IN THE HIGH COURT OF NEW ZEALAND
WELLINGTON REGISTRY

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

CIV-2021-485-584
[2021] NZHC 3064

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 an order made under the COVID-19 Public Health Response Act 2020
BETWEEN	FOUR MIDWIVES Applicants
AND	MINISTER FOR COVID-19 RESPONSE and ATTORNEY-GENERAL Respondents

Continued…

Hearing	8 November 2021
Counsel:	C J Griggs and C F J Reid for the Four Midwives W C Pyke and N T C Batts for NZDSOS S K Green and N T C Batts for NZTSOS D J Perkins and R M McMenamin for the Respondents
Judgment:	12 November 2021

JUDGMENT OF PALMER J

Solicitors:
Stephens Lawyers, Wellington
Haigh Lyon, Auckland
Crown Law, Wellington

CIV-2021-485-595

UNDER	the Judicial Review Procedure Act 2016 and the Declaratory Judgments Act 1908
IN THE MATTER OF	the making and amendment of the COVID-19 Public Health Response (Vaccinations) Order 2021 under s 11 of the COVID-19 Public Health Response Act 2020
BETWEEN	NZDSOS INC and NZTSOS Applicants
AND	MINISTER FOR COVID-19 RESPONSE, DIRECTOR-GENERAL OF HEALTH and ATTORNEY-GENERAL Respondents

Summary

[1] Under the COVID-19 Public Health Response Act 2020 (the Act), the responsible Minister has made orders requiring individuals in certain occupations to be vaccinated against COVID-19. In this case, four midwives challenge the order relating to them. That challenge was heard together with the first cause of action brought by two incorporated societies, NZDSOS and NZTSOS (New Zealand Doctors and Teachers, respectively, Speaking Out with Science). They argue the COVID-19 Public Health Response (Vaccinations) Order 2021 (the Order) is not legally valid because the Act does not empower it to be made, if interpreted consistently with the right to refuse medical treatment under the New Zealand Bill of Rights Act 1990 (Bill of Rights) and the principle of legality. A second cause of action of NZDSOS and NZTSOS, that the Order is invalid because it is not a reasonable and justified limit on the right under s 5 of the Bill of Rights, has yet to be heard.

[2] The words of the Act encompass the power to require a person not to associate with others unless vaccinated, and to be vaccinated in order to engage in an activity. Interpreting the empowering provision in light of its purpose and context does not detract from that. The right to refuse to undergo medical treatment under s 11 of the Bill of Rights is engaged here. No order can be made under the empowering provision that limits the right unless it is reasonable, prescribed by law and can be demonstrably justified in a free and democratic society under s 5 of the Bill of Rights. In this case, the applicants do not argue the Order is an unjustified limit. The Bill of Rights does not require the usual purposive interpretation of the empowering provision to be narrowed to mean that the Order is outside its scope. Indeed, the text of the Act explicitly indicates that Parliament envisaged that orders may be made which limit rights under the Bill of Rights, as long as the limits are justified under s 5. The common law principle of legality, which requires legislative limitations on fundamental rights to be clearly expressed, does not require a different interpretation.

[3] I decline the application. I anonymise the four midwives in this judgment. I direct their court file not be searched without permission of a Judge, for three years, to preserve their effective exercise of the right of access to justice, in light of concerns for them and their family members deriving from current social division.

The Act and the Order

[4] The COVID-19 pandemic has gripped the world since the beginning of 2020. The general context of the advent of the pandemic, as well as New Zealand's history of public health legislation dealing with pandemics, is described in part 2 of the Court of Appeal's recent judgment in *Borrowdale v Director-General of Health*.[1] Relevantly here, in New Zealand:

(a) On 30 January and 11 March 2020, Orders in Council declaring novel coronavirus and COVID-19 notifiable infectious diseases and quarantinable diseases under the Health Act 1956 came into effect.

(b) On 24 March 2020, the Prime Minister issued an epidemic notice under the Epidemic Preparedness Act 2006. The notice has been renewed every three months and remains in force.

(c) On 25 March 2020, the Minister of Civil Defence declared a state of national emergency under the Civil Defence Emergency Management Act 2005. The declaration was extended until it lapsed on 13 May 2020.

The Act

[5] On 13 May 2020, the Act came into force. Section 3 provides that the Act will be automatically repealed after two years unless repealed sooner (though Parliament could, of course, amend that). Section 4 sets out the purpose of the Act:

> The purpose of this Act is to support a public health response to COVID-19 that—
>
> (a) prevents, and limits the risk of, the outbreak or spread of COVID-19 (taking into account the infectious nature and potential for asymptomatic transmission of COVID-19); and
>
> (b) avoids, mitigates, or remedies the actual or potential adverse effects of the COVID-19 outbreak (whether direct or indirect); and
>
> (c) is co-ordinated, orderly, and proportionate; and

---

1 *Borrowdale v Director-General of Health* [2021] NZCA 520.

(ca) allows social, economic, and other factors to be taken into account where it is relevant to do so; and

(cb) is economically sustainable and allows for the recovery of MIQF costs; and

(d) has enforceable measures, in addition to the relevant voluntary measures and public health and other guidance that also support that response.

[6] Part 2 of the Act empowers orders to be made if an epidemic notice is in force for COVID-19, or a state of emergency is in force, or the Prime Minister has authorised the use of COVID-19 orders. The first of those circumstances applies at present. When the Act was enacted, there was no vaccine for COVID-19 in existence.[2]

[7] Sections 9, 11, 12 and 13 of the Act are relevant to this case, particularly s 11. Extracts are annexed to this judgment for ease of reference. In summary:

(a) The empowering provision, s 11(1)(a) states:

> The Minister … may in accordance with section 9 … make an order under this section for 1 or more of the following purposes:
>
> (a) to require persons to refrain from taking any specified actions that contribute or are likely to contribute to the risk of the outbreak or spread of COVID-19, or require persons to take any specified actions, or comply with any specified measures, that contribute or are likely to contribute to preventing the risk of the outbreak or spread of COVID-19, including (without limitation) requiring persons to do any of the following:
>
> …
>
> (v) refrain from carrying out specified activities (for example, business activities involving close personal contact) or require specified activities to be carried out only in any specified way or in compliance with specified measures:
>
> …
>
> (viii) report for and undergo a medical examination or testing of any kind, and at any place or time, specified and in any specified way or specified circumstances:

---

2 (12 May 2020) 745 NZPD (COVID-19 Public Health Response Bill — First Reading, David Parker).

(b) Section 11(1)(a)(viii) was amended by the COVID-19 Public Health Response Amendment Act 2020 with effect from 6 August 2020. The original wording was "report for medical examination or testing in any specified way or in any specified circumstances".

(c) Section 9(1) specifies the considerations to which the Minister must and may have regard in making an order under s 11. That includes the requirement in s 9(1)(ba) that "the Minister must be satisfied that the order does not limit or is a justified limit on the rights and freedoms in the [Bill of Rights]".

(d) Section 12 contains general provisions as to what orders may impose, apply, exempt, or authorise and what they may not. That includes, in s 12(1)(e), that, if any thing can be prohibited, it can be permitted only subject to specified conditions.

(e) Section 13 contains provisions in relation to the legal effect of orders. Section 13(2) preserves application of the Bill of Rights. Section 13(3) clarifies that nothing in the Act prevents legal proceedings being filed, heard or determined in respect of the making or terms of an order.

(f) Section 14(5) requires the Minister and Director-General to "keep their COVID-19 orders under review". Section 15 empowers the Minister, at any time, to amend, extend, or revoke any COVID-19 order the Minister has made, subject to the same requirements as apply to the making of an order, with all necessary modifications.

(g) Section 16 provides that an order made by the Minister is revoked after a specified period unless it is approved by the resolution of the House of Representatives. Section 17 provides that an order is a disallowable instrument and must be presented to the House as soon as practicable.

(h) Under s 18, the Director-General of Health may authorise a person or class of persons to enforce orders. Section 21 empowers an enforcement officer who has reasonable grounds to believe a person is contravening, or likely to contravene, an order to direct them to stop or to take any action that prevents or limits their non-compliance. Under s 26, a person who intentionally fails to comply with a COVID-19 order commits an offence and is liable on conviction to imprisonment for up to six months or a fine of up to $4,000. Offences specified as infringement offences in an order carry penalties of a fee of $300 or a fine of up to $1,000.

The Order and Amendment Orders

[8] Orders have been made under the Act dealing with issues such as management of the air and maritime borders, Alert Level restrictions, Management Isolation and Quarantine (MIQ), quarantine-free travel, testing technology and mandates, and vaccination mandates.

[9] The Order was made on 28 April 2021 and came into force at 11.59 pm on 30 April 2021. It was approved by the House of Representatives on 1 June 2021.[3]

[10] Clause 3 (including immaterial subsequent amendments) provides:

> **3 Purpose**
>
> The purpose of this order is to prevent, and limit the risk of, the outbreak or spread of COVID-19 by requiring certain work to be carried out by affected persons who are vaccinated.

[11] Relevant operative clauses are included in the Annex. In summary:

(a) Clause 7 imposes a duty on affected persons not to carry out certain work unless they are vaccinated or exempt.

---

3 (1 June 2021) 752 NZPD 3071–3080.

(b) Clause 8 imposes a duty on a PCBU not to allow an affected person to carry out certain work unless satisfied they are vaccinated or exempt.

(c) Clause 11 imposes duties on affected persons to advise the relevant PCBU of their vaccination status and give them access to their vaccination records.

(d) A "relevant PCBU" is a "person conducting a business or undertaking" as defined in s 17 of the Health and Safety at Work Act 2015.

(e) Clause 9 of the Order empowers the chief executive of a relevant PCBU to make exceptions to cl 8 and provides for exceptions in an emergency.

(f) Clauses 9A and 9B empower the Director-General to grant vaccination exemptions.

(g) Clauses 10 and 11A impose duties on relevant PCBUs to confirm whether an affected person is vaccinated, to notify an affected person of their duty to be vaccinated, to notify the Ministry of Health as soon as practicable of any change in the vaccination status of an affected person or when a person ceased to be an affected person, and to keep records about certain affected persons.

(h) Clause 12 requires the Director-General of Health to keep, maintain and monitor a register of the vaccination status of affected persons and provide that information to relevant PCBUs.

(i) Clause 13 provides that a breach of cls 7, 8, 10 or 11 is an infringement offence.

[12] Initially, the Order made vaccination mandatory for workers at MIQ facilities, airport and maritime port workers, and aircrew. There have been amendments:

(a) The COVID-19 Public Health Response (Vaccinations) Amendment Order was made on 8 July 2021 and came into force on 14 July 2021.[4] It extended mandatory vaccination to workers handling items removed from MIQ facilities, aircraft, and ships.

(b) The COVID-19 Public Health Response (Vaccinations) Amendment Order (No 2) 2021, was made on 15 October 2021 and came into force on 17 October 2021. It recognised that affected persons may have been vaccinated or partially vaccinated overseas.

The Amendment Order

[13] On 22 October 2021, the Minister amended the Order through the COVID-19 Public Health Response (Vaccinations) Amendment Order (No 3) 2021 (the Amendment Order). It came into effect from 11.59 pm 25 October 2021.

[14] The Amendment Order extended the groups of affected persons in sch 2 to include workers in the health and disability sector and affected education services. The relevant definitions, as currently in force, are included in the Annex.

[15] New clauses were inserted into sch 1 of the Order as a transitional provision for the additional affected persons. Clauses 5 and 7 provide that persons working in the health and disability sector and affected education services are treated as vaccinated until 15 November 2021 if they receive their first vaccination before the close of that day. They are to be treated as vaccinated until 1 January 2022 and thereafter if they receive their second vaccination before the close of that day.

[16] On 5 November 2021, further amendments were made to the Order by the COVID-19 Public Health Response (Required Testing and Vaccinations) Amendment Order 2021. These amendments came into force at 11.59 pm 7 November 2021 and are reflected in the account above.

---

4 Clause 12 came into force on 12 August 2021.

The challenge

The applicants

[17] Four registered midwives challenge the legal validity of the Order. They are affected by the Order. They do not consent to be vaccinated for reasons they do not disclose and which they say are immaterial. I refer to the proceeding as the Four Midwives' proceeding. Their single ground of challenge is that the Act does not explicitly authorise the placing of a limit on their right to refuse to undergo any medical treatment. They do not allege that the Order is an unreasonable limit on their right. They do not adduce evidence in support of their claim. They do apply to offer in evidence legal advice to the Attorney-General about the consistency of the Bill which resulted in the Act, with the Bill of Rights. The Crown does not object and I grant that application.

[18] NZDSOS and NZTSOS are the applicants in the other set of proceedings. Mr Pyke says NZDSOS's members include 79 doctors, 48 dentists and 26 pharmacists. Ms Green says approximately 300 of NZTSOS's members are teachers, principals and members of boards of trustees. They say they represent the interests of affected persons. They challenge the Order in two causes of action. Given the urgency of the mandatory vaccination deadline, I agreed to hear the first of these together with the Four Midwives' case because they make essentially the same argument. The second cause of action of NZDSOS and NZTSOS will be heard separately.

Submissions

[19] Mr Griggs, for the four midwives, submits vaccination is an invasive medical treatment which is a significant infringement of the right not to consent to medical treatment. He submits that, on standard principles of statutory interpretation including s 6 of the Bill of Rights and the principle of legality, s 11(1) of the Act does not explicitly, or by necessary implication, authorise making an order requiring persons to cooperate with a medical procedure. He submits that is a tenable interpretation of the section, adopted by the Ministry of Justice in vetting the Bill for consistency with the Bill of Rights, and resolutions by the House of Representatives approving the Order do not cure the Order's invalidity. He submits the wording of s 11(1) is general and

ambiguous and does not engage explicitly with the right to refuse medical treatment. If Parliament had intended to impinge on this right, the Act or Amendment Act would have explicitly so provided. Mr Griggs submits s 5 of the Bill of Rights does not impinge upon the interpretation of the empowering provision whether the methodology in *R v Hansen* is used or, as he submits is required here, the methodology in *Cropp v Judicial Committee, D (SC 31/2019) v New Zealand Police, Fitzgerald v R* and other cases are used.[5] He submits the Order is a direct assault on the constitutional order of New Zealand. If Parliament wishes to abrogate the right to refuse medical treatment it can do so but it must do it explicitly, accepting the political cost.

[20] Mr Pyke, for NZDSOS and NZTSOS, supports the submissions of Mr Griggs. He submits the Order coerces, directly and derivatively, an affected person who does not want to be vaccinated, into being vaccinated. Parliament was able to leave that option open in the Act; but did not. NZDSOS and NZTSOS also claim that the affected persons they represent are being coerced into participating in a medical or scientific experiment without their consent on the basis of the status of the vaccine. Mr Pyke submits the power to make the Order must be interpreted in the context of public health principles as stated in the Health Act 1956, which are harmonious with the right to free choice over taking a vaccine. Unambiguous authority is required given the degree to which mandatory vaccination departs from modern public health principles.

[21] Mr Perkins, for the Crown, submits s 4 of the Act envisages potentially coercive powers and s 11(1)(a) is a wide, plenary power. Its scheme and purpose are designed to facilitate democratically accountable Ministers taking flexible, and sometimes coercive, action to respond to a public health emergency. He stresses the breadth of the text of the chapeau. He submits s 11(1)(a)(v) is an apposite description of what the Order does. He points to s 9 as contemplating that Orders may limit rights, including the right to refuse medical treatment. He submits that safeguards ensure such limits are not unjustifiable and suggest Parliament was conscious it was delegating wide plenary powers. He submits the Act should be interpreted in the context of general constitutional safeguards including the right to judicial review and

---

5 *R v Hansen* [2007] NZSC 7; [2007] 3 NZLR 1; *Cropp v Judicial Committee* [2008] NZSC 46, [2008] 3 NZLR 774; *D (SC 31/2019) v New Zealand Police* [2021] NZSC 2; and *Fitzgerald v R* [2021] NZSC 131.

the application of the Bill of Rights, which are explicitly preserved. Mr Perkins accepts the principle of legality is engaged in relation to coerced medical treatment. He submits s 11(1)(a) is not general or ambiguous but is unmistakably plain. He relies on the Court of Appeal's judgment in *Borrowdale v Director-General of Health*.[6]

Is the Order unlawful?

Interpretation

[22] Until recently, s 5 of the Interpretation Act 1999 required the courts to ascertain the meaning of legislation "from its text and in the light of its purpose". The Supreme Court's classic statement in 2007 of the courts' approach to statutory interpretation in New Zealand, in *Commerce Commission v Fonterra Co-operative Group Ltd,* was:[7]

> The meaning of an enactment must be ascertained from its text and in the light of its purpose. Even if the meaning of the text may appear plain in isolation of purpose that meaning should always be cross checked against purpose, in order to observe the dual requirements of s 5. In determining purpose the court must obviously have regard to both the immediate and the general legislative context. Of relevance too may be the social, commercial or other objective of the enactment.

[23] On 28 October 2021, most sections of the Legislation Act 2019 came into force and the Interpretation Act 1999 was repealed.[8] Section 10(1) effectively confirms the Supreme Court's approach in *Fonterra* by requiring that "[t]he meaning of legislation must be ascertained from its text and in the light of its purpose and context". Section 10(2) adds that "[s]ubsection (1) applies whether or not the legislation's purpose is stated in the legislation".

The text of s 11

[24] This case concerns the issue of whether the Order and Amendment Order are within the scope of the provision in the Act which empowers orders to be made. That involves the interpretation of s 11(1)(a) of the Act. I start with its text.

---

6 *Borrowdale v Director-General of Health*, above n 1.

7 *Commerce Commission v Fonterra Co-operative Group Ltd* [2007] NZSC 36, [2007] 3 NZLR 767 at [22] (footnotes omitted).

8 The Legislation (Repeals and Amendments) Act Commencement Order 2021 brought into force Part 2 of the Legislation (Repeals and Amendments) Act 2019, which repeals the Interpretation Act 1999. The Legislation Act 2019 Commencement Order 2021 brought most of the Legislation Act 2019, including s 10, into force.

[25] The purposes for which the Minister is empowered to make an order are framed in the chapeau of s 11(1)(a). Broken down, the general statement of the purpose is:

(a) to require persons to refrain from taking any specified actions that contribute or are likely to contribute to the risk of the outbreak or spread of COVID-19; or

(b) to require persons to take any specified actions, or comply with any specified measures, that contribute or are likely to contribute to preventing the risk of the outbreak or spread of COVID-19.

[26] As Mr Perkins submits, the chapeau of s 11(1)(a) is broadly framed. It is the starting point for interpreting the section. It is not a distraction, as Mr Griggs characterised it. The plain meaning of the words of the chapeau includes, as purposes of an order:

(a) requiring a person to refrain from associating with others in their employment unless vaccinated, if such association is a "specified action" and contributes or is likely to contribute "to the risk of the outbreak or spread of COVID-19"; and

(b) requiring a person to be vaccinated, if a "specified action" and/or "specified measure" includes being vaccinated and being vaccinated contributes or is likely to contribute to "preventing the risk of the outbreak or spread of COVID-19.

[27] On the plain words, alone, of the general purpose of orders provided for in s 11, there is no reason to think that not associating with others or requiring vaccination could not be a specified action or measure. In this proceeding, the applicants do not contest that not associating with others or vaccination contributes or is likely to contribute to preventing the risk of outbreak or spread of COVID-19. Accordingly, the plain words of the general purpose of orders provided for in s 11 encompass not associating with others unless vaccinated or requiring vaccination in order to engage in an activity.

[28] The purposes in the chapeau are said to be "including (without limitation) requiring persons to do any of the following" of a list of specified actions. Those actions involve:

(a) restricting the location of persons in relation to entering New Zealand, where they may or may not go, and in relation to others (in (i)-(iv) and (vii));

(b) restricting the activities they carry out or how they carry them out (in (v)); and

(c) requiring persons to be isolated or quarantined, undergo medical examination or testing, or provide information necessary for contact tracing (in (vi), (viii) and (ix)).

[29] Sometimes, a list of specific examples of a general purpose can inform the interpretation of the general purpose. Section 11(1)(a) explicitly provides that this list is inclusive and "(without limitation)" so that is a difficult argument to make here. But, in any case, s 11(1)(a)(ii) and (iii) explicitly envisage refraining from association with, or staying physically distant from, others. Section 11(1)(a)(v) explicitly envisages refraining from carrying out activities (with an example given of refraining from carrying out "business activities" involving close personal contact) or requiring activities to be carried out only in a specified way or in compliance with specified measures. Section 12(1)(e) provides that "if any thing can be prohibited under section 11" a s 11 order may "permit that thing but only subject to specified conditions".

[30] Accordingly, the plain words of specific examples of the purposes of orders listed in s 11, also encompass requiring a person not to associate with others unless vaccinated and to be vaccinated in order to engage in an activity. There is no need to imply that power. The text encompasses it.

The purpose and context of s 11

[31] What does examination of the purpose and context of s 11 add to the interpretation of its text?

[32] Section 4 sets out the purpose of the Act as a whole as being "to support a public health response to COVID-19" that achieves specified outcomes and has specified characteristics. Most related to the purpose of orders provided for in s 11 are:

(a) s 4(a), preventing and limiting the risk of the outbreak or spread of COVID-19;

(b) s 4(b), avoiding, mitigating or remedying the actual or potential adverse effects of the COVID-19 outbreak (whether direct or indirect); and

(c) s 4(d) having enforceable measures, in addition to voluntary measures and guidance.

[33] These aspects of the purpose of the Act are consistent with the breadth of its text. So was the context in which the Act was passed. While any power must be exercised consistently with the purpose of the empowering Act, that does not imperil the making of the Order here. The purpose and context of s 11 do not assist the applicants to narrow the plain meaning of its text. Neither does the amendment to s 11(1)(a)(viii). That provision is not particularly relevant to the issue here and the amendment casts no light upon it.

Wider legislative context

[34] Mr Pyke's submission that the Health Act 1956 is relevant legislative context is well made. Section 13(1) provides that an order may not be held invalid "just because … it is or authorises any act or omission that is, inconsistent with the Health Act 1956". That does not mean the Court may not have regard to the Act as context. But it does attenuate the force of the submission that the provisions of the Health Act require the text of the Act here to be read down.

[35] The principles in part 3A of the Health Act relating to infectious diseases, for example at s 92D, encourage individuals to take responsibility for their own health and emphasise, at ss 92F and 92G, the need for measures applied to an individual to be proportionate to the relevant public health risk and be the least restrictive that will minimise the public health risk posed by the individual.

[36] Under s 92I(4)(b)–(e), a medical officer of health may direct an individual who poses a public health risk to refrain from carrying out specified activities, going to specified places, associating with specified persons and to take specified actions to prevent or minimise the public health risk they pose. These powers have a clear resonance with those in the Act here, which is probably because the Act here was broadly based on the powers in ss 70 and 92I of the Health Act.[9] But the Act here does not prohibit directions to require an individual to submit to compulsory treatment, whereas s 92I(5) of the Health Act explicitly prohibits a medical officer of health from so directing. The wide language used to enumerate the powers in the Health Act suggests that a power to direct submission to compulsory treatment may have been available if it were not for that exception.

The Bill of Rights

[37] Section 13(2) of the Act reinforces the application of the Bill of Rights. Section 13(3) envisages legal proceedings regarding the making or terms of orders. That can, obviously, include by way of judicial review of the lawfulness of an order, assisted by the Bill of Rights.

[38] Section 11 of the Bill of Rights affirms and protects everyone's right to refuse to undergo any medical treatment. The Crown properly concedes, as it did in *GF* and the *Four Aviation Security Employees*, that the administration of a COVID-19 vaccine is medical treatment within s 11 of the Bill of Rights.[10] It also concedes that employees faced with the choice of being vaccinated or their employment being terminated suffer a sufficient imposition on their freedom of choice to engage the s 11 right. As O'Regan

---

9 (12 May 2020) 745 NZPD (COVID-19 Public Health Response Bill — Second Reading, David Parker).

10 *GF v Minister of COVID-19 Response* [2021] NZHC 2526 at [70]; and *Four Aviation Security Service Employees v Minister of Covid-19 Response* [2021] NZHC 3012 at [28].

and Ellen France JJ said in the Supreme Court judgment of *New Health New Zealand Inc v South Taranaki District Council*, "s 11 of the Bill of Rights Act applies to any compulsory medical treatment, whether provided in the course of a practitioner/patient relationship or as a public health measure".[11]

[39] Mr Perkins makes a good point for the Crown in submitting that the Act envisages that the wide powers to make orders are constrained by the Bill of Rights. The s 11 empowering provision to make orders explicitly says "[t]he Minister . . . may in accordance with section 9 … make an order". I accept that making a decision in accordance with s 9 is a necessary pre-condition of the exercise of the power to make an order under s 11. Section 9(1)(ba) requires that the Minister must be satisfied that an order "would not limit or is a justified limit on the rights and freedoms in the New Zealand Bill of Rights Act 1990". That explicitly indicates that Parliament envisaged, in passing the Act, that orders may be made which limit rights and freedoms under the Bill of Rights, if the limit is justified. The level of justification required is that required by s 5 of the Bill of Rights: it must be "a reasonable limit prescribed by law as can be demonstrably justified in a free and democratic society".

[40] The applicants do not contest, for the purposes of this judgment, that mandatory vaccination is a justified limit under s 5.[12] Rather, they submit that s 6 requires the Court to interpret s 11 of the Act consistently with the right to refuse to undergo any medical treatment irrespective of whether a limitation on that right is reasonable and can be demonstrably justified in a free and democratic society. This case comes down to whether this is correct in law.

[41] Section 6 of the Bill of Rights requires that "[w]herever an enactment can be given a meaning that is consistent with the rights and freedoms contained in this Bill of Rights, that meaning shall be preferred to any other meaning". There is a consistent line of authority affirming the important role of s 6 of the Bill of Rights in interpreting statutory provisions conferring discretionary powers. In *Drew v Attorney-General*, the Court of Appeal said:[13]

---

11 *New Health New Zealand Inc v South Taranaki District Council* [2018] NZSC 59, [2018] 1 NZLR 948 at [97].

12 NZDSOS and NZTSOS does contest that in their second cause of action.

13 *Drew v Attorney-General (No 2)* [2002] 1 NZLR 58 (CA) at [68].

> To the extent that it is necessary to refer to the Bill of Rights, the regulation is invalid because the empowering provision read, just like any other section, in accordance with s 6 of the Bill of Rights, does not authorise the regulation. The Court merely gives s 45 a meaning that is consistent with the rights and freedoms contained in the Bill of Rights. In accordance with s 6, that meaning is to be preferred to any other meaning. As Mr Wilding said, s 4 is not reached.

[42] In *Cropp v Judicial Committee*, the Supreme Court confirmed:[14]

> Subordinate legislation involving a relevant guaranteed right or freedom will be invalid when the empowering provision, read in accordance with s 6 of the Bill of Rights, does not authorise its making. Where the Bill of Rights is a relevant consideration, and obviously it will then be an important consideration, the Court gives the generally expressed empowering provision a tenable meaning that is consistent with the right or freedom. "In accordance with s 6, that meaning is to be preferred to any other meaning".

[43] This year, in *D (SC 31/2019) v New Zealand Police*, the Supreme Court confirmed that the relevant empowering provision there should be interpreted in accordance with the direction in s 6 of the Bill of Rights, which requires the power "to be exercised consistently with the Bill of Rights to the extent possible".[15]

[44] Counsel disagree about how s 6 is to be applied, whether the methodology in *Hansen* should be used and whether reference to s 5 is required in applying s 6:

(a) Mr Griggs submits the *Hansen* methodology is not appropriate for the exercise of statutory powers and the approach in *Cropp, Zaoui v Attorney-General (No 2),* and *Dotcom v Attorney-General* should be followed instead.[16] But, whatever approach is used, he submits if it is tenable to give an empowering provision a meaning consistent with the right to refuse medical treatment in s 11 of the Bill of Rights, that interpretation should be adopted, the Order is ultra vires, and it is unnecessary to go on to assess whether s 5 applies. Under the *Hansen* methodology he submits that is because step 1 involves s 6. Mr Pyke supports the submission that s 6 is the start and finish point of the analysis.

---

14 *Cropp v Judicial Committee*, above n 5 (citing *Drew v Attorney-General (No 2)*, above n 13).

15 *D (SC 31/2019) v New Zealand Police,* above n 5, at [101].

16 *Cropp v Judicial Committee,* above n 5; *Zaoui v Attorney-General (No 2)* [2005] NZSC 38, [2006] 1 NZLR 289 at [90]–[91]; *Dotcom v Attorney-General* [2014] NZSC 199, [2015] 1 NZLR 745 at [100] and [161] per McGrath, William Young, Glazebrook and Arnold JJ.

(b) Mr Perkins submits the six-step methodology devised by Tipping J in *Hansen* should be applied as it was by the Supreme Court in *New Health* and the Court of Appeal in *Borrowdale.*[17] That is because, unlike the rights in *Cropp* and *Fitzgerald*, the right here can be limited by s 5. He submits s 6 is not used at the first step of the analysis but at step five and is not reached there because it is not disputed that the limitation here is a justified limit at step three.

[45] I consider this apparent divergence over legal methodology is more apparent than real. It is true that the authorities cited take different approaches to the sequence of reasoning involved in interpreting a statute with the assistance of s 6 of the Bill of Rights. In *Hansen*, Tipping J helpfully offered a six-step summary of such an approach.[18] But, even in *Hansen*, the Supreme Court was clear that that sequence of steps does not apply in all circumstances.[19] Different courts have applied or not applied the six steps.

[46] But, more importantly for present purposes, a majority of the Supreme Court in *Hansen* held that both the relevant right or freedom, and any reasonable and demonstrable justification for the limitation, bear on the interpretation of legislation using s 6. Elias CJ, favouring the approach advocated for by the applicants, dissented from the majority of the Supreme Court on exactly this point.[20] But the majority of the Supreme Court held that interpreting legislation consistently with s 6 involves consideration of whether any limitation is justified under s 5:[21]

(a) Blanchard J held that, where ss 4, 5 and 6 are engaged, and the natural meaning of a provision coincides with the obvious parliamentary intention, that meaning may only be adopted if the limit is justified

---

17 *New Health New Zealand Inc v South Taranaki District Council,* above n 11, at [103]; and *Borrowdale v Director-General of Health,* above n 1, at [141].

18 *R v Hansen*, above n 5, at [92].

19 At [61] and [91].

20 At [6].

21 Anderson J appears to have steered a middle course between Elias CJ and the majority, considering, at [266] "there may, however, by situations where, in order to give effect to s 6, consideration needs to be given to s 5".

under s 5 or it is not capable of bearing any other meaning in terms of s 4.[22]

(b) Tipping J's oft-referred-to summary of his six-step methodology is not explicit about this.[23] But his narrative explanation is clear enough:[24]

> …The Court does not move straight from an apparently inconsistent meaning to look for another meaning. The Court first examines the apparently inconsistent meaning to see whether it constitutes a justified limit on the right or freedom in question. If it does not constitute a justified limit, the Court goes back to s 6 to see if a consistent or more consistent meaning is reasonably possible. If, however, the apparently inconsistent meaning does constitute a justified limit, the apparent inconsistency is overtaken by the justification afforded by s 5. In effect, s 5 has legitimised the inconsistency. If this sequence were not followed, there would be the potential for subversion of a deliberate policy choice by Parliament and its (at least implicit) view that the ensuing limitation of a right or freedom was justified. This would occur if there was a reasonably possible but unintended meaning which could be given to the statutory words. Such would be the consequence of going straight from Parliament's intended but apparently inconsistent meaning to another meaning which was reasonably possible but unintended.
>
> [91] To approach the matter in this way would give the limitation involved in Parliament's intended meaning no chance of being justified under s 5, if there was a tenable and more consistent meaning. If Parliament's intended meaning is not justified under s 5 then, and only then, should the Court look for a reasonably possible alternative meaning under s 6.

(c) McGrath J referred to this approach to ss 5 and 6 as aptly encapsulated by Professor Rishworth in his characterisation of the Bill of Rights as "a bill of reasonable rights".[25] He was satisfied this was right and said:[26]

> It addresses the reality that rights are part of a social order in which they must accommodate the rights of others and the legitimate interests of society as a whole. That approach better accords with the purpose of the enacted Bill of Rights as a measure "[t]o affirm, protect, and promote human rights and fundamental freedoms in New Zealand". Importantly, it is also supported by two significant aspects of the legislative history.

---

22 At [57]–[60].
23 At [92].
24 At [90] (footnotes omitted).
25 At [186].
26 At [186] (footnotes omitted).

[47] The majority's approach in *Hansen* to the relationship between ss 5 and 6 of the Bill of Rights was confirmed by another majority of the Supreme Court in *New Health New Zealand Inc v South Taranaki District Council* which concerned the application of fluoride to drinking water and the right to refuse medical treatment.[27] The majority held that the authorising provisions there limited the s 11 right to refuse medical treatment only to an extent that is demonstrably justified in a free and democratic society or did not engage s 11 at all.[28]

[48] Elias CJ again dissented on the approach to ss 5 and 6 in *New Health New Zealand*, for the same reasons as in *Hansen*.[29] But she explained that the application of s 6 to empowering provisions in *Cropp, Zaoui* and *Dotcom* was not inconsistent with the decision of the majority in *Hansen*, which did not lay down an inflexible rule as to methodology in the application of s 6.[30] I consider that is because those decisions did not involve interpreting empowering provisions consistently with a right or freedom irrespective of whether its limitation was justified under s 5 of the Bill of Rights. Section 5 had no role in *Cropp* and *Dotcom* because it has no role in respect of the right against unreasonable search and seizure.[31] Section 5 had no role in the application of s 6 in relation to the rights not to be deprived of life or subjected to torture in *Zaoui*.[32]

[49] Similarly, the recent judgments of the Supreme Court in *Fitzgerald* and the Court of Appeal in *Borrowdale* take different views of whether to apply the six-step methodology of *Hansen.* But they do not affect the relationship between ss 5 and 6 of the Bill of Rights that was confirmed in *Hansen*:

(a) In *D (SC 31/2019)*, regarding the retrospectivity of penal enactments, O'Regan J and Winkelmann CJ considered the *Hansen* methodology was not appropriately applied to the exercise of a statutory power by a

---

27 *New Health New Zealand Inc v South Taranaki District Council*, above n 11.
28 At [145].
29 At [221].
30 At [298] citing *Cropp,* above n 5, at [25], *Zaoui v Attorney-General (No 2)* above n 16; *Dotcom v Attorney-General,* above n 16.
31 *Cropp,* above n 5, at [33]; *Dotcom*, above n 16, at [100].
32 *Zaoui*, above n 16, at [90]–[91].

court to make a registration order.[33] But they considered the empowering provision should be interpreted in accordance with the s 6 direction which "requires the power to make a registration order conferred by that section to be exercised consistently with the Bill of Rights to the extent possible".[34] They considered that to be consistent with the Court's approach in *Zaoui*.[35] As Tipping J said in *Hansen*, a power may be exercised consistently with the Bill of Rights even if it limits a right or freedom, as long as the limit is reasonably and demonstrably justified under s 5.[36]

(b) In *Fitzgerald*, s 5 was not relevant because no limits on the right at issue, not to be subjected to disproportionately severe punishment, could be considered reasonable and the *Hansen* methodology was not applied.[37] And Winkelmann CJ observed that logic suggests that step one of Tipping J's six-step methodology does not include consideration of s 6 direction, otherwise no purpose would be fulfilled by step five.[38]

(c) The Court of Appeal in *Borrowdale* applied the *Hansen* approach because s 5 was in issue.[39] It held that, even applying a rights-consistent meaning under s 6, there was an inconsistency with the rights and freedoms in ss 16, 17, and 18 of the Bill of Rights.[40] But these inconsistencies were reasonable and justified under s 5.[41]

[50] The s 6 interpretive direction requires, as far as possible, legislation to be interpreted consistently with the Bill of Rights. That requires reference to both the relevant right or freedom and to whether the limit is justified. The right to refuse to

---

33 *D (SC 31/2019) v New Zealand Police,* above n 5, at [75]–[76]. Glazebrook J, at [167]–[168], agreed that *Hansen* should not be applied, but noted that importing s 6 at step one of the *Hansen* methodology may leave step five with no content.

34 At [101] and see Glazebrook J at [259] and footnote 361.

35 At [102].

36 *R v Hansen*, above n 5, at [89].

37 At [3] and see [47] (per Winkelmann CJ), [175] (per O'Regan and Arnold JJ), [241] and [244] (per Glazebrook J).

38 *Fitzgerald v R*, above n 5, at [45].

39 *Borrowdale v Director-General of Health,* above n 1, at [141].

40 At [156].

41 At [162].

undergo medical treatment under s 11 of the Bill of Rights is engaged here. No order can be made under the empowering provision that limits the right unless it is reasonable, prescribed by law and can be demonstrably justified in a free and democratic society under s 5 of the Bill of Rights. If a limit in an order is so justified, s 6 does not require the usual purposive interpretation of the empowering provision to be narrowed to mean the order is outside its scope. That is the substantive position reached by the Supreme Court in *Hansen* and *New Health New Zealand*. It is not contradicted by the other cases referred to. It is consistent with bringing the full, balanced effect of the Bill of Rights to bear holistically on the interpretation of legislation.

[51] Applying s 6 to interpret the meaning of legislation to uphold a right or freedom, irrespective of whether Parliament intended the right or freedom to be subject to a limit that is reasonable and demonstrably justified in a free and democratic society, would involve applying only half of the Bill of Rights to interpretation. It would involve requiring that legislation which, interpreted according to its text and in light of its purpose and context, empowers decisions to limit rights in a way which is reasonable and demonstrably justified in a free and democratic society, must be read down to invalidate those decisions. That would engender a more frequent and hostile constitutional dialogue between the executive, the judiciary and Parliament. I doubt it would bode well for the long-term sustainability of human rights in New Zealand.

[52] This substantive point of law is separate to the issue of judicial process raised by whether to follow the six-step *Hansen* methodology, which all the authorities agree is not essential. On that, as will be evident, the approach in this judgment could be seen as largely consistent with the sequence of the *Hansen* steps. It interprets the text of the Act, in light of its purpose and context, and it examines the implications of both s 5 and 6 of the Bill of Rights for that interpretation. But it deals substantively with the considerations involved in ss 5 and 6, rather than sequentially as a matter of judicial process.

[53] So what difference does the Bill of Rights make to the interpretation of the empowering provision here? The right to refuse medical treatment under s 11 of the Bill of Rights is engaged. Section 6 of the Bill of Rights requires the empowering

provision in s 11 of the Act to be interpreted consistently with the Bill of Rights. But if a limit is reasonable, prescribed by law and demonstrably justified in a free and democratic society under s 5, it is consistent with the Bill of Rights. In this case, the applicants do not argue it is an unjustified limit. So the Bill of Rights does not require the usual purposive interpretation of s 11 to be narrowed to mean that the Order is outside its scope. Indeed, s 9(1)(ba) of the Act is explicitly indicates that Parliament envisaged that orders may be made which limit rights and freedoms under the Bill of Rights, as long as the limits are reasonable and demonstrably justified under s 5 of the Bill of Rights.

The principle of legality

[54] The applicants also argue that the principle of legality should be deployed to achieve the narrow interpretation of the s 11 empowering provision they seek. The principle of legality has been reflected in common law thought for a long time. But it was given a boost in the United Kingdom when the influence of European law was at its height. The applications of the principle of legality in the House of Lords by Lord Bingham in *R (Daly) v Secretary of State for the Home Department* and Lord Steyn in *R v Secretary of State for the Home Department, ex parte Simms* are well known.[42] The explanation of the principle stated by Lord Hoffmann is most cited:[43]

> Parliamentary sovereignty means that Parliament can, if it chooses, legislate contrary to fundamental principles of human rights. … The constraints upon its exercise by Parliament are ultimately political, not legal. But the principle of legality means that Parliament must squarely confront what it is doing and accept the political cost. Fundamental rights cannot be overridden by general or ambiguous words. This is because there is too great a risk that the full implications of their unqualified meaning may have passed unnoticed in the democratic process. In the absence of express language or necessary implication to the contrary, the courts therefore presume that even the most general words were intended to be subject to the basic rights of the individual.

[55] Before that, in a formulation apposite to the context here, Lord Browne-Wilkinson in *R v Secretary of State for the Home Department (ex parte Pierson)* said:[44]

---

42 *R v Secretary of State for the Home Department, ex parte Simms* [2000] 2 AC 115 (HL); and *R (Daly) v Secretary of State for the Home Department* [2001] UKHL 26, [2001] 2 AC 532.

43 *Simms,* above n 42, at 131.

44 *R v Secretary of State for the Home Department (ex parte Pierson)* [1998] AC 539 at 575.

> A power conferred by Parliament in general terms is not to be taken to authorise the doing of acts by the donee of the power which adversely affect … the basic principles on which the law of the United Kingdom is based unless the statute conferring the power makes it clear that such was the intention of Parliament.

[56] The common law principle of legality had a relatively slow start in New Zealand case law. Lord Hoffmann's words in *Simms* were repeated, without the label, by the Supreme Court in *Cropp*.[45] But, in *D (SC 31/2019)* and *Fitzgerald* this year, the Supreme Court has given the principle a push.

[57] In *D (SC 31/2019)*, Winkelmann CJ and O'Regan J, supported by Glazebrook J, cited the principle of legality and Lord Hoffmann's words in observing that, even without the Bill of Rights, legislation that imposes a greater penalty than that applicable at the time an offence was committed needs to be clear to achieve that result.[46] Glazebrook J differed in considering that the common law presumptions only apply to the extent there is not a clear parliamentary purpose to legislate contrary to rights, which she considered there was there.[47]

[58] In *Fitzgerald*, Winkelmann CJ said, most relevantly (footnotes omitted):

> [51] There has been some debate as to the relationship between s 6 and the principle of legality. The latter is a common law principle of statutory interpretation which exists independently of the Bill of Rights, to protect and uphold certain rights and values that the common law has identified as fundamental or as having a constitutional nature. Although it operates to protect the rights and freedoms affirmed in the Bill of Rights, it is not displaced or confined by the Bill of Rights. As a common law principle it continues to develop, as seen in recent decisions of the United Kingdom Supreme Court and the decision of this Court in *D v New Zealand Police*.
>
> …
>
> [55] Clearly, s 6 incorporates aspects of the principle of legality in relation to the affirmed rights and freedoms, in that courts applying it will proceed on the basis that clear words are needed if legislation is to be construed as abridging fundamental freedoms. Just as with the principle of legality, it is the language of the statute which must be clear enough to exclude the possibility of a rights-consistent purpose and effect – it is not enough that parliamentary materials might suggest this.

---

45 *Cropp*, above n 5, at [27].

46 *D (SC 31/2019,* above n 5, at [76] (per Winkelmann CJ and O'Regan), and [161] (per Glazebrook J).

47 At [181].

> [56] But the s 6 direction is not simply a statutory embodiment of the principle of legality. It requires that when the courts undertake the interpretive exercise, they must presume a rights-consistent purpose. Section 6 therefore mandates a more proactive approach to interpretation – proactively seeking a rights-consistent meaning. Hence, as Jason Varuhas recognises, the interpretive principle contained in rights-charters such as New Zealand's Bill of Rights is distinct from the orthodox formulation of the principle of legality in that it allows for "reading down otherwise clear statutory language, adopting strained or unnatural meanings of words, and reading limits into provisions".
>
> [57] It may be, therefore, that in some cases s 6 will go further than the principle of legality. As I come to, in this case I consider that it does. However, not much is to be gained from seeking to fully define the relationship between the principle of legality and the s 6 interpretive direction for the purposes of this appeal. The critical issue in respect of s 6 is its effect and application. And since this case was argued by all parties in reliance upon s 6, I therefore address the issues on that basis.

[59] Glazebrook J did not wish to comment on the relationship between s 6 and the principle of legality but agreed that "s 6 may go further than the principle of legality".[48] O'Regan and Arnold JJ said, most relevantly (footnotes omitted):

> [207] While there remains some dispute about the precise scope and meaning of s 6 of the Bill of Rights, there seems little doubt that it at least requires the courts to take a similar approach to that adopted under the common law "principle of legality".
>
> …
>
> [217] To explain, as noted at [207] above, at a minimum, s 6 effectively gives legislative force to certain aspects of the principle of legality. Some of the fundamental values protected by the common law presumptions are specifically addressed in the Bill of Rights, while others are not (an example is the solicitor/client privilege). In that sense, the principle of legality at common law has wider scope than s 6.
>
> [218] But just as the principle of legality means that Parliament must use explicit language to override fundamental values protected by the common law, so too must it use explicit language where it seeks to override an absolute right protected by the Bill of Rights, such as the right protected by s 9. If Parliament wished to require the courts to sentence offenders in a way that breached s 9 of the Bill of Rights, it needed to say so explicitly rather than relying on the general words "Despite any other enactment". The fact that Parliament would be directing the judicial branch of government, which is bound by the Bill of Rights (s 3(a)), to impose sentences that would, in some instances at least, breach s 9 of the Bill of Rights and also art 7 of the ICCPR, highlights the need for specificity. Further, as noted, Parliament was explicit in overriding the application of inconsistent provisions in the Sentencing and Parole Acts to the three strikes regime; in our view, the fact that Parliament was not explicit in

[48] At [251] and footnote 363.

> overriding the application of s 9 of the Bill of Rights as well is highly significant. If the only purpose of including the words "Despite any other enactment" in s 86D(2) was to oust the operation of the Bill of Rights, we think it implausible there would be no mention of that anywhere in the legislative materials.

[60] Mr Griggs submits that if, in *Fitzgerald*, the Supreme Court could find that legislation saying "[d]espite any other enactment" is insufficiently clear to be given effect contrary to the principle of legality, the Act here is similarly insufficiently clear. Mr Perkins submits that if, in *New Health New Zealand,* the Supreme Court could find that the respondent council's power of general competence and it duty to continue to provide water services was enough legal authority to empower fluoridation of water, then the empowering provision in the Act here is similarly sufficient.[49]

[61] Counsel also differed on whether the principle applies here because they differ on whether the words of the Act are "general and ambiguous". I am not sure that is a useful test. As former Chief Justice French of Australia has said, "the trouble with the term 'ambiguity' is that it is ambiguous", covering both doubt or uncertainty and also where words have more than one meaning.[50] And Matthew Groves notes that other law lords in *Simms* did not require there to be general or ambiguous words when applying the principle.[51] I consider the better view is that, like s 6 of the Bill of Rights, application of the principle of legality does not depend on the generality or ambiguity of the legislative text. The principle is always speaking.

[62] It is now clear that the principle of legality applies in New Zealand common law. We have been influenced by the United Kingdom in adopting it. It is a free-standing principle of the common law, independent of the interpretive direction of s 6 of the Bill of Rights. But its application will usually overlap with the application of s 6. So far, in New Zealand, the principle of legality has played a largely supporting role to s 6. The judicial observations in *Fitzgerald* suggest the reverse is more likely to be the case.

---

49 *New Health New Zealand*, above n 11, at [26], [40] and [155].

50 Robert French CJ "Foreword" in Dan Meagher and Matthew Groves (eds) *The Principle of Legality in Australia and New Zealand* (The Federation Press, Sydney, 2017) v at vii.

51 Matthew Groves "The Principle of Legality and Administrative Discretion: A New Name for an Old Approach?" in Dan Meagher and Matthew Groves (eds) *The Principle of Legality in Australia and New Zealand* (The Federation Press, Sydney, 2017) 168 at 169.

[63] Unlike the debate about the relationship between ss 5 and 6 of the Bill of Rights, the relationship of the principle of legality with limits on rights that are reasonable and justified in a free and democratic society has not previously been determined in New Zealand law. Academic opinions have been offered. Hanna Wilberg considers "[c]ourts should use the principle of legality to read down the apparent scope of statutory provisions only in order to avoid rights-infringing applications that do not represent justified limits".[52] She argues that Lord Bingham in *Daly* and Lord Steyn in *Simms* only applied the principle of legality after carefully detailed consideration of the justification for infringing a right.[53] She argues that justified limits on rights do not represent rights violations, so the principle of legality should not be used to avoid interpretations of statutes that represent justified limits.[54] This is consistent with my conclusion above regarding s 6 of the Bill of Rights.

[64] It is a legitimate question whether the common law principle of legality has a greater reach than s 6 of the Bill of Rights and ignores whether the rights it upholds are reasonable or justified. But, given the current state of New Zealand jurisprudence in relation to s 6, giving it that effect would impinge on the coherence and consistency of the law. It may also be inconsistent with the requirement placed on the judiciary by s 3(a) of the Bill of Rights to apply that instrument to the development of the common law. I do not consider that the principle of legality currently extends so far. If a statutory provision, interpreted according to its text and in light of its purpose and context, limits rights in a way which is reasonable and demonstrably justified in a free and democratic society under s 5 of the Bill of Rights, the principle of legality does not require a different interpretation. That is the case here.

Other institutions' views of the Act and Order

[65] Mr Perkins submits that, if the House of Representatives was surprised by the Order made here, as outside the scope of its empowering provision, the requirement in s 16 that the House approve the Order by resolution to prevent the Order's expiry,

---

52 Hanna Wilberg "Common Law Rights have Justified Limits: Refining the "Principle of Legality" in Dan Meagher and Matthew Groves (eds) *The Principle of Legality in Australia and New Zealand* (The Federation Press, Sydney, 2017) 139 at 140.

53 At 145.

54 At 152.

was an opportunity for it to register that. The House approved the Order, though it has not yet approved the Amendment Order. In so far as it goes, the submission is correct. But, as Mr Griggs submits, and as the Supreme Court of the United Kingdom said in *R (Miller) v Secretary of State for Exiting the European Union*, House resolutions do not cure an invalid order.[55] The point is relevant context about one of the ways in which Parliament provided for a potential safeguard on orders made under the Act. But it does not affect the question of the legal validity of an order.

[66] Mr Perkins also noted that the Regulations Review Committee of the House has reported on the Order and the first Amendment Order. The Committee considered whether the Order trespasses unduly on personal rights and liberties. It identified as an issue, and made recommendations about, only the extent of the information about a worker's vaccination status provided to a relevant PCBU and to an enforcement officer.[56] However, like the House's authorisation, the Committee's reports do not affect the legal validity of the Order, which is up to the courts to decide.

[67] Under s 7 of the Bill of Rights, the Attorney-General is required to draw the attention of the House of Representatives to any provision in a bill that appears to be inconsistent with any of the rights and freedoms in the Bill of Rights. On 11 May 2020, the Ministry of Justice advised the Attorney-General, in advice published on their website:[57]

> With regard to the proportionality of the limit on the right, we note that an outbreak of COVID-19 would have extreme consequences for public health and wellbeing. While the Bill empowers orders to be issued in respect of medical examination and testing, it does not require a person to undertake any particular ongoing form of treatment. In this way, the Bill continues to preserve the scope of personal autonomy and bodily integrity as far as is possible while maintaining public health.

[68] Mr Griggs submits the second sentence, in particular, means that, in introducing the Bill, the Government did not contemplate it would be used to authorise

---

55 *R (Miller) v Secretary of State for Exiting the European Union* [2017] UKSC 5 at [46]. And see Philip Joseph *Joseph on Constitutional and Administrative Law* (5th ed, Thomson Reuters, Wellington, 2021) at 1188.

56 Regulations Review Committee *COVID-19 Public Health Response (Vaccinations) Order 2021* (May 2021); and Regulations Review Committee *Examination of COVID-19 orders presented between 13 and 27 July 2021* (August 2021) at 3.

57 Chief Legal Counsel to Hon Andrew Little, 11 May 2020, at [33].

vaccination orders and neither did Parliament when it passed the Bill. Mr Perkins concedes the second sentence in the Bill of Rights vet was not well expressed. But he submits it is accurate because while the first part of the sentence refers to orders, the second part refers to the empowering provision not to the Order.

[69] Again, the advice to the Attorney-General does not assist resolution of the issues before me. The advice of the Chief Legal Adviser of the Ministry of Justice is important for the Attorney-General's exercise of his function under s 7 at the time a bill is in draft. But it does not determine questions of legal validity of the resulting Act, however expressed.

Four Aviation Security Service Employees

[70] On 20 September 2021, Churchman J heard a challenge to the validity of the Order by a former customs official. The (first) judgment was issued on 24 September 2021, in *GF v Minister of COVID-19 Response*.[58] The challenge was mounted on different grounds than the ground here and did not succeed.

[71] On 21 and 22 October 2021, Cooke J heard a challenge by four aviation security service employees at the border. One of the grounds of challenge there was similar to this one. But, because it was not certain when that judgment would be issued, and the Four Midwives' case is urgent because of the 15 November 2021 deadline for mandatory vaccination, their case was set down for hearing on 8 November 2021. As it happens, the judgment was issued on 8 November 2021, in *Four Aviation Security Service Employees.*[59] I gave leave for further written submissions to be filed by the parties here by 9 am 10 November 2021. As counsel for the applicants emphasised, I am not bound by this decision. But it is relevant, and it is interesting to compare the reasoning with that here.

[72] In relation to the question at issue here, Cooke J held:

(a) The Order limits the applicants' right under s 11 of the Bill of Rights.[60]

---

58 *GF v Minister for COVID-19 Response*, above n 10.
59 *Four Aviation Security Service Employees v Minister of Covid-19 Response*, above n 10.
60 At [29].

(b) Although it was not how the applicant there formulated it, the more direct route by which the Bill of Rights controls the making of orders under the Act is under the line of authority beginning with *Drew v Attorney-General*.[61]

(c) The effect of those authorities is that there is an implied limitation on the empowering provisions that is equivalent to them including the words "provided that no order may be made that is not consistent with the [Bill of Rights]".[62]

(d) Accordingly, there is no need or licence to find an alternative interpretation of the empowering provision in the way described in *Hansen* or *Fitzgerald*.[63] The normal approach of focussing on the text in light of its purpose should be adopted.

(e) If it had been necessary to apply the *Hansen* approach, it would still have been necessary to identify whether the limit on the s 11 right was demonstrably justified under s 5.[64] But the particular approach adopted should not make a different to the ultimate outcome.[65]

(f) Mandatory vaccination falls within the scope of s 11(1)(a)(v) of the Act, according to its text and in light of its purpose.[66]

(g) Although there was evidential uncertainty, on the evidence before the Court, the statutory pre-requisite in s 11(1)(a) for making the order was plainly satisfied: mandatory vaccination of aviation security workers would contribute or be likely to contribute to preventing the risk of the outbreak or spread of COVID-19.[67]

---

61 At [40].
62 At [56].
63 At [57].
64 At [58].
65 At [58].
66 At [61]–[62].
67 At [66].

[73] My reasoning is somewhat different from that of Cooke J. And we dealt with different submissions from counsel. But, except in relation to the last point, which is not before me in this case, my conclusions are consistent with all of his findings above. The submissions of counsel on the implications of *Four Aviation Security Service Employees* for this case are variations on their primary submissions, which I have already dealt with.

[74] Cooke J also said "[i]t is perhaps of some surprise that such an important aspect of the response to the risk of COVID-19 has been implemented through a section that makes no express reference at all to vaccination."[68] Because the generally expressed empowering provision does not expressly address vaccination, he noted a degree of uncertainty arises from its use as the basis of such an order. And he said:[69]

> It may be that significant measures of this kind are better suited to legislation that squarely addresses the issues that arise from the measures. None of this means that the Order is invalid, but neither should my conclusion be interpreted as clearing a path for more extensive use of this power for other circumstances.

[75] I concur.

Anonymisation

Submissions

[76] The applicants in the Four Midwives' proceeding seek anonymisation of their identities in the judgment. They have not applied for suppression. Mr Reid, on their behalf, submits it would also be appropriate to redact the Statement of Claim and other documents naming them, if it is searched. The applicants are concerned that they and their families will face bullying, harassment, and blame if their identities are made public. They are concerned about both online vilification and actual physical assault. They are also concerned about professional consequences for them in their profession.

[77] Ms Green, for NZDSOS and NZTSOS, also seeks anonymisation in the judgment of the affidavits filed in their proceeding. She says that is because of, and

---

68 At [77].
69 At [77].

during the period of, the breakdown of relationships with employers. While Ms Green initially appeared to seek a blanket suppression of the office-holders and members of her client organisations, she withdrew that. She requests that the affidavits and documents referring to the deponents not be accessed without permission of a Judge.

[78] Mr Perkins, for the Crown, notes the principle of open justice is important. He submits there is no evidence the applicants here are in the same position as those in *GF*, with parallel employment proceedings. Although he does not doubt the applicants are apprehensive, he submits the evidence of the applicants in the Four Midwives' proceeding is like that in *Nottingham v Ardern* where there was no anonymisation. And the applicants can be expected to understand there was a risk their participation would become a matter of public record.[70] He submits the point advocated by Ms Green is not reached because the affidavits are not relevant to the issues to be decided in this judgment. Ultimately, though, the Crown abides the Court's decision.

Law of anonymisation

[79] As the Supreme Court confirmed in *Erceg v Erceg,* New Zealand courts have the inherent power to prohibit the publication of names or identifying particulars of parties to civil proceedings.[71] The starting point is the principle of open justice, described in the same judgment as "a principle of constitutional importance".[72] The importance of that principle is reinforced by the requirement on the Court to make decisions consistently with the right to freedom of expression upheld in s 14 of the Bill of Rights. But there are circumstances in which the general rule of open justice may be departed from to the extent necessary,[73] and in which the right to freedom of expression may be limited in terms of s 5 of the Bill of Rights.

[80] The applicants in the two other challenges to mandatory vaccination, so far, also applied for anonymisation:

---

70 *Nottingham v Ardern* [2020] NZCA 144, [2020] 2 NZLR 207.
71 *Erceg v Erceg* [2016] NZSC 135, [2017] 1 NZLR 310 at [6]–[7].
72 At [2].
73 At [3].

(a) In *GF*, Churchman J observed that public feelings about COVID-19 vaccination are very high and made an interim anonymisation order in relation to the applicant's identity.[74] On 28 October 2021, he extended the interim order in parallel with, and to last as long as, suppression orders made in related proceedings before the Employment Court.[75]

(b) In *Four Aviation Security Service Employees,* Cooke J said:[76]

> [24] The function of the Court is to ensure that the rights of minority groups are properly protected when measures such as those in issue are implemented, including measures that appear to have widespread public support. The Court must ensure that the rule of law is observed. There should also be no doubt that persons in the position of the applicants have the right to access the Court to challenge the legitimacy of the measures imposed. The right of access to the Court is fundamental to the very legitimacy of the measures implemented.
>
> [25] In that context I have granted an application that the applicants' identities be suppressed. This order is made under the inherent jurisdiction in order to avoid the unnecessary personal identification and criticism of the applicants. I accept that there is a significant risk of publicity if such an order is not made and that this could cause hardship in the current environment. I also accept that such an order is appropriate to emphasise the importance of access to the Court for those adversely affected by measures that are perceived to be in the wider public interest. For these reasons that order was made notwithstanding the importance of open justice.

Anonymisation

[81] It is quite clear that the issue of vaccination against COVID-19 has become a socially divisive issue in New Zealand, arousing strongly expressed views on both sides. Sadly, the applicants' concerns about bullying, harassment, and vilification of themselves and their family members may have foundation. I do not entirely discount the possibility of physical or professional consequences for them, in the current climate. As Mr Reid submits, the circumstances here are quite different to those in *Nottingham v Ardern* where the Court of Appeal essentially rejected the risk of more than minimal consequences for the applicants.[77]

---

74 *GF v Minister of COVID-19 Response* [2021] NZHC 2337 at [37].
75 *GF v Minister of COVID-19 Response (No 3)* [2021] NZHC 2881 at [14]
76 *Four Aviation Security Service Employees v Minister of COVID-19 Response*, above n 10.
77 *Nottingham v Ardern,* above n 70, at [34].

[82] I do not consider there is significant public interest in the identities of the applicants in the Four Midwives' case being publicly known at this stage. Like Cooke J, I consider anonymisation of the applicants' identities is currently required to preserve their effective exercise of their rights of access to justice, including under s 27(2) of the Bill of Rights. But that concern is not likely to endure forever. I anonymise the judgment as requested. I direct that the court files for the Four Midwives' case not be searched without permission of a Judge, granted after consultation with the relevant applicants, over the next three years. The direction expires in three years' time unless the applicants succeed in applying to renew it.

[83] The NZDSOS and NZTSOS proceedings are already effectively anonymised because they are brought by incorporated societies and the affidavits are not relevant to, and therefore not mentioned in, this judgment. I direct that the court file for the proceedings not be searched without permission of a Judge, granted after consultation with the relevant applicants, until after the hearing of the second cause of action, at which this question can be further considered in that context.

Result

[84] The application for judicial review by the four midwives, and the first cause of action in the application for judicial review by NZDSOS and NZTSOS, are dismissed.

[85] Because of the public interest in clarification of an important legal issue directly affecting the rights and employment of the applicants, and they have acted reasonably, I am inclined to let costs lie where they fall under r 14.7(e) of the High Court Rules 2016.[78] However, I have not heard the parties on costs. If the Crown wishes to pursue costs, they may file submissions of no more than 10 pages within 10 working days of the judgment and the applicants may file submissions in response within 10 working days of that.

Palmer J

---

[78] *Environmental Defence Society Inc v New Zealand King Salmon* [2014] NZSC 167, (2014) 25 PRNZ 637.

Annex: Relevant extracts from the Act and Order

COVID-19 Public Health Response Act 2020

4 Purpose

The purpose of this Act is to support a public health response to COVID-19 that—

(a) prevents, and limits the risk of, the outbreak or spread of COVID-19 (taking into account the infectious nature and potential for asymptomatic transmission of COVID-19); and

(b) avoids, mitigates, or remedies the actual or potential adverse effects of the COVID-19 outbreak (whether direct or indirect); and

(c) is co-ordinated, orderly, and proportionate; and

(ca) allows social, economic, and other factors to be taken into account where it is relevant to do so; and

(cb) is economically sustainable and allows for the recovery of MIQF costs; and

(d) has enforceable measures, in addition to the relevant voluntary measures and public health and other guidance that also support that response.

9 Minister may make COVID-19 orders

(1) The Minister may make a COVID-19 order in accordance with the following provisions:

(a) the Minister must have had regard to advice from the Director-General about—

(i) the risks of the outbreak or spread of COVID-19; and

(ii) the nature and extent of measures (whether voluntary or enforceable) that are appropriate to address those risks; and

(b) the Minister may have had regard to any decision by the Government on the level of public health measures appropriate to respond to those risks and avoid, mitigate, or remedy the effects of the outbreak or spread of COVID-19 (which decision may have taken into account any social, economic, or other factors); and

(ba) the Minister must be satisfied that the order does not limit or is a justified limit on the rights and freedoms in the New Zealand Bill of Rights Act 1990; and

(c) the Minister—

(i) must have consulted the Prime Minister, the Minister of Justice, and the Minister of Health; and

(ii) may have consulted any other Minister that the Minister (as defined in this Act) thinks fit; and

(d) before making the order, the Minister must be satisfied that the order is appropriate to achieve the purpose of this Act.

11 Orders that can be made under this Act

(1) The Minister or Director-General may in accordance with section 9 or 10 (as the case may be) make an order under this section for 1 or more of the following purposes:

(a) to require persons to refrain from taking any specified actions that contribute or are likely to contribute to the risk of the outbreak or spread of COVID-19, or require persons to take any specified actions, or comply with any specified measures, that contribute or are likely to contribute to preventing the risk of the outbreak or spread of COVID-19, including (without limitation) requiring persons to do any of the following:

(i) stay in any specified place or refrain from going to any specified place:

(ii) refrain from associating with specified persons:

(iii) stay physically distant from any persons in any specified way:

(iv) refrain from travelling to or from any specified area:

(v) refrain from carrying out specified activities (for example, business activities involving close personal contact) or require specified activities to be carried out only in any specified way or in compliance with specified measures:

(vi) be isolated or quarantined in any specified place or in any specified way:

(vii) refrain from participating in gatherings of any specified kind, in any specified place, or in specified circumstances:

(viii) report for and undergo a medical examination or testing of any kind, and at any place or time, specified and in any specified way or specified circumstances:

(ix) provide, in specified circumstances or in any specified way, any information necessary for the purpose of contact tracing:

(x) satisfy any specified criteria before entering New Zealand from a place outside New Zealand, which may include being registered to enter an MIQF on arrival in New Zealand:

…

12 General provisions relating to COVID-19 orders

(1) A COVID-19 order may—

(a) impose different measures for different circumstances and different classes of persons or things:

(b) apply,—

(i) in relation to people, generally to all people in New Zealand or to any specified class of people in New Zealand:

(ii) in relation to things that can be specified under section 11, to any class of those things or to all of those things:

(iii) in relation to anything else,—

(A) generally throughout New Zealand:

(B) in any area, however described:

(c) exempt (with or without conditions) from compliance with or the application of any provisions of the order any person or thing or class of persons or things:

(d) authorise any person or class of persons to—

(i) grant an exemption (with or without conditions) referred to in paragraph (c); or

(ii) authorise (with or without conditions) a specified activity that would otherwise be prohibited by the order:

(e) if any thing can be prohibited under section 11, permit that thing but only subject to specified conditions.

(2) However, a COVID-19 order—

(a) may not apply only to a specific individual:

…

13 Effect of COVID-19 orders

(1) A COVID-19 order may not be held invalid just because—

(a) it is, or authorises any act or omission that is, inconsistent with the Health Act 1956 or any other enactment relevant to the subject matter of the order; or

(b) it confers any discretion on, or allows any matter to be determined, approved, or exempted by any person.

(2) However, subsection (1)(a) does not limit or affect the application of the New Zealand Bill of Rights Act 1990.

(3) To avoid doubt, nothing in this Act prevents the filing, hearing, or determination of any legal proceedings in respect of the making or terms of any COVID-19 order.

COVID-19 Public Health Response (Vaccinations) Order 2021

4 Definitions

affected person means a person who belongs to a group (or whose work would cause them to belong to a group)

group means a group of affected persons specified in the second column of an item of the table set out in Schedule 2

vaccinated, in relation to an affected person, means the person has received all of the doses of a COVID-19 vaccine or combination of COVID-19 vaccines specified in the first column of the table in Schedule 3 administered in accordance with the requirements specified for that vaccine or combination of vaccines in the second column of that table

7 Duty of affected person not to carry out certain work

An affected person must not carry out certain work unless they are –

(a) vaccinated; or

(b) an exempt person.

8 Duties of relevant PCBUs in relation to vaccinations

(1) A relevant PCBU must not allow an affected person (other than an exempt person) to carry out certain work unless satisfied that the affected person is vaccinated.

(2) A relevant PCBU—

(a) must notify each affected person of their duty to be vaccinated; and

(b) must not prevent the affected person from reporting for, and undergoing, vaccination during their working

hours, if vaccinations are available during those hours.

…

11 Duties of affected person regarding vaccination status

(1) An affected person who carries out certain work for a relevant PCBU must—

(a) allow the relevant PCBU to access any COVID-19 vaccination record that the Ministry of Health may have for the affected person; and

(b) advise the relevant PCBU if they have received 1 or more doses of a COVID-19 vaccine or combination of COVID-19 vaccines outside of New Zealand.

Schedule 2

Part 7: Groups in relation to the health and disability sector

7.1 Health practitioners providing health services to patients in person

7.2 Workers who carry out work where health services are provided to members of the public by 1 or more health practitioners and whose role involves being within 2 metres or less of a health practitioner or a member of the public for a period of 15 minutes or more

7.3 Workers who are employed or engaged by certified providers and carry out work at the premises at which health care services are provided

7.4 Care and support workers

…

Part 9: Groups in relation to affected education services

9.1 Workers over the age of 12 years who carry out work at or for an affected education service (including as a volunteer or an unpaid worker) and who—

(a) may have contact with children or students in the course of carrying out that work; or

(b) will be present at the affected education service at a time when children or students are also present

9.2 Providers of a home-based education and care service