

New Zealand Public Health and Disability Amendment Bill (No 2)

Government Bill

Explanatory note

General policy statement

Many family members provide health and disability support to their disabled family members. While the Government acknowledges the important role that families play, and while it has provided funding for services (such as respite care) that support families in their role as carers, it has operated on the principle that family members will not be paid for the care they provide.

In the *Family Carers* case (*Atkinson & Others v Ministry of Health*), the Human Rights Review Tribunal declared that the Ministry of Health's policy of not paying family carers involves unjustified discrimination on the ground of family status under the New Zealand Bill of Rights Act 1990 (**NZBORA**). That declaration was subsequently upheld by the High Court and the Court of Appeal.

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.

In amending the New Zealand Public Health and Disability Act 2000, the Bill allows the Government to reduce the ongoing litigation risks while also allowing the Government to implement policies of paying family carers where it wishes to do so.

Overview of Bill

The Bill—

- reaffirms that people will not generally be paid to provide health services or disability support services to their family members:
- confirms that the Crown and DHBs may operate, and always have been authorised to operate, policies in respect of family carers that allow payment in certain limited circumstances, or allow for payment at a lower rate than that for carers who are not family members:
- stops claims of unlawful discrimination being made concerning any care policy, except for any claim that arises out of a complaint that was lodged with the Human Rights Commission before 16 May 2013. A claim that arises out of such a complaint may proceed, but the remedy that may be granted is restricted to a declaration that the policy is inconsistent with NZBORA:
- includes savings provisions that allow the plaintiffs in the *Atkinson* litigation, and also the plaintiff in *Spencer v Attorney-General*, a claim for judicial review that is currently before the High Court, to continue their claims as if the Bill had not been enacted:
- provides a process to enable DHBs and the Crown to certify the content of any existing or future family care policy.

Regulatory impact statement

The Ministry of Health produced a regulatory impact statement on 15 March 2013 to help inform the main policy decisions taken by the Government relating to the contents of this Bill.

A copy of this regulatory impact statement can be found at—

- <http://www.health.govt.nz/familycarersris>

- <http://www.treasury.govt.nz/publications/informationreleases/ris>

Clause by clause analysis

Clause 1 is the Title clause.

Clause 2 is the commencement clause. The Bill will come into force on the day after the date on which it receives the Royal assent.

Clause 3 states that the Bill amends the New Zealand Public Health and Disability Act 2000 (the **principal Act**).

Clause 4 inserts a *new Part 4A* in the principal Act.

New section 70A states the purpose of *new Part 4A*.

New section 70B defines family care policy and family member. A family care policy is defined as a statement in writing of the Crown or a DHB that permits, or has the effect of permitting, persons to be paid in certain cases for providing support services to their family members. Support services are defined as health services or disability support services that are generally funded through Vote Health. The definition of family care policy also includes practices that have the same effect as such a statement and that were followed by the Crown or a DHB before the commencement of the Bill. The section defines family member as a person who receives services from his or her spouse (including his or her civil union partner or de facto partner), parent, child, grandparent, grandchild, sibling, aunt or uncle, niece or nephew, or first cousin. Step-parents, stepchildren, step-siblings, and half-siblings are also included in the definition.

New section 70C prohibits the Crown or a DHB from paying a person for providing support services to a family member unless the payment is permitted by an applicable family care policy or expressly authorised by or under an enactment. The prohibition also applies to payments for support services provided to a family member before the commencement of the Bill. However, existing contracts or arrangements are saved for a limited period by *new section 70G(4)*.

New section 70D provides that—

- the Crown and any DHB are, and have always been, authorised to adopt or have a family care policy and to change, cancel, or replace such a policy:

- any family care policy that the Crown or any DHB had immediately before the commencement of the Bill continues in effect, and may be changed, cancelled, or replaced:
- a family care policy may state, or have the effect of stating, the cases in which persons may be paid for providing support services to family members and sets out the ways in which those cases may be stated. The authorisation applies to family care policies adopted after the commencement of the Bill as well as to those that have been adopted before the commencement of the Bill:
- a family care policy may set rates for the payment of support services to family members, which may be lower than the rates paid for comparable support services provided to persons who are not family members:
- a family care policy may place limits on the funding available for providing support services to a family member:
- a copy of any document that states, changes, or cancels a family care policy after the commencement of the Bill must be made available for public inspection. That duty is imposed on the chief executive of the Ministry of Health, where the family care policy is that of the Crown, and on the chief executive of the relevant DHB in any other case:
- a family care policy may not be disallowed under the Regulations (Disallowance) Act 1989 or the Legislation Act 2012.

New section 70E provides that no complaint may be made to the Human Rights Commission, and no proceedings may be commenced or continued in any court, if the complaint is, in whole or in part, based on an assertion that a person's right to freedom from discrimination on any of the grounds of marital status, disability, age, or family status (affirmed by section 19 of the New Zealand Bill of Rights Act 1990) has been breached by a provision of the Bill, or by a family care policy, or by anything done or omitted in compliance, or intended compliance, with the Bill or a family care policy. Such an assertion is called a specified allegation in *new section 70E*.

New section 70E stops the Human Rights Commission from dealing with complaints based on a specified allegation if the complaints were made after 15 May 2013. It also stops the Human Rights Review Tribunal and any court from hearing, or continuing to hear, or

determining any civil proceedings that arise out of such a complaint made after 15 May 2013.

Complaints made to the Human Rights Commission before 16 May 2013 are not affected and the Human Rights Review Tribunal and the courts continue to have jurisdiction to hear and determine proceedings that arise out of complaints made before 16 May 2013. However, if such a permitted proceeding is successful, the Human Rights Review Tribunal or the court may only grant a declaration that the policy concerned is inconsistent with the right to freedom from discrimination affirmed by section 19 of the New Zealand Bill of Rights Act 1990.

New section 70F authorises certificates to be signed on behalf of the Crown or a DHB as to the contents of a family care policy. Such a certificate is, in the absence of proof to the contrary, sufficient evidence in all proceedings.

New section 70G saves the proceedings in the Court of Appeal between the Ministry of Health and Peter Atkinson (on behalf of the estate of Susan Atkinson) and 8 other respondents. These proceedings may be continued or settled as if the Bill had not been enacted. It also saves a pending judicial review application by Margaret Spencer, to the extent of the pleadings filed in those proceedings before 16 May 2013.

The section also saves any contracts or arrangements, in effect before the commencement of the Bill, under which persons are paid for providing support services to family members. Such contracts or arrangements are permitted to continue for 1 year after the commencement of the Bill.

Hon Tony Ryall

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Contents

	Page
1 Title	1
2 Commencement	2
3 Principal Act	2
4 New Part 4A inserted	2

Part 4A

Family care policies

70A Purpose of this Part	2
70B Interpretation	3
70C Persons generally not to be paid for providing support services to family members	4
70D Family care policy	4
70E Claims of unlawful discrimination in respect of this Act or family care policy precluded	6
70F Certificates relating to family care policies	7
70G Savings	7

The Parliament of New Zealand enacts as follows:

- 1 Title**
This Act is the New Zealand Public Health and Disability Amendment Act (No 2) **2013**.

2 Commencement

This Act comes into force on the day after the date on which it receives the Royal assent.

3 Principal Act

This Act amends the New Zealand Public Health and Disability Act 2000 (the **principal Act**). 5

4 New Part 4A inserted

After section 70, insert:

“Part 4A**“Family care policies**

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“70A Purpose of this Part

“(1) The purpose of this Part is to keep the funding of support services provided by persons to their family members within sustainable limits in order to give effect to the restraint imposed by section 3(2) and to affirm the principle that, in the context of the funding of support services, families generally have primary responsibility for the well-being of their family members. 15

“(2) To achieve that purpose, this Act, among other things,—

“(a) prohibits the Crown or a DHB from paying a person for providing support services to a family member unless the payment is permitted by an applicable family care policy or is expressly authorised by or under an enactment: 20

“(b) declares that the Crown and DHBs have always been authorised, and continue to be authorised, to adopt or have family care policies that permit persons to be paid, in certain cases, for providing support services to family members: 25

“(c) stops (subject to certain savings) any complaint to the Human Rights Commission and any proceeding in any court if the complaint or proceeding is, in whole or in part, based on an assertion that a person’s right to freedom from discrimination on any of the grounds of marital status, disability, age, or family status (affirmed by 30 35

section 19 of the New Zealand Bill of Rights Act 1990)
has been breached by—

- “(i) a provision of this Part; or
- “(ii) a family care policy; or
- “(iii) anything done or omitted in compliance, or in- 5
tended compliance, with this Part or a family care
policy.

“**70B Interpretation**

“(1) In this Part, unless the context otherwise requires,—

“**family care policy**, in relation to the Crown or a DHB,— 10

“(a) means any statement in writing made by, or on behalf
of, the Crown or by, or on behalf of, the DHB that per-
mits, or has the effect of permitting, persons to be paid,
in certain cases, for providing support services to their
family members; and 15

“(b) includes any practice, whether or not reduced to writ-
ing, that has the same effect as a statement of the kind
described in **paragraph (a)**, being a practice that was
followed by the Crown or by a DHB before the com-
mencement of this Part 20

“**family member** has the meaning given by **subsection (2)**

“**support services** means disability support services (as de-
fined in section 6(1)) or health services (as so defined), or both,
being services of a kind that are generally funded, directly or
indirectly, through Vote Health. 25

“(2) Support services provided by a person (**person A**) to another
person (**person B**) are provided to a **family member** in any
case where person B is person A’s—

“(a) spouse, civil union partner, or de facto partner; or

“(b) parent, step-parent, or grandparent; or 30

“(c) child, stepchild, or grandchild; or

“(d) sister, half-sister, stepsister, brother, half-brother, or
stepbrother; or

“(e) aunt or uncle; or

“(f) nephew or niece; or 35

“(g) first cousin.

“70C Persons generally not to be paid for providing support services to family members

On and after the commencement of this Part, neither the Crown nor a DHB may pay a person for any support services that are, whether before, on, or after that commencement, provided to a family member of the person unless the payment is—

- “(a) permitted by an applicable family care policy; or
- “(b) expressly authorised by or under an enactment.

“70D Family care policy

“(1) The Crown and any DHB are, and have always have been, authorised —

“ (a) to adopt or have a family care policy:

“ (b) to change a family care policy:

“ (c) to cancel a family care policy:

“ (d) to replace a family care policy. 15

“(2) Any family care policy that the Crown or any DHB had immediately before the commencement of this Part continues in effect, and the Crown or the DHB may change, cancel, or replace that family care policy.

“(3) A family care policy that the Crown or a DHB adopts or has on or after the commencement of this Part may state, and a family care policy that the Crown or a DHB adopted or had before that commencement has always been authorised to state or to have the effect of stating, 1 or more of the following: 20

“ (a) cases in which persons may be paid for providing support services to family members, including, without limitation, by reference to 1 or more of the following matters: 25

“ (i) the nature of the familial relationship between the person who provides the support services and the family member to whom the support services are provided: 30

“ (ii) the impairment or condition of the family member to whom the support services are provided, which may include references to the effects of the impairment or condition or the degree of its severity, or both: 35

- “(iii) the age of the family member to whom the support services are provided:
- “(iv) the place of residence of the family member to whom the support services are provided:
- “(v) the place of residence of the person who provides the support services: 5
- “(vi) the needs of the family member to whom the support services are provided and the needs of his or her family:
- “(b) the conditions that must be satisfied before payments for support services provided to a family member are made: 10
- “(c) the rates, or ways of setting the rates, of payment for support services provided to family members, which may be lower than the rates of payment for comparable support services provided to persons who are not family members: 15
- “(d) the limits on funding for support services provided to a family member, which may be expressed in any way, including by limiting the amounts that may be paid or the number of hours for which payment may be claimed. 20
- “(4) Where, after the commencement of this Part, the Crown or a DHB adopts a family care policy, or changes or cancels a family care policy, the chief executive of the Ministry of Health or the DHB, as the case requires, must make a copy of the document that states the family care policy, or that changes or cancels it, available for inspection, on request, during working hours at the appropriate head office and at any other places that the chief executive determines are appropriate. 25
- “(5) None of the following is a disallowable instrument for the purposes of the Legislation Act 2012: 30
 - “(a) a family care policy:
 - “(b) a change to a family care policy:
 - “(c) a determination cancelling a family care policy.
- “(6) Before the commencement of section 38 of the Legislation Act 2012, **subsection (5)** must be read as if the reference to a disallowable instrument for the purposes of the Legislation Act 2012 were a reference to a regulation within the meaning of the Regulations (Disallowance) Act 1989. 35

- “(7) **Subsection (6)** and this subsection are repealed on the day after the commencement of section 38 of the Legislation Act 2012.
- “**70E Claims of unlawful discrimination in respect of this Act or family care policy precluded** 5
- “(1) In this section, **specified allegation** means any assertion to the effect that a person’s right to freedom from discrimination on 1 or more of the grounds stated in section 21(1)(b), (h), (i), and (l) of the Human Rights Act 1993, being the right affirmed by section 19 of the New Zealand Bill of Rights Act 1990, has 10 been breached—
- “(a) by this Part; or
 - “(b) by a family care policy; or
 - “(c) by anything done or omitted to be done in compliance, or intended compliance, with this Part or in compliance, 15 or intended compliance, with a family care policy.
- “(2) On and after the commencement of this Part, no complaint based in whole or in part on a specified allegation may be made to the Human Rights Commission, and no proceedings based in whole or in part on a specified allegation may be com- 20 menced or continued in any court or tribunal.
- “(3) On and after the commencement of this Part, the Human Rights Commission must not take any action or any further action in relation to a complaint that—
- “(a) was made after 15 May 2013; and 25
 - “(b) is, in whole or in part, based on a specified allegation.
- “(4) On and after the commencement of this Part, neither the Human Rights Review Tribunal nor any court may hear, or continue to hear, or determine any civil proceedings that arise out of a complaint described in **subsection (3)**. 30
- “(5) Nothing in this section or in **section 70D** affects—
- “(a) a complaint that is, in whole or in part, based on a speci- fied allegation but that has been lodged with the Human Rights Commission or any court before 16 May 2013; 35 or
 - “(b) the jurisdiction of the Human Rights Review Tribunal or of a court to hear and determine proceedings that arise out of a complaint described in **paragraph (a)**.

- “(6) Despite **subsection (5)(b)**, if in proceedings to which that subsection applies the Human Rights Review Tribunal or a court finds that a specified allegation has been proved, the Human Rights Review Tribunal or the court may grant no remedy other than the declaration described in **subsection (7)**. 5
- “(7) The declaration that may be granted by the Human Rights Review Tribunal or the court in proceedings to which **subsection (5)(b)** applies is a declaration that the policy to which the finding relates is inconsistent with the right to freedom from discrimination affirmed by section 19 of the New Zealand Bill of Rights Act 1990. 10
- “**70F Certificates relating to family care policies** 30
- “(1) The chief executive of the Ministry of Health may sign in respect of the Crown, and a chief executive of a DHB may sign in respect of the DHB, a certificate that states facts of the following kind in relation to the Crown or that DHB: 15
- “(a) the contents of any family care policy that, in relation to any period of time, the Crown or the DHB currently has or that it previously had:
- “(b) if the family care policy comes within **paragraph (b)** of the definition of that term set out in **section 70B(1)**, a description of the practice followed by the Crown or the DHB. 20
- “(2) A certificate under this section is— 25
- “(a) admissible in all proceedings without proof of the signature or office of the person appearing to have signed the certificate; and
- “(b) in the absence of proof to the contrary, sufficient evidence of the facts stated in it.
- “**70G Savings** 30
- “(1) The proceedings between the Ministry of Health and Peter Atkinson (on behalf of the estate of Susan Atkinson) and 8 other respondents (being the proceedings that were the subject of the judgment of the Court of Appeal reported in *Ministry of Health v Atkinson* [2012] 3 NZLR 456) may be continued or settled as if this Part (other than this section) had not been enacted. 35

- “(2) Any claim in the proceedings in the High Court between Margaret Spencer and the Attorney-General (CIV 2012-404-006717) may, if, and only if, made in pleadings filed in the High Court before 16 May 2013, be heard and determined as if this Part (other than this section) had not been enacted. 5
- “(3) **Subsection (4)** applies to a contract or an arrangement—
- “(a) that contains commitments or assurances by the Crown or a DHB; and
 - “(b) that is in effect immediately before the commencement of this Part; and 10
 - “(c) that provides for or envisages payments for support services provided to a family member.
- “(4) The contract or arrangement—
- “(a) must, if any of its terms relating to payment for support services to a family member were not permitted or authorised by a family care policy, be construed as if they had been so permitted and authorised; and 15
 - “(b) if still in effect on the day before the first anniversary of the commencement of this Part, ceases to be in effect on the close of that day. 20
- “(5) **Subsections (3) and (4)** override **section 70C.**”
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