HRC Complaint D1951: Child Poverty Action Group / Child Tax Credit

1. This is the Child Poverty Action Group's brief response to the letter of the Crown Solicitor in response to the complaint, addressed to the HRC and dated 29 July 2003. It is not a fully researched legal opinion but a pointer to the areas we think need judicial consideration.

2. While this response does not repeat the detail of the complaint, it should be read in the context of the real harm caused to children by poverty. This is not simply an interesting policy or legal debate. For many children it is a debate about their daily experience and future opportunities. $15 per child per week is a significant sum to these children and their families.

3. In summary, our response is that the tenor and detail of the Department's response are a somewhat alarming indication of a government view of its obligations under the Human Rights and Bill of Rights Act, and also in relation to the UN Convention on the Rights of the Child. We believe that given the obstacles to this matter being addressed in mediation, failure to pursue litigation would leave unchallenged what we hope you will agree is an untenable view of the law as represented by the Crown Law response on behalf of the Department.

Discrimination

4. The complaint by the Child Poverty Action Group (CPAG) which was filed with the Commission on 10 October 2002, concerns ss KD2(4) and OB1 of the Income Tax Act 1994. These sections limit payment of the Child Tax Credit to families that do not receive income-tested benefit as defined by that Act,[1] a Veteran's Pension, a student allowance, New Zealand superannuation or, if received for more than three months, weekly accident compensation payments. CPAG considers that excluding children living in families that do receive such assistance from eligibility for the Child Tax Credit amounts to discrimination on the grounds of employment and family status contrary to ss 20L, 21(1)(k) and (l) of the Human Rights Act 1993 ("the HRA").

5. The Child Tax Credit is one of a number of forms of government assistance to low- and middle-income families with dependent children. At present, it is set at a maximum of $15.00 per child per week. In

addition to ineligibility of families based on receiving income-tested benefits or the other assistance noted above, eligibility is also dependent upon total family income and the number and age of children.

6. The Department does not consider that the ineligibility of families that receive income-tested benefits or other assistance for the Child Tax Credit is discriminatory either on grounds of family status or employment status. The argument by the Department that the CTC is non-discriminatory because, to paraphrase, those children living in ineligible families are "already receiving their share of state support" is spurious.

7. There is neither a legal nor policy ground on which to allege that New Zealanders are allocated social support proportionately and are ineligible for support beyond a certain limit.

8. There are two bases on which the CTC is rationed. The first, income, is not the subject of the CPAG complaint. The second, source of income (employment status), is. The Department's arguments would clearly be better considered under the framework of justification, than of discrimination. To allege that CTC non-recipients are not discriminated against on the basis of their income source is factually wrong.

9. Unlawful discrimination relates to a situation when people in a like situation are treated differently by reason of one of the grounds outlawed in s21. Hence it is unlawful, subject to justification, to distinguish between families of the same income on the basis that one family's source of income is from a benefit. The *Tavita* case requires those who interpret the HRA and BORA, or who have an obligation to promote human rights, to assume that government intended to honour its obligations under articles 2, 26 & 27 of the UN Convention on the Rights of the Child and to heed the recommendations of the Committee on the Rights of the Child. The Committee in its October 2003 Concluding Observations on the NZ Report expressed concern at the significant proportion of children in New Zealand living in poverty [para 41] and recommended that New Zealand take appropriate measures to assist parents to implement the child's right to an adequate standard of living. The Committee also recommended that the Government be proactive to "eliminate discrimination on any grounds and against all vulnerable groups of children".

10. Hence, in determining whether the refusal to give the CTC in respect of children in families in receipt of a benefit is unlawful discrimination, the test should be whether the family and child are disadvantaged in relation to their standard of living by that refusal. There can be no doubt that the CTC would make a significant difference to the standard of living of children living in beneficiary families when their standard of living is compared with the standard of living of children in families with the same (or greater) principal income who receive the CTC. When the

focus is on the child and the receipt or non-receipt of the CTC, the difference in treatment cannot be said to be beneficial for the child of the beneficiary.

11. To state then, as does the Department, that this "difference in treatment is beneficial and cannot, for that reason, amount to discrimination on the grounds of family or employment status" is to wrongly construct the whole basis of the social security system and related tax credits. The CTC was not designed to compensate families who don't receive a principal income from social security for missing out on their share of government support, and no evidence is cited by the Department in support of this contention. Information analysed by CPAG in the preparation of the complaint also fails to give any support to this notion. CPAG's analysis shows that the CTC was primarily intended as income assistance to low and middle income families, targeted on income, family size and employment status. In every respect other than the discriminatory aspect it resembles an addition to family support which is the tax credit that does go to all children on the same basis.

12. Given the spurious nature of this interpretation of the discrimination provisions of the Act by a core Government Department (Inland Revenue), it is our view that the Director of Proceedings should move rapidly to have this view corrected through legal action before the Human Rights Tribunal.

Justification

13. The department relies almost entirely on contesting the existence of discrimination, and refers only briefly to justification in their response to the complaint. We hope the Director is as concerned as we are at the scant attempt made to justify a policy that overtly denies to children in some of the lowest income families assistance which could make a real difference to their welfare. In our view it behoves the Department to make a proper case for justification in these circumstances, and it appears that the only route now available for this is through legal action.

14. In its brief consideration of s 20L(2)(b) of the HRA, the Department argues that "the restriction of the Child Tax Credit to low- to middle-income families that do not already receive substantial government assistance is justifiable as a form of assistance that recognises the contribution that such families make."

15. One accepted criterion for unlawful discrimination is discrimination which denigrates. The above statement demonstrates that criterion well, suggesting as it does that families (and the children in them) not requiring social assistance make a worthier contribution than those that do. Here we see the dilemma of the Department. It is clearly not possible to defend the payment on the basis of financial need (as two

families with the same level of need are treated differently, or worse, families with greater financial need than those eligible miss out). The policy is therefore construed as a reward for *adult* effort, rather than as important social assistance.

16. The trouble for the Department, is that the CTC is not only a reward for adult effort. It is social assistance designed to meet the needs of low income families. There is nothing wrong with that. What is wrong is that it is rationed not only according to need but also according to criteria that do not fit with the Human Rights Act.

17. The Department denigrates beneficiaries by ignoring the contribution they make by caring for children. Ignoring this contribution shows a lack of respect for the child which is contrary to the State's obligations under the UNCRC.

18. By attempting to justify the payments then as a reward for contribution through paid work, the Department not only denigrates the contribution of those who require (even temporary) relief through benefits, ACC or superannuation, but reinvents the policy basis for the CTC.

19. The Department further responds that "the restriction [on eligibility] is consistent with art. 26(2) of the [Child Rights] Convention, which concerns the rights of children to social assistance and which states that 'benefits should, where appropriate, be granted, taking into account the resources and the circumstances of the child and persons having responsibility for the maintenance of the child'."

20. This is a misinterpretation of art 26(2) UNCRC. The qualification in article 26(2) was inserted so that states would not be required to grant social security benefits to wealthy parents[1]. The qualification cannot be used to differentiate according to the source of principal income when granting a benefit such as the CTC.

21. Furthermore, the Convention must be interpreted as a whole. Article 26, when read with its companion article 27(3)[2] and articles 3, and 6, places an obligation on the State to assist parents when such assistance is necessary to grant the child a standard of living which will enable the child to develop so that they may fully participate in society. Articles 2 and 4 reinforce the obligation to not discriminate, and to implement the UNCRC to the maximum extent possible within the resources of the state.

22. The Department seems to be suggesting that the provision of the UEB or DPB ensures that parents have adequate resources to meet the child's needs under articles 6 and 27 of the Convention, and hence the

[1] Detrick 1999) *A Commentary on the UNCRC*, Martinus Nijhoff publishers: The Hague, p.448.
[2] States parties shall take appropriate measures to assist parents to implement the child's right to a standard of living adequate fro the child's physical, mental, spiritual, moral and social development]

government has fulfilled its obligations. Such a reading fails to give the required purposive interpretation to the Convention.

23. Finally, the Department has responded that "the non-payment of the Child Tax Credit to those families that already receive substantial government assistance is also a reflection of the economic constraints upon government, which are recognised as a legitimate constraint upon social assistance in art. 27(3) of the Convention." This is quite inconsistent with Article 4 of UNCRC and the UN Committee's recommendation that the government "pay particular attention to the full implementation of article 4 of the Convention by prioritising budgetary allocations to ensure implementation of the economic, social and cultural rights of children, in particular those belonging to economically disadvantaged groups, "to the maximum extent of … available resources".

24. The Department's position denies the choices available to government. Limited funds do not have to be distributed according to prohibited grounds. Alternatives would include lower payments or a different income threshold. Justification under section 5 of the BORA must presumably conform to a standard of objectivity and reasonableness. Discrimination on the grounds that the child of a person on a benefit is less worthy than the child of a person who earns wages is not equivalent to, for example, treating a co-habiting couple differently from two separately residing individuals (the couple may be shown objectively to have lower living costs). The latter can be said to involve discrimination based on marital status, but it also involves other objective criteria that may support justification under s 5. The same can not be said of the discrimination inherent in the CTC, which is only argued for on "political" grounds (i.e. the desire to reward certain types of families) and not objective ones. If section 5 can be used to support such subjective justifications then it is of no value.

25. The Department has ignored the 5 part test for justification contained in *Moonen v Film and Literature Board of Review* (1999) 5 HRNZ 224, 234 para 18, which requires:
    - Identification of the legislative objective of the provision
    - Assessment of the importance and significance of that objective
    - The way in which the objective is statutorily achieved must be in reasonable proportion to the importance of the objective.
    - The means used must also have a rational relationship with the objective.
    - In achieving the objective there must be as little interference as possible with the right or freedom affected.

26. CPAG is of the view that this complaint must be subjected to this test and other analysis arising from decided cases. Given the impracticability or unwillingness on the part of the Department or government to have the matter addressed through mediation in the

HRC, only the avenue of litigation is open. There is a compelling case to be made for the unlawfulness, and lack of justification, for the inherently discriminatory CTC. Discrimination is not a by-product of the CTC – it is one of its objectives. It cannot have been intended by government to outlaw discrimination with one statute, and with another to sanction it in the absence of a greater objective.

27. Our own brief application of the test in *Moonen* follows:

Identification of the legislative objective of the provision
The Department has responded that the legislative objective was to recognise the contribution of families in paid work. CPAG research suggests that while distinguishing between families on the basis of source of income was one of the means chosen for rationing this assistance (the other is income testing), a significant (and arguably primary) objective was income assistance for children in low income families. Another objective that may be discerned but was not identified by the department was to provide a work incentive. Because a per child payment based on the criteria outlined above does not provide an incentive for an extra hour's work, but rather rewards 'independence from the state', this objective cannot be taken seriously. The introduction of the CTC in 1996 can be seen simply as an increase in Family Support, but only for those families that qualified. This increase reflected past inflation, so the families that qualified got an inflation catch up in effect, while those that did not saw a further decline in the real value of their family support.
Whichever view of the legislative objective is preferred is not material to the overall application of the test on *Moonen*.

Assessment of the importance and significance of that objective
If importance and significance is related to the requirement to "demonstrably justify" discrimination, then we would suggest that if the primary purpose of the legislation is to discriminate according to a prohibited ground it can not be demonstrably justified by the society that has prohibited discrimination on that ground. That is in essence exactly what the Department has argued is the primary purpose of the legislation. If, on the other hand, CPAG's analysis of the objective is preferred, then discrimination or work incentives are less important objectives than income assistance.

The way in which the objective is statutorily achieved must be in reasonable proportion to the importance of the objective
If the objective is discrimination (the Department's view) then the legislation is in proportion to it, but nonetheless unjustified (as previously suggested, a deliberate policy designed solely to discriminate on the prohibited grounds could not logically be demonstrably justified). If a significant objective is income assistance then the discriminatory elements are not necessary and in fact counter-productive.

The means used must also have a rational relationship with the objective

If the objective is to provide a work incentive then the tool is inappropriate, linked as it is to the number of children in a family. If the objective is to provide income assistance on the basis of financial need then the discrimination is an interference with it, and in many cases will undermine that objective as the lowest income families miss out.

In achieving the objective there must be as little interference as possible with the right or freedom affected

There is complete interference with the objective of non-discrimination on employment (source of income) grounds, and no attempt to mitigate it. It is after all the sole (according to the Department) or a major (according to CPAG) objective of the legislation.

28. In summary then, we reject the Department's attempt to construe the CTC as non-discriminatory (we believe that their view of this matter is completely unsupported by evidence and is simply not factual) and also their scan attempt at justification.

29. We urge the Director of Proceedings to view these issues as serious, and requiring judicial attention. We believe that it is both in the interests of tackling child poverty, and challenging the alarming approach taken to the legal issues by a significant government agency, that you act on this matter.