ONTARIO
EQUAL PAY COALITION

CLOSE THE GENDER PAY GAP

SENT VIA EMAIL ONLY

3 November 2017

Hon. Ann Hoggarth, Chair
Standing Committee on Finance and Economic Affairs
c/o Eric Rennie, Committee Clerk
Procedural Services Branch
Legislative Assembly of Ontario
99 Wellesley Street West, Room 1405 Whitney Block
Toronto, Ontario M7A 1A2

Re: Bill 148, *Fair Workplaces and Better Jobs Act:* an Act to amend the Employment Standards Act, 2000 and the Labour Relations Act, 1995 and to make related amendments to other Acts

Dear Ms Hoggarth and members of the Committee:

We write to provide you with additional submissions during your clause-by-clause deliberations regarding the need for a strong statutory framework to close the gender pay gap. We provide you with these additional submissions and specific amendments to the new equal pay provisions (s. 42 of the *ESA* and the proposed s. 42.1 and 42.2 of *Bill 148*).

Our concerns may be summarized in three general categories. First, the Bill 148 language to the equal pay provisions continue to contain loopholes which replicate well-recognized problems that currently exist in the pre-Bill 148 *Employment Standards Act*, s. 42 equal pay provisions.

Second, and more egregiously, the First Reading amendment to Bill 148's s. 21 introduces a new loophole to the existing equal pay provisions which significantly undercuts the original intent of Bill 148 to provide equal pay for precariously employed

info@equalpaycoalition.org
www.equalpaycoalition.org **474 Bathurst Street, Suite 300, Toronto, ON M5T 2S6**
tel: 416.964.1115

workers. This first reading amendment could easily be characterized as the amendment for the "retail sector" . The new amendment introduces a new exclusion clause to enable a pay differential where seniority provisions are "based upon hours of work". As we set out in greater detail below, such a provision encourages employers to distribute existing hours to an increasing number of workers so that none may accumulate sufficient hours to achieve the same pay as full-time workers.

Third, the Bill 148 pay transparency provisions must be improved to provide real protection for non-unionized workers seeking information.

We refer you to our attached summary of the specific language changes and amendments to Bill 148 to close the loopholes. We propose this new and fine-tuned language to ensure that women may achieve the substantive equality as intended by Bill 148. We also request that you continue to refer to our July 2017 submissions for a deeper analysis of the legal framework required to close the gender pay gap.

We encourage you to make the needed amendments. Bill 148 puts forward an equal pay initiative that, *if done right*, could make a real difference for women. Bill 148 takes an important step in the right direction by extending the **same work/same pay principle** so that part-time workers, workers with temporary, seasonal or casual status, and workers employed through temporary help agencies, must be paid the same as full-time and directly-hired employees who are doing substantially the same work.

Our specific requests for changes are as follows:

Part I Improved definition of Equal pay for Equal work: "Substantially similar"

1. **Amendments to include language of "substantially similar"**: The proposed language for the existing ESA section 42, and new sections 42.1 and 42.2 need improvement. The attached language we propose directly sets out, in the legislation, the true intent of Bill 148. The problem with the existing ESA language is that in practice employers have relied on the word "same" to require that jobs be "identical" before receiving equal pay. The word "same" is the problem.

   Our proposal is that Ontario should mirror legislation used in Section 12 of the BC *Human Rights Code* where an employer must not discriminate where an employee…."is employed by that employer for *similar or substantially similar work.*"

2. **Detailed definition for "substantially similar".** The attached language ensures that the test of "substantially similar" will be interpreted in accordance with the objectives of Bill 148. We have not changed the legal test. We have

instead made it explicit by defining what "substantially similar" does not mean (it is does not mean identical; it does not require that jobs be interchangeable) and by defining what "substantially similar" does mean (either similar core functions, or similar skill, effort, responsibility and working conditions).

3. **Improved definition follows the existing jurisprudence.** The existing jurisprudence recognizes that the work must be identified as substantially similar by either using a job function analysis or a skills analysis but both tests are recognized as necessary alternatives. Both approaches are needed because they respond to different ways in which jobs are constructed. The language we have used follows the language that was in the ESA and the existing jurisprudence, particularly that which has developed in labour arbitration to determine if jobs are misclassified or should be in the same job classification.

4. **Clear Equal Pay language.** Clarity on the face of the statute is particularly important for non-unionized workers who rarely have the capacity or security to enforce their rights through adjudication. Clarity on the face of the statute is also necessary because, however well matters may be expressed in the policy manual, most employers and employees do not read the policy manual.

Part II Narrow exemptions and Repeal the First Reading amendment

1. **Narrow the Exemptions.** We request that the exclusions to the equal pay principle must be restricted to seniority systems and merit pay systems that are compliant with the *Human Rights Code* as set out in our attached proposal.

   In particular, the basket exclusion clauses that allow for exceptions for "any other factor other than" sex, employment status or assignment employee status [s.42(2)(d), s. 42.1(2)(d), and s. 42.2(2)] must be repealed because these create an invitation to develop other, more precarious forms of work to evade compliance with equal pay (in the way that part-time and temp agency work has been used to date).

2. **Repeal the First Reading amendments.**

   The exclusion clause for seniority systems that allow for differential pay "based on the accumulated number of hours worked" must be repealed in its entirety [s.42(2.1), s. 42.1(2.1), and s. 42.2(2.1)].

   First, this is a claw back of rights in s.42 which was never subject to this restriction. Second, it is an exclusion that protects some of the very tactics that have been used to create part-time work that remains at lower wages than identical full-time work and preserves existing wage grids under which part-time

workers literally do not achieve equal pay with full-time workers for 20 years or more. This provision is also particularly dangerous because it protects and invites practices under which employers already cap part-time workers' hours when they are close to accumulating hours that would move them into a pay level that approaches full-timers.

This exclusion clause protects practices which encourage employers to hire more part-time workers but distribute the existing hours over an ever greater number of workers so that none of them is able to reach an hours accumulation that would enable them to move up in pay (which also, leaves them with too few hours to secure a sustainable income). In a legislative system, such as the ESA and in which workers have no guarantee of hours, protecting pay differentiation based on hours accumulated - rather than date of hire - encourages and drives the creation of more precarious work. It directly undermines the intent of s. 42.1 and 42.2 and preserves systemic gender imbalances between part-time (largely female) and full-time (largely male) work contrary to s. 42.

Part III Pay Transparency

1. The proposed pay transparency provision puts the responsibility on the worker to ask for information; not the obligation on the employer to proactively disclose information to workers. And, Bill 148's equal pay transition provision denies unionized workers access to the equal pay provisions for what may be several years until collective agreements signed before April 1, 2018 expire.

   These loopholes should be closed. The Coalition's attached detailed submissions provide a roadmap and language to fix these problems and make the law effective.

A few final comments

There is no reason not to close the loopholes in Bill 148 during Second Reading's clause-by-clause review to ensure that the equal pay provisions deliver meaningful protection for workers.

The 1983 Wallace Commission recommended that part-time employees be treated the same as full-time employees. Some employers followed the recommendation. In health care, particularly hospitals and long-term care facilities, education, the Ontario public service, and many other sectors in Ontario, part-time workers are paid the same wage rate as full-time employees. In some sectors, full-time and part-time employees have been paid the same pay rate since the 1980's. It is not a new proposal. As the Changing Workplace Review highlighted, numerous commissions and other jurisdictions support and follow the same work/same pay principle, including: the 1984

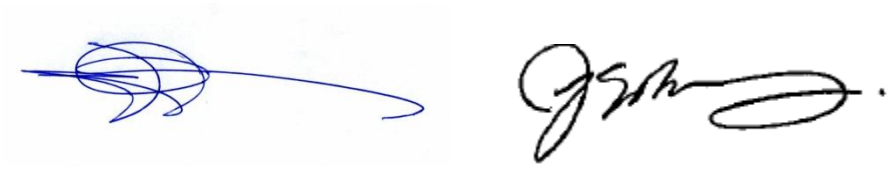
Royal Commission on Equality Report; Arthurs Report to the Federal Government on Federal Labour Standards; partially adopted by two provinces in Australia; and has been in place in Europe for 20 years.

Bill 148's approach follows the equal pay provisions adopted in the European Union for over twenty years. The European Union's economy has not collapsed with part-time, contract, casual and temporary workers guaranteed the same pay as their full-time counterparts.

The equal pay provisions will help improve the Ontario economy. In 2016, the Ministry of Labour retained Deloitte LLP to assist in estimating the potential costs and opportunities to the province's economy from closing the gender wage gap. Deloitte LLP calculated that, in Ontario alone, the gender wage gap represents $18 billion in "foregone income" each year. As the Ontario government's own Gender Wage Gap Steering Committee highlighted, that $18 billion in missing wages equals 2.5% of the province's annual GDP. That's as large as Ontario's motor vehicle and auto parts industries combined.

Bill 148 presents an important opportunity to make meaningful change to close the gender pay gap. It is important to get the language right if there are to be real rights to equality.

In Solidarity,



Fay Faraday and Jan Borowy
Co-Chairs

EQUAL PAY COALITION

EQUAL PAY FOR EQUAL WORK PROVISIONS

REQUIRED AMENDMENTS TO BILL 148

***EMPLOYMENT STANDARDS ACT*, SECTIONS 42 TO 42.3**

October 26, 2017

Equal pay for equal work: Sex

42. (1) No employer shall pay an employee of one sex at a rate of pay less than the rate paid to an employee of the other sex when they perform substantially similar work in the same establishment.

(1.1) "Substantially similar" in subsection (1)

(a) does not mean "identical"; and

(b) does not require that jobs be interchangeable.

(1.2) For the purpose of subsection (1), work will be considered substantially similar if:

(a) the core functions of the work are similar; or

(b) the performance of the work requires similar skill, effort and responsibility and is performed under similar working conditions.

(2) Subsection (1) does not apply if the employer is able to show that the difference in pay is the result of

(a) a formal seniority system that does not discriminate on the basis of sex or any other ground protected under the *Human Rights Code*; or

(b) a merit compensation plan that is based on formal performance ratings and that has been brought to the attention of the employees and that does not discriminate on the basis of sex or any other ground protected under the *Human Rights Code*.

(3) No employer shall reduce the rate of pay of an employee in order to comply with subsection (1).

(4) No trade union or other organization shall cause or attempt to cause an employer to contravene subsection (1).

(5) If an employment standards officer finds that an employer has contravened subsection (1), the officer may determine the amount owing to an employee as a result of the contravention and that amount shall be deemed to be unpaid wages for that employee.

Equal pay for equal work: Employment status

42.1 (1) No employer shall pay an employee at a rate of pay less than the rate paid to another employee of the employer because of a difference in employment status when they perform substantially similar work in the same establishment.

(1.1) "Substantially similar" in subsection (1)

(a) does not mean "identical"; and

(b) does not require that jobs be interchangeable.

(1.2) For the purpose of subsection (1), work will be considered substantially similar if:

(a) the core functions of the work are substantially similar; or

(b) the performance of the work requires similar skill, effort and responsibility and is performed under similar working conditions.

(2) Subsection (1) does not apply if the employer is able to show that the difference in pay is the result of

(a) a formal seniority system that does not discriminate on the basis of sex or any other ground protected under the *Human Rights Code*; or

(b) a merit compensation plan that is based on formal performance ratings and that has been brought to the attention of the employees and that does not discriminate on the basis of sex or any other ground protected under the *Human Rights Code*.

(3) No employer shall reduce the rate of pay of an employee in order to comply with subsection (1).

(4) No trade union or other organization shall cause or attempt to cause an employer to contravene subsection (1).

(5) If an employment standards officer finds that an employer has contravened subsection (1), the officer may determine the amount owing to an employee as a result of the contravention and that amount shall be deemed to be unpaid wages for that employee.

(6) An employee who believes that their rate of pay does not comply with subsection (1) may request a review of their rate of pay from the employee's employer, and the employer shall,

(a) adjust the employee's pay accordingly; or

(b) if the employer disagrees with the employee's belief, provide a written response to the employee setting out the reasons for the disagreement.

Equal pay for equal work: Difference in assignment employee status

42.2 (1) No temporary help agency shall pay an assignment employee who is assigned to perform work for a client at a rate of pay less than the rate paid to an employee of the client when they perform substantially similar work in the same establishment.

(1.1) "Substantially similar" in subsection (1)

(a) does not mean "identical"; and

(b) does not require that jobs be interchangeable.

(1.2) For the purpose of subsection (1), work will be considered substantially similar if:

(a) the core functions of the work are substantially similar; or

(b) the performance of the work requires similar skill, effort and responsibility and is performed under similar working conditions.

(2) Subsection (1) does not apply if the employer is able to show that the difference in pay is the result of

(a) a formal seniority system that does not discriminate on the basis of sex or any other ground protected under the *Human Rights Code*; or

(b) a merit compensation plan that is based on formal performance ratings and that has been brought to the attention of the employees and that does not discriminate on the basis of sex or any other ground protected under the *Human Rights Code*.

(3) No client of a temporary help agency shall reduce the rate of pay of an employee in order to assist a temporary help agency in complying with subsection (1).

(4) No trade union or other organization shall cause or attempt to cause a temporary help agency to contravene subsection (1).

(5) If an employment standards officer finds that a temporary help agency has contravened subsection (1), the officer may determine the amount owing to an assignment employee as a result of the contravention and that amount shall be deemed to be unpaid wages for that assignment employee.

(6) An assignment employee who believes that their rate of pay does not comply with subsection (1) may request a review of their rate of pay from the temporary help agency, and the temporary help agency shall,

(a) adjust the assignment employee's pay accordingly; or

(b) if the temporary help agency disagrees with the assignment employee's belief, provide a written response to the assignment employee setting out the reasons for the disagreement.

Equal pay for equal work: Pay transparency

42.3 (1) Every employee has the right to pay transparency about their employer's compensation structure by sex, employment status and assignment employee status.

(2) Each employer shall post an annual Pay Transparency Report in the workplace including such information as may be directed by regulation.

(3) The employer shall post the Pay Transparency Report in prominent places in each workplace for the establishment to which the document relates in such a manner that it may be read by all of the employees in the workplace.

(4) No employer or temporary help agency may do any of the following:

(a) require, as a condition of employment, that an employee refrain from disclosing the amount of their wages; or

(b) require an employee to sign a waiver or other document that purports to deny the employee the right to disclose the amount of their wages.