SETTLING THE APPROACH TO SECTION 5 OF THE BILL OF RIGHTS IN ADMINISTRATIVE LAW: JUSTIFICATION, RESTRAINT AND VARIABILITY

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One of the more unsettled questions at the intersection of the New Zealand Bill of Rights Act 1990 (the Bill of Rights) and administrative law concerns the relationship between ss 5 (rights contained in the Bill of Rights are subject only to reasonable limits that can be demonstrably justified) and 6 (enactments to be given, where possible, a rights-consistent meaning) of the Act. This article examines recent case law concerned with the application of s 5 in an administrative law context, including challenges both to delegated legislation and exercises of discretion. It finds that the Hansen approach, including its direction as to the centrality of s 5, is available in administrative law cases, and further charts three possible variations to the approach: requiring the decision-maker to be satisfied that any limitation may be demonstrably justified, examining only the empowering provision rather than exercise of the discretion for rights consistency, and framing the s 5 justification analysis as judicial review on reasonableness grounds. While there is much to be said for the former variation, it is argued the latter two variations are not preferred.

I INTRODUCTION

Are administrative decisions and delegated legislation that impose justified limits on rights lawful by virtue of the justification? More than 30 years after the enactment of the New Zealand Bill of Rights Act 1990 (the Bill of Rights), the answer to this question about the role of s 5 still appears unsettled.[1] For instance, the Court of Appeal considering a challenge to the legality of pandemic

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1 Janet McLean "The Impact of the Bill of Rights on Administrative Law Revisited: Rights, Utility, and Administration" [2008] NZ L Rev 377; Claudia Geiringer "Sources of Resistance to Proportionality Review

lockdown orders in *Borrowdale* had to dispose of an argument that s 6 of the Bill of Rights called for a narrow interpretation of the empowering provisions, despite a concession that the limits on the relevant rights were justified in terms of s 5.[2] The Court dismissed that argument: according to the approach established in *Hansen*,[3] justified limits are not inconsistent with the Bill of Rights, and hence s 6 cannot be used to avoid them.[4] But the fact that the argument was made illustrates the uncertainty. Other cases exhibit a bewildering array of different approaches, not always very clearly articulated.[5]

Taking another look at the developing case law, my purpose in this article is twofold. First, I hope to promote clarity in this area by identifying the range of distinct approaches found in the cases. Secondly, I will offer some evaluative thoughts on the extent to which each of them can be defended.

To summarise my criteria for evaluation, a good set of approaches needs to ensure that there is demonstrable justification for limits on rights, and that where limits are justified, they are respected.[6] It needs to strike an appropriate balance between judicial responsibility to protect rights and judicial restraint, and take appropriate account of the variability of context.[7]

The picture emerging from the cases can be summarised in three points. First, the approach to s 5 that was established in *Hansen* is appropriate, and is at long last emerging as common, in at least some types of cases. These include cases where the challenge is conceived as concerning the existence and scope of powers, and challenges to delegated legislation. Secondly, an appropriately modified form of this approach is emerging in some cases, particularly in challenges to exercises of discretion in individual cases. On this approach, decision-makers must satisfy themselves that a limit is justified,

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of Administrative Power Under the New Zealand Bill of Rights Act" (2013) 11 NZJPIL 123; Hanna Wilberg "The Bill of Rights in Administrative Law Cases: Taking Stock and Suggesting Some Reassessment" (2013) 25 NZULR 866; Claudia Geiringer "Process and Outcome in Judicial Review of Public Authority Compatibility with Human Rights: A Comparative Perspective" in Hanna Wilberg and Mark Elliott (eds) *The Scope and Intensity of Substantive Review: Traversing Taggart's Rainbow* (Hart, Oxford, 2015) 329 at 357–360; and MB Rodriguez Ferrere "The New Zealand Bill of Rights Act 1990 and Administrative Law: A History of Confusion and Inertia" [2021] NZ L Rev 71.

2 *Borrowdale v Director-General of Health* [2021] NZCA 520, [2022] 2 NZLR 356 [*Borrowdale* (CA)] at [133]. The argument is set out more explicitly in the High Court's decision: *Borrowdale v Director-General of Health* [2020] NZHC 2090, [2020] 2 NZLR 864 [*Borrowdale* (HC)] at [90]–[91].

3 *Hansen v R* [2007] NZSC 7, [2007] 3 NZLR 1 [*Hansen*].

4 *Borrowdale* (CA), above n 2, at [135]–[141]. See also *Borrowdale* (HC), above n 2, at [92]–[97].

5 Most recently surveyed by Rodriguez Ferrere, above n 1.

6 See further below, pt IV.A.

7 The need for an approach with these features was identified by McLean, above n 1. On restraint, see further below, pt I.C.

and courts will scrutinise the justification with varying levels of deference. Thirdly, there are two further variations that are potentially problematic.

The remainder of this introduction outlines the problem about the approach to s 5 in administrative law.

A Outline of Issues about the Bill of Rights

The issues surrounding s 5 are among three main sets of issues about the approach to the Bill of Rights. The other two concern ss 3[8] and 6.[9] Most unsettled, however, are the issues around s 5, which are the subject of this article.

There are three related, but distinct issues about s 5 in administrative law. These concern the test to be adopted for determining the justification for limits, the role of courts in determining s 5 justification, and the role that s 5 justified limits play in the overall analysis and particularly vis-a-vis the s 6 interpretive direction. The third issue is the most unsettled, and is the focus of this article.

B The Hansen *Approach to the Section 5 Issues*

The usual approach to all three s 5 issues is established by *Hansen*,[10] a criminal law case. This essentially corresponds to an approach proposed for administrative law cases by Janet McLean, Paul Rishworth and Michael Taggart early on.[11] In brief,[12] courts must establish whether a limit on a right is justified in terms of s 5, applying a proportionality test with an appropriate degree of deference. Justified limits are lawful and no further analysis is required. If a limit is unjustified, the interpretive direction in s 6 comes into play. An unjustified limit is unlawful if pursuant to s 6, the empowering provision can be given a rights-consistent meaning that does not authorise this limit. If the

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8 This was among the issues in *Moncrief-Spittle v Regional Facilities Auckland Ltd* [2021] NZCA 142, [2021] 2 NZLR 795. The Supreme Court's decision on appeal is pending, with leave to appeal granted in August 2021 (*Moncrief-Spittle v Regional Facilities Auckland Ltd* [2021] NZSC 94), and the appeal being heard on 22 February 2022.

9 The Supreme Court's latest decision on this is *Fitzgerald v R* [2021] NZSC 131, [2021] 1 NZLR 551. *D (SC 31/2019) v New Zealand Police* [2021] NZSC 2, [2021] 1 NZLR 213 [*D v Police*] also concerned rights-consistent interpretation, but the majority on this issue avoided invoking the New Zealand Bill of Rights Act 1990 (the Bill of Rights) for this. For discussion, see Hanna Wilberg "Legislators' Understanding as a Constraint on Interpretive Presumptions in Aotearoa New Zealand" in Matthias Klatt (ed) *Constitutionally Conforming Interpretation: Comparative Perspectives* (Hart, Oxford, 2022) (forthcoming).

10 *Hansen*, above n 3.

11 Janet McLean, Paul Rishworth and Michael Taggart "The Impact of the New Zealand Bill of Rights on Administrative Law" in *The New Zealand Bill of Rights Act 1990: Papers presented at seminars held by the Legal Research Foundation at Auckland on 24 August 1992 and Wellington on 25 August 1992* (Auckland, Legal Research Foundation, 1992) 62.

12 For detail and references, see pt IV.

empowering provision cannot be given such a rights-consistent meaning, then an unjustified limit prevails by virtue of s 4.

C *The Constitutional Tension Affecting the Approach to Section 5 in Administrative Law Cases*

However, the courts have appeared distinctly uncomfortable with applying s 5 according to this approach in administrative law challenges to exercises of discretion, as Claudia Geiringer has noted.[13] The approach to s 5 in criminal law cases may not be an appropriate guide to the approach to be adopted in that context. In criminal law, courts exercise primary jurisdiction. Even where criminal appeals are limited to questions of law, it would seem that appellate courts are ready to examine the evidence closely and will intervene relatively readily on the basis that the evidence was not capable of satisfying the relevant legal test.[14]

Administrative law, by contrast, is a more confined supervisory jurisdiction: that goes both for judicial review and for limited appeals (especially appeals on questions of law) from the exercise of administrative discretion. The constitutional limits on the court's role flow from the separation of powers, and from Parliament's decision to entrust powers to the primary decision-makers. Those limits, and the standard of review that is appropriate for maintaining them, are central questions in administrative law. The approach to s 5 has to take account of that.[15] Judicial scrutiny of administrative exercises of discretion on s 5 grounds may be seen as straying into merits review to an impermissible extent.

On the other hand, that argument for restraint is in tension with what many would see as a key benefit of having a Bill of Rights: empowering the independent courts to protect the fundamental rights enshrined in the Bill of Rights against abuses of public power. That too is a Parliamentary decision: entrusting courts with that power. Furthermore, even if judicial restraint is still appropriate, the Bill of Rights certainly requires decision-makers themselves to ensure that limits they impose on rights are demonstrably justified.[16]

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13 See Geiringer "Sources of Resistance to Proportionality", above n 1, at 131–138.

14 See for example *Brooker v Police* [2007] NZSC 30, [2007] 3 NZLR 91 at [70] and [96]. This was an appeal on a question of law (a point not mentioned by the Supreme Court): see *R v Brooker* [2004] NZAR 680 (CA) at [12]; and ss 144 and 144A of the Summary Proceedings Act 1957.

15 For extended discussion, see McLean "The Impact of the Bill of Rights", above n 1; Geiringer "Sources of Resistance to Proportionality", above n 1; and Wilberg "The Bill of Rights in Administrative Law", above n 1.

16 In other words, the s 5 requirement of demonstrable justification is a substantive constraint on the exercise of public powers, even if there are limits to judicial scrutiny in this regard: see Geiringer "Sources of Resistance", above n 1, at 133 and 139–143; and for an explanation of the distinction, see at 128–129.

The point about judicial responsibility for rights can be seen as the foundation for the *Hansen*-consistent approach proposed early on by commentators,[17] while the various divergent approaches adopted by the courts often tend to reflect the need for judicial restraint. This tension, therefore, explains much of the uncertainty in this area.

D Outline of the Article

The role of s 5 vis-à-vis s 6 is the most contested of the three aspects of the *Hansen* approach to s 5. The focus in this article, therefore, is on how this aspect works in administrative law cases.

However, courts in administrative law cases also depart from the other two aspects of the *Hansen* approach to s 5: the proportionality test for applying s 5, and the need for some judicial deference or restraint. They often say that they are departing from the *Hansen* approach without distinguishing between the three components of that approach.[18] It is important to be clear which component is being modified, before deciding whether a departure from that component is appropriate. To help clarify that point, I, therefore, start in parts II and III by outlining the other two aspects of the *Hansen* approach and the extent to which these have been doubted or varied in administrative law cases.

Parts IV–VI then explain the *Hansen* approach to the role of s 5 vis-à-vis s 6 and explore in detail whether and to what extent that approach has been followed, varied or abandoned in administrative law cases.

II THE TEST FOR APPLYING SECTION 5

A The Hansen *Approach: Proportionality Test*

The first component of the *Hansen* approach to s 5 is the test for applying s 5. *Hansen* confirms that the proportionality test known as the *Oakes* test is to be used to determine whether a limit on a right is demonstrably justified in a free and democratic society, as required by s 5.[19] This test requires that the limit serves a legitimate and sufficiently important objective, is rationally connected to that objective, impairs the right no more than is reasonably necessary for that purpose, and is proportional to the importance of the objective.[20]

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17 McLean, Rishworth and Taggart, above n 11.

18 See for example *D v Police*, above n 9, at [75], [101] and [259] fn 361.

19 *Hansen*, above n 3, at [64], [79] and [103]–[104], adopting the test set out in *R v Oakes* [1986] 1 SCR 103.

20 The "reasonable" qualification to the minimal impairment step does not appear in *Oakes*, but is adopted in three of the *Hansen* judgments, at [79] per Blanchard J, [104] and [126] per Tipping J, and [279] per Anderson J; and by the plurality in *New Health New Zealand Inc v South Taranaki District Council* [2018] NZSC 59, [2018] 1 NZLR 948 at [132] and [134].

B Variations in Administrative Law Cases

Often, when courts talk about departing from the *Hansen* approach, they are referring to the proportionality test for s 5. There is now significant support in the administrative law cases for an option of departing from the structured *Oakes* proportionality test in favour of more general balancing of the right against competing considerations.[21]

In *Taylor*, the Court of Appeal considered that a balancing approach was appropriate in the context of requests for interviews with prisoners,[22] although it was "attracted to the view" that some form of proportionality analysis was also required. It was unnecessary to decide whether a full proportionality analysis was always required.[23]

D v Police is also relevant here, although it was not an administrative law case. One aspect of the case (separate from the widely noted re-interpretation of a retrospectivity provision) concerned the proper approach to the exercise of a judicial discretion whether to order an offender to be added to a child sex offender register. In reliance on Canadian authority concerning the approach to the Charter of Rights in the administrative law context,[24] the Supreme Court concluded that a simpler balancing test was appropriate for this.[25]

However, the simpler balancing test variation does not apply in all cases. For instance, the Supreme Court in *New Health* applied the full proportionality test.[26] It remains uncertain how to decide which approach is appropriate when and why. We will return to this question in part IV.

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21 See for example *Taylor v Chief Executive of Department of Corrections* [2015] NZCA 477, [2015] NZAR 1648 [*Taylor*] at [84]; *Chief Executive of the Department of Corrections v Smith* [2020] NZCA 675 [*Smith*, (CA) 2020] at [10], [13] and [43]; *Bolton v Chief Executive of Ministry of Business, Innovation and Employment* [2021] NZHC 2897, [2021] 3 NZLR 425 [*Bolton v MBIE*] at [60]. For more general claims that proportionality is a broadly guiding framework rather than a rigid test, see for example *NZDSOS Inc v Minister for COVID-19 Response* [2022] NZHC 716 [*NZDSOS Inc*] at [68]–[69]. Cases that frame the enquiry in terms of the ground of unreasonableness may also be taken as supporting a general balancing approach: see below, pt VI.C.

22 *Taylor*, above n 21, at [72] and [84].

23 At [84].

24 *Doré v Barreau du Québec* 2012 SCC 12, [2012] 1 SCR 395.

25 *D v Police*, above n 9, at [100]–[101], [108] and [129].

26 *New Health New Zealand Inc v South Taranaki District Council*, above n 20, at [112].

III THE ROLE OF THE COURTS IN RELATION TO SECTION 5

A The Hansen *Approach: Deference to Parliament*

The next component of the *Hansen* approach to s 5 is that it recognises the need for some judicial deference.[27] Determining whether a limit is justified in terms of s 5 involves judgment in weighing up competing and often incommensurable values and interests. Even in the criminal context, the *Hansen* Court considered that this is not a question on which courts should simply substitute their own view: a court's function in this regard is rather one of review. The deference or latitude Tipping J had in mind was owed to Parliament.

This approach has been affirmed in the administrative law context by the Supreme Court in *New Health*.[28] The Court considered it right "not to attempt a definitive ruling on the scientific and political issues" surrounding fluoridation of drinking water.[29] Since the challenge in that case was to the existence of the power, the deference was again to Parliament.[30]

B Deference to Administrative Decision-Makers?

In administrative law, more often, the s 5 issue concerns the justification for a rights-infringing exercise of administrative discretion. Deference in such cases is due (at least in part)[31] to the executive or administrative decision-maker. That can be seen in cases such as *Atkinson*[32] and *Taylor*.[33]

There are, however, some cases that reject deference in this context.[34] Courts sometimes prefer different language, such as latitude, respect or weight.[35] Whether the difference goes deeper than the choice of words is open to debate.

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27 *Hansen*, above n 3, at [105]–[119].

28 *New Health New Zealand Inc v South Taranaki District Council*, above n 20, at [114] and [121]–[122].

29 At [122].

30 Similarly, see *R (SC) v Secretary of State for Work and Pensions* [2021] UKSC 26, [2022] AC 223, where the claim was for a declaration of incompatibility; the discussion of deference is at [199] and [208]–[209].

31 See below, pt VI.B, for the possibility that both the legislation and the exercise of discretion pursuant to it may fall to be scrutinised for Bill of Rights compliance.

32 *Ministry of Health v Atkinson* [2012] NZCA 184, [2012] 3 NZLR 456 at [172]–[174].

33 *Taylor*, above n 21, at [87]–[91].

34 For recent examples, see *Four Aviation Security Service Employees v Minister of COVID-19 Response* [2021] NZHC 3012, [2022] 2 NZLR 26 at [80]–[85]; *Yardley v Minister for Workplace Relations and Safety* [2022] NZHC 291 [*Yardley*] at [62]–[63] (under appeal); and *NZDSOS Inc*, above n 21, at [62]. *Grounded Kiwis Group Inc v Minister of Health* [2022] NZHC 832 [*Grounded Kiwis*] at [172]–[175] is more ambivalent on the point.

35 See for example *Yardley*, above n 34, at [63]; and *Grounded Kiwis*, above n 34, at [173]. See also *Child Poverty Action Group Inc v Attorney-General* [2013] NZCA 402, [2013] 3 NZLR 729 at [92] (this was a

Deference certainly should not stop courts from discharging their responsibility to protect rights by scrutinising exercises of power that impact on those rights.[36] Courts are the independent authority charged with protecting individuals against abuse of public power.[37] The question is whether a degree of deference to primary decision-makers is nonetheless appropriate.

Against according any deference or weight to the primary decision-maker, it can be argued that s 5 sets out a legal test, and questions of law in our system of administrative law are for the courts to determine.[38] To put it slightly differently, by enacting a Bill of Rights, Parliament has entrusted application of that test to the courts.[39] In *Kim*, the Supreme Court found it unnecessary to rule on this argument, but cast doubt on it.[40]

The better view is that our appellate courts have been right to recognise the need for some degree of deference to administrative decision-makers. Section 5 justification by reference to proportionality is not a pure legal test.[41] Its application involves evaluation of the balance between competing values and concerns, and often these are incommensurable. It also calls for risk assessments in the face of uncertainty. On that basis, the courts' supervisory jurisdiction cannot extend to courts substituting their own judgment.[42] That would amount to full-blown merits review, which is not permissible in judicial review. First, the courts are not authorised by Parliament to determine the merits of the

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challenge to the legislation itself, seeking a declaration of inconsistency, but deference was discussed in relation to either Parliament or administrative decision-makers). This practice originated in the United Kingdom: see *Huang v Secretary of State for the Home Department* [2007] UKHL 11, [2007] 2 AC 167 at [16]; and *R (Lord Carlile) v Secretary of State for the Home Department* [2014] UKSC 60, [2015] AC 945 [*Carlile*] at [22].

36 See *Carlile*, above n 35, at [48], [57], [67], [87] and [150]–[159]; and *Child Poverty Action Group Inc v Attorney-General*, above n 35, at [92].

37 See also TRS Allan "Human Rights and Judicial Review: A Critique of 'Due Deference'" (2006) 65 CLJ 671 at 689; and BV Harris "Judicial Review, Justiciability and the Prerogative of Mercy" (2003) 62 CLJ 631 at 637–638.

38 See for example *Four Aviation Security Service Employees v Minister of COVID-19 Response*, above n 34, at [79] and [82]–[83]. The argument is discussed in Grant Huscroft "Reasonable Limits on Rights" in Paul Rishworth and others *The New Zealand Bill of Rights* (Oxford University Press, Melbourne, 2003) 168 at 192.

39 See for example *Carlile*, above n 35, at [150], [152], [159] per Lord Kerr SCJ dissenting.

40 *Minister of Justice v Kim* [2021] NZSC 57, [2021] 1 NZLR 338 at [42] and [49].

41 Huscroft, above n 38, at 194.

42 See *Taylor*, above n 21, at [91]. Even outside the context of rights, courts accord some deference to decision-makers on the application of legal tests where the test leaves room for judgment in its application: see *R v Monopolies and Mergers Commission ex parte South Yorkshire Transport Ltd* [1993] 1 WLR 23 (HL) [*South Yorkshire Transport*]; and *Vodafone New Zealand Ltd v Telecom New Zealand Ltd* [2011] NZSC 138, [2012] 3 NZLR 153 at [50]–[58].

question that was addressed by the primary decision-maker. Secondly, the value judgments and risk assessments involved in applying s 5 call for democratic accountability (direct or indirect) which the courts lack, and for institutional capacity which the decision-maker often has to a greater extent.[43]

Some recent High Court decisions on pandemic measures have rejected deference specifically for Bill of Rights challenges to delegated legislation. They have argued that these do not involve review of a discretionary decision, but rather a pure question of law as to whether the measure complies with the Bill of Rights.[44] This argument is misconceived. I will return to whether review of discretion is involved. Suffice it to say for present purposes that it is difficult to see how there can be deference to Parliament's judgment concerning the justification for primary legislation, as per *Hansen*, but not deference to ministers' judgment concerning the justification for delegated legislation.

The more difficult issue is how much deference is due, and this must depend on the context.[45] For instance, greater deference is due where the decision-maker has better access to relevant special expertise or where democratic legitimacy is most important – such as on matters of social policy[46] or national security.[47] Less deference is due where the matter is closer to the court's own expertise, such as the reasonableness of search and seizure and the use of the evidence obtained.[48]

This discussion of deference is also relevant by way of background to the administrative law approach to the other two components of the *Hansen* approach. Deference as usually understood takes the form of according the decision-maker some latitude: recognising that there is a range of reasonable and hence permissible views on what limits can be justified and why. That is the form of deference discussed in this part. However, some of the administrative law variations on the other two

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43 See generally Michael Taggart "Proportionality, Deference, *Wednesbury*" [2008] NZ L Rev 423 at 457; Huscroft, above n 38, at 192–194; Andrew Butler and Petra Butler *The New Zealand Bill of Rights Act: A Commentary* (2nd ed, LexisNexis, Wellington, 2015) at [6.9.21]–[6.9.28]; Harris, above n 37; A Kavanagh "Defending Deference in Public Law and Constitutional Theory" (2010) 126 LQR 222; and *Carlile*, above n 35, at [20] and [27]–[34] per Lord Sumption SCJ, at [68] per Lord Neuberger P and at [99] per Baroness Hale DP.

44 *Four Aviation Security Service Employees v Minister of COVID-19 Response*, above n 34, at [79], [82]–[83], and see at [38]–[43]; *Yardley*, above n 34, at [62]–[63]; and *NZDSOS Inc*, above n 21, at [57]–[62].

45 *R (Daly) v Secretary of State for the Home Department* [2001] UKHL 26, [2001] 2 AC 532 at [28]; and *Taylor*, above n 21, at [89]. For a much-quoted list of factors, see the dissenting judgment of Laws LJ in *International Transport Roth GmbH v Secretary of State for the Home Department* [2002] EWCA Civ 158, [2003] QB 728 at [83]–[84].

46 See for example *Ministry of Health v Atkinson*, above n 32.

47 See for example *Carlile*, above n 35.

48 For example, in *Dotcom v Attorney-General* [2014] NZSC 199, [2015] 1 NZLR 745 at [199]–[201], there was no discussion of deference in this regard.

components of the *Hansen* approach can be seen as involving different means for limiting or excluding the judicial role of second-guessing administrative decision-makers' views on justification.

Finally, a point related to deference should be mentioned briefly. Courts also accept that both Parliament and administrative decision-makers often must proceed on the basis of less than perfect evidence. Courts do place the burden of justification on the Crown.[49] They require not only legitimate and sufficient reasons for limiting rights, but also evidence that the problem addressed by the limit exists; and evidence of the chosen measure's effectiveness in addressing that problem, compared to the effectiveness of available alternatives.[50] However, they accept limits to this requirement for evidence, recognising that it is in the nature of public policy questions that they often have to be made in the absence of conclusive evidence.[51] *Atkinson* held that decision-makers are justified in proceeding on the basis of applying "common sense to what is known, even though what is known may be deficient from a scientific point of view".[52] According to *New Health*, the courts will "undertake a broad assessment" to determine whether "the evidence provides a proper basis" for the justification offered.[53] This has also been applied in challenges to measures to fight the COVID-19 pandemic.[54] The "precautionary principle" has been invoked in this context.[55]

IV THE ROLE OF SECTION 5: THE HANSEN *APPROACH*

Let us finally turn to the most contested of the three aspects of the *Hansen* approach to s 5: the role of s 5 justification vis-à-vis s 6. The remainder of this article is devoted to exploring this issue in detail. This part sets out the *Hansen* approach to this issue, and possible doubts and qualifications. Part V considers whether this approach can apply in administrative law at all: for a long time, there was no authority for this, but that gap has now been filled. Part VI finally considers three variations on the *Hansen* approach to the central role of s 5 in administrative law.

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49 *Ministry of Health v Atkinson*, above n 32, at [163]; *Yardley*, above n 34, at [63] and [65]; *NZDSOS Inc*, above n 21, at [85]; and *R (Aguilar Quila) v Secretary of State for the Home Department* [2011] UKSC 45, [2012] 1 AC 621 [*Aguilar Quila*] at [44].

50 See *New Health New Zealand Inc v South Taranaki District Council*, above n 20, at [123]–[143]; *Yardley*, above n 34, at [67]–[97]; *NZDSOS Inc*, above n 21, at [83] and [94]–[129]; and *Aguilar Quila*, above n 49, at [47]–[58] and [74]–[77].

51 *Ministry of Health v Atkinson*, above n 32, at [165].

52 At [166], adopting the Canadian approach in *RJR-MacDonald Inc v Canada* [1995] 3 SCR 199 at [137].

53 *New Health New Zealand Inc v South Taranaki District Council*, above n 20, at [122], implicitly adopting, at [118], the respondents' argument based on *Ministry of Health v Atkinson*.

54 *GF v Minister of COVID-19 Response* [2021] NZHC 2526, [2022] 2 NZLR 1 at [84]–[86].

55 *Four Aviation Security Service Employees v Minister of COVID-19 Response*, above n 34, at [110]–[112]; *Yardley*, above n 34, at [94]–[95]; and *NZDSOS Inc*, above n 21, at [84]–[92]. See also *Grounded Kiwis*, above n 34, at [174]; and (in a different context) *Carlile*, above n 35, at [51] per Lord Sumption SCJ.

A The Hansen *Approach to the Role of Section 5*

The third component of the *Hansen* approach establishes the central role of s 5 in the overall Bill of Rights analysis, and in particular vis-à-vis s 6. According to *Hansen*, where a limit is demonstrably justified in terms of s 5, that is the end of the enquiry. There is no reason to read down the empowering provision pursuant to s 6 to avoid that limit: a justified limit is consistent with the Bill of Rights.[56] Where s 6 *is* reached, the rights-consistent meaning that it requires empowering provisions to be given, if available, is one that accommodates the right only subject to any limits that are demonstrably justified in terms of s 5. This was expressly affirmed by the Chief Justice in *Fitzgerald* in a footnote.[57]

The central role of s 5 reflects two fundamental points. The first is that the Bill of Rights protects rights only to the extent that is reasonable in the circumstances.[58] "Limits can be fundamental too",[59] because "rights are part of a social order in which they must accommodate the rights of others and the legitimate interests of society as a whole".[60] If the pandemic has taught us one thing, this must be it.[61] The second point, conversely, is that limits on rights must be demonstrably justified as reasonable. The point of the Bill of Rights is to accord special priority to rights, and this is achieved by the requirement of demonstrable justification.[62]

B Tipping J's Optional Six-Step Methodology

The point about the central role of s 5 was put in *Hansen* in terms of a methodology involving a sequence of steps, in which s 5 comes before s 6. Tipping J's six-step version is most commonly cited.[63] Pre-occupation with that six-step test has sometimes obscured the real point about the central role of s 5, as I have argued elsewhere.[64] The position was very helpfully clarified by Palmer J in

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56 *Hansen*, above n 3, at [58]–[59], [89]–[91] and [178]–[192].

57 *Fitzgerald v R*, above n 9, at [48] fn 70: "Of course, an interpretation that recognises and gives effect to reasonable limitations upon a right is a rights-consistent interpretation."

58 See Paul Rishworth "Interpreting and Invalidating Enactments Under a Bill of Rights: Three Enquiries in Comparative Perspective" in Rick Bigwood (ed) *The Statute: Making and Meaning* (LexisNexis, Wellington, 2004) 251 at 277; and *Hansen*, above n 3, at [186]–[187] and [190] per McGrath J.

59 Butler and Butler, above n 43, heading above [6.9.8], and see throughout that chapter.

60 *Hansen*, above n 3, at [186] per McGrath J.

61 See for example *Borrowdale* (CA), above n 2, at [162]; *Four Aviation Security Service Employees v Minister of COVID-19 Response*, above n 34, at [124]; *NZDSOS Inc*, above n 21, at [70]–[81], [125]–[128], [132]–[133] and [143]; and *Grounded Kiwis*, above n 34, at [320], [361] and [407].

62 For the onus of justification, see *Ministry of Health v Atkinson*, above n 32, at [163].

63 *Hansen*, above n 3, at [92]. The other statements of the test have fewer steps, but are largely the same in substance: see at [60] per Blanchard J and [192] per McGrath J.

64 See Hanna Wilberg "Resisting the siren song of the Hansen sequence: The state of Supreme Court authority on the sections 5 and 6 conundrum" (2015) 26 PLR 39.

Four Midwives: while the six-step test is optional, what is *not* optional is the substantive point about the relationship between ss 5 and 6, as set out in the previous section.[65]

C *There Are Qualifications, but They Are Consistent with the Fundamental Points*

There are two qualifications to the central role of s 5. By coincidence, these qualifications have featured heavily in the administrative law cases, as we will see.[66] However, these do not detract from the continued application of the *Hansen* approach, as the Court of Appeal explained in *Borrowdale*.[67] They are consistent with the fundamental points I have just noted about reasonable limits.

First, the formulation of some rights makes reasonable limits part of their definition, and this makes reference to s 5 redundant. One such "internally qualified" right is the s 21 right to be free from unreasonable search and seizure. The Supreme Court in *Cropp* (an administrative law case) confirmed that once a search has been found to be "unreasonable", there is no room left for s 5 justification.[68] In *Fitzgerald*, the Chief Justice noted that the same goes for "disproportionately" severe punishment in s 9.[69] While some would prefer to retain a role for s 5 even in these contexts,[70] what matters here is that this qualification does not detract from the fundamental point that rights are protected only to the extent that is reasonable.

The second qualification is that a small number of rights are considered absolute, thus leaving no role for s 5.[71] The clearest example is the s 9 right not to be tortured, as affirmed by the Supreme Court in *Fitzgerald*.[72] Perhaps that does qualify the fundamental proposition, but we could also say that there are simply no circumstances in which any limits on these rights are reasonable. Even if this

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65 *Four Midwives v Minister for COVID-19 Response* [2021] NZHC 3064, [2022] 2 NZLR 65 [*Four Midwives*] at [45]–[46], [50] and [52]. See also *NZDSOS Inc*, above n 21, at [22]–[23] and [57]–[64].

66 Part V.A below.

67 *Borrowdale* (CA), above n 2, at [137]–[141].

68 *Cropp v Judicial Committee* [2008] NZSC 46, [2008] 3 NZLR 774 at [33]. See also for example *Hamed v R* [2011] NZSC 101, [2012] 2 NZLR 305 at [162].

69 *Fitzgerald v R*, above n 9, at [78].

70 Butler and Butler, above n 43, at [6.5]–[6.6].

71 Which rights are absolute and which are subject to limits is often decided by reference to international instruments such as the International Covenant on Civil and Political Rights 999 UNTS 171 (opened for signature 16 December 1966, entered into force 23 March 1976), as these include specific limitation clauses in their statements of most rights, but state a few rights without such qualification. For this approach, see for example *Borrowdale* (CA), above n 2, at [107]–[108] and [141].

72 *Fitzgerald*, above n 9, at [38], [78], [160] and [241]. See also *Hansen*, above n 3, at [65] (obiter dictum of Blanchard J).

second point does qualify the fundamental proposition, this is very much an exception to the normal rule.

D Remaining Doubts about the Central Role

Leaving aside the above qualifications, the *Hansen* position on the central role of s 5 does remain subject to some uncertainty even outside of administrative law. There was a strong dissent on this point by Elias CJ,[73] which continues to be invoked on occasion.[74] Even the majority contemplated that this approach might not apply in all types of cases.[75]

However, as already noted, the better view is that only the six-step test may be varied, not the central role of s 5 (subject to the above qualifications).[76] *Borrowdale* tends to support this: the Court of Appeal contemplated s 5 not featuring at all only in cases involving the qualifications above.[77] The Supreme Court decision in *Fitzgerald* is consistent with *Borrowdale* in that regard: Winkelmann CJ expressly noted that s 5 was not at issue simply because the right in question was one of the rare absolute rights.[78] Her Honour also referred to s 6 as the starting point, but that comment concerned the relationship of the interpretive direction with s 4 and hence Parliamentary sovereignty, not the role of s 5.[79] As already noted, she also expressly accepted that "an interpretation that recognises and gives effect to reasonable limitations upon a right is a rights-consistent interpretation."[80]

The main recent source of doubt is the Supreme Court decision in *D v Police*. The Court held that *Hansen* did not apply in a challenge to retrospective imposition of a penalty,[81] but that is best understood as reflecting a prior finding that the case did not turn on the Bill of Rights at all.[82] The

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73 *Hansen*, above n 3, at [6]–[7] and [15]–[24].

74 See for example the plaintiff's unsuccessful argument in *Borrowdale* (CA), above n 2, at [133]; *Borrowdale* (HC), above n 2, at [90]–[91]; and *Four Midwives*, above n 65, at [40] (these are administrative law examples).

75 *Hansen*, above n 3, at [61] and [93]–[94], and also [192].

76 See Wilberg, above n 64. See also *Four Midwives*, above n 65, at [45]–[46], [50] and [52].

77 *Borrowdale* (CA), above n 2, at [137]–[141].

78 *Fitzgerald v R*, above n 9, at [43] and [47].

79 At [48] and fn 71.

80 At [48] fn 70.

81 *D v Police*, above n 9, at [75]. The Court also considered *Hansen* inapplicable on a separate issue concerning the exercise of a judicial discretion (and the case is cited for this proposition in *Fitzgerald v R*, above n 9, at [46] fn 66). But that is best read as meaning that the sequence of steps does not apply: see below n 112 and accompanying text.

82 The majority relied on the provision against retrospective punishment in s 6 of the Sentencing Act 2002, in preference to the Bill of Rights, because it read the Sentencing Act as providing stronger protection: *D v Police*, above n 9, at [54] and [75]. While Glazebrook J, dissenting, did apply the Bill of Rights and the *Hansen* approach, she found it unnecessary to analyse the application of s 5, because on her analysis, the

decision does, however, feature a surprising absence of any mention of the potential justification for the retrospective imposition of a penalty.[83] It thus contributes to the uncertainty.

V THE ROLE OF SECTION 5: ADMINISTRATIVE LAW AUTHORITY HAS FINALLY ARRIVED

The most unsettled question is whether and how the central role of s 5 applies in the context of administrative law challenges to exercises of discretion. At least, however, there is now clear authority that this approach is at least available in this context. This part sets out the earlier uncertainty and the recent confirmation.

A Long-Standing Uncertainty whether the Central Role of Section 5 Applies at All

For a long time there was much uncertainty whether the central role of s 5 applies at all in administrative law challenges to exercises of discretion.[84] On the one hand, most commentators always assumed that it did,[85] and United Kingdom courts have adopted an equivalent approach in administrative law cases without any debate.[86] The influential early account by McLean, Rishworth and Taggart expressly envisaged a role for s 5 that corresponded with the approach subsequently adopted in *Hansen*.[87]

On the other hand, there was authority apparently against s 5 having its central role in this context, and conversely a distinct lack of authority (at least at appellate level) to confirm this role.[88]

The authority apparently against this role for s 5 was *Moonen*, then the leading administrative law decision. It held that s 6 required other statutes to be given "such tenable meaning and application as

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provision in question was in any event not capable of a more rights-consistent interpretation, regardless of justification: at [251].

83 See Edward Willis "*D v New Zealand Police* [2021] NZSC 2: A comment on rights-consistent statutory interpretation" (2021) 32 PLR 190 at 193.

84 See Geiringer "Sources of Resistance to Proportionality", above n 1; McLean "The Impact of the Bill of Rights", above n 1; and Wilberg "The Bill of Rights in Administrative Law", above n 1.

85 As pointed out by Geiringer "Sources of Resistance to Proportionality", above n 1, at 129–130.

86 Lord Woolf and others *De Smith's Judicial Review* (8th ed, Sweet & Maxwell, London, 2018) at [11-073] simply state that "British courts now explicitly apply proportionality … under the [Human Rights Act] 1998, as a structured test to evaluate compatibility with Convention Rights". See for example *Aguilar Quila*, above n 49, at [45]–[77]. And see *ANS v ML (AP)* [2012] UKSC 30, 2013 SC (UKSC) 20 at [15] and [38]–[49] for a rare explicit statement that the interpretive obligation is not reached unless the ordinary meaning of a provision is incompatible, as determined by means of a proportionality enquiry.

87 McLean, Rishworth and Taggart, above n 11.

88 See McLean "The Impact of the Bill of Rights", above n 1 at 385 and 395–397; and Geiringer, "Sources of Resistance to Proportionality", above n 1, at 131–138.

constitutes the *least* possible limitation" on the rights, with no regard to whether a greater limit might be justified.[89] Even after *Hansen* had been decided, it was still possible to distinguish it and argue that *Moonen* represented the approach for administrative law cases.

The lack of appellate level authority in favour of the central role for s 5 was due partly to the scarcity of administrative law cases that invoked the Bill of Rights at all, and partly to a judicial reluctance to engage with s 5 in this context. For instance, courts have often side-stepped s 5 as a moot point in cases where the Bill of Rights complaint would fail even if the limit was unjustified, because the court was satisfied that there was no tenable more rights-consistent meaning that could be adopted pursuant to s 6.[90]

Furthermore, the lack of authority was also due to the happenstance that the few leading cases in this area all involved one of the two qualifications noted in part IV above.[91] *Zaoui* involved the right against torture,[92] one of the exceptional absolute rights. *Cropp*[93] and *Drew*[94] both concerned internally qualified rights,[95] which render recourse to s 5 redundant.[96]

This ongoing uncertainty explains some recent direct challenges to the central role of s 5. In some of the judicial review challenges to measures addressing the COVID-19 pandemic, the plaintiffs have argued that the empowering provisions should be given rights-consistent narrow meanings pursuant to s 6 regardless of any s 5 justification for the measures.[97] However, the courts dismissed those challenges. These cases are now among those that confirm the availability of the *Hansen* approach in the administrative law context.

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89 *Moonen v Film and Literature Board of Review* [2000] 2 NZLR 9 (CA) at [16] (emphasis added), and also at [17].

90 See for example *Mangawhai Ratepayers and Residents Assoc Inc v Kaipara District Council* [2015] NZCA 612, [2016] 2 NZLR 437 at [183]. For the same approach outside administrative law, see Glazebrook J dissenting in *D v Police*, above n 9, at [251].

91 See Wilberg "The Bill of Rights in Administrative Law", above n 1, at 872–876. See also McLean "The Impact of the Bill of Rights", above n 1, at 385–393.

92 *Zaoui v Attorney-General (No 2)* [2005] NZSC 38, [2006] 1 NZLR 289.

93 *Cropp v Judicial Committee*, above n 68.

94 *Drew v Attorney-General* [2002] 1 NZLR 58 (CA).

95 In *Cropp v Judicial Committee*, above n 68, it was the s 21 right against "unreasonable" search and seizure. In *Drew v Attorney-General*, above n 94, it was the s 27 right to natural justice, which is defined at common law in terms requiring a case-by-case balancing exercise.

96 As explained in *Borrowdale* (CA), above n 2, at [138]; and *Four Midwives*, above n 65, at [48].

97 *Borrowdale* (CA), above n 2, at [133]; *Borrowdale* (HC), above n 2, at [90]-[91]; and *Four Midwives*, above n 65, at [40].

B Recent Authority Confirming that the Central Role of Section 5 Is Available in Administrative Law

The Supreme Court in *New Health* confirmed that the *Hansen* approach for giving s 5 its central role is at least available in challenges to administrative discretion[98] – albeit this was obiter, as the Court was not asked to scrutinise the exercise of discretion in that case.[99]

As already noted, the central role of s 5 was also expressly affirmed in recent challenges to measures addressing the pandemic. The Court of Appeal in *Borrowdale* dismissed a challenge to the orders imposing the first pandemic lockdown. Several rights in the Bill of Rights were invoked to support a narrow reading of the empowering s 70 of the Health Act 1956. The Court held that the *Hansen* approach was appropriate in determining that issue[100] – albeit that s 5 justification was conceded and the Court, therefore, did not have to engage in a proportionality analysis.[101] The point was that since the limits on the rights were justified, there was no reason to read down the power pursuant to s 6. The attempt to side-step s 5 was dismissed.[102] A similar attempt was also dismissed in *Four Midwives*.[103]

Finally, several High Court challenges to orders imposing vaccination mandates during the pandemic have turned on s 5 justification. The orders were found to be justified limits on the right to refuse medical treatment in some contexts,[104] but were struck down as not justified by their stated purpose in another context.[105] A successful challenge to the lottery aspect of the managed isolation system also turned on s 5 justification, with the Court analysing each step of the proportionality test in detail.[106]

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98 *New Health New Zealand Inc v South Taranaki District Council*, above n 20, at [103]–[104], [109] and [175]–[176].

99 At [5], [111] fn 103 and [176]. Both majority judgments nevertheless considered that at least in some cases, s 5 justification does fall to be considered in relation to an exercise of discretion: for details, see below pt VI.B.

100 *Borrowdale* (CA), above n 2, at [141].

101 At [159]–[160] and [162].

102 For that attempt, see [133]. For the Court's position, see [135]–[141].

103 *Four Midwives*, above n 65, at [40]–[53]. The point is less clear in *Four Aviation Security Service Employees v Minister of COVID-19 Response*, above n 34. However, it seems that a supposedly *Hansen*-based argument dismissed in that case also involved an attempt to rely on s 6 while side-stepping s 5: at [39] and [41].

104 *GF v Minister of COVID-19 Response*, above n 54, at [75]–[94]; *Four Aviation Security Service Employees v Minister of COVID-19 Response*, above n 34, at [78]–[127]; and *NZDSOS*, above n 21, at [56]–[143].

105 *Yardley*, above n 34, at [58]–[106].

106 *Grounded Kiwis*, above n 34, at [251]–[429].

These cases should help to end the long-standing uncertainty on the availability of this approach. However, other administrative law cases have adopted variations on the *Hansen* approach to the role of s 5. The next part outlines the variations, noting the continuing uncertainty about how courts choose between the *Hansen* approach and the variations.

One notable point is that the authorities for the unqualified *Hansen* approach discussed in this part all concerned challenges to delegated legislation: none of them involved individual decisions.[107] This may again reflect the notion, encountered earlier,[108] that review of delegated legislation does not involve review of an exercise of discretion. That will also be addressed in the next part.

VI THE ROLE OF SECTION 5: THREE VARIATIONS ON HANSEN

While *New Health* confirms that the *Hansen* approach to the role of s 5 is available in administrative law challenges to exercise of discretion, it also maintains that alternative approaches remain available, without specifying when that is so.[109] As already noted, *Borrowdale* seems to take a narrow view of this: it contemplates s 5 not featuring at all only in cases involving rights that are not subject to s 5 because they are either absolute or internally qualified.[110] Other cases, however, exhibit a bewildering array of different approaches (not always very clearly articulated) in contexts where the *Borrowdale* explanation does not apply.[111]

One apparent variation can be disposed of quickly. Some cases do give s 5 its central role in this context, but say that the *Hansen* approach is not appropriate. What they appear to mean is that Tipping J's six-step approach is not appropriate. A notable example is the Supreme Court discussing the approach to the judicial discretion at issue in one part of *D v Police*.[112] As already noted, however, it

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107 This tendency was already noted by Geiringer "Sources of Resistance to Proportionality", above n 1, at 137–138. What has changed since then is that cases adopting the *Hansen* approach now include appellate level decisions. They were previously limited to the District Court and High Court level: at 138 fn 68.

108 See text at n 44, discussing *Four Aviation Security Service Employees v Minister of COVID-19 Response*, above n 34.

109 The Court in this case adopted the *Hansen* approach because counsel's submissions had been directed to it: *New Health New Zealand Inc v South Taranaki District Council*, above n 20, at [104]. But in a footnote, it pointedly listed all the passages in *Hansen* that left open alternative approaches: at [104] fn 94.

110 *Borrowdale* (CA), above n 2, at [138]–[139]. For discussion of absolute and internally qualified rights, see above, pt IV.C. See also *Four Midwives*, above n 65, at [48].

111 See Rodriguez Ferrere, above n 1.

112 *D v Police*, above n 9, at [101]. That passage clearly states that an exercise of the discretion is consistent with the Bill of Rights if the level of risk is sufficient to justify limiting the affected right. See also at [108] and [129]. A possible further example is *Four Aviation Security Service Employees v Minister of COVID-19 Response*, above n 34, at [40] and [55]–[57]. However, the better reading of that passage seems to be that the supposedly *Hansen*-based approach rejected by the Court involved by-passing s 5: at [39] and [43].

is possible to depart from the six-step approach without rejecting the substantive point about the central role of s 5; and this was helpfully clarified by the High Court in *Four Midwives*.[113]

At least three further variations on the *Hansen* approach to giving s 5 its central role can be identified. First and most notably, there is significant support for requiring the administrative decision-maker to have considered whether the limit on the right is justified, as well as subjecting that justification to some scrutiny. That is an attractive option, as I will explain. Secondly, in some cases, the courts stop short of scrutinising the impugned exercise of discretion for its compliance with the Bill of Rights, and instead only ask whether (and on what interpretation) the existence of the power can be justified. A third and final variation involves framing the Bill of Rights enquiry as part of the unreasonableness ground of review. The second and third variations are more problematic.

Most of these variations can be seen as reflecting judicial reluctance to scrutinise the justification for rights-limiting exercises of administrative discretion, given the extent to which this intrudes on the merits of the decision. In other words, they can be seen as alternative avenues of judicial deference on s 5 justification.[114]

Two more fundamental propositions are not put in doubt by these variations, with one possible exception to which we will come.[115] First, none of the variations suggest that it might ever be appropriate to determine what the Bill of Rights requires without factoring in s 5 justified limits[116] – which was the dissenting position in *Hansen*. Secondly, the variations generally do not cast doubt on the proposition that exercises of administrative discretion must comply with the Bill of Rights – and hence must not impose unjustified limits on rights. Subject to the one possible exception, the alternative approaches differ only as to how, by whom and in relation to what the s 5 justification for limits is to be determined in the administrative law context.[117]

A The Requirement to Be Satisfied that a Limit Is Justified

New Zealand commentators and United Kingdom cases have both insisted that the Bill of Rights must impose more than a mandatory relevant consideration: it must be a substantive constraint on the

113 *Four Midwives*, above n 65, at [45]–[46] and [50]–[51].

114 Explicit deference was discussed above, pt III.

115 See text at n 178 below.

116 Although as a matter of statutory interpretation this suggestion might be slightly easier to maintain in New Zealand, where s 5 is a stand-alone provision, than under the Human Rights Act 1998 (UK), where the European Convention (Convention for the Protection of Human Rights and Fundamental Freedoms 213 UNTS 221 (opened for signature 4 November 1950, entered into force 3 September 1953)) rights incorporated by that Act are each stated subject to specific limits.

117 For this point, see also Geiringer "Sources of Resistance to Proportionality", above n 1, at 128–129 and 133.

scope of public powers.[118] The latter represents much stronger protection: the power cannot be exercised at all in a way that involves an unjustified limit on a right. That level of protection is considered appropriate and necessary for the Bill of Rights. A mandatory relevant consideration, in contrast, is merely a factor that must be considered, but can be outweighed by competing considerations – it is a mere reasoning process obligation.[119] Yet, there is now much authority in New Zealand that appears to favour a form of mandatory consideration approach to the Bill of Rights. I will explain how the approach seen in the cases is in fact stronger, and argue that it is appropriate. In addition, I will address a separate objection: that treating the Bill of Rights as a mandatory consideration risks "juridifying" administrative decision-making.

1 The case law

There is now much authority in New Zealand that appears to favour a form of mandatory consideration approach to the Bill of Rights. These cases have required the administrative decision-maker to consider the right, and usually also to determine whether the limit on the right is justified. In addition to many High Court decisions,[120] authority for this includes Court of Appeal decisions such as *Taylor*,[121] and arguably the Supreme Court in *Dotcom*.[122] Unfortunately, these cases do not address the objections to such an approach; they do not even acknowledge the choice of approaches.[123]

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118 McLean, Rishworth and Taggart, above n 11; *R (SB) v Governors of Denbigh High School* [2006] UKHL 15, [2007] 1 AC 100 at [29]–[31] and [68]; and *Belfast City Council v Miss Behavin' Ltd* [2007] UKHL 19, [2007] 1 WLR 1420 at [31].

119 For the same distinction in relation to international law rights, see Claudia Geiringer "*Tavita* and All That: Confronting the Confusion Surrounding Unincorporated Treaties and Administrative Law" (2004) 21 NZULR 66.

120 Older instances include many decisions on limited administrative law appeals from the Broadcasting Standards Authority, for example: *Television New Zealand Ltd v Viewers For Television Excellence Inc* [2005] NZAR 1 (HC) at [52]; and *Television New Zealand v West* [2011] 3 NZLR 825 (HC) at [86] (but compare, for example, *Radio New Zealand Ltd v Bolton* HC Wellington CIV-2010-485-225, 19 July 2010). More recent instances in other contexts include *Schubert v Wanganui District Council* [2011] NZAR 233 (HC) at [158]–[162]; *Smith v Attorney-General on behalf of Department of Corrections* [2017] NZHC 463, [2017] 2 NZLR 704 [*Smith v A-G* (HC) 2017] at [73]–[74] and [84]–[88] (the decision was overturned on appeal, but without addressing this issue); and *Watson v Chief Executive of the Department of Corrections (No 2)* [2016] NZHC 1996, [2016] NZAR 1264 [*Watson (No 2)*] at [34]. There are also instances in the pandemic cases, but those may turn on the express statutory requirement to consider rights and the justification for limits: see *Bolton v MBIE*, above n 21, at [77]; and *Grounded Kiwis*, above n 34, at [320] and [360]. For doubts, see *Smith v New Zealand Parole Board* [2018] NZHC 955 at [40]–[46].

121 *Taylor*, above n 21. See also *Lewis v Wilson & Horton Ltd* [2000] 3 NZLR 546 (CA) at [43].

122 *Dotcom v Attorney-General*, above n 48, at [201].

123 This lack of awareness has also been noted in the context of international law rights: Geiringer, above n 119.

In *Taylor*, both aspects of this alternative approach featured, albeit the approach was not very clearly articulated. As to the first aspect, the Court of Appeal held that, at the very least, the s 14 right to freedom of expression was a mandatory consideration when deciding whether to grant a journalist permission for an interview with a prisoner.[124] Furthermore, the decision-maker was required to balance that right against the conflicting considerations supporting the limit,[125] and the Court inclined to the view that at least some form of proportionality analysis was required.[126] The Court went on to identify two mandatory considerations specific to the case, noting that these corresponded to two steps in the proportionality test: the rational connection step, and the reasonably minimal impairment step.[127]

Secondly, the Court in *Taylor* went on to discuss the appropriate intensity of review. It concluded that prison authorities should be "supervised intensively", albeit not on a substitutionary standard, where human rights are involved.[128]

The successful grounds in this case, then, included both the decision-maker's failure to apply an appropriate s 5 justification test[129] and judicial scrutiny of the justification.[130] However, the availability of this approach was simply assumed: The Court did not appreciate the existence of any controversy in this regard.[131]

2 A mere reasoning process obligation, and hence too weak?

What, then, of the objection that treating the Bill of Rights as a mandatory consideration is too weak? It is crucial to note that the approach in the New Zealand cases usually differs from the standard administrative law approach to mandatory considerations in two respects. First, it usually treats s 5 as more than a mere mandatory relevant consideration. Secondly, it is usually paired with some judicial

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124 This was said to be common ground: *Taylor*, above n 21, at [84].

125 At [72]. This amounted to accepting the argument for the applicant: at [17].

126 At [84].

127 At [85]–[86]; applied at [92]–[93] and [101]–[104].

128 At [89]–[91].

129 At [92]–[93].

130 One ground concerned errors of fact (at [94]–[100]), and the remaining two concerned the decision-maker's assessment of relevant risks (at [101]–[104]). Such scrutiny of the reasoning rather than the outcome can be seen as a form of deference.

131 But compare, for instance, *Smith v A-G* (HC) 2017, above n 120, at [80]–[86], where the United Kingdom cases against this approach were distinguished.

scrutiny of the justification offered by the decision-maker. An approach with these features is a good approach, as I will explain in relation to each of these two differences.[132]

The first difference is that, in most cases, what the decision-maker is required to consider is not only the right, but whether the limit is justified.[133] Furthermore, the courts often require the decision-maker to be satisfied that the limit is justified.[134] This renders the obligation more substantive than a mandatory consideration in two respects. First, requiring consideration of whether the limit is justified means that the decision-maker is required to apply a *test*: that is different from merely taking account of the right as one of the relevant factors to be balanced in making the decision. Secondly, if the decision-maker is required to be *satisfied* that the limit is justified, rather than merely consider whether it is, then this does represent a substantive limit on the power: the power cannot be exercised to impose a limit unless the decision-maker is so satisfied. The only difference from the substantive limit approach favoured by the commentators and the United Kingdom cases then concerns the role of the court: the determination whether the limit is justified is here left to the decision-maker, rather than being a question for the court.[135] That remaining difference from the substantive limit approach, however, is usually further qualified by the second difference from mandatory considerations.

The second difference from mandatory considerations is that the requirement for the decision-maker to determine s 5 justification in this approach is usually combined with at least a measure of judicial scrutiny of the outcome (and also perhaps of the decision-maker's reasoning) in terms of s 5 justification. This second difference further strengthens the approach. In the case of mandatory considerations, the weight to be accorded to them is entirely a matter for the decision-maker, subject only to review for *Wednesbury* unreasonableness.[136] In the cases requiring the decision-maker to determine s 5 justification for limiting rights, the judicial scrutiny of the justification is generally stronger than that. While courts do not simply substitute their conclusion (recognising that some deference may be due to the decision-maker), neither do they usually limit themselves to the highly

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132 For further discussion, see Wilberg "The Bill of Rights in Administrative Law", above n 1, at 876–879, 881–883 and 889–892.

133 For example *Taylor*, above n 21, as discussed above at the text accompanying nn 125–127. See also *Bolton v MBIE*, above n 21, at [77].

134 For the "satisfied" formulation, see for example *Viewers For Television Excellence*, above n 120, at [52]; *Television New Zealand Ltd v Green* [2009] NZAR 69 (HC) at [39]; and *Gravatt v Auckland Coroner's Court* [2013] NZHC 390, [2013] NZAR 345 at [82] (note that a requirement to be "satisfied" appeared in the empowering statute here, but as expressed, it only applied to there being good reasons for name suppression, not to those reasons outweighing freedom of expression). See similarly *Smith v A-G* (HC) 2017, above n 120, at [84] and [87]–[88].

135 See Geiringer "Sources of Resistance to Proportionality", above n 1, at 129–130 for the distinction.

136 *New Zealand Fishing Industry Association Inc v Minister of Agriculture and Fisheries* [1988] 1 NZLR 544 (CA) at 552; and *Tesco Stores Ltd v Secretary of State for the Environment* [1995] 1 WLR 759 (HL) at 764.

deferential *Wednesbury* standard.[137] Rather, they vary the intensity of review depending on the context, and count the fact that rights are engaged as a factor in favour of more intensive review.[138] Such a variable deference approach is entirely consistent with the approach to s 5 generally, as discussed earlier.[139]

A better way of understanding this alternative combined approach, I suggest, is not by reference to mandatory considerations at all. While the courts use that language in some of the cases, the approach is better understood as involving a different form of the illegality ground: applying the wrong test, due to misunderstanding the law. Examples of that form of illegality include *Anisminic*, where the decision-maker misinterpreted statutory eligibility criteria.[140] A New Zealand example is *Hawke's Bay Regional Investment Co*, where the Department of Conservation had erroneously applied a test that was provided in the Conservation Act 1987 for one type of conservation land to another type.[141] In Bill of Rights cases, the decision-maker's legal error is in failing to appreciate that all statutory powers are presumptively[142] subject to the Bill of Rights and failing to apply the s 5 justification test.

In that type of illegality challenge, courts usually decide for themselves whether the statutory test was satisfied in the circumstances.[143] However, they do this only where the statutory test takes a clear-cut, definitive form.[144] Where there is room for judgment and evaluation, courts review the application of the test on a rationality standard.[145] That aspect of the usual illegality approach corresponds to the courts' scrutiny of the justification in the Bill of Rights cases discussed here.

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137 With some exceptions, especially among the earlier cases. For example, some of the Broadcasting Standards Authority cases, such as *Browne v Canwest TV Works Ltd* [2008] 1 NZLR 654 (HC) at [54]; and *Lewis v Wilson & Horton Ltd*, above n 121, at [61]–[73], where the conclusion was reviewed on the limited ground of an error of law in terms of *Edwards (Inspector of Taxes) v Bairstow* [1956] AC 14 (HL).

138 See for example *Taylor*, above n 21, at [89]–[90].

139 Above, pt III.

140 *Anisminic Ltd v Foreign Compensation Commission* [1969] 2 AC 147 (HL).

141 *Hawke's Bay Regional Investment Co Ltd v Royal Forest and Bird Protection Society of New Zealand Inc* [2017] NZSC 106, [2017] 1 NZLR 1041.

142 The presumption is rebutted if no rights-consistent interpretation is possible pursuant to s 6.

143 See for example *Anisminic Ltd v Foreign Compensation Commission*, above n 140, at 169.

144 *Bulk Gas Users Group v Attorney-General* [1983] NZLR 129 (CA) at 135 and 136: a "definite" or "ascertainable" test.

145 At 135–136. See also *South Yorkshire Transport*, above n 42; and *Vodafone New Zealand Ltd v Telecom New Zealand Ltd*, above n 42, at [50]–[58]. Deference in such cases can similarly be reflected in the remedy, with courts confining themselves to quashing the decision or declaring it unlawful: see for example *Hawke's Bay Regional Investment Co Ltd v Royal Forest and Bird Protection Society of New Zealand Inc*, above n 141, at [82].

Whether limits are justified in terms of s 5 is undoubtedly a question that leaves room for judgment and evaluation, hence a rationality standard is appropriate for reviewing the answer to this question. Understood by reference to this line of cases, the combined approach in the Bill of Rights cases discussed here is, therefore, entirely orthodox.

Overall, an approach with these two features is stronger, not weaker, than a simple substantive constraint approach.[146] Rights are protected on this approach *both* by requiring the decision-maker to be satisfied that any limit on them is justified *and* by the usual judicial scrutiny of the justification. The judicial scrutiny is limited to the extent that courts accord deference to the decision-maker's view, which varies with the context. However, we have already seen that this is so regardless of whether or not judicial scrutiny is combined with requiring the decision-maker to determine whether limits are justified.[147] A further advantage is that the obligation on decision-makers may promote a rights culture and a culture of justification in public decision-making.[148]

3 In what types of cases does this variation apply?

Finally, in what sort of cases is this variation used? Given that the courts have not acknowledged the choice of approaches, the cases also include no discussion of when the combined approach is appropriate. However, we can once again see a pattern apparently reflecting a distinction between delegated legislation and individual exercises of discretion.[149] The combined approach features rarely, if ever, in challenges to delegated legislation. For instance, there was no mention of the decision-maker being required to consider s 5 justification in *Borrowdale*[150] or *New Health*.[151] In *Four Aviation Security Service Employees*, the Court noted that mandatory considerations had been argued, but preferred an approach that amounted to the unqualified *Hansen* approach to the role of s 5.[152] The combined approach appears to be common only in challenges to the exercise of discretion in individual cases.

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146 In relation to the statutory version, this is acknowledged in *NZDSOS Inc*, above n 21, at [60]. See also Jack Beatson *Human Rights: Judicial Protection in the United Kingdom* (Sweet & Maxwell, London 2008) at [3-123]; Tom Hickman *Public Law after the Human Rights Act* (Hart, Oxford 2010) at 241; David Mead "Outcomes Aren't All: Defending Process-based Review of Public Authority Decisions under the Human Rights Act" [2012] PL 61; and Geiringer "Process and Outcome", above n 1, at 335 and 358.

147 See above, pt III.

148 Geiringer "Process and Outcomes", above n 1, at 334–335 and 341–343; McLean "The Impact of the Bill of Rights", above n 1, at 402–403; Hickman, above n 146, at 236–240; and Mead, above n 146.

149 Recall that this distinction was expressly relied on in *Four Aviation Security Service Employees v Minister of COVID-19 Response*, above n 34, at [79] and [82]–[83] in the context of discussing deference.

150 *Borrowdale* (CA), above n 2.

151 *New Health New Zealand Inc v South Taranaki District Council*, above n 20.

152 *Four Aviation Security Service Employees v Minister of COVID-19 Response*, above n 34, at [39]–[43].

The validity of this distinction is open to doubt and ripe for reassessment. On a better view, delegated legislation also involves an exercise of administrative or executive discretion that could be amenable to the combined approach. Traditionally, review of delegated legislation was said to be limited to review for ultra vires. However, on the modern understanding, all of the grounds of review involve review for ultra vires. For instance, review for unreasonableness, traditionally said to be unavailable for delegated legislation, is now understood as being review for ultra vires.[153] For present purposes, it is particularly relevant to note that the *Fishing Industry Association* case, one of the leading New Zealand authorities on mandatory relevant considerations, was a challenge to delegated legislation.[154]

Indeed, there are statutory versions of the combined approach that do apply to delegated legislation. The COVID-19 Public Health Response Act 2020[155] expressly requires the Minister to be satisfied that an Order to be made under the Act is a justified limit on the rights and freedoms in the Bill of Rights;[156] and, in addition, it also contemplates invalidity for breach of the Bill of Rights.[157] A similar combination of reasoning process and substantive obligations is also expressly provided by the statutory bills of rights in the Australian State of Victoria and the Australian Capital Territory.[158]

4 Undue juridification of administrative decision-making?

A further and separate objection to requiring decision-makers to consider s 5 justification is that it may excessively juridify administrative decision-making.[159] This, however, is a concern about the

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153 See Philip A Joseph *Joseph on Constitutional and Administrative Law* (5th ed, Thomson Reuters, Wellington, 2021) at [26.6.4(1)]; and GDS Taylor *Judicial Review: A New Zealand Perspective* (4th ed, LexisNexis, Wellington, 2018) at [14.30].

154 *New Zealand Fishing Industry Association Inc v Minister of Agriculture and Fisheries*, above n 136, at 546–547 and 552. It should make no difference whether the mandatory relevant consideration is expressly provided by the statute, as in this case, or whether it is implied. See also *Cripps v Attorney-General* [2022] NZHC 1532 at 187 for a recent case where failure to consider mandatory relevant considerations was seen as an available and appropriate ground in a challenge to delegated legislation.

155 COVID-19 Public Health Response Act 2020, s 9(1)(ba).

156 This requirement was found satisfied in *GF v Minister of COVID-19 Response*, above n 54, at [64]–[66] and [82]. In *Four Midwives*, above n 65, at [39], the Court accepted that a decision pursuant to this provision is a necessary precondition of the exercise of the power to make an order.

157 COVID-19 Public Health Response Act 2020, s 13(2).

158 Human Rights Act 2004 (ACT), s 40B; and Charter of Human Rights and Responsibilities 2006 (Vic), s 38(1). Both require decision-makers to "give proper consideration" to relevant rights, as well as requiring them to act consistently with those rights.

159 *R (SB) v Governors of Denbigh High School*, above n 118; and Thomas Poole "Of Headscarves and Heresies: the *Denbigh High School* Case and Public Authority Decision-Making under the Human Rights Act" [2005] PL 685.

structured *Oakes* proportionality test: that is, a detailed legal test that may be inappropriate for at least some administrative decision-makers. This concern can be dealt with by instead requiring decision-makers to apply no more than a general balancing test. As we have seen, there is much authority for that variation of the test in New Zealand.[160]

Indeed, adoption of the balancing test is especially common in cases in which courts require decision-makers to determine s 5 justification, such as *Taylor*.[161] That may represent recognition that a general balancing test is more appropriate for the administrative decision-maker, albeit that point is not usually spelt out. What some of the cases do note is that there are many different kinds of administrative decision-makers and contexts, and more detailed justificatory reasoning may be expected of some than of others.[162] The availability of the balancing test – and the fact that this test itself can be made more or less demanding – provides flexibility for dealing with this variability of contexts.[163]

Where a balancing approach is adopted in the context of requiring decision-makers to determine s 5 justification, the courts tend to apply the same approach in their own scrutiny: they do not draw any distinction between the approaches to be followed by the decision-maker and the reviewing court.[164] That may also reflect the fact that the court's scrutiny focuses on the decision-maker's justificatory reasoning, rather than considering justification de novo.

5 Summary

To summarise this variation on the approach to s 5, decision-makers are required to have satisfied themselves that they are limiting rights no more than justified, often using a general balancing approach rather than the structured proportionality test, and courts subject the justification to varying intensity scrutiny. There is much authority for this approach, and much to be said for it.

B The Interpretation-Only Approach

The discussion so far has concerned s 5 scrutiny of the exercise of discretionary powers. Not all Bill of Rights issues in administrative law cases, however, concern exercises of discretion. Exercises of rule-making powers do involve reviewable discretion, contrary to the assumption apparently underlying some of the case law discussed above. But some Bill of Rights challenges concern

160 See above pt II.

161 *Taylor*, above n 21, at [84]. See also the Broadcasting Standards Authority cases cited above, n 120.

162 See for example *Smith v A-G* (HC) 2017, above n 120, at [80]–[86]; and *Smith v New Zealand Parole Board*, above n 120, at [40]–[46].

163 For the importance of this flexibility, see Geiringer "Process and Outcomes", above n 1, at 338, 356–357 and 360; and McLean "The Impact of the Bill of Rights", n 1, at 406.

164 See for example *Taylor*, above n 21.

administrative authorities' application of rules rather than exercises of discretion. In another group of administrative law cases, the Bill of Rights issue concerns the effect of a privative clause, validation Act or other similar provision.[165] When the Bill of Rights is invoked in either of these types of cases, its impact may perhaps be confined to the proper interpretation of the provision at issue. I will return to this.

There have been cases, however, where statutes do confer discretionary powers, and yet the courts have declined to apply s 5 scrutiny to particular exercises of that discretion. Instead, they have confined themselves to interpreting the empowering provision to determine the existence and scope of the power in light of its s 5 justification.[166] The main instances of such an "interpretation-only" approach, as I will call it, are found in *Commerce Commission*[167] and in *New Health*.[168] This approach is at least potentially problematic.

These cases do not go so far as to identify any legal barrier to s 5 scrutiny of the exercise of discretion, but they may evidence a judicial reluctance to engage in such scrutiny.[169] The Supreme Court in *New Health* found that the context called for deference to Parliament.[170] The interpretation-only approach may represent unwillingness to review administrative decision-makers' decisions on questions calling for deference, albeit that is not how the Court explains it.

Alternatively, both cases could simply be explained on the basis that the scope of the appeal in each case was limited to questioning the existence of the power. However, both decisions include statements of more general application. In *Commerce Commission,* the Court of Appeal asserted, albeit in obiter, that having found the existence of the power justified by a *Hansen* analysis, there was "no need to repeat the exercise".[171]

The more recent decision in *New Health* involves a much more qualified adoption of an interpretation-only approach, and only by the plurality judgment of O'Regan and Ellen France JJ. In

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165 See for example *Mangawhai Ratepayers and Residents Association Inc v Kaipara District Council*, above n 90; and *McGuire v Secretary for Justice* [2018] NZCA 37, [2018] 3 NZLR 71 (the Supreme Court on appeal did not determine the Bill of Rights issue: [2018] NZSC 116, [2019] 1 NZLR 335).

166 This variation was identified by Geiringer "Sources of Resistance to Proportionality", above n 1, at 134–137.

167 *Commerce Commission v Air New Zealand Ltd* [2011] NZCA 64, [2011] 2 NZLR 194.

168 *New Health New Zealand Inc v South Taranaki District Council*, above n 20.

169 For further discussion, see Geiringer "Sources of Resistance to Proportionality", above n 1.

170 *New Health New Zealand Inc v South Taranaki District Council*, above n 20, at [122].

171 *Commerce Commission v Air New Zealand Ltd*, above n 167, at [77].

the other majority judgment,[172] Glazebrook J rejected the interpretation-only account. She considered that the question of justification for the exercise of local authorities' power to fluoridate drinking water, involving a limit on the s 11 right to refuse medical treatment, could only be determined for each particular locality by reference to local conditions.[173]

O'Regan and Ellen France JJ adopted a Canadian test for determining the appropriate subject of the s 5 justification enquiry: it depends on whether or not the legislation itself confers a power to limit the right, expressly or by necessary implication. Where it does so, then, this direct statutory authority must be subjected to the justified limits test. Where it does not, and instead confers merely an imprecise discretion, the exercise of that discretion must be subjected to the justified limits test.[174] In this case, their Honours accepted that the relevant legislation does confer the power by necessary implication. Hence, it was the existence and scope of that power that was subjected to the s 5 justification enquiry.[175]

This plurality position on the one hand clearly recognises that s 5 scrutiny must at least sometimes be applied to particular exercises of discretion: it does not contemplate an interpretation-only approach across the board. That is why we can count the plurality as well as Glazebrook J as clearly confirming that the central role of s 5 established by *Hansen* is at least available in administrative law challenges to exercises of discretion. On the other hand, the plurality leaves open whether some exercises of discretion will escape s 5 scrutiny.

Where statutes expressly or by necessary implication authorise limits on rights, it is often possible for the existence of the power to be justified, but for some exercises of it to be unjustified in the circumstances.[176] We should, therefore, expect s 5 scrutiny to apply *both* to the existence and scope of the power *and* to particular exercises of the power. The High Court in *Bolton* recently noted this need to apply s 5 scrutiny to the particular exercise of a power, even if the existence of the power is justified.[177] The plurality in *New Health* did not address this question. As already noted, this might simply reflect the limited scope of the appeal. But it does mean that the question is left open.

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172 The two judgments discussed here (O'Regan and Ellen France JJ, and Glazebrook J), involving three members of the Court, were the only ones to discuss s 5. For the other two members of the Court (William Young J, and Elias CJ), s 5 was not reached.

173 *New Health New Zealand Inc v South Taranaki District Council*, above n 20, at [174]–[176].

174 At [109], quoting *Slaight Communications Inc v Davidson* [1989] 1 SCR 1038 at 1079–1080. For a similar point, see also *Belfast City Council v Miss Behavin'*, above n 118, at [33]–[37].

175 *New Health New Zealand Inc v South Taranaki District Council*, above n 20, at [111]–[112]. The limit of the enquiry is also reflected in the conclusion at [144].

176 Taylor, above n 153, at [16.19].

177 *Bolton v MBIE*, above n 21, at [58]–[59]. See also the High Court in *Borrowdale*, above n 2.

Rejection of such scrutiny for some exercises of discretion would be problematic and questionable.[178] The resulting departure from the *Hansen* approach would detract from the fundamental requirement that the exercise of public powers must not impose unjustified limits on rights. While the Bill of Rights does not expressly require public authorities to act consistently with it,[179] such an obligation must have been intended. It does indirectly flow from ss 3 (the Act applies to the executive) and 6 (statutory powers to be given rights-consistent meanings where possible).[180] In any event, it is difficult to see why a Bill of Rights obligation should apply to some discretions, as acknowledged by the *New Health* plurality, but not to all discretions.

As an alternative, it might be preferable to avoid this two-stage analysis altogether, and go straight to scrutiny of the discretion regardless of whether the legislation confers power to limit rights. I have argued elsewhere[181] that a better formulation of the *Hansen* approach would always examine prima facie breach and s 5 justification in relation to the impugned act, decision or rule, rather than in relation to the empowering provision. Only when s 6 is reached would the empowering legislation become the subject of the analysis. On that approach, if the empowering legislation clearly authorises the limit on the right, that will simply affect the prospects of finding a rights-consistent interpretation pursuant to s 6. However, this is not the currently established approach.

Finally, we should note a link with one of the other components of the *Hansen* approach: the test for applying s 5. Courts seem much more inclined to use the structured proportionality test, rather than the simple balancing test variation, when the issue concerns the justification for the existence of a power. The decisions in both *Commerce Commission* and *New Health* feature a full application of the *Oakes* proportionality test.[182] In contrast, the balancing approach is more often adopted when scrutinising the justification for particular exercises of power, such as in *Taylor*.[183] This seems appropriate. The Court in *Taylor* expressly referred to this distinction: it noted that the structured proportionality test is well established for determining whether legislation imposes a justified limit, but effectively acceded to a Crown argument that a balancing approach was more appropriate for the challenge to an administrative exercise of discretion in that case.[184]

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178 See further Wilberg "The Bill of Rights in Administrative Law", above n 1, at 895–896.

179 Compare s 6 of the Human Rights Act 1998 (UK).

180 Geiringer "Sources of Resistance to Proportionality", above n 1, at 139–141.

181 Hanna Wilberg "Pandemic Litigation Reaffirms *Hansen* Approach but Also Exposes Two Flaws in its Formulation" (2022) 30 NZULR 69 at 75–77.

182 *New Health New Zealand Inc v South Taranaki District Council*, above n 20, at [123]–[144]; and *Commerce Commission v Air New Zealand Ltd*, above n 167, at [68]–[76]. See also the Court of Appeal in *McGuire v Secretary for Justice*, above n 165.

183 *Taylor*, above n 21, at [84].

184 At [76]–[77] and [84].

C Section 5 Justification Framed in Terms of Unreasonableness Ground

There is a final variation on how and by whom the s 5 justification for limits is to be determined in the administrative law context. In some cases, courts frame the enquiry in terms of unreasonableness as a ground of review, adopting a higher intensity of review than traditional *Wednesbury* unreasonableness. Instances include the High Court decisions in *Watson v Chief Executive of Department of Corrections*, both *(No 1)*[185] and *(No 2)*,[186] and the first part of the Court of Appeal decision in *Chief Executive of the Department of Corrections v Smith*.[187] There are hints of this approach also in *Taylor*.[188]

In substance, this approach is no different from the usual approaches. First, it simply amounts to applying s 5 with deference, and usually involves applying the general balancing approach rather than the structured proportionality test.[189] Secondly, it is also sometimes combined with requiring the decision-maker to determine s 5 justification,[190] in which case the combination amounts to the first alternative approach discussed earlier.[191]

In one respect, however, this approach departs from all the usual approaches. That is in classifying the ground of review as part of the established unreasonableness ground. The usual approaches treat the Bill of Rights as a new ground of review in addition to the traditional common law grounds.[192] To the extent that Bill of Rights challenges can be classified within the traditional tripartite division of grounds into illegality, irrationality and procedural unfairness,[193] they are understood as matters

185 *Watson v Chief Executive of Department of Corrections* [2015] NZHC 1227, [2015] NZAR 1049.

186 *Watson (No 2)*, above n 120.

187 *Smith* (CA) 2020, above n 21.

188 *Taylor*, above n 21: while the discussion of the law focused on the Bill of Rights, the grounds for review included unreasonableness (at [46]), and the successful grounds of appeal also included references to unreasonableness (at [94] and [101]).

189 For express adoption of the balancing test, see *Watson (No 2)*, above n 120, at [34].

190 At [34] for an example.

191 See pt VI.A.

192 See for example Joseph, above n 153, at [22.12.3(1)]. For a court expressly preferring a "direct" approach to the Bill of Rights over one framed in terms of unreasonableness, see *Four Aviation Security Service Employees v Minister of COVID-19 Response*, above n 34, at [39]–[40].

193 *Council of Civil Service Unions v Minister for the Civil Service* [1985] 1 AC 374 (HL) at 410.

of illegality.[194] Although courts approach the s 5 justification question with some deference, that is not usually seen as involving the ground of unreasonableness.

This departure from the usual approach involves a failure to distinguish between two related, but distinct uses of the word and concept of "unreasonableness". In the administrative law context, unreasonableness functions both as a ground of review (alongside illegality and procedural impropriety) and as a standard or intensity of review (distinguished from a correctness or substitutionary standard).[195] The two uses overlap, in that the standard of review on the unreasonableness ground of review is unreasonableness. However, the overlap is only partial: an unreasonableness standard can also apply in the context of other grounds – whenever there is good reason for some deference.[196] That is the position in relation to the s 5 justification enquiry in a Bill of Rights challenge. The ground is breach of the Bill of Rights, and that is usually understood as a form of illegality, but the standard of review usually is unreasonableness due to the need for some deference.[197]

This failure to distinguish between different uses of "unreasonableness" can potentially lead to confusion and erroneous conclusions on two related points. To appreciate both points, we have to remember that on the traditional approach, the ground of review affects the standard and intensity of review.[198] Where the ground of review is illegality, the starting point is a correctness or substitutionary standard. That may be replaced by a reasonableness standard where there is good reason for deference, as in the context of s 5 justification, but only rarely will deference reach the high level of traditional *Wednesbury* unreasonableness.[199] Conversely, where the ground of review is unreasonableness, the starting point is that highly deferential standard, and some good reason is needed for courts to engage in greater intensity review.

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194 This conception tends to be most explicit in challenges to delegated legislation as unauthorised on a rights-consistent reading of the empowering statute: see for example *Drew v Attorney-General*, above n 94, at [68]. See also *New Health New Zealand Inc v South Taranaki District Council*, above n 20, at [109] and [175]. And see for example Peter Cane *Administrative Law* (5th ed, Oxford University Press, Oxford, 2011) at 193; and Matthew SR Palmer and Dean R Knight *The Constitution of New Zealand: A Contextual Analysis* (Hart, Oxford, 2022) at 196.

195 For similar points, see Hickman, above n 146, at ch 4; and Dean R Knight *Vigilance and Restraint in the Common Law of Judicial Review* (Cambridge University Press, Cambridge, 2018) at ch 3.

196 Notably, in applying statutory terms that leave room for judgment in their application: see *South Yorkshire Transport*, above n 42; and *Vodafone New Zealand Ltd v Telecom New Zealand Ltd*, above n 42, at [50]–[58].

197 See above pts III and VI.A.

198 Knight, above n 195, at ch 4.

199 See above pt III.

The first point of potential confusion, then, is that framing the s 5 justification enquiry in terms of the ground of unreasonableness would traditionally imply a starting point of highly deferential review. It needs to be clear that this is not the accepted approach to Bill of Rights issues.

The second point is the converse. Bill of Rights cases that apply heightened scrutiny unreasonableness review on the question of s 5 justification might be considered authority for heightened scrutiny unreasonableness review outside the Bill of Rights context as well. It needs to be understood that this does not follow.

Heightened scrutiny is unremarkable in Bill of Rights cases, for reasons that do not apply in other cases. Applying the traditional approach to the grounds, the starting point in a Bill of Rights challenge is substitutionary review, whereas extreme deference (the *Wednesbury* standard) is the starting point in a challenge on the ground of reasonableness. Even if the formalism of the traditional approach is rejected, the point remains that the Bill of Rights is special. Rights are considered to be an area in which courts have both special expertise and special responsibility. And the rights in the Bill of Rights have been endorsed by Parliament and enshrined in law at least partly so as to give courts a role in protecting them.[200] For both reasons, it is perfectly possible to adopt heightened scrutiny in Bill of Rights cases, but reject it in other cases.

VII CONCLUSION

What emerges, albeit still somewhat inchoate, is a set of approaches that is more responsive to the need for judicial restraint, and also to the variability of contexts, than the single approach that was proposed early on by commentators and that has been adopted for the criminal law context in *Hansen*. Importantly, however, most aspects of that set of approaches are consistent with the fundamental propositions underlying the *Hansen* approach: on the one hand, justified limits must be respected; on the other hand, the justification for limits must be established.

The unqualified *Hansen* approach is now clearly available in administrative law. It features especially in challenges to delegated legislation. In challenges to individual exercises of administrative discretion, courts often apply a variation on the *Hansen* approach. They require decision-makers to be satisfied that they are limiting rights no more than is justified. I have explained this on the basis that a decision-maker who fails to apply this test has misunderstood the law governing the discretionary power. Usually, the expectation is that decision-makers will have used a general balancing approach rather than the structured *Oakes* proportionality test, but what suffices depends on the context. Courts also scrutinise the justification for themselves, generally in terms of the same form of balancing approach rather than switching at this point to a structured proportionality test. They do so with a measure of deference that varies according to context. An approach with this

200 For both points, see *Taylor*, above n 21, at [89]–[90]; and *Carlile*, above n 35, at [48], [57], [67], [87] and [150]–[159].

combination of features is a good approach. Clear appellate authority to endorse this approach would be very helpful.

However, the distinction between delegated legislation and individual exercises of discretion that appears to be reflected in this case law is open to doubt. The courts need to start addressing whether the combined approach would not be equally appropriate in challenges to delegated legislation.

Sometimes, the courts' scrutiny of the balance struck pursuant to s 5 is put in terms of unreasonableness as a ground of review. That involves some conceptual blurring, which in turn carries some risk of questionable implications being drawn. It is important that this should be understood as merely a different way of expressing the more common approach.

Finally, not all administrative law cases involve challenges to exercises of administrative discretion. When the only issue concerns the rights-consistent interpretation of a legislated rule, then courts apply the *Hansen* approach without the above modifications. That is perfectly sensible.

However, more often, discretion will remain in the exercise of the powers conferred by the statute even once the statute has been given a rights-consistent interpretation. Courts need to remain open to entertaining rights-based challenges to the exercise of any such remaining discretion. That is a further important point that remains to be authoritatively established.