NOTE: HIGH COURT ORDER PROHIBITING PUBLICATION OF NAMES OR IDENTIFYING PARTICULARS OF THE RESPONDENTS REMAINS IN FORCE.

IN THE SUPREME COURT OF NEW ZEALAND

I TE KŌTI MANA NUI O AOTEAROA

SC 20/2024
[2025] NZSC 34

BETWEEN	CHIEF OF DEFENCE FORCE First Appellant
	CHIEF PEOPLE OFFICER Second Appellant
	ATTORNEY-GENERAL Third Appellant
AND	FOUR MEMBERS OF THE ARMED FORCES Respondents

Hearing:	8 October 2024
Court:	Glazebrook, Ellen France, Williams, Kós and Miller JJ
Counsel:	U R Jagose KC, D P Neild and S R Hiha for Appellants M I Hague and I B Woodd for Respondents A S Butler KC, R A Kirkness and W H Ranaweera for Te Kāhui Tika Tangata | Human Rights Commission as Intervener
Judgment:	11 April 2025

JUDGMENT OF THE COURT

A The appeal is allowed.

B The Court of Appeal's order that the Temporary Defence Force Order 06/2022 (TDFO) be reconsidered is set aside, as is the Court of Appeal's interim order that no action may be taken by the Chief of Defence Force pursuant to the TDFO and related instruments pending the reconsideration of the TDFO.

C **The respondents must pay the appellants one set of costs of $30,000 plus usual disbursements. We allow for second counsel.**

REASONS

(Given by Miller J)

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Introduction

[1] This appeal concerns a COVID-19 vaccination mandate that the Chief of Defence Force (CDF) first imposed on all members of the Armed Forces of New Zealand on 3 March 2021 as part of their individual readiness requirements for deployment in New Zealand or overseas.[1]

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1 It is not necessary to distinguish among the three appellants so we will refer throughout to the CDF.

[2] The four respondents are or were members of the Armed Forces, which comprise uniformed military personnel. They are or were members of the Regular Forces, which comprise full-time personnel. The part-time Reserve and Territorial Forces are also part of the Armed Forces.[2] The three armed Services (the Navy, Army and Air Force) and the Civil Staff together comprise Te Ope Kātua o Aotearoa | the New Zealand Defence Force (NZDF).

[3] The direction to receive COVID-19 vaccinations was given initially under Defence Force Order (DFO) 3. Directions of this kind are authorised under ss 27 and 45 of the Defence Act 1990.[3] DFO 3, which was issued by the CDF on 23 November 2009, is the NZDF personnel manual. It requires that members of the Armed Forces meet individual readiness requirements, including vaccinations as specified in the NZDF Vaccination Schedule from time to time.[4] There are two parts to the Schedule: baseline (required for all members of the Armed Forces, in both domestic and deployed environments) and enhanced (required for particular roles or deployments).

[4] On the advice of the Chief Medical Officer, the Surgeon General and Director Defence Health added the COVID-19 vaccination to the baseline schedule on 3 March 2021, and boosters were added on 11 February 2022. Two of the four respondents refused the primary vaccination; the others refused booster doses.

[5] Under DFO 3 a member of the Armed Forces who is considered inefficient or ineffectual in the performance of their duties is liable to be discharged on performance grounds.[5]

[6] DFO 4, which was issued by the CDF on 18 October 2005, is concerned with personnel administration. It sets out processes under which a member of the Armed Forces may be discharged or released.[6]

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2 To the extent the Reserve Forces and Territorial Forces differ, this judgment refers to these forces collectively as the Territorial Forces. See Defence Act 1990, s 2(1) definitions of "reserve forces" and "territorial forces" and s 11.

3 Defence Force Orders issued under s 27 of the Defence Act are secondary legislation for the purposes of the Legislation Act 2019: Defence Act, s 27A(1).

4 Defence Force Order 3 [DFO 3], cls 9.6.16–9.6.17 and 9.6.36. See below from [28].

5 Clause 11.8.86. See below at [32].

6 See below at [33].

[7] The respondents (as they are now in this appeal) pleaded that DFO 3 and DFO 4 were unlawful to the extent that those orders coerced members of the Armed Forces to be vaccinated and boosted. But they focused their challenge on a supplementary direction, the Temporary Defence Force Order 06/2022 (TDFO), and its related instruments. The TDFO was issued on 25 May 2022 and was specifically addressed to COVID-19 vaccinations.[7]

[8] The TDFO was issued by way of response to the 2022 High Court judgment in *Yardley v Minister for Workplace Relations and Safety*, in which the High Court set aside a different COVID-19 vaccine mandate for certain work carried out by Police and NZDF personnel.[8] Cooke J was not satisfied that the mandate was necessary for continuation of the relevant services.[9]

[9] The TDFO specified that a member of the Armed Forces who is not fully vaccinated for COVID-19 "is ineffectual, and is to have their continued service reviewed" in accordance with a procedure set out in Annex A to the TDFO.[10] Such members could not be deployed internationally, or domestically as part of any national contingency response.[11] Any member of the Regular Forces who had not received their primary vaccination was required to remain on COVID-19 isolation leave and could not access any NZDF camp, base or facility except for the purpose of health or welfare care.[12] Decisions to discharge or retain a member who had not had the required COVID-19 vaccinations were to be made by the Chief of the relevant Service.[13]

[10] The Court of Appeal found, reversing the judgment of Churchman J in the High Court, that the CDF had not discharged the burden of showing that the limits the

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7 Temporary Defence Force Order 06/2022 [TDFO] was issued on 25 May 2022 but corrected before it was promulgated on 27 May 2022. We refer to the version promulgated.

8 *Yardley v Minister for Workplace Relations and Safety* [2022] NZHC 291, (2022) 19 NZELR 125. See COVID-19 Public Health Response (Specified Work Vaccinations) Order 2021 [Minister's Order] (now revoked).

9 *Yardley*, above n 8, at [105]–[106].

10 TDFO, cl 12–13. See below at [53]–[60].

11 Clause 15.

12 Clause 17.

13 Clause 20.

TDFO imposed on protected rights were demonstrably justified.[14] The Court did not set the TDFO aside but directed that the CDF reconsider it, taking into account changed circumstances including the Government's removal in August 2023 of all remaining restrictions in relation to COVID-19.[15] It made an interim order prohibiting any further action against the respondents (as they are now) and others in the same position pending reconsideration of the TDFO.[16]

[11] This Court granted leave to appeal on the question whether the Court of Appeal was correct to allow the appeal.[17] Counsel were invited to focus on whether the Court of Appeal failed to allow the CDF a sufficient margin of appreciation when deciding whether the TDFO and related instruments were needed to ensure the Armed Forces met operational readiness requirements. Leave extended to the nature and extent of justification evidence required of the CDF and the specificity of pleadings.

The NZDF framework

[12] The defence of New Zealand is a Crown prerogative, but the Crown requires the authority of Parliament to raise, maintain and deploy forces in New Zealand.[18] That authority continues under the Defence Act.[19] It provides that the Minister of Defence shall have the power of control of the NZDF, which shall be exercised through the CDF.[20] These provisions affirm a long-established constitutional principle: although the defence of New Zealand is a prerogative power, the military are subject to civilian control.[21]

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14 *Four Members of the Armed Forces v Chief of Defence Force* [2024] NZCA 17, [2024] 3 NZLR 1 (Gilbert, Collins and Goddard JJ) [CA judgment] at [165]. See *Four Members of the Armed Forces v Chief of Defence Force* [2022] NZHC 2497 [HC judgment].

15 CA judgment, above n 14, at [168]–[169].

16 At [170]. The formal order at [177] was not limited to the respondents.

17 *Chief of Defence Force v Four Members of the Armed Forces* [2024] NZSC 75 (Glazebrook, Ellen France and Miller JJ).

18 See generally Joseph Chitty *A Treatise on the Law of the Prerogatives of the Crown; and the Relative Duties and Rights of the Subject* (Joseph Butterworth and Son, London, 1820) at 43–46; Bill of Rights 1688 (Imp) 1 Will & Mar sess 2 c 2, art 1; and Philip A Joseph *Joseph on Constitutional and Administrative Law* (5th ed, Thomson Reuters, Wellington, 2021) at [19.4.2(3)].

19 Defence Act, ss 5–6 and 9.

20 Section 7. See also *Curtis v Minister of Defence* [2002] 2 NZLR 744 (CA) at [7]–[8].

21 See also Roger Howard *Laws of New Zealand* Defence: Armed Forces at [46]–[49].

[13] Section 8(3) provides that the CDF shall command the Navy, the Army and the Air Force through the respective Chiefs of those Services. Command is the authority of an individual, by reason of their rank, to direct, co-ordinate or control armed forces.[22] The relationship between members of the Armed Forces and the Crown is not one of employment but rather a unilateral relationship of service under which members serve at His Majesty's pleasure.[23] They are bound by an oath of allegiance which includes a promise to obey all orders of superior officers.[24] That extends, obviously, to obeying orders to engage in armed conflict, with attendant risks to personal safety. Members must also deploy in accordance with orders at any time, regardless of personal circumstances. The evidence of the then CDF, Air Marshal Kevin Short, is that "[c]oncepts such as command and morale are uniquely important to the effective functioning of a military force". It is the duty of commissioned and non-commissioned officers to afford the utmost aid and support to their superiors and to foster loyalty and trust in the personnel under their command.

[14] In addition to the functions imposed on the CDF under the Act, or any other enactment, the CDF has certain express responsibilities to the Minister. Relevantly, s 25 provides that:

> (1) In addition to the functions imposed on the Chief of Defence Force by or under this Act or any other enactment, the Chief of Defence Force shall—
>
> …
>
> (b) be responsible to the Minister for—
>
> (i) the carrying out of the functions and duties of the Defence Force (including those imposed by any enactment or by the policies of the Government); and
>
> (ii) the general conduct of the Defence Force; and
>
> (iii) the efficient, effective, and economical management of the activities and resources of the Defence Force;
> …
>
> …

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22 See at [47].

23 See Defence Act, s 45; and *Deynzer v Campbell* [1950] NZLR 790 (CA).

24 Defence Act, ss 34–35; and Defence Regulations 1990, reg 3.

[15] DFOs are provided for in s 27(1):

> In performing the functions and duties and exercising the powers of the Chief of Defence Force, the Chief of Defence Force may from time to time, for the purposes of this Act, issue Defence Force Orders, not inconsistent with this Act, the Armed Forces Discipline Act 1971, or any other enactment.

[16] Section 45 provides for the CDF to prescribe conditions of service, subject to an obligation to consult the Public Service Commission.

[17] Section 57A provides that members of the Services may be discharged or released by the CDF for behaviour which is incompatible with the maintenance of good order and discipline within a Service or which tends to bring a Service into disrepute:

> (1) The Chief of Defence Force may institute the discharge or release of a member of the Services if the Chief of Defence Force has reasonable grounds for believing—
>
> (a) that the member has behaved in a manner which is incompatible with the maintenance of good order and discipline within a Service or which tends to bring a Service into disrepute; and
>
> (b) that the discharge or release of the member is necessary—
>
> (i) to maintain good order and discipline; or
>
> (ii) to avoid prejudice to the reputation of that Service.
>
> …

[18] The Armed Forces Discipline Act 1971 is a consolidation of former enactments of the Parliaments of New Zealand and the United Kingdom relating to Service members.[25] It provides for the discipline of the Armed Forces and the infrastructure and processes needed to administer military justice.[26] Part 2 of the Act creates offences, among many others, of treachery, cowardice when before the enemy, looting, creating alarm or despondency, mutiny, insubordination, and disobedience to lawful

25 Armed Forces Discipline Act 1971, long title. See also Howard, above n 21, at [160].
26 See also Court Martial Act 2007; and Court Martial Appeals Act 1953.

commands of a superior officer.[27] Section 72 creates an offence of endangering the health of members of the Armed Forces:

> (1) Every person subject to this Act commits an offence, and is liable to imprisonment for a term not exceeding 2 years, who, without lawful excuse, refuses or fails to submit himself to medical, surgical, or dental treatment or procedures by a medical practitioner or dental practitioner, as the case may require, after being ordered to do so—
>
> (a) by a medical or dental officer who is a medical practitioner or dental practitioner; or
>
> (b) by a competent officer acting on the advice of any such medical or dental officer—
>
> if any such treatment or procedure, whether preventive, protective, or curative, is stated by the medical or dental officer who gives the order or advice to be, in his opinion, essential in the interests of the health of other members of the Armed Forces, or to be such that refusal or failure to submit thereto would constitute a potential menace to the health of other members of the Armed Forces or would prejudice the operational efficiency of any part of the Armed Forces.
>
> (2) In any proceedings in respect of an offence against subsection (1), where the order involves curative surgery, it is a defence to the charge if the accused proves that the provisions of Defence Force Orders relating to the right of a member of the Armed Forces to ask for a second opinion in such cases have not been observed.

It will be seen that medical treatment may be ordered if a medical practitioner has stated that, in their opinion, the treatment is essential in the interests of the health of other Armed Forces members or that refusal to submit would prejudice the operational efficiency of any part of the Armed Forces.

[19] Section 73 creates an offence of doing or omitting any act that is likely to prejudice service discipline or bring discredit on the relevant Service.[28]

[20] It is common ground that the vaccine mandate, created by DFO 3 and the addition to the baseline schedule, engages rights protected by the New Zealand Bill of

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27 For the implications of disobedience for the concept of military discipline, see, for example, Nigel D White *Military Justice: The Rights and Duties of Soldiers and Government* (Edward Elgar Publishing, Cheltenham, 2023) at 26–27.

28 Armed Forces Discipline Act, s 73(1)(a)–(b).

Rights Act 1990 (NZBORA). They are the rights to refuse to undergo any medical treatment and to manifest religion and belief.[29]

The CDF's rationale for the COVID-19 vaccination requirement

[21] Individual readiness requirements must be met by all members of the Armed Forces. They include baseline vaccinations, which are a condition that must be met on entry and maintained throughout the person's career in the Armed Forces. Colonel Charmaine Tate, the Surgeon General and Director Defence Health,[30] explained why vaccinations are required in a military context:

> Further, the spread of infectious diseases amongst a deployed military force can have a significant detrimental impact on its operational effectiveness, particularly if members of that force do not have any immunity to the disease, such that they may become seriously unwell. If deployed service members become seriously unwell, it compromises the deployed military force by unexpectedly decreasing its number of members, but also by virtue of placing an unexpected burden on deployed health services, and the evacuation chain.
>
> Often the deployed environment is austere and advanced health services are not easily accessible. Much effort goes into optimising the health of all deploying NZDF personnel prior to deployment to reduce the likelihood that they will require health services and reduce the likelihood that they will need to be evacuated from a theatre of operations during their deployment. Any safe health advantage we can access, such as prophylaxis medication to prevent disease impact or vaccinations, is considered as part of this optimisation.
>
> In most major recorded conflicts prior to World War II, disease was a much greater cause of casualties than wounds suffered at the hands of the enemy. This enduring feature of war was only reversed in World War II, chiefly as a result of major medical advances in prevention (vaccines) and treatment (antibiotics). Accordingly, the prevention and control of infectious disease is an important aspect of military strategy and operational success.
>
> Risks of infectious diseases are reduced by measures such as infection prevention and control protocols, hygiene (personal, food and water), vector avoidance and control and waste and case management. Vaccinations are a critical and effective tool to reduce the likelihood of severe illness and impact for specific diseases that a service person may be exposed to.

[22] Colonel Tate explained that the baseline schedule is based on an assessment of which transmissible infections a military population may be vulnerable to in

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[29] New Zealand Bill of Rights Act 1990, ss 11 and 15. The respondents no longer rely upon the right to freedom from discrimination on grounds of religious belief or disability, as provided for in s 19.

[30] Before her appointment to these positions in June 2022, Colonel Tate was Chief Medical Officer, including when the COVID-19 vaccine was added to the baseline schedule.

New Zealand and what vaccinations may be needed to facilitate rapid deployment offshore. It currently includes the National Immunisation Schedule set by the Ministry of Health | Manatū Hauora (minus the HPV vaccine) plus Hepatitis A and COVID-19.[31] The enhanced schedule includes vaccines required for roles or locations where members are at risk of an infectious disease. Rabies, cholera and typhoid are examples.

[23] COVID-19 was designated on 11 March 2020 as a notifiable and quarantinable infectious disease.[32] Colonel Tate explained that it was identified as a disease which affects multiple organs, particularly in the respiratory system, and can cause critical acute symptoms and death and significant long-term consequences. It led in New Zealand to approximately 14,500 hospitalisations and 1,500 reported deaths to mid-2022. Much was unknown about its origin and evolution. Decisions at the time had to be based on the best available information.

[24] NZDF members were required to serve in roles in which they were at risk of exposure to COVID-19. That included service in connection with the Government's quarantine regime, on international postings, or on civil defence operations. That was thought to necessitate vaccination to reduce the health risk of exposure to infected people. Vaccination was also thought necessary to reduce the severity and duration of illness. Isolation requirements beyond those applicable to the general public were also necessary to mitigate effects on NZDF's capacity to perform its functions. In May 2022, the NZDF requirement was that household contacts (which included those sharing barracks) must isolate for at least seven days and until they were symptom-free,[33] meaning that a single case could have a significant effect on availability of personnel who shared barracks, messes and gymnasiums. Non-pharmaceutical interventions, such as the use of masks and social distancing, are

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31 The COVID-19 vaccine now appears on the National Immunisation Schedule to be administered during pregnancy.

32 Infectious and Notifiable Diseases Order (No 2) 2020. Before that, novel coronavirus capable of causing severe respiratory illness was designated a notifiable but not quarantinable infectious disease on 30 January 2020: Infectious and Notifiable Diseases Order 2020. COVID-19 remained a quarantinable infectious disease until 1 October 2024: Infectious and Notifiable Diseases Order 2024. See now Health Act 1956, sch 1 pt 1 section B.

33 This was a wider and more onerous requirement than that set out in sch 2 of the COVID-19 Public Health Response (Self-isolation Requirements and Permitted Work) Order 2022 (as amended 2 May 2022). See also below n 73. The policy contemplated a narrow exemption process for persons required for urgent tasks.

not always practicable during military training or operations. An unvaccinated person might place an unnecessary burden on the limited health services which may be available on some austere deployments; for that reason, unvaccinated persons could not be deployed overseas.

[25] Colonel Tate's view was that the COVID-19 vaccines are well-researched and safe and have a huge impact on the burden of COVID-19 infection. In reaching that conclusion she relied in part on Ministry of Health advice, which has been supported by an affidavit of Dr Ian Town, Chief Science Advisor at the Ministry of Health. She accordingly recommended that the vaccination be added to the baseline schedule and later recommended that the booster doses also be added, primarily because they responded to later variants and helped maintain immunity levels.

[26] Booster doses were moved to the enhanced schedule in March 2023. Colonel Tate made that decision because clusters of NZDF cases had become more related to collective activities and travel, rather than workplaces. That made it appropriate to consider booster doses immediately prior to planned collective activities and travel.

[27] A decision was taken not to prosecute those who refused vaccination (primary or booster doses) without a medical justification, but rather to review their continued service.[34] The CDF considered that refusal was a matter of service, rather than discipline. That approach allowed members to choose to continue in the Armed Forces or leave, and it facilitated retention in cases where it was considered appropriate to retain the member in service.

DFO 3 and DFO 4

[28] DFO 3 records that one of its purposes is to set a framework for individual readiness requirements, which are a fundamental component of operational preparedness:[35]

> The New Zealand Defence Force (NZDF) is required by the Government of New Zealand to provide individuals and units/ships to meet contingencies

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34 Prosecutions might have been brought in respect of s 72 of the Armed Forces Discipline Act.

35 DFO 3, cls 9.6.1 and 9.6.3. Clause headings are omitted throughout these reasons.

> within specified Degrees of Notice (DON). This Order provides the guidance and framework for managing the individual readiness of members of the Armed Forces.
>
> Readiness, like combat viability, deployability and sustainment, is a component of operational preparedness. Therefore individual readiness needs to be applied within the context of the NZDF operational preparedness requirements.
>
> The need for the NZDF to be able to deploy forces requires members of the Armed Forces to be at a level of individual readiness that allows them to deploy to conduct military operations. This ability is a fundamental component of military service.
>
> …
>
> The ability of the NZDF to deploy forces in a timely manner is based partially on the individual readiness of members of the Armed Forces. Individual readiness involves members of the Armed Forces who have completed basic training for their Service meeting prescribed standards and is a combination of professional, military, fitness, trade skills, administrative and other personal requirements.
>
> Members of the Armed Forces are responsible for meeting and maintaining those aspects of individual readiness that are within their ability to control. Commanders are responsible for providing the training, mentoring, coaching and development opportunities to prepare members of the Armed Forces under their command for their designated roles. Single Services are responsible for providing the resources and the strategic direction to units to enable them to carry out their primary functions.

[29] An objective of DFO 3 is to ensure that as many members of the Armed Forces as possible are ready to deploy to meet NZDF output requirements.[36] The impacts sought by DFO 3 are:[37]

> (1) to ensure members of the Armed Forces achieve and maintain individual readiness, and
>
> (2) the number of members meeting their individual readiness requirements is maximised leading to unit/ship readiness within designated DON and required Level of Capability (LOC).

[30] DFO 3 establishes four readiness levels: (1) no impediments, (2) administrative or command issues need resolving but readiness can be achieved within response times, (3) ability to deploy is limited by factors that prevent readiness within response times, and (4) not deployable.[38] On posting to a unit or ship, members

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36 Clause 9.6.11.
37 Clause 9.6.11.
38 Clause 9.6.16.

are to be initially categorised as being at one of these levels. Commanders are instructed that as many members as possible must obtain Level 1 or 2 readiness.

[31] It is the responsibility of members to meet fitness standards that are within their ability to control, including maintenance of vaccines required under the Vaccination Schedule.[39] DFO 3 provides for corrective action for those who do not manage readiness requirements that are within their control. Corrective action extends to review of continued service in the NZDF:[40]

> Where members of the Armed Forces are assessed as being unable to maintain individual readiness for reasons within or beyond their control, their continued service is to be reviewed in accordance with these Orders at DFO 3, Part 11, Chapter 8 *Departing the NZDF (Military)*.
>
> In the context of this provision, 'unable to maintain' means that the member of the Armed Forces is 'not deployable' and has been or is likely to be 'not deployable' for a period of time in excess of six months.

[32] DFO 3 states that a member may be discharged on performance grounds where they are considered to be inefficient or ineffectual in the performance of their duties. It explains that the procedure for discharge is found in DFO 4:[41]

> Discharge is where the NZDF initiates the departure of a member from the Regular Force or Territorial Force under this section, but not as part of a disciplinary process.
>
> …
>
> The Service may initiate the Performance discharge of a member of the Armed Forces where the member is considered to be inefficient or ineffectual in the performance of his or her duties, including repeated failure to meet single Service fitness requirements.
>
> A Performance discharge is to be preceded by a review, and formal written warning for inefficient and ineffectual performance, in accordance with the procedure outlined in DFO 4.
>
> The policy relating to the review and formal written warning for inefficient and ineffectual performance in DFO 4, Chapter 16, Section 7 is to be adhered to.

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[39] Clauses 9.6.3, 9.6.17 and 9.6.36.

[40] Clause 9.6.50 (italics in original).

[41] Clauses 11.8.74 and 11.8.86–11.8.87. These provisions were later amended by Annex C to the TDFO, substituting "repeated failure to meet single Service fitness requirements" with "failure to meet individual readiness requirements".

[33] DFO 4 establishes a detailed process for discharge of Regular Force members who are inefficient or ineffectual in the performance of their duties.[42] Briefly, it provides for the person's commanding officer to raise a report and allow the member to comment on it, to give a formal written warning if appropriate, to review the member's performance during the period (being not less than three months) of the formal warning, to raise a further report at the end of that period, to provide full details if the recommendation is to discharge the member, to allow the member to comment on the report, and (if not satisfied with the member's response) to forward the recommendation for discharge to the appropriate Service Chief or their delegate.[43]

Yardley v Minister for Workplace Relations and Safety

[34] We have explained that COVID-19 vaccination was added to the baseline schedule on 3 March 2021, and that Armed Forces members were obliged to receive it under DFO 3. The obligation to receive it later overlapped in part with two ministerial orders.

[35] The first was an order made by the Minister for COVID-19 Response that came into force on 30 April 2021.[44] It required workers at Managed Isolation and Quarantine (MIQ) facilities, among other affected persons, to be vaccinated in order to carry out work at those facilities, among other border places. On 23 January 2022 this mandate was extended to boosters.[45] It was revoked for border workers on 2 July 2022.[46] Members of the NZDF fell within this mandate when deployed on Operation Protect, which supported MIQ facilities.

[36] The second was the COVID-19 Public Health Response (Specified Work Vaccinations) Order 2021, made by the Minister for Workplace Relations and Safety. It came into force on 15 December 2021, requiring that certain Police and NZDF work

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[42] Defence Force Order 4 [DFO 4], cl 16.104. Annex C to the TDFO expressly extended this discharge category to all members of the Armed Forces.
[43] DFO 4, cls 16.104–16.120.
[44] COVID-19 Public Health Response (Vaccinations) Order 2021 (now revoked).
[45] COVID-19 Public Health Response (Vaccinations) Amendment Order 2022.
[46] COVID-19 Public Health Response (Vaccinations) Amendment Order (No 5) 2022.

be done only by vaccinated personnel.[47] With respect to the NZDF, the Order extended to all work carried out by both civilian and uniformed personnel.[48] The Order was made under s 11AB of the COVID-19 Public Health Response Act 2020. We will call it the Minister's Order to distinguish it from DFOs made by the CDF.

[37] In *Yardley* a number of Police and NZDF personnel sought judicial review of the Minister's Order.[49] The application was heard urgently on 15 February 2022 and judgment was delivered on 25 February 2022, before the transitional period ended and the Order took full effect from 1 March.[50] The judgment did not directly address the mandate for border workers nor the baseline schedule that, pursuant to DFO 3 and DFO 4, already required Armed Forces personnel to receive the vaccination.[51] It did however inform the TDFO which, as we have explained, is now a focus of the present proceeding. The Court of Appeal also cited it in some detail in the judgment under appeal, and there are parallels in reasoning. For these reasons, it is necessary to examine *Yardley* in a little detail.

[38] Cooke J noted evidence from the Minister that vaccination was necessary to ensure continuity of NZDF services, which are essential for public safety, national defence and crisis response.[52] The Minister had deposed that the NZDF performs a unique and critical function, which included the security of MIQ facilities. He stated that NZDF staff live and work at close quarters in shared facilities and an outbreak could affect NZDF's operational capability.

[39] Cooke J addressed the question of deference at the commencement of his analysis of reasonable justification. He held that:[53]

> [62] … I am not convinced that reference to deference, or to a margin for appreciation clarifies the Court's task in the present case. There is an important distinction between the policy decisions made by the Executive, and

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47 COVID-19 Public Health Response Act 2020, ss 17A(1) and 17C–17D (now repealed); and Minister's Order, cls 2 and 7 and sch 2. But see cls 8–11, which allowed for authorised exceptions and exemptions. Schedule 1 also provided for a transitional period.

48 Minister's Order, cl 4 definition of "Defence Force worker" and sch 2; and *Yardley*, above n 8, at [16].

49 *Yardley*, above n 8, at [2] and [17].

50 At [3].

51 But see at [82]–[83].

52 At [10].

53 Footnote omitted.

> the legal questions that are addressed by the Court. The choices made by governments on their response to COVID-19 involve wide policy questions—including decisions on the use of border closures, lockdowns, isolation requirements, vaccine mandates and many other measures. These are decisions for elected representatives to make. The Court addresses narrower and more limited legal questions—here whether the measure adopted is a demonstrably justified limitation of rights pursuant to s 5 of the New Zealand Bill of Rights Act. The Court's function is not to address the wider policy questions. The Minister was free to choose between any options that were legally open to him. The options were so open to him if they satisfied the legal requirement that they were a demonstrably justified limit on the relevant rights.
>
> [63] I accept when addressing the legal questions that the views of the Minister as set out in his evidence are to be given weight. Equally the views expressed by Deputy Commissioner Kura and Brigadier Weston, as senior and experienced persons in their respective areas should also be given weight. Questions involving expertise, such as those addressed by Dr Town may give rise to institutional limitations on the Court's ability to reach definitive conclusions, particularly when their evidence is only provided by way of affidavit. But ultimately the Court must exercise its constitutional responsibility to ensure that decisions are made lawfully. And the Crown has the burden to demonstrate that a limitation of a fundamental right is demonstrably justified. …

It will be seen that the Judge recognised that weight should be given to the views of the Minister, to the expertise and experience of Brigadier Matthew Weston (the NZDF Chief People Officer (CPO) at the time), and to the Court's own institutional limitations when it came to making findings on (untested) affidavit evidence.

[40] After citing *R v Hansen* for the usual methodology,[54] Cooke J identified the risk to the continuity of services as absenteeism from the workplace due to illness or the need to isolate as a close contact of someone ill with the virus.[55] Against that background, he reasoned that justification involved four specific questions:[56]

> (a) How many unvaccinated workers the Order addresses compared with the overall workforce. In particular how many workers have been pressured into vaccinating, or have been terminated/resigned as a consequence of the Order?
>
> (b) Of that number, how many would have been pressured to vaccinate, or terminated/resigned in any event as a consequence of the existing internal policies applied by Police and NZDF. In other words what is the effect of the Order that was not already being achieved by existing vaccination policies?

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54 *R v Hansen* [2007] NZSC 7, [2007] 3 NZLR 1.

55 *Yardley*, above n 8, at [66].

56 At [67].

> (c) What is the risk of the continuity of services of Police and NZDF arising from this number of workers that are so addressed by the Order? This will include evidence of the additional risks of contracting and transmitting COVID-19 arising from being unvaccinated, in light of the number of workers so identified, and the overall workforce and its dynamics. It will also include an assessment of the impact on public trust in these services.
>
> (d) Does the benefit so identified amount to a demonstrably justified limit on the rights bearing in mind the adverse impact on the persons whose rights are so limited?

[41] Unfortunately, there was little evidence addressed to these questions.[57] The parties had addressed justification at a more abstract level.

[42] The Judge was not prepared to accept that a mandate was justified for NZDF civilian staff, or that the Minister's Order was necessary for uniformed personnel. He pointed to evidence that 99.2 per cent of the Regular Forces (who are uniformed personnel) were vaccinated, leaving 75 members who were not, and he noted there was no evidence that the number who remained unvaccinated fell as a result of the Minister's Order; put another way, there was no evidence that the Government's mandate was effective:

> [84] Brigadier Weston's evidence is that at 1 February 2022 99.2 per cent of the regular forces were fully vaccinated leaving 75 members of the regular forces who were not. 98.7 per cent of the civil staff were fully vaccinated leaving 40 who were not. There is no evidence addressing whether the 75 regular force members changed in number because of the Government mandate implemented by the Order. Neither is there any evidence whether the 40 civilian staff was smaller in number than would have been the case had there been no Order and the NZDF's internal employment policies left to operate. The maximum total number said to be covered by the Order is 115, with no evidence as to whether that number is smaller as a consequence of the Order, or evidence about terminations/resignations and how that would have been different with and without the Order. Neither do I have any evidence that there were in fact more than 115 workers addressed by the Order because the fact it was going to be implemented led some workers to get vaccinated or resign in anticipation (excluding those who would have resigned because of the operational policies in any event).

[43] Nor was there evidence that the number of unvaccinated staff adversely affected NZDF's capacity to ensure continuity of its capability.[58]

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57 At [69]. The parties also proceeded on the basis that the purpose of the Minister's Order was to address the spread of COVID-19 rather than to ensure the continuity of the public services and to promote public confidence in those services: at [26]. See below at [46].

58 At [85].

[44] The Judge added that a reasonably low percentage of NZDF personnel were recorded as being ready for deployment for a range of reasons.[59] It would be necessary to know how the number of people subject to the mandate affected deployment capability.

[45] The Judge then turned to whether the presence of unvaccinated personnel, even in small numbers, created a "materially higher risk" to the remaining workforce.[60] However, the evidence was again limited. There was a conflict of expert evidence about the impact of vaccinations on the spread of the then prevalent Omicron variant. Dr Nikolai Petrovsky's opinion was that mandatory vaccination did not reduce spread and may even increase it (because of asymptomatic infections or undue reliance on the vaccine).[61] Dr Town did not respond directly to Dr Petrovsky's evidence.[62] The Judge concluded that:

> [91] I take it from this evidence that vaccination may still have some effects in limiting infection and transmission, but at a significantly lower level than was the case with the earlier variants. It is clear from the evidence that vaccination does not prevent persons contracting and spreading COVID-19, particularly with the Omicron variant. It is equally clear that it does still provide protection from serious illness and death, although this effect wanes after the second dose, and seems to wane in a similar way after the booster. I accept on the basis of Dr Town's evidence that vaccination might contribute to preventing contracting and spreading the Delta and Omicron variants to some extent, although not nearly as much as it did against the original versions of COVID-19.

[46] The Judge accepted that the precautionary principle was relevant.[63] He accepted that decision-makers should act on the best available information at the time.[64] However, the Minister's Order was imposed not to suppress spread but to ensure continuity of, and public confidence in, essential services. If there was evidence of a risk to continuity, there would be "room for giving the Crown the benefit of the doubt in imposing measures to address that risk".[65] But he was not satisfied that the Crown had offered sufficient evidence to justify the measures, even giving it some

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59 At [86].
60 At [87].
61 At [88].
62 See at [89]–[90].
63 At [64], [87] and [94]–[95].
64 At [94] citing *Spencer v Canada (Attorney General)* 2021 FC 361, (2021) 490 CRR (2d) 1 at [113]–[114].
65 At [95].

benefit of the doubt.[66] He pointed to the relatively small numbers of personnel the Minister's Order actually addressed, the lack of any evidence that the numbers would have been materially different without the Order, and the evidence that the Omicron variant in particular broke through any vaccination barrier. For these reasons he was not satisfied that there was a real threat to the continuity of essential services. He found that the impact of the Omicron wave would be significant but transitory, while termination of service would be permanent.[67] It might be that suspensions of the unvaccinated would address any significant problems arising from the Omicron wave; if so, that suggested the Order was not proportionate.

[47] Finally, the Judge noted that the Minister's Order allowed for only limited exceptions which generally did not depend on the individual circumstances of those involved.[68] He was not persuaded that the loss of flexibility, relative to that offered by internal Police and NZDF policies, had been justified.[69]

CDF Directive 13/2022

[48] A number of CDF directives were issued in connection with the COVID-19 vaccination. We need not survey them.[70] Generally, they explained that vaccination was required and established processes for dealing with those who declined either the primary or booster vaccinations. These processes included retention or discharge under DFO 4.[71] We do note that one of them, CDF Directive 31/2021, which implemented the Minister's Order, stated that members of the Regular Forces serving

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[66] At [97].
[67] At [98].
[68] At [102]–[103].
[69] We return to *Yardley* below from [124].
[70] They include CDF Directive 14/2021 (and the associated CPO Administrative Instruction 04/2021), CDF Directive 26/2021 and CDF Directive 31/2021 (and the associated CPO Administrative Instruction 05/2021). We discuss CDF Directive 13/2022 here, which was followed by CDF Directive 20/2022, the TDFO and the associated CPO Administrative Instruction 01/2022.
[71] That was the position from the vaccine's addition to the baseline schedule until CDF Directive 31/2021, and again after the revocation of the Minister's Order.

in New Zealand who by 17 January 2022 had not received at least one dose were to be stood down on COVID-19 isolation leave.[72]

[49] The position as at March 2022 was that New Zealand was at the start of what was predicted to be a significant surge of Omicron cases in the community. There had been a significant base outbreak in Auckland but its spread had been contained. Colonel Tate recommended that the vaccine requirement should remain for uniformed personnel to meet vaccine mandates for border force and international deployments, ensure immediate readiness, provide personal protection and reduce chances of onward transmission. Unvaccinated persons were considered more likely to contract and transmit the disease and become seriously unwell. She noted that experience had shown that very large numbers of people could be affected by a single case, because of the need to self-isolate.[73] For the same reasons, vaccination was recommended for civilian staff in NZDF workplaces.[74]

[50] A number of discharge decisions were in train at the time for unvaccinated Armed Forces members. CDF Directive 13/2022, issued on 12 April 2022, noted that these were rescinded in response to the decision in *Yardley*.[75] The Directive established processes that were thought to be consistent with *Yardley*, varying the DFO 3 and DFO 4 process as follows:[76]

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72 CDF Directive 31/2021, cl 12. CDF Directive 31/2021 was issued on 20 December 2021 and rescinded on 12 April 2022 by CDF Directive 13/2022 (although *Yardley* was delivered on 25 February 2022). The latter directive also cancelled CPO Administrative Instruction 05/2021. CDF Directive 13/2022 was itself rescinded on 13 May 2022. Clause 8 of the TDFO also cancelled CDF Directive 31/2021 and CPO Administrative Instruction 05/2021.

73 This isolation requirement, which at that time applied to positive cases and their household contacts, was not limited to the NZDF. Members of the public were also required to self-isolate: see, for example, COVID-19 Public Health Response (Self-isolation Requirements and Permitted Work) Order 2022 (as made). It was not until 12 September 2022, well after the introduction of the TDFO, that household contacts were no longer required to isolate: see COVID-19 Public Health Response (Self-isolation Requirements) Amendment Order 2022. The isolation requirement for positive cases was then removed on 15 August 2023.

74 Rather than readiness, a concern in relation to unvaccinated civilian staff was capability disruption.

75 CDF Directive 13/2022, cls 5 and 10. However, the CPO advised the CDF that these members remained on COVID-19 isolation leave unless directed otherwise by their commanding officer.

76 Clauses 14 and 17. Clauses 19–20 provided limited exceptions for certain members who were on parental leave or subject to disciplinary proceedings. Clause 18 provided that members deployed overseas who became subject to discharge were to be returned to New Zealand as soon as practicable.

(a) *For Regular Force members who had not received the primary course*: A formal written warning was no longer required. Instead, these members were to be notified by 29 April 2022 that they were subject to discharge.

(b) *For Regular Force members who had not received the booster*: The formal written warning period was to be no more than two weeks in duration. They had until 15 May 2022, or within three weeks of becoming eligible for a booster, to receive the booster or they would be subject to discharge.

[51] For those subject to discharge, their commanding officer was to forward the retention report to the relevant Service Chief, who was to be the approving authority for retention.[77] Unvaccinated members of the Territorial Forces were also prohibited from entering NZDF areas or attending training, and from 30 June 2022 were to have their service reviewed.[78]

[52] CDF Directive 13/2022 was cancelled in turn on 13 May 2022, following an application for judicial review by members of the Armed Forces. It was replaced on 25 May 2022 by the TDFO,[79] and an associated administrative instruction was issued on 31 May 2022.[80]

The TDFO and Administrative Instruction

[53] The TDFO stated that its purpose was to give directions about the COVID-19 vaccine requirement and to specify grounds and processes for discharge for failure to meet individual readiness requirements relating to the vaccination.[81]

[54] The TDFO repeated the main rationale for including the COVID-19 vaccination on the baseline schedule:[82]

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77 Clause 14(c).
78 Clauses 15–16.
79 See above n 7.
80 See below at [59].
81 TDFO, cls 2–3.
82 Clause 6 (footnote omitted).

> [Members' pre-existing requirement to be vaccinated for COVID-19] goes beyond health and safety and extends to their ability to serve where required by the NZDF, both domestically and internationally. Members of the Armed Forces who are unable to maintain their individual readiness for reasons within or beyond their control, are to have their continued service reviewed.

Other rationales were said to include the vaccine mandates for border entry, available clinical evidence for reducing the risk of serious illness or poor health outcomes, and that the vaccine reduces the chance of onward transmission and therefore avoids impacting critical outputs, including safety-related components of duty tasks.[83]

[55] It explained that members had been on notice of the requirement since mid-2021:[84]

> Members of the Armed Forces have been on notice since mid-2021, that being vaccinated against COVID-19 is a requirement of continued service in the Armed Forces. Every effort has been made by the NZDF to educate and reassure members as to the need for the vaccine. …
>
> It has also been communicated to members of the Armed Forces that failure to meet individual readiness requirements may lead to a review of retention in the Service.
>
> Consequently, any member of the Armed Forces who is not fully vaccinated for COVID-19 pursuant to the NZDF Vaccination Schedule is ineffectual, and is to have their continued service reviewed [in accordance with Annex A to the TDFO].

[56] The TDFO made the following changes to DFO 3 and DFO 4 processes:[85]

(a) *Deemed ineffectual, and continued service to be reviewed*: Any member of the Armed Forces who was not fully vaccinated for COVID-19 was deemed ineffectual, and was to have their continued service reviewed.[86]

(b) *Prohibited from deploying*: Members who were not fully vaccinated but were eligible for a vaccination (including a booster) were not to deploy overseas, or domestically as part of a national contingency response capability or any domestic activity with a formal COVID-19

83 Clause 7.
84 Clauses 10–12 (footnotes omitted).
85 The TDFO also dispensed with or heavily truncated formal warning processes: see below at [58]. See also above nn 41–42.
86 Clause 12.

vaccination requirement. Members who were not fully vaccinated but were not yet eligible for a vaccination required a command exemption before deployment.[87]

(c) *Prohibited from accessing camps and bases*: Members of the Regular Forces who had not received their primary COVID-19 vaccination(s) were not to access any NZDF camp, base or facility unless for the purpose of seeking health or welfare care, or support, and were to remain on COVID-19 isolation leave. Members of the Territorial Forces who had not received their primary COVID-19 vaccination(s) were not to access any NZDF camp, base or facility and were not to undertake any NZDF training or other duty-related work. Members of the Armed Forces who had not received a booster were able to access NZDF camps, bases or facilities and undertake duties and training, but only within constraints that would be determined through the review process.[88]

(d) *Service Chiefs to be the approval authority for discharge*: Commanding officers were no longer authorised to retain members subject to discharge on performance grounds for failure to receive the COVID-19 vaccinations.[89] Instead, they were to forward the retention report, including any submissions made by the member, to the relevant Service Chief. The relevant Service Chief was then to serve as the approval authority for discharge on performance grounds. This delegation was not to be sub-delegated.[90]

[57] It will be seen that members of the Regular Forces who had not received their primary vaccination were not to access any NZDF camp, base or facility unless for health or welfare care, and they were to remain on COVID-19 isolation leave. A similar measure had been introduced in Auckland on 21 November 2021 to reduce transmission risk by ensuring that all visitors and personnel within specified

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87 Clauses 15–16.
88 Clauses 17–19. See below n 95.
89 Annex A cl 5(c).
90 Clause 20.

workplaces, service accommodation or other facilities (such as barracks, messes and gymnasiums) were vaccinated.[91] A directive issued alongside the TDFO then cancelled that measure,[92] but the TDFO extended nationwide the prohibition on unvaccinated members of the Armed Forces from accessing NZDF camps, bases and facilities to the extent described above.

[58] The formal warning period was removed for those who had not received the primary vaccination, and the maximum warning period for those who had not received a booster was reduced to two weeks.[93] The reasons for doing so were explained by Brigadier Weston and the CDF. Essentially, a formal warning procedure was superfluous because the primary vaccination had been an individual readiness requirement for more than a year, and the booster for three months. The decision to elevate approval for discharge to Service Chiefs was taken to ensure consistency of decision-making, recognising that Service Chiefs had sufficient overview of operational effectiveness.

[59] Brigadier Weston also issued CPO Administrative Instruction 01/2022 (Administrative Instruction) which established a number of criteria that Service Chiefs must consider when making discharge or retention decisions under the TDFO:[94]

> a. Has the member received the primary COVID-19 vaccination(s)?
>
> b. Is the member in a strategically significant trade or [do they] have critical skills needed by the Service to meet Outputs 4 or 5 [to protect New Zealand's sovereignty and security, and to contribute to New Zealand's security, stability and interests, respectively]?
>
> c. Is the member subject to a [Return of Service Obligation], such that it is in the interests of the Service to retain?
>
> d. Is the member critical to the successful introduction into service of key capabilities in the next 12 months (ie are they posted to a project,

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91 CDF Directive 26/2021, cls 21–22. Clause 23 set out certain exemptions. On 16 January 2022, CDF Directive 33/2021 extended the requirement on visitors to apply nationwide.

92 CDF Directive 20/2022 instead required risk mitigation and management practices, such as masks.

93 TDFO, annex A cl 5. Compare DFO 4, cl 16.112(d) which required a formal warning period of not less than three months. These changes were already introduced in CDF Directive 13/2022, albeit rescinded on 13 May 2022: see above at [50].

94 CPO Administrative Instruction 01/2022, cl 7. Clause 6 clarified these criteria were not exhaustive. The CPO was required by cl 21 of the TDFO to issue these criteria. Clause 22 then required Service Chiefs to consider these criteria when deciding whether a member should be discharged or retained in service.

transition unit or receiving unit supporting the introduction of a new capability)?

e. Is the member in a trade and/or a rank group with an attrition rate significantly higher than the Service 12-month rolling average?

f. Does the retention of the individual delay the promotion of others who do meet the [individual readiness requirement] for COVID-19 vaccination(s)?

g. Is the member considered a 'single point of failure' for key organisational outputs (ie broader than section/unit impact)?

h. Does the member not meet other [individual readiness requirements] in addition to not meeting the COVID-19 vaccination(s) [individual readiness requirement]?

i. Does the member hold a rank or position whereby their continued refusal to be fully vaccinated undermines service discipline?

j. Can the member be employed in a role that is not required to meet Output 4 or 5 tasks [in accordance with] para 14 and 15 of [the TDFO]?

k. Are there exceptional welfare reasons that support retention?

It will be seen that the criteria included the member's skills and role, whether the member was a "single point of failure", the implications for service discipline of the member's refusal given their rank or position, capacity to deploy the member elsewhere, and exceptional welfare reasons.

[60] To summarise, the TDFO initiated the retention review process for every member of the Armed Forces who was not fully vaccinated. The retention review process was to be according to DFO 3 and DFO 4 with two notable modifications. First, the formal warning process was either dispensed with or heavily truncated. Second, commanding officers could not decide to retain a member; instead, the relevant Service Chief (and not a delegate) was to make the final decision. The criteria took into account the need for the member's skills and capabilities, their rank and position, capacity to deploy them elsewhere, and personal circumstances. Unvaccinated Regular Force members were already on isolation leave but the TDFO also limited their access to NZDF camps, bases and facilities (where that was not already the case). In the event a member was retained but continued not to meet individual readiness requirements, the prohibition from deployment was still to apply, and they were to be subject to a new retention review where they were required for

certain deployments and in any event after 12 months from their Service Chief's decision.[95]

[61] As noted earlier, in March 2023 Colonel Tate removed booster doses from the baseline schedule and added them to the enhanced schedule.[96]

Discharge and retention of Armed Forces members who refused COVID-19 vaccination

[62] Brigadier Weston deposed that 39 members of the Regular Forces had their service reviewed by Service Chiefs for failure to receive the primary vaccination. The numbers discharged and retained by each Service are recorded in this table:

Service	Discharge	Retain
Navy	6	6
Army	12	10
Air Force	4	1

[63] It will be seen that a substantial minority (44 per cent) were retained.

The respondents

[64] We turn to the circumstances of the four respondents. Their names and identifying particulars remain suppressed. The record contains details of the process followed in B's case, but not the others.

[65] A serves in the Army as a corporal. He is unvaccinated. He gives three reasons for declining to be vaccinated: his religious beliefs; lack of transparency from NZDF; and concern at provisional approval that the vaccine has received. He describes his religious beliefs as being traditional Catholic. He stands against abortions and does not believe in taking a vaccine that may have been developed and tested using cells

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[95] Clause 23. The TDFO was then amended on 23 June 2022 by Temporary Defence Force Order 07/2022, extending some of the dates by which the Service Chiefs had to make their decisions, as well as some of the termination dates. We infer that these dates were extended again on 8 August 2022 by Temporary Defence Force Order 09/2022, which is not in evidence. They were extended again on 7 September 2022 by Temporary Defence Force Order 13/2022. The latter amendment order also allowed retained members to access NZDF camps, bases or facilities within certain constraints.

[96] Above at [26].

descended from cells taken from an aborted human foetus. He also doubts the efficacy of the vaccine on transmission and infection rates and considers his risk of contracting and dying from COVID-19 to be "statistically low".

[66] A was retained by the Chief of Army. As at the Court of Appeal hearing, he was still subject to a retention review 12 months after his initial retention review. That review would have taken place by 15 August 2023. We do not know what happened at that review. No undertaking was made in respect of A as the CDF said in October 2022, following the High Court decision, that "his position will not be affected by either the outcome of the [a]pplication [for a stay] or the appeal itself".

[67] B is a former senior officer who served for 32 years in the Army. He had a distinguished career which included several overseas deployments, including two operational deployments in Afghanistan. He held the rank of Lieutenant Colonel. B is unvaccinated. He pleaded that he holds religious beliefs against abortion and those beliefs do not permit him to receive the vaccine, which he believes was developed using cells descended from cells taken from an aborted human foetus. He is also concerned that the COVID-19 vaccines are "still experimental" and at what he described as "the number of adverse health reports made globally". He believes there is a significant but as-yet-unknown risk of an adverse reaction, which he deems unacceptable.

[68] B's role was administrative in nature, and he had been non-deployable since early 2015 for unrelated reasons which were outside his control. The process provided for in the TDFO was followed, including meeting with a medical officer. His commanding officer recommended that he be retained, reasoning that his employability and utility were essentially unchanged compared to before COVID-19 vaccinations were mandated; in addition, he had been subjected to retention review processes four times in six months and his wife lost her job because of the health professionals' mandate, placing his family's income in jeopardy. In addition, CDF Directive 20/2022 had removed the general requirement for personnel entering NZDF areas to be vaccinated, so he posed no additional health and safety risk.

[69] B responded to the retention review by contending that the vaccine requirement was unlawful, contravened NZDF values and affected members' well-being, that it was strategically unwise to discharge large numbers of dedicated personnel at a time of international crises, and that discharges would exacerbate existing staff shortages. He stated that a request under the Official Information Act 1982 had revealed that just over 1,000 uniformed personnel were not fully vaccinated. B also confirmed that his utility remained unchanged and pointed to exceptional welfare reasons, in the form of loss of his family income. We observe that the reasons given were not confined to B's ethical or religious objections or his personal medical or family circumstances. They extended to his concerns about the safety of the vaccine more generally, the merits of command decisions about the risks and rewards of vaccination and contemplated that the vaccine requirement might lead to the loss of many staff.

[70] The then Chief of Army, Major General John Boswell, decided to discharge B in August 2022. He acknowledged B's personal circumstances but stated that:

> Whilst your Commanding Officer has recommended your retention, I have decided to approve your Administrative Discharge Category (Performance) based against [the] criteria contained [in the Administrative Instruction].
>
> Being fully vaccinated is a condition of service and members of the Armed Forces must be ready to serve when and where they are needed. The reason why you have been non deployable previously, has been due to an issue that is outside of your control, but in choosing not to have the COVID 19 vaccination you have made a conscious choice to not be vaccinated. I view that choosing to not meet a readiness requirement, which is within your control to meet, is not compatible with the nature of military service. The impact of your choice is exacerbated by the rank that you hold. You are a senior officer in the RNZIR and as such I consider that your continued refusal to be fully vaccinated risks undermining service discipline.
>
> I acknowledge the comments of your Commanding Officer that your utility at DEI is largely unchanged due to your vaccination status. As Chief of Army, my consideration is focused not only on your utility within the narrow confines of the DEI role but also of your utility across the Service. Currently, the attrition of Lieutenant Colonels is 50% up on this time last year. Your choice has a wider impact to your cohort. I need all Lieutenant Colonels remaining to be as versatile as possible across the Army. I also need my career management team to have available staff positions as respite positions from demanding unit command and operational roles. Due to your choice to not be fully vaccinated, you are not able to deploy or take unit command and are filling a staff role that others need for their resilience and the overall resilience of the Army.

[71] C is an officer in the Air Force, holding the rank of Squadron Leader. He has received the primary doses but not the booster dose. He declined the booster from concern that it is unsafe and ineffective. He disagrees with the principle of mandating medical procedures and particularly with mandating what he describes as "unsatisfactorily tested and trialled experimental gene therapy". He has had COVID-19 and experienced only mild symptoms. He believes he has sufficient synthetic and natural immunity to the virus. He says that he would rather have COVID-19 again than risk an adverse vaccination reaction. He is no longer subject to a retention review based on vaccination status because he has received the primary doses and the booster dose is no longer on the baseline schedule.[97]

[72] D is a former officer in the Navy, holding the rank of Lieutenant Commander. He has had two COVID-19 vaccinations but declined the booster. His reason for declining the booster is that he is concerned that men of his age are dying of unexplained heart attacks and he is worried about unknown risks. He believes he has sufficient synthetic and natural immunity to the virus. He also is concerned there may be unknown risks associated with the vaccine.

[73] D appears to have left the Regular Forces in anticipation of the direction given in the TDFO. He found other employment beginning in June 2022. There is later evidence stating D is a member of the Territorial Forces and is no longer subject to a retention review on the basis of vaccination status because he has received the primary doses.

[74] A theme of the affidavits of the respondents, and those of a number of other members of the NZDF who are in similar circumstances, is that the decision to place the COVID-19 vaccination on the baseline schedule was unjustified for a number of reasons, principally its alleged ineffectiveness in controlling spread of the disease, medical risk associated with the vaccine, and the NZDF's ability to function with substantial numbers of non-deployable personnel. The respondents adduced expert evidence that COVID-19 vaccine mandates are unjustified and unnecessary. Many of the deponents consider that they could still add value to the NZDF in non-deployed

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[97] At the time of the Court of Appeal hearing, none of the three serving respondents were to be imminently deployed in circumstances where the booster might be required.

roles and that its stance towards the COVID-19 vaccination has worsened an existing retention crisis. Some explained that discharge caused them and their families financial hardship. Some also say that they were not all treated respectfully when they declined vaccination; their decision was treated as a moral failing, and in some cases they were criticised in the presence of other NZDF members.

[75] In summary, the respondents and other deponents offered a number of reasons for declining vaccination. They included medical objection, some on the ground that they were at greater risk of adverse reactions than others for various reasons, and religious objections to the use of a vaccine that had been developed using human foetal cells. But they also objected on grounds that challenged command decisions. These were decisions about the need to have all Armed Forces personnel vaccinated for readiness and operational effectiveness reasons, and decisions by the Surgeon General about vaccine safety and benefits.[98] The Surgeon General is a medical practitioner,[99] which is noteworthy because the Armed Forces Discipline Act envisages that a medical practitioner may order a member of the Armed Forces to submit to a medical procedure and, subject to the right to a second medical opinion where the order involves curative surgery, the member must obey or risk being charged with a disciplinary offence.[100]

The judgments below

The High Court

[76] Churchman J was satisfied that the purpose of the various instruments establishing the vaccination requirement was to maintain the operational efficacy of the Armed Forces in New Zealand by limiting the spread of COVID-19.[101] That objective was sufficiently important to justify a limitation on the rights to refuse medical treatment and to manifest religion and belief.[102]

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98 See above n 30.

99 The Surgeon General must be a registered health practitioner. Where the Surgeon General is not a medical practitioner, the Chief Medical Officer is to be the Deputy Surgeon General and must exercise the regulatory roles that must be held by a registered medical practitioner: see Defence Force Order 18, cl 2.04.

100 Armed Forces Discipline Act, s 72(1).

101 HC judgment, above n 14, at [106].

102 At [107].

[77] The Judge rejected an argument that the COVID-19 vaccination could be distinguished from other required vaccinations because it appeared that only some 55 members of the Regular Forces (out of 9,251) were unvaccinated, reasoning that the impact of the requirement should be assessed as at the time relevant instruments were promulgated.[103] It seemed unlikely that a vaccination rate of 99.4 per cent would have been achieved had the baseline schedule not been amended to include COVID-19; further, the making of exceptions for the respondents likely would have an adverse impact on future vaccination rates.[104]

[78] Churchman J dismissed an argument that insistence on 55 members being vaccinated could not be justified in circumstances where a substantial proportion of Regular Force members were non-deployable for various reasons.[105] The CDF's response that this heightened the necessity to have the remainder available for deployment appeared legitimate. He also found that the expert evidence did not support the respondents' contention that the medical risks of the vaccine outweigh its benefits.[106]

[79] The Judge referred to evidence that the British Armed Forces did not mandate COVID-19 vaccination but rather assessed needs on a case-by-case basis.[107] He responded that the CDF ought to be given latitude, taking into account the CDF's position as commander of the Armed Forces. The courts are not in a position "to conclusively determine disputed matters of military necessity".[108]

[80] Finally, the Judge found that it was not necessarily the case that a member who refused vaccination on medical or religious grounds would be discharged, pointing out that 17 of 39 members who had been through the process had been retained.[109] He added that those who objected to the Pfizer or AstraZeneca vaccines on religious

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[103] At [108]–[109].
[104] At [111].
[105] At [112]–[114].
[106] At [120].
[107] At [124].
[108] At [125].
[109] At [129].

grounds (because of evidence that human foetal cells had been used in development) could receive the Novavax vaccine instead.[110]

The Court of Appeal

[81] The Court of Appeal accepted that there was sufficient justification for the limits on the rights protected by ss 11 and 15 of NZBORA that resulted from the COVID-19 vaccination being placed in the baseline schedule.[111] However, it found that the CDF had not shown sufficient justification for adopting the TDFO and related instruments.[112] Specifically, the CDF had not shown that the objective of maintaining the ongoing efficacy of the Armed Forces could not have been achieved by a less rights-limiting measure, namely the more flexible case-by-case approach that applies to failure to receive other vaccinations listed in the baseline schedule.

[82] The Court did not find that the whole of the TDFO was invalid.[113] The appeal had been argued at a level of generality which meant it could not identify specific parts which were valid. It also recognised that time had moved on and other regulatory settings had changed. For that reason the Court directed that the CDF reconsider the TDFO in light of its judgment.[114] Pending reconsideration, it would be inappropriate to take action against the respondents under the TDFO and related instruments.[115] An interim order to that effect was made under s 15 of the Judicial Review Procedure Act 2016.

[83] The Court's decision rested on a finding that the TDFO and related instruments imposed significant additional limitations on protected rights when compared with DFO 3 and DFO 4.[116] The Court identified these additional restrictions as: the decision that any unvaccinated member was ineffectual and was to have their service reviewed; the decision that any member who had not received the primary vaccination was effectively non-deployable; the general ban on any member who had not received the primary vaccination accessing NZDF facilities; the requirement that Service Chiefs

110 At [132].
111 CA judgment, above n 14, at [9]. See HC judgment, above n 14, at [107].
112 CA judgment, above n 14, at [10].
113 At [11].
114 Under s 17 of the Judicial Review Procedure Act 2016.
115 CA judgment, above n 14, at [12].
116 At [153].

(and not their delegates) make discharge or retention decisions; and the amendment of DFO 3 and DFO 4 to provide expressly that discharge processes could be initiated for failure to meet individual readiness requirements.[117]

[84] The Court observed that the challenge to the TDFO followed clearly in the footsteps of the *Yardley* proceeding; it went to the alleged inflexibility of the NZDF response, relative to the position had the TDFO not been implemented:[118]

> [143] … In that case the High Court held that the NZDF had not demonstrated that the less flexible approach to failure to be vaccinated that was provided for in the relevant Order was justified, as compared with a more flexible and individualised approach. That is precisely the complaint made here about the TDFO, and the "consistency" that it sought to achieve following *Yardley*. It should have been very clear to the NZDF, following the *Yardley* decision, that any materially less-flexible response to a failure to be vaccinated would require clear justification.
>
> [144] The reduction in flexibility brought about by the TDFO is not as absolute as was the case under the regime in issue in *Yardley*. But the same questions arise: has it been demonstrated that the reduction in flexibility, and associated increase in pressure to be vaccinated, is justified in order to achieve sufficiently important objectives?

[85] Contrary to the view taken by Churchman J, the Court accepted that the respondents had identified alternative ways of addressing the need to maintain the efficacy of the Armed Forces during the pandemic:[119]

> The appellants had identified the following alternative measures which they said would have adequately achieved the benefit sought, while limiting the affected rights less:
>
> (a) The COVID-19 vaccine could have been added to the enhanced schedule, but not the baseline schedule.
>
> (b) The vaccination requirements could be applied to people joining the Armed Forces, but the small number of unvaccinated existing members could be permitted to continue serving.
>
> (c) The NZDF could initiate retention reviews on a case-by-case basis when the individual circumstances justify doing so. The appellants gave evidence that the British Armed Forces consider whether COVID-19 vaccination is required for specific activities, and this is managed by individuals' chain

117 At [48]–[52]. See above nn 41–42.
118 Footnote omitted.
119 At [145].

> of command. The appellants submitted that the same could be done in New Zealand.

[86] The Court noted that there was no evidence for the CDF that engaged with the respondents' argument that a different, less restrictive approach had been taken by the British Armed Forces.[120] It was for the appellants (as they are now) to show that the impact on overall effectiveness and deployability of taking a case-by-case approach would be materially different to the additional measures in the TDFO.[121]

[87] The Court accordingly found that the incremental limits imposed by the TDFO had not been justified.[122] It found the evidence of Brigadier Weston inadequate.[123] Its central conclusion was that a much more specific and focused justification was required:[124]

> [155] The incremental limits on rights effected by the TDFO required justification by evidence drawing on something more than simple assertion: for example, data-based analysis of different scenarios, or comparisons with the measures taken by the Armed Forces of other countries, and their relative effectiveness. The justification needed to explain why the approach provided for in DFO 3 and DFO 4, without the TDFO, would be insufficient to achieve the relevant objectives. It needed to engage with the likely time frame for which any additional restrictions would be justified, and whether permanent discharge of unvaccinated members was necessary to achieve the objectives given that time frame. It also needed to engage with the question of why these measures should apply to members who are already, for other reasons, not deployable (as noted above, a very significant proportion of the Regular Force): it is difficult to see how retaining those members would affect the deployability of the Armed Forces.

[88] The Court added that the United Kingdom evidence, though not extensive, was sufficient to put the appellants squarely on notice that they needed to show why new extensive measures were required in the New Zealand context.[125] The Court concluded that:

> [157] The evidence filed by the deponents provided a clear explanation of the desirability of COVID-19 vaccination for members of the Armed Forces. But it did not provide focused justifications for the incremental limits on rights effected by the TDFO. Their evidence did not address the specific questions identified in the preceding paragraphs. It fell well short of providing

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120 At [150].
121 At [151].
122 At [157]–[158].
123 At [153].
124 Footnote omitted.
125 At [156].

> justifications for the relevant measures that are sufficient to meet the s 5 NZBORA burden.
>
> [158] We emphasise that we are not saying that the measures adopted were not justified. It is possible that they were. But the evidence placed before the Courts is not sufficient to demonstrate that those measures are justified, as s 5 of NZBORA requires where a measure limits rights.

[89] The Court concluded that the TDFO had not been shown to be a reasonable limit on the respondents' rights.[126] When it came to relief, the Court was prepared to make an allowance for the role and responsibilities of the CDF.[127] It also was not persuaded that all six of the "key elements" of the TDFO limited protected rights.[128] It suggested, by way of example, that the amendments to DFO 3 and DFO 4 did no more than spell out what was already generally provided for. It very much doubted that those provisions, standing alone, would raise any NZBORA concerns. As mentioned above, the Court also recognised that events had moved on since the TDFO was issued in May 2022.[129] A review of the TDFO was timely, if not overdue, for these reasons. Hence the Court did not set the TDFO aside but ordered that it be reconsidered in light of the Court's judgment, reasoning that it would be wrong "to engage in an inappropriately granular way with the performance by the CDF of his responsibilities in relation to the Armed Forces".[130] In the meantime, an interim order was made to protect the respondents pending the review.

The issues on appeal

[90] A number of issues addressed in the High Court and/or Court of Appeal were not in issue before us. They were:

(a) whether the TDFO and parts of DFO 3 and DFO 4 were inconsistent with s 72 of the Armed Forces Discipline Act;

(b) whether the same instruments were inconsistent with s 20 of the Health and Disability Commissioner Act 1994 and the Code of Health and Disability Services Consumers' Rights;

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126 At [165].
127 At [167].
128 At [166].
129 At [168].
130 At [169]–[171].

(c) whether the Administrative Instruction was unlawful because it required Service Chiefs to consider irrelevant factors, namely the impact of non-vaccination on promotion of vaccinated members and whether the rank of the person under review means that their decision to disobey the vaccination requirement affects service discipline; and

(d) whether the TDFO and parts of DFO 3 and DFO 4 limited s 19 of NZBORA (freedom from discrimination) and the "right to work" (which was said not to be ousted by NZBORA because of s 28).[131]

[91] The remaining issues are:

(a) whether the additional restrictions that the TDFO and related instruments imposed on the s 11 right to refuse medical treatment and the s 15 right to manifest religion were demonstrably justified;

(b) the nature and extent of justification evidence required, and the specificity of pleadings;

(c) whether the Court of Appeal was right to order that the TDFO be reconsidered; and

(d) what orders, if any, ought to be made with respect to the four respondents consequential on this Court's decision.

Submissions

[92] The CDF's principal contention was that the Court of Appeal erred by not affording leeway to his expert determination of what was needed to meet the objectives of Armed Forces readiness and discipline. The Court failed to recognise the distinct role and institutional expertise of the CDF, and it failed to show restraint and respect for the CDF's responsibility for readiness. The Court instead decided a military matter, leaving the CDF with no discretion to choose among a range of reasonable

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131 The Courts below found that the TDFO did not discriminate on the basis of disability or religion.

alternatives. The Court relied on its own assessment of whether the members' retention was necessary to maintain disciplined Armed Forces in a state of readiness for deployment. In doing so, it overlooked the importance of the NZDF's unique culture of service and discipline.

[93] The CDF contended that the Court of Appeal made two further errors of law. First, it treated the TDFO as an incremental restriction on the right to refuse medical treatment when the right is actually binary; a person whose right has been limited cannot be rendered more unable to choose. The Court also erred by characterising the TDFO as significant; it was no more than a minor procedural change to the existing mandate. Second, the Court erred by attaching significant weight to very late and generic evidence of the British Armed Forces' practices, effectively adopting that practice as an unpleaded less restrictive alternative.

[94] The respondents supported the judgment of the Court of Appeal. In particular, they contended that deference was appropriately given to the CDF, notably at the remedial stage, and the Court of Appeal was well-qualified to assess the evidence against the CDF's obligation to justify the limitation on protected rights. Whether a limitation is justified is a question of law on which a court must not defer. The CDF lost in the Court of Appeal not because the Court failed to defer but because the CDF fell well short of providing evidence to justify the TDFO's restrictions, which were significant additions to those imposed under DFO 3 and DFO 4.

[95] Appearing as an intervener, Te Kāhui Tika Tangata | the Human Rights Commission invited the Court to approach the appeal principally as a search for error on the facts rather than a question of principle about deference. Mr Butler KC accepted that weight may be given to a decision-maker's preference for reasons such as expertise, process and the courts' own institutional competence and suggested we need not decide whether constitutional propriety and/or democratic legitimacy considerations also justify restraint. He argued that the Court should inquire whether there is any less rights-intrusive alternative that would be as effective in securing the measure's objective. Evidence is not always required, but it is usually necessary. The Commission is concerned by the CDF's argument that an applicant must plead any reasonable alternative that might be deployed instead. It considers that this case

provides no basis for introducing a new pleading practice, and to do so would be inconsistent with the onus of proof.

Proportionality review

[96] Section 5 of NZBORA provides that the protected rights and freedoms may be subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society. When reviewing legislation for consistency with protected rights under s 5, New Zealand courts usually adopt the structured methodology developed by the Supreme Court of Canada in *R v Oakes* and subsequent cases.[132] Having established that the measure concerned limits a protected right, the court inquires into justification, asking:

(a) Does the limiting measure serve a purpose sufficiently important to justify curtailment of the right or freedom?

(b) Is the limiting measure rationally connected with its purpose?

(c) Does the limiting measure impair the right or freedom no more than is reasonably necessary for sufficient achievement of its purpose?[133]

(d) Is the limit in due proportion to the importance of the objective?

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[132] *R v Oakes* [1986] 1 SCR 103 at 138–140 per Dickson CJ, Chouinard, Lamer, Wilson and Le Dain JJ as cited in *Hansen*, above n 54, at [64] per Blanchard J and [103]–[104] per Tipping J, and *Attorney-General v Chisnall* [2024] NZSC 178, [2024] 1 NZLR 768 at [86] and [195]–[197] per Winkelmann CJ, O'Regan, Williams and Kós JJ. For Canadian jurisprudence post-*Oakes* see, for example, *R v Edwards Books and Art Ltd* [1986] 2 SCR 713 at 768–769 per Dickson CJ, Chouinard and Le Dain JJ; and *R v Chaulk* [1990] 3 SCR 1303 at 1335–1336 per Dickson and Lamer CJJ, La Forest and Cory JJ.

[133] In *Edwards Books*, Dickson CJ elaborated on the third of the *Oakes* criteria (whether the limit impairs the right as little as possible), explaining that when reviewing legislation for consistency against the Canadian Charter of Rights and Freedoms, the court does not substitute judicial opinions for legislative ones as to the place at which to draw a precise line: *Edwards Books*, above n 132, at 782 per Dickson CJ, Chouinard and Le Dain JJ. See also at 794–796 per La Forest J; *Hansen*, above n 54, at [126] per Tipping J; *Irwin Toy Ltd v Quebec (Attorney General)* [1989] 1 SCR 927 at 993–994 per Dickson CJ, Lamer and Wilson JJ; *Chaulk*, above n 132, at 1340–1343 per Dickson and Lamer CJJ, La Forest and Cory JJ; *RJR-MacDonald Inc v Canada (Attorney General)* [1995] 3 SCR 199 at [160] per McLachlin J as cited in *Ministry of Health v Atkinson* [2012] NZCA 184, [2012] 3 NZLR 456 at [153]; and *New Health New Zealand Inc v South Taranaki District Council* [2018] NZSC 59, [2018] 1 NZLR 948 at [132]–[134] per O'Regan and Ellen France JJ.

[97] Under this approach the court affords the legislature a reasonable margin of appreciation in the choice of measure; it suffices if the measure does not exceed reasonable limits.[134] That approach has been justified on democratic grounds[135] and by reference to the respective institutional competencies of the legislature and the court, particularly when assessing matters of social policy.[136]

[98] The present case concerns administrative decision-making pursuant to statute. In *Moncrief-Spittle v Regional Facilities Auckland Ltd* this Court held that a less structured inquiry may be appropriate when reviewing discretionary executive decisions for compliance with s 5:[137]

> [89] We agree that it is necessary to adjust the steps undertaken as part of the proportionality inquiry to reflect the particular context. As the Supreme Court of Canada said in [*Doré v Barreau du Québec*], a "more flexible administrative approach" to assessing the compatibility of an individual decision with rights, is "more consistent with the nature of discretionary decision-making".[138]

[99] The Court affirmed that it remains necessary to treat protected rights as a substantive constraint on the administrative decision-maker, not merely a mandatory relevant consideration.[139] The extent of any reasonable limits is a legal standard and the application of that standard in any given case is a question of mixed fact and law.[140] However, the court may defer to the decision-maker's assessment, within limits. The Court held that:[141]

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134 *Hansen*, above n 54, at [64] and [79] per Blanchard J and [104], [118]–[119], [123] and [126] per Tipping J. See also *Chisnall*, above n 132, at [248]–[251] per Winkelmann CJ, O'Regan, Williams and Kós JJ.

135 *Hansen*, above n 54, at [112], [118]–[119] and [124] per Tipping J. See also Grant Huscroft "Reasonable Limits on Rights" in Paul Rishworth and others *The New Zealand Bill of Rights* (Oxford University Press, Melbourne, 2003) 168 at 189.

136 *Hansen*, above n 54, at [268] per Anderson J; *Edwards Books*, above n 132, at 794–796 per La Forest J; *Canada (Attorney General) v JTI-Macdonald Corp* 2007 SCC 30, [2007] 2 SCR 610 at [43]; and *Bank Mellat v Her Majesty's Treasury (No 2)* [2013] UKSC 39, [2014] AC 700 at [75] per Lord Reed SCJ dissenting. See also Huscroft, above n 135, at 189.

137 *Moncrief-Spittle v Regional Facilities Auckland Ltd* [2022] NZSC 138, [2022] 1 NZLR 459. See also *D (SC 31/2019) v New Zealand Police* [2021] NZSC 2, [2021] 1 NZLR 213 at [101] per Winkelmann CJ and O'Regan J; and *Taylor v Chief Executive of Department of Corrections* [2015] NZCA 477, [2015] NZAR 1648 at [84].

138 *Doré v Barreau du Québec* 2012 SCC 12, [2012] 1 SCR 395 at [37].

139 *Moncrief-Spittle*, above n 137, at [83]. This is different from the reasonableness inquiry in judicial review proceedings.

140 At [84].

141 At [85]–[86].

(a) Leeway may be given to recognise the nature of the decision and the decision-maker, the context in which the decision must be taken, and the decision-maker's expertise.

(b) While a court which is reviewing a decision must satisfy itself of the reasonableness of the limit on a protected right, some regard may be given to where the decision-maker saw the balance as lying.

(c) It may also be necessary to recognise the court's forensic limits in a judicial review proceeding in which there has been no cross-examination of deponents.

[100] On the facts of that case, in which the decision-maker cancelled a venue booking for controversial speakers whose speeches were likely to attract protesters and risk violence, an important consideration in the Court's proportionality assessment was that the decision-maker had no intermediate options available.[142] The Court also deferred to the decision-maker on questions of capacity to manage security concerns, the costs of doing so, and how the features of the venue would affect risk.[143] It reasoned that the decision-maker was in a better position than the Court to assess those matters.

[101] The Court's approach in *Moncrief-Spittle* reflected that of the Supreme Court of Canada in *Doré*, in which that Court recognised that the *Oakes* framework is not necessarily apt for reviewing administrative decisions.[144] That Court also considered a reasonableness standard was appropriate because a decision-maker making decisions under their home statute "has, by virtue of expertise and specialization, particular familiarity with the competing considerations at play in weighing [Canadian Charter of Rights and Freedoms] values" in any particular case.[145] The Court held that the reasons for judicial restraint in reviewing agencies' decisions do not lose their cogency simply because the question in issue also has a constitutional dimension.[146] For these

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142 At [90].
143 At [102].
144 *Doré*, above n 138, at [37].
145 At [47] (italics omitted). See also at [54].
146 At [46] citing JM Evans "The Principles of Fundamental Justice: The Constitution and the Common Law" (1991) 29 Osgoode Hall LJ 51 at 81.

reasons, a decision would survive a reasonableness review if it fell "within a range of possible, acceptable outcomes".[147] It was appropriate to give decision-makers a margin of appreciation, or deference, in balancing Charter values against broader objectives.[148]

[102] Mr Butler, for the Human Rights Commission, invited us to eschew the terms "deference" and "margin of appreciation", using instead "latitude" (or "leeway") and "weight" (or "regard") respectively for room afforded to decision-makers to choose among options and the amount of regard shown for their evaluations. Courts sometimes speak of leeway and weight, but we do not find it appropriate to insist that they do so. This Court has used the term "deference" in the past[149] and sometimes speaks, as we do in this judgment, of a margin of appreciation.[150] These terms do not signify that the court is abandoning its duty to make its own assessment. They signify rather that the court may accept a decision which it is reviewing for reasonableness, so long as the decision-maker has satisfied it that the decision lies within a range of reasonable alternatives.[151]

[103] One reason for allowing a decision-maker a margin of appreciation is that courts recognise limits on their own institutional capabilities, relative to those of other institutions. As Sir Jack Beatson and others put it in *Human Rights: Judicial Protection in the United Kingdom*:[152]

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[147] At [56] citing *Dunsmuir v New Brunswick* 2008 SCC 9, [2008] 1 SCR 190 at [47] per McLachlin CJ, Bastarache, LeBel, Fish and Abella JJ.

[148] At [57].

[149] See, for example, *Hansen*, above n 54, at [18] per Elias CJ, [113] per Tipping J and [211] per McGrath J; *Austin, Nichols & Co Inc v Stichting Lodestar* [2007] NZSC 103, [2008] 2 NZLR 141 at [16] as cited in *Lodge Real Estate Ltd v Commerce Commission* [2020] NZSC 25, [2020] 1 NZLR 238 at [60]; and *Takamore v Clarke* [2012] NZSC 116, [2013] 2 NZLR 733 at [84] per Elias CJ.

[150] See, for example, *Hansen*, above n 54, at [105], [113], [118] and [131] per Tipping J and [268] per Anderson J; and *Trans-Tasman Resources Ltd v Taranaki-Whanganui Conservation Board* [2021] NZSC 127, [2021] 1 NZLR 801 at [256] per Glazebrook J.

[151] See above at [96(c)]; and see *Chisnall*, above n 132, at [248]–[252] per Winkelmann CJ, O'Regan, Williams and Kós JJ; *Ministry of Health v Atkinson*, above n 133, at [172]–[174]; and *Child Poverty Action Group Inc v Attorney-General* [2013] NZCA 402, [2013] 3 NZLR 729 at [91]–[92]. See also *New Health*, above n 133, at [132]–[134] per O'Regan and Ellen France JJ. To speak of a range is not to suggest that there will always be more than one reasonable alternative available in every case.

[152] Jack Beatson and others *Human Rights: Judicial Protection in the United Kingdom* (Sweet & Maxwell, London, 2008) at [3–184].

> … it is necessary in every case for the court to be satisfied that it is appropriate for it to afford weight to the view of the primary decision maker, for instance because the court itself suffers from some constraint that does not hamper the primary decision maker.

[104] Decisions with a large policy content may fall into that category.[153] So may judgements about the likely future effectiveness of measures taken by one of the political branches, and the potential effectiveness of alternatives. Such decisions may rest on risk assessments which must employ imperfect information. They may not be well-suited to adjudicative decision-making.[154]

[105] A court may also be constrained when asked to decide in judicial review proceedings matters which are potentially capable of proof, because some of the court's usual fact-finding processes do not apply. Evidence is given by affidavit and deponents are rarely cross-examined.[155] The rationales for this are partly practical and partly to do with the purpose of judicial review; it is a supervisory jurisdiction in which a court may afford the decision-maker a margin of appreciation when reviewing a decision for reasonableness.[156] The court's approach in a case which engages protected rights will depend on matters such as the particular right concerned, the nature and extent of the restriction on it, the nature of the justification, the scope of any parliamentary election to authorise the decision-maker to make the decision under review, and the knowledge and expertise of the decision-maker relative to that of the court.[157]

[106] We turn to consider to what extent a margin of appreciation should be afforded to the CDF in this case. There are strong indications each way. Those in favour of a margin of appreciation are:

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153 See *Hansen*, above n 54, at [116] per Tipping J.

154 See Beatson and others, above n 152, at [3–230]–[3–237].

155 *Geary v The Psychologists Board* [2009] NZSC 67, (2009) 19 PRNZ 415 at [1].

156 See above at [99]; and see also *Geary v Psychologists' Board* [2009] NZCA 134, [2009] NZAR 338 at [22]; *Roussel Uclaf Australia Pty Ltd v Pharmaceutical Management Agency Ltd* [1997] 1 NZLR 650 (CA) at 656–658; and *Wilson v White* [2005] 1 NZLR 189 (CA) at [25].

157 See *Moncrief-Spittle*, above n 137, at [84]–[85]; *New Health*, above n 133, at [121]–[122] per O'Regan and Ellen France JJ; *Make It 16 Inc v Attorney-General* [2022] NZSC 134, [2022] 1 NZLR 683 at [45] per Winkelmann CJ, Glazebrook, O'Regan and Ellen France JJ; *Taylor v Chief Executive of Department of Corrections*, above n 137, at [89]; *Child Poverty Action Group*, above n 151, at [91]; Huscroft, above n 135, at 193–194; Michael Taggart "Proportionality, Deference, Wednesbury" [2008] NZ Law Review 423 at 457–458; and Hanna Wilberg "Settling the Approach to Section 5 of the Bill of Rights in Administrative Law: Justification, Restraint and Variability" (2021) 19 NZJPIL 97 at 104–105.

(a) Parliament has assigned control of the Armed Forces to the Minister of Defence, who is accountable to Parliament, and that power is exercised through the CDF, who has the power of command and is responsible to the Minister for the effective management of the NZDF.[158]

(b) The CDF possesses distinctive experience and expertise in maintaining operational effectiveness both generally and for any particular deployment.

(c) Members of the Armed Forces accept the strictures of military service when they enter the Services.[159] The Armed Forces Discipline Act expressly authorises a medical officer to require members of the Armed Forces to undergo medical treatment where that is considered necessary for the health of others or for operational effectiveness.[160] The power to require medical treatment does not extend to forcible administration, but it may lead to criminal sanctions imposed by a military court or termination of service.

(d) The CDF must maintain discipline to ensure operational effectiveness and service ethos. To recognise this in an application for review under s 5 is not to treat military discipline as an end in itself; rather, it is a relevant, and potentially important, consideration when a member refuses to obey lawful orders.

(e) A civilian court has no expertise of its own in these matters.

(f) The CDF paid attention in this case, through Brigadier Weston and Colonel Tate, to the need to select the alternative having the least impact on protected rights and to adopt a process which took account of individual members' circumstances.

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158 See above at [12]–[14].

159 This includes vaccine mandates for other vaccines on the baseline schedule and, when required, any vaccines on the enhanced schedule.

160 Armed Forces Discipline Act, s 72(1).

[107] Other considerations point to a need for careful scrutiny of the vaccine mandate:

(a) The rights to refuse medical treatment and to practise religion are core human rights. In particular, the s 11 right to refuse to undergo any medical treatment is a right that is fundamental to bodily integrity, exercisable though it may be plain to any reasonable observer that treatment is in the person's best interests.

(b) The COVID-19 vaccination was associated with a high degree of compulsion. The CDF chose not to invoke s 72 of the Armed Forces Discipline Act, but members who refused the vaccine could not be deployed, were banned from bases, and were at risk of being discharged. They also experienced what must have been intense pressure from peers who considered their conduct a betrayal of military ethos.[161]

(c) Members of the Armed Forces serve at will and are at risk of dismissal for failure to comply with orders.[162] They lack the legal protections available to employees. Judicial review may be their only recourse against command decisions that interfere with protected rights.

[108] We elaborate briefly on the last point. We have mentioned that the Defence Act maintains civilian control of the military.[163] There is a trend in other common law jurisdictions to recognise that civilian courts have some role to play, alongside Parliament and the executive branch, in oversight of the military.[164] It has long been recognised that members of the Armed Forces are also entitled to the protection of the civil law except to the extent that military law provides otherwise.[165] Care must

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161 See above at [74].

162 See above at [13]. We do not overlook the processes and defences available under the Armed Forces Discipline Act for members charged with the offence of failing to obey an order.

163 See above at [12].

164 See, for example, Matthew Groves and Alison Duxbury "The reform of military justice" in Alison Duxbury and Matthew Groves (eds) *Military Justice in the Modern Age* (Cambridge University Press, Cambridge (UK), 2016) 1 at 4.

165 See, for example, *Report of the Army and Air Force Courts-Martial Committee 1946* (Cmd 7608, 1946) at [11]; and Howard, above n 21, at [51].

always be taken not to undermine command structures on which military effectiveness depends. Subject to that consideration, judicial review offers a form of accountability for compliance with NZBORA-protected rights that is valuable precisely because it lies outside the chain of command.

[109] The balance is not easy to strike. The court can be expected to allow the CDF a margin of appreciation with respect to operational effectiveness and military discipline. The CDF is the decision-maker appointed under the legislation and likely to be in a much better position than the court to evaluate the relevant considerations. The court may make an allowance for the CDF's assessment of where the balance between these considerations and protected rights should fall. But it must also be prepared to scrutinise carefully the justification offered for measures which effectively compel a member of the Armed Forces to undergo unwanted medical treatment. In this case the need for scrutiny is not necessarily less because the CDF refrained from invoking s 72 of the Armed Forces Discipline Act. And, as always in judicial review, context is all-important. Because there is no challenge to the enhanced schedule, we are not directly concerned here with vaccination for overseas deployments in austere environments, or with deployments in combat. This appeal concerns a Service-wide vaccine mandate imposed primarily, though not exclusively, for operational effectiveness within New Zealand, in circumstances where the most immediate need for deployment at that time was to support the civilian border force and secure MIQ facilities.[166]

Could the right to refuse medical treatment be further restricted?

[110] We can deal shortly with the CDF's argument that the right to refuse medical treatment is binary, meaning that it is either restricted or it is not, and in this case it had already been restricted by addition of COVID-19 vaccination to the baseline schedule and the resulting possibility of discharge under DFO 3 and DFO 4.

[166] The evidence was that during the pandemic the Armed Forces were principally deployed in Operation Protect, in which 1,200 members were deployed in rotation to operate MIQ facilities. 984 personnel deployed overseas in the year beginning 1 August 2021, principally in the Pacific Islands but also to support the evacuation of non-combatants from Afghanistan.

[111] We do not agree. There is a world of difference between forcible subjection to medical treatment and an incentive to accept it, but the latter also engages s 11 if the incentive comes with a sufficient degree of compulsion. It is a question of degree. In *New Health New Zealand Inc v South Taranaki District Council* this Court found that fluoridation of reticulated drinking water limited s 11 although residents could filter the water or find another source.[167] It sufficed that affected residents had no practical alternative. The corollary might be, and in that case was, that the measure could more readily be justified.

Did the TDFO and Administrative Instruction further restrict the ss 11 and 15 rights?

[112] We have mentioned above at [83] the respects in which the Court of Appeal found the TDFO further restricted protected rights relative to what it described as the more flexible case-by-case approach under DFO 3 and DFO 4. It appears that the Court found the mandatory service review, the exclusion from deployment and bases, and the elevation of retention or discharge decisions to Service Chiefs to be the most important new restrictions on the existing process.[168] It read the TDFO and Administrative Instruction as a strong steer that discharge would be the likely outcome of service reviews.[169]

[113] We begin with the decision to deem unvaccinated personnel ineffectual and review their service. The Court of Appeal suggested at one point that it was in this respect that the TDFO effected its most significant change to existing processes.[170]

[114] We take a different view. Discharge was authorised under DFO 3, which required that any member who was, or was likely to be, not deployable for more than six months was to have their service reviewed.[171] Mr Hague, for the respondents, accepted before us that this was a mandatory requirement before the TDFO was implemented. In July 2021 the CDF reinforced it by issuing a direction that

167 *New Health*, above n 133, at [99]–[100] per O'Regan and Ellen France JJ, [172] per Glazebrook J and [212]–[213] per Elias CJ. But see at [186] per William Young J dissenting on this point.
168 Compare CA judgment, above n 14, at [47]–[53], [139] and [166].
169 At [140].
170 At [165].
171 See above at [31].

commanding officers were to initiate performance or conduct discharges for members who continued to decline vaccination and for whom there were no exceptional personal or organisational circumstances.[172] In short, the policy decision to engage discharge processes for those who refused vaccination without a medical or some exceptional personal justification, and (in general) to exclude them from deployments in the meantime, preceded the TDFO. Some discharge decisions were in train when it took effect. We accept that after it took effect more members—including some of the four respondents—had their service reviewed. Nonetheless, mandatory review under the TDFO was not a change of policy towards unvaccinated personnel. For these reasons, we do not consider that it further encroached to a material extent on protected rights. The same can be said of the general exclusion from deployments.

[115] The Court of Appeal also found that elevation to Service Chiefs was a significant additional restriction pointing to discharge as a likely outcome.[173] We agree that elevation from commanding officers might result in Service-wide operational effectiveness and discipline assuming greater importance in any given discharge/retention decision. Below at [140] we accept it is reasonable to infer that it resulted in a different outcome in B's case. However, personal circumstances remained relevant under the TDFO and Administrative Instruction,[174] and the commanding officer's close and formal involvement in the process ensured they would not be overlooked.[175] The most that can be said is that Service Chiefs could be expected to attach more weight to implications for the Service as a whole than would commanding officers. We do not regard that as a material restriction on the rights to refuse medical treatment or manifest religion. Nor do we agree that the TDFO and Administrative Instruction signalled that discharge was likely in any given case. That is not how the process operated in practice. Brigadier Weston's evidence, which the Court of Appeal did not discuss in its s 5 analysis, was that Service Chiefs retained almost half of those whose service was reviewed.[176]

[172] CDF Directive 14/2021. This Directive was cancelled on 20 December 2021 by CDF Directive 31/2021, which in turn ordered the discharge of members who were not vaccinated according to the Minister's Order. Subsequently, CDF Directive 13/2022 reiterated that vaccination was an individual readiness requirement and that failure to maintain readiness was to result in retention review: see above at [50].

[173] Compare CA judgment, above n 14, at [51] and [166]. See also at [140].

[174] See above at [59].

[175] See above at [33] and [56(d)].

[176] See above at [62]–[63].

[116] The Court of Appeal also identified the "blanket" exclusion of unvaccinated Armed Forces members from bases and facilities as an important restriction.[177] We have noted that such members were already on COVID-19 isolation leave and unavailable for deployment,[178] but we agree that formal exclusion from facilities (with exceptions for welfare and medical needs) was an additional restriction.[179] We have considered whether members had previously been allowed to isolate on base but were forced to leave after the TDFO excluded them from bases. If so, the loss of NZDF housing would be a significant consequence of the TDFO. But the evidence, such as it is, tends to indicate rather that they were already required to isolate off base.[180]

[117] The Court of Appeal did not appear to attach significance to the TDFO's truncated time frames. The complaint about notice periods was not abandoned in this Court, but it was not pressed. We view length of notice as a natural justice consideration rather than a distinct restriction on the protected rights at issue in this case. Our attention was drawn to no evidence to suggest notice periods were inadequate in the circumstances. Armed Forces members already knew of the mandate, its rationale, and the potential consequences of refusing vaccination.

[118] We conclude that while the TDFO and Administrative Instruction introduced a material adjustment in process by changing the decision-maker (a matter to which we return below at [140]), they did not materially add to the existing substantive restrictions on the rights to refuse medical treatment and to manifest religion.

The CDF's justifications for the TDFO processes

[119] We turn to the justifications offered by the CDF for the processes introduced by the TDFO and related instruments. We have referred to the justification for placing

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177 CA judgment, above n 14, at [139].

178 Above at [48]. Although CDF Directive 31/2021 was rescinded before the TDFO was introduced, the TDFO's language, and the evidence of some deponents, indicates that such members were still on isolation leave when it was issued.

179 For other previous measures, see above at [51], in relation to unvaccinated members of the Territorial Forces, and [57], in relation to Auckland defence areas.

180 One deponent was required in January 2022 (that is, before the TDFO) to leave Burnham Military Camp because of his vaccination status, pursuant to CDF Directive 31/2021, and another was barred from Devonport Naval Base from August 2021. There is evidence that deponents who were discharged had to surrender NZDF housing and experienced hardship as a result, but we are concerned here with exclusion from bases under the TDFO while they were still on isolation leave.

the COVID-19 vaccination on the baseline schedule above at [21]–[25] and will not repeat what we said there. The specific justification for excluding unvaccinated members from bases and placing them on COVID-19 isolation leave was that at the time COVID-19 remained a notifiable disease with an isolation requirement for infected persons and their household contacts, which included those sharing barracks. For that reason, a single case could have a significant effect on operational effectiveness.[181]

[120] The NZDF's understanding also was that, although vaccination was less effective against the Omicron variant which was becoming endemic in early 2022, it remained likely that vaccination was effective to reduce both spread and the incidence of hospitalisation among the affected.[182] As noted in *Yardley*, that was the view of Dr Town, Chief Science Advisor at the Ministry of Health.[183] We observe that it is not in dispute that for these reasons vaccination might be necessary for overseas deployments. The CDF's opinion was that it was necessary on bases in New Zealand because of the need to maintain forces available for deployment at short notice, both overseas and in New Zealand.[184]

[121] The justification for the retention review was that members who do not meet individual readiness requirements are non-deployable and a retention review is appropriate when the member's inability to meet the requirement means that they are unlikely to become deployable. In addition, disciplinary considerations arise when a member chooses not to meet a lawful readiness requirement that is within their control. The COVID-19 vaccination differed from other vaccines in that opposition to it was not confined to members' personal medical circumstances or religious beliefs. As we have explained, some resisted it because they disagreed with Colonel Tate's opinion that it was safe and beneficial to the health of Service members.[185] And some

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181 See above at [24] and [49].

182 Contrast *Four Aviation Security Service Employees v Minister of COVID-19 Response* [2021] NZHC 3012, [2022] 2 NZLR 26 at [109].

183 *Yardley*, above n 8, at [89]–[91].

184 Contrast *NZTSOS Inc v Minister for COVID-19 Response* [2024] NZCA 74, [2024] 2 NZLR 624 at [99].

185 See above at [65]–[75]. In this case the four respondents objected on grounds that the vaccine was potentially dangerous or ineffective generally, or unnecessary both medically and for NZDF operational effectiveness. Some also objected on religious grounds to receiving a vaccine developed using human foetal cells. There is no evidence that any of the respondents was willing to receive the Novavax vaccine, in respect of which any religious concerns were less acute.

disagreed with the CDF's opinion that it was necessary for operational effectiveness. A Service-wide approach could be justified for reasons of consistency, and hence fairness.

Did the Court of Appeal allow the CDF a sufficient margin of appreciation?

[122] We have summarised the Court of Appeal's findings above.[186] It ultimately concluded that the CDF had failed to show that the important objective of maintaining the efficacy of the Armed Forces could not be met using what the Court described as the "more flexible" DFO 3 and DFO 4 arrangements for retention or discharge that apply to other vaccines.[187]

Did the Court step into the CDF's shoes?

[123] The Solicitor-General argued before us that the Court of Appeal effectively stepped into the CDF's shoes, leaving him with no discretion to choose from a range of reasonable alternative measures to meet an important objective which the CDF was uniquely placed to assess. Ms Jagose KC submitted that the Court determined a military matter—the maintenance of disciplined forces in a state of readiness for deployment—with respect to which it ought to have exercised significant restraint. It lent no weight at all to the CDF's expertise when determining whether the TDFO was a proportionate response to a demonstrated need; only at the relief stage, and then obliquely, did it acknowledge the relative competence of the Court and the CDF.

[124] We accept that the Court evidently had in mind that the CDF might have undertaken an in-depth inquiry of the kind envisaged in *Yardley*.[188] The Court's reliance on *Yardley* leads us to record that we have reservations about that decision as it affected the Armed Forces.[189] We make two points about it.

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186 See above at [81]–[89].
187 CA judgment, above n 14, at [10].
188 See above at [40] quoting *Yardley*, above n 8, at [67]; and above at [84] quoting CA judgment, above n 14, at [143]–[144].
189 We note that the Minister's Order allowed for limited exceptions which, unlike the TDFO, did not extend to individual circumstances. It also extended to civilian NZDF staff and some police, whose circumstances are not in issue here.

[125] First, as we explained above at [42], Cooke J attached importance to evidence that a very large percentage of the Regular Forces had been vaccinated before the Minister's Order took full effect on 1 March 2022. He noted that there was no evidence that the number vaccinated changed because of the Order. Nor was there specific evidence before him about how the number of unvaccinated personnel affected deployment capability.[190] It is apparent that he focused on the impact of the Order on civilian staff, who were not subject to an existing mandate.[191] To the extent he concluded that the Order was unnecessary for efficacy of the Armed Forces because almost all uniformed personnel had chosen to receive the vaccination, the evidence before us indicates that he was mistaken. The COVID-19 vaccination was made compulsory for members of the Armed Forces on 3 March 2021, and by the time the Order was announced in November 2021 more than 98 per cent of the Armed Forces were vaccinated.[192] It is accordingly unsurprising that the Minister's Order had little or no effect on vaccination rates in the Armed Forces.

[126] Second, *Yardley* is open to the interpretation that the Court would have undertaken its own analysis of the need for a mandate, had it been supplied with the necessary evidence.[193] That analysis began with the number of workers who had been pressured into receiving the vaccination or had been terminated or resigned under the Order, relative to the alternative.[194] The Court would then assess the risk to continuity of services posed by that number of workers, including the risks of unvaccinated workers contracting and transmitting the virus in light of the number of workers affected and the overall workforce and its dynamics.[195] That is the same analysis that the Court would expect of the Minister. Having reached its own view of the merits, the Court would make an appropriate allowance for the precautionary principle and would give the Minister some benefit of the doubt.[196] The Court was able to avoid using its own assessment as the counterfactual only by relying on the Minister's failure

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190 See above at [44] citing *Yardley*, above n 8, at [86].
191 See *Yardley*, above n 8, at [83] and [85]–[86].
192 Michael Wood "Workplace vaccination requirements extended to cover Police and NZ Defence Force" (press release, 26 November 2021).
193 See *Yardley*, above n 8, at [67]–[69].
194 At [67(a)–(b)].
195 At [67(c)].
196 At [94]–[97].

to discharge the burden of proof with respect to the specific considerations which the Court identified.[197]

[127] Our reservation about this exercise when applied to operational effectiveness within the NZDF generally is that we doubt it would be feasible or necessary to embark on it in judicial review. We do not agree with the Court of Appeal that the CDF ought to have anticipated that such analysis would be necessary. The exercise of evaluating the data would require that findings of contested fact be made about matters such as transmission risks in NZDF environments and the impact of vaccination on both severity of illness and transmission. It is apparent from *Yardley* that there would be a conflict of expert evidence which the Court could not satisfactorily resolve.[198] Given significant disagreement about the benefits and risks of vaccination for both individuals and the relevant workforces, the decision in this case ultimately would likely turn on an overall risk assessment which Parliament had assigned to the CDF. Although epidemiologists' understanding of COVID-19 evolved quickly and it appeared that the Omicron variant was both more transmissible and less dangerous than previous variants, as at May 2022 there was still some room for the precautionary principle in NZDF environments.

[128] That said, we do not accept the CDF's argument that the Court of Appeal relied on *Yardley* to substitute its own view of the merits in this case. The Court did not hold that a data-based analysis of the kind called for in *Yardley* was essential. Rather, it pointed to such analysis as one way for the state to discharge its burden of justification.[199] We infer that the Court might have been content had the CDF shown that a reasonable data-based analysis had been undertaken. The Court also accepted that other evidence, such as a comparison with measures taken by Armed Forces in other countries, might suffice instead.[200] It ultimately refrained from deciding that the TDFO was not justified, finding rather that the CDF had failed to discharge his burden of showing that it was.[201]

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197 At [97].
198 See at [88]–[89].
199 CA judgment, above n 14, at [143] and [155].
200 At [155].
201 At [158].

Did the Court allow the CDF a sufficient margin of appreciation?

[129] However, we accept Ms Jagose's wider point that the Court of Appeal afforded the CDF an insufficient margin of appreciation with respect to the choice of measures to implement the vaccine mandate. It did so in three related respects.

[130] First and most importantly, it allowed the respondents to frame the decision as a choice between two processes for enforcing the mandate that had been implemented under DFO 3.[202] The CDF correctly understood that the respondents' real objection was not to the TDFO processes but the mandate itself. Indeed, that was their position until the hearing in the Court of Appeal, where they narrowed the challenge, somewhat to the CDF's surprise.[203] But they still invited the Court of Appeal to find that not placing the vaccine on the baseline schedule had been a less rights-limiting alternative to the TDFO.[204] In these circumstances, the question the Court had to ask was a wider one: whether the mandate imposed under DFO 3, DFO 4, the TDFO and the Administrative Instruction was a demonstrably justified limitation on the rights to refuse medical treatment and to manifest religion. To engage in close comparison of processes under the TDFO and Administrative Instruction, on the one hand, and DFO 3 and DFO 4, on the other, was to risk finding the one unlawful because the other was a little less restrictive.

[131] Second, by framing the issue as substantially one of process, a field in which it possesses expertise of its own, the Court appears to have discounted the significance of vaccine refusal for operational effectiveness. Colonel Tate had deposed that even a single case could have a significant effect. The Court also appears to have given no or little weight to military discipline. We have explained that once the respondents accepted, or the Court found, that the mandate was lawful, the maintenance of military discipline became a relevant consideration.[205] Operational effectiveness and military discipline are the CDF's responsibilities, and an allowance should have been made for his status, as the decision-maker designated under the legislation, and his expertise,

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202 See at [155].
203 At [159].
204 At [145]. They argued in the alternative that the mandate could have been confined to those newly joining the Armed Forces.
205 Above at [106(d)].

relative to that of the courts, when deciding whether a given measure was within the range of reasonable alternatives.

[132] Third, we do not accept the CDF's argument that the Court dismissed the CDF's justifications summarily as "simple assertion".[206] We think it was making a rhetorical point when it used that phrase. But it did find that more detailed justification was needed. We take a different view of the evidence the Court relied on to reach that conclusion.

[133] We begin with the implications of non-vaccination for operational effectiveness having regard to the large number of non-deployable personnel. The passage cited above at [87] shows that the Court discounted the CDF's justifications partly because of the high percentage of Regular Force members who were non-deployable at any one time. It had noted earlier in its judgment that, as at 31 May 2022, 3,124 of a total 9,251 Regular Force members were non-deployable in New Zealand (the non-deployable number was 4,547 for international deployment).[207]

[134] Care is needed when dealing with whole of Regular Force data. Members of the Regular Forces are not all substitutable for one another. They are organised according to Service, unit, rank, trade and role. The table below records the numbers who were non-deployable within New Zealand by rank and Service in mid-2022 (the exact date is unclear):

206 CA judgment, above n 14, at [155].
207 At [74].

Rank[208]	Royal New Zealand Navy		New Zealand Army		Royal New Zealand Air Force		Regular Forces Total	
	Fit	Unfit	Fit	Unfit	Fit	Unfit	Fit	Unfit
Private to Sergeant	819	507	2,064	914	1,019	412	**3,902**	**1,833**
Staff Sergeant to Warrant Officer Class One	169	122	429	203	198	133	**796**	**458**
Second Lieutenant to Major	295	145	441	198	405	152	**1,141**	**495**
Lieutenant Colonel to Lieutenant General	71	58	102	59	55	52	**228**	**169**
Total	**1,354**	**832**	**3,036**	**1,374**	**1,677**	**749**	**6,067**	**2,955**

[135] This table does not present a full picture either. It is also necessary to take account of factors such as trade, role and skill. The Administrative Instruction envisaged that some members may be a single point of failure, or possess a key capability or practise an important trade.[209] The Court of Appeal did not engage with this point. We are without the numbers who fit into each such category and we think it likely that, as Ms Jagose argued, obtaining them for the entire Armed Forces would be a complex exercise, potentially requiring the exercise of unit-by-unit, deployment-by-deployment and role-by-role judgement. The assessment would need to reflect the risks both that key members would contract the virus and that close contacts would expose them to it, necessitating isolation. We accept Ms Jagose's submission that the exercise would be disproportionate to the modest changes made by the TDFO.

[136] The number of non-deployable personnel also does not necessarily justify an inference that the NZDF has ample capacity to accommodate unvaccinated members by placing them in staff roles. We make three points about this.

[137] First, Brigadier Weston explained that temporal or logistical considerations, such as the need for a medical or dental check, usually explain non-deployability.

208 These data exclude officer cadets.
209 See above at [59].

These members presumably are in the second or third of the four readiness levels set out in DFO 3 (listed above at [30]). These are not problematic because they can be resolved in the short term.

[138] Second, the question strictly is not whether non-deployable members can be placed in other roles. It is whether their non-deployability affects the NZDF's ability to deploy an appropriate force immediately. As Churchman J suggested, the permanent non-deployability of some members might mean it is all the more important that those who can meet individual readiness requirements should do so.[210]

[139] Third, a rationale of the TDFO and Administrative Instruction was that staff roles may be needed to rotate members who are on deployment and in need of respite.

[140] The second and third of these considerations can be seen at work in B's case, along with the implications for service discipline of a senior officer's refusal to receive the vaccine.[211] B was in a staff role. It is a reasonable inference that his commanding officer would have opted to retain him if forced to make the decision, while the Service Chief discharged him. So elevation to the Chief of Army evidently resulted in a different outcome. But B's example does not establish that the TDFO process was less flexible and resulted in personal circumstances being discounted. As explained above at [69], he did not limit himself to personal medical reasons, religious objections or family circumstances. He also rejected the reasoned opinion of the then Chief Medical Officer about vaccine safety, which was endorsed by the Surgeon General. B also asserted that the mandate would adversely affect operational effectiveness across the NZDF because staff would leave rather than be vaccinated. The Service Chief expressed concern about the implications of this stance for service discipline given B's senior rank. There were also operational effectiveness considerations. B was one of a small group of officers of his rank, and the Service Chief stated that his staff position was needed as respite for peers who had been serving in unit command or operational roles. It appears the Court of Appeal may not have been referred to this evidence.

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210 HC judgment, above n 14, at [114] and [121].
211 See above at [67]–[70].

[141] The Court of Appeal also relied on the alternative measure adopted by the British Armed Forces, holding that the CDF had to show it was not a reasonable alternative.[212] The evidence took the form of a two-page letter detailing the response of the United Kingdom Ministry of Defence to a request for the number of armed forces personnel who had chosen not to receive a COVID-19 vaccination. It was produced 11 days before the High Court hearing by a witness who found it on an internet search, evidently shorn of context. The letter indicated that the COVID-19 vaccination was not treated as a mandatory occupational vaccine. Rather, unvaccinated members were to be managed on a case-by-case basis through the single service chain of command following a risk assessment.

[142] Ms Jagose submitted that the letter was a scant and unsafe basis for a conclusion that the measures taken by the British Armed Forces were less restrictive than those adopted by the CDF. She pointed out that the mandate itself was not challenged in this proceeding and the TDFO also provided for case-by-case decisions. The latter feature also distinguished the TDFO from the Minister's Order at issue in *Yardley*.

[143] We accept the CDF's argument. The evidence of the British Armed Forces' approach, such as it is, does not show that the TDFO and Administrative Instruction lay outside the range of reasonable alternatives. The letter relevantly indicates only that each service chain of command followed a case-by-case process. One would need to know something of the reasons for not making the vaccination mandatory, the criteria for retention or discharge, and the outcomes before adopting the British military vaccination regime as a reasonable alternative.

[144] We note finally that Mr Hague drew attention to Churchman J's finding that only 55 of 9,251 Regular Force members remained unvaccinated.[213] He invited us to infer that it is not apparent that the TDFO made a material difference to operational effectiveness. We do not agree. We repeat that the TDFO did not introduce the mandate. The small number of members who remained unvaccinated by the time of

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212 CA judgment, above n 14, at [156].

213 HC judgment, above n 14, at [108]. The evidence is that, as at 27 June 2022, 56 were unvaccinated and 358 had not received a booster.

the High Court hearing may be evidence that the mandate was effective, and possibly that it was no longer needed (although not all of those who received the primary vaccination agreed to receive booster doses). It does not show that a mandate for the Armed Forces was never justified.[214]

[145] For these reasons we consider that the Court of Appeal was wrong to find the CDF's justifications for the TDFO and Administrative Instruction inadequate.

Were the TDFO and related instruments demonstrably justified?

[146] In our view the most significant change that the TDFO and related instruments effected to the existing DFO 3 and DFO 4 processes was the elevation of discharge/retention decisions to Service Chiefs. To the extent that change further restricted the protected rights, we find for the reasons given above at [121] and [143] that it was within the range of reasonably available responses to the CDF's concerns about operational effectiveness and discipline. We take the same view of the decision to bar members from bases and facilities; to the extent that it further restricted the protected rights it was an additional restriction, but it was justified for the reasons summarised above at [119]–[120].

The notice of alternative measures issue

[147] Mr Neild, who argued this part of the appeal for the appellants, submitted that if an applicant intends to contend that a challenged measure is unjustified because there is another, less rights-limiting alternative, that alternative must be pleaded. If the applicant does not plead it, the court will be forced to decide the issue in the absence of evidence that the decision-maker might have led about that alternative. He observed that in this case the United Kingdom model was never pleaded but appeared as an annexure to an affidavit filed shortly before the High Court hearing. He emphasised that counsel for the CDF took the point before Churchman J that the evidence was late and the CDF had had insufficient opportunity to respond to it.

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[214] As we have explained above at [130], the respondents have not claimed in this proceeding that the DFO 3 mandate for all Armed Forces personnel was once lawful but had ceased to be so by May 2022; their position rather is that the mandate was never justified. That distinguishes this case from *Four Aviation Security Service Employees*, above n 182; *Yardley*, above n 8; and *NZTSOS*, above n 184.

[148] As we have noted, the Human Rights Commission opposes any requirement that an applicant should plead any alternative that it means to rely on. Mr Butler submitted that it usually suffices if the applicant pleads that the requirements of s 5 of NZBORA have not been satisfied and argued that any additional pleadings requirement runs the risk of altering the Crown's burden of justification. He argued that the Crown ought to identify any alternatives it thinks relevant and explain why they are not as effective as the measure adopted. It is then for the applicant to identify any other measures that it wishes to identify, filing any evidence in support, and the Crown may then respond by filing evidence if it wishes. In this case, he submitted, counsel for the CDF appears to have taken the risk that it would not be necessary to respond.

[149] We have explained above that when reviewing administrative decisions for NZBORA compliance, the High Court may need to decide how closely it will scrutinise the decision-maker's justification.[215] This characteristic of the Court's supervisory jurisdiction distinguishes judicial review from ordinary civil proceedings. It means that the decision-maker must attempt to anticipate the Court's approach to the claim when formulating a response. The decision-maker's initial response can be expected to depend on the nature of the affected right, the measure's impact on the right, and the particulars pleaded by the applicant.[216]

[150] The Court and the applicant rely on the decision-maker to explain the process that was followed and the reasons for the decision when responding to the claim.[217] The decision-maker usually can be expected to address any less restrictive alternative measure that they considered and discarded. Where the applicant intends to offer some other measure as a counterfactual against which to assess the one adopted, the decision-maker should be given a reasonable opportunity to investigate it. The Court may accept evidence to which a decision-maker has not had a reasonable opportunity to respond, but it must exercise care before doing so.[218] For that reason it is not in the

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215 Above at [98]–[105].

216 Judicial review applications are commenced by statement of claim under s 8 of the Judicial Review Procedure Act.

217 *Ririnui v Landcorp Farming Ltd* [2016] NZSC 62, [2016] 1 NZLR 1056 at [105] per Elias CJ and Arnold J.

218 See *New Health*, above n 133, at [139] per O'Regan and Ellen France JJ.

applicant's interests to leave the decision-maker with insufficient time to address a new measure which the applicant means to advance as a reasonable alternative to the one under review.

[151] We accept that notice of an alternative measure should be given in the statement of claim if the applicant can do so, but that is not always feasible. Judicial review is intended to be relatively simple, non-technical and prompt.[219] Consistent with that philosophy, case management provisions of the Judicial Review Procedure Act envisage that the Court will settle the issues and, among other things, determine whether further particulars or disclosure are needed in the circumstances.[220] It may suffice if the alternative is disclosed in affidavits exchanged before the hearing and the Crown is given a reasonable opportunity to investigate and respond. We agree with Mr Butler that practical case management should address any need for more detail and more time.

[152] In this case, the CDF had not considered the British Armed Forces' vaccination regime. If it was to be taken seriously, he ought to have had an opportunity to respond. Because notice was given very late, that did not happen. Counsel for the CDF was not obliged to ask the Judge to rule the evidence inadmissible or seek an adjournment. Counsel had the alternative of inviting the Court to make an appropriate allowance when deciding what weight to give to the evidence. That appears to be what Churchman J did, we think correctly.

Disposition

[153] The appeal is allowed. The Court of Appeal's order that the TDFO be reconsidered is set aside.

[154] We agree with the Court of Appeal that the respondents' decision to challenge the TDFO at an NZDF-wide level lent an abstract quality to the proceeding.[221] It will be apparent from what we have said that we consider the present challenges ought to

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219 *Wilson v White*, above n 156, at [25] citing *Minister of Energy v Petrocorp Exploration Ltd* [1989] 1 NZLR 348 (CA) at 353.

220 See Judicial Review Procedure Act, ss 13–14.

221 CA judgment, above n 14, at [11].

have been brought at a lower level, where the impact of any given member's non-deployability could be assessed. It is possible that decisions to discharge individual members following reviews initiated by the TDFO and related instruments were unjustified, but we have not been called upon to decide that.

[155] We also agree with the Court of Appeal that circumstances have changed with time and the ending of restrictions in the community.[222]

[156] It may also be that the CDF will now feel his point has been made. But because we have found that the TDFO was lawful we cannot direct that the CDF revisit discharge decisions made under it. The Court of Appeal's interim order that no action may be taken by the CDF pursuant to the TDFO and related instruments pending the reconsideration of the TDFO is set aside.[223]

[157] The CDF sought costs. The respondents asked that they not be ordered to pay costs because they acted in the public interest. We consider that there is no justification for not awarding costs in the usual way.[224] The respondents must pay the appellants one set of costs of $30,000 plus usual disbursements. We allow for second counsel. Costs in the High Court and Court of Appeal should be fixed there if the parties cannot agree.

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Frontline Law, Wellington for Respondents
H M M Northover, Te Kāhui Tika Tangata | Human Rights Commission, Wellington for Intervener

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[222] At [11] and [168]. See now Tony Blakely, John Whitehead and Grant Illingworth *Whītiki Aotearoa: Lessons from COVID-19 to prepare Aotearoa New Zealand for a future pandemic – Main Report (Phase One)* (Royal Commission of Inquiry into Lessons Learned from Aotearoa New Zealand's Response to COVID-19 That Should Be Applied in Preparation for a Future Pandemic, 28 November 2024) at [8.5.1]. We are not to be taken as commenting on the Royal Commission's findings.

[223] See above n 16.

[224] See *Environmental Defence Society Inc v New Zealand King Salmon Co Ltd* [2014] NZSC 167, (2014) 25 PRNZ 637 at [38] and [45] per McGrath, Glazebrook and Arnold JJ; and *Prebble v Awatere Huata (No 2)* [2005] NZSC 18, [2005] 2 NZLR 467 at [5].