

Who cares about carers?

The family carers saga and New Zealand's intermediate constitution

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Introduction

Parliamentary supremacy is usually presented as the underlying principle of New Zealand's Constitution; Parliament can make whatever laws it wishes, while the judiciary merely enforces that law.¹ Contemporary constitutional thinking, however, suggests this relationship is more nuanced; the judiciary are not "obedient decipherers, "discovering" and "declaring" linguistically-ordered meaning."² Joseph, for example, describes law-making as a "collaborative exercise" between the judiciary and Parliament who are "committed to the same ends and ideals, albeit in different, task-specific ways."³ At times Parliament legislates in ways that while perhaps popular, the judiciary sees as unfairly abrogating important rights and therefore prevents the law from operating "sensibly and fairly."⁴ In those circumstances, the judiciary will uphold the law, but it also applies the 'principle of legality' which requires Parliament to be explicit if it wishes to override fundamental values. This pragmatic response ensures Parliament makes its objectives clear and that politicians can be politically accountable for those objectives.

Stephen Gardbaum argues the New Zealand Bill of Rights Act 1990 ("NZBORA") provides even greater judicial protection for specified rights than the principle of legality. While the judiciary must enforce legislation which unjustifiably infringes on protected rights, the NZBORA provides mechanisms for increased judicial and political 'rights scrutiny' of legislation, requiring both politicians and the judiciary to consider whether the limits imposed on protected rights are justifiable.⁵ Gardbaum argues this 'Commonwealth Model' reflects an intermediate constitutional position between orthodox judicial and parliamentary supremacy. He argues that which branch has the final word does not conclusively determine a constitution's classification because the allocation of power between the judiciary and Parliament falls on a continuum rather than being a bipolar question.⁶ While Parliament retains the final word, the judiciary has a new role in substantively reviewing legislation.⁷ The judiciary's increased constitutional role under the NZBORA means its relationship with Parliament becomes even more important.

¹ Philip Joseph, *Constitutional and Administrative Law in New Zealand* (4th ed, Thomson Reuters, Wellington, 2014) at 1.3 and 1.6.2; Janet L. Hiebert and James B. Kelly *Parliamentary Bills of Rights: The Experiences of New Zealand and the United Kingdom* (Cambridge University Press, Cambridge 2015) at 1-2. This is reflected in key statutes, such as the Supreme Court Act 2003, s 3(2); Constitution Act 1986, s 15(1); New Zealand Bill of Rights Act, s 4 and has been recognised by the Supreme Court: *Hansen v R* [2007] NZSC 7, [2007] 3 NZLR 1 at [253]-[254].

² Philip A Joseph "Parliament, the Courts and the Collaborative exercise" (2004) 15 KCLJ 321 at 322.

³ At 323.

⁴ Ross Carter, *Burrows and Carter on Statute Law in New Zealand* (5th ed, Lexis Nexis, Wellington, 2015) at 335.

⁵ Stephen Gardbaum, *The New Commonwealth Model of Constitutionalism: Theory and Practice* (Cambridge University Press, New York, 2013) at 79-80. The name derives from its adoption in varying forms in Canada, the United Kingdom, New Zealand and parts of Australia.

⁶ At 45-46.

⁷ At 1-2.

This paper assesses whether Gardbaum's Commonwealth Model adequately describes the relationship between the judiciary and Parliament when they operate under stress and particularly whether this rights scrutiny can be achieved. The first part will explain Gardbaum's theory of the Commonwealth Model. I will argue that New Zealand's constitutional arrangements fit within this model and that this has advantages over both judicial and political supremacy. In the second to fourth parts, I will apply the Commonwealth Model to a case study, the 'family carers saga'. The 'family carers saga' provides an ideal case study because it involves an issue, whether family carers of adult disabled children should be paid, which the judiciary and Crown disagreed on. It provides insight into how the branches of government interact, including how both the judiciary and executive exercise their increased rights review roles and reveals how the emphasis on pragmatism in New Zealand's constitutional culture affects how the different branches carry out those roles. I will argue that despite Parliament's attempt to use its unlimited law-making authority to undermine this additional rights scrutiny, the Commonwealth Model proved resilient in the family carers saga. Nevertheless, the 'family carers saga' left the Attorney-General,⁸ judiciary,⁹ and the disability community¹⁰ thoroughly displeased with the Government's funded family care policy. While litigation over funded family care is ongoing,¹¹ this paper's focus is limited to the first three stages of the saga because they encompass the most constitutionally important elements.

The second part will analyse the Court of Appeal's decision in *Atkinson v Ministry of Health*.¹² I will argue that the Court's aggressive approach to enforcing individual rights in finding that the Ministry of Health's family care policy was illegal was largely consistent with the Commonwealth Model. However, it left the Crown with legitimate concerns about the decision's fiscal and operational implications. The third part will argue that the legislative response to *Atkinson* in the New Zealand Public Health and Disability Amendment Act 2013 ("NZPHDAA") sought to undermine the additional protections provided by the Commonwealth Model and demonstrates the control which Cabinet continues to exercise over Parliament. The NZPHDAA sought to remove judicial scrutiny of family care policies, while the legislative process sought to remove political accountability.

Finally, I will consider the Court of Appeal's interpretation of the NZPHDAA in *Spencer v Attorney-General*¹³ and argue that *Spencer* demonstrates the Commonwealth Model's resilience. While Parliament sought to undermine the Commonwealth Model, the judiciary

⁸ See for example Chris Finlayson *Report of the Attorney-General under the New Zealand Bill of Rights Act 1990 on the New Zealand Public Health and Disability Amendment Bill (No 2)* (16 May 2013) at [12].

⁹ See for example *Chamberlain v Ministry of Health* [2017] NZHC 1821 at [22]-[23] per Palmer J.

¹⁰ Disabled Persons' Assembly New Zealand *Petition to Repeal the New Zealand Public Health and Disability Amendment Act 2013* (27 October 2014).

¹¹ *Chamberlain*, above n 9; *King v Attorney-General (Application to Remove Proceedings to High Court)* [2017] NZHRRT 10.

¹² *Ministry of Health v Atkinson* [2012] NZCA 184, [2012] 3 NZLR 456 [*Atkinson* (CA)].

¹³ *Attorney-General v Spencer* [2015] NZCA 143, [2015] 3 NZLR 449 [*Spencer* (CA)].

applied the principle of legality to read down the most egregious elements of the NZPHDAA because it was not drafted explicitly enough to allow for appropriate political scrutiny. Consequently, I will conclude that the Commonwealth Model adequately describes how New Zealand's Constitution operated in the family carers saga because *Spencer* demonstrates that Parliament cannot avoid both political and judicial scrutiny.

1. The Commonwealth Model

This part will briefly outline New Zealand's constitutional framework and argue that while the legislature and executive are distinct, the executive exercises a high level of control over the legislature. I will argue that this executive control continues despite substantial constitutional reform in New Zealand since 1984 which aimed to increase constraints on the exercise of public power. One aspect of these reforms was enacting the NZBORA and shifting to a Commonwealth Model constitution. I will then describe the key features of the Commonwealth Model as it operates in New Zealand and argue there are significant benefits to this intermediate form of constitution. Notably, it achieves the key benefits of both judicial and parliamentary supremacy because ultimate power is retained by a publicly accountable entity while additional practical constraints are placed on Parliament.

(a) New Zealand's constitutional framework

New Zealand's constitutional arrangements have recently been debated with some advocating for creating judicially enforceable substantive limits on Parliament's legislative power.¹⁴ There is clear authority, however, that where Parliament explicitly infringes on protected rights, the judiciary will apply that legislation.¹⁵ The executive, which carries out the day-to-day exercises of public power, cannot make law and its actions are judicially reviewable for consistency with Parliament's law.

The distinction between the executive and legislature is weaker than the theory suggests, however. As with other Westminster systems, government ministers must be MPs.¹⁶ Historically, governing parties had absolute majorities under the first-past-the-post electoral system with Cabinet, bound by the convention of collective responsibility, dominating the governing party.¹⁷ Joseph argues this continues under MMP because the government must retain the confidence of the House of Representatives and dissent on government bills is very rare.¹⁸ Waldron argues that the high percentage of Ministers within a ruling coalition further creates incentives to tow party lines because of the high probability of promotion to Cabinet.¹⁹ The House's standing orders allow for party line votes on almost all issues which further

¹⁴ See for example: Andrew Butler and Geoffrey Palmer *A Constitution for Aotearoa New Zealand* (Wellington, Victoria University Press, 2016). The Opportunities Party also advocated for an entrenched bill of rights in the 2017 election.

¹⁵ Two prominent examples are *Hansen*, above n 1, at [253]-[254]; *Attorney-General v Taylor* [2017] NZCA 215, [2017] 3 NZLR 24 at [186].

¹⁶ Constitution Act 1986, s 6.

¹⁷ This convention requires all members of Cabinet to publicly support Cabinet's decisions.

¹⁸ Joseph, above n 2, at 334.

¹⁹ Jeremy Waldron "Parliamentary Recklessness" [2008] NZLJ 417 at 420.

reduces the probability of dissent.²⁰ Consequently the legislature and executive operate effectively as a single branch of government.²¹ This, accompanied by Parliament's unlimited law-making power, makes New Zealand an "executive paradise" because the executive can push through any legislation it is committed to.²²

(b) A collaborative enterprise

Several contemporary constitutional theorists argue that the judiciary has always played a role in restraining Parliament.²³ For Joseph, statutory interpretation is inevitably a "collaborative exercise" between the judiciary and Parliament.²⁴ While statutory meaning is ascertained "from its text and in light of its purpose,"²⁵ that purpose is determined against a "value-laden" background.²⁶ These values are found in both statutes and common law and they are enforced through the principle of legality; the presumption that Parliament does not intend to override fundamental rights unless it explicitly says so.²⁷ This causes judicial approaches to statutory interpretation to vary; courts will sometimes strictly construe legislation, while other times they take a strongly purposive approach, starting with the ostensive parliamentary intent and attempting to construe legislation consistently with that intention. This approach provides some protection for fundamental values against abrogation because it means Parliament cannot hide its intention behind technical language. The Court of Appeal recently described this interaction between the different branches of government as the "routine work of government, in which Parliament legislates and the executive administers and courts interpret, leading in due course to legislative reform to better meet the community's evolving needs."²⁸

(c) Constitutional change

The relationship between the judiciary and Parliament can change over time. Matthew Palmer argues a deeper understanding of a constitution requires emphasising "the real-world impacts

²⁰ Standing Orders of the House of Representatives 2014, SO 141.

²¹ Joseph, above n 2, at 334. Joseph describes this as "the political branch".

²² Matthew Palmer "Using constitutional realism to identify the complete Constitution: lessons from an unwritten constitution" (2006) *American Journal of Comparative Law* 587 at 589.

²³ See for example David Dyzenhaus, "The politics of deference: judicial review and democracy" in Michael Taggart (ed) *The Province of Administrative Law* (Hart Publishing, Oxford, 1997); Peter Oliver "Sovereignty in the twenty-first century" (2003) 14 *KCLJ* 137. But see also Richard Ekins "Judicial Supremacy and the Rule of Law" (2003) 119 *LQR* 127.

²⁴ Joseph, above n 2, at 323.

²⁵ Interpretation Act, s 5(1).

²⁶ Joseph, above n 2, at 338.

²⁷ See for example Claudia Geiringer "The principle of legality and the Bill of Rights Act: a critical examination of *R v Hansen*" (2008) 6 *NZJPIL* 59 at 74.

²⁸ *Taylor*, above n 15, at [150] per Wild and Miller JJ.

of the exercise of public power.”²⁹ A code which sets out ostensibly clear rules can distract constitutional interpreters from focusing on the political, legal and other factors which affect the exercise of public power.³⁰ Consequently, a deeper understanding of constitutional function is gained by considering New Zealand’s historical context, particularly the period from 1984 to 1996. During that time, New Zealand underwent a period of significant constitutional reform even while Parliament remained supreme. New Zealand’s electoral system changed to a MMP and the NZBORA was enacted.³¹ While transformational, these were also pragmatic changes. The electoral system changed only after a referendum and against the wishes of both major party leaders. MMP imposed new political constraints by creating a practical requirement to form coalition governments.³² The NZBORA was a compromise from the unpopular, entrenched Bill of Rights Sir Geoffrey Palmer proposed.³³ Its purpose was to create new mechanisms to reduce parliamentary infringement on protected rights.

While the principle of legality applies generally, there is greater protection against legislative pathologies for protected rights under the NZBORA. The NZBORA increases the strength of this interpretive mechanism and gives the judiciary a role in substantively reviewing legislation, albeit without the power to invalidate it.³⁴ These mechanisms constitute a new, intermediate constitutional framework between judicial and legislative supremacy.

(d) The Commonwealth Model in New Zealand

Gardbaum argues the Commonwealth Model provides both a descriptive and normative account of a constitutional framework. It describes the distinct ways several Commonwealth countries’ constitutional arrangements operate, the key features being:³⁵

1. a charter or bill of rights;
2. mandatory review of legislation by the executive for rights consistency before enactment;
3. an increased role for the courts in substantive rights review of legislation; but
4. parliamentary supremacy is retained.

²⁹ Matthew Palmer “What is New Zealand’s Constitution and who interprets it? Constitutional realism and the importance of public office-holders” (2006) 17 PLR 133 at 134. Palmer describes this approach as “constitutional realism.”

³⁰ At 139.

³¹ Palmer, above n 22, at 597.

³² To win a majority of seats in Parliament, a political party must win 50 percent of the vote by themselves. No New Zealand political party has won a majority of votes since the National Party in 1951.

³³ Geoffrey Palmer “A Bill of Rights for New Zealand: A white paper” (1985) AJHR A6.

³⁴ The substantive review role of the Courts stems from judicial interpretation of NZBORA, ss 5 and 6. See for example *Ministry of Transport v Noort* [1992] 3 NZLR 260 at 272 per Cooke P noting the influence of s 6 on statutory interpretation.

³⁵ Gardbaum, above n 5, at 28-29.

The Commonwealth Model is distinct from judicial sovereignty because Parliament can either override judicial decisions by parliamentary majority using a “notwithstanding” enactment, as in Canada,³⁶ or judicial decisions will not affect that legislation’s validity, as in New Zealand. The Commonwealth Model is also distinct from orthodox parliamentary supremacy because it increases the judiciary’s role by enabling it to substantively review legislation.

New Zealand’s Constitution, through the NZBORA, has all the features of the Commonwealth Model. The NZBORA sets out protected rights.³⁷ It requires the Attorney-General to advise Parliament of “any provision in the Bill that appears to be inconsistent” with protected rights.³⁸ The judiciary has gradually developed the NZBORA’s substantive review function which requires them to determine if limits on rights are “reasonable limits” which can be “demonstrably justified”. In successive decisions the judiciary recognised that the NZBORA has expanded their role and shaping that power to attempt to provide appropriate remedies in each case.³⁹ Gardbaum characterises the NZBORA as an “interpretive” rather than an “overriding” Bill of Rights because it acts as a substantive interpretive tool, requiring rights-consistent interpretations of statutes to be preferred, but the judiciary cannot invalidate legislation.⁴⁰ It is, however, enforceable against the executive when its decisions interfere with protected rights without a statutory basis. New Zealand’s judiciary have, with a few exceptions, exercised this interpretive power with restraint.⁴¹ Nevertheless, Blanchard J suggests that in interpreting rights-inconsistent statutes “little guidance can now be obtained from pre-Bill of Rights cases” because the NZBORA allows courts to go further than the principle of legality.⁴² If no alternative meaning can be found, however, the judiciary can, at most, issue a declaration of incompatibility.⁴³

³⁶ This applies to most, but not all rights in Canadian Charter of Rights and Freedoms 1982 (CA). The exceptions are political, movement and minority language rights.

³⁷ NZBORA, pt 2.

³⁸ NZBORA, s 7.

³⁹ See for example *Noort*, above n 34, at 272 per Cooke P noting the influence of s 6 on statutory interpretation; *Moonen v Film and Literature Board of Review* [2000] 2 NZLR 9 at [20] per Tipping J in which the Court noted that it may indicate whether a limit on a right was demonstrably justified; *Hansen*, above n 1, at [283] per McGrath J for where the Court was willing to “indicate” the inconsistency; *Taylor*, above n 15, at [162] for when the power to issue a declaration of inconsistency was found.

⁴⁰ Stephen Gardbaum “The New Commonwealth Model of Constitutionalism” (2001) 49 Am J Comp L 707 at 728. The NZBORA’s status has been described as ‘subordinate law’ because s 4 prevents any provision in any enactment being “impliedly repealed or revoked” by the NZBORA.

⁴¹ Stephen Gardbaum “A Comparative Perspective on Reforming the New Zealand Bill of Rights Act” [2014] PLQ 33 at 34. The orthodox approach is that there must be another “reasonably available meaning.” See *Hansen*, above n 1, at [257] per McGrath J. For examples of exceptions to this approach see *Hopkinson v Police* [2004] 3 NZLR 704 at [81]-[82]; *Electoral Commission v Watson* [2016] NZCA 512, [2017] 2 NZLR 63 at [72]-[75] per Miller J.

⁴² *Brooker v Police* [2007] NZSC 30, [2007] 3 NZLR 91 at [63].

⁴³ *Taylor*, above n 15, at [182]. The Supreme Court gave the Attorney-General leave to appeal on this point, with the hearing scheduled for November 2017: *Attorney-General v Taylor* [2017] NZSC 131.

(e) Going beyond dialogue

The Commonwealth Model is not designed to ensure agreement between the branches of government on rights issues. Judges frequently disagree amongst themselves about these issues; it would therefore be surprising if the judicial and political branches, with their different perspectives, always agreed.⁴⁴ Hogg and Bushell argue a key advantage of intermediate constitutional arrangements, in their case the Canadian Charter of Rights and Freedoms 1982, is that they allow for “inter-institutional dialogue” whereby Parliament re-evaluates legislation in light of judicial decisions.⁴⁵ They note that most constitutional cases in Canada involve a legislative “sequel” whereby Parliament reformulates legislation to be more rights-consistent.⁴⁶

The NZBORA likewise invites legislative responses because Parliament can overrule or vary NZBORA decisions. In *Moonen v Film and Literature Board of Review* the Court of Appeal found that, in the context of censoring publications, s 6 operated to limit the definition of “objectionable” material in the Films, Videos, and Publications Classification Act 1993 to reduce its infringement on freedom of expression.⁴⁷ Anne Tolley MP introduced a Bill to override *Moonen* and expand the definition of “objectionable.”⁴⁸ This Bill, however, failed to pass its second reading. Similarly, in *Taunoa v Attorney-General*⁴⁹ the High Court awarded NZBORA damages to prisoners for substantial breaches of their right to be treated with “humanity and with respect for the inherent dignity of the person.”⁵⁰ Parliament responded by legislating to limit monetary awards to prisoners for harm caused in prison.⁵¹

Gardbaum was initially attracted to this ‘dialogue’ idea because he saw the Commonwealth Model as requiring “joint responsibility between courts and legislatures.”⁵² He suggested there may be a “rough division of labour” between the branches of government, whereby the courts determine a right’s scope, while the legislature determine whether the right is infringed and whether that is justified.⁵³ Gardbaum has since developed the Commonwealth Model and argues it provides something more nuanced than dialogue. Gardbaum argues Hogg and Bushell’s analysis is over-inclusive, including all instances of legislative responses to judicial

⁴⁴ Compare for example the contrasting answers provided in *Hansen*, above n 1, at [83] per Blanchard J and [234] per McGrath J.

⁴⁵ Peter Hogg and Allison Bushell “The Charter Dialogue between Courts and Legislatures (Or Perhaps the Charter of Rights Isn’t Such a Bad Thing after All)” (1997) 35 Osgoode Hall LJ 75 at 79.

⁴⁶ At 79-80 and 97.

⁴⁷ *Moonen*, above n 39, at [27] and [29].

⁴⁸ Andrew Butler and Petra Butler *The New Zealand Bill of Rights Act: A Commentary* (2nd ed, LexisNexis, Wellington, 2015) at 45-46.

⁴⁹ *Taunoa v Attorney-General* (2004) 7 HRNZ 379.

⁵⁰ NZBORA, s 23(5).

⁵¹ Prisoners’ and Victims’ Claims Act 2005, ss 13 and 14. For a fuller discussion of *Taunoa* and the legislative response see Margaret Briggs “The Prisoners’ and Victims’ Claims Act” [2005] NZLJ 355.

⁵² Gardbaum, above n 40, at 747.

⁵³ At 748.

decisions.⁵⁴ Dialogue is not distinct to the Commonwealth Model. It also occurs under judicial supremacy, where Parliament responds to judicially invalidated legislation, and outside human rights contexts. For example, when the Court of Appeal found the Māori Land Court had jurisdiction to determine whether Māori retained customary title over the foreshore and seabed, Parliament responded by removing that jurisdiction.⁵⁵ The Commonwealth Model is instead distinct because it creates formal mechanisms for political and judicial rights scrutiny of legislation.

(f) Advantages over parliamentary supremacy

Waldron's case for parliamentary sovereignty relies on Parliament taking rights seriously, yet traditional parliamentary sovereignty lacks political mechanisms to ensure this.⁵⁶ Consequently, politicians can unjustifiably target unpopular groups, including prisoners and religious minorities, for political gain.⁵⁷ Defenders of parliamentary sovereignty argue Parliament has a democratic mandate and therefore can be held accountable for its actions.⁵⁸ Further, controversial rights questions invoke both legal and broader ethical and moral questions such as the value of a human life, which judges have no particular expertise in.⁵⁹

The Commonwealth Model provides three mechanisms to achieve those connected goals of ensuring Parliament takes rights seriously and promoting political accountability. Firstly, there is increased pre-enactment political rights scrutiny. When legislation is introduced the Attorney-General must report to Parliament on inconsistencies with protected rights.⁶⁰ This is the most distinct stage because the other two stages occur, albeit in quite different fashion, in judicial supremacy systems.⁶¹ This ensures MPs know the legislation infringes on protected rights before they vote and encourages parliamentary deliberation of both whether the right is infringed and, more importantly, whether this can be justified. If MPs fail to consider these implications, they cannot claim ignorance of the legislation's implications and therefore can be held politically accountable more easily.

⁵⁴ Stephen Gardbaum "Reassessing the new Commonwealth model of constitutionalism" (2010) 8 I Con 167 at 181.

⁵⁵ *Ngati Apa v Attorney-General* [2003] 3 NZLR 643 (CA); Foreshore and Seabed Act 2004, s 12.

⁵⁶ Jeremy Waldron "The core of the case against judicial review" (2006) 115 Yale LJ 1346 at 1364.

⁵⁷ Gardbaum, above n 5, at 54.

⁵⁸ John Smillie "Who wants Juristocracy?" (2006) 11 OLR 183 at 184.

⁵⁹ At 184; Waldron, above n 56, at 1349. The value of a human life has been considered in both Canada and New Zealand. See *Carter v Canada (Attorney General)* [2015] SCC 5; *Seales v Attorney-General* [2015] NZHC 1239, [2015] 3 NZLR 556.

⁶⁰ Gardbaum, above n 5, at 80.

⁶¹ Janet Hiebert "New Constitutional Ideas: can new Parliamentary models resist judicial dominance when interpreting rights?" (2004) 59 Texas L Rev 1963 at 1985.

The second stage of review is substantive judicial review. Kumm argues that political legitimacy requires Parliament to be both democratically accountable and able to justify its decisions.⁶² Dyzenhaus similarly argues that government actions are legitimate because of their justification and argues for the promotion of a 'culture of justification' which requires the Crown to be prepared to publicly justify their decisions.⁶³ These justifications provide a basis for government legitimacy and for deference to these exercises of public power.⁶⁴ This judicial rights review occurs either during statutory interpretation or during judicial review of a government decision. This requires the Crown to justify their infringement on protected rights and the judiciary to determine whether legislation infringes protected rights and if this is demonstrably justifiable.

In applying a statute, the judiciary first determines whether the ordinary interpretation infringes a right and if so whether that infringement can be demonstrably justified. If it can be justified, then that interpretation is applied and if not, an alternative definition is sought. In *Hansen v R*, for example, the defendant challenged the interpretation of s 6(6) of the Misuse of Drugs Act 1977 which placed an onus on him to prove that he was not possessing cannabis for supply.⁶⁵ The Supreme Court found that such an interpretation was an unjustifiable infringement on the right to be presumed innocent, but also that the provision was incapable of any other interpretation and therefore was applied.⁶⁶ Dixon notes legislators frequently lack time to give proper attention to rights-based claims.⁶⁷ A finding of incompatibility with the NZBORA will therefore sound an "alarm" to the public and politicians that there may be unjustified rights-infringing legislation on the books.⁶⁸ This 'alarm' should place political pressure on MPs to respond to such concerns, notwithstanding the issue's divisiveness, to either remedy them or justify position to the public.

The third stage of rights review is 'post-enactment political rights review' which occurs after a judicial finding that a government decision or enactment is incompatible with the NZBORA. Gardbaum argues that this review provides an opportunity for the legislature to engage in a deliberative process and go beyond the individual rights paradigm which the judiciary operates within, considering arguments based on a communitarian paradigm for example.⁶⁹ This review

⁶² Butler and Butler, above n 48, at [17.10.46]; Mattias Kumm, "Democracy is not enough: Rights, proportionality and the point of judicial review" (2009) 118 NYU Public Law and Legal Theory Working Papers, 1 at 4-5; Mattias Kumm "Institutionalising Socratic contestation: the rationalist human rights paradigm, legitimate authority and the point of judicial review" (2007) 1 European Journal of Legal Studies 1.

⁶³ David Dyzenhaus "Law as justification: Etienne Mureinik's conception of legal culture" (1998) 14 SAJHR 111 at 115.

⁶⁴ Gardbaum, above n 5, at 55-56. For a fuller account see Dyzenhaus, above n 63; Etienne Mureinik "A Bridge to Where? Introducing the Interim Bill of Rights" (1994) 10 SAJHR 31.

⁶⁵ *Hansen*, above n 1.

⁶⁶ At [165] per Tipping J, [257] per McGrath J and [290] per Anderson J.

⁶⁷ Rosalind Dixon, "A Democratic Theory of Constitutional Comparison" (2008) 56 Am J Comp L 947 at 967.

⁶⁸ Gardbaum, above n 5, at 49; Waldron, above n 56, at 1355-56.

⁶⁹ Gardbaum, above n 5, 233-234.

ensures “legislative and judicial reasoning are both brought to bear on rights issues.”⁷⁰ Post-enactment review further provides a forum for the Crown to either justify legislation or to change it.

The Commonwealth Model’s rights review mechanisms seek to promote a political culture which “respects rights disagreements” because there is frequently room for reasonable disagreement on rights issues.⁷¹ It emphasises a process for considering rights impacts of decisions rather than a particular outcome.⁷² This therefore promotes a rights-conscious culture which Waldron considers a prerequisite for parliamentary sovereignty. This culture is especially important in New Zealand because Parliament typically does not have to respond to judicial rights reviews because legislation will not be invalidated.⁷³ These mechanisms provide assurance that while Parliament retains the final word, it will consider individual rights.

(g) Advantages over judicial supremacy

The Commonwealth Model also responds to judicial supremacy’s weaknesses. Firstly, Smillie argues that judicial supremacy allows “non-elected, mostly male, former lawyers to substitute their views on highly contestable moral and social issues for those of the democratically elected parliament.”⁷⁴ The Commonwealth Model avoids this problem because a judicial finding that an enactment is incompatible with the NZBORA cannot affect that enactment’s validity. Further, if a rights-compatible interpretation is given to a statute, Parliament can overrule it using ordinary legislation. Therefore, Parliament, a democratically accountable entity, will have the final, but not the only, say on these issues.

A second complaint against judicial supremacy is that transferring ultimate responsibility for rights protection to the judiciary may reduce political rights considerations because the public may believe that rights protection is a legal matter best left to judges.⁷⁵ There are three responses to this concern. Firstly, the judiciary cannot invalidate an enactment and therefore Parliament remains ultimately responsible for rights protection. Secondly, the Attorney-General must, upon a Bill being introduced, draw the public’s attention to any rights-incompatibility.⁷⁶ This should promote parliamentary consideration of rights impacts. Thirdly, the judiciary’s response to incompatible legislation has also been to draw the public’s attention to incompatibility with the NZBORA, through either a “*Hansen* indication” of inconsistency or

⁷⁰ At 233.

⁷¹ At 90.

⁷² At 90.

⁷³ At 88.

⁷⁴ Smillie, above n 58, at 183.

⁷⁵ Gardbaum, above n 40, at 746.

⁷⁶ NZBORA, s 7.

through a formal declaration of incompatibility.⁷⁷ The judiciary has therefore sought to ensure that the matter remains in the political realm.

The judicial and political branches should be cognisant of each branch's relative strengths and weaknesses. The judiciary ought to recognise their limited expertise in social policy and the challenging realities of allocating scarce resources to social programmes within the administrative state. Judges struggle to make polycentric decisions because there will always be affected parties who are not represented in litigation and further, the judicial process is designed to be dogmatic. Fallon, even in arguing for judicial supremacy, accepts judges lack any institutional advantages in this type of reasoning.⁷⁸ The judicial process, however, is good at protecting individual rights and providing an application of broad principles to a set of facts, demonstrating their operation in practice.

Protected rights are not ahistorical and are necessarily influenced by the context in which the rights instrument is written.⁷⁹ This is particularly problematic because entrenched rights are exceptionally difficult to change once enacted.⁸⁰ NZBORA too is a feature of history and consequently it lacks the protection of property rights found in the United States' Constitution or the economic rights found in South Africa's Constitution.⁸¹ Fallon's argument for entrenched rights instruments relies on the libertarian presumption that underenforcement of rights is more troublesome than overenforcement, but he accepts this argument relies on only negative rights being protected.⁸² As Tushnet notes, overenforcement of negative liberties, which prevent enforcement of positive rights to education or social welfare, threaten to entrench historic values at the expense of contemporary values.⁸³ The historically contingent nature of the NZBORA is less problematic because it is unentrenched and can be amended by an ordinary parliamentary majority. NZBORA rights have both increased, with the substantial expansion of the grounds of the freedom from discrimination and reduced with the threshold for the right to trial by jury increasing from offenses carrying maximum sentences of at least three months imprisonment to two years.⁸⁴ The NZBORA therefore provides the advantages of explicit

⁷⁷ See for example *Hansen*, above n 1, at [253]-[254]; *Taylor*, above n 15, at [186].

⁷⁸ Richard Fallon "The core of an uneasy case for judicial review" (2008) 121 Harv L Rev 1693 at 1693.

⁷⁹ Noel Cox "Proposed Constitutional Reform in New Zealand: Constitutional entrenchment, written constitutions and legitimacy" (2013) 70 Round Table 51 at 65.

⁸⁰ See for example the Constitution of the United States 1787 (US), art V. This requires the support of two-thirds of both Houses of Congress and three-quarters of the States to amend the Constitution.

⁸¹ Consider for example: Constitution of the United States 1787 (US), am 14; Constitution of the Republic of South Africa, 1996 (SA), s 26. These provisions provide respectively for: the prevention of any person being deprived "of life, liberty, or property, without due process of law" and a right to housing.

⁸² Fallon, above n 78, at 1705.

⁸³ Mark Tushnet "How different are Waldron's and Fallon's core cases for and against judicial review?" (2010) 30 OJLS 49 at 63.

⁸⁴ The grounds of discrimination are found in Human Rights Act 1993, s 21. The right to a trial by jury in NZBORA, s 24(e) was amended by New Zealand Bill of Rights Amendment Act 2011, s 4.

mechanisms for political and judicial scrutiny of legislation while retaining democratic legitimacy because Parliament remains sovereign.

2. Ministry of Health v Atkinson

In the first part, I argued that New Zealand's Constitution is a Commonwealth Model constitution and that this has significant advantages. In the following three parts I will apply the Commonwealth Model to the family carers saga and analyse whether the Commonwealth Model is working in challenging circumstances. The saga begins with the Court of Appeal's decision in *Ministry of Health v Atkinson* which considers whether the Ministry of Health's blanket ban on employing parents to provide disability support to their children is unlawful discrimination. I will firstly argue that while a policy, rather than legislation, *Atkinson* reflects the judiciary's increased role under the Commonwealth Model. Secondly, I will outline the Court's reasoning in *Atkinson* and argue the Court's strong approach to rights enforcement was largely consistent with the Commonwealth Model because the Court emphasised the importance of justifying rights infringements and ensured those rights were not underenforced. Thirdly, I will argue that *Atkinson* left the Crown in a difficult position because complying with the decision represented a fundamental shift in a tenet of the policy with substantial and uncertain fiscal implications.

(a) A novel case

Atkinson was a "test case" because it was the first-time government policy, rather than legislation, was challenged using s 19.⁸⁵ A finding that a policy was incompatible with the NZBORA would, unlike with legislation, make the policy unlawful. While the Commonwealth Model primarily focuses on the relationship between the judiciary and Parliament and the policy is an executive action, New Zealand's system of responsible government means the executive and legislature are not truly distinct branches.⁸⁶ As the political response discussed in the next part demonstrates, the executive frequently exercises full control over both policy and related legislation. Further, the Court of Appeal substantively reviewed the policy for consistency with the NZBORA, applying the same tests as it would if it was reviewing legislation. The emphasis was substantially different from orthodox judicial review which considers only whether the policy was inconsistent with legislation.⁸⁷ While inconsistency with the NZBORA was required, this did not determine whether the policy was unlawful because NZBORA rights can be subject to "reasonable limits."⁸⁸ The Court therefore also had to consider whether such an infringement was substantively justifiable, while providing some deference to the Crown.

⁸⁵ Philip A. Joseph "Constitutional Law" [2015] NZ L Rev 683 at 700. The NZBORA, s 19 is the freedom from discrimination.

⁸⁶ See part 1(a) above for a fuller discussion.

⁸⁷ Normally judicial review is carried out under the Judicature Amendment Act 1972 (subsequently replaced by the Judicial Review Procedure Act 2016).

⁸⁸ NZBORA, s 5.

Courts have traditionally been extremely deferential when judicially reviewing medical treatment or funding decisions.⁸⁹ This was such a case because if the Ministry was required to pay family carers, it would need to shift funding away from other sources. The NZBORA changes this position with respect to unjustifiably discriminatory allocation of medical resources because those rights can only be subject to reasonable limits. The judiciary must ensure those limits are not exceeded and if they are then the Ministry is acting illegally. Therefore, the judiciary's substantive review of this policy demonstrates its expanded role under the Commonwealth Model.

(b) Context

Family carers of disabled people face very high levels of deprivation. While disabled people typically receive social assistance to pay for disability supports, family carers typically receive little financial support.⁹⁰ Prior to *Atkinson*, solo parents caring for adult disabled children, were entitled to the Domestic Purposes Benefit – Care of Sick and Infirm amounting to \$336.55 per week plus an accommodation supplement.⁹¹ If the carer had a partner who worked full time they frequently would not qualify for any social assistance.

The family carers saga occurred in a period when the judiciary was re-evaluating the economic value of care work, including recognising the strongly gendered aspect of care work.⁹² As Herring argues, “the economic costs of care are largely borne by women,” while the benefits are gained by taxpayers generally.⁹³ The issue of paying family carers was also not new; in 2001 the Human Rights Review Tribunal found in *Hill v IHC NZ Ltd* that IHC's policy of not employing family members of the disabled person to care for them amounted to unlawful discrimination.⁹⁴ Following *Hill*, there was inter-departmental work considering how to provide additional support to family carers, and particularly the construction of a carers' allowance.⁹⁵ However, such a solution never eventuated.

⁸⁹ For discussion of these issues see Peter Skegg “Omissions to provide life prolonging Treatment” (1994) 8 OLR 205 at 236-237; *R v Cambridge Health Authority, ex parte B (a minor)* (1995) 25 BMLR 5, 17 (QB); Jesse Wall “*R v Cambridge Health Authority, ex parte B (a minor)*: a tale of two judgments” in Jonathan Herring and Jesse Wall (ed) *Landmark Cases in Medical Law* (London, Hart, 2015). The New Zealand Court of Appeal even avoided the question of whether a decision to treat a patient was a “statutory power of decision” for the purposes of the Judicature Amendment Act 1972, s 4: *Shortland v Northland Health Ltd* [1998] 1 NZLR 433 at 444.

⁹⁰ Jonathan Herring, *Caring and the Law* (Hart Publishing, London, 2013) at 6 and 32.

⁹¹ Work and Income New Zealand “Benefit rates April 2012” (accessed 18 July 2017), <https://www.workandincome.govt.nz/products/benefit-rates/benefit-rates-april-2012.html#null>.

⁹² See for example *Idea Services v Dickson* [2011] NZCA 14, [2011] 2 NZLR 522; *Terranova Homes & Care Ltd v Service and Food Workers Union Nga Ringa Tota Inc* [2014] NZCA 516, [2015] 2 NZLR 437; *Lowe v Ministry of Health* [2017] NZSC 115. The most explicit case was *Terranova*, which involved a claim under the Pay Equity Act 1972 that care work was systemically undervalued because it was done predominantly by women.

⁹³ Herring, above n 90, at 97.

⁹⁴ *Hill v IHC NZ Inc* (2001) 6 HRNZ 449 at [9].

⁹⁵ *Ministry of Health v Atkinson* (2010) 9 HRNZ 47 (HC) at [168] and [183] [*Atkinson* (HC)].

Finally, disability policy has been shifting toward emphasising disabled people exercising greater “choice and control” over their lives.⁹⁶ This approach included expanding ‘individualised funding’ programmes which give disabled people greater control over their disability supports. Part of this strategy also includes encouraging disabled people to expand their natural supports, defined as “readily accessible resources which the individual can access” including support provided by friends and family on an informal basis, to spread their informal supports across more people.⁹⁷ There is, nevertheless, an argument that government has tended to see the carer and the cared for as isolated individuals without recognising the relationship between the two.⁹⁸ Consequently, the disabled person’s expanded choice and control may not be extended to their carers.

(c) The policy

The Ministry of Health’s approach to funding disability support ensured a disabled person’s needs were met. However, it would only fund services to meet needs if they could not be met by the disabled person’s ‘natural supports.’ The Ministry’s policy did not require the disabled person’s family to provide *any* care to the disabled person and, if necessary, the Ministry would fund support for all the disabled person’s needs.⁹⁹ The Ministry met these needs through various programmes; mostly involving contracting carers to provide services to the disabled person. The Ministry’s policy treated all care provided by resident family members as natural supports and therefore would not employ them to provide care to their disabled relative.

(d) The claim

In October 2005 the nine plaintiffs, seven parents of disabled children and two disabled adults, applied to the Human Rights Review Tribunal, seeking a declaration that the Ministry’s family care policy was inconsistent with s 19 of the NZBORA and therefore unlawful.¹⁰⁰ They argued the Ministry of Health’s “blanket ban” on employing parents to provide disability support services unjustifiably discriminated against them because they were “a relative of a particular person.”¹⁰¹ In early 2010, more than four years later, the Tribunal found in favour of the family carers and declared the Ministry’s policy unlawful. The High Court upheld the Tribunal’s decision. The Ministry appealed to the Court of Appeal. The Court of Appeal judgment is my

⁹⁶ See for example, Office for Disability Issues *Disability Action Plan* (30 October 2012).

⁹⁷ Enabling Good Lives *Objectives* <http://www.enablinggoodlives.co.nz/about-egl/egl-approach/objectives/> (accessed 19 July 2017). The Enabling Good Lives initiative and Local Area Coordination in Western Bay of Plenty are examples of programmes which emphasised this approach.

⁹⁸ Jonathan Herring, “Where are the carers in healthcare law and ethics?” (2007) 27 *Legal Studies* 51 at 52.

⁹⁹ *Atkinson* (HC), above n 95, at [14].

¹⁰⁰ *Atkinson v Ministry of Health* [2010] NZHRRT 1, (2010) 8 HRNZ 902 [*Atkinson* (HRRT)]. The Human Rights Act 1993, s 92(3)(a) provided the court with the authority to provide this declaration.

¹⁰¹ NZBORA, s 19(1); Human Rights Act 1993, s 21(1)(i)(iv).

primary focus; however, I will occasionally draw on the High Court judgment because the Court of Appeal's reasoning frequently summarises the High Court's view.

The Court of Appeal had to resolve two questions:

1. Was the policy discriminatory?
2. If it was discriminatory, could that discrimination be demonstrably justified in a free and democratic society?

(e) Reasoning

(i) Was the policy discriminatory?

The Court of Appeal found the appropriate definition of "discrimination" in s 19 was a 'value neutral' one, requiring only differential treatment because of the applicant's family status which caused material disadvantage.¹⁰² The Ministry argued for a 'purposive approach' which limited discrimination to differential treatment "based on prejudice or stereotyping," which "perpetuated historical disadvantage, or has particularly severe negative effects."¹⁰³ The Court found firstly there was no relevant precedent because the approaches taken in *Quilter v Attorney-General*¹⁰⁴ provided "no clear view" on which definition was preferred.¹⁰⁵ Secondly, the Ministry's 'purposive view' required a strained interpretation of 'discrimination' and implying words into s 19 because the right was "not qualified in any way."¹⁰⁶ Thirdly, the Court noted the purposive view caused questions of justification to be 'double counted' by being incorporated into both the ss 19 and 5 analysis.¹⁰⁷ Finally, the Court considered the purposive interpretation inconsistent with s 19's purpose, which Tipping J found in *Quilter* to be:

"... to give substance to the principle of equality under the law and the law's unwillingness to allow discrimination on any of the prohibited grounds unless the reason for the discrimination serves a higher goal than the goal which anti-discrimination laws are designed to achieve."¹⁰⁸

The Court found that because the parents lost the opportunity to be employed for providing care services they otherwise could be employed for, and the disabled person lost access to the full range of carers, they both suffered a material disadvantage.¹⁰⁹

¹⁰² *Atkinson* (CA), above n 12, at [136].

¹⁰³ At [76].

¹⁰⁴ *Quilter v Attorney-General* [1998] 1 NZLR 523 (CA).

¹⁰⁵ *Atkinson* (CA), above n 12, at [99].

¹⁰⁶ At [113].

¹⁰⁷ At [114]-[115].

¹⁰⁸ *Quilter*, above n 104, at 573 per Tipping J.

¹⁰⁹ At [135].

(ii) *Was the discrimination demonstrably justified?*

The Court then considered whether this discrimination was demonstrably justifiable, and found it was not. The Court agreed with the trial judge, Asher J, who acknowledged that while the Ministry sought to achieve a range of reasonable objectives, these lacked a logical connection to its family care policy. Asher J found, for example, while the potential for commercialising family relationships was a legitimate concern, a blanket ban on employing family carers was not a proportionate response.¹¹⁰ There was evidence of paid family carers, including two of the plaintiffs, whose relationships with their children appeared to be unaffected. The Court further emphasised the experience of the Accident Compensation Corporation, which had used relatives to deliver approximately half their paid care, to demonstrate such risks could be managed.¹¹¹ It suggested a formal audit process could be used to assess the risk of parents or families becoming financially dependent on payments they received.¹¹²

The Court expressed concern that while 272 family carers had been paid, the Ministry had no formal approval process for determining which family carers could be employed.¹¹³ The ad hoc nature of the Ministry's policy, its unclear parameters and the division within the Ministry about whether the policy was appropriate, the Court found, justified a low level of deference.¹¹⁴ While the Court acknowledged paying family carers could create significant and uncertain costs, it was concerned more was not done to provide it with a better estimate of those costs.¹¹⁵ The Court of Appeal therefore agreed with the High Court that the limits on rights were not demonstrably justified because there was a range of alternatives which could manage the Ministry's concerns, while intruding less on the right than a blanket ban.¹¹⁶ The policy was therefore declared illegal.

(f) Evaluation against the Commonwealth Model

Gardbaum argues the judiciary can apply stricter scrutiny in Commonwealth Model jurisdictions than in judicial supremacy jurisdictions because Parliament's ability to respond through ordinary legislation provides "an external check" on judicial power.¹¹⁷ This second stage of rights review occurs "under the shadow" of subsequent political rights review.¹¹⁸ This is especially so when policies are judicially reviewed because the government must respond to a successful review, to either validate the policy through legislation or comply with the ruling. The judiciary's lack of responsibility for the final decision should therefore empower it to take

¹¹⁰ *Atkinson* (HC), above n 95, at [262]-[263]. Cited in *Atkinson* (CA), above n 12, at [156].

¹¹¹ *Atkinson* (CA), above n 12, at [157]-[158].

¹¹² At [161].

¹¹³ At [160].

¹¹⁴ At [179].

¹¹⁵ At [171].

¹¹⁶ *Atkinson* (HC), above n 95, at [286]-[287]; endorsed in *Atkinson* (CA), above n 12, at [180].

¹¹⁷ Gardbaum, above n 5, at 86-87.

¹¹⁸ At 84.

a strong approach to rights enforcement; its legislative mandate being to prevent under-enforcement of individual rights.¹¹⁹ While the judiciary should consider the government's view, it should not be overly deferential; its role being to provide both Parliament and the public with "an authoritative legal perspective."¹²⁰ If the judiciary's view differs from the Crown's, this increases the political costs of continuing the policy because it articulates a contrary, transparent argument against the Crown's view.

(i) *Approach to discrimination*

While some commentators celebrated *Atkinson*, others expressed concern.¹²¹ The Court of Appeal's adoption of the 'value neutral' definition of discrimination substantially expanded s 19's scope, consistent with Gardbaum's view that there should be an expansive and rigorous approach to rights enforcement. Huscroft argues, however, that the 'value neutral' definition of discrimination "trivialises" the right because it causes justifiable differential treatment to be tainted with the same brush as outrageous discrimination.¹²² Consequently, the definition ostensibly ignores why discrimination was included in the NZBORA.¹²³

Anti-discrimination and equality law have been especially problematic for policy-makers because of the difficulty in determining what it means to treat like people alike and unlike people unlike.¹²⁴ While freedom from discrimination is posed as a negative right, it operates like a positive right to equality and therefore imposes positive obligations on the state to not treat people differently.¹²⁵ Such an overarching requirement brings the NZBORA into many social policy areas which can significantly impact resource allocation. Social policy frequently involves making distinctions in pursuit of complicated and sometimes conflicting goals. Consequently, government distinguishes between people on prohibited grounds "all the time."¹²⁶ Differential treatment, Huscroft argues, is frequently necessary to accommodate for circumstances which may cause systematic disadvantage, but may appear arbitrary at the margins.¹²⁷

¹¹⁹ At 85.

¹²⁰ At 84.

¹²¹ For approving commentaries see Sam Bookman "Providing oxygen for the flames? The state of public interest litigation in New Zealand" (2013) NZULR 442; Butler and Butler, above n 48, at [17.9.8] and [17.10.46]. For a disapproving view see Julia Adams "Breaking the Constitution: Discrimination Law, Judicial Overreach and Executive Backlash after *Ministry of Health v Atkinson*" [2016] NZ L Rev 255.

¹²² Grant Huscroft "Freedom from Discrimination" in Paul Rishworth et al *The New Zealand Bill of Rights* (Oxford University Press, Melbourne, 2003) at 376.

¹²³ Adams, above n 121, at 267.

¹²⁴ Adams, above n 121, at 262-263. For a broader view see Peter Westen "The Empty Idea of Equality" (1982) 95 Harv L Rev 537.

¹²⁵ Huscroft, above n 122, at 367.

¹²⁶ Adams, above n 121, at 266.

¹²⁷ Huscroft, above n 122, at 266.

There are three responses to these concerns. Firstly, differential treatment may limit the right to freedom from discrimination, but the policy will only be incompatible with the NZBORA if those limitations are unjustifiable. NZBORA provides reasonable protection of rights and therefore the judiciary must consider the same factors, including whether the discrimination is seeking to reinforce historic disadvantage to determine whether the discrimination is justified.

Secondly, Butler and Butler note the neutral definition provides a “check on unthinking assumptions as to the acceptability of distinctions based on the prohibited grounds.”¹²⁸ Their concern is people may miss unjustifiable discrimination because it does not fit with the narrower purposive vision. Butler and Butler’s suggestion further supports the idea of a “culture of justification” which argues public decision-making can be improved by encouraging politicians to substantively defend public policy.¹²⁹ Discrimination will frequently be readily justified; for example, ‘affirmative action’ programmes might be justified by seeking to rectify historic disadvantage.

Thirdly, there are many grounds in the Human Rights Act which go beyond the narrow purposive definition, yet Parliament has legislated to prevent discrimination on these grounds and can change this if it wishes.

While this definition of discrimination contradicts Canadian authority, which adopted the purposive definition, the NZBORA is a weaker instrument than the Canadian equivalent.¹³⁰ A policy found to be unjustifiably discriminatory can be validated through ordinary legislation in New Zealand. In Canada, however, an unjustifiably discriminatory policy could only be protected if the legislation explicitly states it operates “notwithstanding” s 15 of the Charter and this must be renewed every five years.¹³¹ The federal government has never used this provision, but provincial governments have used it periodically.¹³² The political costs of Parliament overruling the courts are therefore significantly lower in New Zealand which means less deference in the tests applied is necessary to ensure the right is appropriately enforced.

¹²⁸ Butler and Butler, above n 48, at [17.10.46].

¹²⁹ At [17.10.46].

¹³⁰ See for example *R v Kapp* 2008 SCC 41, [2008] 2 SCR 483 at [17]; and *Withler v Canada (Attorney General)* 2011 SCC 12, [2011] 1 SCR 396 at [30]. Compare NZBORA, s 4 to Canadian Charter of Rights and Freedoms (CA) 1982, s 24.

¹³¹ Canadian Charter of Rights and Freedoms 1982 (CA), s 33.

¹³² Quebec famously inserted wording pursuant to s 33 in every law passed in the National Assembly between 1982-1987.

(ii) *Justification*

The Court noted that providing some leeway to decision-makers has “particular resonance in areas such as social and economic policy,” however, it provided relatively little deference to the Ministry’s position.¹³³ The Ministry’s arguments emphasised a more communitarian understanding of the relative responsibilities of the state and family than the Court considered appropriate. The Ministry’s case relied on the proposition that families caring for disabled members was fundamentally different to the care unrelated carers provide and therefore they should not be treated the same.¹³⁴ Its concerns included the potential for “commercialising” family relationships, dependence on income received for caring for disabled family members and preventing the formation of family relationships like those which non-disabled people have.¹³⁵

The Ministry emphasised its understanding of a “social contract” between families and the state in which the state’s role is to support families to provide for disabled members and it is not primarily responsible for caring for the disabled person.¹³⁶ This assumption of the relative responsibilities of the family and state underlies not just disability policy, but arguably all New Zealand’s social policy. *Atkinson* therefore potentially threatened the basis of New Zealand’s social support system. For most of these policies, the assumption is age limited. For example, student allowances are rationed based on parental income until the student turns 24. The assumption being that if parents can support their children they will, with the state intervening only if parents lack the means to. Likewise, 18 and 19-year olds receive a lower rate of unemployment benefit if they live at home.¹³⁷

In the disability context, the Ministry did not coherently apply this social contract because families were not required to care for their disabled children at all and if they could not or refused, the state provided the necessary care.¹³⁸ The state therefore accepted underlying responsibility to care for disabled people because it provided all care the family was unwilling to provide. Once the Court determined this, there was no basis, on an individual rights-based approach, for never paying family carers because it was possible to construct any number of exceptions to the blanket ban which would be less rights-restricting.

¹³³ *Atkinson* (CA), above n 12, at [172] per Ellen France J.

¹³⁴ At [63]-[64].

¹³⁵ *Atkinson* (HC), above n 95, at [201].

¹³⁶ See for example *Atkinson* (HC), above n 95, at [198]-[199] and [207].

¹³⁷ Work and Income New Zealand “Benefit rates April 2012” (accessed 29 September 2017), <https://www.workandincome.govt.nz/products/benefit-rates/benefit-rates-april-2012.html#null>. This does not appear to be the case once the young person turns 20.

¹³⁸ *Atkinson* (HC), above n 95, at [207].

The Court did not appear to consider all family carers must be paid, rather just that there must be exceptions to the blanket ban.¹³⁹ Whether the family care policy's differential treatment was justified therefore rested very heavily on the different lenses through which the judiciary and Crown understood the case. Gardbaum argues that where this occurs, the Court should favour a rights-based approach because the judiciary's obligation under the NZBORA is to enforce individual rights.¹⁴⁰ This is also consistent with the judicial process's emphasis on protecting individual rights. Concerns about whether individual rights are the appropriate paradigm for considering these issues can and should be considered during the post-enactment political rights review stage. Therefore, the Court appropriately adopted a strong individual rights approach.

(iii) Deference

Because *Atkinson* involved the policy was created by the executive and legislation, it could be declared illegal under the Human Rights Act, s 92(3)(a). The "shadow" of post-enactment political rights review therefore loomed larger over *Atkinson* than previous cases because the Crown would have to legislate to change the law if it disagreed with the judiciary.¹⁴¹ This "shadow" of legislative re-evaluation, Gardbaum argues, means the judiciary should not be exceptionally deferential because Parliament can overturn it through normal procedures.¹⁴² Nevertheless, there should still be some deference to the Crown's view because protected rights can be subject to reasonable limits and part of those limitations may be the government's fiscal constraints.¹⁴³

If the Ministry changed its family care policy without increasing disability funding, disabled people with fewer natural supports would likely receive fewer disability supports.¹⁴⁴ The judiciary can shuffle around funds, but cannot increase health funding. The Ministry emphasised the uncertain fiscal implications of funding family care as a reason for affording it a high level of deference. The Court acknowledged that providing decision-makers some leeway has "particular resonance in areas such as social and economic policy."¹⁴⁵ The Ministry estimated the cost of paying family carers was between \$17 million and \$593 million.¹⁴⁶ Asher J suggested that "cost is only a factor to be considered in the mix," however, his Honour tended

¹³⁹ Adams, above n 121, at 274; citing *Atkinson* (HC), above n 95, at [257] and [264].

¹⁴⁰ Gardbaum, above n 5, at 79-80; Gardbaum, above n 41, at 35.

¹⁴¹ Gardbaum, above n 5, at 154. Previous findings of incompatibility were ignored. Consider for example *Hansen*, above n 1; The Labour Government referred *Hansen* to the Law Commission, but no substantive changes were made to s 6(6). Instead, more drugs were added to the provision.

¹⁴² Gardbaum, above n 5, at 85 and 87.

¹⁴³ The High Court spent a considerable amount of time considering these factors. See for example *Atkinson* (HC), above n 95, at [268]-[280].

¹⁴⁴ *Atkinson* (CA), above n 12, at [65].

¹⁴⁵ At [172].

¹⁴⁶ *Atkinson* (HC), above n 95, at [280].

to believe the cost could be “accommodated without other groups having to suffer.”¹⁴⁷ While the strong reading of rights is consistent with Gardbaum’s theory, complying with *Atkinson* created the potential for enormous fiscal costs which the Court did not seriously consider. This is especially so because of the ambiguity as to which family carers must be paid and for what care. There was no guidance as to what might be an adequate exceptions policy. The Courts extraordinarily were willing to rely on their “intuitive view” that the costs could be managed without providing any basis for that belief, especially since the evidence indicated, if nothing else, this was deeply uncertain.¹⁴⁸

The Court’s approach to deference can be understood by comparing it to another Ellen France J judgment, *Child Poverty Action Group v Attorney-General [CPAG]*, delivered 15 months later.¹⁴⁹ *CPAG* concerned a claim that the in-work family tax credit unjustifiably discriminated against unemployed people. In *Atkinson*, Asher J considered the Crown could have done more to provide a solid estimate of the fiscal implications.¹⁵⁰ The Court of Appeal emphasised the Ministry lacked a clear policy position because of the apparently ad hoc exceptions to its policy.¹⁵¹ In *CPAG* the Court also emphasised the Crown’s policy development, noting its careful consideration of alternatives to achieve its competing goals.¹⁵² Ellen France J noted that “good process...is always relevant” and its presence or absence will affect the deference afforded to a policy.¹⁵³ The Court further recognised a high degree of deference was required where an issue involved “the complex interaction of a range of social, economic, and fiscal policies as well as taxation measures.”¹⁵⁴ While the Court also purported to give the Ministry leeway in *Atkinson*, it explicitly considered each concern and explained how it thought a more consistent policy might deal with those concerns.¹⁵⁵

Both *Atkinson* and *CPAG* dealt with issues involving competing social goals. Ellen France J appears to justify the contrasting levels of deference paid because of the divergent levels of policy development. The Ministry’s family care policy was underdeveloped because it reflected an underlying assumption that family members would provide care to their children without payment and consequently a failure to consider alternatives. This was despite a suggestion in

¹⁴⁷ At [279]. This view was shared by the Human Rights Review Tribunal: *Atkinson* (HRRT), above n 100, at [229].

¹⁴⁸ *Atkinson* (HC), above n 95, at [279]. This view was shared by the Human Rights Review Tribunal: *Atkinson* (HRRT), above n 100, at [229]. The High Court indicated frustration that the Ministry was unable to give them a clear estimate of the costs of paying family carers.

¹⁴⁹ *Child Poverty Action Group Inc v Attorney-General* [2013] NZCA 402, [2013] 3 NZLR 729 [*CPAG*]. The two cases even included the same lead counsel: Cheryl Gwyn represented the Ministry of Health and the Attorney General respectively while Frances Joychild QC represented the family carers and Child Poverty Action Group.

¹⁵⁰ *Atkinson* (HC), above n 95, at [278]-[279].

¹⁵¹ *Atkinson* (CA), above n 12, at [179].

¹⁵² *CPAG*, above n 149, at [150].

¹⁵³ At [108].

¹⁵⁴ At [91].

¹⁵⁵ *Atkinson* (HC), above n 95, at [254]-[267].

Hill nearly a decade earlier that this assumption was unjustified.¹⁵⁶ By contrast in *CPAG* the Attorney-General provided significant evidence of the different alternatives explored and the difficulty of achieving the policy's competing aims.¹⁵⁷ The Court noted "this is not a case where the Government has latched on to one option without careful consideration of the alternative."¹⁵⁸ Ellen France J's judgments reflect a recognition that the NZBORA aims to increase the emphasis on justifying government decisions because the deference afforded to each policy varies according to the strength of its justification.¹⁵⁹ The process behind the policy will therefore be relevant. While in *CPAG* the alternatives were carefully evaluated and the policy adopted had strong reasoning behind it, in *Atkinson* there was a much looser justification for a much looser policy, the alternatives to which had not been fully explored.

(g) Conclusion

The Court of Appeal's approach in *Atkinson* was largely consistent with the Commonwealth Model. *Atkinson* was a particularly challenging case because the Crown's arguments emphasised a starkly different paradigm from the liberal individualist paradigm the NZBORA reflects. *Atkinson* demonstrates the judiciary's expanded role under the Commonwealth Model, allowing it to substantively review government policy. The Court gave a strong reading to individual rights by defining discrimination expansively and providing little deference to the Ministry's policy to ensure the right to freedom from discrimination was not underenforced. Nevertheless, the Court's lack of concern for its decision's fiscal implications inevitably created significant problems for the Crown, especially because there was little clarity as to which family carers must be paid. Further deference was appropriate given this genuine uncertainty. The comparison to *CPAG* demonstrates, however, the Crown's problem was partly that it had not properly evaluated alternatives to the *Atkinson* policy and therefore its justification was weaker because of its apparently unchallenged assumption about the family's responsibility to a disabled member. *Atkinson* sought to enforce the right to freedom from discrimination and ensure there was appropriate justification for failing to comply with that right.

¹⁵⁶ *IHC v Hill*, above n 94.

¹⁵⁷ See for example *CPAG*, above n 149, at [105], [108], [112]-[115], [120], [125] and [129].

¹⁵⁸ At [108].

¹⁵⁹ Gardbaum, above n 5, at 55-56.

3. The political response

(a) Introduction

The Ministry of Health declined to seek leave to appeal *Atkinson* to the Supreme Court and conceded its family care policy needed to change. The Minister emphasised the new policy “must be affordable” and “balance the interests of those who are being cared for, the families and taxpayers.”¹⁶⁰ This section will firstly explain the legislative response to *Atkinson* and outline how it demonstrates the importance of Gardbaum’s more nuanced approach to the relationship between the judiciary and Parliament than inter-institutional dialogue. Secondly, I will then argue this response threatened to undermine the Commonwealth’s Model because, firstly, the NZPHDAA purports to preclude judicial rights review of family care policies and secondly, it was enacted by a process which prevented political rights scrutiny. Finally, I will explain how the legislative response can be understood as reflecting New Zealand’s constitutional culture.

(b) The NZPHDAA

Following *Atkinson*, the Ministry of Health consulted the public on how it should respond. The consultation focused on which family carers should be paid, how they should be paid and what they should be paid for. The Ministry also asked how this should be funded, noting the “courts did not require government to fund all support that disabled people need.”¹⁶¹ *Atkinson* did not require any additional funding, rather it just prevented the Crown discriminating in its employment policies as to who it employed to provide those services. The consultation paper recognised this, suggesting “increased costs associated with paying family carers will require Government to reprioritise other expenditure or reduce the level of funded support for the wider disability client group.”¹⁶² The reformulation of the family care policy occurred in the aftermath of the Global Financial Crisis and the Christchurch earthquakes and during a period in which the New Zealand government emphasised its attempt to ‘balance the books.’ Nevertheless, public submissions almost unanimously rejected taking funding from another part of the disability sector to fund paying family carers.¹⁶³

Thus, the Government had three options: amend the family care policy to be consistent with *Atkinson*; legislate to validate the current policy for future claims, while compensating those previously affected; or legislate to validate the policy retrospectively.¹⁶⁴ The Ministry attempted to take the third option. The NZPHDAA was introduced and passed under urgency on 16 May

¹⁶⁰ Hon Tony Ryall “Govt will not appeal family carers decision” (Press Release, 12 June 2012).

¹⁶¹ Ministry of Health *Consultation on paying family carers to provide disability support* (Ministry of Health, Wellington, 2012) at 5.

¹⁶² At 6.

¹⁶³ Ministry of Health *Regulatory Impact Statement: Government response to the family carers case* (15 March 2013) at [75].

¹⁶⁴ Joseph, above n 85, at 700.

2013, Budget Day. The NZPHDAA introduced pt 4A, which created a framework for paying family carers, but also aimed:¹⁶⁵

“to keep the funding of support services provided by persons to their family members within sustainable limits...and to affirm the principle that, in the context of the funding of support services, families generally have primary responsibility for the well-being of their family members.”

Part 4A states that the Crown cannot pay family members to provide care services to relatives, “before, on, or after” commencement of the NZPHDAA unless authorised by a “family care policy.”¹⁶⁶ It provides that the Crown “ha[s] always been authorised and continue[s] to be authorised” to adopt family care policies allowing family members to be paid.¹⁶⁷ This attempted to retrospectively validate the *Atkinson* policy by giving it a legislative basis. The NZPHDAA further sought to preclude claims challenging either the family care policy, pt 4A itself or actions “done or omitted to be done in compliance...with this Part,” for consistency with s 19 on the grounds of marital status, disability, age or family status.¹⁶⁸ Finally, a savings provision allowed the *Atkinson* plaintiffs and a specific claim brought by Margaret Spencer to proceed as if pt 4A had not been enacted.¹⁶⁹

(c) A compromise?

The political response to *Atkinson* facilitated the payment of some family carers, albeit neither on the terms nor to the extent they were hoping; they were paid the minimum wage and frequently were eligible for fewer paid hours than they had anticipated.¹⁷⁰ The Crown was ostensibly complying with *Atkinson*, which did not find that all family carers must be paid, but rather that the Ministry’s objectives could be achieved through a less discriminatory policy.¹⁷¹ This fits within the broadest understanding of inter-institutional dialogue, which merely requires a “legislative sequel” to a judicial ruling.¹⁷² Part 4A is the sort of pragmatic compromise you expect when the executive and judiciary conceptualise an issue entirely differently, but the executive nevertheless wishes to *minimally* comply with the ruling. Indeed, while pt 4A limits *Atkinson*’s effect, this is Parliament’s prerogative because it remains sovereign.

¹⁶⁵ Section 70A(1).

¹⁶⁶ Sections 70A(2)(a) and 70C.

¹⁶⁷ Sections 70A(2)(b) and 70D(1).

¹⁶⁸ Section 70E(1)(a)-(c).

¹⁶⁹ Section 70G(1)-(2).

¹⁷⁰ See for example *Chamberlain*, above n 9.

¹⁷¹ Adams, above n 121, at 274.

¹⁷² Hogg and Bushell, above n 45, at 79-80.

As the Minister of Health commented in Parliamentary debates, NZPHDAA reflects a “compassionate and responsible solution” which shifts “the boundary between family and taxpayer responsibilities” while ensuring the government can control costs.¹⁷³ This occurred even though the Attorney-General’s report made clear the executive believed that the Court of Appeal in *Atkinson* failed to sufficiently defer “to the Crown’s view of the most appropriate way to manage limited funds it has to provide disability services.”¹⁷⁴

(d) Evaluation against the Commonwealth Model

The judiciary and the Crown fundamentally disagreed over whether family carers should be paid. Gardbaum argues that the Commonwealth Model can sustain a “procedurally sound and substantively reasonable legislative view” that differs from the judiciary’s.¹⁷⁵ Yet, Butler and Butler argue pt 4A broke constitutional norms and breached the “existing dialogue” between the political and judicial branches by attempting to exclude the judiciary from its constitutional supervisory role.¹⁷⁶ While pt 4A is inter-institutional dialogue, the Commonwealth Model’s goal is not to increase the volume of dialogue. Rather, the Commonwealth Model aims to increase rights scrutiny of government actions. Part 4A undermines this aim because its substance excludes judicial rights review of the policy while the process of its enactment attempted to avoid political rights scrutiny.

(i) The substance – the privative clause

While Gardbaum’s preference is for prospective validation to avoid undermining the rule of law, retrospective validation of the *Atkinson* policy following the usual parliamentary procedures could be consistent with the Commonwealth Model.¹⁷⁷ However, privative clauses are constitutionally problematic because they create a conflict between parliamentary supremacy and the rule of law. Privative clauses exclude the judiciary from its constitutional function of determining the “legality of government action.”¹⁷⁸ While pt 4A does not explicitly abrogate the right to freedom from discrimination, it precludes the judiciary from scrutinising whether the Ministry’s policy is consistent with that right and consequently gives the executive a “blank cheque” to make policy discriminating on those grounds.¹⁷⁹ The political response therefore is not to attempt to comply with *Atkinson*, but rather to prevent further judicial discussion of the issue and s 19 from being enforced.

¹⁷³ (16 May 2013) 690 NZPD 10116.

¹⁷⁴ Finlayson, above n 8, at [9].

¹⁷⁵ Gardbaum, above n 5, at 90.

¹⁷⁶ Butler and Butler, above n 48, at 857.

¹⁷⁷ Gardbaum, above n 5, at 199.

¹⁷⁸ Legislation Design and Advisory Committee Guidelines on Process and Content of Legislation (Legislation Advisory Committee, 2014) at 15.

¹⁷⁹ Hanna Wilberg “Administrative Law” [2013] NZ L Rev 715 at 749.

Recently, privative clauses have primarily been used where alternative review mechanisms are available.¹⁸⁰ Courts have recognised that where there is a superior alternative mechanism for enforcing a citizen's rights, judicial review may be unnecessary.¹⁸¹ The Crown believed the judiciary overreached by failing to sufficiently defer to their policy in *Atkinson* and s 70E therefore provided a barrier around its family care policy insulating it from judicial scrutiny. While s 70E is limited, applying only to specified grounds of discrimination, it is broad because it remove all methods of adjudication, including the right to have the Human Rights Commission (HRC) take any action on a future complaint.¹⁸² When pt 4A was enacted, the HRC had 56 complaints about the *Atkinson* policy; the privative clause prevented the Human Rights Review Tribunal awarding any remedy except for a declaration that the policy is "inconsistent with the right to freedom from discrimination."¹⁸³ As the Attorney-General noted in his s 7 report, this breached both ss 19 and 27(2) of the NZBORA because it denied people access to the courts to have their rights vindicated and it permitted discrimination.¹⁸⁴

This barrier was needed because the Ministry's subsequently issued family care policy was inconsistent with s 19. The policy provided funding for family members to be paid to care for adult relatives who had either high or very high needs. The policy, however, capped the number of paid hours at 40 hours per week, and stated family carers could only be paid the minimum wage.¹⁸⁵ In June 2012, other care and support workers earned up to \$3 per hour above minimum wage and there was no limit on the hours they could be paid for.¹⁸⁶ In June 2017, the government settled a long-running pay equity dispute with care and support workers and legislation passed which increased care worker's pay rates to between \$3.25 and \$10 above minimum wage. However, family carers were expressly excluded from this settlement.¹⁸⁷ Further, the policy expressly prohibited spouses from being employed to care for their spouse, even if they met the other criteria.¹⁸⁸ Even if one believes family carers should not be employed, paying family carers less once they are employed is clearly discriminatory. Yet, the Crown made no attempt to defend this.

¹⁸⁰ See for example the Tax Administration Act 1994, s 109.

¹⁸¹ See for example *Tannadyce Investments Ltd v Commissioner of Inland Revenue* [2011] NZSC 158, [2012] 2 NZLR 153 at [57]; *Parker v Silver Fern Farms* [2011] NZCA 564, [2012] 1 NZLR 256 at [33].

¹⁸² Section 70E(3)-(7).

¹⁸³ Joseph, above n 85, at 703 citing s 70E(6)-(7).

¹⁸⁴ NZBORA, s 27(2).

¹⁸⁵ Ministry of Health, *Funded Family Care Operational Policy* (2nd ed, Ministry of Health, Wellington, 2016) at 6. The second edition does not materially differ from the first on this point.

¹⁸⁶ *Terranova*, above n 92, at [47]; Simon Collins "Bureaucratic hurdles mean few parents get paid to care for disabled children" *The New Zealand Herald* (online ed, Auckland, 19 April 2014).

¹⁸⁷ Care and Support Workers (Pay Equity) Settlement Act 2017, s 5: definition of "employer." The legislation passed with unanimous support and no s 7 report was produced despite it clearly authorising discrimination on the basis of family status.

¹⁸⁸ Ministry of Health, above n 185, at 4.

Wilberg argues that explicitly overruling *Atkinson* or legislating that notwithstanding s 19, the *Atkinson* policy is lawful were constitutionally preferable alternatives to the approach taken.¹⁸⁹ There is some evidence the Crown preferred to pay a carers allowance over paying family carers as employees.¹⁹⁰ However, this would not solve the discrimination problem from *Atkinson* and therefore such a solution would require legislative overruling. This would be politically challenging because it would involve denying a court ordered right to “impossibly sympathetic claimant[s].”¹⁹¹ Yet, so was the action taken. While approximately one-third of public submissions preferred employment largely because they felt it conferred greater status on the care provided, half of submitters, including most older carers, preferred the payment of a carers allowance.¹⁹² The Crown therefore could have taken this approach and justified it to the public because it would increase the financial resources of family carers, had significant support within the disability community and avoided concerns about undermining familial relationships.

Gardbaum argues that the political costs of the Parliament disagreeing with the judicial view are too low and therefore they have too frequently been ignored.¹⁹³ The judiciary too have been reluctant to criticise Parliament for legislating incompatibly with protected rights, though this position may be changing with its acceptance of the declaration of incompatibility remedy.¹⁹⁴ The lack of political costs for disagreeing with a judicial view reduces the value of judicial rights scrutiny. While Gardbaum argues that a parliamentary right of reply is appropriate, judicial scrutiny of rights infringing acts should provide additional protection for the rights of unpopular minorities by drawing these issues to the public’s attention and providing arguments against them where appropriate. Privative clauses prevent, however, prevent judicial scrutiny altogether and therefore threaten to undermine the Commonwealth Model’s mechanisms for protecting rights.

(ii) *The process*

More egregious than the NZPHDAA’s substance was the legislative process. Political rights review should allow extended parliamentary scrutiny of both the judicial decision and the issue more broadly, including considering the full range of legal, ethical and political concerns to determine the appropriate response. The Crown was concerned that *Atkinson* took a strong rights-based approach to the roles of the state and family, which contradicted their view that

¹⁸⁹ Wilberg, above n 179, at 749.

¹⁹⁰ See *Atkinson* (CA), above n 12, at [175]; Ministry of Health, above n 163, at [17]-[18].

¹⁹¹ Adams, above n 121, at 256.

¹⁹² Ministry of Health, above n 163, at [75].

¹⁹³ Gardbaum, above n 5, at 154. Gardbaum, writing before *Taylor*, argues that a formal declaration of incompatibility be a key way this could be addressed.

¹⁹⁴ At 154. See *Taylor*, above n 15, at [182]-[186].

the family has primary responsibility to care for disabled people. Appropriately, the final decision is left to Parliament, but disagreement with the judiciary typically comes with a political price, especially if the Crown cannot persuasively defend its differing stance. The Commonwealth Model's rights review mechanisms mean the Crown cannot hide because the rights incompatibility will be brought to the public's attention.

Geiringer, Higbee and McLeay argue "political deliberation needs time" and stand down periods between readings of bills provide an opportunity for deliberation and reflection.¹⁹⁵ Particularly important is the select committee process through which MPs can canvass public opinion, receive submissions, debate the legislation and amend it accordingly. Opposition MPs were provided with the text of pt 4A, along with five other Bills being passed under urgency, less than three hours before its introduction.¹⁹⁶ As various opposition MPs noted in Parliamentary debates, it was difficult for them to read and comprehend the Bill, let alone support it, because of the exceptionally short turnaround.¹⁹⁷ Further, because this occurred on Budget Day, there were a myriad of other issues that captured the attention of both the public and MPs. Michael Cullen described this as the "take the bastards by surprise" approach to urgency because it prevented the opposition from effectively organising against the Bill.¹⁹⁸ The tactic did not just take the opposition by surprise, but also the New Zealand public who, because of the lack of a select committee process, were unable to comment on the Bill and its wide-ranging impacts. While the NZPHDAA received some media coverage – all of it negative – it was likely significantly less than it would have received had it followed normal procedures.¹⁹⁹ The passing of the NZPHDAA likely influenced Butler and Palmer's proposal for a 75 percent threshold for the use of urgency, to prevent the rushing through of controversial legislation without the support of both major parties.²⁰⁰

This process also undermined s 7 of the NZBORA. Kelly and Hiebert argue that the Attorney General's reporting function is the Commonwealth Model's most distinctive feature.²⁰¹ The Attorney-General, Chris Finlayson, concluded the limitations on both ss 19 and 27(2) "cannot

¹⁹⁵ Claudia Geiringer, Polly Higbee and Elizabeth McLeay, *What's the Hurry? Urgency in the New Zealand Legislative Process 1987-2010* (Victoria University Press, Wellington, 2011) at 142.

¹⁹⁶ Marcelo Rodriguez Ferrere "Standing orders in the New Zealand House of Representatives" (2014) 34 *Parliaments, Estates and Representation* 228 at 235; (16 May 2013) 690 NZPD 10052.

¹⁹⁷ See for example Hon Ruth Dyson MP (16 May 2013) 690 NZPD 10136; Hon Annette King MP (16 May 2013) 690 NZPD 10123; Chris Hipkins MP (16 May 2013) 690 NZPD 10162.

¹⁹⁸ Geiringer, Higbee and McLeay, above n 195, at 60.

¹⁹⁹ For contemporary media coverage see Bronwyn Torrie "Legal win nets "half-baked" scheme" *The Dominion Post* (online ed, Wellington, 17 May 2013); Martin Johnston "Family caregivers will get minimum wage" *New Zealand Herald* (online ed, Auckland, 17 May 2013); "Disability bill demonstrates contempt for due process" *New Zealand Herald* (online ed, Auckland, 17 May 2013); Andrew Geddis "We owe it to ourselves to be outraged" *New Zealand Herald* (online ed, Auckland, 22 May 2013).

²⁰⁰ Butler and Palmer, above n 14, at 108-109.

²⁰¹ Hiebert and Kelly, above n 1, at 81.

be justified under s 5” of the NZBORA.²⁰² The NZPHDAA was only the second Act with a negative s 7 report passed under urgency and the first without support from both major parties.²⁰³ While s 7 reports are significantly more common in New Zealand than in the United Kingdom or Canada, affected government legislation passes about 90 percent of the time.²⁰⁴ It was anticipated it would be rare for a Bill with a s 7 report to pass unmodified, however, this has occurred at least 35 times since 1990.²⁰⁵ Gardbaum suggests the use of urgency to pass infringing legislation is “inconsistent with the constitutional status of the NZBORA.”²⁰⁶ This is especially so because the NZBORA applies also to the legislature.²⁰⁷ Its use in these circumstances undermines s 7’s importance in the legislative process. This is perhaps even more so when passed by a bare majority.

The NZPHDAA also reflects the dominant role Cabinet continues to play in Parliament. Because the government must retain the confidence of the House, government legislation can almost always be enacted. When there is political imperative, this extends to rights-incompatible legislation.²⁰⁸ As the Bill was not a conscience issue, a party vote was called. Government MPs were not required to cast their votes individually, nor even be present.²⁰⁹ The lack of parliamentary input was striking. No minor party MPs spoke to defend the NZPHDAA at all and after the first reading only the Minister spoke to defend it. This was no accident. The government orchestrated the process to reduce debate, making the Bill a confidence and supply issue to prevent the Māori Party opposing legislation which prevented claims by Māori, who are disproportionately affected by disability.²¹⁰ Cabinet made the Māori Party had to choose between supporting the legislation or potentially bringing down the government. This control can achieve constitutionally problematic outcomes when the government is willing to pay a small political cost and even this cost can be reduced by utilising procedural mechanisms to pass legislation while the public is distracted.²¹¹ Waldron expresses concern at the lack of parliamentary debate in New Zealand, even advocating, despite staunch support for parliamentary supremacy, for additional checks on the “Parliamentary executive” because of the executive’s dominance over both the legislative agenda and the ruling

²⁰² Finlayson, above n 8, at [19].

²⁰³ Hiebert and Kelly, above n 1, at 120. The other was the Parole (Extended Supervision Orders) Amendment Bill 2014 which passed with a 107 to 14 majority.

²⁰⁴ Andrew Geddis “The comparative irrelevance of the NZBORA to Legislative Practice” (2009) 23 NZULR 465 at 477. In Canada no such reports have been made because a judicial finding of incompatibility would mean the legislation is invalid.

²⁰⁵ Andrew Geddis “Rights scrutiny in New Zealand’s legislative processes” (2016) 4 TPLeg 355 at 366-67

²⁰⁶ Gardbaum, above n 41, at 37.

²⁰⁷ NZBORA, s 3(a).

²⁰⁸ Geddis, above n 205, at 371.

²⁰⁹ Jeremy Waldron “Parliamentary Recklessness - II” [2008] NZLJ 458 at 458.

²¹⁰ Statistics New Zealand, *He hauā Māori: Findings from the 2013 Disability Survey* (Statistics New Zealand, Wellington, 2015) at 6.

²¹¹ Rodriguez Ferrere, above n 196, at 235.

government.²¹² Waldron's argument against judicial supremacy relies on the legislature taking rights seriously. That did not happen in this case.

Similarly, Smillie's argument for parliamentary sovereignty relies on MPs being directly accountable for exercises of public power. However, extraordinary steps were taken here to avoid political accountability.²¹³ Geiringer, Higbee and McLeay argue that the "more that legislation affects individual and group rights, the more important it is that it is accorded due process and is carefully considered."²¹⁴ This was a case, however, where Cabinet had determined the legislation would pass in its entirety before revealing it to the opposition. The Hon Annette King noted there was no real urgency to pass the legislation because the policy would not take effect for several months.²¹⁵ Therefore, there was sufficient time for further consideration of the Bill from the public, opposition and government MPs. By following this process, the government avoided political rights scrutiny of legislation which abrogated access to the courts and permitted discrimination on a prohibited ground. It therefore threatened to undermine the Commonwealth Model and the culture of justification it seeks to promote.

(e) Part 4A as a reflection of New Zealand's constitutional culture

While threatening the Commonwealth Model and being contrary to the rule of law, the political response arguably reflects New Zealand's 'constitutional culture.' Matthew Palmer identifies New Zealand's four constitutional norms, three of which are reinforced by features of its constitutional culture: representative democracy reinforced by egalitarianism, parliamentary supremacy reinforced by authoritarianism, the "constitution as an unwritten, evolving way of doing things reinforced by pragmatism" and adherence to the rule of law.²¹⁶ Palmer argues that because it lacks a foundation in New Zealand's constitutional culture, adherence to the rule of law is often trumped by those other constitutional norms.²¹⁷ Palmer explains this by noting the suspicion in the New Zealand psyche about judges as "unelected, elite, former lawyers."²¹⁸ Rishworth further suggests this relative subordination of the rule of law is partly because human rights advances have occurred in New Zealand through Parliament rather than the courts.²¹⁹ Palmer further argues that the rule of law is always subordinate in New

²¹² Waldron, above n 19, at 420; Waldron, above n 209, at 459. For Waldron's views on Parliamentary supremacy see for example Jeremy Waldron "A rights-based critique of Constitutional rights" (1993) 13 OJLS 18; Waldron, above n 56.

²¹³ Smillie, above n 58, at 184.

²¹⁴ Geiringer, Higbee and McLeay, above n 195, at 18.

²¹⁵ (16 May 2013) 690 NZPD 10180.

²¹⁶ Matthew Palmer "New Zealand Constitutional culture" (2007) 22 NZULR 565 at 580 and 589.

²¹⁷ At 588.

²¹⁸ At 585.

²¹⁹ Paul Rishworth "Writing things unwritten: common law in New Zealand's constitution" (2016) 14 I Con 137 at 143.

Zealand's political culture because Parliament, being Supreme, can and has unilaterally changed the law and therefore law cannot have an independent existence.²²⁰

Consequently, New Zealanders have accepted the abrogation of individual rights when they conflict with other features of New Zealand's constitutional culture. Palmer gives the example of the Foreshore and Seabed Act 2004 which overrode Māori customary title to the foreshore and seabed because of a combination of egalitarianism and authoritarianism.²²¹ The egalitarian impulse was to prevent potential restrictions on public access to the foreshore and seabed, while the authoritarian impulse allowed for the retrospective removal of Māori customary rights to the foreshore and seabed. The Labour Government in that instance paid a significant political price for overriding the rule of law and removing Māori rights. Tariana Turia consequently left the Labour Party to form the Māori Party. The Māori Party won seats from Labour at subsequent elections while supporting the National Government. There was, however, no question about Parliament's legal capacity to undertake that action and it followed a relatively normal select committee process, allowing for stakeholders to write submissions and organise protests.

As for pt 4A, the norms of pragmatism and authoritarianism combined to allow for the rule of law and sound parliamentary practice to be overridden. Part 4A is pragmatic because it is a compromise; making New Zealand one of the first countries to pay family carers and doing so against the Crown's apparent wishes. In doing so the Crown can say that it has complied with the Court's decision. Despite carers being displeased about the process followed and their level of remuneration, an independent study of paid family carers revealed they were largely happy with their new status.²²²

Authoritarianism is demonstrated by the continued strength of Cabinet and its ability to manoeuvre around procedural constraints to rush through legislation without allowing the opposition to organise. Unlike the Foreshore and Seabed Act, the NZPHDAA was passed without warning on Budget Day and without the political attention the former received. The political response therefore suggests that the government can avoid rights scrutiny under the Commonwealth Model if it wants to. This would seem to support the argument that this sort of intermediate form of government will inevitably collapse back into normal parliamentary sovereignty.²²³ The judicial response, discussed in the following part, demonstrates that the Commonwealth Model is more resilient than that.

²²⁰ Palmer, above n 216, at 587.

²²¹ At 589.

²²² Artemis Research *Evaluation of funded family care* (Artemis Research, Wellington, April 2015) at iv-v.

²²³ See for example Keith Ewing "The futility of the Human Rights Act" [2004] PL 829; Keith Ewing and Joo-Cheong Tham "The continuing futility of the Human Rights Act" [2008] PL 668.

4. The judicial response

The response to pt 4A was overwhelmingly negative as the disability community and academics condemned the legislation and accompanying policy.²²⁴ Joseph, for example, described the legislation as “constitutionally objectionable.”²²⁵ Part 4A largely avoided political scrutiny, but in *Attorney-General v Spencer*, the judiciary had an opportunity to examine it and determine its scope.²²⁶ I will firstly outline the facts and reasoning in *Spencer*. Secondly, I will analyse how the principle of legality applied in *Spencer* to allow for judicial scrutiny of the NZPHDAA and for reading down the most egregious provisions because Parliament failed to override the rights explicitly enough. Finally, I will conclude that the Commonwealth Model was not fundamentally undermined by the NZPHDAA because the judiciary’s pragmatic approach forced the Crown to accept at least one of political or judicial scrutiny of legislation. Political rights scrutiny, if the Crown follows a normal process and explicitly legislates to abrogate rights which allows it to be held politically accountable. Judicial scrutiny if the Crown attempts to avoid political scrutiny as in this case. Therefore, New Zealand’s constitution continues to exhibit the Commonwealth Model’s additional right’s protections.

(a) The claim

Margaret Spencer has cared for her 46-year-old son Paul, who has Down’s Syndrome, since he was born. She applied for, and was denied, a disability support allowance under the *Atkinson* policy several times, including an application after the Ministry of Health accepted the *Atkinson* policy was discriminatory. When the Ministry adopted its new family care policy in October 2013, Paul was assessed as being entitled to 29.5 hours per week of family funded care, which his mother provided. Mrs Spencer brought two causes of action which were heard in the High Court just 5 weeks after the NZPHDAA was enacted. Firstly, a claim under the Judicature Amendment Act 1972 that the Ministry’s refusal to pay her a disability support allowance under the *Atkinson* policy was unlawful. Secondly, she sought a declaration under the Declaratory Judgments Act 1908 that she was not barred from being joined to the *Atkinson* litigation so she could pursue damages under the Human Rights Act. The latter is the focus of this part.

There were two obstacles to this claim. Firstly, in *Atkinson* the Human Rights Review Tribunal had issued an order, with the consent of the *Atkinson* plaintiffs, suspending the Tribunal’s declaration that the *Atkinson* policy unlawfully discriminated.²²⁷ This is a technical matter and it is sufficient to say this order was set aside. The Crown’s second argument is the focus of

²²⁴ For the academic view see for example, Joseph, above n 1, at 910-911; Wilberg, above n 179, at 748-749; Butler and Butler, above n 48, at [2.10.14]; Rodriguez Ferrere, above n 196, at 235. For the views of the disability community see Disabled Persons’ Assembly, above n 10.

²²⁵ Joseph, above n 85, at 701.

²²⁶ *Spencer* (CA), above n 13.

²²⁷ At [2]. The suspension order was made under Human Rights Act 1993, s 92O(2)(d),

this part because of its constitutional significance: that the *Atkinson* policy was retrospectively validated, and that the privative clause prevented Mrs Spencer from being joined to the *Atkinson* proceedings.²²⁸ The High Court found for Mrs Spencer on all grounds and the Attorney-General appealed to the Court of Appeal. The Court of Appeal largely replicated the High Court's reasoning and I will therefore draw on the High Court's reasoning when it provides greater detail.

(b) Reasoning

(i) Was the Atkinson policy a "family care" policy?

The key interpretive question was whether the policy of a "blanket ban" on paying family carers (the "*Atkinson* policy") was a "family care policy" that the Ministry was authorised to adopt and which s 70E immunised from challenge. The NZPHDAA defines "family care policy" as:²²⁹

any statement in writing made by, or on behalf of, the Crown...that permits, or has the effect of permitting, persons to be paid, in certain cases, for providing support services to their family members.

Mrs Spencer argued the *Atkinson* policy was not a "family care policy" because it did not allow family carers to be paid "in certain cases" and therefore the privative clause did not apply to it. The Crown contested the *Atkinson* policy's characterisation as a 'blanket ban' because 271 family carers were paid under the policy, albeit on an ad hoc basis. Further, the Crown submitted the policy of not paying family carers related only to resident family members and that non-resident family members were paid to deliver a range of services.²³⁰ Harrison J, for a unanimous Court of Appeal, found it was too late to challenge this finding because the Ministry had not appealed *Atkinson* and therefore tacitly accepted that finding.²³¹ Further, the Ministry knew of only two of those 271 cases prior to the *Atkinson* litigation and therefore its policy did not allow for family carers to be paid.²³² Consequently, the Court took a literal approach, finding that the *Atkinson* policy was not a family care policy because it did not allow family carers to be paid "in certain cases" and therefore was not protected by the privative clause.

(ii) Did Parliament intend to retrospectively validate the Atkinson policy?

²²⁸ Only the claim under the Judicature Amendment Act was covered by the savings provision. After pt 4A was enacted, Mrs Spencer issued separate proceedings under the Declaratory Judgments Act 1908 which were not covered by the savings provision.

²²⁹ Section 70B(1)(a).

²³⁰ *Spencer* (CA), above n 13, at [69].

²³¹ At [66].

²³² At [65].

The Crown argued that pt 4A retrospectively validated the *Atkinson* policy and therefore prevented claims for damages. The Court, however, emphasised the interpretive presumption that “an enactment does not have retrospective effect.”²³³ It further considered that prospective protection of family care policies would keep “the funding of support services provided by family members within sustainable limits.”²³⁴ The Court found that even if pt 4A was intended to apply retrospectively, it did not extend to the *Atkinson* policy because it had found the *Atkinson* policy was not a “family care policy.”²³⁵

The Crown sought to rely on the NZPHDAA’s explanatory note, which noted that without legislation the *Atkinson* policy would remain unlawful and be subject to a “very large number of claims.”²³⁶ The Court noted that removing judicial review rights retrospectively was “draconian” and that this intention was not explicitly replicated in the legislation.²³⁷ Harrison J noted pt 4A:²³⁸

“contained a number of features that are traditionally regarded as being *contrary to sound constitutional law* and convention – on the Ministry’s interpretation it has retrospective effect, authorises discriminatory policies, withdraws rights of judicial review and access to the Tribunal and did not go through the normal parliamentary Select Committee and other processes.”

Harrison J held that Parliament must make this intention explicit; perhaps by stating the legislation’s purpose was to retrospectively overrule *Atkinson*, as the Parliamentary Privilege Act 2014 had done with respect to *Attorney-General v Leigh*.²³⁹ Therefore, while the Court would uphold the legislation, they would not “fill the gaps as a means of dealing with inadequate drafting.”²⁴⁰

Finally, the Court noted the result reached by applying a literal interpretation would have been reached by applying the NZBORA interpretive principle that rights-consistent meanings shall be preferred, as well as the presumption against the ousting of judicial review.²⁴¹ Section 70E was inconsistent with both s 27(2) because it ousted judicial review and s 70D and s 19 because it allowed different pay and conditions for family carers.²⁴² The Court noted their

²³³ Interpretation Act 1999, s 7.

²³⁴ Section 70A(1) cited in *Spencer (CA)*, above n 13, at [79].

²³⁵ *Spencer (CA)*, above n 13, at [80].

²³⁶ New Zealand Public Health and Disability Amendment Bill (No 2) 2013 (118–1) (explanatory note) at 1.

²³⁷ *Spencer (CA)*, above n 13, at [82].

²³⁸ At [84].

²³⁹ At [82]-[83] citing *Attorney-General v Leigh* [2011] NZSC 106, [2012] 2 NZLR 713 (SC) in relation to parliamentary privilege.

²⁴⁰ At [84].

²⁴¹ At [73] citing NZBORA, s 6.

²⁴² At [87].

interpretation of these provisions was more rights-consistent than the Crown's because it prevented s 70D from being inconsistent with s 19 by not retrospectively validating a policy found to be unjustifiably discriminatory.²⁴³

(c) Parliament's intended meaning?

Harrison J purported to literally interpret "family care policy." However, legislation's meaning must be "ascertained from its text and in light of its purpose."²⁴⁴ Indeed, meaning can only be determined with reference to its purpose.²⁴⁵ Joseph considered the s 7 report made Parliament's intent to exclude judicial review retrospectively unambiguous.²⁴⁶ Yet, this reflects the Attorney-General's assessment of the Bill's purpose, which will not necessarily be Parliament's purpose. The Court correctly noted "the inquiry is not as to what the legislature meant to say but... what it has in fact said."²⁴⁷ Therefore the Court must start with the legislative text.

The Court, however, arguably mischaracterises the breadth of "family care policy" because family care policies under s 70B include both formal written policies and unwritten practices of paying family members "in certain cases."²⁴⁸ The Ministry, under the *Atkinson* policy, *did* employ non-resident family members and employed 271 resident family carers at various times. The Court, however, considered that the policy of not paying *resident* family members was an isolated policy from a broader practice which did permit paying family members and further that those exceptions did not change the policy's characterisation as a blanket ban. The Court therefore appears to be willing to imply words into the definition of "family care policy" to conclude the *Atkinson* policy was not included, while in the same breath criticising the Attorney-General's suggestion that they take something other than a literal approach.

There were several indicia that the NZPHDAA's purpose was to retrospectively overrule *Atkinson*. The savings provisions purported to save both the *Atkinson* proceedings and the Judicature Amendment Act proceeding from *Spencer*.²⁴⁹ The trial judge, Winkelmann J, suggested this was merely a "clarifying provision" because of the rushed preparation of the

²⁴³ At [73].

²⁴⁴ Interpretation Act 1999, s 5(1).

²⁴⁵ Consider for example *Johnston v R* [2016] NZSC 83, [2016] 1 NZLR 1134 at [55]. The Supreme Court considered that what amounted to a 'proximate act' for the purposes of criminal intent could only be determined by considering the purpose of those acts.

²⁴⁶ Joseph, above n 1, at 911.

²⁴⁷ *Donselaar v Donselaar* [1982] 1 NZLR 97 (CA) at 114 in *Spencer* (CA), above n 13, at [70].

²⁴⁸ Section 70B(1)(b).

²⁴⁹ Section 70G(2).

legislation.²⁵⁰ However, the savings provision allows the proceedings “to be heard and determined as if this Part (other than this section) had not been enacted.” If Parliament intended pt 4A to apply prospectively, the legislation would not affect those proceedings anyway and therefore the savings provision would be unnecessary.

The second indication is that s 70C states that “neither the Crown nor a DHB may pay a person for any support services that are, whether before, on, or after that commencement, provided to a family member of the person” unless permitted by a family care policy. This implicitly overrules *Atkinson* because if the *Atkinson* policy is not a family care policy, there was no applicable family care policy before the NZPHDAA came into force and therefore nothing that could authorise payment to family carers.

(d) Value-laden interpretation

While both the High Court and Court of Appeal referred to the NZBORA sparingly in their judgments, the courts still managed to manoeuvre around prima facie parliamentary intent. They did this through applying various interpretive presumptions, collectively described as the ‘principle of legality.’ This principle recognises that Parliament usually intends legislation to apply “sensibly and fairly” and therefore the judiciary presumes that Parliament intended legislation to be compatible with fundamental values.²⁵¹ As Blanchard J describes it, “the true principle is not “legality” but that the Courts should be slow to impute to Parliament an intention to override established rights and principles where that is not clearly spelt out.”²⁵² These established rights and principles are found in both statutes and the common law.²⁵³ As with many other features of New Zealand’s constitution, the principle is a pragmatic because it attempts to ensure the Crown faces political consequences for ignoring fundamental values. The principle of legality predates the NZBORA and is broader, encompassing NZBORA rights, but also extending its protection to property rights, for example.²⁵⁴ It reflects the collaborative enterprise between the judiciary and legislature, demonstrating the judiciary’s capacity to shape legislation through its interpretation. While the NZBORA allows the judiciary to go further than the principle of legality,²⁵⁵ the principle of legality can still be used to require Parliament to “squarely confront what it is doing and accept the political cost.”²⁵⁶

²⁵⁰ *Spencer v Attorney-General* [2013] NZHC 2580, [2014] 2 NZLR 780 at [151] [*Spencer* (HC)] citing NZPHDAA, ss 70G(1) and (2).

²⁵¹ Carter, above n 4, at 335-336.

²⁵² *Cropp v Judicial Committee* [2008] NZSC 46, [2008] 3 NZLR 774 at [26], citing Oliver Jones *Bennion on Statutory Interpretation* (5th ed, LexisNexis, London, 2008) at 823.

²⁵³ See for example NZBORA, s 6 and the Interpretation Act 1999, ss 5-7.

²⁵⁴ See for example *Choudry v Attorney-General* [1999] 2 NZLR 582 at 592.

²⁵⁵ *Brooker*, above n 42 at [63] per Blanchard J. Academic support for this approach is found in Geiringer, above n 27 at 85; Paul Rishworth “Human rights” [2012] NZ L Rev 321 at 337.

²⁵⁶ *R v Secretary of State for the Home Department, ex parte Simms* [2000] 2 AC 115 at 131 per Lord Hoffmann.

In *Spencer*, the Court invoked two of these presumptions, cumulatively creating a strong presumption against the Crown's contended meaning. Firstly, it emphasised the presumption against retrospectivity.²⁵⁷ Secondly, and equally important, is the presumption against the ousting of judicial review which was far less explicit in both judgments. This is invoked because the two interpretive questions — whether the *Atkinson* policy was a family care policy and whether the legislation was intended to operate retrospectively — determined how broadly the privative clause operated. These presumptions operated in *Spencer* to demonstrate the Commonwealth Model's resilience when faced with attempts to exclude scrutiny of legislation. Notably, this occurred without fully utilising NZBORA which has been used to go beyond the ordinary value-laden approach to statutory interpretation.²⁵⁸

(i) *Retrospective validation*

The Court's approach to the presumption against retrospectivity contrasted sharply with its approach in *Mangawhai Ratepayers and Residents Association Inc v Kaipara District Council*, decided just six months after *Spencer* and decided by Harrison and Cooper JJ who also sat on *Spencer*.²⁵⁹ *Mangawhai Ratepayers*, like *Spencer*, involved legislation that sought to retrospectively authorise an unlawful government action, in that case unlawfully collected rates. Like in *Spencer*, High Court proceedings were filed prior to the validating legislation's enactment. However, that legislation expressly preserved the right to pursue judicial review, albeit with little chance of success because the rates were now authorised.²⁶⁰ While in *Spencer* the Court applied a very strong presumption against retrospectivity, in *Mangawhai Ratepayers* Miller J, in his concurring judgment, stated that retrospective legislation "is usually benign."²⁶¹ Cooper J, for the plurality, emphasised there was nothing "in principle" objectionable about Parliament passing "validating legislation following a full inquiry as to what should occur in the most unfortunate circumstances that have arisen and having made what is pre-eminently a political judgment that a validating act is the best way to proceed."²⁶² His Honour noted that "nothing in s 27(2) of [NZ]BORA affirms as a general proposition a right to have the existing law preserved against retrospective amendment" and that the right against retrospective legislation focused only on criminal matters.²⁶³

²⁵⁷ See for example *Spencer* (CA), above n 13, at [79] and [82].

²⁵⁸ This can be either through issuing a declaration of incompatibility or preferring a more rights-consistent statute which is somewhat tortuous. See for example *Watson*, above n 41.

²⁵⁹ *Mangawhai Ratepayers and Residents Association Inc v Kaipara District Council* [2015] NZCA 612, [2016] 2 NZLR 437. Harrison J wrote the judgment for the Court in *Spencer* while Cooper J also sat on the panel.

²⁶⁰ Kaipara District Council (Validation of Rates and Other Matters) Act 2013, s 14.

²⁶¹ *Mangawhai Ratepayers*, above n 259, at [135].

²⁶² At [203].

²⁶³ At [205]-[206] citing NZBORA, s 26.

There are two explanations for the contrasting approaches in *Spencer* and *Mangawhai Ratepayers*. The first is that there were drastically different levels of political scrutiny applied to the relevant legislation prior to its passage. The principle of comity suggests that Parliament's internal processes are irrelevant to the law's validity.²⁶⁴ However, how legislation is enacted appears, in this instance, to influence the level of deference the judiciary pays Parliament. This is likely because that process determines the extent to which the legislation can be scrutinised and the MPs be held politically accountable.

The NZPHDAA did not allow for political rights scrutiny because it was passed under urgency in a single day and without normal select committee processes. The government therefore could not be held politically accountable for its rights-infringing legislation. In *Spencer*, the Court recognised the process was outside proper legislative procedures, particularly because its substance went against "sound constitutional law and convention."²⁶⁵ The Kaipara District Council (Validation of Rates and Other Matters) Act 2013, by contrast, followed a normal political process. Interested parties could make submissions to the relevant select committee, New Zealand First could organise against the legislation and it passed by a 112-8 margin in Parliament. The legislation passed after considerable deliberation and amendments which made the Act's purpose and scope clear, including amendments to ensure it was consistent with the NZBORA.

Secondly, how the actions were purported to be validated also distinguished the cases. In *Spencer* retrospective validation of family care policies was attempted "by a sidewind" because it neither expressly stated *Atkinson* was overruled nor that this was a legislative purpose.²⁶⁶ Rather the result was impliedly achieved by a convoluted interaction of several provisions. By contrast in *Mangawhai Ratepayers*, the relevant Act included an extensive preamble which provided a narrative of the unlawful actions and clearly stated the intention to retrospectively validate those actions.²⁶⁷ This more explicit approach promotes transparency and allows public accountability; anyone reading the legislation would understand that retrospective validation was intended. This places the onus on MPs to justify their decision and if they could not, they could be more easily held politically accountable. Because of the political scrutiny that that Act faced, there was less need for the judiciary to scrutinise it also.

(ii) *Privative clause*

²⁶⁴ See for example *Pickin v British Railways Board* [1974] AC 765.

²⁶⁵ *Spencer* (CA), above n 13, at [84].

²⁶⁶ *Spencer* (CA), above n 13, at [73], [82] and [83].

²⁶⁷ *Mangawhai Ratepayers*, above n 259, at [204] citing the preamble to Kaipara District Council (Validation of Rates and Other Matters) Act 2013.

Courts have strictly construed privative clauses since well before the NZBORA codified the right to judicial review.²⁶⁸ Joseph argues that because the judiciary's constitutional role is to ensure the executive acts according to law, there is always a "strong presumption" that Parliament does not intend to give the executive unlimited discretion.²⁶⁹ As with the presumption against retrospectivity, the judiciary requires explicit language to rebut that presumption.²⁷⁰ While most commentators accept Parliament sometimes has good reason to exclude judicial review, courts have historically gone to extraordinary lengths to limit privative clause's scope and application, even when doing so renders parliamentary intent "make believe."²⁷¹ The other approach the courts have taken is to consider unlawful decisions invalid void from the outset and therefore the privative clause cannot protect them.²⁷²

Given this presumption, it is curious the Court of Appeal did not explicitly discuss the impact of its decision on the scope of the privative clause, even though it likely influenced its interpretive approach. Stating all relevant interpretive principles from the outset is preferable because it promotes transparency and explains to the public why such a strict approach is taken. Winkelmann J noted that statutory interpretation is guided by s 5(1) of the Interpretation Act, but s 5 is supplemented by ss 5 and 6 of NZBORA.²⁷³ Her Honour does not, however, directly address the privative clause's application, or the NZBORA's impact, until near the end of her judgment. Her Honour emphasises that the result achieved through a literal interpretation, also "flows" from the "traditional approach of the courts to privative or ouster clauses (which is to interpret them restrictively)."²⁷⁴ The Court's failure to outline these presumptions from the beginning meant the reason retrospectivity was so problematic in *Spencer* — that it would prevent *Atkinson* being enforced — was unclear. Being explicit about these presumptions would explain to readers why the Court discounted so readily the Crown's argument that pt 4A's structure indicated it was intended to apply retrospectively. The interpretive presumptions therefore should have been laid out more clearly at the beginning of both judgments to explain why the Court took the approach it did.

²⁶⁸ NZBORA, s 27(2). See for example *Bulk Gas Users Group v Attorney-General* [1983] NZLR 129 at 133.

²⁶⁹ Joseph, above n 1, at 906 and 909.

²⁷⁰ Joseph, above n 2, at 338; Carter, above n 4, at 339.

²⁷¹ Luke Sizer "Privative clauses: Parliamentary intent, legislative limits and other works of fiction" (2014) 20 Auckland U L Rev 148 at 158. For a discussion of the justifications of approaches to determining whether judicial review will be applied see Josh Pemberton "The Judicial approach to privative clauses in New Zealand" [2015] NZ L Rev 617; Dyzenhaus, above n 23.

²⁷² This approach was formally adopted in *Anisminic v Foreign Compensation Commission* [1969] 2 AC 147. For a discussion of the development of this approach see Pemberton, above n 271, at 642. For a critique of this approach see Michael Taggart, 'Rival Theories of Invalidity in Administrative Law: Some Practical and Theoretical Consequences' in Taggart, ed. *Judicial Review of Administrative Action in the 1980s* (Oxford University Press, Auckland, 1986).

²⁷³ *Spencer* (HC), above n 250, at [128].

²⁷⁴ At [143].

Because pt 4A was not tightly constructed, the Court could use the presumptions against the ousting of judicial review to reduce the privative clauses' scope. Dyzenhaus argues privative clauses ironically increase judicial power because the conflicting constitutional principles provide courts with wider discretion to determine whether to enforce them.²⁷⁵ Dyzenhaus characterises the basis for applying a privative clause as “deference as respect.”²⁷⁶ This involves “reverse engineering” the privative clause’s justification to determine whether there is a justifiable basis to oust judicial review rights.²⁷⁷ In *Ramsay v Wellington District Court*, for example, the Court of Appeal found a strict interpretation of the privative clause was unnecessary because the privative clause excluded judicial review only for matters covered by the statutory appeal right.²⁷⁸ Therefore, the Court in *Ramsay* acknowledged that the justification for the privative clause, that it would merely replicate the remedies available through statutory appeal, was sufficient to exclude judicial review.

In *Spencer*, both parties accepted that the privative clause applied prospectively and therefore the Court did not need to consider whether the privative clause could apply prospectively.²⁷⁹ Mrs Spencer’s goal from the litigation was to be eligible for damages, which could occur if the the *Atkinson* policy remained unlawful and therefore the privative clause did not apply to it. By the time of judgment Mrs Spencer was being paid to care for her son. Further, the Court of Appeal in *Spencer* explained that Parliament could achieve its stated objectives of controlling costs and providing for the “shift” in the relationship between the family and the state through a prospective privative clause.²⁸⁰ The Court therefore accepted that these were important objectives, but was able to use orthodox statutory interpretation techniques to scrutinise pt 4A and narrow its scope because the wider scope could not be readily justified.

(e) Consequences for the Commonwealth Model

Spencer demonstrates the extent to which the different branches of government engage in a collaborative exercise to ensure the “community’s evolving needs” are met.²⁸¹ It reflects the judiciary’s involvement in interpretive reform, applying orthodox statutory interpretation principles to rewrite pt 4A and reduce its infringement on fundamental values. The principle of legality requires Parliament to explicitly infringe on individual rights if it wishes to. Parliament, in this instance, neither did this sufficiently explicitly nor followed sound processes in enacting pt 4A; precluding public submissions and making a mockery of the s 7 process. Therefore, the Crown precluded political scrutiny.

²⁷⁵ Dyzenhaus, above n 23, at 282.

²⁷⁶ At 303-304.

²⁷⁷ At 303-304.

²⁷⁸ *Ramsay v Wellington District Court* [2006] NZAR 136 at [33]-[34].

²⁷⁹ *Spencer* (CA), above n 13, at [58].

²⁸⁰ At [79].

²⁸¹ *Taylor*, above n 15, at [150] per Miller and Wild JJ.

The Courts responded by scrutinising the legislation. *Spencer* does not threaten Parliament's power to have the final word. Rather, the judiciary acted pragmatically, bringing the legislation to both the public and the legislature's attention and requiring Parliament to be explicit, and therefore maximally politically accountable, if it wishes to contravene important values.²⁸² Parliament cannot therefore avoid both judicial and political scrutiny. Parliament can therefore either explicitly remove judicial scrutiny and allow for political scrutiny or it can be opaque and face heightened judicial scrutiny, including the potential reading down of egregious provisions. If Parliament explicitly infringes on protected rights under the NZBORA and especially if it excludes political rights scrutiny as the NZPHDAA did, the judiciary can issue a declaration of incompatibility to ensure this is brought to the public's attention.

Spencer demonstrates the Commonwealth Model's resilience because it shows how the judiciary can respond when the Crown attempts to avoid rights scrutiny of its legislation. Consequently, the Commonwealth Model's increased rights scrutiny of government actions is achieved in the family carers saga even without resorting to the stronger mechanisms which the NZBORA provides. This judicial accountability is best achieved through a transparent approach in which all relevant interpretative principles are outlined from the beginning, clearly explaining which values the legislation contravenes. Highlighting rights incompatibilities forces the Crown to justify them or face political consequences. This ensures the Commonwealth Model's objective of strengthening rights protections by increasing the political costs of enacting rights-infringing legislation is achieved.

²⁸² Gardbaum, above n 5, at 83.

Conclusion

The Commonwealth Model describes how the NZBORA has increased the judiciary's role in the collaborative enterprise of law-making. When protected values under the NZBORA are engaged, the judiciary's function includes substantive review of both government decisions and legislation to ensure the political branches take rights seriously when exercising public power. This intermediate constitutional position has the advantage of providing additional protection against legislative pathologies without threatening the democratic accountability that comes with parliamentary supremacy.

The effectiveness of this increased judicial role in government partly relies on Parliament respecting its role. In 2014, Petra Butler described the relationship between the judiciary and Parliament as akin to an "old married couple" where both branches of government "know what to expect of the other."²⁸³ This assessment is perhaps overly optimistic. The family carers saga revealed strains in this relationship and particularly the executive's potential to undermine the judiciary's expanded role through its control of the legislature.

The Crown was justifiably upset about the lack of deference the Court of Appeal afforded its family care policy in *Atkinson*. While the Court's approach in *Atkinson* was largely consistent with the Commonwealth Model, emphasising an individual rights paradigm and ensuring the protected rights were enforced, it failed to sufficiently consider the extremely uncertain fiscal consequences for the Crown. The Court's approach was consistent, however, with its subsequent decision in *CPAG*, as in both cases the Court provided deference in accordance with the strength of the policy's justification. It particularly emphasised the consideration the Crown gave to alternative policies and its justification for choosing the policy it did. The lack of guidance as to when family carers must be paid further meant there could well be real challenges for the Crown in controlling the costs of any funded family care policy, especially if those policies were continually challenged.

Miller and Wild JJ recently described inter-institutional dialogue as the courts acting "on the reasonable expectation that other branches of government, respecting the judicial function, will respond by reappraising the legislation and making any changes that are thought appropriate."²⁸⁴ This describes what occurred in the family carers saga, albeit with some twists. The Crown changed its family care policy in light of *Atkinson*, however, it also attempted to enforce the deference it had sought in *Atkinson*. However, in doing so it threatened to undermine the Commonwealth Model's objectives, particularly creating a Parliament which is more respectful of protected rights. The Crown's response was to attempt to avoid the increased rights scrutiny that the NZBORA established and therefore threaten to undermine

²⁸³ Petra Butler "It takes two to tango – have they learned their steps?" (2014) 136 VUWLRP 1 at 51.

²⁸⁴ *Taylor*, above n 15, at [151].

the Commonwealth Model. The Crown passed their legislative response with as little political scrutiny as possible; using the urgency process to avoid select committee scrutiny while preventing the opposition from reading the legislation's text until a few hours before it was put before the House. Further, pt 4A took an indirect path to overruling *Atkinson*, preventing family carers from being paid except under Ministry policies and excluding judicial consideration of whether those family care policies or pt 4A itself were unjustifiably discriminatory and therefore unlawful.

The judicial response showed, however, that the courts will not allow Parliament to sidestep judicial scrutiny. In *Spencer*, the courts adopted a value-laden interpretation of pt 4A, reading down its most problematic aspects by presuming that Parliament did not intend to abrogate fundamental rights unless it explicitly said so. The NZPHDAA sought to retrospectively validate the *Atkinson* policy while also removing the judiciary's jurisdiction to determine whether family care policies breached s 19 of the NZBORA. As the contrast with *Mangawhai Ratepayers* demonstrates, the judiciary recognises that retrospective legislation may be legitimate when it is considered, open to public submissions and publicly justified. The plurality in *Mangawhai Ratepayers* emphasised the importance of process when retrospective legislation is enacted because it allows for political accountability, which was sorely lacking in *Spencer*. The Court of Appeal in *Spencer*, however, applied a high level of judicial scrutiny. It refused to assist Parliament by filling any gaps in the NZPHDAA and consequently found that the privative clause did not apply retrospectively and that the *Atkinson* policy was not validated.

In conclusion, Parliament tried, but failed, to undermine the Commonwealth Model in the family carers saga. The Commonwealth Model still adequately describes New Zealand's constitutional arrangements because the judiciary prevented Parliament from avoiding both political and judicial rights scrutiny. The saga demonstrates the pervasiveness of pragmatism in New Zealand's constitutional culture. The Commonwealth Model itself is a pragmatic response, expanding judicial review without giving the judiciary ultimate power. When confronted by a misuse of its legislative power – itself a compromise – the judiciary took a pragmatic approach. It applied the principle of legality to assert authority over, and provide judicial scrutiny of, rights-infringing legislation because political scrutiny was excluded. While the Crown likely disagreed with *Spencer*, there was no suggestion of a further legislative response to 'clarify' the meaning of pt 4A. As for the carers, the *Atkinson* claimants settled with the Crown, Mrs Spencer was awarded \$233,091.08 in damages for lost wages and a new group of claimants have been given leave to sue for damages under the *Atkinson* policy.²⁸⁵

²⁸⁵ *Spencer v Ministry of Health* [2017] NZHC 391; *King*, above n 11.

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