Submission

by

Business NZ

to the

Social Services Select Committee

on the

Parental Leave and Employment Protection (Paid Parental Leave) Amendment Bill

February 2002

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1. Introduction

1. This submission is made on behalf of Business New Zealand, incorporating regional employers' and manufacturers' organisations. The regional organisations consist of the Employers and Manufacturers Association (Northern), the Employers and Manufacturers Association (Central), Canterbury Manufacturers' Association, Canterbury Employers Chambers of Commerce, and the Otago-Southland Employers' Association. Business New Zealand represents business and employer interests in all matters affecting the business and employment sectors.

2. Recommendations

1. That the proposed parental leave payment be recognised as the welfare benefit it is, be paid accordingly through the social welfare system, and be subject to an income cut off level.

2. That whether the above proposal is accepted or not:

(a) the principal Act's eligibility criteria be retained and the Bill's revised eligibility criteria abandoned,

(b) the right to accumulate an entitlement to annual holidays over the leave period – currently found in section 42 of the principal Act - be removed,

(c) anomalies detected and discussed under 3.8 in the body of this submission be addressed before the Bill becomes law,

(d) the Bill be amended to provide that benefits in an employment agreement that are in their overall effect as favourable to an employee as those provided in the Act apply to the exclusion of the statutory provisions (as is currently the case with existing statutory parental leave provisions).

3. Discussion

3.1 Although this Bill raises real concerns for employers, Business New Zealand is pleased to note that the introduction of a statutory payment for parental leave is not to take the form of a pay roll tax – the kind of tax the earlier-proposed compulsory levy on employers would have represented. Pay roll taxes attach solely to employers, with the inevitable consequence of undermining their ability to employ.

3.2 The above said, the Amendment Bill raises its own employment concerns The fact that a parental leave payment will be available whether or not an employee returns to work must act as an incentive not to resign from a job, even though the employee in question might otherwise have done so. Many employees intend to care personally for their child on a longer-term basis than

the unpaid leave period for which the principal Act provides. That the Amendment Bill is an encouragement not to indicate their intention will leave even more employers in the dark about what to expect than currently under the existing regime.

3.3 Much is often made of the importance of parental leave in enabling employers to retain skilled employees. In some cases this may well be true. However, there is always the difficulty of finding a suitable interim replacement, a fact to which reference is rarely made. The situation is even harder for smaller employers (of whom New Zealand has a preponderance) who do not have other staff to assist with an absent employee's duties if a replacement employee cannot easily be found. To that extent, the general availability of the leave payment to any who fulfil the statutory criteria may well act as a disincentive to employ women of childbearing age in particular.

3.4 The difficulty posed by the need to keep a job open – with no certainty that the employee will be returning to work - is compounded by the Bill's changed eligibility criteria. Work for a minimum of one hour a week with an average of 40 hours over a four-week period or ten hours a week over the full 12 months could see numbers of casual employees come within the coverage of the principal Act as amended. This means that such employees would be eligible not only for a parental leave payment but for parental leave of up to 12 months. The logistics of keeping track of casual employees whose work is, by its nature, intermittent, would pose an extra burden on employers who, even in the ordinary course of events, can never be certain that their casual employees will continue to be available for work.

3.5 Moreover, clause 18 (inserting a new section 72A(3) into the principal Act) provides that the hours an employee would normally work are to be calculated in accordance with the terms of the employee's employment. In the case of a casual employee, where each period of employment is to be thought of as a separate engagement, there will be no such terms of employment on which this kind of calculation can be based. Even in the presence of an employment agreement that refers to working "as and when required", there will frequently be no consistent pattern of work on which to base a parental leave application. For reasons of this sort, Business New Zealand is of the view that present eligibility criteria should remain unchanged.

3.6 Altered eligibility criteria, extending the ambit of the Act to casual employees, will also greatly exacerbate the difficulties currently associated with the right to accrue an annual holiday entitlement while on parental leave (section 42 of the principal Act). In the report prepared by the Holidays Act Advisory Group employer representatives were of the view that holidays should not accrue while employees are on parental leave but the union position was that this provision should be reviewed in the context of the Paid Parental Leave policy development process. At present, an employee returning from 52 weeks' parental leave is immediately entitled to a three-week holiday which, at that point, is unpaid (section 42(1) of the principal Act). That in itself is unacceptable as after 12 months away from work there is simply no need to have a further three weeks' leave for rest and recreation. But there is also an

inherent conflict between the Parental Leave Act provision and what is required by the Holidays Act. Section 42(2) of the Parental Leave Act states that "…the employee shall, notwithstanding anything in section 16(4) of the Holidays Act 1981, be entitled to holiday pay for that holiday only at the rate of the employee's average weekly earnings (as the term is defined in section 2 of the Holidays Act 1981) during the year in which the employee has become entitled to a holiday". However, section 16(4) of the Holidays Act requires that "… the holiday pay of any worker in respect of any period of his annual holiday shall in any event be at a rate not less than the rate of his ordinary pay at the date when he begins to take that period of his holiday". So if the employee works a further six or twelve months after returning from parental leave and then takes a holiday accrued while on parental leave, under the Holidays Act provision it seems the employer is then required to pay on the basis of what has been earned since the return to work. This total lack of clarity has led to considerable confusion that would be best addressed by removing entirely the right for persons on parental leave to accrue an annual holiday entitlement.

3.7 There is further concern about the Bill's lack of administrative detail much of which is to be provided in later regulations. The concern is the greater in that the exercise of the regulation-making power can introduce detail which, though undesirable, is not subject to the select committee process. Consequently, the opportunity to bring potentially adverse effects to the attention of legislators is lacking. The Amendment Bill bears all the hallmarks of legislation introduced to meet a deadline without being properly thought through.

3.8 With respect to the above, questions yet to be answered are:

- New section 71D(1) (clause 4) provides that an employee is entitled to a parental leave payment if he or she has notified the employer of a wish to the parental leave, has taken leave, and is an eligible employee (in terms of the new criteria). However, new section 71I provides that that there is no entitlement to a payment unless application is made in accordance with that section. What section 71I does not say is who the employee to apply to. Presumably it is to the department responsible for the Act but that is far from clear.

- New section 71T (clause 4) imposes an obligation on employers, within 21 days of receiving notice of an employee's wish to take parental leave, to inform the employee about payment rights (or as the Amendment Bill puts it: "of the substance of [Part 1 of the Bill, new Part 7A of the Act]"). This is to be done by giving the employee notice in a form prescribed by the department. The question here is "which department?" but with that satisfactorily answered two further matters need to be addressed.

  First: Will the department provide the actual form or will it merely prescribe what the employee is to be told and leave it to the employer to convey the information in a notice of his or her own devising?

Second: Will there be some kind of transitional provision to ensure the smooth coming into force of the Amendment Bill? Since the Bill is to come into force on 1 July 2002 and will apply where the expected date of delivery is on or after that date, it will be important to ensure that employers who have not been able to provide payment information within 21 days of an employee giving notice of intention to take parental leave cannot be penalised for a failure to comply with the statutory provisions.

- The problem related to the giving of notice to the employee is the more acute in that on 1 July 2002, altered eligibility criteria, assuming these remain, will see greater numbers of employees than previously becoming eligible for both parental leave and for a parental leave payment.

- Has any thought been given to the effect of the loss of any further payment entitlement, should a period of less than 12 weeks' leave be taken, on the principal Act's presumption that a position can be kept open provided the parental leave period does not exceed four weeks? This is essentially negated by a payment provision which fails to require an employee to state when he or she will be returning to work.

- The principal Act is administered by the Department of Labour but the amendment Bill defines "chief executive" (clause 7, Part 2) as "the chief executive of the department … for the time being responsible for the administration of this Part". This is a source of further confusion since the definition is to be inserted in the principal Act's Interpretation section (section 2) normally suggesting that it is to apply to the whole Act rather than to a particular Part. So the question then becomes: is this definition intended to relate to new Part 7A only (the new payment provisions) and does it indicate that Part 7A will not necessarily be administered by the Department of Labour? The impression that this is so is strengthened by the fact that the Bill has been sent to the Social Services Select Committee suggesting that the parental leave payments are by nature welfare payments. If that is the case, it would be better to say so directly, although it is somewhat anomalous to make welfare provision for those already in work.

3.9 Even if the above points are dealt with, there remains the concern that parental leave payments are to be available despite anything of a similar nature agreed in the employee's employment agreement. Currently the principal Act provides that where parental leave rights and benefits in an employment agreement are, in their overall effect, as favourable to the employee as those for which the Act provides the relevant statutory provisions will not apply. In the opinion of Business New Zealand this provision should apply equally to parental leave payments. Anything else merely serves to emphasise the welfare nature of what is proposed.

3.10 Whether or not employed individuals are to receive a parental leave payment should remain a matter for voluntary agreement. If payments in the nature of a welfare benefit are thought desirable (and that is essentially what current proposals amount to), they should be made through the welfare system, subject to an income cut off level.

7 February 2002