The Foreign Affairs, Defence and Trade Committee has conducted an international treaty examination of the Removal of Reservations on Paid Parental Leave to the International Covenant on Economic, Social and Cultural Rights, and the majority has no matters to bring to the attention of the House.

National supports the right of the Executive to make decisions on international treaties. This is important to enable the Government to operate effectively when negotiating trade agreements.

Where the Government should take a cautious approach is where international treaty decisions have the effect of binding future Parliaments on controversial issues. Paid parental leave is such an issue.

Paid parental leave is a controversial issue in the New Zealand business community and, not surprisingly, has been controversial in the New Zealand Parliament. By removing New Zealand’s reservation on paid parental leave to this Covenant, the Government’s policy in New Zealand is not altered one bit. What is changed is the ability of a future Parliament to alter the provisions of paid parental leave in any way that could be construed as less generous in terms of the amount of paid leave or the level of protection provided.

Binding future Parliaments on such matters where New Zealand is widely divided is not considered good government. Accordingly, National opposes the removal of this reservation.

The National Interest Analysis for the treaty is appended to this report.

Hon Peter Dunne
Chairperson
REMOVAL OF RESERVATION ON PAID PARENTAL LEAVE TO THE INTERNATIONAL COVENANT ON ECONOMIC, SOCIAL AND CULTURAL RIGHTS

National Interest Analysis

Date of Proposed Binding Treaty Action

It is proposed that New Zealand remove the reservations relating to paid parental leave to the International Covenant on Economic, Social, and Cultural Rights (ICESCR) given the introduction of paid parental leave under the Parental Leave and Employment Protection (Paid Parental Leave) Amendment Act 2002. New Zealand would be legally bound to fulfil article 10.2 of ICESCR, following receipt by the United Nations Secretary-General of New Zealand’s notification of such removal.

International Covenant on Economic, Social and Cultural Rights

The International Covenant on Economic, Social and Cultural Rights (ICESCR) is one of the core human rights treaties of the United Nations. Together with the Universal Declaration on Human Rights and the International Covenant on Civil and Political Rights, it forms the International Bill of Rights. There are 146 states parties to this Covenant. New Zealand ratified the Covenant in December 1978, with two reservations – one of which relates to the implementation of article 10:2 on paid maternity leave. New Zealand reserved “the right to postpone, in the economic circumstances foreseeable at the present time, the implementation of article 10:2 as it relates to paid maternity leave or leave with adequate social benefits”. Article 10:2 of ICESCR is as follows:

“The States Parties to the present Covenant recognise that:

[10.2] “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.”

New Zealand is to present its second periodic report on implementation of the Covenant to the International Committee on Economic, Social and Cultural Rights in Geneva on 12-13 May 2003.

The Minister of Foreign Affairs and Trade has considered it appropriate to assess whether New Zealand's paid parental leave scheme would satisfy the broad obligations relating to paid maternity leave under ICESCR, with a view to the removal of the reservation if judged appropriate, so that the decision could be conveyed to the Committee during the examination of our report. The Government has concluded on the basis of examination of the new scheme in relation to the requirements of the Covenant that it is appropriate for New Zealand to do so.

Reasons for New Zealand to Lift the Reservation on article 10.2

The reservation to ICESCR on paid parental leave should be removed because, with the introduction of the paid parental leave scheme, it is judged that New Zealand is now able to fulfil its obligations under article 10.2. A reservation indicating that New Zealand reserves the right not to apply this article is no longer necessary.

Background
A reservation to an international treaty allows for a state party to unilaterally indicate that it does not agree, or cannot bring its domestic law into line with particular provisions of the treaty. Under the Vienna Convention on the Law of Treaties, reservations should not be incompatible with the object and purpose of the treaty. The human rights treaty bodies, established under the six core human rights treaties, and the Office of the High Commissioner for Human Rights have emphasised the desirability of working to remove all reservations to human rights treaties, taking the view that reservations undermine the effective implementation of the treaties and weaken respect for the obligations of states parties. Work is currently underway to review a number of New Zealand’s reservations to the human rights treaties to which it is a party.

Apart from New Zealand, four other countries hold similar reservations to ICESCR in relation to paid parental leave: Bangladesh, Barbados, Kenya and the United Kingdom in respect of Bermuda and the Falklands.

When New Zealand presented its first report under this Covenant, in 1993, the ICESCR Committee asked whether the Government had considered withdrawing its reservations, and in its concluding observations on the report it expressed the hope that we would do so. The issue has now been raised again in advance written questions posed by the Committee in the lead-up to the May hearing (“When does the State party intend to repeal its reservations to article[s 8] and 10.2 of the Covenant?”), and is likely to attract further interest in the hearing itself.

Australia and the US (in respect of some states) are the only developed countries not to have some kind of statutory paid parental leave scheme. Australia has a means-tested lump sum social security payment for eligible new mothers and, like New Zealand, provides 52 weeks unpaid parental leave to all employees. Australia was criticised by the ICESCR Committee during the presentation of its report in September 2000. The Committee noted with concern that paid maternity leave was not provided for in law or in collective labour conventions and that Australia had not ratified ILO Convention 103 on Maternity Protection (at the time, this was the relevant ILO convention. Australia has also indicated that it is unlikely to ratify ILO Convention 183, on the same issue, in the near future).

**International Standards for Paid Parental Leave**

Under ILO Convention 183 (and its related recommendations), states parties should provide no less than fourteen weeks of paid parental leave and, in fact, it is recommended that states endeavour to provide at least eighteen weeks. States should provide payments that are no less than two-thirds of the woman’s previous earnings. It is, however, recommended that the payments reflect the full amount of the woman’s previous earnings. In terms of eligibility, ILO 183 should apply to all employed women, including those in atypical forms of dependent work. ILO 183 also elaborates on health and employment protection, and the rights of breast-feeding mothers. This Convention is not widely ratified (only four states - Bulgaria, Italy, Romania and Slovakia - have ratified it).

The earlier ILO Convention 103 obliged states to provide at least twelve weeks of paid parental leave at a rate of not less than two-thirds of the woman’s previous earnings. Only forty states had ratified ILO 103, and since being superseded by ILO Convention 183 it is no longer open for ratification.
New Zealand’s paid parental leave scheme is less generous than those of most developed countries. According to a recent independent survey (Mercer Human Resource Consulting, Australia), there are wide variations in the global provision of parental leave, including the length of unpaid leave and the level of statutory payments. This study suggests that Norway, Italy and Brazil have the highest statutory parental paid leave in the world. The European Union Framework Parental Leave Directive (1996) recommends a minimum of fourteen weeks paid parental leave and that, as a minimum, payments be equivalent to the rate of sick pay. Many European Union countries exceed these guidelines. Canada provides fifteen weeks of paid parental leave, paid at 55% of previous earnings up to a maximum of C$413 per week, provided that the employee has spent six months with the same employer.

**Progressive Nature of Economic, Social and Cultural Rights**

Under international human rights law, it is generally considered that the fulfilment of economic, social and cultural rights, such as the right to paid parental leave, may be achieved in a progressive manner. ICESCR specifically allows for a state party to implement the treaty “to the maximum of its available resources, with a view to achieving progressively the full realization of the rights” contained in the Covenant. As noted above, the terms of the reservation entered by New Zealand (reserving “the right to postpone, in the economic circumstances foreseeable at the present time, the implementation of article 10:2”) made it clear that the decision would remain under review, reflecting this provision for progressivity.

The presentation of the New Zealand report on 12-13 May will take the form of a dialogue based on questions from the ICESCR Committee about New Zealand’s implementation of the treaty, and the issuing of a set of concluding observations by the Committee at the end of its 3-week session. Questioning by the Committee and possible criticism or recommendations for future action is a normal part of the dialogue between states parties and the human rights committees. It reflects the fact that there is always room for improvement in the implementation of all human rights by states, particularly in the area of economic, social and cultural rights, which are less precisely defined. Acknowledging this fact is not an excuse to limit our efforts to fulfil obligations but, rather, it underlines the expectation that states should constantly strive to improve their compliance with the obligations of these human rights treaties.

**Advantages and Disadvantages to New Zealand Lifting the Reservation**

**Advantages:**

- Removal of the reservation would reflect our assessment that New Zealand’s paid parental leave scheme fulfils the broad obligations under ICESCR.
- Removal of the reservations would highlight the fact that New Zealand has taken significant action to improve its implementation of ICESCR, with the introduction of the paid parental leave scheme.
- It is timely to remove the reservation ahead of the presentation of New Zealand’s report under ICESCR in May. In the lead-up to the presentation of the report, the Committee has again sought an update on New Zealand’s work to remove the reservation.
• It would reduce the scope for criticism from the ICESCR Committee of our maintenance of reservations to the treaty, particularly in view of the forthcoming presentation of New Zealand’s report; and may well be welcomed as a positive step towards fuller implementation of the Covenant.

• As noted above, the human rights treaty bodies and the Office of the High Commissioner for Human Rights have both emphasised the desirability of working to remove reservations to international human rights treaties.

Disadvantages:

• Removal of the reservation would legally commit New Zealand to maintain a paid parental leave scheme; otherwise New Zealand would be in breach of our obligations under ICESCR. Since there is no provision under the Covenant for withdrawal or denunciation of the treaty, it would not be possible for New Zealand to re-introduce the reservation on paid parental leave at a later stage.

• There is no absolute certainty that New Zealand's paid parental leave scheme will be regarded as fulfilling the requirements under ICESCR, since the obligations on states in this regard are expressed in very broad terms. The Covenant does not provide a precise definition of the requirements or article 10.2, particularly in terms of rates of payment, eligibility, and duration of payment. Furthermore, the expectations of the ICESCR Committee regarding compliance have not been explicitly defined. The secretariat of the Committee has not been able to provide concrete advice on the expectations of the ICESCR Committee with regard to paid parental leave.

• It is possible that the ICESCR Committee may consider the standards contained in the ILO Convention 183 on Maternity Protection (or its predecessor, ILO Convention 103) as a benchmark in regard to the relevant articles in ICESCR on paid parental leave. If so, New Zealand could still be subject to criticism regarding the fulfilment of our obligations under ICESCR, despite the introduction of paid parental leave. New Zealand’s current paid parental leave scheme falls short of the detailed requirements under these ILO Conventions so we are not in a position to ratify ILO 183 and had not ratified ILO 103. Neither Convention is widely ratified.

On balance, it is judged that New Zealand’s paid parental leave scheme would be regarded by the Committee as fulfilling the broad obligations under ICESCR, particularly in view of the progressive nature of economic, social and cultural rights and the relatively unspecific nature of these obligations. Any comments from the Committee would reflect the normal and constructive dialogue with states parties on the implementation of the ICESCR treaty.

Obligations

In ratifying ICESCR, New Zealand is legally bound to fulfil its obligations under the treaty. Removal of the reservation to the treaty on paid parental leave would have the effect of adding to New Zealand’s binding treaty obligations under ICESCR. New Zealand would need to demonstrate the measures that it has taken to implement article 10.2 in its future periodic reports to the ICESCR Committee.
Economic, Social, Cultural and Environmental Effects

The paid parental leave scheme was introduced with the aim of improving the well-being of families, especially working mothers and their children, and helping to eliminate discrimination against women in the field of employment. The removal of the reservation to ICESCR would commit New Zealand to maintaining a paid parental leave scheme in order to fulfil our binding obligations under article 10.2. In itself it will have no additional economic, social or cultural impact beyond what is already entailed by the introduction of the scheme in 2002, other than to underline New Zealand’s commitment to the principles of the Covenant and the continued provision of paid parental leave.

The Parental Leave and Employment Protection (Paid Parental Leave) Amendment Act was passed in March 2002. It entitled women to twelve weeks paid parental leave, funded by the government, which can be transferred to eligible partners (including same sex partners). For an employee to be eligible for paid parental leave, they must have worked at least an average of ten hours each week, including at least one hour per week or 40 hours per month, for the same employer for twelve months before the expected date of birth or adoption. Paid parental leave is only available to employees. The payment fully replaces existing earnings, up to a maximum of NZ$325 gross per week, which is 70 % of the average female wage. Women can choose whether they receive the paid parental leave provision or the existing parental tax credit, which pays up to NZ$150 a week to low and middle-income families.

Other provisions of the Parental Leave and Employment Protection Act also enable New Zealand to comply with the broad provisions of article 10.2, as regards “special protection to mothers during a reasonable period before and after childbirth”. For instance, it is prohibited to terminate employment for reasons related to pregnancy, or maternity leave, including during a period of 26 weeks from the end of parental leave. The Act also provides some protection in relation to seniority and social allowances. The period of parental leave should be counted as time served under the employee’s employment agreement. This also includes any entitlement to a superannuation scheme. The provisions of the Human Rights Act are also relevant to the protection of employees from discrimination on the basis of parental leave.

If the Committee were to conclude that the scheme did not fully comply, we could come under pressure to further improve the scheme. However, given the lack of precision in the treaty’s requirements, this seems unlikely, and would better be seen as part of the regular exchange to encourage states parties to continue progressively to strengthen their protections.

Removal of the reservation to ICESCR would have no environmental impact.

Costs

Removal of the reservation to ICESCR will present no new financial implications, given that the paid parental leave scheme has already been introduced in New Zealand.

Future Protocols

Any state party may propose an amendment to ICESCR. Such an amendment would come into force only after it had been adopted by the UN General Assembly and accepted by two-thirds of the states parties to ICESCR. It is unlikely that an amendment to the provisions on paid parental leave in ICESCR would be requested by a state party or adopted by the United Nations General Assembly.
Work is currently underway to review a number of New Zealand’s reservations to international human rights treaties.

**Implementation**

Apart from the formal procedure of notifying the UN Secretariat of a decision by New Zealand to lift the reservation, no further implementation is required, given that the Parental Leave and Employment Protection (Paid Parental Leave) Amendment Act 2002 has already entered into force and is being implemented.

**Consultation**

The Department of Labour, Ministry of Women’s Affairs and Ministry of Justice were all consulted on the contents of this paper. The Parental Leave and Employment Protection (Paid Parental Leave) Amendment Act 2002 was itself the subject of extensive public consultation during the legislative process.

**Withdrawal or Denunciation**

As noted earlier in this paper, there are no explicit provisions under ICESCR for withdrawal or denunciation of the treaty. A state may only enter a reservation at the time of signing, ratifying, accepting, approving or acceding to a treaty. It would not, therefore, be possible for New Zealand to re-introduce the reservation on paid parental leave to ICESCR at a later stage.