Te Tari Whakatau Take Tika Tangata
The Office of Human Rights Proceedings

3 November 2005

Level 10
Tower Centre
Cnr Queen & Customs Sts
PO Box 6751
Wellesley Street
Auckland

Telephone: (09) 375-8623
Facsimile: (09) 375-8641
Email: rhesketh@ohrp.org.nz

Dr Paul Callister
Father and Child Society
88 The Parade
PAEKAKARIKI

Dear Dr Callister

COMPLAINT BY THE FATHER AND CHILD SOCIETY AGAINST THE PARENTAL LEAVE AND EMPLOYMENT PROTECTION ACT 1987 AS AMENDED BY THE PARENTAL LEAVE AND EMPLOYMENT PROTECTION (PAID PARENTAL LEAVE) AMENDMENT ACT 2002

Background

In February 2003 the Father and Child Society ("the Society") made a complaint to the Human Rights Commission ("the Commission") alleging that the Parental Leave and Employment Protection Act 1987 as amended by the Parental Leave and Employment Protection (Paid Parental Leave) Amendment Act 2002 (which will be referred to in this decision as "the PLA") unlawfully discriminates against fathers in heterosexual families in relation to the provision of paid parental leave on the ground of sex.

The relevant provisions are sections 71D(2)(a) and 71E(1) PLA which provide respectively for entitlement to paid parental leave for female employees and to the ability of such employees to transfer part of this entitlement to their spouse or partner. Also relevant to the Society's complaint are two amendments concerning the duration of paid parental leave available under the PLA pursuant to the Parental Leave and Employment Protection Amendment Act 2004. The duration of paid parental leave available when the Society first made its complaint was 12 weeks. The first of these amendments extended this period to 13 weeks from 1 December 2004. The second amendment extends this period to 14 weeks from 1 December 2005.

The Commission was unable to resolve the Society's complaint, and notified it of this in writing on 15 December 2004.

By letter dated 30 December 2004 you applied to my Office for legal representation in respect of proceedings the Society now wishes to issue against the Attorney-General

(who is the proper defendant where legislation is alleged to be discriminatory) in the Human Rights Review Tribunal ("the Tribunal"). On 1 June 2005 you agreed that I should delay finalising my decision until the Tribunal released its decision (in a separate case) concerning whether it has the jurisdiction under the Human Rights Act 1993 ("HRA") to consider proceedings brought by a group whose members are not directly affected by the alleged discrimination complained about by that group. The Tribunal's decision has now been received by my Office.

In summary, the Society's allegations of unlawful discrimination to the Commission included:

- while progressive in its overall aim to support families in the first months of a child's life the paid parental leave legislation is openly discriminatory;
- for biological parents only the mother has the right to take paid parental leave;
- the mother can transfer some of this leave to her partner or spouse;
- by comparison section 71H PLA provides that where two spouses jointly adopt a child they jointly nominate which one of them is to be primarily entitled to paid parental leave;
- while section 74 HRA allows preferential treatment for women relating to pregnancy and childbirth which are sex specific functions, family responsibility is not;
- a short sex specific period of leave may be justified on the basis of pregnancy and childbirth (including a recovery period for the birth mother) but the primary eligibility of the mother to access the whole 12 weeks should not be determined on a sex specific basis;
- paid parental leave may be a measure to ensure equality allowed for by section 73 HRA, by compensating parents who take time out of paid work to look after infants, but not giving fathers equal rights to take paid leave actually undermines the achievement of equality between women and men.

Application for Legal Representation

The HRA gives me the function of deciding whether or not to provide free legal representation to people or groups who have made complaints to the Commission, where those complaints have not been settled informally by it. I receive a large number of requests for legal representation and do not have the resources to provide this in all cases.

In considering the Society's request for legal representation I have taken into account the following:

- the documents provided together with the Society's application for legal representation;
- the Commission's file relating to the Society's original complaint;
- the relevant provisions of the HRA and the PLA; and

- discussions between you and a senior member of my staff.

I have considered all of the above and I have decided **not** to provide the Society with legal representation.

The HRA provides a list of factors which I must consider when making my decision. I have discussed these, along with the reasons for my decision, below.

Factors I must consider when deciding whether to provide legal representation

1 Whether the complaint raises a significant question of law

The Society's complaint does raise several significant questions of law. If proceedings were commenced in the Tribunal this would be one of the first cases to be dealt with under the new provisions in Part 1A HRA, which allow complaints of discrimination to be made about legislation. The issue you have raised is arguably covered by Part 1A. Whether it is likely or not that this issue would be found to amount to discrimination under Part 1A is a separate question which I deal with below in part 4 of this decision.

The significant questions of law which would need to be considered by the Tribunal in this case include the definition of "discrimination", and the legal test for the "justification" defence, under Part 1A.

These concepts have not yet been tested in the Tribunal or any appellate court in New Zealand in relation to a complaint of discrimination under the HRA. However, I cannot provide legal representation in respect of any particular complaint simply to test the provisions of Part 1A. I must consider all the factors listed below when making my decision whether, on balance, it is appropriate in any case to provide legal representation for proceedings in the Tribunal.

2 Whether resolution of the complaint would affect a large number of people (for example, because the proceedings would be brought by or affect a large group of persons)

I accept that resolution of this complaint would affect a large number of people. This would include fathers of newborns who are at present not entitled in their own right to paid parental leave under the PLA as well as mothers of newborns who at present have primary entitlement to paid parental leave under the PLA.

3 The level of harm involved in the matters that are the subject of the complaint

When looking at the question of "harm" in relation to an application for legal representation, I must of course assess "harm" by comparing the many cases that come before me. As you might expect, I am often required to consider cases involving profound harm, arising from violent and abusive behaviour.

I understand that the members of the Society consider that serious equity issues are raised by the failure of the PLA to provide fathers with their own or shared entitlement to some paid parental leave. However, it appears to me that this case raises a point of principle rather than being a case involving a high level of personal harm to any identifiable affected person or persons within the Society's membership. Several of the Part 1A cases I have seen to date are similar in this respect. This does not mean that the issue the Society has raised is not important, however compared to other cases before me, as well as based upon the information I have seen relating to disadvantage which I discuss below, I cannot assess this case as involving a high level of harm.

4 Whether the proceedings are likely to be successful

As I have said above, the issue the Society has raised is covered by Part 1A HRA. It is important to emphasise that at present there is no clear indication from existing New Zealand case law as to how the legal concepts contained in Part 1A will be applied by the Tribunal (or any appellate court). As well, there are varying approaches to these legal concepts in overseas jurisdictions. Because of this uncertainty it is possible the Tribunal (or an appellate court) may take a different approach to the analysis set out below.

To establish a breach of Part 1A concerning legislation it is likely that a plaintiff would need to prove:

(1) the legislation (in this case providing for primary entitlement to paid parental leave to birth mothers) makes a distinction between the members of one group and another (in this case between biological mothers and biological fathers); and

(2) the distinction arises from a prohibited ground of discrimination under the HRA (in this case sex); and

(3) the distinction causes or results in disadvantage to one of the groups (in this case biological fathers).

The provisions in sections 73 and 74 HRA which the Society has referred to do not apply to Part 1A. Instead, the special measures provision in section 19(2) of the New Zealand Bill of Rights Act 1990 (NZBORA) applies. This provision is discussed further below.

Part 1A provides a defence in respect of legislation which is found to be discriminatory. In general terms the analysis which the Tribunal is likely to use is whether the discrimination is:

(1) reasonable; and

(2) prescribed by law; and

(3) demonstrably justifiable in a free and democratic society.

The above analysis may seem very legalistic, however, in general terms this is how the Tribunal is likely to analyse the Society's case. The Society would have the burden of proving the first three elements above. If the Tribunal was satisfied that the Society had proved these elements then the Attorney-General (represented by the Crown Law Office) would have the opportunity to try to establish the three elements of the defence. I discuss both of these aspects below following discussion of a preliminary issue concerning whether the Tribunal has the jurisdiction to consider complaints from a group of unaffected persons.

Preliminary issue

I understand the Society is aware that the Tribunal recently considered the issue of whether it has the jurisdiction to hear proceedings brought by a group of persons whose members are themselves unaffected by the discrimination which is the subject of the proceedings. The Tribunal has decided it has the jurisdiction to do so. However, the Crown Law Office has indicated that an appeal of the Tribunal's decision is likely.

I have not placed substantial weight on the possibility of such an appeal in this decision. However, you need to be aware that if the Society commenced proceedings and the High Court overturns the Tribunal's decision concerning jurisdiction to hear proceedings brought by a group of unaffected persons, the Society's proceedings would probably be struck out unless the point is further appealed to the Court of Appeal. In any event there could be some delay as the Tribunal may not be prepared to allocate a hearing date to this case until the point is finally resolved.

Discrimination

I now discuss the likelihood of success of proceedings in relation to the Society's complaint. I have not mentioned below every matter or point raised by the Society. I have however read all the material provided by it to me. The points which have been mentioned below are those which appear to me to be most relevant to the legal issues which would be likely to arise in proceedings before the Tribunal.

Purposes of paid parental leave

Paid parental leave appears to fulfil a range of purposes. I understand from the Crown Law Office opinion (written in response to the Society's original complaint) that in some cases a portion of paid parental leave is taken prior to childbirth and thus relates to the late stage of pregnancy. In all cases some portion of paid parental leave must cover childbirth itself as well as a recovery period for the birth mother following childbirth. In many cases paid parental leave also covers time for establishing breast feeding though this may overlap with the mother's recovery period. Both the Society and the Crown Law Office appear to agree that these four purposes for which paid parental leave is provided are sex specific and that it is appropriate that birth mothers are given preferential treatment in respect of these. Though I note the Society considers that breast feeding is not necessarily a sex specific activity on an on-going basis given that breast milk can be expressed and bottle fed to a newborn.

The major point of difference between the Society and the Crown Law Office appears to be whether there is an identifiable portion (at least in general terms) of paid parental leave which is not related to these sex specific aspects and instead relates to time caring for the newborn child. The Society says the latter is not a sex specific role. In my view it is likely that the Tribunal would agree with this last point.

A key issue which arises is identifying, even in general terms, the extent of any child care component of the 13 weeks (14 weeks come December 2005) available as paid parental leave under the PLA.

From the material the Society has referred to me it appears that a key reason why any child care component cannot be easily identified, even in general terms, is that circumstances in individual cases concerning the amount of time required for leave for the purposes of pregnancy, childbirth, recovery and breast feeding, varies widely. This appears to me to be a realistic assessment. For example, the Society agrees that research provides little guide as to the time needed for recovery after childbirth (letter dated 19 February 2003). I expect that there is also little guidance from research as to the period of time generally required by pregnant women as paid parental leave prior to giving birth. I have not been able to locate any research on this point. Therefore, it is difficult to assess or estimate in general terms what portion of the 13 weeks period currently available for paid parental leave could reasonably be said to be solely for the purpose of child care. This issue affects several of the elements that the Society would have to prove to establish that the paid parental leave provisions it has complained about amount to discrimination as this is defined in Part 1A.

Whether a distinction is made arising from a prohibited ground of discrimination

In my view, section 71D(2)(a) PLA does make a distinction between female and male biological parents. It provides that a female employee who is entitled to maternity leave under the PLA is entitled in her own right to paid parental leave. A biological

father cannot access paid parental leave unless his spouse or partner transfers part of her entitlement to him pursuant to section 71E(1).

"Sex" as a prohibited ground of discrimination is defined in section 21(1)(a) HRA as specifically including pregnancy and childbirth. A large and liberal interpretation of the term "childbirth" probably includes a recovery period following childbirth rather than being limited to the act of childbirth itself. I am also aware of a view that breast feeding is so closely linked to pregnancy and childbirth that it is covered by one or both of these terms for the purposes of the HRA, although I am not aware of any case law which supports this view.

In respect of the sex specific purposes of paid parental leave discussed above and notwithstanding the Society and the Crown Law Office appear to agree that preferential treatment should be given to birth mothers in respect of these, it appears to me likely that the Tribunal would accept that providing women with paid leave for the purposes of pregnancy, childbirth, recovery following childbirth and breastfeeding makes a distinction on the ground of sex. However, as discussed below, my view is that it is unlikely that this distinction on the ground of sex will be found to amount to discrimination as this is defined in Part 1A.

Concerning any child care component of paid parental leave (separate from the sex specific aspects discussed above), if the Tribunal was able to conclude that some portion of paid parental leave can be identified as relating solely to this, in my view the Tribunal is likely to consider that in respect of any such portion of time giving primary entitlement to women does make a distinction on the ground of sex.

Thus, in my assessment, giving primary entitlement to paid parental leave to women for both the sex specific purposes discussed above as well as any distinct child care component, makes a distinction between men and women on the ground of sex.

I now discuss whether the preferential treatment given to women in respect of the sex specific purposes related to pregnancy and childbirth is exempted from the definition of discrimination as this is defined in Part 1A.

Preferential treatment given to women for reasons of pregnancy and childbirth

Even though the Society and the Crown Law Office appear to agree that preferential treatment for women is appropriate in respect of the sex specific aspects of pregnancy and childbirth, it is necessary to deal further with this point in this decision because of the apparent difference in view between the parties concerning whether there is an identifiable portion of paid parental leave which relates solely to child care. Because of this difference in views, any proceedings would need to deal with the argument which it is likely will be made by the Crown Law Office, that the entire 13 weeks available for paid parental leave is in general terms appropriate for the sex specific purposes which the parties agree warrant preferential treatment for women.

Preferential treatment is permitted by several provisions in the HRA. Section 19(2) NZBORA is relevant to allegations of discrimination under Part 1A by virtue of section 20L(2) HRA. Section 19(2) NZBORA provides that measures taken in good faith for the purpose of assisting or advancing persons or groups of persons disadvantaged because of discrimination do not constitute discrimination. It thus provides an exemption to measures which might otherwise amount to discrimination.

Section 19(2) is similar to sections 73 and 74 HRA. These two provisions do not themselves apply to Part 1A cases, however section 74 in particular will indicate to the Tribunal that the HRA reflects a concern by Parliament that women are disadvantaged by pregnancy and childbirth and that Parliament accepts that preferential treatment should be given to women for these reasons.

The Crown Law Office has suggested that the main overall purpose of paid parental leave is to provide gender equity in the labour market and that within that overall purpose one purpose is to allow women to recover from pregnancy and childbirth. The implication is that women have been disadvantaged in the labour market because of discrimination arising from pregnancy and childbirth and need assistance to overcome this.

In order to conclude that section 19(2) exempts the provision of primary entitlement to paid parental leave to women from the discrimination provision in Part 1A the Tribunal would first need to be satisfied that women have been disadvantaged in the labour market by discrimination as a result of pregnancy and childbirth. Secondly, the Tribunal would need to be satisfied that primary entitlement to paid parental leave (to the extent this is provided for in the PLA) is for the purpose of assisting women to overcome such discrimination. It is not clear whether the Society would have to prove as part of its case, that section 19(2) does not apply or in other words prove that women have not been disadvantaged by discrimination in the labour market and that the PLA is not a means of assisting women in respect of this, or whether the Attorney-General/Crown Law Office would need to prove the reverse. Given the material I have seen in my role as Director of Human Rights Proceedings, which suggests women do face some amount of discrimination in the workplace due to pregnancy and childbirth, it appears to me that the Society would have difficulty proving this was not the case.

The Tribunal would also need to be satisfied that section 19(2) exempted the entire 13 weeks (14 weeks in December) of paid parental leave because of pregnancy and childbirth. This again raises the issue of what period of time should reasonably be provided to women in relation to the sex specific purposes discussed above and whether any remaining portion of the period can be identified as being for the purpose of child care separate from these other purposes.

Leave for pregnancy and childbirth

I noted above that the Society accepts that there is little guidance from research as to what period of time is needed for recovery after childbirth. I understand that the Society considers that despite the uncertainty over how long is reasonable for a recovery period that only a "short" period should be allocated to women as of right for this purpose (refer letter dated 19 February 2003). The Society has also said that 12 weeks is "well beyond the time required for many mothers" (refer letter dated 31 July 2003). In your email dated 7 June 2005 you suggested that the period of child care that follows childbirth could be "from a matter of days after childbirth to perhaps a couple of weeks after childbirth if the birth has been very complicated" which suggests that the Society believes a fair recovery period for birth mothers is between a matter of days to around a couple of weeks. The Society has said that research from the United States has indicated that a tenth of women are back at work within a week of giving birth and other research from New Zealand indicates that a fifth of women may be back at work within a month of doing so (refer letter dated 19 February 2003).

I note that any amount of paid parental leave some women take prior to birth (and I have no evidence as to how often this occurs or what periods of time are generally taken for this purpose) also needs to be accounted for. Also, importantly, I have not seen any evidence which supports the proposition that women generally recover from childbirth within a few days to up to a couple of weeks (this may be correct but the Society would need to prove this point). The research referred to by the Society appears to support a recovery period shorter than the period provided as paid parental leave only in a minority of cases.

The Tribunal might consider that the International Labour Organization's Maternity Protection Convention 2000 is relevant to its assessment of whether 13 weeks (14 weeks in December this year) is or is not, in general terms, overly generous for accommodating the sex specific aspects of pregnancy and childbirth. This convention provides for not less than 14 weeks maternity leave which must be accompanied by cash benefits of at least two thirds of a woman's previous earnings (articles 4 and 6). That convention also distinguishes between pre-natal and post-natal periods and provides for a minimum of six weeks "compulsory" leave following childbirth which appears to be considered a minimum post-natal period even where more than a total of 14 weeks is required by a woman because of extra leave taken for post-natal reasons.

I note the explanatory note to the Parental Leave and Employment Protection Amendment Bill states that one of the objectives of the Bill (which extends the duration of paid parental leave from 12 to 13 to 14 weeks) is to comply with New Zealand's obligations under international human rights instruments relating to paid maternity leave.

Based upon the information I have seen and considering the ILO Maternity Protection Convention, in my view it is unlikely that the Society could prove to the satisfaction of

the Tribunal that 13 (or 14) weeks is overly generous to provide for the sex specific purposes which have been agreed by the Society as warranting preferential treatment for women. I am not saying that I have concluded that 13 (or 14) weeks is required for these purposes, rather that without clear evidence to the contrary, I consider it is unlikely that the Tribunal would decide in favour of the Society on this point.

Given the difficulty I believe the Society would have in establishing that section 19(2) NZBORA does not apply in this case, including whether 13 (or 14) weeks is overly generous in general terms for accommodating the sex specific aspects of pregnancy and childbirth, I cannot asses the Society's complaint as likely to succeed on this point.

Child care

If my assessment in respect of the section 19(2) NZBORA issue is incorrect and the Tribunal did decide that women have not been discriminated against in the labour market due to pregnancy and childbirth; that the paid parental leave provisions were not enacted for the purpose of assisting women in relation to this; and that there is an identifiable separate component of child care within the 13 (or 14) weeks period available for paid parental leave; I consider it likely that the Tribunal would accept that child care or family responsibility (refer letter dated 19 February 2003) is not a task or role which is sex specific.

The Society has suggested that because the PLA provides adoptive parents with full entitlement to paid parental leave "the government is also supporting a period of child care" (letter dated 31 July 2003). In my view this argument carries little weight in respect of biological parents. In particular it does not assist to identify what portion of the paid parental leave period is, or should reasonably be assessed as being available, for child care where there is a birth mother who may need paid leave to cover the late stage of pregnancy, birth, a recovery period, or all of these.

Disadvantage

If all the other points I have discussed were established to the Tribunal's satisfaction in favour of the Society, it is also likely that to prove discrimination (as this is defined in Part 1A) the Society would also have to prove that disadvantage has resulted to biological fathers by not having shared entitlement to paid parental leave.

It appears to me that relevant to this question is that the PLA provides biological fathers with one or two weeks unpaid paternity/partner's leave (if they meet the criteria in the PLA). Paternity leave can be taken immediately following the birth of the child (or at a later time, refer sections 21 and 22 PLA) so that the biological father can spend time at home with his newborn child.

As well, there is no presumption in favour of the mother of the child in respect of extended leave which is provided for in the PLA separately from maternity leave,

paternity leave and paid parental leave. Both parents are able to share the total 52 weeks available under the PLA for extended leave. Extended leave can be taken consecutively or concurrently with leave being taken by the other partner either by way of maternity leave, paternity leave, paid parental leave or extended leave. It appears therefore, in respect of fathers, that extended leave can be taken to coincide with the earliest weeks of a child's life including the 13 weeks paid parental leave taken by his partner whether or not some of that leave has been transferred to him.

Thus it appears to me that there is no disadvantage to fathers in terms of eligibility for leave (unpaid) in the early period of a child's life so that they can share child care responsibilities with their spouse or partner and spend time getting to know their newborn child. The Society has mentioned the "care gap" (refer letter dated 31 July 2003) as well as other disadvantages it suggests arise from paid parental leave not being shared, such as men having a comparative disadvantage in terms of an opportunity to bond with their child and women becoming in effect the primary caregiver in families (refer letter dated 31 July 2003 and your email dated 7 June 2005). The Society acknowledges that there are various reasons why some men do not take up a caring role in respect of their children. The availability of paternity leave and shared access to extended leave appears to provide some means of mitigating against such problems.

I accept that some men and women may not be able to afford financially to have one or both of them take extended leave. However, this would not necessarily assist the Tribunal to conclude that social phenomena such as the "care gap" can be attributed solely or even in the main to the primary entitlement for women to paid parental leave to the extent this is provided for in the PLA.

I also accept that in some countries men have entitlement to paid parental leave in their own right. This positive development will not necessarily assist the Tribunal to determine whether men are disadvantaged compared to women in New Zealand under the PLA specifically in respect of the period available for paid parental leave.

Because there is entitlement for men to paternity leave and shared entitlement to extended leave (so that fathers can spend a significant amount time at home sharing childcare responsibilities in the early months of a child's life) the key difference between women and men under the PLA is the entitlement to a period of leave which is paid. Pursuant to section 71M PLA the rate of payment for paid parental leave is a maximum of $325 per week currently for a period of 13 weeks.

It seems to me unlikely that if a woman takes some portion of the 13 weeks for the sex specific aspects of pregnancy and childbirth that any portion of time solely for child care divided evenly, will result in the father having access to half of the 13 week period available. However, to provide some indication of the extent of the financial disadvantage a biological father may suffer as a result of not having some entitlement to paid parental leave, half of 13 weeks (at the current rate) is a maximum of around $2,000 total. I have not seen any evidence which suggests that entitlement to this level of paid leave would assist with problems such as the "care gap".

I note that some cases from overseas have suggested that a high level of disadvantage is required to establish discrimination. I do not necessarily agree with this proposition and it has yet to be tested in the Tribunal. It is likely, however, in my view that the Crown Law Office will argue that the financial reimbursement available for whatever might be a reasonable share of any child care component of paid parental leave results in minimal disadvantage to fathers. It is difficult for me to assess how sympathetic the Tribunal would be to such an argument.

I cannot assess as likely that the Tribunal would accept that there is disadvantage to fathers in terms of either financial disadvantage or the ability of fathers to play a meaningful role in respect of their children simply because of the primary entitlement of women to paid parental leave to the extent this is currently provided for in the PLA.

Disadvantage arising from failure to provide for joint decision making in respect of paid parental leave

The PLA provides that a birth mother can transfer part (or all) of her entitlement to her spouse or partner.

The Society has said that "biological fathers are …. in a disadvantaged position when a couple is deciding who should take the period of leave" (refer letter dated 31 July 2003). In your email dated 7 June 2005 you suggested that the legislation "makes the mother the gatekeeper and treats the father as not being able to consider the best interests of either the child or the mother". I understand that the Society believes that both parents should have the right to make a joint decision concerning any division of paid leave, at least concerning any component of paid parental leave which solely involves child care, and that this should be provided for in the PLA.

The Society has mentioned article 18 of the United Nations Convention on the Rights of the Child which provides for states to recognise the principle that both parents have common responsibilities for the upbringing and development of children. While this is an important principle it does not itself answer some of the problems I have identified above in particular concerning the identification of a portion of paid parental leave which can reasonably be said in general terms to relate to child care.

Also, concerning joint decision making the Society has noted that in respect of adoptive parents, section 71H PLA provides that spouses jointly nominate which one of them is to be primarily entitled to paid parental leave. I agree that this is the effect of section 71H PLA.

It appears to me that both biological and adoptive parents are treated the same by the PLA in respect of one spouse having primary entitlement to paid parental leave, with that spouse then having the right to transfer part (or all) of their entitlement to their spouse or partner pursuant to section 71E(1).

Where the position of biological and adoptive parents differs under the PLA is in respect of the mechanism by which the spouse with primary entitlement is determined. With adoptive parents there is a joint decision about this. Because neither of the adoptive parents requires leave for the purposes of pregnancy or a recovery period the PLA appears to presume it is appropriate that their decision as to which partner has primary entitlement to paid parental leave be a joint one.

With biological parents the birth mother is automatically the parent with primary entitlement presumably because of the sex specific purposes of paid parental leave. But in both cases the parent who has primary entitlement to the paid leave still technically has the right to decide whether to transfer any of the paid leave to the other. In neither case is there provision for any division of paid leave between both parents being a joint decision.

In terms of disadvantage it seems to me likely that the Tribunal will take the view that despite the PLA providing women with primary entitlement to paid parental leave couples will in the main discuss and jointly decide upon what arrangement best suits their family situation. Factors which would be considered will probably include the family's financial situation, the wages/salaries earned by each of the parents, the mother's health, her need for a period of recovery (which may require on-going assessment), and issues concerning the child such as breast feeding. I imagine that what is suitable for different families will vary widely.

In my view, it is likely that the Tribunal will consider that where couples cooperate in making such decisions there is no disadvantage to the father resulting from the birth mother having primary entitlement to paid parental leave particularly because the existence of the transfer provision indicates this leave can be shared (if this suits the couple's circumstances). Also, because in my assessment the Tribunal is unlikely to accept that 13 weeks is overly generous for the sex specific purposes of paid parental leave and because fathers can take paternity and extended leave, I think it likely that the Tribunal will consider that the PLA provides sufficiently for fathers even where some disadvantage might arise for them where their partner will not transfer any paid leave to them.

The Tribunal might also consider it is appropriate that there is some presumption in favour of the birth mother in respect of determining what she needs in terms of leave for the sex specific aspects of pregnancy and childbirth. An analogy which might be made is with decisions made by any individual concerning health problems. It might be suggested that even though in many cases couples discuss health issues concerning one or other of them, the final decision usually rests with the affected individual. I think it likely that this argument would be raised by the Crown Law Office. In my view this argument is compelling although it is difficult to assess what the Tribunal would decide on this point.

In my view the complaint the Society has made would have some chance of success if birth mothers had primary entitlement to the 52 weeks extended leave under the PLA or if paid parental leave was ever significantly extended beyond 14 weeks and

the primary entitlement to this remained with birth mothers. I understand that the Society is concerned about the latter possibility (refer letter dated 19 February 2003 and your emails dated 6 February 2005 and 7 June 2005). However, the Tribunal does not have the jurisdiction to consider complaints about possible future policy or legislative developments.

Justification defence

If the Society succeeded in establishing to the Tribunal's satisfaction that by providing birth mothers with primary entitlement to paid parental leave (to the extent this is provided for in the PLA currently) section 71D(2)(a) PLA was discriminatory, the Crown Law Office would then have the opportunity to try to establish that this was reasonable, prescribed by law, and demonstrably justifiable in a free and democratic society.

As I have said above in my assessment it is unlikely that the Tribunal would decide that the 13 weeks (or 14 weeks by December) is overly generous for the sex specific purposes which the Society agrees warrants some preferential treatment for birth mothers. Such an assessment would also be relevant to whether the legislation was reasonable for the purpose of the justification defence. Although the Crown bears the burden of proof in respect of this defence I consider that the Tribunal is likely to consider the legislation is reasonable given the lack of any clear evidence concerning the length of time reasonably required for the sex specific purposes associated with pregnancy and childbirth, particularly in light of the ILO Maternity Protection Convention discussed above.

It is difficult for me to assess whether the Tribunal would consider that providing primary entitlement to birth mothers for paid parental leave for the period this is available under the PLA is also demonstrably justifiable in a free and democratic society. This is because the legal tests for this concept have not yet been considered by the Tribunal or the appellate courts in New Zealand in relation to a discrimination case. As well, in overseas jurisdictions there are differing approaches to the justification defence. It is difficult to predict which approach will be followed in New Zealand.

As mentioned above the Crown Law Office opinion suggested that the main overall purpose of paid parental leave is to provide gender equity in the labour market including allowing women to recover from pregnancy and birth and to enable breast feeding. This point is also relevant to the justification defence. However, I note that if proceedings were commenced the Crown would not be limited to this point. It is difficult for me to predict what other issues might be raised in respect of this defence. The opinion also states that in the Crown's view the PLA provisions are proportional to that end.

Proportionality is a concept which is used in some overseas jurisdictions when analysing whether discrimination (or breaches of human rights generally) is justified. This concept has also been used in New Zealand though not yet in relation to a

discrimination case. For the reasons discussed above and given the uncertainty concerning the legal tests which will be applied in Part 1A cases I cannot assess as likely that the Tribunal would take the view that the provisions of the PLA relating to paid parental leave are not proportional. However, in my view it is more likely that the Tribunal would reach such a conclusion if the period of paid parental leave was extended significantly beyond 14 weeks and primary entitlement to this remained with birth mothers.

Conclusion

Though the concerns the Society has raised are, at least in part, arguable as amounting to discrimination under Part 1A, for the reasons discussed above I cannot assess the Society's case as likely to succeed. This is a key factor weighing against providing legal representation to the Society.

5 Whether the remedies available through any proceedings are likely to suit the particular case

If proceedings were successful, because the Society's complaint concerns legislation, the only remedy available from the Tribunal is a Declaration of Inconsistency.

The HRA makes clear that these declarations do not affect the validity of legislation and thus the PLA would continue to apply. However, if such a declaration was made, the Minister responsible for the administration of the PLA would have to provide a written report to Parliament informing it that a Declaration of Inconsistency has been made, as well as containing advice on the Government's response to this. A report does not need to be completed until all appeals are disposed of.

In my view, it is very likely if the Society was successful with its claim, the Tribunal's decision would be appealed by the Crown. This is because this would be one of the first cases decided under Part 1A. It is therefore likely that this case would not be finally concluded for possibly several years.

If, and when, a report was presented to Parliament there would be no guarantee that any changes would be made to the PLA. Ultimately it would be for Parliament to decide this. The Government could consider the issue and decide to retain the status quo and, if a majority of Parliament agreed, no changes would eventuate.

Because a Declaration of Inconsistency can raise awareness and possibly lead to law and policy changes it may be that this is suitable for your purposes. Although as I have explained above I cannot assess the Society's case as likely to succeed in the Tribunal and therefore in my view it is unlikely that a Declaration of Inconsistency would be made in this case.

6 Whether there is likely to be any conflict of interest in the provision of representation by me

It does not seem likely that any conflict of interest would arise in this case if I agreed to provide legal representation to the Society.

7 Whether the provision of representation is an effective use of resources

I have limited resources to take proceedings on behalf of complainants. This is a critical factor in my decision in this case. At present I have a large number of applications for legal representation before me and there is serious competition for resources. Part 1A cases are particularly likely to require significant resources and because I cannot assess the Society's case as likely to succeed it does not seem to me that it is appropriate to assign this level of resources to this case.

8 Whether or not it would be in the public interest to provide representation

There do not seem to me to be public interest factors, in addition to those touched upon above, which lead to a different conclusion. I note that it is important for people harmed by or concerned about allegedly unlawful actions to have an effective remedy and I do not overlook that. However, the Society is free to take its case to the Human Rights Review Tribunal itself.

9 Any other matters I consider relevant in this case

There do not appear to me to be any other matters which are relevant to my decision in respect of the Society's application for legal representation.

Decision

For the reasons discussed above, I have decided not to provide the Society with legal representation.

The Society is however entitled to file its own proceedings in the Human Rights Review Tribunal. The Society can do so itself or with the assistance of a private lawyer. The Society may be entitled to legal aid. A lawyer can assist the Society to determine this.

The Registrar of the Human Rights Review Tribunal is Chris Smith, telephone (04) 918-8300. Mr Smith can provide you with information the Society may need about how the Tribunal operates.

Finally, the Society should be aware that this decision is protected by legal professional privilege because it contains legal advice about its complaint. This means that I cannot disclose this decision to other people, although the Society can do so if it wishes to. However, the Society cannot be required to provide others with a copy of this decision. If the Society does take a case to the Tribunal it should not feel obliged to give a copy of this letter to either the Tribunal or to the Crown Law Office who will represent the Attorney-General.

Yours faithfully

Robert Hesketh
Director of Human Rights Proceedings
Tumuaki Whakatau Take Tika Tangata