

Submission on Employment Standards Legislation Bill

Transport and Industrial Relations Committee

6 October 2015

Introduction

1. The Human Rights Commission (“Commission”) welcomes the opportunity to provide this submission to the Transport and Industrial Relations Committee on the Employment Standards Legislation Bill (‘the Bill’).
2. The Commission has focused its submission on the provisions of the Bill aimed at strengthening paid parental leave (covered in Part 1 of the submission) and addressing the use of “zero-hours contracts” (covered in Part 2).
3. The Commission supports a number of provisions in the Bill but is concerned that some aspects do not go far enough to protect the rights of parents and vulnerable groups in the workforce.

Summary of the Commission’s position

Paid parental leave

4. The Commission endorses key provisions of the Bill, which it considers are in line with human rights principles and international best practice, and acknowledges the government’s efforts in progressing equality in the workplace by extending workplace support. The Commission would support the further extension of paid parental leave to 26 weeks over time. Paid parental leave assists the realisation of human rights for parents and their families because it improves economic well-being, minimises the effect of poverty, assists in maintaining links to the labour market and importantly, assists parents and legal guardians with child-rearing responsibilities during the critical period of infancy.

5. Strengthening paid parental care provisions also promotes gender equality in the work place, an issue of ongoing concern for the Commission. In the last five years the Commission has received 188 complaints which allege discrimination in the workplace about parental leave (male and female), and 23 complaints which allege pregnancy discrimination in the workplace over the same period.
6. The United Nations Human Rights Council recently reaffirmed the importance of governments promoting and empowering the rights of women and girls by adopting gender-responsive policies directed at cultural and family life.¹ The Council called upon States to accelerate the implementation of legal frameworks and policies directed towards achieving equality and the elimination of all forms of discrimination against women and girls.² The International Labour Organisation states:

“Maternity protection is a fundamental human right and an indispensable element of work-family policies. It is crucial to promoting maternal and child health and preventing discrimination against women in the work place.”³

Zero-hours contracts

7. The Commission supports the Bill’s intention to address zero-hours contracts by prohibiting “certain practices” that “lack sufficient mutuality between the parties.” The Commission is concerned that the use of zero-hours contracts is more likely to be directed towards more marginalised groups within the labour market who lack sufficient bargaining power to negotiate equitable or fair terms of employment. New Zealand’s international human rights commitment includes obligations to ensure that conditions of work are just and favourable, and enable workers and their families to enjoy a decent standard of living.
8. However, the Commission notes that the Bill does not seek to prohibit the use of zero-hours contracts themselves. Instead, it seeks to provide a more prescriptive framework for regulating the use of zero-hours contracts and other forms of casual employment. Against this context, the Commission has accordingly recommended that the Committee give specific consideration to the following aspects of the Bill:

¹ United Nations General Assembly, Human Rights Council twenty-ninth session, Agenda 3, A/HRC/RES/29/4 (21 July 2015) at 9

² Ibid at 10.

³ Addati, Laura; Cassirer, Naomi; Gilchrist, Katherine, “Maternity and paternity at work : law and practice across the world.” International Labour Office. – Geneva: ILO, 2014

- The lack of any provision under s 65(2) of the Employment Relations Act 2000 requiring minimum hours of work to be provided for in an individual employment agreement.
- The lack of minimum wage protections for workers who are subject to s 67E availability provisions or s 67G(2) shift cancellations.

Part 1 - Legislative proposals for amending paid parental leave provisions

New definition of primary carer leave

9. The Commission supports replacing the definition of maternity leave with a new definition of primary carer leave and paternity leave with partner's leave. The new definitions put emphasis on the best care of the child and promote shared collective responsibility in parenting extending to a wider range of primary carers than biological or formal adoptive parents. Article 18 of the Convention on the Rights of the Child states that the best interests of the child is paramount with regard to parenting and that parents and legal guardians have common responsibility for the care of the child.⁴ The Office of the Children's Commissioner interprets Article 18 to include care by whanau, stating that children "have the right to live with and be raised by parents or family/whanau."⁵

10. The Commission also appreciates that the new definitions do not differentiate according to gender specific roles and gender-stereotyped assumptions of care for children. The Convention on Elimination of all forms of Discrimination Against Women states that shared responsibility for the upbringing of children should be emphasised⁶ and that customary/ cultural practices that enforce stereotyped roles of men and women should be eliminated.⁷ The International Labour Organisation also affirms that:

"In order to achieve both women's and men's full potential in all realms, policies need to change traditional social attitudes and behaviours by recognizing men's right to

⁴ United Nations Convention on the Rights of the Child Article 18

⁵ Office of the Children's Commissioner, UNCROC, Article 18. <http://www.occ.org.nz/childrens-rights-and-advice/uncroc/> (accessed 2 October 2015).

⁶ At Preamble

⁷ CEDAW article 5

parenthood and actively encouraging a shift towards a model in which men act as active co-parents rather than helpers of their women partners.”⁸

Extending leave payments to non-standard workers and a wider range of primary carers

11. The Commission supports the extension of parental leave payments to a wider range of workers, including casual, seasonal, employees with more than one employer and those who have recently changed jobs. This provision extends greater employment protections to a wider range of particularly low-paying professions and thus enhances the likelihood of all workers experiencing “decent work” conditions as provided under Goal 8 of the UN Sustainable Development Goals.⁹ International human rights treaties also emphasise universal access to maternity protections.¹⁰ The amendment furthers New Zealand’s human rights obligations in this regard. Most notably, it addresses the 2012 recommendation of the Committee on the Elimination of Discrimination Against Women in 2012 that New Zealand “introduce appropriate legal measures to ensure parental leave, including paid parental leave for men as well as paid leave for seasonal or fixed-term workers with multiple employment relationships.”

More flexibility regarding how leave can be taken

12. The Commission supports the added flexibility that the Bill proposes with regard to how employees take parental leave. This new provision is also consistent with the Employment Relations Act Part 6AA¹¹ which entitles employees greater flexibility regarding work arrangements. As above, this provision enforces fair and decent working conditions that are conducive to raising a healthy family and allowing effective and shared parenting.

Extending paid parental leave

⁸ Addati, Laura; Cassirer, Naomi; Gilchrist, Katherine, “Maternity and paternity at work : law and practice across the world.” International Labour Office. – Geneva: ILO, 2014 at 118.

⁹ United Nations Department of Economic and Social Affairs, “Sustainable Development Goals” Goal 8 <https://sustainabledevelopment.un.org/?menu=1300> (accessed 5 October 2015).

¹⁰ Addati, Laura; Cassirer, Naomi; Gilchrist, Katherine, “Maternity and paternity at work: law and practice across the world.” International Labour Office. – Geneva: ILO, 2014

¹¹ Employment Relations Act 2000 Part 6AA

13. The International Labour Organisation recommends that paid parental leave should at a minimum be 14 weeks for *all* women¹² “including those in atypical forms of dependent work”¹³ and that the cash benefit should “be at a level that the woman can maintain herself and her child in proper conditions of health and a suitable standard of living.”¹⁴ The Convention states that 18 weeks paid parental leave is a realistic goal for member states.¹⁵
14. The Commission recognises that New Zealand is behind many OECD countries with regard to paid parental leave.¹⁶ The Commission signals broad support for the members Parental Leave and Employment Protection (Six Months' Paid Leave) Amendment Bill proposing 26 weeks of paid parental leave if this is introduced in an economically sustainable way. The Commission recommends that if 26 weeks is not considered economically viable in the immediate future, a commitment is made to annually reviewing the paid parental leave entitlement with a view to extending it incrementally.

Further issues the Commission should take into consideration with regard to the Parental Leave and Employment Protection Act 1987

15. The Commission submits that the New Zealand government should consider ratifying the International Labour Organisation Maternity Protection Convention 2000. The Convention promotes equality of all women in the workforce and the development of maternity protection in law and practice.¹⁷ Moreover, it outlines international best practice for parental care, particularly relating to women.
16. The Commission supports a coordinated, all-government approach to achieving gender equality in the work place and acknowledges that strengthening parental leave is just part of the strategy in achieving this. The Commission submits that other effective work-family policies and coordination that promote good work-life balance,

¹² International Labour Organisation, Maternity Protection Recommendation, 2000 (R191)

¹³ ILO Convention C183 Maternity Protection Convention, 2000, Article 2

¹⁴ ILO Convention C183 Maternity Protection Convention, 2000, Article 2(2)

¹⁵ Maternity Protection Recommendation, 2000 (R191)

¹⁶ OECD Statistics compiled by Parliamentary Library, March 30, 2015.

¹⁷ C183 - Maternity Protection Convention, 2000 (No. 183) at preamble.

for example, affordable child care and flexible work hours are essential and should be weaved into any law change where possible.¹⁸

17. The Commission also supports an all-government approach to addressing the inequalities that continue to exist for women in unpaid care work and other low paid female-dominated roles. These should be addressed through raising wages, a commitment to assisting mothers to transition back into work and social protection strategies which reduce poverty and inequality.

18. Statistic's New Zealand's quarterly report released on 3 October showed that the gender pay gap is the highest it has been in six years at 12 percent. The Commission's *Tracking Equality at Work* on-line monitoring publication showed that in 2014 two-thirds (66.6%) of adult minimum wage earners in 2014 were women. In addition, the publication found that men are paid more than women both overall and within ethnic groups. These effects increase when combining several factors. For instance there is a significant difference in median pay between New Zealand European men and Pacific women of almost 30%.¹⁹

19. The International Labour Organisation also outlines that a co-ordinated approach to achieving gender equality with regard to parental leave should take place:

“Women and girls still perform the large majority of unpaid care work, which limits their equal employment opportunities and treatment in labour markets. Measures to assist women and men in balancing work and family responsibilities, particularly adequately paid parental and paternity leave, family-friendly working arrangements and quality, State-funded childcare and other social care services, are unavailable, inaccessible or inadequate for most.”²⁰

Part 2: Zero-hours contracts

20. Part 2 of the Bill introduces a range of significant amendments to the Employment Relations Act (ERA) aimed at providing for a “stronger, more effective” enforcement

¹⁸ Addati, Laura; Cassirer, Naomi; Gilchrist, Katherine, “Maternity and paternity at work : law and practice across the world.” International Labour Office. – Geneva: ILO, 2014 p 117 and 119.

¹⁹ Human Rights Commission, “Tracking Equality at Work” <http://tracking-equality.hrc.co.nz/#/issue/pay> (accessed 5 October 2015).

²⁰ Addati, Laura; Cassirer, Naomi; Gilchrist, Katherine, “Maternity and paternity at work : law and practice across the world.” International Labour Office. – Geneva: ILO, 2014 p 116

regime of minimum employment standards; and prohibiting employment practices that “lack sufficient mutuality” between employer and employee, most notably the use of “zero-hour contracts”.²¹

International obligations

21. Legislative and policy measures that address zero-hours contracts engage New Zealand’s international human rights obligations under the International Covenant on Economic, Social and Cultural Rights (ICESCR). Article 7 of ICESCR provides that States Parties are required to recognise the right of all persons to:

- Just and favourable conditions of work.
- Fair wages and equal remuneration; and
- Remuneration that provides a decent living for the worker and their family.

22. Realisation of these rights is also fundamentally consistent with Goal 8 of the UN Sustainable Development Goals, which seeks the promotion of “sustained, inclusive and sustainable economic growth, full and productive employment and decent work for all”.

23. More specifically, in its General Comment on the right to work²², the UN Committee on Economic, Social and Cultural Rights has noted that insecure employment conditions can force people to seek work outside the formal economy. Accordingly, the UN Committee has held that:

“Specific measures to increase the flexibility of labour markets must not render work less stable or reduce the social protection of the worker.”²³

24. Furthermore, New Zealand is a ratified signatory to ILO Convention 122, the Employment Policy Convention 1964. Articles 2 and 3 of ILO 122 provide that employment policies shall:

- Aim at ensuring that there is work for all who are available and seeking work.

²¹ Employment Standards Legislation Bill, Explanatory Note

²² UN Committee on Economic, Social and Cultural Rights, General Comment 18, adopted 24 November 2005, U.N Doc. E/C.12/GC/18

²³ Ibid para 25

- Aim at ensuring that there is the fullest opportunity for each worker to qualify in and use their skills in a job for which they are well suited, irrespective of their inherent factors, such as race, sex and social origin.
- Be pursued by methods appropriate to national conditions and practices.

Context

25. Improvement of employment standards and conditions through a more rigorous statutory scheme is essential if entrenched disparities and inequalities that currently exist in the labour market are to be adequately addressed. In addition to the stark gender disparity regarding low-paid work referred to in paragraph 18 above, *Tracking Equalities at Work* further indicates that ²⁴:

- a. Pacific people are over-represented in minimum wage jobs relative to their population size.²⁵
- b. Gender and ethnicity disparities compound so that Pacific and Maori women receive lower levels of pay than Pakeha women.²⁶
- c. Disabled people are disproportionately represented amongst low income workers. Over 70% of disabled women earn less than \$30,000 per annum.²⁷

26. Similar disparities also exist within unemployment data, signifying a lack of employment opportunity and job security amongst vulnerable, marginalised groups. For example, young Maori and Pacific women are, by some margin, overrepresented in underemployment and unemployment data. It follows that these more vulnerable population groups are more likely to be subject to zero-hours contracts and other potentially exploitative or otherwise unsatisfactory employment conditions. This has concerning implications for beneficiaries, particularly sole parent beneficiaries, who are required to transition into the workforce under the more stringent work-testing criteria introduced by welfare reforms in recent years.

Zero-hours contracts – definitions and legal issues

27. Zero-hours contracts are a form of casual employment agreement that initially came to prominence in the United Kingdom through their widespread use in recent years.

²⁴ <http://tracking-equality.hrc.co.nz/#/issue/pay>

²⁵ *ibid*

²⁶ *ibid*

²⁷ *ibid*

In a survey of businesses carried out by the UK Office of National Statistics (ONS) in August 2014, it was estimated that there were around 1.8 million zero-hours contracts that provided work and a further 1.4 million zero-hours contracts that did not provide work during a two-week period covered by the survey.²⁸

28. A zero-hours contract has been described in the UK as follows:

“The expression ‘zero-hours contract’ is a colloquial term for a contract of service under which the worker is not guaranteed work and is only paid for work carried out. It generally leads to a form of work where the worker is not guaranteed any work but has to be available as and when the employer needs them.”²⁹

29. To the Commission’s knowledge, the prevalence of zero-hours contracts in New Zealand is yet to be quantified. However, the New Zealand Council of Trade Unions has estimated that at least 30% of the New Zealand workforce – over 635,000 people – are in “insecure work”, with around 95,000 of those having no usual work time.³⁰ Anecdotal reports have also indicated that the use of zero-hours contracts has been on the rise in recent times, particularly in sectors such as the fast-food industry.³¹

30. It is important to note the Bill does not state anywhere that it is designed to prohibit zero-hours contracts per se. Instead, the Explanatory Note to the Bill states that the Bill’s intention to prohibit unfair practices that “lack sufficient mutuality” *in relation to* the use of zero-hours contracts.

31. This is an important distinction. As noted above, a zero-hours contract is a form of “casual” employment agreement, an arrangement where the employer offers work when it becomes available and the employee may decide whether to accept that offer or not. At present, there is no statutory basis that prescribes or prohibits casual

²⁸ Office of National Statistics, *Analysis of Employee Contracts that do not Guarantee a Minimum Number of Hours*, 25 February 2015

²⁹ Pyper D and Dar A, *Zero-hours contracts*, Standard Note SN/BT/6553, House of Commons Library, 25 February 2015

³⁰ NZ Council of Trade Unions, *Under Pressure: Insecure Work in New Zealand*, October 2013, <http://union.org.nz/sites/union.org.nz/files/CTU-Under-Pressure-Detailed-Report-2.pdf> - Insecure work is defined by the CTU as being work that is uncertain as to permanency or duration, limits or negates worker rights and voice, has low/fluctuating pay, limits or negates usual terms/benefits of employment such as sick leave and domestic leave and provides limited or no opportunity to gain skills.

³¹ <http://www.radionz.co.nz/news/national/259241/use-of-zero-hour-contracts-growing>, 13 November 2014

employment agreements. The Bill does not attempt to change the status quo in this respect by prohibiting casual forms of employment in all circumstances.

32. Furthermore, legal commentary notes that New Zealand statutory law makes few requirements as regards working hours. While the Minimum Wage Act fixes working hours per week at no more than 40 hours, exclusive of overtime agreements³², it does not set in place any minimum hours requirements. It has been noted that, accordingly, the use of zero-hours agreements could satisfy the requirements of New Zealand legislation.³³

33. However, the Courts have indicated that zero-hours contracts may be potentially unlawful, or at least highly problematic in terms of their practical application. In New Zealand, the 2009 case of *Jinkinson v Oceana Gold Ltd*³⁴ indicates that the Courts are likely to consider the use of zero-hour clauses to be highly dubious. In *Jinkinson*, the Employment Court considered a written casual employment agreement that required the employee to accept work offered by the employer but did not guarantee any hours of work. In addressing that aspect of the contract, Judge Crouch found that:

“the obligations imposed by the agreement alone were not sufficient to reach the ‘irreducible minimum of mutual obligation necessary to create a contract of service’. It must be an essential element of any contract of service that an employee have an opportunity to receive payment of wages or other money.”³⁵

34. Furthermore, in the UK case of *Autoclenz Ltd v Belcher* [2011] UKSC 41, the UK Supreme Court held that:

“the relative bargaining power of the parties must be taken into account in deciding whether the terms of any written agreement in truth represent what was agreed and the true agreement will have to be gleaned from all the circumstances of the case of which the employment agreement is only part”³⁶.

³² Minimum Wage Act 1983, s 11B

³³ New Zealand Employment Law Guide, *Chapter 7: Working Hours and Wages*, p 189, LexisNexis 2015

³⁴ *Jinkinson v Oceana Gold Ltd*, Employment Court, Christchurch, 13 August 2009, per Judge Crouch

³⁵ *Ibid* para 61

³⁶ *Autoclenz Ltd v Belcher* [2011] UKSC 41, para 35, per Lord Clarke

35. This reasoning was later applied by the UK Employment Appeal Tribunal in ***Borrer v Cardinal Security Ltd***³⁷, which concerned a constructive dismissal claim by a security guard who had worked regular weekly hours under a zero-hours employment agreement only to have these hours unilaterally revoked by the employer through use of the contract's zero-hours clause. The Employment Appeal Tribunal held that the "true agreement between the parties" resulted in the employee having a "contractual entitlement" to continue to work those regular hours.³⁸

The Bill's approach

36. Clause 87 of the Bill introduces a set of provisions aimed at regulating the use of zero-hours contracts.

37. At the outset new sections 67C and 67D work to establish a requirement that employers must ensure that an employee's agreed hours of work are included in their employment agreement. The definition of "agreed hours of work" under new section 67C for workers on individual employment agreements (and thus far more likely to be subject to a zero-hours clause) is provided by s 65(2)(iv) of the Employment Relations Act 2000, which merely requires that there is "*an indication of the arrangements of the times the employee is required to work.*"

38. The broad nature of s 65(2)(iv) means that that the Bill will not have the effect of introducing a "minimum hours of work" requirement or require an employer to guarantee work availability. If the Committee wishes to introduce reforms that ensure that the use of zero-hours contracts is negated in New Zealand, then the Commission would recommend that it considers addressing s 65(2)'s lack of any provision for minimum hours or work availability requirements in individual employment agreements.

39. New section 67E regards the use "availability provisions" in casual employment agreements. Under the definition set out in s 67E(1), an availability provision is defined as a provision under a casual agreement that requires an employee to make themselves available for work at certain times whilst not obligating the employer to make work available. New section 67E goes on to provide that availability provisions

³⁷ *Borrer v Cardinal Security Ltd* UKEAT/0416/GE/12, 16 July 2013, per Supperstone J

³⁸ *Borrer v Cardinal Security Ltd*, para 15

are unenforceable against employees unless the employment agreement provides for payment of compensation for making themselves available.

40. New section 67E is perhaps the Bill's most significant measure to address zero-hours contracts insofar that it attempts to require that employees who make themselves available for work are compensated for doing so. However, it is problematic in a couple of crucial ways.
41. Firstly, new s 67E provides statutory reinforcement for casual employment contracts that do not offer minimum hours, albeit with the proviso that employees are not obliged to make themselves available for work unless compensation is provided for their time in doing so. This may have the unintended effect of encouraging the use of no-obligation, zero-hours casual employment agreements in the labour market.
42. Secondly, it does not define the terms of compensation payable to employees who make themselves available. This means that, in theory, employees could be paid well below the minimum wage for any time that they are required to make themselves available for work under an availability provision. In the UK, the National Minimum Wage Regulations 1999 provide that workers have minimum wage protection for any time when a worker is *"available at or near a place of work, other than his home, for the purpose of doing time work and is required to be available for such work."*³⁹
43. The Commission further notes that compensation for workers subject to a shift cancellations in breach of contractual notice requirements under s 67G(2)(b) is also undefined. However, the Commission supports the full wage protections for without-notice shift cancellations under s 67G(5).
44. The Commission accordingly recommends that the Committee consider amending new sections 67E, 67G(2) and Part 4 of the Bill (which introduces amendments to the Minimum Wage Act) to provide for similar minimum wage protections for workers who are subject to s 67E availability provisions and section 67G(2) shift cancellations. This would certainly assist in protecting the economic security of workers subject to availability provisions and would be expected to contribute to the

³⁹ National Minimum Wage Regulations 1999 (UK), Clause 15(1)

overall reduction in disparities and inequalities in the labour market for vulnerable and marginalised groups within the workforce.

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