

## **SUBMISSION TO THE NEW ZEALAND PRODUCTIVITY COMMISSION ON MORE EFFECTIVE SOCIAL SERVICES**

The Human Rights Commission (the Commission) appreciates the opportunity to make a submission on the Productivity Commission's paper on *More Effective Social Services*. The purpose of the inquiry is to identify ways of improving the delivery of social services to ensure they are effective and target those with the greatest need. This is consistent with New Zealand's human rights obligations in international law.

The inquiry will look at the strengths and weaknesses of commissioning and purchasing social services, what lessons can be learnt from recent initiatives and how to improve the coordination of government agencies and service providers. The Commission's experience in the following areas may provide some useful insights into this goal:

- As part of the monitoring group of the Convention on the Rights of Persons with Disabilities (the Disability Convention)
- Involvement in the policy relating to family members caring for their adult disabled children;
- Lessons learnt from the Canterbury Earthquakes and the Right to Housing and Health;
- The impact of the United Nations Guiding Principles on Business and Human Rights;
- The Commission's inquiry into the problems facing those caring for older people who receive home based care.
- The Commission's work with AEGIS on the Children's Action plan where we advised on the human rights implications of information sharing and preventative risk modelling.
- Work on human rights indicators and relationship to Treasury's Living Standards framework.

The Human Rights Commission has discussed with the Productivity Commission in the past the idea of the human rights framework providing a sound base for consideration of issues such as housing and health.

We have limited our comments to the questions we consider most relevant but would be happy to make ourselves available to discuss these matters further.

### **Q.1 What are the most important social, economic and demographic trends that will change the social services landscape in New Zealand?**

A human rights approach involves linking decision making to agreed human rights standards, balancing rights where necessary to maximise respect for all those involved and favouring those who are most vulnerable where there is a conflict. It also emphasises the importance of participation, empowerment and non-discrimination. The Commission considers that a rights-based approach which respects the opinions of recipients of the social services will increasingly impact on the delivery of those services as it is a powerful way of holding providers accountable through rights-based entitlements. This is particularly relevant to the type of social services described in the paper since for the most part they are not purchased directly by consumers but funded by the government from general revenue.

Adopting a rights-based approach is also consistent with the Disability Convention. The Disability Convention is designed to ensure that disabled people have the same rights as everyone else. It requires community services and facilities available to the general population to be accessible on an equal basis to persons with disabilities in a way that is responsive to their needs. The Ministry of Health and District Health Boards all have policies, services and programmes that are designed to meet this objective but the disabled person's wishes are often not central to the development of policy.

The situation in *Ministry of Health v Atkinson*<sup>1</sup>, a recent case relating to contractual arrangements with the Ministry of Health for the provision of home based support services for adult disabled children, is a good illustration of this. Family members were unable to be paid for providing services to their adult disabled children. The Ministry had argued before the Human Rights Review Tribunal, the High Court and eventually, the Court of Appeal, that there was an implicit social contract by which families would look after their own members and it was unnatural to pay them to do so. Prior to the Tribunal hearing the policy was still being finalised by an interdepartmental working group. In 2005 a paper by the Working Group which promoted the idea that family members could be contracted to care for disabled people within their families if that was the wish to the disabled person, was dismissed by the Department of Prime Minister and Cabinet as “too human rights oriented”<sup>2</sup>. The Commission questions how this could ever be the case, particularly in light of New Zealand’s commitment to the various international human rights treaties.

The growing older population is also likely to have a significant impact on the provision of services. Statistics New Zealand predicts that by 2031 one in five New Zealanders will be over 65. Many of these people will require care and support services – many in their own homes. This will require a paradigm shift in attitudes towards the elderly and how they are cared for. Again a significant factor will be their ability to decide for themselves rather than having decisions about what is considered in their best interests imposed on them. In 2011 the Australian Productivity Commission carried out an Inquiry - *Caring for Older Australians*<sup>3</sup> - which canvassed a number of issues similar to those in the present Inquiry and also came to the conclusion that older Australians generally wanted to remain independent and in control of how and where they live, to stay connected to their families and communities and be able to exercise some measure of choice over their care<sup>4</sup>. Although the recommendations are not as explicitly linked to a rights-based approach as we are suggesting, it nevertheless contains some useful insights into reforms designed to promote high quality care.

A rights-based approach to commissioning and monitoring the provision of social services will need to include greater representation of those directly affected, both individually and collectively. Empowerment and community participation which ensure that service users and communities are able to participate in the design and delivery of services is a useful way of controlling the quantity and quality of the services and enhancing accountability and transparency. However, to do this successfully and improve the delivery of social services, the State needs to become more “user friendly” in how it does business.

**Q.5 What are the opportunities for, or barriers to, social services partnerships between private business, not-for-profit social service providers and government?**

The development of partnerships between business, service providers and government should be consistent with *The Guiding Principles on Business and Human Rights: Implementing the United Nations “Protect, Respect and Remedy” Framework* (the Ruggie Principles). The Ruggie Principles were adopted by the UN General Assembly in 2011. They are designed to ensure that companies do not violate human rights. The Ruggie Principles are made up of three parts. The first is the duty of the State to protect against abuse by third parties - which includes businesses - by adopting appropriate policies, regulations and adjudication. The second is the responsibility of business to respect human

---

<sup>1</sup> [2012] 3 NZLR 456

<sup>2</sup> *Ministry of Health v Atkinson* [2010] NZHC 2401 at para [175]

<sup>3</sup> Productivity Commission 2011, *Caring for Older Australians*: Report No.53, Final Inquiry Report, Canberra

<sup>4</sup> *Ibid.* at xix

rights, to avoid infringing the rights of others and to address any adverse impacts, and the third is ensuring victims have greater access to an effective remedy.<sup>5</sup>

While the Principles are binding on Government they are not legally binding in the same way as the more conventional treaties. They establish standards of behaviour which business is expected to conform to. We note that the study by Kaplan quoted in the Productivity Commission's paper states that "social enterprises may achieve social impact more efficiently than government, more sustainably and creatively than not-for profits and more generously than business"<sup>6</sup>. The Commission considers that active endorsement of the Ruggie Principles would go a considerable way towards improving social services partnerships between private business and the government.

**Q.9 How successful have recent government initiatives been in improving commissioning and purchasing of social services? What have been the drivers of success, or the barriers to success, of these initiatives?**

One of the examples that the Productivity Commission is interested in hearing more about is the provision of social housing. The Human Rights Commission has been involved in the right to housing and the right to health in the context of the Canterbury earthquake recovery initiative. This work highlighted the need for a systems approach such as the approach taken by the Canterbury District Health Board, places the home at the centre of patient wellbeing. The CDHB thinking predated the earthquake. The CDHB and other entities in the Canterbury health system concluded that if they continued to work in the way they usually did, by 2020 they would need over 2000 new rest home beds, a new hospital the size of Christchurch hospital and 25% more General Practitioners. This was simply not affordable. Something had to change. Now the home is the primary health care facility. Homes therefore need to be adequate. In deciding what is adequate, useful frameworks have been developed by human rights institutions and experts. Affordability is one of the indicia of adequate housing but other indicia are equally important.

The right to adequate housing is found in the International Covenant on Economic Social and Cultural Rights (ICESCR)<sup>7</sup>. It is also referred to in treaties addressing the specific needs of groups such as women<sup>8</sup>, children<sup>9</sup> and the disabled<sup>10</sup> and reflected in other major treaties such as the International Covenant on Civil and Political Rights,<sup>11</sup> the International Convention on the Elimination of All Forms of Racial Discrimination<sup>12</sup> and the Refugee Convention. It is integral not only to the right to an adequate standard of living but fundamental to the enjoyment of economic, social and cultural rights in general, and rights such as the right to health and education, in particular.

The Committee on Economic, Social and Cultural Rights (the body which monitors the Convention) has defined the scope of the right as including security of tenure, availability of services and facilities, habitability, affordability, accessibility, location and cultural adequacy.<sup>13</sup>In 2008 Raquel Rolnik, the

---

<sup>5</sup> Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises, John Ruggie: *The Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework*, A/HRC/17/31 at para 6.

<sup>6</sup> Kaplan, M *Growing the Next Generation of Social Entrepreneurs and Start-Ups in New Zealand* (2013)

<sup>7</sup> Under Article 11(1) States Parties ... recognise the right of everyone to an adequate standard of living for himself and his family, including adequate food, clothing and housing...

<sup>8</sup> Convention on the Elimination of all Forms of Discrimination Against Women, Art.14(h)

<sup>9</sup> Convention on the Rights of the Child, Art.27(1)

<sup>10</sup> Convention on the Rights of Persons with Disabilities, Art.19

<sup>11</sup> Art.17

<sup>12</sup> Art.5(e)(iii)

<sup>13</sup> United Nations Committee on Economic, Social and Cultural Rights (1991), *The Right to Adequate Housing: Article 11(1) CECSR General Comment No. 4*, Geneva: United Nations (E/1992/23)

Special Rapporteur on Adequate Housing,<sup>14</sup> stated (in relation to the global housing and mortgage crisis):

*One of the fundamental errors has been to consider housing only as a commodity and an investment asset ... the current crisis represents an opportunity for reflection and to consider how to improve housing systems, policies and programmes so as to ensure adequate housing for all ... it is essential that all actors involved in the housing sector fully recognise the subtle dimensions of housing, which is much more than a mere financial asset, and recognise it as a human right.*<sup>15</sup>

While it may seem obvious for the Commission to advocate for such an approach, a human rights approach would have the benefit of reflecting a community-wide perspective, ensuring a more satisfactory outcome with greater buy-in from all those involved. It would also emphasise the social benefits and economic well-being for individuals and families that are inevitably linked with improved housing.

An issue closely linked to the provision of social housing is housing for people with disabilities. Until recently the provision of housing for people with disabilities has focussed on removing barriers to, or modifying, existing housing. Increasingly, however, this is changing with the promotion of a way of building that is more inclusive and meets the needs of all users regardless of age or disability and will become more relevant with the ageing population. Universal design improves the usability of the built environment; promotes safety and well-being for everyone; enables the independent use of the built environment and ensures no one is excluded from the use of the built environment by physical barriers.<sup>16</sup> The Commission suggests that the Productivity Commission recommends taking the principles of Universal Design into account in any future housing policy and consults with the diverse and different communities that make up contemporary New Zealand to identify their specific needs.

**Q.14 What needs to happen for further attempts at service integration to be credible with providers?**

The Commission is currently developing a National Plan of Action for the promotion and protection of human rights. The plan is heavily influenced by the recommendations that were made by the United Nations Human Rights Council earlier this year as part of the Universal Periodic Review process. A major focus will be the reduction of all forms of violence and abuse against women, children and marginalized groups.

As part of this work there is an opportunity to review the way that family and sexual violence services and child abuse and neglect services work together. There is consensus among the NGO community that there needs to be a central, coordinating agency to develop agreed common understanding (including definitions) on all forms of violence and abuse, and to scope the situation for New Zealand as a whole through a population based survey which could be repeated at intervals to monitor progress and identify gaps. This work would involve implementing consistent training, accreditation and education for everyone who work in this sector, collecting agreed data so that trends can be monitored accurately and links available programmes and services. In order to keep women and

---

<sup>14</sup> A Special Rapporteur is an individual designated by the UN to address thematic issues throughout the world and to report to the UN body governing their implementation. As a mechanism of the UN human rights system, the role of the Special Rapporteur is to promote and ensure compliance by Member States with human rights standards.

<sup>15</sup> Raquel Rolnik, *Statement of the Special Rapporteur on adequate housing as a component of the right to an adequate standard of living, and on the right to non-discrimination in this context: A/HRC/10/7 (9/3/08)*

<sup>16</sup> See [www.barrierfreenz.org.nz](http://www.barrierfreenz.org.nz)

children safe, there needs to be a greater focus on perpetrators, reducing re-victimisation and implementing proven preventive strategies.

Ultimately a national strategy must be developed with clear actions, goals and timelines and which has cross party political support. The CEOs of the main Ministries should be held accountable for protecting women from family and sexual violence. There also needs to be regional and population group solutions since European constructs for dealing with family violence don't necessarily work for Maori, Pacific or ethnic communities. Work already underway includes the police victims' database, ACC's healthy relationship training pilot for secondary college students, the proposed ACC population based survey to look at the extent of violence in our society and the new ACC integrated model of dealing with sensitive claims. The ACC model could provide an opportunity for linking family violence and child abuse and neglect which have been siloed up until now.

Many NGOs commented that they were concerned that Government contracts included 'gagging' clauses which they felt bound to observe or forfeit their funding. They strongly believed that they should be able to advocate in their sector and be able to hear and comment on how victims felt the current system failed them. A human rights approach would mean consulting with the frontline providers who have enormous amounts of information and experience. There also needs to be an effective, accessible complaints mechanism so those accessing, or trying to access, services are able to critique the services so they can be improved.

**Q.20 Are there examples where government contracts restrict the ability of social service providers to innovate? Or where contracts that are too specific result in poor outcomes for clients?**

The *Atkinson* case referred to earlier was, in our view, an example of a government contract that unreasonably hampered providers adapting existing services to meet the needs of individual clients. The poorly formulated policy not to pay family members to care for their adult disabled children was applied indiscriminately and led to a finding of family status discrimination by the Courts.

In response the government legislated, passing an amendment to the New Zealand Public Health & Disability Act under urgency that not only purports to make lawful any practice relating to the policy that existed before the Act was changed but also confers on the Crown (and any DHB) the right to adopt or have, change, cancel or replace a family care policy. A Family Care Policy is itself broadly defined as any statement in writing, made by or on behalf of, the Crown or DHB that has the effect of permitting a person to be paid for providing support services to their family members. Further it is no longer possible to complain to the Human Rights Commission if the policy is applied on a discriminatory basis by reason of marital status, disability, age or family status.

The aim of both the amendment and the drawn out legal proceedings was to prevent an avalanche of applicants seeking to be paid for caring of their disabled relatives. In fact, the number of people seeking to take advantage of the policy was very low and nowhere near the estimate of the Ministry.

The implications of both the implementation of the policy and the introduction of the legislation are significant and cannot be said to comply with public sector accountability or the cabinet manual<sup>17</sup>.

---

<sup>17</sup>3.50 - Employees in the state sector must act with a spirit of service to the community and meet high standards of integrity and conduct in everything they do

**Q.56 Are you willing to meet with the Commission? Can you suggest other interested parties with whom the Commission should consult?**

The Commission would welcome the opportunity to meet with the Productivity Commission. We also suggest that there are meetings with organisations representing disabled people such as People First, DPA, Balance NZ and Carers Alliance.