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The Right to Breastfeed

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Mihi

Nga mana, nga reo, he maha nga mihi ki a koutou katoa.

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Front cover print

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Introduction

Although social behaviour and practices around breastfeeding have changed considerably in past decades, stigma and discrimination towards breastfeeding mothers and their babies still persists in New Zealand society. The issues of whether a woman has the right to breastfeed and where, and if a child has a right to be breastfed, are issues which are relevant to the discussions about the right to food, health, women's rights, children's rights, and issues of privacy and family responsibilities.

This paper provides a background and further thinking on some of the human rights considerations associated with breastfeeding in an effort to stimulate public discussion on the realisation of this right in New Zealand. It also sets out a number of principles that will be applied to the work of the Human Rights Commission ("the Commission") when dealing with the right to breastfeed issues. These principles may also inform the work of other bodies that consider issues involving breastfeeding rights, such as tribunals and courts, government agencies, and health providers.

Why should the Human Rights Commission consider the right to breastfeed?

There are a number of reasons why it is timely for the Commission to now consider its work in the area of breastfeeding.

1. Since the Commission published the *Employers' Guidelines for the Prevention of Pregnancy Discrimination* in 2002, a number of questions about the right to breastfeed at work continue to be received by Commission staff. The development of a policy paper about the right to breastfeed was included in the Equal Employment Opportunities (EEO) Unit's 2003/04 work plan.
2. Politically, interest in this topic has increased following a parliamentary petition sponsored by Steve Chadwick MP, which called for stronger protections for breastfeeding mothers and babies in New Zealand. Part of the process of developing this petition involved collecting anecdotal data from mothers about incidents of discrimination due to breastfeeding (Appendix 1). Following the petition's launch, the Commission was asked by Members of Parliament to comment on current breastfeeding protections under the Human Rights Act 1993 (HRA).
3. There continues to be agreement that the HRA is the primary source of protection for breastfeeding mothers. The Commission may experience a rise in the number of complaints and enquiries on this issue based on the incidents of discrimination conveyed to Members of Parliament.
4. A 2004 complaint in the area of early childhood education for which the Commission declined to accept jurisdiction has revived debate about the extent to which breastfeeding is protected by the HRA.

5. The Commission is committed to ensuring nga tikanga Māori are promoted and protected. A tikanga relating to breastfeeding can be found in the use of the term 'Te Ukaipo', which literally relates to 'the breast' (u), 'to feed' (kai), 'in the night/the end of time' (po). This concept binds people back to the place where they were first nurtured, to the person who nurtured them, and to their community, helping to ensure the sustainability of that community – 'hoki ki to ukaipo'. For Māori, as for many other cultures, breastfeeding is a natural practice that takes place in both private and public places. More importantly, the tie between child, mother, community and whakapapa is reliant on the concept and act of 'Te Ukaipo'.
6. During the New Zealand Action Plan for Human Rights (NZAPHR) *Mana ki te Tangata* consultation process with the employment sector, National Party MP Katherine Rich, who at the time was its spokesperson on employment matters, raised the right to breastfeed as a significant human rights issue.
7. Also during the NZAPHR consultations, a theatre manager raised breastfeeding in public as a problematic issue for staff and the community. Young people, in general, freely accepted and exercised this right but older citizens found breastfeeding in public distasteful and a breach of their right to privacy. Staff found it difficult to practically reconcile their customers' rights and different views.

It is timely for the Commission to consider the right to breastfeed and its role in ensuring this right is protected in New Zealand.

Scope

This paper provides a background on international human rights activities and policies as they relate to the protection of breastfeeding in the HRA and the work of the Commission. It then considers how the domestic legislation and case law in other countries has given effect to the right to breastfeed and reviews the situation in New Zealand. Based on the international information, the paper proposes and discusses a set of fundamental concepts to guide and inform the Commission in its assessment of complaints, policy advice, and educational activities.

The paper is organised around five main sections:

1. International human rights
2. Overseas legislation
3. Overseas jurisprudence
4. Breastfeeding rights in New Zealand
5. Principles on the right to breastfeed.

While much of the jurisprudence and discussion about the right to breastfeed involves women workers and the extent to which working women can and should breastfeed or express milk during the course of their working day, this paper considers women's working rights as only one important part of the wider discussion on the right to breastfeed.

The right to health is another discussion which poses some challenging issues to the right to breastfeed. The relationship between human rights and public health forms the basis of a wide range of research studies but these are not discussed directly in this paper.

Informed debate about breastfeeding is often accompanied by a growing volume of medical research which illustrates the short and long-term benefits of breastfeeding in achieving health and social outcomes for both individuals and societies in general. Although these substantiated benefits are not discussed in this paper, they are clearly integral to and should be taken into account alongside other human rights considerations.

1. International Human Rights

1.1 Specific Provisions

The human right to food and nutrition, including breastmilk, is well established in international human rights principles and law. The Universal Declaration of Human Rights (Art. 25(1)), the International Covenant on Economic, Social and Cultural Rights (Art. 11), and the International Covenant on Civil and Political Rights assert the rights to adequate standards of living, to food, life, survival, and development. The Convention on the Elimination of all Forms of Discrimination Against Women (CEDAW) (Art. 11 & 12) protects women from discrimination because of the responsibilities of motherhood. Most explicitly, the Convention on the Rights of the Child (CRC) sets out the rights of children to proper nutrition and health care, while highlighting the importance of their parents' education on "basic knowledge of child health and nutrition [and] the advantages of breastfeeding" (Art. 24).

Breastfeeding breaks or a reduction in hours are specifically construed as a right in ILO Maternity Protection Convention 183. The New Zealand Government voted in support of the adoption of this Convention in 2000 and is in the process of reviewing the compatibility of this Convention with existing domestic law. Article 10 of the Convention provides breastfeeding mothers in paid employment with, "the right to one or more daily breaks or a daily reduction of hours of work to breastfeed her child." These breaks, "shall be counted as working time and remunerated accordingly." Recommendation 191, which supplements Convention 183, adds further weight to this right by supporting the establishment of breastfeeding facilities at or near the workplace.

The ILO's 2004 General Report from the Committee of Experts on the Application of the Convention and Recommendations notes that the right to breastfeed at work is:

"...today generally recognized, even though there remain broad differences at the national level with regard to its implementation in practice: the pauses may be longer or

shorter; there are differences in the period during which such pauses are authorized; it may be possible to convert such pauses into a reduction in working time, thereby allowing the mother to arrive at work later and leave earlier; and special nursing rooms or crèches may be provided within or outside enterprises. When examining national situations, the Committee has focused in particular on compliance with the principle that nursing breaks shall be counted as working time and remunerated accordingly.” (par. 43).

Even where the right has not been stated directly, the human right to food, health, and nutrition is strongly implied and reaffirmed at many different levels in international human rights discussions. Several non-binding international declarations also help give meaning to these rights in relation to infants and children. The World Health Assembly adopted the *International Code of Marketing of Breastmilk Substitutes* in 1981, followed by the *Innocenti Declaration on the Protection, Promotion and Support of Breastfeeding* in 1990, demonstrating an emerging international consensus on the importance of breastfeeding protection, promotion and support.

The World Summit for Children, also in 1990, called for “Empowerment of all women to breastfeed their children exclusively for four to six months and to continue breastfeeding, with complementary food, well into the second year.” Shortly thereafter, the *World Declaration and Plan of Action for Nutrition* promoted breastfeeding as a theme of the Plan of Action and pledged to, “reduce substantially within this decade... social and other impediments to optimal breastfeeding.” The *Beijing Platform for Action* (1995) called for public information on the benefits of breastfeeding, implementing the *International Code of Marketing of Breastmilk Substitutes* and encouraging breastfeeding by working women (see Kent, 2001).

It was not until 1996 that the first reservations about possible conflicting rights came to the international stage at a conference of the World Alliance for Breastfeeding Action (WABA). The major concern was whether the infant should have the right to breastfeed and if so, how it might limit a mother’s freedom of choice. Two years later the *Quezon City Declaration on Breastfeeding, Women and Work: Human Rights and Creative Solutions* used international human rights principles to affirm that no woman should be prevented from breastfeeding.

Building on past and continuing international achievements, the World Health Organisation (WHO) published in 2003 a *Global Strategy on Infant and Young Child Feeding*. This strategised how rights to breastfeeding could be strengthened through activities of governments, non-government agencies, health organisations, mass media and families. This *Global Strategy* called for governments to formulate, implement and evaluate national policies on infant and young child

feeding and to collect information on feeding policies and practices. It set out a policy framework which included some of the following points:

- Mothers and babies form an inseparable biological and social unit; the health and nutrition of one group cannot be divorced from the health and nutrition of the other.
- Keeping improved infant and young child feeding high on the public health agenda is crucial to consolidating gains made during the past two decades.
- Inappropriate feeding practices and their consequences are major obstacles to sustainable socio-economic development and poverty reduction.

(Global Strategy, pg. 3)

These and other international activities on breastfeeding rights have informed and instigated domestic activities throughout the world such as the WHO/UNICEF Baby-Friendly Hospital Initiative, maternity protection legislation, further work on the marketing code for breastmilk substitutes, and an increase and strengthening of domestic legislation to protect breastfeeding mothers.

1.2 A Child-Centred Perspective

The international progress on breastfeeding has informed thinking about a child's right to be breastfed. The CRC adds further weight to this perspective with its basic premise: for all actions concerning children, "the best interests of the child shall be a primary consideration." CRC considers the parents in most cases to be in the best position to determine what is in the child's best interests (Art. 3). The Convention presumes that both the state and the parent have responsibilities to the child, but that the state should intervene in the parent-child relationship only in situations where there is compelling evidence that the parents are acting contrary to the best interests of the child. Although the child's interest is meant to be a primary consideration, it is not intended to be the only consideration. Competing interests may mean that other interests take precedence over the child's.

CRC also recognises the child's right to the "highest attainable standards of health" (Art. 24(1)). There is little debate about the tremendous health benefits of breastmilk; breastfeeding is clearly the most advantageous form of infant-feeding that enables them to achieve the best possible health outcomes. Article 24 (2(e)) acknowledges that parents' education about breastfeeding is crucial to the achievement of this right. Some research also indicates that children who are breastfed are less likely to be abused, abandoned, or neglected (see Appendix 2).

There is little jurisprudence which considers whether a child has the right to be breastfed. However, in what may be the first court action to address this issue, the Fiji Human Rights Commission used the rights

set out in CRC to protect a breastfeeding child (Proceedings Commissioner, 2004). After the Commissioner of Prisons denied a seven-month-old baby visiting rights and access to his imprisoned mother for the purpose of breastfeeding, the Commission argued that the action was in breach of CRC and sought a court direction. The Court directed the Commission and the Commissioner of Prisons to arrange a suitable time for the baby to visit his mother once a day for breastfeeding. The Prisons' Commissioner terminated this agreement a few weeks later, forcing the Commission to go back to the Court to have the agreement enforced. Meanwhile, it appeared that the child had been forcibly weaned; the Commission did not proceed on the matter and preferred to leave it until the complainant had completed her sentence.

1.3 Conflicting Rights – Discussion and Way Forward

As the World Alliance for Breastfeeding Action first stated in 1996 (see pg. 4), a tension between two sets of rights emerges when it is argued that a child has a right to be well-nourished and protected from disease by being breastfed. The corresponding obligation to provide for this right rests primarily with the child's birth mother. In most situations the mother has a shared interest in the child's well-being and will make decisions about breastfeeding accordingly. However, there are some scenarios where the mother's decision about breastfeeding may be in conflict with the child's best interests.

Some of these are where the mother:

- chooses not to breastfeed for personal or professional reasons
- wants to breastfeed but does not have access to her child because of imprisonment or other forms of detention
- is HIV-positive and the risk of transmitting the disease to the child through breastmilk must be balanced against the benefits to the child to be breastfed (see Appendix 3)
- has difficulties, physically or emotionally, in establishing or maintaining breastfeeding.

The advocacy of the right of a child to be breastfed, independent of the mother's decision to breastfeed, gives rise to morally and legally complex questions. Whose responsibility is it to ensure that the right is realised if the birth mother is unable or unwilling to provide for it? Are governments obliged to intervene in situations where the mother cannot or will not breastfeed? If not, what then are the obligations of states to fulfil and protect a child's right to breastfeed, if there is such a right?

Given the well-established health and social benefits that are at stake, there is a strong case for assuming that a child's interests are best served through breastfeeding. George Kent, (2004) argues that infants, in spite of the enormous benefits that breastmilk has for them, are powerless to argue for their rights. It is sensible, he says, to use the law to:

“help assure that the best interests of the infant are served. However, while it is surely appropriate to use the law to protect the infant from outsiders with conflicting interests, it is not reasonable to use the law to compel an unwilling mother to breastfeed... from a human rights perspective, the major concern is with protecting the woman-infant unit from outside interference” (pg. 4).

Kent goes on to say that in spite of some people feeling that women should be obligated to breastfeed their infants, this view is not supported by international human rights law. Instead, a human rights-based approach would allow women to be able to feed their children as they wish and that outsiders are:

“obligated to refrain from doing anything that might interfere with freely made, informed decisions. Rather than have the state make decisions for them, citizens in a democracy prefer assurances that nothing impedes them from making good decisions. To the extent possible we should be free to choose, and that includes being free to make what others might regard as unwise decisions.”

Kent argues that children have the right to be breastfed *if their mothers choose to breastfeed*. Human rights law requires respect, protection, and facilitation by outsiders of the nurturing relationship between mother and child, but that reluctant mothers should not be legally compelled to breastfeed. What infants can be assured of, he says, is that their mothers will have supportive antenatal care, access to basic knowledge of child health and the advantages of breastfeeding, and that their mothers will enjoy maternity legislation to enable them to have adequate opportunities to nurture them as they see fit.

This approach seems sensible in the New Zealand context. A child’s right to be breastfed is best fulfilled through the decisions and actions of the parents, but the Government should be obliged to provide support through appropriate services, facilities and policies. Although mothers should not be required to breastfeed, governments can be made responsible for ensuring that all parents have accurate information about breastfeeding’s benefits, enacting laws that allow mothers to breastfeed their babies wherever they are, and providing facilities and time for mothers in the paid workforce to breastfeed or express milk.

2. Overseas Legislation

There is wide consensus in international law and practice that the right to breastfeed is implied through rights to food and health. This is given effect in several countries through domestic legislation. The following is

a sample of how some western countries have developed this right through domestic statutes.

2.1 Scotland

In July 2004, Scotland enacted the most significant piece of legislation to protect the right to breastfeed. The purpose of the Act is, “to safeguard the right of a child under the age of two years of age to be fed milk in a public place or licensed premises, where the child is otherwise lawfully permitted to be.” (Breastfeeding Etc. (Scotland) Act 2004). Accordingly, the Act does not prevent a business from excluding breastfeeding on its premises where the “lawful custom or practice is to exclude children generally.” (ie. pubs, casinos, or other licensed premises). Further, any person who prevents a person from bottlefeeding or breastfeeding a child may be guilty of an offence and fined up to £2,500.

The legislation is explicit in its intention to “help tackle and address negative attitudes in Scotland” about breastfeeding. It enables and encourages Scottish Ministers to disseminate promotional information on breastfeeding by whatever means they have available to them.

The Welsh Parliament is currently working on a similar statute based on the Scottish legislation.

2.2 Canada

Although there is no federal Canadian legislation specifically prohibiting breastfeeding, the British Columbia Human Rights Commission (BCHRC) and the Ontario Human Rights Commission (OHRC) do have specific policies on breastfeeding that are used to assess anti-discrimination complaints. These give further effect to anti-discrimination laws.

The BCHRC Policy and Procedure Manual states that employers have a duty to accommodate lactating employees, usually requiring work schedule flexibility, breaks for breastfeeding or milk expressing, and suitable facilities. Time required for these extra breaks or reduction of working hours will be remunerated as working time. Women may breastfeed during work-related meetings unless it would be “unduly disruptive”, ie. if the baby is noisy. Drawing on the BCHRC’s own decision in *Poirier v. British Columbia (1997)*, (see pg. 12) the policy states that employers may not prohibit a woman from breastfeeding at a work meeting only because of negative reactions from other participants, (eg. an offended sense of decency).

The BCHRC policy also states that in services, facilities and general spaces available to the public, women cannot be prohibited from breastfeeding, including in shopping malls, restaurants, on mass transport, as well as in publicly owned facilities. Any building open to the public must make available, if one already exists, a private location other

than a toilet to a woman who wants to breastfeed in private, eg. a first aid room.

OHRC's Policy on Discrimination because of Pregnancy and Breastfeeding (1996) is based on the Ontario Human Rights Code which specifies that employers have a duty to accommodate breastfeeding in a workplace. This could be through such measures as extra breaks, scheduling changes or special facilities, and these measures should be provided at the cost of the employer "short of undue hardship". Education providers have the same duty to accommodate as employers.

It also specifies that women have a right to breastfeed undisturbed in all areas open to the public, including restaurants, and may not be asked to move to a more "discreet" area or to "cover up."

2.3 United States

A variety of federal legislation has been used to protect breastfeeding women, including the Family and Medical Leave Act, Title VII of the Civil Rights Act, and the constitutional right to privacy. In spite of a jurisprudential trend in America which has effectively minimised the constitutional right to breastfeed (see jurisprudence discussion below), policymakers have enacted individual state legislation to remove some of the barriers that can affect a woman's decision to breastfeed. Over the past decade, 34 states have enacted some form of breastfeeding legislation by creating new laws, amending laws to add language that relates to breastfeeding, or passing resolutions which encourage the support of breastfeeding in general.

Most breastfeeding legislation in the United States relates to the right to breastfeed in public. Thirty states have clarified or enforced the right for women to breastfeed in any place where they already have the right to be, "even if there is exposure of the breast" (US Breastfeeding Committee, State Breastfeeding Legislation). Provisions relating to exposure of the breast by the breastfeeding mother are necessary in legislation to prevent allegations of indecent exposure, a criminal offence in the United States.

Restrictions or limitations on the right to breastfeed have not been generally upheld by US policymakers since the purpose of the legislation is to encourage women to breastfeed. Restrictions such as requiring the mother to be discreet or modest, defining the age of the breastfed baby or child, or exempting the right to breastfeed while in someone else's residence have been considered but generally not included in the legislation. However, there has been one court case in which the state government forced a woman diagnosed as HIV-positive to stop breastfeeding her infant (Talan, J., 2000).

For working breastfeeding mothers, ten states have legislation which places a positive duty on employers to support breastfeeding mothers

when they return to work or which requires the employers to take specific actions to provide this support. Four of these states require employers to provide breastfeeding breaks (unpaid if necessary).

As commentators say, US breastfeeding legislation tends to:

- Specify that it is discriminatory to stop a woman from breastfeeding in public or at work during her breaks, or to tell her to breastfeed in another location;
- Clarify that women have the right to breastfeed in any place where they have the right to be;
- Eliminate restrictions on the right to breastfeed; and
- Provide women with a remedy for a violation of the law.

(Baldwin, E., 2004)

2.4 European Union

In 1992, a European Union Council Directive (Directive 92/85/EEC) was adopted on the health and safety at work of pregnant and breastfeeding mothers. The Directive applies to all pregnant workers in member states but the definitions of “breastfeeding worker” refer to national law and therefore vary between the member states. These differences may lead to differing levels of protection for breastfeeding workers.

Although the mainstay of the Directive is to ensure that proper health and safety assessments and managements are in place for this protected group of workers, the Directive also prohibits dismissal of pregnant and breastfeeding mothers, stating:

“[Where] the risk of dismissal for reasons associated with their condition may have harmful effects on the physical and mental state of pregnant workers, workers who have recently given birth or who are breastfeeding ... provision should be made for such dismissal to be prohibited....”

This is a different threshold from the provisions in New Zealand’s legislation which state that pregnant workers can be legitimately dismissed as long as the reason for it is not because they are pregnant. New Zealand law is not explicit about the rights of breastfeeding workers (see pg. 13).

2.5 Belgium

In 2002, the National Labour Council, the “most important national bipartite negotiation and consultation body in Belgium”, (European Industrial Relations Observatory), developed a collective agreement which introduced a right to breastfeeding breaks at work for nursing mothers. The agreement entitles the employee to interrupt her work in order to breastfeed or to express milk for babies up to seven months old.

The break will be paid for through an allowance charged to health insurance funds, as opposed to the employer.

Interestingly, the main justification for this agreement was to bring Belgian provisions into line with ILO Convention 183, Maternity Protection Convention (see pg. 3).

2.6 Australia

The *Sex Discrimination Amendment (Pregnancy and Work) Act 2003* makes it clear that discrimination on the basis of breastfeeding is a form of unlawful sex discrimination and that breastfeeding, (including the act of expressing milk), is a characteristic that “appertains generally to women”. Some political commentators argued that, “this took us nowhere new” (personal correspondence, 28/05/04), since women still had to argue that they were discriminated against while breastfeeding by reason of their sex, as compared to a man’s right to bottlefeed a child.

Half of the States and both Territories have specific coverage of breastfeeding in their anti-discrimination legislation (ie. Victoria, ACT, Northern Territory, Queensland, and Tasmania).

3. Overseas Jurisprudence

Case law on the right to breastfeed has developed differently in various countries. Below is a brief overview of international jurisprudence.

3.1 United States

The constitutional right to breastfeed was established in the United States in 1981 with *Dike v. School Board of Orange County*, where the court held, “we conclude that the Constitution protects from excessive state interference a woman’s decision respecting breastfeeding her child.” However, subsequent case law has seriously diluted the right by lowering the threshold required to justify the limitation of the right. For example, efficient running of a prison or a school has effectively been used in the courts as a reason why the Prison Service or Boards of Trustees do not have to accommodate a woman’s need to store breastmilk or take breaks to express milk.

A significant amount of case law exists under different federal and state laws, including cases involving reduced sentencing due to the reliance of the breastfeeding child on the mother, the ability of the Pregnancy Discrimination Act to protect breastfeeding mothers at work, and the relationship between the Family and Medical Leave Act and breastfeeding.

3.2 Canada

In *Poirier v. British Columbia (1997)*, the British Columbia Human Rights Tribunal stated that an employer's temporary prohibition on their employee's breastfeeding in their workplace, and complete prohibition on her breastfeeding during seminars, constituted sex discrimination. The facts of the case led to an examination of the "disruptive" nature of breastfeeding as a reason to prevent breastfeeding in public or work environments and found that the act of breastfeeding itself was not unduly disruptive and on its own, not an adequate reason for stopping a woman from breastfeeding. The BCHRC subsequently supported in its Policy Manual the right of a woman to breastfeed in work meetings.

3.3 European Union (EU)

There appears to be little recent case law in the EU that relates directly to the right to breastfeed. This may in part be due to what one commentator regards as well-entrenched national practices which support breastfeeding in public. Two recent EU cases have involved the amount of leave available to a woman during the breastfeeding period and to another breastfeeding woman's dismissal over the period that she was allegedly covered by the European Union Council Directive 92/85/EEC (see pg. 10).

3.4 Australia

Case law in Australia has focused on first, what health and safety regulations apply to pregnant and breastfeeding workers and secondly, whether breastfeeding should be a factor when sentencing a breastfeeding mother in a criminal court. In *Regina v Togias* a New South Wales Court of Criminal Appeal judge reviewed the international agreements on the right to breastfeed such as the *Innocenti Declaration* and CRC. The judge considered:

"it difficult to accept that this substantial accumulation of solemn voluntary commitment by Australia to support a clear right for babies to be breastfed for a substantial period can be accorded no weight, or can have little effect, on the process of sentencing a breastfeeding mother."

At least three breastfeeding complaints have been conciliated by the Australian Human Rights and Employment Opportunities Commission under the Sex Discrimination Act 1984. These all involved situations where employers refused to accommodate breastfeeding mothers upon their return to work following unpaid maternity leave. Each settlement involved compensation to the breastfeeding mother.

4. Breastfeeding Rights in New Zealand

Some rights are legally enforceable in law, such as anti-discrimination provisions of the HRA which prohibit treating a woman unfairly because she is breastfeeding. Other rights are provided for as obligations on the State under the international human rights treaties that New Zealand has ratified – such as the provisions in CRC to ensure that children enjoy proper nutrition and health by ensuring their parents have access to education about the health benefits of breastfeeding.

New Zealand has not enacted specific law to support breastfeeding in public or at work. However, the HRA and the Employment Relations Act 2000 (ERA) contain anti-discrimination provisions which apply to breastfeeding women. To what extent these provisions protect breastfeeding women has never been tested in New Zealand courts. Since the Employment Relations Service has no record of handling breastfeeding complaints under the ERA, the Commission's Disputes Resolution Service is in a unique position to ascertain how and to what extent the right to breastfeed is protected in New Zealand.

4.1 Commission Complaints

Although the right to protection from discrimination whilst breastfeeding has not been explicit in the HRA in the same way that pregnant women are specifically protected from discrimination under s21, it is generally agreed that breastfeeding falls within the Commission's jurisdiction.

Breastfeeding complaints have periodically featured in the Commission's work. They have usually been in the area of goods and services and most frequently involve mothers being asked to leave cafes, museums and other public places whilst breastfeeding their babies.

In 1989 in what was probably the Commission's first complaint about breastfeeding, media publicity resulted from the Commission's opinion in the *Landmark Gallery* case (C173/89). This involved two women who complained to the Commission that they were not permitted to breastfeed on the premises of a Nelson restaurant. The Commission's Complaints Division formed the opinion that breastfeeding discrimination was a form of sex discrimination because the complainant was affected by gender and one other factor, ie. the act of breastfeeding. This reasoning was, at the time, described as "gender plus" discrimination.

In a 1994 Complaints Division opinion (C285/93), in which the complainant was allegedly asked to move to another room in a restaurant to feed her baby, the Commission commented, "should someone not wish to go into the family room in future to breastfeed but prefer to stay in the other room, they must be permitted to do so." In the opinion, the Complaints Division observed that the complaint "was considered as sex discrimination under the Human Rights Commission Act 1977...."

4.2 Commission Enquiries

From mid-2000 to mid-2004, the Commission has documented 29 enquiries on matters relating to breastfeeding. The annual number of enquiries is increasing.

Like complaints of breastfeeding, most enquiries involve a woman being prohibited from breastfeeding in public places, including colleges, restaurants, or at community events. Some involve an employer resistant to the idea of expressing milk or taking breastfeeding breaks at work. More complex enquiries that have been received by the Commission relate to child custody disputes and parents' access to a breastfeeding infant.

The Commission considers discrimination against a breastfeeding mother as a form of sex discrimination, although the facts of each case will vary. Unlike many other countries, there is no specific case law in New Zealand which tests and helps define the right to breastfeed, except for one case involving a prison inmate and her baby.

4.3 New Zealand Jurisprudence

A 1992 decision considered breastfeeding as a factor when reducing the sentence of a prisoner. In *R v Curd*, a woman was having difficulties establishing breastfeeding with her son who was brought to the prison twice daily to be breastfed. The court acknowledged that although the problems faced by the woman would likely be of limited duration, the circumstances warranted the reduction of the woman's sentence.

This appears to be the only domestic court case relating to breastfeeding.

4.4 Giving Meaning to the Right to Breastfeed

Although there is no specific law in New Zealand on the right to breastfeed apart from anti-discrimination measures, the right is given meaning in a variety of ways through measures to respect, protect and promote the right to breastfeed. The promotion of breastfeeding through education, advocacy and policy development is important to ensuring the right is able to be given effect in everyday life.

The Ministry of Health has a number of programmes to encourage and promote breastfeeding, including:

- the development of a Breastfeeding Action Plan which aims to increase the breastfeeding rates of Māori, Pacific and other New Zealanders by strengthening and monitoring existing promotional initiatives, providing breastfeeding information, and improving strategies in hospitals;

- the creation and funding of the role of a full-time Breastfeeding Advocate which is administered by the Women's Health Action Trust;
- the funding of a contract with the New Zealand Breastfeeding Authority which implements and administers the WHO/UNICEF Baby Friendly Hospital Initiative in New Zealand.

Other activities to promote breastfeeding include distributing information, ensuring the provision of quality advice for relevant health practitioners and institutions, and supporting the wide acceptance of the benefits of breastfeeding in society.

These activities are also being supported by some employer groups and through joint projects. In 2002 for example, Business New Zealand, the Employment Relations Service, the EEO Trust and the CTU worked together with the Commission to develop the *Employers' Guidelines for the Prevention of Pregnancy Discrimination*. The guidelines encouraged employers to provide breastfeeding breaks and accommodation for breastfeeding mothers when they return to work. More detailed breastfeeding guidelines have also been developed (Farquhar & Galtry, 2003, see Additional Resources). The Employment Relations Service is developing a code of practice to support the provision of breastfeeding breaks and facilities in workplaces.

Non-legislative interventions such as these are crucial to the promotion and protection of the right to breastfeed.

5. Principles on the Right to Breastfeed

The Commission has a long history of handling discrimination complaints and enquiries about breastfeeding. Barriers to breastfeeding in certain circumstances are considered to be a form of sex discrimination. Two principles which have guided the Commission's work to date are briefly discussed below.

Some new principles that apply a broad, enabling approach are promoted in an effort to affirm and clarify the right to breastfeed in New Zealand.

5.1 Discussion of Current Principles

The following principles have informed the Commission's approach on breastfeeding issues:

Principle 1: A woman has a right to breastfeed and is protected from discrimination for breastfeeding under the HRA and international law.

Support for principle:

- All relevant human rights covenants and treaties

- HRC complaints and enquiries history
- Overseas legislation.

Since 1989 the Commission has accepted complaints of discrimination due to breastfeeding as a form of sex discrimination. Strongly supported by international law and overseas domestic legislation, this principle is currently in practice.

Principle 2: The Commission should support and promote the right to breastfeed.

Support for principle:

- Relevant human rights binding and non-binding agreements
- Achievement of the New Zealand Government's health and social outcomes.

Examples of the Commission's current promotional activities include comments on breastfeeding breaks in policy submissions, the inclusion of breastfeeding as an "Emerging Human Rights Issue" in its report *Human Rights in New Zealand Today*, and positive commentary to media and in publications on the importance of support and accommodation of breastfeeding mothers and babies. Public consultations, analysis, and distribution of this paper also comprise the Commission's support on this issue.

The following additional principles have been developed following public consultation and international feedback on an earlier draft of this paper.

Principle 3: When considering breastfeeding complaints, a broad analysis should be used for comparisons across groups.

Relevant considerations:

- The Commission's current use of comparator groups
- CEDAW Committee comments
- Recent international commentary.

In assessing discrimination complaints, the treatment or impact of the treatment with that of other groups is compared. For example, when establishing sex discrimination towards women, comparisons with how men in a similar situation are treated are frequently presented.

There are various legal approaches that could be used. Generally speaking, the Commission's Disputes Resolution Team employs a comparative analysis when assessing complaints. This sometimes involves identifying, when it is helpful or necessary to do so, a group or person who does not have the personal characteristic protected by a ground of discrimination, to evaluate how they were or would be treated in a similar circumstance. For example, in a situation where an employer insists on a requirement applicable to all workers under 25

years old, the impact of that activity on young workers may be compared to workers over 25 years old who have not been subjected to the requirement. This helps isolate the reason for different treatment and can be used to prove discrimination based on a specific ground.

There are other views about how and when to use comparator groups in a legal analysis depending on the type of complaint. A review to consider other perspectives on the use of comparisons across groups, especially with respect to sex-specific complaints such as pregnancy and breastfeeding, will be undertaken within the Commission.

Direction as to how and when to engage a comparative analysis can also be informed by recent commentary and analysis of international human rights law and trends. Excerpts from two relevant sources are summarised below.

a) CEDAW Committee's General Comments

In 2004, the CEDAW Committee determined that three obligations are central to the elimination of discrimination. These obligations *“should be implemented in an integrated fashion and extend beyond a purely formal legal obligation of equal treatment of women with men.”*

In the Committee's view:

“a purely formal legal or programmatic approach is not sufficient to achieve women's de facto equality with men ... and is not enough to guarantee women treatment that is identical to that of men. Rather, biological as well as socially and culturally constructed differences between women and men must be taken into account.”

“Women's biologically determined permanent needs and experiences should be distinguished from other needs that may be the result of past and present discrimination against women by individual actors, the dominant gender ideology, or by manifestations of such discrimination in social and cultural structures and institutions.”

b) In Reproductive Health and Human Rights (Cook R., Dickens B., et.al.) University of Toronto Professors of Law Rebecca Cook and Bernard Dickens suggest:

“The right to non-discrimination ... entails treating significantly different interests in ways that adequately respect those differences. The right to sexual non-discrimination requires that societies treat different biological interests, such as in pregnancy and childbirth, in ways that reasonably accommodate those differences. National court and international tribunals that have been vigilant in applying the right to non-discrimination to require

treatment of the same interests without discrimination are beginning to require that states treat differently situated persons according to those legitimate differences” (p.197).

A paradox of the observance of human rights, they argue, is that some societies treat women differently where it should not matter, but “*ignore the distinction where it is critical*” (p.199).

Based on these and other comments, this paper proposes that breastfeeding complaints warrant a broad and interpretive analysis by the Commission, tribunals, and courts, and one that is not based on more narrow comparisons with men or groups of men.

Principle 4: A woman should be permitted to breastfeed where she and her child or children would otherwise be permitted to be.

Relevant considerations:

- Scottish and expected Welsh legislation
- Some US state legislation

While considering its legislation to protect breastfeeding in public, the Scottish Parliament asked whether there is evidence that mothers are likely to encounter adverse behaviour in reaction to their feeding milk to that child in a public place or licensed premises where the child is otherwise entitled to be. It concluded that there was sufficient evidence of adverse reactions to breastfeeding in public and that these reactions had a negative impact on the uptake and duration of breastfeeding rates in Scotland. The creation of a criminal offence to prevent another from feeding their child was promoted to be principally a “symbolic act” in order to convincingly change attitudes and behaviour (Scottish Parliament, 2004, pg. 8).

While the premise of this law - that a child under two years of age has a right to be fed in any place that they are permitted to be - may seem self-evident, several US and now European jurisdictions have demonstrated the need to help overcome the stigma of public breastfeeding by passing positive legislation to protect it. In New Zealand there is a growing collection of anecdotal information (see Appendix 1) to demonstrate this negative public reaction to breastfeeding. The HRA, given its structure and recognition of the “areas of public life”, is well-placed to in part deliver on this concept in the public sphere.

Principle 5: The right to breastfeed should not be limited by any individual, group, or party unless the intervention is based on evidence of significant detriment to either the mother or the child.

Relevant considerations:

- *Quezon City Declaration* (see pg. 4)
- International commentary on the rights of HIV-positive mothers

- Human Rights Commission's *Guidelines for Complaints Affecting Children and Young People*.

The *Quezon City Declaration* developed the aim that no woman should be prevented from breastfeeding. This goal was a rationale for a number of other international activities such as the WHO/UNICEF Baby-Friendly Hospital Initiative which provided guidance to health institutions about the early promotion of breastfeeding to new mothers.

There is some international agreement on the principle not to limit breastfeeding unless there is clearly evidence to demonstrate serious detriment. Even where there is possible significant harm to a child because of breastmilk provided by a HIV+ mother, there can be reluctance to prevent breastfeeding where there can be no viable alternative.¹ Age of the child is not a good reason for limiting the right, although the Scottish legislation put a two-year age cap on its protections for the right to breastfeed in public.² It is noteworthy that the WHO recommends exclusive breastfeeding (no other food or drink) for infants up to 6-months old and complementary breastfeeding (with progressive introduction of other food and drinks) for children for “two years and beyond.”

As we have seen, the CRC and the domestic statutes which give meaning to it direct that the best interests of the child must be a primary consideration. The Commission's own *Guidelines for Complaints Affecting Children and Young People* state, “If we receive a complaint relating to a child, we must consider whether or not a proposed course of action will be in the interests of the child. This is a matter of professional judgement, which we must exercise for ourselves.” In exercising our professional judgement and with respect to both international agreements and a plethora of medical evidence that supports breastfeeding for children according to the WHO standards, this paper suggests that, *prima facie*, limiting the right to breastfeed would violate the best interests of the child.

Principle 6: Breastfeeding should, generally, be considered to be in the best interests of the child but in most circumstances parents should be allowed to determine what is in the best interests of their child with respect to infant-feeding.

¹ Two perspectives, that of the World Health Organisation and the International Federation of Gynaecology and Obstetrics Committee for the Ethical Aspects of Human Reproduction and Women's Health, are expressed in Appendix 2.

² An age limit of two years was passed under the Scottish Act after intense parliamentary debate. The age limit appeared to be a political compromise to ensure safe passage of the Bill. It was held that without the limit, the legislation may be open to ridicule. Further, the framing of the Act under criminal law requires the definition of a child to be specific. It was also noted that the age limit would not make breastfeeding a child over the age of two illegal, but provisions of the Act would not necessarily apply to older children. (Scottish Parliament, 2003).

Relevant considerations:

- International human rights law, especially CRC provisions and commentary
- Domestic statutes which give meaning to CRC
- Medical evidence supporting the benefits of breastfeeding.³

Building on Principle 5 of this paper which suggests that breastfeeding should only seldom be limited, this principle acknowledges the role that parents play in determining what they perceive to be in the best interests of their child. While it is clear that breastfeeding is the most beneficial form of infant-feeding, parents should be free to make informed decisions about what their preferred method of feeding is, including the use of breastmilk substitutes, based on a variety of factors. Even in situations where others may regard parents' decisions about infant feeding as unwise, parents should be able to exercise the ability to choose what they believe to be in the best interests of their child.

Parental responsibility is addressed by the Committee on the Convention on the Rights of the Child's General Comment No. 17 which states:

"...6. Responsibility for guaranteeing children the necessary protection lies with the family, society and the State. Although the covenant does not indicate how such responsibility is to be apportioned, it is primarily incumbent on the family, which is interpreted broadly to include all persons composing it in the society of the State party concerned, and particularly on the parents, to create conditions to promote the harmonious development of the child's personality and his enjoyment of the rights recognized in the Covenant."

Principle 7: The approach to breastfeeding discrimination should encompass the view that breastfeeding mothers and their babies form an inseparable biological and social unit.

Relevant considerations:

- WHO's *Global Strategy*
- The uniqueness of the breastfeeding experience.

The rights of a woman to breastfeed and the rights of the child to be breastfed are interdependent and, in the course of breastfeeding, one person's rights cannot be divorced from the other's. This idea is supported by WHO's *Global Strategy* which considered mothers and their babies to be an "inseparable biological and social unit" and declared that the health of one group cannot be separated from that of the other.

³ As mentioned on pg.3, medical research which illustrates the short and long-term benefits of breastfeeding are substantial but are not discussed in this paper.

Most children who are breastfed are very young and are wholly reliant on their parents to make regular decisions that are in the best interest of the child. The mother's prevention from breastfeeding would, quite simply, amount to the child being prevented from being breastfed. The unique interdependence between mother and child in breastfeeding means that a person cannot discriminate against one without at the same time discriminating against the other.

Case law and legislation throughout most of the world has established that the rights attributed to human beings usually begin for a person at the moment of birth, and in limited cases may be present before the physical disconnection between birth mother and child. After the child is born the mother and child are still tightly bound together by the breastfeeding experience. Physically and it would seem legally, when breastfeeding occurs the rights of the child and mother are interdependent. In the course of breastfeeding it would seem that there is one set of connected rights, not two sets of individual rights, that are at play.

This principle is controversial because it connects the mother to the child during the course of breastfeeding in a way that is not replicated in other types of discrimination complaints. A basic foundation of the HRA, ie. that discrimination complaints are lodged by individuals, is called into question. There could be breastfeeding complaints, for example, where the child cannot establish a ground as the basis of discrimination and the mother cannot establish an area of discrimination, but together the mother/child unit have been discriminated against because of breastfeeding. A more holistic and interconnected view should be taken.

6. Conclusion

The right to breastfeed is substantiated in international law and has been given effect by a number of international agreements, domestic law, and by some overseas courts. There is no specific law to protect breastfeeding in New Zealand apart from anti-discrimination legislation, although other jurisdictions have enacted special legislation to protect and promote breastfeeding. In the current political and social environment, the Commission is likely to see an increase in the number of breastfeeding complaints received and policy work undertaken.

Two principles have been presented as currently operating in the Commission's work on the right to breastfeed. Five new principles have been developed to better align the Commission's work in this area with that of international human rights activities and other jurisdictions which have taken a progressive approach to protecting this right.

As the organisation that is currently charged with protecting people from breastfeeding discrimination, the Commission's use of these principles would help ensure that this internationally recognised right is given

strong and meaningful effect here. For its part, the Commission will continue to foster opportunities for public policy and legislative debate about the right to breastfeed.

There may, of course, be further uses of the principles outside the work of the Commission which would strengthen the right to breastfeed. For example, decision-making bodies such as the Employment Tribunal, the Human Rights Review Tribunal and other courts, and government agencies such as the Ministry of Health, the Department of Labour, and the Department of Corrections, may all refer to these principles when considering how they protect the right to breastfeed. Protecting and extending this right will ensure that families, communities, and societies can safely enjoy the benefits of breastfeeding in New Zealand.

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Appendix 1

Information compiled by Women's Health Action and issued to Steve Chadwick MP about negative reactions to breastfeeding

Names have been removed to protect the privacy of individuals.

Anecdotal Information

Te Papa

I have had very positive breastfeeding experiences with my two daughters, but the odd clanger has stood out...like being asked to leave the library at Te Papa for breastfeeding my baby. (So much for "our place"!). We were waiting to go into the 'Golden Days' exhibit and they had nice comfy seats in the library foyer so we stopped for a quick feed - no-one had even noticed until the librarian marched over and started making a big fuss. I was told I could do "that" in the nappy change room (hot and smelly on the day we were there) and that "people might find it offensive". Her tirade was loud, public, and humiliating.

I put in a complaint, and eventually got an apology from Te Papa.

Tourism Industry Association

A mother involved in the Tourism Industry at TRENZ, when given her baby to breastfeed was abruptly escorted out of the building being told she could not have a baby inside because of OSH regulations. Even on suggesting the toilets to feed in she was denied. The next day she breastfed in the car after a friend brought her baby to the venue.

Public swimming pool

I had an incident at a public pool in Hamilton. I was breastfeeding my toddler while I sat on the edge of the pool, my friends were all in the pool. I was approached by a lifeguard and told to go and breastfeed in the changing rooms.

A mother was asked not to breastfeed by a staff member at a public swimming pool in Christchurch. And this is after quite a lot of input to the City Council from the Canterbury Breastfeeding Network including some staff training from breastfeeding health professionals on breastfeeding mother's rights, health concerns and personal perceptions, etc.

A food court

I was trying to breastfeed my new baby (she was about six weeks old) in the food court while having lunch with my father when the lady at the next table said in a very loud voice that I should go and feed that baby in the toilets as it was disgusting. Thankfully my father was there because I probably would have left; he just told her to go eat her meal in the toilet and see how she liked it!!!

In church

A new mother was visited by the wife of the pastor of her church and asked not to return to church as her breastfeeding in church was upsetting the other parishioners. This is a Combined Community church which she has contributed to extensively, tithed 10% of their income to - her husband works away during the week to support this. When she breastfed her 6-week old baby it was only if baby was making noise, so as to not disturb the service. She always sat in the back row so as to be able to get in and out discreetly with her toddler if necessary and is a modest woman who uses shawls, etc, when feeding to be discreet. If anyone has seen her breastfeed they have had to turn around and look inquisitively to see anything - except of course the pastor who may have very good long vision and would be looking at her. Needless to say she no longer attends.

Playcentre

I attend a monthly meeting which is in the evening. I always take my baby who is always content at the meeting but it is met with disapproval – the expectation is that they stay at home. Because the other mums opt to leave young babies I'm expected to do the same. It's not how I would parent.

Department store

When the mother began to breastfeed her 7-month old in a local department store while her husband was signing up for a Hire Purchase agreement she was told by the shop assistant that they found it very offensive and not to do it there. They were very upset and did complain and the employee actually got a written warning.

Shop in the mall

In my new job at a store in a mall (on the weekends), I asked the manager on my first day there, what time my 1/2 hour lunch would be, so that if my baby was missing me and needed a B/F her dad could bring her in then. Her response:

"This breastfeeding, it's not going to become an issue is it? It's just that I've had a staff member before with a new baby who wanted breastfeeding breaks, and they got longer or happened at inconvenient times, blah blah, etc..."

My lame response:

"I doubt very much whether you will even see my baby, but I just want to make sure that my family is ok on the first day of my job. It's a transition for us; and Sarah is a toddler not a newborn."

I was completely stunned! Later, on another day I asked if the store had ever considered having a corner, or a chair for pregnant mothers to rest on, and for mothers to feed their babies. She said no, there is a feeding room in the mall; most of our mothers don't do 'that' here.

At the park

A mother was hassled by a man in the park for breastfeeding her one month old. He told her it was disgusting!

Custody issue

A mother in dispute with her ex-partner regarding overnight access to their 2 and half year old daughter. The little girl is still breastfed night and morning and now the mother has received notice from the ex-partner's lawyer 'instructing' her to wean. For many reasons she does not wish to do this, including a family history of asthma and the fact that the child is in daycare and these last remaining nursings are precious.

Primary school

I had a major disagreement with my son's new entrant teacher, who asked me (and another breastfeeding Mother) to leave the classroom (during parent help) when we were breastfeeding our babies. My baby Georgia was 5 months at the time and the other baby was a newborn. She reckoned that it was "culturally inappropriate".

Montessori

The youngest just started Montessori and continues to breastfeed and on the first day when he was feeling anxious about the whole preschool business she fed him to comfort him and fed him again when she returned from popping away. The teacher asked that she not feed him because "they couldn't do that while his mother was not there to comfort him". Said mother was at first incensed- "of course I'm the only one who can comfort him at the breast!" However, afterwards she decided that maybe he was old enough for them to set limits about when he could feed. She didn't know what she would do if it didn't work, but amazingly the child was quite co-operative.

Daycare centre

Was in a bit of "shock" this morning after going into daycare. As they asked me if I wouldn't mind breastfeeding in the area where the babies sleep because a father of one of the babies (who has an Asian wife - god knows what that has to do with it!) found it uncomfortable dropping his son off because I was breastfeeding in the babies' play area, (on the couch where the daycare staff bottle feed the children!).

Café

A group of new mothers (myself included) met at a Dunedin cafe for coffee with our babies. We had ordered food and drinks when two of the 8 babies needed feeding. We were sitting at a large round table at the front of the shop near the front window. Myself and another mother began breastfeeding our babies, reasonably discreetly we felt. However, after a few minutes a member of staff came and asked us to stop feeding our babies, as they did not want this 'image' for their cafe. We said that we would not and continued to feed. The staff member left and a few minutes later the 'owner' appeared and asked us to leave. We did and I have never returned to that cafe.

Post script: Our babies needed to have their feed finished so we sat outside the café on the street and finished feeding. I think that would have been even worse for their image actually!

Survey of Hamilton City – 112 questionnaires answered

Forty six women related negative experiences while breastfeeding in public. Twenty five of these comments related to “people staring” and “looks”.

Common responses were:

“People giving dirty looks.”

“People staring in disgust as if they don’t approve or understand.”

“Lots of staring and it can make you feel quite uncomfortable.”

Other bad experiences included:

“Being offered a toilet to feed in. Being told I couldn’t feed in (a particular café).”

“Been told to leave a café coz too many people staring.”

“Confronted by a lady asking why I was feeding my baby in public.”

“Fed baby in the car and stranger tapped on window. Fed baby in café and later a person wrote to local paper complaining about breastfeeding in cafes.”

As a nurse working in a public hospital

I am a registered nurse and work in the operating rooms. I had a baby in October 2001 and had to go back to work when my son was 7-months old. I was determined to continue breastfeeding as I felt it was a shame to stop when my son was doing so well and I was only working two days a week doing 10-hour shifts. As it turned out my son couldn’t tolerate formula anyway. I had to express in the toilets at work as there was no other suitable place. I was so tired by the time I got home from work and never got a chance for a real break all day because of the expressing.

So I’m now there sitting on the toilet seat lid with my electric pump as the hand pump was too tiring 3- 4 times a day and took too long. The hard parts are finding time to do it, as takes 15-20 mins each time and also when others walk into the toilets when I’m in there expressing milk they hear this wurrrrrrrrrring noise and all know its me!

Another workplace

One employer told me I could express milk in the toilets and did not seem to appreciate that we were talking about preparing food for a person. Others at the same work place objected to having human milk in the communal fridge on the grounds that it was “disgusting”!

Information compiled by the Disputes Resolution Team of the Human Rights Commission and supplied to Women's Health Action

Business trip

[June 2000]: Caller's husband has obtained a trip from his employment because he attained his sales target. The trip is for her husband and partner only. The caller and her husband have a small child which is still breast-feeding. Her husband has asked if they could take their child. But he has been refused.

WINZ not approving payment

[July 2000]: Caller said she was ringing on behalf of a friend who has a 12-month old child. The woman has just stopped breast feeding and her child has been found to have an allergy to wheat and dairy products. The woman's doctor is keen to have the baby reared on rice milk and rice bread. But because the woman is on a benefit, WINZ have to approve payment as she can't afford the additional costs. The woman was referred to a dietician who has refused to approve the doctor's recommendation.

College prohibits student breastfeeding

[August 2000]: Student complained that her teachers wouldn't allow her to take her child to college and prohibited her from breast feeding.

School does not allow breastfeeding breaks

[April 2001]: Teacher said that the principal of the school would not allow her to have breastfeeding breaks. The caller said she only wanted to swap one of her shifts to allow breastfeeding to happen.

Custody of breastfeeding child

[September 2001]: Caller is fighting for custody of her child based on the fact that she is still breastfeeding that child.

[September 2001]: Caller said she has to return with her child to Australia as the father of the child is claiming custody. The writer said that she is breastfeeding her child, and that the child will be in jeopardy. Referred to Australian Human Rights & Equal Opportunities Commission ('HREOC'). Further letter received November 2001 from complainant stating that she believed both her rights and those of her son have been violated in Australia regarding a custody issue. She said she'd approached HREOC for assistance and also the United Nations Commission for Human Rights.

General knowledge on rights to breastfeed

[September 2001]: Caller wanting information on the Commission's stance on breastfeeding in public and also her rights as a breastfeeding mother.

[May 2002]: Caller wanting information on the Commission's stance on breastfeeding in public and also her rights as a breastfeeding mother.

Café

[October 2001]: Breastfeeding in a café and management wanted her to leave.

Māori breastfeeding in public

[November 2001]: Writer enquiring about an old piece of legislation still in existence, but not enforced, which makes it illegal for Māori women to breastfeed in public. Dr Judith Galtry, an academic specialising in breastfeeding, advised she had heard anecdotally of such a law being in existence around 1900-1910 but subsequent research had failed to find any trace of it.

Parental leave

[May 2002]: Caller wanted to know her rights with regards to parental leave as she is returning to work on the 1st of June but was not able to work fulltime for a few months as she is still breastfeeding. Will approach Employment Relations too.

[August 2002]: Caller wanting clarification on the right to breastfeed that is hopefully enshrined in law to support women who choose to breastfeed and return to fulltime work. From her 'limited knowledge' she understands that the right to breastfeed is only in the context of the rights of the child to get optimum nutrition. Information requested to prepare for a conference in September 2002 on women combining work and breastfeeding.

Early childhood course prohibits baby from course

[October 2002]: Caller's employee is attending a weekly, early childhood course. Employee has just had a baby and the course provider will not allow her to take baby to class on the basis that other students felt it was inappropriate. No other arrangements can be made as she is breastfeeding and the course is some distance away. Employee only has to attend eight more weekly sessions to get a certificate, otherwise she will have to repeat a year of study. Employer wanted to know whether Commission could help the employee in any way.

Hospital separated breastfeeding mother and baby

[October 2002]: Caller feels she was treated differently than other mothers because she was not allowed to stay with her child after a premature birth and was taken to another hospital. If her baby was not premature and just sick and she was a breastfeeding mother then she would be allowed to stay in the hospital and be fed by the hospital, but not so in this case.

ACC advocating weaning to get assessment

[January 2003]: Lawyer concerned for breastfeeding mother client who has a spinal injury. Currently receiving ACC payments, allegedly being pressured by ACC contracted provider to wean her baby from breastfeeding to allow necessary diagnostic medical procedures to occur which will be used to determine possible future entitlement to ongoing payments. Assessments will require minimum of 12 hours for medical procedures to be carried out. Lawyer and mother feel that is an unreasonable request. Claims contracted provider case manager is advocating that mother weans child from breastfeeding permanently, which mother is not prepared to do.

Employee fearful of asking employer

[March 2003]: Caller worried that her boss will not let her have extra time to breastfeed baby when she wants to continue doing that.

Discrimination because of breastfeeding promotional work

[May 2003]: "White female" government department employee with specific portfolio management responsibilities in the area of child, family and breastfeeding for women, allegedly verbally and physically threatened by male manager. When she reported issue to senior management he claimed he was only disapproving of too much time she spent on breast feeding promotional work. Feels unsafe in work place. Claims such discrimination is against her gender (female) and race/ethnicity (Pakeha).

Prohibited from breastfeeding in staffroom

[July 2003]: School teacher told she cannot breastfeed in staffroom during staff breaks as another teacher is offended by her naked breast, therefore she should go and feed baby in the toilets. What are her human rights? Should she not be provided with a private space to tend to her parental responsibility to feed her child? Potential HRA complaint identified and explained. Ministry of Health's "Breastfeeding and Working" pamphlet sent with EEO Trust website information.

Prohibited from breastfeeding in public swimming pool

[September 2003]: Caller had asked a lady to remove herself and her baby from a public swimming pool while she was breastfeeding as it may contaminate the pool water which is a health and safety issue. Lady has now made a complaint against him so that is why he needed this advice.

Baby prohibited from attending gift fair

[September 2003]: Caller wants to go to a gift fair but was told she cannot bring her breastfeeding baby as no children are allowed.

Father wants mother to stop breastfeeding to gain more access to child

[September 2003]: Referred by La Leche League. Involved with child custody and access dispute with former husband who claims that her still breastfeeding their 22-month old child impinges unjustifiably on his right to unrestricted/unsupervised access to his child. Had mediation session before a family court judge but needs more assistance to refute former husband's assertions.

Prohibited from breastfeeding in early childhood centre

[September 2003]: Breastfeeding mother of three-year old child at private early childhood centre wants to continue doing that despite principal's claim that her wishes conflict with their organisational philosophy of encouraging and fostering independence of children. This situation featured in the media approximately May 2004.

Judge rules to limit breastfeeding in family court

[January 2004]: Problem re: rights of mother and child to breastfeed and interaction with the family court. Mother and 10-month old son currently

involved in family court proceedings. Claims judge increased police officer father's access to child to six hours per week which interferes unjustifiably with two-hour maximum between breast feeds, which was the father's previous weekly access. Judge's decision was allegedly that baby will just have to make do.

Appendix 2

Information issued from the Office of the Children's Commissioner on child abuse and breastfeeding

Mothers who breast-feed are less likely to abuse or neglect their babies than either women who do not nurse or those who nurse for fewer than four months. Lane Strathearn, M.D., a pediatrician at Baylor College of Medicine in Texas, speculates that the hormone oxytocin, released during lactation, has a calming effect on new mothers and allows them to better cope with childbearing. Strathearn drew his conclusions about maternal care in humans by matching surveys on breast-feeding in more than 7,000 infants with reports of later child abuse.

Klinger, C. "A chemical safeguard against child abuse?" *Psychology Today* Nov/Dec 2002;35(6):28

Encouraging early mother-infant contact with suckling and rooming-in may provide a simple, low-cost method for reducing infant abandonment. The mean infant abandonment rate decreased from 50.3 per 10,000 births in the first 6 years to 27.8 per 10,000 births in the next 6 years following implementation of the Baby-Friendly Hospital Initiative at a Russian hospital.

Lvoff-NM et al. Effect of the baby-friendly initiative on infant abandonment in a Russian hospital. *Archives of Pediatrics and Adolescent Medicine*. May 2000; 154(5):474-477.

A retrospective review of 800 pregnancies at one family practice revealed an association between lack of breastfeeding and physical and sexual abuse of the mother and/or her children. This anecdotal association which has not been previously reported is worth further study using more rigorous methods.

Acheson, L., "Family Violence and Breast-feeding", *Arch Fam Med*, July 1995; Vol 4,pp 650-652.

Data based on 2,000 infants born in Thailand in 1987 and 1990 showed a progressive reduction of deserted children after management of rooming-in.

Buranasin B. "The effects of rooming-in on the success of breastfeeding and the decline in abandonment of children." *Asia Pac J Public Health*. 1991;5(3):217-20.

Appendix 3

Two perspectives on HIV+ mothers and breastfeeding

1. The International Federation of Gynaecology and Obstetrics Committee for the Ethical Aspects of Human Reproduction and Women's Health

"In societies where safe, affordable alternative methods of infant feeding are available, it may be unethical for an HIV + infected mother to breastfeed her child. Where the risks of alternative infant feeding are high, the balance of risk to the infant may favour making breastfeeding ethically justified." (Recommendations, 34, in Reproductive Health and Human Rights)

2. HIV and Infant Feeding WHO Guidelines

"Breastfeeding is normally the best way to feed an infant. A woman infected with HIV, however, can transmit the virus to her child during pregnancy, labour or delivery, or through breastfeeding. It is a public health responsibility to prevent HIV infection among pregnant women, and it is also a public health responsibility to support optimal breastfeeding to prevent mortality and illness due to diarrhoea and respiratory infections. Given the need to reduce the risk of HIV transmission to infants while minimizing the risk of other causes of morbidity and mortality, the UN guidance states that "when replacement feeding is acceptable, feasible, affordable, sustainable and safe, avoidance of all breastfeeding by HIV-infected mothers is recommended. Otherwise, exclusive breastfeeding is recommended during the first months of life."

A further perspective which discusses and questions these views can be found in an unpublished paper by George Kent, University of Hawai'i, entitled "HIV/AIDS, Infant Feeding, and Human Rights". A draft is available on www2.hawaii.edu/~kent.

Appendix 4

Relevant sections from Scottish legislation

Breastfeeding etc. (Scotland) Bill

An Act of the Scottish Parliament to make it an offence to prevent or stop a child who is permitted to be in a public place or licensed premises from being fed milk in that place or on those premises; to make provision in relation to the promotion of breastfeeding; and for connected purposes.

1 Offence of preventing or stopping a child from being fed milk

- (1) Subject to subsection (2), it is an offence deliberately to prevent or stop a person in charge of a child from feeding milk to that child in a public place or on licensed premises.
- (2) Subsection (1) does not apply if the child, at the material time, is not lawfully permitted to be in the public place or on the licensed premises otherwise than for the purpose of being fed milk.
- (3) A person guilty of an offence under subsection (1) is liable on summary conviction to a fine not exceeding level 4 on the standard scale.
- (4) In this section—

“child” means a person who has not yet attained the age of two years;

“feeding” includes—

- (a) breastfeeding; and
- (b) feeding from a bottle or other container;

“licensed premises” means premises licensed under—

- (a) section 12 of the Theatres Act 1968 (c.54); 20
- (b) Part II of the Licensing (Scotland) Act 1976 (c.66);
- (c) Part II of the Civic Government (Scotland) Act 1982 (c.45); or
- (d) section 1 of the Cinemas Act 1985 (c.13);

“milk” means breastmilk, cow’s milk or infant formula;

“public place” means any place to which, at the material time, the public or any section of the public has access, on payment or otherwise, as of right or by virtue of express or implied permission.

4 Promotion and support of breastfeeding

After section 38 of the National Health Service (Scotland) Act 1978 (c.29) insert—

“38A Breastfeeding

- (1) The Scottish Ministers shall make arrangements, to such extent as they

consider necessary to meet all reasonable requirements, for the purpose of supporting and encouraging the breastfeeding of children by their mothers.

- (2) The Scottish Ministers shall have the power to disseminate, by whatever means, information promoting and encouraging breastfeeding.”.

Appendix 5

Summary of submissions on the Right to Breastfeed Discussion Paper

The Right to Breastfeed draft discussion paper received twenty six submissions from various groups including Government agencies, MPs, women's health organisations, other NGOs, individuals, and an overseas academic expert in this area.

The following is a summary of both the feedback which has been included in the final paper, and those ideas that have not been incorporated but will be considered in future debate.

Some submissions unequivocally agreed with the concepts laid out in the paper and clearly supported the document and the 'right to breastfeed'. These submissions were received from:

- Jackie Wheeler
- Joan Edwards
- Ministry of Women's Affairs
- New Zealand Breastfeeding Authority
- New Zealand College of Midwives Inc
- New Zealand College of Midwives, Wellington Region
- New Zealand Lactation Consultants Association
- Steve Chadwick, MP.

A large number of submissions supported the concepts set out in the 'Right to Breastfeed' discussion paper. However, some of these raised concerns, many of which were addressed to varying degrees in this paper. These submissions were received from:

- Anne Heritage
- Australian Sex Discrimination Commissioner, Pru Goward
- Barbara Sturmfels
- Centre for Midwifery and Women's Health Research, Auckland University of Technology
- Department of Corrections
- Department of Labour
- Holistic Health Clinic & Learning Services
- Judith Galtry
- Liz Weatherly
- Marcia Roberts, Lactation Consultant, National Women's Health, Auckland City Hosp
- Midwifery Lecturers, School of Midwifery, Christchurch Polytechnic Institute of Technology
- Minister of Health, Hon Annette King
- Ministry of Justice
- Office of the Commissioner for Children
- Rosemary Gordon, Director, La Leche League
- Toi Te Ora Public Health, Whakatane
- University of Hawai'i, George Kent, Professor of Political Science
- Women's Health Action.

The Ministry of Justice suggested a number of structural changes to the organisation of the paper to better highlight how international human rights are relevant to the right to breastfeed. The submission suggested the need for differentiation between binding and non-binding human rights laws, treaties, conventions and codes.

The Ministry of Justice submission also suggested including more direct general comments from UN relevant Committees to give greater “scope, substance and meaning to the rights in question” and international commentary on the right to breastfeed. The Ministry of Justice also recommended citing cases from England and Canada where relevant.

Toi Te Ora Public Health’s submission recommended a consideration for Māori women as a group based upon the Treaty of Waitangi as a framework whereby “Māori have a fundamental right to retain and reclaim the skills necessary to successfully breastfeed their children”.

Judith Galtry’s submission contained three major concerns. First, that the paper appears already to have arrived at a position on the issue rather than laying the groundwork for discussion. Secondly, that the paper does not raise the possibility of strengthening anti-discrimination legislation as a way to further protect breastfeeding. Finally, the paper seems to overlook the relationship of breastfeeding to the right to health. She also suggested a number of wording changes to various sections of the paper.

In reference to the ‘child-centred perspective’ examined on page 5 of the discussion paper, George Kent disagrees with the proposition that there is a widely recognised right of the child to be breastfed as there is no international consensus on this point. Kent explains that one may *advocate for* such a right but cannot assert that this right *exists*. Furthermore he explains that, “Individuals don’t assure that others have rights. Either they have these rights or they don’t.”

Kent highlights that there is currently no international right to breastfeed explicitly stated in human rights law. Rather, it can at most be argued that it is *implied* by human rights law associated with the right to food, the right to health, etc. There is a wide consensus on these rights displayed in national laws and practice.

Women’s Health Action argued that the right to breastfeed covers three distinctively different rights and recommends these three rights should be stated and defined clearly and separately in the introduction. These are:

- the right of a mother to breastfeed;
- the right of a child to be breastfed; and
- the right of a child to breast milk.

The ‘right of a child to breast milk’ is also emphasised by numerous other submissions, especially those of NGO organisations and Women’s Health Action (WHA). The WHA submission said that the World Health Organisation

has clearly stated that where breast milk is unable to be provided to a child the next best thing is breast milk from another mother. This submission further argues that the Commission then has a role to advocate for breast milk banks.

The School of Midwifery, Christchurch Institute of Technology, “wholeheartedly” supported the concepts of the discussion paper and also raised the issue of the right of the baby to be fed breast milk, “if for some reason the mother is not able or it is not appropriate to use her own, (for example if she is HIV positive).” They suggest “the provision of milk banks would help protect the rights of the child” and counter discrimination faced by mothers who use donor milk.

The Department of Corrections questioned whether the term “breastfeeding” needs to be defined within the paper and asks whether the primary focus for the Human Rights Commission is “ensuring that babies are provided where practicable with breast milk, or is it to ensure that a mother and baby have adequate opportunity to bond?” The submission recommends the act of a mother expressing her breast milk be recognised in a definition so that the policy may be applicable to those who cannot breastfeed their child at a particular time. An example highlighted was the situation where a female prisoner may be prevented from breastfeeding her child because it may not be in the child’s best interests, or the activity may threaten the security of the prison or safety of the prisoner or others. In these situations expressing milk may be the only option to ensure the child has access to breast milk. The Department of Correction provided copies of two of its policies relevant to mothers who are serving sentences of imprisonment.⁴⁻⁵

Barbara Sturmfels considered:

“The right of children to breastfeed should not be restricted to those whose mothers choose to, or are willing and able to “stay home”. The babies of social gadabouts and working women have as much right to be breastfed, and get as much benefit from it, as the babies of stay-at-home mothers”.

Additional issues were raised by submitters in relation to specific principles, which are outlined below.

Current Principle 1:

‘A woman has a right to breastfeed and is protected from discrimination for breastfeeding under the HRA and international law.’

The Centre for Midwifery and Women’s Health Research, AUT, supported most of the concepts but also suggested some wording changes. Within principle 1 they propose an insertion of the right of the child with a rationale that “the rights

⁴ Department of Corrections, Feeding and Bonding Facilities (Service Description).

⁵ Department of Corrections, Self Care Units for Female Inmates (Service Description).

of the child should be given consideration alongside the rights of women”. They propose the following change: A woman has a right to breastfeed and a child the right to be breastfed. Therefore they should be protected from discrimination for breastfeeding under the HRA and international human rights standards.

Current Principle 2:

‘The Commission should support and promote the right to breastfeed’.

A number of submissions had concerns about the original wording of this principle which stated the Commission should support the right to breastfeed “wherever appropriate.”

Toi Te Ora Public Health suggested the following Government activities could also support this principle:

- Ministry of Health’s *Infant Feeding*
- Ministry of Health’s *Breastfeeding A Guide to Action Strategy 2002*
- Ministry of Health’s *Review of the NZ Interpretation of the World Health Organisation’s International Code of Marketing Breastmilk Substitutes 2004*
- Ministry of Health’s *Child Health Strategy 1998*
- Ministry of Social Development’s *Agenda for Children June 2002*.

New Principle 3:

‘When considering breastfeeding complaints, a broad analysis should be used for comparisons across groups’.

This principle was supported by most submissions. Toi Te Ora Public Health supported the principle and further recommended relevant considerations could also include:

- The Treaty of Waitangi and protection of breastfeeding
- The Ottawa Charter and UNICEF/WHO Baby Friendly Hospital and Community Initiatives

New Principle 4:

‘A woman should be permitted to breastfeed where she and her child or children would otherwise be permitted to be’.

Most submissions also supported this principle, especially to “overcome the stigma of public breastfeeding”. The Toi Te Ora Public Health submission highlighted the higher levels of embarrassment felt by breastfeeding mothers of Asian ethnicities as opposed to Pacific Island peoples. Its submission stated that generally Māori women are affected by social issues of embarrassment

when breastfeeding in public as are mothers of Asian ethnicity who commonly believe breastfeeding is only done within the home. This is in stark contrast with mothers of Pacific Island ethnicities who are less affected by cultural stigma while breastfeeding in public.

Barbara Sturfels also discussed the issue of stigma in her submission:

“If there has to be a choice made between offending the sensibilities of a sector of the community and protecting the right of mothers and children to breastfeed wherever and whenever required, I would come down firmly on the side of breastfeeding”.

A concern with Principle 4 by the Centre for Midwifery and Women’s Health, AUT, was the need for women to have access to their child at work to breastfeed even if that place was normally considered child-free. They suggested that “provision should be made for women working in areas which do not normally permit a child or children in order for her to breastfeed. This right should be protected through a legislative/industrial relations process”.

The Department of Corrections drew attention to situations in the workplace where it may be difficult for an employee to find a suitable location to breastfeed, e.g. “it may be difficult for a Probation Officer assessing offenders in the courts or in the community to find a suitable place to express in private”. Health and safety implications of having children in the workplace were also a concern as well as the cost and feasibility of establishing a private space for employees to breastfeed. The submission requests that the discussion paper provides a guide as to “what standard of accommodation is appropriate, or what equipment is necessary to enable a mother to breastfeed her baby in the workplace”.

The Department of Corrections in its role as an employer prefers that breastfeeding is completed in an employee’s own time if the breastfeeding breaks are taken in addition to the employee’s usual tea breaks.

New Principle 5:

‘The right to breastfeed should not be limited by any individual, group or party unless the intervention is based on evidence of significant detriment to either the mother or child’.

Several submissions disagreed with an age cap regarding the age of the child in legislation (eg., in reference to the Scottish criminal legislation).

George Kent stated, “that age is not a good reason for limiting the right...”

The Centre for Midwifery, AUT, also did not support an age-cap limitation:

“We strongly disagree with the Scottish example of placing a limitation on the age of the child. There should be no legal limitations based on

the age of the child. We support robust and evidence based research on potential medical detriments that might intervene in the right to breastfeeding, as well as qualitative research evidence that explores the psycho/cultural/economic issues which also act as significant detriments to women's ability and comfort to pursue the right to breastfeed".

The Toi Te Ora Public Health submission recommended that for breastfeeding considerations for HIV positive mothers, that the factors involved be discussed on an individual case basis "as opposed to a decision by 'professional judgement'."

New Principle 6:

'Breastfeeding should, generally, be considered to be in the best interests of the child but in normal circumstances parents should be allowed to determine what is in the best interests of their child with respect to infant-feeding'.

Many submissions raised the issue of parents requiring sufficient information and acquiring knowledge to make the right decisions as to the best interests of their child. Some felt that the current advertising of infant formula in a vacuum of quality information about the benefits and value of breastfeeding prevents this. (See below for further comments.)

The submission from Annette King, Minister of Health and Food Safety, drew attention to the New Zealand Interpretation of the World Health Organisation's International Code of Marketing of Breast-milk Substitutes and argued the code can ensure that parents have access to adequate information for making decisions.

Many submissions were concerned with the need for New Zealand to enact the World Health Organisation International Code of Marketing of Breastmilk Substitutes.

Toi Te Ora Public Health argued that "advertising of infant formula does not contribute to ensuring an informed public" and emphasised that parents have a right to know the risks of using artificial breastmilk substitute to assist in making an informed choice.

Liz Weatherly also raised concerns with Principle 6 and proposed considerations for amendment to reflect two issues:

- That many women are unable to make a fully informed choice as to the best interests of their child due to "existing market forces which undermine key breastfeeding messages" whereby baby formula is perceived as equivalent to human milk.
- Social stigma is a major obstacle to breastfeeding mothers.

New Principle 7:

‘The approach to breastfeeding discrimination should encompass the view that breastfeeding mothers and their babies form an inseparable biological and social unit’.

This concept was supported by all submissions and particularly favoured by NGOs.

Other issues and concerns raised by submissions

Call for Stronger Legislation

The La Leche League submission suggested that debate on legislation relating specifically to breastfeeding was necessary.

“Legislation protecting the right to breastfeed would increase the ability and willingness of mothers to do so, because they would feel more socially comfortable and empowered”.

The New Zealand College of Midwives submission suggested stronger legislation that extended to:

- Support for women returning to work to continue breastfeeding with paid breastfeeding breaks
- Legislation to enable women to breastfeed in public places without discrimination
- Support for promotion and protection of breastfeeding as the normal and best means to feed a baby through the enactment of the World Health Organisation International Code of Marketing of Breastmilk Substitutes
- Public health and education strategies which promote breastfeeding as the normal and healthy way to feed a baby.

The AUT Centre for Midwifery and Women’s Health Research also supported new legislation:

“Government should enact legislation and adopt policies which best resource parents to make fully informed and supported decisions;”

“Provision should be made for women working in areas which do not normally permit a child or children in order for her to breastfeed, this right should be protected through a legislative/industrial relations process”.

Women’s Health Action also supported a legislative approach:

“Legislative change should take the form of making it legal to breastfeed in general and providing legislation to support the ILO Convention and recommendations”.

Judith Galtry considered:

“[The] right to be free from discrimination on the grounds of breastfeeding requires explicit legislative protection in the same way as does pregnancy.”

Liz Weatherly’s submission also supported the addition of a breastfeeding category to anti-discrimination legislation as a national level of protection for the right to breastfeed, with the Human Rights Commission in a role to support and uphold this legislation.

Weatherly’s submission highlighted that the Commission had become the primary source of breastfeeding protection by default as there were no other “entities” to protect this right. However, the need for the Commission to uphold complaints requires effective policy and legislation.

Holistic Health Clinic & Learning Services argued that a main obstacle to public breastfeeding was a common perception in western cultures of the breast as a sex organ and therefore its exposure is indecent, including during the act of breastfeeding. In their submission, Holistic Health Clinic & Learning Services recommends legislation to protect breastfeeding rights as a “backstop” measure as well as education to enable attitude change from present negative views and attitudes.

Barbara Sturmfels suggested provisions used in United States legislation relating to exposure of the breast by the breastfeeding mother may be necessary in New Zealand due to common public comments that it is “disgusting” to breastfeed in public.

Call for Additional Support

Marcia Roberts, Lactation Consultant, National Women’s Health recommended that there is a need to recognise a wider legal right for breastfeeding than exists at present, beyond anti-discrimination legislation. Government, she argued, has a role to not only promote and protect, but also to support breast feeding. This need for further support was highlighted in many other submissions.

Submissions were also concerned with the need for a multi-sectoral approach to breastfeeding as an issue. A submission from La Leche League noted that while the Ministry of Health has some programmes in place, other government agencies do not, and emphasised the need for a more comprehensive consideration of breastfeeding in other agencies (ie. Ministry of Social Development, Department of Labour, etc.)

The submission from Barbara Sturmfels, argued that there is already a legal requirement for government support for the period during which a mother and baby are cared for by a Lead Maternity Carer (up to six weeks postpartum) within section 88 of the Public Health and Disability Act 2000 which provide for: “appropriate additional care for women who need it”. This care is not currently made available as a matter of routine and it is common for mothers to be

discharged from the care of a Lead Maternity Carer with unresolved (and unREFERRED) breastfeeding problems.

The New Zealand College of Midwives noted that section 88 requires further funding:

“With Section 88, all women are entitled to receive follow up/postnatal care once they have left the maternity facility. Although this notice supports women and their babies with breastfeeding it is inadequately funded which then defeats the importance of this role. With improved remuneration midwives would then be encouraged to reduce the number of women they care for and thus provide more support for those mothers choosing to breastfeed”.

Concerns about the International Code of the Marketing of Breast Milk Substitutes

In addition to the comments mentioned under Principle 6 of this summary, there were other issues raised in relation to the International Code of the Marketing of Breastmilk Substitutes.

The AUT Centre for Midwifery and Women’s Research highlighted current anomalies in New Zealand government policies that undermine the principle and support of the human rights aspects of breastfeeding.

“A current example of such an anomaly is the Government’s non-compliance with recommendations of the WHO International Code of Marketing of Breastmilk Substitutes, evidenced in the Ministry of Health led review of the New Zealand Interpretation of the Code”.

A La Leche League submission also suggested that further discussion of the WHO Code be included in the paper as it is a significant instrument for the protection of breastfeeding.

“The Ministry of Health, in its recent review of the New Zealand interpretation of the Code, appears reluctant to implement the WHO Code and subsequent WHA Resolutions in their entirety. Breastfeeding advocates do not agree with the outcomes of this review”.

The submission from Women’s Health Action also referred to the International Codes:

“It would also be helpful if the Commission could work in protection of breastfeeding, supporting the Innocenti Declaration and the WHO Code of the Marketing of Breastmilk Substitutes”.

Other Issues

The Department of Labour suggested the need to balance group rights with individual rights in response to the paper's claims that some women had experienced negative public reactions to breastfeeding.

“Such concerns at the group level (cultural or religious antipathy towards public breastfeeding) are possibly more problematic than individual concerns and ought to be both acknowledged and addressed in the paper to provide a better balance to both the paper and debate...We suggest that you objectively outline these opposing cultural/religious perspectives and make the case for favouring one set of rights over the other (in the same sort of way you did for mothers'/babies potentially conflicting rights)”.

Wording changes were suggested by The Department of Labour and Pru Goward, Australian Sex Discrimination Commissioner, regarding aspects of the paper that fall within their mandates.