

Paid Parental Leave Amendment Bill 2014

Portfolio: Small Business

Introduced: House of Representatives, 19 March 2014

Summary of committee concerns

1.42 The committee seeks further information on the compatibility of the measure to remove the requirement for employers to provide government-funded parental leave pay with the right to social security, the right to just and favourable conditions of work and the right to equality and non-discrimination.

Overview

1.43 The bill seeks to amend the *Paid Parental Leave Act 2010* (the Act) to remove the requirement for employers to provide government-funded parental leave pay to their eligible long-term employees. Instead, from 1 July 2014, employees would be paid directly by the Department of Human Services (DHS), unless an employer opted in to providing parental leave pay to its employees and an employee agreed for their employer to pay them.

Compatibility with human rights

Statement of compatibility

1.44 The statement of compatibility for the bill states that, while the Paid Parental Leave Scheme engages the right to social security, the measures in the bill are 'limited to administrative arrangements for delivering parental leave pay to customers';¹ and concludes that, as such, the amendments do not engage any human rights.

Committee view on compatibility

Right to social security, including protection of the family and the right to just and favourable conditions of work

1.45 Paid Parental Leave payments are available to persons, whether male or female, who are the primary carer for a newborn child or recently adopted child, provided they satisfy certain work, means and other criteria. This is usually the birth mother of a newborn or the initial primary carer of an adopted child.²

1 Statement of compatibility, p 1.

2 Department of Human Services website, 'Eligibility for Parental Leave Pay' (as at 24 March 2014).

1.46 Article 9 of International Covenant on Economic, Social and Cultural Rights (ICESCR) states that:

The States Parties to the present Covenant recognize the right of everyone to social security, including social insurance.

1.47 In addition, and of relevance to this bill, Article 10 of the ICESCR states that:

Special protection should be accorded to mothers during a reasonable period before and after childbirth. During such period working mothers should be accorded paid leave or leave with adequate social security benefits.

1.48 The committee notes that, in addition to the right to social security, the bill engages the right to work and the right to just and favourable conditions of work.³ This is because the benefits paid under the scheme are linked to participation in the paid labour force.⁴ The right to the enjoyment of just and favourable conditions of work is guaranteed by Article 7 of the ICESCR.⁵

1.49 The bill also engages the obligations to take measures to support the family generally,⁶ and the rights of children in relation to family life.⁷

1.50 The committee notes that the right to social security and the right to just and favourable conditions of work are not absolute, and that the rights may therefore be subject to limitations. Article 4 of ICESCR provides that permissible limitations are those that are 'determined by law only in so far as this may be compatible with the nature of these rights and solely for the purpose of promoting the general welfare in a democratic society'. Where a measure may limit a right, the committee's assessment of the measure's compatibility with human rights is based on three key questions: whether the limitation is aimed at achieving a legitimate objective,

3 Article 7 of the International Covenant on Economic, Social and Cultural Rights (ICESCR). See also articles 5 and 11 of the Convention on the Elimination of All Forms of Discrimination against Women.

4 Department of Human Services website, 'Eligibility for Parental Leave Pay' (as at 24 March 2014).

5 The UN Committee on Economic, Social and Cultural Rights has commented that article 7 of the ICESCR requires States parties to take steps to 'reduce the constraints faced by men and women in reconciling professional and family responsibilities by promoting adequate policies for childcare and care of dependent family members.' *General comment No 16* (2005) (The equal right of men and women to the enjoyment of all economic, social and cultural rights (art. 3 of the International Covenant on Economic, Social and Cultural Rights)), para 24.

6 Article 10 of the ICESCR; and articles 23 and 24 of the International Covenant on Civil and Political Rights.

7 Article 8 of the Convention on the Rights of the Child.

whether there is a rational connection between the limitation and that objective and whether the limitation is proportionate to that objective.⁸

1.51 The Regulation Impact Statement included with the explanatory memorandum for the bill notes that the removal of the mandatory employer role may impact on employees with salary sacrifice arrangements in place. It notes that:

Where ... [an employee's] employer is administering the ... [parental leave] payment, these salary sacrifice arrangements are able to continue and so the employee's tax liability would continue to be calculated on a lower salary. However, as DHS does not offer salary sacrifice deduction functionality, an employee's tax liability could increase if the mandatory employer role is removed and their employer does not opt back in. This may be a particular issue for employees in the not-for-profit sector. This impact is not a compliance cost, but is an impact on the after-tax income a person may receive, dependent on an employee's income and the level of salary sacrificed under the arrangement.

1.52 The committee notes that, to the extent that the measure may result in reduced after-tax income for employees with salary sacrifice arrangements in place, the removal of the requirement for employers to provide government-funded parental leave pay may result in a limitation of the right to social security.

1.53 The committee therefore intends to write to the Minister for Small Business to seek clarification as to whether the removal of the requirement for employers to provide government-funded parental leave pay may limit the right to social security and the right to just and favourable conditions of work and, if so:

- **whether the limitation is aimed at achieving a legitimate objective;**
- **whether there is a rational connection between the limitation and that objective; and**
- **whether the limitation is proportionate to that objective.**

Right to equality and non-discrimination

1.54 Article 2(2) of the ICESCR guarantees the right to non-discrimination in the enjoyment of economic, social and cultural rights. Article 2(2) prohibits any direct⁹ or indirect¹⁰ discrimination, whether in law or fact, on prohibited grounds, including

8 See PJCHR, *Practice Note 1*. See also, PJCHR, *Annual Report 2012-2013* ('The committee's analytical framework'), pp 14-15.

9 Direct discrimination occurs where a person is subject to less favourable treatment than others in a similar situation because of a particular characteristic.

10 Indirect discrimination occurs where apparently neutral criteria are applied to make decisions but which have a disproportionate impact on persons who share a particular characteristic.

sex, which has the intention or effect of nullifying or impairing the equal enjoyment or exercise of the right to social security.¹¹ The right to non-discrimination is also recognised in a number of other international human rights treaties.¹²

1.55 A difference in treatment on prohibited grounds, however, will not be directly or indirectly discriminatory provided that it is (i) aimed at achieving a purpose which is legitimate; (ii) based on reasonable and objective criteria, and (iii) proportionate to the aim to be achieved.

1.56 The committee notes that the statement of compatibility for the bill does not address the question of whether the bill's potential to result in reduced after-tax income for employees with salary sacrifice arrangements may indirectly discriminate against women, given that the majority of paid parental leave recipients may be women.

1.57 The committee notes that the assessment sought above in relation to the right to social security will also be relevant to this analysis. Further, the committee considers that, to the extent the measure is found to be compatible with the right to social security, it is also likely to be consistent with the right to non-discrimination.

1.58 The committee intends to write to the Minister for Small Business to seek further information as to whether the bill is compatible with the right to equality and non-discrimination.

11 See Committee on Economic, Social and Cultural Rights General Comment No. 19 (2008), para 29.

12 International Covenant on Civil and Political Rights, International Convention on the Elimination of all Forms of Racial Discrimination, Convention on the Rights of the Child, Convention on the Elimination of all forms of Racial Discrimination Against Women, Convention on the Rights of Persons with Disabilities.