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LEGALLY PRIVILEGED AND CONFIDENTIAL

Dear John

Atkinson and Others v. Ministry of Health - Commentary

1. In my opinion the Tribunal decision appears to be sound; it tells a credible story and the analysis is logical and reasonably robust.
2. The appeal by the Crown criticises how the Tribunal has interpreted and applied the evidence in dismissing the justifications from the Crown for the policy. It is difficult to evaluate whether the points being raised in the appeal have any validity when we have not had access to the evidence. Perhaps some of the judgements made by the Tribunal might have been more difficult than they appear, but it would be surprising if the Tribunal had misconstrued the evidence or made invalid leaps of logic or assumptions, which is essentially what the Crown is claiming in the appeal.
3. One of the problems for the Crown is that it does not appear to have presented any evidence on some of the key points anyway (e.g. the initial policy justifications for not paying family carers from the 1990s or earlier, and the basis for the "social contract" the Crown appears to have relied on). Other critical evidence seems to have been inconclusive, such as the evidence about the potential cost of permitting family carers to be paid and the number of people potentially affected. The Crown's evidence was that the cost could be between \$17 million and \$593 million, and the plaintiffs estimated the range as being \$32 - \$64 million. The Tribunal suggested the Crown was in effect double counting many of the costs at the higher end of its estimate, and it preferred the plaintiffs' evidence.
4. The High Court will have the opportunity to reconsider the evidence on the appeal because it is a "full" appeal, rather than just an appeal on the law.

Interestingly because the appeal includes questions of fact the High Court will include two lay members to assist the judge.¹

5. The risk on the appeal is that the decision is essentially political - dressed up as legal - and the Crown will be hoping a High Court judge will be more deferential to the government than the Tribunal was. It would be interesting to know what difference the lay members will make, but the theory is that they will assist the judge in deciding questions of fact and mitigate the risk that the judge alone might take too technical an approach. This might be an advantage for the plaintiffs responding to the appeal.
6. The Director of Proceedings will continue to represent the plaintiffs under the Human Rights Act. Other interested parties (such as Carers NZ or other members of the Carers Alliance) could have applied to be heard by the Tribunal, but that opportunity does not exist with the appeal.
7. The nub of the case is set out at paragraphs [6] and [7] of the Tribunal decision, which are worth reproducing as follows,
 - [6] We were told a longstanding and overarching policy and/or practice applying to these [disability support] services is that parents, spouses and other resident family members of the qualifying persons are excluded from being paid for providing disability support services to their adult child, spouse or resident family member who qualifies for such support services. Ministry policy is that support services provided by such family members are regarded as "natural supports" which do not attract payment but when the same services are provided by others they are treated as disability support services for which payments can be made.
 - [7] The plaintiffs allege this unlawfully discriminates in that otherwise available and willing carers are excluded from being paid for provision of disability support services by reason of their family status. Further, persons who are eligible to receive paid disability support services are denied the opportunity to choose to have their parent or spouse or resident family member be the paid provider of disability support services to them by reason of their family status.
8. The Crown argued that family carers do not provide the same disability support services which other providers are paid for, because any support family carers provide is "natural family support". The Crown said (and is repeating in the appeal) that the government does not pay families for providing natural family support because there is a social contract that the state does not pay families to look after their own (paragraphs [11] and [12]).
9. The Tribunal decision says the Crown argued that the individualised assessments by the NASCs first assess the level of "natural supports" available to the people they are assessing, and the state only provides top-up support which is required over and above the natural supports. There was no evidence of the origin of the policy - it seems to just be how things have always been done, at least as far back as the RHAs in the 1990s.

¹ Section 126 Human Rights Act 1993

10. The Tribunal decision traverses a lot of the context of the policy, including the *Hill* case and the Carer Strategy. Apparently work being done on a carer allowance following the *Hill* case was deferred pending the Carer Strategy, and that work of course remains on the agenda under the Carer Strategy. The Tribunal also refers to the fact that ACC pays family carers (contrary to the alleged social contract and the Crown's other policy justifications for not doing so), and to the fact that the Disability Strategy refers to valuing family and whanau carers, and that the Select Committee inquiry in 2008 identified that the Disability Strategy has not been well implemented.
11. The Crown's appeal says the Tribunal put too much emphasis on the ACC example.
12. The Tribunal discussed the nature of the natural support families might be expected to provide without receiving any payment. It is accepted that families provide a fairly high level of care for young children, for example. The issue is whether it is reasonable to expect parents and other family members to continue to provide that high level of care and more into the adulthood of disabled persons. The Tribunal held that this is not a reasonable expectation, and that the "natural support" which can be expected to be provided by families without any payment has reasonable limits.
13. One of the problems assessing the impact of the government being required to pay family carers is that there is not sufficient research to determine the scope of the issue. Some things are clear. For example, disabled persons who receive support services from external paid carers may wish to switch to paid family member carers. This would be cost neutral because the state is paying for the care already. No one knows how many disabled people have a mixture of paid care and unpaid family care, and how many family carers might be entitled to be paid in those cases. The Tribunal says it "would not expect there to be a high number in the moderate to severe category," and it is not entirely clear how it reached this conclusion. This is an example of the kind of judgement the Crown will be seeking to have the High Court revisit on the appeal.
14. The most worrying feature from the Crown's point of view is the gap between the estimated number of people entitled to receive disability support (291,000 in 2006) and the number of people who actually receive disability support. The 'gap' is estimated to be 29,000 who receive no funded care. There is an assumption that these people are either living independently with no care at all (apart from their natural supports), or that more extensive support services are being provided free by unpaid family or friends.
15. The evidence from the Crown conceded that this unfunded need represents a policy failure, and that a proportion of the 29,000 would be entitled to funded carer support. The Tribunal made the point that a claim for funded carer support when none has previously been provided is actually a claim on an existing entitlement, and it is irrelevant from a funding point of view whether the support is provided by external carers or family carers. The Tribunal said the cost of meeting this currently unfulfilled entitlement should not be attributed as a cost of

ending discrimination against family carers when the disabled persons have the entitlement anyway.

16. The Crown was attributing this amount to the potential cost of paying for family carers, and this is the most material fiscal issue as far as the Crown is concerned. The concern is not so much that unpaid carers will add to the cost of disability support services if they are paid, but that the system will not cope at all if everyone claimed the disability supports they are entitled to, irrespective of who provides the support. What this shows is systemic free-riding on family carers by the government funded disability system.
17. The risk for the Crown is that it does not really know the extent of the free-riding, or how many disabled persons and family carers might claim funding for support services if family carers could be paid. The Tribunal said if there was only a 10% uptake (because 90% of the people are either happy not to receive funded support, or might not be entitled to it on a NASC assessment anyway) then the cost would be \$11 million per annum. If there was a 90% uptake the cost would be \$272 million per annum.

Legal Analysis

18. The discussion in the Tribunal decision which I have summarised was by way of background to the legal analysis. In broad terms there are two legal issues:
 - a. Is the policy of not paying family carers discriminatory on the grounds of the family status of the family carers?
 - b. If the policy is *prima facie* discriminatory, is it nevertheless permissible on the basis that it is prescribed by law, and it is “demonstrably justified in a free and democratic society” (section 5 New Zealand Bill of Rights Act 1990)?
19. The Crown argued that the policy of not paying family carers was not discriminatory because all family carers are treated the same. Family carers who provide “natural support” are not paid, and family members who are not carers, but who might become carers by providing natural support in the future will not be paid either. The Crown’s argument is that there is no discrimination because everyone is discriminated against equally.
20. The Crown also argued that unpaid family carers are not disadvantaged in relation to other paid carers because family carers do not provide the *same* care. Paid carer support is allegedly *different* from the natural support provided by family carers.
21. The plaintiffs argued, and the Tribunal accepted, that the correct comparison for determining whether family carers are being discriminated against was between unpaid family carers and other carers who are paid for providing the same support. The Tribunal also accepted that, when it considered the support services actually provided by family carers, they were the same as those provided by paid carers.

22. The arguments from the Crown are subtle and a little difficult to understand. Part of the problem is that the Crown's arguments are actually unbelievably outrageous. If we applied the same analysis as in the Crown's arguments to, say, black people in buses during the American civil rights movement, the argument would be that it is not discriminatory to require black people to sit in the back of the bus as long as all other black people who might get on the bus are equally required to sit at the back. The Crown's argument would be that comparing white people in the front of the bus and black people in the back is not a valid comparison because black people and white people are different.
23. As I said in relation to the *Child Poverty Action Group* case in my paper on the Carer Support Subsidy, I do not think the politicians properly understand the arguments made by Crown Law on their behalf. It is reassuring that the Tribunal understood exactly what the Crown was arguing in the *Child Poverty Action Group* case and the present case and rejected the arguments out of hand. It is also inconceivable that the High Court will accept the Crown's argument on appeal that the family carer policy does not discriminate against family carers.
24. The more difficult legal issue is whether the policy which seems to be *prima facie* discriminatory is nevertheless prescribed by law, and is demonstrably justifiable in a free and democratic society.
25. The first point is that the policy must be 'prescribed by law' if it is to qualify as being justifiable. There is no law which authorises the policy of not paying family carers, so it is difficult to see how the policy can be "prescribed by law". This point was raised before the Tribunal, but it decided it did not need to determine this issue because it did not accept the policy was demonstrably justifiable anyway. This will be a hurdle facing the Crown on its appeal.
26. The Crown proposed ten reasons to the Tribunal as to why the policy is demonstrably justifiable in a free and democratic society, and these are listed at paragraph [13] of the Tribunal decision. Many of the arguments relate to the description of the factual background discussed by the Tribunal, and the Tribunal rejected each argument. Many of the arguments are inconsistent with the Carer Strategy and the other statements of support the government has made about carers, and it must be embarrassing for some people in the Ministry of Health that the arguments will be run again on the appeal. The arguments (with my comments added in italics) are,

[13] In addition [*to the arguments about natural support and the social contract*] the Ministry relied on other matters to support the policy not to fund employment of family members, including:

- [a] Funding the employment of spouses, parents and resident family members would create perverse incentives to refuse to provide care or to under-acknowledge the care they are able to provide lest they forego an opportunity to be employed. It was pleaded that this may have serious cost implications for government. [*i.e. families will withhold unpaid natural support in order to extract payment from the Crown for support they would have otherwise have provided*];

- [b] That funding the employment of spouses, parents and resident family members is inconsistent with the current model of individual assessment aimed at government meeting a gap in natural supports. The Ministry argued that revision of the current model may be necessary;
 - [c] The policy [*of not paying family carers*] promotes equality of outcomes for disabled people [*i.e. independent paid carers provide better outcomes than would be available from paid family carers*];
 - [d] The policy encourages the independence of disabled people [*i.e. it does not lock disabled people into receiving care from their families*];
 - [e] The policy supports the development of family relationships in the same way as they develop for non-disabled people [*i.e. it creates a disincentive for families to provide disability support for their family members, so not providing family care is more 'normal' and better*];
 - [f] The policy avoids professionalising or commercialising family relationships;
 - [g] The policy avoids the risk that families become financially reliant on the money and thereby discourage disabled family members from leaving [*i.e. it is better not to give families the choice of whether to care for their family members in case that's what they decide to do*];
 - [h] The policy ensures that the Ministry keeps control of the services it funds and that publicly funded services meet quality standards and can be monitored;
 - [i] The policy avoids unsustainable care burdens and distress and social isolation of family members undertaking extensive care [*i.e. family care is a bad thing, and they are doing families a favour by making sure it is unsustainable*];
 - [j] The policy is fiscally sustainable [*as long as a sizable group of people continue to not claim their entitlements to disability support*].
27. The overall tenor of the arguments made on behalf of the Crown is of course alarming from the perspective of the carer movement. It is as if the carer movement did not exist, and none of the awareness-raising over the last few years has occurred.
28. Of course the context of a legal argument made before the Tribunal (or on appeal to the High Court) is very different from a more conventional policy context. It is unlikely that any politician or official from the Ministry of Health would actually say the things Crown Law is saying on their behalf. We also need to remember that

the Tribunal did not accept any of the points made on behalf of the Crown, and it is hard to imagine the High Court being any more receptive to these arguments. The High Court might even avoid dealing with the policy issues at all by finding the Crown's policy is not "prescribed by law," in which case the Crown's justification arguments would not get off first base.

Recommendations

29. The main tactical advantage for the Crown from the appeal is that, even if they lose, it buys them time when they will not have to deal with the issues at stake. The Director of Proceedings will be doing well to have the case heard this year, and the Crown has no incentive to be in any hurry. Even after the case is heard, there will be a delay while the Court prepares its decision. Having two lay members on the Court may slow this process down further. Even if it loses in the High Court, the Crown could still conceivably appeal to the Court of Appeal (and the Supreme Court after that).
30. The issue is then what can be done while the appeal(s) run their course. From the Ministry of Health's point of view, the litigation is likely to shut down any policy development in the carer allowance area in particular. This has already been the effect of the Tribunal case to date, and the Carers Alliance is not in a position to do anything about this.
31. The onus is therefore on the Carers Alliance to make the best use of the time which is being unavoidably made available, and which might otherwise be wasted. Trying to persuade the Minister to back off the appeal is probably a waste of time because Crown Law will have their own momentum in the case which the Minister would have trouble stopping, even if he wanted to. It is certainly worth making sure the Minister remains aware that the issue is not going away, but we need to be realistic about our expectations on this front.
32. There are two things which stand out from the Tribunal decision as being opportunities for the Carers Alliance. One is the obvious lack of research or other evidence about why people with unpaid family carers have not applied for paid support care, and how many unpaid carers would apply for payment if it was available. The Tribunal's conclusions in this area seemed quite speculative, and they might be vulnerable. I think we should meet as soon as possible with the Director of Proceedings (who is based in Auckland) to find out whether the Carers Alliance could commission various types of research to try to fill these evidential gaps. We would need to find out from him whether 'new evidence' will be able to be introduced in the appeal. I expect it will be, but it might require the Crown's consent or there might be other obstacles. If it is possible to introduce new evidence, the delay in the appeal might be to our advantage.
33. The second useful comment in the Tribunal decision is that it is high-time there was a proper public debate about carer issues and carer payments, and just what our 'social contract' provides for in this area. We need to continue to raise the profile of carers so their contributions are recognised and valued, and arguments criticising them (like Crown Law's arguments) are increasingly marginalised.

34. The recent National Health Committee report on carers is a useful vehicle for putting carer issues on the agenda. The report is strongly supportive of carers and critical of government inaction over the last 10 years. It is useful that the report has the status of a statutory report under the Public Health and Disability Act, and that it is apolitical. We should make sure the Director of Proceedings is aware of the report because it would be a useful addition to the contextual evidence for the appeal. We should also specifically ask politicians and officials whether they agree or disagree with particular parts of the report, even if they do not directly relate to the carer allowance issue. Anything from the government which says it values and needs to better support carers undermines the wider ranging justifications cited by Crown Law for not providing payment or otherwise encouraging family carers.
35. I also think the National Health Committee report is good (and interesting) enough to justify in depth feature articles in magazines or newspapers. As the Minister pointed out when he released the report, it does not address the carer allowance issue, but in fact Crown Law has cast the arguments in the carer payment case so widely that the National Health Committee report is more relevant than the Minister probably realises.
36. The Whanau Ora package which is likely to be announced shortly (with a degree of fanfare, no doubt) will also be an opportunity because it is likely to focus on family autonomy and self-determination. We should continue to build a good relationship with Hon Tariana Turia, because this policy is exactly consistent with the objective of improving the standing of carers. Hon Tariana Turia already released a press statement supporting the Tribunal decision when it was first issued (and before the Minister of Health announced it would be appealed), and it would be sensible for the Carers Alliance to stay in touch with Minister Turia on this issue.
37. Other ideas, like approaching the State Services Commission or the Auditor-General regarding the irregular way the carer payment policy has been developed and implemented might contribute to a wider debate about the role of government, the health and disability NGO sector and families. However this would be a particularly long-term project that is unlikely to stay very focused on carer issues.
38. My view is that the Carers Alliance should continue doing what it has been doing, with as much vigour as possible. This includes engaging with officials on the Carers Strategy governance group and any other forums available. I suspect that Crown Law and some people at the Ministry of Health might not appreciate

39. it, but continuing to build as wide an acceptance and support for carers as possible will eventually turn around the carer allowance argument without necessarily having to confront the issue head-on.

Yours sincerely



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