

New Zealand Public Health and Disability Amendment Bill 2013: Approval for Introduction

Proposal

- 1 This paper seeks approval for the New Zealand Public Health and Disability Amendment Bill 2013 (the Bill) to be introduced to the House of Representatives.

Policy

- 2 Since at least 1991, the Ministry of Health and its predecessors have operated a policy that prohibits payments being made to spouses, parents, or resident family members to provide disability support services for their family members.
- 3 In the Family Carers case (*Atkinson & Others v Ministry of Health*), the Human Rights Review Tribunal (the Tribunal) declared that the Ministry of Health's policy of not paying family carers creates unjustified discrimination on the grounds of family status under the New Zealand Bill of Rights Act 1990. That declaration was subsequently upheld by the High Court and Court of Appeal.
- 4 On 2 April 2013, Cabinet agreed to introduce legislation to address issues raised by the Family Carers case (CAB Min (13) 10/14 refers). Cabinet agreed to:
 - a) change the Ministry's policy to allow some disabled people who are aged 18 and over to employ their parents, or other adult family members (but not spouses) who reside with them, to provide them with Home and Community Support Services. Payments for family care will be available from 1 October 2013 and only in respect of disabled people who have high or very high needs. The terms of payment to family carers will be managed through a notice issued under Section 88 of the New Zealand Public Health and Disability Act 2000. Consideration will be given in the future to paying family carers of people with chronic medical conditions¹ who are funded through DHBs, but other groups of family carers would not be paid; and
 - b) introduce legislation to reduce the on-going litigation risks, while allowing the Government to implement policies of paying family carers where that is fiscally sustainable and there are good policy reasons to do so.
- 5 The Bill amends the New Zealand Public Health and Disability Act 2000 to implement those policy decisions. Legislative amendment is necessary to ensure that any fiscal or litigation risks arising from the Human Rights Review Tribunal are managed.
- 6 Aspects of the Bill that are likely to be contentious are that it:
 - a) places limits on rights to freedom from discrimination that are contained in the New Zealand Bill of Rights Act 1990 (NZBORA) and the Human Rights Act 1993. This issue is discussed further in the Compliance section below;
 - b) restricts remedies for existing complaints that have been lodged with the Human Rights Commission to declarations of inconsistency with NZBORA. Announcing

¹ Examples of conditions that may require ongoing support include brain and nervous system disorders (e.g. brain tumours, haemorrhages and strokes), dementia (e.g. Alzheimers), respiratory disorders and cancer (not in palliative stage).

the policy and introducing and passing the legislation on the same day will also avoid the need for legislation to include any backdating provisions;

- c) stops people from lodging future claims of discrimination against any existing or future policy of not paying family carers.
- 7 The Bill includes a savings provision for the nine claims in the Family Carers case itself. Proceedings have already commenced in the High Court to determine remedies for these claims. Final remedies will be determined either through negotiation with the claimants or will be determined by the Courts.
- 8 A further savings provision has been added to save the current proceeding in *Spencer v AG* (CIV 2012-404-006717).

{Paragraphs 9-10 redacted under Official Information Act 1982 Section 9(2)(f)(iv) to protect confidentiality of advice between Ministers of the Crown and officials}

Regulatory impact analysis

- 11 A Regulatory Impact Statement (RIS) has been previously prepared and submitted at the time Cabinet approval of the policy relating to the Bill was sought [SOC Min (13) 5/7 and CAB Min (13) 10/14 refer].

Compliance

- 12 The Attorney General has an obligation under section 7 of the NZBORA to notify the House if any provision of any Bill introduced into the House appears to be inconsistent with the NZBORA. The Ministry of Justice is expected to advise the Attorney General that the Bill appears to be inconsistent with sections 19(1) (Freedom from discrimination) and 27(2) (Right to judicial review) of the NZBORA.
- 13 The Bill does not appear to fully comply with certain sections of the Legislative Advisory Committee Guidelines on Process and Content of Legislation. The Bill is inconsistent with the right to freedom from discrimination on the basis of family status, marital status, age and disability in section 19(1) of NZBORA because it will allow the Ministry of Health and District Health Boards (DHBs) not to pay some people for provision of health and disability support services, or pay a different rate on the basis of that person's family or marital status, age or disability.
- 14 Crown Law Office and the Parliamentary Counsel Office have advised that the Bill may not sufficiently reduce the risk of further litigation regarding discrimination on other grounds such as sex, ethnicity, or religion. This is because family carers are predominately women, and also because some ethnic and religious groups have higher expectations concerning the extent of care that family members are expected to provide.
- 15 The Bill is inconsistent with section 27(2) of the NZBORA because it will restrict the right of applicants to seek judicial review and restrict remedies for claims that have already been made (other than the claimants in the Atkinson litigation and the Spencer litigation) to declarations of inconsistency. The Bill will also preclude people from taking any new claims in the Human Rights Commission or any court that a family care policy, or any action taken in reliance on a family care policy, is discriminatory.
- 16 Te Puni Kokiri has expressed some concerns that the Bill does not comply fully with the principles of the Treaty of Waitangi. The Bill will allow family care policies to be introduced that restrict payment to some family members. There may be

disproportionate effects on Māori given that whānau care, by a wide range of whānau members, is an expectation within whānau relationships.

- 17 The Bill complies with the principles and guidelines set out in the Privacy Act 1993.

Consultation

- 18 The Ministries of Justice; Education; Business, Innovation and Employment; Social Development; Pacific Island Affairs; and Women's Affairs; the Treasury; the Inland Revenue Department; the State Services Commission, and Te Puni Kokiri were consulted on this paper. Crown Law Office, the Office for Disability Issues, Veterans' Affairs New Zealand and ACC were also consulted on the paper. The Department of Prime Minister and Cabinet and Parliamentary Counsel Office were informed about the paper.
- 19 In 2012, the Ministry of Health consulted with the disability and carer communities, and the wider public on possible responses to the Family Carers case.
- 20 Consultation will take place with the government caucus and the ACT New Zealand, United Future New Zealand and Māori Parties before the Bill is introduced; although all have indicated their support for the proposals in the paper.

Binding on the Crown

- 21 The Bill binds the Crown as it is responsible for health and disability policy and funding.

Creating new agencies or amending law relating to existing agencies

- 22 The legislation does not create a new agency or amend laws relating to existing agencies.

Allocation of decision making powers

- 23 The Bill does not allocate decision making powers between the Courts, the executive and tribunals.

Associated regulations

- 24 Regulations are not required to bring the Bill into operation.

Deemed regulations

- 25 The Bill does not include any provision empowering the making of deemed regulations.

Definition of Minister/ department

- 26 The Bill does not contain a definition of Minister, department, Crown entity, or Chief Executive of a department or Crown entity.

Commencement of legislation

- 27 The Bill will come into force on the day after the date of royal assent.

Parliamentary stages

- 28 On 2 April 2013, Cabinet agreed that the Bill be introduced and passed as part of the Budget 2013 legislation package [CAB Min (13) 10/14 refers].
- 29 It is not proposed to refer the Bill to Select Committee.

Publicity

- 30 The Minister of Health will announce the Government's response to the Family Carers case and introduction of the Bill on Budget Day 2013.

Recommendations

31 It is recommended that Cabinet Legislation Committee:

1. **note** that the New Zealand Public Health and Disability Amendment Bill holds a category 2 priority on the 2013 legislation programme (to be passed in 2013);
2. **note** that on 2 April 2013 Cabinet agreed that the Bill be introduced and passed as part of the Budget 2013 legislation package [CAB Min (13) 10/14 refers];
3. **note** the Bill amends the New Zealand Public Health and Disability Act 2000 to enable the Government to:
 - 3.1 expressly permit that public funding be available for certain family members for the provision of health and disability support services in defined circumstances, and these will be specified outside the legislation;
 - 3.2 expressly state that the Crown and District Health Boards are, and always have been, authorised to implement policies or decisions not to pay for or fund health and disability support services provided by family members, and that any such policy or decision is not unlawful discrimination under the Human Rights Act 1993 or the New Zealand Bill of Rights Act 1990;
4. **agree** that the legislation includes a savings provision allowing Mrs Margaret Spencer in *Spencer v AG* (CIV 2012-404-006717) to have her claim resolved by the Courts if necessary, if she cannot reach a settlement with the Crown;
5. **approve** for introduction the New Zealand Public Health and Disability Amendment Bill 2013;
6. **agree** that the Bill be introduced on 16 May 2013;
7. **agree** that the Government propose that the Bill be enacted by 21 May 2013.

Hon Tony Ryall
Minister of Health

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