Lawyers seek ATO support in childcare tax challenge

Rachael Bolton *Work and careers reporter*

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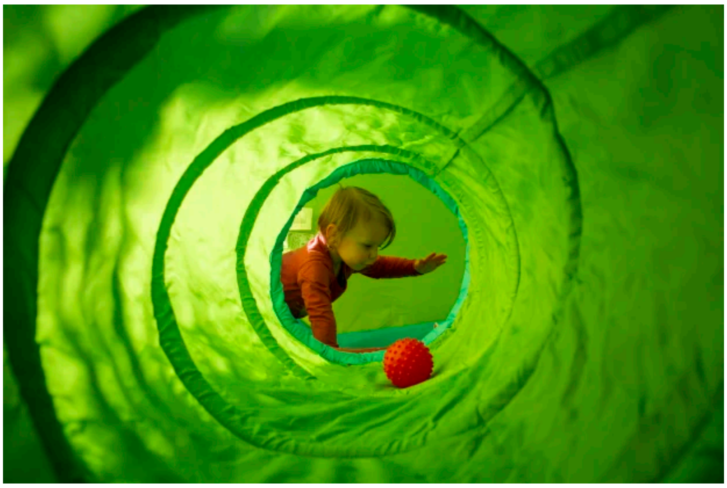
The law firm behind a push to overturn a 50-year-old precedent that stops families claiming a tax deduction on childcare is entering talks with the Tax Office as it inches the case along a winding path to the High Court.

Arnold Bloch Leibler's lead tax partner, Paul Sokolowski, told *The Australian Financial Review* the firm was approaching the ATO seeking its agreement to provide litigation funding under its test case funding program. At a minimum, the firm hopes the ATO will agree not to seek costs during the litigation process.



People currently have to show childcare is helping them materially do their work better to make a tax claim. **Ryan Stuart**

This is important for a legal battle the firm estimates will take over a year to snake through the courts; it won't be cheap.

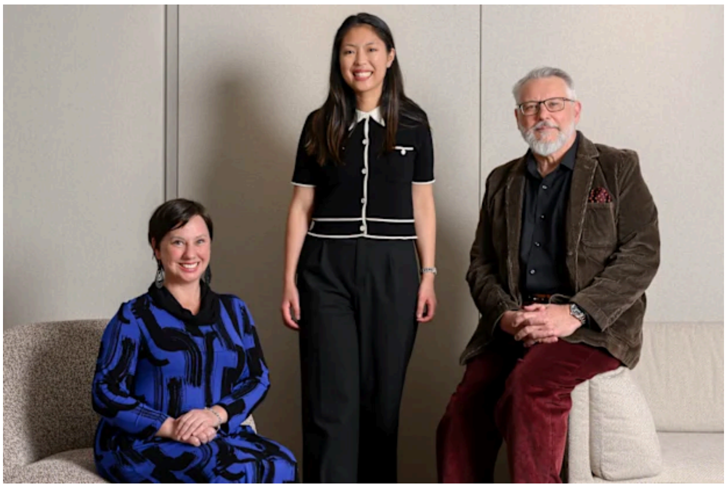
The case tests a 1972 High Court ruling that found parents had no right to claim childcare fees as a tax deduction [https://www.afr.com/link/follow-20180101-p5lvq7] because they were a private, domestic cost. Basically, although childcare might make you more able to seek work, that's not deductible. You have to show it is helping you materially do your work better to make a claim.

ABL will argue that is demonstrably the case today, but in order to contest the High Court's own precedent it will have to proceed through several layers of lower court proceedings, which it anticipates losing. Ultimately, it hopes the case will be referred to the High Court – the only court empowered to reconsider its own decades-old work.
"Look, this is litigation," said Sokolowski. "It's always the least-best alternative because it's torturous, uncertain, it can be expensive, and it's stressful. Absent some certainty about the Commission on Taxation not seeking their costs [if we lose] there is this jeopardy there.

"For that reason, and because this is a matter of public interest that will clarify the law as it is in the 21st century, we would like to get certainty about costs."

The firm has taken the case pro bono on behalf of several litigants who represent different distinct examples of taxpayers who believed they should be entitled to claim a deduction for their childcare costs [https://www.afr.com/link/follow-20180101-p5kbjr].

Family and work life are very different today than they were in the 1970s, said Sokolowski, adding: “What was decided 53 years ago really can be looked at very differently now.”



Special counsel Bridgid Cowling, senior associate Eileen Liu and lead tax partner Paul Sokolowski from Arnold Bloch Leibler are spearheading the charge to have childcare made tax deductable. **Yusuke Sato**

But Georgie Dent from advocacy group The Parenthood said a tweak to the tax code that only helped wealthy families fell short of the wholesale reform the workforce really needs.

“I can understand that there would absolutely be families for whom that is an attractive option,” she said, regarding tax deducting childcare fees.

“But from a public policy perspective, we’ve got to take a step back and recognise that in reality, making early education and care – or a nanny – tax-deductible, overwhelmingly benefits higher income earners and it leaves behind families and households who need that support the most. A tax deduction only helps those who earn enough to claim one.”

Dent said tinkering at the edges of childcare policy diverted attention, political energy and funding from the kind of comprehensive change the childcare system really needs.

The Parenthood is advocating for free care for low-income households and the introduction of a simple, universal, capped daily fee for everyone else, similar to the system already being implemented in parts of Canada.

“Whether that’s $10 or $20 a day, it is easy to understand,” Dent said. “It’s equitable. It is proven to boost participation in the workforce. And by doing that, you are not just delivering a social good, but it’s an economic strategy that delivers benefits for children, parents and families, and productivity.”

It would also result in cheaper care for higher income earners too – more than any tax deduction could deliver.

“If we are serious about lifting productivity, achieving gender equity and setting children up to thrive, what we actually need is a meaningful policy reset,” Dent said.

That’s not an argument unfamiliar to Sokolowski. On the flip side, he argued tax deductibility is not a cure-all but should form part of the complex puzzle for families trying to juggle life and career and very small children: “There’s no one size fits all.”

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