Submission on the Parental Leave and Employment Protection Amendment Bill

22 June, 2004

Submission of the New Zealand Father and Child Society
28 St Vincent Street
Nelson

Background

The Father and Child Society was established in March 1998 and formally incorporated in November 1998. It was created to give local father groups / organisations support in setting up and running initiatives, as well as to improve access to information and improve communication between these groups. It was also formed to represent fathers on a national level through the government's ongoing consultation process with the community. For further information see our website (http://www.fatherandchild.org.nz/)

In 2002 the Father and Child Society submitted a submission to the Select Committee considering the introduction of paid parental leave. In that submission we argued that the proposed legislation discriminated against fathers.[1] Subsequent to the passing of the legislation, the Father and Child Society lodged a complaint with the Human Rights Commission arguing again that the legislation discriminated against fathers. A copy of this complaint is attached as Appendix 1. The reply of the Crown Law Office is attached as Appendix 2, and Appendix 3 is our response to the opinion of the Crown Law Office. We note that the response of the Crown Law Office to our complaint was both slow and inadequate. The Human Rights Commission then asked the Department of Labour to organise a meeting with the Father and Child Society to discuss our claim. Despite asking numerous times for this meeting to be organised, the Department of Labour never responded. This was also a time in which the Department of Labour was reviewing the paid parental leave legislation. We consider this lack of response to our claim of discrimination most unsatisfactory and the inaction supports the view held by many fathers groups that policy makers are not addressing fathers' concerns.

Comments on the proposed amendment of the parental leave legislation

While the proposed legislation expands the eligibility criteria and lengthens the period of paid leave, the legislation still fundamentally discriminates against fathers. This legislation continues to uphold the concept that for biological parents, only the mother has the right to take paid leave but that, if she wishes, she can transfer this to the father provided the father is also eligible for job protection in his own right. The full reasons why this criterion is discriminatory are set out in our complaint to the Human Rights Commission (Appendix 1). We commend those committee members with an interest in both achieving gender equality in society and achieving good outcomes for children to read the full text of our complaint. As argued in our submission to the

[1] See http://www.fatherandchild.org.nz/Submissions/sub_paidlve.htm for a copy of the submission.

HRC treating fathers as second class citizens in the home ultimately works against achieving gender equality in the workplace. We argue it also works against the best interests of the child.

We suggest that the current legislation is amended to allow parents in heterosexual couples to themselves choose which parent will take the leave, rather than the government determining who has primary and secondary rights.

However, if the government is unwilling to redress this imbalance then at least for those couples where the mother is not eligible for job protection (and thus not eligible to take or pass on the entitlement to paid leave) but the father is eligible for job protection, the father should have his own independent right to take a period of paid leave supported by legislation.

In making this argument for equal rights to a period of paid leave, we fully accept that in most couples it will be the mother who takes all or most of the leave. However, just because only a small minority of families will be in a situation where the father will take the period of paid leave is not a reason to discriminate against this family arrangement. We note that the government consistently argues that it wishes to support a diversity of family types, some of which represent only a small minority of parents. However, under the proposed legislation this support of diversity does not extend to couples where it is the father who takes primary responsibility for caring for his child in the early weeks of its life.

Finally, we wish to appear before the Select Committee in support of our submission.

Philip Chapman
President, New Zealand Father and Child Society

Appendix 1

Complaint to Human Rights Commission regarding the Parental Leave and Employment Protection (Paid Parental Leave) Amendment Act

February, 2003

The New Zealand Father and Child Society

The Father and Child Society was established in March 1998 and formally incorporated in November 1998. It was created to give local father groups / organisations support in setting up and running initiatives, as well as to improve access to information and improve communication between these groups. It was also formed to represent fathers on a national level through the government's ongoing consultation process with the community. For further information see our website (http://www.fatherandchild.org.nz/)

Our complaint

The Parental Leave and Employment Protection (Paid Parental Leave) Amendment Act discriminates against fathers in heterosexual families. We believe this is in breach of Part II, section 21 of the Human Rights Act 1993 that renders discrimination on the basis of sex unlawful.

Background

When the first parental leave legislation was passed in the early 1980s (*Maternity Leave and Employment Protection Act 1981)* many groups opposed this legislation because it was only available to women. The then newly formed Human Rights Commission was amongst these groups. In the mid 1980s, this legislation became gender neutral *(Parental Leave and Employment Protection Act 1987).* Under this legislation job protection is available to both parents in heterosexual couples. However, the leave was still unpaid. In late 2001 legislation was introduced to amend the 1987 Act to make paid leave available. This legislation came into effect in July 2002.

The basis of our complaint

While progressive in its overall aim to support families in the first months of a child's life New Zealand's recently enacted paid parental leave legislation is openly discriminatory in nature. For biological parents, only the mother has the right to take paid leave (Part II, Section 71D, 23(a)).[2] However, if she wishes, she can transfer this to the father provided the father is also eligible for job protection in his own right. We recognise that Part II, Section 74 of the 1993 Human Rights Act allows "preferential treatment relating to pregnancy and childbirth, and family responsibility". However, while pregnancy and childbirth are sex-specific functions, family responsibility is not. We also note that "measures to ensure equality" are not unlawful under the Human Rights Act (Part II, Section 73). While paid parental leave may, in itself, be a measure to ensure equality between parents and non-parents by compensating parents who take time out of paid work to look after their infants, not giving fathers equal rights to paid leave actually undermines the achievement of equality between women and men.

We assume that the term childbirth refers to both the actual act of giving birth and some subsequent recovery period. This period is not stated in the Act. Research provides little guide as to the time needed for recovery after childbirth. The length of time depends on a range of factors, including the birthing experience as well as a host of emotional, physiological, and socio-cultural factors (e.g. Gjerdingen, Froberg & Kochevar, 1991; McGovern, Dowd, Gjerdingen *et al.*, 1997, 2000). For instance, maternal recovery is usually longer for women who have given birth by caesarean section and may require the women's partner to take parental leave to care for her. U.S. research indicates that around 10 percent of women are back at work with a week of giving birth (Klerman and Leibowitz, 1994) while New Zealand research indicates that around a fifth of mothers may be back at work within the first month of a child's life (Callister, 1995). While the availability of paid leave may change these figures, there will always be a group of mothers who need or wish to return to work shortly after giving birth.

Based on overseas experience we believe that if mothers and fathers in heterosexual couples were given equal rights to take a period of paid leave, and the choice of who took the leave was left to these parents, then in most situations it would be the mother who took the leave (Moss & Deven, 1999). Research both in New Zealand and overseas nevertheless indicates that in a small number of families it will be the father rather than the mother who becomes the primary caregiver from the time of the birth (Callister, 1994). The following hypothetical examples illustrate the way in which the discriminatory nature of the New Zealand legislation can disadvantage not only fathers who wish to or need to take on the primary caregiver role, but also potentially their partners and children.

Case study 1

A mother has been at home looking after a first child. She has a difficult second birth and needs full-time support at home from her husband to look after her and the new baby. Her husband is in

[2] Section 71H of the Parental Leave and Employment Protection (Paid Parental Leave) Amendment Act covers joint adoptions with point 1 noting that "If 2 spouses assume the care of a child with a view to adoption by them both jointly (a) the spouses must jointly nominate which 1 of them is to be primarily entitled to the parental leave payment"

a low-income job but is eligible to take unpaid leave. However, because the mother is not eligible for job protection she cannot pass on her entitlement for paid leave. The father therefore cannot take a period of paid leave to look after the child and the mother. The mother struggles with caring for herself and the baby and, as a result, stops breastfeeding early.

Case study 2

The mother is self employed and therefore not eligible for paid leave. The father is eligible for job protection, but the mother cannot pass on her entitlement for paid leave. The mother wishes to return to work two weeks after giving birth. The father plans to look after the child at home for three months before the child can start attending a childcare centre. In this time, the mother wishes to exclusively breastfeed the child and this is made possible by the father bringing the baby to the workplace twice a day. However, this situation may not be possible due to the lack of income support.

Case Study 3

The mother is a full-time student during her pregnancy and wishes to return to her study two weeks after giving birth. She does not wish to breastfeed her baby. Her partner, who has been supporting her financially during her studies, is eligible for job protection. However, under the legislation he is not able to take a period of paid parental leave.

When this legislation was introduced one of the supporting arguments was that, on average, women have had lower lifetime earnings than men because they have tended traditionally to take time out of paid work to look after children. In addition, taking time out of paid work involves an immediate loss of income for the period of leave. There is research indicating that taking an extended period out of paid work can lower lifetime earnings for women (Blau *et al.*, 2001; Joshi *et al.*, 1999; Shapiro and Mott, 1994; Waldfogel, 1995, 1998).[3] Providing a payment for leave helps reduce the financial penalty that can accrue from taking leave. However, other ways for women to attain gender equality would be for them to exhibit behaviour more typical of men and/or men to exhibit behaviour more typical of women. Research by New Zealand economist Keith Rankin (2002) into the pay gap between men and women indicates that unequal outcomes in the labour market will continue if we only focus on barriers to women in the workplace. Closing the pay gap also requires equality in the home. As already illustrated, the paid parental leave scheme provides barriers against fathers taking a period of leave and thus works against achieving equality in the home. It is therefore not legislation that could be considered as a measure to "ensure equality" (Human Rights Act 1993, Part II, Section 73).

[3] The little research on the financial costs of men taking parental leave indicates that this is not a gender specific cost, with fathers also being penalised when they take time out (Stafford and Sundström, 1994).

In Sweden, a country which took an early lead in creating gender neutral parental leave, measures to ensure equality are, in fact, now primarily directed at encouraging fathers to increase the time they spend on leave relative to mothers (Galtry and Callister, 1995; Leira, 1999). While it is mothers who still take most of the paid leave in Sweden, fathers nevertheless take more leave than in any other country in the world (ibid). In a study of ways to encourage fathers to take more parental leave undertaken for the Nordic Council of Ministers Carlsen (1998: 10) notes:

> If men are not granted independent rights to leave and are not entitled to the same level of economic compensation as women, this constitutes negative discrimination.

The eligibility criterion under the Parental Leave and Employment Protection (Paid Parental Leave) Amendment Act is an example of negative discrimination. Other Swedish research supports the benefits to both men and women of providing an independent nontransferable right to fathers to take leave (Haas, Allard and Hwang, 2002).

Finally, the paid parental leave scheme is contrary to the intent of Article 18 of the United Nations Convention on the Rights of the Child. Article 18 stresses the need for governments to support both parents in raising a child.

Conclusion

The Parental Leave and Employment Protection (Paid Parental Leave) Amendment Act is a discriminatory piece of legislation. As such, we believe it is in breach of Part II, section 21 of the Human Rights Act 1993 that make discrimination on the basis of sex unlawful. While a short sex specific period of leave may be justified on the basis of pregnancy and childbirth, the primary eligibility to access the whole 12 week paid period for childcare should not be determined on a sex-specific basis. While producing breast milk is clearly a sex-specific activity, having 12 weeks sex-specific leave cannot be justified on this basis for two reasons. First, some women choose not to breastfeed or cannot breastfeed. Second, as outlined, there are some situations where fathers having independent rights to take paid leave will best support optimal breastfeeding. The legislation also does not meet the criteria for ensuring equality. Finally, while we are concerned about the discriminatory nature of the current legislation we are also worried that if the length of paid leave is extended in subsequent legislation the current eligibility criteria would apply to the extended period of leave as well.

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Appendix 2
Letter of reply from the Crown Law Office 3 July 2003

E II R
NEW ZEALAND

CROWN LAW OFFICE

3 July 2003

Mervin Singham
Disputes Resolution Services
Human Rights Commission
P O Box 6751
Wellesley Street
AUCKLAND

Dear Mervin

Human Rights Act complaint: Philip Chapman on behalf of the Father and Child Society against Parental Leave and Employment Protection Act 1987
Our Ref: LAB009/257
Your Ref: D2352

1. This letter sets out the Department of Labour's response to the above complaint. In summary, their view is that it is not discrimination to differentiate between men and women with respect to paid parental leave.

The complaint

2. Mr Chapman's complaint is made against the Parental Leave and Employment Protection (Paid Parental Leave) Amendment Act 2002. That Act amended the Parental Leave and Employment Protection Act 1987 ("the PLEP Act") by providing in Part 7A, for paid parental leave. This complaint has accordingly been treated as a complaint against the PLEP Act.

3. Mr Chapman, in his complaint on behalf of the Father and Child Society alleges that while a short sex-specific period of leave may be justified for mothers on the basis of pregnancy, childbirth and breastfeeding, the 12-week period for *childcare* (his terminology) should not be determined on a sex-specific basis. He provides two reasons to support this allegation. The first reason given is that some women choose not to or cannot breastfeed. The second reason given is that there are certain situations where, if fathers had direct entitlement to the leave, this would support optimal breastfeeding. Mr Chapman outlines those situations in the complaint. All those situations concern cases where the mother is not eligible for paid leave, but the father would be eligible for the leave to be transferred to him had the mother been eligible. Accordingly, the basis of this complaint appears to be the mother's eligibility criteria and an assumption the main purpose of the paid leave is for childcare.

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No discrimination

4. In the Department's view, it is not discrimination that a father is not directly entitled to paid parental leave. A claim of discrimination requires proof of comparative disadvantage and our view is that there is no comparative disadvantage here. The fact is that men and women are differently situated with regard to childbirth. Taking account of that difference is not discriminatory since becoming a parent does not create disadvantage for men in the same way it does for women. In *Schafer v Canada* (1997) 149 DLR (4th) 705, the Ontario Court of Appeal stated:

> "The inescapable biological reality is the fact of pregnancy and childbirth which only mothers experience. Compensating biological mothers for time lost because of pregnancy and childbirth cannot constitute discrimination because only biological mothers undergo the physiological demands of pregnancy and childbirth" (at 728/9).

5. The main overall purpose of paid parental leave is to provide gender equity in the labour market including by reducing the long-term disparity between male and female earnings caused in particular by women's time out of the workforce to bear and raise children. Within that overall purpose one purpose is to allow women to recover from pregnancy and birth and to enable breast-feeding. As it is only women who give birth, provisions that facilitate meeting the needs of birthing mothers and which are proportional to that end are not discriminatory. The leave directly relates to conditions of late pregnancy, childbirth and breastfeeding.

Progress of this matter

6. Officials from the Department of Labour are happy to meet with Mr Chapman and other representatives on behalf of the Father and Child Society to discuss their concerns directly.

7. The Department also thought it helpful to note that there is to be a government review of the Paid Parental Leave Scheme, which is currently in its preliminary stages. Mr Chapman may wish to direct his concerns about the eligibility criteria and the fact it excludes mothers in some situations to that forum.

Yours sincerely

Simon France
Crown Counsel

Appendix 3

Response to Crown Law Office opinion 3 July 2003 by the Father & Child Society

July 31, 2003

We note that in its letter of 3 July, 2003 that the Crown Law Office (CLO) state that it does not consider that Parental Leave and Employment Protection (Paid Parental Leave) Amendment Act discriminates against fathers. We dispute this finding.

We also note that in the letter the Crown Law office state "[a]ccordingly, the basis of this complaint appears to be the mother's eligibility and an assumption the main purpose of the paid leave is for childcare" (Crown Law Office, 2003: 1). This is a blatant misinterpretation of the complaint. The basis of our complaint is that biological fathers are not given appropriate rights in comparison to mother to take paid leave, and this discriminates against them. While we did not highlight this in our original complaint, under this legislation biological fathers are also not given the same rights to take leave as adoptive fathers. Clearly, the legislation does discriminate against biological fathers, the issue is whether this discrimination is both justified and legal.

There are three purposes of paid parental leave. These are to provide support for pregnancy, childbirth and childcare. Childcare covers a wide range of activities from physical care through to emotional bonding. As part of its care a child may, or may not, be breastfed. However, as we noted in our original complaint, a child can be cared for by its father and still be breastfed through pumping and storage of milk. In its response, the Crown Law Office assumes that paid leave is purely for pregnancy and childbirth. Yet, the legislation also covers adoptive parents. This indicates that the government is also supporting a period of childcare. We note that when the paid leave bill was first drafted it was proposed that the rights to leave for adoptive parents was also to be through the mother. However, this was changed after the select committee considered the bill. This indicates that the government recognises that payment for the childcare component of the leave should be provided on a gender-neutral basis.

In our original complaint we noted that "[w]e assume that the term childbirth refers to both the actual act of giving birth and some subsequent recovery period. This period is not stated in the Act. Research provides little guide as to the time needed for recovery after childbirth." We would like to reaffirm that the international research literature provides little guide as to the optimum recovery period needed post childbirth (Galtry and Callister, forthcoming). Some mothers may need considerably longer than the twelve weeks period of paid leave, some mothers are happily back in paid work within days of having a baby. The literature indicates that partner and community support are important factors in recovery and not allowing fathers to independently access a period of paid leave will in some families hinder recovery.

Our argument is that by giving women preferential rights to take the full twelve weeks of paid leave this moves well beyond the time required for recovery for many mothers. It is childcare time and discriminating against fathers in terms of support for childcare does breach the *Human Rights Act*.

In support of the argument that paid leave is about pregnancy and childbirth the CLO quotes a ruling from Canada. This quote fails to take into account the wider context of how paid parental leave is offered in Canada. While it is true there is a period of paid leave exclusively allocated to new mothers, this coexists with paid parental leave that mothers and fathers have equal rights to access. Thus, couples have the right to choose their childcare options from the time of the birth. The law therefore does not discriminate against fathers in the same way it does in New Zealand. (http://www.todaysparent.com/lifeasparent/workfinance/article.jsp?content=1625)

While in much of its argument, the Crown Law Office appears to justify the legislation on the basis of health goals (supporting pregnancy, childbirth and breastfeeding), on page 2 (point 5) of its response it notes "[t]he main overall purpose of paid parental leave is to provide gender equity in the labour market including by reducing the long-term disparity between male and female earnings caused in particular by women's time out of the workforce to bear and raise children". In a peer reviewed article on paid parental leave in an international journal, Callister (2002) notes "[i]n order for gender equity to occur in the labour market and the home one, or preferably both, of the following need to take place" (Callister, 2003):[4]

- Women need to increase their employment tenure, their lifetime hours of paid work and, related to both of these, their yearly and lifetime earnings.
- Men need to undertake a greater share of childcare and household work.[5] This will generally require a reduction in their paid work hours."

International experts in paid parental leave, Peter Moss and Fred Deven (1999), also note:

> If parental leave is to promote gender equality ... then it has to be equally used by men and women. Otherwise it may very easily increase inequality by reinforcing gendered roles

If paid parental leave is designed in a way, such as in New Zealand, which makes it difficult for fathers to take an equal amount of time out of paid employment, then gender equity in the labour market will never be achieved. Under the current system, where eligible mothers can transfer some of their entitlement to their child's father, few such transfers occur. In the first year of the legislation, of every 153 mothers taking paid parental leave, only one transferred any of her entitlement to the father (See Hon Margaret Wilson's answer to written parliamentary question 06379 (2003), lodged 2/7/03).

[4] There are other options and these include the professionalisation of housework and childcare.
[5] The equal sharing of childcare applies both to intact and separated heterosexual couples.

The Crown Law Office also responds to the case studies we put forward by suggesting that in all situations if the mother had been eligible then she could have passed on the leave to the father.[6] While this is theoretically true, it is important to note that it is highly unlikely in New Zealand that paid parental leave would ever be extended to cover mothers who are not in paid work. This in fact would not be paid parental leave, it would be a caregivers allowance. To repeat, this is the example given in case study 1.

> A mother has been at home looking after a first child. She has a difficult second birth and needs full-time support at home from her husband to look after her and the new baby. Her husband is in a low-income job but is eligible to take unpaid leave. However, because the mother is not eligible for job protection she cannot pass on her entitlement for paid leave. The father therefore cannot take a period of paid leave to look after the child and the mother. The mother struggles with caring for herself and the baby and, as a result, stops breastfeeding early.

The Crown Law Office (p. 2, point 4) argues that there needs to be proof of comparative disadvantage to be provided before a case can be made that legislation is discriminatory. Biological fathers are firstly in a disadvantaged position when a couple is deciding who should take the period of leave. More importantly, they have a comparative disadvantage in terms of opportunity to bond with their children under this legislation. While we cannot put a dollar figure on this in the same way that the pay gap between men and women can be highlighted, the "care gap" disadvantages both men and women. For men, one long-term disadvantage is that the mother becomes the primary caregiver and is therefore highly likely to be given custody of the children should the parents separate.

Finally, the move to give mothers the sole rights to take leave (but with the option to transfer that leave) reverses a long-term shift in New Zealand towards gender equity in parental leave. In late 1979 the National Party introduced the *Maternity Leave and Employment Protection Bill*. As indicated by the name, this bill only covered women, did not cover adoption and had very tight eligibility criteria. When public submissions were sought on this bill, one of the key issues identified by the majority of these submissions was the need to expand the eligibility criteria for leave in terms of gender. Included in the submissions was one from the relatively new Human Rights Commission (1980: 3), who argued that the bill "could negate this purpose of the Human Rights Commission Act by causing further discrimination against women in their employment opportunities and career advancement". A number of women's groups also made the point that parental leave for fathers was essential if a mother was seriously ill, died or otherwise was unable to care for the child. After being considered by the select committee the bill continued to cover only women.

In subsequent parliamentary debates on the issue of gender neutrality the government suggested that they support, in principle, the idea of men taking leave. In the debate the opposition Labour Party, as well as some government MP's, continued to seek an extension of leave to men with, with for example Kerry Burke noting, "...that the role of women in the workforce has now reached the point at which many families may decide that, given a choice, the father rather than the mother should remain at home." (Hansard, 1980: 945).

[6] We are aware that there are groups of women who miss out on gaining access to paid leave. One of our committee members, Dr Paul Callister, has written extensively on this topic over the last decade (Callister, 2002; Callister and Galtry, 1996, Callister *et al*, 1995).

In late 1986 the Labour Government introduced the *Parental Leave and Employment Protection* Bill. The most significant feature of this bill was the expansion of leave provisions to include fathers. As stated, the 2001 legislation leave reverses this slow progression to make leave policies more inclusive to fathers. It reintroduces an unnecessary discrimination against biological fathers.

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