IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

CIV-2010-404-000287

UNDER	PART 1A HUMAN RIGHTS ACT 1993
BETWEEN	MINISTRY OF HEALTH Appellant
AND	PETER ATKINSON (ON BEHALF OF THE ESTATE OF SUSAN ATKINSON & EIGHT OTHERS) Respondents

Hearing:	13 - 24 September 2010
Court:	Asher J Ms J Grant MNZM (lay member) Ms P Davies (lay member)
Counsel:	M Coleman, J Foster and R Hoare for Appellant F Joychild and D Peirse for Respondents
Judgment:	17 December 2010

JUDGMENT OF ASHER J
MS J GRANT MNZM AND MS P DAVIES

This judgment was delivered by me on Friday, 17 December 2010 at 4pm pursuant to r 11.5 of the High Court Rules.

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Table of Contents

	Para No
Introduction	[1]
The context of the claim	[10]
Home-based support services	[16]
Individualised funding	[17]
Contract board	[18]
Supported independent living	[19]
The individual claims	
The respondents	[20]
Susan, Peter and Imogen Atkinson – first and ninth respondents (Peter Atkinson on behalf of the estate of Susan Atkinson)	[25]
Gillian Bransgrove (second respondent)	[28]
Jean Burnett (third respondent) and Stuart Burnett (eighth respondent)	[29]
Laurence (Nick) Carter (fourth respondent)	[33]
Peter Humphreys (fifth respondent)	[34]
Clifford Robinson (sixth respondent)	[35]
Linda Stoneham (seventh respondent)	[36]
The statement of claim and statement of reply	[37]
The Tribunal's decision	[44]
Relevant statutory provisions and other instruments relating to discrimination	[49]
Has there been an act or omission by the Ministry inconsistent with s 19(1)?	
General approach	[61]
Background to comparator exercise	[75]
Submissions as to appropriate comparator	[83]
Conduct of comparator exercise	[85]
The comparator exercise in this case	[89]
The Ministry submission that there is no discriminatory impact	[100]
New Zealand authority	[104]
Canadian decisions	[110]
Our assessment on whether we should examine the nature of the discrimination	[116]
Conclusion on whether there is a breach of s 19	[127]
Disadvantage	[136]
Is the policy a justified limitation under s 5?	
The approach to the s 5 exercise	[140]
Deference	[143]
Tribunal's view of its inquiry function	[148]
First s 5 question – sufficiently important purpose?	[152]
Witnesses and submissions on the policy	[155]
Development of policy or practice	[159]
Exceptions	[184]
What is the policy?	[187]
Reasons for the policy	[198]
The social contract	[203]
Are the other objectives are sufficiently important	[216]
Second s 5 question – Is the limiting measure rationally connected with its purpose?	[221]

Third s 5 question – Is the restriction to the right from discrimination no more than is reasonably necessary?
The nature of the limiting measure [231]
The balancing exercise [239]
Accident Compensation benefits for disabled persons [244]
Objective two – promoting equality of outcomes [254]
Objective three – to encourage the independence of disabled persons [257]
Objective four – avoiding the risk that families will become financially reliant on the income [260]
Objective five - support for the development of family relationships in the same way as they develop for non-disabled people [261]
Objective six - to avoid professionalising or commercialising family relationships [262]
Objective seven - to ensure that the delivery and quality of services publicly funded can be monitored [264]
Objective eight – to be fiscally sustainable [268]
Conclusion on whether the right to freedom from discrimination has been impaired as little as possible [281]
Fourth s 5 question – is the limit in due proportion to the importance of the objective? [284]
Conclusion on s 5 [287]
Result [293]

Introduction

[1] This is an appeal against a decision of 8 January 2010 of the Human Rights Review Tribunal[1] when it issued a declaration that the Ministry of Health's practice and/or policy of excluding specified family members from payment for the provision of funded disability support services is inconsistent with s 19 of the New Zealand Bill of Rights Act 1990 ("NZBORA"). The declaration stated that the practice and/or policy limits the right to freedom from discrimination, both directly and indirectly, on the grounds of family status and is not, under section 5 of that Act, a justified limitation. There is to be a further hearing on remedies.

[2] The declaration was issued following a hearing in which nine plaintiffs (seven parents with adult disabled children and two adult disabled children) ("the respondents") successfully alleged unlawful discrimination under Part 1A of the Human Rights Act 1993 ("the HRA") in relation to the practice and/or policy of the Ministry of Health ("the Ministry") of excluding specified family members. The parents claimed that the practice and/or policy, which for convenience we will refer

[1] *Atkinson & Ors v Ministry of Health* [2010] NZHRRT 1.

to as "the policy", excluded them unlawfully from payment for the provision of disability services to their disabled children. The adult children claimed that they were discriminated against and that they were denied any choice of caregiver under the policy because persons giving that care were in a particular relationship with them.

[3] The Ministry accepted that there was a policy as alleged by the respondents. It was described in the Tribunal decision in the following terms:[2]

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

[4] The claim did not relate to general carers' allowances, wages or benefits. Nor was it a claim by family members for the amount of the costs of care for a person in residential care. Rather, the claim related to specific support services which the Ministry makes available for disabled persons.

[5] We are informed that the decision under appeal is the first where the Human Rights Review Tribunal ("the Tribunal") has made a declaration of inconsistency under Part 1A of the HRA in relation to Government policy or practice, as opposed to an enactment.[3]

[6] The hearing in the Tribunal took place between September and October 2008. There was three weeks of evidence and a further week of submissions. The hearing before us took two weeks dedicated entirely to the presentation of submissions by the two parties.

[7] All the respondents were parents or children of those parents. There were no respondents who were spouses or other resident family members. Thus the factual focus before the Tribunal and before us was on the policy as it applied to parents and children. We will refer to "family members" as a shorthand reference to the longer description of "parents, spouses and resident family members".

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2 At [6].

3 The first declaration was *Howard v Attorney-General* (No 3) (2008) 8 HRNZ 378 which related to an enactment.

[8] This appeal is governed by s 123 of the HRA. Section 123(5) provides that in determining any appeal under the section, the High Court has the powers conferred on the Tribunal by ss 105 and 106 of the Act. The appellant has the onus of satisfying the Court that it should differ from the decision under appeal. The principles set out in *Austin Nichols & Co Inc v Stichting Lodestar*[4] apply and this Court must make its own assessment of the issues.

[9] We accept the Ministry's submission that this case is not about what the disability support system should provide. That is a matter for Parliament. The question in this appeal is whether in the context of the disability support services framework that is provided by Government, the refusal to fund the contracting of family members to provide those services is discriminatory.

The context of the claim

[10] At the time of the hearing before the Tribunal, expenditure by the Ministry was between $2.5 and $2.8 billion a year. This figure does not include the clinical services such as hospital care provided by District Health Boards ("DHBs") or income support provided by Work and Income through benefits and allowances such as the domestic purposes benefit for carers, the invalids benefit and disability allowance. Disabled persons are eligible for invalids' benefits and this is not at issue in this proceeding.

[11] Of the Ministry's expenditure, approximately $840 million is spent on disability support services. The Ministry estimates that it provides services to approximately 30,000 disabled persons, not including those who use only the equipment modification services.

[12] It is important to note the disability support services for which the Ministry is not responsible. Generally, disability support services for persons over 65 are provided by the DHBs. Moreover, the Ministry does not provide disability support services for persons whose disability was caused by accident or injury. These

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4 *Austin Nichols & Co Inc v Stichting Lodestar* [2008] 2 NZLR 141 (SC).

services fall under the ambit of the Accident Compensation legislation. It does not provide services for persons with psychiatric, addiction or age-related disabilities as these generally are the responsibility of the DHBs. The Ministry's disability support services that are at issue are not entitlement based. Rather, they are support services targeted at specific essential care needs of disabled persons.

[13] The Ministry uses a "needs assessment and service coordination" process, referred to as "NASC", to allocate its disability support services. This process is effectively the gateway through which individuals gain access to the Ministry's funded disability support services. The Ministry contracts with 15 NASC organisations to assess needs and coordinate services. It is emphasised by the Ministry, and not contested by the respondents, that NASCs in the course of their assessments have no expectation that, families will provide care, or that they will meet all or most of the disabled persons support needs. The NASC system, which in its current form was ushered in from 1991, represented a move towards a targeted system of social assistance based on needs as determined by the Ministry. The Ministry enters into Crown funding agreements with NASCs and other service providers.

[14] Families are normally expected to provide basic family amenities like a bed, access to a shower and toilet, the ability to share in the family meal if one is being prepared (and is appropriate for the disabled person), or assistance getting to school or day activities if others are also heading out to school or work during the day. However, the Ministry has been at pains to emphasise that there is no minimum expectation of what a family may reasonably be expected to provide. While it will encourage a family to provide support, it will work to fill in any gaps. For instance, if a family is willing to help with personal care at the weekend but unable to do so during the week, the NASC process would work to fill that gap through home-based support services. However, if the family is able to assist with all of the personal care needed through the weekend then no support services would be allocated for the weekend. The Ministry has stated that the NASC would probably allocate carer support and/or respite days so that the family could have a break from caring. When a disabled person does not want their family to provide their personal care, even if the family is able and willing to do so, the NASC will allocate outside services to

provide that support. There is no set amount of dollars paid according to severity of disability and the system does not focus on compensation for levels of disability. The idea is to meet support needs on a case by case basis.

[15] There are four particular support services that are the subject of the proceeding. In relation to all four of the services at issue, it is common ground that family members cannot be paid for these services. The services are as follows.

Home-based support services

[16] This service covers two principal types of support. The first is personal care which includes assistance with personal hygiene and bathing, dressing and grooming, toileting, feeding and transfers from bed to wheelchair, and mobility around the home and elsewhere. The second type is household management designed to help the disabled person to maintain, organise and control their home environment. This includes cleaning and laundry. These services can be temporary, short term and even for just a night. About 11,000 disabled people in New Zealand use home-based support services, not including those who receive those services as a part of support for independent living.

Individualised funding

[17] This is an administrative scheme that allows the disabled person or their agent to hold and manage their own budget for the home-based support services they have been assessed as needing. It is not a service as such but a personal entitlement to funds which gives the disabled person more control over who provides services, and some flexibility as to when and how the services are provided. This is a relatively new service, which began in 2008.

Contract board

[18] Contract board is a service where a disabled person moves in with a family that is different from the disabled person's own family, and so generally applies to family environments that do not feature relatives. The service is primarily for people

with an intellectual disability. Contract board families receive a reimbursement package to meet the costs of the individual that boards with them. There are approximately 400 contract board arrangements.

Supported independent living

[19] Supported independent living provides a range of independent support services to the individual disabled person. Its aim is to support persons living independently in the community. It covers a range of supports including assisting a disabled person to find and establish appropriate living arrangements and develop new skills and providing personal contacts on an individual basis to assist and support the person. There are approximately 2,000 people receiving supported independent living services.

The individual claims

The respondents

[20] All but two of the respondents are parents. The two respondents who are not parents are Stuart Burnett and Imogen Atkinson. They are adult disabled children whose choice of caregiver was their mother. Their parents are also respondents. Another child, Jessica Raine, is not a respondent in her own right, but was a witness before the Tribunal.

[21] Of the respondents four parents have adult children with intellectual disabilities and very high disability support needs. Three have adult children with physical disabilities and very high disability support needs. All children are eligible for funded disability support.

[22] All of the parent respondents would like to be paid from one of the four services at issue, but are not able to receive payment because they are family members of the disabled person.

[23] All but one parent has agreed to training if this is deemed necessary for payment by the Ministry. Most have agreed that they should be subject to audit on the same basis as non-family providers of disability support services, should they receive payment.

[24] It is not possible to do justice to the entirety of the evidence of the respondents. However, some aspects of their evidence, which put the claims in context from the respondents' perspective and have some relevance to the s 5 assessment, are now noted.

Susan, Peter and Imogen Atkinson – first and ninth respondents (Peter Atkinson on behalf of the estate of Susan Atkinson)

[25] Imogen Atkinson is diagnosed with spastic quadriplegic hypotonic cerebral palsy and suffers from dyslexia and dyspraxia. She has very high disability needs. She is wholly reliant on wheelchair mobility and requires a personal caregiver for all the activities of daily life, including feeding, dressing, showering, toileting and menstruation. We set out part of Mrs Atkinson's description of Imogen's needs as an example of what can be involved in the care of a disabled person.

> In relation to showering Imogen will wash as much of her body as she can with her left hand, she still needs help to shower and dry afterwards. She cannot feel the heels of her feet due to nerve damage from frequent ulcers. Her feet therefore need to be monitored carefully. She requires her meals to be cut up into small pieces and she can manage a spoon or fork herself but needs to be monitored carefully because of the risk of choking on her food.
>
> Imogen cannot be left alone because she has a very strong 'startle reflex' and is at risk of losing control of her wheelchair and of falls in some situations. She requires a full-body lift for all transfers, and cannot use a hoist instead. This is because a hoist puts her body into extreme 'high tone' and she becomes very rigid. It then take a long time to loosen her up again after the hoist has been used and this requires lots of massage.
>
> The needs assessment marked B, carried out by Angela Hanson of Taikura Trust on 27 February 2004, summarises Imogen's disability support needs well on page 10. She needs '*Full assistance with all personal cares*'.

[26] Her mother Susan Atkinson, who is now deceased, provided an affidavit asserting that she had been unable to get satisfactory third party carers to look after Imogen. Detailed examples were given with problems encountered with third party

carers. She and Mr Atkinson allege that they were offered payment for work that they did but on the basis of it being "under the table". They declined to receive payments on that basis.

[27] It was Imogen Atkinson's evidence, and that of her parents, that it was always her choice to live at home. It was where she felt comfortable and safe and most free and independent. She said that her mother was her choice of caregiver.

Gillian Bransgrove (second respondent)

[28] Ms Bransgrove's daughter Jessie Raine has spina bifida with total paralysis from her armpit level down and total bladder and bowel incontinence. She also suffers from spinal curvature and other disabilities. Ms Bransgrove was originally employed to provide home-based support services for Jessie. The plan was continued for five years. In May 2005, she was advised that she could no longer be paid because of the Ministry policy. Ms Bransgrove recounted the difficulty in getting third party caregivers to adequately provide for Jessie's care. Ms Bransgrove is a registered nurse and her daughter filed an affidavit in support of her position.

Jean Burnett (third respondent) and Stuart Burnett (eighth respondent)

[29] Stuart Burnett suffers from spastic quadriplegia with athletosis and has very high disability support needs including the need to be fed. He has experienced residential care, and prefers care from his mother. He stated about residential care:

> While the resident's basic personal and hygiene needs are met – their other needs as human beings are sometimes neglected, from my observations. They have much less mental stimulation and far fewer opportunities for participation. They are mostly cared for by transient caregivers. They seem to lead restricted stifled lives with a loss of control over their own situation.

[30] He prefers his "safe and comfortable" home environment and the care of his mother to that of contracted caregivers who, he says, are generally untrained and do not understand his disabilities. He owns half of the house with his mother and wants to continue living there.

[31] Ms Burnett confirms her son's strong desire to remain living in the home. She understands his needs and is able to communicate with him despite his inability to verbalise because she can read his body language and hand signals. She believes she is the best person to care for him and to help him continue to achieve success in his life. She and Stuart Burnett want individual funding. She was critical of the Ministry's refusal to fund her and had this to say about residential homes:

> The community stops at the door. People sit there – just sit for hours in their wheelchairs – wall gazing. The community doesn't come to these people and their disabilities prevent them from participating in the community... There is no family atmosphere at most of these places that I have detected – no community involvement. Just isolation. Casual caregivers, who develop no bonds with them.

[32] While being cared for by his mother at home, Stuart Burnett earned School Certificate in six subjects and Sixth Form Certificate. He completed a course in computer science and graduated with an advanced certificate in business computing. He is an avid boccia player and has completed nationally and internationally and had roles in the local boccia association.

Laurence (Nick) Carter (fourth respondent)

[33] Mr Carter's son Sven has serious intellectual disabilities. He is autistic, epileptic and mute. Mr Carter gave evidence of unsatisfactory experiences of institutional care for his son including physical abuse.

Peter Humphreys (fifth respondent)

[34] Mr Humphreys' daughter Sian was born with Angelman syndrome and has very high disability support needs. He gave evidence of the difficulty he had in getting persons with the appropriate skills to care for his daughter, both in terms of their turnover, their physical ability to cope, and their training. Mr Humphreys was paid between 3 September 2001 and 7 April 2006 to care for her. When payments were terminated, he was notified that he could not be paid because of the Ministry's policy in relation to family members.

Clifford Robinson (sixth respondent)

[35] Mr Robinson has two intellectually disabled adult children, Johnny and Marita Robinson. He gave up his job as an engineer when the children were young and took them out of residential care. He has cared for them himself since then. He presently receives the old age pension. The Ministry refused to pay him because he was a family member. Then in September 2002 the Ministry commenced paying him $200 per week towards his childrens' care as a temporary measure. This was renewed until February 2006 when it was increased to $800 per week. He thought that this was the consequence of the work he was doing. At the hearing, it was put to him by the Ministry that the $800 per week was being paid to him by mistake and following the hearing this has been reduced back to $200 per week.

Linda Stoneham (seventh respondent)

[36] Ms Stoneham's daughter Kelly is intellectually disabled. For most of her childhood, her caregiving was organised by the Intellectually Handicapped Corporation ("IHC"). In 2000 Ms Stoneham took her daughter out of care and back home. In her evidence she observes that she no longer has any legal obligations towards her non-disabled three children but considers that her obligations to Kelly are ongoing. She asserts that she looks after virtually every aspect of her daughter's daily life but is not entitled to be paid for this work.

The statement of claim and statement of reply

[37] The relevant third amended statement of claim of 14 August 2008 alleged that the policy of excluding specified family members of people who are eligible under its policies for paid disability support services, from payment for the provision of such services by reason of their family relationship to the eligible person, contravened the provisions of the HRA.

[38] The respondents pleaded that the Ministry's policies made a distinction between persons who are available and willing providers of disability support services to particular persons who are eligible for those services by excluding a

group of such persons. The prohibited ground of discrimination is defined as follows:

> The defendant makes a distinction between these two groups of persons by excluding one group of persons but not the other because the excluded group are particular relatives of the persons eligible for paid disability support services or are particular relatives of persons wanting to be provided with paid disability support services from them.

[39] The relief sought was a declaration pursuant to s 92I(3)(a) of the HRA that the Ministry's practice and/or policy of excluding specified family members from payment was inconsistent with s 19 and various consequential orders.

[40] The Ministry admitted the policy of excluding family members from being funded to provide disability support services to an adult child, spouse or resident family member who qualified for funding disability support services. Indeed, it was clarified in submissions that the policy extended also to partners, whether they were resident or not. It was admitted that the Ministry treated care provided through natural support from family members differently to disability support services. The Ministry denied, however, that the care provided through natural support by family members was the same service as that provided as part of a disability support service.

[41] In relation to circumstances where some parents, spouses and resident family members had been paid to provide disability support services, it was stated that almost all of the arrangements including those relating to the respondents were entered into without its knowledge and in breach of its policy.

[42] The Ministry pleaded ineligibility of family members and others, but in a pleading which captures the essence of its position on discrimination it asserted:

> Funding from the defendant for paid disability support services is only available where essential disability support needs cannot be met through natural support, which includes, but is not limited to, family members;

And:

> Where family members are not natural supports, those family members can be employed to provide disability support services with funding by the defendant.

[43] The Ministry denies the respondents' pleading that they have been disadvantaged by the policy. It asserts in relation to the parent plaintiffs that they do not provide disability support services, but rather provide care through natural family support. Insofar as plaintiffs have been employed, it is stated that this was in breach of the policy. The Ministry pleads that its policy and practice are justified.

The Tribunal's decision

[44] The Tribunal, having set out the basis of the claim, summarised the case for the respondents. It considered the factual context in considerable depth. It then set out the background to the policy and the framework for the Ministry's disability support services, and summarised the services that were the subject of the proceedings and the policy in question. The Tribunal also considered the decision of *Hill v IHC NZ Inc*[5] and the policy review work which followed that and noted that following extensive Ministry review of the policy no "clear cut position" on the topic was reached.[6]

[45] Reference was made to the policy of the Accident Compensation Corporation ("ACC"), which is to allow payments to parents and spouses of those who undertake the care of injured persons at home. The Tribunal concluded the ACC example demonstrated that the payment of non-contracted family members to provide care is an integral part of the ACC strategy of caring for persons disabled by injury in the home setting.[7] It observed that it would appear from the experience of ACC that there is insufficient evidence to suggest that excluding the parents of those with non-accidental disability from equivalent payment arrangements is a supportable policy position. The Tribunal also considered the New Zealand Disability Strategy and

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5 *Hill v IHC NZ Inc* (2001) 6 HRNZ 449.
6 At [86].
7 At [101].

determined that on the surface, the policy would seem to be contrary to the objective and the policy of valuing families, whanau and people providing ongoing support.

[46] The Tribunal considered the concept of "natural support" put forward by the Ministry as a basis for distinguishing between support it would pay for and support it would not pay for. It did not regard it as natural for the support required for an infant or child to be carried on into adolescence and adulthood with the expectation that this personal care should continue. This was classified as disability support rather than natural support.[8] The Tribunal saw the test of "reasonableness" as the key to determining the level of personal care that family members could be expected to provide to a disabled family member.[9]

[47] The Tribunal considered the financial evidence and believed that it was reasonable to assume that there would be some change to Ministry expenditure as a result of the change in financial support.[10] It concluded that the likely potential cost increment if the policy was cancelled would be at the lower end of the range quoted by Ministry experts ($17 million) rather than the higher end ($593 million). It considered the Ministry's submission that there was a social contract under which caring is accepted as a natural part of family life and undertaken as a familial duty. It was unable to discern such a social contract "having the force contended for".[11]

[48] The Tribunal went on to find that the respondents' proposed comparator should be applied and that there had been a disadvantage to the plaintiffs. It held that there was prima facie discrimination. It went on to consider whether the policy was justified under s 5 of the NZBORA. It applied *R v Hansen*[12] as interpreted in *Child Poverty Action Group Inc v Attorney-General*[13] and having gone through the various steps referred to in that case found that the policy could not be justified in a free and democratic society.

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8 At [139].
9 At [146].
10 At [163].
11 At [182].
12 *R v Hansen* [2007] 3 NZLR 1.
13 *Child Poverty Action Group Inc v Attorney-General* HRRT Decision No 31/2008, 16 December 2008.

Relevant statutory provisions and other instruments relating to discrimination

[49] The structure of the HRA and the NZBORA required the claim before the Tribunal to be brought under the HRA. Section 20I, the first section in Part 1A of the HRA, provides:

> **20I Purpose of this Part**
>
> The purpose of this Part is 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 New Zealand Bill of Rights Act 1990 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 New Zealand Bill of Rights Act 1990.

[50] The purpose of the relevant part of the Act is therefore to make an act or omission inconsistent with the right to freedom from discrimination a breach of Part 1A of the Act if it is an act or omission of a relevant person or body.

[51] Section 20L of the HRA provides:

> **20L Acts or omissions in breach of this Part**
>
> (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 New Zealand Bill of Rights Act 1990.
>
> (2) For the purposes of subsection (1), an act or omission is inconsistent with section 19 of the New Zealand Bill of Rights Act 1990 if the act or omission—
>
> (a) limits the right to freedom from discrimination affirmed by that section; and
>
> (b) is not, under section 5 of the New Zealand Bill of Rights Act 1990, a justified limitation on that right.
>
> (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.

[52] It can be seen therefore that s 20L(2) sets out the process for determining whether an act or omission is inconsistent with s 19 of the NZBORA.

[53] Section 3 of the NZBORA provides:

> **3 Application**
>
> This Bill of Rights applies only to acts done—
>
> (a) By the legislative, executive, or judicial branches of the government of New Zealand; or
>
> (b) By any person or body in the performance of any public function, power, or duty conferred or imposed on that person or body by or pursuant to law.

[54] Both parties have accepted that the actions in question of the Ministry of Health are actions that fall within s 3.

[55] Section 19 of the NZBORA provides:

> **19 Freedom from discrimination**
>
> (1) Everyone has the right to freedom from discrimination on the grounds of discrimination in the Human Rights Act 1993.
>
> (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 Human Rights Act 1993 do not constitute discrimination.

[56] Thus, s 19 by virtue of the express reference to it in s 20L sets out the relevant right to freedom from discrimination and refers back to the HRA by stating that the prohibited grounds for discrimination are those in the HRA. Those are set out at s 21 of the HRA under the heading "Prohibited grounds of discrimination". The relevant prohibited ground of discrimination is at s 21(l) which provides:

> **21 Prohibited grounds of discrimination**
>
> ...
>
> (l) Family status, which means—
>
> (i) Having the responsibility for part-time care or full-time care of children or other dependants; or
>
> (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

(iv) Being a relative of a particular person:

...

[57] Finally it is necessary to set out s 5 of the NZBORA which provides:

> **5 Justified limitations**
>
> Subject to section 4 of this Bill of Rights, the rights and freedoms contained in this Bill of Rights may be subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.

[58] Section 20L(2) specifically sets out a two stage consideration of whether an act or omission is discriminatory. First, the act is discriminatory if it limits the right to freedom from discrimination affirmed by s 19. Thus, the initial step must be a consideration of s 19 alone and whether there has been such a limit imposed. The second question is whether under s 5 of NZBORA the act or omission is a demonstrably justified limitation on that right. Both parties accepted the two step approach. However, within those two steps there were variances between them. In particular they differed on the approach to whether there was discrimination, the Ministry urging an evaluative approach incorporating a consideration of whether, if an act was discriminatory under s 19 in the sense of distinguishing between groups, the act nevertheless had the necessary quality of discrimination. The respondents did not accept that such an examination of the nature of the discriminatory act was appropriate.

[59] The preamble to the HRA states:

> An Act to consolidate and amend the Race Relations Act 1971 and the Human Rights Commission Act 1977 and to provide better protection of human rights in New Zealand in general accordance with United Nations Covenants or Conventions on Human Rights.

[60] The Convention on the Rights of Persons with Disabilities adopted by the United Nations[14] and ratified by New Zealand in 2008[15] acknowledges the profound

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[14] Convention on the Rights of Persons with Disabilities adopted by the United Nations at the 61st session in 2006.

[15] United Nations Treaty Collection – located at http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-15&chapter=4&lang=en.

social disadvantages of persons with disabilities. In its preamble the Convention provides:

> (x) considering that the family is the natural and fundamental group unit of society and is entitled to protection by society and the State and 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*.
>
> (emphasis added)

Has there been an act or omission by the Ministry inconsistent with s 19(1)?

General approach

[61] There has been little case law on s 19 of the NZBORA, given its ambit; far less than in Canada which has similar provisions. Important cases include *McAlister v Air New Zealand,*[16] and *Quilter v Attorney-General.*[17]

[62] *Quilter* is the appellate decision most directly on point. It considered directly the purpose and scope of s 19. The issue in that appeal was whether same-sex couples could marry. The plaintiff couples argued that the absence of a definition of "marriage" in the Marriage Act 1955 meant that there was no bar to interpreting that Act as permitting marriage between same-sex couples and that any other meaning would not be compatible with s 19.

[63] The Court of Appeal ruled first (by a three to two majority) that a prohibition on same-sex marriage did not amount to a prima facie infringement of the appellant's right to be free from discrimination, and secondly (unanimously) given that the concept of marriage contemplated by the Marriage Act was the traditional female-male partnership it would not be right to interpret the Act as inconsistent with the right to be free from discrimination on the grounds of sexual orientation, as that would repeal the relevant sections contrary to s 4 of the NZBORA. The judges found different routes to reach this conclusion.

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16 *McAlister v Air New Zealand* [2010] 1 NZLR 153 (SC).
17 *Quilter v Attorney-General* [1998] 1 NZLR 523 (CA).

[64] Thomas J considered discrimination only on the basis of s 19, and because of what he considered to be the clear discrimination on a prohibited ground, did not consider it necessary to go on and consider s 5. That approach is inconsistent with the two stage approach dictated by s 20L(2) (enacted after *Quilter*) and we do not follow it.

[65] The issue of the meaning of discrimination in the NZBORA was directly addressed by Tipping J. He noted that it was not defined by the HRA, but that some guidance could be found in s 65 of the HRA.[18] That section refers to indirect discrimination, conduct which has the "effect of treating a person or group of persons differently on one of the prohibited grounds of discrimination". He stated:[19]

> The section does not expressly identify the person or group with whom the necessary comparison is to be made, but that must be either persons generally or another group as treatment is logically relevant to the person or group alleging discrimination.
>
> The essence of discrimination lies in *difference of treatment in comparable circumstances*. For discrimination to occur one person or group of persons must be treated differently from another person or group of persons. Of course difference of treatment will not necessarily in itself amount to discrimination; and not all discrimination will be unlawful. ...
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> (emphasis added)

[66] Gault J observed on the concept of discrimination:[20]

> [T]o differentiate is not necessarily to discriminate. It is necessary to distinguish between permissible differentiation and impermissible differentiation amounting to discrimination. This is a definitional question and is to be considered before any issue of the possible application of s 5 of the Bill of Rights Act arises.

[67] Keith J in discussing the concept of discrimination observed:[21]

> Rather the purpose is only to suggest that applications of the principle of equality or of the prohibition on discrimination will often have to take careful account of the context and competing principles and interests.

[68] Richardson P did not discuss the concept of discrimination, and Thomas J did so in the context of assessing the difference in treatment against the "fundamental

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18 At p 573.
19 Ibid.
20 At p 527.
21 At p 557.

purpose of preventing the infringement of essential human dignity."[22] The different decisions have been subjected to different commentary in the two leading texts,[23] and some criticism. The absence of any agreement among the members of the Court on the concept of discrimination is noted by the authors.[24]

[69] The various approaches in *Quilter* were not considered in depth in the later Supreme Court decision of *McAlister* as that decision involved the application of s 104 of the Employment Relations Act 2000, which contained a detailed definition of discrimination. There is, therefore, limited appellate guidance on the correct approach to s 19, and none of the various approaches in *Quilter* can be treated as conclusive.

[70] Before the Tribunal, and in this appeal, it was admitted by the Ministry that there was a policy of excluding specified family members from payment for the provision of services by reason of their family relationship. We do not understand the Ministry to deny that there was a point of distinction in the treatment of family members such as the respondents, as against other persons seeking to be paid.

[71] The thrust of the Ministry's submission was that the policy was not discriminatory, despite this distinction. The Ministry submitted that the reason for the difference in treatment must be shown to be a prohibited ground of discrimination. It asserted that the reason for the difference in treatment was not based on a prohibited ground, but for other reasons arising from its legitimate policies. The Ministry submitted that it is not discriminatory to treat those who are in different situations differently.

[72] The essence of the Ministry's submission was that the respondents were in a different situation to other persons who were under the Ministry policy eligible for payment. The Ministry argued that if a comparison was made to a correctly identified comparable group, it could be seen that there was no discrimination. In carrying out that comparison exercise, it submitted that it was necessary to consider

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22 *Egan v Canada* (1995) 124 DLR (4th) 609 at 676; *Quilter* at p 533.

23 *New Zealand Bill of Rights*, *Rishworth* pp 377–380; *Butler & Butler, The New Zealand Bill of Rights Act: A commentary* 17.9.22–17.9.23.

24 *Rishworth* at 380; *Butler* at para 17.9.

the four different types of relevant services provided by the Ministry. Ms Coleman, for the Ministry, also submitted that s 19 was aimed at substantive and not formal equality. She submitted that even if there were distinctions made on prohibited grounds, only those distinctions that have the effect of perpetuating group disadvantage or imposing disadvantage on the basis of prejudice or stereotyping are prohibited under s 19. They must not only be based on a prohibited ground, but have a discriminatory impact. Ms Coleman submitted that the distinction made in relation to the policy was not discriminatory. It was a considered and developed policy that had arisen from expert views, and which was in fact designed to assist disabled people and their families.

[73] She submitted that a finding that there was a discriminatory policy would have widespread implications for DHBs which provide support to approximately twice as many disabled persons as the Ministry, and operate the same policy. She submitted that any other finding would challenge much of New Zealand's system of income support and social assistance, together with other areas such as home schooling, all of which are predicated on treating those within a family unit as a unit.

[74] Ms Joychild for the plaintiffs took a very different position on the appropriate comparator group to that of Ms Coleman. Also, as we understood her submission, she did not accept that an evaluative approach to the type of distinguishing actions was necessary, and supported an approach that required any such exercise to be in the second s 5 step.

Background to comparator exercise

[75] The Ministry admits in its pleading in reply that its policy excludes parents and family members from providing the services in question. The prohibited ground of discrimination on the basis of family status includes discrimination on the grounds of being a relative of a particular person (s 21(l)(iv)). A parent is a relative. It follows that the Ministry policy turns on whether a person is a relative of a particular person. So there is at least a distinction made by the Ministry in its policy between family and non-family members.

[76] However, that factor alone does not prove discrimination and take us to the s 5 exercise of whether the discrimination is justified. If all citizens were treated exactly the same we would live in a very different society from today. It is a fundamental tenet of our social structure that people of different ages, abilities and circumstances are treated differently. Distinctions must be made. It would be unjust to persons with certain disadvantages if that were not so. By treating different people differently we remedy inbuilt inequalities.

[77] For instance, the domestic purposes benefit, available only to solo parents, involves a distinction based on family status, being the relationship of the parent to a child and the absence of a type of relationship with another person. Other benefits vary depending on whether a person lives alone or with a partner, or are determined by age. If governance is to be effective and provide for the inevitable differences that arise between people, distinctions must be made. We are satisfied that it is necessary for there to be something more than a difference in treatment for a policy to be discriminatory.

[78] All reference to equality was deliberately omitted from the NZBORA despite the fact that the Canadian Charter of Rights and Freedoms ("the Canadian Charter") at s 15(1) expressly records the right of every individual to be equal before and under the law before stating the right to the protection and benefit of the law without discrimination. Nevertheless, it is inescapable that the concept of discrimination involves the concept of equality, in the sense of not treating like people equally. For there to be discrimination not only must one person or group of persons be treated differently from another person or group of persons, but there must be similarities between those differently treated groups that make the different treatment unfair. The key is that the decision must involve the making of a distinction in the treatment of otherwise like persons on the prohibited ground. The difference in treatment can only be discriminatory if that difference in treatment is of persons in comparable circumstances. As Tipping J observed,[25] the essence of discrimination lies in the difference of treatment to persons in "comparable circumstances".

[79] The question then arises, how is the Court in a principled way to determine whether there is discrimination when there is a difference in treatment? The

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[25] At p 573.

Canadian Courts have developed an approach of carrying out a comparison exercise with others in a like group to the plaintiffs, to test the discriminatory aspect of the policy or provision. That was the approach adopted by the Supreme Court in *McAlister*[26] in the context of s 104(1)(a) of the Employment Relations Act where a comparison exercise is required. Discrimination is defined in some detail in that section, and there is discrimination if by reason of a prohibited ground of discrimination an employer refuses or omits to offer or afford an employee the same terms of employment as are made available for other employees of the "same or substantially similar qualifications, experience, or skills employed in the same or substantially similar circumstances ...". This section was based on s 15 of the Human Rights Commission Act 1977, the predecessor to the present HRA. Elias CJ made this comment about the application of comparators in that context:

> [34] In cases of alleged discrimination the choice of a comparator is often critical. We were referred to a number of decisions from senior courts in different jurisdictions which were said to provide guidance. For the most part, we did not find them especially helpful. Unless there are distinct similarities in the statutory scheme and in the type of discrimination which is being alleged, what is said in another jurisdiction about how to arrive at a comparator is of limited assistance.

[80] The Court of Appeal in *Quilter* did not explicitly carry out a comparator exercise. However, as Tipping J observed,[27] the essence of discrimination lies in difference of treatment to persons in comparable circumstances. We are satisfied that the use of a comparator is a helpful exercise in assessing whether there has been discrimination. In doing so we note the observation of L'Heureux-Dubé J in *Miron v Trudel:*[28]

> Comparison is only a fruitful exercise when carried out between groups that possess sufficient analogous qualities to make the exercise of the comparison meaningful in respect of the distinction being examined. Thus, in the present case, the only appropriate comparison is between married persons and unmarried persons who are in a relationship analogous to marriage (i.e. of some degree of publicly acknowledged permanence and interdependence). In other words, with all things being roughly equal, the latter group is denied the equal benefit of the law for essentially one reason: the fact they are not married.

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26 At [34].
27 At p 573.
28 *Miron v Trudel* [1995] 2 SCR 418 at [8].

[81] As this statement indicates, the carrying out of a comparator exercise can assist because it requires the Court to focus on the exact reason for the difference in treatment. In this regard, it is the process of arriving at the comparator as much as the comparator itself which is the fruitful exercise. As Priestley J stated in *Claymore Management Ltd v Anderson*:[29]

> There must be a consideration of the effect on a comparative person or group so that the differential of discrimination on a prohibited ground (if there is one) can be assessed. ...

[82] In the absence of any obligation in the relevant sections to carry out a comparison of the type that there is in s 104(1)(a) of the Employment Relations Act, we are reluctant to treat any comparator exercise as the conclusive test for discrimination. Rather, the carrying out of a comparator exercise will assist in the process of determining whether the difference in treatment is in fact discriminatory. We will treat it as a tool only in that regard, and go on to assess whether there has been discrimination after having carried out that comparator exercise. We have no doubt that in assessing whether there has been discrimination, a central consideration is the effect on a comparable group. Thus, like the Tribunal, we commence our analysis by carrying out a comparison exercise.

Submissions as to appropriate comparator

[83] The Ministry submitted to the Tribunal that the appropriate comparator was "someone who does not provide natural support and who has not personally indicated they are unwilling or unable to perform the work". In written submissions in this Court it was submitted that in respect of home-based services, the proper comparator is someone who is employed to meet gaps in support that families and other natural supports are not able to meet, and is able to give families a break from care. In the course of oral submissions there was an emphasis on the comparator group being those who could meet the "unmet needs" of the disabled person.

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[29] *Claymore Management Ltd v Anderson* [2003] 2 NZLR 537 (HC) at [147].

[84] The respondents argued that the appropriate comparator was "everyone else able and willing to provide disability support services to the same particular persons". The Tribunal accepted the respondent's submission.

Conduct of the comparator exercise

[85] The Chief Justice noted in *McAlister*[30] that under s 19 the Court was left to formulate its own concept of discrimination. This is in contrast to s 104 of the Employment Relations Act which applied in *McAlister*, which prohibited discrimination on a prohibited group if, by reason of that ground the employer failed or refused to make work available as was available to other employees of "the same or substantially similar qualifications, experience, or skills ...". It was stated in *McAlister*[31] by the Elias CJ for the majority:

> The task of a court is to select the comparator which best fits the statutory scheme in relation to the particular ground of discrimination which is in issue, taking full account of all facets of the scheme, including particularly any defences made available to the person against whom discrimination is alleged. A comparator which is appropriate in one setting may produce a completely inapt result in another. It will certainly do so do so if it effectively deprives part of the statutory scheme of its operation.

[86] It was further observed by Tipping J:[32]

> [T]he most natural and appropriate comparator is likely to be a person in exactly the same circumstances as the complainant but without the feature which is said to have been the prohibited ground.

[87] It is necessary in arriving at the appropriate comparator to consider all facets of the scheme. The characteristics put into the comparator must be those relevant to the grant or refusal, apart from the personal characteristic that is said to be the ground of wrongful discrimination.[33]

[88] It is helpful to consider the approach of the House of Lords in *Lewisham London Borough Council v Malcolm.*[34] Mr Malcolm had a mental health disability

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30 At [33].
31 At [34].
32 At [52].
33 *Hodge v Canada* [2004] 3 SCR 357 at [1].
34 *Lewisham London Borough Council v Malcolm* [2008] 1 AC 1399 (HL).

and sublet his tenancy in breach of the Council rules during a psychotic episode. He was ejected from his flat as a consequence. He claimed discrimination on the basis of his disability. Lord Neuberger of Abbotsbury observed that there can be two linguistically defensible constructions of comparator groups in such a situation. The question was whether the disabled person's treatment should be compared simply with that of a non-disabled tenant who had done the same thing, or whether the comparison should be with a tenant who had not sublet at all. Lord Neuberger chose the narrower construction. While there was a powerful argument in favour of the wider construction given the need to apply an anti-discrimination statute in the manner that was benevolent towards intended beneficiaries, the wider construction would have produced a "highly invasive" result.[35] As was commented in relation to that case in *McAlister:*[36]

> What His Lordship was doing was balancing the pros and cons of the adoption of the alternative comparators in the context of the whole of the statutory scheme, including such checks and balances as did, or would in the future, exist. That, it seems to us, is the right approach, best calculated to lead to a nuanced result.

The comparator exercise in this case

[89] We consider the two proposed comparators taking into account the whole of the context in which the disability support services operate.

[90] Ms Coleman in her submissions emphasised the fact that at the heart of the Ministry's comparator was the fact those who would be eligible for payment were only available to meet the needs of the disabled person that were not met by the family and immediate support group, and that family members and the immediate support group were not available to meet unmet needs. This involves importing into the comparator all the assumptions on which the Ministry is arguing its case. At the heart of this proposed comparator is the Ministry's assumption of the applicability of what it calls the social contract[37] which means that the disabled person's needs are "met" by family members thus making them ineligible. Defining the comparator as someone who is employed to meet gaps in support that families and other natural

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35 At [142].
36 Elias CJ at [35].
37 See [203]–[215].

supports are not able to meet, and is able to give families a break from the care, is to build into the comparator highly artificial qualifications that incorporate the Ministry's policy decision as to why support should not be made available. It makes the value judgment that family members meet the needs of their disabled family members without payment.

[91] However, as the Ministry policy itself recognises, families do not necessarily meet the needs of family members. They will provide paid contract support when families refuse or are unable to provide it. When family members do provide support, as in the case of the parent plaintiffs in this case, they sometimes meet all the needs of the disabled person. Indeed, as a matter of fact at least two of the parent plaintiffs receive no benefits or payments at all, all the disabled child's needs being met by family members. They just want to be paid for doing so. The concept of "unmet needs" is in this context a concept invented by the Ministry. The comparator exercise becomes circular and the inevitable answer is favourable to the Ministry. Such an analysis involves the application of the very Ministry philosophy that it is said is discriminatory. We therefore do not accept that the Ministry's comparator should be applied.

[92] Further, the Ministry's comparator gives rise to the objection articulated in *McAlister*[38] that there is no work for the comparator to do. Once the Ministry's assumptions are built in, the answer is inevitable. 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.

[93] The issue arose in the course of presentation of the submissions, whether the appropriate comparator is persons who make themselves available for services to disabled people purely for payment, and not because of love and affection for a particular person. This is the aspect of the Ministry comparator definition, when it submitted that the right comparator is persons "who do not provide natural support". They are persons who make themselves available for services to disabled people for monetary reward, and not for the "natural" reason of love and affection for the disabled person.

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[38] Elias CJ at [37].

[94] On reflection we consider such a distinction far too simplistic. It involves accepting the Ministry's premise that family support of disabled persons is "natural" and presumably that non-family support is not. We do not accept the premise that there is a clear distinction between "natural" and "non-natural" support for the reasons we set out later when we reject the Ministry's submission that there is a social contract under which it is accepted that family members provide support for disabled persons through the lifetime of those persons.[39] Moreover, while all the respondents in this proceeding are driven by love and affection, it is perfectly conceivable that a relative who wishes to care for a disabled person could be a perfectly adequate carer, but not in fact be driven by love and affection. It is equally possible that a paid worker who is not related may be driven by love and affection. The Ministry's comparator requires acceptance of the proposition that parents will support their disabled children whatever their age as a truism. We do not think it right to do so. As a matter of fact it is clear that there is no attempt by the Ministry to judge whether the offer of support by a family member is actually driven by "natural" reasons of love and affection, or by a wish for payment. The application of the policy is automatic, if the applicant is a family member, and the member's actual motivation is irrelevant.

[95] The respondents propose that the group against which the discriminatory impact must be assessed is everyone else able and willing to provide disability support services to the particular persons. The question is, is this the group of "like" people to whom those that are subject to the policy can be fairly compared? The persons to be compared are those in our community who will do work for the Ministry to support disabled persons, for payment.

[96] The evidence showed that the range of background skills, ages, and general circumstances of the respondents is considerable. With some exceptions they have no formal training in caring for disabled persons. But nor do carers generally when they start in this sort of work for the Ministry. It is clear that the doing of the work of a paid carer under any of the four services cannot be described as "professional" in the sense that it requires a course or degree as a training pre-requisite. The work is open to persons from all backgrounds, and training is not required. There would

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[39] See [203]–[215].

seem to be no reason why any competent person of any age or background, of good character properly motivated, could not successfully apply.

[97] We are driven to the conclusion that this comparator proposed by the plaintiffs and accepted by the Tribunal is right. It is all persons who are able and willing to provide disability support services to the Ministry. There should be no qualifications to "able and willing".

[98] This conclusion is consistent with the Canadian British Columbia Human Rights Tribunal decision of *Hutchinson v BC (Ministry of Health)*[40] upheld in the Supreme Court of British Columbia[41] where the claim was by a severely disabled 27 year old whose 71 year old father was providing all her care, and had done so since the daughter was 13. The defendant's assistance programme had a policy in similar terms to that of the Ministry, which did not allow payments to family members like her father. The Tribunal held that the comparator group to Ms Hutchinson was the defendant's clients who were not restricted by the blanket prohibition either because they did not wish to or need to hire a family member.[42] The claim that there was discrimination on the basis of family status was upheld on appeal to the State Supreme Court.

[99] Thus, the comparator exercise indicates that the policy is discriminatory.

The Ministry submission that there is no discriminatory impact

[100] The Ministry submitted that whatever the result of a comparator exercise there is no discrimination as the policy does not have the effect of perpetuating a group advantage or imposing a disadvantage on the basis of prejudicial stereotyping. It points to the fact that the policy is not based on actual prejudiced views in the traditional sense such as racial or religious discrimination, or on any historical pattern of discrimination. It was submitted that the context in which the claim is made is important, and that the nature of the prohibited ground in question must be factored into the analysis.

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40 *Hutchinson v BC (Ministry of Health)* (2004) BCHRT 58.
41 *R v Hutchinson* (2004) 261 DLR (4th) 171; [2004] BCSC 1536.
42 *Hutchinson v BC (Ministry of Health)* (2004) BCHRT 58 at [101].

[101] The Ministry referred to *Alberta (Ministry of Human Resources and Employment) v Weller*[43] which concerned a claim that the ineligibility of a social assistance recipient for a shelter allowance to assist with payment of rent because he was living with his mother, was discrimination on the grounds of family status. The Alberta Court of Appeal stated that the issue was not whether the recipients of social welfare had suffered historic disadvantage, but whether Mr Weller had been subjected to discrimination because of family status. It was stated:[44]

> Family status has, on occasion, been the cause of pre-existing disadvantage, for example, illegitimate children and single mothers historically have suffered discrimination in some instances. However, in this case the family status is merely that of being in a parent and child relationship. Being in a parent and child relationship in general has not been subject of historic patterns of discrimination or prejudicial views.

[102] The Ministry submitted that distinctions on the ground of family status do not have the same association with historical disadvantage and marginalisation as other more traditional grounds of discrimination. A number of Canadian cases were relied on to support the submission that parents of disabled adult children are not a disadvantaged group.[45] It emphasised that the Ministry's policy did not involve discrimination born of prejudice, and family status was not a traditional basis for illegitimate distinctions.

[103] If the Ministry is right, then it is necessary to adopt what is sometimes called a "purposive" approach to whether there is discrimination. Can the policy or enactment be regarded as not discriminatory, even if there is prima facie a distinction made between like persons, and on a prohibited ground? There is support for this approach in some New Zealand dicta and commentaries, and as submitted by the Ministry, in Canadian decisions.

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43 *Alberta (Ministry of Human Resources and Employment) v Weller* 273 DLR 4th ed 116, leave to appeal to Supreme Court denied: *Director of the Human Rights and Citizenship Commission v Alberta (Ministry of Human Resources and Employment)* 432 AR 395 SCC.

44 At [53].

45 *Newfoundland v Newfoundland* (1995) 127 DLR (4th) 694 at [65]; *Hutchinson v British Columbia* (2004) BCHRT 58 at [142]; *Wynberg v Ontario* (2006) 269 DLR (4th) 435; and *Harris v Canada* [2009] 4 FCR 330 at [62].

New Zealand authority

[104] Thomas J in *Quilter* quoted the Canadian decision of *Egan v Canada* in asserting that[46] "[t]he existence of discrimination or otherwise can only be determined or otherwise by 'assessing the prejudicial effect of the distinction against...the fundamental purposes of *preventing the infringement of essential human dignity*'." (emphasis added) He was of the view that the exclusion of persons from marriage on the grounds of sexual orientation was very clearly discriminatory. He appeared to have no doubt that the provision infringed essential human dignity. He decided that a s 5 exercise could make no difference.[47] So he did not turn to s 5 in considering the policy issues relating to difference in treatment.

[105] Gault J in *Quilter*, although he took the opposite view to that of Thomas J as to whether there was discrimination, concluding that there was not, also appeared to consider that a purposive approach to whether there was discrimination should be adopted. He observed:[48]

> It is necessary to distinguish between permissible differentiation and impermissible differentiation amounting to discrimination. This is a definitional question and is to be considered before any issue of the possible application of s 5 of the Bill of Rights Act arises. 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.*
>
> (emphasis added)

[106] However, the other three Judges did not, at least expressly, adopt such an approach in the sense of considering whether the difference in treatment was an affront to human dignity, or justified on community values. Tipping J in particular centred his analysis on whether there was a difference in treatment between persons who were in comparable circumstances,[49] and did not seek to analyse further issues of human dignity and community values. Also Richardson P and Keith J, while requiring more than a difference in treatment, focussed rather on difference of

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46 At p 532.
47 At p 540.
48 At p 527.
49 At p 573.

treatment in comparable circumstances. There was no purposive assessment of the nature of the discrimination.

[107] We do not regard the majority in *Quilter,* therefore, as requiring us to embark on a subjective analysis of the nature of the discrimination, to see if there is a breach of s 19. We do not overlook Tipping J's observation that the spirit of the Bill of Rights and Human Rights Act "suggests a broad and purposive approach to these problems".[50] However, this remark was made in the context of him referring to the impact of the conduct, rather than the nature of it. He observed later that he would prefer to define the right to be free from discrimination 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".[51] He observed:[52]

> ...if restrictions which may be legitimate or justified in some circumstances are built into the right itself the risk is that they will apply in other circumstances when they are not legitimised or justified.

[108] In Rishworth, *The New Zealand Bill of Rights*[53] the Canadian approach is noted to be likely to result in a denial of the protection of a right in a variety of circumstances in which complaints might reasonably be made. However, the learned authors do advocate a purposive interpretation of the right. In Butler & Butler, *The New Zealand Bill of Rights Act: A Commentary*[54] a purposive approach is not supported. Reservations are expressed about an evaluative consideration of the nature of the discrimination. Rather, a two-step approach at the s 19 stage is advocated. The first stage is whether the impugned act treats two comparable groups differently by reason of one of the prohibited grounds of discrimination, and the second is whether the different treatment involves disadvantage to the disfavoured group.[55]

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50 At p 575.
51 At p 576.
52 Ibid.
53 Rishworth et al *The New Zealand Bill of Rights* at p 385.
54 At 17.9.22–17.9.23.
55 *Butler & Butler, The New Zealand Bill of Rights Act: A commentary* at 17.9.40.

[109] The Tribunal in its decision did not engage in a purposive analysis of whether there was discrimination. Nor did the Tribunal in *Child Poverty Action Group v Attorney-General Human Rights Review Tribunal*.[56]

Canadian decisions

[110] The Canadian cases relied on by the Ministry showed the Courts carrying out a substantive analysis of whether there has indeed been discrimination. Four volumes containing 29 Canadian decisions were produced, and there were also some further decisions that were relied on. In addition, a number of United Kingdom decisions were referred to.

[111] The respondents urged caution in considering the Canadian decisions. They pointed out that there are significant differences in the wording of the relevant provisions. The equivalent of s 19 of the NZBORA is s 15 of the Canadian Charter . Section 15 provides:

> Every individual is equal before the law 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.

[112] As noted,[57] there is no equality guarantee in s 19 of the NZBORA as there is in s 15 of the Canadian Charter. The wording of s 1 of the Canadian Charter is much closer to the wording of the equivalent NZBORA provision at s 5. Section 1 provides:

> The *Canadian Charter of Rights and Freedoms* guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.

[113] In the Canadian Charter there is a non-exclusive list of prohibited grounds of discrimination set out within the section itself. In s 19 of the NZBORA there is no such statement. Rather, the HRA states that acts or omissions inconsistent with s 19 are in breach of Part 1A of that Act. Section 21 then goes on to set out the

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56 *Child Poverty Action Group v Attorney-General Human Rights Review Tribunal* HRRT 16 December 2008 at [116]–[142].

57 At [78].

prohibited grounds of discrimination in considerable detail in a definitive list. Family status is expressly referred to under s 21(1)(l) as a prohibited ground of discrimination, whereas there is no explicit reference to family status in s 15(1) of the Canadian Charter. However, the Canadian courts have treated family status as a prohibited ground of discrimination by analogy.

[114] We recognise the differences in the New Zealand and Canadian provisions. In particular, we note that in New Zealand there is no equality guarantee such as the equality guarantee in s 15 of the Canadian Charter. That omission was a deliberate action by the drafters of the bill.[58]

[115] In support of its submission that discrimination under s 19 required the perpetuation of group disadvantage or opposing disadvantage on the basis of prejudice or stereotyping, the Ministry relied on the leading decision of *Andrews v Law Society of British Columbia*[59] and other Canadian cases.[60] In *Law v Canada* the Supreme Court held unanimously that the protection of the right to freedom from discrimination was limited to distinctions that undermine human dignity. Iacobucci J explained human dignity as follows:[61]

> Human dignity means that an individual or group feels self-respect and self-worth. It is concerned with physical and psychological integrity and empowerment. Human dignity is harmed by unfair treatment premised upon personal traits or circumstances which do not relate to individual needs, capacities, or merits. It is enhanced by laws which are sensitive to the needs, capacities and merits of different individuals, taking into account the context underlying their differences. Human dignity is harmed when individuals and groups are marginalised, ignored, or devalued, and is enhanced when laws recognise the full place of all individuals and groups within Canadian society.

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58 *A Bill of Rights for New Zealand: A White Paper*, para 10.82.

59 *Andrews v Law Society of British Columbia* [1989] 1 SCR 143 at 174.

60 *Miron v Trudel* [1995] 2 SCR 418; *Battlefords and District Co-operative v Gibbs* [1996] 3 SCR 566 at [37]; *Nova Scotia (Workers' Compensation Board) v Martin* [2003] 2 SCR 504 at [1], [5], [86] and [88]; *Gosselin v Quebec* [2002] 4 SCR 429 at [22]; *Law v Canada (Minister of Employment and Immigration)* [1999] 1 SCR 497.

61 *Law v Canada* [1999] 1 SCR 497 at [53].

Our assessment on whether we should examine the nature of the discrimination

[116] In the Bill of Rights for New Zealand White Paper it was observed:[62]

> The word 'discrimination' in this article [s 19] can be understood in two senses – an entirely neutral sense synonyms with 'distinction', or an invidious sense with the implication of something unjustified, unreasonable or irrelevant. However, the result would seem to be much the same on either interpretation because of the application of Article 3 [now s 5] which authorises reasonable limitations prescribed by law on the rights guaranteed by the Bill.

[117] This statement indicates that the debate on whether the discriminatory conduct is "invidious" is best left to the s 5 "justified limitations" second stage. While not every distinction is discriminatory and there must be different treatment of like persons or groups, the evaluation of the type of different treatment of like persons is to be left to the s 5 exercise.

[118] It is also observed in para 10.82 in explaining why the phrase "equal protection of the law" was not included in s 19, that such a phrase was open and uncertain and would:

> ...enable the courts to enter into many areas which would be seen in New Zealand as ones of substantive policy. A multitude of statutes treat different categories of persons in different ways. The equal protection provision in the United States has been interpreted as giving the courts power to decide whether there is a 'rational basis' for any particular legislative classification or distinction...

[119] We take this to indicate a lack of enthusiasm for judicial attempts to analyse discriminatory acts at the s 19 stage in terms of social policy.

[120] Section 20L(2) of the HRA gives an indication. It specifies a two-stage approach, first a consideration of discrimination and secondly, if there is discrimination, a consideration of whether s 5 applies. Section 21 of the HRA sets out "prohibited grounds of discrimination" without qualification. No evaluative process is indicated. It goes against its unqualified language for there to be an enquiry into the quality and nature of the prohibited discrimination at the s 19 stage, after a prima facie breach is established.

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62 *A Bill of Rights for New Zealand: A White Paper* [1985] 1 AJHR A6, para 10.78.

[121] In *McAlister* the Supreme Court, having found following a comparator exercise that there was discrimination, did not go further and consider policy aspects but rather referred the case back to the Employment Court for a consideration of whether Air New Zealand had a defence under s 30 of the Employment Relations Act. There was no evaluation of the qualities of the discriminatory conduct, that being left for the further hearing, akin to a s 5 hearing.

[122] Essentially the Ministry is asking the Court to make a value judgment about the type of discrimination at the s 19 stage, and that judgment will have a sudden death outcome as to the success or failure of the appeal. We do not think it appropriate for such a judgment to be made at the first s 19 stage. In the Canadian decisions relied on there is no distinct two-stage approach mandated by the legislation, as there is in s 20L(2).

[123] While the concept of discrimination on the basis of family status set out as a prohibited ground of discrimination in s 21 is not one of the historical types of prejudice or stereotyping normally associated with discrimination, Parliament has included it. The Ministry submission, if accepted, would require us to add to the prohibited grounds of discrimination at s 21(1)(l) the qualification that prejudice or stereotyping or some other pejorative feature must be present. We do not consider that such the addition of such qualifications to the prohibited ground of discrimination was the intention of Parliament. We consider it best to assess arguments of this type in the s 5 exercise, if it arises.

[124] We do not agree that family status should be treated as a ground of discrimination that is less discriminatory than more traditional types of discrimination. We should not distinguish between a type of discrimination once it is proved in s 21 of the HRA. Family status is a prohibited ground of discrimination with the other more traditional grounds. We are not prepared to discount our consideration of whether the policy is discriminatory, because it is not one of those traditional grounds.

[125] We have not been able to find any support for the Ministry's submission that we should analyse the nature of the discrimination at this point other than the dicta in

the decisions of Gault and Thomas JJ in *Quilter*. Tipping J in *Quilter* referred to the s 19 exercise as involving "prima facie discrimination on a prohibited ground" and did not go further.[63]

[126] We note that the International Covenant on Civil and Political Rights to which New Zealand is a signatory[64] includes an obligation to ensure protection of rights for individuals "without distinction of any kind ...". This would not seem to allow a value judgment analysis of whether the kind of discrimination is prohibited, when discrimination on a prohibited ground is found. We accept that some consideration of the qualitative nature of the discrimination is unavoidable but we consider that best done in the flexible balancing context of s 5, rather than in the rigid discriminatory or non-discriminatory context of s 19. Thus we will not attempt an assessment of whether the different treatment is justified in terms of social policy and social values at this point.

Conclusion on whether there is a breach of s 19

[127] We have found that the essence of discrimination lies in the treating of persons in comparable circumstances differently. We have found that those who are in comparable circumstances to the parent plaintiffs are persons who are able and willing to provide any of the four disability support services. The respondent parents fall within this group. They are persons who are able and willing to provide support services to disabled persons. But they are not treated in the same way as those other persons. When they apply to be contracted to provide home support services, they find they are not eligible to be contracted. The reason for this is a prohibited ground of discrimination. It is their family relationship with the disabled persons. More specifically, it is because they are the parents of disabled children. If they did not have this family relationship, they would be eligible. We have no doubt that they would have shown themselves to be able and willing to do the work.

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63 At p 576.

64 United Nations Treaty Collection – located at http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-4&chapter=4&lang=en

[128] Thus, a distinction is made between like persons (all those willing to provide support services for disabled persons) on the grounds of a prohibited ground of discrimination, namely family status. It is an undeniable fact that if a parent and a non-relative both sought to be paid for work for a disabled person, and if they were both equal in all respects including qualifications, experience and skills, the applicant who was related would fail by reason of the relationship, and for that reason only.

[129] We are satisfied, therefore, that the respondents are persons who in relation to those in comparable circumstances, are distinguished in their treatment by the Ministry because of a prohibited ground of discrimination. Like persons are not treated alike because of a prohibited ground. We are satisfied, therefore, that there is discrimination. The right of the respondent parents to freedom from discrimination under s 19 is, subject to s 5 considerations, being infringed.

[130] The two respondent children are also discriminated against. They have a more limited range of choice of carer than others in comparable circumstances. This is because of their family status, namely their relationship with their parents. That relationship precludes them from being able to consider the full range of those able and willing to provide services to them. While other claimants who are not so related can be supported by the full range of the group of those able and willing to provide services, these respondents cannot because they have a particular family status; they are related to persons in that group. And by virtue of that relationship they cannot receive benefits from paid workers, who appear to be best able to provide that support. They are left in the position where that support, if it is made available, is unpaid.

[131] This finding of discrimination is consistent with the conclusion reached in the Canadian decision of *R v Hutchinson*.[65] Although there were differences in the type of proceeding in that case, which only impacted on the particular plaintiffs, the finding there that the policy had an adverse impact on the dignity and personal autonomy of the plaintiff is significant. It is the only Canadian decision we are aware of which considered the discriminatory impact of a no family members policy

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[65] *R v Hutchinson* [2004] BCSC 1536.

in relation to disability benefits. The approach and conclusion are consistent with those of the Tribunal in this case.

[132] The discrimination applies most clearly in the administration of home-based support services and the service of supported independent living. These are services where the Ministry, through service organisations, contracts persons to provide support for disabled persons. When the policy is applied to the administration of these services, it is discriminatory.

[133] It does not appear to apply directly to the individualised funding service (if it can be called a service) as this gives a disabled person a personal entitlement to funds, and there is no Ministry contract with the provider. So the policy may not bite. However, if it is a term of the funding that no family members can be employed, that is a discriminatory policy, and disadvantages the family member.

[134] As to contract board, we are by no means certain that there is a discriminatory aspect to the administration of this service. This is because it is a service specifically designed to provide support to a disabled person who is living with a family that is different from that person's own family. If that is so, the appropriate comparator is not all persons able and willing to provide the service. It is to a more narrow group of persons who by definition are not family members.

[135] We did not have detailed submissions on this issue, and do not have sufficient information to express a specific conclusion in relation to contract board. We have considered seeking further submissions, but in the end do not do so. The Ministry does not deny that it has the policy and that it applies it to at least the two services of home-based support services and supported independent living. At this stage, all that is at issue is the general declaration as to whether the policy is discriminatory. While that context of its application is relevant to this, the fact that its application by the Ministry is uncontested means that a more precise service by service analysis is not at this stage necessary.

Disadvantage

[136] Discrimination under s 19 does not arise in a vacuum. It is necessary if discrimination is to be established for disadvantage to be shown by the claimant. There must be a discriminatory impact.[66]

[137] This point can be dealt with shortly. There is no doubt that each of the respondents has been disadvantaged. The parent respondents have shown that they wish to do the work for the Ministry providers and are available to do so, but that they have not received paid work because of the discriminatory policy. The service which they are clearly cut out from is home-based support services, although they may have also been discriminated against in relation to individualised funding and supported independent living. The disabled children respondents have not been able to enjoy access to the unlimited range of contractors that other disabled persons not seeking help from family members can access.

[138] The fact that the disadvantage evinces itself for the parents in monetary terms rather than in relation to available services, is not a basis for holding it not to be discriminatory. The disadvantage can be a monetary disadvantage.

[139] So the policy limits the right to freedom from discrimination affirmed by s 19. We now turn to s 5, the second step prescribed by s 20L(2).

Is the policy a justified limitation under s 5?

The approach to the s 5 exercise

[140] In *R v Hansen* the Supreme Court considered whether the reverse onus of proof in s 6(6) of the Misuse of Drugs Act 1975, which was accepted to be a limit on the guaranteed right under s 25(c) of the NZBORA, could be justified under s 5. Four of the Judges adopted the test used by the Supreme Court of Canada in

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[66] *Quilter v Attorney-General* [1998] 1 NZLR 523 at 575 (CA).

R v Oakes[67] and summarised in the later Canadian decision of *R v Chaulk*[68] as follows:

> 1. The objective of the impugned provision must be of sufficient importance to warrant overriding a constitutionally protected right or freedom; it must relate to concerns which are pressing and substantial in a free and democratic society before it can be characterized as sufficiently important.
>
> 2. Assuming that a sufficiently important objective has been established, the means chosen to achieve the objective must pass a proportionality test; that is to say they must:
>
>   (a) be 'rationally connected' to the objective and not be arbitrary, unfair or based on irrational considerations;
>
>   (b) impair the right or freedom in question as 'little as possible'; and
>
>   (c) be such that their effects on the limitation of rights and freedoms are proportional to the objective."

[141] Tipping J in *R v Hansen* considered the *R v Oakes* approach and provided this adapted summary:[69]

> This approach can be said to raise the following issues:
>
> (a) does the limiting measure serve a purpose sufficiently important to justify curtailment of the right or freedom?
>
> (b) (i) is the limiting measure rationally connected with its purpose?
>
> (ii) does the limiting measure impair the right or freedom 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?

[142] We propose to consider the limiting measure under these four overlapping headings. In doing so we must be careful not to lose the overall sense of the meaning of s 5 and the broad balancing process that is required.

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67 *R v Oakes* [1986] 1 SCR 103 (Blanchard, Tipping, McGrath and Anderson JJ).
68 *R v Chaulk* [1990] 3 SCR 1303 at 1135–1136.
69 *R v Hansen* at [104].

Deference

[143] The Tribunal and this Court may not substitute their own judgment for that of the legislature or Government decision-maker. The Tribunal and this Court should not decide what is an ideal system and then check whether the Ministry's system meets that expectation. Rather, the Tribunal must limit its focus to reviewing whether the policy constitutes a breach of s 19 and, when it comes to the balancing of considerations under s 5, whether the decision-makers' action or policy can be justified.

[144] If discrimination has been established under s 19, then in considering whether the policy can be justified under s 5 the onus is unambiguously placed on the policy-maker by that section to demonstrate why it is justified. However, the Tribunal and this Court must show restraint and caution when considering matters of policy. Courts must allow the decisionmaker some degree of discretion and judgment.[70] Lord Hope in *R v Director of Public Prosecutions; ex parte Kebilene*[71] noted that in considering human rights, questions of balance between competing interests and issues of proportionality arise. He observed:[72]

> In this area difficult choices may have to be made by the executive or the legislature between the rights of the individual and the needs of society. In some circumstances it will be appropriate for the Courts to recognise that there is an area of judgment within which the judiciary will defer, on democratic grounds, to a considered opinion of the elected body or person whose act or decision is said to be incompatible with the convention.

[145] Tipping J observed in *Hansen*:[73]

> The Court's function is not immutably to substitute its own view for that of the legislature. ...
>
> In this way and to this extent the Court's function is one of review. It is not one of directly substituting the Court's own judgment. ...

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70 *R v Hansen* at [117].

71 *R v Director of Public Prosecutions; ex parte Kebilene* [2000] 2 AC 326 at 380–381.

72 Quoted with approval in *R (SB) v Governors of Denbigh High School* [2007] 1 AC 100 at [63] per Lord Hoffman; and *R v Hansen* at [118] per Tipping J.

73 At [123]–[124].

[146] It must be acknowledged that experienced administrators will have an understanding of and feel for issues that the Court can never achieve. As was commented in *JTI-MacDonald Corp*:[74]

> Again, a certain measure of deference may be appropriate, where the problem Parliament is tackling is a complex social problem. There may be many ways to approach a particular problem and no certainty to which will be the most effective. It may in the calm of the courtroom be possible to imagine a solution that impairs the right of the State less than the solution Parliament has adopted. But one must also ask whether the alternative would be as reasonably effective when weighed against the means chosen by Parliament.

[147] We accept the Ministry's submission that even though this policy is not the direct act of elected representatives, when it comes to a policy for administering the payment of limited Government resources to those in need, there should be deference to policy decisions that are made by an expert department. The more considered and refined the decision, the greater the deference. In carrying out this exercise the Court must consider who has been the decision-maker, and the nature of the decision. It is relevant to consider the extent to which the policy has been endorsed by Parliament or Cabinet, and whether the policy is in fact the result of a firm and final result of a considered process. If it is not the clearly articulated consequence of a considered process, but is rather a practice where the Government body itself has not reached a firm policy conclusion, or indeed has doubts about the practice itself, there may be less deference. A Court considering s 5 issues may in such circumstances scrutinise the policy objectives more closely.

Tribunal's view of its inquiry function

[148] We note that the Tribunal observed that it:[75]

> ...does not have the function of judicial review as that is the function of the Court, but it does have the function of inquiry".
>
> We therefore think there is no further purpose in deliberating this point, but, to affirm the inquisitorial role of this Tribunal.

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74 *Canada (Attorney General) v JTI-MacDonald Corp* [2007] 2 SCR 610 at [43].
75 At [185]–[186].

[149] We agree of course that the Tribunal does not have the function of judicial review, in the sense that that phrase is used in the Judicature Amendment Act 1972. However, in these paragraphs the Tribunal may be indicating that it has an inquisitorial role beyond that dictated in ss 105 and 106 of the HRA. Those sections provide that:

> **105 Substantial merits**
>
> (1) The Tribunal must act according to the substantial merits of the case, without regard to technicalities.
>
> (2) In exercising its powers and functions, the Tribunal must act—
>
> (a) in accordance with the principles of natural justice; and
>
> (b) in a manner that is fair and reasonable; and
>
> (c) according to equity and good conscience.
>
> **106 Evidence in proceedings before Tribunal**
>
> (1) The Tribunal may—
>
> (a) call for evidence and information from the parties or any other person:
>
> (b) request or require the parties or any other person to attend the proceedings to give evidence:
>
> (c) fully examine any witness:
>
> (d) receive as evidence any statement, document, information, or matter that may, in its opinion, assist to deal effectively with the matter before it, whether or not it would be admissible in a court of law.
>
> (2) The Tribunal may take evidence on oath, and for that purpose any member or officer of the Tribunal may administer an oath.
>
> (3) The Tribunal may permit a person appearing as a witness before it to give evidence by tendering a written statement and, if the Tribunal thinks fit, verifying it by oath.
>
> (4) Subject to subsections (1) to (3) of this section, the [Evidence Act 2006] shall apply to the Tribunal in the same manner as if the Tribunal were a Court within the meaning of that Act.

[150] The Tribunal can have an inquiring role in the sense of being able to call for evidence and information. However, these sections do not give it an inquisitorial role in the sense that European Courts have an inquisitorial jurisdiction. It has the

traditional role of a Tribunal in the adversarial system to act as arbiter of the respective cases. Its function under s 94(a) is to consider and adjudicate upon proceedings. The Tribunal's inquisitorial powers are limited to matters of evidence, and not the matters at issue. Its adjudication must be by a structured process, and the guidelines in *Oakes* and *Hansen* provide a helpful structure. It must determine the respective arguments following that structure. As McGrath J commented in *Brooker v Police*:[76]

> In undertaking the balancing of the conflicting interests it must be kept firmly in mind that the purpose of the Court is to reach its decision through structured reasoning rather than an impressionistic process.
>
> (footnotes omitted)

[151] So if the Tribunal was indicating that it had the general obligation to investigate the nature of the policy without deference to the Ministry's position, we disagree. However, it is by no means clear that the Tribunal did mean this, as it then went on, quite properly, to follow the *Hansen* guidelines in its s 5 analysis.

First s 5 question – sufficiently important purpose?

[152] Whatever the nature of the provision in question, it is necessary to identify the government objective. Only then can the importance and significance of that objective be assessed under s 5. As was observed by the Court of Appeal in *Moonen v Film and Literature Board of Review*:[77]

> The way in which the objective is statutorily achieved must be in reasonable proportion to *the importance of the objective*. A sledgehammer should not be used to crack a nut. The means used *must also have a rational relationship with the objective*, and in achieving the objective there must be as little interference as possible with the right or freedom affected. Furthermore, the limitation involved must be justifiable *in the light of the objective*. Of necessity value judgments will be involved. ... Ultimately, whether the limitation in issue can or cannot be demonstrably justified in a free and democratic society is a matter of judgment which the Court is obliged to make on behalf of the society which it serves and *after considering all the issues which may have a bearing on the individual case, whether they be social, legal, moral, economic, administrative, ethical or otherwise.*

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76 *Brooker v Police* [2007] 3 NZLR 91 at [132].

77 *Moonen v Film and Literature Board of Review* [2000] 2 NZLR 9 at [18] per Tipping J.

(emphasis added)

[153] We do not at this first step under s 5 try and assess the ultimate strength of the arguments in support of the policy when assessed against those against it. That consideration is best left for the balancing carried out in steps 3 and 4. In this first step our aim is to identify the objective and its importance in general terms. As was observed in *Wynberg*:[78]

> [T]he Court must consider the objectives that underlie the age limit in conjunction with the overall aims of the program. The Supreme Court of Canada has referred to this as the "tension of the objectives", recognising that all legislation, particularly social benefits legislation, is the product of competing objectives that lead to certain compromises.

[154] In order to identify the objective of the policy it is necessary to consider its history, and how it is justified from the Ministry's perspective. It is also necessary to consider its articulation. The definition and bounds of the policy must be understood.[79] We will assess in this part of our judgment the "social contract", the upholding of which the Ministry puts forward as a key objective.

Witnesses and submissions on the policy

[155] Before the Tribunal there was a great deal of detailed evidence about the reason for the policy and the difficulties in employing close family members. The principle deponents were a Miss Rhondda King, the quality manager with the Health and Disability National Services Directorate, Ministry of Health; Dr Peter Watson who is an expert in health while being involved in development issues of young persons with disabilities; Mike Gourley who was at the time of the hearing before the Tribunal the National President of the National Association of People with Disabilities and who gave evidence from the perspective of someone with an impairment; and Suzanne Win who has extensive experience in the disability services both as a nurse and in a managerial and directoratial capacity. There was also the more general evidence of Patricia Davis, the National Operations Manager for the Disability Services Group and the Health and Disability National Services

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78 *Wynberg v Ontario* (2006) 269 DLR (4th) 435 at [165].
79 *R v Hansen* at [203].

Directorate and the evidence of Deborah Hughes, the National Service Manager for the Intellectual Disability (Compulsory Care and Rehabilitation) Act 2003.

[156] It is necessary to record first the position of counsel on two matters. First, as observed at the outset, the Ministry's policy is described as a "practice and/or policy" in the third amended statement of claim. The practice and/or policy has been criticised by the respondents as inconsistent, being neither a clear or final policy either of Cabinet of the Ministry. It is suggested that it is really no more than a practice that is indicative of a work in progress. The Ministry, on the other hand, submitted that there is a clear and definite policy.

[157] The second point is that despite its submission as to the nature of the inconsistent and inconclusive nature of the policy, for the purposes of s 5 of NZBORA and for the purposes of this hearing, the respondents accept that the policy and/or practices are "prescribed by law". They accept therefore that this requirement is met for s 5 purposes.

[158] Nevertheless, it submitted that the uncertain nature of the policy and the lack of explicit endorsement are relevant when it comes to the s 5 balancing process.

Development of policy or practice

[159] We turn to the history of the development of the policy. There was little before the Tribunal setting out how disability support services were provided prior to 1991. Disabled persons tended to live in institutions, and such policies as existed had developed in an ad hoc manner.

[160] On 30 July 1991, the Minister of Social Welfare with the Ministers of Health, Education and Housing in a joint statement indicated that Government policy would move away from a universal system of social assistance to a targeted system based on the genuine needs of the family unit, with better control of Government

expenditure as one of its objectives.[80] In the following year, 1992, the Government released its blueprint for the provision of disability support services.[81]

[161] Until 1994 there were Area Health Boards, and then Regional Health Authorities who in the 1990s developed purchasing policies and service specifications. In August 1994, the Government released a further paper.[82] This set out the still current disability support services framework in the context of new deal and welfare reforms. The "new deal" set in place the NASC system.

[162] The NASCs and other providers of services are contracted to the Ministry to provide needs assessment and coordination services. There are approximately 800 service providers which contract with the Ministry to provide services which the Ministry funds. However, in the end the exact history of the formulation of the policy is not clear from the documents that are before us and was not clear to the Tribunal.[83]

[163] By the year 2000 the structures currently in use involving NASCs had been set up for some time. By then there was undoubtedly a usual practice at least whereby family members were not contracted for home-based support services. This was reflected in the practices recorded in the important Tribunal decision of *Hill v IHC NZ Inc.*[84]

[164] In *Hill v IHC* the plaintiffs were the parents of a 27 year old man who had been under the care of IHC for many years in a contract board situation, with paid caregivers. When the previous caregiver moved from the area the parents applied for the position of caregiver but were informed that they could not be employed in such a role because of an implicit policy which required the IHC to ensure that those contracted to provide residential contract board services were not family members of the persons requiring care. The Tribunal noted that there was no express or written policy which existed requiring those contracted to not be family members of the

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80 *Social Assistance: Welfare that Works, a statement of government policy on social assistance*, 30 July 1991.

81 *Support for independence for people with disabilities – a new deal* – 1992.

82 *The New Zealand framework for service delivery,* August 1994.

83 Tribunal decision at [59].

84 *Hill v IHC NZ Inc* (2001) 6 HRNZ 449. Note the earlier decision of *Hill v IHC NZ* (2000) 6 HRNZ 213.

person requiring care.[85] The existence of a policy was not accepted.[86] The Tribunal went on to hold that there was in fact such a policy. It held that the decision to refuse to consider the parents' application to be the residential contract board provider was not an action saved by the provisions of s 151(2) of the HRA, and that the decision not to consider the plaintiffs as caregivers breached s 22(1)(a) of the HRA (prohibiting discrimination in employment matters).

[165] It had been accepted by IHC that if the Tribunal found that the decision to turn down the plaintiffs' application was not an action saved by the provisions of s 151(2) of the HRA, that the policy not to consider the plaintiffs as caregivers breached s 22(1)(a) of the Act.[87] The Tribunal made a declaration that the IHC had committed a breach of s 22(1)(a) of the HRA relating to discrimination in employment matters. Because of the concession, the decision did not involve any analysis of whether there was a breach of s 19, and as it transpired there was no consideration of s 5.

[166] Ultimately there was no appeal from the *Hill* decision (the Ministry was not a party). A draft report from the Ministry of Health to the Ministry of Social Development was prepared, which considered the policy issues arising out of the *Hill* decision. That paper which appears to have been released in late 2001 or early 2002 noted that payment to family caregivers had a number of difficult and complex ethical and practical problems,[88] and noted a number of public policy reasons to make family members eligible for payment as caregivers on a different basis from other caregivers.[89] Further policy work was recommended.

[167] In 2002 an inter-department working group on the payment of caregivers was set up. It was to develop policy advice for the Minister and amongst other things to consider the policy implications of the options of allowing or not allowing or restricting or limiting the employment of family members as paid caregivers of

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85 At [5].
86 At [7].
87 At [9].
88 Ministry of Health Draft Report 2001/2002 at [29], [32]–[60].
89 At [61]–[82].

persons with disabilities. It was to develop "clear and consistent criteria" to apply across Government agencies.

[168] On 6 November 2002 there was a second draft report from the Ministry of Health which discussed various options for providing some financial recognition for family members including broader eligibility for the domestic purposes benefit for carers, an allowance for carers, broader eligibility for carer support and a wage for caring.[90]

[169] On 11 June 2003 the Office of the Minister for Disability Issues provided a report to the Social Development Committee seeking approval to lead a review of the policy of payments in support for family members following the *Hill* decision.[91]

[170] On 11 June 2003 there was a Minute of the Cabinet Social Development Committee on the "review of payments to in support of family caregivers of people with disabilities". In the proposed terms of reference that were annexed there was reference to options to be orientated around:[92]

- The status quo
- Enabling the contractual employment of family members as the caregivers of people who have disabilities and who would otherwise be receiving care from other paid caregivers.
- Government payment of an entitlement (wage or benefit) to family caregivers of people with disabilities, to recognise and support them in the tasks of caring for which they ordinarily have responsibility.
- Government provision of additional assistance – monetary and/or in-kind – to support family caregivers of people with disabilities.

There was to be consultation and a further report.

[171] Through February there were further papers and Minutes indicating that the work was in progress. On 15 March 2004 there was a Cabinet Minute headed

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90 Second draft report 6 November 2002.
91 Report to Social Development Committee, 11 June 2003.
92 Appendix 1, para B.

"payments to in support of family caregivers of disabled people: Government objectives and position statement".[93] One of the principles set out was:[94]

> Family caregiving of disabled people will not be expected to replace the work of professional support services.

[172] Under related objectives it was stated that Government policies for family caregiving will work to ensure that family caregivers of disabled people are protected from economic hardship or insecurity arising from their caregiving role and to ensure that due attention was given to the full range of costs likely to be faced by them.[95]

[173] There were further papers circulated through 2004 from the Ministry of Health. The options speculated upon included the option of employing family members as caregivers. Treasury officials in a paper of 22 July 2004 are recorded as indicating that funding parameters for such a development would be in the "fives of millions" category. An email from Treasury to the Ministry of Social Development of 3 November 2004 referred to the need to gather empirical information so that cost options could be developed.

[174] On 11 August 2005 there was a draft paper of the Office of the Minister of Disability Issues issued. It referred to *Hill v IHC*[96] and s 5 of the NZBORA.[97] It considered whether the policy was a justified limit on the right to be free from discrimination, identified key aspects which justified the policy and recommended its continuation. The paper discussed the disadvantages and advantages of providing for payment and the lack of empirical information about family caregiving of disabled people.[98] There was a further inter-departmental working group meeting on 15 November 2005 and feedback was received.

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93 Cabinet Minute 15 March 2004.
94 At 2.4.
95 At 2.5 and 2.7.
96 At [1].
97 At [4] and [25].
98 At [34].

[175] There was a revised draft paper on 22 December 2005. That paper[99] suggested that the policy was not necessary for the preservation of the "social contract" and that family members could be contracted to care for disabled people within their families and that could be seen as supporting the social contract. A paper of 30 January 2006 records[100] that "the Department of Prime Minister and Cabinet considers the paper's human rights orientation is too strong" and that it needed to be focused around an analysis of what it means to have family members as caregivers and how that could or should be managed.

[176] In a letter of 26 April 2006,[101] the Minister for Disability Issues advised the Chair of the Cabinet Social Development Committee that the work on the review of payments in support of family caregivers of disabled people had been in effect superseded by the present case. It was proposed that the review process involve only one further report back.

[177] At this point, therefore, in April 2006 there would seem to have been no conclusions reached by the Minister for Disability Issues or Cabinet as a result of the review following *Hill*. The emphasis in the material leans more towards reviewing the practice of not paying family members, and determination of the issue is clearly a work in progress. In the meantime, on the evidence available the general practice of the Ministry was not to pay family members.

[178] However, that was not the end of the consideration of the issue, although the present case was now in progress. There were further reports through 2006 and a report to the Minister for Disability Issues from the Director of the Office for Disability Issues.[102] It was earlier stated in the paper that what the Office wanted to achieve was as follows:[103]

> We want carers to be able to provide care to a disabled family member, if they choose to and the disabled person wants them to provide that care, and it is appropriate for them to do so.

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99 Revised draft paper at [6].
100 Office for Disability Issues paper 30 January 2006 at [6].
101 Letter of 26 April 2006 at p 1.
102 Report of 20 October 2006.
103 At [3].

[179] It was commented in relation to care by family members:[104]

> It has been suggested that the potential framework if it is to be paid could 'open the flood gates'. This is a genuine risk, albeit often overstated. The evidence suggests that carers rarely access their full entitlements, and those in receipt of DPB/CSI very rarely perpetrate any fraud.

[180] It was considered that further work should be undertaken as part of the development of the carer strategy to determine the required elements for a transparent and highly auditable process, and to develop guidance on how to evaluate the potential benefits and risks.

[181] A draft paper of 8 November 2006 from the Office of the Minister for Disability Issues to the Chair of the Cabinet Social Development Committee sought agreement to the payment of family caregivers of disabled persons for the provision of services in specified situations. It specifically recommended that disability support organisations be able to employ or contract family members, and that guidelines be developed. This report is generally very sympathetic to providing payment to family members and critical of arguments to the contrary.

[182] In an urgent email two days later, on 10 November 2006, the Director of the Office for Disability Issues recalled the 8 November paper stating that it was an early draft of a paper that had not been through the internal quality assessment processes and did not therefore represent the views of the office or the Ministry of Social Development. It asked for any copies to be returned or destroyed.

[183] In April 2008 the Cabinet Policy Committee approved a New Zealand carer strategy and five year action plan. A carers' allowance proposal was discussed. Action would include examining options for allowing a wider group of people with significant caring responsibilities the choice of accessing income support, and to develop a proposal for a carers' allowance.

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[104] At [22].

Exceptions

[184] The Ministry's paper reveals that 272 exceptions have been made to the practice. As the Tribunal decision recorded, reasons given were stated as being cultural, involving client or family choice, the unavailability of carers or of carers skilled enough, geographic isolation and safety factors.[105]

[185] The Ministry does not appear to have any policy on exceptions at all. Certainly none was articulated in submissions. It appears to have taken the view that where payments have been made to family members that has been a mistake. The policy, therefore, seems to be inflexible and is on the face of the evidence, at times, capricious. There is no inbuilt system whereby it can respond to particular support needs and family dynamics. Any exceptions appear to be ad hoc. In the end we are left uncertain as to how and why exceptions occur.

[186] The evidence of some of the plaintiffs, in particular Ms Bransgrove, Mr Robinson and Mr Humphreys shows an unpredictable response on the Ministry's part to the request for payment. They received some payments while Ms Burnett and the Atkinsons received nothing. In some of the literature there is a reference to "cultural" exceptions, but there has been no acceptance by the Ministry of such exceptions.

What is the policy?

[187] Ms Joychild for the respondents submitted that the policy at issue in this case would be better regarded as a practice. Ms Coleman submitted that it was best described as a policy.

[188] This brief review of the considerable body of material available where the issue of providing contract support for family members has been debated, leads us to conclude that there is no clearly articulated policy not to pay family members. Indeed, a consideration of the policy papers alone would tend to indicate an ongoing debate about what the policy should be, rather than a firm decided policy.

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[105] At [90].

Throughout the period of this debate, however, the practice of the Ministry has been, with some exceptions, not to contract with family members, and such a practice is articulated on the Ministry's webpage.

[189] The closest to a Cabinet decision on the topic is to be seen in the Minute of 15 March 2004 where it is stated: "family caregiving of disabled people will not be expected to replace the work of professional support services",[106] that attention should be paid to the full range of costs to be faced by family caregivers[107] and that the policy should ensure that family caregivers of disabled people have access to knowledge, skills and services required to help them provide care to complement that of professional support services. These statements may obliquely recognise a practice, but are far from a Cabinet endorsement of any policy of non-payment to family members.

[190] The statements of the policy have varied. We asked the Ministry to provide us with expressions of the policy prohibition so that we could consider its detailed articulation. In relation to home-based services we were referred to a statement in the New Zealand Ministry of Health webpage accessed in 2008 which stated:[108]

> DS does not permit payment to/or employment of:
>
> [1] Any resident family member, including full-time carer/s.
>
> [2] Non-resident spouses/partners.
>
> [3] Non-resident parents/guardians.

[191] In relation to individualised funding services there was a statement:[109]

> Resident family members, spouses, and other full-time carers, cannot be employed or paid to provide personal support services for their disabled family member.

[192] In relation to contract board service specification it is stated that persons are excluded "except by specific case by case negotiation" if they are:[110]

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106 At 2.4.
107 At 2.7.
108 NZ Ministry of Health webpage, 21 September 2008 p 6.
109 At 5.6.
110 At 4.2.2.

Living with family/whanau.

Community residential services.

Supported independent living.

[193] In relation to supported independent living, their guidelines state that it cannot be provided in a person's parental home "unless it is part of a transition".[111]

[194] In relation to carer support services, the definition was of "spouses, parents, partners and other full-time carers",[112] community residential support services "their own family, whanau or guardian"[113] and in relation to the home and community support sector "family and/or whanau members who are not employed by a service provider".

[195] It can be seen that although all the plaintiffs in this proceeding would fall in the definition of excluded family members, the extent of the excepted group is unclear. In some instances it can extend to neighbours and whanau and in others it appears to be limited to resident family members and spouses.

[196] This history and the lack of precise definition of the policy demonstrate a lack of any developed policy. Indeed, the position is succinctly summarised by the withdrawn draft ODI paper of 8 November 2006 as follows:[114]

> *Lack of transparent policy development process:* Lack of documentation suggests that current non-payment policy has emerged without ever having been subject to a rigorous or transparent policy development process.

[197] We agree with this assessment. However, we accept that there is an ill-defined practice to exclude resident family members from providing any of the four relevant services. We accept that those in the Ministry who determine what persons actually receive contracts would regard the practice as a policy that they must recognise, although clearly some exceptions have been allowed.

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111 At 2.3.
112 Carer Support Guidelines for Service Coordinators, at 6.5.
113 Service Specification – Physical Disabilities, at 7.1.
114 At [14].

Reasons for the policy

[198] It is not possible to do justice to the detailed reasons set out to support the policy the Ministry's evidence and submissions. However, key points were set out in a 2002 draft confidential report the Ministry of Health sent to the Ministry of Social Development where certain concerns behind the policy were discussed. We follow the summary in the Crown submissions in setting these out:

> 1 Concern that payment to family caregivers through a contracted service provider would confuse the relationship between provider and organisations and families;
>
> 2 Concern about monitoring the quality of family care giving without intruding into family 'freedom of choice' and privacy;
>
> 3 Concern about protecting the rights of people with disabilities to exercise freedom of choice as to who their caregivers are to be;
>
> 4 Concern that payments to family members as caregivers might distort the relationship between family and people with disabilities, in particular the 'duty of care' by parents for a child with a disability.
>
> 5 Concern that payments to family members as caregivers might lock adults with disabilities into non-normative living situations.

[199] There was a theme of much of the discussion that followed in the paper justifying policy, that a policy is required to preserve what is called the "social contract".[115] For instance, the draft ODI paper of 11 August 2005 noted that the policy underlies much of New Zealand's social policy. Any change is likely to operate as a precedent for family members to fulfil other kinds of family responsibilities. That paper observed that changing the policy would conflict directly with the object of preserving the social contract, and noted that the caring duties carried out by family members are additional to the kinds of duties that most families ordinarily face. It is a theme of many of the justifications of the policy that it will not be possible to properly monitor family caregiving without intrusion into family privacy and the distortion of family relationships. There is concern that a change could turn families into institutions rather than domestic units.[116]

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[115] See [203]–[215] below.

[116] ODI draft of 11 August 2005 at [36]–[40].

[200] Mr Gourley, who spoke from the perspective of an independent person and not on behalf of any organisation, was concerned that paying family members would constrict the autonomy and independence of disabled persons, and limit their ability to move away from the home. Disabled people need to be able to make that move without there being financial pressure, in a sense of the retention of family payments from the Ministry, on them to stay. He did not think it healthy for family supports to become professionalised (in the sense of paid) in the way that those who provide Ministry of Health services are paid.

[201] The Ministry in its submissions summarised nine important purposes of the policy which somewhat overlap with the objectives set out in the 2002 Ministry of Health draft paper. These were:

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;

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.

[202] We accept this as an accurate summary of the Ministry's purposes. We will now consider the validity of the first concern, which is to uphold the so-called "social contract".

The social contract

[203] The social contract has been articulated in various Ministry documents including the 2002 draft report from the Ministry of Health, the ODI draft paper of 11 August 2005 and the revised draft paper of 22 December 2005, as a basis for justifying the policy. Ms Coleman submitted that the question was not whether there is a social contract as claimed, but whether the government thinks there is. We accept that we should not readily substitute our view for the considered opinion of the Ministry. We will review the reliance on the social contract, taking into account how it is articulated, and we accept Ms Coleman's submission that if there is a reasonable basis for the Ministry's perception of the social contract, that we should not replace it with our own view.

[204] The social contract as articulated by the Ministry is that it is not normal in New Zealand society for family members to be paid to care for other family members. It was articulated in this way on 1 March 2004 in the revised paper submitted to the Social Development Committee by the ODI:[117]

> New Zealand, like most countries, has tended to operate with an implicit social contract under which caring is accepted as a natural part of family life and undertaken as a familial duty. There is an underlying, though not formally articulated, principle that people should not receive payment from the State to provide care for family members, including disabled family members, to whom they owe this "familial" duty.

[205] In the 2002 draft report it was observed:[118]

> Caring is considered to be a normal and natural part of family life and is undertaken because of the commitment and love family members have for each other.

[206] Evidence of the social contract was given by two witnesses for the Ministry, the Deputy Director-General of Health, Geraldine Woods and Dr Peter Watson. These witnesses, particularly Dr Watson, were challenged in cross-examination in relation to their perception of the social contract. In its decision the Tribunal observed that it was unable to specify the actual ingredients of a social contract in

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[117] At [17].
[118] At [41].

New Zealand.[119] It noted that the authors of the Cabinet Social Development Committee paper recognised that families caring for disabled people have responsibilities over and above those ordinarily faced by families. It noted the ACC legislation in which household family members and other family members are paid for care.[120] The Tribunal was unable to discern the existence of such a social contract.

[207] Like the Tribunal, we are left unconvinced that a social contract of the type relied on by the Ministry exists in New Zealand. The evidence does not prove it, assuming that such a matter was capable of proof. There is certainly a perception in the community, discernible in the Ministry papers, of a duty on the part of parents to look after their children up to a certain age, in the sense of providing them, within their means, food, shelter and clothing. This concept extends to ensuring that they are educated, and insofar as is possible within the confines of the home, caring for them in the event of illness, or ensuring that they receive proper care. However, it is another matter altogether to suggest that there is such a duty owed by parents to disabled children for the duration of the life of those children, and that the duty or contract extends to caring for them in the disabled state, no matter how severe that disability. While we do not feel qualified to express any final views on familial duties, we note a clear distinction between the orthodox parental duties we have mentioned, and those of the parents of disabled children. This is best demonstrated (as an extreme example) by the level of caring required for Imogen Atkinson.[121]

[208] The Ministry relied on a statement in *Alberta (Ministry of Human Resources and Employment) v Weller*. It was observed in *Weller* that family status:[122]

> [I]s relevant only because it is the basis of the underlying assumption that rent for shared accommodation is not ordinarily expected to be paid by an adult child without the means to do so. Given that the relationship is non-arms length and is normally associated with love and affection, the proposition is based on commonsense and experience.

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119 At [176].
120 At [178].
121 At [25]–[27].
122 *Alberta (Ministry of Human Resources and Employment) v Weller* at [56].

[209] There is a great difference between the expectation that a child without means should not have to pay rent, and the expectation that parents should provide care for their disabled children, no matter how disabled, and into adulthood. We have not been able to find an acceptance of a social contract that parents will care for their disabled children through their lives in the Canadian decisions.

[210] We consider that the draft report of 8 November 2006 of the ODI sent to the Chair of Social Development Committee cogently summarises the distinction between the ordinary care and support of a parent for a child, and the care of a parent for a disabled person. It states:[123]

> This report is not concerned with 'care and support' that might be considered ordinary, such as where a parent cares for a non-disabled child or a spouse cares for a partner while they have the flu. Rather it is concerned with care and support that is extraordinary. This care and support is identified as 'services', that are:
>
> - Unusual in nature, as in the case of someone with high 'medical' support needs, such as naso-gastric feeding or who presents with self-injurious or violent behaviour.
>
> - Require an unusually high or intense level of support, such as in the case of someone who needs feeding, or regular or frequent supervision and/or intervention, or who is heavy and needs to be lifted frequently.
>
> - Continue over an extended period of time, as in the case of someone who will require significant levels of assistance with personal care tasks on an ongoing basis.

[211] It is observed later in the draft report that the tasks for which payment for family members might be considered, lie "outside the bounds of any reasonable 'duty of care' as described".[124]

[212] The lack of any social contract extending to the care of disabled family members is indicated by other aspects of the Ministry policy. The Ministry has been at pains to emphasise that it does not require any family member to look after a disabled person. If the family member is not prepared to do so, then the Ministry will step in and pay for carers. This can be seen as indicating that there can be no expectation on family members to look after long term disabled children or family

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123 At [11].
124 At [14].

members. This is reflected in the evidence of Ms Davis. She stated that there is an expectation that in general families would provide a reasonable level of support for their disabled family member, but where the child is an adult:

> The State has no expectation that a parent will continue to care for their adult child, and provides residential and supported independent living service to facilitate independence. Where the family chooses to stay together as a unit, the State will again look to provide the extra support that the family needs to care for its own members, but again, does not pay a family wages to look after its own.

[213] Ms Davis appears to accept the distinction between caring for a disabled child and caring for an adult disabled child. However, no such distinction is reflected in the Ministry policy, where all family members are not paid in relation to all disabled children no matter how old.

[214] The lack of any material justifying the existence of such a contract, the doubts within the Ministry itself, our own review of the Ministry papers, and such case law as is available, lead us to the view that there is no reasonable basis to put the social contract forward as a justification for the policy. Like the Tribunal, we are unable to accept the submission of the Ministry that there is a social contract which justifies the policy of not paying family members of disabled people for care. We agree with the comments in the draft paper of 8 November 2006 that such a social contract as might be said to exist, exists in relation to care by parents for children and spouses for partners in ordinary circumstances where there is no severe long term disability. Where the affected family member has a severe long term disability it is not possible to assert that there is a contract or duty of care on parents or family members. Therefore, insofar as upholding the social contract is put forward as a justification for the policy under s 5, we reject it as a valid reason.

[215] We will return to the implications of our conclusions about the history and nature of the practice or policy and the social contract later in this judgment.

Are the other objectives sufficiently important?

[216] We consider that the analysis at this first stage enquiry concerning the importance of the policy is rather abstract. There is no weighing at this first point of

the four-stage inquiry of competing objectives and effects. We do not consider counter-veiling arguments, or carry out a balancing exercise. The importance is considered on a stand-alone basis. Are the identified objectives in themselves genuine concerns and sufficiently important in themselves to warrant a curtailment of the right to be free from discrimination?

[217] The other reasons put forward are achieving equality of outcomes, the need to encourage the independence of disabled persons, the problem of families becoming dependent on Ministry payments, difficulties that may arise in monitoring, the danger of commercialising relationships, and the need to be fiscally sustainable, are all legitimate objectives of a Ministry that provides payments to those who care for disabled persons. The purpose of the policy is to preserve (in the sense of avoid damage to) the family unit, to encourage the independence of disabled persons, to ensure proper monitoring, to protect family members from impossible burdens, to protect them from financial dependency on Ministry payments, and use the Ministry's resources in a fiscally sustainable way.

[218] With the exception of the social contract and equality of outcomes, which we consider later,[125] the remaining objectives are important and credible. They are considered in detail later in this judgment.[126] The review of the history of the development of the policy satisfies us that the concerns are genuine. The endorsement of some of them by the former National President of the National Association of People with Disabilities adds to their credibility. The insertion of Government payments for services provided within family relationships is a matter of legitimate concern, as is effective monitoring. We consider these issues later.[127] It is entirely legitimate for the Ministry to be concerned about fiscal sustainability, and there is a basis for concerns about increased costs if the policy is revoked.[128] These concerns all strike us as legitimate and significant concerns in a free and democratic society.

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125 See [254]–[256].
126 See [239]–[280].
127 See [262]–[267].
128 See [268]–[280].

[219] It is certainly arguable that individually each reason, if it stood alone, would not be sufficient, with the possible exception of fiscal sustainability, but if they are taken collectively, the limiting measure can be seen as serving purposes of sufficient importance to justify curtailment of the right to freedom from discrimination. With at least 30,000 disabled persons in New Zealand, these principles and the sustainable administration of funds available for disabled persons are obviously a matter of considerable public importance.

[220] In this regard we differ from the Tribunal which concluded that the policy did not serve such a sufficiently important purpose. We would agree that if the sole purpose put forward was the upholding of the social contract, then that would not be enough.[129] However, the other legitimate considerations that we have outlined were not considered by the Tribunal. In our view those objectives are, as we have said without any consideration or analysis of the counter-arguments and counter-objectives or any balancing, a sufficiently important purpose.

Second s 5 question – Is the limiting measure rationally connected with its purpose?

[221] The second step was explained in *Hutterian Bretheran*[130] as follows:

> To establish a rational connection, the Government "must show a causal connection between the infringement and the benefits sought on the basis of reason or logic". The rational connection is aimed at preventing limits from being imposed on rights arbitrarily. The Government must show that it is reasonable to suppose that the limit may further the goal, not that it will do so. (citations omitted)

[222] It was stated in *Chaulk*[131] that to be rationally connected means to "not be arbitrary, unfair or based on irrational considerations". A rational connection is considered largely on an abstract threshold basis, without equalitative analysis of the arguments.

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129 See consideration of the social contract at [203]–[215].
130 *Alberta v Hutterian Bretheran of Wilson Colony* (2009) 2 SCR 567 AT [48].
131 *R v Chaulk* [1990] 3 SCR 1303 at 1136.

[223] In *Hansen* the first and second *Oakes* criteria were described as threshold issues, and that they do not normally cause the same difficulties as the two remaining proportionality aspects.[132]

[224] In *Oakes* it was held that there was no rational connection between a reversal of the onus of proof or presumption of innocence by making the position of any quantity of a narcotic no matter how minimal, a basis for finding on a presumptive basis possession for supply. That provision did not pass the rational connection test because "possession of a small or negligible quantity of narcotics does not support the inference of trafficking".[133] Thus, in *Hansen*, Blanchard and Tipping JJ who followed the *Oakes* approach had little difficulty in finding a rational connection, as the objectives (achieving the difficult task of convicting those who deal in narcotics) had a rational connection to the provision in question (reversal of the onus of proof when certain quantities of narcotics are found).

[225] It was in relation to the third and fourth *Oakes* grounds where Blanchard and Tipping JJ differed. Blanchard J found that s 6(6) did impair the presumption of innocence as little as possible, and to an extent proportional to the significance of the objective.[134] Tipping J on the other hand found the restriction on the onus of proof to be greater and was reasonably necessary[135] and not in proportion to the importance of the objective.[136] McGrath J also concluded in relation to minimal impairment and proportionality that the Crown had not justified the reversal of the onus.

[226] We have already indicated that we do not consider the so-called social contract to be a sufficiently important objective. It follows also that it has no rational connection with the policy. The policy goes further than is necessary to support the family ties of normal families, which do not involve anything like the responsibility and demands of caring for a disabled person. We record also that we find no rational connection between the second Ministry objective, "achieving

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132 At [121].
133 *Oakes* at [78].
134 At [79]–[82].
135 At [129].
136 At [138].

equality of outcome for disabled persons", and the Ministry's policy. As we explain later,[137] we are not satisfied the Ministry policy has any rational connection with equality of outcomes for disabled persons. They should be able to achieve equality of outcomes without the policy.

[227] However, while not expressing any view at this point on whether the policy will achieve the desired outcomes, there is no doubt that there is a rational connection between it and other desired outcomes of the Ministry. Not paying family members does have a rational connection to at least some of the Ministry's objectives including:

- Avoiding families financial reliance on income;
- Developing family relationships without the interference of some family members being paid to care for others;
- Avoiding the professionalisation and commercialisation of family relationships;
- Ensuring the delivery and auditing of proper control standards;
- Avoiding unsustainable care burdens; and
- Maintaining fiscal sustainability.

[228] This is because we are satisfied that paying family members can lead to those family members becoming reliant on payments, and can interfere with and lead to the commercialisation of family arrangements. It can create auditing difficulties and lead to unsustainable care burdens. In regard to the last factor, we note that balancing competing demands for social and economic resources within the context of limited available funds, by allocating those resources in a manner that optimises the benefits and outcomes of a social programme, is a requirement of good government. There is a rational connection between the objectives and the policy.

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[137] See [254]–[256].

The need to pay available services in a way that maximises the benefits to disabled people, within a limited budget, is recognised in a number of Canadian cases.[138]

[229] We emphasise again that we find this rational connection on a relatively narrow basis. Ms Joychild for the respondents criticised the various policy reasons put forward and presented arguments to show that they were not tenable. We are not, however, at this stage in the consideration process required to carry out a qualitative examination of the Ministry's justification. That will come in the third and fourth steps. At this second stage it is sufficient for us to conclude that there is a rational connection between a policy of refusing to pay family members for services to disabled persons, and avoiding some of the dangers of paying family members that have been identified by the Ministry.

[230] Obviously we have not reached this conclusion without some regard for the merits, as if the nature of the discrimination was prejudice, such as race, or the policy reasons were clearly unjustifiable, or the policy itself obviously unconnected to those policy objectives, then no "rational" connection would be established. However, in this appeal the objectives outlined have sufficient credibility, and the policy a sufficient rational connection as a matter of logic, for the second requirement to be seen as met. We appreciate that in this regard also, we vary in our view from that of the Tribunal.

Third s 5 question – Is the restriction to the right to freedom from discrimination no more than is reasonably necessary?

The nature of the limiting measure

[231] It is at this third stage of the s 5 evaluation that we will consider the nature of the discrimination and whether it is based on prejudice, as this must be relevant to assessing whether the restriction on freedom from discrimination is no more than is reasonably necessary. In terms of the prohibited grounds of discrimination in s 21 of the HRA, certain types of discrimination will be more difficult to justify than others.

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[138] *Wynberg* at [137], [139], [143] and [169]; *Weller* at [64]; and *Cameron v Nova Scotia (Attorney-General)* (1999) 177 DLR (4th) 611 at p 664, leave to appeal to Supreme Court denied [2001] SCR XIII.

Discrimination for instance on the basis of colour or race (s 21(1)(c) or (d)) will be most difficult to demonstrably justify. Other types such as age or family status may be easier to justify. Thus in relation to the right to freedom from discrimination, the nature of the discrimination is relevant for s 5 purposes. As Blanchard J observed in *Hansen*:[139]

> As will be seen, any limitation on a guaranteed right should be accepted as demonstrably justified only after the Court has worked through a careful process. In the case of some rights, no limitation could be justified. The overarching rights not to be tortured or tried unfairly, for example, can have no meaningful existence as anything less than absolute protections. By contrast, within the contextually defined concept of fair trial sit some "subsidiary rights" ... And no one would dispute that many of the freedoms enumerated in Part 2, for example freedom of expression, are in practice routinely limited to a greater or lesser extent by other concerns, both within and external to the Bill of Rights, which are demonstrably justified in a free and democratic society.

[232] Blanchard J was referring here to guaranteed rights different from the right to freedom of discrimination. However, it can be observed that there will be certain acts of discrimination where it will be most difficult to justify a limitation, and others where it will be much easier to do so. Thus some qualitative analysis of a right must be undertaken at the outset.

[233] We have already recognised that governments must make distinctions between people if they are to govern effectively.[140] Governments must be free to target social programmes so that those whom they consider should benefit from them do so, and delineate boundaries between those who will benefit and those who will not.

[234] Also we accept the submission of Ms Coleman for the Ministry (made in the context of whether there was s 19 discrimination) that in evaluating the distinction made, it is necessary to consider the context. McLachlin CJ in *Gosselin v Quebec*[141] illustrated this by reference to a "men only" sign which she observed had very different meanings depending on whether it was on a bathroom or a courtroom door.

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139 At [65].
140 See [76].
141 *Gosselin v Quebec* [2002] 4 SCR 429 at [24].

[235] In *Law v Canada*[142] the plaintiff was a surviving spouse under the age of 35 who was denied a pension. It was argued that this constituted discrimination on grounds of age. The Supreme Court determined under s 15 of the Charter (the equivalent of our s 19) that although this clearly disadvantaged young people it did not have the discriminatory impact because younger adults are not an historically disadvantaged group. The distinction was not based on a stereotype.

[236] In the Alberta Court of Appeal case of *Alberta (Ministry of Human Resources and Employment) v Weller*[143] the Court observed:[144]

> Family status has, on occasion, been the cause of pre-existing disadvantage, for example, illegitimate children and single mothers historically have suffered discrimination in some instances. However, in this case, the family status is merely that of being in a parent and child relationship. Being in a parent and child relationship in general has not been subject to historic patterns of discrimination or prejudicial views.

[237] Also we note that in *Newfoundland v Newfoundland*[145] the Court was not, in the absence of evidence, prepared to find that parents of adult disabled children were an historically disadvantaged group. As a result the claim from a father of a disabled adult son that his employer should not relocate him because it meant that he could not provide support to his disabled son at university failed.

[238] We consider that these comments and decisions are apposite to New Zealand. Family status does not have the same association with historical disadvantage and marginalisation as some other grounds of discrimination such as colour or race. In particular, there is no documented history of disadvantage or prejudice to the parents of disabled children. Further, we have no difficulty in concluding that the policy does not have as its genesis any historic hostility or social prejudice against the relatives of disabled persons. It is not a capricious policy. Rather, the development of the policy was based on a variety of concerns including the nature of the "social contract" concerns about the affects on the family, monitoring and economic considerations. This is relevant in assessing whether the restriction is no more than is reasonably necessary.

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142 *Law v Canada* [1999] 1 SCR 497.
143 See [101] above.
144 At [54].
145 *Newfoundland v Newfoundland* (1995) 127 DLR (4th ed) 694 at [65].

The balancing exercise

[239] It is at this step, and the fourth step, that the balancing exercise takes place. We have concluded that there is a breach of s 19 but that the policy serves a purpose of sufficient importance to justify a curtailment and is rationally connected to the purpose. But this does no more than acknowledge the importance and rationality of the Ministry objectives. Does the policy involve the minimum impairment possible? And the closely linked fourth step, is it in proportion to the importance of the objectives? Here it is necessary to refer back to the history of the development of the policy, its nature and rationale. In the absence of any historic prejudice and given the efforts made to formulate a policy, we defer to the expertise in the Ministry. But we note that within the Ministry there is debate and no obvious consensus in the various reports about the policy. It has not been endorsed at Cabinet or even ministerial level. It has not been clearly articulated, and is not applied consistently. There is less deference, therefore, than there would be to an Act of Parliament or regulation, or a policy unambiguously endorsed by Cabinet or the Minister, or indeed, any consistently applied and clearly formulated policy.

[240] In *Oakes* this aspect was expressed by saying that the party seeking to justify the act or policy must "impair the right or freedom in question as 'little as possible'". Tipping J expressed it as being limiting the right of freedom "no more than is reasonably necessary for sufficient achievement of its purpose". Tipping J considered the more direct words in *Oakes* as unreasonably circumscribing Parliament's discretion.[146]

[241] In making the assessment of whether there is minimal impairment of the right to freedom from discrimination, it is necessary to return to the terms of the policy and the objectives. As has been observed,[147] the policy has not been defined with precision, and has not been endorsed in any formal and final way by Cabinet or the Ministry. Exceptions have been allowed and there appears to be debate within the Ministry as to whether it is the right policy, and whether in fact it would be better for family members to be paid.

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146 *Hansen* at [126].
147 At [187]–[197].

[242] We will now proceed to examine the reasons put forward for the policy, to determine whether that response is no more than is reasonably necessary to achieve the objectives. We will go through the Ministry's nine objectives.[148] We have already decided that the first "social contract" is not a valid objective,[149] but that the other objectives are legitimate concerns.

[243] Before doing so it is necessary to consider the relevance of the ACC experience, where contract payments are made to family members who care for disabled persons. That ACC experience is relied on by the respondents to show that the Ministry policy is more than is reasonably necessary and disproportionate.

Accident Compensation benefits for disabled persons

[244] The Tribunal considered the ACC policies[150] and noted that over half of the ACC's home support services were provided by relatives who were contracted by the ACC.[151] It was noted that the Ministry and the ACC had recently met to produce a combined service specification concerning the eligibility for and the delivery of home care. No distinction was made on that occasion, between accidental or non-accidental causes.[152] The Tribunal noted feedback from ACC staff comparing outcomes between contracted and non-contracted (family members and informal carers) in health care. The indications were that there was no discernible difference in quality and rehabilitation outcomes between ACC and the Ministry.[153]

[245] Although no ACC witnesses were called by either side, there was a considerable body of evidence before the Tribunal about the conduct of the ACC. In an ACC's broad issues paper of 21 September 2007 it was recorded that in relation to contracted providers and informal or family caregivers: [154]

> Participants unanimously agreed that there is no discernible difference in quality and rehabilitation outcomes between these two approaches to purchasing home support services. All participants identified that contracted

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148 See [254]–[280].
149 See [228].
150 At [93]–[103].
151 At [93].
152 At [94].
153 At [96].
154 Ibid.

> and non-contracted services are complementary and essential to the smooth functioning of the system.

[246] The ACC paper also found no conclusive evidence of differences in services, quality or employment outcomes from using contracted or non-contracted services.

[247] Ms Coleman for the Ministry pointed out that the joint service specification developed by the Ministry of Health and ACC applies only to contracted providers. We accept her criticism that the Tribunal's reliance on joint service specifications to support its conclusion regarding paying family members may have therefore been misplaced or at least too great. We also accept that there must be caution in equating non-contracted providers with family members, as non-contracted providers under the ACC are either individual disabled persons themselves or their agent who take responsibility for employing the support workers. She also points out that the evidence shows the ACC experience was not meeting many of the Ministry's key objectives for its policy. We accept that the ACC policy is by no means a complete success.

[248] The Ministry argued that the ACC operates under a different legal framework which is in turn underpinned by a different social contract. We accept that ACC is based on a compensation model aimed at restoring the position to that which pertained prior to the injury, so is aimed to restore the pre-accident position. This is a different conceptual basis to that which drives the Ministry's policies to assist disabled persons. We also accept that ACC payments may tend to be more short term than disabled persons.

[249] The Ministry relied on the Court of Appeal decision in *Trevethick v Ministry of Health.*[155] In that case, Ms Trevethick complained that the Ministry of Health's scheme for providing disability support services was not as generous as that provided by ACC and therefore she was being discriminated against by reason of the cause of her disability. The Court of Appeal held that Ms Trevethick's discrimination claim was rightly struck out because even if she could establish that her exclusion from ACC by reason of her disability amounted to prima facie

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[155] *Trevethick v Ministry of Health* [2008] NZCA 397 and [2009] NZAR 18.

discrimination, it was clearly justified in terms of s 5 of the NZBORA[156] and based its conclusion on the history and philosophy of the ACC scheme that although the policy choice might give rise to anomalies, it constituted a justified limit on rights in terms of s 5.

[250] *Trevethick* is of limited assistance to the issues in this case. The question there was really one of statutory interpretation; whether discrimination on the basis of the cause of disability fell under s 21 of the HRA. The Court held that it did not. The issue here is not about discrimination based on the cause of the disability, but discrimination based on family status. There is no doubt about the cause.

[251] We accept, nevertheless, that this decision demonstrates the difference in history and philosophy of the ACC scheme and the Ministry's policy. We do not, however, agree that the fact that the ACC is paying family members for the care of disabled persons can be discounted as irrelevant. It is a policy that has now been in existence for a number of years. Parliament has not seen fit to change it. The fact that under ACC family members of disabled persons can receive contract payment is in a general sense inconsistent with the Ministry's claim about the ambit of the social contract. If there was such a social contract it could be expected that it would figure somewhere in the debate about ACC payments. It does not appear to do so.

[252] More importantly, the ACC policy and practice of contracting with family members shows that it is possible to run and monitor a contract system whereby such members care for disabled persons. It tends to show that the Ministry's objectives as summarised by them[157] can be managed. This is relevant in assessing whether the right to freedom from discrimination is impaired no more than is reasonably necessary and will be referred to.

[253] The fact that there is uncertainty in the ambit of the policy, a lack of endorsement at the highest level, and doubts within the Ministry, would all tend to indicate that a rigid policy of not permitting any family members to apply is more than is required. There are strong countervailing arguments put forward by the

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156 At [18].
157 At [201].

plaintiffs as to why the policy is necessary, and why the fears that the Ministry has about the policy are unfounded or exaggerated. We will, at this stage, briefly consider and evaluate the substantive points made in relation to the policy by the parties. Having considered the social contract, we now turn to the Ministry's other objectives.

Objective two – promoting equality of outcomes

[254] The Ministry submitted that the present policy works by the NASC process assessing what gaps disabled people have and then allocating external services to meet those gaps. The Ministry submitted that by recognising that the level of natural support available differs between payments, the NASC system is able to focus on achieving equality of outcomes for disabled people. It submitted that services are only allocated where parents, spouses and resident family members have already indicated as part of that process that they are either unwilling or unable to provide the care required.

[255] This submission again involves the circular logic that the policy is designed to fill the gaps in family provided care, which rests in turn on the validity of the concept of the social contract. We have rejected that as a valid concept. We do not consider that there is any basis for the proposition that the policy is necessary to promote equality of outcomes. As a matter of fact, the parent respondents are not unwilling or unable to provide the care provided. They are well able to do so, as the evidence shows. They just want to get paid.

[256] The ACC experience does not indicate any difference in outcomes, whether caregivers are family members or outside contracted parties. We are not satisfied that it has been shown that the outcome of revoking the policy and contracting family members will be any worse than designing a policy where they can be paid if certain criteria are met. While we do not go as far as concluding, as the Tribunal did,[158] that there is the potential for better outcomes for family provided care where this is subject to the NASC process, we accept that there is nothing to suggest a difference in outcomes.

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158 At [225](c).

Objective three – to encourage the independence of disabled persons

[257] The Tribunal noted that there was no research presented to it which supported the proposition that disabled persons could be discouraged from becoming independent if family members cared for them.[159] We agree that the personal case histories that were presented to the Tribunal would tend to indicate the contrary. We recognise, however, that rationally it could be the case that on occasions the presence of family members as caregivers could discourage disabled persons from becoming independent. However, if there is any such risk, we would expect it to be able to be mitigated by the appropriate training of family members and rigorous monitoring.

[258] We note that in the 8 November 2006 draft report of ODI to the Cabinet Social Development Committee, it was not accepted that the payment of family caregivers might serve as an incentive to keep the disabled person dependent in order to attract the wage. This was considered to be rare and it could be mitigated by regular support needs reviews, the establishment of support facilitators and circles of support and the use of an independent disability advocate. It was also observed that the risk of a client capture was no greater within a family than it is with an external service provider, and that caregiver payments produce no greater disincentive to enter the full time paid workforce and become financially independent than exists with any other part time employment.

[259] Our assessment of the evidence and the ACC experience is that with appropriate training and monitoring this objective can be met without the application of the discriminatory policy. Its application is not reasonably necessary to meet this objective.

Objective four – avoiding the risk that families will become financially reliant on the income

[260] There is some support for this concern, observed in the ACC experience and referred to by the Tribunal.[160] However, we see no reason why this risk could not be

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[159] At [225](d).
[160] At [225](e).

met by a careful initial assessment of those family members with whom contracts are made, training, and then ongoing support and monitoring. The policy is not reasonably necessary to meet this objective.

Objective five – support for the development of family relationships in the same way as they develop for non-disabled people

[261] We are far from convinced that this is a major concern. The Tribunal did not see it as a rational or convincing link.[161] Any such concern should be able to 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.

Objective six – to avoid professionalising or commercialising family relationships

[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 Johnny and Marita appears to be unaffected.

[263] In any event, again a proper selection process, training, and monitoring should control any problems in this area.

Objective seven – to ensure that the delivery and quality of publicly funded services can be monitored

[264] The Tribunal noted that the Ministry of Health and the ACC had plans to extend and develop their current auditing and monitoring processes.[162] Given the ACC experience, and comments within the Ministry itself about the ability to audit, we do not see this issue as insurmountable. Indeed, we see a process of proper initial interviewing and vetting of applicants, then of training, then of careful and sustained

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[161] At [225](f).
[162] At [225](h).

monitoring, as an answer to most of the Ministry's concerns about the consequences of making payments to family members.

[265] We have accepted the Ministry has a legitimate concern to ensure that quality standards are met and to properly monitor contractors. There is force in Ms King's concern about the difficulties paying family members would present to quality assurance and evaluation, and the fact that disabled persons might find it difficult to criticise family members, and feel pressure not to report inadequate care or abuse. As we have already indicated, it is difficult to see why the Ministry could not make it a term and condition of any payment that carers had to agree to be trained and audited on a professional basis. While it must be the case that when care is being provided by non-family members existing family members can provide something of a check and balance to ensure standards are maintained, there seems to be no reason why adequate and independent audit arrangements could not adequately monitor the services provided by family members. Most of the respondents indicated a willingness to be audited if that was a requirement. Dr Mary Butler, a health professional called by the respondents, stated:

> Most families caring for someone with a serious disability with high support means, appreciate accountability in a way unimaginable for the professional because they have to bear the full consequences of any breach of care.

[266] Ms Coleman emphasised the difficulty of effective monitoring and urged deference to the Ministry's assessment. However, we are unable to discern in the Ministry papers any formal decision that effective monitoring is not possible. No real effort appears to have been put into devising a draft selection or monitoring policy document, even on a discussion basis only.

[267] There is no indication that adequate monitoring is seen as an insuperable hurdle in relation to the ACC policy. There is in relation to ACC a system of safeguards where disabled persons or concerned non-resident family members can seek assistance. Part of any audit policy could be to ensure that families do not become financially reliant on income and to thoroughly investigate the financial circumstances of the family before agreeing to payment. It could be a condition of the grant of a payment that certain family members continue to work. There could be strategies and counselling put in place to ensure that family relationships are not

damaged by payment arrangements. There is no reason why family members, if they were paid, should end up carrying more unsustainable care burdens and being more socially isolated than family members who provide these services without pay presently sustain. Indeed, with proper monitoring there is no reason why the care burden should be unsustainable by family members. It could be a requirement of payment that certain breaks be taken. We do not of course presume to dictate how any selection and audit policy should work, but we are entirely unpersuaded that adequate policies cannot be devised.

Objective eight – to be fiscally sustainable

[268] It is the general submission of the Ministry that there would be an unacceptable fiscal impact if a policy was not in existence. The Ministry's expert was Mr Jean-Pierie de Raad. He is the chief executive of the New Zealand Institute of Economic Research. He summarised the costs of an estimated change at being between $17 million and $593 million over the four services. The figures were given as ranges as he stated that it was impossible to predict with accuracy what the response of disabled persons and their families would be to a change in policy.

[269] He noted first, that a portion of disabled persons who receive disability support services provided by non-family members will choose to have their services provided instead by family. This would theoretically not cost the Ministry any more. There might even be a saving as the payment for services for family members might be lower than that for contracted providers.

[270] Secondly, a portion of disabled persons living in the community who receive disability support from services but also from family members might choose to receive their support thereafter from paid family members, increasing demand for paid support.

[271] Thirdly, a portion of disabled persons with severe disabilities who receive no service from the Ministry could choose to have their immediate family paid. This is an area of potential and significant cost estimated by Mr de Raad as involving increased costs from $10.4 million, assuming a 10 percent switch, to $258.1 million,

assuming a 90 percent switch. A portion of those disabled persons receiving only minimal services could seek funding for unpaid care.

[272] Finally, a number of disabled people who currently live in residential care could choose to move back to the family home to be cared for by paid family members. This could involve significant increases in costs. In the unlikely event that 50 percent switched, the increased costs would be $243.3 million.

[273] The respondents called Dr Brian Easton, an independent economist. He did not agree with Mr de Raad's evidence. He thought his upper bounds were too high. His conclusion was that if a sum had to be taken into account by the Tribunal in making its decision, in the absence of further evidence, the amount of $32–$64 million should be taken as the maximum net fiscal cost. However, he observed that the "likely out turn" would be less.

[274] The Tribunal was critical of the Ministry's financial projections, but believed that it was likely that there would be some change as a result of the policy changing.[163] It was unable to put a precise dollar figure on the change, but considered the potential increment to be at the lower end of the range quoted by Mr de Raad. It observed that there would be a number of strategies available to control the exposure to fiscal implications, and one example would be for the Ministry to permit the payment of a parent or spouse to be treated as an exception. The criteria for approval could include the personal and family circumstances of the applicant, the carer's qualities and preparedness to be trained and the willingness to be monitored. Approval could be given on a case by case basis. The level of the approval could be influenced by the budgetary allocation available.[164] Another control could be through the individualised funding option with each applicant being assessed as to the applicant's ability to take up the option and the applicant's ability to administer the payment obligations. The Tribunal expressed its intuitive view that the financial impact was not likely to be great within the disability sector.[165]

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163 At [165].
164 At [171].
165 At [229].

[275] The Ministry submissions were critical of this view expressed by the Tribunal. Ms Coleman put forward the observation of the Alberta Court of Appeal in *Weller* that it is reasonable to assume that family members will want payment if it is available.[166] The Ministry submitted that it would be unfair if policies were invalidated simply because there had not been an exhaustive investigation on the cost of the policy being changed.

[276] The Ministry papers reveal that there was far from certainty in the Ministry itself about fiscal consequences. The draft 8 November 2006 policy considered the issue of the cost of a change of policy in some detail. It noted a very real risk that paying family caregivers for services that they have traditionally provided for nothing could result in significant increases in expenditure which would need to be addressed by the injection of additional funding. However, it went on to say that its expectation was that this would not be extensive and could be managed in the same way that increases in demand for any service are currently managed. It noted that a payment regime involving intrusion into privacy, and administrative hurdles, could be a disincentive to applying for payment. It observed that New Zealand could follow the United Kingdom where there is a trend towards individualised budget holding, not dissimilar to the approach used by ACC. A disabled person could choose whom they purchase services from who may or may not be a family member, and this would be an incentive for family members to provide unpaid care. It concluded:

> 46 There is potential financial risk for government in agreeing to the recommendations in this paper. Where budget holding is in place expenditure is expected to stay within the agreed budget, and will therefore be cost neutral. In the case of providers employing or contracting family caregivers, the financial impact does not change where services would have been purchased from someone. However, there is a risk that family members currently providing services for free will seek to be paid for those services. Our expectation is that this will not be extensive, and that it can be managed in the same way that increases in demand for any service are currently managed.

[277] Throughout, we have been cautious about placing too much weight on the views expressed in this withdrawn draft paper. The Ministry did not explain its

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[166] *Weller* at [64].

background, or reveal who was involved in drafting it or withdrawing it. However, as we have indicated, we have found it to contain what appears to be a careful and thoughtful analysis. There is some corroboration for the observations in the paper in other Ministry material. In the paper of 22 July 2004, Treasury officials are recorded as indicating that funding parameters for a change of policy would be in the "fives of millions" category. In the 20 October 2006 report to the Minister for Disability Issues from the Director of the Office for Disability Issues, it was commented that the floodgates argument was genuine, albeit often overstated. Nowhere in the Ministry material that we have read is there any hard conclusion about unsustainable extra costs should the policy be changed.

[278] We are of the view that more could have been done to provide some data as to the costs. There is no indication that there has been any endeavour to do a sample survey of disabled persons to see what the take up would be of a new policy. As it is, we are short on hard facts in relation to fiscal impact. We note again the need for deference, but it is to be observed that the Ministry and related departments seem to be uncertain as to the significance of any fiscal impact. In general terms it was for the Ministry to make out its claim of an unsustainable fiscal impact. It was for the Ministry to show that costs of paying family members was a significant and valid reason for the discriminatory policy and that its policy was the minimum response. In this regard, we note the statement in *Grismer* adopted in *R v Hutchinson* that a Government department seeking to justify a submission of unsustainability or undue hardship should provide "scientific evidence"[167]. As was made clear in *Hutchinson*[168] "impressionistic evidence of increased expense will not suffice".

[279] If changes were initiated cautiously, with training and monitoring requirements, the take up could be relatively modest. We were left unsatisfied that any change would constitute a major extra drain on Government resources. If it did constitute a major drain on Government resources, the policy could be reviewed again. Doing the best we can, our assessment is that the extra cost is at the bottom of the estimate of Mr de Raad of $17–$593 million. That also was the Tribunal's view. We appreciate of course that this alone would be a significant sum. However, in

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167 *R v Hutchinson* (2004) BCHRT 58 at [228].
168 At [214].

relation to a Government Ministry of the size and significance of the Ministry of Health, some modest extra costs should be able to be accommodated without other groups necessarily having to suffer.

[280] At times the Ministry's submissions came close to suggesting that in the face of a decision by a Government department of fiscal unsustainability, a Court should with proper deference accept that the limitation is justified. However, we think that the Act requires the Tribunal to do more than simply accept an assessment put forward by a defendant. Some extra cost will very often be the consequence of a finding of a breach of s 19 by a Government department. Such a consideration, while entirely relevant, is not conclusive. A Court must endeavour to assess cost against the importance of the right, the importance and rational connection of the objectives and carry out a proportionality exercise recognising the need for the minimum impairment. Cost is only a factor to be considered in the mix.

Conclusion on whether the right to freedom from discrimination has been impaired as little as possible

[281] We have considered whether there is any material in the available research in overseas jurisdictions on family members caring for disabled persons that provides assistance in assessing a reasonably necessary impairment to the right to freedom from discrimination. In the end we do not have any data of sufficient clarity and detail to be of use.

[282] The Ministry's objective of running a sound and principled scheme for payments for the support of disabled persons that is fiscally sustainable could well be met by a policy where family members can claim and be paid, although only on condition that they must go through an interview process, (where some family members will be rejected as unsuitable) a training regime (which some will not complete), and accept various conditions imposed on them in relation to ongoing training and monitoring (which will not be acceptable to all). They would have to accept that their contracts could be terminated if they failed to meet monitoring standards, in the same way as any other independent contractor. It is our tentative view that the ODI recommendation in the draft 8 November 2006 paper that

contracted service providers be able to employ or contract with family caregivers, and that guidelines be drafted to ensure the consideration of potential benefits and risks in appropriate employment and contracting procedures, is the way forward.

[283] For the reasons we have set out, the Ministry has not satisfied us that the limiting measure has impaired the right of freedom no more than was reasonably necessary for sufficient achievement of the purpose. The single "no exceptions" blanket prohibition in our view goes too far and cannot be justified.

Fourth s 5 question – is the limit in due proportion to the importance of the objective?

[284] This issue is closely linked to the previous issue. In considering whether the impairment was no more than was reasonably necessary we inevitably entered into what was to an extent a proportionality exercise, evaluating the policy response to the objectives of the Ministry. However, a somewhat different approach is dictated by this last issue. It requires the decider to stand back and make a broad assessment. Is the discrimination in due proportion to the importance to the tenable Ministry objectives as outlined?

[285] We are not in any way convinced that the blanket prohibition is a proportionate response to the importance of the objective. The objectives are attainable if the policy is cancelled, and a new policy designed which incorporates those goals without banning family members. The previous analysis is the key.[169] The blanket prohibition is a disproportionate response to the importance of the objectives. There are more moderate ways to meet them. The ACC has managed to find a way to contract with family members to care for disabled persons. We do not presume to dictate the key features of a policy that does not ban family members from being paid caregivers, but nevertheless the development of criteria which govern paid family care would be a starting point, and those criteria could be based on the legitimate Ministry objectives already discussed.[170] A selection process, training, monitoring and the retention by the Ministry of a right to cancel for a

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[169] See third s 5 question [231]–[283].
[170] See [216]–[220].

failure to meet the criteria should assist the Ministry to meet its objectives. Another factor which could be relevant is the extent of the disability. Ms Joychild in her submissions noted the possibility of a policy based on exceptions to a general policy. It may well be that a policy of "tailored exceptions" of the type proposed in *Hutchinson*[171] taking into account the above mentioned factors could be the way forward, but we express no view on that.

[286] Various Ministry personnel in the course of the reports that we have read have expressed the view that a blanket prohibition may not necessary. We accept that it is to be expected that there will be conflicting views within an organisation such as the Ministry as it seeks to work out policy. It would be wrong to place too much weight on individual statements made in the course of that debate. However, the doubts that we have already referred to in the papers about a blanket prohibition, and the fact that there is no final paper or policy, and the discussion documents are all drafts, indicate that a blanket prohibition is disproportionate to the importance of the objectives. We have accepted that the objectives are important, but a complete prohibition is not justifiable. This finding of disproportionality is supported by the ACC experience, where family members are allowed to receive payments for care.[172]

Conclusion on s 5

[287] The Ministry has failed to demonstrate that the infringement on the right to freedom from discrimination constituted by the policy is justified in a free and democratic society.

[288] We return to the New Zealand Disability Strategy of April 2001 which sets out as an objective that individual needs are to be treated flexibly, that disabled persons are at the centre of service delivery, that there should be an improvement in the support and choices for those who support disabled people, and that family whanau and those who support disabled people are given the opportunity to have input into decisions effecting their disabled family member. It seems to us that the rigid policy put forward by the Ministry in these proceedings is at odds with these

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171 At [209]–[211].
172 See discussion at [244]–[253].

flexible objectives, focusing as they do on the needs and wishes of disabled persons and their families. It also does not reflect the acknowledgement in the United Nations ratified Convention on the Rights of Persons with Disabilities, that persons with disabilities and family members should receive the necessary "protection and assistance" to enable families to contribute to the full and actual enjoyment of the rights of persons with disabilities. To the contrary, it is a policy which in relation to certain services prohibits assistance to family members.

[289] We have disagreed with the Tribunal on aspects of its decision. In particular, we disagree with its conclusion that the policy is not sufficiently important to justify curtailment of the right and not rationally connected with its purpose. We have seen the concerns and conclusions it reached in relation to importance and rational connection as more appropriately considered when examining minimum impairment and proportionality. But in broad terms we have not disagreed with any particular aspect of its reasoning. Our difference with the Tribunal is more in categorisation than the analysis of fact.

[290] We agree with the Tribunal's conclusion in the end that the policy is against the accepted objectives of the New Zealand Disability Strategy. We conclude that the Tribunal was right to conclude that the policy breached the rights of both disabled parents and disabled children to freedom from discrimination on the basis of family status. The breach of that right is not justified under s 5.

[291] We have considered whether some modification of the Tribunal's order is required. However, the Tribunal has at this stage just made a declaration. It states that the policy is inconsistent with s 19 of the NZBORA in that it limits the right to freedom from discrimination. Ms Joychild argues that it could have added that the Ministry thereby breached s 20L of the HRA, but there has been no cross-appeal and we do not propose modifying the declaration.

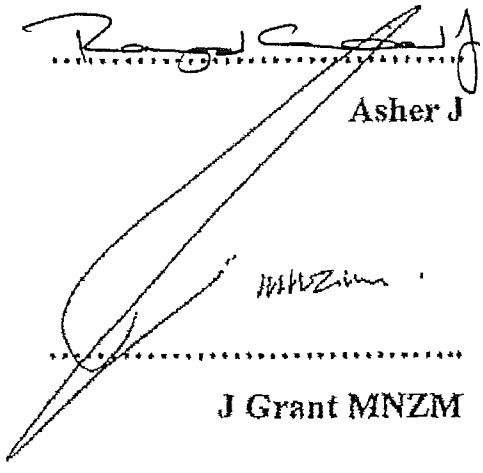
[292] We do not consider that the Ministry has acted in bad faith. Given that the formulation of a policy and the administration of it are formidable challenges, the Ministry must be given time to prepare a new policy informed, we hope, by the five year process of participating in these proceedings, and the decade of consideration

that has already taken place. Any remedies that the Tribunal ultimately grants should give the Ministry time to finalise a considered, non-discriminatory policy. However, the details of this are a matter for the Tribunal at the next hearing.

Result

[293] The appeal is dismissed.

[294] Costs are reserved for further submissions, if necessary.



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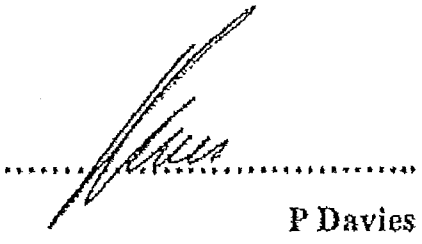

P Davies