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Report of the

# *ATTORNEY-GENERAL*

under the New Zealand Bill of Rights Act  
1990 on the New Zealand Public Health and  
Disability Amendment Bill (No 2)

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Presented to the House of Representatives pursuant to  
Section 7 of the New Zealand Bill of Rights Act 1990  
and Standing Order 262 of the Standing Orders of the  
House of Representatives

1. I have considered whether the New Zealand Public Health and Disability Amendment Bill (No 2) ('the Bill') is consistent with the rights and freedoms affirmed in the New Zealand Bill of Rights Act 1990 ('the Bill of Rights Act').
2. The Bill amends the New Zealand Public Health and Disability Act 2000 ('the Act') to provide that individuals caring for family members can be paid only in accordance with family care policies developed under the Bill. A family member is defined as a: spouse, civil union partner, or de facto partner; parent, step-parent, or grandparent; child, step-child, or grandchild; sister, half-sister, stepsister, brother, half-brother, or stepbrother; aunt or uncle; niece or nephew or first cousin.
3. The Bill responds to the decision of the Court of Appeal in *Ministry of Health v Atkinson*<sup>1</sup> (the *Family Carers* case). In that case, the respondents complained under Part 1A of the Human Rights Act 1993 about a Ministry of Health policy of not paying parents for providing disability support services to their adult children in circumstances where a non-family member would be paid. The Court of Appeal upheld decisions of the High Court and the Human Rights Review Tribunal that the policy amounted to unlawful discrimination on the basis of family status.
4. As the general policy statement to the Bill sets out:

Responding to the *Family Carers* case by paying all groups of family carers would undermine the fundamental tenet that the Government's primary role is to support families in their role and would result in unmanageable fiscal costs to the Government. In the absence of legislation, the Government's policy would be unlawful and the Government could face a very large number of claims. The only feasible way of managing these risks is through legislation.
5. The Bill inserts a new s 70C into the Act, which prevents the Crown or a District Health Board (DHB) from paying a person for any services provided to a family member of the person unless the payment is:
  - a) permitted by an applicable family care policy, or
  - b) explicitly authorised by or under an enactment.
6. New s 70D(1) states that the Crown and any DHB are, and always have been, authorised to adopt, change, cancel and replace a family care policy. New s 70D(3) provides that a family care policy may state the cases in which a person may be paid for providing services to a family member by reference one or more of the following matters:
  - a) the nature of the familial relationship between the person who provides the support services and the family member to whom the services are provided;
  - b) the impairment or condition of the family member to whom the support services are provided, which may include the effects of the impairment or condition or the degree of its severity;

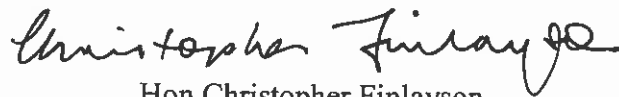
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<sup>1</sup> [2012] NZCA 184.

- c) the age of the family member to whom the support services are provided;
  - d) the place of residence of the family member to whom the support services are provided;
  - e) the place of residence of the person who provides the support services; and
  - f) the needs of the family member to whom the support services are provided and the needs of his or her family.
7. A family care policy can also state conditions that must be satisfied before payments are made and the rates, or ways of setting the rates, of payment for support services provided to family members.
8. This Bill protects the right of the Crown to set funding policy for disabled carers. The foundation of government social spending is targeted assistance. This assistance is often based on one of the grounds on which it would be, *prima facie*, unjustifiable to discriminate. For example, an unemployment benefit is restricted to the unemployed. The invalid's benefit is restricted to those who cannot work because of long term illness or disability.
9. The objective of this Bill is to ensure the government does not incur unmanageable fiscal costs as a result of the decisions in the *Family Carers* case. The Crown does not have access to a limitless pool of money. Decisions about how scarce resources are to be allocated must reside with the Crown. By their nature, courts must decide each case on the individual facts in front of them. With respect, they lack the institutional competence to consider the range of competing claims on public funds which government must contend with every day, and which cannot be approved or dismissed in isolation. The enactment of the Bill of Rights Act was not intended to alter that. In the *Family Carers* case I do not consider courts sufficiently deferred to the Crown's view of the most appropriate way to manage the limited funds it has available to provide disability support services.
10. Moreover, I accept the view set out in the general policy statement to the Bill that responding to the *Family Carers* case by paying all groups of family carers would undermine the fundamental tenet that the Government's primary role is to support families in their role.
11. Were the Bill merely to override the *Family Carers* case, I would consider any limits on s 19(1) reasonably necessary and in due proportion to the importance of the Bill's objectives to be justified under s 5 of the Bill of Rights Act.
12. However, while I do not agree the prohibition at issue in the *Family Carers* case was discriminatory, I recognise that the Bill prohibits payment to a wider range of family members beyond those considered in that case. It also authorises the Crown or a DHB to adopt new policies which permit paid family caring in some circumstances, including policies that make distinctions on prohibited grounds of discrimination, whether or not those distinctions can be justified. To the extent the

legislation authorises such policies, the legislation could be potentially in breach of the non-discrimination right guaranteed by s 19(1) of the Bill of Rights Act.<sup>2</sup>

13. Section 27(2) of the Bill of Rights Act affirms the right of any person affected by a determination made by a public authority to apply for a judicial review of that determination in accordance with law.
14. The Bill inserts a new s 70E into the Act, which prevents a person from making a complaint to the Human Rights Commission, or commencing proceedings at the Human Rights Review Tribunal or in any court, on the basis that a family care policy breaches that person's right to be free from discrimination affirmed in s 19(1) of the Bill of Rights Act. This is limited to the prohibited grounds of marital status, family status, disability and age.
15. New s 70E also prevents the Human Rights Commission from taking any further action in relation to a complaint made after 16 May 2013. In addition, the Human Rights Review Tribunal and any court are not permitted to hear or determine civil proceedings arising from any such complaint.
16. If a complaint is made before 16 May 2013, the complaint or proceedings may continue. However, the only remedy that may be granted by the Human Rights Review Tribunal or a court is a declaration that the policy is inconsistent with the right to freedom from discrimination affirmed by s 19(1) of the Bill of Rights Act.
17. It is important to note that a savings provision in new s 70G of the Act preserves the position of the parties in the *Family Carers* case and one other case (*Spencer v Attorney-General*).<sup>3</sup> That litigation may continue or be settled as if the Bill had not been enacted. New s 70G also preserves existing contractual arrangements that envisage payments for support services provided to family carers.
18. New s 70E appears to limit the right to judicial review because it would prevent a person from challenging the lawfulness of a decision on the basis that it was inconsistent with s 19(1) of the Bill of Rights Act.
19. On balance, I have concluded that limitation cannot be justified under s 5 of the Bill of Rights Act.
20. I draw these matters to the attention of the House.



Hon Christopher Finlayson  
Attorney-General

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<sup>2</sup> Section 79(2) of the Human Rights Act 1993 states that any complaint against an act or omission authorised by legislation can only be taken as a breach of the legislation itself.

<sup>3</sup> (CIV 2012-404-006717).