NEW ZEALAND CENTRE FOR PUBLIC LAW
Te Wānanga o ngā Kaupapa Ture ā Iwi o Aotearoa

New Zealand Journal of Public and International Law

VOLUME 11 ▪ NUMBER 1 ▪ NOVEMBER 2013

SPECIAL CONFERENCE ISSUE
THE NEW ZEALAND BILL OF RIGHTS ACT

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TE WHARE WĀNANGA O TE ŪPOKO O TE IKA A MĀUI
VICTORIA
UNIVERSITY OF WELLINGTON

NEW ZEALAND JOURNAL OF PUBLIC AND INTERNATIONAL LAW

Faculty of Law
Victoria University of Wellington
PO Box 600
Wellington
New Zealand

November 2013

The mode of citation of this journal is: (2013) 11 NZJPIL (page)

The previous issue of this journal is volume 10 number 2, December 2012

ISSN 1176-3930

Printed by City Print Communications, Wellington

Cover photo: Robert Cross, VUW ITS Image Services

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NEW ZEALAND JOURNAL OF PUBLIC AND INTERNATIONAL LAW

NEW ZEALAND CENTRE FOR
PUBLIC LAW
TE WĀNANGA O NGĀ KAUPAPA TURE Ā IWI O AOTEAROA

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The week of twenty-first birthday celebrations at which preliminary versions of most of these articles were originally presented was hosted by the New Zealand Centre for Public Law, and was made possible with the generous support of Judge Ian Borrin and the New Zealand Law Foundation.

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SOURCES OF RESISTANCE TO PROPORTIONALITY REVIEW OF ADMINISTRATIVE POWER UNDER THE NEW ZEALAND BILL OF RIGHTS ACT

Claudia Geiringer*

Much scholarship on the New Zealand Bill of Rights Act 1990 assumes that the Act requires the courts to engage in proportionality review of administrative action. This article seeks to establish two key propositions. The first is that the New Zealand case law does not bear out that assumption. The second is that there may be some distinctive features of the New Zealand context that help to explain why that is so. The author's purpose in drawing out these sources of resistance to proportionality review is not (necessarily) to validate the absence of proportionality review in the New Zealand case law. Rather, it is to shed light on the reasons for this resistance so that the desirability (or not) of proportionality review can be addressed within a distinctively New Zealand context.

Over the last few years, a prodigious quantity of ink has been spilled over the question whether proportionality review should be a unified ground of judicial review in New Zealand and the United Kingdom.[1] For the most part, the assumption underlying this impressive body of scholarship is that, under the statutory human rights instruments adopted in these two jurisdictions, proportionality is a recognised ground of review in human rights cases involving challenges to the exercise of

* Chair in Public Law, Victoria University of Wellington; Director, New Zealand Centre for Public Law. My thanks for helpful comments on the draft (but without attribution of responsibility) go to Dr Caroline Henckels, Dean Knight, Professor Janet McLean, Professor David Mullan, Professor Cheryl Saunders, Professor Adrienne Stone, Dr Rayner Thwaites, Hanna Wilberg and the participants at the August 2011 New Zealand Centre for Public Law symposium which gave rise to this special issue.

1 For example Michael Taggart "Proportionality, Deference, Wednesbury" [2008] NZ L Rev 423; and the volume of responses to it (including contributions from New Zealand, the United Kingdom and Canada) found at [2010] NZ Law Rev 229.

administrative power or discretion.[2] The outstanding question addressed by these scholars is whether proportionality review should be confined to human rights cases (or perhaps to an analogous class of cases, variously defined) or whether it should instead be embraced across the full panoply of administrative decision-making.

In the United Kingdom, the assumption that proportionality review is an established feature of administrative law jurisprudence under the Human Rights Act 1998 (UK) is undoubtedly supported by the case law.[3] In New Zealand, on the other hand, the view held by many scholars that the New Zealand Bill of Rights Act 1990 (the Bill of Rights Act) mandates proportionality review of exercises of administrative power or discretion is not borne out by the judicial authorities. A close examination of the case law shows that, more than two decades following the Act's enactment, there is weak support at best for proportionality review of administrative decisions.[4] This is an area in which academic theorising and judicial practice have diverged.

This article seeks to establish two key propositions. The first has already been stated: that, contrary to the weight of academic authority, the New Zealand case law does not support the conclusion that the Bill of Rights Act mandates proportionality review of administrative action. The second proposition is that there may be some distinctive features of the New Zealand context that help to explain why that is so.

In evolving a New Zealand public law jurisprudence, New Zealand judges, scholars and practitioners have become accomplished comparativists. We routinely draw on the experience of other countries with similar heritages (the United Kingdom foremost amongst them) to enrich our understanding of our own public law framework. This practice is not only highly beneficial but, I would suggest, demanded by our shared common law heritage and, in the case of the Bill of Rights Act, by the broader international and comparative context in which it was enacted.

But this habit of comparativism, if not handled with care, can serve to obscure the extent to which local context nevertheless conditions the response of the domestic courts to particular legal

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2 On the New Zealand position, see for example Taggart, above n 1, at 448–449; and Dean R Knight "Mapping the Rainbow of Review: Recognising Variable Intensity" [2010] NZ L Rev 393 at 427. On the position under the Human Rights Act 1998 (UK), see for example Tom Hickman "Problems for Proportionality" [2010] NZ L Rev 303 at 309–311 (though Hickman prefers to characterise proportionality under the Human Rights Act 1998 (UK) as a "standard of legality" rather than a "standard of review").

3 For example *Huang v Secretary of State for the Home Department* [2007] UKHL 11, [2007] 2 AC 167; *Belfast City Council v Miss Behavin' Ltd (Northern Ireland)* [2007] UKHL 19, [2007] WLR 1420; and *R (Laporte) v Chief Constable of Gloucestershire* [2006] UKHL 55, [2007] 2 AC 105. This is not to say that proportionality review under the Human Rights Act 1998 (UK) is straightforward or even universally applied: see for example Janet McLean "The Impact of the Bill of Rights on Administrative Law Revisited: Rights, Utility, and Administration" [2008] NZ L Rev 377.

4 The case law is discussed in Part III below.

doctrines.[5] This article suggests that proportionality is one such doctrine, and that the response of the New Zealand courts to proportionality review needs to be understood in a distinctively New Zealand context.

In order to develop these themes, I begin (in Part I) by explaining what I mean by "proportionality review", and then proceed to canvas briefly the academic literature (in Part II). I suggest that most scholarly accounts assume that the Bill of Rights Act has established proportionality review of administrative action but that, recently, some important scholarship has begun to question whether that is or ought to be so.

I then turn to the case law. In Part III, I argue that, contrary to the impression that one might receive from reading scholarly accounts of the operation of the Bill of Rights Act, there is little sense from the case law that proportionality review has become an accepted or normalised element of administrative law cases involving Bill of Rights challenges. Of particular note, there is yet no Supreme Court or Court of Appeal authority to support the practice of proportionality review under the Bill of Rights Act, and several appellate decisions that cast its availability into doubt.

The obvious question this presents is whether (bearing in mind the weight of the scholarly literature) this judicial reluctance to engage in proportionality review is grounded in an incorrect understanding of what the Bill of Rights Act requires. In Part IV, I consider the arguments that can be, and have been, made in reliance on the scheme of the Bill of Rights Act to support the case for proportionality review. I conclude that there is a compelling argument from the scheme of the Act that administrative decision-makers are required to abide by the proportionality standard established by virtue of s 5 of the Act. On the other hand, the question whether the courts should police compliance with this requirement by themselves engaging in some form of proportionality review of administrative action ultimately depends on normative considerations and cannot be answered from the text alone.

I leave resolution of that ultimate question for another occasion. Instead, the insight that I seek to develop in Part V is that the ultimate question whether proportionality review ought to be embraced needs to be addressed in a way that is attentive to local context. Specifically, I suggest that there might be local factors – both textual and contextual – that explain the particular resistance of New Zealand judges to proportionality review. These include the somewhat elliptical drafting of the Bill of Rights Act, its vintage, and the strong preference of New Zealand judges for contextualism over formalism in administrative law.

I stress again that my point is not to suggest that these sources of resistance are determinative as to whether proportionality review ought to be embraced in this jurisdiction; nor even as to whether it *will* be embraced at some point in the future. My objective in drawing out these sources of resistance

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5 See Cheryl Saunders "Constitution as Catalyst: Different Paths within Australasian Administrative Law" (2012) 10 NZJPIL 143.

is twofold. First, although it might not be determinative, local culture must surely be *one of* the factors that is relevant to the ultimate inquiry as to whether proportionality review ought to be adopted. Secondly, as a practical matter, it is helpful for advocates of proportionality review to be aware of the special sources of resistance that they face before the New Zealand courts. If nothing else, attention to these sources of resistance may provide advocates of proportionality with insights into how best to present their case, and as to which particular visions of proportionality are most likely to succeed in a New Zealand administrative law context.

I WHAT I MEAN BY "PROPORTIONALITY REVIEW"

At the outset, it may be helpful to define a little more carefully what I mean by "proportionality review" for the purposes of this article. The starting point for that discussion is s 5 of the Bill of Rights Act, which provides that, subject to s 4 (preserving inconsistent enactments), the rights protected in the Bill of Rights Act "may be subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society". In short, my interest in this article is in the extent to which the New Zealand courts are prepared to deploy s 5 as a standard by which to evaluate the lawfulness of administrative action. In unpacking that idea, let me begin by expanding on the link between s 5 of the Bill of Rights Act and the idea of "proportionality", and then return to consider a little further what I mean for the purposes of this article by the composite expression "proportionality review".

A Proportionality

The proposition that s 5 of the Bill of Rights incorporates a proportionality standard is not a controversial one. The language of s 5 draws inspiration from limitation clauses in human rights charters in other jurisdictions and at international law – most directly, from s 1 of the Canadian Charter of Rights and Freedoms.[6] These various limitation clauses have been interpreted as embodying a proportionality inquiry and, for that reason, it is perhaps unsurprising that the New Zealand courts have affirmed the proposition that s 5 does also.[7]

Although that much is widely accepted, the exact form that a proportionality inquiry should take in the context of s 5 of the Bill of Rights Act is not completely settled. In the leading Bill of Rights Act decision of *R v Hansen*,[8] the justices of the New Zealand Supreme Court drew primarily on the Canadian *Oakes* test (as first enumerated by the Supreme Court of Canada in *R v Oakes*[9] and refined

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6 See Department of Justice *A Bill of Rights for New Zealand: A White Paper* (1985) at 71–74.

7 For example *Moonen v Film and Literature Board of Review* [2000] 2 NZLR 9 (CA); and *Hansen v R* [2007] NZSC 7, [2007] 3 NZLR 1.

8 *Hansen*, above n 7, at [42] per Elias CJ, [64] per Blanchard J, [103]–[104] per Tipping J, [203]–[205] per McGrath J.

9 *R v Oakes* (1986) 1 SCR 103.

by it in later cases).[10] *Oakes* and its progeny establish a highly structured framework for assessing the proportionality of rights-infringing measures. Such measures must survive a series of tests relating, in turn, to their importance, sufficiency, necessity and, ultimately, proportionality with the intrusion on rights. As paraphrased by Tipping J in *Hansen*:[11]

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

This vision of proportionality predominates in the New Zealand case law and literature, but it is not the only one to be found there. For example, in *Noort v Ministry of Transport*, Richardson J suggested that the application of s 5:[12]

> …is a matter of weighing:
>
> (1) the significance in the particular case of the values underlying the Bill of Rights Act;
>
> (2) the importance in the public interest of the intrusion on the particular right protected by the Bill of Rights Act;
>
> (3) the limits sought to be placed on the application of the Act provision in the particular case; and
>
> (4) the effectiveness of the intrusion in protecting the interests put forward to justify those limits.

This alternative formulation envisages a similar set of inquiries to the *Oakes* test but, significantly, incorporates them into an overarching weighing process rather than treating them as a set of separate knockout blows. Interestingly, an overall evaluation approach of this kind has been explicitly embraced in the texts of two more recent human rights charters: the South African Bill of Rights (found in ch 2 of the South African Constitution) and the Victorian Charter of Human Rights and Responsibilities.[13]

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10 For example *RJR-MacDonald Inc v Attorney-General of Canada* [1995] 3 SCR 199.

11 *Hansen*, above n 7, at [104] per Tipping J.

12 *Ministry of Transport v Noort* [1992] 3 NZLR 260 (CA) at 283–284 per Richardson J. See also *Hansen*, above n 7, at [64] per Blanchard J; and Andrew S Butler and Petra Butler *The New Zealand Bill of Rights Act: a commentary* (LexisNexis NZ, Wellington, 2005) at [6.12].

13 *Constitution of the Republic of South Africa Act 1996*, ch 2, s 36; and Charter of Human Rights and Responsibilities Act 2006 (Vic), s 7(2).

B Proportionality Review

The main concern of this article is not, however, with the precise nature of the proportionality test but, rather, with whether *any* form of proportionality inquiry is deployed by the New Zealand courts when reviewing the legality of administrative action in cases where the Bill of Rights Act is engaged. To put the matter another way, the preoccupation of this article is with whether New Zealand judges, in judicial review cases, consider that it is their role to enforce s 5 of the New Zealand Act against administrative decision-makers. My concern here is not *how* they do it, or whether they do it well, but whether they do it at all. In this article, therefore, proportionality review is a synonym for explicit engagement with s 5.

To narrow the focus still further, I am not interested here in all judicial decisions in which an issue under s 5 of the Bill of Rights Act might arise. Rather, my interest is in examples of the courts utilising (or refusing to utilise) s 5 (and therefore the proportionality standard that it encapsulates) to constrain the lawful scope of administrative decision-making. I am not, therefore, interested in cases in which the courts act as first instance decision-makers or determine general appeals on their merits (for example, when they utilise s 5 of the Bill of Rights Act to develop the common law),[14] nor in cases where they utilise s 5 in the process of interpreting a statute.[15] Rather, my interest here is in whether the courts will engage with s 5 when exercising their supervisory role in relation to administrative action. That includes cases that come before the courts by way of judicial review and, additionally, statutory analogues such as appeals that are limited to questions of law or appeals from a discretion.[16]

In order to maintain that focus, it is helpful at the outset to identify two conceptually discrete questions that arise in relation to the role of proportionality in constraining administrative action. The first and prior question is whether, as a matter of substantive law (and putting aside the role of the courts), the Bill of Rights Act establishes proportionality as the lawful boundary for administrative actions that limit rights. This question focuses on the obligations of public authorities themselves. The second question concerns the resulting implications for the supervisory role of the

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14 For example *Hosking v Runting* [2004] NZCA 34, [2005] 1 NZLR 1.

15 For example *Hansen*, above n 7.

16 The correct appeal/review standard to be applied in each of these situations is not, of course, identical but there is considerable overlap in the principles that are applied: see for example *Wolf v Minister of Immigration* (2004) 7 HRNZ 469 (HC) at [41]. That is because in each of these situations, the courts are responding to a common challenge: how to police compliance with principles of good governance, including the Bill of Rights Act, without usurping the role of the first instance decision-maker. On this, see for example Rayner Thwaites and Dean Knight "The Tension between Supervision and Performance" in Susy Frankel (ed) *Learning from the Past, Adapting for the Future: Regulatory Reform in New Zealand* (LexisNexis, Wellington, 2011) 215.

courts. In other words, if the Bill of Rights Act does establish proportionality as the lawful boundary for administrative action how, if at all, is that boundary to be judicially enforced?[17]

To illustrate this distinction, take the example of the Broadcasting Standards Authority – a body that is empowered to determine whether broadcasters have breached certain broadcasting standards such as privacy, fairness and decency. These broadcasting standards inevitably have the effect of limiting broadcasters' freedom of expression, as protected by s 14 of the Bill of Rights Act. The first question, therefore, is whether the Authority is entitled to uphold a complaint against a broadcaster even if to do so would result in a disproportionate limit on the s 14 right and thus be inconsistent with s 5.[18] The second question, though, is what impact this substantive standard of observance has on the supervisory role of the courts. Assuming that the Authority cannot act disproportionately, does it follow that on a judicial review application, the reviewing court is itself entitled to inquire into whether the limit that the Authority has placed on a broadcaster's freedom of speech is disproportionate? Or alternatively, is the Court confined to more traditional administrative law considerations such as whether or not the decision-maker has understood the law, has taken relevant factors into account, and has acted reasonably?

This second question is the particular focus of this article. However, as the two issues are interrelated, and as neither the case law nor the commentaries always distinguish clearly between them, both issues are explored below.

II THE ACADEMIC LITERATURE

An examination of the academic literature on the Bill of Rights Act reveals a high degree of support for the proposition that the Act mandates proportionality review of administrative action.

In exploring that literature, it is helpful to deploy the distinction just identified between the proposition that the Bill of Rights Act establishes proportionality as a substantive standard of conduct for public authorities, and the proposition that the Act requires the courts to engage in proportionality review of administrative action. It is fair to say that there is something close to a consensus in the academic literature that the Bill of Rights Act does establish proportionality as a

17 This is a similar distinction to the one drawn by Tom Hickman when he distinguishes between proportionality as a "standard of legality" and proportionality as a "standard of review": Tom Hickman *Public Law after the Human Rights Act* (Hart Publishing, Oxford, 2010) at 99–101; and Hickman, above n 2, at 308–309. However, I avoid Hickman's language because, at least for the purposes of this article, I conceive of the relationship between standards of legality and standards of review in slightly different terms to Hickman: see the discussion at below n 88.

18 For an attempt to explore the impact of this prior question (distinct from the complicating issues surrounding the judicial role), see Claudia Geiringer and Steven Price "Moving from Self-Justification to Demonstrable Justification – the Bill of Rights and the Broadcasting Standards Authority" in Jeremy Finn and Stephen Todd (eds) *Law, Liberty, Legislation: Essays in Honour of John Burrows QC* (LexisNexis NZ, Wellington, 2008) 295.

substantive standard of conduct for administrative decision-makers.[19] The precise arguments that have been made to support that view are explored in further detail in Part IV and need only be summarised briefly at this stage. In short, the argument for proportionality as a substantive standard of conduct for public authorities is that, either through the vehicle of s 6 of the Bill of Rights Act (which demands Bill of Rights-consistent interpretations of statutes where possible) or s 3 (which states who the Bill of Rights Act "applies" to), the proportionality standard in s 5 serves as a substantive constraint on the actions of administrative decision-makers.

What, though, of the second proposition – that the courts are entitled (indeed bound) to police this aspect of Bill of Rights compliance by themselves engaging in proportionality review of administrative action? The first point to note in this respect is that commentators rarely pick these two issues apart in the way that I have done here, and rarely provide explicit justification for their support for the second proposition.[20] Nevertheless, for the most part, academic discussions assume, either explicitly or implicitly, that the consistency of administrative action with s 5 of the Bill of Rights Act can indeed be policed directly by the courts.[21]

A small group of New Zealand commentators are not, however, persuaded.[22] Of particular note in this respect is an article published by Professor Janet McLean in 2008. What makes this analysis of especial significance is that McLean was one of three authors (together with Paul Rishworth and Michael Taggart) who, in 1992, had published a seminal essay in which they advocated the case for proportionality review under the Bill of Rights Act.[23] In 2008, McLean recanted.[24]

McLean's starting point in 2008 was the sense of expectation that she and her co-authors had expressed in their earlier essay that the introduction of proportionality review would contribute to a culture of transparency and justification in New Zealand administrative law.[25] Writing sixteen years

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19 For example Janet McLean, Paul Rishworth and Michael Taggart "The Impact of the Bill of Rights on Administrative Law" in *The New Zealand Bill of Rights Act 1990* (Legal Research Foundation, Auckland, 1992) 62; Paul Rishworth and others *The New Zealand Bill of Rights* (Oxford University Press, Auckland, 2003) at 139–141; Butler and Butler, above n 12, at [6.14.8] (though compare [13.19.4], which appears to pull in a different direction); Philip A Joseph *Constitutional & Administrative Law in New Zealand* (3rd ed, Thomson Brookers, Wellington, 2007) at 878–879; and Geiringer and Price, above n 18, at 301–304.

20 This latter point has been made by Knight, above n 2, at 427.

21 For example Rishworth and others, above n 19, at 191–192; Joseph, above n 19, at 879; and Jason N E Varuhas "*Powerco v Commerce Commission*: Developing Trends of Proportionality in New Zealand" (2006) 4 NZJPIL 339 at 347.

22 McLean, above n 3; and Knight, above n 2, at 427–428. See also Butler and Butler, above n 12, at [6.9.20]–[6.9.26].

23 McLean, Rishworth and Taggart, above n 19.

24 McLean, above n 3.

25 McLean, Rishworth and Taggart, above n 19, at 96–97.

later, McLean worried that this expectation had not been fulfilled. In order to illustrate this point, she examined selected case law from three jurisdictions – New Zealand, Canada and the United Kingdom – which, she said, showed that proportionality methodology had been applied inconsistently and that there had been a significant degree of "methodological blurring".[26] As such, McLean suggested that proportionality review under human rights instruments such as the Bill of Rights Act had not, as a matter of fact, fulfilled its promise of contributing to a culture of transparency and justification in administrative law.

More generally, McLean worried that the position put forward in the 1992 essay had failed to account adequately for how the judicial assessment is, or ought to be, affected by the legislature's choice of decision-maker as well as by "the practical constraints on the courts' capacity to second-guess or remake the decisions made within the administration".[27] In 1992, the authors had not confronted these "deference" issues head-on but had expressed the hope that they could be considered more transparently in the s 5 calculus than under traditional administrative law methodologies.[28] Writing in 2008, McLean was no longer sanguine about that possibility. She worried that proportionality review has the potential to magnify rather than diminish the difficulties of achieving transparency. Proportionality methodology, she said, "appears to make governmental claims to the need for deference more pressing, without providing a transparent framework through which to express such interests".[29] McLean wondered whether traditional administrative law methodologies might hold more promise in this regard after all.[30]

III THE CASE LAW

If nothing else, McLean's typically insightful analysis forces those who would claim that the Bill of Rights Act mandates proportionality review of administrative action to front up to the uncomfortable fact that there is a striking absence of judicial practice to support it.

McLean herself illustrated her point that proportionality methodology was being applied inconsistently by providing a close analysis of the two Court of Appeal decisions in *Moonen v Film and Literature Board of Review*.[31] She pointed out that although the Court of Appeal set out (but did not apply) a proportionality standard on the first occasion that Mr Moonen's case appeared before it, the Court retreated to a perversity standard on the second occasion.[32]

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26 McLean, above n 3, at 382.

27 At 394.

28 McLean, Rishworth and Taggart, above n 19, at 97–97.

29 McLean, above n 3, at 395.

30 At 406–407.

31 *Moonen*, above n 7; and *Moonen v Film and Literature Board of Review (No 2)* [2002] 2 NZLR 754 (CA).

32 McLean, above n 3, at 395–397.

A broader examination of more than two decades of New Zealand case law suggests that McLean's conclusion of "methodological blurring" is, if anything, understated. In contrast to the high degree of acceptance of proportionality review disclosed in the academic literature, the case law reveals very few instances at all of judges actually doing it. There is blurring, certainly. But proportionality review in any form – even blurred – is, at best, found at the edges of the canvas.

Before substantiating this assertion by reference to the case law, it is necessary to acknowledge another point helpfully explored by McLean in her 2008 article. It is that one of the reasons why proportionality analysis does not always feature in Bill of Rights Act cases is because New Zealand judges have held that some rights do not engage a s 5 inquiry at all.[33] This tends to be for one of two reasons. First, the New Zealand courts have indicated that some rights are so fundamental that they could never be "reasonably limited" under s 5. The right to be free from torture is an obvious example.[34] Secondly, some rights are cast in language that already incorporates an internal balancing exercise – for example, the right to be free from "unreasonable" search and seizure. The New Zealand courts have indicated that they see no cause for a further s 5 balancing exercise in relation to some such rights.[35]

This is an important point, but not one I intend to pursue here. My interest here is with what the courts do when they are confronted with one of those rights or freedoms that, because of the unmediated form in which they are expressed, unquestionably *do* need to be balanced against other public goods through some form of utilitarian calculus. The freedoms of expression, religion, movement, assembly and association are obvious examples. It is when those rights come before the courts in administrative law cases that the question of proportionality review under s 5 most clearly arises.

Nevertheless it is worth noting that, whether coincidentally or not, many of the leading appellate authorities that confirm the availability of judicial review to enforce substantive compliance with the Bill of Rights Act fall into the category just described – that is, they involve rights that are not thought to attract a s 5 inquiry.[36] Academic commentators (myself included) have tended to assume

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33 At 383–393. Tom Hickman makes a similar point about the Human Rights Act 1998 (UK): Hickman, above n 2, at 310.

34 See *Hansen*, above n 7, at [65] per Blanchard J.

35 For example *Cropp v Judicial Committee* [2008] NZSC 46, [2008] 3 NZLR 774 at [33].

36 *Drew v Attorney-General* [2006] NZLR 58 (CA), establishing that the courts will review the exercise of a power to make delegated legislation to ensure that it is exercised consistently with the right to natural justice found in s 27 of the Bill of Rights Act as well as at common law; *Cropp*, above n 35, affirming *Drew* in a case involving the right to be free from unreasonable search and seizure; *Zaoui v Attorney-General (No 2)* [2005] NZSC 38, [2006] 1 NZLR 289, suggesting that a minister of the Crown would not be entitled to exercise a particular power of deportation in such a way as to threaten the deportee's rights not to be tortured or arbitrarily deprived of life.

that, by analogy, these cases provide indirect support for the availability of proportionality review in cases where s 5 is appropriately engaged.[37] The point that I seek to establish here is that there is a striking absence of judicial support for that assumption.

In exploring the relevant case law, it is again helpful to utilise the distinction drawn above between the proposition that the Bill of Rights Act establishes proportionality as a substantive standard of conduct for public authorities, and the proposition that the Act requires the courts to engage in proportionality review of administrative action. Some New Zealand judges have struggled even with the former proposition.[38] Nevertheless, the weight of New Zealand case law accepts that, unless there is a statutory direction to the contrary, first instance decision-makers (including courts) must not limit the rights found in the Bill of Rights Act any more than is demonstrably justified in terms of s 5.[39] The Supreme Court decision in *Brooker v Police* is a leading example – albeit involving an appeal confined to questions of law rather than a judicial review.[40] In explaining how the test of behaving in a "disorderly manner" in s 4(1)(a) of the Summary Offences Act 1981 should be applied, a majority of the Supreme Court recognised explicitly that the correct characterisation of the appellant's behaviour as disorderly depended on whether "treating the particular behaviour in the particular circumstances as disorderly constitutes a justified limitation on the defendant's exercise of the right in question".[41]

In contrast, there is a striking absence of judicial authority in support of the second proposition – that the Bill of Rights Act requires the courts to themselves engage with the standards contained in s 5 of the Bill of Rights Act when reviewing administrative action. Here, we need to be careful about the kind of authority on which we rely. To repeat a point already made, our interest here is in cases in which judges utilise (or refuse to utilise) proportionality analysis while exercising a review role distinct from that of the first instance decision-maker. This means that there is little assistance to be derived from cases where judges have utilised the s 5 proportionality test in the course of first instance decision-making or in the course of a general appeal. Examples of that kind simply confirm the first proposition: that proportionality constitutes a substantive standard of conduct for public authorities. For the same reason, it is best to put to one side decisions in which a reviewing court,

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37 See Claudia Geiringer "Shaping the Interpretation of Statutes: Where are we now in the s 6 debate?" in *Using the Bill of Rights in Civil and Criminal Litigation* (NZLS, Wellington, 2008).

38 For example *TV3 Network Services Ltd v Holt* (2002) 6 HRNZ 759 (HC) at [37]–[41].

39 Some examples of cases where that proposition has been stated include *Newspaper Publishers' Association of New Zealand (Inc) v Family Court* [1999] 2 NZLR 344 (HC); *Police v Beggs* (1999) 3 NZLR (HC); and *Lewis v Wilson and Horton* [2000] 3 NZLR 546 (CA).

40 *Brooker v Police* [2007] NZSC 30, [2007] 3 NZLR 91.

41 At [59] per Blanchard J. See also [91] per Tipping J and [130] per McGrath J (the latter dissenting as to the result).

having found that the decision-maker has misdirected itself as to the relevant law, then feels free to step into the shoes of the first instance body and remake the decision.[42]

Another category that needs to be distinguished comprises cases in which the courts have addressed the Bill of Rights issue as a question of statutory interpretation, conceived of as a choice between two contrastable statutory meanings. I have suggested previously that, even in these "ambiguity"-type statutory interpretation cases, the case law discloses a degree of judicial resistance to deploying proportionality analysis.[43] Nevertheless, examples can undoubtedly be found of the New Zealand courts doing so,[44] and there is certainly no suggestion in the case law (at least post-*Hansen*)[45] that they are not entitled to.

My interest here, though, is in cases where the Bill of Rights Act argument relates not to the way the statute is to be interpreted (in a narrow sense) but to the way administrative (or indeed judicial) power is to be applied in a particular case. In other words, my interest is in cases where the statute, however interpreted, leaves a discretion or judgement to be exercised in individual cases. If the Bill of Rights Act creates a substantive standard of conduct for administrative decision-making, then it follows that it is not enough for decision-makers simply to articulate Bill of Rights-consistent "interpretations" of their empowering statutes. They must also exercise their powers in a way that does not result in disproportionate limits being placed on rights in individual cases.[46] Proportionality review under the Bill of Rights Act would involve the courts in policing this aspect of Bill of Rights compliance directly – by themselves engaging with the elements of a proportionality inquiry in some way. It is striking, therefore, to note that the case law discloses almost no examples of this occurring.

The decision of the Court of Appeal in *Commerce Commission v Air New Zealand* deftly illustrates the distinction that I am trying to draw here.[47] The Court of Appeal was confronted with two competing interpretations of a section in the Commerce Act 1986 that placed a limit on the right to freedom of expression (by empowering the Commerce Commission to prohibit disclosure of

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42 I would suggest that *Brooker*, above n 40, is an example of this. The Supreme Court (on an appeal limited to questions of law) held that the District Court judge had misstated the test for disorderly conduct. The Court then proceeded to decide for itself whether Mr Brooker's behaviour was disorderly, bearing in mind the question whether this would constitute an unjustified limit on his right to freedom of expression.

43 Claudia Geiringer "On a Road to Nowhere: Implied Declarations of Inconsistency and the New Zealand Bill of Rights Act" (2009) 40 VUWLR 613.

44 For example *Radio New Zealand Ltd v Bolton* HC Wellington CIV-2010-485-225, 19 July 2010; and *Commerce Commission v Air New Zealand Ltd* [2011] NZCA 64, [2011] 2 NZLR 194.

45 *Hansen*, above n 7.

46 McLean, Rishworth and Taggart, above n 19.

47 *Commerce Commission v Air New Zealand Ltd*, above n 44.

information or evidence given to the Commission in an interview). The Court ultimately adopted the more expansive (and therefore more rights-limiting) of the two interpretations, but only after satisfying itself that this broader interpretation did not result in a disproportionate limit being placed on the right to freedom of expression.[48] In other words, the Court did engage in a proportionality analysis as part of the interpretive exercise.

However, the Attorney-General as intervener had submitted that not only must the competing interpretations of s 100 be subject to a proportionality analysis; individual exercises of the Commerce Commission's power under s 100 should also be scrutinised through the proportionality lens. The Court of Appeal rejected that proposition out of hand, noting that: "The *Hansen* analysis has justified the existence of s 100 and there is no need to repeat the exercise."[49] The Court reached this view as to the (non)-applicability of proportionality review despite acknowledging more than once in its judgment that the mere fact that the Commerce Commission had been given a broad power did not justify its exercise in any particular case, and despite calling for on-going case-by-case assessment (without reference to the Bill of Rights Act) of the justification for individual orders.[50]

Commerce Commission v Air New Zealand thus provides direct appellate authority to the effect that the Bill of Rights Act does not support proportionality review of individual exercises of administrative power. This is broadly consistent with the decision of the Court of Appeal in *Moonen v Film and Literature Board of Review (No 2)*, discussed by McLean.[51] The *Moonen* litigation concerned provisions in New Zealand's censorship legislation that deem as objectionable any publication that "promotes or supports or tends to promote or support" the exploitation of children for sexual purposes. The appellant challenged the Board's assessment that certain publications met this statutory test of objectionability saying, amongst other things, that the finding was inconsistent with his right to freedom of expression. The matter came before the Court of Appeal on two occasions by way of appeals limited to questions of law. On the first occasion, the Court granted Mr Moonen's appeal. In the course of doing so, the Court noted that the Bill of Rights Act was relevant not only to "the construction of the Act" but also to "any classification made thereunder".[52] But in actual fact, the Court's reasons for granting the appeal fell into the former category – the Board was held to have misunderstood the statutory test.[53] Following reconsideration by the Board, a further

48 At [65]–[76].

49 At [77].

50 At [46] and [108]–[109].

51 *Moonen (No 2)*, above n 31.

52 *Moonen*, above n 7, at [16].

53 *Moonen*, above n 7.

appeal to the Court of Appeal was dismissed.[54] This time, the Court of Appeal was satisfied that the Board had properly construed the statutory test. That being so, the Court showed no appetite for undertaking its own assessment of the proportionality of the intrusion on Mr Moonen's rights. Instead, the Court alluded to the "perversity" test in *Edwards v Barstow*[55] and noted that the question of objectionability was a matter for expert judgement of the Board.[56]

The recent decision of the Court of Appeal in *Ministry of Health v Atkinson* is consistent with these earlier authorities.[57] The appeal was from a decision of the Human Rights Review Tribunal, exercising its explicit statutory mandate to determine, in "civil proceedings", whether breaches of the right to freedom from discrimination can be justified under s 5 of the Bill of Rights Act. The Tribunal held that a certain Ministry of Health policy gave rise to unjustifiable discrimination, and its decision was upheld on appeal to the High Court. On a further appeal to the Court of Appeal, the Court's mandate was limited by statute to questions of law. That being so, the Court took pains to confine itself to answering certain carefully confined questions and noted that it was not its role to engage in an overall proportionality assessment.[58]

Finally, although arising in a criminal law context, the case of *Morse v Police* is also of interest.[59] Morse, a protestor, appealed her conviction for behaving in an "offensive" manner contrary to s 4(1)(a) of the Summary Offences Act 1981. She argued that to criminally sanction her conduct as "offensive" would amount to a disproportionate limit on her right to freedom of expression. Before the Court of Appeal, the statutory appeal right was again confined to questions of law. For that reason, the Court of Appeal had to decide if the assessment as to whether the appellant's behaviour was "offensive" – an assessment that turned on whether the limit on her freedom of expression was proportionate – was a "question of law".

The three Court of Appeal judges who heard the case took different approaches to this issue. William Young P recorded his view that whether the conduct was "offensive" was "a question of fact, rather than a mixed question of fact and law".[60] In dismissing the appeal, he noted that he was "distinctly unenthusiastic about any alternative approach under which every public disorder case which engages rights protected under the [Bill of Rights Act] must be resolved by an evaluative

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54 *Moonen (No 2)*, above n 31.

55 *Edwards v Barstow* [1956] AC 14 (HL).

56 *Moonen (No 2)*, above n 31, at [25]–[27]; For further discussion of the Court of Appeal's approach in the *Moonen* litigation see McLean, above n 3; Geiringer and Price, above n 18.

57 *Ministry of Health v Atkinson* [2012] NZCA 184, [2012] 3 NZLR 456.

58 At [180].

59 *Morse v R* [2009] NZCA 623, [2010] 2 NZLR 625; and *Morse v Police* [2011] NZSC 45, [2012] 2 NZLR 1.

60 *Morse v R* (NZCA), above n 59, at [46].

exercise which is legal in character and thus capable of being re-litigated through the appeal system."[61] Arnold J agreed with the President that the appeal should be dismissed but did not address the "question of law" issue directly.[62] Glazebrook J dissented as to the result but posited that the "offensiveness" question was "either a question of fact or possibly a mixed question of fact and law".[63]

On further appeal to the Supreme Court, the issue was not resolved.[64] During the course of oral argument, three Supreme Court judges expressed the view that the question whether the limit to Ms Morse's freedom of expression was unjustifiable must be a question of law.[65] Ultimately, though, the Supreme Court allowed Morse's appeal on the conceptually prior point that the trial judge had misunderstood the correct test. That being so, the Court was able to leave unresolved the question whether the way that the test is applied in an individual case (and specifically the question whether that application results in an unjustified limit on rights) raises a question of law.

Nevertheless, two judges made passing observations on the point. Elias CJ noted that whether behaviour was offensive would usually be a judgement of fact but went on to say that the question whether it amounted to a disproportionate limit on freedom of expression would always be a question of law.[66] McGrath J, on the other hand, observed that whether the conduct was sufficient to justify the interference of the criminal law was a question of fact for the court (presumably he meant trial court) to decide in the circumstances.[67] Unlike Elias CJ, he did not qualify these remarks by reference to the application of the Bill of Rights Act.

In short, then, I am aware of no clear precedents from either the Court of Appeal or the Supreme Court supporting the availability of proportionality review of administrative decision-making under the Bill of Rights Act, and several judgments that cast its availability into doubt. Unsurprisingly given this background, High Court authority is mixed at best. Certainly, rare examples can be found of judges substituting their own evaluations of the justifiability of limits on protected rights for that of first instance decision-makers. Interestingly, though, a number of these examples have concerned

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61 At [46].

62 At [29]–[43]. Arguably, though, the fact that he addressed the substantive issue on the appeal by engaging in a lengthy analysis as to why, in his view, the conviction was justified, can be taken to reflect implicit acceptance that the question was not wholly one of fact: see Knight, above n 2, at 428, n 216.

63 *Morse v R* (NZCA), above n 59, at [111]. She nevertheless would have granted the appeal because she concluded that the principles, properly applied to the facts as found, could not have legitimately led to the conviction.

64 *Morse v Police* (NZSC), above n 59.

65 *Morse v Police* [2010] Trans 10 at 66 per Tipping, at 67 per Blanchard J and at 68 per Elias CJ.

66 *Morse v Police* (NZSC), above n 59, at [40].

67 At [101] and [103].

the vires of delegated legislation – perhaps because the exercise of power in these cases has more of a rule-like quality to it and therefore feels more susceptible to judicial control through something approximating an exercise of statutory interpretation.[68]

But whereas the secondary literature tends to assume that these delegated legislation cases raise the same set of Bill of Rights issues as any other case involving an exercise of administrative power,[69] New Zealand judges have not obviously been willing to draw that conceptual parallel. 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.[70] 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.[71] 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.[72]

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.

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68 As well as administrative law decisions such as *Cropp v A Judicial Committee* [2007] NZAR 465 (HC), District Court judges have been prepared to assess the proportionality (and therefore vires) of by-laws in the context of injunction applications: *Auckland City Council v Finau* [2002] DCR 839; and *Auckland Council v Occupiers of Aotea Square* DC Auckland Central CIV-2011-404-2492, 21 December 2011. See also *Schubert v Wanganui District Council* [2011] NZAR 233 (HC) at especially [152]–[159], in which the judge made it clear that he would have felt free to impose his own proportionality assessment on the Council were it not for the particular wording of the empowering provision, which he thought specifically conferred that role on the Council itself.

69 For example Geiringer "Shaping the Interpretation of Statutes", above n 37, 14–17; and Paul Rishworth "The impact of the Bill of Rights when litigating against the Crown" in *Litigating against the Crown* (NZLS, Wellington, 2010) at 89–90.

70 For two recent examples of High Court judges doing so in the context of appeals from the exercise of a discretion see *Television New Zealand v Green* (2008) 8 HRNZ 715 (HC); and *Television New Zealand Ltd v Freeman* HC Wellington CIV-2011-485–840, 26 October 2011.

71 For example *TV3 Network Services Ltd v Holt*, above n 38, at [37]–[41].

72 For example *Television New Zealand Ltd v Viewers for Television Excellence Inc* [2005] NZAR 1 (HC); *Television New Zealand Ltd v West* [2011] 3 NZLR 825 (HC). Both these cases again involved appeals as if from the exercise of a discretion.

IV THE CASE FOR PROPORTIONALITY REVIEW

The reluctance of the New Zealand courts to embrace proportionality review stands in stark contrast to the situation in the United Kingdom, where proportionality review is now a routine feature of administrative law challenges under the Human Rights Act (UK). Even there, as McLean has pointed out, the case law discloses a degree of "methodological blurring".[73] Further, the intensity of review that ought to accompany a proportionality inquiry undoubtedly remains a question of debate, with many commentators taking the view that the level of intensity of review (or, conversely, the extent of judicial deference or restraint) ought to vary depending on a range of contextual factors.[74]

Despite these complexities, the starting point in the United Kingdom is that there is well-embedded appellate authority to the effect that it is the role of judges when reviewing administrative action under the Human Rights Act (UK) to satisfy themselves (to a degree that is appropriate in the particular circumstances) of the proportionality of any limits placed on rights by first instance administrative decision-makers.[75] In New Zealand, as we have seen, that is far from so.

The obvious question this presents is whether this judicial reluctance to engage in proportionality review is grounded in an incorrect understanding of what the Bill of Rights Act demands (as many of the scholarly accounts would seem to suggest)? In order to cast further light on this question, it is necessary to rehearse in rather more detail the analytical arguments that support proportionality review.

Starting with the first issue as to whether the Bill of Rights Act establishes proportionality as a substantive standard of conduct for administrative decision-makers, there are two distinct (though complementary) explanations that can be advanced from the scheme of the Act in support of that claim. The first relies on the combined effect of ss 5 and 6 of the Act. By way of background, s 6 says that wherever an enactment can be given a meaning that is "consistent" with the rights and freedoms contained in the Bill of Rights Act, that meaning is to be preferred to any other meaning. Prior to the decision of the Supreme Court in *Hansen*,[76] there was some confusion as to what the phrase "consistent with the rights and freedoms" in s 6 might mean.[77] As is well known, *Hansen*

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73 McLean, above n 3, at 382.

74 For example Julian Rivers "Proportionality and Variable Intensity of Review" (2006) 65 CLJ 174; Murray Hunt "Sovereignty's Blight: Why Contemporary Public Law Needs the Concept of 'Due Deference'" in Nicholas Bamforth and Peter Leyland (eds) *Public Law in a Multi-Layered Constitution* (Hart Publishing, Oxford, 2003) 337; and Aileen Kavanagh *Constitutional Review under the UK Human Rights Act* (Cambridge University Press, Cambridge, 2009) at 237–241.

75 For example the House of Lords decisions cited at above n 3.

76 *Hansen*, above n 7.

77 Compare, for example, the contrasting views expressed by different judges in *Ministry of Transport v Noort*, above n 12 at 273 per Cooke P, 282–283 per Richardson J, 287 per Hardie Boys J and 295 per Gault J.

resolved that controversy. It held that the key to understanding the concept of "consistency", as deployed in s 6, is to be found in s 5 – the limitation provision. According to the Supreme Court in *Hansen*, "consistent" in s 6 means consistent with the injunction (in s 5) that only "reasonable limits" may be placed on rights.[78] *Hansen* also reaffirmed the proposition already well-established in the New Zealand case law that the concept of "reasonable limits" in s 5 equates to a test of proportionality, as reflected in the international and comparative human rights jurisprudence.[79]

How, then, does this reading of the scheme of the Bill of Rights Act, as it relates to the interpretation of statutes, support the argument for proportionality as a substantive standard of conduct for administrative actors? The argument is that, as administrative power is generally conferred by statute, the scope of such power is necessarily constrained by the interpretive direction in s 6. On this account, the effect of s 6 is that administrative power must be read subject to an implicit proviso: that it cannot lawfully be exercised in a manner that would result in inconsistency with the protected rights (in the *Hansen* sense of non-compliance with s 5).[80] In this way, the combined effect of ss 5 and 6 of the Act is to prohibit public authorities, even those exercising apparently broad power, from exercising that power in a way that would result in an unreasonable (or disproportionate) limit on the protected rights. If they do so, they have, in effect, misinterpreted or misapplied their statutory power, and have thus acted unlawfully or ultra vires.[81]

The scholarly literature tends to place particular emphasis on this first (interpretive) explanation for how the scheme of the Bill of Rights Act establishes proportionality as a substantive standard of conduct. However, a complementary (and in fact somewhat simpler) explanation is also available.[82] This alternative explanation does not rely on the interpretive effect of s 6 of the Bill of Rights Act but, instead, points to the combined effect of ss 3 and 5. Section 3 stipulates that the Act "applies" both to acts done by the legislative, executive and judicial branches of government,[83] and to other

78 *Hansen*, above n 7, at [57]–[59] per Blanchard J, [89]–[91] per Tipping J and [186]–[189] per McGrath J. Compare [6] and [15]–[124] per Elias CJ dissenting. This means that s 6 does not require statutes to be interpreted consistently with the rights as listed in Part II of the Bill of Rights Act in their unmediated form.

79 At [42] per Elias, [64] per Blanchard J, [101]–[124] per Tipping J, [180] and [203]–[205] per McGrath J and [269]–[272] per Anderson J.

80 See McLean, Rishworth and Taggart, above n 19, at 71.

81 This account leaves open the possibility that a statute may be worded in such a way as to, in effect, *require* the decision-maker to act inconsistently with the Bill of Rights Act (in which case, their actions will be protected by s 4 – the section that preserves inconsistent parliamentary enactments). However, commentators have suggested that this is likely to be a rare occurrence because broad power-conferring language is inherently flexible and, therefore, generally capable of being "read down" to ensure compliance with human rights standards: see for example Joseph, above n 19, at 879; and McLean, Rishworth and Taggart, above n 19, at 80.

82 See Geiringer and Price, above n 18, at 304–305.

83 New Zealand Bill of Rights Act 1990, s 3(a).

persons or bodies when performing "any public function, power or duty conferred or imposed … by law".[84] If the Bill of Rights Act "applies" to administrative action falling into these two categories then surely, so the argument goes, the relevant actor is forbidden from acting inconsistently with the rights and freedoms contained in the Act. Applying the logic from the *Hansen* case, that means refraining from acting in a way those rights and freedoms, unless the limit is proportionate and therefore authorised by s 5.

Those, then, are the two textual explanations that are available to support the proposition that the Bill of Rights Act establishes proportionality as a substantive standard of conduct governing administrative action. In my view, they are convincing. Even if one does not accept the point that the interpretive direction in s 6 constrains case-by-case-application of administrative power, it is difficult to see what content can be given to the word "applies" in s 3 of the Bill of Rights Act if it does mean being bound by the injunction in s 5.

Nevertheless, it is worth noting that the route by which the obligation of compliance is imposed on public authorities under the Bill of Rights Act is, in comparative terms, somewhat indirect. For example, although the Victorian Charter of Human Rights and Responsibilities contains an "application" provision drafted in similar language to s 3 of the Bill of Rights Act,[85] the drafters considered it necessary to supplement that section with an additional provision, specifying in explicit terms that it is "unlawful" for "public authorities" to act "incompatibly" with the protected rights.[86] This is a point that I explore in further detail in Part V.

What, though, of the second question identified above: whether it necessarily follows from the fact that public authorities are themselves bound by the proportionality standard in s 5 that the courts can and must police this legal obligation directly – that is, by themselves judicially reviewing the proportionality of limits on rights that result from an exercise of administrative power? An initial point to note is that the Bill of Rights Act offers no explicit textual support for this proposition, which must rest instead on background assumptions as to the role of the courts – both generally in controlling administrative action, and specifically in relation to the enforcement of the Bill of Rights Act. Two arguments in particular can be made. The first draws on the simple fact that the Bill of Rights Act is part of the law of New Zealand, so that administrative action that is inconsistent with it amounts to an error of law.[87] That being so, proportionality review under s 5 of the Bill of Rights

84 New Zealand Bill of Rights Act 1990, s 3(b).

85 Charter of Human Rights and Responsibilities Act 2006 (Vic), s 6.

86 Section 38(1).

87 Rishworth and others, above n 19, at 191; Hickman, above n 17, at 111 (in the context of the United Kingdom instrument); Knight, above n 2, at 427 (articulating the argument though apparently rejecting it).

Act can be conceived of as a necessary aspect of judicial review for illegality under the first head of Lord Diplock's orthodox tripartite schema.[88]

The second contextual argument draws on the proposition affirmed in *Simpson v Attorney-General (Baigent's case)* that the right to an effective remedy is implicit in the scheme of the Bill of Rights Act.[89] If that is so then, so the arguments goes, the failure of administrative actors to comply with the terms of s 5 of the Bill of Rights Act ought to be remedied directly by the courts through proportionality review.[90]

These are certainly respectable arguments. But they are not so overwhelming as to admit of no possible rejoinder. For example, the proposition that a right to an "effective" remedy is implicit in the Bill of Rights Act is, of course, well established in the case law,[91] but what might be considered effective in particular circumstances is a matter for the courts. It is clear from the case law that, in making that assessment, the New Zealand courts will consider competing public interest considerations.[92] These might surely include the "institutional choice" concerns adverted to by McLean in her 2008 article. In her words:[93]

> …under an "interpretive" bill of rights methodology, just as under a judicial review one, the court cannot overrule the legislature's institutional choice. … This is not only a consequence of respect for legislative judgement, but also of the practical constraints on the courts' capacity to second-guess or remake the decisions made within the administration.

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88 *Council of Civil Service Unions v Minister for the Civil Service* [1985] AC 374 (HL). In reliance on this line of argument, Tom Hickman argues that proportionality under the Human Rights Act 1998 (UK) (to the extent that it attaches to particular rights), is a standard of legality and therefore must be enforced directly by the courts through a "correctness" standard of review. On his typology, therefore, proportionality under the Human Rights Act is a "standard of legality" and not a "standard of review", by which he means a freestanding head of judicial review at common law: Hickman, above n 17, at 111. For the purposes of this article, though, that terminological approach would beg some of the very questions that I am seeking to address – such as whether, in the New Zealand context, judicial review of the proportionality of administrative action *has* been held to follow automatically from illegality; and, if not, why not? For that reason, in this article, I have avoided Hickman's terminology.

89 *Simpson v Attorney-General (Baigent's case)* [1994] 3 NZLR 667 (CA).

90 See Peter James Niven "The principle of proportionality and section 5 of the Bill of Rights: controlling administrative action" (LLM Research Paper, Victoria University of Wellington, 2003) at 33–41; and Varuhas, above n 21, at 347.

91 *Baigent's case*, above n 89.

92 See *R v Shaheed* [2002] 2 NZLR 377 (CA); and *Attorney-General v Chapman* [2011] NZSC 110, [2012] 1 NZLR 462.

93 McLean, above n 3, at 394.

Of course, one possible way to accommodate these concerns is by retaining proportionality review as the starting point but developing a doctrine of judicial deference or restraint to accompany its application.[94] On the other hand, the point being made by McLean is that a retreat to more traditional doctrines of administrative law may also be viewed as a rational strategy for accommodating these concerns.[95]

Similarly, the argument that consistency with s 5 of the Bill of Rights Act must be enforced directly through a proportionality inquiry simply because it is a form of error of law is also based on assumptions that are potentially open to contestation – that the proportionality of limits on rights is a pure question of law; and that the only appropriate review standard for questions of law is one of "correctness". In New Zealand, the latter assumption undoubtedly has formidable credentials.[96] But it is worth noting that the Canadian courts have taken quite a different approach. Their administrative law framework leaves space for the possibility that questions of law may, in some circumstances, attract something less than a correctness standard.[97]

My point here is simply this. The answer to the question whether the courts should engage in proportionality review of administrative action in order to police compliance with the Bill of Rights Act cannot be found in the text alone. Ultimately, it depends on normative considerations – whether, in all the circumstances, proportionality review is the most apt method for accommodating the competing interests involved. Those competing interests include judicial responsibility for enforcing compliance with human rights standards, but also the countervailing "institutional choice" concerns articulated above.

V ACCOUNTING FOR THE RELUCTANCE OF NEW ZEALAND JUDGES TO EMBRACE PROPORTIONALITY REVIEW – A COMPARATIVE PERSPECTIVE

In what remains of the paper, I do not attempt to resolve that ultimate question of whether the New Zealand courts *should* engage in proportionality review of administrative action in Bill of

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94 This is what has been done in the United Kingdom, although the term "deference" remains controversial – see for example *R (Pro-Life Alliance) v BBC* [2003] UKHL 23, [2004] 1 AC 185, at [75]–[76] per Lord Hoffmann.

95 McLean, above n 3, at 394–395.

96 For example *Bulk Gas Users Group v Attorney-General* [1983] NZLR 129, at 135–136 per Cooke P. Though see Michael B Taggart "The Contribution of Lord Cooke to Scope of Review Doctrine in Administrative Law: A Comparative Common Law Perspective" in Paul Rishworth (ed) *The Struggle for Simplicity in the Law: essays for Lord Cooke of Thorndon* (Butterworths, Wellington, 1997) 189 at 196, pointing out that Lord Cooke's dicta in *Bulk Gas* was limited to a "definite" or "ascertainable" statutory test or "pure question of statutory interpretation" and not to situations where there remained "legitimate room for judgment" in applying the test.

97 See Part V.B below.

Rights Act cases. Instead, I explore a rather narrower insight. It is that this ultimate question needs to be addressed in a way that is attentive to local context. Specifically, I suggest below that there might be local factors that explain the particular resistance of New Zealand judges to adopting proportionality review. I explore this proposition by examining, through a comparative lens, both the text of the Bill of Rights Act itself and aspects of the wider legal culture in which it was enacted and is enforced.

I do not offer this analysis as a justificatory exercise – that is, in order to establish that we *should not* adopt proportionality review. What I wish to suggest, however, is that we cannot decide that ultimate normative question without first having an accurate appreciation of the local conditions in which the argument for or against proportionality review must be made. As Thomas Poole has suggested (with reference to the role of proportionality in classical Greek and Roman thought), proportionality is a situated concept that operates in a defined political space.[98]

A Comparatively Weak Textual Support for Proportionality Review

The Bill of Rights Act was not drafted primarily as a set of rules to constrain administrative decision-making. It was modelled on the Canadian Charter of Rights and Freedoms as a constitutional document that would constrain primary legislation. This is not to say that the drafters did not mean it to place limits on administrative action – clearly they did.[99] But this was, at best, a secondary focus during the drafting process. There was no clear thinking about how, precisely, the Act's operational provisions would impact on administrative decision-making and what that might mean for the supervisory jurisdiction of the courts.

Perhaps for this reason, textual support for proportionality review in the Bill of Rights Act is far less explicit and direct than it is in the more recent statutory human rights charters adopted in the United Kingdom, the Australian Capital Territory (the ACT) and the state of Victoria.[100] As noted above, the textual case for proportionality review under the Bill of Rights Act depends on a particular reading of ss 3–6 of the Act, read against background assumptions as to the role of the courts in enforcing legal norms. In contrast, the statutory human rights charters that have since been adopted in the United Kingdom and Australia stipulate, in terms, that it is "unlawful" for "public authorities" to act in a way that is "incompatible" with the protected rights.[101] In addition to the injunction in the three instruments that "incompatible" action by public authorities is "unlawful", the

98 Thomas Poole "Proportionality in Perspective" [2010] NZ L Rev 369.

99 For example *A Bill of Rights for New Zealand: A White Paper*, above n 6, at 46–47.

100 Human Rights Act 1998 (UK); Charter of Human Rights and Responsibilities Act 2006 (Vic); Human Rights Act 2004 (ACT).

101 Human Rights Act 1998 (UK), s 6(1); Charter of Human Rights and Responsibilities Act 2006 (Vic), s 38(1); Human Rights Act 2004 (ACT), s 40B(1), as amended in 2008. The two Australian charters also require public authorities to give "proper consideration" to human rights.

Australian and United Kingdom instruments also address explicitly the remedial consequences of such "unlawfulness". The United Kingdom and ACT instruments empower the courts to grant such relief as they consider "appropriate".[102] The Victorian instrument says, somewhat more elusively, that:[103]

> If, otherwise than because of this Charter, a person may seek any relief or remedy in respect of an act or decision of a public authority on the ground that the act or decision was unlawful, that person may seek that relief or remedy on a ground of unlawfulness arising because of this Charter.

In the United Kingdom at least, it is clear from the broader European context that the concept of "compatibility" as utilised in the Human Rights Act imports notions of "proportionality" as developed in the jurisprudence of the Strasbourg Court.[104] It is, in my view, clear that the drafters of the more youthful Victorian and ACT instruments also intended that the concepts of "compatibility" and "proportionality" would be linked.[105] For example, in the second reading speech on the Victorian Charter, the Attorney-General Robert Hulls, discussing the role of s 7(2) of the Charter (the equivalent of s 5 of the Bill of Rights Act) observed as follows:[106]

> Where a right is so limited, then action taken in accordance with that limitation will not be prohibited under the charter, and is not incompatible with the right. … The general limitations clause embodies what is known as the "proportionality test".

Similarly, the earlier report of the (Victorian) Human Rights Consultation Committee that gave rise to the Charter noted that, under the proposed instrument, "a person might be able to show that … the way the decision-maker had acted was not appropriate or proportionate given the person's rights".[107] The report went on to note the lack of impact that the New Zealand instrument had had

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102 Human Rights Act 1998 (UK), s 8(1); Human Rights Act 2004 (ACT), s 40C(4). The phrase in the United Kingdom instrument is "just and appropriate". In the ACT the remedy must be sought from the Supreme Court. Both instruments contain qualifications in relation to the availability of damages.

103 Charter of Human Rights and Responsibilities Act 2006 (Vic), s 39(1).

104 This follows from the fact that Human Rights Act 1998 (UK) is designed to "bring home" the rights protected by the European Convention on Human Rights, together with the fact that the doctrine of proportionality was well developed in European jurisprudence at the time the Act was drafted. Although the Act only requires judges to "take into account"(rather than to follow) Strasbourg jurisprudence (s 2), it is difficult to imagine the United Kingdom courts sustaining a departure from the European conception of human rights on such a fundamental issue.

105 For example Victoria, *Parliamentary Debates*, Legislative Assembly, 4 May 2006, 1291 (Mr Hulls); and ACT, *Parliamentary Debates*, Legislative Assembly, 6 December 2007, 4028–4030 (Mr Corbell). The relevant provisions in the ACT legislation were introduced in 2008 by the Human Rights Amendment Act 2008 (ACT).

106 Victoria, *Parliamentary Debates*, Legislative Assembly, 4 May 2006, 1291 (Mr Hulls).

107 Human Rights Consultation Committee *Rights, Responsibilities and Respect: The Report of the Human Rights Consultation Committee* (Victoria Department of Justice, Melbourne, 2005) at 124. In the United

on administrative law jurisprudence, as compared with the United Kingdom. It suggested that a principal factor explaining this discrepancy was probably that:[108]

> … the obligation to observe human rights in the *Human Rights Act* 1998 is clearly stated. People can see a link between their rights, the duty of government to observe those rights and how to bring a case if government does not meet that standard.

In short, I agree. The elliptical drafting of the New Zealand instrument makes it difficult for people (including judges and lawyers) to comprehend the way in which the instrument might impact on administrative action, and how one might use the Bill of Rights Act to challenge such action in a court of law. This is not to say that the texts of the Australian and United Kingdom statutes resolve conclusively the question whether the courts in these jurisdictions could or should supervise the lawfulness of administrative action by engaging directly in proportionality review. Indeed, the position in Australia remains unsettled following a High Court decision in which the judges split on the issue.[109] The short point, though, is that these statutory regimes speak explicitly to administrative law obligation in a way that cannot be said for the New Zealand instrument. Under them, public authorities are left in no doubt that their decisions are constrained by the substantive standards contained in the relevant human rights instrument, and the courts are left in no doubt that they have a supervisory jurisdiction in relation to this question of administrative law compliance. A natural assumption from these legislative schemes, even if it is not the only possible assumption, is that this supervisory jurisdiction requires the courts to satisfy themselves that public authorities have complied with the proportionality standard found in the relevant instruments.

The comparative indeterminacy of the New Zealand instrument helps to explain (if not justify) the reluctance of the New Zealand courts to engage in proportionality review. So, for example, in *Wolf v Minister of Immigration* (a case that provides a rare example of a New Zealand judge grappling explicitly with the applicability of proportionality review – albeit not directly in a Bill of Rights Act context), Wild J noted that the adoption of a proportionality standard in the United Kingdom had been driven by s 6 of the Human Rights Act (UK) – the section that provides that it is "unlawful" for public authorities to act in a manner that is "incompatible" with European Convention rights.[110] He went on to observe that: "absent the driver of Convention rights and s 6 of the UK Human Rights Act, the role for proportionality in current New Zealand public law is unclear".[111]

Kingdom context, see for example *Rights Brought Home: The Human Rights Bill* (White Paper CM3782, October 1997) at [2.2]–[2.5].

108 Human Rights Consultation Committee , above n 107, at 124.

109 *Momcilovic v The Queen* [2011] HCA 34, (2011) 245 CLR 1.

110 *Wolf v Minister of Immigration*, above n 16, at [26]–[35].

111 At [35]. I am grateful to Hanna Wilberg for reminding me of this passage.

Bearing in mind the textual similarities between the Bill of Rights Act and the Canadian Charter, it is also worth reflecting on the position in that jurisdiction.[112] The starting point is the Supreme Court of Canada's 1989 decision in *Slaight Communications v Davidson* – a case that was relied on by McLean, Taggart and Rishworth in their seminal 1992 essay in order to support the case for proportionality review under the Bill of Rights Act.[113] In *Slaight Communications*, the Supreme Court of Canada accepted the proposition that the *Oakes* proportionality test (which had been formulated in the context of a Charter challenge to the validity of primary legislation) should also be applied when reviewing administrative action for consistency with the Canadian Charter.

The first point that needs to be made about the holding in *Slaight Communications* is that it was rationalised principally on the basis that the Charter has supreme law status so that any legislation that is inconsistent with it is of no force or effect.[114] It was this argument from supremacy that drove Lamer J's conclusion in *Slaight Communications* that an exercise of administrative discretion that is inconsistent with s 1 of the Canadian Charter (the equivalent of our s 5) is beyond power. Even on its own terms, therefore, the reasoning in *Slaight Communications* does not apply directly to the New Zealand context.

The second point, though, is that the holding from *Slaight Communications* on this point has had a checkered history. Not only has it generated strong dissents in some subsequent cases[115] but, in practice, it has not always been applied.[116] Recently, in *Doré v Barreau du Québec*, the Supreme Court of Canada abandoned altogether its view that the *Oakes* test applies in administrative law cases, preferring to formulate an approach that would sit more comfortably within the boundaries of the mainstream Canadian administrative law framework.[117]

To repeat, my point in this section has not been to question whether, as a matter of law, the Bill of Rights Act does in fact impose proportionality review. Rather, by deploying a comparative lens, I simply wish to suggest that the precariousness of the textual scaffolding by which this result is (arguably) achieved may well go some way to explain the reluctance of New Zealand judges to embrace it.

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112 The Canadian Charter contains equivalents of both ss 3 and 5 of the Bill of Rights Act.

113 *Slaight Communications v Davidson* [1989] 1 SCR 1038.

114 At 1077–1078 per Lamer J.

115 Especially *Multani v Commission Scolaire Marguerite-Bourgeoys* [2006] 1 SCR 256.

116 For example *Lake v Canada (Minister of Justice)* [2008] 1 SCR 761. For a useful discussion on this point, see David Mullan "Section 7 and Administrative Law Deference – No Room at the Inn?" (2006) 34 SCLR (2d) 227.

117 *Doré v Barreau du Québec* 2012 SCC 12, [2012] 1 SCR 395. The decision is discussed further below at Part V.B.

B Contextual Factors

Even accepting this point, though, textual ambivalence is unlikely to provide the whole of the explanation for the reluctance of New Zealand judges to embrace proportionality review. After all, as I concede in Part IV, the argument that the proportionality standard in s 5 of the Bill of Rights Act does substantively constrain administrative action is ultimately a convincing one, even if the route by which it is achieved is somewhat more indirect than under some other human rights charters. As noted, that argument has been embraced wholeheartedly in the academic literature (which, for the most part, does not even acknowledge, let alone reflect, the textual weaknesses that I have just identified).[118] We need, therefore, to look beyond the words of the Act for further explanation in the broader legal and constitutional context in which the Act has been applied over time.

Here, too, attention to the comparative experience in Canada, the United Kingdom and Australia is helpful, if only to underline the way in which the human rights instruments adopted in each of those jurisdictions are embedded in the unique constitutional and administrative law frameworks of the respective jurisdiction.[119] The posture of the courts towards proportionality review in these jurisdictions is undoubtedly driven by a range of factors, going well beyond the text.

For example, the adoption of proportionality review under the Human Rights Act (UK) – the statutory human rights charter in relation to which, as we have seen, it is most firmly established – is obviously driven by supranational influences from both European Convention and European Union law. Proportionality review of administrative action is an embedded feature of both these regional systems. Indeed, the European Court of Human Rights has held that the common law review standard of unreasonableness – even with a gloss of "anxious scrutiny" – is insufficient to protect the rights guaranteed by the European Convention on Human Rights.[120] That being the case, it is difficult to see how McLean's suggestion that traditional administrative law methodologies might hold more promise than proportionality review could have much traction in that jurisdiction.[121]

On the other hand, in Canada, three (related) contextual factors might be seen to drive the Supreme Court's ambivalence towards, and recent rejection of, the *Oakes* proportionality test as a basis for reviewing administrative action. The first is the Charter's status as a constitutional document that operates as a limit on legislative power. Arguably (and perhaps paradoxically) this higher law status may have had the effect in Canada of distancing the proportionality framework developed under s 1 of the Canadian Charter from the evolution of mainstream administrative law

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118 See Part II.

119 See Saunders, above n 5, at 145–146.

120 *Smith and Grady v United Kingdom* (1999) 29 EHRR 493 (ECHR) at [138].

121 McLean, above n 3, at 406–407.

principles. As we have seen, the United Kingdom and Australian human rights instruments are explicitly conceived of as administrative law tools, and incompatible administrative action as a form of administrative law unlawfulness. It follows that, at least to the extent that those instruments establish a substantive test of proportionality as the touchstone for compatibility with human rights, proportionality review can readily be conceptualized as a form of review for error of law (and thus located within the orthodox boundaries of judicial review).[122] In Canada, by comparison, many judges and commentators seem to view proportionality review under s 1 of the Charter as an alien constitutional law interloper that sits apart from, and has the potential to disrupt, the organic development of administrative law principles.[123]

The second factor is the long-established position in Canadian administrative law that questions of law do not necessarily attract a correctness standard of review. Relevantly, the Supreme Court has held that reasonableness rather than correctness will be the standard where the legal issues cannot easily be separated from factual issues[124] – a formulation that squarely captures a proportionality inquiry. Of course, this does not settle the issue. After all, the Canadian Supreme Court has also said that "constitutional" questions attract a correctness standard,[125] and there is a compelling argument that compatibility with s 1 of the Canadian Charter is preeminently a "constitutional" question.[126] The short point here, though, is that recognition within the structure of Canadian administrative law that questions of law do not automatically attract a correctness standard of review means that the logic of the "error of law" argument set out in the previous paragraph is less conceptually compelling in Canada than in some other jurisdictions.

The third and more general point is that the decision in *Doré v Barreau du Québec* to abandon the *Slaight Communications* approach to proportionality review of administrative action in Charter cases needs to be understood as part of a fundamental transformation of Canadian administrative law that began in 1999 (a decade after *Slaight Communications*) with the Supreme Court's decision

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122 Though in Australia, an additional obstacle that this argument will have to overcome is the distinction still drawn in that jurisdiction between "jurisdictional" and "non-jurisdictional" errors of law: *Craig v South Australia* [1995] HCA 58, (1995) 184 CLR 163.

123 For example JM Evans "The Principles of Fundamental Justice: The Constitution and the Common Law" (1991) 29 Osgoode Hall L J 51 at 73; and *Doré v Barreau du Québec*, above n 117, at [34]–[35].

124 For example *Dunsmuir v New Brunswick* 2008 SCC 9, [2008] 1 SCR 190 (SCC), at [51]–[55] per Bastarache and LeBel JJ. There is also a strong presumption that reasonableness is the correct standard for questions of law involving the interpretation of a decision-maker's constitutive and other closely related statutes: *Smith v Alliance Pipeline* 2011 SCC 7, [2011] 1 SCR 160; and *Alberta (Information and Privacy Commissioner) v Alberta Teachers' Association* 2011 SCC 61, [2011] 3 SCR 654.

125 For example *Dunsmuir*, above n 124, at [58].

126 As accepted in *Slaight Communications*, above n 113.

in *Baker v Canada (Minister of Citizenship and Immigration)*.[127] *Baker* is significant in this context for at least two reasons. First, in *Baker*, the Supreme Court of Canada recognised a general obligation on public authorities to give reasons when important individual interests are at stake. This is clearly relevant to any assessment of the relative capacities of "mainstream" administrative law principles versus proportionality review to support the culture of transparency and justification that McLean wistfully referred to in her 2008 article.

Secondly, *Baker* transformed the Canadian approach to the substantive grounds of review of the exercise of a discretion. Prior to *Baker*, the Canadian approach was similar to the traditional New Zealand approach, with the substantive ground of review being limited to *Wednesbury*-type unreasonableness.[128] In *Baker*, the Supreme Court replaced this framework with a "pragmatic and functional approach" in which the reviewing court could choose between three review standards – patent unreasonableness, reasonableness and correctness. The Supreme Court has since reduced the available standards of review from three to two (correctness and reasonableness),[129] but applies reasonableness as a flexible standard that "varies with the context and the nature of the impugned administrative act".[130]

For our purposes, two important features of this post-*Baker* approach to the control of discretion need to be stressed. The first is that the *Baker* approach is grounded in a policy of deference, meaning:[131]

> … respect for the legislative choices to leave some matters in the hands of administrative decision makers, for the processes and determinations that draw on particular expertise and experiences, and for the different roles of the courts and administrative bodies within the Canadian constitutional system.

But secondly, and as importantly, *Baker* also introduced a values-based approach to the control of discretion in which Canadian courts are able to take into account the values underlying the grant of the discretion as part of the reasonableness assessment. Following *Baker*, a number of scholars drew on this new values-based paradigm to critique the *Slaight Communications* approach to review of administrative action in Charter cases.[132] They suggested that the values-based approach signaled

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127 *Baker v Canada (Minister of Citizenship and Immigration)* [1999] 2 SCR 817. For relevant commentary, see especially G Cartier "The Baker Effect: A New Interface between the Canadian Charter of Rights and Freedoms and Administrative Law –The Case of Discretion" in David Dyzenhaus (ed) *The Unity of Public Law* (Hart Publishing, Oxford, 2004) 61.

128 See the helpful overview in Cartier, above n 127, at 63–66.

129 *Dunsmuir v New Brunswick*, above n 124.

130 *Catalyst Paper Corporation v North Cowichan (District)* 2012 SCC 2, [2012] 1 SCR 5 at [23]. See also *Canada (Citizenship and Immigration) v Khosa* 2009 SCC 12, [2009] 1 SCR 339 at [59] per Binnie J.

131 *Dunsmuir v New Brunswick*, above n 124, at [49].

132 For example Cartier, above n 127, at 75–76.

in *Baker* opened up possibilities for the Charter to "nurture" administrative law rather than being allowed to develop down a separate track through the application of *Oakes*-style proportionality review.[133]

In short, *Baker* and subsequent cases equipped Canadian administrative law with an established common law duty to give reasons, a comparatively sophisticated and well-articulated framework (grounded in a policy of deference) for determining the degree of intensity to apply when reviewing exercises of administrative power, and an articulated role for values-based inquiry in that assessment process. These developments provided the platform for the Supreme Court's decision in *Doré v Barreau du Québec* to abandon the rigid *Oakes* framework for proportionality review in Charter cases. In *Doré*, the Court contrasted "the values-based approach in *Baker*" with "the more formalistic template in *Slaight*" [134] and embraced the former as a "richer conception of administrative law, under which discretion is exercised 'in light of constitutional guarantees and the values they reflect'".[135] In doing so, the Court shed the formal justificatory structure of an *Oakes* inquiry but articulated an approach that was still explicitly informed in a general way by the concept of "proportionate balancing" underlying s 1 of the Charter. It stressed that administrative decision-makers themselves have an obligation to consider "how the *Charter* value at issue will best be protected in view of the statutory objectives" and that the reviewing court would consider "whether the decision maker has properly balanced the relevant *Charter* value with the statutory objectives".[136]

At the same time, the *Doré* Court also emphasised the policy of deference that is to guide the courts' approach to judicial review of discretionary decision-making, noting that this policy was justified "on the basis of legislative intent, respect for the specialized expertise of administrative decision-makers, and recognition that courts do not have a monopoly on adjudication in the administrative state".[137] The *Doré* case thus reflects the Canadian Supreme Court's assessment that in the administrative law context, deference can best be achieved without unacceptable cost to the protection of Charter rights through adaptation of the "pragmatic and functional" approach, as informed by Charter values.

The Australian situation provides a striking counterpart. The case law concerning the two Australian human rights charters is still at a very early stage of development and, as noted above, the position regarding the role of proportionality under them remains unsettled. What is clear,

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133 At 75–76.

134 *Doré v Barreau du Québec*, above n 117, at [31].

135 At [35] citing *Multani*, above n 115, at [152] per LeBel J.

136 *Doré v Barreau du Québec*, above n 117, at [56]–[57].

137 At [30] citing *Dunsmuir v New Brunswick*, above n 124.

though, is that the debate over proportionality in the Australian charters must be fought on distinctive constitutional terrain. This is because the Australian federal constitution has been held to demand a strict separation of federal judicial power[138] – a doctrine that, in the way that it has been interpreted over time, both shapes and inhibits the evolution of the common law grounds of judicial review.[139] The sharp distinction between questions of "law" and "merits" that this doctrine has to date been thought to entail has resulted, for example, in the High Court's refusal to expand reasonableness review beyond its original *Wednesbury* formulation, its refusal to develop an explicit doctrine of deference or variable intensity and, relevantly, its reluctance to recognise proportionality as a freestanding common law ground of review.[140]

This restrictive approach to the scope of judicial review at common law necessarily has implications for the environment in which administrative law remedies under the ACT and Victorian human rights charters fall to be considered.[141] How these contextual factors will ultimately play out in relation to proportionality review under the human rights charters is by no means easy to predict (at least for an outsider such as myself). It is certainly possible that the hostility manifested by the High Court to proportionality review at common law will translate across to the legislative charter context.[142]

On the other hand, it is also possible that the backdrop of doctrinal rigidity in Australian administrative law will instead provide an impetus for the courts in Victoria and the ACT to

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138 *R v Kirby; Ex parte Boilermakers' Society of Australia* [1956] HCA 10, (1956) 94 CLR 254.

139 See Saunders, above n 5, at 148–154. There are no doubt other significant contextual differences at play in the Australian jurisdictions, including the broad merits-based jurisdiction of the Commonwealth, Victorian and now ACT civil and administrative tribunals, and the impact of these merits-based jurisdictions both directly on the remedies that are available under the human rights charters and indirectly on Australian conceptions of administrative law. But these are themes that I am unable to develop in this context.

140 For example *Attorney General (NSW) v Quin* [1990] HCA 21, (1990) 170 CLR 1; and *Corporation of the City of Enfield v Development Assessment Commission* [2000] HCA 5, (2000) 199 CLR 135. See Saunders, above n 5, at 148–154.

141 This is so both to the extent that courts in these jurisdictions continue to draw on the unified Australian common law as a source of the grounds of judicial review and also to the extent that the state courts are indirectly constrained by the separation of federal judicial power, through the doctrine developed by the High Court of Australia in *Kable v Director of Public Prosecutions (NSW)* [1996] HCA 24, (1996) 189 CLR 51.

142 For example in *Momcilovic*, above n 109, Heydon J (dissenting) held that proportionality analysis under the Victorian Charter was inherently inconsistent with the doctrine of federal separation of powers, and inconsistent with the *Kable* doctrine (by which the federal separation of powers feeds down to state courts, albeit in a diluted form). Heydon J did not, however, have explicit support from other members of the High Court on this point, and in the admittedly different context of the development of Australian *constitutional* law, some High Court justices, notably Keifel J, have expressed tentative interest in proportionality doctrine: see Susan Kiefel "Proportionality: A Rule of Reason" [2012] 23 PL 85, and the cases discussed in that article.

embrace proportionality review under their respective charters. To put it another way, as in the United Kingdom, it is difficult to see McLean's preference for working with "traditional administrative law methodologies" as having much traction in these jurisdictions. That is because these traditional methodologies are comparatively underdeveloped and are not well suited to promoting compatibility with the statutorily protected rights. This consideration may in fact dictate a bifurcated approach to review in the Australian context that emphasises the character of the two human rights charters as sui generis statutory regimes, and that recognises a role for proportionality review under the statutory instruments. In that way, the statutorily mandated requirement of proportionality under the human rights instruments may provide Victorian and ACT judges with a mechanism for bringing their administrative law practice, at least in the context of human rights challenges, more into conformity with developments that other jurisdictions (such as Canada) may have been able to achieve by developing the common law grounds of review.[143]

Against this background, what can be said about the contextual factors that may drive the reluctance of the New Zealand courts to embrace proportionality review under the Bill of Rights Act? First, it is worth dwelling on the early point of its enactment, as compared with the United Kingdom and Australian instruments. After all, basic assumptions as to the effect of a new legal instrument are often set within the first few years of its operation and can sometimes be difficult to shift.

To reinforce this point, recall that the Act's entry into force was almost contemporaneous with the decision of the House of Lords in *Brind v Secretary of State for the Home Department* – a decision in which, as is well known, the House of Lords rejected an argument that statutory language conferring a discretion could be controlled through the use of an interpretive presumption.[144] In the early 1990s, then, the law/discretion dichotomy was still firmly intact.

It was against this inauspicious background that scholars such as McLean, Rishworth and Taggart, in their seminal 1992 essay, tried to persuade the legal profession of the "constitutional impediment" that the Bill of Rights Act would now impose on administrative decision-making.[145] Their account challenged orthodox assumptions as to the legitimate bounds of administrative law in not just one, but two respects. The first was the idea that discretion can be controlled through the device of statutory interpretation. Their thesis, as we have seen, was that the interpretive direction in s 6 of the Bill of Rights Act acted upon statutory provisions conferring administrative power in such a way as to create a legally enforceable constraint on those exercising such power. This is the

143 For an example of early enthusiasm from one Victorian judge for proportionality review under the Charter, see *PJB v Melbourne Health* [2011] VSC 327.

144 *R v Secretary of State for the Home Department, ex p Brind* [1991] UKHL 4, [1991] 1 AC 696. See also *Ashby v Minister of Immigration* [1981] 1 NZLR 222.

145 McLean, Rishworth and Taggart, above n 19.

antithesis of the approach exemplified in *Brind* because it rejects the conceptual distinction between the interpretation of an administrative power or discretion and its application in particular cases. It is the interpretive effect of s 6, they argued, that results in individual exercises of administrative authority that are inconsistent with the Bill of Rights Act being reviewable for being beyond power.

In hindsight, it seems clear that New Zealand judges were not entirely ready to make this conceptual leap. Indeed, although much recent scholarship assumes that administrative law has now "well and truly broken down the law/discretion distinction formerly maintained in *ex p Brind*",[146] cases such as *Commerce Commission v Air New Zealand Ltd* (discussed in Part III)[147] suggest that many judges in fact remain puzzled or uneasy about the claim that the s 6 interpretive direction provides a vehicle for constraining the exercise of power or discretion. This may be what Professor McLean meant when, commenting on the *Moonen* case (involving the classification of objectionable material), she noted that "there must be serious practical limits on how much work 'interpretation' can be made to do here".[148]

If this is so, one must also wonder whether those wishing to make the case for proportionality review under the Bill of Rights Act have made a strategic error in placing so much weight on the interpretive explanation for how the Act constrains administrative power when an alternative account (relying on s 3 of the Act instead of s 6) is available. The proposition that the Bill of Rights Act constrains public authorities because s 3 says it does is both far more straightforward and, I suspect, far more attractive to many judges than the more rarefied notion that administrative power is constrained through interpretation. Yet it is surprising how rarely one sees this alternative account clearly articulated.

To return to the initial point, the vintage of the New Zealand instrument may, then, be part of the reason for the reluctance of New Zealand judges to embrace proportionality review. But it cannot provide the whole explanation. After all, in at least one related area – the application of the presumption of legislative consistency with international law – the New Zealand judiciary has since broken new ground with its innovative use of interpretation as a vehicle for controlling administrative power.[149] Further, as noted in Part III, a number of leading appellate authorities do now acknowledge the role of s 6 of the Bill of Rights Act in constraining exercises of administrative

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146 McLean, above n 3, at 380.

147 *Commerce Commission v Air New Zealand Ltd*, above n 44.

148 McLean, above n 3, at 396.

149 See Claudia Geiringer "International law through the lens of *Zaoui*: Where is New Zealand at?" (2006) 17 PLR 300. As that article discusses, New Zealand judges have also embraced the idea of a common law "principle of legality" that operates as a substantive constraint on the scope of administrative power.

power; it is just that, for the most part, those authorities concern rights that do not, for one reason or another, attract a s 5 inquiry.[150]

This brings us to the second respect in which the McLean, Rishworth and Taggart account challenged orthodox assumptions as to the proper bounds of administrative law – that is, simply by imagining a place for a proportionality inquiry within New Zealand's administrative law framework. In this respect, too, their account was out of step with the judicial ethos of the early 1990s. In 1990, even variable intensity review had not yet made its entrée onto the New Zealand stage – let alone its exotic European cousin, proportionality. Admittedly, some early signs of interest in proportionality could be detected in contemporaneous decisions from the House of Lords, including in *Brind* itself.[151] But those proto-developments had not achieved any real currency in New Zealand judicial thinking – indeed, arguably they still have not.

This climate of resistance to proportionality as a common law ground of review must inevitably have had an impact on the receptiveness of New Zealand judges to claims that the same result had been achieved by force of the Bill of Rights Act itself. It did not help, either, that unlike in Victoria and the United Kingdom, the Act's entry into force was not accompanied by judicial or governmental education programmes to assist judges and officials with identifying the transformative potential of the new instrument.[152]

Still, why is it that, more than two decades later (and long after United Kingdom judges have embraced proportionality review under the Human Rights Act (UK)), New Zealand judges remain so impervious to it? After all, much else in administrative law has moved on. Whether or not it can yet be said that "the geographic epithet"[153] has received its New Zealand "Wednesburial",[154] the days of *Wednesbury* as a monolithic standard of review have long since been left behind. That being so, why is it that there is such a signal lack of interest from New Zealand judges in exploring the possibility that s 5 of the Bill of Rights Act may itself have created a more intrusive standard in judicial review challenges?

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150 See above n 36 and associated text. The key cases involving the international law presumption of consistency (discussed in Geiringer "International law through the lens of *Zaoui*", above n 149) likewise did not involve rights that attracted a proportionality analysis.

151 *Brind*, above n 144.

152 See Anthony Lester "The Magnetism of the Human Rights Act 1998" (2002) 33 VUWLR 477, 483–384; Ivor Richardson "The New Zealand Bill of Rights: Experience and Potential, Including the Implications for Commerce" (2004) Cant LR 259 at 260; and Victorian Equal Opportunity and Human Rights Commission *First Steps Forward: the 2007 Report on the Operation of the Charter of Human Rights and Responsibilities* (2008). See also ACT Human Rights Research Project *The Human Rights Act 2004 (ACT): The First Five Years of Operation* (2009) 61, complaining of a similar lack of judicial training in the ACT.

153 *Hawkins v Minister of Justice* [1991] 2 NZLR 530 (CA) at 534 per Cooke P.

154 Rodney Harrison "The New Public Law: A New Zealand Perspective" (2003) 14 PLR 41 at 56.

My suggestion is that the final piece of the puzzle may well be found in the distinct preference expressed by New Zealand judges, especially those at appellate level, for contextualism over formalism in administrative law. This trend has been well documented by Dean Knight in his work on variable or heightened intensity under the reasonableness ground of review.[155] Following an exhaustive survey of the relevant case law, Knight concludes that, although it is commonplace for High Court judges to recognise or apply variable intensity review, there is a curious lack of endorsement of it from appellate courts (and, indeed, outright hostility to it from some senior judges).[156] In documenting this phenomenon, Knight records a pertinent exchange from the transcript of the Supreme Court hearing in *Ye v Minister of Immigration*.[157] The exchange, which was provoked by a submission from counsel that the case required a heightened level of intensity of review, included the following responses from the bench:[158]

> Elias: It's just, it's got to be contextual. What is reasonable takes its colour from the context. Really, there's so much dancing around on the heads of pins in this area. …
>
> Tipping: … the Court must interfere where it must. You either feel driven to interfere or you don't, and that will depend on what sort of right it is and what the whole shebang is …
>
> Tipping: … I think there's a lot of nonsense talked in this area and it's unhelpful to start trying these adjectival or adverbial adornments of the sort of review you're undertaking.

As Knight points out, this exchange evidences "the strong commitment of New Zealand courts to contextualism", and their equally strong resistance to attempts to "explicitly calibrate" intensity review or to provide any "firm scaffolding" for its deployment.[159] Knight rightly locates this trend in a broader fear of formalism in administrative law that stems from Lord Cooke's simplicity project. For example, in his seminal essay "The Struggle for Simplicity in Administrative Law", Sir Robin warned against adding to the difficulties of administrative law through "superfluous complications of principle" and invited his readers "to entertain the serious possibility that reasonable means

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155 Dean R Knight "A Murky Methodology: Standards of Review in Administrative Law" (2008) 6 NZJPIL 117; and Knight, above n 2.

156 Knight, above n 155, at 123 and 133–136; and Knight, above n 2, at 399.

157 *Ye v Minister of Immigration* [2009] NZSC 76, [2010] 1 NZLR 104.

158 *Ye v Minister of Immigration* [2008] Trans 53 at 180–182.

159 Knight, above n 2, at 389–401. See also Sian Elias "Administrative Law For 'Living People'" (2009) 68 CLJ 47 at 65–66. In a recent article, constitutional scholar Philip Joseph took this suspicion of formalism to its logical extreme and advocated for the abandonment of the unreasonableness head of review altogether: Philip A Joseph "Exploratory Questions in Administrative Law" (2012) 25 NZULR 73.

reasonable".[160] Elsewhere, he articulated further the view that the discipline of administrative law did not "lend itself well to elaboration of principles." In his view:[161]

> … statutory interpretation and the judicial attitude of mind are basically, in most instances, the governing factors. The crunch cases are not decided by textbook principles; they are exercises in line-drawing.

These themes are explored more fully (and ably) by others.[162] My point here is simply to highlight the implications of this anti-formalist strand of New Zealand jurisprudence for the adoption (or non-adoption) of proportionality review under the Bill of Rights Act. Proportionality analysis is, after all, at the formalist end of the substantive review spectrum. Indeed, arguably the whole point of proportionality analysis is to encourage judges (as well as, potentially, administrators themselves)[163] to engage in a more formal justificatory process through which they weigh more explicitly the benefits and detriments of the rights-limiting measure.

Further, the inherent formalism of proportionality analysis is accentuated in the New Zealand context by the fact that New Zealand judges generally associate proportionality inquiry with one of the most structured versions of it that is available – the *Oakes* test.[164] As noted above, *Oakes* mandates a four-pronged inquiry, in which each step of the justificatory process is treated as a knockout blow rather than as an element in a process of overall evaluation. The test was formulated by the Supreme Court of Canada for the purpose of assessing legislative consistency with the Canadian Charter. I have suggested elsewhere that the test is not always well suited to the scrutiny of administrative decision-making[165] – a point that was also made by the Supreme Court of Canada in the *Doré* case.[166] For example, the necessity limb of the *Oakes* test embodies the important idea that even a legitimate reason for limiting a right should not be used to justify an unnecessarily broad restriction. In practice, though, it is often difficult, if not impossible, to articulate why a decision to

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160 Robin Cooke "The Struggle for Simplicity in Administrative Law" in Michael Taggart (ed) *Judicial Review of Administrative Action in the 1980s: Problems and Prospects* (Oxford University Press, Auckland, 1986) 1 at 5 and 14.

161 Robin Cooke "Has Administrative Law Gone too Far?" (a paper presented to the International Bar Association, 25th Biennial Conference, held in October 1994, Melbourne, Australia) 4 as cited in Taggart "Proportionality, Deference, Wednesbury", above n 1, at 474.

162 Taggart "Proportionality, Deference, Wednesbury", above n 1, at 474–476; and Knight, above n 2, at 399–411.

163 This latter suggestion is controversial: see for example Thomas Poole "Of headscarves and heresies: the *Denbigh High School* case and public authority decision-making under the Human Rights Act" [2005] PL 685.

164 *R v Oakes*, above n 9.

165 Geiringer and Price, above n 18, at 313–314.

166 *Doré v Barreau du Québec*, above n 117, at [36]–[39].

exercise an administrative discretion in all the circumstances impairs a right "no more than is reasonably necessary".[167] In proposing a rather differently worded test for inclusion in the Victorian Charter, the Victorian Human Rights Consultation Committee noted that they had received feedback from New Zealand practitioners that the New Zealand provision: "can be difficult to interpret and apply on a day-to-day basis".[168]

Although the *Oakes* framework is not the only vision of proportionality found in the New Zealand case law,[169] it is undoubtedly the dominant one.[170] The irony, therefore, is that whereas New Zealand judges tend to associate proportionality with the most rigid and structured version of proportionality analysis that is available, that is the version that is most in tension with New Zealand's contextualist administrative law culture. Arguably, it is the formalistic *Oakes* version of proportionality, rather than proportionality inquiry per se, that the Supreme Court of Canada rejected as inapposite to administrative decision-making in the *Doré* case.[171]

In sum, the resistance of New Zealand judges to proportionality review may be fed by a number of contextual factors. It may in part be explained by the vintage of the instrument, as well as the lack of any concerted efforts at the time of its enactment to re-orient judges to its potentially transformative effects. But it may also be explained by a tension between the formalistic nature of proportionality analysis and the contextualist orientation of New Zealand judges. This tension is exacerbated by the fact that New Zealand judges associate proportionality inquiry with the *Oakes* test – a framework which is at the more structured end of the proportionality spectrum and which is arguably inapposite to administrative decision-making.

VI CONCLUSION

This article has set out to explore two key propositions. The first is that, as a matter of fact, New Zealand judges have rarely treated the Bill of Rights Act as an invitation to engage in proportionality review of administrative action. The second is that there may be special sources of resistance to proportionality review deriving both from the text of the New Zealand instrument and the wider context in which it was enacted and is applied.

Both of these propositions are explanatory rather than normative. In particular, identification of the sources of resistance to proportionality review should not be treated as determinative of whether proportionality review ought to be embraced. On the other hand, nor can local context and culture be ignored in that ultimate normative inquiry.

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167 See Geiringer and Price, above n 18, at 314.

168 Human Rights Consultation Committee, above n 107, at 47.

169 See the authorities cited at above n 12.

170 See *Moonen*, above n 7; and *Hansen*, above n 7.

171 *Doré v Barreau du Québec*, above n 117, at [55]–[57].

A second reason why attention to the sources of resistance to proportionality review is important is that, as a practical matter, advocates of proportionality review need to be aware of the special challenges that they face in making out a case for it in the New Zealand environment. If nothing else, identification of these sources of resistance to proportionality review may generate insights as to how best to articulate the case in its favour. One of the most obvious of these insights is that, within the spectrum of possible approaches to proportionality inquiry, highly structured and formalistic approaches are less likely to gain traction in the New Zealand administrative law context than softer ones. This suggests that the proportionality framework developed by the Canadian Supreme Court in *R v Oakes* may well be particularly unhelpful in this context.