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POVERTY
ACTION
GROUP

**Left Behind. Using the Law to
Make Every Child Count:**

CPAG vs Attorney General

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**Every Child Counts Conference
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Left Behind. Using the Law to Make Every Child Count:

CPAG v Attorney General

IN THE MATTER OF A CLAIM UNDER THE
HUMAN RIGHTS ACT 1993 AND ITS AMENDMENTS
BETWEEN
CHILD POVERTY ACTION GROUP INCORPORATED
Plaintiff
AND
THE ATTORNEY-GENERAL
Defendant

HRRT 41/2004

Introduction

Thank you for asking me to speak today, and, for accepting my suggestion that I talk on this contentious and complex subject. I am aware of the extent of controversy the Child Poverty Action Group (CPAG) case has engendered politically and within the “children’s” movement. People have questioned why CPAG has been embroiled in fighting the expensive and time-consuming case now before the Human Rights Tribunal.

Put simply, all the rhetoric in the world around how “every child counts”, does not ensure that every child *actually* counts. If our *policies* scream “every child **does not** count”, child advocates find they must exhaust all avenues to get justice for the poorest and most marginalised children in society. While we have no money, CPAG is a truly independent group, not inside any political tent, and can say it as it sees it without fear or favour.

A couple of weeks ago I went to an Auckland film festival film, *Taxi to the dark side*. The shocking thing about that film was not so much the graphic portrayal of the atrocities committed by the Americans at Abu Ghraib and Guantanamo Bay, but the fact that in a country like America there could be such a cavalier attitude to the honouring of the Geneva Convention.

Where was the outrage from the academic lawyers, and the checks and balances that should have kicked into place? Human progress is painfully slow and hard-won gains are easily reversed. International commitments are only as good as the goodwill of the countries that sign up to them.

It got me thinking not only about the Convention on the Rights of the Child as a landmark of progress in the 20th century for children, but also thinking about the hard won efforts of Sir Truby King and Michael Savage to improve the wellbeing of women and children. In the early post-war period, most mothers had sufficient time in hospital to regain their strength and to establish breast feeding with support from Karitane and Plunket nurses. The gains included adequate housing, free milk in schools, and a meaningful family benefit for every

child. In the 1970s, sole parents were recognised with the Domestic Purposes Benefit (DPB), and social security benefits were set at levels to ensure participation and belonging. It was not all rose tinted, but there was not the income and wealth divide we see today, and at least as far as government policy was concerned, **every child did count**.

Not only have we abandoned the principle that all mothers with young children should be financially secure and thus able to stay out of the workforce if they choose to, we have failed to honour our obligations as a signatory to UNCROC,² the international convention designed to protect children. Our best effort is just to legislate for breastfeeding breaks at the workplace while intoning the mantra “work is the way out of poverty”. Importantly, we have carelessly abandoned the hard-won principle that children should not be treated in a way that adversely affects them because of the status of their parents.

Background

The resolution of the CPAG case is vital to progressing the theme of this conference and ensuring every child does count, and I welcome this opportunity to explain the importance of this case taken on behalf of over 200,000 children representing about 20% of all children in Aotearoa New Zealand under the age of 18. In large part because of this failure to respect Human Rights obligations in developing child-related policies, 150,000 of those children have been consigned to living in severe and significant hardship, an unacceptable situation with high social, economic, and individual present and future costs.

In a time of rapid population ageing in which the number over 65 years will more than double by mid century, and the numbers over 85 will be around 6 times the numbers today, failure to invest in the poorest children because they live in families on benefit income will cost them and us dearly.

Undeniably, using the law to make every child count is an appalling way to get necessary changes in policy. But after over ten years of using the conventional channels and seeing things become worse for the poorest children in times of economic plenty, CPAG is proud to have been instrumental in getting the courts to examine the rights and wrongs of this issue.

The case is complex, involving over 700 documents in the discovery process, and many, many months of work, with detailed statements of evidence and cross examination in a full hearing of 4 weeks in the Human Right Tribunal. We were indeed fortunate that lawyers Catherine Rodgers and Jenny Ryan at the Office of the Human Rights Proceedings represented us so ably; and we have the satisfaction of knowing that we could not have mounted a better case. Personally it has been the most interesting, and riveting public policy exercise that I have ever been involved in. There will be a databank from this case that will provide fascinating material for research for many years to come.



² United Nations Convention on the Rights of the Child

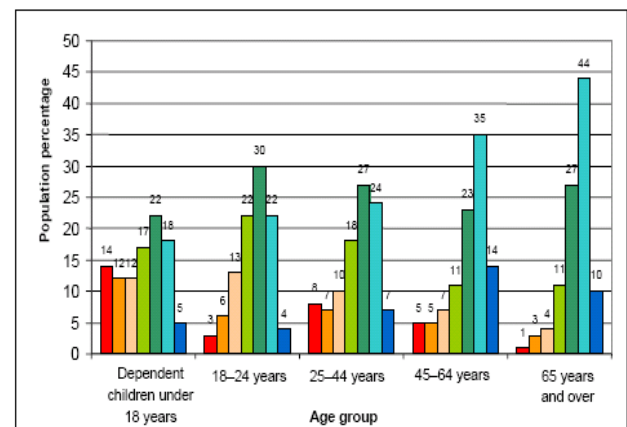
The nub of the case is the persistence of child poverty in a land of plenty. In developed countries, the old and the young are the most vulnerable to poverty and exclusion. Neither form of poverty is inevitable. Some countries like the UK have to contend with both pensioner poverty and child poverty. Why is it that in New Zealand the issue has been just child poverty?

Child poverty persistence

Data from the Ministry of Social Development (MSD) shows quite starkly the difference in living standards using the ELSI scale which puts the population into 7 different graded categories of well being (Figure 1), ranging from “severe hardship” at one end to very good” at the other. There are two startling observations in relation to the ranking by age:

1. The very good living standards of those over 65 and the very low living standards of those under 18; and
2. Between 2000 and 2004 in spite of very good economic growth and an improvement in employment for low income households, there was a staggering rise from 18% to 26% in the numbers of children in the lowest two hardship categories.

Figure 1. MSD ELSI Scale 2007



In that period from 2000 to 2004, there was a small increase for those over 65 in severe and significant hardship, but the rate of 4% is negligible compared to the 26% for children. To explain the difference between young and old, look no further than the difference in policies: excellent incomes policies to protect those over 65, and a wanton neglect of incomes policies for children from the late 1980s.

The key for those over 65 has been the provision of an adequate basic income floor for all through a universal pension tied to the average wage, not just to prices. We don't insist that they work even if they are perfectly capable: they are free to get their sense of social inclusion and well-being from unpaid work. Nor do we agonise over what the feckless over 65s spend their pension on, we trust them to spend the money on looking after themselves, before gambling it away, or drinking it. If a few of them do drink, smoke or gamble, we don't deny them the pension.

Also, we don't run the argument that poverty for the elderly is inevitable because we are no longer a rich country; or that globalisation has put us into a different ball park and tied our hands. New Zealand Superannuation is regularly adjusted and will actually be significantly enhanced next month (October 2008) because of the link to the net wage that goes up with the tax cuts.

Importantly, as well, unlike many other OECD countries, we don't make New Zealand Superannuation conditional on work history. Everyone gets the same whether they have been in paid or unpaid work, so that it is very fair to women whose participation rates fall

well below those of men at all ages as they continue to do the bulk of child rearing and all of the work of child bearing.

In stark contrast to these conditions for those over 65, financial provision for children is not universal. While it will become inflation-proofed, at last, next month, it is not adjusted for wage growth, and most importantly, the amount that parents get for their children is now dependent on whether they are in sufficient hours of paid work.

The history of the case before the Human Rights Tribunal

After years of writing about this injustice, CPAG saw no answer except to challenge in law the prevailing ideology that divides poor children into two groups: the deserving and the undeserving. The heart of CPAG's case is that the state discriminates against children whose parents are not in paid employment, and by doing so material disadvantage is caused, which is not justified by appeal to any higher good that the discrimination achieves.

The rationale for the case is best understood in the context of the history of family assistance through the child-significant 1991, 1996 and 2004 budgets.

In the late 1980s there was a universal child benefit and a commitment to the principle that children should not be treated differently based on their parent's status in society. By the end of the Labour government's term in 1990, there was a Family Benefit of \$6 a week per child, and Family Support which varied according to family income. Together, they provided a weekly payment for the child or children. For example the one-child family (I will use this to illustrate, but a similar story can be told for all families of differing size) on a low income got a maximum of \$42 a week.

The 1991 budget was a terrible time. Benefits were cut savagely when we already knew how difficult life was for those on benefits. There was no consideration or empathy as to the effect those cuts would have on children. Children were invisible in policy-making considerations

This was also the moment when we lost the principle of a universal payment for children. The one-child family still got a total of \$42, but the Family Benefit component was amalgamated with Family Support so that higher income families got nothing. Yet even then at least in 1991 all low income children were on the same level playing field.

It is not surprising that poverty soared after the 1991 budget in a way the post-war generation had not known. Foodbanks, largely unheard of previously, mushroomed, and the paediatricians began recording a shocking rise in the incidence of preventable poverty-induced childhood diseases. It was shortly after the 1991 budget that a group of us got together in alarm that this could be happening on our watch. Based on the well-established UK model of CPAG we set up an affiliated branch, CPAG NZ.

The 1991 Budget:

From Post war security:

- ▲ 1986 Family Support/
Family Benefit
- ▲ 1991 Family Support
- ▲ No indexation

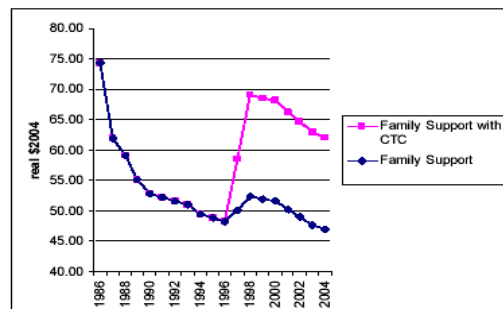


CPAG, like others in the children’s advocacy area, sees poverty as multidimensional. Income alone is not the answer to entrenched poverty, but CPAG believes that having an adequate income for families with children is an essential basic requirement. This view is supported by research, including by the Ministry of Social Development. After adequate income is established, other things such as budgeting help can be effective, but not before.

From the early 1990s, CPAG was deeply concerned that family assistance was not indexed, not even to prices, let alone wages. For example, the \$42 total per week for the one-child family had not been increased since 1986. By 1996, this neglect had seen Family Support dramatically lose purchasing power and it was badly in need of a catch up.

In the 1996 budget, after years of neglect, Family Support was increased by \$20 per child, a much needed inflation catch up. But of this, \$15 was marked off, called the Child Tax Credit, and only given to children of the deserving poor: parents not on benefits (see Figure 2). The ones left out were the poorest and the most needy. They did not even get an inflation catch-up and continued to fall further behind.

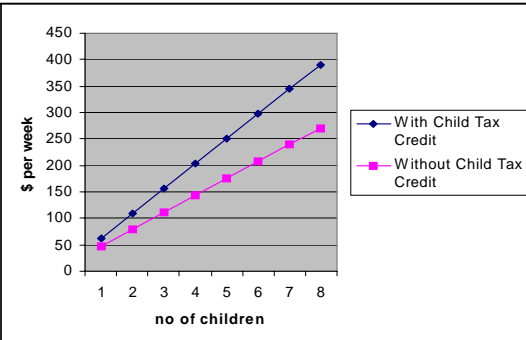
Figure 2. Maximum real family assistance (1-child family) 1986-2004 (\$2004)



Now looking at how family assistance changes with the numbers of children: there are two paths, one for the deserving and one for the others as shown in Figure 3. The 6-child family got \$90 more per week if not on a benefit. The discrimination was gross. Children of parents on benefits, student allowances, New Zealand Superannuation or on ACC, all missed out.

CPAG wrote to the Human Rights Commission in 1996 to allege discrimination, but the government was not itself subject to the HRA at that time. We were not alone in our concern. In opposition, as is recorded in page after page of Hansard, Labour railed against the Child Tax Credit. While it is not my intention to embarrass our politicians, it is clear that in opposition, they thought or at least spoke differently to when they became the Government.

Figure 3. Weekly Family Assistance to low income family by numbers of children



For example, this from Annette King: *“What this Government has done is create two classes of children: the children of beneficiaries and the children of people in work. We have never had a public policy that labels children and put value on a child whose parents have a job and a lesser value on a child of a person who is on a benefit. But that is exactly what this Government has done with its announcement. If one is the child of a beneficiary, one is not as valuable as the child of a working person.”*

In the terminology of this conference, Annette King may as well have said- every child does not count with the Child Tax Credit. She continued: *“It is no wonder that we do not value the*

work that is done in our homes, because we dismiss it and give it no economic value at all. That is disgusting. To divide children into those whose parents are good parents because they work and children who are bad because their parents do not is absolutely disgusting.”

Michael Cullen gave us even more cause for optimism that the issue was seen clearly by the Opposition, describing it as: *“a simplistic tangle of bigotry and ignorance ... barely disguised attack on beneficiaries ... mean spirited, ill thought through and punitive ... unholy product of National’s deeply held view that everyone on a benefit is a bludger and Treasury’s new right agenda ... based on highly questionable incentives arguments.”*

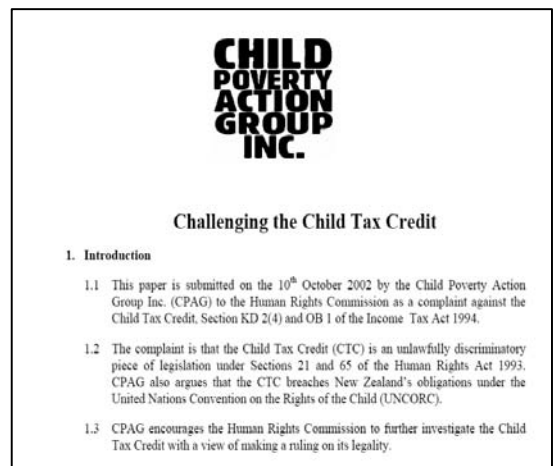
The 1996 manifesto of the Labour government promised to remove the discrimination by joining the CTC to Family Support, so that every low income child got family assistance on the same basis and every child would count once again.

From 1996 CPAG campaigned vigorously against the CTC, seeing it as the thin end of the wedge, which we saw could lead to the further erosion of the principle that all children be treated the same. Once a principle is lost there are no guidelines, and it becomes easy to use policy to meet other objectives. How right we were.

We estimated that the government had saved \$250m a year by not paying the CTC to those deemed not to be “independent of the state” and thus contributed to large fiscal surpluses. Surpluses, that could be seen to be generated on the backs of the poor, were siphoned off into the New Zealand Superannuation Fund (NZSF) to secure wage adjusted pensions of those over 65, a group with the best profile of standard of living of any age group.

In 2002, once the government itself became subject to the anti-discrimination provisions of the HRA under Part 1a, CPAG put together an official complaint.

It is fair to say that none of us had any concept of what we had set in train. In our naivety, we thought the HRC would look at our arguments and pronounce that the CTC was indeed discriminatory and that the government would agree then to remove the discrimination by adding the CTC to Family Support as it should have done as soon as it was elected in 1999.



In actuality, following the election of Labour in 1999, nothing was done for the next 6 years to halt the slide in the real value of family assistance.

When it finally arrived in 2005, Working for Families (WFF) was a big package, but it had to be after so many years of neglect. Although from the perspective of 2008 it does not look as generous as it did in 2005, it did represent a real increase for many families over and above a mere inflation catch-up.

But our worst fears about the loss of principle were realized. Far from bringing back the principle of treating all children the same, WFF intensified the discrimination by changing

the CTC into the even more generous and more exclusionary In Work Tax Credit (IWTC). Moreover its dual policy goals of encouraging work and reducing child poverty were in conflict.

Figure 4 shows the increased value of family assistance and the way in which the two paths, with the IWTC and without the IWTC, diverge. The IWTC is more generous than the CTC especially for the 1, 2, and 3 child families.

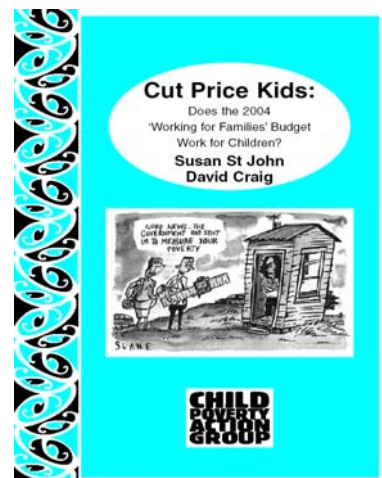
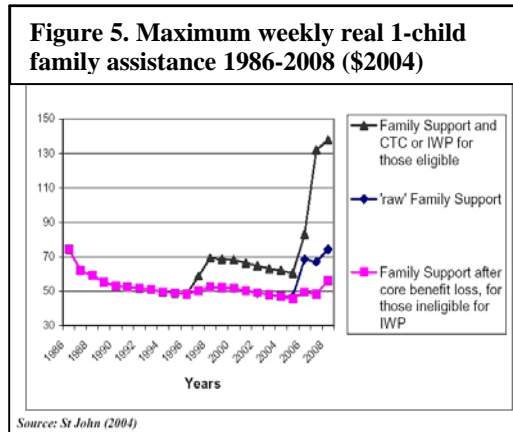
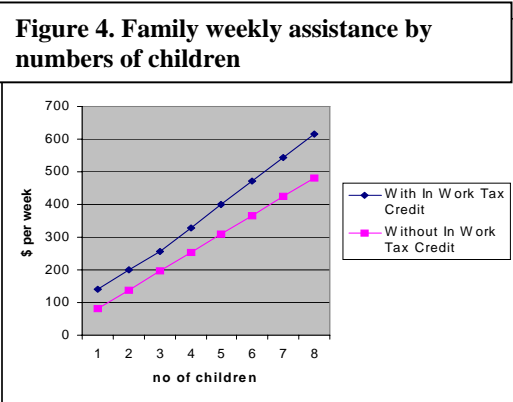
Let's return to those 26% of children in severe and significant hardship. WFF certainly has helped many of these children out of this situation, but it did not help all poor children by the same amount. The impact was to leave behind about 150,000 of those who were the poorest. By not paying the IWTC to all on the same basis, the annual cost saving to the government was \$450m. Figure 5 shows the large gap created after 2005.

Moreover, and another very poorly understood aspect of these issues, WFF was used as the cover for reducing other social welfare benefits for families. Family Support went up, but core benefits and hardship provision went down. In this way it saved another \$237m (see third line Figure 5 for the changes to the core benefit).

Here is an analogy: if 250,000 children were drowning or afflicted with a severe but treatable disease we would not say to the very sickest 150,000 children, or those furthest from the life raft: "Go tell your parents to get a job and then we will think about helping you. But right now we will save the other 100,000."

We may have been regarded as quite extreme in our reaction, but it was clear to CPAG from budget night 2004 that Working for Families would not give adequate lift to all poor children. Many would be LEFT BEHIND. We made ourselves unpopular by pointing this out in *Cut Price Kids*, 2004. After such neglect, to leave the very poorest merely 'no worse off' was, we felt, not good enough.

Predictably, by 2007 problems were apparent. MSD's 2007 June report *Pockets of Significant Hardship* identified that many families on benefits "had nothing in reserve" with incomes after housing costs falling under even the very stringent 40% poverty line. The public did not hear about this report until it was posted on the website a year later. But, even then there was no relief in the 2008 budget, only a subsequent promise that special needs grants for food, the most stigmatising of assistance, would be increased.



It is no wonder that paediatricians continue to report high incidence of treatable diseases, and foodbanks continue to struggle to meet the ever- increasing demand.

Names are very important because by changing the name of the CTC to the IWTC, the child-focused nature of the payment is obscured. The expensive name changes for the various components of family assistance defy belief and are partly responsible for the poor understanding of the CPAG case by the public. We often hear, for example, that there can be nothing wrong with paying an in work tax credit to those who are in work.

We saw how similar the impact of the IWTC is to the CTC in driving a wedge between the children of beneficiaries and others. The IWTC is the CTC in drag. The small difference is that the IWTC of \$60 does not change for 1, 2, or 3 children, but it increases at the rate of \$15 a child after that. A label does not change the reality. It is a payment for the child/ren and it is needed to meet the extra costs of children, regardless of the work status of the parents. Families that miss out on the IWTC get a minimum of \$60 a week less than other poor families. That is \$3,000 every year, a lot of bread and milk, and a huge loss for low income families.

Because the Crown initially disputed the right of CPAG to take the case, and the pre court process was so time consuming, when it was finally decided we could take the case, the CTC had become the IWTC. So now the case is against the IWTC which is even more discriminatory than the CTC as it requires a minimum number of hours of work to be met, as well as non-benefit status. Table 1 gives a brief summary of the way the case was in and out of the courts from 2002, as Crown Law tried to stop it going to court by arguing CPAG could not take the case because we ourselves were not discriminated against.

Table 1.	Human Rights Case: CPAG v The Attorney General
1996	HR complaint rejected
2002	CPAG lodged complaint under Part 1A
2003	Crown Law objected
2004	Case taken on CPAG's behalf by Office of Human Rights Proceedings
March 2005	Crown disputed CPAG's right to take the case
September 2005	Human Rights Tribunal ruled in CPAG's favour
October 2005	Crown Appealed
May 2006	Reserved decision dismissed Crown's appeal
August 2006	case went to Judicial Review
November 2006	CPAG won right to take the case

The IWTC impact

We can see how disastrous the policy is with a few examples.

Example 1: A young couple

Bob and Anne in their 30s just had their first child. He earns \$35,000 - \$543 net a week. She gets max WFF \$142 a week. They are only just getting by. No KiwiSaver. He loses his job. UB = \$307 a week. Her WFF falls to \$82 a week. Welfare state is no longer a cushion. They will never own their own home.

Example 2: A young widow

A young mother with a one year-old loses her partner to sickness. She has to subsist on the DPB and her payment for the child reduces from \$142 to \$82 a week – just when she needs more help, not less.

As families lose their jobs in the current slowdown, the relevance of the case CPAG is taking is painfully obvious. In the old days when low-income people lost their jobs- family support

payments actually increased. Now the caregiver in a family on say \$35,000 not only loses the earner's main income but also loses \$60+ of her income for the children.

We estimate the discrimination in Family Assistance (first the CTC, now the IWTC) has cost poor families a cumulative 3-4 Billion since 1996. The longer this goes on the wider the wealth and income gaps between the poor on benefits and those in work become.

The Crown argues, disingenuously, that families on benefits are already getting more from the state and so giving more to those not on benefits is acceptable. Further, they claim that there is no discrimination because according to them the IWTC is not related to children or the costs of children but is purely work incentive.

To counter the claim that the IWTC is not simply a part of Family Support, Crown Law cite that the IWTC is treated differently to Family Support for separated families. Family support is shared for parents with joint custody, but both separated partners may claim the IWTC in their own right provided they are looking after the child/ren for at least 5 days a fortnight. This proves the IWTC is related to the children. Moreover there has been no answer to the question, why, if it is simply a work incentive, can both parents have it if they are separated but not while they are together? Even if the child-related aspect is accepted, the Crown argues that discrimination is justified because of the higher good of providing a work incentive. It must be the strangest in work benefit in the OECD.

Table 2.	In work benefits are hard to design
UK- working tax credit	NZ- In Work Payment
minimum hours worked	minimum hours worked
Adult based	Adult based
Paid to worker	Paid to carer
Abates from v. low level	Abates v. high level
Abates fast	Abates slowly

The In Work Tax Credit does not operate as a work incentive except in a very crude sense when full time work is possible for a sole parent. For couples it is paid to the partnered carer who is often not working, and it can even make it less necessary for the carer to work.

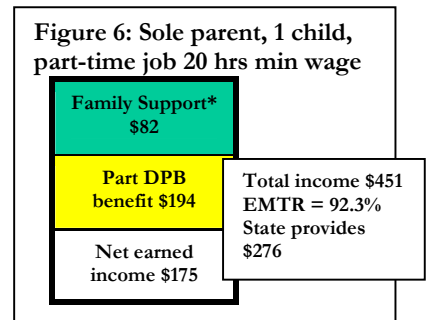
It is a payment that has at its heart making life better for children, just as Family Support itself does and always has done. It is not paid to individuals without children, nor does it target the transition to work (as in the UK). It has arbitrary hours of work requirements that are more severe for sole parents than couples. It does not recognise the value of caregiving and takes no account of the age or the health of children. At a cost of \$590m, paid right up the income scale to families on over \$100,000 per annum with several children,



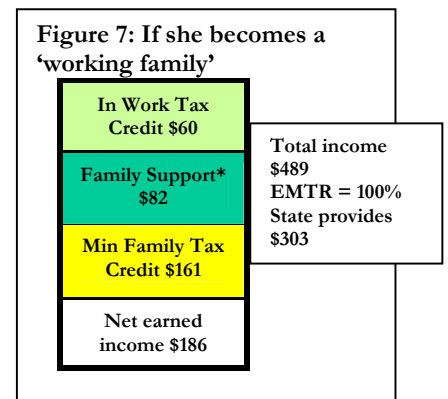
The IWTC is an astonishingly expensive way to shift a few sole parents into work.

Somehow, on our watch, looking after children became not work. Paid work has been elevated to be the panacea of all society ills. In the words of the Social Security Amendment Act 2007 - paid work is the best source of social and economic well being.

Care-giving is definitely not work unless it is done by strangers for money. In the strangely convoluted logic of the paid work mantra, if a sole parent puts her young children in day care and spends 20 hours stacking shelves at the supermarket she is better off and society is better off even if the total paid for child care by the state may exceed her wage, and even if there are no prospects for her to gain more skilled work. With regard to families, paid work is the best way, if not the only way out of poverty. “Making work pay” is a dangerous slogan. When paid work manifestly fails to deliver a living income then the government must come along with a dollop of money to ‘make work pay’.



Let’s see how the fixation on work plays out in practice. Figure 6 shows the situation for a sole parent working 20 hours a week at the minimum wage on a part benefit. Figure 7 shows what happens if she goes off the benefit. Under WFF she is now called a ‘working family’ (even though she is not working any more hours than before), and qualifies for the IWTC. But to remain off the benefit she now *also* requires a top-up from the state by way of the Minimum Family Tax Credit (MFTC). Ironically, she now gets more from the state than she was getting on a part benefit, and the incentive to work more hours is entirely eliminated by a dollar for dollar clawback of the MFTC. But now she will be counted as a success of WFF, and of the IWTC in particular.



Conclusion

Family assistance as a per week payment to the caregiver for the children should have had at the heart of its purpose the goal of ensuring income adequacy for the care of all children. The problem is that there are now two objectives for family assistance. The bit marked off and called the IWTC is supposed to both

- Reduce Child poverty; and
- Encourage work effort.

The outcome is that it does neither well, and it actually entrenches poverty of the poorest families with children.

What do we want the government to do? The solution is to join up the parts of family assistance so that all low income children are once again treated the same. Pre-election 2005, Labour vastly improved the work incentive aspect of WFF by raising the threshold before families begin to lose tax credits, and by reducing the rate of loss for extra income. Thus it was more worthwhile to earn extra income. The fiscal cost was \$500m.

The complex IWTC is not needed as an additional work incentive and should be joined up to Family Support, now the FTC. This could be done by adding \$60 to FTC for the first child in all families at a net cost of \$450m, thereby returning to an important principle of treating all children in low income families the same.

This would be a highly efficient way of targeting poverty as the only families to benefit would be those of the poorest children, whose parents currently do not qualify for the IWTC. This would go some way to alleviating the plight of the 150,000 children trapped in the “severe and significant hardship” categories.

It is only after the discrimination is removed, and not before, that we should talk about returning to the principles of universality. Then, to start down this track, twenty dollars for each child aged under 5 could become fully universal at a modest cost of approximately \$100m. This would be better and fairer than income splitting.

CPAG’s priority is making sure that every child counts. Income splitting, increased paid parental leave, and making some existing family assistance universal, may all have some merit in making it clear that parenting is work. But none of those policies addresses the issue of assisting those 150,000 or more of the poorest children left out in the cold.

Income splitting may be particularly problematic as a device to recognise the value of child rearing. Its expense, along with increased paid parental leave, may preclude the more needed spending on the families left behind

CPAG is seeking a declaration that the IWTC is inconsistent with the Human Rights Act. A judgement in CPAG’s favour does not compel action, but it will carry a good deal of moral force. The judgement in the case has not yet been delivered but CPAG wishes to put all politicians on notice: If any government uses a decision in CPAG’s favour to abandon the IWTC and give tax cuts instead, rest assured that CPAG and we hope the entire children’s movement, will rise up in protest.

WFF is not too generous. It does need to be more honest and acknowledge that all the per week payments to the caregiver are for the costs of children, and if *some* low income families need these payments to meet the basic needs of their children, then all low income families do. Removing the current discrimination would mean that all the families who need these payments for their children would receive them.

Once again, I thank the organisers for their vision in bringing this conference together and for their inclusive approach that has enabled us to explain “our case”.