IN THE COURT OF APPEAL OF NEW ZEALAND

CA736/2013
[2015] NZCA 143

BETWEEN	ATTORNEY-GENERAL ON BEHALF OF THE MINISTRY OF HEALTH Appellant
AND	MARGARET SPENCER First Respondent
AND	HUMAN RIGHTS REVIEW TRIBUNAL Second Respondent

Hearing:	22 October 2014
Court:	Harrison, French and Cooper JJ
Counsel:	M R Heron QC and U R Jagose for Appellant J A Farmer QC, S L Robertson, H L Quinlan and M A Sissons for First Respondent Second Respondent abides decision of the Court A S Butler and O Gascoigne for Human Rights Commission as Intervener
Judgment:	4 May 2015 at 2.15 pm

JUDGMENT OF THE COURT

A The appeal is dismissed.

B The appellant is ordered to pay costs separately to each respondent on a standard band A basis with usual and reasonable disbursements.

REASONS OF THE COURT

(Given by Harrison J)

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Introduction

[1] A group of parents had for many years cared for their disabled children without financial assistance from the State. Seven of them and two adult disabled children (together called the Atkinson plaintiffs) brought a claim in the Human Rights Review Tribunal alleging that the Ministry of Health's policy of refusing to pay disability support to parents of disabled adult children was discriminatory on the grounds of family status contrary to the Human Rights Act 1993 (the HRA). The Ministry's defence was that parents are natural supports of disabled children and are bound by a social contract with the State which disentitles them to financial assistance for caring for their own family members.

[2] The Tribunal upheld the Atkinson plaintiffs' claim, declaring that the Ministry's policy (the Atkinson policy) was inconsistent with s 19 of the New Zealand Bill of Rights Act 1990 (the Bill of Rights Act).[1] That section provides that everyone has the right to freedom from discrimination on the grounds of discrimination in the HRA. Materially, also, the Tribunal later made an order by consent purporting to suspend for an indefinite period the effect of its declaration

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1 *Atkinson v Ministry of Health* [2010] NZHRRT 1, (2010) 8 HRNZ 902 [*Atkinson* (HRRT)].

from the date it was made.[2] The Ministry appealed unsuccessfully against the Tribunal's decision to grant a declaration, first to the High Court[3] and then to a Full Court of this Court.[4] The Tribunal's determination of consequential remedies including a claim for damages was deferred during the appeal process. The Ministry has since accepted that the Atkinson policy is discriminatory.

[3] Margaret Spencer, who was not one of the Atkinson plaintiffs, is the mother of Paul. Paul is a seriously disabled 46 year old man who has suffered from Down's syndrome since birth. Paul is unable to care for himself. His mother, with whom he lives, has been his lifelong caregiver. In reliance on the Atkinson policy the Ministry refused Mrs Spencer's application for a disability support allowance.

[4] Following this Court's decision in *Atkinson*, Mrs Spencer renewed her application for a disability support allowance. The Ministry, however, maintained its original stance. It also opposed her application to be joined as a plaintiff in the Atkinson plaintiffs' proceedings before the Tribunal. Mrs Spencer responded by seeking judicial review in the High Court of the Ministry's decision to refuse to pay her a disability support allowance.

[5] The Ministry defended Mrs Spencer's claim on two grounds. One was that while the Tribunal's suspension order was in place the Ministry could continue lawfully to apply the Atkinson policy. The other was that pt 4A of the New Zealand Public Health and Disability Act 2000, as inserted by the New Zealand Public Health and Disability Amendment Act 2013 (the NZPHDAA), Parliament's response to this Court's decision in *Atkinson*, now makes the Atkinson policy lawful and bars Mrs Spencer from issuing her own proceeding. Mrs Spencer responded to the Ministry's second ground by separately applying for declarations about the effect of pt 4A.

[6] Winkelmann J found in Mrs Spencer's favour on both applications.[5] In summary the Chief High Court Judge: (1) declared invalid and set aside the

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2 *Atkinson v Ministry of Health* HRRT 33/05, 3 June 2010 [Suspension Order (HRRT)].
3 *Atkinson v Ministry of Health* (2010) 9 HRNZ 47 (HC) [*Atkinson* (HC)].
4 *Ministry of Health v Atkinson* [2012] NZCA 184, [2012] 3 NZLR 456 [*Atkinson* (CA)].
5 *Spencer v Attorney-General* [2013] NZHC 2580, [2014] 2 NZLR 780 [*Spencer* (HC)].

Tribunal's suspension order; (2) declared that the Ministry acted unlawfully by refusing to consider Mrs Spencer's application for a disability support allowance and ordered it to reconsider the application; and (3) declared that pt 4A does not preclude Mrs Spencer from applying to the Tribunal to be joined as a plaintiff in the *Atkinson* proceedings.

[7] The Ministry appeals against the High Court judgment and the remedies granted. Its grounds divide into challenges to Winkelmann J's findings on, first, the effect of the Tribunal's declaration and suspension order and, second, the correct interpretation of pt 4A. We shall address the appeal in the same order.

Effect of declaration and suspension order

(a) Tribunal's decisions

[8] In its decision delivered on 8 January 2010 the Tribunal issued a declaration pursuant to s 92I(3)(a) of the HRA that the Ministry's:[6]

> … practice and/or policy of excluding specified family members from payment for the provision of funded disability support services is inconsistent with section 19 of the New Zealand Bill of Rights Act 1990 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 that Act, a justified limitation.

[9] The Tribunal's jurisdiction derived from s 92I(3) of the HRA which prescribes 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:
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> (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

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6 *Atkinson* (HRRT), above n 1, at [231]. Note that it appears at [232] of the law report.

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:

(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.

(Emphasis added.)

[10] Section 92O provides as follows:

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.

(Emphasis added.)

[11] In reliance on s 92O(2)(d) the Ministry applied for an order suspending the Tribunal's declaration. The grounds for its comprehensive application in support are set out in the High Court judgment.[7] The Ministry proposed that the suspension order apply for 12 months after the expiry of the appeal period or the final determination of an appeal, whichever event occurred sooner. After initially opposing the Ministry's application to suspend, the Atkinson plaintiffs consented.

[12] On 3 June 2010 the Tribunal made an order without reasons that its "declaration … is suspended until further order of the Tribunal" and was "deemed to have been in effect since 8 January 2010", the date of the declaration.[8] The suspension order was not formally set aside until 24 June 2013.[9]

(b) High Court

[13] As noted, the Ministry relied on the Tribunal's suspension order to justify its position that while the order remained in force the declaration was ineffective and the Atkinson policy was lawful, entitling the Ministry to reject Mrs Spencer's application for funding.

[14] Winkelmann J carefully surveyed the statutory framework and relevant principles, including a review of foreign jurisprudence, before concluding as follows:

> [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

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7 *Spencer* (HC), above n 5, at [18].
8 Suspension Order (HRRT), above n 2, at 1.
9 See *Spencer* (HC), above n 5, at [26].

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.

[15] The Chief High Court Judge later summarised her reasons for concluding that the suspension order was a nullity in any event:

[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.

(c) The Ministry's appeal

(i) Scope of declaration

[16] The Ministry challenges the Chief High Court Judge's finding on two bases. Its first ground, which was not raised in the High Court, is that the Tribunal's declaration of inconsistency was only effective as a dispute resolution mechanism between the parties – that is, the Ministry and the Atkinson plaintiffs – and did not invalidate the Atkinson policy or have any legal effect on third parties.

[17] This proposition, broadly stated, faces a number of obstacles. Not the least, as Messrs Farmer QC and Butler emphasised, is its direct contradiction of the Ministry's second ground – that the declaration was effective in general, but its effect was lawfully suspended.

[18] After opening with an observation that the *Atkinson* decision was the first declaration made by the Tribunal that the government had acted in breach of pt 1A of the HRA in adopting a policy or practice, Ms Jagose submitted that the status of the declaration was far from clear, and that while it addresses the effect of a Tribunal's declaration of inconsistency the HRA does not expressly provide for policies or practices. She said this uncertainty justified the Ministry's application for a suspension order.

[19] We reject this submission. There is no doubt and never has been about the status of the *Atkinson* declaration. A breach of pt 1A is defined as: "an act or omission" which is inconsistent with s 19 of the Bill of Rights Act.[10] For the purposes of the HRA, an act includes a "policy [or] practice".[11] A practice or policy is one which by its terms applies generally, not just to the particular parties. The Atkinson policy fell squarely within this definition and was found to be unlawful.

[20] In support of the Ministry's principal argument Ms Jagose relied upon pt 3 of the HRA which was introduced to establish a relatively informal, efficient and cost effective method of resolving disputes between parties. Ms Jagose described the

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10 Human Rights Act 1993 [HRA], s 20L(1).

11 Section 2(1) (definition of "act").

Tribunal as an inferior decision making body of limited jurisdiction without the powers vested in a court. In this respect she noted correctly that courts declare what the law is with both retrospective and prospective effect as it applies to the parties before the court as well as anyone else: a declaration, while non-executory, is a formal statement by a court of the existence or non-existence of a legal state of affairs, directly binding the parties through the doctrine of res judicata and indirectly binding other parties through the doctrine of precedent.

[21] We do not accept Ms Jagose's submission. The Ministry was a party to the *Atkinson* proceedings. On the premise that the Tribunal was of competent jurisdiction the Ministry was bound by the Tribunal's declaration that it had committed a breach of pt 1A by adopting the Atkinson policy, estopping it in any subsequent litigation from denying or disputing the declaration on its merits.[12] The Ministry applied the Atkinson policy to Mrs Spencer's application for a disability support allowance. There was neither an arguable difference between the applications by Mrs Spencer and the Atkinson plaintiffs nor a principled basis for the Ministry to deny that the Tribunal's declaration bound it equally in Mrs Spencer's case.

[22] Moreover, both the High Court and this Court dismissed the Ministry's appeal and upheld the Tribunal's declaration. Ms Jagose accepted that the Crown will always seek to comply without compulsion with orders and with the law as confirmed in a court's declaration. In terms of Ms Jagose's submission, the High Court's decision in *Atkinson* in December 2010 not only bound the Ministry and the Atkinson plaintiffs through the doctrine of res judicata. It also indirectly bound Mrs Spencer through the doctrine of precedent.

[23] In any event Ms Jagose's argument is now beside the point. The effect of the decisions of the High Court and this Court is that the Atkinson policy was at the time of the declaration and had been retrospectively from its inception in breach of pt 1A and unlawful. Subject to our interpretation of pt 4A, any available argument about the scope of the Tribunal's declaration has now been overtaken by a common acceptance that the Atkinson policy was unlawful.

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[12] *Shiels v Blakely* [1986] 2 NZLR 262 (CA) at 266.

[24] We add our rejection of Ms Jagose's submission that the Tribunal's function is limited to providing an "inter partes" dispute resolution mechanism. There is nothing in the text or context of the HRA to support it. The High Court has held for the purposes of s 88B of the Judicature Act 1908 that the Tribunal is an inferior court.[13] This Court has since confirmed that a tribunal is an inferior court where: (1) the members are appointed by the State; (2) the decision maker fulfils a public function; (3) the body has power to enforce orders that it makes; and (4) the statutory provisions (here the HRA) refer to proceedings before the body as "judicial proceedings".[14]

[25] All four criteria are satisfied here. The Tribunal members are appointed by the State.[15] Its primary function is, as we have noted, adjudicative – that is, a public function.[16] It has express powers to enforce its orders including a power to imprison or impose fines for contempt.[17] And one of the HRA's express objects is to "recognise that *judicial* intervention at the lowest level [that is, the Tribunal] needs to be that of a specialist decision making body".[18]

[26] Ms Jagose's submission appears to confuse the role of the Human Rights Commission with that of the Tribunal. The Commission has numerous and critical statutory functions.[19] One of its two primary functions under pt 3 is to facilitate the resolution of disputes about compliance with pts 1A or 2 in the most efficient, informal and cost effective manner possible.[20] The Commission is not the Tribunal: and if a dispute is not settled, the claimant or the Commission is entitled to bring civil proceedings before the Tribunal.[21] By this orthodox means the adjudicative judicial process is commenced.

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13 *Attorney-General v O'Neill* [2008] NZAR 93 (HC) at [36]–[41]. See also *Attorney-General v Howard* [2010] NZCA 58, [2011] 1 NZLR 58 at [147].

14 *Daimler AG v Sany Group Co Ltd* [2014] NZCA 421, [2014] NZAR 1159 at [6]–[14]; affirming *Waikato/Bay of Plenty District Law Society v Harris* [2006] 3 NZLR 755 (CA).

15 HRA, s 99(1): the chairperson is appointed by the Governor-General albeit on the Minister's recommendation, which in turn must be based on a number of criteria set out in s 99A.

16 Section 94(a).

17 Section 114.

18 Section 75 (emphasis added).

19 See s 5 and following.

20 Section 76.

21 Section 92B.

[27] The Act does not state or imply that this judicial process is simply an extension of the dispute resolution mechanism undertaken by the Commission. All the material provisions suggest the opposite. As Mr Butler pointed out, pts 1A and 3 give the Tribunal a constitutionally significant function, empowering it among other things to declare legislation to be inconsistent with the right to freedom from discrimination. Also, for example, the Tribunal is authorised to restrain the Ministry "from engaging in … conduct of the same kind as that constituting the breach"; and "order [the Ministry to] undertake any specified training or other programme, or implement any specified policy or programme … to help it comply" with the HRA's provisions.[22]

[28] Moreover, in deciding whether to provide representation in proceedings before the Tribunal, the Director of Human Rights Proceedings, who is an officer of the Commission, must have regard to a number of factors. Among them are whether the complaint raises a significant question of law or its resolution "would affect a large number of people".[23] The Director may exercise his or her power to limit the number of parties to a proceeding to ensure that the complaint is heard in a cost effective and timely manner. The purpose of this representative power of appointment would be negated if any relief granted had effect only between the nominated parties.

[29] Adoption of Ms Jagose's submission would also lead to practical problems. Logically extended it means that if, for example, the Ministry applied the Atkinson policy to 1000 people, each one would have to file separate proceedings before the Tribunal for what would inevitably be the same result. Parliament cannot have intended there should be a proliferation of proceedings where the decision in each would be a foregone conclusion, given each proceeding would be based on the same policy whose meaning has already been settled by appellate judicial determination.

[30] We add that, while the Ministry is not bound or estopped by its earlier submissions on a point of law, the foundation for its application for a suspension order was tellingly that the Tribunal's decision "affects the entire population of

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22 Section 92I(3)(b) and (f).
23 Section 92(2)(a)–(b).

people who access or who may potentially access Ministry funded disability support services, and not just the plaintiffs in this case". The Ministry sought suspension because in its own words the Tribunal's decision required it to "redesign the disability support services framework" which was said to be a complex task and would require time to implement. The Ministry's case in 2010 for a suspension order contradicts its current position that the declaration was only effective as a dispute resolution mechanism confined to the parties themselves.

(ii) Suspension order

[31] The Ministry's second ground challenges Winkelmann J's finding that the Tribunal had no power to suspend the effect of its declaration. Ms Jagose submitted that the suspension order was effective. As a consequence the policy which the Tribunal had found unlawful was rendered lawful for the duration of the suspension order. That state of suspension included the period in May 2012 when the Ministry declined Mrs Spencer's application and continued until the order was set aside in June 2013. Accordingly, Ms Jagose argued, the Ministry had acted lawfully in declining Mrs Spencer's application in reliance on the Atkinson policy.

[32] In Ms Jagose's submission the Tribunal's statutory powers should be interpreted broadly to enable it "to mitigate the wider distributive consequences of a declaration". That was so because s 92O, upon which the Ministry relied, "empowers innovative remedial modifications" including a power to defer a remedy already granted either prospectively or from a date specified.

[33] In particular, Ms Jagose submitted that the Tribunal had jurisdiction to suspend its declaration of inconsistency because:

(1) Section 92O(2)(d) applies once the Tribunal determines an act is in breach of pt 1A and provides for deferral or modification of any remedy on application by a party.

(2) There is nothing in the text of s 92O to suggest that the powers exclude deferral or modification of a declaration already granted. The Tribunal's powers should be read expansively to ensure that its unique

dispute resolute jurisdiction is given full force. Such a broad reading is consistent with developing common law concepts of the temporal effects of legal decisions.

(3) The Tribunal should not have been required to adopt a punctilious approach to procedural niceties when in fact under the HRA it is directed to act according to the substantive merits of the case without regard to technicalities.[24] Thus, the High Court was wrong to impose stringent requirements on the Tribunal to comply with its s 92P powers. In particular, the HRA did not require reasons to be given and there was no indication that the Tribunal failed to take account of the relevant matters in s 92P.

(4) Even if the order is open to criticism for procedural deficiencies, the Court's discretion should not have been exercised so as to set the order aside from inception.

[34] Again there is a short answer to Ms Jagose's submission even assuming the Tribunal's suspension order was valid. The Ministry appealed to the High Court against the Tribunal's declaration. The right of appeal is limited materially to a decision granting one of the remedies prescribed by s 92I.[25] In December 2010 the High Court dismissed the appeal, thereby confirming the decision.[26] In May 2012 this Court dismissed the Ministry's further appeal. So, even if the suspension order was valid, it ceased to have effect from December 2010. The Ministry could not rely on the suspension order to justify its decision in July 2012 to decline Mrs Spencer's application for funding.

[35] Nevertheless, we shall address the substance of Ms Jagose's submission. We agree with her that the Tribunal has power to provide that a declaration has effect only at a future date.[27] A declaration that the Ministry has committed a breach of

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[24] Section 105.
[25] Section 123(2)(b).
[26] Section 123(6)(a).
[27] Section 92O(2)(d).

pt 1A is within the meaning of "any remedy granted".[28] However, the fact that an order is made does not of itself invest that order with any particular legal effect. The order's nature and purpose must be examined to determine what it means in any individual case.

[36] In Ms Jagose's submission the suspension order effectively rendered lawful what the Tribunal had declared to be unlawful or altered the declaration's temporal effect by deeming the policy to be valid. However, as Winkelmann J observed, a declaration is merely a formal order encapsulating the consequences of the legal reasoning set out in the preceding reasons for decision. The existence of the remedy makes no difference to the law as found in the judgment.[29] While the formal order may be notionally suspended, its substance – the reasoning process and its result – remains unchanged.

[37] The effect of a suspension order is confined accordingly: it is temporal, not substantive. The Ministry requested the suspension order primarily to give it time to address the logistical effects of the declaration, not because it was asking the Tribunal to reverse the substance of its decision. Rights of appeal are provided for that purpose. The terms of the order are not logically capable of construction either as a statement that the Ministry's discriminatory act was not unlawful or, in the way the argument was advanced, as an affirmation that the policy was lawful or valid. Nor does s 92O(2)(d) enable such a course. All the Tribunal can suspend by that provision is the "effect" of "any remedy granted". The Tribunal had already found the policy was unlawful: its substance cannot be altered by an order purporting to suspend its formal embodiment.

[38] Of the Commonwealth authorities cited by counsel on this issue, only two decisions of the United Kingdom Supreme Court are on point. Both support our conclusion. In *Ahmed v Her Majesty's Treasury* a majority of six of the seven members of the Supreme Court dismissed the Crown's application to suspend a

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[28] Sections 92I(3)(a) and 92O(2)(d).
[29] At [68].

declaration that anti-terrorism orders were ultra vires the empowering Act.[30] As Lord Phillips observed for the majority, "[t]he 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".[31] Lord Hope, who was in the minority, recited the Crown's proper acceptance that:

> [19] It would be wrong to regard the suspension as giving any kind of temporary validity to the provisions … suspension would do no more than delay the taking effect of the court's orders, which would then operate retrospectively as from the specified date. It would have no effect whatever on remedies for what had happened in the past or during the period of the suspension.

[39] Ms Jagose suggested these observations must be read subject to the later decision in *Salvesen v Riddell* where, she submitted, the Supreme Court did suspend its judgment.[32] In that case the Court found that a provision enacted by the Scottish Parliament was an unjustifiable interference with landlords' property rights under the European Convention on Human Rights;[33] and nor could it be interpreted in a Convention-compatible manner.[34] Thus the enactment was outside the legislative competence of or ultra vires Parliament's powers.[35]

[40] The Court's statutory power in *Salvesen* was to remove or limit the retrospective effect of its consequential decision that the enactment was outside Parliament's legislative competence or, analogously to s 92O(2)(a)(i) and (d) of the HRA, suspend the effect of that decision for the purpose of allowing the defect to be corrected.[36] The Court declined to make an order removing the retrospective effect of its decision.[37] It did, however, suspend the effect of the decision (the consequential ultra vires finding) that the provision in question is not law, to allow Parliament time to correct its error.[38]

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30 *Ahmed v Her Majesty's Treasury (Nos 1 and 2)* [2010] UKSC 2, [2010] UKSC 5, [2010] 2 AC 534. This report records the judgments from the Court of Appeal and Supreme Court, followed at 689–696 by the judgment as to remedy which is relevant to this appeal.

31 At [4].

32 *Salvesen v Riddell* [2013] UKSC 22, 2013 SLT 863.

33 At [31]–[45].

34 At [46]–[49].

35 At [2] and [49]–[51].

36 At [52].

37 At [53]–[57].

38 At [57].

[41] The *Salvesen* suspension order did not purport to modify or change what could not be changed – the Court's primary finding that the statutory provision violated the claimant's rights. That finding could not be suspended because the statutory power to suspend was limited to the court's decision "that … any provision … is not within the legislative competence of the Parliament" – the consequential finding.[39] It was never suggested that the effect of the primary finding of violation of a Convention right, which was similar to the declaration made in the present case, might be suspended. *Salvesen* does not assist the Ministry.

[42] The purpose of the statutory power to defer or modify the effect of a remedy is not to validate or condone the Ministry's continuation of an unlawful practice or policy. Its apparent objective is to suspend implementation of one or more of the mandatory remedies.[40] In particular, we refer to orders which restrain a defendant from continuing a breach or require performance or require its undertaking of acts or training to satisfy remedial requirements.[41]

[43] So, while we accept that s 92O(2)(a) vests the Tribunal with jurisdiction to defer the granting of the remedy of a declaration, any temporal deferment had no effect upon the underlying substantive finding of invalidity and there was no apparent purpose in deferring a declaration which did not require the Ministry to take any steps in response. Putting that another way, it was not the Tribunal's declaration that had the effect of making the policy unlawful: the unlawfulness arose from the breach of the HRA.

[44] We do not need to embark upon an analysis of whether Winkelmann J was correct to conclude that the suspension order was a nullity. Strictly speaking, such a conclusion was unnecessary once the Judge found that the suspension order could not operate to render the Ministry's unlawful policy or practice lawful.

[45] It follows that, in common with Winkelmann J, we are satisfied that the Ministry acted unlawfully in July 2012 when declining Mrs Spencer's renewed

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39 Scotland Act 1998 (UK), s 102(1)–(2).
40 HRA, s 92I(3).
41 Section 92I(3)(b) and (f) respectively.

application for a disability support benefit. The question remains whether pt 4A retrospectively validates or makes lawful the Ministry's unlawful act.

Part 4A NZPHDAA

(a) Introduction

[46] Before addressing the merits of the Ministry's appeal against Winkelmann J's findings on pt 4A of the NZPHDAA, it is necessary to recite briefly some more facts.

[47] In response to this Court's decision in *Atkinson*, the Ministry commenced a public consultation process about a proposed new policy for payment of disability support. On 15 May 2013, a week before Mrs Spencer's application was due to be heard in the High Court,[42] Parliament sitting under urgency enacted pt 4A. When introducing the statutory amendment in the House, the then Minister of Health, the Hon Tony Ryall, announced that the government policy would remove the blanket ban on paying parents for the care they provided their adult disabled children with new funding of $92 million to be made available for that purpose.

[48] On 1 October 2013, two days before the High Court delivered judgment, the government's new funded family care policy commenced. On 13 December 2013 the Tribunal by consent joined Mrs Spencer as a plaintiff in the *Atkinson* proceeding. The original plaintiffs have all settled their claims. Only Mrs Spencer remains. She wishes to pursue a claim for compensation for unpaid benefits. The Ministry's position is that pt 4A is an absolute barrier. The existence of Mrs Spencer's intended claim and the resulting dispute is the rationale for this litigation.

[49] Mrs Spencer's renewed application for disability support has now been approved. Since May 2014 the Ministry has paid her for 29.5 hours of approved services provided weekly to Paul.

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[42] As a consequence of pt 4's enactment the fixture was in fact briefly adjourned until 24 June 2013 to enable Mrs Spencer to add her claim for declaratory relief.

(b) Statutory provisions

[50] Counsel agree that these three issues of statutory interpretation arise for our determination:

(1) Is the Atkinson policy a "family care policy" as defined in pt 4A?

(2) Does pt 4A validate the Atkinson policy both prospectively and retrospectively?

(3) Does s 70G prevent Mrs Spencer from joining and seeking compensation in the *Atkinson* proceeding before the Tribunal?

[51] It is necessary to recite the relevant provisions of pt 4A. First, s 70A describes the purpose of pt 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.

(Emphasis added.)

[52] Second, s 70C, upon which the Ministry relies to support its refusal to make payments to Mrs Spencer, provides:

> **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.

[53] Third, s 70D, which the Ministry says has the effect of declaring as lawful the policy which was found to be unlawful in *Atkinson*, relevantly provides as follows:

> (1) The Crown and any DHB are, and have always have been [sic], 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:

….

(Emphasis added.)

[54] Fourth, s 70B defines a "family care policy" as follows:

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)

…

(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.

(Emphasis added.)

[55] Fifth, s 70E, which has the effect of limiting rights of complaint about pt 4A or a family care policy, 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).

…

[56] Sixth, s 70G, which has a savings effect and is directly relevant to the third question of whether Mrs Spencer is entitled to join the *Atkinson* proceeding for the purposes of seeking compensation, 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.

[57] The Ministry's position is that pt 4A prohibits the Crown from paying a person for providing support services to a family member unless payment was permitted either by a family care policy or expressly authorised under an enactment

pursuant to s 70C. According to the Ministry, there was no family care policy which permitted it to pay Mrs Spencer and thus it could not pay her; and further, s 70D had the effect of declaring lawful the Atkinson policy.

[58] It is common ground that pt 4A operates prospectively to prohibit parties from taking any legal steps to enforce rights breached by a family care policy where it is applied after 15 May 2013. The question is whether pt 4A also operates retrospectively, by validating the Atkinson policy as it was applied to Mrs Spencer before that date and by prohibiting her from taking any legal steps to enforce her rights which had accrued by then.

[59] We shall determine the Ministry's appeal by reference to each of the three issues formulated by counsel and summarised above.

(c) Issues

(i) "Family care policy"

[60] Winkelmann J accepted that the central issue was whether the Atkinson policy is a "family care policy" as defined in pt 4 of the Act. We agree that it provides the conceptual foundation for pt 4A and is critical to the Ministry's argument. The Chief High Court Judge noted the Minister of Health's admission when introducing the amendment bill to Parliament that the Ministry had operated for over 20 years a blanket policy of not paying family members for disability support.[43] In her judgment:

> [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".

[43] *Spencer* (HC), above n 5, at [147].

[61] Winkelmann J found that the natural textual meaning of pt 4A limits or prevents complaints or proceedings about policies that fall within the definition of family care policies which were not the subject of the *Atkinson* decisions. However, even if the natural meaning of pt 4A was to preclude Mrs Spencer from pursuing remedies based on the Atkinson policy, the Judge's approach was an available interpretation and the most Bill of Rights Act consistent one pursuant to the approach in *Hansen*.[44]

[62] The Solicitor-General, Mr Heron QC, submitted that Winkelmann J was wrong to find that the Atkinson policy was not a "family care policy" within the definition of s 70B. In his submission the use of the phrase "in certain cases" indicates that a policy or practice which permits persons to be paid "in certain cases" for services provided to family members will "in other cases" refuse payment for people. The permissive part of the policy is the necessary corollary of the restrictive part.

[63] Mr Heron submitted that Winkelmann J erred in fact because the evidence showed the Atkinson policy did permit payments for support services provided by a range of non-resident family members to care for disabled relatives. He distinguished this permissive arrangement from the so-called "blanket" element of the Atkinson policy, which prohibited payments to parents, spouses or resident family members. He relied upon evidence given to the Tribunal in July 2008 by Patricia Davis, a senior Ministry official, that:

> 135. There has for a long time been a general "exception" to the non-payment of family members, in that non-resident family members (except the spouse or parents of the disabled person) can be employed to provide the support the NASC had assessed the disabled person as needing. This is because these people obviously can deliver the services that fit within the description – they can provide care that is not being provided by the family unit in the home, and they can provide respite for the primary caregivers and the resident family.
>
> 136. This general "exception" however does not extend to parents or spouses of the disabled person, even if they do not live in the same house. This is because the State considers that spouses and parents are always natural supports, whether or not they live with the disabled person. So, if a parent living outside the house can provide the care that is needed, then the needs assessment should show that additional services are not required. If

[44] At [164]; *R v Hansen* [2007] NZSC 7, [2007] 3 NZLR 1.

> they cannot provide that care, then funding would be provided for someone else to do so.
>
> 137. The Ministry also has a policy of allowing exceptions to its requirements in individual cases. Any exception to the general policy must be approved in each case by the Ministry. There has apparently been some confusion with some NASCs around this at least until 2 or 3 years ago. However, all NASCs are now fully aware of this requirement.

[64] Our starting point is Mr Heron's acceptance of the Tribunal's description of the Atkinson policy as:[45]

> … a longstanding and overarching policy … that parents, spouses and other resident family members of the qualifying persons are excluded from being paid for providing disability services to their adult child, spouse or resident family member who qualifies for such support services.

[65] That was the blanket, prohibitory policy which this Court described in *Atkinson*.[46] Evidence was given of about 270 informal or ad hoc exceptions to this exclusion. According to the Ministry, many were cases of mistaken payment, that is the payments were in fact made contrary to the policy. In only two cases had the Ministry been aware of the payments being made prior to carrying out a review completed in May 2007, and none of the payments had been made through a formal ministry approval process Thus they cannot be said to be payments made pursuant to a policy, or to any stated exception to it.

[66] This Court concluded accordingly in *Atkinson* that "there was no clarity about the nature and extent of any 'exceptions policy'" and, importantly that "for all intents and purposes, the High Court was correct to describe the policy as a blanket one of non-payment of family members".[47] Mr Heron complains that the Court's finding was inaccurate. But the decision was not appealed, and we see no basis on which we should now characterise the policy that applied prior to the introduction of pt 4A in a way different to the description given it in *Atkinson* and by the Minister himself when introducing the amendment.

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45 *Atkinson* (HRRT), above n 1, at [6].
46 *Atkinson* (CA), above n 4, at [160].
47 At [160].

[67] While Pt 4A maintains a general prohibition on payment for support services provided to a family member,[48] it now allows two significant exceptions "in certain cases". The Ministry is empowered to permit payments according to a discrete family care policy. Also, the definition of a family member extends to a resident parent or spouse, in contrast to the unlawful Atkinson policy prohibition on payment to this specified class.

[68] We emphasise, however, that in *Atkinson* the Courts and the Tribunal were not considering a policy which permitted payment "in certain cases" to parents or spouses. To the contrary, they were concerned solely with a policy which absolutely prohibited payment to that category of family members. What was in issue and was the subject of the Tribunal's declaration was the Ministry's policy of "excluding specified family members [parents and spouses] from payment for the provision of funded disability services".[49] As Winkelmann J found, a no exceptions policy of this nature could not be construed as permitting payment "in certain cases".

[69] Mr Heron may be correct that the Ministry did in fact permit payment for support services provided by a range of non-resident family members. But whatever that permissive policy was, it was not the Atkinson policy. A family care policy now has a discrete and self-contained definition, explicitly based upon the Ministry's power to pay "in certain cases, for providing disability support services to … family members".[50] We cannot be expected to strain Parliament's language to incorporate by implication or corollary within the scope of that permissive definition a prohibitory policy which had the opposite purpose and effect, or to read into the plain words of the text what the Ministry now submits the words were meant to say.

[70] As this Court has previously observed, "the inquiry is not as to what the legislature meant to say but as to what it means by what it has in fact said".[51] To that we would add the words "Nor can the Court be expected to adopt an interpretation based on what Parliament has not said." The political context cannot assist where the legislature elects to frame its formal response to judicial decisions in terms which

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48 Section 70C.
49 *Atkinson* (HRRT), above n 1, at [231]. Note that it appears at [232] of the law report.
50 Section 70B(1)(a).
51 *Donselaar v Donselaar* [1982] 1 NZLR 97 (CA) at 114.

plainly do not reflect the intention now ascribed to them.[52] And there is nothing in the statutory purpose of pt 4A which would lead us to a different conclusion.

[71] We add that Mr Heron did not in his written submissions seek to draw particular support for his argument from s 70G, the savings provision. Nevertheless, the terms of s 70G(3) and (4) were raised in argument. Their apparent purpose is to validate retrospectively payments made to a family member for support services which were not permitted or authorised by a family care policy in force before 15 May 2013. Their terms may have been capable of supporting the Crown's construction of a family care policy on the premise that Parliament may have assumed its reference to a "family care policy" in s 70(4)(a) was to be understood as a reference to the Atkinson policy and payments made in prohibition of it.

[72] However, we are not satisfied that this savings provision assists in determining the meaning of a family care policy. The provision only applies to payments made to a family member which "were not permitted … by a family care policy". On our interpretation the Atkinson policy did not permit payment to specified family members under any circumstances. The possibility that Parliament might have assumed its use of the term "family care policy" incorporated the Atkinson policy when enacting a savings provision does not materially assist us in construing the statutory definition of a family care policy.

[73] We add to the extent necessary that ss 4, 5 and 6 of the Bill of Rights Act affirm our analysis and that undertaken by Winkelmann J. If the Ministry was correct that the definition of a "family care policy" includes the Atkinson policy, then s 70B has the effect of making pt 4A inconsistent with s 19 of the Bill of Rights Act. It is settled that if Parliament intends to limit a right prescribed by the Bill of Rights Act and actively respond to the *Atkinson* decisions in a manner inconsistent with the Tribunal's findings it could be expected to do so clearly and explicitly, not by a sidewind.[53]

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[52] See also Daniel Greenberg (ed) *Craies on Legislation* (10th ed, Sweet & Maxwell, London, 2012) at [27.1.14.2]: "it would clearly be most undesirable for the courts to begin to attach significance to what Parliament does not do, the manner in which it does not do it and the reasons for which it does not do it."

[53] *R v Pora* [2001] 2 NZLR 37 (CA) at [52] and [56]; *R v Secretary of State for the Home Department, ex parte Simms* [2000] 2 AC 115 (HL). See also Philip A Joseph *Constitutional and Administrative Law in New Zealand* (4th ed, Thomson Reuters, Wellington, 2014) at 792–794.

[74] Section 6 of the Bill of Rights Act directs that wherever a statutory enactment can be given a meaning consistent with the rights and freedoms contained in the Act that meaning is to be preferred to any other. That section reflects a common law principle of legality that operates in a wider context, is constitutional in nature, existed long before enactment of the Act and does not depend on the existence of ambiguity in a statutory provision.[54] In a passage cited by Elias CJ and Tipping J in *R v Pora*,[55] Lord Hoffman referred in *R v Secretary of State for the Home Department, ex parte Simms* to the importance of the principle of legality in a constitution which acknowledges the sovereignty of Parliament. He acknowledged that Parliament could, if it chose to do so, legislate contrary to fundamental human rights. However:[56]

> …the principle of legality means that Parliament must squarely confront what it is doing and accept the political cost. Fundamental rights cannot be overridden by general or ambiguous words. … In the absence of express language or necessary implication to the contrary, the courts therefore presume that even the most general words were intended to be subject to the basic rights of the individual.

[75] In the present context, whether the principle is applied as a common law presumption or through the agency of section 6 of the Bill of Rights Act, the same position is reached. Clear words are necessary before the court will read legislation as intending to remove rights protected by the Act.

[76] These considerations apply with equal force in the contexts discussed below.

(ii) Validation

[77] Winkelmann J found that, because the Atkinson policy was not a family care policy, s 70D(2) cannot retrospectively authorise or revive it and the suspension could not render the policy lawful until pt 4A was enacted. Even if this conclusion was wrong, Winkelmann J held that if Parliament had intended to take the unusual step of retrospectively reversing a finding of inconsistency by the Tribunal, it could be expected to do so deliberately and to have used express and unambiguous language. Section 70C does not by itself preclude the Ministry from paying any

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54 *Simms*, above n 53, at 130 per Lord Steyn.
55 *R v Pora*, above n 53, at [53]; *Simms*, above n 53, at 131
56 *Simms*, above n 53, at 131.

damages ordered by the Tribunal in the *Atkinson* proceeding as it is not clearly directed to prohibiting the payment of damages awards by the Ministry. Finally, ss 70E and 70G do not have the effect of prohibiting the making of complaints or commencing of proceedings based on the Atkinson policy which the courts have held to be unfairly discriminatory.

[78] Mr Heron referred to a number of provisions within pt 4A to support his submission that the amendment overrules the *Atkinson* declaration and authorises the Atkinson policy retrospectively. Among those provisions are:

(1) the imposition of a prohibition on paying family members for support services unless lawfully authorised;[57]

(2) Parliament's tempering of its prohibition by permissive provisions, in particular its affirmation that the Crown has always been authorised to adopt family care policies,[58] and that those in force before pt 4A was passed continue in effect;[59]

(3) Parliament's express authority for policies distinguishing between people on grounds which might otherwise be found to be unlawfully discriminatory, including family status, age and disability – where the authority is both prospective and retrospective;[60]

(4) Parliament's prohibition of any new complaint to the Commission or on any proceedings being commenced on the grounds that pt 4A is discriminatory except for complaints lodged before 16 May 2013;[61] and

(5) Parliament's saving of the *Atkinson* result in the Tribunal,[62] allowing Mrs Spencer to continue her judicial review proceeding.

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57 Section 70C.
58 Section 70D(1).
59 Section 70D(2).
60 Section 70D(3).
61 Section 70E(5).
62 Section 70G.

[79] The short answer to Mr Heron's submission is that with one exception all of the provisions of pt 4A which he cited are prospective, consistent with the principle that enactments in general have prospective effect only.[63] Only one provision of pt 4A is possibly retrospective – but it simply affirms the authority of the Crown or a DHB to implement family care policies, as defined. The purpose of pt 4A as stated in s 70A is consistent with this prospective theme: it is to "*keep* the funding of support services provided by persons to their family members within sustainable limits".[64] Achievement of that purpose does not require the extreme step of authorising retrospectively the unlawful Atkinson policy, preventing any complaints or proceedings, or prohibiting any payment to Mrs Spencer. We agree with Mr Butler that the terms of pt 4A in light of their purpose apply only to the *prospective* funding of disability support services provided by family members.

[80] Our rejection of Mr Heron's submission necessarily follows from our preceding conclusion on the meaning of a family care policy as excluding the Atkinson policy. The operative part of s 70B(2)(b) on which he relies is a declaration that the Crown and DHBs have always been authorised to adopt family care policies which permit payment for providing support to family members. However, we repeat again that the Atkinson policy did not have that effect. Even if s 70B(2)(b) does have retrospective effect, it does not apply to the Atkinson policy.

[81] Mr Heron submitted that the explanatory note to the New Zealand Public Health and Disability Amendment Bill (No 2) expresses an intention to remove a party's right to claim compensation for the Ministry's application of the Atkinson policy. Again, the note confirms that the purpose of pt 4A is prospective, to allow the government to implement policies for paying family carers where it so wishes. Without legislation, the note says, the Atkinson policy would remain unlawful and "the Government could face a very large number of claims", which we understand to refer to applications for payments for benefits.[65]

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63 Interpretation Act 1999, ss 7, 17–18; *Foodstuffs (Auckland) Ltd v Commerce Commission* [2002] 1 NZLR 353 (CA) at [7].

64 Section 70A(1) (emphasis added).

65 New Zealand Public Health and Disability Amendment Bill (No 2) 2013 (118–1) (explanatory note) at 1.

[82] We do not derive material assistance from the note. It confirms the Crown's prospective exposure to a large number of claims for so long as it continued to implement and practice the unlawful Atkinson policy. In recognition of that risk pt 4A was enacted to end the Ministry's indefinite exposure by discontinuing a discriminatory practice against a specified class of family members. The draconian measures introduced in s 70B(2)(c) to remove rights of challenge for breaches of family care policies said nothing about the Atkinson policy and we cannot be expected to strain the statutory text to remove all retrospective rights of claim arising from that policy. Without clear and unequivocal words requiring that result, we can see no warrant for giving retrospective effect to pt 4A to incorporate an expansive interpretation of a phrase taken from the explanatory note when it can reasonably be understood as referring to the Crown's prospective exposure unless it discontinued the Atkinson policy.

[83] Part 4A was, we accept, Parliament's response to the *Atkinson* decisions. However, if as Mr Heron submitted the legislature intended as a component of that response to overrule the *Atkinson* declaration and give the Atkinson policy retrospective authority, it could and should have said so. In other contexts Parliament has done just that. The Parliamentary Privilege Act 2014, for instance, provides that one of its subsidiary purposes is "to alter the law in the decision in *Attorney-General v Leigh* [2011] NZSC 106, [2012] 2 NZLR 713 (SC)".[66] But there is nothing approaching those terms in pt 4A.

[84] In this context we refer to a point made by both Messrs Farmer and Butler. Parliament introduced pt 4A under urgency without prior notice only one month before Mrs Spencer's judicial review proceeding was heard in the High Court. It contained a number of features that are traditionally regarded as being contrary to sound constitutional law and convention – on the Ministry's interpretation it has retrospective effect, authorises discriminatory policies, withdraws rights of judicial review and access to the Tribunal and did not go through the normal Parliamentary Select Committee and other processes. While both counsel accept that the courts must respect and apply pt 4A, like any other legislation, we agree with them that if

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[66] Parliamentary Privilege Act 2014, s 3(2)(c).

the words have not achieved the result which its promoters intended the courts should not seek to fill the gaps as a means of dealing with inadequate drafting.[67]

[85] In any event it is by no means clear that Parliament can have intended the consequences for which Mr Heron contended. Our interpretation does not deprive the legislation of effect. On the contrary, it endorses the legislature's intention that the Crown and a DHB may adopt family care policies that permit some family members to be paid and others not to be paid for providing support to their family members, regardless of any discriminatory impact of such a policy. Mr Heron argued that the legislative intent must also be seen as excluding any liability that might flow from past breaches of the HRA, claiming this followed from the assertion in s 70D(3) that the Crown has always been authorised to adopt family care policies with the characteristics set out in the subsection. However, that stops short of authorising the Atkinson policy for reasons already addressed, let alone authorising it retrospectively.

[86] It does not follow from concerns expressed by the executive about cost implications that Parliament intended persons in the position of Mrs Spencer to be denied any redress for unlawful discriminatory acts carried out prior to enacting pt 4A. Parliament must be presumed to be aware that, if an historical claim is made and sustained, the impact of any monetary remedy is a matter that must be considered by the Human Rights Review Tribunal under s 92P(1)(d) of the HRA.

[87] We emphasise that our construction of pt 4A is consistent also with s 6 of the Bill of Rights Act. In this respect we note that the Attorney-General's s 7 report on pt 4A accepted that s 70E – which specifically bars anybody from bringing a claim of unlawful discrimination as a result of the enactment of pt 4A – is inconsistent with s 27(2) of the Bill of Rights Act, and that s 70D is also inconsistent with s 19 of the Bill of Rights Act.[68] On our interpretation, ss 70B and 70D can be read in a manner consistent with the right to freedom from discrimination to recognise that Parliament

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[67] Compare *Northland Milk Vendors Assoc Inc v Northern Milk Ltd* [1988] 1 NZLR 530 (CA) at 538, where it was suggested that courts *were* able to fill gaps – in the distinguishable context of new legislation failing to foresee and thus provide for a particular factual scenario.

[68] Christopher Finlayson *Report of the Attorney-General under the New Zealand Bill of Rights Act 1990 on the New Zealand Public Health and Disability Amendment Bill (No 2)* (16 May 2013) at [12]–[19].

would not without plain and clear words retrospectively declare the Atkinson policy lawful prior to 15 May 2013.

(iii) Savings

[88] Winkelmann J found that even if her construction was incorrect and s 70E does apply to prevent further claims based on the Atkinson policy, s 70G(1) is not naturally read as precluding Mrs Spencer's right to apply for joinder in the *Atkinson* proceedings or as precluding the Tribunal from dealing with that application on its merits.[69]

[89] We are not satisfied that the Ministry's consent to Mrs Spencer's joinder as a plaintiff in the *Atkinson* proceeding necessarily renders this issue moot, because it is difficult to see how consent could cure a statutory prohibition of joinder – if that is the true effect of s 70G(1), as Mr Heron submitted it was.

[90] However, we reject Mr Heron's submission as to the correct interpretation of s 70G(1), for two reasons. First, the terms of the section are decisive. Section 70G(1) provides that the *Atkinson* proceedings "may be continued or settled as if [pt 4A] … had not been enacted." It says nothing about the availability or otherwise of Mrs Spencer's right to join those proceedings. In the absence of clear words to that effect, we would be reluctant to adopt an interpretation that Parliament has deliberately denied a party access to the courts to enforce her pre-existing right. Section 27(2) of the Bill of Rights Act requires that approach.

[91] Second, and of equal weight, is the fact that if pt 4A had not been enacted Mrs Spencer would have been entitled to join the *Atkinson* proceedings. The very purpose of including savings provisions generally is to "save" or preserve pre-existing rights, not to alter and certainly not to diminish them.[70] A savings provision such as s 70G(1) cannot properly be relied on for the proposition that rights of

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69 *Spencer* (HC), above n 5, at [187]–[189] and [197].

70 See John Bell and George Engle *Cross on Statutory Interpretation* (3rd ed, Butterworths, London, 1995) at 122–123; G C Thornton *Legislative Drafting* (2nd ed, Butterworths, London, 1979) at 297–298.

joinder have been extinguished. It follows that we also agree with Winkelmann J's conclusion on this issue.

Result

[92] The appeal is dismissed.

[93] We have read counsel's memoranda on costs. We are satisfied, however, that costs must follow the event. The appellant is ordered to pay costs separately to each respondent on a standard band A basis with usual and reasonable disbursements.

Solicitors:
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