IN THE SUPREME COURT OF NEW ZEALAND

I TE KŌTI MANA NUI **SC 26/2022**

BETWEEN	**ATTORNEY-GENERAL** First Appellant / Cross-Respondent
AND	**CHIEF EXECUTIVE, ARA POUTAMA AOTEAROA DEPARTMENT OF CORRECTIONS** Second Appellant / Cross-Respondent
	MARK DAVIS CHISNALL Respondent / Cross-Appellant
	HUMAN RIGHTS COMMISSION | TE KĀHUI TIKA TANGATA Intervener

SUBMISSIONS FOR HUMAN RIGHTS COMMISSION | TE KĀHUI TIKA TANGATA

Dated: 27 March 2023

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MAY IT PLEASE THE COURT:

I. FUNDAMENTALS

1. The Human Rights Commission | Te Kāhui Tika Tangata (the **Commission**) has been invited to address the issues noted in the minute of 11 November 2022 and any other issues it considers should be addressed.[1] It begins with some basic propositions relevant to the New Zealand Bill of Rights Act 1990 (**BORA**) that should inform the approach on this appeal.

2. BORA applies to the State as a whole. It enlists the different branches of the State (acting within their domestic competencies) in the project of *affirming*, *protecting*, and *promoting* human rights and fundamental freedoms in New Zealand.[2] The Long Title underscores the commitment of the State ("New Zealand"), including all State organs,[3] to the ICCPR.[4] If an ICCPR right is violated in New Zealand and is not remedied in this jurisdiction, then New Zealand will be in breach of international law.[5]

3. BORA is a constitutional statute. It is to be expected that a court will recognise the constitutional status of BORA rights and freedoms and seek to give them as much protection as the circumstances permit. As Winkelmann CJ observed in *Fitzgerald v R*, BORA is a "statute of constitutional significance"[6] that is "intended to be woven into the fabric of New Zealand law".[7] The rights and freedoms in BORA therefore ought to be given a generous interpretation "to give individuals the full measure of the enacted fundamental rights and freedoms" and to render "the rights practical and effective".[8]

4. BORA does not simply replicate the common law position that prevailed before it was enacted.[9] BORA has common law, statutory and international

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1 *Attorney-General v Chisnall* SC 26/2022, Minute, 11 November 2022 [**Minute**] at [2], [5]–[6] and [8(c)]. The Commission was not present at the hearing in October 2022. It has reviewed the transcript in order to focus its submissions on issues it apprehends the Court will find most useful.

2 New Zealand Bill of Rights Act 1990 [**BORA**], s 3.

3 The conduct of all state organs, including the legislature and judiciary, is attributable to New Zealand as a matter of international law: see James Crawford *State Responsibility: The General Part* (Cambridge University Press, Oxford, 2013) at [4.2.2.3].

4 International Covenant on Civil & Political Rights (opened for signature 16 December 1966, entered into force 23 March 1976) [**ICCPR**]. See *Fitzgerald v R* [2021] NZSC 131, [2021] 1 NZLR 551 [***Fitzgerald***] at [42] (Winkelmann CJ (Glazebrook J agreed at [244], n 347)).

5 *Fitzgerald* at [42] (Winkelmann CJ) and see [242]–[243] and [247] (Glazebrook J). Cf nn 219 and 223 (O'Regan and Arnold JJ).

6 *Fitzgerald* at [41] (Winkelmann CJ), [221] (O'Regan and Arnold JJ) and [250] (Glazebrook J).

7 *Fitzgerald* at [41] (Winkelmann CJ (Glazebrook J agreed at [244], n 347)) and cases cited therein.

8 *Fitzgerald* at [41] (Winkelmann CJ) (Glazebrook J agreed at [244], n 347)) and cases cited therein.

9 See eg *New Health New Zealand Inc v South Taranaki District Council* [2018] NZSC 59, [2018] 1 NZLR 948 [***New Health***] at [85] and [90]. Similarly, the common law may develop further than the rights enshrined in BORA: see eg *Hosking v Runting* [2005] 1 NZLR 1 (CA) at [92]–[96].

law antecedents[10] and contemporary analogues, but it has been enacted to *protect* and *promote* fundamental rights in New Zealand. It can lead to the reversal of long-held understandings of the meaning of statutory provisions and of the approach to interpretation.[11] All legislation (whether enacted before or after BORA) must be understood as having a compound purpose:[12] the purpose of the individual statute *and* BORA's purposes. BORA may provide greater protection to the rights it guarantees than given by the common law to those same rights, but it would be inconsistent with BORA's purposes to say it provides weaker protection.[13]

5. BORA identifies outcomes that must be avoided (viz, avoid the imposition of unreasonable limits on fundamental rights and freedoms). BORA sets legal standards.[14] In most cases, those standards are set by proscribing conduct that (unreasonably and/or without prescription of law) infringes the rights and freedoms that BORA guarantees. Where it is obvious (as it almost always will be) that a BORA right or freedom is implicated in an interpretation exercise, it will usually be sensible to identify what conduct the BORA right or freedom is seeking to preclude. It is the avoidance of that conduct that should drive the search for meaning in the other enactment, not the other way around. The utility of any proposed approach depends on its ability to secure that outcome. BORA interpretation is likely to require a court to work out how to fit together the rights and freedoms in BORA, and the provisions of other statutes.[15] The limits of this interpretive exercise will fall to be drawn by the courts.[16] There is no single methodology that must be applied in all BORA cases, as this Court has repeatedly emphasised.[17] It is the avoidance of *certain outcomes*—

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10 *Fitzgerald* at [42] (Winkelmann CJ (Glazebrook J agreed at [244], n 347)).

11 For a particularly clear example, see *Rae v Police* [2000] 3 NZLR 452 (CA) at [40].

12 *R v Hansen* [2007] NZSC 7, [2007] 3 NZLR 1 at [61] (Blanchard J) [***Hansen***]. See also *Fitzgerald* at [49] (Winkelmann CJ).

13 It is acknowledged that not all rights recognised at common law are to be found in BORA.

14 *Moncrief-Spittle v Regional Facilities Auckland Ltd* [2022] NZSC 138 at [84] [***Moncrief-Spittle***]. See *Belfast City Council v Miss Behavin' Ltd* [2007] UKHL 19, [2007] 1 WLR 1420.

15 Some scholars have suggested the process of determining how laws fit together (akin to fitting bricks together into gaps in a wall) in a way that upholds coherence may be a constituent part of the rule of law. "The function of the rule of law is to facilitate the integration of particular pieces of legislation with the underlying doctrines of the legal system": Joseph Raz *Ethics in the Public Domain: Essays in the Morality of Law and Politics* (OUP, 1994) 370 at 375–376. Raz goes on: "courts ensure coherence of purpose in the law, ensuring that its different parts do not fight each other" and there is a "need to mix the fruits of long-established traditions with the urgencies of short-term exigencies".

16 *Fitzgerald* at [66] (Winkelmann CJ) (where to draw the line between legitimate interpretation and illegitimate judicial amendment of legislation "is a question of constitutional significance").

17 *Hansen* at [61] (Blanchard J), [93]–[94] (Tipping J), [192] (McGrath J) (neither Elias CJ nor Anderson J adopted the majority's stepped methodology); *D (SC 31/2019) v Police* [2021] NZSC 2,

unjustified and/or unprescribed limits on fundamental rights—that determines the utility of any methodology.

6. BORA expressly recognises the State's ability to limit rights. Subject to certain well-established exceptions,[18] BORA rights and freedoms may be subject to limits. Limits arising from legislation form part of the applicable legal standard.[19] Balancing is thus made part of the interpretive exercise that a court must engage in *before* it can settle on a binding interpretation when an enactment interferes with a right that is capable of limitation (as most are). The types of limits on fundamental rights tolerated by BORA are "only"[20] those that are: (i) reasonable; (ii) prescribed by law; and (iii) demonstrably justified in a free and democratic society.[21] The onus on the State to satisfy each of these criteria is intended to foster a "culture of justification",[22] which in turn contributes to principles of good government, including transparency and accountability.[23] Proportionality (whichever test is adopted) is a necessary, but not sufficient, condition for a limit to satisfy s 5.[24] Limits must also be "prescribed by law". This aspect of BORA has been under-theorised. It has received little attention in the jurisprudence to date, as has the role of reasonableness more generally when assessing limits on fundamental rights.

7. BORA respects the basic constitutional division of labour between the different branches of government. The courts do not 'legislate';[25] they 'assess' the substantive reasonableness of limits on rights (something they

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[2021] 1 NZLR 213 [***D (SC 31/2019)***] at [101]–[102] (Winkelmann CJ and O'Regan J) and [259], n 361 (Glazebrook J) (*Hansen* methodology not appropriate here); *Fitzgerald* at [46]–[47] (Winkelmann CJ) (not proposing to apply *Hansen* methodology); and *Moncrief-Spittle* at [89] and [91] (necessary to adjust *Hansen* proportionality inquiry to reflect context).

18 Eg s 9 is illimitable (*Fitzgerald)* and s 21 has an internal modifier (*Cropp v Judicial Committee* [2008] NZSC 46, [2008] 3 NZLR 774).

19 *Moncrief-Spittle* at [84].

20 BORA, s 5. See *R v Oakes* [1986] 1 SCR 103 [***Oakes***] at [66] referring to these being "exceptional criteria" in respect of the similarly worded s 1 of the Canadian Charter.

21 *Hansen* at [101] (Tipping J).

22 See Etienne Mureinik "Emerging from Emergency: Human Rights in South Africa" (1994) 92 Mich L Rev 1977; Andrew Butler "Limiting Rights" (2002) 33 VUWLR 537 [**Butler "Limiting Rights"**] at 541 and 544; and Andrew Butler and Petra Butler *The New Zealand Bill of Rights Act: A Commentary* (2nd ed, LexisNexis, Wellington, 2015) [**Butler and Butler**] at 181. Endorsed in *Wright v Attorney-General* [2019] NZHC 59 at [17]; and see *Brooker v Police* [2007] NZSC 30, [2007] 3 NZLR 91 [***Brooker***] at [210] and [231] (Thomas J).

23 Butler and Butler at 181.

24 A limit may be proportionate but not prescribed by law: *R (Miranda) v Secretary of State for the Home Department* [2016] EWCA Civ 6, [2016] 1 WLR 1505 [***Miranda***]. See also *Beghal v Director of Public Prosecutions* [2015] UKSC 49, [2016] AC 88 [***Beghal***] and the cases discussed therein.

25 The courts obviously do not "legislate". What is meant is there is a certain point beyond which courts may not go, because of constitutional constraints on the judicial function. Whether this line is crossed turns on judicial assessment: *Hansen* at [157] (Tipping J); and *Fitzgerald* at [66] (Winkelmann CJ).

have been doing in the civil liberties space for centuries, making the sort of substantive assessments they have also done in areas such as tort, contract and trusts) and the procedural limits on rights (ie "prescribed by law", again something they have been doing in the civil liberties space, as well as in other areas of law); and they 'interpret'. BORA does not establish itself as supreme law and cannot be used by the courts to invalidate or impliedly repeal an enactment that is inconsistent with it.[26] The correct posture for the court is informed by this shared project of *affirming*, *protecting*, and *promoting* rights across the branches of the State. The courts themselves are subject to BORA under s 3.[27] They also serve a supervisory role in ensuring that other branches are affirming, protecting, and promoting rights through their activities, and subjecting rights only to those reasonable limits as can be demonstrably justified. In litigation, the courts (ultimately) bear institutional responsibility for determining whether the legal standards in BORA have been met.[28] When legislation is BORA-inconsistent, the courts are responsible for identifying the inconsistency and making a declaration of inconsistency (**DOI**),[29] but Parliament is responsible for addressing it (or not).

II. PUNISHMENT

The BORA challenge

8. Mr Chisnall contends: (i) that the extended supervision orders (**ESO**) regime in Part 1A of the Parole Act 2002 and the public protection orders (**PPO**) regime in the Public Safety (Public Protection Orders) Act 2014 (**PPO Act**) contain a pervasive penal element that is inconsistent with rights protected by BORA;[30] and (ii) that penal element cannot be justified because the public safety objective of the regimes could be met by less restrictive means, namely, clinically directed, therapeutic measures.[31] The challenge engages several BORA rights, including the right not to be punished twice in s 26(2) and, for those whose eligible offences preceded enactment of the regimes, the right to be free from retrospective penalty in

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26 BORA, s 4.
27 *Fitzgerald* at [37] (Winkelmann CJ), [218] (O'Regan and Arnold JJ) and [247] (Glazebrook J).
28 *Child Poverty Action Group Inc v Attorney-General* [2013] NZCA 402, [2013] 3 NZLR 729 at [92]; and *Moncrief-Spittle* at [84].
29 The abbreviation **DOI** is also used to refer to declarations of incompatibility in the United Kingdom.
30 See eg Respondent's Submissions (4 Oct 2022) **[Resp subs]** at [47].
31 See eg Resp subs at [58].

s 26(1).[32] Mr Chisnall seeks DOIs in respect of the two regimes.

9. The Attorney accepts that ESOs and PPOs are penalties but contends the Court of Appeal was wrong to focus abstractly on the regimes on the face of the legislation[33] because: the regimes confer a discretion on a Judge to make orders, they do not require the Judge to do so; and Judges can be expected to exercise that discretion consistently with BORA,[34] especially where proportionality is in-built in the regimes.[35] Section 5 must be assessed in the light of the order imposed in each individual case.[36]

10. The Crown's concession as to penalties (if accepted),[37] means that in every case that the power to make ESOs and PPOs is exercised, the Judge will be imposing a second penalty on a person for the same offence. This is a limit on s 26(2). The Crown must justify this BORA-infringing power under s 5.[38] It is not an answer to say the s 5 assessment does not fall for consideration at the present stage, when *every* ESO or PPO limits s 26(2).

11. The powers conferred on a Judge to make an ESO or PPO are also not "discretionary". When the threshold conditions for the exercise of the power have been met, the powers are intended to be used by a Judge to make ESOs or PPOs.[39] This is so unless an exception is read into the regimes permitting Judges *not* to exercise the power. It does not appear the Crown argues that such an exception should be "grafted" onto the legislation,[40] and it is unclear precisely how the Crown envisages BORA consistency would be achieved without the risk of disapplying the regime.[41] The "discretion" relates, for example, to what, if any, special

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32 He also says the regimes as inconsistent with ss 9, 22, 23(5), 25 and 27(2): Cross-Appeal Submissions (9 Sep 2022) [**Cross-app subs**] at [3]; and Notice of Application for Cross-Appeal [**05.0007**] at [18].

33 Appellant's Submissions (2 Sep 2022) [**App subs]** at [31]; and Notice of Application for Leave [**05.0001**] at [4] and [7].

34 App subs at [7] and [15]; and Transcript at 5–6.

35 Transcript at 3–4, 17 and 19; and App subs at [16].

36 Transcript at 63. See also at 5–6.

37 *Attorney-General v Chisnall* [2022] NZSC 77 at [1].

38 The Commission submits the s 26(2) right is limitable. While the Human Rights Committee's *General Comment No 32 on Art 14* CCPR/C/GC/32, 23 August 2007 [***GC* No 32]** contains strong statements, it does not contend the right allows of no limitation (compare *General Comment No 20 on Article 7* A/44/40, 10 March 1992 at [3]). Though derogation and limitation are distinct concepts, it is also relevant that art 14 is capable of derogation: *GC No 32* at [6]. See also Butler and Butler at 1473. The Commission notes however that many of the established exceptions (eg tainted acquittal and new and compelling evidence) relate more directly to the right not to be tried again. It is unfortunate in that sense that s 26(2) includes both the right not to be tried again and the right not to be punished again.

39 See by analogy *Parker v Ministry of Transport* [1982] 1 NZLR 209 (CA) at 210–211 (Woodhouse P) and 214–215 (McMullin J).

40 Transcript at 6–7 and 9.

41 Cf Appellants' Supplementary Submissions (13 Feb 2023) [**App supp subs]** at [70]: "s 4 has not been reached (or even argued)".

conditions should attach to an ESO. But deleting some special conditions for a particular defendant does not make a penalty not a penalty; all it might do is reduce the *severity* of the penalty. The proper characterisation of these powers is important[42] because it determines the operation of BORA here.[43]

Penalties[44]

12. The indicia of punishment identified in the domestic, overseas, and international jurisprudence tend to converge, although the weight given to each factor can differ.[45] A key thread running through many of the authorities is the need for a substance-over-form approach; labels identifying measures as "civil" are not determinative, nor do stated protective or preventive purposes remove penal qualities.[46]

13. The parties' submissions identify many of the comparative cases on regimes akin to ESOs and PPOs. In addition to the cases identified, the Court may also be assisted by US cases on civil confinement of offenders

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42 See similarly *Fitzgerald* at [59] (Winkelmann CJ) (BORA "operates differently depending on the type of rule in question and the problem it poses to the right at stake"), citing Janet McLean "Legislative Invalidation, Human Rights Protection and s 4 of NZBORA" [2001] NZ L Rev 421.

43 See similarly the distinction in *Slaight Communications Inc v Davidson* [1989] 1 SCR 1038 (Charter-consistency of administrative orders pursuant to statutory discretion) at 1080 (Lamer J) between legislation which: (i) confers, expressly or by implication, the power to infringe protected rights; and (ii) confers an imprecise discretion and does not confer, either expressly or by implication, the power to limit protected rights. In (i) it is necessary to "subject the *legislation*" to s 1 of the Charter (s 5-equivalent); in (ii) it is necessary to "subject the *order made* [pursuant to legislation]" to s 1. Applying that distinction (which the Commission endorses), the ESO and PPO regimes confer expressly the power to infringe s 26(2) and so it is the *legislation* that should be subject to s 5. In *Attorney-General v IDEA Services Ltd* [2012] NZHC 3229, [2013] 2 NZLR 512 at [182], Lamer J's comments were considered "helpful". See also below at [19] on "facial" and "as applied" BORA challenges.

44 The Commission briefly addresses the approach to interpreting "punished" in s 26(2) (an "additional issue": Minute at [8(c)]), as well as relevant comparative authorities (as requested: Minute at [6]).

45 Factors include: (i) whether the trigger for the measure is a criminal conviction (*D (SC 31/2019)* at [57]; *G v Commissioner of Police* [2022] NZHC 3514 [***G***] at [20] and [108]; *R v Rodgers* 2006 SCC 15, [2006] 1 SCR 554 [***Rodgers***] at [63]; *R v KRJ* 2016 SCC 31, [2016] 1 SCR 906 [***KRJ***] at [41]; *Nilsson v Sweden* ECtHr Second Section, 73661/01, 13 December 2015 [***Nilsson***] at 11 (but note focus on repeat criminal proceedings); *JG v New Zealand* CCPR/C/115/D/2631/2015 [***JG***] at [4.4]; *Tillman v Australia* CCPR/C/98/D/1635/2007 [***Tillman***] and *Fardon v Australia* CCPR/C/98/D/1629/2007 (***Fardon***) at [7.4(2)] (in context of art 9(1) ICCPR); *Fardon v Attorney-General* [2014] HCA 46, (2004) 223 CLR 575 [***Fardon* HCA]** at [182] (Kirby J dissenting); *M v Germany* [2009] ECHR 2071, (2010) 51 EHRR 41 at [120]; and *Kansas v Hendricks* [1997] USSC 63, (1997) 521 US 346 [***Kansas***] at 380 (Breyer J dissenting)); (ii) the purpose, nature, and degree of severity of the measure, including hardship caused, the extent and duration of intrusion, and whether the person is prevented from engaging in otherwise lawful conduct (*Khean v Police* HC Dunedin, CRI-2007-412-58, 28 November 2007 at [18]; *KRJ* at [36]–[42]; *Nilsson* at 11; *M v Germany* at [120]; and *G* at [71]–[72]); (iii) the similarity of the measure and its consequences to the consequences of sanctions available at sentencing (*G* at [71]; *Rodgers* at [63] (but see [64]); *KRJ* at [41]; *M v Germany* at [127]; and *Kansas* at 379 (Breyer J dissenting)); (iv) whether the measure is imposed to further sentencing purposes and principles (*Rodgers* at [63]; *KRJ* at [41]; and *Kansas* at 361–362 (Thomas J); (v) the closeness in time between imposition of the measure and completion of the original sentence (*G* at [71]); and (vi) procedures involved in making and implementing the measure, including whether breach of conditions is an offence (*D (SC 31/2019)* at [57]; *G* at [71] *Nilsson* at 11; and *M v Germany* at [120]).

46 See eg *M v Germany* at [120]; *D (SC 31/2019)* at [58]; *G* at [67] and [71]; *KRJ* at [33]–[34]. Cf eg *Fardon* HCA at [219] (Callinan and Heydon JJ) at [34] (McHugh J).

deemed to pose a risk to the public.[47] The cases on comparative regimes largely return to the reasoning in the cases considering the meaning of "penalty" or "punishment" more generally.[48] An exception is the European Court of Human Rights (**ECtHR**) decision in *Bergmann v Germany*, which finds the punitive elements of detention can be "eclipsed" if detention has an individualised and therapeutic focus.[49]

14. *Bergmann* was followed by a majority of the Grand Chamber in *Ilnseher v Germany*. A basic difference between the majority and the dissent of Judge Pinto de Albuquerque (joined by Judge Dedov)[50] was the extent to which preventive detention ordered with the aim of treating mental disorder could "erase" the punitive nature of detention.[51] According to the Judge, the fundamental error in the majority's analysis was to ignore that a "prison sentence should be just as therapy- and liberty-oriented as preventive detention".[52] A State-imposed coercive measure that "has the commission of a criminal offence as a 'precondition' can only be a penalty".[53]

15. What is the relevance of these authorities for this appeal? As a preliminary matter, the Court's approach should be informed by the purpose of s 26(2). Protection against double jeopardy is not an end in itself; it is a guarantee of individual liberty, as well as a protection against abuse of state power. The common law has "jealously guarded" liberty interests since time immemorial, long before the enactment of BORA, and continues to do so: "the principle that statutes should be interpreted *in favorem libertatis* (in favour of liberty) has been part of the common law for centuries".[54]

16. The Commission submits this Court should determine the meaning of "penal" or "punishment" by applying a multi-factorial assessment,

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47 See *Kansas* discussed above at n 45 (the majority (at 361–369) and dissenting (at 379–395) opinions are starkly divided on whether indefinite civil confinement is punishment). See also *Seling v Young* [2001] USSC 7, (2001) 531 US 250; and *Kansas v Crane* [2002] USSC 10, (2002) 534 US 407.

48 As discussed above at [12] and n 45.

49 *Bergmann v Germany* ECtHr, Fifth Section, 23279/14, 7 January 2016 [***Bergmann***] at [166]–[182].

50 *Ilnseher v Germany* [2018] ECHR 991 (GC) [***Ilnseher***]. Judge Ravarani concurred (but clarified some general principles set out by the majority). Judge Sicilianos partially dissented (he found the impugned measure was a penalty under art 7 of Convention and in particular disagreed with the majority's focus on the "therapeutic aim" and other "dynamic" criteria: at [3] and [8]–[16].

51 See eg *Ilnseher* at [236] (majority). On the need for additional detention to be aimed at "rehabilitation and reintegration" to avoid arbitrariness under art 9, see *General Comment No 35 on Article 9* at [21].

52 *Ilnseher* at [37]; and see also at [39], [41], [53] and [96]–[107] (Judge Pinto de Albuquerque).

53 *Ilnseher* [120] (Judge Pinto de Albuquerque).

54 *Woods v Police* [2020] NZSC 141, [2020] 1 NZLR 743 at [62], n 46, citing *Crowley's Case* (1818) 2 Swans 1 at 67–68; 36 ER 514 (Ch) at 533; *Tan Te Lam v Superintendent of Tai A Chau Detention Centre* [1997] AC 97 (PC) at 111; *Refugee Council of New Zealand Inc v Attorney-General* [2002] NZAR 717 (HC) at [32]; and see *Attorney-General v Refugee Council of New Zealand Inc* [2003] 2 NZLR 577 (CA) at [57] (McGrath J) and [256] (Glazebrook J). See also Butler and Butler at [19.4.6].

considering several factors that bear on whether a sanction is "penal". This has the benefit of transparency about factors influencing the assessment. It also facilitates the Court's ability to weigh relevant considerations.

17. The harder question is what factors ought to be evaluated. Some value judgments are inescapable, and sanctions may have multiple purposes or bases. The Court must inquire into the true character of a sanction, rather than being constrained by the labels attached to, or purposes claimed for, it.[55] The following should be considered: (i) whether a basis for a sanction is an offence or conviction (in which case a sanction would appear to have a retributive character), as opposed to a sanction being independent of an offence or conviction; and (ii) whether a sanction is so severe, or so causative of hardship, or of such magnitude, as to be considered penal in character and nature.

III. LIMITING RIGHTS

Types of BORA challenge

18. The Commission submits that there is no legal impediment to a challenge proceeding in this case to the operation of the ESO and PPO regimes *in toto*. A statute or legal rule, or the application of that statute or legal rule, can be BORA-inconsistent in multiple ways. This Court should not adopt prescriptive and exclusionary rules. The inconsistency can implicate a single provision, multiple provisions, part of an Act, or the Act in its entirety.[56] If a BORA-consistent interpretation cannot be given to the enactment;[57] a DOI should be made responding to the nature of the inconsistency.

19. BORA challenges may focus on legal tests or enactments as well as BORA's operation in application of the law. The distinction in US law[58]

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55 An overly formalistic or narrowly legalistic approach limiting double jeopardy protections to cases involving repeated criminal proceedings is inappropriate: Cf *Nilsson* (focus on repeat criminal proceedings, reflecting wording of art 4 of Seventh Protocol of the Convention: "punished again in criminal proceedings"); and *GC No 32* (analysis arguably limited to repeat "criminal" measures: [54]–[57]). New Zealand law has now moved beyond the formalistic position in *Daniels v Thompson* [1998] 3 NZLR 22 (CA) and takes a substance-over-form approach: eg *Khean*, *D (SC 31/2019)* and *G*.

56 In addition to the English cases discussed below, see eg *R v Morgentaler* [1988] 1 SCR 30 (multiple abortion provisions in Canadian Criminal Code stuck down); *Blake v Attorney-General* [1981] IESC 1, [1982] IR 117 (Parts II and IV of Rent Restrictions Act 1960 struck down); *R v Big M Drug Mart Ltd* [1985] 1 SCR 295 [***Big M Drug Mart***] (Lord's Day Act struck down in effect); and *Buckley v Attorney-General* [1950] IR 67 (Sinn Féin Funds Act 1947 deemed unconstitutional in whole).

57 Sections 7A–7B BORA refer to DOIs about an "enactment". "Enactment" is not defined in BORA but is defined in s 13 of the Legislation Act 2019 as "the *whole* or *a part of* an Act" (emphasis added).

58 *United States v Salerno* (1987) 481 US 739. Facial challenges are challenges to laws "on their face": challenges to a legal regime as a whole. As-applied challenges involve challenges to how a law is applied and involve a narrower claim that how a law is applied in a particular instance is in violation

between "facial" and "as-applied challenges can be useful. *Brooker v Police*[59] and *Morse v Police*[60]—where the majority focus on a BORA challenge to the legal test for disorderly and offensive behaviour—show that "facial" challenges are not foreign to BORA jurisprudence.[61]

20. Comparative case law affords useful examples of other types of challenges. UK courts have been cautious about granting DOIs where the incompatibility does not arise in the instant case or where the public authority is able (sometimes with the benefit of a robust application of s 3 of the Human Rights Act 1998 (UK) (**HRA (UK)**) to operate compatibly with the European Convention on Human Rights (**Convention**).[62] But the UK courts have expressly reserved the possibility that DOIs may be granted in the abstract and/or where the incompatibility does not arise in all cases, or the legislation has not operated incompatibly in the instant

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of a constitutional provision. Notwithstanding critiques of the distinction (Richard H Fallon Jr "As-Applied and Facial Challenges and Third-Party Standing" (2000) 113 Harv L Rev 1321; and Alex Kreit "Making Sense of Facial and As-Applied Challenges" (2010) 18 Wm & Mary Bill Rts J 657), the distinction is operative in the law: *National Endowment for the Arts v Finley* (1998) 524 US 569.

59 The majority focused on the lower Courts' failure to consider the legal test for "disorderly behaviour" in light of BORA, thereby subjecting the legal test to something akin to a facial challenge with less focus on its application: at [11]–[12], [22] (the Court of Appeal "does not address the test used by the District Court") and [48] (Elias CJ), [59] and [64] (Blanchard J) and [90]–[91] (Tipping J, who agreed the test needs updating, but seems to suggest it might apply differently in cases with a BORA element to cases without that element). The dissenting Judges direct their reasoning more squarely to the question of how the law should have been applied in the particular case, and whether that application was BORA-consistent: at [161] and [166] (the "values to be weighed are not values in the abstract, but the value of Mr Brooker's exercise of his right and the value of Ms Croft's, or any resident's, interest in being left alone in the home *in the circumstances of this case*" (Thomas J, emphasis added).

60 *Morse v Police* [2011] NZSC 45, [2012] 2 NZLR 1. Elias CJ takes issue with an "approach which balances freedom of expression only in its application". Section 6 cannot result only in "[BORA] protection to be balanced in application; [i]t requires an enactment itself to be given a meaning consistent with the rights, if it can" (at [6], [11] and [14]). Three other Judges agreed with the need for offensive behaviour to be disturbing of public order: at [67] (Blanchard J), [69] (Tipping J) and [124] (Anderson J). McGrath J dissented noting the "court's analysis must assess the impact of the exercise of the right *in the circumstances*": at [107] (emphasis added).

61 The individuals' treatment under that law formed part of the context of the Court's consideration; but properly understood, the majority reasoning in both cases directs itself only to the nature of the law and its consistency with BORA.

62 Conall Mallory and Hélène Tyrrell "Discretionary Space and Declarations of Incompatibility" (2021) 32 King's LJ 466; open access version (tandfonline.com/doi/full/10.1080/09615768.2021.1975590) [**Mallory and Tyrrell**] at 12–18. See *R (H) v Secretary of State for Health* [2005] UKHL, [2006] 1 AC 441 at [32] ("the means exist of operating s 29(4) in a way which is compatible with the patient's rights [under art 5(4)]. It follows that the section itself cannot be incompatible, although the action or inaction of the authorities under it may be so"); *Christian Institute v Lord Advocate (Scotland)* [2016] UKSC 51 at [88] ("if a legislative provision is capable of being operated in a manner which is compatible with Convention rights in that it will not give rise to an unjustified interference with [those] rights in all or almost all cases, the legislation itself will not be incompatible with Convention rights"); and *R (Chester) v Secretary of State for Justice* [2013] UKSC 63, [2014] AC 271 [***Chester***] at [102] (s 4 "does appear to leave open the possibility of a declaration *in abstracto*, irrespective of whether the provision in question is incompatible with the rights of the individual litigant. There may be occasions when that would be appropriate. But in my view the court should be extremely slow to make a [DOI] at the instance of an individual litigant with whose own rights the provision in question is not incompatible). Cf *R (T) v Chief Constable of Greater Manchester* [2014] UKSC 35, [2015] AC 49 [***R (T)***] at [52] (a DOI "is not a declaration that the legislation always operates incompatibly with Convention rights. It is a declaration only that it is capable of operating incompatibly and, almost always, that it has operated incompatibly in the case before the court".).

case.[63]

21. For example, in *R (Reilly) v Secretary of State for Work and Pensions (No 2)*, the Court of Appeal granted a DOI in respect of an entire Act; "the enactment of the [Jobseekers (Back to Work) Schemes Act 2013] gave rise to a breach of art 6.1";[64] and in *International Transport Roth Gmbh v Home Secretary*, the Court of Appeal considered the "intrinsic legality of the [penalty scheme in part of an Act, ie Part II of the Immigration and Asylum Act 1999] rather than the liability of carriers in individual cases". Simon Brown LJ noted "the troubling features of the scheme are all interlinked: to achieve fairness would require a radically different approach".[65]

22. The UK courts have also granted DOIs on the face of the legislation, even where there is no incompatibility in its application to the litigant.[66] In *R (Miranda) v Secretary of State for the Home Department*, the Court of Appeal found that the exercise by police of the stop power in para 2(1) of sch 7 of the Terrorism Act 2000 (UK) on Mr Miranda was exercised for a lawful purpose[67] and was a justified and proportionate interference with his art 10 right to freedom of expression ("the compelling national security interests clearly outweighed Mr Miranda's art 10 rights *on the facts of this case*").[68] However, the Court went on to a make a broader DOI that the "stop power conferred by para 2(1) of sch 7 is incompatible with art 10 … in relation to journalistic material in that it is not subject to adequate safeguards against its arbitrary exercise".[69] The requirement in art 10(2)

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63 See *Chester* at [102] (s 4 "does appear to leave open the possibility of a declaration *in abstracto* … there may be occasions when that would be appropriate"); *R (T)* at [52] ("*and almost always*, that it has operated incompatibly in the case before the Court"); and *R (Nasseri) v Home Secretary* [2009] UKHL 23, [2010] 1 AC 1 at [19] ("would not wish to exclude the possibility that in a case in which a public authority was not, on the facts, acting incompatibly with a Convention right, the court might consider it convenient to make a [DOI] that if he had been so acting, a provision of primary legislation which made it lawful for him to do so would have been incompatible with Convention rights").

64 *R (Reilly) v Secretary of State for Work and Pensions (No 2)* [2016] EWCA Civ 413, [2017] QB 657 [***Reilly* (EWCA)**] at [83] (permission to appeal refused: [2017] 1 WLR 518 (SC)). The breach was in the form embodied by the principle in *Zielinksi v France* (2001) 31 EHHR 19 at [57].

65 *International Transport Roth GmbH v Home Secretary* [2002] EWCA Civ 158, [2003] QB 728 [***Roth***] at [9] and [66]. See further at [46]–[47]. For the regime's "interrelated features", see at [24]–[26].

66 See also *R (F) (A Child) v Home Secretary* [2010] UKSC 17, [2011] 1 AC 331 [***(F) (A Child)* (UK SC)**]. The Court declared s 82(1) of the Sexual Offences Act 2003 (UK) incompatible with art 8. In the Court of Appeal, the Crown argued that "whatever view [the Court took] of the proportionality of the notification requirements regime as a scheme, it would be wrong to grant a [DOI] to these two claimants because they have not produced evidence that *their* art 8 rights had been breached". The argument was that proportionality must be determined on individual facts, "rather than on the basis of reviewing the 2003 Act in the abstract". The Court did not consider this barred granting a DOI to the claimants: [2010] EWCA Civ 792, [2010] 1 WLR 76 [***(F) (A Child)* (EWCA)** at [32]–[33]. The Supreme Court made clear the only issue raised by the appeals "is a general one": at [5].

67 *Miranda* at [58].

68 *Miranda* at [84] (emphasis added). See also at [84] and [93].

69 *Miranda* at [119]. Cd at [118] where the Court dismissed the appeal as it related to this case.

for interferences to be "prescribed by law" was not satisfied.[70]

23. And they have granted DOIs that legislation is incompatible in its operation to an individual litigant and a similarly placed group of persons, even though it is not incompatible in all cases. In *Reilly* (discussed above), the Court of Appeal upheld the DOI made in the High Court that the "Jobseekers (Back to Work) Schemes Act 2013 is incompatible with the *claimants'* rights under art 6(1)".[71] While the DOI was framed broadly, it was clear from the High Court's reasoning that the incompatibility found "was limited to the effect of the 2013 Act on the minority of claimants who had commenced proceedings in the courts or tribunals prior to it coming into force" (and that group included the appellant, Mr Hewstone).[72]

24. DOIs can also be available where the inconsistency arises from an omission. In *Vriend v Alberta*, the Supreme Court of Canada held that the omission of protection on the basis of sexual orientation in the Individual's Rights Protection Act was an unjustified violation of s 15 of the Charter.[73]

Assessing BORA-consistency

25. Section 5 sets the test for whether limits on rights comply with BORA: limits on rights are BORA-consistent if they are reasonable, prescribed by law *and* demonstrably justified in a free and democratic society.[74] These requirements emphasise New Zealand's commitment to the rule of law.[75] They ensure that those exercising public power must have a clear basis in

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70 *Miranda* at [94].

71 *Reilly* (EWCA) at [83] and [180], upholding *R (Reilly) v Secretary of State for Work and Pensions (No 2)* [2014] EWHC 2182 (Admin), [2015] QB 573 [***Reilly* (EWHC)**] at [151].

72 *Reilly* (EWCA) at [82]–[83], citing *Reilly* (EWHC) at [128].

73 *Vriend v Alberta* [1998] 1 SCR 493 [***Vriend***]. UK courts have tended to rule out DOIs where the "incompatibility is traced to the absence, or lacuna, of legislation such that there is no offending legislative provision to declare incompatible": Mallory and Tyrrell at 7–8, citing *Re S (Children) (Care Order: Implementation of Care Plan)* [2002] UKHL, [2002] 2 AC 291. But this approach has been criticised; "the whole purpose of a [DOI] is to signal to the executive/legislative partnership that there is a problem with legislation. … If that can be done where a single provision or a whole Act positively breaches the [Convention], why cannot the same signal be sent where the scheme omits to do something required by the [Convention]: David Bonner, Helen Fenwick and Sonia Harris-Short "Judicial Approaches to the Human Rights Act" (2003) 52(3) Intl & Comp Law Quarterly 549 at 562–563; and see Richard Clayton and Hugh Tomlinson *The Law of Human Rights* (2nd ed, OUP, Oxford, 2009) vol 1 [**Clayton and Tomlinson**] at [4.84]. An example of a similar approach in the HRRT is *Hoban v Attorney-General* [2022] NZHRRT 16 [***Hoban***] at [65].

74 *Hansen* at [101] (Tipping J). See also *A Bill of Rights for New Zealand: A White Paper* [1985] AJHR A.6 [**White Paper**] at [10.28].

75 *Hansen* at [102] (Tipping J) (in respect of "demonstrably justified" but the relationship is even stronger in the case of the "prescribed by law" requirement). See Butler and Butler at 203: prescribed by law requirement ensures "that basic-rule-of-law values are complied with when limits are placed on rights"; and Peter Hogg *Constitutional Law of Canada* (5th ed supplemented, Thomson Reuters Canada, Ontario, 2007) vol 2 at [38.7(a)], as cited in *Attorney-General v IDEA Services Ltd* [2012] NZHC 3229, [2013] 2 NZLR 512 [***IDEA Services***]: "The requirement that any limit on rights be prescribed by law reflects two values that are basic to constitutionalism or the rule of law".

the law (whether statute or common law) for doing so and must justify their exercise of power by reference to democratic standards and processes. This section focuses on *legislative* limits on BORA-protected rights.

26. Any proposed interpretation that limits rights must be assessed against s 5. This is because a s 5-compliant limit forms a necessary part of the applicable legal standard set by BORA. In assessing a rights-limiting meaning, BORA's purposes serve as an important cross-check on the reasonableness of any limit. If the proposed meaning is not BORA-consistent and no alternative interpretation is proffered (which must also be assessed against s 5), the limit in the ESO and PPO regimes will not be a s 5-compliant limit. It is at that point that a DOI should be made.

27. The "prescribed by law" or "legality" standard is under-theorised in New Zealand. It is typically associated with the requirement that limits be identifiable and expressed with sufficient precision in statute, subordinate legislation or the common law.[76] But this Court should recognise that it goes further and requires compatibility with the rule of law. It is in this latter sense that the requirement is relevant in the present case: any meaning of the ESO and PPO legislation that limits protected rights under BORA must afford adequate protection against arbitrariness and indicate with sufficient clarity the scope of any discretion conferred under those regimes, including the manner in which it is to be exercised.[77]

28. Canadian jurisprudence (drawing in part on US case law) refers to the need for law not to be "vague, undefined, and totally discretionary; it must be ascertainable and understandable".[78] In *Committee for the Commonwealth of Canada v Canada*, L'Heureux-Dubé J cited earlier authority for the proposition that limits on rights must "be expressed through the *rule of law*. The definition of law for such purposes must necessarily be narrow. Only those limits on guaranteed rights which have survived the rigours of

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76 *Hansen* at [180] (McGrath J); and White Paper at [4.17] and [10.28].

77 *Hansen* at [180] (McGrath J): "limits must neither be ad hoc nor arbitrary and their nature and consequences must be clear".

78 *Re Ontario Film and Video Appreciation Society and Ontario Board of Censors* (1983) 41 OR (2d) 583, affirmed in 45 OR (2d) 80 (CA) (leave to appeal granted but appeal discontinued: [1984] 1 SCR xi). The Divisional Court found that although there had been a legislative grant of power to the Board to censor certain films, the limits placed upon freedom of expression had not been legislatively authorised. It is insufficient to authorise the Board to censor any film of which it disapproves.

the law-making process are effective".[79] This underscores the importance of evidence so that a court has confidence any limit put forward by the Attorney has in fact been through the rigours of the law-making process.

29. The UK courts and ECtHR have also held that the requirement for limits on rights to be "in accordance with law"[80] requires compatibility with the rule of law: ie, by ensuring any limit is not just expressed with sufficient precision in the law but also contains adequate safeguards against arbitrary exercise of the power (or discretion).[81] The protection against arbitrariness complements the requirement that limits be proportionate.[82] Examples of the types of legislative regimes that the UK courts have ruled would fail this requirement include: (i) an over-rigid regime that does not contain the flexibility needed to avoid rights-inconsistency;[83] and (ii) a power or discretion with insufficient safeguards against exercise in an arbitrary manner, including because it is too broad or vague.[84]

30. What is required in terms of precision and what are sufficient safeguards will depend on context. It is in this way that the "prescribed by law" standard ensures any proposed limit "fits" New Zealand law (statute and common law). This will be particularly relevant where a statute is said to confer discretion on a Judge or administrative official. A court will need to inquire into whether the discretion said to exist contains sufficient safeguards. What is "sufficient" will require consideration of any relevant statutory provisions, as well as relevant principles of the common law and international law. If the proposed interpretation involves a limit that does not contain adequate safeguards, the court will need to discard it in favour

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79 *Committee for the Commonwealth of Canada v Canada* [1991] 1 SCR 139 at 207–208, citing *McKinney v University of Guelph* [1990] 3 SCR 229 at 386. A law that is "too vague" is not a limit prescribed by law: at 208–209. At the time the void-for-vagueness doctrine was relatively new to Canadian law but was established in American and European jurisprudence: at 209–210, citing *Sunday Times v United Kingdom* [1979] 2 EHRR 245 [***Sunday Times***] and *Grayned v City of Rockford* (1972) 408 US 104 as examples. At 210, she notes the void-for-vagueness doctrine "finds its sources in the rule of law"; it reflects two specific concerns, ie, that "citizens should be given proper notice of the law, and no room for arbitrary government action should exist under that law".

80 White Paper at [10.28], describing "in accordance with law" as "almost identical language" and relying on ECtHR reasoning in respect of what may be required by the "prescribed by law" standard and *Hamed v R* [2011] NZSC 101, [2012] 2 NZLR 305 at [35] (Elias CJ); and *Sunday Times* at [48].

81 For the UK position, see eg *Beghal*; and *Miranda*. For the ECtHr position, see eg *Rotaru v Romania* (2000) 8 BHRC 449 at [55]; *Amann v Switzerland* (2000) 30 EHRR 843 at [56]; *S v UK* (2008) 25 BHRC 557 at [95]; and *Gillan v UK* (2010) 28 BHRC 420 at [83].

82 *Beghal* at [34] (Lord Hughes). Legality is distinct from proportionality, albeit closely linked. Legality is a "prior test" designed to ensure limits can be proportionate, but legality does not "subsume the issue of proportionality, whether the issue is the proportionality of the measure as a whole or … of its application in a particular case": at [33] (Lord Hughes).

83 See eg *MM v United Kingdom (Application No 24029/07)* The Times, 16 January 2023; and *R (T)*.

84 See eg *Beghal* at [32] (Lord Hughes); and *Miranda* at [94]–[117].

of another BORA-consistent interpretation or mark the inconsistency by making a DOI. The "prescribed by law" requirement "does not stand in the legislature's way" but rather "sends the matter back to the legislature" (quoting the White Paper, the "legislature has not yet done *its* job which is to make law, to prescribe limits. It is that that the court is asking it to do."[85])

31. This is why it is critical—especially given the concession an ESO or PPO is a penalty—for the Attorney to be explicit about the interpretation of the ESO and PPO regimes that he is advancing, thereby facilitating the ability of this Court to stress-test the limit (including any discretion said to arise) against the standard required by BORA.

32. If the "prescribed by law" standard has been satisfied, s 5 requires that the limit also satisfy a "proportionality"[86] requirement to establish that it is "demonstrably justified in a free and democratic society". There is no single methodology mandated by BORA.[87] The courts have sometimes tested the proportionality of a measure by adopting a *structured* test (bearing in mind that the ultimate test is that set out in s 5);[88] at other times through unstructured proportionality balancing.[89] A structured approach should usually be adopted for legislative limits because it clearly sets out the criteria against which Parliament's measure will be assessed (and that the Attorney must meet to discharge the burden), offers greater transparency than unstructured balancing, accords with the observable practice adopted by the Attorneys-General discharging their s 7 BORA function, and makes the (inevitable) value judgments required by s 5 more explicit. This type of approach was endorsed for legislative limits on

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85 White Paper at [10.28].

86 Proportionality in this context has a particular meaning associated with the assessment of limits on fundamental rights; it should not be assumed that this type of proportionality is the same as statutory tests referring to proportionality outside of the human rights context.

87 *Moncrief-Spittle* at [91] ("no immutable rule").

88 This is sometimes referred to as the "*Hansen* test" or, by reference to the leading Canadian decision that *Hansen* endorsed, the "*Oakes* test". The Commission does not consider such references to be helpful: the wording of the proportionality methodology considered in *Oakes* and endorsed in *Hansen* has varied considerably over time. Similar methods are used in other jurisdictions too. What these methods have in common is adopting a *structured* approach to assessing the proportionality of the limit (as opposed to unstructured balancing). It thus uses the phrase "structured proportionality" in these submissions rather than emblematic references to specific cases. The Commission also notes that structured proportionality is not inappropriate merely because a discretionary statutory power is under consideration; this type of analysis was, for example, undertaken in *Moonen v Film and Literature Board of Review* [2000] 2 NZLR 9 (CA) at [18] (discretionary statutory power applied to a particular censorship decision) and *Schubert v Whanganui District Council* [2011] NZAR 233 (HC) [***Schubert***] at [76]–[77], [104] and [107]–[130] (discretionary power to make bylaws).

89 See *D (SC 31/2019)* at [99]–[102] (Winkelmann CJ and O'Regan J) and [259], n 361 (Glazebrook J); and *Moncrief-Spittle* at [87]–[92] and the cases cited therein.

fundamental rights in New Zealand in *Hansen*[90] and has been adopted by apex courts in the United Kingdom[91] and Canada,[92] among others.[93] It is important to recall that the purpose of testing the proportionality of a limit is to satisfy the s 5 test (ie, only these limits can justify intrusions into protected rights). Any test—structured or unstructured—is an analytical framework and should not be applied mechanistically. It is an evaluative exercise that is used in service of complying with the s 5 test.[94] The reasons why the steps have been included are more important than the precise words used to express each step.

33. The structured proportionality methodology can be (and has been) formulated in different ways (although the consistency of approach across jurisdictions is notable). In essence, the New Zealand courts consider that a limit must satisfy four steps: (i) the objective of the measure limiting a right is sufficiently important to justify interfering with fundamental rights; (ii) the measure must be rationally connected to that objective; (iii) the measure should limit the right as little as possible to achieve the objective; and (iv) the effects on the limitation of rights and freedoms should be proportional to the objective. Steps (i) and (ii) operate as threshold steps.[95] Experience shows that courts are unlikely to find that a measure does not have a sufficiently important objective unless it runs directly counter to the types of values found in a free and democratic society.[96] However, it serves a useful purpose as part of the test: how the

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90 *Hansen* at [42] (Elias CJ), [64]–[65] and [69]–[82] (Blanchard J), [103]–[104] (Tipping J), [203]–[205] (McGrath J) and [269]–[272] (Anderson J).

91 See eg *F (A Child)* (UKSC) at [17] (Lord Phillips, Lady Hale and Lord Clarke, with whom Lord Hope agreed at [59]); *Bank Mellat v Her Majesty's Treasury (No 2)* [2013] UKSC 39, [2014] AC 700 at [72]–[76] (Lord Reed, with whom Lord Sumption, Lady Hale, Lord Kerr, Lord Clarke and Lord Neuberger agreed (at [20] and [166]); and *R (Aguilar Quila) v Secretary of State for the Home Department* [2011] UKSC 45, [2012] AC 621 at [45] (Lord Wilson, with whom Lord Phillips and Lord Clarke agreed at [98]).

92 *Oakes*; *R v Chaulk* [1990] 3 SCR 1303; and *RJR-MacDonald Inc* [1995] 3 SCR 199 [***RJR-MacDonald***]. South Africa's Constitution has a general limitation clause (s 36) listing relevant factors that are similar to those in *Oakes*. But the Constitutional Court has resisted a stepped *Oakes*-style test in favour of engaging in a balancing exercise and arriving at a global judgment on proportionality: *State v Manamela* [2000] ZACC 5, 2000 (3) SA 1. For other examples of a list of factors set out in legislation, see Charter of Human Rights and Responsibilities Act 2006 (VIC), s 7(2); Human Rights Act 2004 (ACT), s 28; Human Rights Act 2019 (QLD), s 13; and Constitution of Kenya 2010, art 24.

93 In Ireland, use of structured proportionality is traced to *Heaney v Ireland* [1994] 3 IR 593 (Costello J), which in turn drew on *Oakes*: see *Donnelly v Minister for Social Protection* [2022] IESC 31 at [178].

94 See similarly *RJR-MacDonald* at [62] (La Forest J).

95 *Hansen* at [121] (Tipping J).

96 See eg *Big M Drug Mart* at [140] where the Supreme Court of Canada held the objective of the Lord's Day Act was to compel the observance of the Sabbath in direct conflict with the religious freedom values recognised in s 2(a) of the Charter. A legislative objective diametrically opposed to the purpose of a right cannot be "sufficiently important" for the purposes of this step in the *Oakes* test.

objective is formulated will inform what is required to satisfy the remaining steps. A narrow formulation will have consequences for whether the limit can be said to be rationally connected to the objective; a broader formulation will impact upon the minimal impairment step in the analysis. The second step (rational connection) is also usually easily satisfied. It serves to shear away under-inclusive and over-inclusive limits on fundamental rights.[97] The more focused the objective, the more tailored the measure will need to be to satisfy this step. The step must be applied in a manner that is sensitive to novel or innovative steps where empirical evidence may be unavailable,[98] but must nonetheless be applied robustly to ensure that a limit satisfying these tests *is* "demonstrably justified".

34. The third part of the test has tended to be harder to satisfy, including in New Zealand, typically because courts have found that measures have failed to limit rights as a little as possible. The Judges in *Hansen* vacillate between phrasing this part of the test as requiring that a right is limited "as little as possible"[99] and that a right is impaired "as little as was reasonably necessary".[100] The step has also been recast in some cases, typically where the relevant provision represents a legislative choice on a complex social issue, as whether Parliament's measure falls within a "range of reasonable alternatives".[101] This step and the different formulations adopted underscore the importance of focusing on the objective of the step, not repeatedly recasting it in response to different contextual factors. The simplest formulation that captures the purpose of this step is to ask whether there is any less rights-intrusive alternative that would be as effective at

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97 See *Hansen* at [70] (Blanchard J).

98 This is not to say that the courts could not insist on demonstration of the proposed effect of the legislation by logic and reason: see eg *R v Bryan* 2007 SCC 12, [2007] 1 SCR 527 [***Bryan***] at [16] (per Bastarache J, in majority, reviewing previous authority on using logic and common sense in the absence of determinative social science evidence).

99 *Hansen* at [70] (Blanchard J) and [204] (McGrath J).

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

101 See eg *Canada v JRI-Macdonald Corp* 2007 SCC 30, [2007] 2 SCR 610 [***JTI-MacDonald***] at [43], [66] and [137]; *Harper v Canada* [2004] 1 SCR 827 [***Harper***] at [110] (Bastarache, Iacobucci, Arbour, LeBel, Deschamps and Fish JJ); *RJR-MacDonald* at [160] (McLachlin J, in majority); and *Ministry of Health v Atkinson* [2012] NZCA 184, [2012] 3 NZLR 456 [***Atkinson***] at [151].

securing the measure's objective.[102]

35. The final part of the test, sometimes described as "overall proportionality",[103] requires a "balance to be struck … between social advantage and harm to the right".[104] That is, the courts—with the benefit of the evidence adduced by the parties—weigh the costs and benefits of the measure (bearing in mind the limitations inherent in court processes, even if augmented to make additional evidence available).[105] This will often involve consideration of the extent of intrusion into a right and value underpinning it (eg, liberty) and the severity of the interference. The importance of the right and the interests it is seeking to protect can also bear on a court's assessment.[106] Although these types of considerations could be split out as separate steps in any structured approach, the courts can secure transparency about the considerations they are weighing by ensuring that those considerations are identified explicitly in their reasoning. Some value judgments are inescapable; however, problems of incommensurability tend to evaporate as competing values become more unbalanced: for example, a minor restriction on liberty will be uncontroversial where it attains a large measure of security (eg, pre-flight checks at an airport).

36. A further issue raised during the assessment under s 5 is the weight to be given to reasons advanced in defence of the limit. It is the role of the court to determine whether a limit is reasonable.[107] But in assessing the reasonableness of the proposed limit, it is legitimate (and in some cases necessary) for a court to give weight to the reasons offered as justification

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

103 See eg *Atkinson* at [180].

104 *Hansen* at [134] (Tipping J).

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

106 *Dagenais* at 890–891 (Lamer CJ (for the majority)). See *Hansen* at [193] (McGrath J, discussing the importance of the presumption of innocence prior to engaging in the *Oakes* test).

107 *Moncrief-Spittle* at [84].

(eg, evidence demonstrating it is a reasonable limit). This can be understood as "performance of the ordinary judicial task of weighing up competing considerations on each side and according appropriate weight to the judgment of a person with responsibility for a given subject matter and access to special sources of knowledge and advice".[108] This is sometimes characterised as "deference".[109] There has been some controversy as to when and how the courts should give weight to Parliament in the context of assessing the rights-consistency of legislation (and, indeed, in public law more generally); but there is general acceptance that weight should be afforded by the courts in response to concerns of relative institutional competence.[110] Those concerns are implicated by the court's assessment of the reasonableness of limits for the purposes of s 5, which will require the court to inquire into the justification for limits. The point here is that there is a pressing need for a practical and transparent approach to this issue: assessment of the BORA-consistency of legislation is a necessary feature of statutory interpretation following the enactment of BORA and these types of considerations too often remain submerged within the overall analysis. The Commission makes the following additional observations.

37. *First*, whether and if so, how much weight should be afforded to a decision-maker (here, Parliament) is contextual; but it bears noting that weight must be earned, not assumed as an entitlement. Claims that Parliament's limit is entitled to weight can be made throughout the BORA justification analysis, regardless of the methodology adopted for assessing

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108 Tom Hickman *Public Law after the Human Rights Act* (Hart Publishing, 2010) [**Hickman**] at ch 5; and *Huang v Secretary of State for the Home Department* [2007] UKHL 11, [2007] 2 AC 167 at [16].

109 The Commission does not enter into the terminological debate. "Deference" has become a commonly-used term, albeit controversial given its overtones of servility. The Commission prefers to focus on the task of giving "weight"; this situates the exercise within the judicial function and focuses the analysis on the justification offered for a limit. It also avoids mischaracterising what Judges are doing as applying an independent doctrine. For some examples of literature on "deference" in a human rights context: Paul Craig "The Courts, The Human Rights Act and Judicial Review" (2001) 117 LQR 589; Jeffrey Jowell "Judicial deference: servility, civility or institutional capacity?" [2003] PL 592; TRS Allan "Human Rights and Judicial Review: A Critique of Due Deference" [2006] CLJ 671 [**Allan**]; Johan Steyn "Deference: A Tangled Story" [2005] PL 346; and Hickman at ch 5.

110 *Nicklinson* at [166]–[171], in particular [167] referring to UK case law endorsing this principle in the context of proportionality assessments (Lord Mance); *Hansen* at [131] (Tipping J, although the Commission does not endorse Tipping J's spatial metaphor); *Taylor* (CA) at [42] and [75] (but see below on "democratic legitimacy"); and Paul Rishworth "The Bill of Rights and Administrative Law" (NZLS Human Rights Intensive, 2022) at 63. The Commission does not support as an independent basis for assigning weight the fact a decision-maker "experiences democratic accountability"(*Taylor* (CA) at [42] and [75]) as it is unclear that this factor does not just devolve into relative institutional competency: see Hickman at 156–167. Deciding this point is best left to a case where it is expressly in issue. Alternatively, if minded to decide the point, the Court may benefit from further submissions.

BORA-consistency. Those claims must be supported by argument and, in appropriate cases, evidence.

38. *Second*, and relatedly, performance of this task is not a stand-alone step. The courts do not simply assume that, for instance, the pressing social need and the compatibility of the means chosen to pursue it are justified *because* Parliament has adopted them.[111] That would risk immunising certain areas from scrutiny or risk double-counting. This would undercut the effective protection of BORA by *avoiding* rather than *requiring* justification. But if weight is given (or "deference" is applied) after the justification analysis, this creates its own problems:[112] many existing standards in the law, including elements of the structured proportionality test have been explicitly calibrated to afford Parliament (or other public actors) some "room to manoeuvre".[113] To simply apply a doctrine of deference post-the justification analysis risks deference occurring through existing standards and again when the independent doctrine is applied.

39. *Third*, spectrum analyses break down in practice. In *Hansen*, Tipping J introduced the spectrum approach for determining when Courts should give what he called "deference to Parliament", but, in the same passage, pointed out the inability for that approach to function effectively in practice.[114] The problem with the spectrum analysis is that, when applied in practice, it cannot assist in the determination of when deference is appropriate in cases where political/economic/social matters raise legal questions,[115] or legal matters raise political/economic/social issues.[116] As Tipping J recognises, the spectrum analysis breaks down when analysed purely in terms of subject matter because matters involving political, economic and social decisions may (and frequently do) intersect with constitutionally protected rights and vice versa. The conclusion that a

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111 For the dangers of this approach, see *RJR MacDonald* at [136] (McLachlin J); and *Vriend* at [54] (Cory J) (the "notion of judicial deference to legislative choices should not … be used to completely immunize certain kinds of legislative decisions from Charter scrutiny").

112 Allan at 679–680.

113 *Edwards Books* at 795 (La Forest J concurring).

114 *Hansen*, at [116]ff (Tipping J).

115 See eg the types of concerns present in *A v Secretary of State* [2004] UKHL 56, [2005] 2 AC 68.

116 Consider, for example, the real world implications of the right in s 24(f) BORA to receive legal assistance without cost "if the interests of justice so require". In *Child Poverty Action Group Inc v Attorney-General* [2008] NZHRRT 31 [***CPAG* (HRRT)**], the HRRT said at [214] that it "would be an inadequate discharge of our responsibilities to conclude that, since the legislation at issue reflects government decision-making at the macro-economic and social policy end of the spectrum, the Legislature effectively had an unconstrained discretion to infringe [BORA]. See generally at [210]ff.

matter sits at the legal end of the spectrum as opposed to the political, social and economic end simply begs the question: *how* should it be determined where a matter sits on the spectrum.

40. *Fourth*, some Judges have proposed multi-factorial lists: for example, in *Roth*,[117] Laws LJ set out the following list: (i) greater deference is to be paid to an Act of Parliament than to a decision of the executive or subordinate measure; (ii) there is more scope for deference where the Convention itself requires a balance to be struck, much less so where the right is stated in terms which are unqualified; (iii) greater deference will be due to the democratic powers where the subject-matter in hand is peculiarly within their constitutional responsibility; and (iv) greater or less deference will be due according to whether the subject matter lies more readily within the actual or potential expertise of the democratic powers or the Courts. Similarly, in *M v H*, Bastarache J proposed the following list of factors in the context of s 1 of the Charter:[118] (i) the fundamental nature of the interest; (ii) the vulnerability of the groups concerned; (iii) the complexity of the scheme and/or expertise required; (iv) the source and democratic origins of the rule; and (v) whether there is a strong role for moral judgments in setting policy. While this has the benefit of transparency, it risks rigidifying as a "test" a task that is inherently context- and fact-specific. Both the factors identified as relevant, and the weight to be accorded to those factors, will vary according to the facts of each case. Indeed, the list may be expanded each time a new case throws up a novel factor. Such approaches are thus ultimately indeterminate: they do not tell us which factors are relevant; how to assign weight as between factors; or how much weight each factor is to be given.

41. In the end, the critical requirement is for the courts to be transparent about how and why they are giving weight on the facts of the particular case before them when assessing a legislative limit for BORA-consistency. In

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117 *Roth* at [82]–[87].

118 *M v H* [1999] 2 SCR 3, at [305]–[321]. See also the Supreme Court of Canada's recognition of a list of contextual factors affecting the degree to which deference is due to the legislature in s 1 Charter analysis in the form of a relaxed approach to the nature of evidence required to justify an impugned provision in *Harper* at [75]–[77]ff (Iacobucci, Bastarache, Arbour, LeBel, Deschamps and Fish JJ); *Thomson Newspapers v Canada* [1998] 1 SCR 877 [88] and [90]–[91] (Cory, McLachlan, Iacobucci, Major and Bastarache JJ); and *Bryan* at [10] (Bastarache J in majority). The contextual factors identified were the: (i) nature of the harm and the inability to measure it; (ii) vulnerability of the group protected; (iii) subjective fears and apprehension of harm; and (iv) nature of the infringed activity.

doing so, it can be hoped that the courts will incentivise the culture of justification pursued by s 5 BORA and provide guidance to litigants and other courts for future cases raising similar issues. Of course, where no "evidence" is offered, the claim that Parliament's choice of a particular limit should be afforded weight is likely to be weak or even non-existent.

Burdens and constitutional expectations

42. It is well established that, after a plaintiff has established an interference with BORA, the onus moves to the defendant to defend the limitation on BORA rights.[119] There is no change to this general approach in the context of an application for a DOI; however, an important issue that has arisen in this and other recent DOI cases is the proper role of the Attorney in discharging the Crown's burden.

43. The Attorney fulfils an important function in ensuring BORA works as it should, including in relation to DOIs. The Attorney is tasked to bring to the attention of Parliament: (i) any Bill that appears to be BORA-inconsistent (s 7); and (ii) a court-issued DOI (s 7A). The courts have recognised the special role fulfilled by the Attorney in relation to DOIs.[120] The Attorney claims that role for himself in his submissions.[121]

44. There is a tension between the constitutional role assigned to (and claimed by) the Attorney in relation to DOIs and how that role is carried out in practice. In *Make It 16*, the Attorney argued that the relevant limit was justified but did not lead evidence of justification.[122] As a result, the Court was constrained in the form of DOI it could make. It only declared that the prima facie infringements of rights by the impugned provisions "*have not been*" justified, not that they "*cannot be*" justified.[123] This can diminish the utility of a DOI.[124] The same difficulty is apparent in the present

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119 *Hansen* at [108]; *Atkinson* at [163]; *Ministry of Transport v Noort* [1992] 3 NZLR 260 (CA) at 283; and *Schubert* at [106].

120 *McDonnell v Chief Executive of the Department of Corrections* [2009] NZCA 352, (2009) 8 HRNZ 770 at [129] (this was pre-*Taylor*). See also *Attorney-General v Taylor* [2017] NZCA 215, [2017] 3 NZLR 24 [***Taylor* (CA)**] at [167]. Commentators have noted the importance of notifying and/or naming the Attorney as defendant, noting this is a formal requirement in most overseas jurisdictions and also in the HRRT: see Butler and Butler at 1627 and the provisions cited at 1627, nn 113–114.

121 App supp subs at [36]–[37].

122 See *Make It 16 Inc v Attorney-General* [2022] NZSC 134 [***Make It 16***] at [45].

123 *Make It 16* at [57], [68] and [70]. Cf *Taylor v Attorney-General* [2015] NZHC 1706, [2015] 3 NZLR 791 at [79] (restrictions on prisoner voting rights "*cannot be*" justified (emphasis added)).

124 See *Attorney-General v Taylor* [2018] NZSC 104, [2019] 1 NZLR 213 [***Taylor* (SC)]** at [58] (Glazebrook and Ellen France JJ). The Judges also observe an advantage of a formal DOI is that it is more effective in providing some protection against attempts to relitigate BORA-consistency.

case.[125] This contrasts with the approach before the HRRT where the Attorney has more frequently (although not always) adduced considerable evidence to justify legislative limits.[126] The concern raised by this inconsistent practice is that the Attorney's litigation choices should not be permitted to undermine the utility of an important power under BORA. As Kós J said in *Make It 16* "important questions of public rights … cannot just be resolved by the forensic choices made by parties".[127] That concern assumes particular significance in the context of a constitutional statute that enlists the State in the protection and promotion of rights.

45. The courts should make explicit that there is a constitutional expectation that, when the Attorney appears before them to argue that a limit on a fundamental right satisfies s 5, the Attorney is to: (i) lead sufficient evidence to meet the onus of proof;[128] or (ii) be transparent about the basis for any concession in those rare cases where the Attorney concedes there is a BORA-inconsistency and/or that a DOI should be granted.[129] Such an expectation is necessary because the Attorney's approach will influence the form and utility of any DOI. Nor is this type of expectation foreign to public law in New Zealand. It is analogous to the duty of candour recognised by the courts in the context of judicial review, which "derives from the relationship between the courts and those who obtain their power from public law".[130] The logic is that the courts and those who obtain their power from public law act in "partnership based on a common aim, namely the maintenance of the highest standards of public administration".[131]

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125 See Transcript at 5, 8–9, 17, 54 and 58

126 See eg *CPAG* (HRRT) (19-day hearing; extensive evidence on prima facie discrimination and justification issues from plaintiff and Crown, including expert evidence); and *Butcher v NZ Transport Agency* [2022] NZHRRT 21 (6-day hearing, Crown called "extensive and compelling evidence" on justification, including expert evidence: at [274] and [327]). Cf *Heads v Attorney-General* [2015] NZHRRT 12 (7-day hearing; extensive evidence including actuarial evidence on costs implications of successful challenge, but on "real question" (compensating surviving spouses after death of spouse in fatal accident) the Crown conceded almost no evidence could be found; and no evidence to support argument that objective of limit was the need to control expenditure and choose between priorities, or of actual policy objective underlying the provision: [139]–[146] and [160]–[163]).

127 *Make It 16* at [76] (regarding the Attorney's decision to abandon a "non-inconsistency" argument).

128 In *Make it 16* at [45], the Court accepted that "a limitation on a right may be one that is well recognised either in the relevant international instruments … or common law. In that situation, evidence about the reasonableness of the limit may not be required or may be minimal".

129 If the Crown considers a DOI has been sought at too high a level of abstraction or in terms too general, that should be made clear; the position cannot be communicated indirectly through a resistance to providing evidence and/or argument.

130 *De Smith's Judicial Review* (8th ed, Sweet & Maxwell, London, 2018) [***De Smith's***] at [16-027].

131 *De Smith's* at [16-027], citing *R v Lancashire County Council* [1986] 2 All ER 941 (CA) at 945.

IV. MAKING DECLARATIONS OF INCONSISTENCY

46. The Commission submits that when a court determines that an enactment is inconsistent with one or more rights protected by BORA, the court should ordinarily make a DOI (although it can in exceptional cases determine not to exercise the power).[132]

47. *First*, a DOI gives Parliament, as the State organ responsible for addressing the BORA-inconsistency, the opportunity both to address the inconsistency *and* facilitate compliance with New Zealand's obligations under the ICCPR. A useful analogy can be drawn with the approach to declaratory relief in judicial review where "extremely strong reasons would need to be established to withhold the remedy".[133]

48. *Second*, in exceptional circumstances, a court may determine it would not be appropriate to make a DOI. The courts may be justified in withholding the remedy where there would be no point in making a DOI or where it would not advance BORA's purposes.[134] The assessment is likely to be fact- and case-specific; prescriptive rules are not desirable.[135] In *R v Manawatu*, the Court of Appeal (without determining whether it had the power to make DOIs) held it would be "gratuitous and unnecessary" to grant a DOI because a clause repealing s 398(1) had been added to the Criminal Procedure Bill, which was before select committee.[136] The Court's position is undoubtedly correct: a court should not make a DOI where it has formed the view that a DOI would be "gratuitous" or "unnecessary" in the circumstances.[137]

49. The UK courts have doubted the utility of making a DOI under s 4 of the HRA (UK) where: (i) the incompatibility is already under active

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132 See also Jack Beatson and others *Human Rights: Judicial Protection in the United Kingdom* (Sweet & Maxwell, London, 2008) [**Beatson**] at [5-144]; Clayton and Tomlinson at [4.73]; and *Halsbury's Laws of England* Rights and Freedoms (vol 88A, 2018, online ed) at [49].

133 See eg *Adoption Action Inc v Attorney-General* [2016] NZHRRT 9, [2016] NZFLR 113 [***Adoption Action***] at [266], citing *Air Nelson Ltd v Minister of Transport* [2008] NZCA 26, [2008] NZAR 139 at [60] and *Geary v New Zealand Psychologists Board* [2012] NZHC 384, [2012] 2 NZLR 414 at [107]–[108]. This is especially so where DOIs are "the only remedy" if legislation breaches Part 1A.

134 See *Taylor* (SC) at [58] (Glazebrook and Ellen France JJ): "utility of relief" relevant to discretion.

135 In the UK, judges have taken different approaches to the discretion given to them by s 4 of the Human Rights Act 1998 (UK): see Mallory and Tyrrell at 10 and 23–24.

136 *R v Manawatu* (2006) 23 CRNZ 833 (CA) at [13].

137 However, it does not follow the existence, or prospect, of a Bill removing the inconsistency will *always* make a DOI "gratuitous and unnecessary". See eg *Howard v Attorney-General* [2008] NZHRRT 10 [***Howard***], the HRRT rejected the submission that it should not exercise its discretion to grant a DOI because a Bill had been introduced to Parliament, just prior to the hearing, which the Crown said would meet the plaintiff's concerns: at [17(c)] and [88]–[90] (and see [2007] NZHRRT 24 at [38]); and *Bellinger v Bellinger* [2003] UKHL 21, [2003] 2 AC 467 [***Bellinger***] and *R (Steinfeld) v Secretary of State for Education* [2018] UKSC 32, [2020] AC 1 [***Steinfeld***] discussed at n 138.

consideration by Parliament such that there would be "no point" in making a DOI;[138] (ii) there would be no point in making a DOI because the relevant provisions had been repealed;[139] (iii) the impugned legislative regime has been superseded by subsequent legislation, which had not been the subject of argument;[140] (iv) the DOI is sought by an individual litigant with whose own rights the provision in question is not incompatible (but expressly acknowledging it may be appropriate to make a DOI *in abstracto*).[141] These examples offer useful guidance on when a court may be justified in withholding the remedy.[142]

50. *Third*, considerations of institutional competence or democratic accountability (often referred to as "deference")[143] should not play a role in determining whether to grant a DOI.[144] The focus at the stage of whether to exercise the power to grant a DOI should be on the utility of doing so.[145] "Deference" may have a role to play at the prior stage when determining BORA-inconsistency, but as Lady Hale has said:[146]

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138 *Chester* at [39] (Lord Mance, with whom Lord Kerr, Lord Hughes and Lord Hope agreed), [105] (Lord Clarke agreed with Lord Mance's reasons), [112] (Lord Sumption (with whom Lord Hughes also agreed) also endorsed Lord Mance's reasons); and *R (Nicklinson) v Ministry of Justice* [2014] UKSC 38, [2015] AC 657 [***Nicklinson***] at [116] (Lord Neuberger), endorsed at [150] and [190] (Lord Mance) and [197] (Lord Wilson). But compare [300] and [324] (Lady Hale) and [294], [326] and [361] (Lord Kerr) who considered the incompatibility was clear and there was "little to be gained and much to be lost, by refraining from making a [DOI]". The other Judges did not reach the discretionary stage because they considered the justification issue to be an "inherently legislative issue for Parliament": at [234] (Lord Sumption), [267] (Lord Hughes), [290] (Lord Clarke) and [297]–[298] (Lord Reed). Compare *Bellinger* at [53]–[55] (Lord Nicholls) and [78]–[79] (Lord Hobhouse) where the Court rejected a submission that a DOI would serve no useful purpose because, among other things, the Government had announced its intention to bring forward primary legislation on the relevant subject; and *Steinfeld* at [58] where the Court said even an imminent law change to remove the inconsistency "would not constitute an inevitable contraindication to a [DOI]".

139 *R (Hooper) v Secretary of State for Work and Pensions* [2005] UKHL 29, [2005] 1 WLR 1681 at [52] (Lord Hoffmann).

140 *Times Newspapers Ltd v Flood* [2017] UKSC 33, [2017] 1 WLR 1415 at [64]. See also at [29].

141 *Chester* at [102] (Lady Hale (with whom Lord Kerr and Lord Hope agreed)), endorsed by Lord Clarke, Lord Sumption and Lord Hughes at [111]–[112]. See Beatson at [5-137]–[5-138].

142 *Bellinger* at [55] (Lord Nicholls).

143 See *Taylor* (CA) at [75]. But see the discussion above at n 110.

144 The Commission agrees with this Court's judgment in *Make It 16* that reasons of "restraint and comity" do not prevent it from engaging in a BORA consistency inquiry: at [25]–[34]. The Court held further that "the factors the Attorney-General advances as to the need for restraint and comity are relevant to the exercise of discretion to grant a [DOI]": at [30]. The Commission's submission is not inconsistent with this proposition; properly understood the restraint referred to by some of the Judges in *Nicklinson* was a concern not to cut across Parliamentary processes that were underway, not a concern as to institutional competence of the Court making a DOI. Note at [66] of *Make It 16* where the Court rejected the Attorney's argument against exercising discretion based on "institutional competence". See also at [68], citing Lady Hale's judgment in *Nicklinson*.

145 The HRRT has rejected an argument that "comity" concerns mean it should "consider whether the grant of declaratory relief would go too far and impinge upon the proper functions of Parliament, namely determining its own legislative priorities": *Adoption Action* at [260.1]. The enactment of s 92J "is Parliament's own statement as to the boundaries of the comity to be observed between Parliament and the Tribunal": at [264].

146 *Re Human Rights Commission for Judicial Review (Northern Ireland: Abortion)* [2018] UKSC 27 [***NI Abortion***] at [39]. See also *Make It 16* at [32], citing *Steinfeld* and *Nicklinson*; a DOI "does not oblige the Government or Parliament to do anything"; in other words, "the courts say to Parliament,

> Parliament did not say, when enacting section 4 of the HRA, "but there are some cases where, even though you are satisfied that the law is incompatible with the Convention rights, you must leave the decision to us". Parliamentary sovereignty is respected, not by our declining to make a declaration, but by what happens if and when we do.[147]

51. *Fourth*, there has been discussion of the potential for a so-called "*Hansen* indication" to provide a sufficient remedial response where an enactment is found to be BORA-inconsistent.[148] But relying on an "indication" of inconsistency in the reasons of a judgment does nothing to vindicate fundamental rights and risks subverting the statutory process in ss 7A–7B for addressing inconsistency between an enactment and BORA.[149]

52. It should also be noted[150] that the court is not bound by DOI formulations proposed by either party,[151] but should be guided by the purpose of DOIs: to draw an inconsistency to the attention of Parliament so it can consider whether and if so how to address it.[152] There are case law examples of narrow[153] and broad formulations.[154] The precise formulation will be informed by the nature of the BORA-inconsistency. If the fact of inconsistency is uncertain, the "framework for the dialogue between the branches of government" intended by ss 7A–7B may be subverted.[155] This will turn on the extent to which the Attorney has fulfilled his role.[156] What Parliament envisages from a DOI is an "unambiguous statement".[157]

'This particular piece of legislation is incompatible, now it is for you to decide what to do about it'".

147 Other reasons given by Lady Hale for exercising the discretion are set out in *NI Abortion* at [37]–[40]. See also at [300] (Lord Kerr (with whom Lord Wilson agreed)), citing [344] of *Nicklinson*: "What the courts do in making a [DOI] is to remit the issue to Parliament for a political decision, informed by the court's view of the law. The remission … does not involve the courts making a moral choice which is properly within the province of the democratically elected legislature".

148 *Taylor (CA)* at [162] ("a *Hansen* indication should ordinarily suffice"). See *Hansen* at [253] and [259] (McGrath J). A "*Hansen* indication" is a label. It does nothing for a litigant.

149 *Taylor* (SC) at [58] (Glazebrook and Ellen France JJ): the formality of a DOI means it is more effective than an indication of inconsistency" in preventing re-litigation of BORA-consistency.

150 Minute at [5(c)].

151 By analogy, see *Hospice New Zealand v Attorney-General* [2020] NZHC 1356 where Mallon J did not make declarations (under the Declaratory Judgments Act 1908) in the form sought, but formulated a number of declarations on matters with which the Court could assist: at [213]–[214].

152 See New Zealand Bill of Rights (Declarations of Inconsistency) Amendment Bill (230-1) (explanatory note) at 1; and New Zealand Bill of Rights (Declarations of Inconsistency) Amendment Bill (230-2) (select committee report) at 1–2 [**DOI select committee report**].

153 See eg *Reilly* (EWHC) at [151], upheld in *Reilly* (EWCA) at [82]–[83] and [110]; *Howard* at [92]; and *Hennessy v Attorney-General* [2019] NZHRRT 4 at [23].

154 *(F) (A Child*) (UKSC), where Lord Phillips (with whom Lady Hale and Lord Clarke agreed) at [58] repeated the DOI made in the Divisional Court (and see [59] (Lord Hope)). *F (A Child)* (EWCA) at [5] describes the DOI granted by the Divisional Court as being that s 82(1) is incompatible with art 8 "*to the extent that indefinite notification periods are not subject to any review mechanism whereby the proportionality of the notification requirements can be evaluated*" (emphasis added). See also *Miranda* (EWCA) at [119]; and *R (Morris) v Westminster City Council* [2005] EWCA Civ 1184, [2006] 1 WLR 505 at [57] (Sedley LJ, with whom Auld LJ agreed at [82]).

155 See DOI select committee report at 2.

156 *Make it 16* at [57], [70] and [72].

157 DOI select committee report at 2.

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