IN THE SUPREME COURT OF NEW ZEALAND
I TE KŌTI MANA NUI O AOTEAROA

SC 20/2024

Between	**CHIEF OF DEFENCE FORCE** *First Appellant*
	CHIEF PEOPLE OFFICER *Second Appellant*
	ATTORNEY-GENERAL *Third Appellant*
And	**FOUR MEMBERS OF THE ARMED FORCES** *Respondents*

SUBMISSIONS FOR TE KĀHUI TIKA TANGATA | HUMAN RIGHTS COMMISSION

Dated: 23 September 2024

Having made appropriate inquiries, counsel certify that, to the best of their knowledge, these submissions are suitable for publication and do not contain any suppressed information.

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MAY IT PLEASE THE COURT:

I. Overview

1. The Chief of Defence Force (**CDF**) can issue Defence Force Orders if these are not inconsistent with "any other enactment",[1] which includes the New Zealand Bill of Rights Act 1990 (**NZBORA**). The CDF issued Temporary Defence Order 06/2022 (**TDFO**), which, among other things, provided for a review of retention in the Armed Forces of any member who was not fully vaccinated for COVID-19.

2. It is undisputed that the TDFO limits s 11 (right to refuse to undergo medical treatment) and s 15 (right to manifest religion) of NZBORA.[2] Pursuant to s 5 of NZBORA, the CDF has the opportunity to establish that the TDFO can be demonstrably justified in a free and democratic society; "only" such a limit will be upheld as lawful. The Court of Appeal determined the limit imposed by the TDFO had not been justified and directed the CDF to reconsider it.[3]

3. This appeal raises the question whether, to use the Crown's words, the Court of Appeal "failed to allow a sufficient margin of appreciation" to the CDF in assessing the TDFO against s 5 of NZBORA.[4] Te Kāhui Tika Tangata | Human Rights Commission (the **Commission**) submits that this question requires an assessment of the "latitude" and/or "weight" that should be afforded to the CDF. The Commission's submissions address the appropriate legal framework (and related issues) but do not express a view on the particular facts of the case.

II. NZBORA's structure and the culture of justification

4. NZBORA's structure necessarily affects the approach to latitude and weight. That structure, as reflected in s 5, involves: (i) a *legislated legal* standard for limiting rights; (ii) a clear statement that "only" a limit meeting that standard is lawful; (iii) an obligation on the person claiming that a limit is lawful to

1 Defence Act 1990, s 27.
2 Crown Synopsis of Submissions dated 12 September 2023 (**Crown synopsis**) at [1].
3 *Four Members of the Armed Forces v Chief of Defence Force* [2024] NZCA 17 [**CA judgment**], overturning *Four Members of the Armed Forces v Chief of Defence Force* [2022] NZHC 2497.
4 *Chief of Defence Force v Four Members of the Armed Forces* [2024] NZSC 75.

show that it meets the standard; and (iv) the duty of the courts to determine whether the standard is met.

5. Standing back, it can be said that what the structure of s 5 does is create a "culture of justification" which enhances New Zealand's democratic society by ensuring limits on rights are reasonable and justified (not simply justifiable). But the emphasis on the democratic nature of New Zealand society and on reasonableness acknowledges that limits on rights involve choices. Sometimes those choices will be made by institutions with a democratic mandate in a context where there is a contest over a range of matters such as the problem definition, how to address novel social issues, and the assessment of means effectiveness. NZBORA recognises that it is ultimately for the courts to make the assessment whether fundamental rights have been justifiably limited (or not). This leads us to at least three important propositions in relation to such issues: (i) reasonable minds can reasonably differ; (ii) societal disagreement can be resolved through public discourse and political decision-making; but (iii) the courts have been given an important (constitutional) role to protect human rights.

6. A final point about NZBORA's structure and the culture of justification: because knowledge evolves, the process of justification is inherently dynamic. Today's answer to a s 5 NZBORA assessment may differ from that given in a few years' time. So long as all players acknowledge that dynamic element, then the culture of justification preserves within it a substantial degree of flexibility for change, including ongoing review.

III. Latitude and weight

A. Clarifying terminology: Court should eschew "deference" and "margin of appreciation"

7. The Commission submits that this Court should adopt the concepts of: (i) the "latitude" (or "leeway") afforded to decision-makers; and (ii) the "weight" (or "regard") given to their assessment. This is broadly consistent with the language used in recent Supreme Court decisions.[5] Latitude and

[5] See *Moncrief-Spittle v Regional Facilities Auckland Ltd* [2022] NZSC 138, [2022] 1 NZLR 459 [***Moncrief-Spittle***] at [60] and [85]; and *Auckland Council v C P Group Ltd* [2023] NZSC 53, [2023] 1 NZLR 35 [***Auckland Council***] at [90] and [96].

weight are *separate concepts*.[6] They represent subtly different ideas that are factored into rights analysis in different ways.[7]

8. Correctly, in the Commission's submission, this Court appears to have deliberately avoided using the term "deference" in previous cases, preferring instead to refer to the "latitude" or "leeway" to be afforded to the primary decision-maker.[8] While "deference" has been used in academic discourse (and by some other courts), the term has been criticised for its "overtones of servility" or "gracious concession".[9] Even its supporters are forced to recast it as "deference as respect".[10] In the light of the unhappy experience with it overseas, this Court should continue eschewing use of the term.

9. The "margin of appreciation" language also does not assist.[11] It is associated with the quite particular doctrine developed by the European Court of Human Rights to acknowledge the different perspectives, capabilities and domestic circumstances of the Council of Europe's diverse Member States. The spatial metaphor is also potentially problematic because it risks creating the impression that it is possible for a court to find that a state response falls within some area (ie, a "margin") without determining whether the legal standard has been met.[12]

B. A conceptual overview

10. Section 5 of NZBORA establishes a legislated legal standard against which limits on fundamental rights can be assessed for consistency with NZBORA (ie, lawfulness).[13] By allowing rights to be subject "only" to "reasonable

6 Not synonyms, as the interchangeable use of them in the Crown synopsis may suggest. See also Crown synopsis at [38].

7 Though the courts have often run them together in the past, "it is helpful in demystifying this topic for them to be separated as far as possible in exposing the underlying principles": Jack Beatson and others *Human Rights: Judicial Protection in the United Kingdom* (Sweet & Maxwell, London, 2008) [***Human Rights: Judicial Protection***] at [3-192]. See also Anne Carter *Proportionality and Facts in Constitutional Adjudication* (Hart Publishing, Oxford, 2021) [**Carter**] at 153.

8 *Moncrief-Spittle*; and *Auckland Council*.

9 *R (ProLife Alliance) v British Broadcasting Corporation* [2003] UKHL 23, [2004] 1 AC 185 at [75] per Lord Hoffman and at [144] per Lord Walker. See also *Child Poverty Action Group Incorporated v Attorney-General* [2013] NZCA 402, [2013] 3 NZLR 729 [***CPAG***] at [78].

10 David Dyzenhaus "The Politics of Deference" in Michael Taggart (ed) *The Province of Administrative Law* (Hart Publishing, London, 1997) 286 at 303.

11 Noting it is a transliteration from the French administrative law concept of *marge d'appréciation,* which is more correctly translated as a margin of judgement.

12 This is discussed below at [12].

13 *Moncrief-Spittle* at [84].

limits prescribed by law as can be demonstrably justified in a free and democratic society", Parliament has, through s 5, determined the *latitude* to be afforded to rights-limiting measures.[14]

11. The courts also play a role in setting the latitude to be afforded. The leading authorities on this are *Hansen* and *Moncrief-Spittle*.[15] In *Hansen*, the Supreme Court endorsed a structured proportionality approach for the s 5 analysis, drawing on the Supreme Court of Canada's approach in *Oakes*.[16] As the late Professor Taggart noted, "[s]ome version of this test operates almost everywhere there is statutory human rights protection".[17] This Court recently confirmed in *Moncrief-Spittle* that it "is necessary to adjust the steps undertaken as part of the proportionality inquiry to reflect the particular context".[18] A "less structured approach" may sometimes be adopted depending on the nature of the decision-making.[19] However, a less structured approach does not "entail a lesser threshold".[20] Thus, the threshold (and therefore latitude afforded) is and should be the same, regardless of the analytical framework adopted to assist in meeting the s 5 test.[21]

12. It is not enough for an impugned limit to be close to meeting the legal standard; it must actually meet it by passing the threshold. Spatial metaphors such as "margins" or "discretionary areas" or a "shooting target" ought to

[14] The point can be illustrated by considering the different structural treatment of rights under the Human Rights Act 1998 (UK) (**HRA**). Under the HRA, the latitude to be afforded to a decision-maker varies depending on the right, including: no latitude (ie, absolute protection); where a limit is "absolutely necessary"; where the limit is "prescribed by law and … necessary in a democratic society [for specified reasons]"; and where the limit is "in the public interest and subject [to conditions and principles]"). See Peter Leyland *The Constitution of the United Kingdom: A Contextual Analysis* (4th ed, Hart Publishing, Oxford 2023) [**Leyland**] at 211.

[15] Given it is not in issue in this case, and the approach is under-theorised, the Commission does not focus on the "prescribed by law" limb of s 5 but notes that the same principles would apply.

[16] *R v Oakes* [1986] 1 SCR 103 [***Oakes***]. See also *R v Hansen* [2007] NZSC 7, [2007] 3 NZLR 1 [***Hansen***] at [64] per Blanchard J, [121] per Tipping J, [185] and [204] per McGrath J and [272] per Anderson JJ. This is discussed in more detail below at [35].

[17] Michael Taggart "Proportionality, Deference, Wednesbury" [2008] NZ L Rev 423 [**Taggart**] at 437. See, for example, *Heaney v Ireland* [1994] 3 IR 593 (Ireland); *Chaudhry v Attorney-General*, [1999] FJCA 28 (Fiji); and *S v Zuma* 1995 (2) SA 642 (South Africa).

[18] *Moncrief-Spittle* at [89]. 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.

[19] *Moncrief-Spittle* at [91]–[92].

[20] At [91].

[21] At [91].

be avoided; they risk giving the impression that getting close to (ie, "in the zone" or "margin" of) the relevant standard is sufficient.[22]

13. In determining whether a particular decision or enactment meets s 5, the Court may have regard to the assessment made by the decision-maker.[23] As noted in *Moncrief-Spittle*, depending on the context, "some regard may be had and respect given to where the decision-maker saw the balance as lying".[24] This is appropriately captured by the concept of giving "*weight*" to the decision-maker's assessment. Giving weight to the reasons offered as justification is not an abdication of the judicial role. Rather, it can be understood as performing the "ordinary judicial task of weighing up the competing considerations … and according appropriate weight to the judgment of a person with responsibility for a given subject matter and access to special sources of knowledge and advice".[25] The critical point remains that it is for the courts to make the ultimate decision on whether a limit on fundamental rights meets the test in s 5.[26]

[22] See Murray Hunt "Sovereignty's Blight: Why Contemporary Public Law Needs the Concept of 'Due Deference'" in Nicholas Bamforth and Peter Leyland (eds) *Public Law in a Multi-Layered Constitution* (Bloomsbury Publishing, London, 2003) [**Hunt**] at 346–347; and Aileen Kavanagh *Constitutional Review under the UK Human Rights Act* (Cambridge University Press, Cambridge, 2009) [**Kavanagh**] at 202–203

[23] See Paul Rishworth "The Bill of Rights and Administrative Law" (NZLS Human Rights Intensive, 2022) at 62.

[24] *Moncrief-Spittle* at [86]. It is respectfully submitted that when the Court referred to the giving of "leeway" based on expertise (at [85]), this really means "weight" in the way the term is used in the Commission's submissions.

[25] *Huang v Secretary of State for the Home Department* [2007] UKHL 11, [2007] 2 AC 167 [***Huang***] at [16]. See further Tom Hickman *Public Law after the Human Rights Act* (Hart Publishing, Oregon, 2010) [**Hickman**] at 135: "affording weight to the assessments and views of others … is actually part of any rational decision-making process where other people, whose opinions are known to the decision-maker, have relevant knowledge or experience that the decision-maker lacks". In a different context, albeit highlighting similar institutional concerns, see *Sena v Police* [2019] NZSC 55, [2019] 1 NZLR 575 at [38]–[40]; *Lodge Real Estate Ltd v Commerce Commission* [2020] NZSC 25, [2020] 1 NZLR 238 at [60]; and *Deng v Zheng* [2022] NZSC 76, [2022] 1 NZLR 151 at [72].

[26] *Ministry of Health v Atkinson* [2012] NZCA 184, [2012] 3 NZLR 456 [***Atkinson***] at [173]. See also Crown synopsis at [1]. For instance, the Court may "prob[e] the quality of the reasoning and ensur[e] that assertions are properly justified": Harry Woolf and others *De Smith's Judicial Review* (7th ed, Thomson Reuter, London, 2013) [***De Smith's***] at [11-015]. See also *Director of Public Prosecutions v Ziegler* [2021] UKSC 23, [2022] AC 408 at [130]–[131] (cited with approval in *Moncrief-Spittle* at [84], n 117).

C. Reasons for giving weight

14. There are broadly two reasons commonly referred to in the literature and case law to justify giving weight[27] to a decision-maker's assessment: relative institutional competence and constitutional propriety.[28]

1. Relative institutional competence

15. The Commission submits that relative institutional competence (or as the Crown calls it in its submissions "institutional expertise")[29] is a legitimate ground for giving weight to the reasons for a rights-limiting measure.[30] As this Court recognised in *Moncrief-Spittle*:[31]

> [85] Where the court is reviewing the application in a given case, *the expertise of the decision-maker will be relevant* — so too will be the nature of the decision and the decision-maker and the context in which the decision must be taken. *The extent of any leeway accorded to that expertise will vary depending on the context.* ….
> [86] Further, while the Court must satisfy itself of the reasonableness of the limit, some regard may be had and respect given to where the decision-maker saw the balance as lying. The extent to which this is so will depend on the context. It is accordingly not appropriate particularly at this, still relatively early, stage in the development of this aspect of the Bill of Rights jurisprudence to attempt to be more definitive on these matters. The range of decisions in issue and the nature and expertise of the decision-maker will vary considerably. The forensic *limitations of our undertaking these types of factual inquiries* in an application for judicial review where there has been no cross-examination of the deponents are also relevant.

16. There are different ways that weight may be given in recognition of relative institutional competence. *First,* one basis for giving weight may be that the decision-maker has "greater experience and expertise than judges in making certain evaluations".[32] That said, weight must be earned, not assumed (or an entitlement to it simply asserted). The Court must still "satisfy itself that the

[27] More specifically, these are generally considered under the broader umbrella of deference or a margin, which incorporates both aspects of what the Commission refers to as latitude and weight.

[28] See Carter at 84; *De Smith's* at [11-014]; Jonathan Auburn, Jonathan Moffett, and Andrew Sharland *Judicial Review: Principles and Procedure* (Oxford University Press, Oxford, 2013) at [18.43]; Taggart at 457; *Attorney-General v Taylor* [2017] NZCA 215, [2017] 3 NZLR 24 at [75].

[29] Crown synopsis at [50].

[30] See *R (Nicklinson) v Ministry of Justice* [2014] UKSC 38, [2015] AC 657 at [166]–[171] per Lord Mance referring to UK case law endorsing this principle in the context of proportionality assessments; and Mark Elliot "Proportionality and Deference: The Importance of a Structured Approach" in Forsyth and others (eds) *Effective Judicial Review: A Cornerstone of Good Governance* (Oxford University Press, Oxford, 2010) 264 [**Elliot**] at 272. See also *Minister of Justice v Kim* [2021] NZSC 57, [2021] 1 NZLR 338 at [50] (emphasis added) per the majority: "If this Court, *taking into account the Minister's expertise where appropriate* …".

[31] Emphasis added and footnotes omitted.

[32] *Human Rights* at [3-211] and the examples given there.

evidence provides cogent justification and, where proportionality is in issue, that it satisfies the burden of showing that a measure is proportionate".[33]

17. Where evidence from the primary decision-maker is contradicted by "someone equally experienced and informed, the court will have more scope for finding that the view of the primary decision-maker does not provide sufficient justification".[34] This may be through expert evidence in an appropriate case. In *New Health*, O'Regan and Ellen France JJ noted that "scientific evidence relating to fluoridation is contentious" and that the Court "is not in a position to unpick these disputes nor is it able to determine whether particular scientific reports are scientifically robust".[35] However, their Honours suggested they would give weight to the consistent views expressed by the World Health Organisation and Ministry of Health, and approaches in comparable jurisdictions.[36] Thus, despite acknowledging an evidential conflict at the rational connection, minimal impairment and proportionality stages of the inquiry,[37] the Judges nevertheless concluded that the limit was justified.

18. *Second*, the process followed by the decision-maker may establish good reason for weight to be afforded to them. In such cases, a decision-maker "[may] not have any particular expertise or experience, but nonetheless has carried out a rigorous decision-making process which affords him or her knowledge superior to that of the court".[38] For instance, in *B v Waitemata District Health Board*, in a related context, the Court noted that "another relevant factor is that the Board introduced its policy after a comprehensive inquiry over the course of which it took advice and consulted with a range

33 At [3-214]. See, for example, *Hudson v Attorney-General* [2023] NZCA 653 at [68].

34 At [3-215]. In *Make It 16 Inc v Attorney-General* [2022] NZSC 134, [2022] 1 NZLR 683 [***Make It 16***], the Court referred to uncontested expert evidence provided by the applicants: see at [52]–[53]. For the opposite situation of there being no contradictory evidence provided by an applicant, see *R (Gillan) v Metropolitan Police Commissioner* [2006] UKHL 12, [2006] 2 AC 307 at [17]. See also Mark Elliot at 274; and *Hansen* at [278] per Anderson J.

35 *New Health New Zealand Inc v South Taranaki District Council* [2018] NZSC 59, [2018] 1 NZLR 948 at [121]. See also *B v Waitemata District Health Board* [2017] NZSC 88, [2017] 1 NZLR 823 [***B v Waitemata***] at [56]–[87] and [135].

36 *New Health* at [121].

37 At [130]–[131], [134] and [143].

38 Hickman at 149 (giving the example of *R (SB) v Governors of Denbigh High School* [2006] UKHL 15, [2007] 1 AC 100).

of interests".[39] To be clear: the provision of extensive reasons in a decision-making document is not *of itself* a reason to give weight. Rather, a well-reasoned decision may provide "evidence that the decision maker has, through the process of making the decision, acquired an insight and knowledge not possessed by the court".[40]

19. *Third*, as also alluded to in *Moncrief-Spittle*, the limits of the adjudicative process are relevant.[41] Those limits include the fact that Court hearings are adversarial rather than inquisitorial; Judges must rely on the information provided by the parties, the quality of which can vary; rules of evidence and procedure may not facilitate the provision of fulsome or fully-tested evidence; and courts face considerable time-pressure in their decision-making. As noted in *Hansen*, the Court's "perspective may be constrained by the limits of its own process and the scope of its inquiry".[42]

20. The Commission does not consider it helpful at this nascent stage of the jurisprudence exhaustively to identify the circumstances when weight should be given.[43] There is no clear consensus in overseas jurisdictions as to when and on what basis weight should be afforded as part of the justification analysis. Accordingly, in line with the observations of the late Professor Taggart, through articulating the reasons for weight to be given and applying them in particular cases, a more nuanced picture is likely to develop.[44]

2. Constitutional propriety

21. Constitutional propriety captures two circumstances: where the decision-maker is elected (or as the Crown says, "has relevant democratic credentials")[45] and where the decision-maker has been allocated a role by

[39] *B v Waitemata* at [76]. See also at [10]–[14]. This comment was in the context of discussing whether a policy was consistent with s 23(5) of NZBORA. Nevertheless, the discussion reflects what may also have been expected at the justificatory stage. Moreover, the same discussion appears to have been relied upon (at [135]) as showing the limit was reasonable and proportionate in terms of s 5. See also *Hansen* at [73]–[77].

[40] *Human Rights: Judicial Protection* at [3-228]. See also Hickman at 151–152.

[41] See also *Human Rights: Judicial Protection* at [3-230]; and Hickman at 153–155.

[42] *Hansen* at [268] per Anderson J.

[43] See *Moncrief-Spittle* at [86].

[44] Taggart at 460. This reflects the incrementalism of the common law method: *Ellis v R* [2022] NZSC 114, [2022] 1 NZLR 239 at [116] per Glazebrook J, and [167] per Winkelmann CJ.

[45] Crown synopsis at [50]. See, for example, *Hansen* at [111] per Tipping J; and *Secretary of State for the Home Department v Rehman* [2001] UKHL 1, [2003] 1 AC 153 at [62].

Parliament.[46] Each is controversial as a separate reason for affording "weight".[47]

22. Despite raising the point in its analysis of the legal framework, the Crown does not appear to argue for its application to the particular facts of this case, presumably reflecting that the CDF is not an elected representative. However, the Commission submits that neither "democratic credentials" *alone* or the fact that a decision-maker has been allocated a particular function *alone* provide a basis for giving weight. The more difficult question is whether there are potential situations of, say, true incommensurability where a Court may consider weight should be afforded for constitutional reasons. Given the facts of this case and the manner in which it has been argued, the present case is not an appropriate vehicle for reaching a determinative position on this question. As a result, the Commission submits that this Court should be cautious before *endorsing* weight on the grounds of constitutional propriety *in a NZBORA context*. In case the Court is minded to explore the issue, the reasons for not giving weight *solely* on constitutional propriety grounds are as follows.

23. *First*, as a preliminary point, the concept of latitude already captures the appropriate constitutional division of labour in the context of an assessment of justification for the purposes of s 5 of NZBORA. It is unclear why a Court should also give weight because of concerns around "democratic credentials" or give weight to another decision-maker when the Court has been given the function of making the s 5 assessment. As noted in *Human Rights: Judicial Protection*, in a UK context, the Human Rights Act 1998 "has expressly made it the duty of the courts to determine whether decisions and acts of the political branches of the state are compatible with Convention rights".[48] As Lord Bingham states, the Act "gives the courts a very specific, wholly democratic, mandate".[49] The same can be said of NZBORA which

[46] See Hickman at 156 referring to the "ballot box" and "allocation of function" justifications.

[47] Hickman at 156.

[48] *Human Rights: Judicial Protection* at [3-200]. See also Richard Clayton and Hugh Tomlinson *The Law of Human Rights* (2nd ed, Oxford University Press, Oxford, 2009) vol 1 at [5.153]; and Hickman at 160.

[49] *A v Secretary of State for the Home Department* [2004] UKHL 56, [2005] 2 AC 68 [***A v SSHD***] at [42]. See also Jefferey Jowell QC "Judicial deference: servility, civility or institutional capacity?" [2003] PL 592 at 597; P Craig *Administrative Law* (6th ed, Sweet & Maxwell, London, 2008) at

imposes legal limits on s 3 actors.[50] The Crown contends that, without "deference", the Court risks stepping into the shoes of the executive and therefore going beyond its constitutional role.[51] But requiring a decision-maker to comply with statutory standards (or alerting them when they are not[52]) is not the same as the Court usurping the primary decision-maker's role.[53] The Court is playing a more limited role *in furtherance* of its constitutional function.[54]

24. *Second*, as the authors of *Human Rights: Judicial Protection* also suggest, many cases affording weight on constitutional grounds can best be "understood as simply a shorthand for deference on … other grounds", namely those relating to relative institutional competence.[55]

25. *Third*, if weight were given *purely* because a measure was passed by Parliament or pursuant to statutory authority, that would cover an extraordinary range of decisions, and significantly reduce the protection afforded by NZBORA.

26. *Fourth*, in respect of legislation, it is open to Parliament expressly to provide in a statute that rights may be limited or to restrict the degree of judicial oversight. The fact Parliament has not done so suggests there is nothing constitutionally improper with the Court reaching its own conclusion.

27. *Fifth*, the very fact that the judiciary is an independent body, removed from electoral pressures, arguably makes Judges uniquely placed to determine whether a rights-limitation is justified. The electoral avenue may not be open to a minority person or group whose rights have been limited.[56] The fact Judges are not elected does not mean they lack democratic legitimacy. By

600; J Steyn "Deference: a Tangled Story" [2005] PL 346 [**Steyn**] at 352; and *Huang* at [17] rejecting the argument that the court should assume the challenged rules had the "imprimatur of democratic approval and should be taken to strike the right balance between the interests of the individual and those of the community".

50 Noting that the judiciary itself is bound by NZBORA (s 3) and so to the extent it abdicates its role, it is breaching its own *legal* obligations. See also *Hansen* at [108] per Tipping J (emphasis original): "Parliament has nevertheless given the New Zealand Courts a significant review role. That role arises by virtue of s 5, which requires that a limit on a right or freedom be *demonstrably* justified. Determination of this question necessarily falls to the Courts". See also *CPAG* at [92]

51 Crown synopsis at [52].

52 NZBORA, ss 7A–7B; and *Make It 16*.

53 Hickman at 113.

54 Hickman at 115. See also Leyland at 211.

55 *Human Rights: Judicial Protection* at [3-200]. See also Hickman at 161–162 citing Steyn at 352.

56 See *Make It 16* at [67], albeit in the context of whether relief should be granted.

fulfilling an independent role, the judiciary enhances democratic values.[57] As Lord Bingham has said: "the function of independent judges charged to interpret and apply the law is universally recognised as a cardinal feature of the modern democratic state, a cornerstone of the rule of law itself".[58]

28. *Sixth*, in cases where constitutional propriety *could* have been referred to, this Court has not done so. For instance in *Make It 16*, in considering whether voting age provisions that breached rights were justified, there was no suggestion that Parliament's choice ought to be given weight because of its democratic credentials.[59]

D. How latitude and weight are applied

29. The Commission submits that the appropriate weight to be given in this context should be determined in the application of the structured proportionality assessment. Indeed, it would be a retrograde step in the development of this area of NZBORA case law to create an initial or standalone assessment of the amount of weight to be afforded to the decision-maker's assessment.[60] The courts do not simply assume that, for instance, the pressing social need and the compatibility of the means chosen to pursue it are justified because Parliament or a decision-maker exercising statutory powers has adopted them.[61] That would risk immunising certain areas from scrutiny. It would also risk double-counting the "weight" both at the initial abstracted assessment stage and then again in the application of the structured proportionality assessment. This would subvert the effective protection of NZBORA (and the justification exercise contemplated by s 5) by *avoiding* rather than *requiring* justification.

57 Hickman at 161.

58 *A v SSHD* at [42].

59 See also *New Health New Zealand Inc v South Taranaki District Council* [2018] NZSC 59, [2018] 1 NZLR 948 [***New Health***] at [113]–[145] per O'Regan and France JJ.

60 It is unclear to the Commission whether the Crown submission is that weight should be calibrated and given as an initial and/or standalone step, or through the actual application of the structured proportionality assessment. See Crown synopsis at [2]; and [36] stating that the s 5 proportionality test "lacks a mechanism though which these issues can be accommodated if they are not expressly addressed by the Court". Compare at [50].

61 For the dangers of this approach in the legislative context, see *RJR-MacDonald Inc v Canada* [1995] 3 SCR 199 [***RJR-MacDonald***] at [136] per McLachlin J; and *Vriend v Alberta* [1998] 1 SCR 493 at [54] per Cory J (the "notion of judicial deference to legislative choices should not … be used to completely immunize certain kinds of legislative decisions from Charter scrutiny").

30. Another possible approach to determining when weight should be given is to posit (as Tipping J did in *Hansen*) a spectrum "which extends from matters which involve major political, social or economic decisions at one end to matters which have a substantial legal content at the other".[62] On this approach, the closer to the legal end, the less weight given to the decision-maker's view, and vice versa. But, as Tipping J acknowledged, "[t]he reality" is that "a particular matter may partake of a number of different elements involving different aspects of this spectrum".[63] Tipping J gave the example of how the "allocation of scarce public resources can often intersect with questions which, from a different standpoint, may seem more legal than political".[64] The Crown's argument at times is suggestive of this type of categorical approach. For instance, it states that the case is about a "military matter" that is "quintessentially a matter on which the Court should show some restraint and respect, or leeway".[65]

31. This type of labelling or characterisation can detract from the substantive analysis as to whether or why the Court may need to give weight because another person or body has greater the institutional competence in relation to the issues raised by s 5. In the immediate context, this point can be conveyed by asking, "Why does a person lose the full benefit of their right to be free from medical treatment simply because they have become a member of the Defence Force?" or "What is so special about the Defence Force context that means that a Court cannot appropriately weigh the rights of the soldier against the discipline and morale demands of the CDF?". Indeed, precisely because of the system of command within the Armed Forces it might be thought that an external review by a court is even more important, not less.

32. A further problem with spectrum analysis is that it focusses on the subject matter of the decision, even though this may be only one of several variables

[62] *Hansen* at [116]. These comments have been drawn on in *CPAG* at [79]; and *Atkinson* at [172].
[63] *Hansen* at [116]. See also *De Smith's* at [11-015]; and Kavanagh at 186
[64] *Hansen* at [116]. See *Ghaidan v Godin-Mendoza* [2004] UKHL 30, [2004] 2 AC 557 at [19] (where Lord Nicholls held that even in fields where Parliament needed to balance "the competing interests of tenants and landlords, taking into account broad issues of social and economic policy" if a measures discriminates on a prohibited ground "the court will scrutinise with intensity" any reason for justification, requiring it to be "cogent"). See also Hunt at 347.
[65] Crown synopsis at [6].

as to why weight ought to be given in any given factual scenario.[66] As noted by Aileen Kavanagh: "[t]here are no pre-ordained areas in which deference is warranted – not even … the area of national security … [T]he courts need to be vigilant in scrutinising whether there are any particular claims of superior expertise and competence in the context of the individual case, rather than adopting a crude subject-based approach".[67]

33. An alternative approach is to enumerate relevant factors that determine weight. This was the approach taken in *Roth* by Laws LJ[68] and similarly in *M v H*[69] by Bastarache J. While such an approach explicitly identifies the factors that have influenced the Court's assessment in a particular case, the Commission does not consider any multi-factorial list should be endorsed as a more general "test". In keeping with this Court's posture in *Moncrief-Spittle*, it is preferable to acknowledge the context and fact-specific nature of the assessment of when and to what extent to give weight, at least at this nascent stage of the development of this area. Both the factors identified as relevant, and the weight to be afforded to them, will vary according to the facts.[70] Indeed, any "list" offered up in one case may be expanded (or adjusted) each time a new case throws up a novel factor. Such approaches are thus ultimately indeterminate: they do not tell us *a priori* which factors are relevant; how to assign weight as between factors; or how much weight each factor is to be given.[71]

34. The critical requirement is for the courts to be transparent about how and why they are giving weight on the facts of the case before them when

66 Hunt at 348.

67 Kavanagh at 176.

68 *International Transport Roth GmbH v Home Secretary* [2002] EWCA Civ 158, [2003] QB 728 at [82]–[87], setting out the following list: (i) greater deference is to be paid to an Act of Parliament than to a decision of the executive or subordinate measure; (ii) there is more scope for deference where the Convention itself requires a balance to be struck, much less so where the right is stated in terms which are unqualified; (iii) greater deference will be due to the democratic powers where the subject-matter in hand is peculiarly within their constitutional responsibility; and (iv) greater or less deference will be due according to whether the subject matter lies more readily within the actual or potential expertise of the democratic powers or the Courts. See further Taggart at 458.

69 *M v H* [1999] 2 SCR 3, at [305]–[321], listing in the context of s 1 of the Charter: (i) the fundamental nature of the interest; (ii) the vulnerability of the groups concerned; (iii) the complexity of the scheme and/or expertise required; (iv) the source and democratic origins of the rule; and (v) whether there is a strong role for moral judgments in setting policy.

70 See Hickman at 137–138 on the importance of a non-doctrinal approach.

71 See Taggart at 458.

assessing a limit for NZBORA-consistency. This is consistent with the Crown's suggestion that the "s 5 framework should facilitate the court to weigh such matters appropriately".[72]

E. Applying latitude and weight as part of structured proportionality

35. There is no dispute between the parties that the structured proportionality framework endorsed in *Hansen* should be applied in this case.[73] It is helpful therefore to further consider how latitude is factored into the inquiry and how weight can be factored into it. The approach to s 5 typically involves addressing the following issues:[74]

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

36. The first two steps (ie, (a) and (b)(i)) serve as thresholds.[75] They "do not normally cause the same difficulties" as the latter two.[76] Experience shows that courts are unlikely to find that a measure does not have a sufficiently important objective unless it runs directly counter to the types of values found in a free and democratic society.[77] However, it serves a useful starting point for the assessment: how the objective is formulated will inform what is required to satisfy the remaining steps.[78] Because the first two steps are seldom contested, issues of weight are unlikely to arise. The Court will often

72 Crown synopsis at [50].
73 Crown synopsis at [28].
74 *Hansen* at [104] per Tipping J. Adopted in *New Health* at [112] per O'Regan and Ellen France JJ.
75 *Hansen* at [121] per Tipping J.
76 At [121] per Tipping J.
77 See, for example, *R v Big M Drug Mart Ltd* [1985] 1 SCR 295 at 352 where the Supreme Court of Canada held the objective of the Lord's Day Act was to compel the observance of the Sabbath in direct conflict with the religious freedom values recognised in s 2(a) of the Charter. A legislative objective diametrically opposed to the purpose of a right cannot be "sufficiently important" for the purposes of this step in the *Oakes* test. See also Carter at 156.
78 *Hansen* at [121] per Tipping J. For instance, as noted in *GF v Minister of Covid-19 Response* [2021] NZHC 2526, [2022] 2 NZLR 1 at [77], a "significantly broad purpose … may easily satisfy the first limb, but encounter challenges under the minimal impairment limb, because there may be other less rights-limiting measures that achieve the same purpose". See also *Moonen v Film and Literature Board of Review* [2000] 2 NZLR 9 (CA) [*Moonen*] at [18].

be able to determine this on the basis of its own experiences and common knowledge.[79] Nevertheless, there may be situations where, say, due to scientific difficulties, the Court should give weight to a decision-maker's assessment as to whether a measure is responding to a concern that is "pressing and substantial".[80] In this situation, the Court may be assisted by technical evidence, such as in *New Health* where there was evidence of the incidence of tooth decay being higher where fluoridation did not occur.[81]

37. The second step (rational connection) is also usually easily satisfied.[82] It shears away under-inclusive and over-inclusive limits on fundamental rights.[83] The more focused the objective, the more tailored the measure will need to be to satisfy this step. Weight at this stage may be appropriate where the decision-maker is tackling a novel social problem or using novel means to tackle a familiar social problem. Given the decision-maker will in this type of situation necessarily lack an empirical record, it may be appropriate for the Court to give weight to the assessments made by a body that the Court considers may have greater institutional competence or expertise.

38. The third part of the test has tended to be harder to satisfy, including in New Zealand, typically because courts have found that measures have failed to limit rights as a little as possible. The Judges in *Hansen* phrase this part of the test variously as requiring that a right is limited "as little as possible"[84] and as requiring that a right is impaired "as little as was reasonably necessary".[85] The step has also been recast in some cases, typically where the relevant provision represents a legislative choice on a complex social issue, as whether Parliament's measure falls within a "range of reasonable alternatives".[86] This

79 See, for instance, *Hansen* at [67]–[70] per Blanchard J, [125] per Tipping J and [273] per Anderson J. Even McGrath J, who considered the need for weight to the legislature on the question of whether there was a pressing concern concluded that "[i]n any event" he had "no hesitation in concluding" the requirement was met: at [207].

80 *Hansen* at [64] per *Blanchard* J.

81 *New Health* at [123] per O'Regan and France JJ.

82 *JTI-MacDonald v Canada* 2007 SCC 30, [2007] 2 SCR 610 [***JTI-MacDonald***] at [40].

83 *Hansen* at [70] per Blanchard J.

84 *Hansen* at [70] per Blanchard J and [204] per McGrath J.

85 At [79] per Blanchard J. The Canadian courts relaxed this aspect of the *Oakes* formulation ("as little as possible") almost immediately in *R v Edwards Books & Art Ltd* [1986] 2 SCR 713 at 772 per Dickson CJ, Chouinard and Le Dain JJ and 795 per La Forest J.

86 See, for example, *JTI-Macdonald* at [43], [66] and [137]; *Harper v Canada* [2004] 1 SCR 827 [***Harper***] at [110] per Bastarache, Iacobucci, Arbour, LeBel, Deschamps and Fish JJ; *RJR-MacDonald* at [160] per majority; and *Atkinson* [2012] NZCA 184, [2012] 3 NZLR 456 at [151].

step and the different formulations adopted underscore the importance of focusing on the objective of the step, not repeatedly recasting it in response to different contextual factors. The simplest formulation that captures the purpose of this step is to ask whether there is any less rights-intrusive alternative that would be as effective at securing the measure's objective.[87] This step is also most obviously where weight could be given to the primary decision-maker. For instance, the Court may give weight to the view of the primary decision-maker that alternative means would not be effective in securing the stated objective.

39. The final part of the test, sometimes described as "overall proportionality",[88] requires a "balance to be struck … between social advantage and harm to the right".[89] That is, the courts—with the benefit of the evidence adduced by the parties—weigh the costs and benefits of the measure (bearing in mind the limitations inherent in court processes, even if augmented to make additional evidence available).[90] This will often involve consideration of the extent of intrusion into a right, the value underpinning it (eg, liberty) and the severity of the interference. The importance of the right and the interests it is seeking to protect can also bear on a court's assessment.[91] Although these types of considerations could be split out as separate steps in any structured approach, the courts can also secure transparency about the considerations they are weighing by ensuring that those considerations are identified explicitly in their reasoning. Some value judgments are inescapable;[92] however, problems of incommensurability tend to evaporate as competing

87 *Hansen* at [79] (Blanchard J, observing that "[a]ny remedy [to combat street dealing] must be one which is effective and I am persuaded that nothing short of a reverse onus would be sufficient"); [104] and [126] (Tipping J, noting that the Court must ask whether Parliament might have "sufficiently achieved its objective" by a less rights-intrusive method); [217] (McGrath J, "[t]he inquiry here is into whether there was an alternative but less intrusive means of addressing the legislature's objective which would have a similar level of effectiveness"). Similarly, in *JTI-MacDonald*, McLachlin CJ (per curiam) noted at [43] that at this stage of *Oakes* "one must also ask whether the alternative would be reasonably effective when weighed against the means chosen by Parliament".

88 See, for example, *Atkinson* at [180].

89 *Hansen* at [134] per Tipping J.

90 Note that in *Dagenais v Canadian Broadcasting Corp* [1994] 3 SCR 835 [***Dagenais***] at 888–889 per Lamer CJ (for the majority) suggests that true proportionality requires a balancing of the measure's positive effects (as actually achieved) against its deleterious effects (in impairing rights). His Honour thought it too narrow a concept of proportionality to inquire solely, as was originally anticipated by *Oakes*, whether the legislative objective in the abstract justifies the rights limitation, when in fact that objective may not be fully attained in practice.

91 *Dagenais* at 890–891 per Lamer CJ (for the majority). See *Hansen* at [193] per McGrath J.

92 See *Moonen* at [18].

values become more unbalanced. For example, a minor restriction on liberty will be uncontroversial where it attains a large measure of security (eg, pre-flight checks at an airport). The Commission agrees that this step is "not a matter on which institutional expertise … is likely to be relevant".[93] However, it may be that weight is indirectly factored into this step given that it necessarily builds on and is informed by the analysis in the previous steps.

IV. Evidential requirements

40. Section 5 "only" permits limits on fundamental rights that are "demonstrably" justified. As the Court of Appeal noted in *Atkinson* "the context will affect the type of evidence required to meet the standard of proof" under s 5.[94] This is supported by the treatment of evidence in Supreme Court cases. For instance, in *Make It 16* the Court held that where a limit is "well recognised either in the relevant international instrument … or common law" then "evidence about the reasonableness of the limit may not be required or may be minimal".[95] This is not an area of law that lends itself to bright-line rules as to how much evidence and/or argument must be advanced to justify a limit on fundamental rights.[96] That said, "demonstrably" obviously sets the expectation of what must be done, even if the extent and type of evidence required will depend on context. And the degree of weight afforded to the primary decision-maker is likely to, in turn, depend (at least to some extent) on the evidence.

41. Logically, the extent of evidence required depends on the legal question before the Court. For instance, in relation to assessing whether a measure serves a sufficiently important objective, the Court may be able to rely on

93 Crown synopsis at [50].

94 *Atkinson* at [166]. See *R (Simonis) v Arts Council England* [2020] EWCA Civ 374 at [93]–[100].

95 *Make It 16* at [45]. See also Geoffrey Palmer "A Bill of Rights for New Zealand: A White Paper" [1984–1985] I AJHR A6 [**White Paper**] at [10.34]; and *Cropp v Judicial Committee* [2008] NZSC 46, [2008] 3 NZLR 774 at [30] where, though not strictly in a s 5 context, the Court rejected an argument as to the absence of evidence showing a social problem, holding that the issue was "too well known to need confirmation by evidence". For completeness, the Commission notes that there are other cases concerned whether certain *court* powers were justified in terms of s 5. In these situations, the Court has not required evidence, arguably because the matters were squarely within the Court's institutional competence. See *Siemer v Solicitor-General* [2010] NZSC 54, [2010] 3 NZLR 767 at [26]–[27] per Elias CJ and McGrath J (contempt of court summary procedure); and *Siemer v Solicitor-General* [2013] NZSC 68, [2013] 3 NZLR 441 at [159] (non-party suppression order).

96 See Carter at 68 (noting that the Canadian courts are still grappling with how to balance the "demand for definitive proof" and the "reality of policy making under conditions of factual uncertainty").

"common sense".[97] Similarly, as to rational connection, the Court "will often be able to answer … on the basis of reason or logic".[98] The extent and type of evidence required may also vary depending on the nature and type of justification advanced. As the UKSC has observed "justifications based on moral or political considerations" or "based on intuitive common sense" may "not be capable of being established by evidence"; in contrast, "economic or social justification … may well be expected to be supported by evidence".[99]

42. In the present case, the Court of Appeal held that the rights-limiting nature of the TDFO needed to be justified "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".[100] The Court of Appeal was not suggesting that "data-based analysis" or "comparison" must be provided in every case; rather, it gave these as *examples* of the justificatory material that (it considered) was needed *in this context*.[101]

V. Incremental limit

43. The Crown is critical of the Court of Appeal's reference to an "incremental limit" which the Crown sees as introducing a "new concept [that] … is not required to be added to the existing law of justification of limits of rights".[102]

44. In the Commission's submission, the Court of Appeal's reference to an "incremental limit" was not introducing a new concept. *First*, it described the reality of the applicant's challenge, being to the TDFO and Administrative Instruction, not the addition of COVID-19 to the vaccination schedule. *Second*, there is no reason why a right that is limited (whether that is justified or not), could not be further limited. The nature and degree of intrusion is more properly considered in assessing justification. *Third*, the Crown's

97 *Harper* at [26] and [93]. See also *R v Bryan 2007* SCC 12, [2007] 1 SCR 527 at [16] per Bastarache J (in majority), reviewing previous authority on using logic and common sense in the absence of determinative social science evidence.
98 Carter at 156.
99 *R (Lumsdon) v Legal Services Board* [2015] UKSC 41, [2016] AC 697 at [56]. See also *Re Brewster* [2017] UKSC 8, [2017] 1 WLR 519 at [62] where the Court considered that in the circumstances "tangible evidence" was needed rather than "vague suggestions" unsupported by evidence.
100 CA judgment at [155]. See also White Paper at [10.33].
101 Contrary to the Crown synopsis at [85].
102 Crown synopsis at [10].

argument appears to be, in substance, that the TDFO and Administrative Instruction did not breach ss 11 and 15. But this appears to be in tension with the Crown's concession that the TDFO limited rights.[103]

VI. Pleadings

45. The Crown contends that "[i]f an applicant intends to argue that a rights-limiting measure is unjustified because there is a less rights-limited alternative available, it should be pleaded".[104] The Commission submits that it will usually be sufficient for an applicant to allege in its pleadings that the requirements of s 5 have not been satisfied. While the Commission recognises that the Crown cannot be expected to explain why every conceivable alternative would not have been as effective as the selected measure, the Crown must identify the sufficiently important objective said to justify the limit in the first limb of the structured proportionality approach.[105] The third limb of the structured proportionality test responds to the objective that has been identified (ie, by considering whether alternatives could have been adopted that would be as effective in securing the objective). The core principle is that the person seeking to uphold the rights-limiting measure (usually the Crown) bears the burden of demonstrating that the limit is justified.[106] This recognises that there is often an asymmetry in the information available to an applicant and the decision-maker as to why a particular measure was adopted, including whether any alternatives were considered and, if so, why they may not be as effective at achieving the objective as the rights-limiting measure.

46. The Commission submits that it is for the Crown to identify any alternatives it considers relevant and why they are arguably not as effective. It will then

[103] Crown synopsis at [1]. This was also the position taken in the Court of Appeal: see CA judgment at [8] and [126], at least in respect of s 11 rights.

[104] Crown synopsis at [102]. The Crown accepts a specific pleading is not required when an alternative measure is "so obvious", but that this is not the case here: at [107].

[105] See White Paper at [10.32], in respect of legislative measures.

[106] *Hansen* at [108] per Tipping J; *Atkinson* at [163]; and *Ministry of Transport v Noort* [1992] 3 NZLR 260 (CA) at 268 at 283 per Richardson J. See also White Paper at [10.29]. The United Kingdom position is the same: see, for example, *R v Shayler* [2002] UKHL 11, [2003] 1 AC 247 [***Shayler***] at [45] and [59] per Lord Hope; and Michael Fordham *Judicial Review Handbook* (7th ed, Hart Publishing, London, 2020) at [37.1.20]. There is no suggestion that the onus changes to the plaintiff at the "minimal impairment" stage. See, for example, *Sauvé v Canada (Chief Electoral Officer)* 2002 SCC 68, [2002] 3 SCR 519 at [7] per the majority. See also *Shayler* at [59] per Lord Hope.

be for applicant to challenge the Crown's position on the effectiveness of the identified alternative or, if it wishes to identify additional alternatives that have not been identified by the Crown, adduce evidence in support of such alternatives (to which the Crown will be able to respond, including by accepting it and deciding whether to file responsive evidence or objecting to any such evidence and, if necessary, protecting its position through appeals). What the applicant may be expected to say in a statement of reply will depend on how detailed the Crown's statement of defence is. However, this would not preclude the ability for alternatives to be considered in the evidence put forward by the parties.

47. The argument that ultimately prevailed in the present case appears to have come into focus at a relatively late stage proceedings.[107] Evidence was filed in advance of the High Court hearing on the United Kingdom position.[108] The Crown appears to have taken the position at the hearing that it could not file responsive evidence given time constraints but that it did not need to do so.[109] There does not appear to have been any reservation of rights or challenge to the admissibility of the evidence.[110] Nor was a formal challenge advanced as part of the appeal. A risk was taken. The consequence materialised. It is not a good basis for a change in pleading practice.

48. Standing back, the Commission says that even if the Court felt some sympathy for the position the Crown found itself in here, the solution is not to impose a requirement on all future plaintiffs to plead alternative means that would give effect to the Crown's pressing and substantial objective. That would place further unjustified obstacles in the way of plaintiffs who already face difficult forensic challenges in mounting NZBORA claims.

[107] See, for example, CA judgment at [163].
[108] See 201.0132 and 301.0142.
[109] See 102.0282, 102.0290 and 102.0294.
[110] The transcript provided in the case on appeal is not entirely unclear (at 102.0266).

Dated 23 September 2024

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