



Health Select Committee

Parliament, New Zealand

1 April 2020

## **Submission: Health and Disability Amendment Bill**

### **Introduction**

Thank you for the opportunity to write a submission on the Health and Disability Amendment Bill.

The Public Health Association of New Zealand (PHA) is a national association with members from the public, private and voluntary sectors. Our organisation's vision is 'Good health for all - health equity in Aotearoa', or 'Hauora mō te katoa – oranga mō te Ao', and our purpose is to advocate for the health of all New Zealanders.

To achieve this, we provide a forum for information and debate about public health action in Aotearoa New Zealand. Our organisation includes a wide membership across New Zealand and has a Māori Caucus, a Pacific Caucus and an Asian Caucus. Through these forums our collective public health action aims to improve, promote and protect the health of the whole population through organised events and resources and collaboration with stakeholder partners.

We recognise Te Tiriti o Waitangi as Aotearoa New Zealand's founding document, defining respectful relationships between tāngata whenua and tangata Tiriti. We are actively committed to supporting te Tiriti o Waitangi articles in policy and legislation.

We actively promote full implementation of related international agreements to which New Zealand is a signatory, including the UN Covenant on Economic, Social and Cultural Rights (ICESCR), particularly Article 12 The Right to Health, the UN Convention on the Rights of the Child (UNCROC), the UN Declaration of the Rights of Indigenous People (UNDRIP), the Convention on the Rights of Persons with Disabilities (UNCRPD), Convention on the Elimination of All forms of Racial Discrimination (CERD) and the UN Framework Convention on Climate Change and the Paris Climate Agreement.

### **We support the Repeal of 4A inside the Health And Disability Act of New Zealand**

Our position is that the introduction of 4A to the Act in 2013 was an attempt to manage the considerable costs imminent for our government in addressing the 2012 ruling of the court case Ministry of Health v Atkinson and Others. This ruling was that New Zealand's funded family care policy breached the Human Rights Act 1993 on the basis that contracted carers were paid to provide care but family carers who provided the same care were not.

We hold that the introduction of 4A in 2013 attempted to create limits to government's fiscal and legal responsibility to fund family members providing support services, by establishing a principle of

devolved responsibility to families, for the wellbeing of its family members. We hold that this devolution of responsibility goes against the social contract between public and state, that in New Zealand establishes a safety net of social services for any and all citizens, to uphold their rights and maintain their wellbeing, should circumstances prevent them from caring adequately for themselves. The introduction of 4A to the Health and Disability Act undermined this social contract for New Zealanders with disabilities and long term disorders, and exacerbated the inequity in our family-funded care policies.

The responsibility to set funded family care policies was devolved by 4A's introduction, to the Ministry of Health and every District Health Board, both of which then set Disability Support Service and Paid Family Care policies respectively, that continued to be discriminatory. These continued to exclude some roles within family from eligibility; determined and allocated the hours of services needed; and was based on an assessment of criteria that was difficult to dispute and created imbalance of power between policy holder and the families applying for the funding.

We note also that 4A was introduced in 2013 under urgency, avoiding Health Select Committee's consideration of public submissions and therein a proper democratic process. We were disappointed not to be given an opportunity to submit at this time, as were many other members of the sector and households affected by the policy.

When the United Nations reviewed New Zealand's progress in implementing the United Nations Convention on the Rights of Persons with Disabilities in 2012, the UN Committee's concluding observations (31 October 2014) noted that the Public Health and Disability Amendment Act 2013, introducing 4A, reversed the Ministry vs Atkinson and Others court decision, by continuing to allow the denial of carers' pay to some family members. The Committee's added concern was that these provisions in 2013 also prohibited these family members from making complaints of unlawful discrimination.

The Committee recommended that government reconsider this matter to ensure that all family members who are carers are paid on the same basis as other carers are, and that family members who are carers be entitled to make complaints of unlawful discrimination in respect of the State party's family care policy. This is so that New Zealand is not in breach of its human rights obligations as a signatory to the UN Convention.

We note that addressing and repealing the continued provision of discriminatory family-funded care policies was an election promise made by all three parties now in the coalition government. We applaud this government for acting on these promises with the introduction of this bill, and support the repeal of 4A either in full, or with no litigation bar and a compensatory framework, as outlined in the Ministry of Health's Regulatory Impact Statement.

#### Care of whānau is tikanga Maori: Tiriti obligations for funded family care policies

We note there is no regard for the Crown's obligations to te Tiriti o Waitangi Articles in the Ministry of Health's Regulatory Impact Statement<sup>1</sup>. Care of whānau is an intrinsic aspect of tikanga Māori, yet we note there is no regard for whether there are differences of impact between Māori and non-Māori applying for funded family care policies, both before and since 2013's introduction of 4A. We should expect to see adequate Tiriti analysis of at least the repeal of 4A - if not the Act in full - inside a Regulatory Impact Statement.

We note the high likelihood that funded family care policies both before and since 4A have been more discriminatory for Māori communities, because of tikanga surrounding what is sufficient care

of whānau members with disabilities and disorders, meaning care is more automatically shared and assumed within whānau. We note the disparity of tikanga care practices with the values inside professional care services in New Zealand will compound the likelihood that a greater proportion of Māori are affected by funded family care policy.

Policy makers ought to consider the possible outcomes of policy for Māori, in accordance with the Crown's obligation to te Tiriti's Articles<sup>ii</sup>. We note the equity and cultural tools that the Ministry of Health has developed to minimise the risk of policy causing harm<sup>iii</sup>, yet it remains unclear whether they are consistently and competently utilised. It appears they have not been used in the analysis of this policy and its impact for Māori, which we see as regrettable.

### [Take this opportunity to amend further the Health and Disability Act to uphold te Tiriti](#)

We note te Tiriti of Waitangi is not upheld adequately inside the Health and Disability Act of New Zealand (2000). As noted by Tiriti Scholars in New Zealand<sup>iv</sup>, the Crown has sought to limit the mana (prestige and authority) of the Māori text of te Tiriti o Waitangi, by developing a collection of 'Treaty principles'<sup>v</sup>. The principles of partnership, participation and protection<sup>vi</sup> are most widely used in the health system and are included in the New Zealand Public Health and Disability Act 2000.

The New Zealand Health and Disability Act (2000) allows that DHBs will be governed by boards of up to 11 members and there must be at least two Māori members depending on the proportion of Māori in the Board's population. In practical terms, this means that Māori are consistently a small minority on Boards ensuring that they are usually out-voted and compromised in efforts to effect change<sup>vii</sup>.

While we support the proposed amendment to this Act, we call for further amendments to ensure the Health and Disability System's proper accountability to Tiriti Articles. We note the findings of the Waitangi Tribunal in response to the WAI2575 and other claims<sup>viii</sup>, describing where and how the Health and Disability Act fell short of being Tiriti compliant. We urge this Select Committee to engage and respond to those findings with sufficient recommendations to bring the legislation up to full Tiriti compliance.

We would like an opportunity to speak to this submission before the Select Committee.

Ngā mihi nui,

Dr Prudence Stone

CEO of the PHA

## References

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- <sup>i</sup> <https://treasury.govt.nz/sites/default/files/2020-01/ria-moh-ffc-dec19v2.pdf>
- <sup>ii</sup> Durie M (1989) The Treaty of Waitangi and healthcare. *The New Zealand Medical Journal* 102: 283–285.
- <sup>iii</sup> Ministry of Health (2004) A Health Equity Assessment Tool (Equity Lens) for Tackling Inequalities in Health. Wellington, New Zealand: Author. See also Ministry of Health (2007) *Wh\_anau Ora Health Impact Assessment*. Wellington, New Zealand: Author.
- <sup>iv</sup> Came, H., O'Sullivan, D., & McCreanor, T. (2020). Introducing Critical Tiriti Analysis through a retrospective review of the New Zealand Primary Health Care Strategy *Ethnicities*. <https://doi.org/10.1177/1468796819896466>
- <sup>v</sup> Hayward J (1997) The principles of the Treaty of Waitangi. In: Ward A (ed.) *Rangahau Whanui National Overview Report*. Wellington, New Zealand: Waitangi Tribunal, pp.475–494.
- <sup>vi</sup> Royal Commission on Social Policy (1988) *Towards a Fair and Just Society*. Wellington, New Zealand: Government Printer.
- <sup>vii</sup> Came H (2014) Sites of institutional racism in public health policy making in New Zealand. *Social Science & Medicine* (1982) 106(0): 214–220.
- <sup>viii</sup> Waitangi Tribunal (2019) *Hauora: Report on Stage One of the Health Services and Outcomes Kaupapa Inquiry*. Downloaded from the Waitangi Tribunal Website: [https://forms.justice.govt.nz/search/Documents/WT/wt\\_DOC\\_152801817/Hauora%20W.pdf](https://forms.justice.govt.nz/search/Documents/WT/wt_DOC_152801817/Hauora%20W.pdf)  
See also PHA Submission 2019 to Maori Affairs Select Committee Inquiry on Inequity of Health Outcomes for Maori: <https://app.box.com/s/mddp8j28bjhsjqb1l3gumsotnkto9zjd>