

## Submission to the Ministry of Labour

### RE: The *Pay Transparency Act, 2018*

#### Overview

For more than a century, the Ontario Chamber of Commerce (OCC) has supported economic growth in Ontario by advocating for business priorities at Queen’s Park on behalf of our diverse 60,000 members, including local chambers of commerce and boards of trades in over 135 communities.

The OCC and its members recognize that a gap exists between the compensation women and men receive for engaging in the same work. We believe that closing this gap is a critical part of ensuring women are equal and valued members of the labour force. Our 2019 Business Confidence Survey underscored how important talent is to employers, with 75 percent of respondents indicating the ability to recruit and retain talent is a critical factor to their competitiveness. Given the established challenges businesses face with respect to hiring, better serving the under-utilized female labour pool is a clear solution. Not only are there reputational benefits to taking action on pay equity in the “war for talent,” but an equitable workplace is a productive and competitive workplace.

Unfortunately, research has shown that the pay gap exists due to a complex nexus of social, economic, and political factors; it, therefore, cannot simply be legislated away. Any legislation from government that seeks to do so should consider this reality, and judge both its expected success and its impact on employers accordingly.

Ontario is currently a leading jurisdiction with respect to legislation that aims to address the pay gap. In 1987, the government introduced the *Pay Equity Act*, which represents a strict approach to identifying and rectifying compensation inequity. Over the past 30 years, Ontario has seen its pay gap shrink from 36 percent to approximately 29 percent. This is in spite of a lack of awareness, education, and resources from government to support employers as they attempt to comply with the legislation or create their own approaches to making their workplaces more equitable.

The *Act* was last amended in 1993 and has not seen serious efforts at regulatory modernization since that time. Given the substantive changes to the labour market Ontario has experienced in the intervening years, the OCC and its members were dismayed when the previous government chose to introduce new anti-pay gap legislation rather than undertake a review and update of the *Pay Equity Act*. Many of the goals of the *Pay Transparency Act* could be achieved by improving the existing legislation and its associated regulations, including strengthening the mandate of the Pay Equity Office.

Given that your government has a stated goal of reducing red tape for business, an examination of the *Pay Transparency Act* should include consideration for how to reduce its anticipated burden, particularly with respect to the increased resource outlay associated with new reporting requirements as well as the impact on competitiveness. Furthermore, any legislative action on the pay gap must be taken in context with existing

regulatory and reporting requirements on business. Regulation which is excessive, duplicative, and expensive effectively limits the ability of industry to comply, which, in turn, undermines the intent of the regulations themselves. It is for these reasons that we believe a ‘carrot’ approach is more productive than a ‘stick’ approach when it comes to closing the pay gap; making it easier for employers to comply with regulation will result in increased efficacy of that regulation.

As such, our members have concerns about the impact of the *Pay Transparency Act*, both with respect to its imposition of red tape and its effectiveness in achieving pay equity. Of particular concern is the potential for this legislation to duplicate the efforts of the *Pay Equity Act* in a manner that both increases the administrative burden on employers and fails to achieve our common goal of closing the pay gap. Currently, the lack of resources available to employers under the *Pay Equity Act* has resulted in confusion, resistance, and the need to hire expensive outside consultants to be in compliance. Adding further administrative responsibilities under the *Pay Transparency Act* is, therefore, a step in the wrong direction for employers.

On principle, the OCC recommends the Government of Ontario undertake a comprehensive review and update of the *Pay Equity Act*, the *Pay Transparency Act*, and the relevant sections of the *Employment Standards Act*. However, we recognize that a review of the *Pay Equity Act* would require an investment of both time and resources to which the government may not be amenable. While this submission outlines a series of considerations for a comprehensive pay gap review, we have also provided recommendations for amendment of the *Pay Transparency Act* to better reflect the needs of employers.

Considerations for a review of the *Pay Equity Act*:

- Understand how all employers subject to the *Act*, particularly those that have emerged since 1993, may be made aware of their obligations, including clarification and ‘myth-busting’ with respect to their responsibilities under the law.
- Consider the types of employers and employees that need to be covered by the *Act*, in light of changes in the labour market, as well as evolutions in the relationship between employer and employee.
- Examine how limiting retroactive payments can improve compliance and speed the achievement of pay equity.
- Determine how to support the maintenance of pay equity for employers who have already achieved it, particularly if they add new job classes and/or adjust their compensation schedules.
- To ease comprehension and streamline efforts to close the pay gap, consider transferring the equal pay for equal work provision from the *Employment Standards Act* to the *Pay Equity Act* (or the equivalent resulting legislation post-review).
- Review ongoing litigation to understand where pain points currently exist, particularly with respect to the proxy process.

Recommended amendments to the *Pay Transparency Act*, and further action on closing the pay gap:

1. **Remove the requirement to post compensation ranges on job listings.** This requirement makes it difficult for employers to be competitive in the already challenging talent marketplace. Not only would public disclosure reveal compensation details to competitors, a base salary range does not convey total compensation, which may fluctuate based on a candidate’s qualifications or experience

and is a critical component of an employer's 'pitch' to candidates. Public salary disclosure also invites *both* men and women to negotiate, placing upward pressure on compensation without addressing the core issue of pay inequity.

2. **Better define compensation and clarify the proposed calculation.** Any analysis required under the *Pay Transparency Act* must be simpler than the existing *Pay Equity Act* calculations. However, the OCC recognizes the calculation of compensation for the purposes of uncovering a pay gap is subject to several variables, many of which are difficult to control at an individual employer level. For example, academic surveys have revealed that a share of the pay gap is a result of objective factors related to women's education levels, caregiving and family commitments, and/or professional experience. These factors influence the results of the calculation and signify that the gap is not entirely the result of employer bias. The remaining share of the gap cannot be explained by such factors and, as such, is challenging to legislate away.

The current proposed calculation, though refreshingly simple, may be improved by including at least one variable that reflects these factors, such as:

$$\text{Gender wage gap (\%)} = \frac{\text{male wages (level of employment x)} - \text{female wages (level of employment x)}}{\text{male salary (level of employment x)}} \times 100$$

Furthermore, compensation differs between each employer and job position and may contain more than a base salary. Commission, bonuses, overtime, and other financial benefits all impact total compensation and may prove challenging to accurately calculate and compare. Similarly, irregular forms of compensation (such as severance and grievance settlements) should not be considered as part of the calculation. Poor definition of compensation may result in confusion for employers, distortion of data, or result in inadvertent loopholes.

3. **Avoid inflicting duplicative and burdensome reporting obligations on employers.** If the government insists on pay equity reporting, it should be harmonized with existing reporting requirements such as those related to accessibility, the Workplace Safety and Insurance Board (WSIB), or the *Corporations Information Act*. The reporting structure of the *Accessibility for Ontarians with Disabilities Act* (AODA) is worth reviewing as a model, as firms use a ServiceOntario account to access an Accessibility Compliance Reporting tool that poses questions customized to the size of the organization. Similarly, when determining the size of business to which reporting requirements will apply, consider those limits placed on other forms of reporting and seek to harmonize those rules.
4. **Develop a pay gap analysis tool.** Given its expectations for reporting, the government has a critical role to play in developing and publicizing a standardized approach to data production, collection, and assessment. This standardized approach should be translated into an online tool that could assist employers in calculating their internal pay gap. Once workplace data has been analyzed, employers and employees can diagnose if there are barriers preventing women from fully engaging in the workplace—as barriers may differ across industries, regions, sizes of business, or by the historic sex representation in particular job classes—and then take action to address them (see “best practices from other jurisdictions”).

5. **Stagger the roll-out of mandatory reporting.** Pay transparency reporting should be implemented on a schedule that respects the ability of organizations to comply. If the government is to move forward with the *Pay Transparency Act*, it should develop a timeline that includes both voluntary and mandatory deadlines. The OCC recommends the following timeline, to be rolled out over 18 to 24 months:

- Ontario Public Service and related agencies (mandatory)
- Broader Public Sector (voluntary)
- Private sector employers over 500 employees (voluntary)
- Private sector employers (250-499 employees) (voluntary)
- Private sector employers (100-249 employees) (voluntary)
- Broader Public Sector (mandatory)

This staggered rollout would result in greater publicization of anti-pay gap policies that could help support smaller employers and those without pre-existing pay equity practices. It would also lead to the development of benchmarks, standards, and targets against which organizations could measure themselves.

6. **Empower the Pay Equity Office.** One of the weaknesses of the *Pay Transparency Act* is its failure to engage with the *Pay Equity Act*. A consequence of this is the further sidelining of the Pay Equity Office, an entity which could act as a useful resource for employers if empowered to do so. Employers require a repository of best practices and expertise to determine their pay gap and then effectively respond to it. The Government of Ontario should enhance the role of the Pay Equity Office to act as a “centre of excellence” for closing the pay gap. The Office could support and advise business, assist in reporting, provide resources, and develop industry-specific benchmarks and strategies. As a first step, the OCC recommends reviewing the results of a recent Pay Equity Office Wage Gap pilot project.<sup>1</sup> Its high participation rate among businesses indicated that many employers are eager for guidance from the Office and wish to understand if a pay gap exists within their own organization.
7. **Create mechanisms for positive reinforcement.** In place of the ‘name-and-shame’ approach implied in the existing *Act*, your government should harness the power of the war for talent by publicly recognizing employers that take tangible action on pay equity and women’s equality in the workplace. A pledge to close the pay gap, public recognition of action taken, and/or an accreditation program would likely see uptake as firms compete ever more aggressively for talent. Additionally, these programs could be used to drive the sharing and scaling of best practices between employers, resulting in not merely a public disclosure of pay gaps but also on the action being taken to close them.
8. **Assess and review.** Revisit the *Act* after five years to understand its impact and determine where further action may be required including, if necessary, a move towards mandatory reporting or other regulatory intervention.

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<sup>1</sup> [http://www.payequity.gov.on.ca/en/Monitoring/Pages/wage\\_gap\\_results.aspx](http://www.payequity.gov.on.ca/en/Monitoring/Pages/wage_gap_results.aspx)

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### **Best Practices From Other Jurisdictions**

**Europe:** Switzerland, Germany, Luxembourg, and Liechtenstein employ an online tool called Logib, which allows employers with more than 50 employees to review their compensation practices and calculate their internal pay gap. The software can also reveal details such as the underrepresentation of women in higher-paying jobs, which may not be captured in Ontario’s pay transparency reporting. Importantly, the tool is also easy to use for employers. It is an excel-based program that is standardized, transparent in its calculation, only requires five variables to run, and provides immediate results.

**Switzerland:** The Dialogue on Equal Pay is an approach that is founded on partnerships between employers, employee associations/unions, and government. A tripartite agreement encourages companies to voluntarily examine their pay practices and then work together with other stakeholders to develop organization-specific solutions. Companies have four years to rectify any problems identified through the process and, once complete, are given a certification that proves the organization pays its male and female employees equally.

**United Kingdom:** In the Ministry of Labour consultation paper, the UK’s *Equity Act, 2010* is cited as an example for Ontario to follow. That country’s original approach to closing the pay gap – the voluntary ‘Think, Act, Report’ scheme – was a framework to help employers put equity at the forefront of their recruitment, pay, and promotion activities. It was viewed as an asset in recruiting and retaining talent, and many large employers developed ‘Think, Act, Report’ programs as one way to help attract talent. In 2018, a mandatory pay transparency regime came into effect. However, it should be noted that the current Brexit context makes comparison to Ontario difficult: as it negotiates an exit from the European Union, the UK will need to re-develop labour laws that were previously dictated by membership in the union, potentially redefining regulatory and reporting standards across the board.

**Conclusion**

Regardless of the approach chosen by your Ministry, we recommend that it engage with employers as partners in closing the pay gap, as opposed to disinterested parties in need of enforcement and reprimand. Education and awareness activities designed by the Ministry and/or the Pay Equity Office can be supported by organizations like the OCC, as well as human resources industry professionals, employment lawyers, and sector associations.

Rather than attempt to achieve the laudable goal of closing the pay gap through legislation alone, the Government of Ontario should act as a resource and a steward as employers take action appropriate to their workplaces. While we have seen progress over the past 30 years, employers require greater clarity, tools, and guidance to go further.