IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

CIV-2012-404-6717
[2013] NZHC 2580

UNDER	the Judicature Amendment Act 1972
BETWEEN	MARGARET SPENCER Plaintiff
AND	HER MAJESTY'S ATTORNEY-GENERAL in respect of the Ministry of Health First Defendant
AND	THE HUMAN RIGHTS REVIEW TRIBUNAL Second Defendant

CIV-2013-404-2910

UNDER	the Declaratory Judgments Act 1909
BETWEEN	MARGARET SPENCER Plaintiff
AND	HER MAJESTY'S ATTORNEY-GENERAL in respect of the Ministry of Health Defendant

Hearing:	24-26 June 2013
Appearances:	J Farmer QC, S L Robertson, M A Sissons, G J Peachey for plaintiff U R Jagose, M G Coleman for defendant A S Butler, P R Barnett, S A Bell for Human Rights Commission
Judgment:	3 October 2013

JUDGMENT OF WINKELMANN J

This judgment was delivered by me on 3 October 2013 at 3.30 pm pursuant to Rule 11.5 of the High Court Rules.

Registrar/ Deputy Registrar

TABLE OF CONTENTS

Introduction

[1] This judgment is given in two proceedings. In the first, a judicial review proceeding, the primary issue is whether the Human Rights Review Tribunal (the Tribunal) had jurisdiction to suspend a declaration it had already made that a Ministry of Health policy was inconsistent with the right preserved in s 19 of the New Zealand Bill of Rights Act 1990 (Bill of Rights Act) to be free from discrimination on the grounds of family status. In the second proceeding, the issue is the effect of Part 4A of the New Zealand Public Health and Disability Act 2000[1] (NZPDHA) on the right of those affected by that policy to seek redress. That issue also arises in the remedies phase of the judicial review proceeding.

[2] The background to these proceedings is as follows. Mrs Spencer is the caregiver for her adult son Paul. He has suffered from Down's Syndrome since birth, is seriously disabled and unable to care for himself. He cannot live independently and lives with his mother. Mrs Spencer is one of a number of family caregivers who have, for many years, strived to obtain payment from the Ministry of Health (the Ministry) for the care they provide to their adult relatives. The Ministry operates a policy that excludes parents, spouses and other resident family members who provide disability support services to their adult relatives from receiving publicly funded payment for those services. That policy reflects the Ministry's view that family members are "natural supports", bound by a social contract between families and the state whereby families are not paid for looking after their own.

[3] This policy was challenged before the Tribunal. Mrs Atkinson[2] and eight others (seven parents of adult disabled children and two adult disabled children) brought proceedings in which they alleged that the Ministry's practice of excluding specified family members of people eligible for disability support services from payment for those services contravened s 20L of the Human Rights Act 1993. That provision states that an act or omission is in breach of Part 1A if it is inconsistent with s 19 of the Bill of Rights Act because it unjustifiably limits the right to freedom from discrimination. Family

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1 Inserted on 21 May 2013 by s 4 of the New Zealand Public Health and Disability Amendment Act 2013.

2 Mrs Atkinson died before the hearing of her claim, and her husband was substituted as first plaintiff as executor of his wife's estate.

status is, by virtue of s 21 of the Human Rights Act, a prohibited ground of discrimination. For reasons discussed later in this judgment, Mrs Spencer was not a party to that litigation.

[4] On 8 January 2010 the Tribunal found in favour of the *Atkinson* plaintiffs, declaring the Ministry's policy inconsistent with s 19 of the Bill of Rights Act. The Tribunal directed that there should be a separate hearing to determine whether any of the orders sought by the plaintiffs should be granted. The relief sought includes an order restraining the Ministry from continuing the breach, damages for pecuniary loss, and damages for humiliation, loss of dignity and injury to feelings. The remedies hearing was ultimately delayed by the filing of appeals against the Tribunal's decision. It was scheduled to take place later this month but has been further adjourned.

[5] Following the issue of the January 2010 decision, the Ministry immediately applied, under s 92O(2)(d) of the Human Rights Act, for an order suspending the declaration of inconsistency The application stated that the order was sought to enable the Ministry to be able to lawfully apply the existing policy while it worked out its new policy, and also while it pursued its appeal. Although the application was initially opposed by the *Atkinson* plaintiffs, they subsequently consented to a "suspension" order being made.

[6] The Ministry appealed the Tribunal's decision. Its appeal was dismissed in the High Court on 17 December 2010, and in the Court of Appeal on 14 May 2012. The Court of Appeal upheld the finding of the High Court and the Tribunal that the policy was inconsistent with s 19 of the Bill of Rights Act. It discriminated against family caregivers on a ground prohibited by s 21 of the Human Rights Act, namely family status, because it imposed a material and more than trivial disadvantage on both the caregivers and those in need of care. That limitation could not be justified in a free and democratic society; the Court of Appeal rejected the Ministry's "social contract" justification for the policy. On 12 June 2012 the Ministry announced that it would not pursue a further appeal to the Supreme Court.

[7] After the Tribunal's decision was upheld by the Court of Appeal, Mrs Spencer renewed her earlier efforts to obtain payment from the Ministry as Paul's caregiver. The

Ministry declined to consider her application on the basis that the Tribunal's declaration had been suspended, so that its policy continued to operate.

[8] Mrs Spencer has now applied for judicial review on the grounds that the Ministry acted unlawfully in refusing to consider her application for funding. Mrs Spencer further alleges that in declining to consider her application the Ministry took into account an irrelevant consideration, namely the policy declared unlawful by the Tribunal. Alternatively, she says it breached her legitimate expectation that her request for funding would be considered according to its merits.

[9] The Ministry's defence to this claim is that while the suspension order was in place the Ministry could continue to lawfully apply the policy. Mrs Spencer responds that the suspension order was made without jurisdiction. The Human Rights Act does not confer a power on the Tribunal to make such an order. She says further that if there was statutory jurisdiction, the Tribunal's procedure was so deficient that the order is invalid. Finally, she says the Ministry is estopped from asserting that there has at all times been a policy that precludes the payment of family members in all circumstances, because in practice the Ministry did pay family caregivers.

[10] The Ministry has an additional defence to Mrs Spencer's claim for judicial review. It says that Part 4A of the NZPHDA now makes the policy that was successfully challenged in the *Atkinson* proceeding lawful, and in any case prohibits the Ministry from paying Mrs Spencer other than in accordance with that policy or some other family care policy. Since the existing policy is a policy of non-payment of family members, any relief granted to Mrs Spencer to the effect that the Ministry reconsider her application would be futile. Mrs Spencer responds that the relevant parts of Part 4A of the NZPHDA do not make lawful the Ministry's existing policy, and do not prohibit the Ministry from paying Mrs Spencer.

[11] In amended pleadings,[3] Mrs Spencer seeks the following relief:

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[3] The amended pleading was filed during the course of the hearing. The amendment was simply to insert an additional request for relief, for an order setting aside or declaring invalid the suspension order. Although the Ministry initially opposed the filing of an amended pleading, consent was ultimately given to the amendment during the course of the hearing.

(a) A declaration that the Ministry's refusal to consider her application was unlawful;

(b) An order setting aside the suspension order; and

(c) An order requiring the Ministry to consider her application on its merits and without regard to its discriminatory policy.

[12] Mrs Spencer's judicial review proceeding does not stand alone. With the consent of all parties, it was heard together with another proceeding commenced by her under the provisions of the Declaratory Judgments Act 1908, seeking a declaration as to the effect of provisions in Part 4A of the NZPHDA.

[13] Section 70E in Part 4A of the NZPHDA contains a prohibition on the making of complaints to the Human Rights Commission (the Commission), and on commencing or continuing proceedings in any court or tribunal based in whole or in part on a specified allegation. A specified allegation is defined as an assertion to the effect that a person's right to freedom from discrimination on one or more of the grounds stated in s 21 of the Human Rights Act has been breached by Part 4A or a family care policy or anything done or omitted to be done in compliance with Part 4A or a family care policy. Section 70G of the Act contains certain savings. It expressly identifies two proceedings — the *Atkinson* proceeding and Mrs Spencer's judicial review proceeding — and states that they can be continued as if Part 4A had not been enacted.

[14] Mrs Spencer seeks a declaration that s 70G(1) of the NZPHDA does not by its terms preclude her from applying to the Tribunal to be joined as a plaintiff or party to the *Atkinson* proceeding, for the purposes of obtaining compensation for the effects of the Ministry's unlawful policy upon her. Alternatively, a declaration that the Ministry, having treated and held out the *Atkinson* proceeding as having the nature of a class action, is estopped from denying Mrs Spencer's right to apply to the Tribunal to be joined to the *Atkinson* proceeding.

[15] The Commission sought leave to intervene in both the judicial review and declaratory judgment proceedings on the grounds that the issues in the proceedings are of wide public interest and considerable importance. The Commission's application was

consented to by both parties. I was satisfied that the Commission's intervention would be of assistance in determining the issues in the proceedings. As the national advocate for human rights, the Commission could assist me with the issues in the proceedings, and also with the architecture of the human rights legislation, the procedures under it and how they apply in these circumstances. I observe that the Commission was of considerable assistance during the course of the hearing.

[16] I propose to approach the many issues raised by these proceedings and the parties' arguments under the following broad headings:

A. The validity and effect of the suspension order

    1. Did the Tribunal have jurisdiction to make the order?

    2. Is the order affected by procedural flaws?

    3. If the answer to 2 is yes, is the order invalid from the beginning as a consequence?

B. If the suspension order is valid, is it binding on Mrs Spencer?

C. Is the Ministry estopped from relying upon the policy?

D. What is the effect of Part 4A of the NZPHDA on Mrs Spencer's right to relief in the judicial review proceeding, and her ability to seek to be joined to the *Atkinson* proceeding?

E. In any case, is the Ministry estopped from denying that the *Atkinson* proceeding is a representative proceeding?

F. What relief, if any, is Mrs Spencer entitled to?

G. Summary of conclusions.

H. Formal orders

A. The validity and effect of the suspension order

1. Did the Tribunal have jurisdiction to make the order?

Relevant background

The making of the order

[17] On 8 January 2010 the Tribunal issued a declaration in the following terms:[4]

> We declare, pursuant to s 92I(3)(a) of the [Human Rights Act] that the defendant's practice and/or policy of excluding specified members from payment for the provision of funded disability support services is inconsistent with s 19 of the NZBORA in that it limits the right to freedom from discrimination, both directly and indirectly, on the grounds of family status, and is not, under s 5 of the Act, a justified limitation.

[18] On the same day as the declaration was issued the Ministry applied for an order "suspending" the Tribunal's declaration so that it would not affect the ongoing lawful operation of the policy by the Ministry. The grounds for the application were as follows:

> 2.1 The impact of the Tribunal's decision affects the entire population of people who access or who may potentially access Ministry funded disability support services, and not just the plaintiffs in this case.
>
> 2.2 The impact of the decision needs to be carefully managed to ensure that the Ministry funded disability support services continue to be properly delivered to those persons currently receiving them, without significant disruption.
>
> 2.3 The policy affected by the decision is integral to the framework under which disability support services are provided, as the whole scheme is predicated on meeting gaps in family provided care. The effect of the decision is that the Ministry will need to redesign the disability support services framework. This is a complex task, which will take time to complete properly.
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> 2.4 Simply removing the prohibition on funding employment of spouses, parents and resident family members will render the existing system incoherent and chaotic. It is also likely to lead to significant cost increases that have not been budgeted and for which there is no current appropriation by Parliament.
>
> 2.5 Careful consideration will need to be given to designing a disability support services framework that addresses the issues arising around needs assessments, fiscal sustainability, equitable distribution of resources

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4 *Atkinson v Ministry of Health* (2010) 8 HRNZ 902 (HRRT) at [232].

between those with family support and those without, and quality control and service delivery risks.

2.6 Careful consideration will also need to be given to addressing the issues that will be faced by service provider organisations. It is likely that many of these will be met with demands to employ family members instead of existing employees, and consideration needs to be given to if and if so, how, they can respond to such demands:

2.6.1 consistently with existing employment obligations;

2.6.2 without engaging in conduct which itself discriminates on the grounds of family status in breach of s 22 of the Human Rights Act 1993 (HRA) by giving preference to family members;

2.6.3 in a way that does not interfere with the proper and responsible running of their own organisations (for example, through the increased employment of "one client only" employees); and

2.6.4 in a way that does not interfere with compliance with their obligations under their contracts with the Ministry in relation to quality control and service delivery.

2.7 It is likely that the Ministry will file an appeal against the decision. It is necessary to preserve the status quo pending resolution of that appeal to avoid significant and potentially only temporary disruption to the Ministry's service framework, the operation of the NASC structure, the on-going operations of the service provider organisations and their employee caregivers, and the day to day relationships between current employed carers and those persons receiving services.

2.8 The Ministry is required to continue to fund disability support services, and service provider organisations are required to continue to deliver those services. The orders sought are necessary to ensure that all parties involved in providing these services can continue to do so pending an appeal and resolution of the above issues without risk of incurring further liabilities under Part 1A of the HRA.

[19] The application stipulated alternative time frames for the duration of the order sought: if no appeal was filed, the suspension order was to last for 12 months after the expiry of the appeal period, or if an appeal was filed, for 12 months after the final determination of the appeal.

[20] The application was accompanied by an affidavit of Ms Woods, Deputy Director-General of the Ministry's Health and Disability National Services Directorate. In her affidavit Ms Woods provided extensive reasoning and material to support the application. However, the Ministry's case for the making of a suspension order boiled down to two propositions. First, the declaration had the effect of rendering unlawful the funding

policy for specified disability support services, and potentially a far wider group of services. But if the Ministry were simply to remove the prohibition on funding the employment of spouses, parents and resident family members, it would render the existing system incoherent and chaotic. The Ministry needed to develop a new policy and to redesign its disability support services framework in light of the Tribunal's decision, a complex task which would take time to complete properly.

[21] Secondly, it was likely that the Ministry would file an appeal against the decision. In the meantime the Ministry was required to continue to fund disability support services, and the service provider organisations were required to continue to deliver those services. The orders sought were necessary to ensure that all parties involved in providing disability services could continue to do so lawfully pending an appeal and resolution of these issues. For this reason it was necessary to preserve the status quo and thereby avoid significant and potentially only temporary disruption to the Ministry's service framework.

[22] Although the application was initially opposed, an order was ultimately consented to by the *Atkinson* plaintiffs, with their consent recorded in a joint memorandum dated 24 March 2010. But the plaintiffs consented to the making of an interim order only, until there could be a hearing of the Ministry's application. Counsel requested that the order be made as soon as possible to enable the Ministry's services to continue to be provided lawfully, and also asked that the order be backdated to the date of the original judgment.

[23] On 3 June 2010 the Tribunal made the following consent order:

> Upon reading the joint memorandum dated 24 March 2010 of counsel for all parties and upon reading the affidavit sworn on 24 March 2010 of Geraldine Nancy Woods the Tribunal orders pursuant to s 92O Human Rights Act 1993 and by consent that the declaration made by the Tribunal in these proceedings on 8 January 2010 is suspended until further order of the Tribunal. This order is deemed to have been in effect since 8 January 2010.

The suspension order was signed by Judge J E Ryan[5] for and on behalf of himself, Dr McKean and Mr Solomon. These three had constituted the Tribunal for the substantive hearing.

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[5] The Judge was appointed acting Chairperson for the *Atkinson* hearing, objection having been taken to the then permanent Chairperson hearing the matter.

[24] Contrary to the explicit assumption underlying the joint memorandum and the wording of the order, the order was not re-visited by the Tribunal for three years. It seems that no party actively pursued the allocation of a hearing date for the application while the Ministry's appeals remained on foot. Then, after the Ministry announced that it would not further appeal the Court of Appeal decision, those of the *Atkinson* plaintiffs still being cared for by a parent or caring for an adult child reached an agreement with the Ministry that they would not apply to lift the suspension order. This was in return for receiving interim payments from the Ministry for the disability services they provide to family members.

[25] Ms Atkinson, Group Manager of Disability Support Services, said that one of the reasons these payment arrangements were made was that:

> It was extremely important to the Ministry that it have a year in which to develop its policy in response to the discrimination finding by the courts. The plaintiffs had consented to the declaration being suspended but only on an interim basis and the Ministry needed the security of knowing it had a whole year ….

[26] After the conclusion of the hearing in these proceedings, counsel for the Ministry provided me with a copy of the Tribunal's decision lifting the suspension order. It was issued on 24 June 2013 in response to an application by the *Atkinson* plaintiffs. The decision narrates the Ministry's submission that, arguably, the suspension order had already lapsed, since more than 12 months had passed since the Court of Appeal judgment, a reference back to the time frame indicated in the initial notice of application filed in January 2010. Counsel for the *Atkinson* plaintiffs asked the Tribunal to "deem" the suspension to have been lifted from 14 May 2013 (the 12 month date). A differently constituted Tribunal from that which had made the original suspension order declined to backdate the lifting of the order, saying "we see no need for taking such a step even assuming that such deeming is within the Tribunal's power".

Statutory framework

[27] The Tribunal is a statutory body, created by provisions contained within the Human Rights Commission Act 1977, and continued in existence by s 93 of the Human Rights Act. Its principal function is to consider and adjudicate upon civil proceedings

brought under the Act by either a complainant or the Commission.[6] The complaints procedure provides the gateway to the Tribunal. Only those who have complained to the Commission may bring proceedings in the Tribunal, including proceedings alleging a breach of Part 1A of the Human Rights Act (as was the case in the *Atkinson* proceeding).

[28] Part 1A of the Human Rights Act subjects all three branches of government to the anti-discrimination standard contained in s 19 of the Bill of Rights Act and s 21 of the Human Rights Act. The explanatory note to the Bill which introduced Part 1A into the Human Rights Act records the Government's commitment to the development of a "robust human rights culture in New Zealand".[7] The note continues:

> Two important features of a robust human rights culture are –
>
> - human rights institutions that are able to effectively perform the dual functions of promoting and protecting human rights;
>
> - an anti-discrimination standard for Government that is backed up by an accessible complaints process and effective remedies.

[29] The Human Rights Act describes the Tribunal's jurisdiction, including the remedies it can grant. The remedies that the Tribunal is empowered to grant in relation to proceedings such as the *Atkinson* proceeding are set out in s 92I(3) as follows:

> (3) If, in proceedings referred to in subsection (2), the Tribunal is satisfied on the balance of probabilities that the defendant has committed a breach of Part 1A or Part 2 or the terms of a settlement of a complaint, the Tribunal may grant 1 or more of the following remedies:
>
> (a) a declaration that the defendant has committed a breach of Part 1A or Part 2 or the terms of a settlement of a complaint:
>
> (b) an order restraining the defendant from continuing or repeating the breach, or from engaging in, or causing or permitting others to engage in, conduct of the same kind as that constituting the breach, or conduct of any similar kind specified in the order:
>
> (c) damages in accordance with sections 92M to 92O:
>
> (d) an order that the defendant perform any acts specified in the order with a view to redressing any loss or damage suffered by the complainant or, as the case may be, the aggrieved person as a result of the breach:

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6 Human Rights Act, s 94.

7 Human Rights Amendment Bill 2001 (152-1) (explanatory note) at 1.

(e) a declaration that any contract entered into or performed in contravention of any provision of Part 1A or Part 2 is an illegal contract:

(f) an order that the defendant undertake any specified training or any other programme, or implement any specified policy or programme, in order to assist or enable the defendant to comply with the provisions of this Act:

(g) relief in accordance with the Illegal Contracts Act 1970 in respect of any such contract to which the defendant and the complainant or, as the case may be, the aggrieved person are parties:

(h) any other relief the Tribunal thinks fit.

[30] The Ministry says that the declaration that was made was validly suspended pursuant to the power conferred upon the Tribunal by s 92O(2)(d). The relevant wording of s 92O is:

92O Tribunal may defer or modify remedies for breach of Part 1A or Part 2 or terms of settlement

(1) If, in any proceedings under this Part, the Tribunal determines that an act or omission is in breach of Part 1A or Part 2 or the terms of a settlement of a complaint, it may, on the application of any party to the proceedings, take 1 or more of the actions stated in subsection (2).

(2) The actions are,—

(a) instead of, or as well as, awarding damages or granting any other remedy,—

(i) to specify a period during which the defendant must remedy the breach; and

(ii) to adjourn the proceedings to a specified date to enable further consideration of the remedies or further remedies (if any) to be granted:

(b) to refuse to grant any remedy that has retrospective effect:

(c) to refuse to grant any remedy in respect of an act or omission that occurred before the bringing of proceedings or the date of the determination of the Tribunal or any other date specified by the Tribunal:

(d) to provide that any remedy granted has effect only prospectively or only from a date specified by the Tribunal:

(e) to provide that the retrospective effect of any remedy is limited in a way specified by the Tribunal.

[31] Section 92P lists matters the Tribunal must take account of in determining whether to take an action referred to in s 92O as follows:

> (1) …
>
> (a) whether or not the defendant in the proceedings has acted in good faith:
>
> (b) whether or not the interests of any person or body not represented in the proceedings would be adversely affected if 1 or more of the actions referred to in section 92O is, or is not, taken:
>
> (c) whether or not the proceedings involve a significant issue that has not previously been considered by the Tribunal:
>
> (d) the social and financial implications of granting any remedy sought by the plaintiff:
>
> (e) the significance of the loss or harm suffered by any person as a result of the breach of Part 1A or Part 2 or the terms of a settlement of a complaint:
>
> (f) the public interest generally:
>
> (g) any other matter that the Tribunal considers relevant.
>
> (2) If the Tribunal finds that an act or omission is in breach of Part 1A or that an act or omission by a person or body referred to in section 3 of the New Zealand Bill of Rights Act 1990 is in breach of Part 2, in determining whether to take 1 or more of the actions referred to in section 92O, the Tribunal must, in addition to the matters specified in subsection (1), take account of—
>
> (a) the requirements of fair public administration; and
>
> (b) the obligation of the Government to balance competing demands for the expenditure of public money.

Argument

[32] As noted, Mrs Spencer challenges the validity of the suspension order on several grounds, the first of which is that the Tribunal did not have jurisdiction under the Human Rights Act or the general law to make an order suspending a declaration already made by it. She says that the order sought and granted was in reality a stay of the declaration, and the Tribunal did not have power to grant such a stay.

[33] The Ministry responds that the Tribunal had jurisdiction under s 92O(2)(d), and validly exercised that jurisdiction in this case. The effect of the suspension order was to

render the policy lawful while the order remained in place, with the policy to be declared unlawful at some time in the future unless Parliament responded prior to that time to validate the policy. The ability to suspend or postpone a declaration reflects the constitutional dialogue between the courts, the executive and the legislature.

[34] The Commission says that the Tribunal has jurisdiction to effectively postpone or suspend a declaration of a breach of Part 1A where the exigencies of a particular situation demand it, but the Commission says this power arises under s 92O(2)(a), not s 92O(2)(d). The Commission accepts that in appropriate circumstances, suspending declaratory relief to allow a legislative or executive response to a decision will be consistent with the rule of law and a functioning democracy.[8] Overseas courts have recognised a similar jurisdiction in respect of cognate rights.

[35] However, the Commission says that the suspension order made in the *Atkinson* proceeding was not an appropriate exercise of that jurisdiction. It purported to suspend the declaration for an unlimited period. If suspension were appropriate it could only have been on much more limited terms. The Commission also says that even if the declaration is suspended, that does not have the effect of curing the policy; it remains unlawful.

Analysis

[36] Because the Tribunal is a statutory body, its jurisdiction is defined by statute. It may have such additional powers (inherent powers) as are necessary to properly exercise that jurisdiction, but it does not have inherent jurisdiction. In any case the Ministry argues that s 92O conferred the required jurisdiction on the Tribunal.

[37] In interpreting s 92O, and thus determining the Tribunal's jurisdiction to limit the temporal effect of declaratory orders, I bear in mind that the meaning of an enactment must be "obtained from its text and in light of its purpose" as required by s 5 of the Interpretation Act 1999.

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[8] Counsel for the Commission, Mr Butler, referred me to the Cabinet paper that preceded the enactment of Part 1A as providing an indication of the intended function of s 92O and supporting this view: Cabinet Paper "Anti-Discrimination Standard for Government Activities" (17 May 2001) POL (01) 99 at [57]. But I accept the Ministry's submission that Cabinet papers provide little indication of Parliament's intention, and in this case the best indication of that appears in the words of the Act: *Skycity Auckland Ltd v Gambling Commission* [2007] NZCA 407, [2008] 2 NZLR 182 at [40]–[42].

[38] In *Commerce Commission v Fonterra Co-operative Group Ltd* the s 5 touchstone was discussed in this way:[9]

> It is necessary to bear in mind that s 5 of the Interpretation Act 1999 makes text and purpose the key drivers of statutory interpretation. The meaning of an enactment must be ascertained from its text and in the light of its purpose. Even if the meaning of the text may appear plain in isolation of purpose, that meaning should always be cross-checked against purpose in order to observe the dual requirements of s 5. In determining purpose the Court must obviously have regard to both the immediate and the general legislative context. Of relevance too may be the social, commercial or other objective of the enactment.
>
> (footnotes omitted)

[39] Section 92O allows the Tribunal to shape the temporal application of its orders. It can delay the making of formal orders (s 92O(2)(a)), it can refuse to grant a remedy that has retrospective effect (s 92O(2)(b)) or in respect of things that happened before the proceedings were commenced or determined (s 92O(2)(c)), it can provide that any remedy granted has effect only from a date specified by the Tribunal (s 92O(2)(d)), or that any retrospective effect of any remedy is limited as the Tribunal specifies (s 92O(2)(e)). The power to modify the temporal application of its orders on the face of it extends to the issue of declarations, since a declaration is one of the remedies the Tribunal may grant. Section 92O therefore allows the Tribunal to depart from the very strong presumption that exists at common law that judicial declarations or determinations of the law, once made, operate both retrospectively and prospectively including when assessing the remedies available to parties.[10]

[40] The mandatory s 92P considerations for a tribunal exercising its s 92O jurisdiction make clear the purpose of this section. It is to allow the Tribunal to modify its remedies in light of the potentially disruptive effect of a finding of breach. This in turn reflects the fact that often the Tribunal will determine issues that affect large numbers of people and its decisions may therefore have significant implications for the allocation of public money. The allocation of public money is an issue normally left to government. The mandatory considerations in s 92P(2) also recognise that the Tribunal's findings have the potential to disrupt the operation of policy, and in granting remedies some allowance may

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9 *Commerce Commission v Fonterra Co-operative Group Ltd* [2007] NZSC 36, [2007] 3 NZLR 767 at [22].

10 See *Ha v New South Wales* (1997) 189 CLR 465; *Lai v Chamberlains* [2006] NZSC 70, [2007] 2 NZLR 7.

need to be made for the Crown to develop new policy. In this area considerations of good faith are likely to be important.

[41] In this case the Tribunal purported to "suspend" the declaration. It picked up the language used in the application, but in doing so used a word which does not appear in s 92O. The first issue that has to be resolved before the Tribunal's jurisdiction to make the order can be determined, therefore, is what the Tribunal intended to do when it made the order suspending a declaration it had already made. This is complicated by the fact that the Tribunal gave no reasons for its decision. The order was made on a consent basis. In the absence of reasons, the documents on which the Tribunal relied in making the orders provide the best indication of what the Tribunal intended. The purpose given for seeking the order was to allow the Ministry to operate its policy lawfully during the period of the suspension. The Ministry's application referred to s 92O(d), which I take to mean s 92O(2)(d). It also referred to a Canadian case, *Corbiere v Canada (Minister of Indian and Northern Affairs)*.[11]

[42] I agree with the Commission that the Tribunal could have exercised its discretion under s 92O(2)(a) to specify a period during which the Ministry should remedy the breach, and could then have adjourned the proceedings to a specified date to hear the parties as to whether a declaration and any other remedies should be granted. That is all that s 92O(2)(a) allows — a delaying of the consideration of remedies accompanied by an order specifying a period during which the defendant must remedy the breach. That is not what happened here. The Tribunal did not purport to exercise the power under s 92O(2)(a) in respect of the declaration. It issued the declaration and did not specify a period during which the Ministry's ongoing breach should be remedied.

[43] Since the application was made under s 92O(2)(d) I proceed on the basis that, as the Ministry contends, the Tribunal purported to act under s 92O(2)(d) to suspend the declaration and thereby render the policy lawful until further order of the Tribunal. However, I see several difficulties with the Ministry's argument that s 92O(2)(d) gave the Tribunal jurisdiction to issue the particular order.

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[11] *Corbiere v Canada (Minister of Indian and Northern Affairs)* [1999] 2 SCR 203.

[44] Beginning with the language of s 92O(2)(d), it does not on its face empower the Tribunal to modify a remedy already granted. The Ministry argued that I should give effect to s 105 of the Human Rights Act which requires that the Tribunal act according to the substantial merits of the case, without regard to technicalities. The Ministry plainly wanted a stay, the Tribunal intended to grant one, and that is the effect the order should be given. However I do not consider that the Tribunal's intent was clear. It was certainly not plain on the face of the order what its effect was intended to be, and it is significant that during the course of argument several different versions emerged as to what that order achieved. I also consider that s 105 cannot be relied upon to extend the Tribunal's jurisdiction. Section 105 is concerned with technical non-compliance, and is akin to a "slip rule". Since s 92O(2)(d) cannot comfortably be read as a power to stay or suspend the effect of an existing remedy,[12] s 105 cannot confer that jurisdiction on the Tribunal.

[45] Secondly, I am satisfied that the *Atkinson* plaintiffs did not agree to the making of an order that "suspended" the Tribunal's finding that the policy was unlawful, so that the findings would operate only prospectively. But s 92O(2)(d) empowers the Tribunal to grant remedies that have only prospective effect. I am also satisfied that the Tribunal could not have understood the plaintiffs to be consenting to that. Such consent would have been inconsistent with the *Atkinson* plaintiffs' intention to pursue damages for the past application of the policy. It would also be inconsistent with the fact that the plaintiffs agreed to the order on an interim basis, pending full argument of the Ministry's application for a suspension order. The Ministry attempts to step around this difficulty by arguing that although the suspension order rendered the policy lawful, the plaintiffs retained their rights to damages as if it remained unlawful. That reads a lot into the Tribunal's order, and if that had been the Tribunal's intention, I would have expected it to say so.

[46] For the same reason I am satisfied that the plaintiffs did not agree, and the Tribunal did not understand them to agree, to an order that the remedy granted would be "from a date specified by the Tribunal", the second part of s 92O(2)(d). The second limb

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[12] Section 123(9) of the Human Rights Act deals with stays. It provides that an appeal against a determination of the Tribunal does not operate as a stay of proceedings "unless the Tribunal or the Court so orders". Section 123(9) does not empower the stay of a non-executory order: see Mason J in *Re Marks and Federated Ironworkers' Association; ex parte Australian Building Construction Employees and Builders' Labourers' Federation* (1981) 34 ALR 208 (HCA) at 211; *Willowford Family Trust v Christchurch City Council* [2006] 1 NZLR 791 (HC).

of s 92O(2)(d), if read in the context of the provision, is to be interpreted as enabling delayed prospective application of a remedy. Again, for the reasons given, the plaintiffs cannot be taken to have agreed to a wiping away of rights to remedies for past breaches, given their continued active pursuit of remedies for those breaches.

[47] The suspension order is also not on its face an order that the remedy will only have effect from a date specified by the Tribunal, as there is no such date specified in the orders. The Ministry argues that a "specified" date can be deduced from the consent memorandum. The memorandum repeats the terms of the order proposed in the 8 January 2010 application, namely, "if no appeal is filed, for twelve months after the expiry of the appeal period; if an appeal is filed, for twelve months after the final determination of the appeal". However, that information was included in the consent memorandum by way of background only. The orders sought were "until further order of the Tribunal, consequent on resolution of the Ministry's application for order 1.1 in the Notice of Application dated 8 January 2010".

[48] Another difficulty for the Ministry is that there is no power for the Tribunal to backdate the effect of its orders, as it has purported to do here. The Ministry accepts that the order could not be made retrospectively. The Tribunal does not need such a power, as s 92O is not concerned, by its terms, with the type of issues with which the Ministry was confronted because a declaration had already issued.

[49] If the Tribunal had addressed this point before it issued a declaration, could it have delayed its coming into effect? If the temporal limitation were part of the original decision, then s 92O(2)(d) would seem to empower the Tribunal to do just that. I note that Ms Jagose, for the Ministry, says that during the Tribunal hearing the Ministry had asked for an opportunity to be heard on the appropriate relief if the Tribunal did find a breach of s 19 of the Bill of Rights. If that is the case, and the Tribunal did not provide that opportunity, then the Ministry could have applied for a recall of the Tribunal's decision. It did not do so. For reasons I come to shortly, even if the Tribunal had delayed the coming into force of the declaration at the Ministry's request, I do not consider that would have had the effect the Ministry desired.

[50] In its application the Ministry referred to *Corbiere*, a Canadian case in which the Supreme Court of Canada granted an order "suspending" a declaration that an Act was invalid with the effect that the Act was lawful during the period of suspension. However, Canadian cases have to be read with care because of the different legal context in which they are decided. A declaration that an Act is inconsistent with the Canadian Constitution Act, 1982 (the Constitution) operates to invalidate part or all of that Act.[13] This is the effect of s 52(1) of the Constitution which provides:

> The Constitution of Canada is the supreme law of Canada, and any law that is inconsistent with the provisions of the Constitution is, to the extent of the inconsistency, of no force or effect.

There is no equivalent provision in New Zealand.

[51] It is also apparent that when the Canadian courts make an order suspending a declaration they use the expression "suspend" as shorthand for two quite distinct things: a declaration of invalidity, accompanied by a simultaneously issued declaration that the Act (or policy) is nevertheless deemed valid for a fixed period of time. To understand the nature of an order "suspending" a declaration, it is necessary to read *Corbiere* within the context of the line of cases of which it is part. Those cases begin with *Reference Re Manitoba Language Rights*.[14]

[52] In *Manitoba* the Supreme Court of Canada first grappled with the issue of what was to be done in the face of a determination by the courts which would have the effect of striking down Acts of Parliament and thereby undermining the rule of law. The Supreme Court had held that the failure to enact Manitoba's legislation in both English and French was inconsistent with the constitutionally entrenched Manitoba Act 1870. The effect of this finding was that the unilingual enactments of the Manitoba legislature (effectively all statutes passed since 1880) were invalid as inconsistent with the Constitution. The Court however recognised that simply declaring those enactments invalid and of no force or effect would, without going further, create a legal vacuum with consequent legal chaos in the province of Manitoba. There would be no law, institutions that had been created under those Acts would have no authority to act, and all legal

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13 Constitution Act, 1982, being Schedule B to the Canada Act 1982 (UK), 1982, c 11.

14 *Reference Re Manitoba Language Rights* (1985) 1 SCR 721.

rights, obligations and other effects which had arisen under the Acts would be open to challenge. The Court said that an aspect of the rule of law required the creation and maintenance of actual or positive laws preserving the more general principle of normative order. Declaring that the Acts or the legislature of Manitoba were invalid and of no force and effect would thus offend the rule of law, and deprive Manitoba of its legal order. For a Court to allow such a situation to arise and fail to resolve it would be an abdication of its responsibility as protector and preserver of the Constitution.

[53] The solution the Court settled upon was to issue a declaration that the unilingual acts of the legislature of Manitoba were invalid, and of no force and effect, but to simultaneously issue an additional declaration that those same acts were deemed temporarily valid and effective. The Court found support for this approach in cases which had arisen under the doctrine of state necessity, whereby the laws of an unconstitutional government are nevertheless recognised by the courts in order to maintain the rule of law. It is of note that the Court did not in *Manitoba* purport to suspend the declaration of invalidity, but rather accompanied it with a declaration deeming the affected Acts valid as an interim measure. The words "suspend" or "suspension" were not used.

[54] The next case in the line of authorities is *R v Swain*.[15] In that case, the Supreme Court of Canada held that a provision of the Criminal Code requiring the automatic detention of any person acquitted by reason of insanity was inconsistent with the principles of fundamental justice preserved under the Constitution, and with the Charter right to liberty.[16] For these reasons it was "of no force and effect".[17] However, the Court observed that were the courts to simply declare the provisions to be of no force and effect as from the date of the judgment, judges would be compelled to release into the community all insanity acquittees, including those who may well be a danger to the public. Because of that, the Court said that there would be a period of temporary validity for six months. Even so, during that period any detention ordered under the Criminal Code provision would be limited to 30 days in most instances, or to a maximum of 60 days where the Crown establishes that a longer period is required in the particular

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15 *R v Swain* [1991] 1 SCR 933.

16 Canadian Charter of Rights and Freedoms, Part I of the Constitution Act, 1982, being Schedule B to the Canada Act 1982 (UK), 1982, c 11, s 7.

17 At [160].

circumstances of the case. The Court said that would give the legislature time to respond to the declaration of invalidity. Again this was expressed as the Court "deeming" the provisions valid, rather than "suspending" the declaration for invalidity.

[55] In the cases referred to me by counsel, the use of the word "suspended" appears first in *Schachter v Canada*.[18] In that case the Court considered the validity under the Constitution of a benefit which provided for sharing of parental leave provisions between a mother and a father where the child was adopted, but only for maternal leave where the child was a natural child of the relationship. The Court found that the clause in the Act was invalid because it was underinclusive. It went on to say that it would have suspended the declaration of invalidity but it did not need to in that particular case as Parliament had already acted to correct the unfair discrimination.

[56] Although invoking *Manitoba* and *Swain* as authority for its actions, the Court made no mention of "deemed validity", but rather, it appears, used the expression "suspending the declaration" as shorthand for the twin declaration approach taken in *Manitoba* and *Swain*. It said:[19]

> A court may strike down legislation or a legislative provision but suspend the effect of that declaration until Parliament or the provincial legislature has had an opportunity to fill the void. This approach is clearly appropriate where the striking down of a provision poses a potential danger to the public (*R v Swain, supra*) or otherwise threatens the rule of law (*Reference Re Manitoba Language Rights*, [1985] 1 S.C.R 721). It may also be appropriate in cases of underinclusiveness as opposed to overbreadth. For example, in this case some of the interveners argued that in cases where a denial of equal benefit of the law is alleged, the legislation in question is not usually problematic in and of itself. It is its underinclusiveness that is problematic so striking down the law immediately would deprive deserving persons of benefits without providing them to the applicant. At the same time, if there is no obligation on the government to provide the benefits in the first place, it may be inappropriate to go ahead and extend them. The logical remedy is to strike down but suspend the declaration of invalidity to allow the government to determine whether to cancel or extend the benefits.

[57] The Court also emphasised the seriousness of suspending a declaration:[20]

> A delayed declaration is a serious matter from the point of view of the enforcement of the Charter. A delayed declaration allows a state of affairs which has been found to violate standards embodied in the Charter to persist for a time

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18 *Schachter v Canada* [1992] 2 SCR 679.
19 At [80].
20 At [82].

> despite the violation. There may be good pragmatic reasons to allow this in particular cases. However, reading in [words which make the Act compliant with the Constitution] is much preferable where it is appropriate, since it immediately reconciles the legislation in question with the requirements of the Charter.

[58] Coming to *Corbiere*, the case the Ministry referred to in its application, a declaration that certain words in a statute were invalid as inconsistent with Charter rights was suspended for 18 months to "give legislators the time necessary to carry out extensive consultations and respond to the needs of the different groups affected".[21]

[59] The last in the series of cases referred to me by counsel is *Eldridge v British Columbia*.[22] In *Eldridge* the Court found that although an Act funding primary and hospital health care services did not expressly provide for the payment of sign language interpreters for deaf patients, the Act itself was not a violation of the Charter. Rather it was the exercise of a delegated decision-making power in a way which failed to provide interpreters that was in breach of the Charter. The appropriate remedy was to grant a declaration that the failure was unconstitutional and direct that the government administer the Acts in a Charter-consistent manner. However the Court went on to "suspend the effectiveness of the declaration" for six months to enable the government to canvass its options and formulate an appropriate response.[23] Again the Court equated suspending a declaration with deeming the unlawful policy lawful.

[60] Although *Eldridge* and *Corbiere* indicate a more liberal use of "deemed invalidity" than the judgment in *Manitoba* suggests was initially contemplated, it should not be lost sight of that the Supreme Court of Canada developed the remedy of deemed invalidity in conjunction with the exercise of a power that tribunals and courts in New Zealand do not have, the power to invalidate Acts of Parliament. This is an exceptional remedy employed by a constitutional court.

[61] The effect of an order merely "suspending" or staying a declaration (rather than deeming an invalid Act valid) has been considered by the courts in Hong Kong. In *Koo Sze Yiu v Chief Executive of HKSAR* the Court of Final Appeal framed the question for itself as whether a court can ever, and if so under what circumstances, accord temporary

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21 *Corbiere*, above n 11, at [118].
22 *Eldridge v British Columbia* [1997] 3 SCR 624.
23 At [96].

validity to a law or executive action it had declared invalid, and failing such an order whether a court can ever, and if so in what circumstances, suspend a declaration that a law or executive action is unconstitutional.[24] The executive action in the case concerned was covert surveillance found to be incompatible with freedom and privacy of communication, which was a constitutionally guaranteed right. As to the first question, Bokhary PJ said that a decision on the scenarios in which it would be right for the Court to accord temporary validity to a law or executive action which they had declared unconstitutional did not arise. He commented however:[25]

> Where temporary validity is accorded, the result would appear to be twofold. First, the executive is permitted, during such temporary validity period, to function pursuant to what has been declared unconstitutional. Secondly, the executive is shielded from legal liability for so functioning. Looking at the decided cases involving scenarios such as a virtual legal vacuum or a virtually blank statute book, it may be that the courts there thought that, absent such a shield, there would be, even after corrective legislation, chaos between persons and the state and also between persons and persons.

[62] Addressing the second question Bokhary PJ said that the power to suspend the declaration was a concomitant of a power to make the declaration in the first place. The effect of suspending declarations, which the Judge was prepared to do, was that:[26]

> The Government can, during that period of suspension, function pursuant to what has been declared unconstitutional, doing so without acting contrary to any declaration in operation. But, despite such suspension, the Government is not shielded from legal liability for functioning pursuant to what has been declared unconstitutional.

Therefore, if the declaration were suspended, although the government would not be acting in contempt of court, it would be acting unlawfully.

[63] Similarly, Sir Anthony Mason said:[27]

> The terms of the order pronounced by Mr Justice Bokhary PJ will not endow acts or transactions undertaken in the period of postponement with any greater validity than they would have if the declaration of invalidity were made now.
>
> The postponement of the making of the declaration will enable the authorities to decide what course they wish to take, though actions taken pursuant to the legislation which is the subject of the postponed declaration will be affected by

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24 *Koo Sze Yiu v Chief Executive of HKSAR* (2006) 9 HKCFAR 441.
25 At [33].
26 At [50].
27 At [58]–[60].

> the effect of that declaration, subject, of course, to remedial legislation, if any, which might be enacted.
>
> Although I agree that a court should not postpone the making of a declaration of invalidity unless it is necessary to do so, the level of necessity in such a case is substantially lower than the level of necessity which would be required before the court would make an order for temporary validity, assuming the court to have power to make such an order.

[64] Writing extra judicially Sir Anthony Mason says of this judgment: [28]

> The judgments in *Koo Sze Yiu* make it very clear that suspending the operation of a declaration of invalidity of a statute does not entail, as some Canadian authority might seem to suggest, the valid operation of the statute during the period of suspension. Acts (including omissions) and transactions occurring in that period will ultimately be determined for legality by reference to the law as declared by the court. The suspension order does not affect the rights of the parties; indeed, its effect may be no more than cosmetic.

[65] The effect of an order suspending a declaration without an accompanying declaration of deemed validity has also been considered by courts of the United Kingdom. In *Ahmed v Her Majesty's Treasury* the Supreme Court made a finding that anti-terrorism orders (made by Order in Council), which had the effect of freezing the appellant's assets, were made ultra vires of the empowering Act.[29] The Court was asked to suspend the operation of the proposed order declaring the regulations ultra vires for eight weeks. Lord Phillips of Worth Matravers, writing for the majority, described the basis on which counsel made the application as follows:[30]

> Mr Swift urged the court to suspend the operation of its judgment because of the effect that the suspension would have on the conduct of third parties. He submitted that the banks, in particular, would be unlikely to release frozen funds while the court's orders remained suspended.

[66] The Judge commented that if suspension were to have that effect, it would only be because the third parties wrongly believed that suspension affected their legal rights and obligations. Lord Phillips:[31]

> The problem with a suspension in this case is, however, that the court's order, whenever it is made, will not alter the position in law. It will declare what that position is. It is true that it will also quash the TO and part of the AQO, but these

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28 Simon N M Young and Yash Ghai (eds) *Hong Kong's Court of Final Appeal: The Development of the Law in China's Hong Kong* (Cambridge University Press, to be published in 2013) at 327.

29 *Ahmed v Her Majesty's Treasury* [2010] UKSC 5, [2010] 2 AC 534.

30 At [7].

31 At [4] and [8].

> are provisions that are ultra vires and of no effect in law. The object of quashing them is to make it quite plain that this is the case.
>
> …
>
> The ends sought by Mr Swift might well be thought desirable, but I do not consider that they justify the means that he proposes. This court should not lend itself to a procedure that is designed to obfuscate the effect of its judgment.

[67] Lord Hope of Craighead described the effect of the suspension order that was sought as follows:[32]

> It would be wrong to regard the suspension as giving any kind of temporary validity to the provisions that are to be quashed. As Bokhary PJ said in *Koo Sze Yiu v Chief Executive of the Hong Kong Special Administrative Region* 9 HKCFAR 441, para 63, there is no shield from legal liability for functioning pursuant to what has been declared to be ultra vires during the period of the suspension.

[68] The point underlying these statements in *Yiu* and *Ahmed* is that the existence of the remedy, the declaration, makes no difference to the law as found in the judgment of a court.[33] Even if the declaration is stayed or suspended, the law remains as pronounced in the judgment.

[69] I have considered whether s 92O empowers the Tribunal to deem an unlawful policy to be lawful. There is nothing in the language of s 92O which can be read as empowering the Tribunal to confer deemed "legality" on a policy. Nor does the purpose of the section suggest that it was intended that the Tribunal have such a power. Section 92O is a provision that allows some modification of the remedies that flow from the substantive law as found by the Tribunal, not of the substantive law itself. By this I mean that provision does not contemplate that the Tribunal will, in substance, say "until this date this conduct will not be unlawful discrimination, but after this date it will". Rather it contemplates that it will determine for what periods of the unlawful discrimination remedies will be available. As the cases referred to make clear, deeming an invalid Act or policy valid is an exceptional step. It would require express words to authorise a statutory body to take that step.

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32 At [19].

33 I note, again, the strong presumption that judgments apply to define legal rights both prospectively and retrospectively: see footnote 10 above.

[70] In this case the declaration issued by the Tribunal was merely a statement of the law. It did not prevent the operation of the policy it dealt with; it was not an injunction. It did not compensate the parties for the breach of law declared in the order; it was not an award of damages. It was merely the formal order encapsulating the legal reasoning set out in the judgment. Without the declaration the law would still be as it is expressed in the reasoning of the Tribunal, and indeed, as it was expressed by the High Court and Court of Appeal. Even if the declaration was stayed (or "suspended", to use the language of the order), that would leave the law unchanged. The policy would still be unlawful, as a breach of s 19.

[71] To conclude:

(a) The Tribunal did not have jurisdiction under s 92O(2)(d) to make an order in effect staying the declaration it had already issued, and to backdate that order. Section 92O(2)(d) is not on its face a provision that authorises the grant of a stay of a declaration.

(b) The order made does not otherwise fit within the terms of s 92O(2)(d).

(c) Even if the Tribunal had power to stay or suspend a declaration, this would not render the policy lawful.

(d) The Tribunal has no power to deem a policy it has found unlawful, lawful. Deeming an invalid Act or policy valid or lawful is an exceptional remedy, utilised by constitutional courts in cases of necessity. Such a power would need to be expressly conferred on the Tribunal. It was not.

2. Is the order affected by procedural flaws?

Argument

[72] Mrs Spencer argues that the Tribunal failed to follow the process envisioned by s 92P and that, by its terms, s 92P does not allow for a consent arrangement because of the requirement that the Tribunal balance the competing factors set out in s 92P. No consideration of the factors enumerated in s 92P is apparent on the face of the record. Because of the significance of the orders sought there should have been a hearing at

which interested parties (including Mrs Spencer) had an opportunity to be heard. Where the interests of third parties are concerned, the Tribunal is in error if it proceeds on a "consent" basis where the only consent is between the parties. The absence of reasons completes the picture of a fundamentally flawed process.

[73] The Commission supports these arguments and says a "full, fair and open hearing" was required to consider the making of orders which were known to have application and effect far beyond the immediate parties to the litigation. Mr Butler argues that in the absence of such a hearing, and in the absence of reasons, it must be assumed that the s 92P factors were not addressed by the Tribunal. He says that the means by which the order was obtained were so procedurally deficient that it is a fair description that the Tribunal was blind to the nature and constitutional significance of the power it purported to exercise.

[74] The Ministry says that the Tribunal can be taken to have turned its mind to all s 92P matters, as these were addressed in the initial application, consent memorandum and accompanying affidavit. Reasons were not, in these circumstances, required. It emphasises that this was an order consented to by the *Atkinson* plaintiffs, and in such circumstances it would be unusual for the Tribunal to hold a hearing or give reasons. The interests of third parties were required to be considered, and were considered, but third parties had no right to be heard.

[75] The Ministry also submitted that I do not have a sufficient platform in the pleadings or on the evidence to determine fairly these challenges to the suspension order. The plaintiffs in the *Atkinson* proceeding are not party to these proceedings, and I do not have evidence from the Tribunal outlining the way it approached the decision or the factors relevant to its decision that would allow me to determine its lawfulness.

[76] The Ministry also initially took the point that the prayer for relief in the judicial review proceeding did not seek an order quashing the suspension order. For Mrs Spencer, Mr Farmer QC said such a pleading was not necessary, as the suspension order had been raised as an affirmative defence by the Ministry, and it was for the Ministry to establish its validity. In any event, in this case the extent of the defects in the order were such that it fitted into that category that could be assumed to be invalid without court

order. The defects were both apparent on the face of the order and were so serious as to go to the very jurisdiction of the Tribunal to make the order. It was a nullity. Out of an excess of caution, as he put it, he amended his pleading to seek this additional relief.

Relevant background

[77] To provide context to these arguments it is helpful to describe the role of the Commission and the Director of Proceedings in bringing proceedings before the Tribunal, and necessary to say something of Mrs Spencer's attempts to gain payment for her care of Paul, and of the circumstances of others affected by the Ministry's family care policy.

Role of the Commission and Director of Proceedings

[78] The Commission is an independent Crown entity. Section 5(1) of the Human Rights Act sets out its primary functions as follows:

> (1) The primary functions of the Commission are—
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> (a) to advocate and promote respect for, and an understanding and appreciation of, human rights in New Zealand society; and
>
> (b) to encourage the maintenance and development of harmonious relations between individuals and among the diverse groups in New Zealand society.

[79] Ms June Crane, a Practice Leader with the Enquiries and Complaints Service at the Commission, has provided an affidavit in which she says that in broad outline, the Commission discharges these functions by receiving and assessing enquiries and complaints, and by providing a variety of dispute resolution services, ranging from the provision of general information, to expert problem solving support, to mediation.

[80] Under the Act, the Commission may at any stage decline to take action or further action in relation to a complaint in circumstances set out in s 80(2) and (3) of the Human Rights Act:

> (2) The Commission may decline to take action or further action under this Part in relation to a complaint if the complaint relates to a matter of which the complainant or the person alleged to be aggrieved (if not the complainant) has had knowledge for more than 12 months before the complaint is received by the Commission.

> (3) The Commission may also decline to take action or further action under this Part in relation to a complaint if, in the Commission's opinion,—
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> (a) the subject matter of the complaint is trivial; or
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> (b) the complaint is frivolous or vexatious or is not made in good faith; or
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> (c) having regard to all the circumstances of the case, it is unnecessary to take further action in relation to the complaint; or
>
> (d) there is in all the circumstances an adequate remedy or right of appeal, other than the right to petition Parliament or to make a complaint to the Ombudsman, that it would be reasonable for the complainant or the person alleged to be aggrieved (if not the complainant) to exercise.

[81] If the Commission decides to take no further action it is obliged to inform the complainant of that decision, the reasons for it and of the right to bring civil proceedings before the Tribunal. The Commission may also refer the complaint to the Director of Proceedings.

[82] The office of the Director of Proceedings sits within the Commission, but the Director must exercise his or her functions independently of the Commission. If a complaint is referred to the Director, the Director must decide whether, and to what extent, to provide representation for a complainant before the Tribunal. In deciding this issue the Director must have regard to the mandatory considerations set out in s 92 of the Act, which include whether the complaint raises a significant question of law, whether resolution of the complaint would affect a large number of people, whether the provision of representation is an effective use of resources, and whether or not it would be in the public interest to provide representation. A complainant may choose to bring proceedings before the Tribunal without the Director's representation but only if they have first made a complaint to the Commission. I refer to the requirement for a complaint as the gateway requirement.

Complaints to the Commission in the Atkinson proceeding

[83] In her affidavit, Ms Crane details the Commission's dealings with Mrs Spencer and others the Commission identifies as having a direct interest in the *Atkinson* proceeding and in the making of any suspension order.

[84] Ms Crane says that there have been a significant number of complaints to the Commission about the Ministry's policy. The first of these complaints were made to the Commission between August 2001 and February 2003. The Commission formally notified the Ministry of them by letter of 13 February 2003. In June 2003, Crown Law, acting for the Ministry, acknowledged receipt of the complaints but said although it was accepted that the policy raised a discrimination issue, the relevant differentiation was justified. (The justification advanced was largely that rehearsed in the *Atkinson* litigation). Nevertheless the Ministry gave an assurance that it would work with the three complainants to ensure that their children were receiving the maximum amount of government-funded assistance available to them.

[85] The Commission persisted with its attempts to facilitate resolution of the complaints. Throughout the course of the ensuing discussions the Ministry continued to indicate that there was to be a review of payments to family caregivers, although the time frame for that review continued to be moved out.

[86] Further complaints were received in 2004 and were passed on to the Ministry. By letter of 3 December 2004, the Commission notified the Ministry that each of the complainants had asked that their complaint be closed so that the Commission could request that the Director provide them with representation in civil proceedings. In May 2005 another complaint was made to the Commission.

[87] The Director decided to provide representation and what has come to be referred to as the *Atkinson* proceeding was commenced in October 2005. There were five original plaintiffs. In March 2006 another complaint was made to the Commission and that complainant and the person who had complained in May 2005 were added to the proceeding. From that point on no further family caregivers were added as plaintiffs, although a son and daughter of two of the existing plaintiffs were added when the amended statement of claim was filed in August 2008.

[88] The nine plaintiffs in the *Atkinson* proceeding were, then, the first to complain to the Commission about the Ministry's policy. Since then, the Commission has declined to take further action in respect of a large number of similar enquiries and complaints, including Mrs Spencer's. Ms Crane says that the complaints were closed or suspended

by the Commission because it was clear that the attempts at resolution by the parties would be unsuccessful.

[89] Fifty-six people have enquired or complained to the Commission about the Ministry's policy. Of that number, one complaint is presently open, nine are the plaintiffs in the *Atkinson* proceeding, one was a witness before the Tribunal in the *Atkinson* proceeding, 20 have had their complaints suspended pending the outcome of the *Atkinson* proceeding, and 25 have had their complaints closed.

[90] Of the 25 complaints that were closed Ms Crane says:

> (a) Three complainants requested that the Commission provide their files to the Director;
>
> (b) 12 are aware of the Tribunal's decision and expressed interest in its practical application, given that they were caring for a family member or advocating for someone who was; and
>
> (c) 10 did not claim direct disadvantage as a result of the Ministry's policy and required no further contact.

[91] In an email of 5 September 2008 sent to the Office of the Leader of the Opposition, the Commission said, in terms agreed with the office of the Director:

> At this point, further complaints about this same matter are not able to be joined to the existing proceedings. However, that will not disadvantage any future complainant because that process is a two-step one: firstly, proceedings will determine whether or not the policy is discriminatory under the Human Rights Act 1993. Any claim for compensation will be made pursuant to these initial proceedings and other complainants about the same policy could be included in that process.

Mrs Spencer's complaints to the Commission

[92] In affidavits filed in this proceeding, Mrs Spencer describes her attempts, stretching back more than a decade, to obtain financial assistance to help support her son Paul. In September 2007 she complained to the Commission by telephone and letter.[34] The Commission responded that it would not notify the Ministry and Crown Law about her complaint, and that it would close her complaint file. The reason given for this was that the Commission's role was to facilitate a resolution by way of mediation. Mediation

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[34] And therefore meets the gateway requirements of s 92B of the Human Rights Act.

processes had not resolved earlier complaints about this same issue, and those complaints were closed and a number of the complainants had then chosen to take the matter to the Director of Human Rights Proceedings. The Commission advised Mrs Spencer that she could take her complaint to the Tribunal either directly or by seeking representation from the Director, and enclosed information about the Office of the Director.

[93] As suggested, Mrs Spencer made contact with the Director, but the Director decided not to provide representation to Mrs Spencer. He visited her at her home and at that meeting told her that she was too late to be added as a plaintiff in the *Atkinson* proceeding.

[94] Mrs Spencer said she followed the *Atkinson* litigation with interest. In March 2010, and again in May, she wrote to the Director to complain about the policy and the Ministry's decision to appeal the Tribunal's decision. She followed this up with a telephone call to the Director. The Director responded by letter dated 19 May 2010 in which he said:

> I share your frustration about the length of time that this issue has taken to be heard and decided. I sincerely wish that I could do something to speed the process up, but that is not possible. What I can offer is to say that, in any event that if the Tribunal's decision in *Atkinson* is eventually upheld, then this should make a difference to yours and Paul's situation.

[95] Mrs Spencer had also applied to the Ministry of Social Development for an increased accommodation allowance to obtain some recompense for the board and related services that she provided to Paul. Her application was rejected by the Benefits Review Committee of the Ministry of Social Development. She appealed that decision to the Social Security Appeal Authority, without success. The Authority said, "[t]he cost for which assistance is sought, namely the cost of care and supervision, is in effect a health and disability service."[35]

[96] In accordance with the decision, and taking up a suggestion made by the Director, Mrs Spencer again applied to the Ministry for funding. In June 2012 Paul's doctors wrote to the Ministry's agency, the Taikura Trust, seeking an assessment of Paul so that Mrs Spencer could be paid for care. The Trust replied enclosing a notice the Trust had

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[35] *Re Spencer* [2012] NZSSAA 45 at [29].

received from the Ministry advising that no appeal would be pursued in the *Atkinson* proceeding, and that in the interim the existing policy remained unchanged while the Ministry developed a new non-discriminatory policy.

[97] Mrs Spencer then wrote to both the Trust and the Ministry asking to be paid for Paul's care. By letter dated 20 July 2012, the Ministry replied rejecting the application, invoking its family care policy which it said "does not permit parents, spouses and resident family to be paid to care for their disabled family member." The letter continued:

> This position remains because the Human Rights Review Tribunal (HRRT) issued an order under Section 92(O) [sic] Human Rights Act 1993 suspending its declaration that the Ministry's policy is discriminatory pending final resolution of the legal proceedings between the Ministry and the litigants. The parties agreed to the suspension which has allowed the Ministry to lawfully continue to operate its policy until the suspension is lifted. This suspension allows the Ministry time to undertake the required policy work.

Analysis

[98] I have already held that s 92O and, it follows, s 92P are not provisions that deal with the type of order the Tribunal made here, an interim order purporting to deem a policy lawful (and backdating that deemed lawfulness) in the face of a finding that it was unlawfully discriminatory. Nevertheless I proceed to address this ground of challenge on the basis that it was within the Tribunal's power under s 92O to make an order which effectively "stayed" both the declaration and the finding of unlawfulness. The issue then is, what was the proper procedure for the Tribunal in light of the order sought?

[99] The order was made on an interim basis, but even so the s 92P matters were required to be taken into account by the Tribunal in determining whether to make an order under s 92O. The absence of reasons again creates difficulties, this time in determining whether the Tribunal did turn its mind to the mandatory considerations in s 92P. Nevertheless, in reviewing whether the Tribunal addressed all of the s 92P matters, it is possible to patch together the issues considered by the Tribunal by reading the application, consent memorandum and supporting affidavit of Ms Woods.

[100] It is true that, as the Ministry submits, the affidavit material and memorandum addressed many of the s 92P factors, including the adverse effects if the suspension order

was not made. But there is nothing in the material that addressed the impact on interested third parties of the making of the order. Indeed the material did not set out, other than in the most superficial way, what the effect of the orders would be. It simply asserted that the effect would be the lawful operation of the policy. The Ministry submits that the order meant that no-one could do what Mrs Spencer has purported to do, namely seek to judicially review the Ministry's application of the policy. If that were so, that is a substantial interference with the rights of interested third parties. There is no evidence that the Tribunal turned its mind to that issue.

[101] The Ministry suggested that I could not determine this issue without the Tribunal having the opportunity to file affidavits setting out the matters it took account of when explaining its processes. I do not accept that the absence of evidence from the Tribunal precludes consideration of this issue. The Tribunal has advised that it abides the decision of the Court, and it has not sought to tender evidence. In any case, had it sought to tender evidence about its reasons for making the order, it is unlikely that such evidence would have been admissible. The issue for me is the reasoning process of the Tribunal at the time it made the order. An explanation given three years later could be accorded little weight, particularly when given in response to a challenge to the validity of the decision-making process. The risk that the explanation would inevitably be tainted by ex post facto reasons (even were the Tribunal to assiduously strive to avoid this) weighs heavily against the admission of such evidence.[36] The Tribunal was correct in its decision simply to abide the decision of the Court.

[102] The next issue is whether there should have been a hearing of the application, at which the interests of those not party to the proceeding were represented and articulated.

[103] It is true that the scheme of the Human Rights Act is that proceedings brought before the Tribunal by the Director are in the nature of public interest litigation. Given the considerations affecting the Director's decision whether to provide representation, the proceedings will almost certainly resolve issues affecting many more than the immediate parties. In the *Atkinson* proceeding the Tribunal heard evidence about the numbers

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[36] *Petone Planning Action Group Inc v Hutt City Council* HC Wellington CIV 2006-485-405, 10 October 2006; *R (on the application of KVP Ent Ltd) v South Bucks DC* [2013] EWHC 926 (Admin); *R v Westminster City Council, ex parte Ermakov* [1996] 2 All ER 302 (CA) at 315-316.

affected by the Ministry's policy. However when the Director elects to bring proceedings for a complainant, the Director is acting for and in that complainant's interests. When considering making an order under s 92O the Tribunal cannot therefore safely assume that the Director is acting on behalf of all those potentially adversely affected if the order is made.

[104] Natural justice normally requires that someone who may be adversely affected by a decision is afforded an opportunity to be heard. The requirements of the principles of natural justice may be supplemented or varied by statute. In that regard I note that s 108 of the Human Rights Act provides:

> (1) Any person who is a party to the proceedings before the Tribunal, and any person who satisfies the Tribunal that he or she has an interest in the proceedings greater than the public generally, may appear and may call evidence on any matter that should be taken into account in determining the proceedings.
>
> (2) If any person who is not a party to the proceedings before the Tribunal wishes to appear, the person must give notice to the Tribunal and to every party before appearing.
>
> (3) A person who has a right to appear or is allowed to appear before the Tribunal may appear in person or be represented by his or her counsel or agent.

Affected third parties had no opportunity to meet the s 108(1) threshold in respect of the application for the suspension order, as those third parties had no notice of the application.

[105] It is also relevant that the Human Rights Review Tribunal Regulations 2002 require that any new proceedings commenced before the Tribunal be served on the Commission.[37] This recognises both that proceedings before the Tribunal will have significance for a wider group than the immediate parties, and the critical role the Commission plays in human rights advocacy. In the present situation, where the Tribunal was asked to make an exceptional order on a consent basis, it would have been prudent for the Tribunal to direct that the application be served on the Commission. The Commission would know the identity of those who had met the gateway requirement for proceedings to be brought before the Tribunal. Moreover, the Commission could have

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[37] Human Rights Review Tribunal Regulations 2002, r 14.

been appointed to represent the interests of those affected by the suspension order and whose views were not otherwise represented. This is a technique often employed by the courts and, I expect, by tribunals to ensure representation of the interests of a large group of individuals and entities, where it is not practical for those persons or entities to be individually served with the proceeding or be represented.

[106] Sometimes where an order is sought on an interim basis, and urgently, a court or tribunal is justified in proceeding without hearing from an affected party. But this is on the basis that the order will be brief in duration and have only provisional effect, until the matter may be addressed at a hearing by all affected parties.[38] The effect the Ministry was seeking was not provisional; it is hard to see how a Tribunal could provisionally deem an unlawful policy lawful. Moreover, the Tribunal did not stipulate a date for the inter parties hearing of the application, nor did it direct that affected parties be served with the application.

[107] There should also have been a public hearing to enable an exploration of the implications of the application before the Tribunal. The parties asked the Tribunal to make an unusual order, and within the context of what was self-evidently public interest litigation. The order was expressed to retrospectively "suspend" the application of a declaration as to human rights, which inevitably affected the interests of third parties.

[108] A hearing was unlikely to add delay to the process. As it was, the Tribunal took more than two months to deal with the application after it received the consent memorandum. In *Koo Sze Yiu* Bokhary J addressed this issue of the appropriate process where an application was made for a suspension order. He said:[39]

> …. it will be decided by an independent judiciary after a full, fair and open hearing, and with reasons given. Suspension would not be accorded if it is unnecessary. And it would not be accorded for longer than necessary. As Lord Mansfield CJ so neatly put it in *Proceedings against George Stratton and Others, for deposing Lord Pigot* (1779) 21 State Trials 1045 at p 1231, "necessity will not justify going further than necessity obliges".

[109] Was the Tribunal required to give reasons? Section 116 of the Human Rights Act sets out when reasons must be given:

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38 *WEA Records Ltd v Visions Channel 4 Ltd* [1983] 1 WLR 721 (CA) at 727.
39 *Koo Sze Yiu*, above n 24, at [41].

(1) This section applies to the following decisions of the Tribunal:

(a) a decision to grant 1 or more of the remedies described in section 92I or the remedy described in section 92J or an order under section 95:

(b) a decision to make a declaration under section 97:

(c) a decision to dismiss proceedings brought under section 92B or section 92E or section 95 or section 97.

(2) Every decision to which this section applies must be in writing and must show the Tribunal's reasons for the decision, including—

(a) relevant findings of fact; and

(b) explanations and findings on relevant issues of law; and

(c) conclusions on matters or issues it considers require determination in order to dispose of the matter.

(3) The Tribunal must notify the parties, the Attorney-General, and the Human Rights Commission of every decision of the Tribunal.

[110] Although the section does not list s 92O, the exercise of a power under s 92O necessarily entails a decision to grant a remedy under s 92J. Even if s 116 did not apply, I consider that reasons should have been given here. The order made was unusual. It employed language which did not clearly link the order to the exercise of a statutory power. It purported to do a most unusual thing, deviate from the usual rule that the law as found in a judgment applies prospectively and retrospectively from when the judgment is issued. What the order was intended to effect was unclear, but it was plainly, on any basis, an order that would affect the rights of many, including those not before the courts. The parties' consent did not relieve the Tribunal of the obligation to give reasons. Sometimes the courts will issue orders, which substantially affect rights on the papers, and without giving reasons. But that is done in the context of urgency, and will normally be accompanied by a direction that the proceeding be listed before the court in a matter of days, at which time those affected by the order can be heard as to whether the orders made should continue.

[111] The application before the Tribunal was an application which called for a punctilious approach to procedure. The lack of opposition, and the apparent lack of consciousness on the part of the Tribunal as to the significance of the power it was purporting to exercise, meant that the orders were made without reasons given, and

although apparently on an interim basis, with no call-back date. As things turned out, this meant the Ministry had the benefit of those orders for in excess of three years — far longer than necessity required. Moreover, because of the interim payment arrangements the Ministry subsequently entered into with the *Atkinson* plaintiffs, those plaintiffs were for some of the time exempt (at least in part) from the effect of the order. Yet it was their consent that was critical in the Ministry obtaining the order. I do not criticise the plaintiffs or the Ministry but, for whatever reason, this process went very wrong.

[112] The approach of the Tribunal in *Atkinson* can be contrasted with the Tribunal's approach in *Idea Services Ltd v Attorney-General on behalf of the Ministry of Health*.[40] In that case the Tribunal considered an (admittedly opposed) application for a suspension order, which was framed in similar terms to the application before the Tribunal in *Atkinson*. The Tribunal had before it an application for suspension and supporting affidavit evidence, and it also heard argument on the point.

[113] The Tribunal first considered the nature of the application, noting that it was essentially being asked to do two separate things: one, to place "a moratorium on the declaration for two years after the last appeal"; and two, to stay the effect of the declaration immediately, while the appeal processes unfold.[41] In respect of the apparent application to stay the effect of the declaration, the Tribunal said:

> [18] With respect, we have reservations about whether s 92O is quite so closely related to the 'stay of execution' idea as suggested. In our view s 92O is addressed to the question of what can be done when remedies are being granted to meet the kinds of concerns reflected in the section. It is not addressed to the question of what interim arrangements should apply once such remedies as have been awarded are under appeal – we see a difference between fashioning a remedial response to the problem presented by a case, and deciding what needs to be done while those chosen remedies are being challenged in a higher jurisdiction.

[114] In any event, the Tribunal considered that if an application for stay had been made, it would have failed because the declaration could not yet be enforced in any practical way and because it was being asked to suspend the declaration until the

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40 *Idea Services Ltd v Attorney-General on behalf of the Ministry of Health* [2011] NZHRRT 21.
41 At [15].

completion of any appeals. The Tribunal did not think that could be appropriate because:[42]

> The question of whether and to what extent interim measures to protect the status quo are really needed at each step ought to be for those courts to decide after they have each dealt with the substantive issues; the outcome must be informed by the reasoning and the result of the most recent decision. We regard it as at least premature, and at worst presumptuous, for us to purport to stipulate what measures should be in place after...

[115] The Tribunal then considered the moratorium sought by the Ministry, which it dismissed after discussing the evidence before it and each s 92P factor in detail, the latter spanning 20 paragraphs.

3. If the answer to 2 is yes, is the order invalid from the beginning as a consequence?

[116] The Ministry contends that an order otherwise made within the power of a judicial or administrative body should be treated as valid until it is set aside by a court of competent jurisdiction. Ms Jagose described this approach as well settled, an approach which reflects the demise of the old absolute theory of invalidity and its reconciliation with discretionary administrative law remedies. The position that a decision "[subsists and remains] fully effective unless and until … set aside by a Court of competent jurisdiction" has replaced the historical notions of void, voidable, nullity or ultra vires.[43] This principle, she says, applies equally to judicial bodies as to any other body, citing *Martin v Ryan* as authority for that proposition.[44] If the order is valid until set aside, then the Ministry acted lawfully in relying upon it in declining to consider Mrs Spencer's application.

[117] I see significant difficulties with this argument. While it has as its launchpad judgments which reject the rigid categories of void or voidable, the argument relies upon just such rigid distinctions being drawn. The modern approach the Ministry refers to is to eschew the mechanistic application of inflexible rules to determine the consequences of error, and to approach the consequences of error as a matter requiring the exercise of judicial discretion. This judgment is not the place to explore the jurisprudence as to the consequences of invalidity – there are many pages of textbooks devoted to that and

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42 At [20(b)].
43 *R v Panel on Take-Overs and Mergers; Ex p Datafin plc* [1987] 1 QB 815 (CA) at 840.
44 *Martin v Ryan* [1990] 2 NZLR 209 (HC) at 238.

textbook writers have done a better job of discussing the issue than can I.[45] It is sufficient to say that the Court has a discretion at the remedies phase as to the consequences of procedural deficiencies. If the Court considers that they are so significant as to invalidate the decision, the usual effect of a finding that a decision or order is invalid is that the impugned decision is invalidated retrospectively. This much is expressly recognised by Fisher J in *Martin v Ryan*:[46]

> In his submissions Mr Paterson equated the rejection of the absolute theory of invalidity with the assumption that any judicial power to invalidate must be only prospective in operation. He based that upon such statements as "the decision in question is recognised as operative unless set aside" (per Cooke J in *AJ Burr Ltd v Blenheim Borough Council* p 4), "until it is so declared by a competent body or court, it may have some effect, or existence, in law" (per Lord Wilberforce in *Calvin v Carr* at pp 589-590) and ". . . save in exceptional cases a decision is to be treated as valid until set aside by the Court" (per Somers J in *Hill v Wellington Transport District* at p 323). However I do not think that these statements were intended to suggest that the removal of legal consequence from the decision is to be merely prospective in operation. At least as a general rule, if the Court does decide to invalidate a decision on the ground of administrative law deficiencies, the impugned decision is invalidated retrospectively and for all purposes. As Aicken J said in *Forbes v New South Wales Trotting Club Ltd* (1979) 143 CLR 242, 277:
>
> > "That which is done without compliance with applicable principles of natural justice, in circumstances where the relevant authority is obliged to comply with such principles, is not to be regarded as void ab initio so that what purports to be an act done is totally ineffective for all purposes. Such an act is valid and operative unless and until duly challenged but upon such challenge being upheld it is void, not merely from the time of a decision to that effect by a court, but from its inception. Thus, though it is merely voidable, when it is declared to be contrary to natural justice *the consequence is that it is deemed to have been void ab initio*." (Emphasis added.)

[118] In any case, even if the Ministry's classification system is accepted, it is clear that an order made without jurisdiction or with such fundamental defects as are present in this case qualify the Tribunal's decision suspending its own declaration as a nullity. *Anisminic Ltd v Foreign Compensation Commission* was one of the cases relied upon by the Ministry in support of the approach to invalidity it contends for.[47] It is clear from that

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45 Phillip A Joseph *Constitutional and Administrative Law in New Zealand* (3rd ed, Brookers, Wellington, 2007) at 86–870.

46 At 238.

47 *Anisminic Ltd v Foreign Compensation Commission* [1969] 2 AC 147 (HL) at 171.

case that the errors affecting the suspension order fit within the definition of nullity proposed by Lord Reid:[48]

> It has sometimes been said that it is only where a tribunal acts without jurisdiction that its decision is a nullity. But in such cases the word "jurisdiction" has been used in a very wide sense, and I have come to the conclusion that it is better not to use the term except in the narrow and original sense of the tribunal being entitled to enter on the inquiry in question. But there are many cases where, although the tribunal had jurisdiction to enter on the inquiry, it has done or failed to do something in the course of the inquiry which is of such a nature that its decision is a nullity. It may have given its decision in bad faith. It may have made a decision which it had no power to make. It may have failed in the course of the inquiry to comply with the requirements of natural justice. It may in perfect good faith have misconstrued the provisions giving it power to act so that it failed to deal with the question remitted to it and decided some question which was not remitted to it. It may have refused to take into account something which it was required to take into account. Or it may have based its decision on some matter which, under the provisions setting it up, it had no right to take into account. I do not intend this list to be exhaustive. But if it decides a question remitted to it for decision without committing any of these errors it is as much entitled to decide that question wrongly as it is to decide it rightly.

B. If the suspension order is valid, is it binding on Mrs Spencer?

[119] If I am wrong in any of the findings to date, does the suspension order bind Mrs Spencer, when she was not given notice of the application or the order? Mrs Spencer argues that even if the failure to hear from affected third parties did not nullify the suspension order, the order does not bind her as she was neither a party to the proceeding, nor served with the application. I agree that since the order purported to affect the interests of third parties, if their interests were not represented at the hearing of the application, they were not bound by the order made. That, of course, makes the order meaningless.

C. Is the Ministry estopped from relying upon the policy?

[120] Finally, Mrs Spencer argues that irrespective of the suspension order, the Ministry is estopped from relying upon the policy. This is in light of the evidence produced in the *Atkinson* proceeding that notwithstanding the blanket "no payment" policy, over 272 family caregivers were paid, and also in light of the special payment arrangements the Ministry entered into with some of the *Atkinson* plaintiffs.

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[48] At 171.

[121] Mrs Patricia Davis gave evidence in the High Court as to how and why the 272 family members were being paid as caregivers. She said that none of them had Ministry approval, and more than a third of them were paid by one provider of disability services to the Ministry. Ms Davis said in her statement of evidence:

> [145] The reasons given for the exceptions were predominantly that the NASC had been unable to co-ordinate the service, or the service provider had been unable to provide a support person. The reasons for this failure varied. "Cultural reasons" were cited most often (26.3%). Almost as common was "client choice" (25.5%). The third most common reason was the difficulty in finding support workers because of the high needs of clients (both medical and behavioural) and the lack of caregivers with those skills (14.4%). The other reasons were unavailability of carers; family choice; geographic isolation; and safety. In 11% of cases, the original reason for funding the employment of a family caregiver was not known.
>
> [146] The Ministry gave very serious thought to whether any or all of these reasons should be used as the criteria on which to base the Ministry's exceptions policy. However, the Ministry decided against adopting any of the reasons given during the review as firm criteria for an exceptions policy. The reason for this is that none of those reasons are consistent with eligibility for the support services themselves. The needs assessment identifies only those needs that are not able to be met by the family unit. If the family have already determined they cannot meet that need, not only is it illogical to fund them to be employed to meet it, the disabled person (and their family) still require that identified support. The need has not been met by employing the family member.

[122] The Ministry says that with two exceptions, the 272 family members receiving payments were being paid without Ministry approval. The payment arrangements had been entered into by Ministry service providers. Mrs Spencer is not in the same situation as the *Atkinson* plaintiffs, and the Ministry notes that Canadian courts have distinguished between plaintiffs and others, exempting plaintiffs from the scope of the suspension of a declaration of invalidity.

[123] It was not clearly stated how these payments could estop the Ministry from applying the policy to Mrs Spencer given that conventional elements of an estoppel are as follows:[49]

> (a) A belief or expectation has been created or encouraged through some action, representation or omission to act by the party against whom estoppel is alleged;

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[49] James Every-Palmer "Equitable Estoppel" in Andrew Butler (ed) *Equity and Trusts in New Zealand* (2nd ed, Thomson Reuters, Wellington, 2009) at 613—614, cited with approval in *Cornwall Park Trust Board Inc v Chen* [2013] NZHC 1067; *Holm-Hansen v Johnson* [2012] NZHC 3445.

(b) The belief or expectation has been reasonably relied on by the party alleging the estoppel;

(c) Detriment will be suffered if the belief or expectation is departed from; and

(d) It would be unconscionable for the party against whom the estoppel is alleged to depart from the belief or expectation.

[124] During argument, Mr Farmer said the Ministry could not simply apply the policy, but was required to consider whether one of the exceptions applied to Mrs Spencer. That sounds more like an argument of irrationality — that it is irrational to apply a policy inconsistently in this manner. However I do not think that the Ministry's policy is properly described as a policy with exceptions. The Court of Appeal described the matter as follows:[50]

> [160] That leads in to the final point we need to discuss under the heading of the range of reasonable alternatives. That is the Ministry's concern that the policy was treated by the High Court as a "no exceptions" policy. There was evidence that there were exceptions to the policy. However, there was no clarity about the nature or extent of any "exceptions policy". When it became apparent that some family members were being paid, contrary to the policy, the Ministry undertook a review, which was completed in May 2007. It transpired that just over 270 family members were being paid to provide care. The reasons for this varied, for example, in some cases there were cultural reasons. Other reasons included rural isolation or unavailability of carers. Only two of these cases were previously known of by Ministry staff, being two of the respondents. None of the arrangements had been through a formal Ministry approval process. Further, Ms Davis said in her evidence that the Ministry had agreed to short term exceptions in a few cases. But this was simply to allow families to make alternative care arrangements. We consider, for all intents and purposes, the High Court was correct to describe the policy as a blanket one of non-payment of family members.

[125] For this reason I consider that this argument adds nothing to the strength of Mrs Spencer's challenge.

D. What is the effect of Part 4A of the NZPHDA on Mrs Spencer's right to relief in the judicial review proceeding, and her ability to be joined to the *Atkinson* proceeding?

[126] The effect of Part 4A of the NZPHDA is at issue in both the judicial review proceeding and the declaratory judgment proceeding. In the judicial review proceeding

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50 *Ministry of Health v Atkinson* [2012] NZCA 184, [2012] 3 NZLR 456 at [160].

Mrs Spencer argues that the suspension order was a nullity, and the Ministry was therefore obliged to consider her application. The Ministry responds that even if Mrs Spencer establishes that the Ministry erred in failing to consider her application for payment as a carer for her son Paul, the only relief that should be given is a declaration as to the lawfulness of the challenged decision. A declaration can be an adequate vindication of rights,[51] and any other relief would be futile. If, as Mrs Spencer asks, the Ministry is directed to reconsider Mrs Spencer's application to be paid as a caregiver for Paul, the same result will inevitably be reached. This is because Part 4A of the NZPDHA applies to validate the policy the subject of challenge in the *Atkinson* proceeding, and prohibits payment other than in accordance with that policy.

[127] In the declaratory judgment proceeding Mrs Spencer seeks a declaration that she is not precluded by s 70G from applying to be joined as a party to the *Atkinson* proceeding for the remedial phase. The Ministry contends that she is so precluded by the terms of s 70G.

[128] These arguments raise issues as to the proper interpretation of the provisions in Part 4A. Again the starting point is s 5 of the Interpretation Act. To the principles set out there however, must be added the interpretative principles contained in ss 5 and 6 of the Bill of Rights Act which provide:

> **5 Justified limitations**
>
> Subject to section 4 of this Bill of Rights, the rights and freedoms contained in this Bill of Rights may be subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.
>
> **6 Interpretation consistent with Bill of Rights to be preferred**
>
> Wherever an enactment can be given a meaning that is consistent with the rights and freedoms contained in this Bill of Rights, that meaning shall be preferred to any other meaning.

[129] As the majority of the Supreme Court made clear in *R v Hansen*, the first step in giving effect to these provisions is to ascertain the natural meaning of the statutory provision.[52] From that point, the process is as follows:

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51 *Taunoa v Attorney-General* [2007] NZSC 70, [2008] 1 NZLR 429.

52 *R v Hansen* [2007] NZSC 7, [2007] 3 NZLR 1 at [60] per Elias CJ dissenting.

> If the natural meaning of a statutory provision does appear to limit a guaranteed right, the appropriate next step is to consider whether that limit is a justified one in terms of s 5. If it is, the meaning is not inconsistent with the Bill of Rights in the sense envisaged by s 6, and should be adopted by the Court. It is only when that natural meaning fails the s 5 test that it is necessary to consider whether another meaning could legitimately be given to the provision in issue. If the words of the provision in their context are not capable of supporting a different and Bill of Rights-consistent meaning, s 4 requires the Court to give effect to the provision in accordance with its natural meaning notwithstanding the resulting inconsistency with the Bill of Rights.

[130] I start with the purpose of the legislation. Section 70A sets out the purpose of Part 4A as follows:

> (1) The purpose of this Part is to keep the funding of support services provided by persons to their family members within sustainable limits in order to give effect to the restraint imposed by section 3(2) and to affirm the principle that, in the context of the funding of support services, families generally have primary responsibility for the well-being of their family members.
>
> (2) To achieve that purpose, this Act, among other things,—
>
> (a) prohibits the Crown or a DHB from paying a person for providing support services to a family member unless the payment is permitted by an applicable family care policy or is expressly authorised by or under an enactment:
>
> (b) declares that the Crown and DHBs have always been authorised, and continue to be authorised, to adopt or have family care policies that permit persons to be paid, in certain cases, for providing support services to family members:
>
> (c) stops (subject to certain savings) any complaint to the Human Rights Commission and any proceeding in any court if the complaint or proceeding is, in whole or in part, based on an assertion that a person's right to freedom from discrimination on any of the grounds of marital status, disability, age, or family status (affirmed by section 19 of the New Zealand Bill of Rights Act 1990) has been breached by—
>
> (i) a provision of this Part; or
>
> (ii) a family care policy; or
>
> (iii) anything done or omitted in compliance, or intended compliance, with this Part or a family care policy.

[131] Section 3(2) of the NZPHDA, referred to in s 70A(1) states: "[t]he objectives stated in subsection (1) are to be pursued to the extent that they are reasonably achievable within the funding provided". The objectives stated in s 3(1) are:

(i) the improvement, promotion, and protection of [New Zealanders'] health:

(ii) the promotion of the inclusion and participation in society and independence of people with disabilities:

(iii) the best care or support for those in need of services:

[132] Part 4A is sensibly to be read and understood as a response by Parliament to the decisions of the Tribunal, the High Court and Court of Appeal in *Atkinson*. Part 4A was enacted under urgency, and passed through all of its stages in one day. It bypassed Select Committee scrutiny so there was no opportunity for the public to make submissions upon its proposed language or effect. The introductory statement to the regulatory impact statement accompanying the Bill was headed "Government Response to the Family Carers Case" and contained the following comments:[53]

> The Government has decided that the immediate focus of its response will be on the issues that directly arise from the Courts' decisions, which is the discrimination that arises within Ministry of Health funded home and community support services (HCSS) through not paying parents and resident family members to provide these services to their adult disabled family members. Although the Courts said that the policy as a whole was discriminatory, the Family Carers case specifically addressed the existing policy's prohibition on parents providing HCSS to their adult sons and daughters. This means that the Government can be certain that it needs to change its policy to address these circumstances.
>
> ….
>
> The Government has decided on a preferred response to the Courts' decisions but recognises that there are a number of significant risks and issues, including legal risks, associated with this response.

[133] There is nothing unusual in the government responding to a decision of the courts in this area. When Part 1A was enacted, it was expressly contemplated that the government might respond to a decision that a policy or Act was non-compliant by either affirming or modifying the policy.[54]

[134] The Minister of Health, the Honourable Tony Ryall, introduced the Bill which would enact Part 4A to the House for its first reading, describing it as:[55]

> … the Government's solution to the decisions made by the High Court and the Court of Appeal in relation to *Ministry of Health v Atkinson and Others*. This is a compassionate and responsible solution. It does shift the boundary between

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53 Government Response to Family Carers Case (Ministry of Health, March 2013) at 1.

54 "Anti-Discrimination Standard for Government Activities", above n 8, at [57].

55 (16 May 2013) 690 NZPD 10116).

> family and taxpayer responsibilities, but it has landed in a fair and reasonable place. The Ministry of Health advises that New Zealand will be only the third country in the world, after Sweden and the Netherlands, that will pay a wage to some family members caring for other family members.
>
> ….
>
> The *Atkinson* court case raised issues that went to the heart of the relative obligations of families and the Government, and the degree of responsibility that family members in different situations have for each other. The court in the *Atkinson* case found that the Ministry of Health, under all Governments, had a policy on disability support funding that was unjustifiably discriminating against parents caring for adult disabled children. This bill takes account of the court's decision and clarifies the Government's position on paying family carers. The bill provides certainty without the need to resort to the courts on individual cases, and it manages the significant financial risks to the Government. This approach balances the interests of disabled people, family carers, and tax payers, in challenging fiscal times.

Argument

[135] The Ministry says that Part 4A prohibits the Crown or a District Health Board from paying a person for providing support services to a family member unless the payment is permitted by an applicable family care policy, or is expressly authorised by or under an enactment. It relies upon the prohibition contained in s 70C as follows:

> **70C Persons generally not to be paid for providing support services to family members**
>
> On and after the commencement of this Part, neither the Crown nor a DHB may pay a person for any support services that are, whether before, on, or after that commencement, provided to a family member of the person unless the payment is—
>
> (a) permitted by an applicable family care policy; or
>
> (b) expressly authorised by or under an enactment.

[136] The Ministry says that there is no family care policy which permits the Ministry to pay Mrs Spencer. As at the date of hearing the only applicable family care policy in operation is the very family care policy that was declared in breach of the *Atkinson* plaintiffs' right to be free from unlawful discrimination. It prohibits payment to family members.

[137] The Ministry also says that the effect of s 70D is that the care policy the subject of the *Atkinson* decision has been declared lawful, even retrospectively lawful, and so may now be applied by the Ministry. Section 70D provides in material part:

> (1) The Crown and any DHB are, and have always have been, authorised —
>
> (a) to adopt or have a family care policy:
>
> (b) to change a family care policy:
>
> (c) to cancel a family care policy:
>
> (d) to replace a family care policy.
>
> (2) Any family care policy that the Crown or any DHB had immediately before the commencement of this Part continues in effect, and the Crown or the DHB may change, cancel, or replace that family care policy.
>
> (3) A family care policy that the Crown or a DHB adopts or has on or after the commencement of this Part may state, and a family care policy that the Crown or a DHB adopted or had before that commencement has always been authorised to state or to have the effect of stating, 1 or more of the following:
>
> (a) cases in which persons may be paid for providing support services to family members, including, without limitation, by reference to 1 or more of the following matters:
>
> (i) the nature of the familial relationship between the person who provides the support services and the family member to whom the support services are provided:
>
> (ii) the impairment or condition of the family member to whom the support services are provided, which may include references to the effects of the impairment or condition or the degree of its severity, or both:
>
> (iii) the age of the family member to whom the support services are provided:
>
> (iv) the place of residence of the family member to whom the support services are provided:
>
> (v) the place of residence of the person who provides the support services:
>
> (vi) the needs of the family member to whom the support services are provided and the needs of his or her family:
>
> (b) the conditions that must be satisfied before payments for support services provided to a family member are made:
>
> (c) the rates, or ways of setting the rates, of payment for support services provided to family members, which may be lower than

> the rates of payment for comparable support services provided to persons who are not family members:
>
> (d) the limits on funding for support services provided to a family member, which may be expressed in any way, including by limiting the amounts that may be paid or the number of hours for which payment may be claimed.

[138] The Ministry further argues that even if s 70D does not retrospectively validate the challenged policy, that policy was rendered lawful by the suspension order until, on the Ministry's argument, 14 May 2013, and then prospectively by s 70D.

[139] For Mrs Spencer, Mr Farmer says that s 70C does not prevent Mrs Spencer being paid if I order the Ministry to consider her application for payment. He also argues that s 70D does not, as the Ministry would have it, validate the family care policy declared unlawful by the courts in the *Atkinson* proceeding, as that policy is not a "family care policy" for the purposes of Part 4A. He relies upon the definition of family care policy in s 70B and says that the policy addressed in *Atkinson* is not a policy that permits payment to her or others in her situation. One of the critical issues of interpretation in this proceeding is therefore whether the challenged policy is a family care policy. If the policy addressed in *Atkinson* is not a family care policy, then most if not all of the obstacles the Ministry contends Part 4A creates for Mrs Spencer fall away.

[140] Section 70B defines "family care policy" in the following way:

> **70B Interpretation**
>
> (1) In this Part, unless the context otherwise requires,—
>
> **family care policy**, in relation to the Crown or a DHB,—
>
> (a) means any statement in writing made by, or on behalf of, the Crown or by, or on behalf of, the DHB that permits, or has the effect of permitting, persons to be paid, in certain cases, for providing support services to their family members; and
>
> (b) includes any practice, whether or not reduced to writing, that has the same effect as a statement of the kind described in paragraph (a), being a practice that was followed by the Crown or by a DHB before the commencement of this Part
>
> **family member** has the meaning given by subsection (2)

support services means disability support services (as defined in section 6(1)) or health services (as so defined), or both, being services of a kind that are generally funded, directly or indirectly, through Vote Health.

(2) Support services provided by a person (**person A**) to another person (**person B**) are provided to a **family member** in any case where person B is person A's—

(a) spouse, civil union partner, or de facto partner; or

(b) parent, step-parent, or grandparent; or

(c) child, stepchild, or grandchild; or

(d) sister, half-sister, stepsister, brother, half-brother, or stepbrother; or

(e) aunt or uncle; or

(f) nephew or niece; or

(g) first cousin.

[141] Also relevant to consideration of these issues is s 70E which limits the ability of people to complain to the Commission or bring proceedings alleging unlawful discrimination in respect of the NZPHDA or a family care policy. Section 70E provides:

70E Claims of unlawful discrimination in respect of this Act or family care policy precluded

(1) In this section, **specified allegation** means any assertion to the effect that a person's right to freedom from discrimination on 1 or more of the grounds stated in section 21(1)(b), (h), (i), and (l) of the Human Rights Act 1993, being the right affirmed by section 19 of the New Zealand Bill of Rights Act 1990, has been breached—

(a) by this Part; or

(b) by a family care policy; or

(c) by anything done or omitted to be done in compliance, or intended compliance, with this Part or in compliance, or intended compliance, with a family care policy.

(2) On and after the commencement of this Part, no complaint based in whole or in part on a specified allegation may be made to the Human Rights Commission, and no proceedings based in whole or in part on a specified allegation may be commenced or continued in any court or tribunal.

(3) On and after the commencement of this Part, the Human Rights Commission must not take any action or any further action in relation to a complaint that—

(a) was made after 15 May 2013; and

(b) is, in whole or in part, based on a specified allegation.

(4) On and after the commencement of this Part, neither the Human Rights Review Tribunal nor any court may hear, or continue to hear, or determine any civil proceedings that arise out of a complaint described in subsection (3).

(5) Nothing in this section or in section 70D affects—

(a) a complaint that is, in whole or in part, based on a specified allegation but that has been lodged with the Human Rights Commission or any court before 16 May 2013; or

(b) the jurisdiction of the Human Rights Review Tribunal or of a court to hear and determine proceedings that arise out of a complaint described in paragraph (a).

(6) Despite subsection (5)(b), if in proceedings to which that subsection applies the Human Rights Review Tribunal or a court finds that a specified allegation has been proved, the Human Rights Review Tribunal or the court may grant no remedy other than the declaration described in subsection (7).

(7) The declaration that may be granted by the Human Rights Review Tribunal or the court in proceedings to which subsection (5)(b) applies is a declaration that the policy to which the finding relates is inconsistent with the right to freedom from discrimination affirmed by section 19 of the New Zealand Bill of Rights Act 1990.

[142] In the declaratory judgment proceeding Mrs Spencer seeks declaration as to the correct interpretation of s 70G(1) of the NZPHDA and in particular, whether the effect of s 70E combined with s 70G precludes her from joining the *Atkinson* proceeding for the purposes of seeking compensation. Section 70G provides:

70G Savings

(1) The proceedings between the Ministry of Health and Peter Atkinson (on behalf of the estate of Susan Atkinson) and 8 other respondents (being the proceedings that were the subject of the judgment of the Court of Appeal reported in *Ministry of Health v Atkinson* [2012] 3 NZLR 456) may be continued or settled as if this Part (other than this section) had not been enacted.

(2) Any claim in the proceedings in the High Court between Margaret Spencer and the Attorney-General (CIV 2012-404-006717) may, if, and only if, made in pleadings filed in the High Court before 16 May 2013, be heard and determined as if this Part (other than this section) had not been enacted.

(3) Subsection (4) applies to a contract or an arrangement—

(a) that contains commitments or assurances by the Crown or a DHB; and

(b) that is in effect immediately before the commencement of this Part; and

(c) that provides for or envisages payments for support services provided to a family member.

(4) The contract or arrangement—

(a) must, if any of its terms relating to payment for support services to a family member were not permitted or authorised by a family care policy, be construed as if they had been so permitted and authorised; and

(b) if still in effect on the day before the first anniversary of the commencement of this Part, ceases to be in effect on the close of that day.

(5) Subsections (3) and (4) override section 70C.

[143] Mrs Spencer says that notwithstanding ss 70E to 70G she remains able to apply to be joined as a plaintiff in the *Atkinson* case for the purpose of the remedies hearing and, by implication, that the Tribunal is not constrained in how it deals with that application. She says first that the barriers to accessing the Tribunal or the courts set out in s 70E do not apply to her, because her proceedings and the *Atkinson* proceedings do not depend upon a specified allegation. That is because the policy the subject of the proceedings is not a family care policy. In the alternative she argues that the reference in s 70G(1) to "Ministry of Heath v Peter Atkinson (on behalf of the estate of Susan Atkinson) and 8 other respondents" is a mere description of the proceedings and what is preserved is the ability of the proceedings to continue or be settled. This interpretation flows not just from the wording of s 70G, but also from the traditional approach of the courts to privative or ouster clauses (which is to interpret them restrictively), and from the principles of interpretation contained in ss 5 and 6 of the Bill of Rights Act.

[144] The Commission supports the interpretation of Part 4A argued for by Mrs Spencer.

[145] The Ministry says that s 70G is properly interpreted as allowing the continuation of the *Atkinson* proceeding only in respect of existing parties. It says that is why those parties are specifically referred to in the legislation. This interpretation aligns with Part

4A's purpose which is to prevent ongoing complaints in proceedings based on allegations of discrimination. The Ministry agues that a joinder of Mrs Spencer to the proceeding would undermine that intention. If she may join the proceeding, it follows that any affected person may continue to claim relief on the grounds of discrimination under the policy the subject of the decision in *Atkinson*.

Analysis

[146] A critical issue in interpreting Part 4A is whether the policy the subject of the decision in *Atkinson* is a "family care policy" for the purposes of that part. How that issue is resolved is determinative of most of the issues as to interpretation between the parties.

[147] Starting with the language of Part 4A there is a strong argument that the policy the subject of challenge in the *Atkinson* proceeding is not a policy permitting or having the effect of permitting "persons to be paid, in certain cases, for providing support services to their family members" and so does not fall within the definition of family care policy for the purposes of Part 4A. That policy, as recognised by both the High Court and the Court of Appeal, comprises a blanket prohibition upon such payments. This much was also recognised by the Minister of Health, the Honourable Tony Ryall, who when in introducing the Amendment Bill to Parliament said:[56]

> For over 20 years, under Governments of all hues, the Ministry of Health has operated a blanket policy of not paying family members for support they provide to disabled family members receiving disability support services.

[148] A "blanket" policy that family members will not be paid for support they provide to disabled family members can hardly be characterised as a policy permitting or having the effect of permitting payment for providing support services provided by family members as they are defined in s 70B. Nor can it be characterised, for the purposes of s 70B(1)(b), as a practice that has the same effect as a family care policy. To put this in more case specific terms, a policy that provides that parents may never be paid for providing support services to their adult children who reside with them is not a policy that permits those classes of family members to be paid for providing support services to their family members "in certain cases".

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[56] (16 May 2013) 690 NZPD 10116.

[149] I accept however that there are, at least arguably, some contrary indications in the legislation suggesting that the policy is for the purposes of Part 4A a "family care policy". First, if the policy declared unlawful in *Atkinson* is not a "family care policy", why does s 70E impose limitations on access to the complaints procedure, and the remedies available from 15 May 2013, a date before the commencement of the legislation? Given that 15 May 2013 was the day before the Bill was announced and passed through Parliament under urgency, it seems likely that date was selected to forestall a flood of complaints about family care policies, when those complaints might be precluded once the Bill was enacted.

[150] However, I do not regard this as a significant contrary indication to the interpretation argued for by Mrs Spencer. The natural meaning of the text is that it limits or prevents complaints or proceedings about policies that fall within the definition of family care policies which were not the subject of the decision in *Atkinson*. As the regulatory impact statement acknowledged, the *Atkinson* case addressed the circumstances of a narrow category of family carers. It did not address other grounds of discrimination which fall within the definition of specified allegation, including age, disability and marital status.

[151] The Ministry can also point to the fact that s 70G expressly provides that Mrs Spencer's judicial review proceeding and the *Atkinson* proceeding may continue as if "this Part (other than this section) had not been enacted" as another contrary indication. Why is it necessary to include such a provision if the limitations on complaints and proceedings contained in s 70E do not apply to the policy declared unlawful in *Atkinson*? Again, I am not persuaded that this is a significant contrary indication if the interpretation Mrs Spencer contends for is adopted. Section 70G still fulfils the role of providing clarity that Mrs Spencer's and the *Atkinson* proceedings are not captured or affected by the provisions of s 70E. Given the speed at which this Part was enacted, and the complexity of what is sought to be achieved in just a few sections, it is not surprising that such a clarifying provision is included.

[152] Having dealt with the threshold issue of the meaning of "family care policy" for the purposes of Part 4A, I come back to the particular arguments made by the Ministry in reliance upon its interpretation of Part 4A. It says first that by stating that the Crown and

any DHB are and have always been authorised to adopt or have a family care policy, s 70D has rendered the policy challenged in *Atkinson* lawful. By providing in s 70D(2) that the policy continues in effect, it has both retrospectively authorised and revived the policy. This argument has two difficulties. The first, the interpretation of family care policy already addressed. Secondly, even if I am wrong in my view as to that interpretation, the Ministry's argument also involves the proposition that by the rather indirect path trod in s 70D(1) Parliament intended to overrule the finding by the Tribunal (confirmed on appeal by the High Court and Court of Appeal) in *Atkinson* that the Ministry's policy was inconsistent with the Bill of Rights Act and, implicit in that finding, that it was unlawful. The Ministry would have s 70D(1) given effect to retrospectively reverse that finding, so that even at the time of the Tribunal, High Court and Court of Appeal decisions, the Ministry was entitled to have a policy inconsistent with the Bill of Rights Act. This is so, the Ministry says, even though at the time that those reasons were delivered, the Ministry had no clear statutory authority for that policy.

[153] As mentioned above, the Human Rights Act contemplated that Parliament may respond to a finding of inconsistency by providing statutory authority for the policy, thus rendering the policy prospectively lawful. But to purport to retrospectively overturn a finding of inconsistency is a very unusual step and one which involves a considerable departure from the traditional roles that the courts and Parliament play. If Parliament is to take such an exceptional step it can be expected to do so very deliberately, and accordingly to use very express and unambiguous language here. As Elias CJ and Tipping J observed in *R v Pora*: "[i]t is improbable that Parliament would do by a side wind what it has not done explicitly."[57]

[154] I also note that when introducing the Bill, the Minister of Health made no mention that the new sections of the Act would have this effect. The regulatory impact statement, or at least that part of it publicly released and available to Parliament, also makes no mention that this was the intended effect of Part 4A.

[155] The Ministry also argued, in the alternative, that the suspension order had rendered the policy lawful until 14 May 2013, and then on 22 May 2013 Part 4A had prospectively authorised it. Again, this argument cannot succeed. As I have held, the

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[57] *R v Pora* [2001] 2 NZLR 37 (CA) at [52].

suspension order did not make the policy the Tribunal had declared unlawful, lawful, and the policy is not a family care policy for the purposes of the Act.

[156] Mr Butler took this argument further. He submitted that the Act does not expressly authorise a family care policy which is not Bill of Rights Act consistent. I agree that there is no authorisation in Part 4A for a policy which discriminates in a way which the Tribunal has found to be an unjustifiable limit on the right to be free from discrimination. However, Part 4A does severely constrain the ability of anyone to challenge a family care policy which meets the definition in s 70B even if it is not Bill of Rights Act consistent. Unless the proceedings were issued before 16 May 2013, Part 4A appears to take away the right to seek even a declaration from the Tribunal or the court of inconsistency in respect of a family care policy. However at this point, in this proceeding, it is sufficient to say that I do not construe s 70D as retrospectively legitimising the policy which had been declared to be inconsistent with the Bill of Rights Act, because first, the policy was not a family care policy, and secondly, very clear words would be needed to retrospectively validate a policy declared unlawful by the courts. Accordingly, s 70D has no impact upon Mrs Spencer's ability to claim that the Ministry was acting unlawfully in declining to consider her application for funding.

[157] The next issue is whether s 70C prohibits the Ministry from paying Mrs Spencer, other than under a new family care policy when it is brought into force. That date is yet uncertain. While it is true that there is no family care policy under which Mrs Spencer can seek to be paid, Mr Farmer and Mr Butler pointed to s 10 of the NZPHDA as a provision under which the Ministry would be empowered to make a payment to Mrs Spencer, or indeed to any other claimant. Section 10 of the NZPHDA provides:

> (1) In this Act, **Crown funding agreement** means an agreement that the Crown enters into with any person, under which the Crown agrees to provide money in return for the person providing, or arranging for the provision of, services specified in the agreement.
>
> (2) The Minister may, on behalf of the Crown,—
>
> (a) negotiate and enter into a Crown funding agreement containing any terms and conditions that may be agreed; and
>
> (b) negotiate and enter into an agreement that amends a Crown funding agreement; and

(c) monitor performance under a Crown funding agreement.

(2A) A Crown funding agreement is an output agreement for the purposes of Part 4 of the Crown Entities Act 2004 in respect of any outputs covered by the agreement and section 170(2) to (5) of the Crown Entities Act 2004 applies to a Crown funding agreement, with any necessary modifications.

(3) Except to the extent that the Minister determines by written notice to the Ministry of Health, the Ministry of Health may exercise the Minister's powers under subsection (2) on the Minister's behalf.

(4) Nothing in this section limits section 39 or section 64 or any other enactment, or any powers that the Minister or the Crown has under any enactment or rule of law.

(5) As soon as practicable after giving a notice under subsection (3), the Minister must publish a copy of the notice in the *Gazette*.

(6) To avoid doubt, a Minister may not require a publicly-owned health and disability organisation to have in place a separate output agreement under section 170(1) of the Crown Entities Act 2004, in respect of any outputs covered by a Crown funding agreement.

[158] I accept that s 10 provides a sufficient statutory authority for the Ministry to enter into a Crown funding agreement to allow payment to Mrs Spencer, if that was found appropriate.

[159] As an aside, I also accept the Commission's argument that s 70C does not by itself preclude the Ministry from paying any damages ordered by the Tribunal in the *Atkinson* proceeding, as s 70C is clearly not directed to prohibiting the payment of damages awards by the Ministry.

[160] This takes me to Mrs Spencer's declaratory judgment proceeding. If I am correct in my earlier finding that the policy the subject of the *Atkinson* litigation is not a family care policy for the purposes of this litigation, then that means that ss 70E and s 70G do not have the effect of prohibiting the making of complaints or commencing of proceedings in respect of the policy which the courts have held to be unfairly discriminatory. The effect of this interpretation is to give Part 4A the forward-looking effect argued for by Mr Spencer, and to prevent it operating retrospectively at least in respect of these and the *Atkinson* proceeding.

[161] I am satisfied that the interpretation of Part 4A set out above is the natural meaning of the text of the statute. I must also however be satisfied that this interpretation gives effect to the purpose of Part 4A. The primary purpose of that part is stated to be to keep the funding of services within sustainable limits and, I infer, to do so both by reaffirming that in the context of the funding of support services, families have primary responsibility for the well being of family members, and by managing litigation risk in connection with family care policies It is not however legislation with a singular focus upon reducing or eliminating expenditure. Another purpose of the Act is to authorise the making of payments to family members. This much is clear from s 70A(2)(b) and also from the following remarks of the Minister of Health on introducing the Bill to the House:[58]

> Support should be given to those families who need it most, and submitters wanted some flexibility to deal with individual circumstances in their best interests. The Government recognises that changing the policy to pay all categories of family carers would result in unmanageable fiscal costs to the Crown. In considering targeting, the Government decided that the fairest way of managing these risks was to provide support to those people who need it most.
>
> …
>
> The Ministry of Health will allocate funding to adult disabled people in high and very high need situations who wish to employ their parents or resident family members to provide personal care and household management supports they have been assessed as needing. There will be some flexibility within the policy to consider disabled people in particular circumstances who do not meet the eligibility criteria but where payment is clearly desirable. An example might be disabled people living in remote rural areas where alternative care is not available.

[162] To achieve these purposes it is not necessary to take away from individuals rights they have by reason of the Tribunal's finding that the policy operated by the Ministry was unlawful. That is not an open ended liability. Moreover the Ministry can raise its concerns as to the impact on public finances of any damages awarded in the remedies phase of the *Atkinson* proceeding. If it does so the Tribunal is obliged to consider the s 92P matters which include "the social and financial implications of granting any remedy sought"[59] and "the obligation of the Government to balance competing demands for public money".[60]

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58 (16 May 2013) 690 NZPD 10117.
59 Section 92P(1)(d).
60 Section 92P(2)(b).

[163] To sum up my findings on this point, I have found Part 4A to be forward-looking. It is intended to provide statutory authority for family care policies, as they are defined in s 70B. Part 4A does not purport to authorise the policy that has been declared unlawful. It neither authorises it prospectively or retrospectively. To the extent it precludes complaint to the Commission or proceedings before the courts, or limits what remedies are available, those provisions do not apply to complaints and proceedings in relation to the unlawful policy.

[164] If I am wrong in this interpretation and the natural meaning of Part 4A is that it precludes Mrs Spencer and others from pursuing remedies before the Tribunal or courts in respect of the policy the subject of the decision in *Atkinson*, I am satisfied that the meaning I have adopted it is an available interpretation and I would nevertheless accord it this meaning, consistent with the approach spelt out in *Hansen*. The principle of statutory interpretation that clear and unequivocal language is required to oust the subject's right of access to the courts is a principle of longstanding. That approach to statutory interpretation is now reinforced by the provisions of ss 5 and 6 of the Bill of Rights Act.

[165] The provisions of s 70D, 70E and 70G, if given the meaning the Ministry argues for, are plainly inconsistent with the provisions of s 27 of the Bill of Rights Act, which provides in material part:

> **27 Right to justice**
>
> …
>
> (2) Every person whose rights, obligations, or interests protected or recognised by law have been affected by a determination of any tribunal or other public authority has the right to apply, in accordance with law, for judicial review of that determination.
>
> (3) Every person has the right to bring civil proceedings against, and to defend civil proceedings brought by, the Crown, and to have those proceedings heard, according to law, in the same way as civil proceedings between individuals.

[166] In *Young v Police*, Randerson J considered s 27(2) and said:[61]

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[61] *Young v Police* [2007] 2 NZLR 382 (HC) at [33].

> I agreed with those commentators who consider that s 27(2) is intended to strengthen the existing status of the judicial review powers available to the Courts at common law and under statute. Those powers are constitutional in nature in their own right, but reference to them in s 27(2) enhances their constitutional standing and means that those powers should not be diminished or limited except within the constraints of s 5 of the Bill of Rights Act.

[167] The Ministry submits that Part 4A was intended to manage litigation risk in connection with the operation of the unlawful policy, as well as future family care policies, because of constraints upon resources available to meet any damages awards. I note that the Ministry did not provide any evidence as to the potential implications for the public finances of damages awards before the Tribunal, although I appreciate that such an exercise would probably be unhelpful given the extent of the Tribunal's discretion, and the fact that it is not known how many may pursue such relief. Nevertheless I cannot see that concern as to limited resources could justify the limitation the Ministry argues for when the Tribunal is bound to take into account under s 92P the issue of constrained resources. Moreover, the Ministry has been aware of the challenge to the lawfulness of its policy for more than a decade. If the fiscal implications were unsustainable as the Ministry now contends, the Ministry would surely have moved many years ago to limit the extent of its liability. Its leisurely response tends to undermine any notion that damages the Tribunal might award would cause unmanageable fiscal demands. It seems from Mr Gray's affidavit dated 20 December 2012 that the Ministry only began working on a policy in the later part of 2012. Insofar as these sections are said to preclude those affected by the unlawful policy from access to the courts, they should be given a Bill of Rights Act consistent meaning, if they are capable of bearing it.

[168] Finally, even if I am wrong as to the correct interpretation, and s 70E does apply to prevent further claims in respect of the Ministry's policy challenged in *Atkinson*, the issue still arises as to what the effect of the proviso in s 70G is on Mrs Spencer's proposed application to be joined as a plaintiff. In this regard I accept Mrs Spencer's argument that s 70G(1) is not naturally read as precluding her right to make application to be joined as a party to that proceeding, or as precluding the Tribunal from dealing with that application on its merits. The express words of s 70G(1) contemplate that the proceeding may be continued or settled as if that part had not been enacted. If Part 4A had not been enacted, then the parties would have been free to make application for joinder to the proceeding, and the Tribunal would have been free to deal with those

applications for joinder on their own terms. Indeed, as I now come to shortly, this was known by the Ministry to be quite a likely development, given the public interest nature of the litigation in question.

[169] The Ministry argues that the naming of all plaintiffs to the litigation precludes such an interpretation because if Parliament had wanted to save the *Atkinson* proceeding more generally it could have listed the pleading and proceeding number only. The interpretation the Ministry contend for seems improbable. It would involve Parliament dictating to the Tribunal how it may conduct proceedings already before it. If Parliament had intended to regulate the Tribunal's procedure to the extent of providing that it may not add additional parties to the proceedings, then it could be expected to have done so expressly. Further support for this interpretation is found in the different wording in subs (1) to that in subs (2). Subsection (2) expressly limits the claims that may be resolved in Mrs Spencer's judicial review proceeding to those made in pleadings filed before 16 May 2013. There is no such limitation in s 70G(1) for the *Atkinson* proceeding.

[170] I therefore conclude that Part 4A of the NZPHDA does not limit Mrs Spencer's right to relief in the judicial review proceeding, nor does it preclude an application for joinder to the *Atkinson* proceeding.

E. In any case, is the Ministry estopped from denying that the *Atkinson* proceeding is a representative proceeding?

[171] Mrs Spencer argues that the Ministry, having treated and held out the *Atkinson* proceeding as being in the nature of a class action, is estopped from denying Mrs Spencer's right to apply to the Tribunal to be joined as a party. Mrs Spencer relies upon the following factors as raising an estoppel, or a legitimate expectation that she can rely upon:

(a) The pleading in paragraph 5 of the third amended *Atkinson* statement of claim, is as follows:

> The Plaintiffs numbered 1 to 7 and others in similar situations are a specified group of persons, namely parents, spouses and the resident family members, who have cared for and/or currently care for their adult children, spouses or other adult family members who qualify, by reason of the level of their disability

> support needs, for paid disability support services funded by the defendant.

(b) On 23 November 2011 the Deputy Solicitor-General responded to counsel for the *Atkinson* plaintiffs' request that interim arrangements be put in place to pay two of the parent plaintiffs who were providing care to their children pending final resolution of proceedings, as follows:

> The Ministry of Health's agreement to honour pre-existing arrangements that contravene the policy pending the outcome of the proceedings is limited to family members who were, at the time of that agreement, already receiving payment for delivering Ministry- funded disability support services. Given that the proceedings are essentially a class action, brought on behalf of all families affected by the policy rather than for the plaintiffs' own benefit, it is appropriate that the scope of the grandparent agreement is not defined in terms of involvement with the proceedings. To extend the benefit of the agreement to these two plaintiff [sic] families in recognition of their participation in the case would overlook the position of many other families who are similarly affected by the policy. Such separate, preferential treatment would be inappropriate and unfair to the class of persons on whose behalf the claim was brought.

(c) In a memorandum dated 30 April 2013 filed in the judicial review proceeding, Crown counsel appended that statement of claim in support of a submission that Mrs Spencer was bound by the suspension order in the *Atkinson* proceeding. At paragraph 5 of that memorandum counsel states:

> Other statements expressly extended the claim to cover those in similar situations to the plaintiffs are made at paragraph 6, 7, 37 and 38. Further paragraphs, while not expressed in such terms, nevertheless make it clear the claimed discrimination was not limited to the plaintiffs. Moreover, the declaration sought was not limited solely to the effect of the policy upon the plaintiffs, and was identical to that granted by the Tribunal.

[172] The Ministry responds that these statements do not constitute representations upon which Mrs Spencer could or did rely. Neither of the statements constitute a clear and unambiguous representation by the Ministry that the *Atkinson* proceeding was a class action, or in the nature of such an action. Moreover, the alleged representations were not made to Mrs Spencer, but rather in the context of the *Atkinson* proceeding to which Mrs Spencer was not a party. There was clearly no intention on the part of the Ministry to induce Mrs Spencer to act in reliance on the statements in question to her detriment.

Indeed, Mrs Spencer only became aware of the statements after April 2013 when she was sent a copy of the information with counsel for the Crown's memorandum. That could not therefore have informed her decision not to join the proceeding in 2007.

[173] Finally, the Crown says that it is unclear how a statement that the *Atkinson* proceeding was a class action could estop the Ministry from opposing an application by Mrs Spencer to join the *Atkinson* proceeding at this stage.

[174] I see some force in Mr Farmer's submission that the Ministry has at times put forward seemingly inconsistent propositions. First, it argued, at least in the interlocutory stages of the judicial review proceeding, that Mrs Spencer is bound by the suspension order because the *Atkinson* proceeding is essentially a class proceeding. The proposition that the *Atkinson* proceeding is in the nature of a class action seems to have been the basis upon which the Crown dealt with the *Atkinson* proceeding throughout. On the other hand, the Ministry now says that Mrs Spencer should not be able to be joined to that proceeding, because Parliament only intended to preserve the benefit of that proceeding for those who are currently parties to it.

[175] Nevertheless, the submissions advanced for Mrs Spencer were not very detailed as to how this estoppel could operate, or how any of the conventional elements of estoppel are made out on this evidence. I am not satisfied that they are. I consider that the points raised by Mr Farmer are best regarded as matters to be weighed by the Tribunal in deciding whether to allow Mrs Spencer to be joined to the proceeding, and not as operating as any kind of estoppel.

F. What relief, if any, is Mrs Spencer entitled to?

Judicial review proceeding

[176] In the judicial review proceeding Mrs Spencer seeks a declaration that the Ministry has acted unlawfully and in breach of her rights by refusing to consider her application for funding to provide disability support services to Paul.

[177] It follows from the findings above that I am satisfied that the Ministry has acted unlawfully and in breach of Mrs Spencer's rights by taking into account an irrelevant

consideration in refusing to consider her application for funding to provide disability support services to Paul, namely the unlawful policy. Mrs Spencer was entitled to have her application for funding considered without regard to those parts of the Ministry's policy for payment of disability support services which had been found by the Tribunal to be unjustifiably discriminatory. That being the case, Mrs Spencer is entitled to a declaration to that effect. If the grounds of review are made out, the Ministry does not oppose the granting of such a declaration.

[178] Mrs Spencer also seeks an order setting aside the suspension order, and declaring it invalid. The Ministry submits that such an order should not be made because the Ministry will be significantly prejudiced for the following reasons:

1. The Ministry's good faith continuation of its policy, while pursuing its appeals, its public acceptance after the Court of Appeal decision that a blanket policy was unlawful, and its wide consultation with the sector about the future of disability funding were all based on the suspension order being valid.

2. There was no contemporaneous challenge to the suspension order. It was made by consent for the reasons advanced by the parties to that proceeding, and separately by the Ministry. The Ministry now has no real ability to regularise any defect.

3. There is no suggestion made by Mrs Spencer or the Commission that the Ministry has obtained the suspension order by deception or relied on it, once made, in bad faith.

4. There is likely to be considerable confusion as to the true legal position of a number of other people who have been refused payment for caring for a family member on the same basis. In that regard the Ministry notes that the recent enactment of Part 4A of the Act was intended to resolve and regularise the past position, and is also relevant to the granting of any relief, in that it validates past decisions refusing payment on the basis of family relationships.

[179] I am satisfied that this is one of those cases where the order is void from the beginning without the need for a court declaring it to be so, because the Tribunal had no jurisdiction to the make the order. As Mr Farmer said, there really was no need to amend the pleading to seek a declaration to this effect, because an order made without jurisdiction is in that category of case which is of no force or effect even without further order of the Court. However, in case I am wrong in this view, I propose to exercise my discretion to declare the suspension order void. For the sake of clarity, I state that I consider that the order was void from the beginning. I make this order even though the Tribunal has now revoked its suspension order, as the order I make is relevant to the rights of third parties in the period of time before the Tribunal acted to revoke the order.

[180] I do not consider that any of the matters raised by the Ministry weigh against the grant of an order declaring the suspension order invalid. The procedure adopted by the Ministry was very much of its own design. It formulated the order sought, and also selected the process ultimately adopted by the Tribunal, proceeding on the papers on the basis of consent. The Ministry utilised this procedure although it knew many others had a direct interest in both the declaration, and any suspension order that would be made. It took no steps to ensure that those views were heard or considered by the Tribunal or to draw this to the Tribunal's attention. Since interested third parties such as the Commission and Mrs Spencer had no notice of the application, they were in no position to challenge it. In these circumstances the absence of an allegation of bad faith or abuse of process does not assist the Ministry.

[181] Moreover, I do not consider that giving Mrs Spencer this relief significantly prejudices the Ministry. This follows from the view I have taken as to the effect of the suspension order. That is, that it is no more than cosmetic. It did not legalise the policy effectively declared unlawful by the Tribunal. As to the Ministry's last point, for the reasons given I am not persuaded that the enactment of Part 4A of the NZPHDA was expressly to resolve and regularise the past position or that it validated past decisions refusing payment on the basis of a family relationship.

[182] The final issue in connection with the judicial review is Mrs Spencer's request for an order that the Ministry consider her application for funding to provide disability support services to her disabled son Paul. The Ministry says that although it may be open

to the Court to order reconsideration and direct that this is done without reference to Part 4A and without reference to the former unlawful policy, such an order should not be made. That is because, faced with a fresh application, asked to act in an essentially ad hoc way and without reference to policy or the recent enactment of Part 4A, a decision maker would have to come to the application on the basis of good administrative decision-making. This would mean that the merits of the decision would have to be considered, and so too the way in which other similar cases have been treated. The Ministry says that there appear to be no reasons to treat a fresh application differently to how it was treated initially, especially in the context of the limited funding available for services, how that funding is currently distributed, and the requirement in s 3(2) of the NZPHDA to deliver services within allocated funding. Absent a family care policy and factoring in these various matters, the decision would inevitably be taken to refuse to pay Mrs Spencer, at least pending a new family care policy which would provide a framework for the decision. Mrs Spencer can apply once the policy is in place, probably later this month, for consideration of her claim under that policy. She is not unduly prejudiced by this delay.

[183] I am not persuaded by the Ministry's argument against the grant of relief, given the history of this matter. Mrs Spencer made the application upon which she grounds her judicial review proceeding, midway through last year. She was entitled at that time to have the Ministry consider her application without reference to the unlawful aspects of its policy. After so many years of confronting the actual and potential issues raised by the *Atkinson* proceeding, the Ministry should have been in a position to put in place some policy, even if it were only interim, to enable it to deal with that application. The Ministry's concern not to enter into further ad hoc arrangements is belied by the fact it had already entered into ad hoc payment arrangements with the 272 people already referred to, and also with the plaintiffs in the *Atkinson* proceeding.

[184] Applying the good administrative decision-making approach the Ministry properly identifies, the Ministry already has many models for payment of family carers in Mrs Spencer's situation.

[185] Section 4(5) of the Judicature Amendment Act 1972 empowers me to refer any matter back to the decision maker for reconsideration and to give such directions as I think just as to that reconsideration. Section 4(5B) provides:

> Where any matter is referred back to any person under subsection (5) of this section, that person shall have jurisdiction to reconsider and determine the matter in accordance with the Court's direction notwithstanding anything in any other enactment.

The order sought is in appropriate form. The Ministry should consider Mrs Spencer's application within the context of its existing policy for funding disability support services, without regard to the parts of its policy which the Tribunal declared unfairly discriminatory and without regard to the limitation contained in s 70C of the NZPHDA. Because of my findings as to the meaning and purpose of Part 4A of the NZPHDA, I have concluded that directing such a reconsideration does not undermine the scheme of that part of the legislation, or the imperative spelt out in s 3(2) of the NZPHDA.

[186] I appreciate that there may be some nuances to this order that are not apparent to me. I therefore propose to reserve leave to the parties to apply for clarification or further direction.

Declaratory judgment proceeding

[187] In the declaratory judgment proceeding, Mrs Spencer seeks a declaration that s 70G(1) of the Act does not "by its terms preclude the plaintiff from applying to the Human Rights Review Tribunal to be joined as a plaintiff or a party to the *Atkinson* proceeding for the purposes of obtaining compensation on the same grounds as have been found in favour of the present plaintiffs in those proceedings".

[188] Alternatively she seeks a declaration that the Ministry, having treated and held out the *Atkinson* proceeding as being in the nature of a class action, is estopped from denying the right of the plaintiff to apply to the Tribunal to be joined as a plaintiff or party to the *Atkinson* proceeding.

[189] For the reasons set out above I consider that she is entitled to the first, but not the second, declaration.

G. Summary of conclusions

[190] I have found that when the Tribunal purported to suspend the declaration of inconsistency made in the *Atkinson* proceeding, it did so without jurisdiction. The Tribunal did not have jurisdiction under s 92O(2)(d) of the Human Rights Act to make an order staying a declaration it had already issued, and to backdate that order. Section 92O(2)(d) is not on its face a provision that authorises the grant of a stay of a declaration, nor did the order otherwise fit within the terms of s 92O(2)(d). Even if the Tribunal had the power to stay or suspend a declaration, I consider that this would not render the policy lawful as the Ministry argued. The Tribunal does not have statutory authority to deem a policy it has found unlawful, lawful.

[191] In the event that I am wrong, and the Tribunal did have jurisdiction to make the suspension order with the effect that the Ministry's policy was deemed lawful, I have nevertheless found that the order is so affected by procedural defects that it is a nullity. First, the Tribunal failed to consider all of the factors, listed in s 92P, that it was required to take into account in making an order under s 92O. In particular, it failed to consider the impact of the order on interested third parties. Secondly, given the unusual nature of the order sought, expressed as it was to retrospectively "suspend" the application of a declaration as to human rights, the Tribunal ought to have held a hearing before making the order. This would have enabled examination of the implications of the application for a suspension order, and allowed for the hearing of third party interests. Finally, I have found that the Tribunal was obliged to give reasons for its decision under s 116 of the Human Rights Act or, alternatively, by the principles of natural justice.

[192] Having found that the order was made without jurisdiction or, alternatively, without following the requisite procedures, the issue arose as to the effect of those defects on the validity of the order. The Ministry argued that the order should be treated as valid until set aside, apparently assuming that the order was made within the Tribunal's jurisdiction. I have found that the lack of jurisdiction and the procedural defects involved rendered the order void. The Ministry was thus not entitled to rely on the suspension order in refusing to consider Mrs Spencer's application for funding for the care she provides to her son, Paul.

[193] Finally, even if I am wrong in these findings, I have nevertheless found that Mrs Spencer was not bound by the suspension order, as she had no notice of it.

[194] It follows that the Ministry was not entitled to rely upon the parts of its policy that the Tribunal had found to be unjustifiably discriminatory in declining to consider Mrs Spencer's application for funding.

[195] Furthermore, I have rejected the Ministry's arguments that no relief beyond a declaration ought to be given if Mrs Spencer is successful in her claim for judicial review. I have found that the unlawful policy is not a family care policy as defined in Part 4A of the NZPHDA. For this reason, the policy has not been retrospectively or prospectively validated such that the Ministry could lawfully reconsider her application pursuant to that policy. There is nothing in Part 4A which validates the policy the subject of the finding in *Atkinson*. Although there is currently no family care policy under which Mrs Spencer could be paid, were the Ministry to reconsider her application, she could be paid, if determined appropriate by the Ministry, pursuant to a Crown funding agreement entered into under s 10 of the NZPHDA.

[196] Finally, in respect of the declaration sought by Mrs Spencer as to the effect of s 70G, I have found that ss 70E and 70G do not preclude Mrs Spencer from being joined to the *Atkinson* proceeding. Because the policy addressed in *Atkinson* is not a family care policy, the restrictions on access to the Tribunal and the courts contained in s 70E do not apply to claims in relation to that policy and, it follows, any application for joinder Mrs Spencer makes. This is the natural meaning of these provisions. However, if I am wrong in this respect, and the natural meaning of s 70E does prevent individuals from pursuing remedies before the Tribunal or courts in respect of the policy declared lawful, that meaning would be inconsistent with s 27 of the Bill of Rights Act, which protects an individual's right to pursue civil proceedings through the courts against the Crown, and to apply for judicial review where their rights, obligations, or interests protected or recognised by law have been affected by a determination of any tribunal or other public authority. I do not consider the limit on that right to be justified and consequently, s 6 of the Bill of Rights Act requires that, if possible, a Bill of Rights Act consistent meaning should be adopted. The interpretation I have adopted is reasonably available, and achieves such consistency.

[197] Further and alternatively, s 70G does not purport to preclude third parties from applying to be joined as plaintiffs to the remedies phase of the *Atkinson* proceeding.

H. Formal orders

[198] I declare that the Ministry acted unlawfully and in breach of Mrs Spencer's rights by refusing to consider her application for funding to provide disability support services to her son, Paul.

[199] I make an order setting aside and declaring invalid the suspension order issued by the Tribunal on 3 June 2010.

[200] I make an order directing the Ministry to consider Mrs Spencer's application for funding within the context of the existing policy for funding disability services, but without regard to the parts of its policy which the Tribunal declared unfairly discriminatory in the *Atkinson* proceeding.

[201] I further declare the Tribunal s 70G(1) of the Act does not by its terms preclude the plaintiff from applying to the Tribunal to be joined as a plaintiff or a party to the *Atkinson* proceeding for the purposes of obtaining compensation on the same grounds as have been found in favour of the present plaintiffs in those proceedings.

[202] The parties are in agreement that there should be no order as to costs.

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