IN THE HIGH COURT OF NEW ZEALAND
WELLINGTON REGISTRY

I TE KŌTI MATUA O AOTEAROA
TE WHANGANUI-A-TARA ROHE

CIV-2023-485-330
[2023] NZHC 3183

UNDER	the Judicial Review Procedure Act 2016 and Part 30 of the High Court Rules
IN THE MATTER	of an application for judicial review of directions made by the Director-General of Health under section 116E(1) of the Health Act 1956
BETWEEN	NEW HEALTH NEW ZEALAND INCORPORATED Plaintiff
AND	DIRECTOR-GENERAL OF HEALTH First Defendant
	ATTORNEY-GENERAL Second Defendant

Hearing: 18 September 2023

Counsel: L M Hansen and C F J Reid for Plaintiff
A M Powell and K M Eckersley for First and Second Defendants

Judgment: 10 November 2023

JUDGMENT OF RADICH J

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Introduction

[1] In a decision on 27 July 2022, the Director-General of Health (the Director-General) gave directions to 14 local authorities under s 116E of the Health Act 1956 to add fluoride to their drinking water supplies (the decision).

[2] Fluoridation is a limit on the right in s 11 of the New Zealand Bill of Rights Act 1990 (the Bill of Rights Act) to refuse medical treatment.[1] The Director-General accepts that there is no reference to the Bill of Rights Act in the decision-making documents to which the decision relates. There is nothing on the record to show that, in making the decision, he turned his mind to whether, in terms of s 5 of the Bill of Rights Act, the limit is a reasonable limit prescribed by law such as can be demonstrably justified in a free and democratic society.[2]

[3] The issue that is addressed in this decision is whether, when a discretionary decision has the potential to restrict a fundamental right in the Bill of Rights Act, the decision-maker must in a procedural sense address the restriction and consider

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1 *New Health v South Taranaki District Council* [2018] NZSC 59, [2018] 1 NZLR 948 [*New Health v South Taranaki District Council* (SC)] at [99]–[100] per O'Regan and Ellen France JJ, at [172] per Glazebrook J and at [243] per Elias CJ.

2 The Director-General, when the decision was made, was Dr Ashley Bloomfield.

whether it is demonstrably justified, quite apart from an assessment by the Court of whether any restriction is so justified.

The preliminary issue in context

[4] The proceeding raises a number of judicial review causes of action to challenge the decision. They include, for example, relatively orthodox judicial review grounds such as a failure to consider relevant considerations and irrationality. They include an allegation that the decision is in breach of the Bill of Rights Act in a substantive sense.

[5] In the second cause of action, it is alleged that:

> 172. The [Bill of Rights Act] imposes a substantive constraint on the first respondent and before making the directions the [Director-General of Health] was required to turn his mind to and be satisfied that the directions were a reasonable limit on the right to refuse medical treatment.
>
> 173. The [Director-General of Health] failed to turn his mind to whether the directions were a reasonable limit on the right to refuse medical treatment.
>
> 174. By so failing, the first respondent made an error of law and failed to recognise the application of s 3 of the NZBORA to his exercise of the statutory power under s 116E of the Health Act.

[6] It is that cause of action alone that is the subject of this decision.

[7] The parties agreed that this cause of action should be isolated and dealt with as a preliminary legal issue. Is, then, there an obligation, in a procedural sense on those to whom the Bill of Rights Act applies[3] to consider the application of the Act if their exercise of power might engage a protected right?

[8] It might be thought that this is a question that has been addressed previously, given the Act's 33-year history. However, it would appear that it is an issue that has not been addressed in its own right.

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[3] The New Zealand Bill of Rights Act 1990 applies to acts done by the legislative, executive or judicial branches of the Government of New Zealand or by any person or body in the performance of any public function, power, or duty conferred or imposed by that person or body by or pursuant to law; see s 3.

[9] Not uncommonly, a decision-maker's assessments under the Bill of Rights Act – whether it relates to the engagement of a right or to a s 5 reasonable limits assessment – will be considered by a court alongside its own substantive assessments under the Act. But the issue that arises in this case is whether the Bill of Rights Act only goes so far as to create substantive obligations to act consistently with the rights it guarantees or whether, independently, it creates an actionable form of process obligation on a decision-maker to undertake a Bill of Rights Act assessment at some level if rights under the Act are engaged.

[10] To put it another way, is a Bill of Rights Act assessment a mandatory relevant consideration such that a failure to undertake it, in the event that rights are engaged, is a flaw which, in and of itself, could warrant a remedy? Or, is a Bill of Rights Act assessment by the decision-maker something that, while it might be useful all round, is not required on the basis that the Bill of Rights Act operates as a substantive constraint – exercisable through public law proceedings – to ensure that the ultimate decision is rights-compliant?

[11] In *Moncrief-Spittle v Regional Facilities Auckland Ltd*, the Supreme Court, in addressing what it would expect to see from the decision-maker there when limiting the right in question, said "We leave for an occasion on which it arises the approach to be taken by the courts in a situation where the decision-maker does not engage with the effect of the Bill of Rights. That does not in any event affect the court's role".[4]

[12] While Cooke J has, on two occasions since the Supreme Court's decision in *Moncrief-Spittle*, addressed the issue alongside a substantive rights assessment,[5] this case calls for it to be addressed on a stand-alone basis.

[13] New Health New Zealand Inc (New Health) is an incorporated society that describes itself as a "consumer-focused health organisation whose objectives are to advance and protect the best interests and freedoms of consumers". It is opposed to

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4 *Moncrief-Spittle v Regional Facilities Auckland Ltd* [2022] NZSC 138, [2022] 1 NZLR 459 at n 118.

5 *Wallace v Chief Executive of the Department of Corrections* [2023] NZHC 2248 at [65] and *New Health New Zealand Ltd v The Minister for COVID-19 Response* [2023] NZHC 2647 [*New Health v Minister for COVID-19* (HC)] at [71].

the fluoridation of drinking water. In a letter of 12 May 2023 to the Director-General in which reference was made to the intention to bring this proceeding, counsel for New Health asked whether or not the Director-General had considered the application of s 11 of the Bill of Rights Act when it made the decision.

[14] In a letter in response of 29 May 2023, it was said:

> We agree there is no explicit reference to NZBORA in the decision-making documents. However, we do not agree that where a right is engaged the right is a mandatory relevant consideration. The point is for the decision-maker to reach a rights-consistent conclusion, not to simply refer to relevant rights. In *Moncrief-Spittle v Regional Facilities Auckland Ltd* [2022] NZSC 138, the Court left open the question of whether the failure to consider a relevant right would be a failure to consider a mandatory relevant consideration (the decision-maker in that case had considered the relevant right) but the Crown would argue that the United Kingdom position as outlined in *Belfast City Council v Miss Behavin' Ltd* [2007] UKHL 19 is the proper one and should be followed in New Zealand.

[15] The Director-General's response frames the issue that is to be considered in this decision.

Background

New Health v South Taranaki District Council – section 11 of the Bill of Rights Act is engaged

[16] The first part of the background to this decision is legal in nature. It is the Supreme Court's decision in *New Health v South Taranaki District Council*.[6] It is that decision which led to the introduction of the statutory powers under which the decision was made.

[17] New Health challenged decisions of the Taranaki District Council to add fluoride to the water supplies in Patea and Waverley. In broad terms, it alleged that there was no statutory power for it to do so, that it caused people to undergo medical treatment (in terms of s 11 of the Bill of Rights Act) and that the limitation on the right of people to refuse treatment was not justified.

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6 *New Health v South Taranaki District Council* (SC), above n 1.

[18] A majority[7] of the Supreme Court dismissed New Health's appeal, but for different reasons. Elias CJ, Glazebrook, O'Regan and Ellen France JJ all agreed that fluoridation was a limit on the right in s 11 of the Bill of Rights Act to refuse medical treatment.[8]

[19] Elias CJ allowed the appeal. She did not consider that the Local Government Act and the Health Act provided any authority for local authorities to add fluoride to water and did not, therefore, go on to consider whether the addition of fluoride was a justified limit on s 11.[9]

[20] William Young J, while of the view that local authorities have the power to add fluoride to water, did not consider that fluoridation engaged s 11 of the Bill of Rights Act and did not, therefore, consider whether fluoridation was a justified limit on s 11.[10]

[21] Glazebrook J found that local authorities had power to add fluoride to water and that s 11 of the Bill of Rights Act was engaged. But she did not go on to consider whether, in terms of s 5, the addition of fluoride was a justified limit because that is something that may, in her view, depend upon local conditions.[11] Elias CJ agreed on this point, saying:[12]

> We are not called on in the present appeal to consider whether the decision of the Council to add fluoride was lawful if found to be authorised. The challenge brought by New Health to the substantive determination of the council is not before us. The Court does not have available to it the materials which show how the council weighed the human right in s 11 in reaching its decision, as it was obliged to do even if authorised to limit rights on a justifiable basis.

[22] O'Regan and Ellen France JJ went further in finding that there was power to add fluoride to water, that fluoridation engaged s 11 of the Bill of Rights Act and that it was a justified limit on the right to refuse medical treatment under s 5 of the Bill of Rights Act. They found that the objective of preventing and reducing dental decay was a significant problem in the South Taranaki area, was sufficiently important to

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7 William Young, Glazebrook, O'Regan and Ellen France JJ.
8 See above, n 1.
9 At [334], per Elias CJ.
10 At [210], per William Young J.
11 At [176], per Glazebrook J.
12 At [223], per Elias CJ.

justify a limitation on the right to refuse medical treatment, and that the right was impaired no more than was necessary to achieve the purpose sufficiently.[13]

Part 5A of the Health Act

[23] Following the decision of the Supreme Court in *New Health v South Taranaki District Council*, on 13 December 2021, a new Part 5A of the Health Act came into effect.[14] The purpose of the new part is to:[15]

> (a) enable the Director-General to direct a local authority to add fluoride or not to add fluoride to drinking water supplied through its local authority supply; and
>
> (b) require the local authority to comply with the direction.

[24] Section 116E of the Act is in the following terms:

> **116E Director-General may direct local authority to add or not to add fluoride to drinking water**
>
> (1) The Director-General may direct a local authority to add or not to add fluoride to drinking water supplied through its local authority supply.
>
> (2) The Director-General must seek and consider advice from the Director of Public Health on the matters in subsection (3)(a) and (b)(i) before deciding whether to make a direction.
>
> (3) Before making a direction, the Director-General must consider—
>
> (a) scientific evidence on the effectiveness of adding fluoride to drinking water in reducing the prevalence and severity of dental decay; and
>
> (b) whether the benefits of adding fluoride to the drinking water outweigh the financial costs, taking into account—
>
> (i) the state or likely state of the oral health of a population group or community where the local authority supply is situated; and
>
> (ii) the number of people who are reasonably likely to receive drinking water from the local authority supply; and
>
> (iii) the likely financial cost and savings of adding fluoride to the drinking water, including any additional financial costs of ongoing management and monitoring.

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13 *New Health v South Taranaki District Council* (SC), above n 1 at [126], [131], [134], [143].
14 Health (Fluoridation of Drinking Water) Amendment Act 2021.
15 Health Act, s 116C.

(4) For the purpose of subsection (3)(b)(i), the Director-General may take into account any evidence that the Director-General considers relevant.

(5) As soon as practicable after making a direction, the Director-General must publish the direction and the reasons for the decision to make the direction on the Ministry of Health's Internet site.

[25] Before making a direction to add fluoride to drinking water, the Director-General must invite written comments from the local authority on the cost of adding fluoride and on the date by which the local authority could comply with a direction.[16]

[26] A local authority that receives a direction from the Director-General under s 116E is not required to consult on any matter related to the direction.[17] Furthermore, a local authority must comply with a direction from the Director-General under s 116E[18] and, in the event that it does not, it commits an offence of a strict liability nature and is liable to a fine of up to $200,000 and to a further fine of up to $10,000 for every day during which the non-compliance continues.[19] Accordingly, a decision of the Director-General requiring a local authority to add fluoride is not something that is subject to local discussion, or that a local authority can resist. They are significant powers and they must, as such, be able to withstand careful scrutiny on review.

The Director-General's decision

[27] On 27 July 2022, the Director-General wrote to 14 local authorities, directing each of them under s 116E of the Health Act to add fluoride to its drinking water supplies.[20] In letters of a generic nature (but tailored to the circumstances of each local authority) the local authority was advised that "in accordance with s 116I of the Act", it was required to ensure by a date specified in the letter that "you are fluoridating at

16 Section 116G.
17 Section 116H.
18 Section 116I.
19 Sections 116J and 116K.
20 Directions were issued to Kawerau District Council, New Plymouth District Council, Rotorua Lakes Council, Auckland Council, Tararua District Council, Tauranga District Council, Waitaki District Council, Western Bay of Plenty District Council, Nelson City Council, Hastings City Council, Far North District Council, Waipa District Council, Horowhenua District Council, Whangārei District Council.

the optimum levels (between 0.7 ppm to 1 ppm, parts per million)" at the relevant water supply.

[28] The letter to each local authority said that it was "informed by the matters I am required to consider" and went on to describe those matters in the following way:

> In reaching my decision to issue this direction to you, I considered the scientific evidence on the effectiveness of adding fluoride to drinking water in reducing the prevalence and severity of dental decay. I am satisfied that community water fluoridation is a safe and effective public health measure that significantly reduces the prevalence and severity of dental decay. In reaching this conclusion, I considered: *Water fluoridation to prevent tooth decay* (Cochrane Collaboration 2015), *Health effects of water fluoridation: A review of the scientific evidence* (PMCSA and Royal Society Te Aparangi 2014) and *Fluoridation: an update on evidence* (PMCSA 2021).
>
> In reaching my decision, I also considered whether the benefits of adding fluoride to the drinking water outweigh the financial costs, taking into account: the state or likely state of the oral health of your community served by the [water supply relevant to the local authority]; the number of people who are reasonably likely to receive drinking water from these supplies; and the likely financial cost and savings of adding fluoride to the drinking water of the supplies, including any additional financial costs of ongoing management and monitoring.

[29] The matters identified in the quotation just set out are a reflection of the statutory criteria in s 116E(3) of the Act. The Director-General's consideration of each of those criteria was explained in a more extensive way in an appendix that accompanied each letter.

[30] As the Director-General accepts, there is no explicit reference to the Bill of Rights Act in the decision-making documents.

Positions of the parties

[31] New Health says that, before making the decision, the Director-General was required to be satisfied that any limitation on the s 11 right was justified. He was, it is said, required explicitly to consider and justify the limitation on s 11 as part of his decision-making process. It says that the omission on the part of the Director-General to turn his mind to the right to refuse medical treatment, and then to justify his decision under s 5 of the Bill of Rights Act by being satisfied that the limitation on the right was reasonable and proportionate, constitutes an error of law.

[32] It adds that a s 5 analysis requires among other things an analysis of contemporary societal values, including tikanga principles.

[33] Mr Powell, for the Director-General, expressed the position in the following way:

> The question here, one not yet finally settled in New Zealand, is how the NZBORA fulfils its aims when it applies to administrative decision-makers and whether it imposes a procedural obligation on them to consider relevant rights or whether it operates as a substantive constraint to ensure the ultimate decision is rights-consistent.

[34] It is said that the plaintiff can only succeed if there was a procedural obligation on the Director-General to undertake an acceptable proportionality assessment before making the direction, regardless of whether the direction is substantively consistent with the Bill of Rights Act. It is said that the experience in other jurisdictions suggests strongly that no such procedural obligation should be recognised.

[35] Whether or not a decision is consistent with the Bill of Rights Act is, it is said for the Director-General, an issue of law for the Court to determine. It is said that complex issues arise and that to require decision-makers to correctly contextualise their decision among the guaranteed rights that are relevant, and to attempt to balance them against the competing state interest, would unnecessarily complicate and encumber administrative decision-making at all levels of government with no corresponding benefit to the affirmation, protection and promotion of human rights.

[36] Acting in breach of the Bill of Rights Act has, it is said, legal consequences and that adverse rulings from the courts on questions of law can be expected to result in adjustments in future behaviour.

[37] Given that the aspirations in the Bill of Rights Act were fulfilled by elevating human rights above the status of relevant considerations and making them enforceable legal rights, the focus, it was said, must be upon substantive assessments from the courts on rights compliance, rather than on the creation of procedural obligations.

[38] The path that New Zealand law should take, it was said, is illuminated by relevant overseas experience, particularly in decisions from the United Kingdom.

[39] The Crown agrees that tikanga values or principles may be relevant to a s 5 analysis in some cases, depending on the issue, if analysis identifies its relevance and if information about the tikanga consideration is obtained from an appropriately authoritative source. However, because tikanga was referenced for the first time in the applicants' written submissions on this preliminary question, and because no particular tikanga value or principle has been identified, it is not, the Crown says, a matter that can be advanced through the consideration of this preliminary question.

Consideration of the issue in New Zealand

[40] The Supreme Court in *Moncrief-Spittle v Regional Facilities Auckland Ltd*, considered the directly related point as to whether, in a judicial review proceeding, the application of the Bill of Rights Act imposes a substantive constraint on a decision-maker or whether it is simply a procedural obligation in the sense of being a mandatory relevant consideration to be taken into account.[21] In the following passages, the Court expressed the view that the rights in the Bill of Rights Act are not just mandatory relevant considerations as had been suggested in that case. Rather, they impose substantive constraints on decision-makers; the assessment of which is to be undertaken by the Court:[22]

> [81] We have found that RFAL was required to act consistently with the Bill of Rights. The first issue arising from the parties' submissions is whether, in a judicial review proceeding, the application of the Bill of Rights imposes a substantive constraint on the decision-maker or simply a procedural obligation. This issue has been the subject of debate in academic commentary.
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> [82] This Court's decision in *Zaoui v Attorney-General (No 2)* supports the view that the correct approach is to treat the right as constraining the outcome the decision-maker may reach, rather than simply a mandatory relevant consideration. That case, unlike the present, involved a right which the Court considered was not subject to the limits in s 5 but, for present purposes, we do not see that difference as material. There is also support for this approach in the United Kingdom decisions in a similar context. The Supreme Court of Canada in *Doré v Barreau du Québec* adopted an approach which, to some extent at least, merges consideration of both substantive and procedural issues.

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21 *Moncrief-Spittle*, above n 4.

22 At [81]–[84] citing *Zaoui v Attorney-General (No. 2)* [2005] NZSC 38, [2006] 1 NZLR 289 at [93]. *Zaoui* was concerned with whether the principle of non-refoulment was to be taken into account when a minister decided to ask the Governor-General to order deportation of a refugee found to be a threat to national security. The Court in that case referred to the need for the minister to be satisfied in a substantive way that the person would be in danger of being subjected to torture or cruel, inhumane or degrading treatment or punishment if deported.

> [83] The logic of an approach which treats the right to freedom of expression in the Bill of Rights as a substantive constraint on a decision-maker is hard to challenge, given both the constitutional status of the Bill of Rights and the fact the effect of s 3(b) is that the Act "applies" to RFAL. We consider the result of doing so in this case is that Mr Macrae had to turn his mind to and engage with the question of whether it was reasonable to limit the free speech interest in play by cancelling the event, albeit what that required in that regard must reflect the context in which he was operating.
>
> [84] It also logically follows that if the decision is challenged by way of judicial review, the Court must be satisfied that the decision was a reasonable limit. The extent of any reasonable limits is a legal question. The correct application of that legal standard in any particular case will involve mixed questions of fact and law. In a case such as this one, we would expect to see evidence that Mr Macrae had identified and weighed the right, and gave consideration to whether the reasons to cancel (the security and safety concerns) were such as to outweigh the right. That will assist the court in its task.
>
> [footnotes omitted]

[41] Paragraph [84] of the Court's decision ended in a footnote in which the Court said that the approach to be taken by the courts in a situation where the decision-maker does not engage with the effect of the Bill of Rights Act would be left for a future occasion.

[42] The point left open by the Supreme Court for a future occasion has been addressed by Cooke J in *Wallace v Chief Executive of the Department of Corrections*.[23] *Wallace* involved a challenge to a decision to transfer prisoners from Arohata Prison to Christchurch Women's Prison or to Auckland Regional Women's Corrections Facility. One issue was whether the decisions involved unlawful discrimination on the basis of gender in contravention of s 19 of the Bill of Rights Act.

[43] The Court found that the decision did limit that right and that the limitation was not demonstrably justified. It found that, in addition, the decision-maker needed to have taken into account and to have addressed – but did not – the question of limiting a fundamental right. Cooke J expressed the position in the following way:

> [65] The way in which fundamental rights in the NZBORA constrain discretionary decision-making has recently been confirmed by the Supreme Court in *Moncrief-Spittle v Regional Facilities Auckland Ltd*. When a right is being limited by such a decision:

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23 *Wallace*, above n 5.

(a) The decision-maker must turn their mind to this, and engage with the question whether the limitation involves a reasonable limit on that right.

(b) The outcome that the decision-maker may reach is also constrained. If the Court concludes that the decision is an unjustified limitation on the right it is unlawful.

…

[110] As the Supreme Court confirmed in *Moncrief-Spittle*, discretionary decision-making which limits fundamental rights in the NZBORA requires the decision-maker to take into account the limitation and whether it is justified. I have already addressed whether the decisions did so limit the right provided for in s 19, and concluded that it did for the three reasons identified. I have also concluded that that limitation was not demonstrably justified. But it is also necessary for the decision-maker [to] take into account, and address the question of limiting a fundamental right.

[44] Cooke J found that no such consideration was given and that there was no reference in the relevant documents to any appreciation that the decision had an apparently discriminatory effect.[24]

[45] The consideration that needed to be given to the potential limitation of a fundamental right needed, it was said, to be a matter of substance, rather than a matter of form. As Cooke J said:[25]

> The fact that a decision-maker does not expressly refer to the particular section of the NZBORA is not what is most important. What is necessary was a consideration recognising, as a matter of substance, that the decisions had discriminatory effect on women prisoners, and addressing whether that was justified. That did not occur, and I uphold this ground of review.

[46] Relief in *Wallace* is to be the subject of separate consideration and so whether that procedural finding alone would warrant relief in the circumstances of that case is yet to be determined. However, Cooke J's view that a decision-maker must turn their mind to and engage with the question of rights limitation, with which I concur, is directly on point.

[47] The topic came before Cooke J again in *New Health New Zealand Ltd v The Minister for COVID-19 Response*.[26] In that case, Cooke J repeated the points made in *Wallace* set out in [43] above, that where a discretionary decision restricts a

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24 At [111].
25 At [111].
26 *New Health v Minister for COVID-19* (HC), above n 5.

fundamental right in the Bill of Rights Act, the decision-maker must address that restriction and consider whether it is demonstrably justified and the Court must, *in addition*, be satisfied that any restriction is so justified. Cooke J referred to the first of the two requirements as being subjective and to the second as being objective.[27]

[48] In many ways, this formulation of the dual components of the Bill of Rights Act rights assessment confirms an understanding that has always been implicit. For example, in *Moonen v Film and Literature Board of Review*, a Full Bench of the Court of Appeal, in finding that the Board of Review had failed to have proper regard to ss 5 and 6 of the Bill of Rights Act, said:[28]

> Furthermore, in applying the concepts of promotion and support to the publications in question, s 5 of the Bill of Rights Act requires that such application favours freedom of expression over objectionability if the case is marginal. It is not clear how the board approached the construction and application of the concepts of promotion and support in the present case. There is, however, a likelihood, by reason of the board's reference to, and its being bound by the decision of, the Full Court in *News Media*, that the Board erroneously regarded Bill of Rights Act considerations as having no part to play. For these reasons the board should reconsider the book on the correct basis as outlined in the next paragraph.

[49] Accordingly, rather than making a substantive rights-based finding, the Court was critical of the board for not having considered the Bill of Rights Act and sent it back there for that to occur.[29]

[50] Similarly, in *Schubert v Wanganui District Council*, Clifford J found that, in making a bylaw prohibiting the display of gang insignia at certain public places, the Council had failed in its decision to consider the significance of the right to freedom of expression.[30] The fact that a right was engaged required, the Court found, the Council to consider it and to express its conclusions in the first instance.

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27 At [71] and [82].

28 *Moonen v Film and Literature Board of Review* [2000] 2 NZLR 9 at [28]; The Court was referring here to *News Media Ltd v Film and Literature Board of Review* (1997) 4 HRNZ 410, which the Court overruled in this decision.

29 At [40].

30 *Schubert v Wanganui District Council* [2011] NZAR 233 at [160], [162] and [171].

[51] The same point was made by Asher J in *TVNZ v West*.[31] In that case, the Broadcasting Standards Authority had decided that two broadcasts breached broadcasting standards under the Broadcasting Act 1989. In doing so, in each case, the authority had acknowledged that upholding the complaints would limit TVNZ's right to freedom of expression under s 14 of the Bill of Rights Act but found that to uphold the complaint placed a justified and reasonable limit on that right. However, in both cases, its reasons were given only very briefly. Asher J said:

> [86] The application of the provisions of the NZBORA is a mandatory relevant consideration, and must be taken into account by the Authority if it is considering upholding a complaint. While the Courts in earlier decisions were prepared to accept that the consideration was implicit, it is now clear that the consideration, and in particular the s 5 NZBORA analysis, should be articulated in the Authority's decision.

[52] While, it was said, the degree of formalism required of a decision-making body will vary according to the nature of the body and of the decision in question, a pure "boiler-plate" consideration which records only, without reasons, that weight has been given to the provisions of the Bill of Rights Act is unlikely to be adequate.[32]

[53] The importance of decision-makers undertaking, themselves, a rights assessment is emphasised by the authors of *The New Zealand Bill of Rights Act: A Commentary*.[33] They support the promotion of a "culture of justification"; a phrase used by South African constitutional law professor, the late Etienne Mureink.[34] The authors explain what is meant by a "culture of justification":[35]

> A "culture of justification" means a culture in which citizens are entitled to call upon the provision of reasons for measures that affect their rights, are entitled to challenge those reasons, and in a sense more importantly, are entitled to expect that in advance of impairment thought will have been given to the reasonableness of a particular limit. The culture of justification contributes to principles of good government, such as transparency, accountability, rational public policy development, attention to differing interests, and so on.

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31 *Television New Zealand v West* [2011] 3 NZLR 825 (*TVNZ v West*).

32 At [97], [98], [103] and [104].

33 Andrew Butler and Petra Butler *The New Zealand Bill of Rights Act: A Commentary* (2nd ed, LexisNexis, Wellington, 2015) at 181.

34 E Mureinik *"Emerging from Emergency: Human Rights in South Africa"* (1994) 92 Mich L Rev 1977.

35 Butler and Butler, above n 33, at 181.

[54] With those principles in mind, the authors make the point that the use of a two-stage process by decision-makers (first, delineating the scope and purpose of the right, and secondly, the s 5 reasonableness inquiry) will lead to a position, when rights are implicated, where interferences are deliberate, measured and closely scrutinised before the interference occurs.[36]

The position in the United Kingdom

[55] As mentioned in [38] above, the Crown says that the path that New Zealand law should take should be illuminated by that taken in the United Kingdom, where procedural error as a judicial review ground when the Human Rights Act 1998 (UK) is engaged has been rejected.

[56] In the leading United Kingdom decision of *R (SB) v Governors of Denbigh High School*, the House of Lords held that the ultimate question for the courts when supervising the discharge of the obligation in s 6 of the UK Human Rights Act[37] was not whether the public authority used a defective reasoning process but whether the actions of the public authority were incompatible in a substantive way with rights guaranteed under the European Convention on Human Rights (the Convention).[38] In *Denbigh High School*, the school's board of governors had refused to allow the plaintiff, a Muslim student, to wear a jilbab rather than a prescribed school uniform that had been approved by local Muslim religious leaders. The student claimed the decision to be an unjustified infringement upon her freedom to manifest her religious beliefs.

[57] The Court of Appeal had found, unanimously, that the school's decision should be set aside because of the way in which the school approached the decision-making process.[39] Brooke LJ was of the view that the high school board needed to have in place a decision-making structure that addressed six quite complex questions. The

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36 At 181.

37 The Human Rights Act 1998 (UK) provides that (subject to override by primary legislation) it is unlawful for a public authority to act in a way which is incompatible with the rights and freedoms protected by the Convention for the Protection of Human Rights and Fundamental Freedoms 2889 UNTS 221 (opened for signature 4 November 1950, entered into force 3 September 1953).

38 *R (SB) v Governors of Denbigh High School* [2006] UKHL 15, [2007] 1 AC 100 [*Denbigh High School* (UKHL) at [29]–[31]; European Convention on Human Rights, above n 37.

39 *R (SB) v Governors of Denbigh High School* [2005] EWCA Civ 199, [2005] 1 WLR 3372.

questions would have involved the board identifying Convention rights, determining potential violation and justification, determining whether interference was prescribed by law and whether it had a legitimate aim, balancing considerations, and considering whether interference was justified under relevant Convention articles.[40] In addition, a range of factual considerations and questions were identified which, it was said, the Board would "no doubt need to consider".[41]

[58] The House of Lords did not accept that the quality of the school's decision-making process could be determinative and found, in a substantive sense, that, while the decision was an infringement of the plaintiff's right to be free to manifest her religious beliefs, the infringement was justified. Lord Bingham was persuaded that the Court of Appeal's approach was mistaken for three main reasons.[42] The first was that the focus of the European Court of Human Rights had never been on whether a challenged decision or action was the product of a defective decision-making process but on whether an applicant's Convention rights had been violated substantively.[43]

[59] Secondly, it was said that the Court's approach to an issue of proportionality under the Convention must go beyond that traditionally adopted for a judicial review setting. The Courts must, in proceedings like this, themselves make value judgments.[44]

[60] Thirdly, it was thought that the Court of Appeal's approach would introduce "a new formalism" and be a "recipe for judicialisation on an unprecedented scale".[45]

[61] Lord Bingham's reasons demonstrate some real differences between the position in the United Kingdom, through *Denbigh High School*, and our own position. First, we do not look to the approach of the Strasbourg Court, or to a similar body, in considering rights under the Bill of Rights Act. Secondly, while aspects of the

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40 At [75] and [78].

41 At [81].

42 *Denbigh High School* (UKHL), above n 38, at [29]. It was said that the purpose of the Human Rights Act (UK) was not to enlarge the rights or remedies of those in the United Kingdom whose Convention rights had been violated but to enable those rights and remedies to be asserted and enforced in domestic courts.

43 At 115–116. The Human Rights Act (UK) was seen to be a measure which enabled those Convention rights to be asserted and enforced in domestic courts.

44 At [30].

45 At [31].

principles we employ in judicial review cases can adopt a proportionality assessment, we do not use the proportionality approach taken in judicial review in the United Kingdom. Thirdly, the extent of the reasoning on the part of the decision-maker that was thought to be necessary by the Court of Appeal in *Denbigh High School* goes beyond the level of engagement with rights limitations on the part of a decision-maker that is proposed here.

[62] In any event, the House of Lords returned to the topic in *Belfast City Council v Miss Behavin' Ltd*.[46] In that case, the applicant sought, unsuccessfully, a licence to operate a sex shop from its premises and sought judicial review on the basis of an alleged procedural failure on the council's part to consider properly its right to freedom of expression.

[63] Lord Hoffman rejected the Court of Appeal's finding that the council had not demonstrated a consciousness of the Convention rights that were engaged. He said:

> [13] This approach seems to me not only contrary to the reasoning in the recent decision of this House in *R (SB) v Governors of Denbigh High School* [2007] 1 AC 100 but quite impractical. What was the council supposed to have said? "We have thought very seriously about your Convention rights but we think that the appropriate number of sex shops in the locality is nil"? Or: "Taking into account article 10 and article 1 of the First Protocol and doing the best we can, we think that the appropriate number is nil"? Would it have been sufficient to say that they had taken Convention rights into account, or would they have had to specify the right ones? A construction of the 1998 Act which requires ordinary citizens in local government to produce such formulaic incantations would make it ridiculous. Either the refusal infringed the applicant's Convention rights or it did not. If it did, no display of human rights learning by the Belfast City Council would have made the decision lawful. If it did not, it would not matter if the councillors had never heard of article 10 or the First Protocol.

[64] It would seem that the United Kingdom approach comes close to eliminating process-based considerations from an assessment by the courts of decisions which engage fundamental rights. However, it does not do so entirely. In *Denbigh High School*, Lord Hoffman said:[47]

> The most that can be said is that the way in which the school approached the problem may help to persuade a Judge that its answer fell within the area of judgment accorded to it by the law.

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46 *Belfast City Council v Miss Behavin' Ltd* [2007] UKHL 19, [2007] 1 WLR 1420.

47 *Denbigh High School* (UKHL), above n 38, at 68.

[65] Along similar lines, Lord Rodger in *Belfast City Council* said:[48]

> Of course, where the public authority has carefully weighed the various competing considerations and concluded that interference with a Convention right is justified, a court will attribute due weight to that conclusion in deciding whether the action in question was proportionate and lawful.

[66] The principles in *Denbigh High School* and *Belfast City Council* have not been adjusted in subsequent authorities in the United Kingdom[49] and so it can be said that the position in the United Kingdom is that, while there will not be an actionable flaw in the event that a decision-maker does not address a potential restriction on a fundamental right and consider whether it is demonstrably justified, it will be a relevant consideration for the reviewing court. And a challenger's task will be harder if a decision-maker has paid attention to relevant human rights considerations.

[67] This was a point that Asher J picked up on in 2011 in *TVNZ v West*.[50] Having referred to the point made by Lord Bingham in *Denbigh High School* that a prescriptive obligation to address UK Human Rights Act issues on decision-makers would be unwarranted as introducing "a new formalism" (a point referred to in [60] above), Asher J went on to discuss the level of the "analytical requirements" on a decision-making body.

[68] He saw the Broadcasting Standards Authority, whose decisions were before him in that case, as being a more legally sophisticated body than the school board in *Denbigh High School*. While, he said, there "must be caution in imposing too formalistic and detailed analytical requirements on such a body" and that "to excessively judicialise the process of the authority" would be unwise, there must be an obligation on the Authority to "clearly and transparently explain the reasons for its decision" – including on rights compliance under the Bill of Rights Act.[51]

[69] In this way, Asher J did not see *Denbigh High School*, in the New Zealand context, as adjusting the need for a decision-making body to explain the consideration it has given to ensuring that its actions do not disproportionately limit protected rights.

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48 *Belfast City Council v Miss Behavin' Ltd*, above n 46, at 26.

49 See, as a further example, *In the Matter of B (a Child)*, [2013] UKSC 33, [2013] 1WLR 1911 at [84] (per Lord Neuberger).

50 *TVNZ v West*, above n 31.

51 At [98].

Rather, he used it as a basis for making the point that different levels of explanation will be required of different bodies, depending on the nature of the decision-making body, its workload, and the importance of the type of right that is being restrained.[52]

[70] In her 2014 article *Process and Outcome in Judicial Review of Public Authority Compatibility with Human Rights: A Comparative Perspective*, Professor Claudia Geiringer considered – in a critique of the United Kingdom approach that came out of *Denbigh High School* – "a set of competing policy concerns that may arise from the marginalisation of process-based inquiry."[53] Professor Geiringer highlighted four primary policy concerns.[54] The first is that a judicial focus on outcomes rather than process may do little to advance the project of developing a 'human rights culture' in government.

[71] The second concern is that an exclusive focus on outcomes sits uncomfortably with the expectation that the 'constitutionalisation' of administrative law should foster a 'culture of justification' in which administrative decision-makers must give (good) reasons for their decisions.

[72] The third concern relates to the desirability of equipping courts with flexibility to manage their delicate institutional relationship with the elected branches of government. It is noted that the *Denbigh High School* approach enables the courts to give credit for a good process by according weight to the judgements of a public decision-maker. But this does not provide the assistance a court needs where the process followed was poor but where there are nevertheless strong institutional reasons to accord deference to a decision-maker.

[73] And the fourth concern relates to the bifurcated relationship between human rights law and administrative law. As Professor Geiringer said, human rights law and administrative law should not necessarily part company in terms of the principles to be applied by the courts.

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52 At [103].

53 Professor Claudia Geiringer "*Process and Outcome in Judicial Review of Public Authority Compatibility with Human Rights: A Comparative Perspective*" in H Wilberg and M Elliott (eds) *The Scope and Intensity of Substantive Review: Traversing Taggart's Rainbow* (Hart Publishing, Oxford, 2015) at 334.

54 At 334–338.

[74] There are, as I see it, sound reasons for us not to push the pendulum away from a process obligation to the same extent as has been the case in the United Kingdom.

The position in Canada

[75] The Crown has referred to two decisions of the Supreme Court of Canada in support of the proposition that the courts there will make their own analysis of compliance with the Canadian Charter of Rights and Freedoms (the Charter), much as the House of Lords in *Denbigh High School* would have done.

[76] I do not know that the decisions can be said to support a proposition entirely in those terms. In *Doré v Barreau du Québec* the Court was considering a decision of the Lawyers Disciplinary Council relating to an intemperate letter sent by Mr Doré (a barrister) to a judge before whom he had appeared.[55] The Court asked whether it should apply a reasonableness standard of the type that would be applied in a judicial review proceeding, or whether it should apply a 'correctness standard' using the proportionality assessment devised in *R v Oakes*.[56]

[77] The Court essentially applied a reasonableness standard. It did so by reference to the type of assessment that an administrative decision-maker should undertake in the first place. Abella J said that the decision-maker needed to balance Charter values with the relevant statutory objectives and that it should then ask how the Charter value at issue will best be protected in view of the statutory objectives. That, it was said, is where the role of judicial review for reasonableness aligns with the proportionality approach the Court would then undertake.[57]

[78] The Judge said:[58]

> Though this judicial review is conducted within the administrative framework, there is nonetheless conceptual harmony between a reasonableness review and the *Oakes* framework, since both contemplate giving a "margin of appreciation", or deference, to administrative and legislative bodies in balancing Charter values against broader objectives.

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55 *Doré v Barreau du Québec* 2012 SCC 12, [2012] 1 SCR 395.
56 At [59], citing *R v Oakes* [1986] 1 SCR 103.
57 At [55] and [56].
58 At [57].

[79] In other words, the Court must undertake the ultimate assessment of a Charter issue in a substantive sense but it will assess, also, the decision-maker's Charter assessment for reasonableness. That a decision-maker should give reasons in the first place is implicit in the Court's approach.

[80] *Doré* related to adjudicated administrative decisions.[59] However, the Canadian Supreme Court's subsequent decision in *Loyola High School v Québec (Attorney-General)* demonstrates that the same principles will apply to a conventional non-adjudicated administrative decision.[60] That case concerned a decision by a minister to withhold approval for a private Catholic school to provide a Catholic-based programme on ethics and religious culture rather than the secularised programme that was to be used under the Canadian Government's education policy at the time.

[81] Abella J said that the case "squarely engages the framework set out in *Doré*".[61] While in that case the minister's decision did not demonstrate that he had considered the Charter, and while there is no reference to there having been a procedural error as a result, it would seem that a challenge on that basis was not made.

[82] Accordingly, the position in Canada would not appear to be inconsistent with the position in New Zealand in which a discretionary decision-maker is to address any restriction on a fundamental right under the Bill of Rights Act and in which, in addition, the Court should be satisfied that any restriction is so justified.

[83] The point that arises in this case is whether the first of those requirements, alone, is essentially a mandatory relevant consideration such that it can give rise to relief in its own right.

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59 At [3].
60 *Loyola High School v Québec (Attorney-General)* 2015 SCC 12, [2015] 1 SCR 613.
61 At [35].

Discussion

Was the Director-General required to undertake a rights assessment?

[84] It seems sufficiently clear on the basis of New Zealand authorities that, when discretionary decisions on the part of those captured by s 3 of the Bill of Rights Act might restrict a right protected under the Act:

(a) the decision-maker must address that restriction and consider whether it is demonstrably justified under s 5; and

(b) the Court must be satisfied that any such restriction is so justified.[62]

[85] It is a mixed process and outcome approach. It is an approach that is in my view adopted in the New Zealand authorities referred to. And, while the United Kingdom authorities do not impose the first of the two requirements referred to above on a mandatory basis, they have indicated at least a preference for a decision-maker to have addressed rights issues to form the basis for consideration by the Court. To the extent that the approach in New Zealand, as addressed in this decision, differs from the position in the United Kingdom, the points that I go on to discuss provide, as I see it, a sound basis for maintaining the process-related half of the equation.

[86] It follows as a matter of course that a finding in favour of a claimant on either of the two requirements mentioned in [84] above would enable the Court to go on and consider the question of relief. In that sense, it can be said that the first of the two requirements is a mandatory relevant consideration.

[87] Having said that, the two requirements will more often than not go hand in hand and so they should be pleaded and considered by the Court alongside each other. Typically, the Court will move from looking at the decision-maker's assessment of the rights restriction to making its own assessment. In this sense, even in the face of the first of the two requirements being seen as a mandatory relevant consideration, the Court will reach its own, independent, view on the issue. But, as was said in *Denbigh*

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[62] As explained in *Wallace*, above n 5 at [65] and in *New Health v Minister for COVID-19* (HC), above n 5 at [82].

High School, the decision-maker will be assisted by, and will attribute due weight to, the decision-maker's views in the course of its own assessment.

[88] What if the allegation pleaded is the first of the two requirements alone: that there has been a failure on the part of a decision-maker to consider whether a fundamental right has been engaged, whether it has been restricted and, if so, whether the restriction is justified? Is that, alone, an actionable flaw that could give rise to relief?

[89] In this case, the point falls to be addressed because it has been isolated as a separate question of law. In many cases, even if it is pleaded as an isolated question, both of the requirements referred to in [84] will need to be addressed by the Court in any event. I say that because, in the event that there was a finding in favour of a claimant on the first of the two requirements, the Court will need to consider the exercise of its discretion to grant relief. One of the factors for a Court in exercising that discretion is that relief must be of a possible practical value. A Court will not be likely to exercise its coercive powers to no purpose.[63] And so, if, despite a procedural error, the substantive Bill of Rights Act outcome is sufficiently clear – one way or another – the Court may simply say so. There may be no point in those circumstances in sending it back to be reconsidered.

[90] On the other hand, there may be circumstances in which the Court would prefer to have the decision-maker consider, or reconsider, rights compliance in the first instance. *TVNZ v West* is an example of that.[64]

[91] Whichever pathway is chosen, the Court will, and should, be assisted by the decision-maker's rights assessment in the first place. In *Hansen v R*, Tipping J looked carefully at the way in which a court in considering a Bill of Rights Act issue will have regard to the decision-maker's rights assessment.[65] He said that, in evaluating whether a rights restriction is demonstrably justified under s 5, the courts do "perform a review function rather than one of simply substituting their own view".[66] Using the metaphor

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63 *Turner v Pickering* [1976] 1 NZLR 129 at [141]–[142].
64 *TVNZ v West*, above n 31 at [110].
65 *Hansen v R* [2007] NZSC 7, [2007] NZLR 1.
66 At [116] and [124].

of a shooting target, Tipping J expressed the Court's consideration of a decision-maker's rights assessment in the following way:

> [119] This general approach, with which I respectfully agree, can be figuratively described by reference to a shooting target. The Court's view may be that, in order to qualify, the limitation must fall within the bull's-eye. Parliament's appraisal of the matter has the answer lying outside the bull's-eye but still on the target. The size of the target beyond the bull's-eye will depend on the subject matter. The margin of judgment or discretion left to Parliament represents that area of the target outside the bull's-eye. Parliament's appraisal must not, of course, miss the target altogether. If that is so Parliament has exceeded its area of discretion or judgment. Resort to this metaphor may be necessary several times during the course of the proportionality inquiry; indeed the size of the target may differ at different stages of the inquiry. The court's job is to delineate the size of the target and then say whether Parliament's measure hits the target or misses it.

[92] It is in my view an essential component of the Bill of Rights Act scheme that a shot must be taken at the target by the decision-maker in the first instance before the Court comes to see where it lands.

[93] The Supreme Court in *Moncrief-Spittle* appears to have expressed a similar view in saying that "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."[67]

[94] The Crown has argued that an approach of this sort should not be supported on four grounds. The first two of them can be considered together. It is said that limiting Bill of Rights Act obligations to a substantive assessment on the part of the Court alone would avoid the overjudicialisation and the overburdening of the administrative decision-making process. The point is made that a rights assessment will often require complex analysis as cases before the courts have demonstrated. Not all decision-makers are, it is said, imbued with or have access to the kind of legal knowledge that would be needed to make a proper attempt at determining them. In many cases, it is said, that it is not even clear that a human right has been engaged. And, it is said, regardless of how well a decision-maker goes about giving Bill of Rights Act rights proper consideration, the Court will be required to undertake the exercise itself in any event.

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[67] *Moncrief-Spittle*, above n 4, at [86].

[95] As Cooke J said in *Wallace v Chief Executive of the Department of Corrections*, the Bill of Rights Act consideration by a decision-maker must be a matter of substance, rather than of form. The fact that a decision-maker does not refer expressly to a particular section of the Bill of Rights Act is not the most important thing.[68] It is not suggested that a prescriptive analysis of the type required by the Court of Appeal in the *Denbigh High School* case is needed.[69] An obligation to consider rights and freedoms and whether, if they might be impinged, the limits can be demonstrably justified, need not be an undue burden. The extent of the consideration to be given must be sensitive to the range of decision-making contexts in which human rights might apply. Relevant factors will include:

(a) the nature of the decision and the nature of the rights involved;

(b) the number of people whose rights are affected and the precedent that the decision will create for others;

(c) the nature and expertise of the decision-maker;

(d) the relevance of human rights issues to the purpose and functions of the decision-maker;

(e) the time frame in which the decision needs to be made;

(f) the resources available to the decision-maker; and

(g) the extent to which reasons could generally be expected to be given by a decision-maker of the type in question..

[96] For example, one might not expect a reasoned analysis to be given by the public librarian who requires a library user wearing an arguably offensive T-shirt to leave the library and so limits their freedom of expression. But one would expect the librarian to turn his or her mind to the issue and to explain why the T-shirt crosses the line, even if they do not use rights-based language to do so. At a mid-point, one would expect a minister or a person occupying a position of responsibility within a government department who makes a decision that might impinge upon the freedom of association

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68 *Wallace*, above n 5, at [111].

69 As described in paragraph [57] above.

of members of an organised group to demonstrate in a handful of sentences that he or she has considered the nature of the right involved, the extent to which it is infringed by the restriction and the reasons for believing that the restriction is justified.

[97] Towards the upper end of the spectrum, one would expect a tribunal imposing a rights restriction to identify the right, its infringement and its justification for the infringement in a more complete way.

[98] The obligation should not be seen as a burden. It should be perceived as a positive and integral part of a society in which fundamental rights are defined and cannot be limited arbitrarily.

[99] I mention here the suggestions made by Ms Hansen as to the type of analyses that are required under s 5. She referred to the need to consider contemporary societal values including, in this case, the likes of bodily integrity, informed consent, democratic principles, efficacy and safety of fluoridation, the precautionary principle and alternative measures. She went on to say that, since the decision of the Supreme Court in *Ellis v R*, those values should include tikanga principles.[70] As mentioned earlier, the Crown does agree that tikanga values or principles may be relevant to a s 5 analysis in some cases. However, as the Crown has said, in order to assess the value that an aspect of tikanga might bring to a s 5 analysis, the tikanga value or principle would need to be identified and there would need to be some explanation of the difference that it would make to the s 5 assessment. That has not been done here. The point was raised but not developed. Accordingly, the framework that would be necessary for the Court to consider the point is not present.

[100] The third ground advanced by the Crown in support of its position in this case is that a substantive-only obligation is simple and can be applied universally to all decision-makers. However, the broad array of rights, limits and decision-makers involved are such that a one-size-fits-all approach would in itself be unworkable.

[101] The fourth ground advanced by the Crown is that a substantive-only obligation would be consistent with administrative law in New Zealand in the sense that

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70 *Ellis v R* [2022] NZSC 14.

inconsistency with the Bill of Rights Act will render a decision ultra vires, whereas, otherwise, public law grounds are more procedural in nature.

[102] Certainly, a Bill of Rights Act assessment is more expansive than will be the case in a non-Bill of Rights Act judicial review proceeding. That must be so because, at the end of the day, while procedural and legal flaws must be examined by the Court, the courts are the final guardians of fundamental rights in a substantive way. But the decision-maker's involvement in the rights assessment is part and parcel of that. It is not enough to excuse decision-makers from the process and to leave it to those few cases in which a challenge is actually brought to the Court.[71]

[103] While the Court must make the ultimate decision under the Bill of Rights Act, an essential component of New Zealand's Bill of Rights Act obligations is for decision-makers to use rights-focused lenses when making decisions and to demonstrate that the lenses have been attached. There must be an expectation on the part of New Zealanders that, when rights are engaged, any interferences are, to use the words of the authors of Butler and Butler, deliberate, measured and properly scrutinised before the interference occurs.[72]

Did the Director-General undertake a rights assessment?

[104] At one level, there is little discussion to be had under this head. In the letter written on behalf of the Director-General on 29 May 2023, and referred to in [14] above, it was agreed that "there is no explicit reference to NZBORA in the decision-making documents". The letter went on to say that it was not agreed, however, that the Bill of Rights Act needed to be considered.

[105] Similarly, in the affidavit of Dr Old, the Deputy Director-General of the Public Health Agency, filed in this proceeding, it was said that:[73]

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71 Given in particular the cost barrier involved in litigation; see, for example, Law Commission *Delivering Justice for All* (Law Commission, Report 85, March 2004) at 36.

72 Butler and Butler, above n 33 at 181.

73 At [12] and [22] of the affidavit.

(a) In 2018, the Supreme Court determined that fluoridation was a demonstrably justified limit on the right to refuse medical treatment – a finding made with reference to relevant scientific evidence; and

(b) The issue was not revisited in making the decision because nothing of substance had changed in the intervening period.

[106] However, in the Crown's submissions, the point was put on the basis that the Supreme Court in *New Health v South Taranaki District Council* had ruled that fluoridation was a demonstrably justified limit on the right to refuse medical treatment if there was credible scientific evidence that it was a safe and effective treatment to prevent or inhibit tooth decay in the area served by the water supply in question. It was said that in making the decision the Director-General had correctly turned his mind to that science, in respect of which there had been no material change. It was said that Dr Old's evidence showed that the Director-General had before him evidence that addressed the number of people affected and the relative health inequities in terms of poor dental outcomes for Māori and Pasifika children who are distributed throughout the population and updated information on scientific support for water fluoridation. However:

(a) it is not quite right to say that the Supreme Court found that there was a demonstrably justified limit if there was credible scientific evidence about safety and effectiveness in the relevant area; and

(b) while there is evidence that the Director-General turned his mind to the science, there is no evidence that he turned his mind to the relevant terms of the Bill of Rights Act.

[107] I look at each point in turn. On the first point, only O'Regan and Ellen France JJ in *New Health v South Taranaki District Council* went so far as to consider the application of s 5. As discussed in [18]–[21], Elias CJ and William Young and Glazebrook JJ did not consider that issue. Elias CJ said that the Court did not

have available to it materials that would enable it to make that assessment.[74] Glazebrook J said that the application of s 5 would depend upon local conditions.[75]

[108] O'Regan and Ellen France JJ did agree with the Court of Appeal that there was evidence to establish that fluoridation of drinking water is one of a range of reasonable alternatives to address the problem of dental decay[76] but they did not put it on the basis that *if* there was credible scientific evidence that it was safe and effective in the relevant area, then the s 5 test would be met. The Director-General needs to turn his or her mind to the Bill of Rights Act considerations on the basis of local conditions in each area in which s 116E directions might be given. There is no evidence that that occurred here.

[109] While, as the Crown says, the Director-General did turn his mind to relevant scientific evidence, he did so for the purpose of meeting the requirements of s 116E of the Health Act. Considering scientific evidence on the effectiveness of adding fluoride to drinking water under s 116E(3), for example, is not the same as the judgement that is required under s 5 of the Bill of Rights Act in considering whether a restriction is demonstrably justified in a free and democratic society. There is in my view no getting away from the fact that the Director-General did not turn his mind to Bill of Rights Act considerations when making the decision.

Relief?

[110] The question of relief in the event that, as is the case here, the second ground of review is made out was not addressed by either party.

[111] The preliminary issue that was referred to the Court was "the second ground of review". For the reasons given, the second ground of review succeeds.

[112] But, as in all judicial review proceedings, whether the Court should exercise its discretion and grant relief is to be assessed separately. The prayer for relief to which the second cause of action relates is "an order setting aside each direction". In

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74 *New Health v South Taranaki District Council*, above n 1 at [223].
75 At [176].
76 At [134] and [143].

the memorandum of counsel which accompanied the application for determination of the preliminary issue of law, it was said that "if the applicant is correct [on the allegations in the second ground] the directions are invalid and should be set aside". But an order of that sort does not follow as a matter of course. As mentioned in [87] above, the requirement for a decision-maker to address Bill of Rights Act considerations and the Court's own assessment of those considerations will more often than not go hand in hand and be considered by the Court alongside each other. Accordingly, when it comes to considering relief, a balanced assessment may be made having regard to the nature and extent of both procedural and substantive shortcomings. Therefore, in many ways, it is artificial to separate a procedural and a substantive assessment.

[113] Having said that, in the face of a finding of the type that has been made here – that the Bill of Rights Act assessment is a mandatory relevant consideration – there is certainly the ability for a substantive remedy to be given. However, whether or not to grant a remedy, particularly in the case of a procedural flaw, requires the Court to balance a number of factors. They include an assessment of the gravity of the error, the degree of prejudice for an applicant, the potential for significant prejudice to public administration, prejudice to third parties, events subsequent and, as mentioned in [89], the need for relief to be of possible practical value.

[114] I make no comment on whether factors of this sort are relevant here, but I identify them to make the point there are factors that need to be considered before, in the light of the findings that have been made on the second cause of action, an order could be made setting aside the decision or sending it back for consideration.

[115] Accordingly, I leave it to the parties at this stage to consider whether or not agreement on outcome could be reached under r 10.17 of the High Court Rules 2016. Otherwise, a brief hearing on relief can be convened. If a hearing is required, a directions teleconference can be convened to fix a timetable.

Result

[116] The answer to the preliminary legal question in this proceeding is: yes, the Director-General was required to turn his mind to whether the directions given to the

14 local authorities under s 116E of the Health Act were in each case a reasonable limit on the right to refuse medical treatment, he needed to be satisfied that they were and, if satisfied, he needed to say why that was so. Accordingly, the second cause of action in the proceeding is made out.

[117] Costs were not addressed in the submissions for either party. It has been said that, given that the determination of a preliminary question forms just one part of the suite of considerations in a proceeding as a whole, it would be inefficient to deal with costs following the determination of a preliminary issue.[77] That may well be an appropriate principle to apply here. I leave it for the parties to consider. But costs could not in any event be considered until the steps referred to in [115] above are complete. I ask that, when they are ready to do so, the parties file a joint memorandum on their preferred approach to dealing with issues of relief and costs.

Radich J

Solicitors:
Maxwell Law, Wellington for Plaintiff
Crown Law, Wellington for First and Second Defendants

[77] *Pascoe v Minister for Land Information* [2023] NZHC 795 at [6] and [7].