IN THE COURT OF APPEAL OF NEW ZEALAND

CA205/2011
[2012] NZCA 184

BETWEEN	MINISTRY OF HEALTH Appellant
AND	PETER ATKINSON (ON BEHALF OF THE ESTATE OF SUSAN ATKINSON) First Respondent
AND	GILLIAN BRANSGROVE Second Respondent
AND	JEAN BURNETT Third Respondent
AND	LAURENCE CARTER Fourth Respondent
AND	PETER HUMPHREYS Fifth Respondent
AND	CLIFFORD ROBINSON Sixth Respondent
AND	LYNDA STONEHAM Seventh Respondent
AND	STUART BURNETT Eighth Respondent
AND	IMOGEN ATKINSON Ninth Respondent

Hearing:	13-23 February 2012
Court:	O'Regan P, Glazebrook, Ellen France, Harrison and White JJ
Counsel:	C R Gwyn, M G Coleman and R J Hoare for Appellant F M Joychild, D L Peirse and J M Ryan for Respondents A S Butler, S A Bell and O C Gascoigne for the Human Rights Commission as Intervener
Judgment:	14 May 2012 at 11 am

JUDGMENT OF THE COURT

A The Court answers the two questions of law on which the appellant was granted leave to appeal as follows:

(i) ***First question*****: Did the High Court correctly state and apply the test for a breach of s 19 of the New Zealand Bill of Rights Act 1990?**

Answer**: Subject to one qualification which does not affect the outcome, yes.**

(ii) ***Second question*****: Did the High Court misapply the test for s 5 of the New Zealand Bill of Rights Act 1990?**

Answer**: No.**

B The appeal is accordingly dismissed.

C No order as to costs.

REASONS OF THE COURT

(Given by Ellen France J)

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Introduction

[1] The current policy of the Ministry of Health (the Ministry) excludes family members from payment for the provision of various disability support services to their children. The nine respondents (seven parents of adult disabled children and two adult disabled children) all of whom are affected by this policy, made a complaint under Part 1A of the Human Rights Act 1993 (the HRA) to the Human Rights Commission (the Commission). The respondents claimed the Ministry's policy comprised unlawful discrimination against them on the basis of their family

status. It was alleged that the parents were providing services for their disabled children but not being paid and the adult children were denied their choice of caregiver.

[2] In terms of s 20L(1) of the HRA, an act or omission is in breach of Part 1A if it is inconsistent with s 19 of the New Zealand Bill of Rights Act 1990 (the Bill of Rights). That section protects, amongst other matters, the right to be free from discrimination on various grounds, including family status. For the purposes of s 20L(1) an act or omission is inconsistent with s 19 if it limits the right to freedom from discrimination and is not, under s 5 of the Bill of Rights, a justified limitation on that right.[1]

[3] The matter was referred to the Human Rights Review Tribunal (the Tribunal). After a hearing, the Tribunal made a declaration that the policy was inconsistent with s 19 of the Bill of Rights.[2] The Ministry appealed to the High Court against the making of the declaration. The High Court dismissed the appeal, upholding the Tribunal's conclusion that the policy was discriminatory and was not a justified limit on s 19 in terms of s 5 of the Bill of Rights.[3] There is an ability to appeal to this Court under the HRA on questions of law.[4] The Ministry sought and was granted leave to appeal on two questions of law.[5] The two questions are as follows:[6]

> (a) Did the Court correctly state and apply the test for a breach of s 19 of the [Bill of Rights]?
>
> (b) Did the Court misapply the test for s 5 of the [Bill of Rights]?

[4] Before answering the questions of law, we first need to set out the policy and factual context in which the respondents made their claims. We then describe the statutory framework and the Tribunal and High Court judgments. We add that the

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1 Human Rights Act 1993 [HRA], s 20L(2).
2 *Atkinson v Ministry of Health* (2010) 8 HRNZ 902 (NZHRRT).
3 *Ministry of Health v Atkinson* (2010) 9 HRNZ 47 (High Court judgment). The panel comprised Asher J, Ms J Grant MNZM and Ms P Davies.
4 HRA, s 124.
5 *Ministry of Health v Atkinson* HC Auckland CIV-2010-404-287, 11 March 2011.
6 At [18].

Commission gave notice of its intention to appear and be heard on this appeal under s 92H of the HRA.[7]

The contextual setting for the claims

[5] The figures before us[8] indicate that the Ministry provides services to approximately 30,000 disabled persons.[9] That figure encompasses persons aged mostly less than 65 years having a physical, sensory or intellectual disability, or a combination of them. Other departments and agencies are responsible for other groups of disabled persons. For example, District Health Boards (DHBs) have responsibility for people with psychiatric, addiction or age related disabilities. The Accident Compensation Corporation has responsibility for those whose disability results from personal injury as defined in the Accident Compensation Act 2001.[10]

[6] Public funding for disability services operates under the umbrella of the New Zealand Public Health and Disability Act 2000 (the 2000 Act). We briefly describe the legislative framework.

The New Zealand Public Health and Disability Act 2000

[7] One of the key purposes of the 2000 Act is to provide for public funding and provision of, amongst other matters, disability support services.[11] "Disability support services" are defined in s 6(1) of the 2000 Act.[12] The purposes of the Act also include achieving for New Zealanders the following objectives:[13]

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7 The Commission is entitled to appear and be heard under s 92H if, relevantly, the Commission considers that will facilitate performance of its functions under s 5(2)(a) of the HRA.

8 The evidence before us is that as heard by the Tribunal in September 2008. No updating evidence was provided in the High Court or this Court.

9 This excludes those who use only equipment modification services like the provision of wheelchairs for long-term use or of ramps.

10 Accident Compensation Act 2001, s 26.

11 New Zealand Public Health and Disability Act 2000, s 3(1).

12 The definition states that the phrase includes goods, services and facilities – "(a) provided to people with disabilities for their care or support or to promote their inclusion and participation in society, and independence; or (b) provided for purposes related or incidental to the care or support of people with disabilities or to the promotion of the inclusion and participation in society, and independence of such people".

13 New Zealand Public Health and Disability Act 2000, s 3(1)(a).

(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:

…

[8] Section 3(2) of the 2000 Act provides that these objectives are to be pursued to the extent "that they are reasonably achievable within the funding provided". The Act makes it clear that nothing in the 2000 Act limits the operation of s 73 of the HRA which deals with measures to ensure equality.[14] Finally, s 10 of the 2000 Act provides that the Minister may enter into funding agreements for the provision of disability support services.

The policy

[9] Geraldine Woods, the Deputy Director-General of the Health and Disability National Services Directorate in the Ministry (the Directorate),[15] explained in her evidence that the funding for disability support services was transferred from the Department of Social Welfare to the health sector in the early 1990s. This was as a part of what was described as the "New Deal" reforms to social services. These reforms included the move to targeted assistance.[16] As part of these reforms, the Government released its framework for the funding and delivery of health and disability services which reflected the decision to co-ordinate funding for disability support services through one agency. Specifically, the four Regional Health Authorities (RHAs) had purchasing powers for disability support services to allow a focus broader than hospital or other medical services.[17]

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14 Section 73 is in Part 2 of the HRA.

15 The Disability Services group in the Directorate has responsibility for the planning and funding of disability support services.

16 Hon Jenny Shipley et al *Social Assistance: Welfare that Works. A Statement of Government Policy on Social Assistance* (Department of Social Welfare, 30 July 1991).

17 Hon Jenny Shipley and Hon Simon Upton *Support for Independence for People with Disabilities: A New Deal: A Government Statement on the Funding and Delivery of Health and Disability Services* (1992).

[10] A disability support services framework was also developed.[18] As Ms Woods said, an important part of this framework was the separation of needs assessment, service co-ordination, and service provision (colloquially known as the funder/provider split).

[11] Patricia Davis, National Operations Manager for the Disability Services group in the Directorate, explained in her evidence that, although disability support services were under the wing of the four RHAs over the period from the early 1990s to 1997, the Ministry had a policy and strategic role. The RHAs established various forms of what are now known as Needs Assessment and Service Co-ordination organisations (NASCs), and contracted with providers to deliver services. In 1997 the four RHAs were merged into a single Health Funding Authority (HFA). In 2000, the HFA became a part of the Ministry. The Ministry then took over responsibility for funding, policy and planning for disability support services in all age groups. From 2003 the responsibility for disability support services for those over 65 was devolved to the DHBs.

[12] From the Ministry's perspective the premise of the provision of disability services is that funded services complement or supplement the services provided by the individual's natural supports. Disability services are therefore provided to meet gaps in essential care needs. "Natural support" in this context is defined to mean:[19]

> Natural resources and supports are supports that can be accessed by all people who live and work in any community within New Zealand. They are readily available and reasonably easy to access. They describe the personal resource an individual has within them. They describe the support that is available from family members, neighbourhoods and community/social groups, schools, church groups, Scouts, Girl Guides, service groups, sports clubs and so on. They are supports that people access on a very informal basis and in reality are accessed by most New Zealanders.

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[18] Disability Support Services, Ministry of Health *The New Zealand Framework for Service Delivery* (August 1994).

[19] Disability Services Directorate, Ministry of Health *Operational Manual for Needs Assessment and Service Co-ordination Managers (Vol 1)* (May 2005) at 47. Vivienne Maidaborn, Chief Executive Officer of CCS Disability Action in Wellington, gave evidence on behalf of the respondents. She discussed the flexibility of the concept of "natural supports".

[13] The process of assessing needs works in this way. There is a NASC interview with the disabled person and his or her family.[20] At the interview, the parties work through a form which is designed to identify the disabled person's needs.[21] There is no obligation on family or friends or other natural supports to provide support beyond basic amenities. As Ms Gwyn for the Ministry explained to us, if the disabled child is in the family member's house, the family member would be expected to provide a bed, access to a shower and toilet and participation in the family meal. The Ministry emphasises the concept that the determination of the level of funded support relates to unmet needs rather than the level of disability. The current system reflects the framework for service delivery agreed upon in August 1994.[22]

[14] Once the disabled person's needs are identified, service co-ordination follows.[23] This involves considering what options are available to meet the needs and goals of the disabled person.

The services in issue

[15] We next need to say something about the four services that are the subject of the proceeding, namely, home-based support services, individualised funding, contract board, and supported independent living. There are other disability support services, such as residential and respite care, which were not challenged.

[16] Home-based support services (HBSS) are services provided in the home. The two main areas of support are personal care and household management. Personal care covers assistance with activities of daily living such as personal hygiene, dressing and feeding. Household management services are those relating to helping

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20 The Ministry contracts with the NASCs to provide the needs assessment and service co-ordination services. There are currently contracts with 15 NASCs about half of which are DHB organisations.

21 The Ministry of Health's "*Support Needs Assessment and Service Co-ordination Policy, Procedure and Information Reporting Guidelines*", (15 February 2002), contain a sample needs assessment form: Appendix 1.

22 *The New Zealand Framework for Service Delivery* above n 18.

23 There are separate contracts for the approximately 800 providers. The service providers include organisations like IHC New Zealand, previously, the New Zealand Society for the Intellectually Handicapped.

the disabled person to maintain and organise the household such as cleaning, laundry and meal preparation. As the High Court noted, these services can be temporary, short term and even for a night.[24] People receiving home-based support services make up about a third of the 30,000 receiving disability support services.

[17] The specification for individualised funding (IF) records that this service:

> … is an administrative arrangement for some disabled people, that enables them to hold, manage or govern their own budget for support services that are assessed by the [NASC] policy. IF is not a personal entitlement rather it provides the opportunity for some disabled people to manage the personal support services they require in the way they believe meets their needs best.

This service has been available only relatively recently, since 2008.

[18] Contract board is described by the Tribunal in the following way:

> [56][c] … a service where an individual moves in with another family when the person no longer wants to, or is not able to continue living with their own family but still wish to have the sort of supports that the family environment can provide. The service is primarily for people with intellectual disability.

There are some 400 individual contract board arrangements.

[19] Supported independent living (SIL) is intended to support people living independently in the community. It covers various household and accommodation support services and other supports designed to assist in the development of new skills. There are approximately 2,000 people receiving SIL.

The individual claims

[20] It is against this background that the respondents made their claims. We do not repeat the detail about their claims, which is set out by the High Court, but highlight some aspects. In doing so, we largely adopt the description in the High Court judgment.[25]

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[24] At [16].
[25] At [20]–[36].

The Atkinson family (first and ninth respondents)

[21] Imogen Atkinson has spastic quadriplegic hypotonic cerebral palsy. She suffers from dyslexia and dyspraxia. As a result her disability needs are very high. As the High Court noted she is "wholly reliant" on wheelchair mobility and needs a personal caregiver for all the activities of daily life including feeding, dressing, showering and toileting.[26]

[22] Susan Atkinson, who is now deceased, was Imogen's mother. Affidavits from Mrs Atkinson and Peter Atkinson, Imogen's father, say they were offered payment "under the table" for the work they did in caring for Imogen. They refused to accept payments on that basis and from 2006, Mrs Atkinson said she did all of the care herself, unpaid. Since Mrs Atkinson's illness in 2008, Imogen has been living in a community residential care facility.

[23] Imogen and her parents gave evidence that it was always her choice to live at home. She also said that her mother was her choice of caregiver.

Gillian Bransgrove (second respondent)

[24] Gillian Bransgrove is the mother of Jessie Raine. Jessie has spina bifida with complete paralysis from her armpit level down and total bladder and bowel incontinence. Jessie also suffers from spinal curvature and other disabilities. She, too, has very high disability support needs.

[25] Ms Bransgrove, a registered nurse, was initially employed to provide home-based support services for her daughter. This continued for five years until, in May 2005, she was told Ministry policy prevented her from being paid. After the withdrawal of her pay, agency caregivers cared for Jessie for two weeks until she had a fall. The arrangement was mutually cancelled. Mrs Bransgrove continued to do the work unpaid. Jessie filed an affidavit in support of her mother's position.

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[26] At [25].

Jean Burnett and Stuart Burnett (third and eighth respondents)

[26] Stuart Burnett has spastic quadriplegia with athletosis. His disability support needs are very high and include feeding. Stuart has spent time in residential care and was cared for by various home-based support workers over time. However, he prefers care in his "safe and comfortable" home environment from his mother, Jean Burnett.[27] Ms Burnett has not been paid for this work. Ms Burnett, confirmed in her evidence Stuart's real wish to remain living at home. He has continued his education whilst at home and has competed on the national and international scene playing boccia, a paralympic sport.

Laurence (Nick) Carter (fourth respondent)

[27] Sven Carter, Laurence (Nick) Carter's son, has serious intellectual disabilities. He is autistic, epileptic and mute. As the High Court noted, Mr Carter gave evidence of "unsatisfactory experiences of institutional care for his son including physical abuse."[28] Mr Carter is the sole caregiver for Sven and he does this on an unpaid basis.

Peter Humphreys (fifth respondent)

[28] Peter Humphreys is the father of Sian Humphreys. Sian was born with Angelman syndrome and her disability support needs are very high. Mr Humphreys was paid for almost a five year period to care for Sian. He was then told he could not be paid because of the Ministry's policy concerning payment of family members. Payment has been continued pending the outcome of this case.

Clifford Robinson (sixth respondent)

[29] Clifford Robinson has two adult children who are intellectually disabled. He gave up work when the children, Johnnie and Marita, were young and took them

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[27] At [30].
[28] At [33].

out of residential care. Mr Robinson has cared for Johnnie and Marita since then. Initially, the Ministry refused to pay him because he was family. That position changed in September 2002 when the Ministry began paying him $200 per week towards his children's care on a temporary basis. That figure was increased at one point but, more recently, was reduced back to $200 per week.

Lynda Stoneham (seventh respondent)

[30] Lynda Stoneham has an intellectually disabled daughter, Kelly. For the best part of her childhood her care was organised by the IHC, an organisation which provides support for people with intellectual disabilities so that they can participate in the community. The position changed in 2000 when Mrs Stoneham took Kelly out of care and back home where she cared for her on an unpaid basis until August 2006. At that point, Lynda's health was such she had to be placed in care. Ms Stoneham has unsuccessfully tried to bring Kelly home on an individualised or other arrangement but funding has been declined.

[31] The Tribunal also heard evidence from Gary Somner whose son, Craig, has physical disabilities. Mr Somner's complaint to the Commission was filed too late for him to be included as a plaintiff.

[32] Finally, we note that it is a consistent theme in the respondents' evidence that there were difficulties in arranging sufficiently skilled third party carers.[29]

The statutory scheme

[33] As we have foreshadowed, the respondents made their complaints under Part 1A of the HRA. The long title of the HRA states that the Act is intended "to provide better protection of human rights" in New Zealand "in general accordance with the United Nations Covenants or Conventions on Human Rights".

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[29] Susan Atkinson, Gillian Bransgrove and Peter Humphreys made this point.

[34] Part 1A of the HRA deals with discrimination by government, related persons and bodies, or persons or bodies acting with legal authority. The purpose of this part is set out in s 20I as follows:

> … to provide that, in general, an act or omission that is inconsistent with the right to freedom from discrimination affirmed by section 19 of [the Bill of Rights] is in breach of this Part if the act or omission is that of a person or body referred to in section 3 of the [Bill of Rights].

[35] Importantly for these proceedings, s 20L sets out when an act or omission will be in breach of Part 1A. Section 20L states that:

> (1) An act or omission in relation to which this Part applies (including an enactment) is in breach of this Part if it is inconsistent with section 19 of the [Bill of Rights].
>
> (2) For the purposes of subsection (1), an act or omission is inconsistent with section 19 of the [Bill of Rights] if the act or omission—
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> (a) limits the right to freedom from discrimination affirmed by that section; and
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> (b) is not, under section 5 of the [Bill of Rights], a justified limitation on that right.
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> (3) To avoid doubt, subsections (1) and (2) apply in relation to an act or omission even if it is authorised or required by an enactment.

[36] Section 19 of the Bill of Rights provides that:

> (1) Everyone has the right to freedom from discrimination on the grounds of discrimination in the [HRA].
>
> (2) Measures taken in good faith for the purpose of assisting or advancing persons or groups of persons disadvantaged because of discrimination that is unlawful by virtue of Part 2 of the [HRA] do not constitute discrimination.

[37] Section 5 of the Bill of Rights describes the justified limitations on the rights and freedoms in the Act in this way:

> 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.[30]

[38] The grounds comprising the prohibited grounds of discrimination are specified in s 21(1) of the HRA. The listed grounds include sex, marital status, religious and ethical belief, ethnic origins and disability as well as family status. "Family status" is defined as follows:[31]

> (i) having the responsibility for part-time care or full-time care of children or other dependants; or
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> (ii) having no responsibility for the care of children or other dependants; or
>
> (iii) being married to, or being in a civil union or de facto relationship with, a particular person; or
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> (iv) being a relative of a particular person.

[39] One of the purposes of the Bill of Rights is to affirm New Zealand's commitment to the International Covenant on Civil and Political Rights (ICCPR).[32] Both the ICCPR and the International Covenant on Economic, Social and Cultural Rights (ICESCR), which New Zealand has also ratified, contain equality rights.

[40] Under art 2 of the ICCPR, parties to the ICCPR undertake, broadly speaking, to take steps to ensure the rights in that Covenant are respected without distinction of any kind and to provide effective remedies for breaches. Article 3 contains an undertaking to ensure the equal right of men and women to enjoyment of the rights in the Covenant. Article 26 deals with equality before the law and provides:

> All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

[41] Article 2.2 of the ICESCR contains an undertaking to:

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30 The Bill of Rights, s 4 provides that a Court cannot hold any provision to be impliedly repealed or revoked or decline to apply any enactment by reason only of inconsistency with the Bill of Rights.

31 HRA, s 21(1)(l).

32 The Bill of Rights, Long Title and see the Long Title to the HRA referred to above.

> … guarantee that the rights enunciated in the present Covenant will be exercised without discrimination of any kind as to race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

[42] Finally, we need to refer to the United Nations Convention on the Rights of Persons with Disabilities to which New Zealand is a party. The Preamble to the Convention records that persons with disabilities and their family members "should receive the necessary protection and assistance to enable families to contribute towards the full and equal enjoyment of the rights of persons with disabilities". The right to equal enjoyment of rights is spelt out elsewhere in the Convention. Articles 5 and 12 deal, respectively, with equality and non-discrimination and equal recognition before the law. Autonomy is another theme which runs through the Convention. The general principles in Art 3 include individual autonomy. Article 19(a) recognises the right of persons with disabilities to live in the community including by ensuring the opportunity to choose their place of residence and with whom they live. Finally, Art 23.5 provides that:

> States Parties, shall, where the immediate family is unable to care for a child with disabilities, undertake every effort to provide alternative care within the wider family, and failing that, within the community in a family setting.

The judgments below

[43] As we have indicated, the respondents succeeded in both the Tribunal and in the High Court. The Tribunal found that the Ministry's policy was prima facie discriminatory and was not a justified limit under s 5 of the Bill of Rights. In reaching the latter conclusion, the Tribunal did not consider that the objectives of the policy were sufficiently important to justify limiting the right. The Tribunal made a declaration that the Ministry's practice and/or policy were contrary to s 19 of the Bill of Rights.

[44] The High Court agreed that the policy was on its face inconsistent with s 19(1) of the Bill of Rights. In determining whether there was a breach of s 19, the Court said that the "essence" of discrimination lay in treating persons in comparable

circumstances differently.[33] The Court found that those in comparable circumstances to the respondents were persons willing and able to provide any of the four disability support services in issue. The respondents were all willing and able to provide support services but were not treated in the same way as others who were in that position. The reason for the difference was a prohibited ground of discrimination, namely, their family relationship with a disabled person.

[45] The Court accepted that for a policy to be discriminatory there must be "something more than a difference in treatment".[34] However, the Court considered it was sufficient at the s 19(1) stage to show that the differential treatment resulted in some discriminatory impact, namely, disadvantage. Any further "value judgment" about the nature of the discrimination should occur when considering whether the limit on the right was a reasonable one in terms of s 5 of the Bill of Rights.[35]

[46] The Court considered that when this approach was applied to the respondent caregivers, there was prima facie discrimination because they had shown that they wanted to do the work and were available to do so but had not been paid because of the policy. The Court said the parent respondents were "clearly cut out" from home based support services, although they may have also been discriminated against in relation to individualised funding and supported independent living.[36] The Court was less certain of the position in relation to individualised funding because that service gave the disabled person a personal entitlement to funds. There was no Ministry contract with the provider. Hence, the Court said that the policy of not paying family members "may not bite".[37] However, the Court continued, "if it is a term of the funding that no family members can be employed, that is a discriminatory policy".[38]

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33 At [127].
34 At [77].
35 At [122].
36 At [137].
37 At [133].
38 At [133].

[47] As we discuss later, the High Court was not at all certain that the contract board service was discriminatory.[39] That was because contract board is designed to provide support to a disabled person living with another family. The High Court said that on this basis, the appropriate comparator is "a more narrow group of persons who by definition are not family members".[40] The Court also found that the two respondent children were discriminated against. That was because they had a more limited range of choice of caregiver than others in comparable circumstances. Again, this was because of their family status, that is, their relationship with their parents.

[48] The Court then dealt with whether the policy was a justified limitation under s 5. The Court addressed this applying the approach of Tipping J in *R v Hansen*.[41] That essentially required a consideration of the importance of the objectives of the policy, the link between the limit imposed by the policy and the policy's purpose, and overall proportionality.

[49] The Court, like the Tribunal, rejected the first of the nine purposes advanced by the Ministry as supporting the limit on the right, namely, that there was a social contract between families and the state, under which families have the primary responsibility for providing care to family members. The Court also rejected the Ministry's suggested objective of promoting equality of outcomes for disabled people. That appears to be primarily on the basis that the policy was not necessary to ensure that objective was met.

[50] The Court concluded that the remaining objectives were important and credible. Those objectives included avoiding the risk of families becoming financially reliant on the income and avoiding professionalising or commercialising family relationships as well as the objective of being fiscally sustainable. As we have indicated, in this respect, the Court departed from the Tribunal which found that the Ministry's policy did not serve a sufficiently important purpose.

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39 High Court judgment at [134] and see discussion below at [138].
40 At [134].
41 *R v Hansen* [2007] NZSC 7, [2007] 3 NZLR 1 at [104].

[51] The Court then addressed the second s 5 question, namely, whether the limiting measure was rationally connected with its purpose. The Court accepted there was a rational connection between the policy and the desired outcomes of the Ministry, aside from the objectives based on a social contract and on achieving equality of outcomes. Not paying family members was seen as having a rational connection to at least some of the Ministry's purposes. For example, the Court found that paying family members could lead to those family members becoming reliant on payments, could interfere with family arrangements and lead to them being commercialised.

[52] The Court finally dealt with the question whether or not the policy limited the right more than was reasonably necessary. It was at this step in the process that the policy fell short. The Court concluded that although the objectives were important, a complete prohibition was not justifiable. Nor was the Court convinced that a blanket policy met the final, overall proportionality, limb of the test. While this limb of the test required a different approach, the earlier analysis was important. Accordingly, the Court said that the Ministry had failed to show that the infringement on the right to freedom from discrimination constituted by the policy was justified in a free and democratic society.

[53] There was some argument before the Tribunal about whether, in terms of s 5 of the Bill of Rights, the Ministry's policy was "prescribed by law". The Tribunal did not decide the point but proceeded on the assumption this aspect of s 5 was met.[42] The High Court judgment records that the respondents accepted at that hearing that the "prescribed by law" requirement was met.[43] The High Court accordingly did not deal with the point. We return to this question at the end of our judgment.

[54] We turn now to the first question of law on which leave was granted, namely, whether the Court correctly stated and applied the test for a breach of s 19 of the Bill of Rights.

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[42] At [218].
[43] At [157].

The test for a breach of s 19

[55] It is agreed that the first step in the analysis under s 19 is to ask whether there is differential treatment or effects as between persons or groups in analogous or comparable situations on the basis of a prohibited ground of discrimination.[44] The second step is directed to whether that treatment has a discriminatory impact. We deal with the issues raised by the two steps in turn.

Differentiation on a prohibited ground?

[56] The requirement for differential treatment as between those in comparable situations raises an issue about who is the appropriate comparator group.[45] That is the primary issue under this limb of the test. There is also a preliminary issue about whether the differentiation was on the basis of family status or on some other ground which is not prohibited. We deal with the latter issue first and then turn to the comparator.

[57] Initially, the Ministry argued that the parent respondents were not treated differently because of their family status. In other words, it was argued that the differentiation was not on the basis of a prohibited ground. Rather, the factor which led to different treatment was the person's willingness or ability to provide disability support services. The Ministry abandoned this contention at the hearing. There is in any event an air of unreality about the argument. That is because the Ministry accepts that the relevant burden imposed by the exclusion is principally going to bear on family members and so ultimately would at least amount to indirect discrimination on the basis of family status.

[58] However, the Ministry maintains its position in relation to the two adult children respondents. In terms of these respondents, the submission is that they have not established that they have been treated differently on a prohibited ground. There is no evidence that other disabled adult children get their first choice of carer. It is

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44 For ease of reference we will refer only to differential treatment.

45 Robert Walker "Treating Like Cases Alike and Unlike Cases Differently: Some Problems of Anti-discrimination Law"(2010) 16 Canta LR 201 at 205 is critical of the use of the term "comparator" but its use in this area is now well accepted.

accepted however that the Ministry tries to accommodate a preference as to a carer subject to any practical issues of availability or competence or the like. There is accordingly a difference in practice between the adult children respondents and others in the same position because the former's preference is not accommodated on the same basis. For the adult children respondents, the first choice of carer has been limited by the fact that if they choose family carers, the Ministry will not pay those family members.

[59] We turn then to the comparator.

The comparator

[60] The focus on an appropriate comparator arises because it is necessary to determine whether the person or group is being treated differently to another person or group in comparable circumstances.[46] There has been considerable discussion in Canada and England, both in the authorities and amongst the commentators about the usefulness of the comparator exercise and the impact of the choice of comparator on the success of claims.[47] The Supreme Court of Canada in *Withler v Canada* has recently retreated from the concept that the comparator should be the mirror of the complainant group, that is, the comparison should put the comparator in exactly the same circumstances as the claimant group save only for the discriminatory factor.[48] In the United Kingdom, the search for a comparator has been described as an arid exercise.[49] However, we do not need to resolve any of the broader questions about the use of a comparator in the present case. The High Court treated the comparator as a helpful tool and no-one takes any issue with that approach. Rather, the focus is on the extent to which it was necessary to consider the nature and purpose of the NASC scheme when choosing the comparator. That is the issue we determine.

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[46] See the discussion in *Air New Zealand v McAlister* [2009] NZSC 78, [2010] 1 NZLR 153 and see *Smith v Air New Zealand Ltd* [2011] NZCA 20, [2011] 2 NZLR 171 at [28]–[29].

[47] See, for example, Daphne Gilbert and Diana Majurey "Critical Comparisons: the Supreme Court of Canada Dooms Section 15" (2006) 24 Windsor YB Access Just 111. Gilbert and Majurey suggest that the focus on the "right" comparator means a wrong choice can doom a claimant's case. Further, the focus on a single comparator group treats the categories of discrimination as rigid and distinct which is an over-simplification.

[48] *Withler v Canada* 2011 SCC 12, [2011] 1 SCR 396.

[49] *R (Carson & Reynolds) v Secretary of State for Work and Pensions* [2005] UKHL 37, [2006] 1 AC 173 at [97] per Lord Carswell and *AL (Serbia) v Secretary of State for the Home Department* [2008] UKHL 42, [2008] 1 WLR 1434 at [28] per Lady Hale.

[61] The High Court accepted the respondents' submission that the comparator was all persons who are able and willing to provide disability support services to the Ministry. The Ministry says that this is not the correct comparator. Ms Gwyn says the High Court has erred in the choice of comparator because the Court has effectively separated out the analysis of discrimination from the nature and purpose of the NASC scheme as a whole. On the Ministry's analysis, the respondents are not comparable to those able and willing to provide disability services because the effect of the NASC process means that they are not in fact able and willing. Instead, the appropriate comparator is those persons employed to meet the gaps not filled by natural supports. The Ministry also says that the respondents' comparator could not be appropriate because the parents can choose to become part of the group discriminated against or not by their decision as to whether or not they care for their disabled children.

[62] The parties' respective approaches to the NASC scheme require some discussion. The Ministry's argument is that the policy provides for meeting the gaps in support needs. The Ministry describes these gaps as unmet needs, that is, needs that are not met by unpaid carers such as family members of the disabled person. Ms Gwyn emphasises that the respondents do not challenge the fact that benefits are targeted, or the NASC scheme generally. Rather, the focus is on something that happens at the end of that process, namely, the payment of those providing the service. This argument was put in varying ways. In its least attractive form it was advanced as a pleadings point although not ultimately put in that way. We accept that it has more force in terms of what it means for the comparator than as a pleading point.

[63] In terms of the pleadings, we interpolate here that the Commission made a plea for simplicity in these matters. The Commission emphasises that one of the objectives in the area is to establish a readily accessible complaints scheme. That is apparent in the way in which claims are initiated.[50] We acknowledge that goal[51] but,

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[50] The Human Rights Review Tribunal Regulations, 2002, provide that proceedings are commenced by filing an approved form: reg 5(1). Dr Butler for the Commission provided us with a copy of the statement of claim form which prefaces the section for the allegations with a

given the potential outcome of Part 1A cases for the government,[52] the nature of the case the government agency is facing has to be clear. In this case we think it was.

[64] The relevant part of the third amended statement of claim contained this allegation:

> This policy treats disability support services provided by such specified family members as "natural supports" but when the same services are provided by others they are treated as "disability support services" for which payment can be made.

The statement of claim went on to say that this aspect of the policy unlawfully discriminates in two ways, one of which was that otherwise available and willing carers are excluded from being paid for their provision of disability support services to a particular eligible individual by reason of their family status. In response, in its statement of defence, the Ministry accepted that it had a "long-standing overarching policy and practice" of excluding parents, spouses and other resident family members from being paid to provide disability support services to someone who qualifies for funded disability support services. Further, the Ministry admitted that it treated care provided through natural support from family members differently to disability support services. Finally, the Ministry denied that the care provided through natural support by family members was the same service as that provided as part of a disability support service.

[65] The difference between the parties is that the Ministry says that the NASC system fills unmet needs. Ms Joychild for the respondents says that is an artificial construct because natural supports are a self-defining group. The accuracy of Ms Joychild's point is apparent from the cross-examination of two of the Ministry's witnesses, Ms Davis and Ms Woods. Ms Davis accepted that natural supports was "a self-choosing definition" at least in the sense the Ministry did not tell a person who his or her natural supports were. Further, Ms Davis agreed that unmet support needs were "what the person and their carer says their unmet needs are". Ms Woods

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direction to outline "what the defendant has done or not done" that contravened the HRA, as well as when and where it happened, and who was involved.

51 See the discussion at [104], below.

52 The potential remedies include damages: HRA, s 92M.

also accepted that where a disabled person and/or the person's family "put their hand up" and said they needed disability support services those needs would be met, as long as that was reasonable. She acknowledged this did not involve any judgment on the Ministry's part as to whether the parent, for example, should be able to care for the child.

[66] In the end, we agree with the High Court that defining the comparator as someone who is employed to meet gaps in natural support (the Ministry's comparator) builds into the comparator "highly artificial qualifications that incorporate the Ministry's policy decision as to why support should not be made available".[53] In other words, it makes a value judgment that family members meet the needs of their disabled family members without payment. However, as the policy itself recognises, families do not necessarily meet the needs of their members. The Ministry will provide paid contract support when families refuse or are unable to provide it. As Ms Joychild said, family members in the position of the respondents could go out and get a job and care for someone else's child on a paid basis but when caring for their own child they cannot be paid.

[67] We agree also with the High Court that on the Ministry's approach the comparator exercise becomes circular. The "inevitable answer" is one favourable to the Ministry.[54] That is because the analysis involves the application of the Ministry philosophy which is said to be discriminatory. In other words, on the Ministry's approach, there is no work for the comparator to do. The Court put it this way:[55]

> … There is no discrimination on a prohibited ground, because the prohibited ground is neutralised by the building in of the contested assumptions which lead to the Ministry's desired result.

[68] Similarly for the adult children respondents, those who do not wish their parent or other relative to care for them can choose a carer who will be paid but if they choose their parent or other relative, the latter will not be paid.

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53 At [90].
54 At [91].
55 At [92].

[69] There is also support for the High Court's approach in the Canadian decision of *Hutchinson v B.C. (Ministry of Health*)[56] which involved a similar policy prohibiting the hiring of family members by adults with disabilities who received funding for various in-home services from the Ministry of Health and Ministry Responsible for Seniors. The British Columbia Human Rights Tribunal adopted the same comparator as that of the High Court. The Tribunal held that the appropriate comparator group to the claimant, Ms Hutchinson, comprised clients who were not restricted by the blanket policy, either because they did not wish or need to employ a family member.[57] The Tribunal's choice of the comparator was upheld on an application for judicial review of the Tribunal decision which was heard in the Supreme Court of British Columbia. Cullen J said:

> [100] [T]o use an appropriate comparator group but to make the impact of the policy on the objectives of the program or the individual in it off limits to scrutiny, renders the exercise pointless. The selection of the comparator group must be conducive to a determination of the potential impact of the impugned policy without a negation of its relevance.

[70] Finally, we need to deal with the argument made by the Ministry that the comparator adopted by the High Court cannot be correct because interposing the payment of family members on the NASC scheme means the scheme will not be able to continue in its present form. The submission can be understood by reference to the observation in *Air New Zealand v McAlister* by Elias CJ for the majority that a comparator will not be appropriate "if it effectively deprives part of the statutory scheme of its operation".[58]

[71] There was evidence about the impact on the NASC scheme if family members were paid to provide disability support services. Ms Woods made the point that the framework reflects "underlying concepts of a targeted and fiscally responsible system" that attempts to meet essential support needs that would otherwise be unmet. Her evidence was that if family members were paid that framework would change completely. That is because the Ministry would have to move away from supplementing the natural supports to funding the entirety of

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56 *Hutchinson v B.C. (Ministry of Health)* (2004) BCHRT 58; aff'd *R v Hutchinson* 2004 BCSC 1536, (2004) 261 DLR (4th) 171.

57 *Hutchinson v B.C.* above n 56 at [101].

58 At [34].

support needs, basically working on a model of funding which depended on the severity or level of disability. Deborah Hughes, who works for the Ministry in the area of intellectual disability, said that such a system would be inequitable because those who do have large amounts of natural supports would be very much advantaged over those who did not.[59]

[72] Dr Brian Easton, the expert called to give evidence on behalf of the respondents, challenged this evidence. He suggested the Ministry's concern could be dealt with by ensuring there was some assessment of what the family should reasonably provide, presumably on an unpaid basis.

[73] The Ministry's submission is answered by the earlier discussion that the notion the NASC scheme is premised on filling gaps in needs is artificial. Hence, the High Court said that the concept of "unmet needs" in this context was a "concept invented by the Ministry".[60] Further, the reality is, as Ms Joychild submits, that some of the parents have been paid within the framework of the NASC system and this has not brought the system to an end.

[74] For these reasons, we agree with the High Court that the appropriate comparator is those persons who are able and willing to provide disability support services to the Ministry.

Discriminatory treatment?

[75] As the matter has been argued, the primary issue under this heading is what is required to establish that a difference in treatment is discriminatory, subject to the ability to demonstrate that the discrimination is justified under s 5 of the Bill of Rights. We define the issue in that way because it is agreed that not all differential treatment will be discriminatory. However the parties disagree on what more is required to establish that different treatment is discriminatory.

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59 Ms Hughes is the National Service Manager for the Intellectual Disability (Compulsory Care and Rehabilitation) Act 2003.

60 High Court judgment at [91].

[76] The difference between the parties is apparent in the way in which the Ministry frames the limb of the test relating to what comprises discriminatory treatment. The Ministry says we should adopt the approach taken in Canada to the equivalent right in the Canadian Charter of Rights and Freedoms (the Charter). On the basis of this jurisprudence, the Ministry submits it is necessary to consider whether the law or policy creating the differential treatment is based on prejudice or stereotyping, perpetuates historical disadvantage, or has particularly severe negative effects. The Ministry states that prejudice means being motivated by negative attitudes towards a group or members of a group that correlates to one of the prohibited grounds. In other words, a negative attitude motivated by, for example, ethnicity. Stereotypes are generalisations that do not accord with the person or group's actual attributes, characteristics or circumstances.

[77] To illustrate the effect of the Ministry's approach, Ms Gwyn says the respondents fail to meet this requirement because there is no evidence that the respondents are members of a disadvantaged group (that is, parents of disabled children) and this is not a matter for judicial notice. Nor is there any suggestion that the Ministry was motivated by any sort of animus or ill-will and nor is there any stereotyping.

[78] By contrast, the respondents' approach is that any differential treatment that meets the first step will be prima facie discriminatory if it is a distinction which, viewed in context, gives rise to real disadvantage, that is, one which is more than trivial. The position of the Commission is that any such distinction giving rise to a disadvantage is discriminatory.

The Canadian approach

[79] It is helpful at this point to discuss the Canadian approach. The Canadian jurisprudence figures strongly in the Ministry's approach and the drafting of the New Zealand Bill of Rights draws on the Canadian Charter.[61]

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[61] By contrast, in the United Kingdom there are three sources of discrimination law. The first source is domestic, the Equality Act 2010. The second source derives from the operation of the European Union law and, finally, there is the European Convention on Human Rights. The latter is incorporated into United Kingdom law by the Human Rights Act 1998.

[80] The equivalent to s 19 of the Bill of Rights is s 15 of the Charter. Section 15(1) provides that:

> Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.

[81] Section 15(2) essentially mirrors s 19(2) of the Bill of Rights and provides that s 15(1) does not preclude any affirmative action programmes.[62] In contrast to the closed list of prohibited grounds of discrimination in the Bill of Rights, the Charter's list of grounds is open. This means that a person may establish discrimination under the Charter by demonstrating their claimed ground is analogous to the enumerated ones.

[82] Finally, s 1 of the Charter uses the same formulation as s 5 of the Bill of Rights. Charter rights are accordingly subject only to "such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society".

[83] It is helpful to discuss the developments in Canada by considering the cases of *Andrews v Law Society of British Columbia*,[63] *Law v Canada (Minister of Employment and Immigration)*,[64] *R v Kapp*,[65] and *Withler v Canada*.[66]

[84] The *Andrews* case involved a challenge to restrictions preventing permanent residents who were not Canadian citizens from admission to the bar. The provision in issue required non-citizens who were permanent residents to wait three years before they could be admitted to the bar. The definition of discrimination adopted was that set out by McIntyre J. His Honour took what has been described as the "middle course"[67] position between the view that any difference in treatment was discriminatory and the notion that consideration should be given to the nature of the

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62 Programmes in that category are defined as those programmes which have as their object "the amelioration of conditions of disadvantaged individuals or groups including those that are disadvantaged because of race, national or ethnic origin, colour, religion, sex, age or mental or physical disability".

63 *Andrews v Law Society of British Columbia* [1989] 1 SCR 143.

64 *Law v Canada (Minister of Employment and Immigration)* [1999] 1 SCR 497.

65 *R v Kapp* 2008 SCC 41, [2008] 2 SCR 483.

66 *Withler v Canada* above n 48.

67 *Miron v Trudel* [1995] 2 SCR 418, at [47].

law in issue, its reasonableness and fairness.[68] The latter was seen as trivialising the right and removing any content from the right. The former gave s 15(1) little content.

[85] In stating that not every differentiation in treatment will be discriminatory, McIntyre J made the point that legislatures may, indeed, must, make distinctions between different individuals and groups. In this context, McIntyre J cited Dickson CJ in *R v Big M Drug Mart Ltd*,[69] who referred to the need for a "generous" interpretation aimed at meeting the purpose of the right whilst not "overshoot[ing]" that purpose.

[86] The definition of discrimination adopted in *Andrews* was as follows:[70]

> … a distinction, whether intentional or not but based on grounds relating to personal characteristics of the individual or group, which has the effect of imposing burdens, obligations, or disadvantages on such individual or group not imposed upon others, or which withholds or limits access to opportunities, benefits, and advantages available to other members of society. Distinctions based on personal characteristics attributed to an individual solely on the basis of association with a group will rarely escape the charge of discrimination, while those based on an individual's merits and capacities will rarely be so classed.

[87] Applying that test, the provision restricting admission to the bar was discrimination. It placed a burden (delay) on those permanent residents who had acquired all or some of their legal training abroad.

[88] In *Law*, the Court was considering a benefits scheme for the surviving spouses of those whose deceased partners had made contributions under the Canadian Pension Plan.[71] Iacobucci J, delivering the judgment of the Court, provided what he described as a guideline for analysis of s 15(1). That analysis involved consideration of three steps, the first and second of which focused on whether there was differential treatment on a prohibited ground. The third step

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68 McLachlin JA's view in the lower court: *Andrews v Law Society of British Columbia* (1986) 27 DLR (4th) 600 at 605–607.

69 *R v Big M Drug Mart Ltd* [1985] 1 SCR 295 at 344; cited by the Supreme Court in *Andrews* at 169.

70 *Andrews* above n 63 at 174.

71 If a survivor claimant was not at least 35, disabled or with dependents at the time of the deceased's death, he or she was not entitled to the benefits until age 65.

involved considering whether the differential treatment discriminated in "a substantive sense, bringing into play the purpose of s.15(1)" in remedying harm such as "prejudice, stereotyping, and historical disadvantage".[72]

[89] Iacobucci J then set out various contextual factors relevant to establishing discrimination. These were expressed as non-exhaustive factors on which a claimant might rely to show the legislation had the effect of demeaning his or her dignity. The factors included pre-existing disadvantage, vulnerability, stereotyping or prejudice experienced by the person or group. The general theme running through this test is that a breach of s 15(1) exists if it can be shown that, after taking into account the contextual factors relevant to the claim, "the … differential treatment has the effect of demeaning [the claimant's] dignity".[73]

[90] Changes to commercial fisheries regulations to improve aboriginal fishing rights were considered in *Kapp*. McLachlin CJ and Abella J, delivering the majority judgment of the Court, traversed the development of the jurisprudence. Their Honours observed that there had been difficulties in the application of the test in *Law* because of the "abstract and subjective" nature of the concept of human dignity.[74] The *Law* approach had also had the unexpected effect of imposing an additional burden on claimants. Finally, the approach to the comparator was seen as leading to formalism.

[91] The Court took the view that the better analysis was to focus on the factors that identify effects amounting to discrimination. The four factors referred to in *Law* were seen as "based on and relate[d] to" the identification in *Andrews* of "perpetuation of disadvantage and stereotyping *as the primary indicators* of discrimination".[75] Importantly for present purposes, McLachlin CJ and Abella J said the *Law* factors should be read "as a way of focussing on the central concern of s. 15 … combatting discrimination, defined in terms of perpetuating disadvantage

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72 At [39].
73 At [60].
74 At [22].
75 At [23], emphasis added.

and stereotyping".[76] Essentially, this meant a move away from the use of human dignity as a legal test.

[92] To complete the picture, we need to refer briefly to *Withler.* This case concerned the legality of the federal death benefits scheme, under which the benefits given to surviving spouses were based on the age of the deceased. The older the deceased was, the less the surviving spouse received. In a judgment delivered by McLachlin CJ and Abella J, the Court said that there were two ways in which discrimination may be established. The first was by showing that the law in issue (in purpose or effect) "perpetuates prejudice and disadvantage" on the basis of personal characteristics within s 15(1).[77] Their Honours said that perpetuation of disadvantage "typically" occurs when a historically disadvantaged group is treated in a way that worsens the situation of the group.[78] The second way of showing discrimination was by pointing to a disadvantage based on a stereotype that "does not correspond" to the claimant's actual circumstances and characteristics.[79] McLachlin CJ and Abella J noted that usually stereotyping results in perpetuation of prejudice and disadvantage. But this did not mean that the members of a group who had not historically experienced disadvantage were precluded from bringing themselves in under this route. The issue was whether the challenged law imposed a disadvantage by stereotyping.

[93] Finally, McLachlin CJ and Abella J gave a non-exhaustive list of factors that may help in assessing a discrimination claim, namely:

> [38] … where the discriminatory effect is said to be the perpetuation of disadvantage or prejudice, evidence that goes to establishing a claimant's historical position of disadvantage or to demonstrating existing prejudice against the claimant group, as well as the nature of the interest that is affected, will be considered. Where the claim is that a law is based on stereotyped views of the claimant group, the issue will be whether there is correspondence with the claimants' actual characteristics or circumstances. Where the impugned law is part of a larger benefits scheme, as it is here, the ameliorative effect of the law on others and the multiplicity of interests it attempts to balance will also colour the discrimination analysis.

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76 At [24].
77 At [35].
78 At [35].
79 At [36].

[94] Given the emphasis on a set of non-exhaustive factors, the Canadian approach is not as rigid as the Ministry's argument suggests. It is however the case that on the Canadian approach a greater number of cases are disposed of under the s 15(1) analysis, with less recourse to s 1 than would be the case under the approach favoured by the respondents and the Commission. That practical effect is apparent in the judgment of McLachlin CJ in *Alberta v Hutterian Brethren of Wilson Colony*.[80] At issue in that case was Alberta's requirement that drivers' licences include a photograph. The photograph taken at the time the licence was issued was placed in the province's facial recognition databank. The Wilson Colony of Hutterian Brethren had a rural, communal, lifestyle but carried on a variety of commercial activities that required the ability to drive on public roads. The Colony members objected to having their photographs taken on religious grounds. The province proposed steps to lessen the effect of the universal photograph requirement but still required a photograph be taken for placement in the databank. This did not satisfy the Wilson Colony whose members challenged the constitutionality of the regulation imposing the photograph requirement on two grounds. One, that it was a breach of their right to religious freedom and two, a breach of the right to be free from discrimination on religious grounds.

[95] The focus of McLachlin CJ's judgment was on whether the regulation was a justified breach of the freedom of religion. But, on the claim based on breach of s 15, McLachlin CJ said that assuming the first step (a distinction based on an enumerated or analogous ground) was met, there was no discrimination. That was because the distinction did not arise from "any demeaning stereotype but from a neutral and rationally defensible policy choice".[81]

Summary

[96] The development of the jurisprudence on s 15 of the Charter demonstrates the accuracy of the observation of McIntyre J that equality is an "elusive concept".[82] The Supreme Court of Canada has used a variety of ways to try to define

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80 *Alberta v Hutterian Brethren of Wilson Colony* 2009 SCC 37, [2009] 2 SCR 567.
81 At [108].
82 *Andrews* above n 63 at 164.

discrimination with the current approach reflected in *Withler*. There is therefore a focus on whether the legislation or policy in issue perpetuates prejudice or disadvantage or is based on a stereotype.

[97] Some consistent themes do emerge from this jurisprudence, particularly the concern to strike the correct balance between giving sufficient content to the right so as not to trivialise it and at the same time capturing the purpose of the right. There are also concerns about the proper balance between what occurs at the s 15(1), prima facie breach, stage in comparison with the analysis at the s 1 stage concerning reasonable limits. An associated issue is the impact of the test on who has the burden of proof and at which stage.

The New Zealand approach

[98] The most extensive discussion in the New Zealand context is found in *Quilter v Attorney-General*.[83] The appellants in that case were three lesbian couples. They challenged the decision of the Registrar of Marriages to refuse to accept their notices of intended marriage under the Marriage Act 1955. The Act did not define the term "marriage" but the appellants argued that s 19 of the Bill of Rights required the Act to be interpreted so as not to discriminate against same sex couples. This Court concluded that the wording and scheme of the Marriage Act could not accommodate same sex marriages.[84] The Registrar was correct to decline to issue marriage certificates.

[99] No clear view as to the meaning of "discrimination" emerges from the judgments. There is though, some support in the judgments for the Ministry's position. In particular, Gault J drew a distinction between "permissible" and "impermissible" differentiation.[85] His Honour saw this as a "definitional" question to be considered before any issue about s 5 arose.[86] This approach suggests that

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83 *Quilter v Attorney-General* [1998] 1 NZLR 523 (CA).

84 The majority of the Court held the definition of marriage was not discriminatory under s 19. Tipping and Thomas JJ held it was discriminatory but could not be read consistently with the Bill of Rights so s 4 applied.

85 At 527.

86 At 527.

elements, at least, of "justification" may need to be considered at the definitional stage.[87] Gault J continued:[88]

> Discrimination generally is understood to involve differentiation by reference to a particular characteristic (classification) which characteristic does not justify the difference. Justification for differences frequently will be found in social policy resting on community values.

[100] Apart from these comments on the scope of s 19, Gault J expressed agreement with the views of Keith J. Keith J's approach does not assist particularly with our inquiry although it does suggest a cautious approach to the definition of discrimination.[89] He took the view s 19 did not apply because Parliament would not have used such an indirect way of making such a significant change to marriage and its definition.

[101] Tipping J said the essence of discrimination lay in differential treatment in comparable circumstances.[90] His Honour accepted not all difference was necessarily discriminatory but he considered the question of whether there was discrimination as distinct from whether it was justified. Importantly for this case, Tipping J preferred to broadly define the right to be free from discrimination law in view of the purpose of s 19 and then consider whether the limit was justified. "In short", Tipping J said:[91]

> … I would prefer to define the right … with the purpose of anti-discrimination laws in mind, and then consider whether any suggested limitation is justified or otherwise lawful rather than circumscribe the content of the right at the outset. This accords more with the spirit and purpose of the Bill of Rights. In this kind of case it is better conceptually to start with a more widely-defined right and legitimise or justify a restriction if appropriate, than to start with a more restricted right. … if restrictions which may be legitimate or justified in some circumstances are built into the right

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87 Grant Huscroft "Freedom from Discrimination" in Paul Rishworth et al *The New Zealand Bill of Rights* (Oxford University Press, Melbourne, 2003) 366 at 380 and Andrew Butler and Petra Butler *The New Zealand Bill of Rights Act: a Commentary* (LexisNexis NZ Ltd, Wellington, 2005) at [17.9.8] agree that Gault J limits the application of s 19 to distinctions that are somehow "wrongful". The authors of both texts note it is unclear what this "something more"/element of wrongfulness requires.

88 At 527.

89 Huscroft above n 87 at 377–378 and Butler and Butler above n 87 at [17.9.16] agree Keith J's judgment anticipates some additional element of justification but, again, there is no clarity about what that is.

90 At 573.

91 At 576.

> itself the risk is that they will apply in other circumstances when they are not legitimised or justified.

[102] Richardson P agreed with Tipping J's reasons as to the construction of the Marriage Act, that is, it confined marriage to a man and a woman, but also with Keith and Gault JJ that s 19 did not require equal recognition of heterosexual and same-sex marriages.

[103] Thomas J agreed that not all distinctions were discriminatory however he considered the prohibition on same-sex marriage was discriminatory. In reaching that conclusion, Thomas J said the key question was whether the distinction in issue was based on the group's personal characteristics, and had "the effect of imposing burdens, obligations, or disadvantages on that … group which are not imposed on others".[92]

[104] The Supreme Court's focus in *Air New Zealand v McAlister* was on the appropriate comparator. Tipping J in his judgment, albeit in that context, reiterated that the policy of the HRA was to take a "purposive and untechnical approach to whether there is … prima facie discrimination, while allowing the alleged discriminator to justify that prima facie discrimination…".[93] That observation reflects the approach taken by Tipping J in *Quilter*.

[105] The High Court in *Child Poverty Action Group Incorporated v Attorney-General* (*CPAG*) dealt with a claim that a component of the Working for Families package of tax credits discriminated against those on state benefits, and in particular against the children of those families.[94] In *CPAG*, the High Court expressed a concern that the approach taken by the High Court in the present case may set too low a threshold. This was because the Court appeared to suggest that any degree of disadvantage triggered s 19.

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92 At 532. Thomas J's approach has to be considered in light of the fact he did not consider s 5 could be applied to s 19 to limit the right to freedom from discrimination. That approach has been overtaken by s 20L.

93 *Air New Zealand v McAlister* above n 46 at [51].

94 *Child Poverty Action Group Inc v Attorney-General* HC Wellington CIV-2009-404-273, 25 October 2011, a panel comprising Dobson J, Ms J Grant MNZM and Ms S Ineson QSM.

[106] It seems that the threshold adopted in *CPAG* is to require disadvantage of a "real" or "more than trivial" nature, that is, the position advanced by the respondents in this case.[95] The Court summarised the approach in this way:[96]

> [82] [The] test we have settled on is not materially different from that applied by the Tribunal. However, unlike the Tribunal, we would not be inclined to reduce the requirement for a meaningful extent of disadvantageous treatment by relying on the terms of the rights protected by the ICCPR where rights are expressed as being "…without distinction of any kind…".
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> [83] The Tribunal considered that little would be gained by adding adjectives to the idea of "disadvantage". However, if the concept of disadvantage was entirely unqualified, it would raise the prospect of theoretical, innocuous or *de minimus* disadvantages qualifying as prohibited discrimination, and that indeed would risk trivialising the right protected by s 19. We note that in another part of its decision, the Tribunal observed that some "real disadvantage…needs to be established".

[107] As is apparent from the discussion in *CPAG*, the Tribunal applies a two-step test, the second step of which requires a claimant to show there has been disadvantage.

Discussion

[108] It is common ground that the meaning of "discrimination" has to be determined in light of the text and purpose of the Act in accordance with s 5 of the Interpretation Act 1999.[97] The authorities also make it clear that a broad and purposive approach to constitutional rights such as s 19 is to be adopted.[98]

[109] Applying these principles, our conclusion is that the approach contended for by the Ministry ought not to be adopted. Instead, we consider that differential treatment on a prohibited ground of a person or group in comparable circumstances will be discriminatory if, when viewed in context, it imposes a material disadvantage on the person or group differentiated against. This reflects the position advanced by

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95 At [81].

96 (Footnotes omitted).

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

98 See for example, *Mist v R* [2005] NZSC 77, [2006] 3 NZLR 145 at [45] and *Air New Zealand v McAlister* above n 46 at [35] per Elias CJ; and see *Ministry of Transport v Noort* [1992] 3 NZLR 260 at 268 (CA) and the other cases cited by Butler and Butler above n 87 at [4.2.4] footnote 10.

the respondents but substituting the term "material" for the words "real/more than trivial". There are several reasons for this approach which we identify now and then discuss more fully.

[110] First, we do not consider that the Ministry's approach is consistent with the statutory scheme and purpose. Nor do we consider the legislative history of s 19(1) supports the Ministry's approach. Second, there are differences between the New Zealand and Canadian provisions which explain why the latter approach is not necessarily appropriate for New Zealand. Finally, there are a number of policy considerations including the extent to which matters of justification should be dealt with at the s 5, reasonable limits, stage which support the position we take. We deal with each of these in turn.

Consistency with the statutory scheme and purpose

[111] The first point we note is that the Ministry's approach requires engrafting various factors on to the statutory scheme. There is nothing in the statutory scheme, the wording of s 20L of the HRA or of s 19 of the Bill of Rights to warrant such an addition. Indeed, by treating the inquiry as involving two separate steps, namely, whether there is a limit and whether that limit is justified, s 20L(2) of the HRA supports the view that matters such as the extent or otherwise of stereotyping or prejudice will be factors for the second part of that inquiry. The argument can be made that those two steps equate with the analysis required by s 19(1) and s 5. However, in drafting the HRA it was seen as necessary to differentiate between the two steps in s 20L.[99] Some effect has to be given to that.

[112] Second, differentiation is an important concept in the New Zealand scheme.[100] A number of sections in the HRA focus on differentiation in treatment. For example, s 22(2) makes it unlawful for persons in the employment context to treat any person seeking employment "differently from other persons in the same or

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99 We agree with the Ministry that it overstates the position to distinguish the Canadian approach on the basis that there is no equivalent to the two-step approach in s 20L: High Court judgment at [122].

100 See the discussion in Butler and Butler above n 87 at [17.4.1].

substantially similar circumstances" on any of the prohibited grounds.[101] We accept the Ministry's submission that Part 2 of the HRA proceeds on a different basis as it allows for reasonable accommodation but that does not detract from the general point.[102]

[113] Third, the word "discrimination" in s 19(1) is not qualified in any way. While plainly the word means more than differentiation, a comparison can be made with other rights in the Bill of Rights which include a qualification in the statement of the rights themselves. For example, s 21 of the Bill of Rights protects the right to be free from "unreasonable" search and seizure.[103] The right to freedom from discrimination is not qualified in this way.

[114] Fourth, we reject the Ministry's submission that the legislative history of s 19 supports the Ministry's approach. The Ministry emphasises the passage in the White Paper, "A Bill of Rights for New Zealand", in which it is noted that affirmative action programmes were "unlikely" to be seen as discrimination.[104] That suggests, the Ministry submits, an approach in which matters of justification, including the purpose of the legislation or policy, are considered at the s 19(1) stage. When the White Paper was considered by the Justice and Law Reform Select Committee, the Committee agreed that affirmative action measures were unlikely to be viewed as discriminatory.[105] The Committee recommended that this be made explicit by the inclusion of an express subsection to this effect, stating that such a provision would have an educative function.[106]

[115] However, the White Paper also made it clear that the word "discrimination" could be understood in two ways. The first was "an entirely neutral sense,

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101 See also HRA, ss 28(1), 29(1), 39(2) and 65.

102 *Multani v Commission scolaire Marguerite-Bourgeoys* 2006 SCC 6, [2006] 1 SCR 256.

103 Kate O'Regan, a former Judge of the Constitutional Court of South Africa, notes that rights themselves may have "their own internal limitations": "Text Matters: Some Reflections on the Forging of a New Constitutional Jurisprudence in South Africa" (2012) 75 MLR 32 at 25. Section 9(3) of the South African Constitution is an example of this as the section protects the right to be free from "unfair" state discrimination.

104 Geoffrey Palmer, "A Bill of Rights for New Zealand, a White Paper" [1984–1985] I AJHR A6 at [10.79].

105 Justice and Law Reform Committee "Interim Report of the Justice and Law Reform Committee: Inquiry into the White Paper – A Bill of Rights for New Zealand" [1987] I AJHR 8A at 51.

106 At 51.

synonymous with 'distinction'".[107] The second was treatment "in an invidious sense with the implication of something unjustified, unreasonable or irrelevant".[108] The White Paper considered that the result would be much the same on either approach because of the application of what is now s 5. Accordingly, we do not consider much can be drawn from the explicit exclusion of affirmative action programmes.

[116] Finally, the Ministry's approach is not consistent with the purpose of s 19(1). The purpose is aptly summarised by Tipping J in these terms:[109]

> … to give substance to the principle of equality under the law and the law's unwillingness to allow discrimination on any of the prohibited grounds unless the reason for the discrimination serves a higher goal than the goal which anti-discrimination laws are designed to achieve.

[117] We consider that purpose is best achieved by an approach in which matters of justification are dealt with at the s 5 stage rather than at the s 19(1) stage.

Comparison of the statutory schemes

[118] In considering whether to apply an approach based on the Canadian jurisprudence, it is relevant, first, that s 15(1) of the Charter is not on all fours with s 19(1). We emphasise that s 15(1) of the Canadian Charter is open-ended in terms of the grounds that may be covered. That would suggest a more cautious approach to when something amounting to differentiation will be discriminatory. Further, if ultimately it is concluded the legislation in issue in Canada is in breach of the right, the Court can strike down the legislation. Due to s 4 of the Bill of Rights the New Zealand position, at least in cases brought under the Bill of Rights, is different in that the courts' powers are more limited.

[119] Second, the New Zealand statutory scheme unlike the Charter, contains its own mechanisms to reduce concerns about possible floodgates arguments. That concern appears to have been influential in Canada. Professor Peter Hogg refers to

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107 At [10.78].
108 At [10.78].
109 *Quilter v Attorney-General* above n 83 at 573.

the "wasteful floods" of litigation over s 15 in Canada.[110] The concern in Canada to capture the "something more" required to establish discrimination so as not to overshoot the right appears, at least in part, to reflect a response to this problem. By contrast, in New Zealand Part 1A cases are, as Ms Joychild submits, subject to a number of filters.

[120] One of the Commission's functions is to assess complaints alleging a breach of Part 1A.[111] The Commission may then take action or decline to do so on various grounds. For example, the Commission may decline to take action if the subject matter of the complaint is trivial, the complaint is frivolous or vexatious, or where "having regard to all the circumstances of the case", it is not necessary to take further action or there is another adequate remedy.[112] The other filter is provided by s 92B of the HRA. That section contains the requirement that complainants first lodge their complaints with the Commission prior to filing proceedings. Ms Joychild points to the comparison between the total number of Part 1A complaints received (approximately 3,000) and those substantively considered by the Tribunal (five) as illustrative of the effectiveness of these filters. As we understand it, some of the complaints will have been resolved by mediation. Others will have been struck out as of little merit.

[121] Finally, both the HRA and the New Zealand jurisprudence indicate there is no requirement here to demonstrate historic disadvantage which is one of the factors referred to in the Canadian jurisprudence. Section 21(2) of the HRA provides that each of the grounds in s 21(1) (which include family status) is a prohibited ground if it relates to a person or a relative or associate of a person and it relevantly "currently exists or has in the past existed". That position was reached early on in the New Zealand jurisprudence.[113]

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110 Peter Hogg *Constitutional Law of Canada* Vol 2 (5th ed supplemented, Thomson Reuters Canada Ltd, 2007) at [36–8(b)].

111 HRA, s 76(2)(a).

112 HRA, s 80.

113 In *Northern Regional Health Authority v Human Rights Commission* [1998] 2 NZLR 218 (HC). Cartwright J rejected a need for historic disadvantage, stating that the focus cannot be, if it ever was, primarily on "remedying adverse outcomes for traditionally disadvantaged groups": at 232. Cartwright J continued at 235: "… history is littered with instances where even the rich, powerful or famous have been subjected … to … measures which have distinguished them adversely from other citizens".

[122] There are, accordingly, a number of textual matters in the New Zealand statutory scheme which point away from the Canadian test.

Policy considerations

[123] We turn then to the various policy considerations advanced by the parties.

[124] We agree with the Ministry that the definition of discrimination should not trivialise the anti-discrimination right. However, the choice of the comparator group does provide some inbuilt safeguards against ridiculous claims. For example, if an able-bodied person complained about the presence of a lift only for disabled persons, the comparator is probably another disabled person rather than the able-bodied person. In addition, the ability to take some account of context will assist in that regard. Furthermore, there is no suggestion of trivialisation here.

[125] The flip-side of the concern about trivialisation is the concern that the respondents' approach will unfairly stigmatise actions which are on a s 5 analysis lawful. We agree with Tipping J in *McAlister* that:

> [55] … the concept of prima facie discrimination has the capacity to be pejorative and the idea that it is "excused" by an exception will not necessarily assist in removing any stigma attaching to the prima facie position. That, however, is the consequence of a legislative structure which creates a general rule from which exceptions are allowed.

Stigma should attach only to findings of unlawful discrimination not intermediate findings of discrimination as part of an analysis that culminates in a finding that it is justified. As this Court said in *Smith v Air New Zealand Ltd*, the finding of a prima facie breach was just one step in the process of determining lawfulness.[114]

[126] The Ministry says that disadvantage defined by the degree of its impact (more than trivial/material) rather than by its nature is inherently arbitrary and provides no analytical tool to identify at what point a disadvantage amounts to discrimination. Ms Gwyn used the *CPAG* case as an illustration. The High Court in *CPAG* said some evaluation was necessary but treated missing out on an income

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[114] *Smith v Air New Zealand Ltd* above n 46 at [39].

increase of $23 a week as a "real" disadvantage.[115] The criticism made is that the Court did not spell out what amount would fall short of sufficient monetary disadvantage. Ms Gwyn suggests this means $1 either side of the chosen point will be the test between a breach or not. However, there is, on the respondents' approach, a need to show material disadvantage. Depending on the context, several dollars on one side of the equation may well make a real difference to the claimant group.

[127] The Ministry also says that the Canadian approach best reflects the appropriate inter-relationship between s 19(1) and s 5. Ms Gwyn draws support from *Quilter* for the proposition that more work needs to be done at the s 19 rather than at the s 5 stage. The Ministry says we should maintain that approach because it ensures that the government is not required to justify measures that do not engage the interests that the HRA and the Bill of Rights are designed to protect. However, cases decided after *Quilter* on the right to freedom of expression suggest that the right will be defined broadly and the justification for the limits will then be dealt with under s 5.[116] More importantly, *Quilter* preceded the enactment of Part 1A. For these reasons, we do not consider we are bound to apply *Quilter* on this point, assuming there is a majority on this aspect.[117]

[128] In any event, as we have indicated, we consider the statutory purpose is best met by an approach in which matters of justification are dealt with at the s 5 stage. As Dr Butler submits, it is preferable to focus on having a structured and reasoned approach and so avoid decision-making based on instinct rather than analysis.

[129] The Ministry's approach has some support in one commentator's concern about the difficulties in applying "rigid, justificatory criteria" to limits that "may not raise the concerns thought to underlie the protection of the right".[118] In Grant Huscroft's view, s 5 works best in the context of the liberty rights.[119] The answer to Professor Huscroft's concern is that there is an educative aspect in leaving more

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115 At [128].
116 As illustrated by the approach in *Brooker v Police* [2007] NZSC 30, [2007] 3 NZLR 91.
117 The better view is that there is no clear majority on the definition of discrimination.
118 Grant Huscroft "Freedom from Discrimination" above n 87 at 386.
119 Grant Huscroft "Freedom from Discrimination" above n 87 at 386.

content to the s 5 stage. That enables s 19 to have both a preventive and an ameliorative effect.

[130] The Ministry also emphasises that there is a cost in requiring governmental action to be justified. Further, as Professor Hogg points out, the cost will not fall totally on the government.[120] For example, if the government seeks to justify a measure with expert evidence, the claimant may have to call evidence in response. The question of cost can be over-stated, however. If matters of "justification" are considered at the s 19(1) stage, whoever advances those matters will incur some cost in doing so.

[131] The approach advanced by the respondents and the Commission has the advantage of simplicity. It is also the approach adopted in the field, as Dr Butler puts it. This is a reference to the various guidelines applicable to those developing governmental policy that adopt the Commission's preferred definition of discrimination.[121] That definition has not been shown to be wildly problematic in that context. Obviously those materials are providing guidance rather than establishing a legal test. The guidelines relied on by the Commission accordingly have to be seen as such. That said, the experience with the guidelines indicates the workability of that definition. We add that the definition of discrimination should be sufficiently flexible to allow for the fact that what is seen as discrimination will evolve over time. Distinctions have been drawn in the past which would now be universally regarded with some horror.

[132] The Commission in support of its position is concerned to avoid what Hart Schwartz called "justification creep" whereby matters which should be considered in the context of s 5 are shifted to the s 19 analysis.[122] We have found Hart Schwartz's analysis helpful in this context. He suggests that a definition focused on disadvantage has a number of benefits. First, it allows examination of a "neutral"

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120 Peter Hogg *Constitutional Law of Canada* above n 110 at [38.4].

121 Ministry of Justice *The Non-Discrimination Standards for Government and the Public Sector, Guidelines on how to apply the standards and who is covered* (March 2002); Ministry of Health *Changes to the Human Rights Act 1993, Guidelines for the health and disability sector* (2002); and Legislation Advisory Committee *Guidelines on Process and Content of Legislation* (May 2001).

122 Hart Schwartz "Making Sense of Section 15 of the Charter" (2011) 29 NJCL 201 at 217.

rule or law that nevertheless has an adverse impact. Second, it ensures that the "good reason" for the law is kept separate from the determination of prima facie discrimination. By contrast, he suggests a focus on the *Kapp* and *Withler* factors of prejudice and stereotyping means a focus only on the intent of the legislation or policy.[123] Measures may of course be introduced with the best of intentions but nonetheless, on analysis, comprise prima facie discrimination.

[133] Finally, we note that the approach of the respondents and the Commission is consistent with the approach taken to the equivalent provisions in the ICCPR. The General Comment from the Office of the High Commissioner for Human Rights on the non-discrimination provisions in the ICCPR records the Human Rights Committee's view that the term "discrimination" in the ICCPR:[124]

> … should be understood to imply any distinction … which is based on any ground such as race, colour, sex [etc] and which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise by all persons, on an equal footing, of all rights and freedoms.

[134] Dr Butler notes that the Human Rights Committee under the ICCPR has made the point that intent is not dispositive.[125] Further, Dr Butler says that a requirement for historical disadvantage or stereotyping is not part of the Committee's jurisprudence.

Conclusion

[135] When these matters are all taken into account, we prefer the approach advanced by the respondents and the Commission. We consider the disadvantage must be material. To that extent we take a different view from that taken in the High Court judgment which required only that there be a disadvantage. We prefer an approach closer to that adopted in *CPAG*.

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123 At 213.

124 Office of the High Commissioner for Human Rights *General Comment No 18: Non-discrimination* (10 November 1989) at [7].

125 *Simunek v Czech Republic* (1995) 5 Selected Decisions of the Human Rights Committee 157 at [11.7] and *Althammer v Austria* Human Rights Committee, Communication No 998/2001, 8 August 2003 at [10.2].

[136] The reference to "material" disadvantage is a more helpful descriptor than the "real"/"more than trivial" approach favoured by the respondents but there is no substantive difference between the two. Accordingly, we consider differential treatment will be discriminatory if, when viewed in context, it gives rise to a material disadvantage. As will be seen, the introduction of the requirement for material disadvantage makes no difference to the outcome of this case.

Application of the test to this case

[137] As the High Court said, the parent respondents have shown they want to do the work for the Ministry providers and are available to do so. They have not received paid work because of the Ministry policy. That is a material disadvantage.[126] The adult children respondents similarly have been disadvantaged because they are denied access to the range of paid service providers that other disabled persons can access.

[138] However, it is necessary to make a distinction between the various services in issue. Like the High Court, we question whether it has been shown contract board is prima facie discriminatory.[127] The material before us shows that this is a service for a disabled person living away from home. The appropriate comparator for this service is a narrower group of persons who by definition are not family members. Because of the nature of the services, there may also be questions about whether individualised funding and supported independent living are discriminatory. The High Court said these two services "may" be discriminatory.[128]

[139] We do not consider we need to reach a concluded view on these matters. The issue may, however, be of relevance to the Tribunal in considering remedies if the matter gets to that stage. The Ministry suggested that the form of the declaration was too broad. The submission was that it could have been cast to apply only to the respondent parents and been confined to home based support services. It is in our view accurate to describe the policy as discriminatory even if one or more of the

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126 At [137].
127 At [134]–[135].
128 At [137].

challenged services were not, subject of course to the s 5 analysis. There is no suggestion the policy applies differently to others in a similar position to the respondents. The High Court was accordingly right to find that the policy was prima facie discriminatory on the ground of family status.

[140] Before we turn to the second question of law relating to s 5, the justified limits, we briefly address a matter of terminology which was raised by the Ministry's submissions.

Terminology

[141] The Ministry advanced its argument, as it did in the High Court, on the basis that a "substantive, purposive" approach to s 19 was required. This approach was contrasted to one of "formal" equality. In rejecting a "purposive" approach, it seems the High Court was rejecting an approach which considered the nature and quality of the discrimination at the s 19 stage.

[142] We did not find this terminology helpful. Professor Hogg notes that a theory covering only cases of direct discrimination is often termed "formal" equality.[129] There is no suggestion, by anyone, that s 19 is so limited. To the extent, then, that it is suggested the High Court's approach is one of formal equality, that is not correct. Nor do we see the use of a purposive approach as somehow limiting the right, as the Ministry's analysis suggests. The relevant purpose here imports the usual purposive approach to interpretation requiring a consideration of the purpose of the statutory scheme in general and the right in issue in particular.

The approach to s 5

[143] Section 5 provides relevantly that the rights in the 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". It is common ground that the High Court

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[129] At [55.6(3)].

was correct to approach s 5 by considering the headings set out by Tipping J in *R v Hansen*, namely:[130]

> [104] …
>
> (a) does the limiting measure serve a purpose sufficiently important to justify [curtailing the right]?
>
> (b) (i) is the limiting measure rationally connected with its purpose?
>
> (ii) does the limiting measure impair the right … no more than is reasonably necessary for sufficient achievement of its purpose?
>
> (iii) is the limit in due proportion to the importance of the objective?

[144] The Ministry submits that there are four errors of law arising from the High Court's approach to the steps relating to minimal impairment ((b)(ii) above) and proportionality ((b)(iii) above). The first error relates to the Court's approach to minimal impairment; the second relates to the approach to the standard of proof; the third error concerns the approach to the standard of deference; and, finally, the Ministry says the Court erred in relation to proportionality. There is considerable overlap between these grounds but we deal with specific aspects arising in relation to each under separate headings.

[145] Before we do so, we note that the Ministry's submissions raised some questions about the approach to be taken to factual matters on appeal. The Ministry said that the usual limits on appellate courts revisiting factual findings in appeals on questions of law, as set out in *Waller v Hider*[131] and *Bryson v Three Foot Six Ltd*[132] are not applicable to the social or legislative facts underlying the proportionality analysis. The contrast being drawn was between adjudicative facts and those relating to legislative or social fact-finding.

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130 *R v Hansen* above n 41.
131 *Waller v Hider* [1998] 1 NZLR 412 (CA).
132 *Bryson v Three Foot Six Ltd* [2005] NZSC 34, [2005] 3 NZLR 721.

[146] As we have noted, this is an appeal on a question of law. In addition, this is a second appeal from a specialist tribunal,[133] the first appeal having been dealt with by the High Court with two lay assessors. In our view, the *Bryson* test applies. That means that provided the High Court has not overlooked any relevant matter or taken account of an irrelevant matter, "the conclusion is a matter for the fact-finding court, unless it is clearly insupportable".[134] Whether, within that framework, there is room for a greater level of scrutiny to be given to certain types of facts does not ultimately arise here so we do not need to decide that.[135] Although we deal with a number of factual matters below, we do so fairly briefly for three reasons. First, although a number of factual matters were raised by the Ministry in their submissions, few, if any, of these matters were particularly pressed in oral argument. Second, to the extent these matters were raised at the hearing, the complaint about the High Court's approach was, in essence, simply a plea for a different outcome. Finally, on some of the factual matters, such as the finding there was no social contract of the sort advanced, there were concurrent findings of fact.[136]

The objectives relied on by the Ministry

[147] It is helpful here to set out the purposes on which the Ministry relied in support of the limit on the right, as noted by the High Court, namely:[137]

> 1 To reflect and support the social contract between families and the state, under which the primary responsibility for providing care to family members rests with families;
>
> 2 To promote equality of outcomes for disabled people;
>
> 3 To encourage the independence of disabled people;
>
> 4 To avoid the risk that families will become financially reliant on the income;

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133 HRA, s 101 provides for a panel of persons to be maintained for membership of the Tribunal. The panel members are required to have expertise as set out in s 101.

134 *Bryson* above n 132 at [25] and see [26]–[28].

135 Reference to the term "legislative" fact is made by Elias CJ in *R v Hansen* in the context of distinguishing between matters on which it is appropriate to take judicial notice and those for which evidence is required: at [9].

136 Discussed at [49] above, and further at [169] below.

137 At [201].

5 To support the development of family relationships in the same way as they develop for non-disabled people;

6 To avoid professionalising or commercialising those relationships;

7 To ensure that the delivery and quality of publicly funded support services can be monitored;

8 To avoid imposing unsustainable care burdens on family members; and

9 To be fiscally sustainable.

Minimal impairment

[148] In terms of the minimal impairment aspect of the test, the submission is that the High Court should have considered whether the Ministry's decision to adopt the policy fell within a range of reasonable alternatives. The Court did not do that. Further, the Ministry argues, the evidence did show that the policy was within a range of reasonable alternatives. Nor, it is submitted, did the Court consider whether the alternative that the Court advanced itself was a reasonably effective means of meeting the objectives.

[149] For the first proposition, the Ministry emphasises the evidence of Maire Dwyer. Ms Dwyer gave evidence on behalf of the Ministry of a review she had undertaken of literature dealing with issues arising in paying family caregivers. Ms Dwyer said the literature review showed that the question of payment of family caregivers is complex, impacts on other policies and that there are arguments both ways. In her evidence, Ms Dwyer discussed studies of the position in a number of OECD countries. That showed a spectrum of positions in that in some countries there were high levels of public funding for services provided in homes whereas in others there was little or no public funding. The Ministry says this evidence shows that there are a range of different, reasonable, policy responses to the issue of payment for care.

[150] This ground overlaps with other appeal points, because the Ministry says that the Court has effectively required the Crown to bear all the burden of empirical uncertainty and so both the wrong standard of proof and an inadequate level of deference have been applied.

The applicable principles

[151] There is no dispute as to the relevant principles. This limb of the test can be addressed by considering whether the Ministry's approach fell within a range of reasonable alternatives. In *R v Hansen*, Blanchard J noted that "a choice could be made from a range of means which impaired the right as little as was reasonably necessary".[138] Tipping J dealt with minimal impairment in this way:

> [126] … The Court must be satisfied that the limit imposed … is no greater than is reasonably necessary to achieve Parliament's objective. I prefer that formulation to one which says that the limit must impair the right as little as possible. The former approach builds in appropriate latitude to Parliament; the latter would unreasonably circumscribe Parliament's discretion. In practical terms this inquiry involves the Court in considering whether Parliament might have sufficiently achieved its objective by another method involving less cost to the presumption of innocence.

[152] Finally, McGrath J put the point slightly differently when he said:

> [217] The second question concerning proportionality is whether the measure intrudes … as little as possible…. The inquiry here is into whether there was an alternative but less intrusive means of addressing the legislature's objective which would have a similar level of effectiveness. …

[153] A similar approach has been adopted in Canada. For example, in *RJR-MacDonald Inc v Canada*, McLachlin J said the requirement for minimal impairment meant that:[139]

> [160] … the law must be carefully tailored so that rights are impaired no more than necessary. The tailoring process seldom admits of perfection and the courts must accord some leeway to the legislator. If the law falls within a range of reasonable alternatives, the courts will not find it overbroad merely because they can conceive of an alternative which might better tailor objective to infringement… . On the other hand, if the government fails to explain why a significantly less intrusive and equally effective measure was not chosen, the law may fail.

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138 At [79].

139 *RJR-MacDonald Inc v Canada* [1995] 3 SCR 199.

Discussion

[154] We agree that if there is an alternative option that will have less impact it does not follow that the Ministry's option is outside the range of reasonable alternatives. The problem for the Ministry's argument is that, in essence, the High Court found that the policy imposed a limit that was greater than was reasonably necessary to achieve the objectives. In other words, the Court decided that the policy was not within a range of reasonable alternatives. In this context, the Court did not have to accept Ms Dwyer's evidence, even if unchallenged. The Court was able to take a different view having regard to all of the evidence. In any event, Ms Dwyer's evidence does not preclude the view that the Ministry's approach fell outside the range of reasonable alternatives. The complaint really amounts to a different view as to what the outcome of this part of the analysis should be.

[155] The High Court's approach to the Ministry's policy objectives five and six, above, is illustrative of the approach taken. Objective five relates to support for the development of family relationships in the same way as they develop for non-disabled people. Objective six refers to avoiding professionalising or commercialising those relationships. As to objective five, the Court said this:[140]

> [261] We are far from convinced that this is a major concern. The Tribunal did not see it as a rational or convincing link. Any such concern should be able to be met by a careful assessment of family members with whom contracts are entered, by initial training, and by ongoing monitoring. It is not a reason for a blanket discriminatory policy.

[156] On objective six, the Court's observation was as follows:

> [262] This is closely aligned to the previous concern. It seems extreme to assume that where a family member is paid, there is a professionalisation or commercialisation of family relationships. There is no reason why a family relationship cannot survive payments to a family member, as is shown by the example of the sixth respondent Mr Robinson. He was paid for a period and his relationship with [Johnnie] and Marita appears to be unaffected.
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> [263] In any event, again a proper selection process, training, and monitoring should control any problems in this area.

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[140] (Footnotes omitted).

[157] We need to deal here with one matter flowing from the reference, in the passage just cited, to Mr Robinson's experience. The Ministry is critical of the Court's reliance on the evidence of individual respondents. The Ministry says that the evidence of the individuals cannot be drawn on to support general propositions. We see no error in the Court's approach. The material the Court drew on was part of the evidence before it and was illustrative of the point being made.

[158] In assessing the range of reasonable alternatives, the High Court placed some reliance on the experience in the accident compensation (ACC) arena of payment to relatives for the provision of support services. The Tribunal noted that over half of the ACC's home support services were provided by relatives who contracted with the ACC. The High Court drew on the Tribunal's consideration of the ACC experience and said that experience was "in a general sense" inconsistent with the Ministry's claim about the scope of the social contract.[141] Further, and of more significance, the Court said the ACC practice showed it was possible to "run and monitor" a contract system under which family members care for disabled persons.[142]

[159] There was no particular focus on this issue at the hearing but the Ministry's written submissions advanced this as a factual error comprising an error of law. The Ministry says the ACC scheme is different because it is a self-funding scheme where premiums are set at a level to meet the costs of care, whatever they may be. We agree that ACC payments proceed on a different basis and that the context is not completely analogous. That is because, for example, those receiving the ACC-funded assistance do so as a result of an entitlement to the funding. However, we see no error in extrapolating from this some support for the proposition that the Ministry's concerns are overstated or, to put it another way, that the policy involves using a sledgehammer to crack a nut.

[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

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141 At [251].
142 At [252].

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.

[161] As we indicated earlier, the Ministry also says the High Court did not consider whether the alternative advanced by the Court was a reasonably effective means of meeting the objectives. The submission is that, for a number of reasons, the High Court's alternative would not be as effective. The Ministry challenges, for example, the inference that quality monitoring of caregivers is possible. The underlying concern relates to the High Court's observations that the various objectives could be met in other less intrusive ways. We have referred to the types of matters discussed in setting out the High Court's response to objectives five and six. A further illustration is provided by the High Court's observation that an audit policy could include the objective of ensuring that families do not become financially reliant on income and to "thoroughly investigate the financial circumstances of the family" before agreeing to payment.[143]

[162] The matters raised by the Ministry are factual concerns, or an assertion that the Ministry's policy is the best option, or a complaint about the outcome. There is no clear articulation of any error of law in the High Court's approach. Instead, the Ministry re-states its concerns about the fiscal effects, implications for the social contract and the impact on the NASC policy. We are satisfied that none of the

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[143] At [267].

matters raised gives rise to a question of law. The High Court was alive to the need to consider this aspect of the test and did so.

Standard of proof

[163] There is no issue that the Ministry had the onus of proving the limit came within s 5 of the Bill of Rights. As we have noted, the Ministry submits that the High Court's approach has meant the Ministry has borne all of the cost of empirical uncertainty and so the wrong standard of proof has been applied. To illustrate this point, reference is made to the Court's conclusion the Ministry did not meet its burden on the social contract point.

The relevant principles in determining the standard of proof

[164] There has been considerable debate in Canada over the impact in an evidential sense of the test used by the Supreme Court of Canada[144] to determine whether a limit is justified in cases where it is hard to provide empirical evidence to show the proportionality between the objective and the legislation or policy.

[165] The debate is encapsulated in a passage from an article by Professor Choudhry we cite below.[145] This analysis is relied on by the Ministry and was endorsed by Bastarache J in *R v Bryan*.[146] The passage reads as follows:[147]

> Public policy is often based on approximations and extrapolations from the available evidence, inferences from comparative data, and, on occasion, even educated guesses. Absent a large-scale policy experiment, this is all the evidence that is likely to be available. Justice La Forest offered an observation in [*McKinney v. University of Guelph*, [1990] 3 S.C.R. 229, at p. 304] which rings true: "[d]ecisions on such matters must inevitably be the product of a mix of conjecture, fragmentary knowledge, general experience and knowledge of the needs, aspirations and resources of society".

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144 *R v Oakes* [1986] 1 SCR 103.

145 Sujit Choudhry "So what is the Real Legacy of *Oakes?* Two decades of Proportionality Analysis under the Canadian Charter's Section 1" (2006) 34 SCLR (2d) 501.

146 *R v Bryan* 2007 SCC 12, [2007] 1 SCR 527 at [29].

147 Choudhry above n 145 at 524; cited in *Bryan* above n 146 at [29].

[166] It is clear the context will affect the type of evidence required to meet the standard of proof. The point was aptly made by McLachlin J in *RJR-MacDonald* when she said that the context of the particular law, or policy, will be obviously relevant because the s 1 inquiry is a fact-specific one. McLachlin J continued:

> [133] … Context is essential in determining legislative objective and proportionality, but it cannot be carried to the extreme of treating the challenged law as a unique socio-economic phenomenon, of which Parliament is deemed the best judge.
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> …
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> [137] Context and deference are related to a third concept in the s. 1 analysis: standard of proof. I agree with La Forest J that proof to the standard required by science is not required. Nor is proof beyond a reasonable doubt on the criminal standard required. … Discharge of the civil standard does not require scientific demonstration; the balance of probabilities may be established by the application of common sense to what is known, even though what is known may be deficient from a scientific point of view.[148]

Discussion

[167] It follows from what we have said about the part of the appeal relating to minimal impairment that we do not see any error in the High Court's approach. The appropriate standard of proof has been articulated and applied.

[168] As to the finding relating to the social contract, we agree with the reasoning of the High Court. The Court accepted that there was a community perception of a parental duty to look after their children up to a certain age "in the sense of providing them, within their means, food, shelter and clothing."[149] That concept included ensuring the children were educated and, as far as possible within the home, caring for them when ill or seeing they receive proper care. However, the Court saw it as a different matter altogether to extrapolate from that to a duty owed by parents to care for disabled children "for the duration of the life of those children, … no

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148 See also *Thomson Newspapers Co v Canada (Attorney-General)* [1998] 1 SCR 877 at 955 where, in the context of considering legislation prohibiting publication of opinion surveys during the final days of an election, Bastarache J reiterated the type of proof may vary depending on the context.

149 At [207].

matter how severe that disability".[150] We agree. There is no support for the suggestion there is a social contract to care for adult children who are disabled for the remainder of their lives on a full-time basis, subject to respite care. In any event, the existence of such a contract is inconsistent with the Ministry's policy which effectively enables a parent to decline to care for his or her disabled adult child.

[169] The Ministry is critical of the Court's observation that the presence of a social contract might not be capable of proof.[151] We do not see that as any more than recognition of the difficulties of proof in this area. The Ministry also suggests the social contract it advanced was not as extensive as portrayed by the Court. This is another way of putting the argument we have rejected that these matters have to be viewed through the lens of the Ministry's policy.

[170] Finally, we need to briefly address the Ministry's challenge to the concurrent findings made by the Tribunal and the High Court that the fiscal impact of a change to the policy was at the bottom of the estimate made by the Ministry's expert, Jean-Pierre de Raad, of $17–$593 million over the four services.[152] In part this was a response to the observation "more could have been done to provide some data as to the costs".[153]

[171] We can only endorse the High Court's view of these matters. We do not underestimate the challenges and costs to government in responding to claims of this nature. Obviously, choices have to be made and lines drawn. However, as the High Court indicated, there were ways of trying to obtain a better view of the likely take-up of a new policy. Ms Joychild in her submissions suggests three major missed opportunities, namely, non-collection of empirical data, no research into the experiences of paid family caregivers, and no attempt to review the ACC experience. This sort of information may have enabled Mr de Raad to reduce the uncertainties in his calculations and thus the very broad range of the figures he advanced. Without some refinement, that evidence did not advance matters. The Tribunal was critical of

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150 At [207].
151 At [207].
152 At [279].
153 At [278].

the absence of any firm evidence about how many disabled persons and their potential carers would come forward to take up any change in funding options.[154] It is hardly surprising then that both the Tribunal and the High Court plumped for the low end of the range.

Level of deference

[172] There is no real dispute as to the applicable principles. It is agreed that, as Tipping J put it, "there is a place for some latitude, greater or less according to the circumstances" to be given to the decision maker.[155] This concept is expressed often as a matter of deference recognising that governmental agencies must have some space to make legitimate choices. This idea is often seen as having particular resonance in areas such as social and economic policy. For example, in *R (RJM) v Work and Pensions*,[156] the House of Lords was considering a challenge to one aspect of an income support scheme for persons unable to work because of mental health problems. The premium payable was stopped once the claimant became homeless. Lord Neuberger made the point that social welfare payments policy "must inevitably be something of a blunt instrument" and that there will always be hard cases falling on the wrong side of the line.[157]

[173] It is, however, also agreed that the concept of deference does not displace the Court's responsibility under s 5 of the Bill of Rights. That responsibility has been described as a "significant review role".[158] This side of the coin was articulated eloquently by Lord Hoffman who suggested that the word "deference" with its "overtones of servility, or perhaps gracious concession" was not appropriate to describe the process.[159]

[174] We do not have to develop these concepts in the present case because the real issue here is whether, having said some deference was appropriate, the High Court did in fact defer. This is really another way of arguing that the High Court did not

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154 At [161].
155 *R v Hansen* above n 41 at [111].
156 *R (RJM) v Work and Pensions Secretary* [2008] HL 63, [2009] 1 AC 311.
157 At [54].
158 *R v Hansen* above n 41 at [108] per Tipping J.
159 *R (ProLife Alliance) v BBC* [2003] UKHL 23, [2004] 1 AC 185 at [75].

look at the matter through the lens of what was within the range of reasonable alternatives. We have dealt with that.

[175] In this and in the other arguments about the approach to s 5, the Ministry also placed reliance on inter-departmental policy work, particularly that which was undertaken after the decision of the Tribunal in *Hill v IHC* which considered an aspect of contract board.[160] The gravamen of the submission is that the concerns underlying the present claim have now been addressed by the Carers' Strategy, under which consideration is being given to a range of different ways of responding to the needs of carers.[161] It is also implicit that the policy work illustrates the difficulties in this area and so the need for deference. As to the former, the problem is that this exercise is still a work in progress. It has not led to any resolution for the respondents. As to the latter, it is the case that some stock taking was done that identified issues and various work streams were pursued. For example, a literature review was undertaken in 2003 and principles were considered and agreed by Cabinet and Cabinet committees. The work undertaken does, generally, indicate the sorts of concerns relied on by the Ministry for the policy such as the distortion of familial relationships. However, the focus has shifted towards other ways of dealing with the issues such as introducing a Carers' Allowance, albeit without any final resolution. In light of this we do not see these matters as assisting the Ministry's case.

[176] The Ministry was critical of the reference by the High Court to a draft policy paper which was subsequently withdrawn. The paper indicated that the risks associated with paying family members could be managed. This matter does not give rise to any question of law. In any event, the High Court expressed caution about placing a great deal of reliance on the paper.[162]

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160 *Hill v IHC NZ Inc* (2001) 6 HRNZ 449 (CRT).

161 The Ministry of Social Development produced a Five-year Action Plan to advance the objectives of the Carers' Strategy. Its proposals included introducing a Carers Allowance; improving respite care provision; and improving the income support provision for families with high and complex needs: Ministry of Social Development *Caring for the Carers: The New Zealand Carers' Strategy and Five-year Action Plan* (April 2008). See also Cabinet Policy Committee "The New Zealand Carers' Strategy: Minute of Decision" (2 April 2008) POL Min (08) 5/11.

162 High Court judgment at [277].

[177] There are two other specific aspects of the argument relating to deference that we need to consider.

[178] First, the Ministry is critical of the High Court's description of the policy as uncertain. Given our conclusions on the extent to which there is a lack of clarity about the exceptions to the policy, the High Court's description is apt.

[179] There is a further criticism of the High Court's observation that less deference should be afforded to a less well articulated policy. The Ministry sees this as a criticism of their process and says that is the stuff of judicial review, not a discrimination claim. We see the High Court's statement as reflecting the practical reality of the situation. As a matter of fact, it is harder to defer when the nature of the policy is unclear. We need take this matter no further.

Overall proportionality/reasonableness

[180] The Ministry accepted that if we did not accept the Ministry's submissions on the three other matters raised under this head we did not need to consider proportionality ourselves. We should, in any event, make it clear that we agree with the High Court's conclusions on this aspect of s 5.

Addendum – prescribed by law?

[181] There was some discussion at the hearing about whether the authorisation for the policy was sufficiently specific and publicly accessible to meet the requirement in s 5 of the Bill of Rights that the limit is one "prescribed by law". The issue potentially arises because there is a statute which contains a general provision,[163] although not without some specificity, as to the funding arrangements. The specifics of the policy are then found in the various service specifications and in contractual arrangements.

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[163] New Zealand Public Health and Disability Act 2000, s 10.

[182] There is little doubt that the protection under s 5 applies only if the limit on the s 19 right is "prescribed by law". In *R v Hansen* McGrath J suggested that:[164]

> To be prescribed by law, limits must be identifiable and expressed with sufficient precision in an Act of Parliament, subordinate legislation or the common law. The limits must be neither ad hoc nor arbitrary and their nature and consequences must be clear, although the consequences need not be foreseeable with absolute certainty.

[183] The need to be able to identify the limit with precision reflects the nature of the analysis required under s 5 to determine whether the limit is indeed reasonable and demonstrably justified. It would be open to argument therefore that an administrative policy not prescribed in that manner did not meet the requirement.

[184] We have decided however that it would not be appropriate for us to deal with this issue. The matter was conceded by the respondents in the High Court. We do not have the benefit of a High Court decision on the issue. Nor did we have full argument on this aspect. We have been able to decide the case in favour of the respondents without also needing to rely on an argument that the policy in this case was not in any event "prescribed by law".

Result

[185] The appeal is dismissed. We understand the parties have an agreement on costs. Accordingly, we make no order as to costs.

Solicitors:
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Office of Human Rights Proceedings, Auckland for Respondents
Human Rights Commission, Wellington

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[164] At [180].