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Paid

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leave

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**PAID PARENTAL LEAVE : AN IDEA WHOSE TIME HAS COME?**

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In November this year, New Zealanders will go to the polls. One of the most controversial issues in the lead up to this election has become the degree to which current legislation regarding a woman's right to leave and employment protection on the birth of a child really does provide adequate protection and whether it meets the need of women in employment as we approach the new millennium.

The Alliance party, proponents of the Paid Parental Leave Bill, argue that childbirth is a legitimate reason for taking leave from work and that therefore paid parental leave when a baby is born is an employment right. Others argue that having children is a personal choice that as family makes and that the family should bear the costs of that choice.

In light of the proposed legislation and opposing views, this paper will consider the issue of paid parental leave. The first section will consider the status of New Zealand's policy in an international setting and assess the need for reform of this area. The second section will consider the alternatives available and make a recommendation for reform.

## *I PARENTAL LEAVE IN NEW ZEALAND*

### *A Current Framework*

Currently in New Zealand, provision for parental leave is made by the Parental Leave and Employment Protection Act 1987. It is important to note also, that the principal legislation operates in a wider context of legislation and social benefits directed at young families. This section will examine the historical development of parental leave provisions in New Zealand, the current statutory entitlements under the Parental Leave and Employment Protection Act 1987, and further relevant legislation and benefits available to assist families on the birth of a child.

#### *1 The development of parental leave provisions in New Zealand*

Parental leave in New Zealand has developed in four critical stages :



1 Parental leave was first provided for in 1948<sup>1</sup>, but provision for such leave only covered employees in the public sector. Married women working in this sector were eligible for six months maternity leave without pay. Not much is known about the rationale for the introduction of maternity leave, but newspapers of the day reported that the amendment was

“[aimed at encouraging] married women to remain in the Public Service. It applies mostly to teachers in native schools. Many of these schools are staffed by both husband and wife and, if the wife continues teaching after the birth of a child, it will be an important factor in helping solve accommodation difficulties.”<sup>2</sup>

Thus it appears that such measures were introduced for practical reasons with no gender equity focus. These regulations were later amended to include the right to re-employment and to cover unmarried women<sup>3</sup>.

2 In 1978, the maternity leave period was extended to twelve months and provision was made for stronger job protection. In addition, a payment equal to thirty working days' wages was available to woman on completion of six months service after returning to work. The policy objective of these improvements was to “eliminate discrimination against women and to promote equal opportunity for men and women in the State Services”<sup>4</sup>.

3 In 1980, with the passage of the Maternity Leave and Employment Protection Act, legislated access to parental leave was extended to cover employees in the

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<sup>1</sup>Public Service Regulations 14(4) 1948

<sup>2</sup>Evening Post, 1 November 1947 : Presumably, many of these so-called ‘native schools’ were in remote areas and bringing in an extra teacher in the event of the birth of a child would have created accommodation pressures.

<sup>3</sup>Public Service Regulations 1950, No. 46

<sup>4</sup>A O’Sullivan *Maternity Leave in the New Zealand Public Service* PDU Paper 85/1(Policy Development Unit, State Services Commission, Wellington, 1985) 10 quoted in Ministry of Women’s Affairs *Parental Leave Policies, Women and the Labour Market* (Ministry of Women’s Affairs, Wellington, 1995) 27 - 29



private sector. The new legislation was to "prescribe minimum requirements with respect to maternity leave and to protect the rights of female employees during both pregnancy and maternity leave"<sup>5</sup>. Subject to the eligibility criteria, the Act entitled female employees to 26 weeks leave on the birth of a child<sup>6</sup>. The legislation was described as "balancing the needs of family with personal choice. The Bill moves another step closer towards ensuring equality of opportunity between the sexes in the workplace."<sup>7</sup> Despite extending leave eligibility and job protection to working women in both the public and private sectors, the Act did not provide for paternity leave. The eligibility criteria also meant that maternity leave and job protection were not available for casual workers<sup>8</sup>.

- 4 In 1987, the Parental Leave and Employment Protection Act was passed. This Act made provision for both parents to take extended leave from their employment to care for a newborn child in its first year. The provisions of This Act will be discussed in more detail below.

From this brief survey of the history of parental leave in New Zealand, it is apparent that while initially parental leave provisions were designed with the aim of maintaining women's participation in the paid workforce primarily for practical reasons, the clear focus the development has been such that the clear focus of the current legislative framework is the promotion of gender equity in the workforce.

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<sup>5</sup>Maternity Leave and Employment Protection Act 1980, long title

<sup>6</sup>Maternity Leave and Employment Protection Act 1980, s8

<sup>7</sup>National Advisory Council on the Employment of Women *Submission to the Labour Select Committee : Maternity Leave and Employment Protection Bill* (Wellington, 1980) 1

<sup>8</sup>Maternity Leave and Employment Protection Act 1980, s6 : to qualify for maternity leave in accordance with the Act, at the expected date of delivery, the female employee must have been, for the immediately preceding 18 months, in the employment of the same employer for at least 15 hours a week.



The Parental Leave and Employment Protection Act declares itself by its long title to be

“An Act to prescribe minimum entitlements with respect to parental leave for male and female employees and to protect the rights of employees during pregnancy and parental leave...”

This section will examine the key provisions of the Act, including eligibility criteria, the duration of leave entitlements and the rights and obligations of employees and employers after the commencement of parental leave.

(a) Eligibility

Under section 7 of the Act, every female employee who becomes pregnant and who, at the expected date of delivery, will have been, for the immediately preceding twelve months, in the employment of the same employer for at least ten hours a week, shall be entitled to maternity leave in accordance with the Act. Under section 17, every male employee who is the spouse of a pregnant women and who assumes or intends to assume the care of the child of the pregnancy and who, at the expected date of delivery, will have been, for the immediately preceding twelve months, in the employment of the same employer for at least ten hours a week, shall be entitled to paternity leave.

The effect of the eligibility criteria is to exclude casual workers, workers who have changed jobs in the twelve months preceding the expected delivery of the child, or workers who are employed in more than one job for less than an average of ten hours a week per job. The eligibility criteria are becoming a major issue in an increasingly mobile workforce with short term contracts becoming more and more common.



(b) Duration

Subject to certain provisions<sup>9</sup>, under section 9 of the Parental Leave and Employment Protection Act, maternity leave shall be taken in one continuous period not exceeding fourteen weeks. A male employee entitled to paternity leave under section 17, may take up to two weeks leave, taken in one continuous period. Part III of the Act provides for extended leave to be taken in one continuous period, not exceeding 52 weeks. The extended leave may be shared between parents, pursuant to section 27, provided that the combined total leave does not exceed 52 weeks. Adoptive parents may also be entitled to extended leave under section 24 of the Act. In the case of multiple births, any extended leave to which that employee is entitled, shall be determined as if the employee had given birth to only one child<sup>10</sup>.

(c) Rights and obligations after commencement of parental leave

Part V of the Act guarantees the right of return to work. An employer shall be presumed to be able to keep open the employee's position for that employee until the end of the employee's parental leave, unless the employer proves that the employee's position cannot be kept open because a temporary replacement is not reasonably practicable due to the key position occupied within the employer's enterprise by the employee, or because of the occurrence of a redundancy situation where the former position of the employee has become superfluous to the requirements of the employing organization. The employer is under no obligation to pay the employee any remuneration for any period of parental leave taken pursuant to the Act<sup>11</sup>.

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<sup>9</sup>See s9(2) Parental Leave and Employment Protection Act 1987

<sup>10</sup>s25, Parental Leave and Employment Protection Act 1987

<sup>11</sup>s42, Parental Leave and Employment Protection Act 1987



### 3 Further relevant legislation *Parental Leave*

#### (a) Taxation (Parental Tax Credit) Act 1999

The new Parental Tax Credit, announced by the National Government in this year's Budget, was introduced partly as a response to pressure created by the Alliance Paid Parental Leave Bill. It is designed to provide additional support to working families for the eight week period following the birth of a child. Part of a package called "Family Plus", the new credit is aimed at assisting low to middle income working families.

The Parental Tax Credit will apply to births that occur on or after 1 October 1999<sup>12</sup>. The credit is payable at the rate of \$150 per week per child, the maximum annual entitlement being \$1200 for each new born child. For multiple births, a family will receive multiple entitlements<sup>13</sup>.

### 4 Parental leave in the wider context of targeted social benefits

The New Zealand parental leave legislation operates in a wider context of social benefits available to employees who become pregnant. Parents have access to health care services in the public health system, until four weeks after the birth, or six weeks if requires. Free specialist services will be provided through public hospitals and children under the age of six are entitled to free visits to the doctor. If specialist services are required, then these are subsidised to the level of cost in the public sector. In addition to these services, new parents have access to after birth advice and care through the Plunket system. The Government currently funds Plunket approximately \$19.4 million per annum.

There is also in place a system of targeted income support to parents, regardless of their employment status prior to the pregnancy or birth. Whether or not a family is eligible to receive any of these benefits is dependent on their level of income.

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<sup>12</sup>s2, Taxation (Parental Tax Credit) Act 1999

<sup>13</sup> Credit calculation formulae contained in ss 6-7 Taxation (Parental Tax Credit) Act 1999



## **B Arguments in favour of Paid Parental Leave**

At present, under the Parental Leave and Employment Protection Act 1987, there is no statutory entitlement to remuneration whilst a new parent is on parental leave. This section of the paper will set out the main policy arguments in favour of a system that would entitle parents to some form of payment related to absence from work on the birth of a child.

In 1986, the Working Party on Payment for Parental Leave found that arguments for providing a statutory payment for parental leave tended to revolve around the need to resolve the conflict between allowing for the adequate care of a newborn infant, and the need to foster equal opportunities for both parents to maintain their employment<sup>14</sup>. Thus arising out of this conflict, the arguments can be separated into two broad categories : the need to provide financial assistance for working families with newborn children and the need to foster gender equity in the workforce.

### *1 Financial Assistance for working families with newborn children*

Parental Leave is recognized as being vital in supporting good child development. Adequate care in the first few months of a newborn baby's life is essential for the physiological and psychological development of the child. Breastfeeding alone has been identified as a major factor in the healthy development of a child<sup>15</sup>. Thus the availability of job protected parental leave is vital to the welfare of our community. This concept has clearly been identified as a key element in the formulation of parental leave policies in some European countries<sup>16</sup>. Unfortunately, for many families, taking leave from work at this

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<sup>14</sup>*Report of the Working Party on Payment for Parental Leave* (Department of Labour, Wellington, 1986) 6

<sup>15</sup>For examples of such research see : A S Cunningham, D B Jelliffe and E F P Jelliffe "Breastfeeding and Health in the 1980s : A global epidemiologic review" (1991) 188 *The Journal of Paediatrics* 659-666; and Dignam "Understanding intimacy as expressed by breastfeeding women" (1995) 16 *Women's Health Care International* 477-485

<sup>16</sup>*European Commission Leave Arrangements for Workers with Children : A review of leave arrangements in the member states of the European Community and Austria, Finland, Norway and Sweden* (European Commission Network on Childcare and other Measures to Reconcile Employment and Family Responsibilities for Women and Men, Brussels, 1994)



essential time is not an economically viable option. Indeed 1993 American research has shown that while the return of mothers to paid employment in the United States is strongly related to the cessation of breastfeeding, this does not necessarily occur in countries with more adequate maternity and parental leave provisions<sup>17</sup>. Thus while there may be a system in place that provides job protected leave for a substantial period on the birth of a child, this simply may not be accessible for many women. A system whereby a new mother or father were to receive payment, related to loss of earnings over a period of parental leave, would increase the effectiveness of existing parental leave provisions and would make parental leave a more realistic choice for many more families.

## 2 *Gender Equity in the Workplace*

The second major argument in favour of paid parental leave is the promotion of gender equality in the workplace. While some in the community may regard having children as a lifestyle choice, rather it must be recognized as a lifestyle function and while fulfilling this function, women should be afforded the same opportunities as men to continue their careers in employment. Because on average a woman's income is less than that of her male counterpart's<sup>18</sup>, it is usually the women that forego paid work and take the leave from work on the birth of a child. The 1986 Working Party found that a payment related to the lost earnings of the parent taking leave on the birth of a child would reduce the financial pressure that forces the woman to take leave, thereby encouraging men to take their legislated right to extended leave on the birth of a child. The Working Party found that an earnings related payment would tend to promote a more equitable balance between men and women invoking their parental leave entitlements<sup>19</sup>.

In addition, the Working Party found that in the absence of income, pressures arise that

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<sup>17</sup>L S Acheson and S C Danner "Postpartum Care and Breastfeeding" (1993) 20 Primary Care 729 - 747

<sup>18</sup>*Report of the Working Party on Payment for Parental Leave* (Department of Labour, Wellington, 1986) 12

<sup>19</sup>*Report of the Working Party on Payment for Parental Leave* (Department of Labour, Wellington, 1986) 12



have particular effects on women. It cited evidence that many women, in an effort to replace the lost income, make various work and childcare arrangements such as shift-working. Such activities can not only result in personal conflicts and health problems, but can affect work performance and significantly disrupt a career pattern and the return to the previous position with the former employer.

#### *International Conventions*

There has also been evidence that suggests that rights to paid parental leave in Europe have "raise[d] the percentage of women employed, with a substantial effect observed for even short durations"<sup>20</sup> Indeed, an increasing number of large corporations and legal firms have recognized the value of paid parental leave as a method of retaining female staff. WestpacTrust in Australia recognised that a comprehensive approach to parental leave was an essential element in a community banking business predominantly staffed by female employees. WestpacTrust found that in 1994, only 30 percent of female employees returned to work after parental leave, which resulted in a net lost investment of 1.8 million dollars per year. In response to this finding, WestpacTrust formulated an integrated approach to parental leave, which involved maintaining contact with the employee throughout the period of leave and assistance in making the transition back to work by offering flexible working arrangements. Having introduced this comprehensive system of paid maternity leave, WestpacTrust found that the number of resignations following maternity leave more than halved<sup>21</sup>.

Thus, there is strong evidence to suggest that a payment related to the lost earnings of the parent taking the leave, would not only reduce the financial pressure which affects women's employment prospects more than those of men, but may also result in a higher rate of women returning to their previous employment. These factors certainly promote gender equality in the workforce.

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<sup>20</sup>International Labour Organization Convention No. 103 - Convention concerning Maternity Protection (Revised 1952) in ILO International Labour Conventions and Recommendations 1917-1976 International Labour Organization, Geneva, 1996) IV

<sup>20</sup>Christopher J Ruhm *The Economic Consequences of Parental Leave Mandates : Lessons from Europe* (Working Paper 5688, National Bureau of Economic Research, Massachusetts, 1996) 30

<sup>21</sup>Lorraine Skiffington "Parental Leave : A Progress Report 10 Years On" (1998) 4 ELB 22-24, 23



## C *Paid Parental Leave : An International Perspective*

This section of the paper will consider New Zealand's standing internationally as regards provision for parental leave.

### 1 *International Conventions*

There are three major international Conventions which deal with balancing family responsibilities with employment needs. The first of these is the International Labour Convention No.103 Convention Concerning Maternity Protection (Revised)1952. Article 4 of this Convention states that "while absent from work on maternity leave...the woman shall be entitled to receive cash benefits"<sup>22</sup> Article 4 stipulates that the rates of cash benefit shall be fixed by national laws or regulations so as to ensure benefits sufficient for the full and healthy maintenance of herself and her child in accordance with a suitable standard of living. It provides that cash benefits shall be provided either by means of compulsory social insurance or by means of public funds. Paragraph 8 of article 4 provides that "in no case shall the employer be individually liable for the cost of such benefits due to women employed by him"<sup>23</sup>.

The second major international Convention is the International Labour Convention No. 156, concerning Equal Opportunities and Equal Treatment of men and women workers : Workers with Family Responsibilities<sup>24</sup>. While this Convention does not provide explicitly for paid leave on the birth of a child, it does promote equality of men and women in the paid workforce, especially, as the title suggests, in relation to achieving a balance between participation and opportunities in the paid workforce and family responsibilities. Article 4 provides :

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<sup>22</sup>International Labour Organisation Convention No.103 : "Convention concerning Maternity Protection (Revised 1952)" in ILO *International Labour Conventions and Recommendations 1952 - 1976* (International Labour Organisation, Geneva, 1996) 39

<sup>23</sup>Above n22, Convention 103, 39

<sup>24</sup>International Labour Organisation "Convention No. 156, concerning Equal Opportunities and Equal Treatment of men and women workers : Workers with Family Responsibilities" in ILO *International Labour Conventions and Recommendations 1952 - 1976* (International Labour Organisation, Geneva, 1996)



“With a view to creating effective equality of opportunity and treatment for men and women workers, all measures compatible with national conditions and possibilities shall be taken

- (a) to enable workers with family responsibilities to exercise the right to free choice of employment; and
- (b) to take account of their needs in terms and conditions of employment and in social security”

At the International Labour Conference, 67<sup>th</sup> session in Geneva in 1981, the Reporter of the Committee on Workers with Family Responsibilities, in presenting the report of the committee and Convention No.156, discussed the objective of the Convention and its accompanying recommendation :

“The Convention seeks one goal, namely to bring about effective equality of opportunity and treatment for men and women workers...”

The third major Convention is the United Nations Convention on the Elimination of All Forms of Discrimination Against Women<sup>25</sup>. Article 11 of the UN Convention states that State parties to the Convention have agreed “to introduce maternity leave with pay or with comparable social benefits without loss of former employment, seniority or social allowances;”.

It is clear from these three Conventions, that the need to achieve a balance between the promotion of equality between the sexes and the fulfilment of family responsibilities, is recognized at an international level.

## 2 *Parental leave policies implemented internationally : 2 Case studies*

Over 112 countries have some form of payment to new mothers or families associated

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<sup>25</sup>“Convention on the Elimination of All Forms of Discrimination Against Women” in UN *Human Rights : a compilation of International Instruments* (United Nations Centre for Human Rights, New York, 1995)



with the birth of a child<sup>26</sup>. These payments take different forms, and derive from various different philosophical viewpoints. Following are examples of two countries that have developed such systems. Detailed are the provisions currently made for payment, some discussion of the historical background to the systems, and the principles upon which the systems are based.

(a) United Kingdom

The United Kingdom introduced new maternity leave provisions in 1994 to comply with the minimum leave requirements stipulated in the European Community Pregnant Workers Directive<sup>27</sup>. All pregnant workers are entitled to 14 weeks maternity leave and have a right to reinstatement and protection from pregnancy-related dismissal. Women who have worked full-time for the same employer for at least two years and women who have worked part-time for the same employer for five years, are eligible for Statutory Maternity Pay which entitles them to 90 percent of their former earnings for the first six weeks of their maternity leave, followed by twelve weeks at a flat rate. They are also entitled to a longer period of leave of up to approximately forty weeks. Women who are not eligible for Statutory Maternity Pay are entitled to receive a flat rate Maternity Allowance. The Statutory Maternity Pay is initially paid by the employer, who is then reimbursed from National Insurance. The Maternity Allowance is funded through National Insurance<sup>28</sup>.

The approach to parental leave in the United Kingdom has been somewhat haphazard. The latest provisions follow a legacy of measures stretching back to 1891. Initially introduced as a prohibitive measure, excluding women from working in factories immediately after childbirth, they have since largely developed in response to external pressures. In the 1940s

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<sup>26</sup>(9 September), NZPD, 11866 : Second Reading of the Paid Parental Leave Bill included in Alliance *Paid Parental Leave Pack : Briefing papers on Paid Parental Leave* (Alliance, Wellington, 1998)

<sup>27</sup>At present the leave entitlements extend only to women. The Labour government is proposing to extend unpaid leave only to fathers in response to European Community Directive.

<sup>28</sup>Statutory provisions are from the Employment Protection (Consolidation) Act 1978 (amended in 1980 and 1982); Statutory Maternity Pay (General) Regulations (S.I 1986 No.1960); and Social Security Contributions and Benefits Act 1992



they were part of social insurance measures designed to maintain a war-time solidarity and consensus: wartime conditions requiring women to enter the workforce in much greater numbers. Changes in the 1970s and 1990s have come as a result of pressure from other European Community member States<sup>29</sup>. Due to this unsystematic approach, the provisions are extremely complicated and the goals of the system are hard to identify. There is little evidence to suggest that the UK maternity leave provisions are designed to address problems in gender inequity in the workforce : there is no provision for shared parenting and there is no leave available to the woman's partner. Prior to the introduction of the 1994 legislation, there was no guaranteed right of return to former employment. Under the current provisions, if a pregnant worker with less than two years service is dismissed, the onus is on her to prove that the dismissal was pregnancy related.

At a practical level, there has been little research into the effectiveness of the system. There is, however, anecdotal evidence that suggests that in some situations employers regard the statutory requirements as the minimum standard and use it as a floor upon which to build their internal parental leave policies. Employers may therefore see the advantages of an integrated approach to parental leave and recognize that a flexible policy will benefit them in the long term. The complicated nature of the system does, however, cause problems and confusion. This is compounded by a body of difficult case law. Many commentators and academics in Britain support changes to the system which would see it simplified and leave provisions extended to the pregnant worker's partner<sup>30</sup>.

#### (b) Sweden

All current statutory provisions for parental leave in Sweden are contained in the Childcare Leave Act 1974. This provides for up to twelve weeks maternity leave to all working mothers and ten days paternity leave to all working fathers. Extended parental leave of up to fifteen months is available to either parent and all workers have job protection.

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<sup>29</sup>Ministry of Women's Affairs *Parental Leave Policies, Women and the Labour Market* (Ministry of Women's Affairs, Wellington, 1995) 27 - 29

<sup>30</sup>"Maternity Laws in the UK - interview with Jill Earnshaw" *Nine to Noon with Kim Hill* (National Radio, Wellington, 11 March 1999)



Eligibility for wage related payments while on leave is dependent upon the length of the employment and a record of social contributions. Those parents not meeting this criteria are entitled to a low flat payment during maternity or extended parental leave<sup>31</sup>.

Parental Leave provisions in Sweden can be traced from a philosophy that viewed pregnancy as a form of sickness where employed women could pay into a voluntary sickness plan. Over time, however, the emphasis shifted from compensating women for sickness to the provision of paid maternity leave with job protection. The war was another major factor in this progression due to the labour shortage at the end of World War II. By the 1960s, in an attempt to utilise internal labour resources, the government turned its attention to married women and extended the period of paid maternity leave from three to six months. In the 1970s, Sweden introduced extended job protected leave and a parental allowance of the equivalent of 90 percent of normal earnings, which could be shared between men and women. Sweden was the first country in the world to recognize the role of both partners in the parenting process in this pro-active way. The policy was designed to promote equality between men and women, both in the labour market and at home<sup>32</sup>.

***D Drawing a comparison : How does New Zealand stand internationally?***

As established above, there is currently no system in New Zealand that affords a universal entitlement to payment for workers who take leave from work on the birth of a child. The current government is firmly of the view that such payment is a matter for private negotiation between employer and employee. Rather, as detailed above, it is in favour of a system of targeted welfare benefits, provided on the basis of financial need<sup>33</sup>.

Studies have shown that when such provision is left to the employment market as a matter for private negotiation it is either omitted from contractual terms and conditions or

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<sup>31</sup>Childcare Leave Act 1974 (Sweden)

<sup>32</sup>Above n29, Parental Leave Policies, 26

<sup>33</sup>New Zealand Government response - Report V(1): Maternity Protection at Work: Questionnaire (International Labour Conference 87<sup>th</sup> Session, Geneva, 1999)



token measures are taken and usually take the form of a return to service bonus<sup>34</sup>. It is also apparent that women in higher bargaining positions are more likely to be able to negotiate effectively on this matter<sup>35</sup>.

The question therefore remains to be asked : How does New Zealand compare internationally as regards our international obligations and in direct comparison with parental leave provisions in other countries?

### 1 *International Conventions*

As established above, there are three main international Conventions relating to the issue of the promotion of gender equality in the workforce and workers with family responsibilities.

New Zealand, although a member state of the International Labour Organisation, has neither ratified Convention 103 nor Convention 156. The present New Zealand government is not in favour of Conventions that set down rigid standards. It favours more flexible recommendations which enable member states to achieve desirable outcomes through a diversity of approaches<sup>36</sup>.

In respect of International Labour Organisation Conventions, members have certain obligations, to bring Conventions to the attention of an authority within whose competence it lies to enact legislation. If the member does not obtain the consent of that authority, no further obligation shall rest upon the member except that it shall report to the Director General of the International Labour Office, at appropriate intervals, the position of its law and practice

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<sup>34</sup>See for examples of such research: Raymond Harbridge *Parental Leave Provisions in collective employment contracts* (Industrial Relations Centre, Victoria University of Wellington, 1994); and Department of Labour *Contract* (1998) 25 May 1998, 14

<sup>35</sup>For example, parental leave provisions may be more favourable for women in senior positions in Legal Firms. See "Bell Gully's paid maternity leave" Lawtalk 497, May 1998, 3 for one example of such an arrangement.

<sup>36</sup>New Zealand Government response - Report V(1): Maternity Protection at Work: Questionnaire (International Labour Conference 87<sup>th</sup> Session, Geneva, 1999)



in regard to the matters dealt with in the Convention, showing the extent to which progress has been made and stating the difficulties which prevent or delay the ratification of the Convention<sup>37</sup>.

New Zealand did, however, in 1984, ratify the United Nations Convention on the Elimination of all Forms of Discrimination Against Women. This move signalled an international commitment on behalf of the New Zealand government to providing leave from employment for new mothers with pay, or comparable social benefits<sup>38</sup>. Ratification of the Convention did provide for a period of grace before paid parental leave became mandatory<sup>39</sup>. Fifteen years have passed, however, since New Zealand ratified the Convention and no significant step has been made towards the introduction of a comprehensive statutory regime for the provision of paid parental leave. Not surprisingly, in 1994 the United Nations committee expressed difficulty in understanding why paid maternity leave had not been implemented in working life<sup>40</sup>.

Therefore, as a member state of the International Labour Organisation, while not having an obligation to ratify the Conventions adopted by the International Labour Conference, New Zealand should be looking more closely at trying to bring its law and practice into line with the minimum standards laid down by Convention Nos.103 and 156. Further, having ratified the United Nations Convention, New Zealand must address its obligations with regard to paid parental leave.

## II POSSIBLE REFORM: WHAT ARE NEW ZEALAND'S OPTIONS?

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<sup>37</sup>International Labour Organisation Constitution, Article 19 paragraph 5 : Obligations of members in respect of Conventions <<http://www.ilo.org/public/english/overview/iloconst.htm#a19>> last updated 8 December 1998

<sup>38</sup>United Nation Convention on the Elimination of All Forms of Discrimination Against Women *Human Rights : A Compilation of International Instruments* (Centre for Human Rights, Geneva, ...!!!!!!)

<sup>39</sup> Lorraine Skiffington "Paid Parental Leave : One small step towards social and family responsibility" (1998) 4 ELB 126

<sup>40</sup>Above n39, "Paid Parental Leave", 126



It is difficult to draw a useful comparison between New Zealand and other countries in terms of parental leave provisions. This is due to several factors. Firstly, the social conditions in many countries are quite different, secondly, many countries have a different social welfare and taxation structure. Paid parental leave does not exist in a vacuum : it is an integral part of each country's social policy and employment structure. It is, however, instructive to draw comparisons with the United Kingdom systems as it has a similar social structure and may be a possible model for the development of a paid parental leave system in New Zealand.

As discussed above, the maternity leave system in the United Kingdom is complicated. Paid leave is legislated, and therefore there is a fairly broad entitlement paid parental leave of some sort. This is in direct contrast with New Zealand where paid parental leave provisions have to be negotiated as part of an employment contract, a policy which is clearly not achieving results. There is no paternity leave entitlement in the United Kingdom, whereas in New Zealand, not only may the father have paternity leave immediately post delivery, but he can elect to take or share the extended parental leave entitlement.

Thus, after comparing New Zealand's parental leave policy against our international obligations and the precedents set by other countries, it is clear that New Zealand has to pay significant consideration to reform in this area.

## **II POSSIBLE REFORM : WHAT ARE NEW ZEALAND'S OPTIONS?**

Part two of this paper will look at the possible options for reform to New Zealand's parental leave legislation. One of the options is the enactment of Laila Harre's Paid Parental Leave Bill. This Bill will be analysed below, it will be examined in the context of our international obligations and the arguments of those in opposition will be addressed. Also discussed will be other options for reform.



## A *The Alliance Paid Parental Leave Bill*

### 1 *The provisions of the Bill*

Early in 1998, Laila Harre, Member of Parliament for West Auckland and Alliance Spokesperson on Workplace Relations, introduced the Paid Parental Leave Bill ("the Bill") as a private member's Bill. The Bill would amend the principal legislation, the Parental Leave and Employment Protection Act 1987, to provide for twelve weeks paid leave for every female employee who qualifies under the existing Act<sup>41</sup>. The paid leave may be transferred from the female employee to her spouse, provided that the spouse is entitled to leave under the Act<sup>42</sup>. The payment would be made at 80% of the person's normal wage, with a cap of the average male wage<sup>43</sup>. Working fathers whose partners do not qualify for paid leave, will be entitled to two weeks paid leave<sup>44</sup>. The leave payment would be funded by all employers through a levy paid at the same time as PAYE. The rate of this levy would be set by regulations pursuant to the Act<sup>45</sup>.

The basic proposition that Harre makes in promotion of the Bill, is that reproduction is an essential lifestyle function, not a lifestyle choice. Equally, it is essential that most people work, indeed the twentieth century has been one that has seen a huge increase in women's participation in work. Due to the obvious necessity of providing adequate care and nurturing

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<sup>41</sup>Paid Parental Leave Bill, clause 2 : for eligibility provisions see Parental Leave and Employment Protection Act 1987, s7 **Entitlement of female employee to maternity leave** - "Except as otherwise provided in this Act, every female employee-

(a) who becomes pregnant; and

(b) Who, at the expected date of delivery, will have been for the immediately preceding 12 months in the employment of the same employer for at least 10 hours in each week,-

shall be entitled to maternity leave in accordance with this Act"

<sup>42</sup>Paid Parental Leave Bill, clause 2

NB This provision does not extend to partners in same sex relationships.

<sup>43</sup>Paid Parental Leave Bill, clause 5

<sup>44</sup>Paid Parental Leave Bill, clause 3

<sup>45</sup>Paid Parental Leave Bill, clause 6



to a newborn in its first formative months, a balance has to be achieved. Harre argues that absence from work on the birth or adoption of a child is a legitimate reason for being absent from work and in line with other legitimate working conditions such as annual leave and sick leave and as such should be funded by employers<sup>46</sup>.

The particular form of the proposed legislation has raised some questions. Before looking at the arguments in opposition to the Bill, the arguments and reasoning of the Alliance in support of the legislation taking the proposed form will be discussed.

## 2 *Why reform the law in this way? - the Alliance perspective*

The key features of the Alliance Paid Parental Leave Bill, and those that have attracted the most controversy, are the proposed duration of the paid leave, the source of the funding and the level of payment.

### (a) 12 weeks

The proposed legislation provides for twelve weeks maternity pay. The twelve week period is the minimum standard set down by the International Labour Organization<sup>47</sup> and is recognized as a vital time in the development of a newborn child. Harre argues that society should reinforce the "desirability of a reasonable settling in period for a new baby"<sup>48</sup>.

### (b) Source of Funding

Harre proposes to set up a central fund, called the Parental Leave Fund, which would consist of payments, collected from all employers at a prescribed rate based on the total payroll of the employer to employees. Every employer would have the right to claim from this

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<sup>46</sup>Laila Harre "Paid Parental Leave - An idea whose time has come" in *Alliance Paid Parental Leave Pack* (Alliance, Wellington, 1998)

<sup>47</sup>Above n22, ILO Convention 103, article 3

<sup>48</sup>Laila Harre, above n46, 1



fund for any paid maternity leave or paternity leave taken by an employee under the Act. The rationale for sourcing funding for the scheme solely from the employers is based on the general policy argument that absence from work on the birth of a child is a legitimate work right, that it should be viewed no differently from any other contractual term or condition, such as paid annual leave or sick leave. Harre acknowledges other possible sources of funding, such as general taxation, or contributions from the employees themselves, but she argues that such an approach is to misunderstand the concept of paid parental leave : a legitimate working condition<sup>49</sup>.

(c) Level of payment

The scheme proposes a payment at 80% of wages previously earned but the employee taking leave. This is essentially a compromise provision. Harre argues, that while payment at 100% of the workers wages would be the ideal, New Zealanders have accepted 80% as an appropriate level of wage replacement in the context of Accident Compensation and that is why that level was chosen. The second feature of the payment level is the cap of the average male wage. This provision recognizes that women in higher paying positions are better placed to negotiate a higher level of payment directly from their employers. Harre also argues that this cap prevents the Bill from being elitist : that it recognises that broadest possible approach is desirable, at a reasonable cost<sup>50</sup>.

Thus Harre, placing the cost directly on employers, sees paid parental leave as a legitimate employment condition. Through capping the level of payment available, however, she strives to make the system non-elitist and aims to make its appeal as broad as possible. The proposed scheme, however, has certainly not been met with approval. It has come under attack, principally from opposing right wing parties, employers organisations and from the Business Roundtable. Before looking at how the proposed reform would bring New Zealand into line with our international obligations, the main arguments of those in opposition will be

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<sup>49</sup>Harre, above n46, 2

<sup>50</sup>Harre, above n46, 1



examined.

### 3 *The Arguments against the proposed legislation*

The arguments against the Bill rest mainly on the issue of funding. Opponents are not only anti the proposition that the scheme be funded solely by employer contributions at an economic level, they are against the philosophy behind such a proposition. Opponents also claim that the purpose of the proposed legislation is blurred. These arguments are addressed in more detail below.

#### (a) State intervention in the employment market

At a general level, anti-paid parental leave campaigners claim that the proposed system would constitute yet another state intervention in New Zealand's supposedly deregulated labour market : in broad terms, that such State imposed requirements serve only to restrict employment opportunities and exclude people from work<sup>51</sup> Opponents claim that the system would impact adversely on those whom it is intended to benefit. It is argued that the system would create confusion and that the inconvenience and expense of finding and training temporary replacement employees, with no guarantee of the employee on parental leave returning to work, would act as a deterrent to employees from hiring women of child bearing age<sup>52</sup>. It is further argued that while such legislation may benefit some individuals, it does not benefit society as a whole, nor the operation of the labour market. The labour market would have to absorb the cost of a payroll levy, hiring temporary replacement staff and coping with the inconvenience of a staff member being absent from work for a year, with no certain benefits in return<sup>53</sup>.

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<sup>51</sup>New Zealand Employers' Federation *Submission of the New Zealand Employers' Federation on the Paid Parental Leave Bill* (New Zealand Employers' Federation, Wellington, 1998) 1-2

<sup>52</sup>NZEF Submission, above n52, 2. This argument does overlook the fact that under the existing legislation, a woman is not bound to return to work and that employers are still faced with finding temporary replacement staff even when the absence is indeed temporary. In Britain, where there is a paid parental leave system, there is no evidence to suggest that employers are failing to employ women for this reason (Interview with Jill Earnshaw, above n31)

<sup>53</sup>NZEF Submission, above n51, 3



(b) Method of funding of the legislation

The proposed method of funding the system has also been the subject of much criticism, from both an economic and a philosophical perspective. Harre's arguments for sourcing funding from employers have already been examined. Opponents argue that paid parental leave is a social benefit and that as such it shouldn't be funded through what is essentially a payroll tax. They argue that to describe the proposed legislation as simply making paid parental leave a term of the employment contract is to deny its total lack of reciprocity<sup>54</sup>.

It is argued that a further payroll tax will prevent job growth and keep wages lower. An across the board tax is claimed to be inequitable : that male dominated industries, while having to contribute to the fund would rarely have the need to claim from it. The argument that the investment would pay off in retention of staff, thus reducing costs incurred in recruitment and training of new staff is rebutted by the opposing claim that this overlooks the need to replace absent workers temporarily. It is also argued that there is no reason why mere payment should encourage a woman to return to work<sup>55</sup>.

This method of funding, it is argued, could result in employers avoiding hiring women likely to take parental leave. The New Zealand Employers' Federation argues that this could arise out of confusion regarding the way the legislation is to operate and the need to find and train replacement staff. The 1986 Working Party also concluded that an employer funded system could, for the same reasons, conflict with the equal opportunity objective of the Parental Leave and Employment Protection Act. The Working Party also cited the International Labour Organisation Convention No.103, which in article 4 states that "in no case shall the employer be individually liable for the costs of such benefits due to women employed by him [sic]"<sup>56</sup>

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<sup>54</sup>NZEF Submission., above n51, 3

<sup>55</sup>NZEF Submission, above n51, 3

<sup>56</sup>Report of the Working Party, above n18, 15



(c) The blurred purpose of the legislation  
The purpose of the current New Zealand legislation, the Parental Leave and Employment Protection Act 1987, is to enable new parents to take leave from work on the birth or adoption of a child and to provide job protection which enables the leave taker to return to work. It also has a gender equity focus. Opponents argue that in light of this, the purpose of the proposed legislation is blurred, and that it ignores the objectives of the principal Act. Additionally it is argued, that if the Bill's purpose is to assist those in the workforce whose employment is interrupted by the birth or adoption of a child, the employer funded paid leave is not an appropriate means of achieving this end because qualification for paid leave is not on the basis of financial need. Advocated instead, is a system of targeted welfare help, not a blanket benefit.

#### 4 *Would the proposed Alliance Bill fulfil our international obligations?*

As established above, New Zealand has made international commitments to developing a paid parental leave scheme.<sup>57</sup> The proposed legislation would fulfil the minimum United Nations requirement of providing twelve weeks paid leave and would certainly bring us closer to the provisions made by other countries worldwide, making it superior in the case of countries such as Britain, in extending the provision of paid leave to the father. To some extent, the proposed scheme would also comply with the relevant International Labour Organisation Conventions, as yet not ratified by the New Zealand government. However, as noted above, the legislation would be contrary to Convention No.103 in that it places the cost of the system solely on the employer<sup>58</sup>.

#### 5 *Is the Alliance Bill the answer?*

While the enactment of the proposed Alliance Bill would, to a large extent, fulfil New

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<sup>57</sup>Pursuant to the United Nations Convention on the Elimination of All Forms of Discrimination Against Women.

<sup>58</sup>ILO Convention No.103, article 4, above n22



Zealand international obligations as regards parental leave provision, there is clearly opposition to the proposed scheme. Indeed the Social Services Select Committee recommended, when presenting their report in June, that the Bill should not proceed to enactment, those in opposition claiming that the Bill in its current form is discriminatory against those women who work part-time, the self-employed, and those who choose to stay at home on a more permanent basis to care for children<sup>59</sup>. This paper submits that while the Bill has brought the issue to prominence in this country, it is not a satisfactory response to New Zealand's requirements in this area.

### **B What is the Alternative?**

The final section of this paper proposes to suggest an alternative to the Alliance Paid Parental Leave Bill.

In formulating a system of paid parental leave, it is essential to bear in mind the objectives of the proposed system : the philosophical rationale is essential in determining issues such as the source of funding, the eligibility requirements, the job protection provisions and whether paid leave should be available the mother's partner. As identified above, the approach in New Zealand to parental leave thus far has been a progression towards gender equity in the workplace and providing leave with strong job protection mechanisms. These two goals are promoted in the international Conventions outlined above. Any future New Zealand policy on parental leave must be based on these objectives. The most controversial aspects of the policy would be the source of funding and the eligibility provisions.

#### *1 A Proposed alternative system*

Outlined below is a possible system to reform New Zealand's parental leave provisions.

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<sup>59</sup>Select Committee press releases 25 June 1999-2 July 1999, <[http://www.clerk.parliament.govt.nz/cgi-bin/ootc/display?back\\_url=/generated/index/press-release.html%25F&archive\\_id=5835&issue\\_id=19522&paper\\_id=5479](http://www.clerk.parliament.govt.nz/cgi-bin/ootc/display?back_url=/generated/index/press-release.html%25F&archive_id=5835&issue_id=19522&paper_id=5479)>, compiled in the Select Committee Office, Office of the Clerk, 2 July 1999



(a) Source of funding

The source of funding for paid parental leave is dependent on the rationale behind providing payment associated with the birth of a child. The proposition of this paper, is that based on New Zealand's current policy, any payment should be directly related to the employment relationship<sup>60</sup>. Thus the onus should not rest solely with the State to provide funding for the system. Rather, bearing in mind the employment relationship, the decision to have a child and the responsibility of the State to foster gender equity and its inherent interest in ensuring the proper nurturing and development of the child, the funding should be sourced through a system of social insurance. Such a system could be funded by levies on employers, employees and the State. A social insurance system could be either voluntary or compulsory. A voluntary system would allow families to opt out of the scheme, although the effect of this would be that lower income families, unable to afford the levies, would not receive payment. A compulsory system would spread payment over all employers and employees. Not all those levied would benefit directly from the system, but the payment might be considered part of a wider social responsibility. Funding by this option would involve setting up a new parental leave fund<sup>61</sup>.

(b) Eligibility

Under the present legislation, a large number of people fail to qualify for leave. In a workforce which is becoming increasingly mobile and where part-time workers and short term contracts are becoming extremely common<sup>62</sup>, eligibility criteria must be flexible enough to ensure the broadest possible coverage. A possible system would allow independent contractors to earn credits on the basis of employment history and social insurance

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<sup>60</sup>As opposed to a welfare payment on the birth of a child.

<sup>61</sup>Such a system was discussed in the *report of the Working Party on Payment for Parental Leave*, Above n18, 15-16

<sup>62</sup>The Household Labour Force survey for the June Quarter 1999 found that the number of part-time workers in New Zealand is 414,000 compared to 1.32 million full-time workers. This figure is an increase of 16,000 from the June Quarter 1998 : "The Future of Work" *The New Zealand Listener*, Auckland, New Zealand 4-10 September, 16



contributions which would then enable them to claim payment from the Parental Leave Fund. This sort of system would ensure that a link is maintained between employment and the payment, and would address the changing form of the modern workforce. To ensure that employers are not discriminated against, it may be necessary to retain a minimum period of service before an employee in a traditional employment contract relationship becomes eligible for leave.

(c) Payment

While full pay for the duration of the leave would be the most desirable scenario, this is clearly not economically viable. However, in line with international standards, payment may be made for the period of maternity leave taken (up to fourteen weeks). This payment may be at full salary, or at 80% of regular earnings as proposed by Laila Harre and as in the case of Accident Compensation payments. In line with the gender equity focus of New Zealand's parental leave legislation, both parents should be equally eligible for payment. The payment would be made by the employer at the first instance, much like the system in the United Kingdom, who would then be reimbursed from the Parental Leave Fund. Independent contractors would claim directly from the Parental Leave Fund

### *III CONCLUSION*

Laila Harre's Paid Parental Leave Bill has pulled the issue of parental leave in New Zealand into the spotlight. It is abundantly clear that New Zealand has been ignoring the issue and important international obligations regarding parental leave for too long. Changing society demands that more comprehensive and equitable provision be made to allow families to have children, encourage their healthy development and for women to maintain their positions in the workforce. It is the proposition of this paper that Harre's Bill is not the answer. Instead it proposes a social insurance system with eligibility provisions which would meet that needs of a changing workforce. Such a policy would bring ensure New Zealand meets its international obligations regarding minimum statutory entitlements for parental leave. It would meet the gender equity policy objective and would share the costs across



employers, employees and the State. It would eliminate discrimination against the more mobile sector of the workforce. Paid Parental Leave : the time has come, but in implementing a system, the legislature must address the needs of society as a whole, not a select few at the disadvantage of others.

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