



NEW ZEALAND COUNCIL OF TRADE UNIONS

Submission
of the
New Zealand Council of Trade Unions
to the
Transport and Industrial Relations Select
Committee
on the
Employment Relations (Flexible Working
Hours) Amendment Bill

13 July 2005

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Executive Summary

The CTU:

- ? supports the Employment Relations (Flexible Working Hours) Amendment Bill
- ? notes that this Bill proposes eligibility criteria that largely follow those adopted successfully in the UK, where there is already considerable public support to further extend these criteria
- ? supports at least expanding the eligibility criteria by:
 - ✍ deleting the word “full-time” in *clause 4(a)* of the Bill so that parents and guardians providing part-time care to a child are also eligible to make an application for flexible work arrangements and
 - ✍ increasing the upper age limit for a disabled child (as defined in *Clause 4*) from 18 to 21
- ? supports the right to request flexible work being extended to all workers
- ? recommends, as an initial step, extending eligibility to those providing care to a child or adult
- ? recommends amending *Clause 4(a)* of the Bill to redefine a qualifying employee as a employee who has:
 - (a) unpaid caring responsibilities for a child or adult
- ? recommends *new subsection 61A(1)(b)* should then be amended to read:
 - (b) the employee’s purpose for applying for the change is to enable the employee to provide unpaid care to a child or adult
- ? notes this drafting change would also require:
 - ✍ amending *subsection 61A(2)(d)* so that it covers “explaining how the employee meets this purpose, in respect of the child *or adult* concerned” and
 - ✍ deleting *subsection 61A(3)* which requires applications to be made at least 14 days before a child turns 5, or before the child’s 18th birthday if they have a disability.

- ? recommends mirroring the successful UK legislation by introducing the additional right to request flexible working time arrangements that enable a worker to work from home
- ? recommends adding a *new subsection 61(1)(a)(iii)* that allows changes related to:
 - ✍ “where the employee is required to work, as between either the employee’s home or a place of business of the employer”.
- ? supports the ability to make more than one application a year, if the employee’s circumstances change
- ? recommends that *subsection 61A(4)* is amended to read
 - “If an employee has made an application under this section, unless their circumstances change, he or she may not make a further application under this section to the same employer . . .
- ? recommends the following changes to improve the fairness and transparency of the Bill’s provisions, namely that:
 - ✍ sufficient information is available for workers, unions and employers about the application process and the range of possible flexible working arrangements
 - ✍ the legislation and/or regulations provides a clear process and timeframe for making and responding to requests
 - ✍ workers have the opportunity to seek advice and, if required, representation from a union delegate or organiser
 - ✍ any application must be in writing and state that it is the arrangement sought by the employee – *as proposed in amended subsection 61A(2)(a)*
 - ✍ any flexible working time arrangement between a worker and employer must also set out the arrangements in writing and be signed by both the worker and employer - *as proposed in new subsection 61B(2)(c)*
 - ✍ that if an employer rejects a request, they are required to provide a written explanation of the grounds on which the request was

refused and also outline the legal right to appeal this decision - as *proposed as in an additional subsection 61B(2)(d)*

- ? recommends that *subsection 61B(2)(b)(vi)* is tightened so that planned structural changes should only be a ground for an employer refusing a request if they are :
 - ✍ planned structural changes that the employer can show would impact directly on the employee's work and the employer's ability to provide flexible working hours

- ? recommends a stronger right to flexible working arrangements by *amending subsection 61B (2) (b)* to require an employer to:
 - ✍ "accept the application unless they show evidence that it would be reasonable to refuse on one of more of the following grounds" as listed from (i) to (vi).

- ? recommends that the Bill provides protection for workers against employers imposing unjustifiable conditions when a worker requests flexible working arrangements

- ? recommends inserting an *additional subsection 61C(1)(c)* enabling a complaint to be lodged to the Employment Relations Authority if:
 - ✍ "the employer has imposed an unjustifiable condition on the arrangement or has made the employer's agreement to the arrangement conditional upon an unjustifiable condition"

- ? notes that the unintended effect of the Bill's proposed right to request a variation to an employment agreement might be to undermine a collective employment agreement .

- ? recommends adding a *new subsection 61B(2)(aa)* stating that:
 - ✍ (aa) "where a request requires a reorganisation of work among existing staff, the employer is required to consult co-workers and their unions for the purpose of finding an arrangement that is workable for all parties"

- ? recommends the following addition to *new subsection 61B(2)(c)* to state:
 - ✍ where an employee is a member of a Union covered by a collective employment agreement, a copy of the flexible working hours arrangement is to be forwarded to the relevant Union by the employer
- ? supports the Bill's mechanism which ensures that only the employee can initiate and make an application for flexible working hours
- ? supports the right to request flexible working arrangements being placed within the mainstream legal framework already provided for in the Employment Relations Act 2000
- ? recommends complaints should be considered a personal grievance on the basis that there has been an unjustified action to the employee's disadvantage
- ? notes this would provide access to the Department of Labour's mediation services and, if necessary, the Employment Relations Authority
and therefore
- ? recommends deleting new subsections 61C(1)–(5) and clause 7 and
- ? recommends inserting new section 61C as follows:

"61C *Grounds for Personal Grievance*

An employee who makes an application under section 61A may pursue a personal grievance in terms of section 103(1)(b) of the Act if -

- (1) the employer has failed to comply with section 61B in relation to the application;
- (2) a decision made by the employer to reject the application was based on incorrect facts;
- (3) the employer has imposed an unjustifiable condition on the arrangement or has made the employer's agreement to the arrangement conditional upon an unjustifiable condition. "

- ? recommends that there should be a right to review agreed changes
- ? recommends a further subsection 61B(3) that would read:
 - ✍ “At least six monthly, an employer along with the employee shall review the arrangements agreed to with the option of retaining those changes, reverting to original terms and conditions or making a new request”
- ? recommends that any enacted right to request flexible working time arrangements should be evaluated to:
 - ✍ identify what measures would be, and have been, of most assistance to low income workers
 - ✍ identify whether other groups of workers have been unable to access flexible working time arrangements and
 - ✍ propose any changes required to ensure low-income workers and any other under-represented groups of workers have access to these provisions
- ? notes there is often a pay penalty associated with flexible working arrangements, particularly part-time employment
- ? recommends that Pay and Employment Equity Unit within the Department of Labour is asked to provides expert advice on how the pay and employment equity implications of the proposed Bill should be effectively monitored and evaluated
- ? recommends that the right to request flexible working arrangements is reviewed within 2 years of enactment, and includes assessing whether an automatic entitlement to such provisions is required

Submission

1. Introduction

- 1.1 The New Zealand Council of Trade Unions (CTU) is the internationally recognised trade union centre in New Zealand. It represents 35 affiliated unions with a membership of approximately 320,000 workers in a range of industries in both the private and public sectors. As such the CTU is the largest democratic organisation in Aotearoa-New Zealand.
- 1.2 The CTU supports the Employment Relations (Flexible Working Hours) Amendment Bill. As the Bill is largely based on current UK legislation, many of the CTU's recommendations draw on extensive evaluations of that legislation. The CTU has put considerable thought into drafting changes that improve the Bill's effectiveness and ease of implementation within the framework of the Employment Relations Act 2002.
- 1.3 The CTU supports workers' rights to flexible working hours and therefore supports the intention of the Bill to empower workers to achieve this result. In our view, the most effective way to achieve flexible working hours is through collective negotiation and problem solving. However the submission outlined below has been developed within the context of this Bill, which merely enables individual workers the right to request flexible working hours.
- 1.4 The CTU's position and recommendations are grouped under the following headings:
 - ? Eligibility
 - ? Breadth of the Right to Request
 - ? Workers' Ability to Amend Arrangements
 - ? Employers' Ability to Impose Conditions

- ? Employers' Ability to Oppose Applications
- ? Procedural Issues including the Role of Unions
- ? Stronger Right to Flexible Working Arrangements
- ? Remedies and Problem Resolution Process
- ? The Gender Pay Gap

1.5 In order to make the submission easier to read, all recommendations are collated in the Executive Summary and all proposed drafting changes are collated as an Appendix at the end of the submission.

1.6 The CTU would like to appear before the Select Committee to speak to this submission.

2. Eligibility

2.01 The CTU notes that this Bill proposes eligibility criteria that largely follow those adopted successfully in the UK, where there is already considerable public support to further extend these criteria. The UK right to request flexible work arrangements is provided for in the Employment Act 2002 and the relevant provisions are incorporated by that Act into the Employment Rights Act 1996. Some of the specific eligibility criteria are then set out in the accompanying regulations – the Flexible Working (Eligibility, Complaints and Remedies) Regulations 2002.

2.02 The definitions proposed in clause 4 of this Bill are broader in some ways, and more restrictive in others, compared to those contained in the UK legislation. Clause 4 of the Bill specifies that a qualifying employee must have:

- (a) full-time care of a child or children under 5 years or has full time care of a disabled child or children up to and including 18 years;
- and

(b) been for the immediately preceding 6 months, in the employment of the same employer

2.03 The equivalent UK legislative provisions can be found in section 3 of the Flexible Working (Eligibility, Complaints and Remedies) Regulations 2002. A UK employee can apply to their employer for a contract variation that will allow flexible work arrangements, if they have been:

(a) continuously employed for a period of not less than 26 weeks

(b) are either –

(i) the mother, father, adopter, guardian or foster parent of the child or;

(ii) married to or the partner of the child's mother, father, adopter, guardian or foster parent;

(c) has, or expects to have responsibility for the upbringing of the child

2.04 The UK legislation's eligibility criteria enable either parent to apply for flexible work arrangements, as long as they have responsibility for the upbringing of the child. That right covers biological parents, adoptive and foster parents, guardians - and their de facto or marriage partners. One advantage of eligibility criteria in the NZ Bill is that it is not limited to parents and guardians, and therefore potentially recognises the level of informal care provided by grandparents and other extended family members and whanau.

2.05 However the Bill is excessively restrictive when it limits the right to request flexible working arrangements to those providing *full-time* care. This potentially excludes the growing number of parents who share caring responsibilities within households, or the many and varied reconstituted families who provide care across households. Therefore the CTU supports at least expanding the eligibility criteria by deleting the word "full-time" in clause 4(a) of the Bill so that parents and guardians providing part-time care to a child are also eligible to make an application for flexible work arrangements.

- 2.06 The proposed Bill and the current UK legislation only allow those providing care *for children* to access the right to request flexible work arrangements. In both cases this is limited to those with pre-school children (aged under 5 in NZ and under 6 in the UK). Both countries then extend this upper age limit to 18 for children with a disability. Under the Education Act 1989, a child with a disability is still entitled to go to a NZ school until the end of the school year in which they turn 21. Access criteria for respite and support services are inconsistent and age dependent.
- 2.07 The CTU welcomes the current Government's focus on independence for young people with disabilities. However, as many other support services are not available until someone is 21, parents often still play a significant role in providing support when their children are aged 19-21. In order to maintain consistency with the Education Act, the CTU considers there is a strong case for at least expanding the Bill's eligibility criteria by increasing the upper age limit for a disabled child (as defined in Clause 4) from 18 to 21. This may require an extension to the definition of a 'disabled child', which is also found in clause 4 of the Bill, as it is currently limited to those entitled to a disability allowance within the meaning of section 39A of the Social Security Act 1964.
- 2.08 There has been considerable debate and public support in the UK for extending the right to request flexible work arrangements to those providing care to either older children or to adults, including elderly parents. A January 2005 ICM Research survey of 2000 people, commissioned by the Equal Opportunities Commission, found that 82% of respondents thought the right to request flexible working time arrangements should be extended to all parents and carers. The Department of Trade and Industry (DTI) has recently completed a consultation process on extending the right to request flexible working to carers of sick and disabled relatives, and parents of older children. That consultation closed on 25 May this year.

- 2.09 There is no NZ data available on the number of people providing unpaid care to children or adults. UK data tends to differentiate between unpaid childcare, on the one hand, and care provided to a partner, relative or friend with an illness, frailty or disability. New research indicates there is a significant number of people providing the latter form of care. Latest statistics published on 27 June 2005 by the Sheffield Hallam University's Centre for Social Inclusion¹ show that as many as 1 in seven working women, and up to one in ten working men, provide support to a partner, relative or friend with an illness, frailty or disability.
- 2.10 Given that carers are not static group, 3 out of every 5 people in the UK will provide such unpaid care at some stage in their working lives. In the UK, nearly 80% of carers are of working age. A number of studies predict that an ageing population, coupled with insufficient numbers of paid caregivers, will lead to a significant increase the proportion of the population juggling paid work and unpaid care. The inflexibility of current workplace employment practices mean many workers find it impossible to balance these competing demands.
- 2.11 A 2003 Carers UK survey² found that 7 out of 10 carers under 50, and 8 out of 10 carers aged 50-60, have given up work to provide care. Almost two thirds (65%) believed their career prospects had been affected because of their caring responsibilities. Yet 1 in 3 carers who were currently not working wanted to return to paid work if the right alternative care was available. Expanding the eligibility criteria within this Bill to cover all forms of care would be an important initial step to improve the ability of carers to juggle, if not integrate, their paid work and caring responsibilities.

¹ Sheffield Hallam University (2005) *We Care – do you?* Centre for Social Inclusion, Sheffield Hallam University, Sheffield.

² Carers UK (2003) *Missed Opportunities; the impact of new rights for carers*. Carers UK, London.

2.12 Recent research undertaken by the Joseph Rowntree Foundation in the UK has shown there is a more equitable access to work life balance measures when they are universal statutory provisions. That research concluded that the UK Government should “move swiftly to extend the right to flexible working to carers, with a view to extending it to all employees”.³

2.13 There is also considerable support from UK unions, employers and NGOs for extending the right to request flexible working arrangements to all workers – not just those providing care. A recent Chartered Institute of Personnel and Development (CIPD) survey showed that four in ten responding UK organisations already provide flexible working policies that go beyond the statutory requirement. Two of the strongest business arguments in support of extending the right to all workers are that it reduces resentment from co-workers without caring responsibilities; and that by increasing the pool of workers potentially available to change their working time arrangements, the range of possible solutions increases. For example, in calling for the right to be extended to all employees, CIPD stated:

“Once there is a critical mass of people wishing to work flexibly – not only parents – this increases the chances of finding a workable solution for the team.”⁴

2.14 While collectively negotiated flexible working arrangements are most likely to achieve solutions that work for everyone for the team and ensure individual arrangements are supported by co-workers, in the context of this Bill, the CTU suggests adding a requirement on employers to consult co-workers. This addition would also mitigate against employers assuming an arrangement is unworkable for co-

³ Marilyn Howard (2005) *Support for Working Carers* . Research undertaken for Carers UK as a Joseph Rowntree Foundation research project. Accessed on 9 July 2005 from: <http://www.jrf.org.uk/bookshop/ebooks/supportforworkingcarers.pdf>

⁴ Cited in Jodie Levin-Epstein (2005) *Work-Life Balance Series policy brief*, July 2005, No.3, p5. Center for Law and Social Policy (CLASP) Washington, D.C.

workers. Therefore the CTU proposes the addition of a new subsection 61B(2)(a)(a) stating that:

“where a request requires a reorganisation of work among existing staff, the employer is required to consult co-workers and their unions for the purpose of finding an arrangement that is workable for all parties “

2.15 The second quarterly *HR Trends and Indicators* survey, published by the CIPD (July 2004), found that two thirds of UK organisations support proposals for extending the current flexible working legislation so that more employees would benefit from it. In addition, this survey of almost 2,000 HR professionals in all sectors and regions of the UK, showed that just under a half (46%) back the right being extended to all workers.

2.16 The CTU agrees that the right to request flexible work should be extended to all workers. As an interim measure, the CTU supports an extension of the eligibility criteria in the Bill so that it clearly and explicitly values the caring role. In other words, it should be immaterial whether the worker is a full-time or part-time carer, nor should they be need to be a relative or partner of the person receiving care. Therefore the CTU recommends amending Clause 4(a) to redefine a qualifying employee as a employee who has:

- (a) “*unpaid caring responsibilities for a child or adult*” and
- (b) has been for the immediately preceding 6 months, in the employment of the same employer.

2.17 In line with this recommendation, new subsection 61A(1)(b) of the Employment Relations Act 2000, as inserted by clause 6 of the Bill, should then be amended to read:

- (b) the employee's purpose for applying for the change is to enable the employee to provide unpaid care to a child or adult

2.18 This drafting change would also require:

- ? amending subsection 61A(2)(d) so that it covers “explaining how the employee meets this purpose, in respect of the child *or adult* concerned”
- ? deleting subsection 61A(3) which requires applications to be made at least 14 days before a child turns 5, or before the child’s 18th birthday if they have a disability.

2.19 Finally, even if the legislated access to flexible working time arrangements is extended, there remain significant barriers for many low-wage workers to utilise these provisions. Reduced hours is one of the two most common requests made under the UK legislation, yet many low-waged workers cannot afford the resultant fall in their income. The CTU recommends that any enacted right to request flexible working time arrangements should be evaluated to:

- ? identify what measures would be, and have been, of most assistance to low income workers
- ? identify whether other groups of workers have been unable to access flexible working time arrangements and
- ? propose any changes required to ensure low-income workers and any other under-represented groups of workers have access to these provisions

2 Breadth of the Right to Request

3.1 The proposed Bill only lists two types of flexible working arrangements that can be requested. These are the right to change either the hours or the days on which the employee is required to work, as outlined in subsection 61A(1)(a). However, the UK legislation provides a broader right. It includes the option of working from home (for all or part of the

week) and the open-ended ability for the Secretary of State to specify additional forms of flexibility, through regulations.

- 3.2 The ability to work from home can be a particularly effective means of addressing the extra pressures that commuting places on managing caring responsibilities. Therefore, the CTU supports adding an additional subsection 61(1)(a)(iii) to included changes related to:

“where the employee is required to work, as between either the employee’s home or a place of business of the employer”.

3 Workers’ Ability to Amend Arrangements

- 4.1 Neither the UK legislation and NZ proposed Bill provide the ability to amend proposals if the original application is rejected. In both cases, once the application has been submitted, a new application cannot be made for another 12 months. This limitation is outlined in subsection 61A(4) of the proposed Bill and has particular implications if the worker’s original application is denied. Namely, once the employer has refused the application, there is no ability to modify the request in an attempt to negotiate flexible working arrangements.

- 4.2 Even if the worker’s circumstances (including their caring responsibilities) change, a 12-month waiting time is still required between requests for flexible working arrangements. This severely limits the Bill’s flexibility and therefore its effectiveness in helping workers balance their paid work and caring responsibilities.

- 4.3 Under both the UK provisions and the proposed Bill, once an employer agrees to the worker’s request to change their hours or days of work, these will be a permanent change to the worker’s terms and conditions, unless otherwise agreed. The employee has no legal right to revert back to their previous working pattern.

- 4.4 The UK parents' group, Working Families, was asked by the Department of Trade and Industry to review the impact of the legislation during the first year it was implemented. One of their seven recommendations was that the right to request flexible working arrangements should explicitly offer greater options for employers and employees to agree to either temporary or permanent changes. Working Families went on to say that "currently employees can technically adjourn the process and make a temporary arrangement or agree a trial period, but this is not very clear to most employees or employers".⁵
- 4.5 The Bristol City Council's flexible working time project, initiated by the Trades Union Congress (TUC) and the Employers' Organisation for Local Government, models an alternative approach. Policies there allow more than one flexible working time arrangement to be requested each year, including when the initial application is unsuccessful. In addition, changes negotiated under the Bristol City Council project were deliberately voluntary, with workers able to pilot changes but revert back to their original conditions if the pilot was unsuccessful. A 2004 five-year evaluation of the Bristol City Council project identified this flexibility as a key success factor in gaining the cooperation of both staff and management.⁶
- 4.6 The CTU supports the ability to make more than one application a year, if the employee's circumstances change. This could include, but should not be limited to, changes in a worker's caring responsibilities or arrangements. For example, changes to a worker's financial circumstances could also impinge on the viability of previously agreed

⁵ Christine Camp (2004) *Right to Request Flexible Working – review of impact in first year of legislation*. Reported prepared by Working Families for the DTI, March 2004.

⁶ Local Government Employers Organisation (2004) Five year evaluation of "The Time of Our Lives" project at Bristol City Council.

changes. Accordingly, the CTU proposes that subsection 61A(4) is amended to read:⁷

“If an employee has made an application under this section, *unless their circumstances change*, he or she may not make a further application *under this section to the same employer . . .*”

- 4.7 The CTU supports greater clarity about the nature of any agreed changes, including whether they are temporary or permanent, and recommends that any agreements should be in writing. Therefore we propose an additional subsection 61B(2)(c) that would read:

“where the employer is agreeing to the application, set out the arrangements in writing, and together with the employee, sign the document setting out the arrangements.”

- 4.8 The CTU also suggests there should be a right to review agreed changes (for example, quarterly). We propose a further subsection 61B(3) that would read:

“At least six monthly, an employer along with the employee shall review the arrangements agreed to with the option of retaining those changes, reverting to original terms and conditions or making a new request.”

5. Employers’ Ability to Impose Conditions

- 5.1 As acknowledged by section 3(a)(ii) of the Employment Relations Act 2000, there is an inherent inequality of power in employment relationships. That imbalance is likely to affect both the process and outcome of this Bill’s proposed right to request flexible working arrangements. Evaluations of UK’s legal right to request have identified instances where workers were stuck with unviable compromises, especially when their overall (or even hourly) pay,

⁷ Due to the proposed deletion of subsection 61A (3), as proposed in paragraph 2.17, this subsection would be renumbered subsection 61A(3). This reordering is clearly listed in Appendix 1.

conditions or employment status had been reduced during the process.⁸

- 5.2 Some of these compromises result from systemic or indirect discrimination, such as the low status of part-time work that is predominantly performed by women, and the limited effort made to create quality part-time jobs. These pay penalties are discussed further in section 10 of this submission.
- 5.3 In other instances an employer may make flexible working arrangements conditional on the worker accepting inferior pay and employment conditions. Two small surveys, undertaken by Maternity Alliance and Working Families, provide some evidence of these pressures. While 68% of the 104 parents surveyed by Maternity Alliance had made requests, 27% had experienced detrimental treatment such as reduced hourly pay, increased workloads or demotion.
- 5.4 The CTU recommends that the Bill provides protection for workers against employers imposing unjustifiable conditions when a worker requests flexible working arrangements. Specifically, it should be possible to lodge a complaint to the Employment Relations Authority if the employer does impose such an unjustifiable condition. Accordingly, the CTU recommends that clause 6 of the Bill is amended to insert an additional subsection 61C(1)(c) enabling a complaint to be lodged if:
- " the employer has imposed an unjustifiable condition on the arrangement or has made the employer's agreement to the arrangement conditional upon an unjustifiable condition"
- 5.5 The CTU notes that the unintended effect of the Bill's proposed right to request a variation to an employment agreement might be to

⁸ For example, Public and Commercial Services Union (March 2004) *Research into the experiences and perceptions of workers changing to part-time hours*.

undermine a collective employment agreement (CEA). While no individually agreed variation will directly affect the terms and conditions of the CEA, a series of individual variations over time could accumulate with the consequence of undermining collectively agreed conditions.

5.6 The use of flexible working hours arrangements intentionally by employers as a means of undermining the CEA could be recognised as being not only within the bargaining ambit of section 32, but also the general duties of section 4 of the Act. In order to ensure the provisions are not being manipulated, we suggest the following amendment and clarification of the Bill's provisions –

- (i) the amendment suggested in paragraph 2.14 and
- (ii) where an employee is a member of a Union covered by a collective employment agreement, a copy of the flexible working hours arrangement is to be forwarded to the relevant Union by the employer - *to be added to the new subsection 61B(2)(c)*

5.7 In order to protect workers against pressure to change their working timing arrangements, the CTU also believes it is important to maintain the Bill's current mechanism which ensures that only the employee can initiate and make an application for flexible working hours.

6. Employer's Ability to Oppose Applications

6.1 An employer can refuse an application for flexible working arrangements when it cannot reasonably be accommodated on one or more of the six grounds listed in subsection 61B(2)(b). The CTU is concerned about the breadth of these grounds, especially as the right of appeal neither allows the Authority to question the employer's business grounds for refusal nor asks for any supporting evidence.

6.2 The Bill's explanatory note states that "if a request is turned down, employers will need to demonstrate, if challenged, that a clear business case exists for rejecting a request." However, these

requirements are not spelt out in the current draft of the Bill. While it is likely the details would be contained in regulations, the CTU believes such an evidential approach should be signaled in the main body of the legislation. Therefore the CTU proposes an additional sub-section 61B(2)(d) that would state that an employer must:

" where the employer is refusing the application, set out the reasons for the refusal in writing and forward to the employee within 14 days from the date of receipt of the employee's application".

- 6.3 The CTU has specific concerns about the Bill's final ground for refusing a request, namely "planned structural changes". This category is too broad, given many structural changes may not impact on the employer's ability to accommodate flexibility working arrangements. In fact many of the UK joint union / management projects have taken place within the context of structural change, as have those undertaken in Germany.⁹ Therefore the CTU recommends that subsection 61B(2)(b)(vi) is tightened and should read:

"planned structural changes that the employer can show would impact directly on the employee's work and the employer's ability to provide flexible working hours".

7. Procedural Issues including the Role of Unions

- 7.1 The UK legislation is supported by two sets of regulations relating to procedural requirements; and eligibility, complaints and remedies. Ninety percent of UK businesses surveyed by the Chartered institute of Personnel and Development reported that compliance with these requirements had not been a significant problem.¹⁰

⁹ Antonie Boessenkool and Ariane Hegewisch [2004] Summary Report of the *Working Time for Working Families: Europe and the United States* conference, held in Washington, D.C. June 7-8 2004. WorkLife Law Program, American University Washington College of Law.

¹⁰ CIPD and Lovells (October 2003) *A Parent's Right to Ask. A review of flexible working arrangements*. CIPD and Lovells, London.

- 7.2 UK evaluations and surveys of employer, union and consumer groups have all highlighted the importance of a fair and transparent process. The CTU supports similar transparency around the proposed New Zealand entitlement, as already signaled in other parts of the submission. This would include ensuring that:
- ? sufficient information is available for workers, unions and employers about the application process and the range of possible flexible working arrangements
 - ? the legislation or regulations provides a clear process and timeframe for making and responding to requests
 - ? workers have the opportunity to seek advice and, if required, representation from a union delegate or organiser
 - ✍ any application must be in writing and state that it is the arrangement sought by the employee – *as proposed in amended subsection 61A(2)(a)*
 - ? any flexible working time arrangement between a worker and employer must also be in writing and state that this is the arrangement sought by the employee - *as proposed in subsection 61B(2)(c)*
 - ? where the employee is a member of a Union covered by a collective employment agreement, the employer shall provide a copy of the signed flexible working time arrangement to the relevant Union – *also proposed in the new subsection 61B(2)(c)*
 - ? that if an employer rejects a request, they are required to provide a written explanation of the grounds on which the request was refused and also outline the legal right to appeal this decision - *as proposed as in an additional subsection 61B(2)(d)*
- 7.3 The proposed Bill introduces an individual right to request flexible work arrangements. The CTU believes it is important that such a right sits alongside a collective response to the organisation of working time. Unions in UK and continental Europe have initiated a significant number of bipartite projects focused on working time arrangements which illustrate the importance of ensuring workers and their unions are

involved at all stages.¹¹ In the UK, some of these ventures have been undertaken at an industry level. For example, the print union AMICUS GPM has recently made work-life balance a top priority in its draft agreement with major employers in the print sector.¹²

7.4 In New Zealand, the CTU is co-ordinating private and public sector unions' involvement in the Department of Labour's worksite-based work life balance pilots. The State Services Commission, in partnership with public sector employers and the PSA, has also developed a framework for the involvement of public sector workers and their unions in developing work-life balance strategies.

8. Stronger Right to Flexible Working Arrangements

8.1 The proposed Bill does not include a right to flexible work arrangements, merely a right for an eligible worker to request such changes to their hours or days of work. This mirrors the UK legislation. UK unions report the main operational problem arising from this 'soft' legal right is the inconsistent application of policies, especially where local or line managers oppose good corporate level policies.

8.2 Low paid and low status workers are particularly vulnerable to inconsistent decisions by lower level managers or supervisors as often they have very little opportunity to present their case to a more senior manager. This is a particular constraint for workers who have little or no time sovereignty within their work environment. In addition, many of these workers are less likely to work in union-organised workplaces or have any form of representation or advocacy. In order to remain in paid work, it may be crucial for these workers to have a stronger right to adjust working hours to meet their caring needs.

¹¹ Antonie Boessenkool and Ariane Hegewisch [2004] Summary Report of the *Working Time for Working Families: Europe and the United States* conference, held in Washington, D.C. June 7-8 2004. WorkLife Law Program, American University Washington College of Law.

¹² Amicus news release 22 March 2005 www.amicustheunion.org.uk

- 8.3 Women and older workers are over-represented as carers, and amongst those with lower levels of participation in paid employment. In New Zealand's tight labour market, there are both equity and efficiency arguments for developing work arrangements that enable those with caring responsibilities to remain in, or return to, paid employment.
- 8.4 The CTU recommends that parents and carers, and ultimately all workers, should have the right to have requests for reduced hours or flexible working arrangements granted, unless employers can justify refusals on objective grounds. Therefore the CTU supports creating a stronger right to flexible working arrangements by amending subsection 61B (2) (b) to require an employer to:
- “accept the application unless they show evidence that it would be reasonable to refuse on one of more of the following grounds” as listed from (i) to (vi).*
- 8.5 This amendment may still not carry enough weight to ensure workers have access to flexible working time arrangements. If that is the case, it is notable that a number of European countries place a significantly higher burden of proof on the employer than that currently proposed by the CTU.¹³ For example, German law includes the automatic right for parents of children under 1 year to switch from full-time to part-time work for up to a year. There is also a right for workers to reduce their working hours irrespective of the reasons, unless there are serious contravening business reasons.
- 8.6 The Dutch Working Time Adjustment Law 2000 is the latest addition to a long line of Dutch working time initiatives. The Act gives employees the right to ask for either a reduction or increase in working hours. Employers must grant this unless they can demonstrate a substantial adverse impact. Therefore the CTU recommends that the right to

¹³ Antonie Boessenkool and Ariane Hegewisch [2004] Summary Report of the *Working Time for Working Families: Europe and the United States* conference, held in Washington, D.C. June 7-8 2004. WorkLife Law Program, American University Washington College of Law.

request flexible working arrangements is reviewed within 2 years of enactment, and includes assessing whether an automatic entitlement to such provisions is required.

9. Remedies and Problem Resolution Process

- 9.1 The CTU supports the right to request flexible working arrangements being placed within the mainstream legal framework already provided for in the Employment Relations Act 2000. We propose that, instead of setting up a different type of complaint and process for its resolution, complaints should be considered a personal grievance on the basis that there has been an unjustified action to the employee's disadvantage. This would provide access to the Department of Labour's mediation services and, if necessary, the Employment Relations Authority. This CTU proposal would also avoid the need for the draft provisions set out in subsections 61C(2) – (5) and in clause 7 of the Bill.
- 9.2 In other words, the CTU recommends that new subsections 61C(1)–(5) and clause 7 are deleted and a new section 61C is inserted as follows:

“61C *Grounds for Personal Grievance*

An employee who makes an application under section 61A may pursue a personal grievance in terms of section 103(1)(b) of the Act if -

- (4) the employer has failed to comply with section 61B in relation to the application;
- (5) a decision made by the employer to reject the application was based on incorrect facts;
- (6) the employer has imposed an unjustifiable condition on the arrangement or has made the employer's agreement to the arrangement conditional upon an unjustifiable condition. “

10. The Gender Pay Gap

- 10.1 Flexible working time arrangements are an important mechanism enabling greater participation by women in paid employment. As a result, they have the potential to significantly increase women's economic independence and employment equity. However, there is growing New Zealand and overseas evidence that there is often a pay penalty associated with flexible working arrangements, particularly part-time employment.¹⁴
- 10.2 On average, women returning to paid work after maternity leave make a downward occupational shift in order to work in a part-time job that enables them to meet their family responsibilities. The limited number and range of quality part-time jobs results in occupational segregation in jobs which under-utilise women's skills.¹⁵
- 10.3 Due to the difficulty women experience in reducing their hours on return to their job from parental leave, job opportunities are being determined by gender-based expectations of women's role in parenting. Women are then having to make job choices based on the availability of reduced or flexible hours, rather than the skills and abilities they bring to the job. Making flexible working the norm for more, and eventually all, workers will ensure that "both men and women are able to stay in jobs that suit their skills and abilities, not just those that suit their caring responsibilities"¹⁶.
- 10.4 Evaluations of the UK legislation have shown that women continue to make the vast majority of applications for flexible work arrangements to meet childcare responsibilities. The TUC's recent submission to the

¹⁴ For example, Ang, Ee Kheng and Briar, Celia (2005) *Valuing Motherhood? Experiences of Mothers Returning to Paid Employment*, *Women's Studies Journal*;18:2, pp 11-25.

¹⁵ Department of Trade and Industry (March 2005) *Women and Work Commission Interim Statement*, p 7

¹⁶ Trades Union Congress (May 2005) *Fairness and Flexibility*. TUC Response to the Department of Trade and Industry's consultation document, *Work and Families: Choice and Flexibility*, p 17

Department of Trade and Industry has highlighted the broader pay and employment equity issues underpinning these take-up rates.

“We believe that sole reliance on a ‘marketing to men’ approach to flexible working issues misses the underlying point. The problem is a systemic one. Men cannot afford to work flexibly because they are likely to earn more than their partners, are more likely to have access to overtime or plus payments to supplement the loss of income of their partner, and are not prepared to accept a reduction of state and company benefits that often accompanies flexible working.”¹⁷

- 10.5 It is crucial that New Zealand’s work life balance policies (including the right to request flexible working time arrangements) are developed, implemented and monitored as to their effectiveness in encouraging men to also take up these provisions. Otherwise these measures can merely reinforce the ‘Mummy track’ of lower status jobs and careers, exacerbating the gender pay gap. As the UK Equal Opportunities Commission’s 2004 report *Part-time is no crime – so why the penalty* found:
- ? women working part-time earn on average 40% less per hour than men working full-time and
 - ? Just 1 year of part-time work can lead to a 10% wage penalty, even after 15 years.
- 10.5 New Zealand’s Pay and Employment Equity (PaEE) Taskforce identified work-life balance issues as an important component of their Action Plan to close the gender pay gap in the public service, public health and public education sectors. The CTU recommends that the PaEE Unit within the Department of Labour is asked to provides expert advice on how the PaEE implications of the proposed Bill should be effectively monitored and evaluated.

¹⁷ Trades Union Congress (May 2005) *Fairness and Flexibility*. TUC Response to the Department of Trade and Industry’s consultation document, *Work and Families: Choice and Flexibility*, pp 29-30

Appendix A Summary of Redrafted Provisions

NB: All changes to the Bill's proposals are highlighted in italics

Clause 4 Interpretation

“qualifying employee” means an employee who has -

- (a) *“unpaid caring responsibilities for a child or adult”* and
- (b) has been for the immediately preceding 6 months, in the employment of the same employer.

Clause 6 New sections 61A to 61C inserted

61A Right to request variation of employment agreement

- (1) [~~Delete~~ *“Despite section 61”*] A qualifying employee may apply to his or her employer for a change in his or her terms and conditions of employment if -
 - (a) the change relates to –
 - (i) the hours the employee is required to work;
 - (ii) the days on which the employee is required to work;
 - (iii) *“where the employee is required to work, as between either the employee’s home or a place of business of the employer”*; and
 - (b) *the employee’s purpose for applying for the change is to enable the employee to provide unpaid care to a child or adult.*
- (2) An application under this section must -
 - (a) state that it is such an application *and the arrangement sought by the employee*;
 - (b) specify the change applied for and the date on which it is proposed the change should become effective;

- (c) explain what effect, if any, the employee thinks making the change applied for would have on his or her employer and how, in the employee's opinion, any such effect might be dealt with; and
- (d) explain how the employee meets, in respect of the child *or adult* concerned, the conditions as specified in subsection 1(b).

- (3) Delete current clause "An application under this section must be made before the fourteenth day before the day on which the child concerned reaches the age of 5 or, if disabled, 18 years"]
Renumber current subsection(4) as subsection (3), as follows:]

If an employee has made an application under this section, *unless the employee's circumstances change*, he or she may not make a further application under this section to the same employer before the end of the period of 12 months beginning with the date on which the previous application was made.

Renumber current subsection(5) as subsection (4), as follows:]

- (4) For the purposes of this section and sections 61B and 61C, employee means a qualifying employee.

61B Employer's duties in relation to application under section 61A

- (1) An employer must acknowledge that a qualifying employee has the right to work whenever possible.
- (2) An employer to whom an application under section 61A is made must -
 - (a) deal with the application as soon as possible;
 - (aa) *where a request requires a reorganisation of work among existing staff, the employer is required to consult co-workers and their unions for the purpose of finding an arrangement that is workable for all parties*

- (b) *accept the application unless they show evidence that it would be reasonable to refuse the application on one or more of the following grounds:*
 - (i) inability to re-organise work among existing staff;
 - (ii) inability to recruit additional staff;
 - (iii) detrimental impact on quality;
 - (iv) detrimental impact on performance;
 - (v) insufficiency of work during the periods the employee proposes to work;
 - (vi) planned structural changes *that the employer can show would impact directly on the employee's work and the employer's ability to provide flexible working hours.*
 - (c) *where the employer is agreeing to the application, set out the arrangements in writing, and together with the employee, sign the document setting out the arrangements. Where the employee is a member of a Union covered by a collective employment agreement, provide a copy of the document to the relevant Union.*
 - (d) *where the employer is refusing the application, set out the reasons for the refusal in writing and forward to the employee within 14 days from the date of receipt of the employee's application.*
- (3) *At least six monthly, an employer along with the employee shall review the agreed arrangements with the option of retaining those changes, reverting to original terms and conditions or making a new request.*

61C

[Delete new subsections 61C(1)–(5)]

Insert a new section 61C, as follows:

61C **Grounds for Personal Grievance**

An employee who makes an application under section 61A may pursue a personal grievance in terms of section 103(1)(b) of the Act if -

- (1) the employer has failed to comply with section 61B in relation to the application;*
- (2) a decision made by the employer to reject the application was based on incorrect facts;*
- (3) the employer has imposed an unjustifiable condition on the arrangement or has made the employer's agreement to the arrangement conditional upon an unjustifiable condition."*

[Delete **Clause 7 Jurisdiction**]