IN THE COURT OF APPEAL OF NEW ZEALAND

I TE KŌTI PĪRA O AOTEAROA

CA754/2023
[2026] NZCA 279

BETWEEN	DIRECTOR-GENERAL OF HEALTH First Appellant
AND	ATTORNEY-GENERAL Second Appellant
AND	NEW HEALTH NEW ZEALAND INCORPORATED Respondent

Hearing:	4 June 2025
Court:	French P, Courtney, Katz, Mallon and Thomas JJ
Counsel:	J N E Varuhas and R E R Gavey for Appellants L M Hansen and C F J Reid for Respondent A S Butler KC, R A Kirkness, D T Haradasa and D Qiu for Te Kāhui Tika Tangata | Human Rights Commission as Intervener
Judgment:	29 June 2026 at 3 pm

JUDGMENT OF THE COURT

A The appeal against the High Court decision of 10 November 2023 is allowed.

B The ruling that the first appellant's decision to issue the water fluoridation directions was unlawful because he failed to address the restriction on the protected right to refuse medical treatment and to consider whether that restriction was justified under s 5 of the New Zealand Bill of Rights Act 1990 is set aside.

C We make no award of costs in relation to the appeal.

D The costs award made by the High Court in favour of the respondent is set aside, and the costs paid to the respondent refunded.

REASONS

	Para No.
French P, Courtney, Katz and Thomas JJ	[1]
Mallon J (dissenting)	[165]

FRENCH P, COURTNEY, KATZ AND THOMAS JJ
(Given by French P)

Table of Contents

	Para No.
Introduction	[1]
Background	[6]
The High Court decision	[30]
Arguments on appeal	[42]
Is an actionable procedural obligation existing law?	[50]
The authorities relied on by the Judge	[51]
The three Supreme Court decisions	[63]
Moncrief-Spittle v Regional Facilities Auckland Ltd	[63]
A (SC70/2022) v Minister of Internal Affairs	[74]
Chief of Defence Force v Four Members of the Armed Forces	[83]
The UK authorities cited by the Supreme Court	[89]
Canadian authority	[100]
Conclusion on existing New Zealand law	[108]
Should a novel process duty be recognised?	[118]
Consistency with the Bill of Rights and the benefits of a process obligation	[118]
Doctrinal difficulties	[137]
Uncertainty and costly inefficiencies	[141]
Summary of conclusions	[155]
Costs	[157]
Outcome	[161]

Introduction

[1] It is now well established that the New Zealand Bill of Rights Act 1990 (the Bill of Rights) creates obligations on administrative decision-makers to make

decisions that are consistent with the rights it guarantees.[1] The substantive constraint thus imposed on the decision-maker is enforceable through public law proceedings. In such proceedings, the task of the court is to determine whether the decision in question engaged a protected right and if so whether the limitation on the right affected by the decision was, to quote the words of s 5 of the Bill of Rights, a reasonable limit "as can be demonstrably justified in a free and democratic society".[2]

[2] It is also now established that in undertaking the s 5 "reasonable limit" assessment of an administrative decision, the court may adopt a less structured approach than it does when assessing primary legislation for compliance with the Bill of Rights.[3] This has been said not to be an immutable rule and further that the adoption of a less structured approach does not entail a lesser threshold. It is still a robust one, one that properly reflects the nature of the decision-making involved while giving due regard to the importance of the rights.[4] It has been said to revolve around notions of reasonableness.[5]

[3] However, in this case, the High Court went one step further than requiring a decision-maker to reach a rights-consistent conclusion. It held that in addition to this substantive constraint, there is also an independent procedural or process obligation on the public decision-maker to undertake a Bill of Rights analysis as part of the reasoning process leading to their decision.[6] A failure to undertake that analysis, it

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1 See, for example, *Zaoui v Attorney-General (No 2)* [2005] NZSC 38, [2006] 1 NZLR 289 at [90]–[93]; and *Moncrief-Spittle v Regional Facilities Auckland Ltd* [2022] NZSC 138, [2022] 1 NZLR 459 at [59] and [61].

2 *Moncrief-Spittle*, above n 1, at [101]; and *Chief of Defence Force v Four Members of the Armed Forces* [2025] NZSC 34, [2025] 1 NZLR 21 at [130].

3 *Moncrief-Spittle*, above n 1, at [87]–[92]. When assessing the compatibility of legislation with the Bill of Rights, the s 5 inquiry involves consideration of the objective of the legislative measure, whether there exists a rational connection of the limit to that objective, whether the limit impairs the right as little as possible, and whether the limit is proportional to the objective. The test is often described as a proportionality assessment: see, for example, *Moonen v Film and Literature Board of Review* [2000] 2 NZLR 9 (CA) at [18]; *R v Hansen* [2007] NZSC 7, [2007] 3 NZLR 1 at [42] per Elias CJ, at [70] per Blanchard J, at [103]–[104] per Tipping J, at [204] per McGrath J, and at [272] per Anderson J; *New Health New Zealand Inc v South Taranaki District Council* [2018] NZSC 59, [2018] 1 NZLR 948 at [112] and [122]–[144] per O'Regan and Ellen France JJ; and *Chief of Defence Force*, above n 2, at [96]. See also *R v Oakes* [1986] 1 SCR 103 at 138–140.

4 *Moncrief-Spittle*, above n 1, at [91]–[92].

5 At [83]–[86] and [91].

6 *New Health New Zealand Inc v Director-General of Health* [2023] NZHC 3183, [2024] 2 NZLR 1 [High Court judgment] at [7] and [116].

was held, renders the ultimate decision unlawful, even if the decision itself is substantively compliant with the Bill of Rights.

[4] The appellants challenge the existence of any such procedural duty under existing law and further contend that such a novel development is both doctrinally unsound and contrary to good policy.

[5] The legal issue raised by the appeal has never been directly addressed before by this Court. Due to the novelty and importance of the case, a Full Court was convened to hear the appeal. The Court also granted leave to Te Kāhui Tika Tangata | Human Rights Commission to appear as intervener.

Background

[6] The issue arose in the following context.

[7] In July 2022 the Director-General of Health (the Director-General) acting under powers conferred on him by pt 5A of the Health Act 1956 issued directions to 14 local authorities requiring them to fluoridate their drinking water supplies (the directions).[7]

[8] The relevant empowering provision, s 116E of pt 5A of the Health Act, stipulates that:

> (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 cost, 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

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7 At [1].

(iii) the likely financial cost and savings of adding fluoride to the drinking water, including any additional financial costs of ongoing management and monitoring.

[9] By virtue of s 116E(2), the Director-General is required to seek and consider advice from the Director of Public Health on the matters in subs (3)(a) and (b)(i) before deciding whether to make a direction. Section 116G(1) also requires the Director-General to consult with the relevant local authority on the estimated cost of fluoridation as well as the date by which the local authority would be able to comply with a direction were one to be issued.

[10] Part 5A was enacted following the decision of the Supreme Court in *New Health New Zealand Inc v South Taranaki District Council*.[8] In that case, the Supreme Court confirmed that local authorities had the statutory power to fluoridate their public drinking water,[9] but also held that water fluoridation amounted to medical treatment for the purposes of the protected right under s 11 of the Bill of Rights to refuse medical treatment.[10] That in turn meant the respondent's decision to fluoridate its water supplies was a limitation on a protected right.

[11] Although not determinative of the outcome, two of the five-judge panel went on to find that the decision to fluoridate the drinking water was a justified limit for the purposes of s 5 of the Bill of Rights.[11] They reasoned that because dental decay was a significant problem in the relevant region, reducing it by fluoridation was sufficiently important to justify a limitation on the s 11 right and further that the right was impaired by the decision no more than was necessary to achieve the intended purpose.[12] In separate reasons, a third Judge, Glazebrook J, expressed the provisional view that whether the addition of fluoride was a justified limit may depend on local conditions.[13]

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8 *New Health New Zealand Inc v South Taranaki District Council*, above n 3.
9 At [56] per O'Regan and Ellen France JJ, at [165] and [170] per Glazebrook J, and at [178] per William Young J.
10 At [97]–[100] per O'Regan and Ellen France JJ, at [172] per Glazebrook J, and at [243] per Elias CJ.
11 At [144] per O'Regan and Ellen France JJ.
12 At [122]–[144] per O'Regan and Ellen France JJ.
13 At [176].

[12] The directions in the present case followed consultation with the Director of Public Health and each of the affected local authorities. The directions were issued to the 14 local authorities in individualised letters. In the letters, the Director-General detailed his consideration of the statutory criteria under s 116E(3) of the Act and his reasons for the conclusions he had reached. The letters stated:

> 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.

[13] The letters then cited the scientific studies the Director-General had relied on and then continued:

> 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…; 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 these supplies, including any additional financial costs of ongoing management and monitoring.

[14] The letters went on to say that the Director-General was satisfied the relevant communities would each receive significant benefit through improvement to the state of their oral health. The number of persons who were reasonably likely to receive the fluoridated water was specified as well as the likely financial costs and savings of fluoridation.

[15] Finally, each of the letters annexed an appendix containing a more extensive summary of the information that had informed the Director-General's decision-making, including the advice he had received from the Director of Public Health.

[16] Neither the letters nor the annexed appendices made any express reference to the Bill of Rights and in particular no reference to the protected right to refuse medical treatment, which was undoubtedly engaged by the decision to issue the directions.

[17] The respondent, New Health New Zealand Inc (New Health), is an incorporated society that describes itself as a consumer-focused health organisation

which aims to advance and protect the best interests and health freedoms of consumers. Over the years, it has conducted what can fairly be described as an anti-fluoridation campaign in the courts. New Health is strongly opposed to fluoridation of drinking water on the basis that it removes freedom of choice and because it also believes fluoridation is potentially harmful and ineffective to prevent tooth decay.

[18] In June 2023, New Health issued judicial review proceedings in the High Court against the Director-General and the Attorney-General challenging the fluoridation directions that the former had issued to the 14 local authorities. The statement of claim pleaded several orthodox review grounds including an allegation that the Director-General's decision to issue the directions was a breach of s 11 of the Bill of Rights. However, it also included as a second ground of review the following allegations under the heading "error of law":

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

[19] We pause here to interpolate that the s 3 referenced in the pleading quoted above is the application section of the Bill of Rights. Section 3 states that the Bill of Rights applies only to acts done:

> (a) by the legislative, executive, or judicial branches of the Government of New Zealand; or
>
> (b) by any person or body in the performance of any public function, power, or duty conferred or imposed on that person or body by or pursuant to law.

[20] In this case, we are obviously concerned with the second category of actors.

[21] The essence of New Health's pleading was that the Bill of Rights creates an actionable form of process obligation on all s 3 actors to undertake a Bill of Rights assessment whenever protected rights are engaged. Applied to the Director-General,

it meant it was an error of law for him to fail to turn his mind to the protected right to refuse medical treatment, and to fail to justify his decision under s 5 of the Bill of Rights by being satisfied the limitation on the right was reasonable and proportionate.

[22] The question of what approach the courts should take in a situation where the decision-maker does not engage with the effect of the Bill of Rights was expressly left open for another occasion by the Supreme Court in *Moncrief-Spittle v Regional Facilities Auckland Ltd*.[14] Since *Moncrief-Spittle*, Cooke J in the High Court has twice addressed the issue,[15] but not in stand-alone circumstances like the present case where the empowering statute, the Health Act, does not contain any express requirement to consider the Bill of Rights,[16] and where there is no accompanying substantive rights assessment.[17]

[23] Returning to the narrative in this case, the parties agreed that because of its novelty New Health's second cause of action should be isolated and dealt with as a preliminary question of law. The question was formulated in the following terms:[18]

> [7] … Is, then, there an obligation, in a procedural sense on those to whom the [Bill of Rights] applies to consider the application of the [Bill of Rights] if their exercise of power might engage a protected right?

[24] In a decision issued on 10 November 2023, Radich J answered that question in the affirmative. He held that because the directions engaged the protected right under s 11 of the Bill of Rights, a Bill of Rights assessment was a mandatory relevant consideration.[19] The Director-General was, the Judge said, required to turn his mind to whether the directions were in each case a reasonable limit on the right to refuse medical treatment, required to be satisfied that they were and required to say why that

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14 *Moncrief-Spittle*, above n 1, at [84], n 118.

15 *Wallace v Department of Corrections* [2023] NZHC 2248; and *New Health New Zealand Ltd v Minister for COVID-19 Response* [2023] NZHC 2647.

16 In *New Health New Zealand Ltd v Minister for COVID-19 Response*, above n 15, at [72], the empowering legislation contained an express provision to that effect: see COVID-19 Public Health Response Act 2020, s 9(1)(ba).

17 In both *Wallace v Department of Corrections* and *New Health New Zealand Ltd v Minister for COVID-19 Response* there was an accompanying substantive rights assessment: see *New Health New Zealand Ltd v Minister for COVID-19 Response*, above n 15, at [81]–[83], [93]; and *Wallace v Department of Corrections*, above n 15, at [99]–[108].

18 High Court judgment, above n 6 (footnote omitted).

19 At [84]–[116].

was so.[20] His failure to do that meant the second cause of action was made out and the decision to issue the directions was unlawful.[21]

[25] The Judge dealt with relief in a separate judgment delivered on 16 February 2024 (relief decision).[22] New Health had applied for the directions to be set aside,[23] but the Judge declined to do so because of practical considerations, including the fact that funding was being provided to local authorities for the capital works to which the directions related.[24] The Judge did however order the Director-General to reconsider the decision while keeping the directions in place.[25]

[26] The reconsideration duly took place and in December 2024 the Director-General published the Bill of Rights analysis.[26] The Director-General's conclusion was that fluoridation of water is a substantively justified limit on the s 11 right as a safe and effective public health measure. Having reconsidered, the Director-General reconfirmed the directions.

[27] The appeal before us was filed by the Crown immediately after the 10 November 2023 judgment but before the relief decision. Due to its concerns about the general implications of the High Court ruling that the directions were unlawful for failing to consider the Bill of Rights, the Crown decided to proceed with the appeal notwithstanding the Director-General's December 2024 reconsideration.

[28] Technically, the appeal is moot, the outcome having no practical effect in relation to the specific dispute between the parties. However, the court will entertain a moot appeal in exceptional circumstances including where there is an important public interest at play as there clearly is in this case.[27]

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20 At [109] and [116].
21 At [116].
22 *New Health New Zealand Inc v Director-General of Health* [2024] NZHC 196, [2024] NZAR 36 [relief decision].
23 At [13].
24 At [29].
25 At [31]–[32].
26 Ministry of Health | Manatū Hauora "Director-General of Health consideration of community water fluoridation under the New Zealand Bill of Rights Act 1990" (information release, 4 December 2024).
27 *Baker v Hodder* [2018] NZSC 78, [2019] 1 NZLR 94 at [33]; and *Chief Executive of the Department of Corrections v Jones* [2025] NZCA 457, [2025] 3 NZLR 318 at [12], citing *Baker v Hodder*.

[29] We turn now to consider the High Court decision in more detail.

The High Court decision

[30] The Judge identified the issue to be addressed as being:[28]

> [3] … whether, when a discretionary decision has the potential to restrict a fundamental right in the [Bill of Rights], the decision-maker must in a procedural sense address the restriction and consider whether it is demonstrably justified, quite apart from an assessment by the Court of whether any restriction is so justified.

[31] He continued by articulating the competing positions in the following terms:

> [10] To put it another way, is a [Bill of Rights] 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] 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] operates as a substantive constraint — exercisable through public law proceedings — to ensure that the ultimate decision is rights-compliant?

[32] In adopting the position advocated by New Health, the Judge relied principally on High Court authority, in particular the two decisions of Cooke J mentioned above.[29]

[33] In the first of these, *Wallace v Department of Corrections*, Cooke J upheld a ground of review founded on the decision-maker's failure to consider whether his decision had a discriminatory effect and to address whether that was justified.[30] In the second, *New Health New Zealand Inc v Minister for COVID-19 Response*, Cooke J stated that discretionary decision-making is constrained in two separate ways when a protected right is being limited:[31]

> (a) subjectively: the decision-maker must be satisfied that a limitation of the right is justified; and
>
> (b) objectively: the Court must assess whether there has been an unjustified limitation of the right.

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28 High Court judgment, above n 6.

29 *Wallace v Department of Corrections*, above n 15; and *New Health New Zealand Ltd v Minister for COVID-19 Response*, above n 15.

30 *Wallace v Department of Corrections*, above n 15, at [109]–[111].

31 *New Health New Zealand Ltd v Minister for COVID-19 Response*, above n 15, at [71].

[34] In the view of the High Court Judge in the present case, Cooke J's formulation of the dual components reflects "an understanding that has always been implicit".[32]

[35] The Judge therefore concluded it was "sufficiently clear" that on the basis of the New Zealand authorities the correct approach was a "mixed process and outcome approach",[33] an approach which he described as follows:[34]

> [84] … when discretionary decisions on the part of those captured by s 3 of the [Bill of Rights] might restrict a right protected under the [Bill of Rights]:
>
> (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.

[36] In the Judge's view, the adoption of this approach meant it followed "as a matter of course" that a finding in favour of a claimant on either of those two requirements would enable the court to go on and consider the question of relief. In that sense, the first of the two requirements was, the Judge said, "a mandatory relevant consideration".[35]

[37] The Judge acknowledged that English authority was to the contrary,[36] but considered there were sound reasons for New Zealand "not to push the pendulum away from a process obligation to the same extent as has been the case in the United Kingdom",[37] and to instead maintain "the process-related half of the equation".[38] In a later section of this judgment,[39] we discuss the reasons relied on by the Judge, which were drawn heavily from a 2014 article by a leading New Zealand academic Professor Geiringer.[40]

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32 High Court judgment, above n 6, at [48].
33 At [85].
34 Footnote omitted.
35 At [86].
36 At [85] following the Judge's discussion at [55]–[74] where he had discussed: *R (SB) v Governors of Denbigh High School* [2006] UKHL 15, [2007] 1 AC 100; and *Belfast City Council v Miss Behavin' Ltd* [2007] UKHL 19, [2007] 1 WLR 1420.
37 High Court judgment, above n 6, at [74].
38 At [85].
39 See below at [117]–[140].
40 High Court judgment, above n 6, at [70]–[74], citing Claudia Geiringer "Process and Outcome in Judicial Review of Public Authority Compatibility with Human Rights: A Comparative Perspective" in Hanna Wilberg and Mark Elliott (eds) *The Scope and Intensity of Substantive Review: Traversing Taggart's Rainbow* (Hart Publishing, Oxford, 2015) 329.

[38] As to what would be required to discharge the procedural obligation, the Judge said a more than perfunctory or pro forma consideration was required, but that the extent of the consideration must also be sensitive to the range of decision-making contexts in which human rights might apply. Relevant factors would, he said, include:[41]

> (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.

[39] As an example, the Judge posited the situation of a librarian who requires a library user wearing an offensive T-shirt to leave the library, thereby limiting that person's right to freedom of expression. Although a reasoned Bill of Rights analysis might not be expected, the librarian would be expected to turn their mind to the issue and explain why the T-shirt crossed the line.[42]

[40] Having concluded that a Bill of Rights assessment was a mandatory relevant consideration such that it can give rise to relief in its own right, the Judge turned to the facts of the case before him. He held that while the Director-General did turn his mind to relevant scientific evidence, he did so for the purpose of complying with the criteria under the Health Act, not the Bill of Rights.[43] According to the Judge, the Director-General was also required to turn his mind to Bill of Rights considerations on the basis of local conditions in each area in which the fluoridation directions might be given.[44] However, in the Judge's view he failed to do so. In those circumstances,

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41 High Court judgment, above n 6, at [95].
42 At [96].
43 At [109].
44 At [108].

there was "no getting away", the Judge said, from the fact that the Director-General did not turn his mind to Bill of Rights considerations when making his decision.[45] That was an error rendering the decision to make the directions unlawful.

[41] In the relief decision, the Judge held that the Director-General's reconsideration was to be limited to an assessment of whether the directions given to the 14 local authorities were in each case in terms of s 5 of the Bill of Rights reasonable limits on the right to refuse medical treatment prescribed by law as can be demonstrably justified in a free and democratic society. He also directed that the reconsideration would require the Director-General to take the views of New Health into account.[46]

Arguments on appeal

[42] As mentioned, the appellants contend a procedural Bill of Rights obligation as formulated by the Judge is not part of existing New Zealand law and nor should it be. They submit that the Judge's analysis of the existing authority was selective and flawed, wrongly suggesting as it did the development of a consensus around an actionable procedural obligation which does not, in their submission, exist.

[43] Further, in their submission, recognition of a procedural duty will generate doctrinal difficulties and create serious practical problems including imposing significant costs and burdens on public administration. They say in addition that it is a solution in search of a problem, there being no evidence of a systemic problem of lack of respect for human rights within the New Zealand government, and the substantive constraint providing a strong form of protection. As regards the latter contention, they point to evidence showing agencies developing, via sophisticated

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45 At [109].
46 Relief decision, above n 22, at [32].

internal agency processes, successful rights-respecting cultures in light of the substantive obligation.[47]

[44] As a fallback position, the appellants argue that even if a procedural duty does exist it was discharged by the Director-General. While the Director-General may not have expressly referred to the right to refuse medical treatment, the factors he did take into account were in substance the factors relevant to a Bill of Rights analysis.

[45] For their part, the respondent and the intervener support the Judge's decision and his reasoning as outlined above.

[46] Counsel for New Health, Ms Hansen, submitted that recent Supreme Court decisions are consistent with there being a pre-existing procedural obligation on decision-makers, a breach of which will be an independent ground of unlawfulness. She also argued that concerns about a procedural duty being too burdensome were overstated.

[47] Mr Butler KC for the intervener acknowledged in his written submissions that New Zealand's appellate courts have to date left open whether there is a legal obligation on s 3 actors to consider and apply the Bill of Rights in their decision-making.[48] However, he endorsed the reasoning of the High Court Judge, submitting it was consistent with the express purposes of the Bill of Rights.[49]

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47 Citing Richard Martin "A 'Culture of Justification'? Police Interpretation and Application of the Human Rights Act 1998" in Jason Varuhas and Shona Stark (eds) *The Frontiers of Public Law* (Hart Publishing, Oxford, 2020) 499. The existence of various Bill of Rights advisories that have been developed by the Cabinet Office, Crown Law, the Police and Immigration New Zealand can also be said to support this view. Ironically, those same publications are cited by Mallon J at [196], n 236 of her dissent rejecting the suggestion that the imposition of an actionable process duty will create practical problems.

48 In written submissions, Mr Butler supported this contention by reference to what he described as a "pregnant footnote" in the Supreme Court decision of *Moncrief-Spittle*, above n 1, at [84], n 118, where the Court said that it was leaving for an occasion on which it arises the approach to be taken by the courts in the situation where the decision-maker does not engage with the effect of the Bill of Rights. In oral submissions however, Mr Butler appeared to take a different approach as discussed below at [73].

49 Those purposes are to affirm, protect, and promote human rights and fundamental freedoms in New Zealand, and to affirm New Zealand's commitment to the International Covenant on Civil and Political Rights: see New Zealand Bill of Rights Act 1990, long title.

[48] Mr Butler also argued that the appellants' concerns did not warrant a blanket rule that would absolve s 3 decision-makers of any requirement to identify and weigh limits on fundamental rights. Further, in his submission, the appellants' approach risked over-judicialising the Bill of Rights by making it relevant only when a person challenges particular conduct before a court.[50]

[49] It follows from the submissions of all parties that the first issue for resolution is the state of the existing law.

Is an actionable procedural obligation existing law?

[50] We begin our analysis by considering whether the Judge was correct to suggest in effect that there was an established New Zealand approach to the existence of an independent actionable process obligation.

The authorities relied on by the Judge

[51] Turning first to the authorities relied on by the Judge, we agree with the appellants that correctly analysed they are of limited significance and do not evidence a consensus.

[52] As mentioned, two of the four High Court decisions relied on were written by the same Judge, Cooke J. For the reasons identified at [22], the statements in both decisions about an independent procedural duty were made in a different context to the present case.[51] Further, in both decisions, Cooke J cited the Supreme Court decision in *Moncrief-Spittle* as confirming the existence of an actionable process obligation.[52] For reasons we explain at [63] to [73], we consider the correct position to be that the Supreme Court left the issue open.

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50 Ironically opponents of the procedural approach say it has the effect of judicialisation: see, for example, *R (SB) v Governors of Denbigh High School*, above n 36, at [31] per Lord Bingham, citing Thomas Poole "Of headscarves and heresies: The Denbigh High School case and public authority decision-making under the Human Rights Act" (2005) PL 685 at 695.

51 *Wallace v Department of Corrections*, above n 15; and *New Health New Zealand Ltd v Minister for COVID-19 Response*, above n 15.

52 *Wallace v Department of Corrections*, above n 15, at [110]; and *New Health New Zealand Ltd v Minister for COVID-19 Response*, above n 15, at [71] and [82].

[53] The third High Court decision relied on by Radich J, *Television New Zealand Ltd v West*, is a decision of Asher J in which the Judge undoubtedly recognised the existence of an actionable process duty.[53] However, that was not determinative of the ultimate outcome.[54] It is also an arguable inference from the judgment that Asher J's recognition of a process duty was influenced by his understanding that the relevant decision-maker was not subject to any substantive Bill of Rights constraint. That is unsurprising given that Asher J's decision was delivered in 2011 when the Bill of Rights jurisprudence on the role of the courts was still evolving. Indeed, as recently as 2022, the Supreme Court was moved to observe in *Moncrief-Spittle* that the issue of whether the application of the Bill of Rights imposes a substantive constraint on the decision-maker was still the subject of debate.[55]

[54] As regards the fourth High Court decision cited by Radich J, *Schubert v Wanganui District Council*, that turned on an interpretation of the empowering statute, not the existence of a universal stand-alone process obligation derived from the Bill of Rights.[56] That is to say, the reason the decision-maker's failure to consider the Bill of Rights was held to be an actionable error was because that was a relevant consideration under the empowering statute,[57] not because of the existence of a universal actionable process obligation on every s 3 decision-maker under the Bill of Rights.

[55] In addition to the four High Court decisions, the Judge relied on a decision of this Court in *Moonen v Film and Literature Board of Review*.[58] That too however was a case about a decision-maker being held to have misinterpreted its empowering legislation by not construing it with a rights-consistent lens.[59]

[56] We have also considered two other decisions cited in Mallon J's dissent as supporting the approach taken by the High Court, namely *Taylor v Chief Executive of*

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53 *Television New Zealand Ltd v West* [2011] 3 NZLR 825 (HC) at [86] and [90]–[106].
54 On the facts the process duty was held to have been discharged: at [108]–[112].
55 *Moncrief-Spittle*, above n 1, at [81].
56 *Schubert v Wanganui District Council* [2011] NZAR 233 (HC) at [1]–[4].
57 At [171].
58 *Moonen v Film and Literature Board of Review*, above n 3.
59 At [40].

Corrections decided in 2015,[60] and *Smith v Attorney-General* decided in 2017.[61] However, in our view, both decisions, like those cited by Radich J, have limited precedent value in the present case.

[57] *Smith* concerned the decision of a prison manager revoking permission for a prisoner to wear a hairpiece when the prisoner was returned to custody after absconding. Wylie J held that the manager's decision engaged the protected right of freedom of expression,[62] and that the decision was unlawful because the manager had failed to undertake a Bill of Rights analysis in reaching his decision.[63] In taking that approach, the Judge relied on *Television New Zealand Ltd v West* discussed above,[64] and at no stage did he undertake a substantive analysis.

[58] Two other notable features of *Smith* are that unlike the High Court Judge in the present case, Wylie J did not consider the process duty was applicable to all s 3 actors. It was only said to be applicable to the prison manager because of their significant coercive powers.[65] The second notable feature is that on appeal, this Court held that Wylie J had erred in finding the prison manager's decision had engaged the protected right in the first place.[66]

[59] We would add that in a later High Court decision involving the same prisoner, another High Court Judge, Simon France J, took a different view to both Asher and Wylie JJ.[67] In the context of a challenge to a decision of the Parole Board on the sole ground that the Board had failed to take into account the Bill of Rights, Simon France J stated:

> [45] … the real concern is that basic rights are not interfered with more than is necessary and justified. I am not convinced that it is correct to impeach a decision by reference to a person's basic rights without inquiring whether that basic right has in fact been unjustifiably limited. …

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60 *Taylor v Chief Executive of Department of Corrections* [2015] NZCA 477, [2015] NZAR 1648.
61 *Smith v Attorney-General* [2017] NZHC 463, [2017] 2 NZLR 704.
62 At [70]–[71].
63 At [72]–[74], [86]–[88] and [97].
64 At [83], citing *Television New Zealand Ltd v West*, above n 53.
65 At [85]–[86], distinguishing *R (SB) v Governors of Denbigh High School,* above n 36.
66 *Attorney-General v Smith* [2018] NZCA 24, [2018] 2 NZLR 899 at [51]–[52].
67 *Smith v New Zealand Parole Board* [2018] NZHC 955.

> [46] … the Parole Act contains its own detailed scheme, aimed, I consider, at ensuring a proportionate decision. … I doubt that the system will be aided by imposing a requirement of a set reasoning methodology…

[60] Finally, as regards *Taylor*, in that case the decision-maker had treated the relevant protected right as a mandatory relevant consideration,[68] and therefore the existence or otherwise of a universal process duty was not a live issue. What is also noteworthy about *Taylor* for present purposes is its ambiguity regarding the existence of any substantive constraint other than orthodox judicial review reasonableness.[69] Again, that is unsurprising having regard to the date of the judgment.

[61] A survey of these authorities confirms our view that in order to ascertain the existing law the proper focus must be recent decisions of the Supreme Court, the three most pertinent decisions being *Moncrief-Spittle*,[70] *A (SC 70/2022) v Minister of Internal Affairs*,[71] and *Chief of Defence Force v Four Members of the Armed Forces*.[72] In fairness to Radich J, it should be noted that two of the trilogy were decided after he issued his decisions.[73]

[62] Counsel before us were all able to point to selected passages in the three Supreme Court judgments which arguably support their respective positions. It has therefore been necessary for us to examine each of the Supreme Court decisions in some detail. In addition, given that the Supreme Court has indicated its approach is similar to that adopted in the United Kingdom (UK),[74] we have also undertaken a review of the two key authorities in that jurisdiction as a cross-check to our understanding of the Supreme Court decisions.

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68 *Taylor v Chief Executive of Department of Corrections*, above n 60, at [32]: the decision-maker said he was "fully cognisant of the right to freedom of expression".

69 As noted in Hanna Wilberg *Administrative Law in Aotearoa New Zealand* (Hart Publishing, Oxford, 2025) at 189.

70 *Moncrief-Spittle*, above n 1.

71 *A (SC 70/2022) v Minister of Internal Affairs* [2024] NZSC 63, [2024] 1 NZLR 372.

72 *Chief of Defence Force*, above n 2.

73 Those two being: *Chief of Defence Force*, above n 2, which was issued on 11 April 2025; and *A (SC 70/2022)*, above n 71, which was issued on 5 June 2024.

74 *Moncrief-Spittle*, above n 1, at [82]; and *A (SC 70/2022)*, above n 71, at [137].

The three Supreme Court decisions

Moncrief-Spittle v Regional Facilities Auckland Ltd

[63] The first Supreme Court decision in time is the *Moncrief-Spittle* decision which we have already briefly mentioned. *Moncrief-Spittle* concerned the decision of a venue manager to cancel a venue booking for controversial speakers because of concerns about health and safety risks arising from anticipated protests. The cancellation decision was challenged in judicial review proceedings by a person who had purchased a ticket to hear the speakers and by another person concerned about disruption of future events.[75] The grounds of review advanced were irrationality and failure to act consistently with the Bill of Rights, including the protected right to freedom of expression.[76]

[64] The first issue for determination was whether the Bill of Rights applied. The Court held that the venue manager came within s 3(b) of the Bill of Rights, was required to act consistently with the Bill of Rights and therefore the decision to cancel was subject to it.[77]

[65] The second issue was whether the decision to cancel was a breach of protected rights. The Court held that the cancellation decision limited the claimants' right to freedom of expression which in turn meant the venue manager could only lawfully cancel if cancellation was a reasonable limitation on that right in terms of s 5 of the Bill of Rights.[78]

[66] Relevantly for present purposes, the parties' submissions raised an issue described in the judgment as "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".[79] That description of the issue is set out in the Supreme Court judgment under the heading of "Our view on the role of the Court".

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75 At [1]–[2].
76 At [3].
77 At [51] and [59].
78 At [74].
79 At [81].

[67] Under the same heading, the Court responded to that submission in the following terms. For reasons which will become obvious, we have included in the quote the relevant paragraph numbers and relevant footnotes from the Supreme Court judgment:[80]

> [82] … the correct approach is to treat the right as constraining the outcome the decision-maker may reach, *rather than simply a mandatory relevant consideration.* … There is also support for this approach in the United Kingdom decisions in a similar context.[115] …
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> [115] *Regina (SB) v Governors of Denbigh High School* [2006] UKHL 15, [2007] 1 AC 100; *Belfast City Council v Miss Behavin' Ltd* [2007] UKHL 19, [2007] 1 WLR 1420; and *Regina (Lord Carlile of Berriew) v Secretary of State for the Home Department* [2014] UKSC 60, [2015] AC 945.
>
> [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 [the venue manager]. We consider the result of doing so in this case is that [the venue manager] *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 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 [the venue manager] had identified and weighed the right, and gave consideration to whether the reasons to cancel … were such as to outweigh the right. That will assist the court in its task.[118]
>
> [118] We leave for an occasion on which it arises the approach to be taken by the courts in the 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.
>
> …
>
> [86] Further, while the Court must satisfy itself of the reasonableness of the limit, some regard may be had and respect given to where the decision-maker saw the balance as lying. The extent to which this is so will depend on the context. …

[68] In our view, the statement we have italicised from [82] of the Supreme Court — "rather than simply a mandatory relevant consideration" — needs to be understood in the context of the submission to which it was responding, namely that there was only one obligation on a s 3 decision-maker and that was simply a procedural one. The focus was accordingly very much on the court's substantive constraint role.

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80 Emphasis added.

[69] Significantly, in the later 2024 Supreme Court decision *A (SC 70/2022)*, the Court itself described its earlier decision in *Moncrief-Spittle* as endorsing an approach similar to that in the UK and said it was an approach:[81]

> [137] … to the effect that rights under the Bill of Rights constrain the outcome a decision-maker may reach, *rather than being* a mandatory relevant consideration. …

[70] All of that said, we acknowledge that read in isolation the wording of [82] in *Moncrief-Spittle* is obviously capable of the interpretation that the Court was positively affirming the existence of a process obligation as formulated by the Judge in this case. The latter it will be recalled, used the terms "mandatory relevant consideration" and "procedural obligation" interchangeably.[82] There is also the use of the phrase "had to" at [83] of *Moncrief-Spittle*,[83] where it was said that the decision-maker "had to turn his mind to and engage with" the question of whether the decision was a reasonable limit on the protected right at issue.

[71] However, on balance, having regard to a number of other countervailing factors within the *Moncrief-Spittle* judgment itself, we have reached the view that despite the possible ambiguities, the better interpretation is that it was not the Court's intention in *Moncrief-Spittle* to pronounce on the existence of an independently actionable process duty. Those countervailing factors are:

(a) the citation with approval of two UK authorities that have categorically rejected the notion of an actionable process obligation in human rights law;[84]

(b) the footnote expressly stating that the Court is leaving the approach to be taken by the courts in the situation where the decision-maker does not engage with the effect of the Bill of Rights for another occasion;[85]

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81 *A (SC 70/2022)*, above n 71 (emphasis added and footnote omitted).

82 See, for example, High Court judgment, above n 6, at [7], [10], [33]–[34], [37], [40], [83], [86]–[87], [98] and [113].

83 *Moncrief-Spittle*, above n 1.

84 At [82], citing *R (SB) v Governors of Denbigh High School*, above n 36, and *Belfast City Council v Miss Behavin' Ltd*, above n 36. See our discussion of these UK cases below starting at [89].

85 *Moncrief-Spittle*, above n 1, at [84], n 118.

(c) the absence of any statement expressly saying that in addition to the Bill of Rights constraining the outcome it is also a mandatory relevant consideration which if not taken into account will render the decision unlawful even if it is substantively compliant; and

(d) the fact that the references to the expectations on the decision-maker's processes are stated to arise from the substantive constraint and are not expressed as a free-standing independent duty.

[72] It follows from the above that for present purposes we consider the weight that the High Court placed on *Moncrief-Spittle* was misplaced.

[73] In coming to that conclusion, we have not overlooked an oral submission made by Mr Butler that appeared to suggest (contrary to his written submissions) that footnote 118 in *Moncrief-Spittle* was simply a reference to the Court's remedial response to a breach of an actionable process obligation rather than reflecting any undecided issue as to the existence or otherwise of that duty. However, in our view, that is not a tenable interpretation of the footnote. The concept of a mandatory relevant consideration and the consequences of failing to take it into account are well established. That being so, it would be strange if the Supreme Court would consider it necessary to make a point of reserving that issue for later consideration, especially if a mandatory relevant consideration in the Bill of Rights context was well established prior to *Moncrief-Spittle* as claimed by the High Court.[86]

A (SC 70/2022) v Minister of Internal Affairs

[74] This judgment concerned a judicial review proceeding challenging a decision made by the Minister of Internal Affairs under the Passports Act 1992 to cancel A's passport. The Minister made that decision on the recommendation of the New Zealand Security Intelligence Service (NZSIS).[87] The NZSIS briefing paper to the Minister was silent on the Bill of Rights and apart from a brief reference in his affidavit evidence regarding the effect of cancellation on freedom of movement, there was

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86 See, for example, High Court judgment, above n 6, at [84]–[85].
87 *A (SC 70/2022)*, above n 71, at [1]–[3].

nothing to indicate the Minister had considered the effect of the decision on other guaranteed rights.[88]

[75] In the High Court, Dobson J held that while it would have been preferable if the briefing paper had addressed Bill of Rights questions to enable the Minister to assess them, that failure could not vitiate the cancellation decision, unless the decision did in fact infringe protected rights to an extent greater than reasonably justified, which in the Judge's view it did not.[89] The Court of Appeal upheld the High Court decision.[90]

[76] The Supreme Court found on the evidence that the Minister did not have reasonable grounds to believe that one of the pre-requisites for cancellation under the Passports Act had been satisfied. That finding was sufficient to dispose of the appeal in A's favour.[91] However, significantly, the Court did make some obiter observations about the Bill of Rights.

[77] As already mentioned, these included a statement that the approach endorsed in *Moncrief-Spittle* was that the rights under the Bill of Rights "constrain the outcome a decision-maker may reach, rather than being a mandatory relevant consideration".[92]

[78] The Court also made further observations about whether the Minister had engaged with the right in the way contemplated by *Moncrief-Spittle* — which it found he had not — and if so, what was the effect of that failure.

[79] As regards the Minister's failure, the Court said:[93]

> [138] While we agree substantive compliance with the Bill of Rights is a legal issue for the court to resolve, that does not mean the decision-maker (in this case, a Cabinet Minister) does not need to engage with the Bill of Rights. As noted in *Moncrief-Spittle*, the fact that the Bill of Rights is a substantive constraint on the decision-maker means *they must turn their mind to and engage with* the question of whether it was reasonable to limit the affected rights by their decision.

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88 At [132].
89 At [133], citing *A v Minister of Internal Affairs* [2020] NZHC 2782 at [113] and [119].
90 *A (SC 70/2022)*, above n 71, at [134], citing *A (CA677/2020) v Minister of Internal Affairs* [2022] NZCA 257 at [88].
91 *A (SC 70/2022)*, above n 71, at [116].
92 At [137].
93 Footnote omitted and emphasis added.

[80] As to the legal effect of the failure, the Court went on to say that it agreed with a Crown contention that if the statutory grounds under the Passports Act were made out:[94]

> [140] … it is likely a decision to cancel would be a justified limit on rights. In that event, a failure to address the issue *would not be fatal to* the validity of the decision. But that does not mean those advising the Minister should feel free not to address the issue.

[81] Understandably, New Health focused on the Court's use of the word "must" at [138], arguing that it denoted a procedural obligation, while the Crown emphasised the passage at [140] to the effect that a failure to address the issue would not of itself be fatal to the validity of the decision. The Crown also emphasised the Court's statement that "rights under the Bill of Rights constrain the outcome a decision-maker may reach, rather than being a mandatory relevant consideration".[95]

[82] It is in our view possible to reconcile the Court's use of the word "must" with its rejection of the Bill of Rights imposing a mandatory relevant consideration. We consider that the general thrust of the Court's analysis is that there is only one inquiry, namely an inquiry into substantive compliance, and not two separate inquiries either of which can lead to unlawfulness. The need for the decision-maker to consider the Bill of Rights is regarded as flowing from the Bill of Rights being a substantive constraint and is thus an aspect of the substantive analysis, rather than an actionable process duty in its own right. Seen in that light, the "must" is, in our view, best interpreted as meaning "should" in the sense that if the decision-maker wishes to avoid or minimise the risk of the court finding the limit on the relevant right(s) was not justified, they should conduct a Bill of Rights analysis themselves.

Chief of Defence Force v Four Members of the Armed Forces

[83] Delivered in 2025, this judgment concerned a decision by the Chief of Defence Force (the Chief) to issue defence force orders under the Defence Act 1990.[96] The orders required as part of overseas readiness that staff be vaccinated, failing which they would be discharged.

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94 Emphasis added.
95 At [137].
96 *Chief of Defence Force*, above n 2, at [1]–[9].

[84] A judicial review challenge to the validity of the orders failed in the High Court,[97] but succeeded in this Court on the grounds that the Chief had not discharged the burden of showing the limits on protected rights imposed by the orders were demonstrably justified.[98] On further appeal to the Supreme Court however, it was held that this Court had failed to allow the Chief a sufficient margin of appreciation when deciding whether the orders were needed to meet operational readiness requirements.[99]

[85] While the Court repeated the *Moncrief-Spittle* statement that it is necessary to treat protected rights as a substantive constraint on a decision-maker, "not merely a mandatory relevant consideration",[100] it did not suggest in any part of the judgment that how the Chief took the Bill of Rights into account was a touchstone of illegality. Rather, the Chief's reasoning on the Bill of Rights was viewed as one of the factors that fed into the Court's assessment of substantive compliance. Thus, the Court talked about regard being had in appropriate cases to where the decision-maker saw the balance as lying, and the fact that in appropriate cases the Court may defer to the decision-maker's assessment.[101]

[86] In her dissent, Mallon J considers this third Supreme Court decision to be irrelevant.[102] However, we disagree. We consider it is relevant because it demonstrates how the decision-making process is factored into the one inquiry which the Court affirms is a substantive inquiry as to whether the decision represents a reasonable limit on the protected right.

[87] Our analysis of these three important Supreme Court decisions leads us to the conclusion that the Court has endorsed what Mr Varuhas described as an "integrated approach", that is to say a mixed process and substantive model. Under this approach, a failure on the part of the decision-maker to take the Bill of Rights into account or reason adequately about the Bill of Rights will not of itself ground a finding of illegality. A finding of unlawfulness will only follow from the court's analysis of

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97 At [10], citing *Four Members of the Armed Forces v Chief of Defence Force* [2022] NZHC 2497.
98 *Chief of Defence* Force, above n 2, at [10], citing *Four Members of the Armed Forces v Chief of Defence Force* [2024] NZCA 17, [2024] 3 NZLR 1.
99 *Chief of Defence Force*, above n 2, at [129]–[145].
100 At [99].
101 At [102]–[109].
102 See below at [193].

substantive compliance. However, that does not mean the decision-maker's reasoning processes are entirely irrelevant to substantive illegality or invalidity. The reasoning of the decision-maker is one element of substantive compliance, but it is not conclusive. As another commentator pithily put it, such an approach:[103]

> … does not mean that the reasoning process of the public authority is irrelevant, but rather that it cannot be used either to vitiate or rescue a decision which is otherwise … compatible.

[88] We are reinforced in that conclusion by consideration of the UK authorities expressly described in *Moncrief-Spittle* and *A (SC 70/2022)* as evidencing a similar approach to the New Zealand approach.

The UK authorities cited by the Supreme Court

[89] The legislative context of the UK authorities is the Human Rights Act 1998 (UK). It incorporates the European Convention for the Protection of Human Rights and Fundamental Freedoms 1950 (Convention) into UK law.[104] According to established UK case law, a limitation or interference with a protected right must be prescribed by law and necessary in a democratic society for a permissible purpose, meaning that the limitation or interference must be directed to a legitimate purpose and must be proportionate in scope and effect.[105]

[90] The authorities in question are two decisions of the House of Lords: *R(SB) v Governors of Denbigh High School*,[106] which was decided in 2006, and *Belfast City Council v Miss Behavin' Ltd*,[107] which was decided in 2007. Both decisions emphatically reject the suggestion of an actionable process duty.

[91] *Denbigh High School* concerned a decision made by the head teacher and governors of Denbigh High School refusing to allow a student to wear a religious form of dress under the school's uniform policy. The Court of Appeal quashed the decision,

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103 Aileen Kavanagh "Reasoning about Proportionality under the Human Rights Act 1998: Outcomes, Substance and Process" (2014) 130 LQR 235 at 245.

104 European Convention for the Protection of Human Rights and Fundamental Freedoms 213 UNTS 221 (opened for signature 4 November 1950, entered into force 3 September 1953), as enshrined in the Human Rights Act 1998 (UK), sch 1.

105 *R (SB) v Governors of Denbigh High School*, above n 36, at [26] per Lord Bingham.

106 *R (SB) v Governors of Denbigh High School*, above n 36.

107 *Belfast City Council v Miss Behavin' Ltd*, above n 36.

not because it found the school had breached the student's art 9 Convention right to manifest their religion, but on the grounds that the decision had been reached without sufficient consciousness of the Convention right.[108] The Court held the school was required to demonstrate a correct process of reasoning,[109] and set out a decision-making structure with a series of questions required to be asked and answered.[110] The series of questions effectively replicated the legal test applied by Judges.

[92] On further appeal, the House of Lords was divided as to whether the Convention right in question had been breached. However, the Law Lords were all agreed that even if the decision did interfere with the right, the interference was proportionate to the right and therefore lawful.[111] Significantly for present purposes, two of their Lordships, Lord Bingham and Lord Hoffmann, were highly critical of what Lord Bingham termed the Court of Appeal's "procedural approach".[112]

[93] Lord Bingham stated such an approach would introduce a "new formalism" and be "a recipe for judicialisation on an unprecedented scale".[113] He went on to say that while the Court of Appeal's decision-making prescription would be admirable guidance for a lower court or legal tribunal, it could not be required of a head teacher and governors even with a solicitor to help them. What matters, he said, in any given case is the practical outcome not the quality of the decision-making that led to it.[114]

[94] These sentiments were echoed by Lord Hoffmann. He suggested that the approach taken by the Court of Appeal amounted to expecting school principals and governors to make the sorts of decisions at issue "with textbooks on human rights law at their elbows".[115] His Lordship also pointed out the important distinction between human rights litigation and conventional domestic judicial review. In the latter, the court, he said, is usually concerned with whether the decision-maker reached their

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108 *R (SB) v Governors of Denbigh High School* [2005] EWCA Civ 199, [2005] 1 WLR 3372 at [75]–[78] per Brooke LJ, at [86]–[88] per Mummery LJ, and at [90], [92] and [94] per Baker LJ.

109 At [75] per Brooke LJ, at [87] per Mummery LJ, and at [94] per Baker LJ.

110 At [75] per Brooke LJ, and at [90] per Baker LJ.

111 *R (SB) v Governors of Denbigh High School*, above n 36, at [32]–[34] per Lord Bingham, at [41] per Lord Nicholls, at [58] and [68] per Lord Hoffmann, at [83]–[84] and [91] per Lord Scott, and at [98] per Baroness Hale.

112 At [28] per Lord Bingham.

113 At [31], citing Poole, above n 50, at 691–695.

114 At [31].

115 At [68].

decision in the right way rather than whether they got what the court might think to be the right answer. In contrast, art 9 was concerned with substance, not procedure: "It confers no right to have a decision made in a particular way. What matters is the result".[116]

[95] While none of the other three Law Lords expressly addressed the issue of a process obligation, one of them expressed "full agreement" with the reasons given by Lord Bingham and Lord Hoffmann.[117]

[96] The second case, *Belfast City Council v Miss Behavin' Ltd*,[118] concerned the decision of a local authority declining the respondent's application to use premises as a sex shop. The respondent sought judicial review which was declined at first instance but succeeded in the Court of Appeal on the ground the local authority had not shown it was conscious of the Convention rights which were engaged, in particular, the art 10 right to freedom of expression.[119]

[97] The respondent Council appealed to the House of Lords which held the Court of Appeal had been wrong to quash the decision for process reasons. Lord Hoffmann described the approach taken in the Court of Appeal as unorthodox,[120] "contrary" to the reasoning in *Denbigh High School*,[121] and "quite impractical".[122] He graphically opined:

> [13] … A construction of the [Human Rights 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 …

[98] Lord Rodger was similarly critical. He and Baroness Hale did however also note that where the public authority has carefully weighed the various competing

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116 At [68].
117 At [91] per Lord Scott.
118 *Belfast City Council v Miss Behavin' Ltd*, above n 36.
119 *Re Misbehavin' Ltd's Application for Judicial Review* [2005] NICA 35, [2006] NI 181 at [56]–[63].
120 *Belfast City Council v Miss Behavin' Ltd*, above n 36, at [12],
121 At [13].
122 At [13].

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.[123] But if the local authority has made no attempt to do that, then its views will carry less weight.[124]

[99] The same point had been made by Lord Bingham in *Denbigh High School* where he said that if a decision-maker such as the school governors has conscientiously paid attention to all human rights considerations, the task of the party challenging the decision will be harder.[125]

Canadian authority

[100] For completeness we record that in addition to the two UK decisions, our Supreme Court in *Moncrief-Spittle* also referred to the decision of its Canadian counterpart in *Doré v Barreau du Québec*.[126] The latter was described in *Moncrief-Spittle* as adopting an approach "which, to some extent at least, merges consideration of both substantive and procedural issues".[127]

[101] It is arguably implicit from this observation (qualified in a way that the reference to the UK authorities was not) that our Supreme Court considered its own approach also merged consideration of both substantive and procedural issues but not in the same way as Canada.

[102] As we understand the Canadian jurisprudence prior to *Doré*, Canadian courts applied a proportionality test for assessing both legislation,[128] and administrative decisions,[129] for compliance with rights in the Canadian Charter of Rights and

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123 At [26] per Lord Rodger, and at [37] per Baroness Hale.

124 At [27] per Lord Rodger, and at [37] per Baroness Hale.

125 *R (SB) v Governors of Denbigh High School*, above n 36, at [31].

126 *Moncrief-Spittle*, above n 1, at [82], citing *Doré v Barreau du Québec* 2012 SCC 12, [2012] 1 SCR 395.

127 *Moncrief-Spittle*, above n 1, at [82]. *Doré* is also cited in *Moncrief-Spittle* at [89] as support for the proposition that in assessing the compatibility of an individual discretionary decision with protected rights, a more flexible approach is appropriate.

128 See for example, *R v Oakes*, above n 3; and *R v Edwards Books and Art Ltd* [1986] 2 SCR 713.

129 *Slaight Communications Inc v Davidson* [1989] 1 SCR 1038 at 1053 and 1081; *Ross v New Brunswick School District No 15* [1996] 1 SCR 825 at 879; and *Multani v Commission scolaire Marguerite-Bourgeoys* 2006 SCC 6, [2006] 1 SCR 256 at 282–296 and 324–325.

Freedoms (Charter).[130] This changed following *Doré* where in relation to administrative decisions the Supreme Court of Canada adopted a reasonableness standard. The reasonableness standard was held to be grounded in Charter values as distinct from Charter rights and involved giving deference to the decision-maker's balancing of those values and statutory objectives.[131] This approach has been regarded as merging process and outcome into the one reasonableness inquiry.[132]

[103] In the article cited with approval in the High Court decision under appeal,[133] Professor Geiringer identifies a benefit of the Canadian approach as being that it avoids a bifurcated regime of constitutional versus administrative law, the reasonableness standard being integrated into mainstream administrative law.[134]

[104] Other commentators however have been critical of *Doré*, contending that the approach undervalues Charter rights, failing to give them the primacy and priority they deserve under a constitutional framework.[135] Much of the discussion seems to have focused on the distinction between Charter rights and Charter values.[136]

[105] For reasons we discuss at [137]–[140], the current New Zealand position is that human rights law and administrative law are two distinct fields of law. This further reinforces our view that the differences between the New Zealand and Canadian constitutional contexts and rights instruments make reliance on Canadian authorities for the purposes of the issue in this case problematic.

[106] In making this last point, we have not overlooked Mr Butler's submission that the same thing could be said of the UK decisions and that they too should be approached with caution. However, while there are obvious differences between our

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130 Canadian Charter of Rights and Freedoms, pt 1 of the Constitution Act 1982, being sch B to the Canada Act 1982 (UK).

131 *Doré*, above n 126, at [35]–[58].

132 See, for example, Geiringer, above n 40, at 354.

133 High Court judgment, above n 6, at [70]–[73], citing Geiringer, above n 40.

134 Geiringer, above n 40, at 353 and 356.

135 See, for example, Audrey Macklin "Charter Right or Charter-Lite? Administrative Discretion and the Charter" (2014) 67 SCLR 561; and Paul Daly "Prescribing Greater Protection for Rights: Administrative Law and Section 1 of the Canadian Charter of Rights and Freedoms" (2014) 65 SCLR 249.

136 See, for example, Paul Daly "The Doré Duty: Fundamental Rights in Public Administration" (2023) 101 CBR 297; and Aidan C Testa "To Defer or Not to Defer? The Judicial Review of Charter-Impacting Decisions Post-*Vavilov*" (2025) 50(2) QLJ 65.

legal framework and that of the UK, there are significant similarities. Further the fact remains that the New Zealand Supreme Court regarded the UK authorities as more closely aligned to the New Zealand position.[137]

[107] In none of the three New Zealand Supreme Court decisions has the Court referred to Australian authority. We therefore only note in this section of the judgment that three Australian state legislatures have enacted statutory rights charters under which it is expressly unlawful for a public authority to fail to give proper consideration to a relevant human right when decision-making.[138]

Conclusion on existing New Zealand law

[108] For the reasons discussed above, we conclude that an actionable process obligation formulated in the terms suggested by the High Court is not supported by existing New Zealand authority. Under the current New Zealand law, it is substantive compliance that is the touchstone of legality under the Bill of Rights, not the process by which the administrative decision has been reached. What matters is the result.

[109] That does not mean the views of the decision-maker are irrelevant. Some high-level decision-makers — including for example cabinet ministers — are expected to consider the Bill of Rights. And whether the decision-maker took the Bill of Rights into account and the quality of their reasoning bears on the ultimate inquiry of substantive compliance. The critical point is that there is no universal free standing process duty on all s 3 actors, a breach of which will render the decision unlawful, regardless of whether or not the decision is itself rights consistent.

[110] We agree with Mr Varuhas that this mixed process/substance model (as he termed it) is consistent with the New Zealand legal tradition of flexibility and preference for substance over form.

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137 *Moncrief-Spittle*, above n 1, at [82]; and *A (SC 70/2022)*, above n 71, at [137].

138 Charter of Human Rights and Responsibilities Act 2006 (Vic), s 38; Human Rights Act 2019 (Qld), s 58; and Human Rights Act 2004 (ACT), s 40B(1).

[111] In adopting a different interpretation of the Supreme Court judgments, Mallon J relies on the same passages from the judgments cited to us by New Health.[139] In addition, she also considers that the statement in *A (SC 70/2022)* that a failure to consider the Bill of Rights would not be fatal to the validity of a rights-consistent decision is simply a statement about remedial discretion.[140]

[112] As regards the footnote in *Moncrief-Spittle* about the effect of a decision-maker's failure to consider the Bill of Rights being left for another day, Mallon J prefers an alternative interpretation to that adopted by the majority. It is also a different interpretation to that advanced orally by Mr Butler. Mallon J suggests the footnote simply relates to the scenario where the court is not assisted in its substantive constraint task by the decision-maker.[141]

[113] We are not however persuaded that this was the intent of the footnote. First if it were intended to be limited to the effect on the substantive assessment, it strikes us as surprising that the Court would regard that as a sufficiently important issue to be reserved for another occasion. Indeed, the concluding sentence in the footnote is "[t]hat does not in any event affect the court's role" — the court's role being the substantive assessment role. Even more telling in our view is the absence of any reference in the footnote to the point that such a failure on the part of the decision-maker would however be a breach of an actionable process obligation. That omission also sits uneasily with the suggestion that the existence of a process duty was well established in New Zealand law prior to *Moncrief-Spittle* as New Health submits and Mallon J accepts.

[114] We note too that the footnote is annexed to a paragraph where the Court refers to there being an "expectation" of evidence of decision-makers engaging in a Bill of Rights analysis, not a requirement. Further, in the same paragraph, the Court limits that expectation to a "case such as this one." It does *not* say it is an expectation of all s 3 actors.

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139 See Mallon J's discussion of the cases starting below at [173].

140 See below at [191].

141 See below at [186], n 221. This is a different interpretation to that advanced orally by Mr Butler. As noted above at [73], he submitted the footnote was the Court reserving consideration of what the stand-alone response should be for breach of the procedural obligation itself.

[115] Nor in our view does the interpretation favoured by Mallon J explain why the Supreme Court in *A (SC 70/2022)* talked about the Bill of Rights constraining the outcome a decision-maker may reach "rather than being" a mandatory relevant consideration.[142]

[116] We also consider that Mallon J's interpretation sits uneasily with the Supreme Court's references to the UK authority as evidencing a similar approach to New Zealand.[143] It would be difficult to find a more emphatic rejection of an actionable procedural duty than the two UK decisions cited.[144] The existence of such a duty was a core issue in both decisions. It is reasonable in our view to assume that had the Supreme Court disagreed with the UK approach on that issue it would surely have said so, again especially if the existence of an actionable process duty was well established in New Zealand law as claimed by the High Court.[145]

[117] Having reached the conclusion that an actionable process duty as formulated by the Judge is not part of existing New Zealand law, we turn to the issue of whether, nevertheless, despite its novelty, the duty is a desirable development that should be recognised. This requires an examination of the Judge's reasons for imposing a duty, the benefits such a duty is said to bring and the concerns raised by the appellants.

Should a novel process duty be recognised?

Consistency with the Bill of Rights and the benefits of a process obligation

[118] As mentioned, one of the core submissions made on behalf of the Human Rights Commission was that adoption of the High Court approach was consistent with the express purposes of the Bill of Rights. Those purposes are:[146]

> (a) to affirm, protect and promote human rights and fundamental freedoms in New Zealand; and
>
> (b) to affirm New Zealand's commitment to the International Covenant on Civil and Political Rights.

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142 *A (SC 70/2022)*, above n 71, at [137].
143 *Moncrief-Spittle*, above n 1, at [82]; and *A (SC 70/2022)*, above n 71, at [137].
144 Those two being *R (SB) v Governors of Denbigh High School*, above n 36; and *Belfast City Council v Miss Behavin' Ltd*, above n 36.
145 See, for example, High Court judgment, above n 6, at [84]–[85].
146 New Zealand Bill of Rights Act, long title.

[119] In making that submission, Mr Butler was not however suggesting that the appellants' mixed approach model was necessarily inconsistent with the Bill of Rights. And nor could he. Indeed, on closer analysis, we consider it distinctly arguable that the mixed approach model is more consistent with the Bill of Rights than a stand-alone actionable process duty.

[120] Neither the International Covenant on Civil and Political Rights,[147] the White Paper preceding the enactment of the Bill of Rights,[148] nor the Bill of Rights itself contain any express provision for an independent procedural duty. The way the Bill of Rights is framed also supports the appellants' analysis in a positive way. That is because the focus of the Bill of Rights is entirely on consistency and outcomes. Given that focus, we question the legitimacy as well as the logic of an approach which can result in a decision that was rights consistent nevertheless being declared unlawful.

[121] It is also noteworthy that the Bill of Rights contains an obligation on the Attorney-General to scrutinise all proposed legislation (including of course legislation which confers decision-making power on administrators) for consistency with the Bill of Rights and to bring any apparent inconsistency to the attention of Parliament before enactment.[149]

[122] That safeguard was clearly intended to assist in promoting rights-consistent legislation. That must include the enacted terms of any empowering provisions which if followed by a decision-maker should result in a rights-consistent decision. Indeed, the present case illustrates this point. Although the terms of s 116E of the Health Act do not expressly mention the Bill of Rights, it is striking how they mirror matters raised in the Supreme Court decision of *New Health New Zealand Inc v South Taranaki District Council*.[150]

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147 International Covenant on Civil and Political Rights 999 UNTS 171 (opened for signature 16 December 1966, entered into force 23 March 1976).

148 Geoffrey Palmer "A Bill of Rights for New Zealand: A White Paper" [1984–1985] I AJHR A6.

149 New Zealand Bill of Rights Act, ss 7 and 7A.

150 *New Health New Zealand Inc v South Taranaki District Council*, above n 3.

[123] The existence of an Attorney-General's report on compliance of proposed legislation with the Bill of Rights also of course has the added benefit of putting a decision-maker on notice that a protected right may be engaged.

[124] Finally, in terms of parliamentary intention, we note too the existence of statutory powers in the New Zealand statute book that expressly require mandatory consideration of the Bill of Rights.[151] In those circumstances, there is a duty to take the Bill of Rights into account as a mandatory relevant consideration, but it is a duty derived from the empowering provision, not the Bill of Rights itself. Had Parliament considered the Bill of Rights already imposed a universal duty to the same effect, it is reasonable to assume those express provisions would not have been seen as necessary.

[125] In making these observations, we have not overlooked arguments that imposing an actionable process duty will promote human rights in accordance with one of the express purposes of the Bill of Rights. It will do that, it is argued, by advancing the development of a human rights culture in government and fostering a culture of justification in which decision-makers must give good reason for their decisions and thereby improve public decision-making. These were arguments that resonated with the Judge in this case, as did the associated contention that in contrast a judicial focus on outcomes does little to promote a human rights culture in government.[152]

[126] However, the Judge did not refer to any current evidence in support of either proposition. There was no evidence for example as to what training and policy guidance in human rights is available to administrators which might allow a rights culture to evolve organically. Nor was there any recognition of the fact that academic opinion is divided as to whether an actionable process obligation is more likely to foster a rights culture or a culture of formalism as officials attempt to apply judicial-type reasoning.[153]

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151 See, for example, COVID-19 Public Health Response Act, s 9(ba); Severe Weather Emergency Recovery Legislation Act 2023, s 8(1)(a)(iv); and Urban Development Act 2020, s 168(1)(b)(ii).

152 High Court judgment, above n 6, at [70]–[71].

153 See, for example, Kavanagh, above n 103, at 256–258.

[127] Professor Poole for example, in an article relied on in *Denbigh High School*,[154] warns against turning "the judge over your shoulder" into the "judge inside your head" and contends that a procedural approach promotes a culture of excessive legalism which may burden public administration and discourage thoughtful decision-making.[155]

[128] It might fairly be said that we are in no better position than the Judge to determine with any certainty whether the imposition of a process duty will have a positive or adverse effect on the quality of public decision-making. We acknowledge too that it would be unrealistic to dispute that the imposition of an actionable process duty is likely to create greater awareness of the Bill of Rights.

[129] However, while we agree it will heighten awareness, we *are* in a position to question how significant or meaningful that heightened awareness will be, given there is already a strong incentive under the mixed model approach, especially for high-level decision-makers, to turn their mind to the protected rights. Another reason to question whether recognition of a process duty will further the purposes of the Bill of Rights in any meaningful way or do little more than add an extra step to the analysis is that, in the vast majority of cases, what will determine outcomes is whether or not the decision is rights compliant. If the decision is not rights compliant, it will be invalidated anyway regardless of whether rights were considered or not.

[130] The other benefit of a process duty cited by the Judge was the desirability of the courts having greater flexibility to manage their delicate institutional relationship with the elected branches of government. The Judge accepted that the UK approach enabled the court to give credit for a good process by according weight to the judgments of a public decision-maker. However, he considered that despite this the UK approach did 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.[156]

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154 *R (SB) v Governors of Denbigh High School*, above n 36, at [31] per Lord Bingham.
155 Poole, above n 50, at 695.
156 High Court judgment, above n 6, at [72].

[131] A similar point to that made by the Judge can in fact be found in the opinions of Baroness Hale and Lord Mance in the *Belfast City Council* decision itself.[157]

[132] Lord Mance raised the issue of how a focus on outcomes rather than the quality of the decision-making interrelated with recognition of a concept known in English public law as "a discretionary area of judgment". The latter term is used to describe issues in respect of which the judiciary will defer, on democratic grounds, to the considered opinion of the elected person or body whose act or decision is said to be incompatible with the Convention.[158] His Lordship went on to note that the existence of a discretionary area of judgment meant necessarily that there may be decisions which a court could regard as justified, whichever way they went.[159] If however the court was deprived of the assistance and reassurance of a considered opinion because the decision-maker did not have regard to the Convention, then the court's scrutiny was, he said, bound to be closer. He agreed it might mean, as noted by Baroness Hale,[160] that the court has no option but to strike the balance for itself, giving due weight to such judgments as were made by the decision-maker on matters they did consider.[161]

[133] Neither Baroness Hale nor Lord Mance however suggested that this was a compelling reason to recognise a process obligation, presumably because that consideration was far outweighed by the perceived disadvantages of such a duty. It seems to us too to follow that the more borderline and policy-oriented the case, the greater the incentive on the decision-maker under existing New Zealand law to engage in a rights analysis. Further, as our own Supreme Court decision in *Chief of Defence Force* demonstrates, it is wrong in any event to assume that the absence of a process duty is necessarily an impediment to deference being accorded in appropriate cases.[162]

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157 *Belfast City Council v Miss Behavin' Ltd*, above n 36.
158 At [46].
159 At [46].
160 At [37] per Baroness Hale.
161 At [47] per Lord Mance.
162 *Chief of Defence Force*, above n 2, at [101]–[109].

[134] A "retreat to procedure" as one English commentator termed it may have the effect of enabling a court to avoid or postpone difficult decisions,[163] but we are not persuaded that avoidance or deferral is necessarily in the interests of justice and therefore do not consider that as a benefit of imposing an actionable process duty. On the contrary, as Lord Bingham stated in *Denbigh High School*, the court is obliged to confront these questions however difficult.[164]

[135] All of that said, it would be wrong to exclude the possibility of any benefit arising from the recognition of a process obligation and, as indicated, that is not our view. Our view is that there will be some benefit particularly in the form of heightened awareness of the Bill of Rights. A process duty is not however necessarily mandated by the Bill of Rights itself and we consider that the suggested benefits are limited.

[136] We now turn to weigh those benefits against other practical and doctrinal difficulties which it is said the novel duty is likely to create.

Doctrinal difficulties

[137] The first of the doctrinal difficulties is that the concept of mandatory relevant considerations is an administrative law concept. Transmuting the Bill of Rights into a mandatory relevant consideration arguably confuses human rights and administrative law concepts, despite them being distinct and separate fields of law.[165] As noted by Baroness Hale in *Belfast City Council*, the role of the court in human rights adjudication is quite different from the role of the court in an ordinary judicial review of administrative action.[166] In the latter, the court is concerned with reviewing process, not the merits of the decision, the only substantive inquiry being irrationality. That they are distinct fields of law has also been recognised by our Supreme Court when for example it made a point of noting in *Chief of Defence Force* that the reasonableness

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163 Gareth Davies "Banning the Jilbab: Reflections on Restricting Religious Clothing in the Light of the Court of Appeal in *SB v Denbigh High School*" (2005) 1 EuConst 511 at 517, cited in *R (SB) v Governors of Denbigh High School*, above n 36, at [28] and [30].

164 *R (SB) v Governors of Denbigh High School*, above n 36, at [30] per Lord Bingham.

165 See, for example, Jason Varuhas "Against Unification" in Hanna Wilberg and Mark Elliott (eds) *The Scope and Intensity of Substantive Review: Traversing Taggart's Rainbow* (Hart Publishing, Oxford, 2015) 91.

166 *Belfast City Council v Miss Behavin' Ltd*, above n 36, at [31].

inquiry for the purposes of the Bill of Rights is different from the reasonableness inquiry in review proceedings.[167]

[138] To add to the potential confusion, although the concept "mandatory relevant consideration" derives from administrative law, it is not used in that field of law to describe an invariable universal duty that applies across the board. Rather, whether a matter is or is not a mandatory relevant consideration depends on the particular terms of the empowering provision under which the decision-maker has acted and which the court subjects to close examination before identifying what factors the empowering provision required the decision-maker to take into account. In the leading administrative law case on mandatory relevant considerations, this Court pointed out that the mere fact a consideration is one that could properly be taken into account by the decision-maker does not of itself make it a mandatory relevant consideration.[168]

[139] As indicated, whether human rights law should be integrated into administrative law is a topic on which eminent scholars disagree. For our part, we consider there is a risk to doctrinal coherence in recognising a procedural duty in the terms formulated by the Judge. We also consider there is force in the appellants' submission that in addition to "weaving the [Bill of Rights] into a traditional administrative law paradigm" and "[p]roceduralising human rights", a process duty may ironically run the risk of downgrading rights protection rather than enhancing it as intended.

[140] It follows that we disagree with the High Court's view that a sound reason for recognising an actionable process duty is the desirability of ensuring the same principles are applied in human rights law and administrative law.[169] In our view, the converse is the case.

Uncertainty and costly inefficiencies

[141] What the new duty recognised by the High Court will require in any given case is also, in our view, replete with uncertainty, expressed as it is to apply to all s 3 actors.

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167 *Chief of Defence Force*, above n 2, at [99], n 139.
168 *CREEDNZ Inc v Governor-General* [1981] 1 NZLR 172 (CA) at 183.
169 High Court judgment, above n 6, at [73]–[74].

These are not of course limited to government officials but also local and statutory entities and their staff. The range of affected public officials is very significant as the Judge's own example of the librarian confronted with an offensive T-shirt demonstrates.[170] That a librarian should be under a legal obligation to turn their mind to relevant Bill of Rights considerations before asking the T-shirt wearer to leave would, we consider, strike many people as a surprising and impractical expectation.

[142] There are over 20 protected rights and freedoms in the Bill of Rights, and even identifying whether rights are engaged in the first place is often not straightforward as the disagreement among Judges over the wearing of a hairpiece shows.[171] Similarly, in a more recent decision, this Court indicated that in order to decide whether compulsory mask wearing engaged the right to decline medical treatment, it would have had to undertake an analysis of overseas jurisprudence.[172] Another example relevant to the present case are the divergent views in this Court and the Supreme Court about whether water fluoridation engaged the right to be free from medical treatment.[173] Given that judges and lawyers struggle at times to grapple with these issues, how realistic is it to expect lower-level decision-makers to have the necessary expertise and knowledge? Radich J assumes the librarian would immediately recognise that freedom of expression was engaged. But even if freedom of expression is obvious, the offending T-shirt might, depending on its content, also engage other rights, such as freedom of religion, which the process duty requires the librarian to recognise before embarking on a proportionality analysis.

[143] In submissions, the appellants posited numerous other scenarios in a bid to highlight the potential ramifications of the High Court decision, including: a corrections officer deciding to search a cell, the police when tasering someone, an academic deciding whether to give a trigger warning to a class, a government decision on school lunch menus, a school determining dress codes and a local body deciding whether to install a rainbow crossing. According to the appellants, it is "implausible" and simply a "bad rule" that every official from the parking warden at street level all

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170 At [96].
171 *Smith v Attorney-General*, above n 61; and *Attorney-General v Smith*, above n 66.
172 *New Health New Zealand Inc v Minister for COVID-19 Response* [2025] NZCA 592, at [162].
173 Compare *New Health New Zealand Inc v South Taranaki District Council* [2016] NZCA 462 at [71]–[98] with *New Health New Zealand Inc v South Taranaki District Council*, above n 3.

the way up to the ministerial level is required to take the Bill of Rights into account and be sufficiently conversant with the justification requirements of it. It will, the appellants say, impose a cost and time burden on the business of central and local government leading to an overly formalistic approach to decision-making.

[144] In response, the respondent points to the factors identified in the High Court judgment as impacting on the scope of the duty,[174] and contend that any uncertainty can be worked out on a case-by-case basis.

[145] Inevitably predictions about the practical effect of a new legal development contain an element of speculation. In our view, some of the appellants' concerns may well be overstated but equally we consider New Health and the intervener significantly underestimate them. We are far from convinced that any benefit from recognising an actionable universal process duty outweighs the cost of the administrative burden it imposes and the costs of the inevitable litigation it will spawn, including litigation about the scope of the duty.

[146] Indeed, if a real-world illustration of the problems was needed, it is this very case.

[147] The decision that had been made by the Director-General was a carefully considered one and in accordance with the statutory criteria under the Health Act. Those criteria were consistent with what the Judges in the Supreme Court in *New Health New Zealand Inc v South Taranaki District Council* had identified as being relevant to justification under the Bill of Rights.[175] It is almost certain in our view that a court would have confirmed the decision was a justified limit on the s 11 freedom and therefore lawful. Yet, the decision was held unlawful and set aside resulting in a reconsideration, which took almost a year to complete, and which must have consumed significant resources. It included requiring the Director-General to consult with New Health despite there being no mention of interest groups in the consultation requirements under the empowering provision.

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[174] High Court judgment, above n 6, at [95]. The respondent specifically references the nature of the decision and nature of rights involved, the number of people whose rights are affected, and the nature and expertise of the decision-maker.

[175] *New Health New Zealand Inc v South Taranaki District Council*, above n 3.

[148] We were also provided with affidavit evidence stating that as a result of the High Court decision, 13 of the 14 affected local authorities contacted the Director-General expressing various concerns directly arising from the High Court decision. These included legal uncertainty and concerns that the local authorities were coming under pressure from interest groups and threats of litigation. As a result of the uncertainty, several also requested extensions to compliance dates with what was an important health measure.

[149] In all these circumstances it is difficult not to see the reconsideration as a wasteful and ultimately pointless exercise. The case also demonstrates the risk of satellite and gaming litigation that recognition of a procedural duty may generate. It obviously incentivises claimants who know they are unlikely to win on a substantive challenge to attempt to impugn the decision solely on technical procedural grounds.

[150] In her dissent, Mallon J suggests that if the Judge did err in this case, it was not in his recognition of an actionable process duty but in the remedial response. She considers that this case was unusual because of the way in which the process duty came to be considered on a stand-alone basis.[176] In her view, the illogicality of a decision being quashed for failure to consider the Bill of Rights when the decision is in substance rights consistent will be avoided by a court's exercise of its remedial discretion.[177]

[151] In response, we would make three points.

[152] The first is that the Court of Appeal decisions overturned by the House of Lords in *Denbigh High School*,[178] and *Belfast City Council*,[179] were not stand-alone cases and yet administrative decisions were quashed for procedural failings.

[153] The second is that the need to have recourse to remedial discretion to avoid illogicality highlights the doctrinal confusion created by importing into human rights law the concept of mandatory relevant consideration. As mentioned, the latter is

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176 See below at [207].
177 See below at [167], [191]–[192] and [200].
178 *R (SB) v Governors of Denbigh High School*, above n 108.
179 *Re Misbehavin' Ltd's Application for Judicial Review*, above n 119.

derived from orthodox judicial review which is focused on process and not merits. Hence the reason why a defining feature of a mandatory relevant consideration is that a failure to consider it generally renders the decision unlawful which is precisely why Radich J invalidated the Director-General's decision. In contrast to orthodox judicial review however, human rights law involves the application of a substantive constraint. As we have said, the Bill of Rights itself is all about rights-consistency and outcomes.

[154] Thirdly, if Mallon J is correct and the outcome in all cases will in any event turn on substantive justification, the question arises — what then is the point of having an actionable process duty? It can only be that it will promote a culture of justification amongst public decision-makers. But will it? Or will it as we (and the House of Lords) consider much more likely result in undue formalism, unnecessary delay and administrative costs as well as unnecessary litigation? In this regard, the wide range of s 3 actors who will be subjected to the process duty is highly relevant. Unlike Mallon J, we are unable to view the librarian scenario with equanimity.

Summary of conclusions

[155] Drawing all these threads together, the majority of the Court has reached the following conclusions:

(a) The duty adopted by the High Court is not part of New Zealand's current law and nor does it represent a desirable development mandated by the Bill of Rights.

(b) Any benefits that might result from recognising such a duty are limited and far outweighed by well-founded concerns of practicality, undue formalism, doctrinal confusion and uncertainty.

(c) The Bill of Rights is not generally a mandatory relevant consideration for a s 3 decision-maker to take into account unless there is an express provision to that effect in the empowering legislation. Absent such an express provision, the failure to undertake a Bill of Rights analysis does not give rise to freestanding illegality.

(d) The High Court erred by holding that the Bill of Rights creates an actionable process obligation on all s 3 decision-makers to undertake a Bill of Rights assessment if rights under it are engaged.

(e) The High Court also erred in finding that through a failure to expressly undertake a Bill of Rights assessment prior to issuing the directions under s116E of the Health Act, the Director-General acted unlawfully.

[156] It follows that the appeal must be allowed. The ruling that the Director-General's decision to issue the fluoridation decision was unlawful because he failed to address the restriction on the protected right to refuse medical treatment and to consider whether that restriction was justified under s 5 of the Bill of Rights is set aside.

Costs

[157] In the event that the appeal was to succeed, the appellants sought costs on the appeal. They submitted that while there was a public interest in the case, New Health was not acting in the public interest. Rather its persistent opposition to water fluoridation demonstrated that it was a group pursing a particular set of political ideological ends.

[158] A survey of litigation in which New Health has been involved demonstrates that there have been costs awards made against it in some cases but not others.[180]

[159] On balance we consider this is a case where no costs award should be made. New Health was a respondent to an appeal which raised an important issue of law, sufficiently important for this Court to decide to convene a Full Court.

[160] The costs award made in favour of New Health in the High Court must however be set aside. Counsel advised us that the costs have already been paid. They must therefore be refunded in light of this judgment.

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[180] For example, New Health was ordered to pay costs in *New Health New Zealand Inc v South Taranaki District Council*, above n 3, at [146]; and in *New Health New Zealand Inc v Wellington Water Ltd* [2022] NZHC 2389 at [30]. No cost award was made against New Health in *New Health New Zealand Inc v Attorney-General* [2014] NZHC 2487 at [54].

Outcome

[161] In accordance with the views of the majority, the appeal against the High Court decision of 10 November 2023 is allowed.

[162] The ruling that the first appellant's decision to issue the water fluoridation directions was unlawful because he failed to address the restriction on the protected right to refuse medical treatment and to consider whether that restriction was justified under s 5 of the New Zealand Bill of Rights Act 1990 is set aside.

[163] We make no award of costs in relation to the appeal.

[164] The costs award made by the High Court in favour of the respondent is set aside, and the costs paid to the respondent refunded.

MALLON J

Summary

[165] I write separately because I disagree with the majority that the High Court erred in holding that the New Zealand Bill of Rights Act 1990 (NZBORA) can give rise to a procedural obligation on a public decision-maker (as defined in s 3 of NZBORA). I also disagree that the High Court erred in holding the Director-General was required to consider and be satisfied that his decision under s 116E of the Health Act 1956 to direct 14 local authorities to add fluoride to water was a reasonable limit on the right to refuse medical treatment under s 5 of NZBORA (the procedural obligation).

[166] I consider that, unless the empowering statute under which the discretionary public power is exercised clearly excludes this, NZBORA gives rise to both a procedural requirement and a substantive constraint on the public decision-maker.[181] The procedural requirement arises because of the importance of NZBORA rights, reflected in NZBORA's purpose to affirm, protect and promote human rights and fundamental freedoms in New Zealand and to affirm New Zealand's commitment to

[181] That is, a decision-maker under s 3 of the New Zealand Bill of Rights Act.

the International Covenant on Civil and Political Rights,[182] and because NZBORA applies to public decision-makers. The substantive constraint arises because s 5 requires that the rights and freedoms affirmed in NZBORA may be subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society (a "reasonable limit").

[167] The procedural requirement is a mandatory relevant consideration for the decision-maker but, because the decision-maker must be satisfied that the decision is a reasonable limit (a legal test, in its application involving mixed questions of fact and law), the court determines compliance with that legal test, giving appropriate deference to the decision-maker's assessment of this. This means the appropriate relief (if any) will not necessarily be a direction that the decision-maker reconsider their decision if they have not complied with the procedural requirement, although that may be appropriate in some situations. Nor will it be necessary to rely on the unreasonableness ground of review if the decision-maker has considered whether their decision is a reasonable limit on a NZBORA right but has got the balance wrong. That is because, unlike mandatory relevant considerations in other reviewable discretionary decisions, compliance with s 5 is ultimately an assessment for the court.

[168] My reasons follow.

First principles

[169] A public decision-maker is required to exercise discretionary powers lawfully, that is, within the discretion vested in them. The breadth of the discretion granted depends upon the grant. As a matter of general principle, even where no express limitations are imposed in the grant, a discretionary power must be exercised "in accordance with the object and policy of the legislation by which it is conferred and in accordance with the principles of judicial review".[183]

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182 New Zealand Bill of Rights Act, long title.

183 Maurice Sunkin "Grounds for Judicial Review: Illegality in the Strict Sense" in David Feldman (ed) *English Public Law* (2nd ed, Oxford University Press, Oxford, 2009) 615 at [14.05].

[170] A mandatory relevant consideration for a discretionary statutory power arises when the statute expressly or impliedly identifies that consideration as one that as a matter of legal obligation must be taken into account.[184] It includes:[185]

> … matters so obviously material to a decision on a particular project that anything short of direct consideration of them … would not be in accordance with the intention of the Act.

[171] Section 3(b) of NZBORA applies to acts done by any person or body in the performance of any public function, power, or duty conferred or imposed on that person or body by or pursuant to law.[186] Section 5 provides that the rights and freedoms affirmed in NZBORA may be subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society. If a public actor is making a decision that limits a NZBORA right, it may only do so if it is a reasonable limit in terms of s 5 or if the empowering legislation requires otherwise.

[172] Since a public actor's decision is constrained in this way, when a decision will have the effect of limiting a NZBORA right, that limit is a consideration that is "so obviously material" to the decision that "anything short of direct consideration" will not be in accordance with the empowering statute under which the public decision-maker acts. This will be so unless the statute itself clearly addresses where the balance between the limit to the right and other considerations relevant to the decision is to lie, or otherwise excludes consideration of the limit to the NZBORA right. Given the importance of NZBORA rights, this exclusion would need to be clear. In other words, the procedural requirement to consider whether, if the decision engages

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184 As it was put by Cooke J in *CREEDNZ Inc v Governor-General*, above n 168, at 183: "What has to be emphasised is that it is only when the statute expressly or impliedly identifies considerations required to be taken into account by the authority as a matter of legal obligation that the Court holds a decision invalid on the ground now invoked. It is not enough that a consideration is one that may properly be taken into account, nor even that it is one which many people, including the Court itself, would have taken into account if they had to make the decision."

185 At 183. See *Climate Clinic Aotearoa Inc v Minister of Energy and Resources* [2025] NZSC 197, [2025] 1 NZLR 1021 at [50] for a recent endorsement of this long-established point. The pressing concern of climate change for New Zealand, New Zealand's international commitments to reduce greenhouse gas emissions, the connection between the subject matter of the statutory power of decision and greenhouse gas emissions and the absence of a framework for addressing those climate change implications meant that climate change was so obviously relevant to the decision as to be a mandatory relevant consideration: see at [86]–[88].

186 Section 3(a) applies to acts done by the legislative, executive, or judicial branches of the Government of New Zealand. As noted by the majority at [20], in this case we are only concerned with actors under s 3(b).

a NZBORA right, any limit to a NZBORA right is a reasonable one arises as a matter of statutory interpretation, with the starting point being that NZBORA applies to a s 3 public decision-maker.

Cases

[173] Prior to *Moncrief-Spittle v Regional Facilities Auckland Ltd*,[187] the reasonably consistent view of the New Zealand courts treated NZBORA as a mandatory relevant consideration in the exercise of a statutory discretionary power of decision when a relevant right was engaged. The issue was not so much whether it was required to be considered, but what the court's role was beyond that.[188]

[174] For example, as at 2013 Professor Claudia Geiringer described the current state of the cases this way:[189]

> Outside the delegated legislation context, very few examples exist of High Court judges making a direct assessment of the proportionality of an exercise of administrative power. Some judges have refused to accept even the prior proposition that administrative decision-makers are themselves obliged to exercise their power in individual cases in a manner that is consistent with the constraints imposed by s 5. Others accept that public authorities are themselves obliged to act consistently with s 5 of the Bill of Rights Act, but nevertheless argue that it is not the court's role to police compliance by themselves undertaking a proportionality inquiry. Instead, they tend either to collapse the inquiry into an orthodox assessment of whether the Bill of Rights Act has been "taken into account" or to adopt a form of hybrid inquiry in which the adequacy of the Bill of Rights consideration conducted by the first instance decision-maker is, in some way, assessed.
>
> In sum, more than 21 years following its enactment, there is little sense from the case law that proportionality review under the Bill of Rights Act has become an accepted or normalised element of the judicial control of administrative power.

[175] The decision of this Court in *Taylor v Chief Executive of Department of Corrections* provides an example of the acceptance that s 5 operated as a mandatory

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187 *Moncrief-Spittle*, above n 1.

188 See, for example, Hanna Wilberg "The Bill of Rights in Administrative Law Cases: Taking Stock and Suggesting Some Reassessment" (2013) 25 NZULR 866; Hanna Wilberg "Settling the Approach to Section 5 of the Bill of Rights in Administrative Law: Justification, Restraint and Variability" (2021) 19 NZJPIL 97; and Claudia Geiringer "Sources of Resistance to Proportionality Review of Administrative Power under the New Zealand Bill of Rights Act" (2013) 11(1) NZJPIL 123 at 138.

189 Geiringer, above n 188, at 138 (footnotes omitted).

relevant consideration.[190] The case concerned a media request to interview a prisoner on camera for a television broadcast and internet news service. The Corrections Regulations 2005 (Regulations) prohibited interviews by the media with a prisoner without the prior approval of the chief executive and the prisoner.[191] Regulation 109 set out expressly what the chief executive was required to consider in deciding whether to give approval,[192] and the matters of which the chief executive was required to be satisfied;[193] it also authorised the chief executive to give approval subject to conditions.[194] There was no mention of the right to freedom of expression in the Regulations.

[176] Nevertheless, the Chief Executive made his decision "fully cognisant of the right to freedom of expression" but was not satisfied, for reasons he gave, that the interests of people other than the prisoner concerned would be protected, nor that security and order of the prison would be maintained.[195] In the judicial review challenging this decision it was common ground that the right to freedom of expression was a mandatory consideration when a request to interview a prisoner was made under reg 109.[196]

[177] The Court considered the Chief Executive erred in his assessment of this saying:

> [85] Where, as here, there is a range of options for interviewing prisoners and the decision-maker has the ability to impose conditions on any form of interview granted, the decision-maker is obliged to consider whether the objectives reflected in the mandatory considerations in reg 109(1) could be met by granting an interview in a format that sufficiently addresses and mitigates the identified risks to safety and good order. That approach is consistent with minimising any impairment of the right to freedom of expression.

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190 *Taylor v Chief Executive of Department of Corrections*, above n 60.

191 Corrections Regulations 2005, reg 108(2).

192 Namely, the need to protect the interests of people other than the prisoner concerned and the need to maintain security and order of the prison concerned: reg 109(1).

193 Namely, the prisoner's understanding of the nature and purpose of the interview and the possible consequences to the prisoner and other people of the publication or broadcasting of the interview concerned: reg 109(2).

194 Namely, conditions that were reasonably necessary to address the 109(1) matters: reg 109(3).

195 At [32]. The decision was made by an authorised delegate of the Chief Executive but was treated as the Chief Executive's decision for the purpose of the proceedings.

196 At [84].

[178] The Court was attracted to the view that the decision-maker needed to apply some form of proportionality analysis when considering requests for an interview under the Regulations, but considered it unnecessary to determine the broader question of whether administrative decision-making under NZBORA should always embrace a full proportionality analysis.[197] The Court allowed the appeal.[198] It went on to say that ordinarily, "an order would be made directing the decision-maker to reconsider the decision", but it did not do so because of events subsequent to the decision.[199] It considered the better course was for a fresh application for an interview to be made (if an interview was still to be pursued) and for all the relevant facts and circumstances to be placed before the Chief Executive.[200]

[179] The outcome in *Taylor* was consistent with the usual approach in judicial review to a failure to consider a mandatory relevant consideration. It is for the decision-maker to make the decision taking into account that mandatory consideration, and the weight it gives to that consideration is not reviewable except on the unreasonableness ground (applying the *Wednesbury* unreasonableness test or potentially heightened scrutiny in a human rights context), and so ordinarily the remedy is to set aside the decision and to direct a reconsideration.

[180] However, academic commentary suggested this was not necessarily the correct approach in the NZBORA context. For example, Associate Professor Hanna Wilberg considered it was not enough to simply consider NZBORA, including s 5, as a mandatory relevant consideration;[201] instead, the decision-maker should apply a "mandatory test approach" and be satisfied that any infringements on the protected right could be justified.[202] A s 3 actor's failure to consider the s 5 balance would, under a mandatory test approach, invalidate the resulting decision, regardless of the court's view as to whether the decision was inconsistent with NZBORA.[203] Accordingly, Ms Wilberg argued it did not follow that s 5 could not be a mandatory consideration

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197 At [84].
198 At [92]–[104] and [107].
199 At [108].
200 At [109].
201 Wilberg "The Bill of Rights in Administrative Law Cases: Taking Stock and Suggesting Some Reassessment", above n 188, at 890 and 896.
202 At 882–883, 890, and 896.
203 At 890–892.

as well as a substantive limit;[204] a mandatory test approach imposed both a process obligation and a substantive one.[205]

[181] In subsequent commentary, Ms Wilberg argued that the substantive limit might be better viewed as applying the wrong test due to a misunderstanding of the law (a legal error), which opened up the prospect that the court could decide for itself whether the test was satisfied but with appropriate deference when the issue is not clear cut and there is room for judgement and evaluation.[206]

[182] There were, however, other views and emerging uncertainty. For example, in 2006 and 2007 respectively the decisions of *R (SB) v Governors of Denbigh High School* and *Belfast City Council v Miss Behavin' Ltd* were delivered by the House of Lords.[207] Also by way of example, the issue was raised in the appeal of the High Court decision in *Smith v Attorney-General*.[208] The case concerned a prison manager's decision that Mr Smith, a prisoner, could no longer wear his hairpiece. The High Court Judge treated the failure of the prison manager to consider the right to freedom of expression (s 14 of NZBORA) in deciding that Mr Smith could no longer wear his hairpiece as a failure to consider a mandatory relevant consideration.[209] The decision was set aside. The prison manager subsequently decided that Mr Smith could wear his hairpiece. On appeal the Crown did not seek to alter this outcome but rather raised two legal issues, one of which was whether it was necessary for the prison manager to identify the s 14 right and undertake a s 5 proportionality analysis, or whether it was sufficient that the decision limited a right in a manner ultimately justified under s 5.[210] The Court of Appeal declined to answer this question because it was moot.[211]

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204 At 896.

205 At 890–891.

206 Wilberg "Settling the Approach to Section 5 of the Bill of Rights in Administrative Law: Justification, Restraint and Variability", above n 188, at 118–119. Ms Wilberg's perspective following *Moncrief-Spittle* and *A (SC 70/2022) v Minister of Internal Affairs* [2024] NZSC 63, [2024] 1 NZLR 372 is set out in Wilberg, above n 69, at 188–193.

207 *R (SB) v Governors of Denbigh High School*, above n 36; and *Belfast City Council v Miss Behavin' Ltd*, above n 36.

208 *Smith v Attorney-General*, above n 61.

209 At [98]–[99].

210 *Attorney-General v Smith*, above n 66, at [17(c)].

211 At [28]–[29] and [53].

[183] Another unresolved issue at the time of *Moncrief-Spittle* was how the discretionary decision-maker and the court should assess the substantive constraint imposed by s 5: was a full *R v Oakes* proportionality assessment required in every case, or was it simply necessary to balance the right engaged with other relevant factors and be satisfied that the decision limiting the right should be made?[212] Further, if the decision-maker took into account the right, to what extent should the court defer to where the decision-maker saw the balance as lying?

[184] It was against this background that *Moncrief-Spittle* was decided. It was not a case where the decision-maker had failed to turn its mind to the NZBORA right.[213] Two issues before the Supreme Court were whether the decision-maker was amenable to review and within s 3(b) of NZBORA, and whether NZBORA imposed a substantive constraint on the decision-maker. On the former, the answer was yes.[214] On the latter, the Supreme Court said:[215]

> [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.

[185] The Court went on to make the comments at [82] to [86] that are set out in the reasons of French P for the majority.[216] Notably the Court said the NZBORA right is a substantive constraint on the decision-maker, "rather than *simply* a mandatory relevant consideration", and with the result that the decision-maker "*had to* turn his mind to and engage with" the question of whether it was a reasonable limit to the protected right (in that case, freedom of expression).[217] This is the language of a

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212 *R v Oakes*, above n 3.

213 The Supreme Court considered that the decision-maker had turned their mind to the protected right: *Moncrief-Spittle*, above n 1, at [125]. The judicial review causes of action in *Moncrief-Spittle* were for making an irrational decision in an administrative law sense (by not obtaining and having regard to the relevant information relating to the security risks on which the decision was based) and failing to act consistently with the Bill of Rights by making a decision that unreasonably limited the right to freedom of expression: at [3].

214 At [59].

215 Citing, among other items of commentary, Wilberg "The Bill of Rights in Administrative Law Cases: Taking Stock and Suggesting Some Reassessment", above n 188; Wilberg "Settling the Approach to Section 5 of the Bill of Rights in Administrative Law: Justification, Restraint and Variability", above n 188; and Geiringer, above n 188 (emphasis added).

216 Above at [67].

217 *Moncrief-Spittle*, above n 1, at [82]–[83] (emphasis added).

mandatory requirement rather than of an expectation. It is consistent with the Court having earlier stated that, "[w]here the Bill of Rights applies, obviously [the decision-maker] will have obligations to protect the relevant rights".[218]

[186] The Court went on to discuss how to approach the assessment of the substantive constraint, finding that the court must satisfy itself that decision was a reasonable limit on the right,[219] and, in doing so, may have regard to where the decision-maker saw the balance as lying.[220] The Court said it would expect to see evidence that the decision-maker had identified and weighed the right, and given consideration to whether the reasons for the decision made were such as to outweigh the right. This would assist the court.[221] As to how the Court would assess s 5, it considered it was "necessary to adjust the steps undertaken as part of the proportionality inquiry to reflect the particular context".[222] It indicated that the "*Hansen/Oakes* analysis may more readily be applied where the legislature or a policy maker have a range of options to choose between",[223] but a "less structured approach may … be more workable in assessing the reasonableness of a limit in cases involving the review of an administrative decision of the nature of that in issue here".[224]

[187] In *A (SC 70/2022) v Minister of Internal Affairs* the decision-maker (the Minister) had deposed that he was "acutely aware of the significant impact" cancelling a passport could have on a person's freedom of movement but did not consider whether cancelling A's passport was a reasonable limit on that right.[225] It is true that the Court in *A (SC 70/2022)* omitted "simply" when it said that *Moncrief-*

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218 At [61].

219 At [84], citing *Director of Public Prosecutions v Ziegler* [2021] UKSC 23, [2022] AC 408 at [130]–[131] per Lord Sales.

220 At [86].

221 At [84]. The footnote "leav[ing] for another occasion on which it arises" (n 118) was to this discussion. It is not entirely clear what the Supreme Court was here contemplating: see, for example, Wilberg, above n 69, at 188. However, given the emphasis the Court placed on the decision-maker having to turn its mind to and engage with the protected right, I suggest the footnote may be leaving open for consideration the court's remedial response in a case where it does not have evidence of the decision-maker's view on where the balance lay and so has not been assisted in its substantive assessment by the decision-maker's assessment of the balance in a situation where that assistance may be important.

222 At [89].

223 At [90].

224 At [91]. This more flexible approach to assessing the substantive constraint imposed on s 5 addresses a concern of Lord Bingham in *R (SB) v Governors of Denbigh High School*, above n 36, with the approach that the Court of Appeal had taken in that case.

225 *A (SC 70/2022)*, above n 71, at [139].

Spittle endorsed the approach "to the effect that rights under the Bill of Rights constrain the outcome a decision-maker may reach, rather than being a mandatory relevant consideration".[226] However, it went on to emphasise that the decision-maker "must" turn their mind to and engage with whether it was reasonable to limit the rights affected by their decision.[227]

[188] It did so after noting the respondent's argument that the focus was on substantive compliance "not formalism", relying on Lord Hoffman's observation in *Belfast City Council* that either the decision infringed the relevant right under the Convention or it did not and, "[i]f it did not, it would not matter if the [decision-maker] had never heard of [the right under the Convention]".[228] The Court agreed that substantive compliance was a legal issue for the court to resolve, but said that did not mean the decision-maker did not need to engage with NZBORA. Rather, because it was a substantive constraint on the decision-maker, the decision-maker "must" turn their mind to the right and engage with whether it was reasonable to limit the right.[229]

[189] Again, "must" is the language of a mandatory requirement rather than an expectation. Put another way, unless the decision-maker is legally required to turn their mind to this, the court could not say that this is a "must" requirement. I therefore do not read the "must" requirement as endorsement of the integrated approach advanced by the appellants in this case. Rather, I consider this is consistent with the Court in *Moncrief-Spittle* having endorsed the United Kingdom approach that the court was to address substantive compliance with the right, but not necessarily endorsing that jurisdiction's approach that the decision-maker was not required to do so.

[190] The Court in *A (SC 70/2022)* accepted that, if the statutory grounds for cancelling a passport were made out, it was likely cancellation would be a justified limit on the holder's rights. If it was a justified limit on rights (a matter for the court to satisfy itself of) the Court considered that a failure by the Minister to address the

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226 At [137].
227 At [138].
228 At [137], quoting *Belfast City Council v Miss Behavin' Ltd*, above n 36, at [13].
229 At [138].

issue "would not be fatal to the validity of the decision".[230] The Court went on to say that this did "not mean those advising the Minister should feel free not to address the issue".[231] I do not regard this language as supporting an expectation rather than a requirement. Rather, I consider that here again the Court was emphasising the need for the NZBORA limit to be addressed by the decision-maker, even though a failure to do so would not necessarily be fatal to the "validity" of the decision if it was not addressed.

[191] The Court's observation that it would not be fatal to the "validity" of the decision if the limit was a justified one under s 5 (that is, a "reasonable limit" as I have defined earlier) follows from the fact that s 5 is a substantive constraint. All official decisions are presumed to be valid until set aside or otherwise held to be invalid by a court of competent jurisdiction.[232] In judicial review, relief is always discretionary,[233] and one of the reasons it may be declined is where it would serve no practical purpose.[234] In such a case there would be no need to set aside the decision and so it would remain valid.

[192] In a clear case, where the limit to the right was clearly justified even without having the benefit of the decision-maker's assessment, it would be pointless to set aside the decision and require the decision-maker to retake it. That is because the point of the mandatory requirement is ultimately aimed at substantive compliance by the decision-maker. In a less clear case, where the court's assessment of substantive compliance would be assisted by the decision-maker's assessment, it may be appropriate for the court to require that or to give the decision-maker the opportunity to reconsider its decision (the statute having vested the statutory discretionary power in the decision-maker rather than the court) before the court determines substantive compliance.

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230 At [140].

231 At [140].

232 Ivan Hare, Catherine Donnelly and Joanna Bell (eds) *De Smith's Judicial Review* (9th ed, Sweet & Maxwell, London, 2023) at [4-066].

233 At [18-047]; and Maurice Sunkin "Remedies Available in Judicial Review Proceedings" in David Feldman (ed) *English Public Law* (2nd ed, Oxford University Press, Oxford, 2009) 793 at [18.50].

234 Hare, Donnelly and Bell, above n 232, at [18-055]; and Sunkin, above n 233, at [18.63]–[18.65].

[193] I do not regard *Chief of Defence Force v Four Members of the Armed Forces* as assisting on this issue. It was not a case about the failure to consider a right under NZBORA.[235] The Chief of Defence Force had taken into account NZBORA and the issue was substantive compliance with s 5. The decision contains no discussion on whether a NZBORA limit gives rise to a procedural obligation on the decision-maker.

[194] In short, I consider the three Supreme Court decisions do not give rise to a conclusion that a decision-maker is not required to consider and be satisfied a decision complies with s 5. I consider s 5 is a mandatory consideration for the decision-maker, albeit one that can lead to a different outcome than mandatory considerations in other discretionary public powers because of the substantive constraint that s 5 involves.

Practical issues

[195] The appellants' oral submissions emphasised the impracticality of requiring all decision-makers to be subject to a process obligation when NZBORA rights are engaged by their decision. In making this point the appellants said decision-makers have no clear guidance as to how they satisfy themselves of compliance because *Moncrief-Spittle* endorsed a context-dependent approach. It also emphasised the wide array of public decision-makers (such as the librarian example) and the circumstances in which decisions limiting rights would arise, some of them requiring urgent decision-making (such as in the prison context).

[196] I agree with the submission for the intervener (Te Kāhui Tika Tangata | the Human Rights Commission) that these concerns are overstated. In the first place, as their submissions point out, there are numerous examples of s 3 decision-makers proactively putting processes in place that ensure an intentional and pragmatic approach to identifying rights-engaging decisions and justifying any proposed rights-limiting measure.[236]

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235 *Chief of Defence Force*, above n 2.

236 Examples include Cabinet Office *Cabinet Manual 2023*; Department of the Prime Minister and Cabinet *Human Rights implications in bills and Cabinet papers* (Cabinet Office, CabGuide, 16 July 2019); Crown Law Office *The Solicitor-General's Prosecution Guidelines* (1 January 2025); New Zealand Police *New Zealand Bill of Rights* (9 August 2024); and Ministry of Health | Manatū Hauora *Human Rights and the Mental Health (Compulsory Assessment and Treatment) Act 1992* (8 September 2020). See also *Operational Manual* (online ed, Immigration New Zealand) at [A16.2].

[197] There is nothing to suggest that the librarian example has caused any problems in the past, even though the reasonably consistent view of the courts prior to *Moncrief-Spittle* has been that the NZBORA rights are a mandatory relevant consideration. In theory, someone who is removed from a library for wearing an offensive T-shirt could bring a judicial review for failure to consider freedom of expression or freedom of religion, but compliance with the substantive constraint in s 5 is likely to be clear and no remedy would be granted. Where it is not so clear, it does not seem to be unduly onerous to require the librarian to have thought about these rights before removing the person from the library. Indeed, simple guidelines may already be in place for librarians reminding them of the need to balance having a safe space for the benefit of all members of the public and these rights when removing a person for offensive clothing.[237]

[198] I also accept the submission of the Human Rights Commission that requiring the public decision-maker to consider whether any limit to a NZBORA right is a reasonable one under s 5 may potentially promote a "culture of justification".[238] While there is commentary that disagrees with this, the reality is that only a very small fraction of public decisions that implicate rights are likely to reach the courts. Requiring decision-makers to assess the reasonableness of the limit to a NZBORA right ought to facilitate substantive compliance with it in the many cases that do not reach the court.

[199] This is not unnecessary formalism but rather reflects that s 3 applies to all public and governmental actors. It also helps to ensure that the court is not usurping

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[237] I accept that whether a right is engaged may not always be clear to a public decision-maker. However, some public decision-makers may identify the right as potentially engaged and make an assessment on whether their decision is a reasonable limit. Where the public decision-maker has not identified that the right is engaged, but the court finds that it is, the court's remedial response may depend on whether the court will be assisted by evidence as to how the decision-maker would have assessed the balance, for example, in a decision involving complex policy considerations. I note that in the case involving compulsory mask wearing, the legislation expressly required a s 5 NZBORA assessment, and the High Court and this Court were satisfied that this assessment had in substance been carried out even though the right to decline medical treatment had not been identified: see *New Health New Zealand Inc v Minister for COVID-19 Response*, above n 172, at [162]–[167]. I therefore do not see the difficulties that may arise in identifying that a right is engaged as sufficiently problematic so as to exclude the procedural obligation.

[238] See Andrew Butler and Petra Butler *The New Zealand Bill of Rights Act: A Commentary* (2nd ed, LexisNexis, Wellington, 2015) at [6.8].

the power vested in the decision-maker to make the discretionary decision where there is more than one way the balance might be struck, as well as potentially assisting the court in determining whether the s 5 test is met. It may also avoid any potential of the court finding that s 5 is not met when, with the benefit of the decision-maker's assessment made at the time of the decision, the court might have found otherwise.

[200] Nor need it lead to satellite and gaming litigation, that is, seeking review of a failure to comply with the process obligation even when it is clear that a decision is substantively compliant. That is because, if it is clear that a decision is substantively compliant, the decision need not be set aside for the decision-maker to retake the decision in a way that conforms with the process obligation.

This case

[201] In this case, the starting point is that the Director-General's decision engaged the right to refuse medical treatment (s 11 of NZBORA). The Director-General was therefore required to determine whether the limit on this right was a reasonable limit (s 5 of NZBORA) unless the Health Act excluded this. The appellants' "fall-back" position was that even if a procedural obligation can arise, it did not arise under s 116E of the Health Act. This was because it was a prescribed decision-making process that struck a "deliberate, considered balance between competing concerns, which Parliament saw as at apt for water fluoridation".

[202] We were not taken to the legislative history of s 116E of the Health Act by counsel but, in this respect, it is relevant that s 116E was enacted after the Supreme Court's decision in *New Health New Zealand Inc v South Taranaki District Council*.[239] In that case, two Judges (O'Regan and Ellen France JJ) considered on the evidence that the provisions authorising the fluoridation of drinking water limited the right only to the extent that was demonstrably justified under s 5.[240] This was because preventing and reducing dental decay was sufficiently important to justify the limit on the s 11 right which was a minimal intrusion and was one of a range of reasonable alternatives to address the problem of dental decay.[241] Glazebrook J considered that O'Regan and

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239 *New Health New Zealand Inc v South Taranaki District Council*, above n 3.
240 At [144].
241 At [122]–[144].

Ellen France JJ's view related to the power to fluoridate, and this did not require a s 5 analysis. That was because the power could only be exercised in a rights-consistent manner and so the existence of the power was rights consistent. Whether the exercise of the power would comply with s 5 might depend on local conditions.[242] Elias CJ considered that the Court did not have the evidence which showed "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".[243]

[203] The Ministry of Justice's advice to the Attorney-General on the Bill which preceded s 116E referred to the High Court decision in *New Health New Zealand Inc v South Taranaki District Council* and concluded that the proposed power to fluoridate, which was at that stage intended to be exercised by district health boards, was a reasonable limit on s 11 if indeed fluoridation were medical treatment.[244] It considered that the considerations under what is now subs (2) provided "adequate safeguards to mitigate any intrusion" into the s 11 right.[245] A later Ministry of Health disclosure statement on a supplementary order paper amending the Bill said the Supreme Court had held that adding fluoride to drinking water engaged s 11 and that the Court "also held that the local authority's power to add fluoride to drinking water was a justified limitation on this right".[246] The first part of this is correct: the majority concluded that adding fluoride engaged s 11. The second part also appears to be a correct reading of *New Health New Zealand Inc v South Taranaki District Council* in relation to a statutory power to fluoridate. However, there was no majority conclusion that the exercise of the discretion under the statutory power granted would itself comply with s 5.

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242 At [175]–[176].

243 At [223] (emphasis added).

244 Jeff Orr *Consistency with the New Zealand Bill of Rights Act 1990: Health (Fluoridation of Drinking Water) Amendment Bill* (Ministry of Justice | Te Tāhū o te Ture, 2 November 2016) at [8]–[13]. In the High Court, Rodney Hansen J had held that fluoridation did not engage the s 11 right but that, if it did, the scientific evidence before him showed that the power to fluoridate (in that case implied in the Local Government Act 2002) was a reasonable limit. This was particularly so in socially disadvantaged areas: *New Health New Zealand Inc v South Taranaki District Council* [2014] NZHC 395, [2014] 2 NZLR 834 at [79]–[91] and [111].

245 Orr, above n 244, at [12].

246 Ministry of Health | Manatū Hauora *Supplementary Departmental Disclosure Statement: Health (Fluoridation of Drinking Water) Amendment Bill* (13 May 2021) at 7. The supplementary order paper amended the Bill to give the decision-making power to the Director-General of Health rather than district health boards: at 3.

[204] Certainly, s 116E(3)(a) included a mandatory consideration that was relevant to the question of whether a direction to fluoridate water could outweigh the intrusion on the s 11 right, namely the scientific evidence on the effectiveness of adding fluoridation to drinking water in reducing the prevalence and severity of dental decay. The other mandatory consideration in s 116E(3)(b) is consistent with Glazebrook J's view that local conditions mattered to whether a decision to fluoridate was a reasonable limit. And it does appear from my overview of the evidence on which Dr Andrew Old — the Deputy Director-General of the Public Health Agency — advised the Director-General that this was understood.[247] This meant that the Director-General's decision was very likely substantively compliant with s 5.

[205] It might therefore be asked what more a process obligation on the Director-General to consider compliance with s 5 would add. On the information the Director-General had before him, the answer is probably nothing. However, what it would ensure is that the Director-General kept the s 5 requirement in mind in future decisions if the scientific information or local conditions of oral health were to change. Moreover, the second mandatory consideration in s 116E(3)(b) is directed to "financial cost" taking into account local conditions, rather than whether the (minimal) intrusion on the right to refuse medical treatment is justified in light of the local population's oral health. Therefore, while I accept that s 116E was intended to be a NZBORA-compliant power, I have concluded it did not exclude consideration of s 5 when the Director-General exercised the power. In light of guidance from *New Health New Zealand Inc v South Taranaki District Council*, consideration of that mandatory test should be a relatively straightforward matter in water fluoridation decisions.

[206] It is not within the scope of the appeal to determine if the Judge erred in granting a remedy or in the remedy he granted. In this case the pleadings, in addition

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247 In respect of this second mandatory consideration, quite specific information was set about tooth decay of the local population. The Director-General was advised that fluoride was a safe and effective way to improve oral health outcomes by reducing and preventing dental decay, and that this applied to the communities served by the relevant water supply; and that the communities served by the relevant water supply had significant levels of preventable tooth decay and, given the evidence that community water fluoridation improved oral health outcomes by reducing dental decay was applicable to that population as was the evidence that these benefits tended to be greater for populations experiencing higher levels of tooth decay, fluoridation of the water supply that served these communities would consequently improve oral health outcomes and was likely also to reduce health inequities.

to other orthodox judicial review grounds, alleged both that the decision breached NZBORA in a substantive sense as well as a procedural obligation. The procedural obligation (the second ground of review) was framed this way:

> 172. The NZBORA imposes a substantive constraint on the [Director-General of Health] 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.

[207] An unusual feature of this case was that the parties agreed that this second ground of review should be isolated and dealt with as a preliminary legal issue. It was this agreement that led to what the majority consider to have been the wasteful and ultimately pointless exercise when "it was almost certain … that a court would have confirmed the decision was a justified limit on the s 11 freedom and therefore lawful".[248] I agree that this was almost certain here but the isolation of the preliminary question meant the question of substantive compliance was not determined.

[208] It follows that I agree with the Judge that the procedural obligation arose, and I would therefore have dismissed the appeal on the scope on which it was brought.

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248 Above at [147].