid, and subject to no greater gender-related wage differentials than the women whose wages are most likely to be adversely affected (those in 'female' jobs in very small

> firms). Women working for large employers in the private sector, to whom the comparable worth remedy may also apply, have wages that lie between those of the groups above. In general, then, among women in female-dominated jobs, the probability of comparable worth coverage is inversely related to 'need'... the cross-sector effects of comparable worth will tend to exaggerate earnings inequality in society.

The nature of coverage and its distributional effects would be likely to differ in detail in New Zealand because of our more centralised, collectivist labour relations system and, in particular, the proposal to allow unions to make comparable worth claims on a national basis. However, the voluntary nature of claims under the proposed system and the exclusion of individual claims would be likely to lead to uneven coverage. While the Working Group rightly recognised the importance of this source of 'flexibility' in mitigating disemployment effects, it could be expected to reinforce existing imbalances between sectors exposed to international competition, and sectors (particularly government) largely protected from it. Comparable worth would primarily benefit workers in the latter. (Union restraint in sectors facing severe competitive pressure cannot, however, be counted on, in particular where wages are set at an occupational, rather than an enterprise or workplace, level.)

Erosion of benefits. The benefits to those covered by comparable worth claims (at least those who manage to retain their jobs) are likely to be eroded over time. This is because a 'successful' comparable worth claim will create a 'rent' — a special, statutory profit — for its beneficiaries. Other workers wanting a share of this rent will attempt to raise their chances of entering the occupation, for example by increasing their qualifications above those actually required. Incumbents may seek to protect their rents, for example by stipulating stricter entry requirements in agreements, awards or licensing arrangements. The costs of these activities will eventually consume the 'rent'.

This highlights the fact that comparable worth policies are effectively a form of special interest regulation, using legislation and the court system to divert income in favour of one group at the expense of others. This explains the popularity of comparable worth among employees in the sheltered sectors (particularly government) and unions seeking to raise the incomes of their relatively highly skilled, employed members.

Some Counter-arguments

The Working Group on Equal Employment Opportunities and Equal Pay

— echoed by the Minister of Women's Affairs (see for example Shields, 1989) — has argued that the harmful effects of comparable worth policies are overstated by their opponents. In particular, they argue that as the scheme would be phased in gradually, and as there is scope for recognition of 'allowable differences', the wage cost, at least initially, would be small. Further, they assert that rather than introducing new rigidities in pay relativities, the implementation of the scheme would simply lead to the adjustment of older, 'unjust' relativities. Again, the Working Group 'does not believe' (though this belief was not substantiated in their report) that comparable worth would create inappropriate labour market signals, encouraging more women into occupations that they already dominate and reinforcing job segregation. The argument was that if pay did operate as a labour market signal, women would not now be concentrated in these occupations (this of course ignores state-supported barriers to the employment of women in other occupations). Finally, they argue that any adverse employment effects would be mitigated by the proposed three-year phase-in period, the fact that coverage is not mandatory and 'the protection against employment substitution that occupational segregation affords' (Wilson, 1988:14). In this sense, their proposal relies on one of the very phenomena they are purportedly concerned about.

To the extent that the proposed legislation makes 'allowances' designed to minimise the adverse employment effects of comparable worth policies, its rationale may be seen to be undermined. And while the overall effect on employment may be less adverse with the resulting incomplete coverage, the distributional effects are likely to be aggravated:

> If women in the covered sector are those most in 'need' — that is, those with the lowest wages or those facing the most discrimination — then comparable worth advocates would almost certainly regard relative gains by those women as socially defensible. But if those in the noncovered sectors are the most needy, both their relative wage reductions and any absolute wage losses they face [through loss of employment] will tend to exacerbate inequality. (Smith, 1988:232)

Within the New Zealand industrial relations system, such effects are likely to be reinforced. Representatives negotiating comparable worth claims at a national level may pay little attention to the effects on women's employment in individual firms. There is likely to be a strong temptation to use comparable worth claims — and the regulatory

advantage created by access to compulsory final-offer arbitration — to create new relativities between national awards and to perpetuate rigidly these relativities, against the interests of both male and female workers in industries and firms trying to meet the requirements of international markets. The overall effect would be to increase the rigidity of the labour market over time, penalising, not benefiting, the most vulnerable of workers.

In summary, comparable worth policies offend against both economic efficiency (leading to resources being wasted in unemployment, and distorting the way in which labour and capital are used across occupations) and equity (benefiting the relatively articulate and skilled at the expense of the most vulnerable of workers). They represent not a trade-off between efficiency and equity, but a sacrifice of both, hampering economic growth, and hence income prospects for all workers, and aggravating income differentials.

Chapter 4

Alternatives to Comparable Worth

COMPARABLE worth proposals provide an excellent illustration of the point that good intentions and compassionate rhetoric do not necessarily make for good policy. Good intentions without good analysis can, indeed, prove tragically harmful. To say as much is not to claim the supremacy of economic analysis in deciding the appropriateness of any particular policy. However, if we ignore the insights of economics — in this case, insights on the likely disemployment and distributional effects of comparable worth policies — we run a considerable risk not only of failing to reach our intended goals, but of hurting precisely those whom we had hoped to help. As Hayek (1988:502) writes:

> The point is not that whatever economists determine to be efficient is therefore right but that economic analysis can elucidate the usefulness of practices heretofore thought to be right — usefulness from the perspective of any philosophy that looks unfavourably on human suffering ... It is a betrayal of concern for others, then, to theorize about the just society without carefully considering the economic consequences of implementing such views.

To condemn comparable worth policies as both inefficient and inequitable is not, however, to condone the status quo. There is much in New Zealand's existing system of regulation that protects discriminatory behaviour and limits the options of relatively vulnerable groups of workers. That comparable worth is not a solution does not imply that there is no solution. Finding a solution, however, requires looking beyond differentials in pay or the distribution of women across occupations, to the barriers to the efficient use of women's labour and correspondingly to their equitable treatment.

Labour Market Regulation

In New Zealand, the most direct and significant barriers to the equitable

treatment of workers and to the efficient (and therefore increasingly remunerative) use of their labour are to be found in the provisions of the Labour Relations Act of 1987. This legislation has its historical roots in the Industrial Conciliation and Arbitration Act of 1894. Its philosophical roots lie in the characteristic beliefs of Fabian Socialism: that differences of income reflect exploitation; that the solution lies in collective pursuit of some centrally-determined concept of 'social justice'; that the individual worker can be 'empowered' only through politicisation of the work relationship and through the subjugation of his or her individual interest in favour of the collective. It is legislation that seeks to protect and enrich by decree, rather than through individual initiative and the facilitating of voluntary economic and social interactions.

The result is a system dependent on the suppression of two individual freedoms: freedom of contract between employer and worker, and freedom of association between workers to form unions. Three mechanisms are crucial to this suppression of freedom: registration provisions that define union coverage (and make competition for the 'right' to cover workers virtually impossible); 'blanket coverage', which enables industrial agreements to be extended to all workers covered by a union whether or not their employer was directly involved in negotiating them; and compulsory unionism. This has made for a predominance of national occupational and craft unions with statutory monopoly power in the representation of workers; in effect, a power to exploit both employers (who have no alternative but to negotiate over employment contracts with unions) and those workers who differ from the 'norm' represented by union officials (who are free neither to negotiate with employers on their own behalf nor to choose the kind of union that will best represent their interests). In short, what was intended as a means of protecting workers has evolved into a system that protects the interests of union officials at the expense of significant groups of workers: workers in companies struggling to increase productivity in the face of international competition, for example, and workers whose skills, needs and preferences differ from historical norms.

This system is inimical to the interests of many women. Officials in unions in traditionally male-dominated occupations are likely to have little interest in negotiating work conditions — flexible hours, job sharing, part-time work or the availability of childcare, for example — that will expose them to increased competition from female workers. On the contrary, they will have an interest in defending conditions of work and mechanisms for pay and promotion that are incompatible with the needs of working mothers, thus excluding an important sector of the female workforce, or in using their dominant position within the union

to discriminate against female members. An important recent example of the latter is the collaboration by male Air New Zealand cabin staff to block the promotion of female air stewards.

More generally, state-protected unions are in a position to raise pay and compress pay differentials, making it more difficult for low-skilled workers or workers who have been out of the workforce for some time to price themselves into work experience and training. This is of particular importance for women attempting to re-enter the workforce after a period raising children. This effect is reinforced by statutory minimum wages — again a policy that is well-intentioned, but of considerable harm to the most vulnerable of workers.

Other Regulatory Barriers to Equity in Employment

Legislation that makes possible the inequitable treatment of women in employment is not limited to the labour market. It may also be found, for example, in town and country planning legislation that makes it inordinately costly to provide childcare facilities at or near the workplace, or in some forms of legislation intended to protect workers from occupational health and safety hazards, but in practice excluding them from employment altogether. (A recent, extreme example was reported in *The Wall Street Journal*, 29 September 1989. A Court of Appeals in the United States decided to support a 'fetal-protection policy' barring women up to the age of 70 from working in a company's battery division, where they might risk exposure to lead — a move which one women's rights activist has described as inviting an open season on women employees.)

The lesson of such policies is that constraints on individual behaviour dictated by centralised governments, bureaucracies and state-protected unions, however intelligent and well-intentioned, can have significant adverse implications both for women's access to employment and the efficient use of their labour, and for their fair treatment in employment. In both cases, an important cause is the sheer incapacity of centralised organisations to understand and take account of the diverse needs, abilities and preferences of workers and employers. As Hayek writes in a more general context:

> At least before the obvious failure of East European socialism, it was widely thought by ... rationalists that a centrally planned economy would deliver not only social justice but also a more efficient use of resources. This notion appears eminently sensible at first glance. But it overlooks the fact that the totality

> of resources one could employ in such a plan **is simply not knowable to anybody** and therefore can hardly be centrally controlled. (Hayek, 1988:501, emphasis in the original)

The harmful effects are compounded by the fact that, in practice, those given positions of power in a centralised regime cannot be expected to act solely for the general good: a lesson which, like the former one, has been learned only slowly by countries such as New Zealand that have embraced the 'certainties' promised by collectivism. As Buchanan (1988:206) writes:

> For more than a century, and despite earlier constitutional understandings, judicial and public opinion has posed little or no constitutional challenge to increasing governmental intrusions into the economic liberties of citizens. This constitutional acquiescence occurred because political and legal philosophers, as well as citizens generally, were trapped in the romantic delusion that as long as democratic electoral procedures are in place, legislative majorities act to further the public interest. Modern public-choice theory has shattered this romantic delusion, if such delusion were not already demonstrably destroyed by the mere observation of modern political excesses.

Protecting Freedom of Contract

The solution — whether for promoting general social well-being or for empowering those workers, including female ones, most oppressed by the current system — does not, of course, rest in wholesale deregulation. Rather, it rests in a reformulation of our approach to the role of the government in the labour market. Economic relationships, including employment relationships, cannot take place in a legal vacuum. But what is needed is not a system of law concerned with constraining the outcomes of these relationships, taking choice out of the hands of those directly affected by them, but a system of law that facilitates fairness and efficiency in employment.

The basis of such a law must be an affirmation of the rights of workers in their labour, and of sanctity of contract (whether between workers and employers or between workers and unions). The freedom of contract and association protected in this kind of system would not, of course, be absolute; liberty, to be sustainable, cannot be allowed to degenerate into either anarchy or licence. But the constraints that make

freedom meaningful are not constraints on outcomes (dictated by judges or bureaucrats in the name of fairness), but constraints on the process by which contracts are formed, such as the basic common law prohibitions on the use of force or fraud, the mistreatment of those genuinely incapable of contracting for themselves, or the use of contracts to harm third parties (the way such a system might be constructed is considered at greater length in Brook [forthcoming]).

In a system based on freedom of contract, workers are empowered by their ability to exercise choice and are protected by the law, which tests and enforces the contracts that they form, by access to collective organisation (and the enhanced accountability of unions where they must compete for members) and by competition in the marketplace: competition that can severely penalise exploitative or discriminatory treatment. This protection, unlike the 'protection' afforded by comparable worth or affirmative action policies, is not restricted to the articulate and well-resourced, or to those 'on-side' with the union hierarchy. Instead, it is arguably **most** significant for the most vulnerable of workers: those locked into low-skilled employment or unemployment by the current system.

There is increasing evidence that relatively freely-functioning markets are in practice of great benefit to women seeking employment and improvements in income. Becker points out, for example, that while the Reagan administration was criticised by women's groups for its opposition to the Equal Rights Amendment and to comparable worth laws, it oversaw a period in which the unemployment rates of both black and white women declined and the differential between men's and women's median earnings narrowed by seven percentage points (to 32 per cent by 1987):

> This strong improvement in the position of women is all the more remarkable since the gender gap remained fixed at about 40 percentage points from the late 1950s to the end of the 1970s, and many people believed the gap would never shrink without extensive government help ... The full employment environment, the shift towards a service economy, increased training, and higher labor-force participation all contributed to women's economic advancement. (Becker, 1988:12)

Similarly, referring to the United States, Paul (1989:129) argues that:

> Rather than condemning the market system, feminists ought to be glorying in it, for it has proved remarkably adaptable to

> women's evolving desire to work full-time, to work throughout their lives, and to work in new and challenging jobs .... Why emphasize women's disadvantages — their alleged victimization, their helplessness — when feminism rightly understood should glory in women's remarkable advances? Indeed, it is the opponents of comparable worth, rather than its advocates, who have a positive attitude towards women's abilities, who see women as capable of determining what is in their own best interests and working for these goals in the marketplace alongside men, without any special privileges.

In New Zealand, rather more labour market barriers remain to protect historical male privileges than exist in the United States. Labour market reform is the key mechanism for eroding these privileges, enabling women to work alongside men in the pursuit of individual and shared goals.

Policies aimed at breaking down stereotypes and reducing labour market barriers to the employment and promotion of women will, of course, need time to take effect. However, the temptation to hasten history by placing even what are intended to be transient restrictions on pay or workforce composition is to be resisted. There are considerable risks to such intervention, not solely in terms of the loss of employment and adverse distributional effects, but also through the diversion of attention from the underlying causes of inequity, and thus their perpetuation.

Appendix

Comparable Worth Policies in the United States, Canada and New Zealand

THIS appendix summarises the approaches to comparable worth in the United States, Canada and New Zealand. In the United States, the primary focus has been on constitutional and statutory prohibitions on discrimination, although some individual States have introduced explicit comparable worth policies for State employees. In Canada, federal 'human rights' guidelines are supportive of comparable worth, and active comparable worth policies have been adopted in Manitoba and Ontario. In New Zealand, an Employment Equity Bill has been introduced, adopting much of the language of the Canadian comparable worth schemes, but differing in some significant details.

1. THE UNITED STATES OF AMERICA

Comparable worth as an explicit, legislated doctrine has received little acceptance in the United States. Rather, given the de facto supremacy of federal law and legislation in this area, attention has focused predominantly on interpretations of both constitutional and statutory prohibitions on discrimination, the issue being whether alleged acts of discrimination are violations of statutory and constitutional prohibitions. Consequently, to the extent that there exists anything resembling American assent to the doctrine of comparable worth, it has been through a 'bootstrapping' of the doctrine via equal pay and discrimination legislation and litigation, rather than overt acceptance of the doctrine.

The Legal and Constitutional Background

The polestars of individual liberty in the United States are to be found in the Bill of Rights, which consists of the first ten amendments to the United States Constitution. After the American Civil War, this Bill of Rights was amplified by the passage of the 13th, 14th and 15th amendments,

collectively known as the anti-slavery amendments. The best-known of these is the 14th — the Equal Protection Amendment — which provides, in Sections I and V, that 'No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws', and 'The Congress shall have the power to enforce, by appropriate legislation, the provisions of this article'.

It is often supposed that this Amendment makes unequal treatment unconstitutional and thus illegal. But this interpretation is incorrect. The 14th Amendment is a prohibition against unequal treatment by **governments**, not by private individuals. There is, at least in principle, nothing unconstitutional or illegal under American law and jurisprudence about discriminatory acts by private individuals against other private individuals. However, consequent upon judicial interpretation of Congress's general regulatory powers, a number of federal statutes have been introduced to prohibit such discrimination.

Comparable Worth in the United States Courts

To the extent that there have been comparable worth claims in the United States they have centred around:

- the Equal Pay Act 1962;
- Title VII of the Civil Rights Act 1963; and
- an amendment to Title VII, known as the 'Bennett Amendment'.

The Equal Pay Act was an extension of the Fair Labor Standards Act to require equal pay for the same jobs, regardless of the sex of the worker. Title VII of the Civil Rights Act proscribed employment discrimination on the basis of race, colour, religion, national origin or sex. The Bennett Amendment of the following year was enacted in an attempt to clarify controversy over whether Title VII extended to claims arising out of comparisons of different jobs.

During congressional consideration of the Equal Pay Act, the concept of comparable worth was explicitly considered and rejected, despite pleas by the incumbent Kennedy administration to include a ban on sex discrimination in wages for 'work of comparable character on jobs the performance of which requires comparable skills'. Instead, the Congress enacted a law requiring employers to pay the same wage to a

woman and a man doing the same job. The courts later interpreted the law to mean that work need not be identical, but must be 'substantially equal', to come within the purview of the Act.[1]

The Supreme Court decision on *County of Washington* v. *Gunther* of 1981,[2] involving an equal pay claim by female prison guards (designated 'matrons') who were being paid 70 per cent of the wages paid to male prison guards (designated 'male corrections officers'), encouraged comparable worth proponents to believe that legal recognition of comparable worth was possible. However, the court ultimately proved unwilling to move beyond a strict interpretation of the Equal Pay Act.

Following *Gunther*, the focus of comparable worth claims shifted from suits brought under the Equal Pay Act to those brought under Title VII. These cases, which have largely grown out of claims alleging racial discrimination, have established two dominant theories of discrimination. The first postulates that discrimination exists where there is 'disparate treatment' of women. In order to prove disparate treatment, the courts have held that there must be an affirmative demonstration of intentional discrimination, based on impermissible criteria. The second relies on showing that there is a 'disparate impact' on women which constitutes de facto evidence of discrimination. While the decision in *Gunther* seemed to exclude wage claims solely on the basis of disparate impact (implying that this doctrine was primarily relevant to the existence of discriminatory entry barriers to particular jobs), proponents of comparable worth have continued to attempt to use the 'disparate impact' doctrine, in particular, as a means to the judicial adoption of a comparable worth rule.

A key case in this process was the *AFSCME* case,[3] which appeared to give some legal sanction to the two theories. The trial court hearing the case upheld, for the first time in American jurisprudence, a variation of the union's comparable worth claim. However, this was denied by the judge who presided over the case, which was overturned on appeal.

The *AFSCME* case arose when a public sector union claimed that the State of Washington was guilty under Title VII of sex-based wage discrimination. Prior to the case, the State had voluntarily commissioned an outside pay consultant to evaluate State sector jobs. (This study was case conducted on the basis of four factors: knowledge and skill, mental demands, accountability and working conditions.) The study con-

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1 See, for example, *Christensen* v. *State of Iowa*, 563 F. 2d 353 (1977).

2 *County of Washington* v. *Gunther*, 452 U.S. 161 (1981).

3 *American Federation of State, County and Municipal Employees* v. *State of Washington*, 578 F. Supp 846 (1983).

cluded that there was a disparity of approximately 20 per cent between comparable jobs, and that this disparity increased as workers progressed up the job hierarchy. Accordingly, under the auspices of a 'lame-duck' governor, the State passed a $7 million budget appropriation to begin equalising wage differentials. However, the incoming governor (a woman), upon taking office, removed these appropriations from the budget, whereupon the union filed suit.

In deciding for the union, the judge found that there was evidence of both disparate impact and disparate treatment. Disparate impact was shown to exist by the State's own studies. The fact that these disparities were not redressed by the State upon their discovery was held to be indicative of disparate treatment. Further, the existence of these disparities, which was then known to State officials, was taken as demonstrating an intent to discriminate. The judge's conclusion was that the case was merely a 'failure-to-pay' case, in which the issue was not whether comparable worth was a doctrine demanding judicial sanction, but rather a matter of the court being asked to accept the conclusions of the State of Washington's own studies. In short, the judge held that the State should be bound by its own findings regarding pay disparities.

The Ninth Circuit Court of Appeals reversed this decision.[4] One reason given for this reversal was that it would be inequitable, and give rise to undesirable public policy, if those who, in good faith, commissioned studies aimed at helping them to eradicate inequities were then 'categorically bound' by the findings of those studies. However, the Court went further and rejected the lower court's position as to both disparate impact and disparate treatment.

Writing for the appellate court, Judge (now Justice) Kennedy held that a finding of disparate impact was inappropriate in that the broad definition of compensation in the State of Washington study was influenced by too many divergent factors to lend itself to disparate impact analysis. On the issue of disparate treatment, the court alleged that the plaintiffs had failed to prove an intent to discriminate, arguing that it was not sufficient to 'boot-strap' the observation that wages paid to women were less than those paid to men into a finding of an 'intent to discriminate'. It emphasised that it was, instead, the market that set wages, taking a myriad of factors into account in the process. Justice Kennedy noted that 'Neither law nor logic deems the free market system a suspect enterprise. Economic reality is that the value of a particular job to an employer is but one factor influencing the rate of compensation for that

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[4] *American Federation of State, County and Municipal Employees* v. *State of Washington*, 770 F. 2d 1401 (1985).

job ... We find nothing in the language of Title VII or its legislative history to indicate Congress intended to abrogate fundamental economic principles such as the laws of supply and demand or to prevent employers from competing in the labor market'.

The Appeal Court's finding, imposing as it did new restrictions on the twin theories used to 'prove' violation of Title VII with regard to sex discrimination, was a severe blow to judicial recognition of the comparable worth doctrine in the United States. The reluctance of the courts to give legal sanction to the doctrine was subsequently reasserted in a case brought by the American Nurses' Association against the State of Illinois.[5] When this case was brought to appeal, Richard Posner, writing for a unanimous court, asserted that the comparable worth doctrine 'is not of the sort that judges are well equipped to resolve intelligently or that we should lightly assume has been given to us to resolve by Title VII or the Constitution'.

The American courts have shown little enthusiasm for the concept of comparable worth. Absent further legislative direction, there is no reason to think that this will change. Indeed, even if Congress were to pass a comparable worth statute, it is far from clear that such legislation would survive an attack on its constitutionality.

State Legislation

While the courts have been reluctant to go beyond narrow interpretations of the Equal Pay Act and Title VII, State governments — largely at the insistence of public sector unions — have been more disposed to enact comparable worth legislation. (They have, however, been decidedly less enthusiastic about appropriating funds to implement the wage adjustments mandated by such legislation.) A study by the United States General Accounting Office (1986) found that ten States had adopted comparable worth policies for State employees, while a further 18 had conducted some kind of comparable worth study.

Minnesota has been the most active State in passing, and appropriating funds for, State sector comparable worth legislation. In 1979, it engaged an outside consultant to perform job evaluations. This was followed by a second wage study which found an average 25 per cent wage differential between male- and female-dominated job classifications. In an attempt to 'remedy' this, it in 1982 passed a law designed to achieve parity over a four-year period. Two years later, the scheme was extended to cover all workers employed by cities, counties and school

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5 *American Nurses Association* v. *State of Illinois*, 40 FEP Cases 245 (1986).

districts within the State.

II. CANADA

In Canada, the federal government, and all but one province, have laws enshrining the doctrine of equal pay for equal work. The provinces of Manitoba and Ontario have adopted explicit comparable worth legislation. The concept of comparable worth has also received support in recent federal legislative guidelines.

Early Federal Legislative Guidelines

The (federal) Human Rights Act of 1977 set the stage for subsequent developments in comparable worth policy in Canada. Section 11 of the Act provided that:

- It is a discriminatory practice for an employer to establish or maintain differences in wages between male and female employees employed in the same establishment who are performing work of equal value, and

- In assessing the value of work performed by employees in the same establishment the criterion to be applied is the composite of skill, effort and responsibility required in the performance of the work and the conditions under which the work is performed.

The Act provided for a Human Rights Commission with investigatory and enforcement powers. This Commission established 'Equal Value Guidelines', specifying both the criteria for measuring the 'value' of work and the factors that could constitute 'justifiable' reasons for wage differentials.

The Commission hears complaints related to only a limited portion of the workforce: in general, workers in federal employment and in sectors subject to federal regulation, such as banks. Once the Commission decides that it has jurisdiction over a complaint, the complainant is given the right to specify the group with which it wishes to be compared, and a comparator group is composed. Job assessments are then carried out, based on required skills, effort, responsibility and working conditions. If, on the basis of these assessments, the complainant is found to be 'underpaid', the Commission attempts to mediate a solution. If this is unsuccessful, it can appoint a human rights tribunal to resolve the

issue. The findings of this tribunal may then be enforced — and challenged — through the federal court system.

The Federal 'Equal Wage Guidelines' of 1986

In 1986, the Human Rights Commission issued new Equal Wage Guidelines, binding on any human rights tribunal dealing with an equal pay complaint. Under these new guidelines, the Commission expressly suggested that it would largely deal with classes of employees rather than individual employees. The guidelines offer detailed definitions of 'occupational dominance by gender', as a basis for deciding jurisdiction in comparable worth cases.[8] They provide for job evaluations to be carried out on an 'establishment-wide' basis, using either an employer's own job evaluation system (providing this meets broader Human Rights Commission criteria), or an evaluation system proposed by the Commission. An 'establishment' is defined to include all employees who are subject to a common personnel and wage policy, whether or not the policy is administered centrally, and notwithstanding any collective bargaining agreement covering employees. Within an establishment, however, some allowance is made for regional differences in pay.

Finally, it should be noted that the new Guidelines coincide with recent equal pay initiatives on the part of the Canadian Labour Department. Labour inspectors are empowered to use their statutory right of inspection to examine an employer's books to ascertain whether they are complying with Section 11 of the Human Rights Act. They may then either notify the Human Rights Commission of non-compliance, or file complaints directly with the Commission.

Comparable Worth Legislation in Manitoba

In 1985 Manitoba passed the first comparable worth legislation in Canada, in the form of its Pay Equity Act. This legislation initially applied only to the civil service. In 1986 it was extended to apply to some Crown corporations, universities, hospitals and agencies receiving substantial government funding.

The Act places on the Civil Service Commission, and the bargaining agents of employees, the affirmative duty of identifying female- and male-dominated groups of employees. 'Domination' of an occupation

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[8] Under the new federal guidelines, the percentage of workers of one sex required to define an occupation as 'male' or 'female' is 70 for groups of less than 100, 60 for groups of 100 to 500, and 55 for groups of over 500.

is defined to exist when an occupation with ten of more workers has 70 per cent or more of one sex. Once a male or female occupation is identified, the Act provides for a single job evaluation to be carried out, referring to skill, effort, responsibility and working conditions in the occupation, and for wages to be adjusted accordingly. These adjustments cannot be made by reducing the pay of any group; however, the Act provides for an upper limit on adjustments by prescribing a ceiling of 1 per cent of the employer's total payroll for any year, and a maximum of four such adjustments in any four consecutive years. Compliance is monitored by a Pay Equity Bureau, which also has powers of arbitration where a dispute arises over the implementation of a comparable worth wage increase.

Comparable Worth Legislation in Ontario

The most recent, and most far-reaching, comparable worth legislation in Canada was enacted in Ontario in 1987. Among the novel features of Ontario's Pay Equity Act are that

- it is the first such Act anywhere in the world to apply to the private as well as the public sector (though not to employers with fewer than ten workers);
- it is expressly designed solely to apply to women; and
- in the terms of the preamble of the Act, it is designed to provide affirmative action to redress perceived gender discrimination in the compensation of employees in 'female' job classes.

The Act expressly requires employers to establish and maintain compensation practices that are designed to provide for 'equal pay for jobs of equal value'. A Pay Equity Bureau has been established to oversee both the process of job evaluation and subsequent wage adjustments. To demonstrate compliance, employers are required to:

- identify female- and male-dominated occupational classes, defined as classes in which workers are 60 per cent female and 70 per cent male respectively;
- compare the value of work of male and female occupations according to skill, responsibility, physical demands and working conditions; and

- increase the wage of each female occupational class so that it is at least equal to the wages of the employer's lowest-paid male occupational class performing work of the same 'value', if possible within the same establishment, and otherwise in the same collective bargaining unit.

Employers' 'pay equity' plans are required to be posted in the workplace. Unions may file any objections to these plans with the Employment Equity Commission, as may individual workers in non-unionised workplaces. The Commission has extensive powers to investigate and adjudicate such complaints. The Act provides for wage adjustments to be limited to 1 per cent of an employer's annual payroll in Ontario.

III. NEW ZEALAND

New Zealand has had equal pay legislation in the state sector since 1961, and in the private sector since the Equal Pay Act of 1972. Complaints about direct discriminatory treatment can be handled either under the Human Rights Commission Act of 1977 or through the personal grievance mechanisms of the Labour Relations Act 1987.

At the time when the Equal Pay Act was passed, there was some expectation on the part of proponents of comparable worth that it could be interpreted to embrace claims for equal pay for work of equal value. However, the finding on a 1986 'comparable worth' application by the clerical workers' union made it clear that this was beyond the jurisdiction of the Act. (In this respect, the New Zealand experience parallels that of the United States.) The result was increasing pressure to legislate explicitly for equal pay for work of equal value, and in 1987 the Labour Party made an election commitment to this effect.

In 1988, a Working Group on Equal Employment Opportunities and Equal Pay, convened under Margaret Wilson, a former President of the Labour Party, recommended 'employment equity' legislation combining 'results-oriented' equal employment opportunities requirements and 'pay equity'. The Working Group's proposals borrowed heavily from the language and structures of the legislation implemented in Manitoba and Ontario. An Employment Equity Bill, fairly closely based on the Working Group's proposals, was introduced to Parliament late in 1989, and at the time of writing is passing through the legislative process.

Comparable Worth in the Employment Equity Bill

The Employment Equity Bill provides for comparable worth — labelled 'pay equity' — assessments to be carried out by an Employment Equity Commissioner, and implemented through the existing structure of industrial awards and agreements (sustained by the Labour Relations Act), with the assistance of the Arbitration Commission. Requests for comparable worth assessments can be lodged by a union representing a female-dominated occupation (i.e. where at least 60 per cent of workers are women), by an employer, or by a group of 20 or more workers where no union has coverage, or where the union with coverage is slow to pursue a claim. The claim assessment process involves nine separate steps, including the selection of two male comparator occupations and debate over an acceptable process for evaluating the claim. Once an assessment is completed, the union involved can lodge a claim to have it incorporated in its awards and agreements (at this point workers without union representation or with unhelpful union representation seem to slip from view). If there is failure to agree on the incorporation of a claim, an Arbitration Commissioner may impose compulsory, final offer arbitration, assisted by two lay people with 'pay equity expertise'. The resulting pay adjustments are to be phased in over three years, although this period can be either reduced or increased by the Arbitration Commission, according to its assessment of the impact on 'the overall costs of employers and the Government of New Zealand' and 'the New Zealand economy'.

A Comparison with Canada

While the New Zealand proposals draw on the language of comparable worth policies in Manitoba and Ontario, and borrow some of their structures, they differ in some significant respects.

The schemes are alike principally in their emphasis on equalising income across comparable occupations, rather than between individuals; in the powers of investigation and adjudication that they invest in government bureaucracies; and in their prohibition of pay reductions as an instrument of equalisation. There are only minor differences in definitions of occupational dominance and in phase-in provisions: for example, the Canadian schemes are explicit about the allowable impact of comparable worth adjustments on employer costs.

There are, however, some important differences. In particular, the Canadian schemes operate on an enterprise basis, providing for comparable worth assessments to be carried out within establishments rather

than, as in New Zealand, applying to all workers in a given occupation. Second, comparable worth assessments and pay adjustments under the Canadian schemes are treated separately from collective bargaining arrangements, whereas the New Zealand proposals rely on existing collective bargaining arrangements for the implementation of claims. Third, the Ontario scheme provides for access to the comparable worth apparatus for individual workers as well as for unions, whereas the New Zealand scheme is more narrowly focused on existing unions. In each of these respects, the Canadian schemes could be argued to be more potentially responsive to the differing circumstances of firms and the differing needs of workers, and less conducive to the entrenchment of relativities across the workforce as a whole, than the scheme proposed for New Zealand. On the other hand, the Canadian schemes are mandatory for the employers over whom they have coverage — which in Ontario includes all private sector firms with more than ten workers — whereas under the New Zealand proposals pursuit of comparable worth claims would be voluntary.

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THE INEQUITY OF 'PAY EQUITY'

PENELOPE J. BROOK

COMPARABLE WORTH POLICY IN NEW ZEALAND

Policies promoting comparable worth (equal pay for work of equal value) in New Zealand and elsewhere assume that the 'wage gap' between men and women is proof of discrimination against women. Against this, Penelope Brook argues:

- the gap may in fact reflect other factors, like the greater role of women child-rearing and their need to find jobs compatible with that role;
- where labour markets work well, employers who do discriminate on grounds of sex or race risk going out of business;
- comparable worth policies will instead reduce employment opportunities, especially for the most disadvantaged women.

The true road to 'employment equity' lies in reforming such regulations as those governing the labour market and town and country planning, to remove unnecessary barriers to the advancement of women.

Penelope J. Brook is a freelance economics consultant. She has written widely on labour market issues for the New Zealand Business Roundtable, and is the author of the major study *Freedom at Work*, to be published by Oxford University Press in Auckland in 1990.

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