HRRT 41/2004

IN THE HUMAN RIGHTS REVIEW TRIBUNAL

IN THE MATTER OF A CLAIM UNDER THE HUMAN RIGHTS ACT 1993 AND ITS AMENDMENTS

BETWEEN	**CHILD POVERTY ACTION GROUP INCORPORATED**
	Plaintiff
AND	**THE ATTORNEY-GENERAL**
	Defendant

PLAINTIFF'S SUBMISSIONS IN RESPONSE TO DEFENDANT'S SUBMISSIONS ON JURISDICTIONAL/PRELIMINARY ISSUES

1 INTRODUCTION

1.1 The defendant says in its submissions (at paragraph 3) it intends to pursue at this stage only three of the four preliminary issues raised in paragraphs 2 - 5 of its statement of defence. It says however, that the fourth issue (paragraph 5 statement of defence) remains in issue.

1.2 These submissions will address all four issues raised in the statement of defence. This is because it is clear that the resources and time required for preparation for the substantive proceeding, given the magnitude this proceeding is anticipated to be, will be substantial. In the plaintiff's view such preparation should not proceed, in the interests of both parties, until all preliminary or jurisdictional points are dealt with.

1.3 It is suggested that the defendant respond to the fourth issue at the hearing following giving advance notice of any authorities it will be relying upon in relation to this point.

1.4 Referring to paragraph 4 of the defendant's submissions, as will be discussed in detail further below the plaintiff submits:

(1) It is clear that it is a "complainant" who has made a "complaint" for the purposes of s 76(2)(a) of the Human Rights Act 1993 ("the HRA") as these terms are not subject to any specific limits contained within the HRA itself and nor does anything referred to by the defendant support a more restricted definition than the ordinary meaning of either of these terms.

(2) The plaintiff has made two complaints which were both received and assessed by the Human Rights Commission as required by s 76(2)(a) and as well both complaints allege a breach of Part 1A; therefore each "complaint" is a complaint for the purposes of s 76(2)(a).

(3) It does not need to also be an "aggrieved person" to be a "complainant" for the purposes of s 76(2)(a). This appears to be agreed by the defendant – refer paragraph 21 of the defendant's submissions.

(4) Nor where a "complainant" is not an "aggrieved person" is the term "complaint" in s 76(2)(a) restricted to complaints brought by those who bring complaints on behalf of, or as representatives of, an "aggrieved person" or persons.

(5) If the plaintiff is a "complainant" who has brought a "complaint" for the purposes of s 76(2)(a) it must also be a "complainant" for the purposes of s 92B(1) and thus able to bring proceedings in this Tribunal.

(6) Referring specifically to paragraph 4.2 of the defendant's submissions: a breach of Part 1A in respect of legislation has "occurred" for the purposes of jurisdiction of this Tribunal to hear proceedings once the legislation is an "enactment". In particular there is no requirement in the HRA for an "enactment" to be in force or otherwise operational before the Tribunal has jurisdiction to consider and decide whether it is a breach of Part 1A. This point is discussed below in section 3 of these submissions.

(7) Further, as discussed below in section 3 of these submissions, whether an enactment is in force or not may have implications for the Tribunal in terms of the availability of evidence of disadvantage which is one limb of discrimination (the other being different treatment or differentiation) but this is not a jurisdictional issue.

Background

1.5 The plaintiff agrees in general terms with paragraphs 5 – 10 of the defendant's submissions under the heading "Background". Facts

particularly relevant to this interlocutory proceeding which appear to be agreed are:

- The plaintiff's objects include those set out in paragraph 5 of the statement of defence **[refer Bundle page 11]**.

- The plaintiff made two separate complaints to the Commission in relation to the Child Tax Credit ("CTC") and the In-Work Payment ("IWP") in October 2002 and October 2004 respectively **[refer Bundle pages 1 - 9]**.

- The Commission accepted the complaint relating to the CTC as coming within jurisdiction of Part 1A HRA and notified the Crown Law Office of the complaint **[refer Bundle page 4]**.

- The Commission closed its file relating to the complaint concerning the IWP without notifying the Crown Law Office as it recognised this complaint has the same implications as the complaint concerning the CTC and that that previous complaint had not been able to be mediated through the Commission's dispute resolution processes and was now with the Office of Human Rights Proceedings **[refer Bundle page 9]**.

Statement of claim

1.6 The plaintiff agrees in general terms with paragraphs 12 – 16 of the defendant's submissions but notes:

(1) Referring to paragraphs 14 and 15, an analysis of the HRA makes clear that there is no requirement for the purposes of jurisdiction for the Tribunal to hear proceedings under the HRA for a complaint made to the Commission to identify any particular child or children, nor to identify any particular principal caregiver of any child or children, who would be affected by, or disadvantaged by, an ineligibility to receive the CTC or IWP. This is an evidential not a jurisdictional issue.

(2) Referring to paragraph 15, the plaintiff submits that the claim is not a "general challenge" to legislation but rather is an example of the types of challenges which have been made to the Commission, and will be made to this Tribunal, under Part 1A HRA. Further, that it will not be relying upon "hypothetical examples" as to the effect of legislation. This also is an evidential not a jurisdictional issue.

(3) Referring to paragraph 16.3, the plaintiff accepts that in theory the children affected by the CTC or IWP (or their parents) could bring proceedings themselves but submits that this does not prevent the current plaintiff from doing so. The authorities discussed below make clear that in some circumstances where

proceedings are underway or in the past have been taken by affected persons themselves, unaffected persons may not be given standing at common law to raise the same issues. However, this is not the circumstance of the present case. Nor does the plaintiff accept that the common law rules relating to standing apply to the HRA except in so far as if standing would be available at common law it is unconvincing to suggest that the HRA should be more limited than the common law without express intention in the legislation that it be so limited. It is also questionable whether it is likely or reasonable to expect any of those affected by ineligibility to receive the CTC and IWP to do so. The children and principal caregivers of those children are some of the poorest and most vulnerable people in our community.

(4) Referring to paragraph 16.4, the plaintiff notes that though it refers to the common law test relating to standing in its statement of claim it relies primarily on the provisions of the HRA in respect of "standing" to bring proceedings in respect of the complaints it has made to the Commission and only relies on the common law rules in so far as if standing would be available at common law it is unconvincing to suggest that the HRA should be more limited than the common law without express intention within the Act itself that jurisdiction be so limited.

1.7 All of these points are expanded on below in the order these are discussed by the defendant.

Statement of reply

1.8 The plaintiff agrees that paragraph 17 of the defendant's submissions sets out the preliminary points raised in paragraphs 2 – 5 of its statement of defence and notes that as suggested above the issue at paragraph 17.4 (and paragraph 5 of the statement of defence) could usefully be dealt with at the interlocutory hearing and thus is dealt with below in section 4 of these submissions.

1.9 Referring to paragraph 18 of the submissions, the plaintiff respectfully requests that the Tribunal consider and decide all four preliminary issues in its decision, even if it decides against the plaintiff in respect of any one of these issues.

1.10 It is noted, and it is expected the Crown would agree, that some of these issues have been raised in other cases at the Commission level. Because Part 1A remains largely untested, including in respect of jurisdiction, it would be very helpful for both the Commission and the Crown in respect of the dispute resolution stage for Part 1A complaints, as well as for the Director when deciding whether to provide legal representation to persons/bodies wanting to institute proceedings in the Tribunal under Part 1A, to have some guidance from the Tribunal on all

these issues. The Director can advise that for example he has at least one other application from a person who is not himself an "aggrieved person" or perhaps sufficiently connected to an "aggrieved person" to bring proceedings should the defendant's view as to the definition of "complainant" for the purpose of s 76(2)(a) be accepted by the Tribunal.

2 JURISDICTION/STANDING

2.1 Referring to paragraphs 19 and 20, the plaintiff agrees that standing in this Tribunal is governed by the HRA, specifically by s 76(2)(a) and s 92B(1), but as well s 94(a) is relevant. The key hurdle provision is s 76(2)(a). Only a "complaint" under that section can be the subject of proceedings by a "complainant" under s 92B(1) and thus heard by the Tribunal pursuant to s 94(a).

2.2 It is noted that s 76(2)(a) does not use either of the words "complainant" or "aggrieved person". It refers only to a "complaint". However, s 76(2)(**d**) refers to [the Commission] taking action in relation to **the** complaint if "*the complainant or aggrieved person wishes to proceed with it…*". It is accepted therefore that a "complaint" for the purposes of s 76(2)(a) must be a "complaint" made by a complainant" or an "aggrieved person".

2.3 Section 92B(1) uses the terms "complainant" or "aggrieved person" and it is submitted that it must be the case that if a person or body is a "complainant" or an "aggrieved person" for the purpose of s 76(2)(a) (read together with s 76(2)(**d**)) they or it must be such for the purpose of s 92B(1). The defendant has not argued otherwise.

2.4 Thus standing in respect of proceedings before this Tribunal is provided for under the HRA by s 76(2)(a) and s 92B(1). Those provisions define who can, and by reference to these persons thus who cannot, bring proceedings.

2.5 As well, in terms of jurisdiction it is important to note that Part 1A HRA defines the subject matter which is justiciable in this Tribunal. This is "*any act or omission*" by specified actors (s 20J(1) HRA). "*Any act*" includes legislation as well as policies and practices (s 2).

2.6 The Ministry of Justice accepts that "*any act*" done by the persons or bodies specified in s 20J(1) is covered by Part 1A and has advised the Government and the public sector that: "*This means you should assume that all actions are subject to the Bill of Rights Act standard including legislation, regulations, policy development, service delivery, and programmes run by your agency*". (Refer *The Non-discrimination Standards for Government and the Public Sector*, Ministry of Justice, March 2002, page 17.)

2.7 Of course these acts can only be scrutinised by this Tribunal in respect of alleged discrimination (s 20L HRA). Thus Part 1A does not allow general challenges to policy decisions by the Government, including those manifest in legislation, but it specifically gives the role to this Tribunal of in effect reviewing policy decisions for compliance with the anti-discrimination provisions in Part 1A.

2.8 Thus the statutory framework is clear as to who can bring (subject to settling definitional issues for example the definition of "complainant"), and what can be the subject matter of, proceedings before this Tribunal.

2.9 The defendant submits that those who can bring proceedings should be restricted by limiting the terms "complainant" and "complaint" to where a complainant makes a complaint "on behalf of" an aggrieved person. The consequence of this would be to limit jurisdiction in this Tribunal to a much greater extent in respect of issues of public importance than is the case at common law or in respect of judicial review proceedings (both points are discussed further below). It is submitted that without a clear intention within the HRA itself that a more limited jurisdiction apply under the HRA this cannot have been the intention of Parliament. This point is also discussed further below in order of the issues raised by the defendant.

2.10 Referring to paragraphs 21 and 22, the plaintiff agrees it is not claiming to be an "aggrieved person" for the purposes of either s 76(2)(a) (read together with s 76(2)(**d**)) or s 92B(1) but rather it relies on being defined as a "complainant" who has made two complaints under s 76(2)(a).

2.11 Referring to paragraphs 23 and 24, the plaintiff agrees that the first issue for the Tribunal to determine concerns interpretation of the terms "complainant" and "complaint". The plaintiff submits these are not limited in the HRA to those who are acting "on behalf of" an aggrieved person or persons.

Principles of Statutory interpretation

2.12 Referring to paragraphs 25 – 27 it is agreed:

(1) That s 5(1) of the Interpretation Act 1999 requires that the meaning of an enactment be ascertained from its text and purpose (paragraph 26).

(2) That human rights legislation should be given a fair, large and liberal interpretation (paragraph 27). However, it is noted that the case *King-Ansell v Police* [1979] 2 NZLR 531 goes further than suggested by the defendant. Woodhouse J states that the language in the Race Relations Act 1971 (now repealed) at issue in that case is "*probably deliberately flexible*" and "*to give*

effect to its important purpose of making every form of racial discrimination unlawful I am satisfied that the language must not be interpreted in any confined or restricted way but broadly and in terms of common sense" (page 537 – emphasis added). As with s 5(1) Interpretation Act there is a focus on the "purpose" of the legislation. The case *Coburn v Human Rights Commission* (1994) 1 HRNZ 120 is authority for the principle that given the "*special character of human rights legislation*" there is a need to accord it a fair, large and liberal interpretation rather than a literal or technical one (page 137). This principle is supported by the cases of *New Zealand Van Lines Ltd v Proceedings Commissioner* [1995] 1 NZLR 100, 103 and *The Director of Human Rights Proceedings v New Zealand Thoroughbred Racing Inc* (2002) 6 HRNZ 713, 719 – 720. In the latter case the Court of Appeal described the HRA as "*no ordinary statute*" (paragraph [21]) and as having "*special status*" (paragraph [22]) including because of its link with s 19 of the New Zealand Bill of Rights Act 1990 ("the NZBORA") and the fact that it gives effect to New Zealand's obligations under international human rights covenants. The latter is directly relevant to the purpose of the HRA.

2.13 At paragraph 27 of the defendant's submissions the defendant quotes from *Coburn* suggesting this is authority for a particular approach to statutory interpretation. The words mentioned by the defendant are words from a 1979 English decision which is not singled out for particular approval by the New Zealand court but rather is only one of several quotes from overseas cases reviewed by it. *Coburn* does not support the proposition in paragraph 28 of the defendant's submissions as being a specific approach to the interpretation of human rights legislation in New Zealand.

2.14 At paragraph 28 the submission by the defendant is that the result is that the courts will strive for "*the most practical and sensible approach, even if that is not the most natural grammatical interpretation of the text*". None of the cases referred to nor s 5 Interpretation Act support this submission. No research has identified this as a recognised principle of statutory interpretation in particular relevant to the interpretation of human rights legislation.

2.15 The *Commissioner of Police v Carrington* [1996] 1 NZLR 135 case does not support the proposition asserted at paragraph 28. That case concerned consideration of a general power given to the police commissioner to appoint police officers under the Police Act 1958 and its relationship with specific provisions relating to discipline (including in relation to unsatisfactory performance) of officers in the same Act. The question was whether the general power in that Act could be used to avoid compliance with specific protective process provisions of the Act and in effect impose a penalty upon an officer without going through those protective processes.

2.16 All three judges in this case speak of construction of legislation in its context (pages 137, 139 and 141). McGechan J also states this should be done "*with an eye to overall purpose*" and notes that if the police commissioner's view of the Act had been intended the Act "*would have said so…*" and "*in my view, the silence is telling*" (page 141).

2.17 It is noted that a Lexis Nexis search indicates that this case has been referred only once in a case with similar facts (*Commissioner of Police v Moore* unreported, Court of Appeal, CA 138/01, 28 November 2001). It is submitted that it is not a decision of wide application.

2.18 The decision *R v Wain* [1984] 1 NZLR 363 is a criminal case concerned with the imposition of a penalty for a second and subsequent offence (being more serious than that available in respect of a first offence), when that second offence though it had occurred in time after a first offence, occurred prior to a conviction in respect of the first offence. Hardie-Boys J says: "*Parliament cannot have intended such an arbitrary result and we reject a construction that would lead to it*" (page 364).

2.19 It is not clear how this case relates to the interpretation of human rights legislation nor why interpreting the terms "complainant" and "complaint" in the manner suggested by the plaintiff could be described as arbitrary.

2.20 Nor does the decision *Holmes v Bradfield Rural District Council* [1949] 2 KB 1, 7 support the proposition put forward by the defendant at paragraph 28.

2.21 This case was not a human rights case. It concerned the interpretation of the term "work" and whether this included preparation of plans for the building work planned by the claimant but which had not eventuated. Finnemore J said that: "*the mere fact that the results of applying a statute may be unjust or absurd does not entitle the court to refuse to put it into operation*" (page 7) but that the common practice, where there are two reasonable interpretations "*so far as the grammar is concerned*", is to apply a meaning that is "*just, reasonable and sensible*" (pages 7 - 8).

2.22 It is not clear what grammar in particular in the HRA the defendant believes results in an unjust or absurd result nor why giving a wide interpretation to the terms "complainant" and "complaint" would have this result.

2.23 In any event the principles in this 56 year old case have been replaced in New Zealand, certainly in relation to human rights interpretation issues, by s 4 and s 6 of the NZBORA.

2.24 It is noted that a United Kingdom Citator (current legal information database) search indicates that this case has not been referred to in any subsequent case in the United Kingdom itself.

2.25 The decision *Cooper Brookes Pty Ltd v Commissioner of Taxation* (1980 – 1981) 147 CLR 297, 320 referred to at paragraph 29 does not assist the defendant either. This is a tax case concerned with a clear error by the draftsman.

2.26 Gibbs CJ states that an elementary and fundamental principle in interpreting a statute is to see what the intention expressed by the words used is and "*it is not unduly pedantic to begin with the assumption that the words mean what they say*" (page 304). He then says that where the meaning is clear and unambiguous the court must give effect to the words (page 304). His Honour then says (at page 304):

> "There are cases where the result of giving words their ordinary meaning may be so irrational that the court is forced to the conclusion that the draftsman has made a mistake, and the canons of construction are not so rigid as to prevent a realistic solution in such a case." (emphasis added)

2.27 His Honour says further (at page 305):

> "However, if the language of a statutory provision is clear and unambiguous, and is consistent and harmonious with the other provisions of the enactment, and can be intelligibly applied to the subject matter with which it deals, it must be given its ordinary and grammatical meaning, even if it leads to a result that may seem inconvenient or unjust." (Compare s 4 NZBORA.)

2.28 Stephen J says (at page 310):

> "… if literal meaning is to be departed from, it must be clear beyond question both that literal meaning does not give effect to the intention of the legislature and that some departure from literal meaning will fulfil that intent. Statute law, the direct product of the legislature, is perhaps the least appropriate field of all in which to indulge in judicial law-making."

2.29 Mason and Wilson JJ say (at page 321) that: "*the decisive factor in making this choice is that the literal interpretation of s. 80C (3) results in an operation for s. 80B (5) (c) which in our opinion is capricious and irrational*" (emphasis added). Though it is also noted that at page 321 these Judges accept that departure from the literal interpretation may occur in other circumstances but only where: "*for good reason the operation of the statute on a literal reading does not conform to the legislative intent as ascertained from the provisions of the statute*".

2.30 It is noted that Lexis Nexis has labelled this case as warranting "cautionary treatment".

2.31 It is not clear how the principles in this case apply to the issues in dispute in the present proceedings nor how the meaning the plaintiff

has suggested meets the high test of irrationality. This needs to be clarified by the defendant. But as well, as discussed further below there is nothing in the HRA which indicates an intent on the part of Parliament to restrict the terms in dispute to the meaning the defendant argues for and further there are good reasons for giving these terms a wide meaning in line with the recognised principles applying to human rights legislation.

2.32 Rather s 5(1) Interpretation Act requires a focus on the text in dispute, in this case s 76(2)(a) (and s 76(2)(**d**)) and s 92B(1) HRA in particular the terms "complainant" and "complaint". The recognised principles applying to human rights legislation and the cases discussed above require a broad interpretation be given to the text including those terms. As well both s 5(j) and the cases discussed above (including those referred to by the defendant) require a purposive interpretation of the text.

2.33 The plaintiff submits that a key purpose of Part 1A HRA is to allow Governmental action to be assessed as to any discriminatory effect. Limiting or restricting those who can make complaints or bring proceedings under the Act cannot be in line with this purpose.

2.34 The defendant has not put forward any good reasons in terms of these principles for reading in limits to the terms in dispute to restrict those who can make complaints or bring proceedings under the HRA.

2.35 Referring to paragraph 30, it is agreed that an interpretation consistent with NZBORA is required in respect of legislation, if reasonably available.

2.36 But first the Tribunal must find that there is more than one interpretation of the terms "complainant" and "complaint" <u>reasonably available</u>. The ordinary meaning of the terms, the recognised principles relating to interpretation of human rights legislation, as well as s 6 NZBORA all support the plaintiff's suggested interpretation. In particular this will more readily allow claims of discrimination against Government to be considered by the Tribunal and promote accountability of the Government in line with the HRA, NZBORA and the Government's international obligations and thus the plaintiff's suggested interpretation accords with the purpose of the HRA.

2.37 But if the Tribunal finds that the meaning argued for by the defendant is an alternative meaning which is reasonably available, it is not clear what reasons the defendant has for the view that its proposed interpretation is more consistent with the NZBORA in particular the right to be free from discrimination. The plaintiff submits that its suggested interpretation is more consistent with the right to be free from discrimination.

2.38 The defendant's interpretation will limit the cases which can be dealt with by the Tribunal to an extent which may impact most on the most vulnerable groups in our community who may not for various reasons readily access the complaints and litigation processes available under the HRA or even consider that as in the present case the issue raises an issue of discrimination because employment status is not as well known a ground as others such as race or sex. The authorities discussed below emphasise the need for important public interest issues to be litigated without requiring those who are most affected to undertake the burden of doing so.

Sections 92B(1) and 76(2)(a)

2.39 The plaintiff agrees with the analysis in paragraph 32 of the defendant's submissions. Section 76(2)(a) is clearly the first hurdle for jurisdiction in any particular case and the meaning of "complainant" in s 92B(1) must sensibly conform with the meanings of the words "complaint" in s 76(2)(a) and "complainant" in s 76(2)(**d**).

2.40 The elements of s 76(2)(a) are:

- The Commission has received and assessed a complaint;
- The complaint or complaints allege a breach of Part 1A or Part 2 or both;
- The complaint or complaints were made by a "complainant" or an "aggrieved person" – refer s 76(2)(d).

2.41 Concerning the first and second bullet points above, the Commission has clearly received and assessed two complaints by the plaintiff, relating to the CTC and the IWP respectively which both allege a breach of Part 1A **[refer Bundle pages 1 - 9]**.

2.42 In respect of the requirement in the third bullet point above it is noted that s 76(2)(a) does not itself refer to a complaint having to be made by a "complainant" or an "aggrieved person". These words first appear in s 76(2)(**d**). The plaintiff accepts that it is sensible to therefore read s 76(2)(a) as referring to a complaint made by either a "complainant" or an "aggrieved person". The "or" clearly indicates that the two elements are disjunctive.

2.43 The plaintiff submits that it is a "complainant" and thus the defendant's submissions concerning the term "aggrieved person" need not be considered by the Tribunal – refer to paragraphs 33 – 34 of the defendant's submissions. It is agreed that sometimes (perhaps most often) the "complainant" and "aggrieved person" will be the same person. But this will not always be the case as is agreed by the defendant – refer paragraph 34.

2.44 It is noted however, that one of the cases referred to by the defendant in relation to the term "aggrieved person" at paragraph 33: *New Zealand Freedom From Discrimination Group v New Zealand Grand Lodge of Freemasons* (1980) 2 NZAR 401 was decided when the Human Rights Commission Act 1977 was in force. The only reference in that Act to who could make complaints under the Act was "the person alleged to be aggrieved" (s 35(1)) and the "aggrieved person" (s 38(4)). Otherwise the relevant provisions of that Act refer only to the complaint or collectively to the parties.

2.45 The use of the term "complainant" as an alternative option for who could make complaints to the Commission as well as take civil proceedings in the then Complaints Review Tribunal was introduced in the HRA 1993. The two alternatives of "complainant" and "aggrieved person" were not altered by the 2001 amendments to the HRA.

2.46 Clearly there was an intention in 1993 to widen the categories of those who could make complaints under the HRA from those who were themselves aggrieved by alleged breaches of the Act to others who were not themselves aggrieved by the alleged discrimination.

2.47 It is noted that at several places in the HRA there is reference to the "aggrieved person (if not the complainant)" (emphasis added - see for example s 92B(1)). These references clearly envisage other persons making complaints who cannot be described themselves as "*aggrieved persons*".

2.48 Referring to paragraph 35, it is agreed that in accordance with s 76(2)(**d**) the textual meaning of "complainant" is someone who has made a complaint under s 76(2)(a); and the textual meaning of complaint is specifically a complaint alleging a breach of Part 1A or Part 2 or both. These elements have all been met in the present case as complaints were made by the present plaintiff to the Commission on two occasions separately in respect of the CTC and the IWP.

2.49 Referring to paragraph 36, it is not agreed that the term "complaint" is limited, as submitted by the defendant, to being a complaint "*in respect of an actual aggrieved person*" and brought by either that person or "*by a third party on their behalf*" (emphasis added). Nor is it agreed that the term "complainant" has a corresponding meaning. These are the key issues in dispute which need to be decided by this Tribunal.

2.50 For clarity it is noted that the defendant's submission in paragraph 36 that "complainant" must mean either an aggrieved person or a third party acting on behalf of that person. Clearly the aggrieved person is covered by the words "aggrieved person" in the HRA and therefore the defendant must be arguing that the term "complainant" is limited to parties acting on behalf of aggrieved persons.

2.51 It is noted that in paragraph 36 the defendant appears to agree that third parties can bring proceedings before this Tribunal. This must be as a "complainant" if they are not an "aggrieved person". The present plaintiff is agreeable to being considered a third party.

2.52 The plaintiff also notes that regulation 6 of the Human Rights Review Tribunal Regulations 2002 refers to a "*person or body*" bringing proceedings. This terminology does not appear to be used in the HRA itself. However, it supports the view that groups can bring proceedings in the Tribunal. Though this does not clarify whether such groups need to have any link with aggrieved persons.

2.53 Before moving to discuss the scheme of Part 3 as the defendant has done at this point, though it is agreed that neither the HRA nor the NZBORA define the terms "complaint" or "complainant" and nor has research identified any case law concerning these words (as is agreed by the defendant – see paragraph 23 of the defendant's submissions), some assistance to the Tribunal is available from other sources. These are now discussed.

Meaning of "complaint" and "complainant"

2.54 It appears to be agreed that a "complainant" can make a "complaint" under s 76(2)(a) and then make use of all the processes under Part 3 including taking proceedings under s 92B(1).

2.55 Though neither term is defined in the HRA it is submitted that it must be a wider term than the term "aggrieved person" or it would be redundant. As well, as discussed above, it was clearly added to the HRA in 1993 to widen the categories of persons who could make complaints under the Act.

2.56 The Concise Oxford English Dictionary (10th edition, 1999) defines the term "complaint" as:

> "An act or the action of complaining … A reason for dissatisfaction … The plaintiff's reasons for proceeding in a civil action."

2.57 "Complainant" is defined in the Concise Oxford Dictionary as:

> "A plaintiff in certain lawsuits."

2.58 Neither definition suggest the ordinary meaning of the terms are confined to, or even more appropriately used in respect of, persons actually affected or harmed by the subject matter of a complaint.

2.59 The term "complainant" is used in approximately 30 statutes in New Zealand. Though in respect of most of these the term (as with the HRA and NZBORA) is not defined.

2.60 However, some of these statutes provide some limits on who can make complaints. An example is the Corrections Act 2004 which at s 2 defines "complainant" as "*a person who makes a complaint under subpart 6 of Part 2*" of that Act. In subpart 6, s 152(1)(b) refers specifically to "*all persons under control or supervision* ….". Clearly under this Act complainants are limited to affected or aggrieved persons.

2.61 Both the Privacy Act 1993 and the Private Investigators and Security Guards Act 1974 ("the PISGA") specify that "*any person*" can make a complaint (s 67(1) and s 53(2) respectively). However, the Privacy Commissioner and the Registrar of Private Investigators and Security Guards, can or shall respectively, decline to deal with the complaint if the complainant does not have a "*personal interest in the subject matter of the complaint*" (s 71(1)(e) and both s 53(3) and s 59(3) respectively). Clearly those who do not have a personal interest in the subject matter of the complaint are still regarded as complainants in the first instance though under the Privacy Act there is a discretion whether to take further action regarding the complaint and under the PISGA the complaint must be declined.

2.62 The Law Practitioners Act 1982 is the only example located by research which specifies that a complaint can be made "*by or on behalf of a complainant*" (s 97(1) of that Act relating to Lay Observers and complaints about the conduct of practitioners).

2.63 It was open to Parliament, as has been done in the above examples, to qualify the term "complainant" in the HRA if it intended this be limited in any manner including in the way which the defendant suggests. It did not and it is submitted there is nothing which the defendant has referred to which supports reading in such a qualification or limitation.

2.64 The current plaintiff is clearly a "complainant" in the ordinary sense of the word "complaint" because it has complained to the Commission on two occasions (in respect of both the CTC and the IWP) and these complaints were both received and assessed by the Commission apparently according to its standard processes **[refer Bundle pages 1 - 9]**.

<u>Scheme and purpose of Part 3 HRA</u>

2.65 Paragraphs 37 and 38 of the defendant's submissions are agreed.

2.66 Referring to paragraph 39, it is correct that s 77 says the Commission "*must provide dispute resolution services…*". However, clearly this is subject to other provisions in Part 3 including s 76(2)(d) which requires the agreement of the complainant to take action and s 80(3) which permits the Commission to decline to take action under Part 3 for a range of specified reasons including s 80(3)(c) which provides that

having regard to all the circumstances of the case, it is unnecessary to take further action in relation to the complaint.

2.67 In other words whether or not dispute resolution services have been provided in any case does not determine whether a complaint under s 76(2)(a) has been received and assessed for the purpose of that section nor whether a complaint has been made for the purpose of s 92B(1). Whatever may or may not have occurred at the Commission stage is not relevant to the jurisdiction of this Tribunal to hear proceedings.

2.68 Section 81 (referred to in paragraph 39) does not assist the defendant either. That provision provides requirements for the performance of one particular function (out of eight) provided to the Commission in s 76 for dealing with complaints it receives. The information gathering function referred to in s 81 is provided for in s 76(2)**(b)**.

2.69 The jurisdiction point at issue concerns whether the complaint is a "complaint" under s 76(2)(a). Whether the Commission was required to perform or did or did not perform any of the other functions listed in s 76 or whether it complied with other requirements of the HRA, such as those in s 81, is not relevant to whether this Tribunal has jurisdiction to hear the substantive claim.

2.70 Similarly, whether the function in s 83 was or was not performed in any particular case is not relevant to this Tribunal's jurisdiction to hear proceedings.

Whether the scheme of Part 3 HRA requires complaints be made on behalf of identifiable aggrieved persons

2.71 The submission that the terms "complainant" and "complaint" be restricted to complaints made on behalf of victims or identifiable aggrieved persons or affected persons is peppered throughout the defendant's submissions: see paragraphs 24, 35, 36, 40, 47, 49 and 55. The concept of representation is also used at paragraphs 14 and 43.

2.72 Referring to paragraph 40 of the defendant's submissions and the suggested requirement that disputes about discrimination need to involve "*actually affected identified individuals or groups*": of course it is correct that discrimination involves impact upon human beings because only human beings have the characteristics which make up the prohibited grounds of discrimination, for example sex, race and disability. In many discrimination cases, particularly under Part 2, the "aggrieved person" or persons will be readily identifiable and often be the "complainant".

2.73 But the defendant also appears to agree at paragraph 40 that disputes about discrimination can involve actually affected identified **groups**.

2.74 In the present case there are identifiable aggrieved persons or victims of the alleged discrimination in the sense of there being a **group** or class of affected children whose principal caregivers or the spouses of those principal caregivers all share a characteristic, namely employment status (namely being in receipt of a benefit), which is a prohibited ground of discrimination and which results in them being affected by the provisions at issue in the substantive claim. These are the approximately 250,000 children whose families by reason of the employment status of their principal caregivers or the spouses of those principal caregivers are not entitled to receive the CTC or IWP.

2.75 Importantly in terms of the identification in broad terms of the extent of this **group** this number is sourced from research completed by the Government itself. (Refer *New Zealand Families Today,* Ministry of Social Development (July 2004), Table 14 at page 164.)

2.76 It is submitted it will not be unusual in Part 1A cases for a large group to be potentially directly affected or concerned with both complaints at the Commission level and proceedings before this Tribunal because legislation and Government practices and policies regularly impact upon large groups. In such cases identification of all possible affected persons will not be practicable and nor should this create a jurisdictional hurdle as the result would be that discrimination which potentially affected the largest numbers of people in our community would be effectively prevented from being litigated which cannot have been the intention of Parliament when providing protections in the HRA without a clear indication that such was the case.

2.77 Further, there is nothing in the HRA which requires any link (including representing particular affected persons), for the purpose of jurisdiction to either make a "complaint" or bring proceedings in this Tribunal, between a "complainant" and any affected persons. As discussed above the provisions in issue clearly provide "complainant" or "aggrieved person" as alternatives.

2.78 An important reason why proceedings under our HRA should not be limited to being taken by persons who are directly affected or by those acting <u>on behalf of</u> affected persons in a representational sense is that this limit does not apply at common law.

2.79 The plaintiff notes on this point the comments of the New Zealand Court of Appeal in <u>*Environmental Defence Society Inc v South Pacific Aluminium Ltd (No 3)*</u> [1981] 1 NZLR 216, 220. (Though it is noted that because this case concerns standing at common law it is discussed in more detail further below in relation to the common law principles relevant to standing.)

2.80 The Court of Appeal said in relation to the common law rules of standing that "*responsible public interest groups*" may undertake

proceedings challenging the legality of Governmental action and "*we see no reason why it must be left to the individuals directly affected to undertake the burden*".

2.81 It is submitted that because such a limit does not apply at common law it should not be read into the HRA.

2.82 Referring to the second point in paragraph 40 of the defendant's submissions (that Part 3 processes are not designed for or intended to be a forum for policy debates with unaffected persons), first it is clear that complaints about Part 1A are dealt with by processes in Part 3. This is uncontroversial.

2.83 Second, concerning the suggestion that Part 3 processes are not designed for "*policy debates*" it is noted that Part 1A applies to any "act" of those persons and bodies listed in s 3(b) of the NZBORA and repeated in s 20J(1) HRA. "Act" is defined in s 2 HRA as including an "*activity, condition, enactment, policy, practice or requirement*". These things will all certainly involve the Tribunal in policy debates though it is important to note that this will only occur in a limited form, which has been specifically authorised by Part 1A, which is whether or not the policy behind any Government act is discriminatory.

2.84 The defendant can correctly argue (though it has not) that this Tribunal and the courts are not the correct forum for wholesale debate about policy choices made by a democratically elected Government. But courts have always had a role to consider and review the legality of Governmental action by certain recognised means such as the grounds for review in administrative law.

2.85 Similarly the clear intention of Part 1A HRA is to allow this Tribunal to consider Government action and policy choices in the limited sense of whether such choices are discriminatory. And in doing so Parliament has allowed both aggrieved persons and complainants to raise such issues in this Tribunal.

2.86 The amendments allowing for challenge to these Governmental and public functions may have been part of the reasons for the comments by the select committee who considered the Human Rights Amendment Bill in 2001 when it recommended requiring the Chairperson of the Tribunal to be a barrister or solicitor of not less than five years practice "*in keeping with the increased importance that the Complaints Review Tribunal takes on in the bill, which renames it the Human Rights Review Tribunal*". (Refer Human Rights Amendment Bill as reported back from the Justice and Electoral Committee at page 15.)

2.87 Also see below Parliament was aware that limits such as the defendant wants read into the HRA existed elsewhere internationally. Clearly our

Parliament chose not to similarly limit the categories of those who could bring complaints and proceedings under the HRA.

2.88 Nothing in paragraph 40 of the defendant's submissions supports limiting the terms in dispute in the manner argued for by the defendant.

2.89 Referring to paragraph 41 of the defendant's submissions, it is agreed that proceedings under Part 1A are likely to have a wider public effect. It is not clear at all why this point supports the claimed need to have cases brought by affected persons.

2.90 The defendant also suggests that Part 3 requires that disputes be about "actual discrimination" rather than "discrimination in the abstract". This distinction is misleading. "Actual discrimination" is not synonymous only with claims made by affected persons. The present case is about (alleged) actual discrimination and is not "abstract". As discussed below the evidence the plaintiff intends to bring in respect of the substantive claim will demonstrate this. This may include evidence from affected persons if this is available. But this issue is an evidential one not a jurisdictional one.

2.91 It is not sufficient for the defendant to continue to repeat the assertion that Part 3 supports the interpretation it is arguing for. It needs to point to wording which supports this assertion. It has not done so with one exception which is dealt with now.

2.92 The defendant refers at paragraph 42 to remedies available under the HRA as supporting a restricted interpretation of "complaint" and "complainant". The view put forward of the remedies provision is extremely narrow and the plaintiff relies on the principles of interpretation of human rights legislation discussed above to suggest a wider and purposive interpretation be given to these words.

2.93 The remedies mentioned in paragraph 42 of the defendant's submissions are equally applicable to complainants/plaintiffs such as the present plaintiff. Compare the ***Environmental Defence Society*** case – does the defendant suggest that the two plaintiffs in that case could not have mediated or settled their case.

2.94 Further, it is not controversial to suggest that in most Part 1A complaints concerning legislation the complainant seeks a change to the legislation complained about. In such cases proceedings seek a declaration of inconsistency. Neither of these outcomes can be said to logically relate only to those who can be described as actually aggrieved by the alleged discrimination. Contrast the remedy of monetary compensation (available in other types of discrimination cases) which properly relate only to persons actually aggrieved or harmed as a result of discrimination.

2.95 The plaintiff submits that the ordinary meaning of the terms in light of the recognised principles of interpretation of human rights legislation and s 6 NZBORA (if more than one meaning is reasonably available) should be applied by this Tribunal.

Class actions

2.96 Referring to paragraph 43, the HRA specifically contemplates proceedings being taken by the Commission "*on behalf of the class of persons affected*" (s 92B(2) – emphasis added). Though pursuant to s 92B(6)(a) the Commission can only take proceedings if the complainant or aggrieved person has not brought proceedings themselves. By virtue of s 92B(6)(a) the default for proceedings is therefore in favour of complainants not the Commission as was the case to some extent via the Proceedings Commissioner model prior to the 2001 amendments.

2.97 Thus the HRA contemplates complainants or aggrieved persons, separately from the Commission (and as a default prior to the Commission being able to do so), taking proceedings relating to a class or group of persons. However, importantly s 92B(6) does not specifically limit such proceedings to being "*on behalf of the class of persons affected*" as is done in respect of the Commission's ability to take proceedings on behalf of a class under s 92B(2). The effect of these provisions is that the Commission is required to act as a representative for a class but no such limit is provided in respect of complainants.

2.98 In other parts of the HRA the Commission's role is also specifically limited, for example in exercising some of the functions and powers under s 5(2), the Commission must consider whether doing so will facilitate the performance of its primary functions in s 5(1). See for example s 5(2)(j). No such limits are placed on members of the public who make complaints and who come within the terms "aggrieved person" or "complainant".

2.99 Referring to paragraph 43, it must be the case in respect of representative or class actions generally as well as in discrimination cases that there be an identifiable person or group who is affected by the matter complained about. As discussed above there is in the present case an identifiable affected group which has been assessed numerically by the Government itself.

2.100 But the defendant has not pointed to any authority as to why this means that complaints and proceedings under the HRA must therefore be representative in nature specifically in relation to who can make such complaints or bring such proceedings. There is nothing in the HRA which suggests a representative relationship must exist between actual affected or aggrieved persons and a complainant for the purposes of jurisdiction.

2.101 In paragraph 43 the defendant refers to a case which is an example of a group complaint heard by the Tribunal prior to 2001: *Hosking v Wellington City Transport Ltd (t/a Stagecoach Wellington)* (1995) 1 HRNZ 542.

2.102 This decision related to an application for interim relief. The substantive proceeding was never heard by the Tribunal for reasons not relevant to the present proceedings. The decision records that the proceedings were brought by the Proceedings Commissioner on behalf of a class of persons described as "*all potential users of the Defendant's public transport service who are or will be prevented or impeded, by reason of disability, from utilising those services*" (at page 544).

2.103 The Director can confirm that the three initial complainants in that case were themselves affected persons in terms of the particular discrimination alleged in that case.

2.104 However, it is not correct to thus conclude that because of this decision, as the defendant has concluded, at paragraph 43: "*there still needs to be an identified individual or group affected by the alleged discrimination*". This case is not authority for limiting the terms "complaint" and "complainant" in the manner suggested by the defendant. Nor is there anything in this decision which supports the defendant's submission at the end of paragraph 43 that the case illustrates there still needs to be an identified individual or group to assess whether a proposed resolution or settlement addresses their concerns about discriminatory conduct.

2.105 Part 1A cases will often involve challenges to Government action which potentially affects very large groups of people and it is clear such issues are now justiciable in this Tribunal pursuant to s 20L contained in Part 1A. It is not at all clear that such cases can only be settled by affected individuals or aggrieved persons or that the remedies available in the HRA logically only apply to such persons.

Complaints process

2.106 Paragraph 44 is not accepted. But it is noted that the defendant appears to accept that Part 1A is likely to have a broad effect.

2.107 Paragraph 45 is agreed and it is further submitted that the terms in dispute must be given a wide and purposive interpretation to accommodate a range of different complaints and complainants to allow issues of discrimination to be brought before this Tribunal and considered on their merits rather than reading in jurisdictional limits which are not at all apparent from the Act itself.

2.108 Referring to paragraph 46, it is noted that there is no authority cited for the proposition that an unaffected person cannot make a complaint or bring proceedings under Part 2 HRA. As far as the plaintiff is aware this has not been the practice in the past before this Tribunal and this would certainly pose evidential difficulties if the affected person was not willing to give evidence in the proceedings. However, this is theoretically possible given the wide terms used in the jurisdictional provisions in the HRA.

2.109 However, presumably any case brought by a "*busybody*" could be dealt with by way of a strike out application particularly where direct evidence of the alleged discrimination was not available because the complainant was not taking part in the proceedings. It is agreed that Parliament could not have intended such proceedings to be heard in full by the Tribunal. But this raises an evidential issue not a jurisdictional one. It is not clear how this assists the defendant's argument. Further, it is submitted that there is a great deal of difference between the present plaintiff and a case about legislation affecting 250,00 children in New Zealand taken under Part 1A and a "*busybody*" bringing Part 2 proceedings relating to another person who does not want to be involved in such proceedings.

2.110 Referring to paragraph 47 of the defendant's submissions, again the submission that complaints be limited to being "by or <u>on behalf of</u> aggrieved persons" is repeated but with no authority or wording in Part 3 pointed to support this assertion. It does not make sense to restrict complaints under Part 1A in the manner suggested as this may prevent issues of discrimination being litigated before this Tribunal contrary to the wide terms of the legislation itself.

2.111 Of course it is important that there is an appropriate factual context on which the Tribunal can consider the legal issues raised by the substantive claim (which appears to be another way of saying that claims should not be "hypothetical" or "abstract"). As discussed below this will be provided in the present case.

2.112 It is not clear what the defendant is suggesting by the final two sentences in paragraph 47 or how these statements assist its suggested interpretation of the terms in dispute.

<u>Whether general public concerns should be dealt with exclusively by the Commission</u>

2.113 Referring to the heading before paragraph 48 of the defendant's submissions, it appears that the defendant may be suggesting that general public interest concerns should be dealt with <u>exclusively</u> by the Commission.

2.114 Clearly, this is not the case and the defendant has not pointed to anything in the HRA which supports this view. The particular functions

referred to by the defendant at paragraph 48 will be discussed below, however it is noted that nothing in the HRA suggests these functions or powers limit the nature of complaints and proceedings which can be made and brought under Part 3.

2.115 Part 1 of the HRA includes functions and powers allocated to the Commission relating to a wide range of human rights whereas Part 3 is limited to discrimination issues only.

2.116 An analysis of provisions in both Part 1 and Part 3 makes clear that both Parts contemplate issues affecting wider public concerns or including issues of concern to groups as well as individual concerns.

2.117 For example, the primary functions of the Commission outlined in s 5 (Part 1) of the HRA include a general reference in terms of advocacy by the Commission to "human rights in New Zealand society" (s 5(1)(a)). There is specific reference to "individuals" as well as "groups" in s 5(1)(b). The word "individuals" was inserted by the select committee considering the Human Rights Amendment Bill in 2001. There was a concern that individuals needed to be recognised in the Commission's primary functions. (Refer Human Rights Amendment Bill as reported back from the Justice and Electoral Committee at page 6.)

2.118 Other functions of the Commission under s 5 refer to "human rights" generally in s 5(1)(a), "any matter affecting human rights" in s 5(2)(c), s 5(2)(f) and s 5(2)(k). Compare the function in s 5(2)(l) which is specifically limited to "any group".

2.119 The function contained in s 5(2)(i) relating to the Commission appearing or bringing proceedings including in this Tribunal (under s 92B) as well as other courts (under s 92H) is expressed in general terms and cannot sensibly exclude proceedings brought by or concerning individuals. This is particularly so when read in conjunction with the primary functions in s 5(1)(b).

2.120 The recent various *Zaoui* cases in which the Commission intervened is an example of it being involved in proceedings which involve an individual. Counsel for the defendant are well aware of the Commission's on-going role in this litigation.

2.121 The Commission thus has a role in respect of general public concerns as well as individual concerns.

2.122 The distinction between general public concerns and individual concerns is somewhat artificial in respect of the HRA. Where individuals raise human rights (including discrimination) issues arising from their individual experience the outcome can have a wider or public interest impact. The *Zaoui* litigation is one example of this. It is not controversial to say that the Commission became involved with this

because, though the litigation on its face concerned only one individual, it raised issues of wider public interest.

2.123 Previous discrimination cases brought by individuals also have had this characteristic. This was recognised in ***Transportation Auckland Corporation Ltd v Proceedings Commissioner*** (1998) 4 HRNZ 442, 455. Robertson J said in relation to a case brought under Part 3 of the HRA by a man alleging political opinion discrimination against him (alone) in his workplace:

> "….an important part of the spirit and letter of Human Rights Act is its educative aspect and the creation of preventive measures in respect of any future human rights breaches. …..the discrimination provisions under the Employment Contracts Act 1991 are oriented towards a fair resolution of an individual grievance. There is a wider perspective under the human rights legislation."

2.124 As well as individual cases under Part 3 HRA having a wider impact than simply settling the individual disputes, cases under this Part are clearly not limited to "individual concerns". The ***Hosking*** case referred to above is an example of this.

2.125 As discussed above, Part 3 makes specific provision for class actions in the Tribunal (see s 92B(2) and (6)). This makes clear that Part 3 is not limited to dealing with individual concerns.

2.126 And as discussed above, the ability for the Commission to litigate complaints operates only when a complainant or a person aggrieved has not done so (s 92B(6)).

2.127 Part 3 (now) also contains provisions relating to the functions of the Director of Human Rights Proceedings ("the Director"). One criterion which must be considered by the Director in deciding whether to provide legal representation for proceedings in the Tribunal is whether resolution of the complaint would affect a large group of persons (s 92(2)(b)). Another criterion the Director must consider when making such decisions is whether or not it is in the public interest to provide representation (s 92(2)(h)).

2.128 These criteria apply to all applications received by the Director (both from individual persons and bodies and the Commission) and indicate to him that cases which have these characteristics must be given some priority in terms of who he provides representation to.

2.129 Clearly, these provisions anticipate that proceedings by individual persons or bodies may involve wider or general public interest issues.

2.130 The nature of Part 1A complaints including the justification defence in s 20L HRA will often involve issues of wider public interest. If there was any intention that the Commission had an exclusive role in respect of such issues this would have been stated.

2.131 The defendant suggests at paragraph 48 that public interest groups or other unaffected persons who are concerned about discrimination are not without a remedy. The existence of other mechanisms available under the HRA specifically to the Commission for dealing with human rights issues does not prevent a "complainant" making a "complaint" under s 76(2)(A).

2.132 There is nothing in the HRA which suggests these other mechanisms should be explored or pursued by complainants such as the present plaintiff first prior to, or in substitution of, making a complaint or bringing proceedings.

2.133 Nor should a "complainant" who makes a "complaint" about discrimination be constrained in pursuing the issue they have complained about by decisions by the Commission as to its priorities and available resources to deal with particular issues.

2.134 The defendant suggests that the functions of the Commission in s 5(2)(f), s 5(2)(h) (to hold an enquiry) and s 92E (proceedings following an enquiry) are sufficient for groups such as the present plaintiff. It is noted that in the three and a half years since the 2001 amendments the Commission has held only one inquiry (*Inquiry into Accessible Public Land Transport*) and the Commission's final report is still outstanding. No criticism is made of the Commission, however this indicates that only few matters of public concern can realistically be dealt with it under its inquiry function.

2.135 Without a clear statement in the HRA that matters of general public concern are limited to such processes these alternative means of dealing with discrimination issues cannot be interpreted as providing a compulsory alternative to making complaints and bringing proceedings under Part 3.

2.136 The HRA is clear that proceedings can follow where a complaint by a complainant is unresolved. The issue for the Tribunal is whether this has occurred.

2.137 The Justice and Electoral Committee report on the Human Rights Amendment Bill suggests proceedings should follow where complaints are unresolved. That report also makes clear that the 2001 amendments were clearly aimed at creating a complaints process as a whole intended to be more within the control of the parties themselves (at page 15). This also suggests that complainants should not be limited by decisions made by the Commission.

<u>International practice, NZBORA and "ordinary principles"</u>

2.138 The conclusions made in paragraphs 49 – 51 are not agreed. None of the authorities/instruments referred to provide support for the

submission that a "complainant" for the purposes of the HRA should be limited to being on behalf of an actual aggrieved person.

2.139 The Optional Protocol to the International Covenant on Civil and Political Rights provides the complaints process for complaints of human rights breaches to the United Nations Human Rights Committee. It is agreed that the Optional Protocol limits jurisdiction to bring a Communication to the Human Rights Committee to those who themselves "*claim to be victims of*" human rights violations (article 1). Unlike the NZBORA or the HRA this limitation is specified in the instrument.

2.140 This limit is also specified in instruments/legislation relating to other jurisdictions. Examples are:

- s 7(1) Human Rights Act 1998 (UK) ("the UK HRA") limits proceedings in a court or tribunal: "*only if he is (or would be) a victim of the unlawful act*"

- article 25 of the European Convention on Human Rights limits petitions to being brought by those who are: "*the victim of a violation*".

- clause 24(1) of the Canadian Charter of Rights and Freedoms allows proceedings to be brought by: "*Anyone whose rights or freedoms, as guaranteed by this Charter, have been infringed or denied….*"

- s 46P Human Rights and Equal Opportunity Commission Act 1986 (Australian Commonwealth) which provides:

  "Lodging a complaint

  (1) A written complaint may be lodged with the Commission, alleging unlawful discrimination.
  (2) The complaint may be lodged:
  (a) by a person aggrieved by the alleged unlawful discrimination:
  (i) on that person's own behalf; or
  (ii) on behalf of that person and one or more other persons who are also aggrieved by the alleged unlawful discrimination; or
  (b) by 2 or more persons aggrieved by the alleged unlawful discrimination:
  (i) on their own behalf; or
  (ii) on behalf of themselves and one or more other persons who are also aggrieved by the alleged unlawful discrimination; or
  (c) by a person or trade union on behalf of one or more other persons aggrieved by the alleged unlawful discrimination.
  (3) A person who is a class member for a representative complaint is not entitled to lodge a separate complaint in respect of the same subject matter."

2.141 Concerning the limit on standing in the UK HRA the plaintiff notes the comments in Clayton and Tomlinson *The Law of Human Rights,* Oxford University Press, 2000, paragraphs 3.84 – 3.86. The authors say that

during the passage of the UK Human Rights Bill: "*there was considerable disquiet about the restrictive definition of standing*". They suggest that limiting standing to victims is appropriate in relation to a supra-national court (the European Court of Human Rights) as the latter should not interfere in domestic decision making unless the complainant is directly affected (paragraph 3.84). The plaintiff suggests that this argument would equally apply to the Optional Protocol which the defendant specifically relies upon.

2.142 The authors go on to say: "*This principle has no direct application to a domestic human rights instrument*". The authors compare the restricted definition on standing in the UK HRA with the wider test available in respect of judicial review. They note that the courts have given standing in the latter area: "*a generous interpretation*". The authors discuss possible undesirable consequences of this difference including that: "*It may also provide insufficient access to justice to meet the basic objectives of the Human Rights Act*" (citing J Miles *Standing Under the Human Rights Act 1998: Theories of Rights Enforcement and the Nature of Public Law Adjudication* [2000] 59 Cam LJ 133).

2.143 The authors also note that in the third reading of the UK Bill the Government declined to support an amendment to the Bill (which it appears would have widened standing under the Bill) which had been proposed by Lord Lester and supported by Lord Slynn, Lord Simon and Lord Ackner.

2.144 The key difference between the HRA (and the NZBORA) and the instruments and legislation discussed above is that these all specify some form of limitation on who can complain and/or bring proceedings. Given the number of examples from overseas where this occurs it is surprising that s 76(2)(a) was not specifically limited in some manner as part of the 2001 amendments, including in the way the defendant suggests, if this was Parliament's intention. On this point the plaintiff refers back to the *Carrington* case where McGechan stated: "*the silence is telling*" (page 141).

2.145 The defendant is asking for a limitation to be read into the HRA though it has not provided any examples of any similar limitations being read into human rights legislation. There are good reasons why it is not appropriate to read such a limit into s 76(2)(a) (or s 92B(1)) HRA.

2.146 The first reason is that it is clear that this was not intended by Parliament when enacting the NZBORA upon which Part 1A of the HRA is largely based. This is demonstrated by an analysis of A Bill of Rights for New Zealand – A White Paper (1985) ("the White Paper"). Paragraph 10.2 of the White Paper explains that the (then draft) NZBORA is closely based on the text of the Canadian Charter of Human Rights ("the Canadian Charter").

2.147 Further, the draft NZBORA contained in the White Paper includes a provision very similar to that in s 24 of the Canadian Charter (relied on by the defendant) which would have limited bringing proceedings to those "*whose rights and freedoms as guaranteed by this Bill of Rights have been infringed or denied*". Only those persons may apply to a court to obtain a remedy for the breach. (Refer to clause 25 of the draft Bill of Rights at page 114 of the White Paper.) This limitation on those who are able to bring proceedings does not appear in the enacted NZBORA and it can be reasonably presumed that for whatever reason this was not considered appropriate. This extract makes clear that Parliament was aware of at least one jurisdiction where such a limit was applied.

2.148 It is submitted that it is most unlikely that courts would read such a limitation into the NZBORA when the point has been considered and rejected by Parliament. It is further submitted that to read such a limitation into the HRA in respect of Part 1A claims in particular would be inconsistent.

2.149 At paragraph 50 of the defendant's submissions the submission is made that NZBORA is limited to claims by those who are either the victim of the breach or those who are bringing the claim "at least on behalf of" the victim and an authority for this proposition is cited. *R v Bruhns* (1994) 11 CRNZ 656 does not support this proposition. That case concerns the criminal process protections under NZBORA and the remedy of exclusion of evidence that can be granted by the courts when an individual suspect/accused is not accorded those protections. The criminal process protections in NZBORA clearly apply only to suspects/accused persons and not to other witnesses interviewed by the police. This is clear on the face of those provisions as is not the case in relation to other provisions in NZBORA such as s 19 nor to the provisions under the HRA in dispute.

2.150 The defendant has not provided any authority for a general limitation as to standing applying to the NZBORA. Neither Rishworth (et al) *The New Zealand Bill of Rights*, Oxford University Press, 2004 nor Joseph *Constitutional and Administrative Law in New Zealand*, second edition, Brookers, 2001 appear to contain any reference to limits on standing under either the NZBORA or the HRA.

2.151 At paragraph 51 the defendant refers to Rishworth's book (at page 374) as supporting the proposition that civil and political rights, in particular the right to be free from discrimination, are individual rights. It is correct that individuals are affected by breaches of human rights but in the case of all of the prohibited grounds of discrimination this is because of a personal characteristic which they share with a group of others. Rishworth recognises this point and says (at page 374): "*The right is an individual right, but claims of discrimination will often be asserted by groups or on the basis of a person's membership in a group. …..the concept of group disadvantage is relevant to the right*

to freedom from discrimination". The substantive claim in the present case concerns an allegation of group disadvantage. This type of claim appears to be recognised by Rishworth as a proper type of claim in the discrimination area at least.

2.152 The second reason for not reading in the limitation argued by the defendant is that international practice is not consistent on this point. There are international examples where wider categories of persons are able to make complaints and bring proceedings relating to human rights breaches including discrimination.

2.153 One example is the Canadian Human Rights Act (consolidated in 1985). Similarly to New Zealand's HRA, this Act sets up and provides functions for the Canadian Human Rights Commission, provides for a complaints process limited to discrimination complaints and sets up the Canadian Human Rights Tribunal. It also provides that Tribunal with the power to hold "inquiries" which are similar to proceedings before the New Zealand Tribunal in that it decides whether complaints are substantiated and can impose remedies.

2.154 The jurisdiction provision equivalent to our s 76(2)(a) is s 40.

2.155 Relevantly, s 40 provides the jurisdiction for the Canadian Commission to accept complaints. This is not limited to persons who have themselves suffered a violation of their rights. Rather, s 40(1) provides that "*any individual or group of individuals having reasonable grounds for believing that a person is engaging or has engaged in a discriminatory practice may file with the Commission a complaint* …".

2.156 Pursuant to s 40(2) the Commission may refuse to deal with a complaint if it is "*made by someone other than the individual who is alleged to be the victim of the discriminatory practice to which the complaint relates* …" unless the victim consents. In other words if the relevant victim consents the Commission must deal with the complaint (but note that the victim is not required to make a complaint themselves or substitute for the non-affected complainant) but if the victim does not consent the Commission still has a discretion to deal with the complaint.

2.157 Once complaints have been accepted by the Canadian Commission these complaints can (subject to first going through the Canadian Commission's processes) be heard by the Tribunal. The equivalent of our s 92B(1) is s 49. Though it is noted that this provision provides the Canadian Tribunal with a wide discretion as to whether or not to commence an inquiry into a complaint.

2.158 Another example is contained in the Constitution of the Republic of South Africa which provides in s 38 (which is contained in the Bill of Rights section of the Constitution) the widest specific provision (that the

plaintiff's research has located) relating to who is entitled to enforce rights under that Constitution:

> "Enforcement of rights
>
> 38. Anyone listed in this section has the right to approach a competent court, alleging that a right in the Bill of Rights has been infringed or threatened, and the court may grant appropriate relief, including a declaration of rights. The persons who may approach a court are -
>
> a. anyone acting in their own interest;
> b. anyone acting on behalf of another person who cannot act in their own name;
> c. anyone acting as a member of, or in the interest of, a group or class of persons;
> d. anyone acting in the public interest; and
> e. an association acting in the interest of its members."

2.159 The South African Constitution specifically provides for the widest range of persons and bodies to challenge human rights violations.

2.160 As can be seen from the international examples discussed above international practice varies as to who can make complaints and/or bring proceedings about human rights breaches. It is submitted that the Tribunal should interpret s 76(2)(a) HRA in line with the accepted principles of interpretation of human rights legislation in New Zealand and that international practice, because it varies, provides little assistance to the Tribunal.

2.161 The third reason the terms "complaint" and "complainant" should not be read in a restricted manner is that such a limit does not apply at common law. Parliament cannot have intended such a result without clear words to this effect. As shown by some of the examples discussed above (both in other New Zealand legislation and in overseas) it could have restricted these terms if it had intended this. The wide tests applying at common law are discussed in detail below.

2.162 Paragraph 52 of the defendant's submissions is agreed. However, it is not clear how this supports the reading in of a limit to the ordinary meaning of the terms "complainant" and "complaint" in the HRA particularly given the principle of giving human rights legislation a wide and purposive interpretation.

2.163 Referring to paragraph 53 the plaintiff is not asking the Tribunal to act in a purely advisory role but rather to consider and decide upon the provisions of Part 1A along with the evidence which will be provided at the substantive hearing. This submission by the defendant appears to overlap with the hypothetical issue which is discussed in detail further below along with the two cases referred to at paragraph 53.

2.164 It is not clear but the defendant may also be suggesting at paragraph 53 that the issue raised in the substantive claim in the present proceedings is not justiciable. Justiciability does not only concern

whether a claim is too hypothetical (which is discussed below). Wider issues of justiciability, for example whether the plaintiff has a significant personal or private interest, were dealt with in some detail in the defendant's draft submissions. However, as these issues are not dealt with explicitly in the submissions now filed by the defendant the plaintiff will not respond to these.

2.165 However it is noted that justiciability is a common law concept and nothing the defendant has referred to provides authority for this Tribunal to apply common law rules relating to standing or justiciability in the context of a detailed statutory framework under the HRA.

Whether the plaintiff's interpretation is impracticable

2.166 Referring to the first sentence of paragraph 54 of the defendant's submissions the plaintiff submits as discussed above that the ordinary meaning of the words of s 76(2)(a) and s 92B(1) given a wide and purposive interpretation do have the result suggested by the defendant in that paragraph.

2.167 From paragraphs 54 – 62 the defendant then raises a number of issues which include:

(1) The implicit undesirability of "busybodies" bringing proceedings (paragraphs 54 & 59).

(2) Responsible public interest groups being allowed standing at common law (paragraph 55 – also see paragraph 56).

(3) The implicit undesirability of allowing those with "no real interest" to bring proceedings (paragraphs 56 & 62).

(4) The confining of standing at common law to where it is necessary to protect the public interest and there is no other realistic prospect of addressing the legal issues of significant public interest (paragraph 56).

(5) Ensuring efficient use of judicial resources and the avoidance of unnecessary litigation (paragraphs 57, 58 & 60).

(6) The undesirability of litigation which lies on the fringes of justiciability due to its political or philosophical character (paragraph 59).

(7) Not involving parties in cost, delay and harassment of unwarranted litigation (paragraph 59).

(8) Concerns about the hypothetical and abstract nature of some proceedings (paragraph 61).

2.168 These issues as well as the cases referred to by the defendant in paragraph 56 do not so much raise practical issues but rather relate to principles which have been previously recognised as relevant to standing and justiciability at common law as well as in respect of litigation under the Canadian Charter.

2.169 The first question for the Tribunal is whether these issues are at all relevant to the clear statutory framework it has before it namely s 76(2)(a) and s 92B(1) (which together define who has standing to bring proceedings under the HRA) and Part 1A (which defines the subject matter which is justiciable in this Tribunal under the HRA).

2.170 It is submitted it cannot be correct that the standing and justiciability provisions in the HRA itself are to be read subject to all the issues mentioned in the defendant's submissions at paragraphs 54 - 62. The question then is to what extent the common law can assist this Tribunal with interpreting the HRA provisions; for example are there gaps or ambiguities in the HRA provisions relating to standing and justiciability which need to be filled or clarified. The defendant needs to clarify to what extent it believes the common law rules might assist the Tribunal to interpret the relevant provisions in the HRA.

2.171 The plaintiff submits that the common law is of little assistance to this Tribunal, given the clear statutory framework around jurisdiction, in particular concerning standing and justiciability, except to the extent of providing a comparison which argues against restricting standing under the HRA without clear words to this effect. However the issues raised by the defendant will now be addressed. Before doing so the case *Moxon v Casino Control Authority* (unreported, High Court, Fisher J, M324/99) will be discussed. This High Court decision considered most of the cases referred to at paragraph 56 of the defendant's submissions.

2.172 First it is noted that Fisher J decided that all plaintiffs in the *Moxon* case had standing.

2.173 Second, it is noted that standing was not challenged in that case in respect of two plaintiffs who had been granted party status by the Casino Control Authority at the licence hearing, the decision arising from which was being challenged in the High Court (see paragraph [98]). It is submitted that these two plaintiffs are most similar to the plaintiff in the present case. This is because both the two *Moxon* plaintiffs and the present plaintiff were both parties to a process concerning the matters at issue prior to the challenge in court or this Tribunal respectively. As well, the two *Moxon* plaintiffs and the current plaintiff had status in respect of the processes available prior to proceedings pursuant to a statutory provision in the relevant legislation. In the *Moxon* case this is s 4A Casino Control Act 1990 (see paragraph [109] of the *Moxon* decision) and in the present case s 76(2)(a) HRA.

2.174 Thus if the Tribunal accepts the plaintiff's earlier submission that it is a "complainant" who made a "complaint" pursuant to s 76(2)(a) HRA, and if the Tribunal considers it must go further than this and as well consider the common law rules relating to standing and justiciability; the ***Moxon*** case is authority for being involved in an earlier part of a statutory process as being sufficient for standing at common law. Therefore the common law principles which Fisher J then goes on to discuss are irrelevant to the present case. However, for completeness the points set out by Fisher J will now be addressed.

2.175 Referring to paragraph [99] of Fisher J's decision, it is submitted that the present case cannot be described as:

- "unnecessary"; or
- "unwarranted"; or
- lying "on the fringes of justiciability due to the political or philosophical character" of the proceedings (Part 1A makes clear that legislation is justiciable in this Tribunal where discrimination allegations are involved and it is expected that the issues which will arise under Part 1A will sometimes relate to political decisions concerning for example targeting of funding – the political decisions themselves are not what will be in issue but whether these are discriminatory and if so whether they are justified); or
- being taken by "busybodies"; or
- a case where the plaintiff seeks to be added as an "additional party" where the issues would be adequately traversed by others and which would fruitlessly add to cost and delay.

2.176 Though the defendant's submissions mention some of these points the submissions do not directly argue that any of these apply to the present case. This needs to be clarified by the defendant.

2.177 Fisher J states further at paragraph [100] that: "*There is also a public interest in judicial intervention to prevent or remedy unlawful actions affecting the community at* large". And further because standing is ultimately procedural rather than substantive even in "*marginal cases*" standing should be favoured and important public interests not be allowed to be passed over without proper consideration (paragraph [100]).

2.178 A further relevant case not referred to by the defendant but referred to by Fisher J is ***Murray v Whakatane District Council*** (unreported, High Court, 2 July 1997, CP20/96). In that decision Elias J said: "*Any person able to point to a breach of the law by a public authority has access to the courts to raise the concern*" (at page 41).

2.179 The points then mentioned by Fisher J which he says weigh in favour of granting standing all (with one exception) apply to the present plaintiff. These are:

- Standing will usually be granted where the applicant has a significant personal or private interest beyond that shared by the public (paragraph [103]).

- Where the applicant cannot point to any personal or private interest the fundamental question is whether standing is necessary or desirable in order to protect the public interest and there will be a strong case for standing if there is no other realistic prospect of addressing legal issues of significant public interest (paragraph [104]) (this point is dealt with below).

- Responsible public interest groups representing a relevant aspect of the public interest have a strong case for standing where the decision can be expected to have community impact (paragraph [105]) (this point is dealt with below).

- Different considerations apply where there are many applicants representing the same public interest (paragraph [106]) (this point does not apply to the present case).

2.180 The one exception which it is agreed does not apply to the present plaintiff is that contained in the first bullet point above as it does not have personal or private interest beyond that shared by the public. However, it is noted that this one point is not decisive but is recognised by Fisher J as redundant if the second bullet point above applies. It is noted that the defendant is not pursuing this point as it did in its earlier draft submissions.

2.181 At paragraph [102] of ***Moxon*** Fisher J raises a further issue. He says that standing cannot be decided in the abstract and unless the answer is obvious the question will need to be considered in its full legal and factual context.

2.182 On this point in the ***Murray*** decision Elias J said: "*in general, questions of standing will normally require examination of the substantive issue to establish the legal and factual context*" (page 41). Further: "*This flexible approach promotes the application of law in the performance of public functions*" (page 41). Her Honour discusses further the importance of allowing claims alleging breaches of the law by public authorities to be heard by the courts (pages 41 and 42).

2.183 Thus, if the Tribunal decides that the common law rules relating to standing are relevant to its jurisdiction under the HRA (which is a question it can decide now on the basis of the submissions filed by both parties), it is not in a position at this time to decide whether the present plaintiff has standing at common law in the present case. The

full legal and factual context is not before the Tribunal. Refer to ***Moxon*** where Fisher J says that deciding standing after the substantive hearing (while not desirable) will "*often be unavoidable*" (paragraph [99]).

2.184 It is submitted that these two High Court decisions strongly suggest that the appropriate course for the Tribunal, if it considers the common law principles discussed above relating to standing are relevant in terms of limiting the terms "complainant" and "complaint" for the purposes of Part 3 of the HRA, is to reserve the issue of whether the present plaintiff has standing to closing submissions following the substantive hearing. Though it is submitted that the Tribunal is in a position now to decide the first question of whether the common law rules relating to standing are relevant or applicable to the HRA and the plaintiff requests that it do so.

2.185 These submissions will now discuss in turn the particular issues raised by the defendant as matters of impracticability but which are really issues relating to standing and justiciability at common law and in respect of litigation under the Canadian Charter.

"Busybodies"

2.186 The defendant suggests a wide interpretation of the terms "complainant" and "complaint" would allow "mere busybodies" to bring proceedings before the Tribunal and implicitly that this is undesirable. Certainly, Fisher J suggests that if a plaintiff is a busybody this weighs against being granted standing at common law.

2.187 The defendant' submissions mention "busybodies" at paragraphs 46, 54 and 59.

2.188 The defendant has not however put forward any evidence to indicate that the present plaintiff can be considered a mere busybody. The defendant needs to clarify whether it is arguing this point in relation to the present plaintiff. This point has been covered above as it was raised earlier by the defendant.

Responsible public interest groups

2.189 The defendant says at paragraph 55 that whether the plaintiff is a responsible public interest group is not relevant. It is agreed that this point is not directly relevant in the present case however two questions need to be answered by the defendant:

(1) It has raised several other common law principles which it presumably sees as relevant to this Tribunal's jurisdiction but has not explained why this is so; and

(2) In particular in reference to the common law principles it has raised the defendant has not addressed the question of why standing under the HRA (s 76(2)(a) and s 92B(1)) without clear words within the Act itself should be given a more restrictive interpretation than standing available at common law in particular to responsible public interest groups raising issues of important public interest.

2.190 At common law responsible public interest groups representing a relevant aspect of the public interest may be granted standing to bring proceedings even where they are not directly affected by the subject matter of the proceedings. In *Environmental Defence Society* the Court of Appeal said in respect of the appellants in that case: "*Both are bodies representing some relevant aspect of the public interest, the Environmental Defence Society being concerned with environmental matters generally, the Royal Forest and Bird Protection Society with a more limited class of such matters*" (at page 220).

2.191 There is unfortunately no reference to the type of evidence which was available in that case to the Court upon which to make this assessment. The plaintiff in the present case relies upon the documents contained in the **Bundle pages 10 - 60**.

2.192 CPAG is a responsible public interest group representing a relevant aspect of the public interest. It has been concerned with poverty issues including involving children for around 10 years. The issue at the heart of the substantive proceeding involves the poorest families being exempt by tax legislation from eligibility for a payment targeted at other low income families to assist with raising children.

2.193 CPAG's work has included research, publications, lobbying and other involvement with issues around income and benefit levels for that lengthy period.

2.194 It is submitted that the present plaintiff is a responsible public interest group representing a relevant aspect of the public interest to an extent at least equivalent to the appellants in the *Environmental Defence Society* case. It is noted that the defendant has not taken issue with this point as was the case in its earlier draft submissions.

2.195 The Court of Appeal said further: "… *the proceedings challenge the legality of Government action …. and we see no reason why it must be left to individuals directly affected to undertake the burden. In the exercise of the Court's discretion responsible public interest groups may be accepted as having sufficient standing….*" (at page 220). The Court of Appeal cites with approval the comments by Lord Diplock in the House of Lords decision *Inland Revenue Commissioners* case at pages 104 and 107, who says in relation to challenges against government departments or public authorities who are transgressing the law, or are about to transgress it, in a way which offends or injures thousands of Her Majesty's subjects:

"*To revert to technical restrictions on locus standi to prevent this that were current more than thirty years ago or more would be to reverse that progress towards a comprehensive system of administrative law that I regard as having been one of the greatest achievements of the English courts in my judicial lifetime*".

And further:

"*It would, in my view, be a grave lacuna in our system of public law if a pressure group, like the federation, or even a single public spirited tax payer, were prevented by outdated technical rules of locus standi from bringing the matter to the attention of the court to vindicate the rule of law and get the unlawful conduct stopped. ……officers or departments of central government …are responsible to a court of justice for the lawfulness of what they do, and of that the court is the only judge*". (Both quotes from page 221 *Environmental Defence Society* case.)

2.196 Referring to page 221 of the *Environmental Defence Society* case, it is submitted that the present case involves an important issue alleging unlawful conduct by the Government which at common law would be accepted as a proper subject for scrutiny by the courts. Given the wide terms of Part 1A of the HRA such issues are clearly appropriate for scrutiny by this Tribunal as to any discriminatory effect.

2.197 In *Moxon* Fisher J discusses responsible public interest groups representing a relevant aspect of the public interest which he says "*have a strong case for standing*" (paragraph [105] - emphasis added). His Honour refers to the Court of Appeal decision in the *Environmental Defence Society* case and the decision in *Murray*. He refers to both decisions again at paragraph [113] and says: "*I would not confine the principles referred to in those cases to resource management*".

2.198 The plaintiff accepts that the Government is entitled to make policy decisions concerning targeting of assistance including in respect of poor families. However, via Part 1A Parliament has given this Tribunal a role to ensure that such decisions are not discriminatory or if so that these are justifiable in a free and democratic society. Scrutiny of such issues is clearly intended by Part 1A similarly to the common law rules in favour of standing discussed in the *Environmental Defence Society* case.

"No real interest" in the proceedings

2.199 It is not clear whether this point is raised as a repeat of the actual aggrieved persons or affected persons point which is discussed at length above.

2.200 If not it is submitted that the plaintiff does have a real interest in these proceedings consistent with its objectives as an incorporated society as well as the work it has done in the area of child poverty over many years **[refer Bundle pages 10 - 60]**.

Protection of the public interest and where there is no other realistic prospect of addressing legal issue of significant interest

2.201 Fisher J says in *Moxon* that responsible public interest groups representing a relevant aspect of the public interest have a strong case for standing where the decision can be expected to have community impact (paragraph [105]).

2.202 Given that the issues at the heart of the substantive claim concern the ineligibility of the poorest families, including 250,000 children, for certain types of Government assistance aimed at supporting the raising of children it is clear that this case will have community impact. It follows that the substantive claim is clearly in the public interest.

2.203 The question for the Tribunal thus is whether there is any real prospect of the legal issues raised by the substantive claim being addressed by other means.

2.204 There is no evidence before the Tribunal that any affected individuals or the Commission have done or will do so.

2.205 Fisher J says in the *Moxon* case there will be "*a strong case for standing if there is no other realistic prospect of addressing issues of serious public interest*" and further "*even an individual having no interest beyond the norm may sue if the public illegality would otherwise continue*". (paragraph [104] – emphasis added).

2.206 The second statement by Fisher J is consistent with the strong statements supporting access to the courts to raise issues of public concern in the *Murray* and *Environmental Defence Society* cases. In the latter case the Court of Appeal makes the further point: "*we see no reason why it must be left to individuals directly affected to undertake the burden*".

2.207 The decision *Canadian Council of Churches v Canada (Minister of Employment and Immigration)* [1992] 1 SCR 236 (referred to at paragraph 56 of the defendant's submissions) suggests that one factor to be considered in relation to standing under the Canadian Charter is whether there is another reasonable and effective way to bring the issue before the Court. The appellant in that case lost on this point as many refugee claimants had appealed the issues the appellant in that case wished the Court to consider and importantly because this meant that the legislation was not immunised from challenge which the Supreme Court said was a factor in favour of granting standing (pages 255 - 256).

2.208 The Supreme Court of Canada also said: "*standing is not required when, on the balance of probabilities, it can be shown that the measure will be subject to attack by a private litigant*" (page 252). This is not the situation in the present case.

2.209 As well concerning the *Canadian Council of Churches* case the Supreme Court appears concerned with "*marginal or redundant suits*" (page 252), which the present case is not, nor has the defendant submitted any reasons for categorising it as such.

2.210 Second, and importantly, the Supreme Court emphasises that the purpose of granting standing is to prevent the immunisation of legislation or public acts from challenge (the defendant agrees with this at paragraph 56 of its submissions). The Court also emphasises that public standing principles in Canada should be given a large and generous interpretation. These statements are in line with the comments in the *Moxon* and *Environmental Defence Society* cases.

2.211 Third, the points the Canadian Supreme Court sets out as relevant to deciding whether to grant standing do not support the defendant's submission that the present plaintiff should not be granted standing.

2.212 The other factors the Supreme Court listed as relevant to standing (pages 253 – 255) are:

- Whether there is a serious issue raised by the substantive claim in the present proceeding as to the validity of the legislation in question. The plaintiff submits that there is in the present case because the Government's own numbers show that approximately 250,000 children in families receiving benefits are affected by the legislation which on its face clearly differentiates between beneficiary families and others (being the first element of discrimination). The defendant has not provided any reasons as to why it believes there is not a serious issue raised by the substantive claim.

- If a plaintiff is not directly affected (which it is agreed the present plaintiff is not) it needs to show it has a genuine interest in the validity of the legislation at issue before the court. The present plaintiff does have a genuine interest in the issue raised by the substantive claim, namely a longstanding involvement in issues concerning child poverty and government assistance to the poorest children and families in New Zealand. The distinction the defendant has tried to make at 63.3 is narrow and unconvincing. The effect the plaintiff claims results from the exemption of certain families and their children from receiving the CTC or IWP comes well within its objectives which focus upon children living in poverty. Note the appellant in the Canadian case was found to meet this test as did the appellants in the *Environmental Defence Society* case.

- Whether there is another reasonable and effective means of bringing the issue before the Tribunal. In the present case there is no evidence before the Tribunal that any persons

directly affected by the CTC and IWP have complained to the Commission, or commenced litigation, as the refugee claimants in the Canadian case had. To refuse standing to the present plaintiff would in effect allow immunisation of the legislation in issue until some indeterminate time in the future which the Supreme Court says should not occur.

2.213 It is accepted that there is no blanket right to standing in Canada (*Canadian Council of Churches* case at page 252). This is supported by the analysis of factors relevant to determining standing at common law in the New Zealand cases which have been discussed above.

2.214 But as has been submitted above this is not relevant to circumstances where a clear statutory jurisdictional framework is provided as in the HRA. However, if the principles discussed above are of any relevance to this Tribunal in determining whether a plaintiff has standing under the HRA, it is submitted that the present plaintiff falls well within the requirements for standing in New Zealand (at common law) and Canada (in respect of the Canadian Charter).

2.215 The other Canadian decision referred to by the defendant: *Hy v Zel* [1993] 3 SCR 675 considered the issue of standing in the absence of a substantive hearing and thus there was an absence of concrete facts upon which to consider the legal issues raised. This was the point that was of most concern to the Court (page 693). The need for a proper factual context upon which to consider the legal issues in the substantive claim is agreed by the plaintiff. The Tribunal is properly concerned to ensure this eventuates. This issue is discussed further below.

2.216 In respect of the realistic prospect of other proceedings point the defendant refers to one other New Zealand case (at paragraph 56): *Finnegan v New Zealand Rugby Football Union* [1985] 1 NZLR 159. This case applied the Court of Appeal decision in the *Environmental Defence Society* case. It involved consideration of standing to bring proceedings against a private body and thus concerns the application of the general approach in the *Environmental Defence Society* case to that situation. Therefore the *Finnegan* case does not assist this Tribunal.

2.217 The defendant has not pointed to anything which suggests that there is another realistic prospect of addressing the legal issues which have been raised in the substantive proceedings and which are of significant public interest affecting the poorest children in our society.

2.218 The plaintiff is not aware of any such children or their parents making complaints to the Commission about the issue concerned in these proceedings. Therefore no alternative litigation is in contemplation. To refuse standing in the present case would be to at least delay any challenge to the legislation in issue (which if the plaintiff's claim is

correct will continue to have a serious detrimental effect on a large number of persons) and perhaps have the result that it is never challenged. Both the *Canadian Council of Churches* and *Moxon* cases are authority for not allowing this to result from denial of standing

Efficient use of judicial resources

2.219 The defendant has not put forward any reasons why the present proceeding is not an efficient use of judicial resources so it is difficult to respond to this point if this is the defendant's view. This point needs to be clarified.

2.220 As well there is no evidence before the Tribunal that the flood gates are opening or that unacceptable delays will arise in the Tribunal.

2.221 The present proceeding is the first Part 1A case before this Tribunal (known to the plaintiff) and as well the plaintiff is not aware of any other cases which are imminent.

Litigation which lies on the fringes of justiciability due to its political or philosophical nature

2.222 This point is referred to in *Moxon*. However, again the defendant needs to clarify whether it considers this point applies in the present case particularly given the broad nature of Part 1A.

Cost, delay and harassment of unwarranted litigation

2.223 The defendant needs to clarify whether it believes this point applies in the present case. It is difficult to respond to the point in the absence of reasons the defendant views as bringing the present proceedings within this category.

Hypothetical and abstract proceedings

2.224 The issue of whether the substantive claim is hypothetical or abstract or whether there will be an appropriate factual context is referred to at several places in the defendant's submissions. These include at paragraphs 15, 41, 47, 53 and 61.

2.225 In line with the *Moxon* and *Murray* decisions it is submitted that this point cannot be adequately assessed at this point given that the full factual and legal context is not before the Tribunal. But for completeness the points raised by the defendant will now be discussed.

2.226 Referring to paragraph 61 of the defendant's submissions which refers to the *Hy and Zel* case, in the present case the plaintiff is not asking the Tribunal to dispense with a factual background.

2.227 It is agreed that the substantive claim must be heard in the context of a relevant factual background. What facts and evidence will be relevant will be determined by the legal tests for discrimination and justification under Part 1A.

2.228 Given that this case will be the first Part 1A case heard by the Tribunal and those legal tests have yet to be considered in the context of a discrimination case, the plaintiff is well aware that it will need to present a factually rich case, in order that the legal tests can be properly considered.

2.229 Concerning the legal tests which will be the subject of the substantive hearing it is expected that the defendant will agree that proving discrimination under Part 1A is likely to involve in general terms a plaintiff establishing three points:

- Does the legislation (or policy or practice etc) involve differentiation between, or different treatment of, one individual or group and another individual or group;

- Does the differentiation or different treatment arise from a prohibited ground of discrimination;

- Does the differentiation or different treatment result in disadvantage (in this case as a result of being excluded from receiving the CTC or IWP).

2.230 The first two points are not expected to always involve issues of fact. In the present case the Tribunal will simply need to consider the words of the allegedly discriminatory legislation and determine whether it differentiates between one group and another on the basis of a prohibited ground. In the present case the legislation on its face does so.

2.231 In respect of the third point it is agreed that the Tribunal will need a factual background to decide whether the differentiation in the legislation in issue results in disadvantage to those exempted from receiving the CTC or IWP. As set out in the statement of claim the plaintiff claims it does. Examples of evidence (anticipated at this stage) which the plaintiff will bring to the Tribunal to assist it to decide this point will include:

- Information from government agency websites (it is hoped more precise information will be available following discovery from the defendant) showing the levels of various benefits including the CTC up to April next year and the IWP up until June 2008;

- Government agency and other research showing the disadvantages suffered by children in families reliant on benefits including when compared to families earning similar levels of income by way of

wages (the latter are entitled to the CTC or IWP, the former are not);

- Evidence from medical and other professionals working with impoverished families as to their observations of the effect of low incomes particularly on children;

- Evidence from academic and other witnesses concerning the difference receiving the CTC or the IWP would make in terms of living standards for affected families and their children;

- Evidence from affected persons if available;

- Information and research from overseas relating to the implementation of similar policies in other countries.

2.232 As can be seen there will be no factual vacuum in the substantive hearing of the present case. It is correct that the evidence in this case will not in the main relate to personal experiences as occurs in relation to most cases under Part 2 of the HRA. Rather, as is anticipated will be the case in respect of many Part 1A cases, this case will instead involve consideration of social and economic research as well as a substantial component of expert evidence.

2.233 In respect of the justification defence it is expected that the Attorney-General will provide evidence which supports the claim that the ineligibility of families reliant on benefits to receive the CTC or IWP provides incentives to work etc (see justification points listed at paragraph 22 of the statement of defence). This may include:

- Recent policy work and/or research which was presumably completed and/or relied upon to support the continued differentiation between beneficiary families and working families in respect of the recently enacted IWP.

2.234 In respect of the justification defence the plaintiff will rely on evidence including:

- Information and research from overseas which show alternative means of achieving the policy goals of the legislation in issue; some of which have been implemented by other countries but which do not have the discriminatory effect. This is directly relevant to what will be the plaintiff's submission in respect of the justification defence: that governments can discriminate when this can be justified but the means chosen to promote a policy goal must be the least discriminatory possible.

2.235 Thus the substantive claim is not hypothetical or abstract and nor will it be heard in a factual vacuum. Part 1A proceedings will be different in terms of the nature of evidence to be considered by the Tribunal

compared to the personal experience focussed discrimination cases of the past.

2.236 Paragraph 53 of the defendant's submissions also refers to two cases which will now be discussed. Neither of these cases are analogous to the present case.

2.237 In *Auckland City Council v Attorney-General* [1995] 1 NZLR 219 the High Court considered the circumstances of being asked to provide what was in effect an advisory opinion relating to certain statutory provisions which related to the disposition of properties by the Council which it might in the future deem to be surplus lands (pages 222 and 223).

2.238 The High Court referred to a decision *Re Chase* [1989] 1 NZLR 325, 343 in which Henry J referred to a decision of the House of Lords *Russian Commercial and Industrial Bank v British Bank for Foreign Trade Ltd* [1921] 2 AC 438, 448 in which Lord Dunedin said: "*The question must be real and not a theoretical question*". As discussed above the substantive proceeding does not involve a theoretical question but a real question as to allegedly discriminatory legislation and evidence (including research) which shows its demonstrable impact on the poorest families in New Zealand.

2.239 Lord Dunedin also refers to a "*proper contradictor*" (mentioned by the present defendant at paragraph 53) as being "*some one presently existing who has a true interest to oppose the declaration sought*".

2.240 It is submitted this criterion is met in the present case by the Attorney-General representing a Government department who administers the legislation under which the alleged discrimination operates and who recently chose to continue the discrimination which operates in respect of the CTC by continuing this payment (though under a new name: the IWP) as part of the Government's flagship Working for Families package.

2.241 Further this is what was envisaged by the 2001 amendments which made the Attorney-General responsible for Part 1A claims relating to legislation (s 92B(1)(b)).

2.242 *Gazley v Attorney-General* (1995) 8 PRNZ 313 concerns a case which raised "*purely academic*" and "*hypothetical*" questions with "*no factual setting*" (pages 315, 317 and 318). As discussed above, the present case will not do so.

2.243 The court was also concerned in that case that the proceedings were an attempt to re-litigate a separate proceeding (pages 315 and 319). This is not the case in the present case.

Conclusion concerning impracticability points

2.244 The extent to which any common law principles are relevant to the interpretation of the key jurisdictional provisions in the HRA needs to be decided by the Tribunal. The plaintiff says these are only relevant to demonstrate the width of the test for standing at common law, in particular the principle relating to responsible public interest groups raising issues of public interest.

2.245 Referring back to the conclusions at paragraph 55 of the defendant's submissions, concerning the width of persons and bodies that could potentially bring claims to this Tribunal if a wide interpretation is given to the terms "complainant" and "complaint", the plaintiff suggests that there is a middle ground available to the Tribunal. However, this does not relate to jurisdiction but rather to the power to strike out claims which are unlikely to be successful because of lack of evidence for example where a complainant does not want to be involved with the proceedings.

2.246 It is also interesting to note that prior to the 2001 amendments complainants and aggrieved persons had the ability to bring proceedings in this Tribunal even where the complaint was found not to have substance by the Commission - see s 83(4)(a) (now repealed) or where the Proceedings Commissioner had declined to take proceedings – see s 83(4)(b) (now repealed). This potentially allowed claims which had little or no merit to be filed in this Tribunal. It is submitted that the means available to deal with such claims was the strike out application.

2.247 Such an application is available to the defendant in the present case if it believes this case has no merit. It is submitted that the case should not be not permitted to proceed under the guise of limiting jurisdiction, in particular standing, by giving a restricted interpretation to the terms "complainant" and "complaint".

2.248 Lastly, paragraph 58 of the defendant's submissions suggests that hearing the substantive claim could prejudice subsequent challengers of the CTC. This principle is not referred to in any of the New Zealand decisions which rather focus on the need for issues of public importance to be brought before the courts without regard to technical points concerning standing (at common law). This point was mentioned in the ***Hy v Zel*** case but the primary concern of the Supreme Court in that case was not possible prejudice to subsequent challenges but rather the resulting absence of facts in respect of which to consider the issues raised by the appellant in that case (page 693).

2.249 The plaintiff submits that the terms "complainant" and "complaint" for the purposes of Part 3 HRA can be interpreted simply by reference to the ordinary meaning of these words together with a wide and purposive interpretation (in line with the recognised principles of interpretation applying to human rights legislation) and if more than one

meaning is considered to be reasonably available, by the use of s 6 NZBORA, to give a wide interpretation to theses words to allow serious complaints of discrimination to be considered by this Tribunal. This is consistent with the purpose of both the HRA and the NZBORA which were enacted to provide a strong basis for the protection of human rights in our community. The defendant has not raised any strong arguments which support doing otherwise. In particular much of what the defendant has argued relates to evidential issues (which are more properly the subject of a strike out application) and not jurisdictional issues.

3 WHETHER THE DOCTRINE OF RIPENESS APPLIES TO THE IN-WORK PAYMENT

3.1 Paragraphs 64 – 69 of the defendant's submissions concern the agreed fact that the legislative provisions relating to the IWP do not come into force until 1 April 2006.

3.2 The defendant's concern at this point is that, though it appears to agree that the IWP provisions have been enacted, it suggests these should not be able to be the subject of litigation before the Tribunal, until "*a breach has actually* occurred" (paragraph 66), the enactment is "*in force and will have an impact on the rights of a person*" (paragraph 68), and consideration of the IWP at this stage would be "*premature and hypothetical*" (paragraph 69).

3.3 The key jurisdictional provision in the HRA, namely s 76(2)(a), refers only to complaints alleging "*a breach of Part 1A or Part 2 or both*". Further, s 92B(1)(b) provides that proceedings in the Tribunal can include those relating to: *"a breach of Part 1A <u>that is an enactment</u>*" (emphasis added). This subsection simply provides that such proceedings are "*against the Attorney-General or a person or body referred to in section 3(b) of the New Zealand Bill of Rights Act 1990*".

3.4 There is no reference in the HRA to enactments needing to be in force or having operational effect before this Tribunal has jurisdiction to consider these under Part 1A. Nor has the defendant referred to any relevant authorities to support this restrictive interpretation.

3.5 It is noted that "enactment" is not defined in the HRA. However, enactments are clearly covered by Part 1A pursuant to s 20J(1) which provides that Part 1A applies to an "*act or omission*" of certain defined persons and bodies and s 2 which defines "*act*" as including an "*enactment*". There is no clear statement that this term means enactments which have come into force.

3.6 The first point to note is that s 16 of the Constitution Act 1986 provides:

> "A Bill passed by the House of Representatives shall become law when the Sovereign or the Governor-General assents to it and signs it in token of such assent."

3.7 The Interpretation Act 1999 refers to enactments coming into force (for example ss 7, 10 and 11) These provide for operational aspects of the enactment to be set up prior to the enactment coming into force so that on the date the enactment comes into force it can operate effectively from that date.

3.8 The Concise Oxford Dictionary defines an "enactment" as:

> "a law that has been passed".

3.9 Clearly the ordinary meaning of the word enactment is a law which has been passed and pursuant to the Constitution Act 1986 enactments are at this point in time "law".

3.10 The restrictive definition of "enactment" suggested by the defendant would have the effect of requiring any harm caused by enactments to commence before an issue could be litigated.

3.11 This interpretation, given that litigation takes time and as well it is strongly arguable that the interim relief provision in s 95 HRA could not operate to delay the implementation of things required by legislation, would have the practical effect of affected persons having to suffer a reasonably lengthy period of harm without any prospect of compensation as this remedy is not available in respect of legislation found to be discriminatory perhaps after several appeals. This cannot have been the intention of Parliament without a clear statement to this effect.

3.12 Consider, such an argument in the context of legislation enacted but not yet in force which allegedly discriminates on other grounds such as race or ethnic origin or disability. It cannot be correct in principle that enactments must be in force and affecting people (perhaps for some lengthy period of time and particularly where no injunctive relief is available) before challenges under the HRA can occur.

3.13 Refer to the ***Environmental Defence Society*** case which refers to the House of Lords decision in the ***Inland Revenue Commissioners*** case per Lord Diplock who refers to an earlier judgment of Lord Denning MR which speaks of government departments or public authorities who are "*transgressing the law, or are about to transgress it*" (at page 221 - emphasis added).

3.14 The defendant refers at paragraph 69.1 to two cases which discuss the principle that Bills which are not yet enacted cannot be the subject of litigation.

3.15 The first case ***Te Runanga o Wharekauri Rekohu Inc v Attorney-General*** [1993] 2 NZLR 301 concerned appellants wanting injunctive relief in respect of legislation which was not enacted but was

anticipated as a result of a deed of settlement entered into by the Crown and Maori concerning claims by Maori to fisheries resources.

3.16 The Court referred to "*the established principle of non-interference by the Courts in parliamentary proceedings*" (page 307). And further said this principle "*applies so as to require the Courts to refrain from prohibiting a Minister from introducing a Bill to Parliament*" (page 308).

3.17 The Court said further: "*the proper time for challenging an Act of a representative legislature …. is after the enactment*" (page 308).

3.18 The second case referred to by the defendant *Milroy v Attorney-General* (unreported, Court of Appeal, 11 June 2003, CA197/02) concerned challenges to a decision made by a Minister relating to a settlement proposal for particular Maori claims. The Court said at paragraph [14]: "*The formulation of government policy preparatory to the introduction of legislation is not to be fettered by judicial review*". (Also see paragraph [18].)

3.19 The present case is not at all comparable to these two cases. It is agreed that Bills could not form the basis of litigation in this Tribunal for various reasons in particular because these are not enactments.

3.20 The present case in contrast to these two cases referred to by the defendant concerns an enactment which s 20J(1) read with the definition of "act" in s 2 (along with s 92B(1)(b)) make clear can be the subject of proceedings before this Tribunal.

3.21 This point raises possible evidential issues but is not a jurisdictional issue. One evidential issue which could arise in some cases concerns not being able to adequately assess the claimed disadvantage or effects of some new enactments. This assessment may not be able to be made until the enactment is operational and some period of time has passed to allow the effects of the enactment to manifest. The appropriate remedy in such cases would be a strike out application based on insufficient evidence to establish the claim.

3.22 However, this does not apply to the present case. The IWP provisions do not create a completely new and untested policy of which the effects cannot be reasonably assessed. In such circumstances the defendant's argument on this point might be stronger.

3.23 In the present case the situation is that the aspect the defendant wishes removed from consideration in the proceedings, being the IWP, replaces the CTC which does at present and has since 1996 had an actual effect on those not entitled to receive it. The link between the two payments is clear from s 13 Taxation (Working for Families) Act 2004 which will insert a new s KD 2(2) into the Income Tax Act 2004 from 1 April 2006. That new section provides that a person is entitled to an "*IWP or a CTC*".

3.24 The entitlement to both payments remains the same and thus also arguably do its effects; only the name of the payment will change as well as the amounts payable. The claim cannot thus be described as premature or hypothetical (refer paragraph 69 of the defendant's submissions).

3.25 Concerning the Government's view as to future effects the Ministry of Justice, though without referring to any authority, has said: "*Under the Bill of Rights Act it is immaterial whether this disadvantage has already occurred or whether it is being assumed that it will occur as a result in the future*". (Refer *The Non-discrimination Standards for Government and the Public Sector*, Ministry of Justice, March 2002, page 20.)

3.26 The provisions relating to the IWP have been passed and assented to. These are now reasonably described in terms of the ordinary meaning of this word as being an "enactment" and its effects can reasonably be assessed as being substantially similar to those of the CTC. It is submitted the Tribunal thus has jurisdiction to hear the substantive claim in respect of the IWP.

3.27 The defendant suggests at paragraph 69.2 that the IWP provisions may be amended or repealed before these come into force on 1 April next year. Presumably Parliament intended the legislation it enacted would come into effect in the form enacted. The plaintiff is not aware that there is any intention to amend or repeal the IWP provisions. It would be useful to know if this possibility is being considered by the Government.

3.28 Also, presumably the Government has completed research and other work to predict the effects of the legislation in issue both on those who benefit from the CTC and the IWP as well as those who cannot because of the differentiation made between families who receive benefits and others who do not. This information has not yet been made available to the plaintiff but is expected to be so following discovery prior to the substantive hearing. It is anticipated that this information will be of considerable assistance to this Tribunal in assessing the continuing effects of the IWP once it replaces the CTC.

3.29 Importantly, it is noted that future, actual and practical effects of the provisions relating to the IWP (as well as some other benefits) seem to be sufficiently clear to the Inland Revenue Department because they have published information about the levels of payments to which people will be eligible (in respect of a range of benefits not only the CTC or the IWP) right through to the 2007 – 2008 financial year.

<u>Doctrine of ripeness</u>

3.30 The doctrine of ripeness is referred to at paragraph 4 of the statement of reply as one of the defendant's preliminary issues and at paragraph

17.3 of the defendant's submissions though it has not been dealt with in paragraphs 64 – 69 of the final version of these submissions. However, for completeness the plaintiff considers that the Tribunal should be aware of this doctrine as it specifically concerns the concept of limits on when it is appropriate for the courts to consider Governmental action.

3.31 The doctrine has not received judicial consideration in New Zealand in relation to legislation. It was considered by the High Court in *Zaoui v Attorney-General* [2004] 2 NZLR 339, in relation to the judicial review of statutory powers of decision making, specifically whether judicial review was available at a very early stage of what could be a lengthy series of decision-making processes. However, some principles can be said to apply to the doctrine as it relates to legislation.

3.32 In *Zaoui* Williams J noted that section 4(1) of the Judicature Amendment Act 1972 allowed for judicial review of "*proposed exercise of statutory power*". Clearly this can involve imminent rather than actual "*harm*".

3.33 This part of Williams J's judgment was considered by the Court of Appeal in *Attorney-General v Zaoui* (unreported, 30 September 2004, CA 20/04) by Anderson J, who held at paragraph [19]:

> "…. I am satisfied it is apt to review the Inspector-General's process en route to an appealable determination. It is the case that, as a generalisation, the Courts are diffident about intervening by way of judicial review before a matter is ripe for an available appeal. But an exception must be admitted where the whole process en route to the appealable decision may miscarry, with grave consequences, unless judicial guidance is obtained. There are compelling arguments for intervention in this case where a review by the Inspector-General is entirely unprecedented, where the subject's liberty and convention rights are potentially jeopardised and where the individual must join issue with one hand tied behind his back by an assertion of the existence of classified security information."

3.34 Glazebrook J simply said at paragraph [106] that:

> "… the blanket application of the ripeness doctrine ……is excluded by the Judicature Amendment Act (1972)".

3.35 In other jurisdictions the doctrine of ripeness has been considered in both judicial review and statutory contexts. In simple terms, the doctrine prevents courts from hearing cases that are too premature for a court to make a ruling.

3.36 *Abbott Laboratories* 387 US 136 (1967) concerned the *circa* 1962 exercise of a statutory authority by the US Commissioner of Food and Drugs, in relation to prescription drug labeling.

3.37 In *Abbott Laboratories*, the doctrine of ripeness was expressed thus:

> "(The) basic rationale (of the doctrine of ripeness) is to prevent the courts, through avoidance of premature adjudication, from entangling themselves in abstract

> disagreements over administrative policies, and also to protect the agencies from judicial interference until an administrative decision has been formalized (*sic*) and its effects felt in a concrete way by the challenging parties. The problem is best seen in a twofold aspect, requiring (the Court) to evaluate both the fitness of the issues for judicial decision and the hardship to the parties of withholding court consideration."

3.38 Thus the ***Abbott*** test for ripeness involves two steps:

- Are the issues fit for judicial decision; and
- Would the party seeking relief suffer undue hardship if adjudication were deferred.

3.39 The US Supreme Court has considered "ripeness" in several other decisions. In *Thomas v Union Carbide Agricultural Products Co* 473 US 568 (1985), the Court (citing ***Abbott***) said that:

> " …. "the fitness of the issues for determination" and "the hardship to the parties of withholding court consideration" must inform any analysis of ripeness … "One does not have to await the consummation of threatened injury to obtain preventive relief. If the injury is certainly impending, that is enough" (Quoting *Pennsylvania v West Virginia* 262 US 553, 593 (1923)).

3.40 In *Williamson County Regional Planning Commission v Hamilton Bank of Johnson City* 473 US 172 (1985) the US Supreme Court held that a claim is not ripe unless a final decision has been reached by the government agency in charge of enforcing the regulation. The Court also noted what it had earlier said in *Hodel v Virginia Surface Mining and Reclamation Assn Inc* 452 US 264, that where there are "*other opportunities to obtain administrative relief*", such potential "*confirms the conclusion that the (taking issue) simply is not ripe for judicial resolution*".

3.41 In *Texas v United States* 532 US 296 (1998) the Court cited *Thomas* noting that:

> " … a claim resting upon contingent future events that may not occur as anticipated, or indeed may not occur at all … is not fit for adjudication".

3.42 The Court in *Texas* noted that the problem it had been asked to solve was "*too speculative*" and the hardship in the plaintiff biding its time "*insubstantial*". For those reasons the Court held that the matter was not ripe for adjudication.

3.43 From the above, the following may be distilled:

- The Judicature Amendment Act 1972 allows for judicial review of a "*proposed*" (ie pre-harm) exercise of a statutory power;
- Courts are ***diffident*** about intervening in a matter before a matter is "ripe for an available appeal" (*Zaoui* – Court of Appeal - emphasis added);

- "Ripeness" involves analysing both fitness for determination and hardship (*Abbott*);

- Contingent future events which may not eventuate are not "fit" for adjudication (*Thomas*/*Texas*);

- Alternative remedies restrict ripeness (*Williamson County*);

- Impending injury can ripen an issue (*Pennsylvania*).

3.44 In the present case, the following is clear:

- CTC and IWP are enactments;

- To that extent the democratic process has ended (thus rendering *Milroy* and *Te Runanga o Wharekauri Rekohu* obsolete to the analysis);

- Parliament has made a final decision about the legislation;

- Those excluded by CTC and IWP (ie that group whose interests are represented by the plaintiff) have no alternative remedies available to them to challenge the regimes;

- There are no "contingencies" with respect to the legislation – it clearly identifies who is and who is not eligible;

- There is clearly "impending harm" to the group represented by the plaintiff.

3.45 Importantly, as discussed above the effects of the IWP will be substantially similar to those of the CTC and thus the Tribunal will have evidence relating to nine years of experience with the CTC payment to assess the effects and disadvantage which will continue to be caused by the IWP. Though the effects of some new enactments may not be able to be assessed where an entirely new policy is enacted this does not apply in the present case. The provisions of the IWP are ripe for hearing.

3.46 Though not directly relevant to jurisdiction the plaintiff notes that the provisions relating to the IWP will come into force on 1 April 2006. At the date of the interlocutory hearing this will be only nine months away.

3.47 At this time the CTC will be largely replaced by the IWP. (Refer s 14 Taxation (Working for Families) Act 2004 relating to the new s KDAAAB which will be inserted into the Income Tax Act 2004 from 1 April 2006. This relates to continuation of CTC payments for those who will not be entitled to receive the IWP.) The plaintiff has not been

able to locate figures indicating how many people may still be entitled to receive the CTC after this date. The defendant may be able to provide this information.

3.48 However, at best guess on the basis of the limited information which is available at this point, the plaintiff anticipates that the CTC will be available to only a relatively small number of persons. If the IWP is not included in the substantive proceedings the Tribunal's decision in this case unless the case is heard and a decision released prior to 1 April 2006, will concern a largely redundant payment.

3.49 This could possibly compromise the plaintiff's right of appeal despite on-going harm to the affected persons as the defendant could claim to the High Court that the issue has become largely academic.

4 FOURTH PRELIMINARY POINT RAISED IN STATEMENT OF DEFENCE: EFFECT OF CHILD TAX CREDIT BEING CLAIMABLE BY PRINCIPAL CAREGIVER AND NOT THE CHILDREN TO WHOM THE PRINCIPAL CAREGIVER GIVES CARE

4.1 It is clear that this issue is not a jurisdictional issue in the sense of whether the plaintiff is a "complainant" who has made a "complaint" pursuant to s 76(2)(a) HRA and thus able to bring proceedings in this Tribunal.

4.2 As has been discussed above, the right of the plaintiff to do so or not, is dependant solely upon the interpretation of s 76(2)(a) and s 92B(1) of the HRA.

4.3 Referring to paragraph 5 of the statement of defence, the plaintiff agrees that pursuant to the Income Tax Act 2004 the CTC (as well as the IWP from next April) payments are claimable only by principal caregivers and not the children to whom those principal caregivers provide care.

4.4 However, the provisions in the Income Tax Act 2004 do not determine what subject matter the Tribunal has jurisdiction to consider in proceedings before it.

4.5 Separate from the jurisdictional points discussed above which relate to who can bring proceedings, concerning the subject matter of proceedings, it is clear that the Tribunal can only consider and decide cases involving allegations of discrimination on any of the prohibited grounds provided for in the HRA. The prohibited grounds of discrimination are listed in s 21(1). As well s 21(2) provides:

> "(2) Each of the grounds specified in subsection (1) is a prohibited ground of discrimination, for the purpose of this Act, if –
>
> (a) it pertains to a person or to a relative or associate of a person ….."

(emphasis added)

4.6 Subsection (2) specifies that it applies to the Act as a whole and is not restricted to Part 2 complaints.

4.7 Pursuant to s 21(2) the plaintiff is bringing the substantive proceedings in the interests of the children of principal caregivers (who are not entitled because of their employment status to payment of the CTC or IWP) because they (the children) are relatives or associates of those principal caregivers.

4.8 Section 21(2)(a) has not been considered by either this Tribunal or other courts.

4.9 The plaintiff relies upon the cases requiring the HRA be given a wide and purposive interpretation.

……..
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