NOTE: ORDER PROHIBITING PUBLICATION OF NAMES OR IDENTIFYING PARTICULARS OF THE APPELLANTS.

IN THE COURT OF APPEAL OF NEW ZEALAND

I TE KŌTI PĪRA O AOTEAROA

CA540/2022
[2024] NZCA 17

BETWEEN	FOUR MEMBERS OF THE ARMED FORCES Appellants
AND	CHIEF OF DEFENCE FORCE First Respondent
	CHIEF PEOPLE OFFICER Second Respondent
	ATTORNEY-GENERAL Third Respondent

Hearing:	20 April 2023
Court:	Gilbert, Collins and Goddard JJ
Counsel:	M I Hague and A P Miller for Appellants S V McKechnie and S L Gwynn for Respondents
Judgment:	16 February 2024 at 3.00 pm

JUDGMENT OF THE COURT

A The appeal is allowed.

B The Chief of Defence Force is directed to reconsider Temporary Defence Force Order 06/2022 (TDFO) in light of this judgment.

C The Court makes an interim order under s 15 of the Judicial Review Procedure Act 2016 prohibiting the Chief of Defence Force from taking any further action pursuant to the TDFO and related instruments until such time as the reconsideration of the TDFO is complete.

D **Any order as to costs that has been made in the High Court is set aside. Costs in the High Court are to be determined by that Court in light of this judgment.**

E **The respondents must pay costs to the appellants for a standard appeal on a band A basis with a 50 per cent uplift, with usual disbursements.**

REASONS OF THE COURT

(Given by Goddard J)

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Introduction and summary

[1] Members of the New Zealand Armed Forces are required to meet "individual readiness requirements" to ensure that they are fit and healthy to enter and remain in service, and to carry out the full range of functions that the Armed Forces perform in New Zealand and overseas. Those individual readiness requirements include maintaining certain vaccinations that are specified in the New Zealand Defence Force (NZDF) Vaccination Schedule. On 3 March 2021, COVID-19 vaccination was added to that Schedule. On 11 February 2022, applicable COVID-19 booster doses were added to that Schedule.

[2] On 27 May 2022, the Chief of Defence Force (CDF) issued Temporary Defence Force Order 06/2022 (the TDFO) under s 27(1) of the Defence Act 1990, addressing the consequences of failure to meet individual readiness requirements relating to vaccination against COVID-19. The TDFO provided, among other things, for a review of retention in the Armed Forces of any member who was not fully vaccinated for COVID-19 in accordance with the NZDF Vaccination Schedule. The consequences of not being vaccinated for COVID-19 were in a number of respects more prescriptive and more stringent than those that apply in respect of other vaccinations required by the NZDF Vaccination Schedule. In particular, failure to meet that requirement was more likely to result in dismissal from the Armed Forces. And if the member was retained, their retention was to be reviewed at least annually.

[3] The appellants are four members of the Armed Forces. Two of them have not received any COVID-19 vaccination. Two have received the primary doses of the

COVID-19 vaccine, but not the booster doses. They applied to the High Court for judicial review of the TDFO (and related instruments) on the grounds that the TDFO was unlawful because it was inconsistent with:

(a) the Armed Forces Discipline Act 1971 (AFD Act);

(b) the Code of Health and Disability Services Consumers' Rights (the Code); and

(c) the New Zealand Bill of Rights Act 1990 (NZBORA).

[4] Churchman J dismissed the challenges based on inconsistency with the AFD Act and the Code.

[5] The Judge accepted that the TDFO and related instruments limit the right to refuse to undergo medical treatment (s 11 of NZBORA) and the right to manifest religion (s 15 of NZBORA). He did not accept that the right to freedom from discrimination (s 19 of NZBORA) was engaged. The Judge was satisfied that maintaining the ongoing efficacy of the Armed Forces was a sufficiently important objective to justify a limitation on the rights contained in ss 11 and 15 of NZBORA. He considered that the TDFO and related instruments imposed limits on those rights that were demonstrably justified in a free and democratic society, for the purposes of s 5 of NZBORA. The applications for judicial review were dismissed.

[6] The appellants appeal to this Court, advancing the three grounds of challenge to the TDFO identified above.

[7] We consider that the Judge was right to dismiss the appellants' arguments based on inconsistency with the AFD Act and the Code.

[8] It was common ground before us that the TDFO and related instruments limited the appellants' rights under ss 11 and 15 of NZBORA. We agree with the Judge that s 19 of NZBORA is not engaged by the TDFO.

[9] We agree with the Judge that the respondents have established that there was sufficient justification for the limits on those rights that resulted from adding the COVID-19 vaccinations to the NZDF Vaccination Schedule, including the potential for a member's service to be reviewed for failure to meet readiness requirements if they declined the COVID-19 vaccinations. Indeed the lawfulness of adding COVID-19 vaccination to the NZDF Vaccination Schedule was not challenged before us.

[10] However the respondents have not demonstrated that there was a justification for adopting more prescriptive and more stringent consequences for failure to have the prescribed COVID-19 vaccinations than in relation to other vaccinations. In particular, they have not shown that the objective of maintaining the ongoing efficacy of the Armed Forces could not have been achieved by a less rights-limiting measure: namely, retaining the more flexible approach that applies in relation to failure to obtain other vaccinations listed on the NZDF Vaccination Schedule. To that extent, the TDFO and related instruments are inconsistent with NZBORA.

[11] We do not consider that the whole of the TDFO is invalid, however. Because of the level of generality at which the appeal was argued, we are not in a position to identify specific parts of the TDFO that are invalid. In those circumstances, and bearing in mind the time that has passed since the hearing and the evolution of wider regulatory settings in relation to COVID-19 over that period, we consider that the appropriate relief in this case is to require the CDF to reconsider the TDFO in light of our findings, under s 17 of the Judicial Review Procedure Act 2016. That will necessarily require reconsideration of related aspects of other instruments.

[12] Until that reconsideration has taken place, it would be inappropriate for the CDF to take any action against the appellants under the TDFO and related instruments. We grant interim relief under s 15 of the Judicial Review Procedure Act to ensure that does not occur.

[13] The appeal is to that extent allowed. Our reasons are set out in more detail below.

Relevant legislation

[14] We begin by identifying the statutory setting in which the TDFO was issued.

Defence Act 1990

[15] The NZDF is constituted by the Defence Act.[1] The NZDF comprises the Armed Forces of New Zealand, and the civil staff.[2]

[16] The Defence Act provides for appointment of the CDF by the Governor-General in Council. The CDF commands the forces that together comprise the NZDF.[3]

[17] Section 27 of the Defence Act provides for the CDF to issue Defence Force Orders (DFO):

> **27 Defence Force Orders**
>
> (1) In performing the functions and duties and exercising the powers of the Chief of Defence Force, the Chief of Defence Force may from time to time, for the purposes of this Act, issue Defence Force Orders, not inconsistent with this Act, the Armed Forces Discipline Act 1971, or any other enactment.
>
> (2) Any officer or person duly authorised by the Chief of Defence Force, either by name or appointment, may issue Defence Force Orders.
>
> (3) The production of a document that purports to be a copy of a Defence Force Order and that includes a copy of the signature of the Chief of Defence Force, or of any officer or other person duly authorised by the Chief of Defence Force to sign such copies, shall, in the absence of proof to the contrary, be sufficient evidence of the order in all courts and proceedings and for all other purposes.
>
> (4) Subject to subsection (5), every order issued under this section shall come into force on such date as may be specified in the order, being the date of the order or any other date after the date on which it was issued.
>
> (5) Any order issued under this section relating to terms and conditions of service of members of the Armed Forces and conferring benefits on any such members may have effect from a date before the date of the issue of the order.

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1 Defence Act 1990, Title and s 11.
2 Section 11(1).
3 Section 8.

[18] Defence Force Orders issued under s 27 of the Defence Act are secondary legislation for the purposes of the Legislation Act 2019.[4]

[19] Part 4 of the Defence Act provides for the terms and conditions of service in the Armed Forces. Section 45 provides for the conditions of service of members of the Armed Forces to be prescribed by the CDF:

> **45 Conditions of service in Armed Forces**
>
> (1) Except as otherwise provided in this section, the conditions of service of members of the Armed Forces shall be prescribed by the Chief of Defence Force.
>
> (2) In prescribing conditions of service under subsection (1), the Chief of Defence Force shall have regard to the following criteria:
>
> (a) the need to achieve and maintain fair relativity with the levels of remuneration received elsewhere; and
>
> (b) the need to be fair both—
>
> (i) to the persons or group of persons whose remuneration is being determined; and
>
> (ii) to the taxpayer; and
>
> (c) the need to recruit and retain competent persons.
>
> (3) The Chief of Defence Force shall consult with the Public Service Commission when prescribing conditions of service of members of the Armed Forces under this section. The Public Service Commission may at any time, either before or during the prescribing of such conditions of service, indicate to the Chief of Defence Force that it wishes to participate with the Chief of Defence Force in prescribing those conditions of service, and the Chief of Defence Force shall allow the Public Service Commission to participate accordingly.
>
> …
>
> (5) Nothing in the Employment Relations Act 2000 applies to the conditions of service of members of the Armed Forces.
>
> …

[4] Section 27A.

Armed Forces Discipline Act 1971

[20] The AFD Act provides for the discipline of, and administration of justice within, the Armed Forces. Section 72 of the AFD Act provides for criminal sanctions for failure to comply with certain orders requiring a member to accept medical treatment, where failure to do so endangers the health of other members of the Armed Forces:

> **72 Endangering the health of members of the Armed Forces**
>
> (1) Every person subject to this Act commits an offence, and is liable to imprisonment for a term not exceeding 2 years, who, without lawful excuse, refuses or fails to submit himself to medical, surgical, or dental treatment or procedures by a medical practitioner or dental practitioner, as the case may require, after being ordered to do so—
>
> (a) by a medical or dental officer who is a medical practitioner or dental practitioner; or
>
> (b) by a competent officer acting on the advice of any such medical or dental officer—
>
> if any such treatment or procedure, whether preventive, protective, or curative, is stated by the medical or dental officer who gives the order or advice to be, in his opinion, essential in the interests of the health of other members of the Armed Forces, or to be such that refusal or failure to submit thereto would constitute a potential menace to the health of other members of the Armed Forces or would prejudice the operational efficiency of any part of the Armed Forces.
>
> (2) In any proceedings in respect of an offence against subsection (1), where the order involves curative surgery, it is a defence to the charge if the accused proves that the provisions of Defence Force Orders relating to the right of a member of the Armed Forces to ask for a second opinion in such cases have not been observed.

Defence Force Order 3

[21] Defence Force Order 3 (DFO 3), issued by the CDF under ss 27 and 45 of the Defence Act, contains the NZDF Human Resource Manual.[5] It was first issued on 23 November 2009, and has been amended on a number of occasions since that date. DFO 3 expressly provides that nothing in it is to be construed as prevailing over any relevant Act of Parliament or Regulations.[6]

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5 See cl 1.

6 Clause 2. This reflects the express limit in Defence Act, s 27(1).

[22] Part 9 of DFO 3 sets out a number of obligations of members of the NZDF. It is divided into 11 chapters. Chapter 6 sets out the individual readiness requirements. The rationale for those requirements is set out in cl 9.6.1:

> **Introduction** 9.6.1 The New Zealand Defence Force (NZDF) is required by the Government of New Zealand to provide individuals and units/ships to meet contingencies within specified Degrees of Notice (DON). This Order provides the guidance and framework for managing the individual readiness of members of the Armed Forces.
>
> Readiness, like combat viability, deployability and sustainment, is a component of operational preparedness. Therefore individual readiness needs to be applied within the context of the NZDF operational preparedness requirements.
>
> The need for the NZDF to be able to deploy forces requires members of the Armed Forces to be at a level of individual readiness that allows them to deploy to conduct military operations. This ability is a fundamental component of military service.
>
> This Order provides the minimum individual readiness requirements needed for operational preparedness.

[23] Clause 9.6.11 describes the intent of the Order as being "to ensure as many members of the Armed Forces as possible are ready to deploy in order to meet NZDF output requirements". The "impacts sought by [the] Order" include the number of members meeting their individual readiness requirements is maximised leading to unit/ship readiness.[7]

[24] Individual readiness is defined in DFO 3 as a level of individual preparedness for deployment, characterised by various matters including the member of the Armed Forces maintaining the required level of fitness.[8] DFO 3 identifies four levels of readiness, based on 19 criteria: three levels of readiness for deployment, and a fourth category of "Not deployable".[9] Criterion 17 requires vaccinations to be maintained according to the NZDF Vaccination Schedule. Additional vaccinations may be

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7 Clause 9.6.11.
8 Clause 9.6.15.
9 Clause 9.6.16.

required for specific deployments.[10] Meeting criterion 17 is one of the "fitness standards" identified in ch 9 of DFO 3.[11]

[25] Members of the Armed Forces are required to resolve any barriers to individual readiness within their control as soon as practicable, and update their Commanding Officer on at least a monthly basis of their progress.[12]

[26] Where members of the Armed Forces are assessed as being unable to maintain individual readiness for reasons within or beyond their control, their continued service must be reviewed in accordance with DFO 3, pt 11, ch 8 which relates to "Departing the NZDF (Military)". In this context, "unable to maintain" is defined to mean that the member is not deployable and has been or is likely to be not deployable for a period of time in excess of six months.[13] Chapter 8 of pt 11 of DFO 3 provides for NZDF initiated discharge in certain circumstances, including where the member "is inefficient or ineffectual in performance of duties and has shown insufficient improvement after formal written warning".[14] Before issue of the TDFO, it was expressly provided that this includes the ability to meet single Service physical fitness requirements. As explained below, the TDFO replaced this with a reference to meeting individual readiness requirements.

Defence Force Order 4

[27] Defence Force Order 4 (DFO 4), issued on behalf of the CDF under the Defence Act, is concerned with personnel administration. It sets out the processes for discharging a member of the Armed Forces on various grounds.[15] One of the grounds on which a member may be discharged is where that member is inefficient or ineffectual in the performance of their duties.[16] Before issue of the TDFO, it was expressly provided that this includes the ability to meet single Service physical fitness requirements. As explained below, the TDFO amended DFO 4 to expressly provide that this includes inability to meet individual readiness requirements.

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10 Clause 9.6.36.
11 Clause 9.6.17.
12 Clause 9.6.47.
13 Clause 9.6.50.
14 Clause 11.8.25. See also cl 11.8.86.
15 See ch 16.
16 Clause 16.104.

[28] DFO 4 sets out a detailed procedure to be followed where discharge on this ground is under consideration. The Commanding Officer raises a report, or appoints an officer to raise a report. The member has an opportunity to read and comment on the report. Decisions are then made by the member's Commanding Officer about what further action will be taken, which may included recommending discharge. A range of factors must be taken into account.[17] The member then has a further opportunity to comment on any such recommendation. If the Commanding Officer is not satisfied with any comments made, the recommendation for discharge is forwarded through the normal command channel for decision by the appropriate Service Chief or delegate.[18]

[29] What this means in practice is that a member's Commanding Officer may decide to retain a member who does not meet individual readiness requirements. If the Commanding Officer decides that the member should be retained, the retention review process concludes. It is only where the Commanding Officer considers that the member should be discharged that the matter is escalated to the relevant Service Chief (or their delegate), who then makes a decision on whether the member should be retained or discharged.

NZDF Vaccination Schedule

[30] The NZDF Vaccination Schedule has two parts: the baseline programme and the enhanced programme. The baseline programme is designed to provide vaccination cover that is appropriate for both domestic and deployed environments. The baseline vaccination programme must be maintained during the course of a member's service. The enhanced programme includes vaccines identified for specific roles and/or locations (overseas or in New Zealand) where prevalence or severity of an infectious disease which may pose a risk to NZDF personnel or populations is identified. Enhanced programme vaccines are administered only when a person has specific notice that they are going to an area with an applicable health threat.

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17 Clause 16.116.
18 Clause 16.120.

Code of Health and Disability Services Consumers' Rights

[31] The Code is set out in regulations made under the Health and Disability Commissioner Act 1994. It identifies a number of rights that every health consumer or disability services consumer has. Every health provider is subject to the rights in the Code. Those rights include:

(a) right 2, which provides that every consumer is entitled to be free from discrimination, coercion, harassment, and sexual, financial or other exploitation;

(b) right 7(1), which provide that services may be provided to a consumer only if that consumer makes an informed choice and gives informed consent, except where any enactment, or the common law, or any other provision of the Code provides otherwise; and

(c) right 7(7), which provides that every consumer has the right to refuse services and withdraw consent to services.

Relevant NZBORA provisions

[32] It is elementary that the CDF cannot issue a DFO that is inconsistent with NZBORA.

[33] The appellants rely on the rights protected by ss 11, 15 and 19 of NZBORA:

> **11 Right to refuse to undergo medical treatment**
>
> Everyone has the right to refuse to undergo any medical treatment.
>
> …
>
> **15 Manifestation of religion and belief**
>
> Every person has the right to manifest that person's religion or belief in worship, observance, practice, or teaching, either individually or in community with others, and either in public or in private.
>
> …

> **19 Freedom from discrimination**
>
> (1) Everyone has the right to freedom from discrimination on the grounds of discrimination in the Human Rights Act 1993.
>
> …

[34] Where those rights are limited by an instrument such as a DFO, the instrument will be valid only if the limits on the relevant rights are reasonable and can be demonstrably justified in a free and democratic society.[19]

COVID-19 vaccination regime for the Armed Forces pre-TDFO

[35] On 11 March 2020, the World Health Organization (WHO) declared COVID-19 to be a global pandemic. On the same date, COVID-19 was added to pt 3 of sch 1 to the Health Act 1956 as a notifiable and quarantinable infectious disease. The first case of COVID-19 in New Zealand had been identified shortly before that in late February 2020.

[36] Effective COVID-19 vaccinations first became available globally towards the end of 2020. The first vaccine approved for use in New Zealand was the Pfizer/BioNTech Comirnaty COVID-19 vaccine (Pfizer vaccine). Approval was subsequently given for two other vaccines: the AstraZeneca COVID-19 vaccine (AstraZeneca vaccine) and Nuvaxovid COVID-19 vaccine (Novavax vaccine).

[37] The NZDF rolled out the Pfizer vaccine to its members as soon as it was able to do so. As already mentioned, the COVID-19 vaccination was added to the NZDF Vaccination Schedule baseline programme. The NZDF COVID-19 vaccination programme commenced on 26 February 2021. COVID-19 booster doses were added to the baseline schedule on 11 February 2022.

[38] The COVID-19 Public Health Response (Specified Work Vaccinations) Order 2021, made by the Minister for Workplace Relations and Safety under s 11AB of the COVID-19 Public Health Response Act 2020, provided that work carried out by certain Police and NZDF personnel could only be undertaken by workers who had been vaccinated.

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[19] New Zealand Bill of Rights Act 1990 [NZBORA], s 5.

[39] A number of Police and NZDF staff who did not wish to be vaccinated brought judicial review proceedings challenging that Order. They faced termination if they were not vaccinated by 1 March 2022. The application was heard on 15 February 2022. On 25 February 2022 the High Court held that the Order was unlawful as it implemented unjustified limits on fundamental rights protected by NZBORA. It was common ground before the High Court that the Order limited the right to refuse to undergo medical treatment,[20] and the right to manifest religion[21] for those who declined to be vaccinated because the vaccine has been tested on cells derived from a human foetus, contrary to their religious beliefs. The Crown had not put forward sufficient evidence to justify the measures that were imposed, as required by s 5 of NZBORA. Cooke J said:[22]

> [97] I am not satisfied that the Crown has put forward sufficient evidence to justify the measures that have been imposed, even giving it some benefit of the doubt. The apparently low numbers of personnel the Order actually addresses, the lack of any evidence that they are materially lower than would have been the case had the internal policies been allowed to operate, and the evidence suggesting that the Omicron variant in particular breaks through any vaccination barrier means that I am not satisfied that there is a real threat to the continuity of these essential services that the Order materially addresses. If there is a threat to these services it will arise precisely because vaccination and other measures are not able to prevent the risk that Omicron will sweep through workforces.
>
> [98] It is apparent from the evidence that Omicron is highly transmissible, and that it could affect a significant number of New Zealanders, and accordingly a significant number of Police and NZDF personnel. But it is apparent from such waves of infection in other countries that ultimately the levels of infection drop. In other words it has a relatively temporary but very significant impact. That is of importance in my view. The major impact for a period of three to six months may need to be addressed. But the terminations arising from the Order are permanent. It may be that the suspension of the unvaccinated address any potential problems arising from the Omicron wave that are identified. That would suggest that the Order is not proportionate as other means (suspension) could have been employed to achieve the same end in accordance with steps (b)(ii) and (iii) of Tipping J's approach in *R v Hansen*.

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20 Section 11.

21 Section 15.

22 *Yardley v Minister for Workplace Relations Safety* [2022] NZHC 291, (2022) 19 NZELR 125.

[40] Cooke J then went on to compare the case the Crown had presented with the limitation of the rights effected by the Order and the significance and impact of that limitation. That comparison anticipates issues that arise on the present appeal. Cooke J said:

> [102] Mr Hague also emphasised that a key difference between the internal policies and the requirements of the Order was that the Order was far less flexible in addressing individual circumstances. The Order contemplates termination of workers that do not comply. The exceptions in the Order are limited, and generally do not vary depending on the individual circumstances of the person involved. That was not so with respect to the internal policies. An individual employee of the Police or the NZDF would be able to go through processes where their internal circumstances were taken into account and assessments could be made on whether the particular functions they undertook involved any significant risks for others. For example an assessment could be made on the extent to which the person had a public facing role, or interacted with other colleagues, or whether they could work from home. That individual assessment was not available when this situation was regulated by the Order, and a breach of the Order allows termination given the amendment to the Employment Relations Act.
>
> [103] I accept that the greater individual flexibility in internal policies is relevant in assessing whether the measures imposed by the Order are demonstrably justified. *It is for the Crown to show why that flexibility is inconsistent with the public interest sought to be advanced by the measure.* And I do not accept that this is addressed simply by witnesses saying that individual consideration was administratively difficult. For example, for Police that individual consideration will presumably still be applied with respect to the significant number of non-sworn officers. I have no evidence that explains why this is workable for civil staff, but not workable for sworn officers, particularly given the low number of people involved.
>
> (Emphasis added, footnotes omitted)

[41] Cooke J set aside the Order.[23] He summarised his reasons for granting that relief as follows:

> [105] In essence, the Order mandating vaccinations for Police and NZDF staff was imposed to ensure the continuity of the public services, and to promote public confidence in those services, rather than to stop the spread of COVID-19. Indeed health advice provided to the Government was that further mandates were not required to restrict the spread of COVID-19. I am not satisfied that continuity of these services is materially advanced by the Order. The actual number of affected staff — 164 Police staff and 115 NZDF staff is very small compared to the overall workforce of over 15,000 for each of the Police and NZDF. *Moreover there is no evidence that this number is any different from the number that would have remained unvaccinated and employed had the matter simply been dealt with by the pre-existing internal vaccine policies applied by Police and NZDF. Neither is there any hard*

[23] At [104].

> *evidence that this number of personnel materially effects the continuity of NZDF and Police services.*
>
> [106] COVID-19 clearly involves a threat to the continuity of Police and NZDF services. That is because the Omicron variant in particular is so transmissible. But that threat exists for both vaccinated and unvaccinated staff. I am not satisfied that the Order makes a material difference, including because of the expert evidence before the Court on the effects of vaccination on COVID-19 including the Delta and Omicron variants.
>
> (Emphasis added)

[42] In reliance on the Order, unvaccinated members of the Armed Forces were to be discharged from service on 1 March 2022 pursuant to Directive 31/2021 issued by the CDF in December 2021.[24]

The TDFO

Origins of the TDFO

[43] The position following the decision in *Yardley* was that the COVID-19 vaccinations remained on the NZDF Vaccination Schedule. NZDF members were required to obtain those vaccinations in order to meet their individual readiness requirements. Failure to do so could result in steps being taken under DFO 3 and DFO 4. Those steps provided for individual assessment of the circumstances of an NZDF member who was not vaccinated, as explained above. A range of outcomes could follow from such an assessment.

[44] The CDF sought advice from Brigadier Matthew Weston, the NZDF Chief People Officer (CPO), about the management of members of the Armed Forces who were not vaccinated in accordance with the NZDF Vaccination Schedule following the decision in *Yardley*. On the basis of that advice, the CDF directed the CPO to draft a Directive amending the retention review process under DFO 3 and DFO 4 for Armed Forces members who could not meet individual readiness requirements due to their COVID-19 vaccination status.

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[24] CDF Directive 31/2021 — Vaccination Mandate — Members of the Armed Forces, 20 December 2021.

[45] Those amendments to the discharge process, and certain related matters, were ultimately dealt with in the TDFO issued by the CDF on 27 May 2022.[25]

TDFO key provisions

[46] As already mentioned, the TDFO sets out the grounds and process for retention review and discharge on the basis of a failure to meet individual readiness requirements relating to vaccination against COVID-19. It has six main elements.

[47] First, the TDFO cancelled Directive 31/2021 and an associated Administrative Instruction issued by the CPO.[26] This was a consequence of the *Yardley* decision, which set aside the Order on which that Directive was founded.

[48] Second, the TDFO provides that any member of the Armed Forces who is not fully vaccinated for COVID-19 pursuant to the NZDF Vaccination Schedule "is ineffectual, and is to have their continued service reviewed". That review is to be conducted in accordance with Annex A to the TDFO, described in more detail below.

[49] Third, Armed Forces members who have not received the primary COVID-19 vaccination(s) may not deploy overseas or domestically as part of any national contingency response capability, or participate in any domestic activity with the COVID-19 vaccination requirement formally set as a health readiness requirement. Members who have received a primary dose but not booster doses are required to receive a command exemption to deploy overseas or domestically.

[50] Fourth, the TDFO provides that a member of the Regular Force who has not received their primary course of COVID-19 vaccination(s) may not access any NZDF camp, base or facility except for the purpose of seeking health or welfare care or support and is to remain on COVID-19 isolation leave. Similar provision is made in relation to members of the Territorial Force.

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25 This version of the TDFO replaced an earlier version issued on 25 May 2022.

26 CPO Administrative Instruction 05/2021 — Implementation of Vaccination Mandate — Members of the Armed Forces, 17 December 2021.

[51] Fifth, the TDFO provides that Service Chiefs are the approval authority for discharge on the basis of a failure to meet individual readiness requirements relating to COVID-19 vaccination, and that the delegation by the CDF cannot be sub-delegated. The CPO is to issue criteria to guide Service Chiefs' decisions on discharge or retention. The TDFO provides that where a decision to retain a member is made:

(a) restrictions on deployment continue to apply; and

(b) that member is to be subject to a new retention review immediately where that member is required for certain deployments and does not meet individual readiness requirements at that time, and in any event after 12 months from the Service Chief's decision, if they do not meet individual readiness requirements at that anniversary.

[52] Sixth, the TDFO amended DFO 3 and DFO 4 to expressly provide that discharge on performance grounds could be initiated where the member fails to meet individual readiness requirements. References to those requirements were inserted in various provisions in place of existing references to inability to meet single Service physical fitness requirements.

[53] Annex A to the TDFO modifies the retention review process in DFO 4 in a number of ways. As already mentioned, the TDFO provides that the approving authority is the relevant Service Chief, not the Commanding Officer. Annex A expressly provides that Commanding Officers are not authorised to approve retention. For NZDF members who have not received the primary course of vaccination, Annex A removes the requirement to provide a formal warning, or follow the regular reporting process set out in DFO 4. For NZDF members who have received the primary course but not the booster, Annex A shortens the formal warning period from three months to no more than two weeks. Annex A goes on to deal with notification dates, warning dates, booster eligibility and various other matters.

[54] The TDFO provides that it will be cancelled on 31 March 2024 unless extended by the CDF. Thus the TDFO was "temporary" in the sense that it was envisaged that it would remain in force for a little less than two years.

Evidence about the objectives of the TDFO

[55] The CDF swore an affidavit setting out the background to the issue of the TDFO, and explaining its objectives. This evidence is central to an assessment of the justification for the TDFO, as required under s 5 of NZBORA.

[56] The CDF described the purpose of the restrictions on deployment of unvaccinated members as both to minimise the risk of COVID-19 being transmitted amongst a deployed force or contingent, or from a contingent to the local population in the area of deployment, and to minimise the risk of an individual service member becoming severely unwell with COVID-19 while deployed or where health services are limited, thus placing a strain on NZDF health services and risking health outcomes to individuals.

[57] The CDF said the purpose of the restrictions on access to NZDF facilities is to reduce the risk of transmission of COVID-19 in the NZDF workforce, by ensuring all military personnel within a given workforce or in service accommodation or other facilities are vaccinated against COVID-19. The restrictions are also intended to reduce the risk of unvaccinated service members contracting COVID-19 in the workplace and becoming severely unwell.

[58] The CDF described the purpose of the modified retention review regime as being to ensure consistency in decision-making, and to ensure that the needs of the Service are considered at the highest level when considering whether an unvaccinated member should be retained in service or discharged.

[59] The CPO, Brigadier Weston, also gave evidence about the decision to issue the TDFO. He explained the reason for adopting a different process for a retention review in this context as follows:

> 76. [The CDF and I] subsequently decided that, given the circumstances, the process for discharge-performance under DFO4, Chapter 16, Section 7 was not fit-for-purpose. In particular:
>
> 76.1 The formal written warning procedure provided for in paragraphs 16.111 to 16.114 were superfluous in relation to those people who had decided not to receive the COVID-19 vaccine at all. This was because, by that stage, vaccination against COVID-19 had been an individual readiness requirement for a year. As discussed above, [Regular Force] personnel who had decided not to undergo vaccination for COVID-19 (either by not receiving any dose or receiving only part of the primary course) had already been provided with sufficient opportunity to remedy their deficiency or seek a waiver for the requirement. Accordingly, the natural justice function provided by the formal warning process had already been fulfilled.
>
> 76.2 With respect to those people who had received the primary course but declined to receive a booster dose, the formal warning period set out in paragraph 16.112(d) was inappropriately long. Again, by this stage [Regular Force] members had been aware for approximately three months that being fully vaccinated against COVID-19, including by receiving the booster dose when eligible, was an individual readiness requirement. Members had also been provided significant opportunity to become compliant or seek a waiver. We therefore considered that a shortened formal warning period provided sufficient further opportunity to discharge natural justice requirements.
>
> 76.3 Finally, whereas under paragraph 16.119 a commanding officer may determine that no further action is required in relation to the relevant performance issues following the formal warning period and having considered comments from the relevant member, we did not consider this appropriate in relation to discharge for failing to meet the Vaccination Schedule requirements. This is because we wanted to ensure consistency of decision making in respect of whether a person should be discharged for failing to meet the Vaccination Schedule requirements. It also reflected the importance that NZDF placed on ensuring all members of the Armed Forces were fully vaccinated against COVID-19. Accordingly, in all cases, reports would need to be provided to Service Chiefs, as the approving authority for discharge, to decide whether discharge or retention were appropriate. Service Chiefs were selected as the appropriate approving authority as they have sufficient strategic overview of the impact retention or release would have on operational effectiveness, and to have the

> decision held at the same level of authority for all members of the Armed Forces. To further support the consistency in decision-making the DFO(T) also specifies that this delegation is not to be sub-delegated.

CPO Administrative Instruction

[60] As contemplated by the TDFO, on 31 May 2022 the CPO promulgated a CPO Administrative Instruction setting out a number of criteria that Service Chiefs were required to take into account when deciding whether a member of the NZDF should be retained in service or discharged for failing to meet individual readiness requirements.[27] Two of those criteria are challenged in the current proceedings:

(a) Whether retention of the individual delays the promotion of others who do meet the individual readiness requirement for COVID-19 vaccination.

(b) Whether the member holds a rank or position whereby their continued refusal to be fully vaccinated undermines service discipline.

[61] Because the justification for these requirements is in issue before us, we set out in full Brigadier Weston's evidence in relation to the rationale for these criteria:

> ***Does the retention of the individual delay the promotion of others who do meet the individual readiness requirement for COVID-19 vaccination?***
>
> 86. If a member of the Armed Forces who does not meet individual readiness requirements is in a role or position that needs to deploy and retaining them in service means that another person cannot be promoted into that position, this degrades the operational effectiveness of the relevant unit. For example, if a person is the chief engineer on board a ship, and there is only one such position, them remaining in service may hold up the promotion of one of the other officers in the engineering department. If the chief engineer is not able to deploy, it will obviously degrade the operational effectiveness of the ship. It will also have an impact on unit cohesion and morale, as it is likely to breed resentment in the person whose promotion is being blocked.
>
> 87. Simply posting the person to another position, while this may appear to be a solution, is contrary to the requirement that the NZDF has the flexibility to post its personnel into positions that best suit their training and experience in order to best support operations. This is particularly important where the NZDF invests (in some cases) millions of dollars, and significant

[27] CPO Administrative Instruction 01/2022: Guidance to Service Chiefs to Support Retention Decisions in accordance with DFO(T) 06/2022 [CPO Administrative Instruction].

> time, in training people for particular roles. So, for example, if an engineering officer can no longer deploy on board a ship, the time and money spent on their training as a marine engineer will have been wasted.
>
> ***Does the member hold a rank or position whereby their continued refusal to be fully vaccinated undermines service discipline?***
>
> 88. There are some ranks and/or positions where refusal to meet an individual readiness requirement will have an impact on service discipline. For example, if the Commanding Officer or Regimental Sergeant Major of an Army unit refused to be vaccinated, and this meant that the Commanding Officer or Regimental Sergeant Major could not undertake certain duties (e.g., service in a Managed Isolation Facility on Operation PROTECT), this would inevitably have a negative impact on morale and service discipline. Again, simply posting a person to a different position, rather than discharging them, conflicts with the requirement that the NZDF needs the flexibility to post people into the positions that best suit their training and experience in order to best support operations

The proceedings

The appellants

[62] We adopt with gratitude the Judge's description of the appellants' personal circumstances.

[63] Appellant A serves in the Army. He is unvaccinated. He gives three reasons for declining to be vaccinated:

(a) his religious beliefs;

(b) lack of transparency from NZDF; and

(c) concern at provisional approval that the vaccine has received.

[64] He describes his religious beliefs as being traditional Catholic. He stands against abortions and does not believe in taking a vaccine that may have been developed and tested using cells descended from cells taken from an aborted foetus.

[65] Appellant B is an officer who has served for many years in the Army. He is unvaccinated. He has religious beliefs against abortion and those beliefs do not permit him to receive the vaccine due to development of the vaccine using cells descended from cells taken from an aborted foetus. He is also concerned that the COVID-19 vaccines are "still experimental" and at what he described as "the number of adverse health reports made globally". He believes there is an as-yet-unknown risk of having an adverse reaction, which he deems unacceptable.

[66] Appellant C is an officer in the Air Force. He has received the primary doses but not the booster dose. He declined the booster because of concerns that it is unsafe and ineffective. He says that he disagrees with the principle of mandating medical procedures and particularly with mandating what he describes as "unsatisfactorily tested and trialled experimental gene therapy". He has had COVID-19 and experienced only mild symptoms. He says that he would rather have COVID-19 again than risk an adverse vaccination reaction.

[67] Appellant D is an officer in the Navy/Naval Reserve. He also has had two COVID-19 vaccinations but has declined the booster. His reason for declining the booster is that he is concerned that men of his age are dying of unexplained heart attacks and he is worried about unknown risks.

[68] One of the appellants has left the Armed Forces in anticipation of discharge. He says he wishes to remain in the Reserve Force but the TDFO makes that impossible. Another has been discharged as a result of his failure to be vaccinated against COVID-19. One appellant was retained following an initial retention review: he is subject to a further retention review 12 months after that initial review. The remaining appellant, who has received the primary doses but not the booster doses, does not currently face discharge as a result of the booster doses being moved to the enhanced programme after the date of the High Court hearing.[28]

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[28] See [81] below.

The challenge to the TDFO and related instruments

[69] Before the High Court, the appellants challenged the TDFO, the amendments made by the TDFO to DFO 3 and DFO 4, and the CPO Administrative Instruction. The challenge was brought on three main grounds:

(a) inconsistency with s 72 of the AFD Act;

(b) inconsistency with the Code; and

(c) inconsistency with three rights recognised under NZBORA:

(i) the right to refuse to undergo medical treatment (s 11);

(ii) the right to manifest religion (s 15); and

(iii) the right to be free from discrimination (s 19).

[70] The appellants also invoked the "other rights and freedoms" referred to in s 28 of NZBORA, including what they described as the "right to work" referred to in the Universal Declaration of Human Rights 1948.[29]

[71] Because there was some confusion about the scope of the challenge at the hearing before us, it is worth emphasising that the appellants' proceedings never challenged the addition of the COVID-19 vaccinations to the NZDF Vaccination Schedule. They were not arguing that the vaccinations could not be required. Rather, they were contending — along similar lines to *Yardley* — for retention of the existing flexible approach to determining the consequences of a particular individual not being vaccinated in accordance with that Schedule.

Evidence filed by the appellants

[72] The appellants filed affidavits setting out their personal circumstances, and the reasons why they have declined to be vaccinated. They also gave evidence about the

[29] Universal Declaration of Human Rights 1948, art 23(1).

significant impact on them and their families of the challenged requirements, and the prospect of losing their employment as a result of a retention review.

[73] The appellants also filed affidavits from other members of the NZDF who are unvaccinated, explaining their reasons for declining vaccination, and the impact on them of the challenged instruments. One of those deponents explained that he was already medically downgraded and did not meet required fitness levels for other reasons, but this did not affect his ability to perform his duties.

[74] It appears from a response to a request under the Official Information Act 1982, which was included in the evidence of the appellants, that as at 31 May 2022, out of a total of 9,251 NZDF Regular Force personnel, 3,124 were not fit for service within New Zealand and 4,547 did not meet the fit for service criteria for international deployment. We return to this below.

Expert evidence filed by the appellants

[75] The appellants also filed expert evidence from Dr Nikolai Petrovsky, a physician and vaccine developer. His evidence addressed the effectiveness of various COVID-19 vaccines, and the likelihood of vaccinated New Zealanders being exposed to and becoming infected with COVID-19 variants. Dr Petrovsky gave evidence that it would be predicted, based on published data, that a reasonably high proportion of vaccinated New Zealanders will get exposed and infected with one or more COVID-19 variants that arise from time to time. He considers that vaccinated adults infected with the Omicron variant are likely to have similar risks of transmitting that infection to other individuals as an unvaccinated individual. He explains that just because someone is vaccinated, it cannot be assumed that they are not infected or capable of transmitting the virus to others.

[76] Dr Petrovsky's evidence also summarised the published data on risks associated with COVID-19 vaccines.

[77] Dr Petrovsky also gave evidence about the use of cell lines that may be derived from an aborted human foetus in vaccine production or testing. His evidence was that the AstraZeneca vaccine and some other vaccines are produced in such cells.

The Pfizer vaccine is not made in such cells, but those cells are used by Pfizer for testing the effectiveness of their vaccine.

[78] Dr Petrovsky explained in some detail why he does not consider that vaccine mandates for particular workforces are justifiable, based on the evidence available. That view is based on his conclusions in relation to the benefit of vaccination, alternative measures for managing risks to staff, the risk of serious adverse reactions, and the importance of genuinely informed consent.

[79] In a second affidavit sworn in August 2022, Dr Petrovsky summarised his views as follows:

> 6.1. The SARS-CoV-2 virus that causes Covid-19 disease is genetically unstable and has mutated into many different variants. Omicron, the most recent variant, is highly transmissible, and has already created a range of sub-variants referred to as BAJ, [BA.2], BA.3 etc with each new successful variant demonstrating greater transmissibility and vaccine-resistance, an ongoing process that means the current vaccines which have already lost many of their benefits will ultimately become ineffective.
>
> 6.2. Omicron causes milder disease than the earlier variants in the vast majority of the population, such that the illness it causes in most people is no worse than seasonal influenza. The exception remains the elderly particularly those with medical co-morbidities who can still get severe disease and die from Omicron infection just as they can die from influenza infection.
>
> 6.3. Omicron strains demonstrate increasing vaccine-resistance, which means that 2 and even 3 or 4 doses of the current vaccines provide no major long-term protection against Omicron infection or transmission.
>
> 6.4. Three-doses of the current vaccines provide some protection against severe illness caused by Omicron in those at high risk but have not been shown to materially reduce the spread of infection through the community. Even a third or fourth booster dose benefits on severe illness caused by Omicron variants is now recognised to be partial, transient and to wane rapidly.
>
> 6.5. Comparisons of Omicron infection rates in those who have received a fourth dose as compared to those who have only had three dose[es] suggests the fourth dose has minimal additional, if any, effect on reducing Omicron infection or transmission.
>
> 6.6. An extremely large number of healthy young adults would need to be vaccinated to prevent one severe or lethal Omicron infection, reducing the benefit to risk ratio of the vaccines in such populations.

6.7. mRNA vaccines cause myocarditis and pericarditis but the mechanism for this remains unknow[n], as does the medium and longterm consequences of this heart inflammation. Even the true frequency of its occurrence in vaccinated individuals is not certain. This absence of data on their long-term effects is the reason these vaccines remain provisionally approved rather than being fully approved.

6.8. Current cases of Omicron infection are predominantly transmitting through vaccinated individuals, as vaccinated individuals remaining susceptible to Omicron infection and are able to transmit this infection to others.

6.9. There is no good evidence that the ability of an infected vaccinated individual to transmit infection is currently any less than that of an infected unvaccinated individual.

6.10. The fact someone has received a Covid-19 vaccine provides no guarantee that they are not infected with Omicron and are not contagious to others, irrespective of whether they have symptoms or not.

6.11. Even if the current vaccines were to be assumed to have a modest short-term effect on reducing the rate of Omicron infection, removing a small proportion of unvaccinated individuals from a workplace would not in my opinion have a material effect on the overall risk of workplace infection or transmission in that workplace.

6.12. If there is a desire to reduce the risk of workplace infection or transmission due to Omicron, then appropriate interventions could include improved workplace hygiene, social distancing, better airflow management, training in and use of suitable personal protective equipment (PPE) and use of regular rapid antigen tests (RATs) for early identification and isolation/quarantine of those who are infected and thereby potentially contagious.

6.13. Vaccines have not been shown to reduce the risk of workplace transmission, with overwhelming evidence that workplace transmissions continue to occur unabated even in 100% vaccinated workplaces.

6.14. While vaccines remain a valuable tool to try and reduce serious illness and death in those at greatest risk from serious Covid-19 infection, this is largely restricted to elderly individuals with multiple medical co-morbidities who are unlikely to be represented to any great degree, if at all, in relevant workforces.

6.15. An appropriate risk-benefit analysis should assess the potential vaccine benefits to each specific individual and weight these against the harms and risks of taking the vaccine.

6.16. The risk-benefit of Covid-19 vaccines is constantly changing, due to ongoing changes in the virus, changing appreciation of the risks associated with the vaccines and Covid-19 infection, and the effects of high levels of natural immunity in the population that did not exist

> at the start of the pandemic. This requires a constant reassessment of the utility and use of the vaccines, with the weight of evidence supporting a move to principally focus the vaccines on high risk groups, while urgently researching better vaccines to replace the current generation that fail to protect against Omicron infection and transmission and thereby have limited utility in healthy young adults at low risk of serious Omicron disease, whether vaccinated or not.

Respondents' evidence

[80] The respondents filed evidence about the background to the issue of the TDFO and related instruments, and the purpose of those instruments, from the CDF, the CPO, and the Surgeon General for the NZDF and Director of Defence Health for the NZDF, Colonel Charmaine Tate. Some of that evidence was set out above.

[81] The respondents also filed updating evidence in this Court from Colonel Tate and from Ms Jacinda Funnell, who is Brigadier Weston's successor as CPO. Their updating evidence, which we granted leave to adduce, explains that a decision has been made to amend the NZDF Vaccine Schedule to retain the primary course of COVID-19 vaccination as a baseline requirement, and move booster doses for COVID-19 from the baseline requirement to the enhanced programme. That has implications for the retention process set out in the TDFO. Members of the NZDF who have received their primary doses will no longer be subject to a retention review on the basis of vaccination status: that includes two of the appellants in these proceedings. The position remains unchanged for members who have not received their primary vaccination doses.

[82] As a result of the COVID-19 booster doses being on the enhanced programme, a NZDF member would need to receive a booster dose if deployed in an area where the enhanced programme is considered by the Surgeon General to apply. If they refuse to get the booster dose prior to a deployment that required one, a number of potential scenarios could apply. Ms Funnell explains that none of the three serving appellants are being imminently deployed in circumstances where the booster might be required, so those scenarios are not directly relevant in these proceedings.

High Court judgment

[83] After setting out the background to the proceedings, and the parties' submissions, the Judge dealt with each of the challenges in turn.

Consistency with s 72 of the AFD Act

[84] The Judge began by considering the argument that the instruments were inconsistent with s 72 of the AFD Act.

[85] The Judge understood the respondents to be arguing that the addition of the COVID-19 vaccine to the NZDF Vaccination Schedule, and thus to the individual readiness requirements, did not amount to an order to members of the NZDF to have the vaccine. The legal authority to order a member of the NZDF to receive a vaccine does not come from s 72 of the AFD Act, but is a function of command which is a prerogative power. All that s 72 does is to establish an offence for failing to comply with an order.[30]

[86] The Judge accepted the argument that addition of the COVID-19 vaccination to the NZDF Vaccination Schedule, and thus to the individual readiness requirements, did not amount to an order under s 72 of the AFD Act. He considered that the readiness requirements and s 72 of the AFD Act serve entirely different functions. The addition of the COVID-19 vaccination to the individual readiness requirements did not constitute an order pursuant to s 72. It had consequences different from the liability to criminal sanction that results from failure to comply with an order given pursuant to s 72. Unvaccinated NZDF members retain the ability to choose whether to remain unvaccinated, and their discharge is not a foregone conclusion as a result of the exercise of that choice.[31] So there is no inconsistency with s 72 of the AFD Act.[32]

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30 *Four Members of the Armed Forces v Chief of Defence Force* [2022] NZHC 2497 [High Court judgment] at [47].
31 At [48].
32 At [49].

Consistency with the Code of Health and Disability Services Consumers' Rights

[87] The Judge applied his own reasoning in an earlier case, *GF v Minister of COVID-19 Response*, in which he held that the Code was relevant at the point when a vaccine was being administered and that nothing in the Order under consideration in that case limited or excluded rights and duties under the Code.[33] Similarly, in this case, the Judge held that the Code applies at the time the vaccination is to be administered.[34] The appellants had exercised free choice to decline vaccination (or boosters). The fact that that decision came with the consequence of possible loss of employment did not mean that the Code had been breached.[35]

Claimed unlawfulness of the CPO Administrative Instruction

[88] The Judge then considered the challenge to two of the criteria in the CPO Administrative Instruction.

[89] The Judge accepted the evidence of Brigadier Weston in relation to the rationale for the criterion relating to whether retention of an unvaccinated individual delays the promotion of others who do meet the readiness requirements in relation to COVID-19 vaccination:

> Unvaccinated members of the Armed Forces not only reduce the force numbers that are able to be deployed, but in occupying non-deployable roles/positions may also reduce the capacity for force rotation and available posting opportunities for respite. For some ranks or trades in particular, this adversely impacts on the personnel who are fit for service, as sufficient respite cannot be accommodated.

[90] The Judge concluded that this criterion was relevant to the overall purpose of the CPO Administrative Instruction and was not an irrelevant consideration.[36]

[91] The Judge then turned to the criterion of whether the member holds a rank or position whereby their continued refusal to be fully vaccinated undermines service discipline. The Judge accepted that refusal by a member who holds an influential role to comply with individual readiness requirements has the potential to directly affect

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33 *GF v Minister of COVID-19 Response* [2021] NZHC 2526, [2022] 2 NZLR 1 at [122].
34 High Court judgment, above n 30, at [52].
35 At [53].
36 At [64].

unit morale and service discipline. It is therefore related to the individual readiness requirements, and is not an irrelevant consideration.[37]

Conflict with NZBORA Rights

[92] The Judge treated the challenged instruments as the product of the exercise of a prerogative power to set and vary terms of engagement of service and discharge. That did not mean that the rights set out in NZBORA do not apply. But it provided relevant context when applying s 5 of NZBORA. Other relevant contextual matters, the Judge said, were that it is for the CDF to determine appropriate readiness requirements, and that vaccine mandates have been an established part of readiness requirements for many years.[38]

[93] The Judge noted that once one of the rights protected by NZBORA is engaged, there is "a significant evidential burden placed on the respondents to demonstrate that the measures implemented are reasonable and demonstrably justified in a free and democratic society".[39]

[94] The Judge recorded that it was accepted by the respondents that administration of vaccines amounts to medical treatment for the purposes of s 11 of NZBORA, and that "when a person is faced with the choice of either being vaccinated or having their employment terminated, there is a sufficient imposition on their freedom of choice to engage both the s 11 and s 15 rights."[40]

[95] In relation to s 15 rights, the Judge noted that the Court in *Yardley* accepted that "the right to manifest a religion under s 15 of NZBORA is limited for those who object to vaccination with a vaccine that has been tested using cells derived from a human foetus on religious grounds, but not otherwise".[41] That was the basis on which the appellants argued that the instruments unjustifiably limited their s 15 rights in the present case.[42]

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37 At [66].
38 At [67].
39 At [68].
40 At [70], referring to *GF v Minister of COVID-19 Response*, above n 33.
41 At [71], referring to *Yardley v Minister for Workplace Relations Safety*, above n 22, at [52].
42 At [72].

[96] The respondents argued that the appellants had been provided with access to an alternative vaccination — the Novavax vaccine — which did not engage the s 15 NZBORA right because it had not been developed using cell lines derived from a human foetus.[43] After reviewing the evidence of Dr Petrovsky and Colonel Tate, the Judge expressed the view that it was not possible, on the basis of the conflicting affidavit evidence, for the Court to come to a determinative view as to whether the Novavax vaccine was tested using cell lines descended from cells taken from aborted foetuses. The Judge therefore proceeded on the basis that this was at least a possibility,[44] and that a requirement to have a vaccine which may have been tested on cells derived originally from cell material from an aborted foetus engages s 15 of NZBORA.[45]

[97] The Judge did not accept that the right to be free from discrimination set out in s 19 of NZBORA had been infringed by the instruments. The instruments did not expressly contemplate the use of religion to distinguish between affected members. Nor was there any other differential treatment of groups with a particular religious practice in a way that caused a disadvantage.[46]

[98] Turning to the claimed infringement of the "right to work", the appellants acknowledged that NZBORA does not specifically provide such a right.[47] But as already mentioned, they relied on the Universal Declaration of Human Rights which provides in art 23(1) that everyone has the right to work.[48] They submitted that NZBORA expressly provides that existing rights or freedoms are not abrogated or restricted by reason only of the fact that they are not included in that Act.[49] The Judge noted that there are mechanisms for NZDF members to seek remedies in respect of such matters, including the ability to challenge the application of the orders to them under the instruments.[50] The Judge considered that it was significant that the provisions said to amount to a limit on the right to work are conditions of service, and

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43 At [73].
44 At [74]–[80].
45 At [88].
46 At [89]–[92].
47 At [93].
48 At [94].
49 At [93], referring to NZBORA, s 28.
50 At [99].

that the need to comply with the NZDF Vaccination Schedule was known to, and therefore accepted by, all relevant personnel at the time of their enlistment. In those circumstances, the Judge did not accept that the "right to work" had been infringed.[51]

[99] The Judge then went on to undertake a s 5 NZBORA analysis in relation to the rights that he had found to be engaged, namely the right to refuse to undergo medical treatment and the right to manifest religious beliefs. He was satisfied that the purpose of the relevant instruments is to maintain the operational efficacy of the Armed Forces in New Zealand by limiting the spread of COVID-19 within the Armed Forces. That limitation serves a focussed and important objective: maintaining the operational efficacy of New Zealand's Armed Forces by ensuring that members are able to be deployed.[52] The Judge was satisfied that maintaining the ongoing efficacy of the Armed Forces is sufficiently important to justify a limitation on the rights contained in ss 11 and 15.[53] He noted that the appellants had not sought to challenge the addition of any of the other required vaccinations contained in the Vaccination Schedules. That appeared to be an acceptance by them that receiving certain vaccines as a condition of service is a justified limitation, for the reasons identified in the respondents' evidence. "If vaccination generally is accepted as a justifiable limit, evidence would be required to establish that the COVID-19 vaccine was of a sufficiently distinct nature to warrant a different conclusion."[54]

[100] The Judge went on to consider whether there were any material differences in relation to the approach to the COVID-19 vaccine. He understood the appellants to focus on two issues:

(a) The fact that there were now only some 55 members of the Regular Force unvaccinated, out of a force of 9,251.

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51 At [100].
52 At [106].
53 At [107].
54 At [107].

(b) The fact that historically retention reviews had been done on an individual basis. The appellants argued that there was no good reason to shift from that approach to a blanket approach.[55]

[101] The Judge considered that these arguments ignored the fact that the readiness requirements, including compliance with the NZDF Vaccination Schedule "are not matters of recent invention".[56] He considered the focus should be on whether, at the time the instruments were promulgated, they served a sufficiently important purpose, there was a rational connection between the limit on rights and that purpose, whether the right was restricted no more than reasonably necessary, and the restriction was proportionate to the objective.[57]

[102] The Judge considered that the amendment to the individual readiness requirements was rationally connected to its purpose, and was not disproportionate. The maintenance of the NZDF in a suitable state of readiness is a sufficiently important objective to warrant a restriction on the rights protected by ss 11 and 15 of NZBORA.[58]

[103] The Judge noted that if the NZDF Vaccination Schedule had not been amended to include the COVID-19 vaccines, the high vaccination rate achieved appears to have been unlikely. Making exceptions for the appellants was likely to have a precedent effect. There was evidence that others would have preferred not to get vaccinated but did so because it was a readiness requirement and therefore a condition of service. "If a new variant of COVID-19 emerges, requiring a different vaccination, any exemption of the appellants from being vaccinated on the basis that they only represent a small number of NZDF personnel may well influence the willingness of others to be vaccinated."[59]

[104] The Judge did not accept the appellants' argument that because of the large number of undeployable personnel, the CDF could not claim that the retention of 55 unvaccinated Regular Force members is so intolerable that they should be subject

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55 At [108]–[109].
56 At [109].
57 At [109].
58 At [110].
59 At [111].

to mandatory retention review and likely discharge.[60] The Judge accepted the CDF's response that the fact that there is a significant number of members of the Armed Forces who are undeployable as a result of matters beyond their control heightens the necessity to have the remainder of the NZDF available for deployment, including as rotation for members deployed who need respite.[61]

[105] The Judge considered that the number of otherwise deployable or undeployable members of the Armed Forces is irrelevant, "when the clearly stated purpose of the instruments was to ensure that the **maximum** number of possible members are deployable".[62] The fact that the vast majority of the Armed Forces are vaccinated for COVID-19, or that there is a significant number of members considered not deployable for other reasons, did not in the Judge's view bear on the purpose of ensuring that the maximum amount of members comply with the specific readiness requirement.[63]

[106] The Judge did not accept an argument that the risks of receiving the COVID-19 vaccine outweighed the benefits sought to be achieved, or that those risks put COVID-19 vaccines, either individually or as a group, in a category different from the other vaccines in the NZDF Vaccination Schedule.[64]

[107] The Judge then turned to the question of proportionality. He was satisfied that the means (the vaccination requirement) was rationally connected to the objective of preventing or reducing the risk of COVID-19 spreading.[65]

[108] The Judge next considered whether the means chosen impaired the right or freedom no more than reasonably necessary, and whether there is an alternative measure that has the same effect but is less inconsistent or intrusive. The Judge understood this to mean that the question was whether less intrusive means than

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60 At [112]–[113]. As noted above, out of 9,251 Regular Force members, some 3,124 did not at the time meet the readiness requirements for service within New Zealand and 5,547 did not meet the readiness requirements for international service.

61 At [114].

62 At [121] (emphasis in original).

63 At [121].

64 At [120].

65 At [122], citing *GF v Minister of COVID-19 Response,* above n 33, at [80].

vaccination could achieve the purpose of maximising the amount of deployable members, and thereby the operational efficacy of the Armed Forces.[66] The Judge said:

> [125] It is well-established that "a conclusion under this limb needs to take into account the level of latitude to be afforded to public policy decision-makers, particularly in matters of science". In the present context, that latitude must take into account the position of the CDF as commander of the Armed Forces. The Courts are not in a position to conclusively determine disputed matters of military necessity, and limits held to be unreasonable in a civilian context may not necessarily be unreasonable in the context of service in the Armed Forces. In this respect the evidence of Colonel Tate, Director of Defence Health is relevant. She stated:
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> > It is not possible to assess health threats individually for every domestic activity, and for every individual, and only to vaccinate before that activity. The Baseline Programme is a reasonable set of health protections to mitigate risk to military populations and maintain timely readiness for the spectrum of duties that members can be expected to undertake. Collective (group based) operations or training environments domestically include locations without close medical support such as remote locations and ships, and doing everything we can to ensure less severe outcomes within high numbers of cases, is in line with military preventative medicine principles.
>
> [126] Air Marshall Short also stated:
>
> > … the very nature of service in the Armed Forces is to undertake tasks in the national interest, as directed by the Government of the day, which involve risk to personal safety and sacrifice to individual liberties.
> >
> > As a corollary, commanders within the Armed Forces have a responsibility to ensure the welfare of personnel under their command …
> >
> > …
> >
> > The basis of virtually all of NZDF's activities is to either conduct operations or to build and maintain readiness to conduct operations. Each individual member of the Armed Forces is required to meet individual readiness requirements in order to contribute to military operations as and when required. Units within the NZDF are required to train to achieve directed levels of readiness for operations …
>
> [127] While Dr Petrovsky's evidence spoke to the declining efficacy of vaccination in preventing transmission, he did not substantially dispute the premise that vaccination in and of itself, is an effective mechanism for reducing the harm associated with COVID-19 generally. I am also satisfied that Colonel Tate and Air Marshall Short's evidence establishes that in a military context, vaccination is significantly more useful and efficient than

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66 At [123].

> using alternative measures, or adopting a case-by-case approach for individual members.
>
> (Footnotes omitted)

[109] Finally, the Judge considered whether the benefits achieved by the measure were outweighed by the significance of the limitation of the right.[67] He did not accept the argument that a failure to be vaccinated would necessarily result in a member being discharged. He noted that 17 of the 39 members who have been subject to a retention review process, as a result of being unvaccinated, have been retained. He considered that this "clearly demonstrates that discharge was not a likely conclusion of the review process".[68] In relation to the s 11 right, he said:

> [130] The reality is that failure to be vaccinated is a ground under which a member's service may be reviewed, and that discharge is one out of a range of possible consequences, to be considered by Service Chiefs in accordance with the guidance set out in the AI. The addition of the COVID-19 vaccination as a readiness requirement is not akin to an order made under s 72 in that members have no choice but to comply. Unvaccinated members retain their ability to [choose] to become vaccinated. On the evidence before the Court, I conclude that to the extent requiring vaccination might limit s 11 rights, the benefits of that requirement outweigh that limitation.

[110] In respect of s 15, the Judge adopted the reasoning of Gwyn J in *Orewa Community Church v Minister for COVID-19 Response*.[69] It was necessary to consider how the manifestation of the appellants' religious beliefs might impact on others. In the present case, that would have an impact on other members of the Armed Forces, and by extension the defence of the Realm. It would have a palpable effect on the efficacy of the Armed Forces. The rights of other members of the Armed Forces and the need for the Armed Forces to be effective and deployable demonstrated the necessity for qualification of the appellants' rights. The Judge said this was "especially so when the Novavax vaccine remains available to those members who object to the vaccine on religious grounds".[70]

[111] The Judge concluded that the appellants had not identified an alternative method of addressing the need to maintain the efficacy of the Armed Forces during

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67 At [128].
68 At [129].
69 *Orewa Community Church v Minister for COVID-19 Response* [2022] NZHC 2026, [2022] 3 NZLR 475.
70 High Court judgment, above n 30, at [132].

the pandemic that would be equally effective. Although a case-by-case approach was potentially an alternative, the Judge was not satisfied that this would be an operationally feasible alternative within the context of the NZDF.[71]

[112] The applications for judicial review were dismissed.[72]

Issues on appeal

[113] The parties identified the following issues on appeal:

Illegality

(a) Whether s 72 of the Armed Forces Discipline Act 1971 has a limiting effect on s 27 of the Defence Act 1990?

(b) Whether the Health and Disability Commissioner (Code of Health and Disability Services Consumers' Rights) Regulations 1996 has a limiting effect on s 27 of the Defence Act 1990?

(c) Whether the instruments subject to this appeal are contrary to the asserted limits in paragraphs (a) and (b) above?

Unjustified limitation on rights

(d) Whether the High Court erred in:

(i) its characterisation of the evidence before it?

(ii) making findings of fact that were not in evidence?

(iii) relying on Colonel Tate's evidence as expert opinion?

(e) Whether the instruments subject to this appeal engage the right to be free from discrimination on the basis of disability?

(f) Whether the High Court erred in failing to place the burden on the respondents of satisfying the Court that the limitations on the affected rights were demonstrably justified in a free and democratic society?

(g) Whether the limitations on the affected rights were demonstrably justified in a free and democratic society, including:

(i) whether the purpose sought by the vaccine requirement was rationally connected to the objective?

(ii) whether there are any practicable alternatives that would achieve the benefit sought in a way that would limit the affected rights less?

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71 At [133].
72 At [134].

[114] We will address the issues raised in this order, except that the evidential points raised as issue (d) are in our view better addressed in the context of the substantive issues to which they relate. We will therefore address issues about the sufficiency of the evidence that the respondents provided to justify limits on NZBORA rights when we address substantive issues (e)–(g).

Inconsistency with s 72 Armed Forces Discipline Act?

The source of the power to issue the TDFO

[115] It was common ground before us that the requirement in DFO 3 to maintain individual readiness requirements was an order for the purposes of the Defence Act, as were the various requirements and procedures provided for in the TDFO.

[116] The appellants argued that the Judge erred in proceeding on the basis that the DFOs were made under prerogative power. They submitted that the orders were issued under ss 27 and 45 of the Defence Act. The respondents supported the High Court view that the legal authority to order a member of the Armed Forces to receive a vaccine is a function of prerogative power, subject to limitations expressed in legislation. They describe the Defence Act as "[clothing] the prerogative with a partial statutory framework".[73]

[117] Ultimately it was common ground that nothing turned on whether the power exercised by the CDF was a statutory power, or a prerogative power the exercise of which is controlled by statute. We note that DFO 3 expressly provides that it is issued under ss 27 and 45 of the Defence Act, and the TDFO expressly provides that it is issued by the CDF pursuant to s 27 of the Defence Act. These were for all relevant purposes the exercise of statutory powers of decision to make secondary legislation. Any background prerogative power in relation to the Armed Forces is not relevant to our analysis.

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[73] Referring to Philip A Joseph *Joseph on Constitutional and Administrative Law* (5th ed, Thomson Reuters, Wellington, 2021) at 18.4(3).

The issue

[118] The issue thus becomes whether the power to issue a DFO under s 27 of the Defence Act in relation to COVID-19 vaccination was limited by s 72 of the AFD Act, which we set out again for ease of reference:

> **72 Endangering the health of members of the Armed Forces**
>
> (1) Every person subject to this Act commits an offence, and is liable to imprisonment for a term not exceeding 2 years, who, without lawful excuse, refuses or fails to submit himself to medical, surgical, or dental treatment or procedures by a medical practitioner or dental practitioner, as the case may require, after being ordered to do so—
>
> (a) by a medical or dental officer who is a medical practitioner or dental practitioner; or
>
> (b) by a competent officer acting on the advice of any such medical or dental officer—
>
> if any such treatment or procedure, whether preventive, protective, or curative, is stated by the medical or dental officer who gives the order or advice to be, in his opinion, essential in the interests of the health of other members of the Armed Forces, or to be such that refusal or failure to submit thereto would constitute a potential menace to the health of other members of the Armed Forces or would prejudice the operational efficiency of any part of the Armed Forces.
>
> (2) In any proceedings in respect of an offence against subsection (1), where the order involves curative surgery, it is a defence to the charge if the accused proves that the provisions of Defence Force Orders relating to the right of a member of the Armed Forces to ask for a second opinion in such cases have not been observed.

Appellants' submissions

[119] Mr Hague, who appeared for the appellants, accepted that s 72 was not the source of any power to give orders requiring an NZDF member to receive medical treatment. But he submitted that an order of that kind must comply with the requirements set out in s 72, including that the order must be given by a medical or dental officer who is a medical practitioner or dental practitioner, or by a competent officer acting on the advice of any such medical or dental officer, that the treatment must be stated to be essential in the interests of the health of other members of the Armed Forces, or such that refusal would constitute a potential menace to the health of other members of the Armed Forces or would prejudice operational efficiency.

Moreover the right to ask for a second opinion must be observed, before the order is valid.

Discussion

[120] We agree with the Judge that this argument misunderstands the function of s 72. Section 72 of the AFD Act makes it a criminal offence for a member of the NZDF to fail to submit to medical treatment in the circumstances set out in that provision. That is why it is so narrowly circumscribed, and incorporates a number of protections for the person to whom the order is addressed.

[121] The CDF gave evidence that he considered issuing an order under s 72, but decided not to do so. Putting to one side the question whether such an order could lawfully have been issued in the present circumstances, it is in our view clear that s 72 of the AFD Act does not limit the range of orders that can properly be made under the Defence Act. Rather, it prescribes additional (criminal) consequences for failure to comply with a particular subset of such orders.

[122] Put another way, the orders given to Armed Forces members in relation to COVID-19 vaccination through DFO 3, the NZDF Vaccination Schedule and the TDFO did not satisfy the pre-requisites for s 72 of the AFD Act to apply. That means that failure to comply with the orders does not trigger criminal consequences. But it does not follow that the orders are unlawful or invalid.

[123] The Judge was right to reject this ground of challenge to the instruments.

Inconsistency with the Code?

Appellants' submissions

[124] The appellants argued that the Code is an enactment, and the CDF may not issue DFOs that are inconsistent with any enactment (as s 27(1) of the Defence Act expressly provides). They said the NZDF is a healthcare provider, and is therefore subject to the requirements of the Code. Vaccination is within the definition of "health services" set out in the Health and Disability Commissioner Act. The appellants

submitted the TDFO and related instruments breached the three rights in the Code listed at [31] above.

Discussion

[125] We do not accept this submission. A DFO must not be inconsistent with any *applicable* enactment. The Code applies at the point in time at which health services are provided. So, here, it applies — and the NZDF must act consistently with it — at the time when a vaccination is offered to an individual NZDF member. The issue of DFOs is not itself the provision of health services, and the Code is quite simply inapplicable to the CDF when issuing such orders.

Inconsistency with NZBORA?

NZBORA rights engaged

[126] It was common ground before us that the TDFO and related instruments limit the right to refuse medical treatment protected by s 11 of NZBORA because they place significant pressure on the appellants and other members of the Armed Forces to accept vaccination against COVID-19, which is a form of medical treatment.

[127] The High Court also found that the instruments limited the right to manifest religious beliefs protected by s 15 of NZBORA. Before us, the respondents submitted that s 15 is not engaged as there are reasonable alternatives for members of the NZDF that do not engage those rights. The NZDF Vaccination Schedule sets out a number of COVID-19 vaccine options, including the Novavax vaccine. The respondents submitted that their evidence demonstrated that the Novavax vaccine did not use human
foetal-derived cell lines or tissue in its development, manufacture or production.

[128] There are two difficulties with this submission. The first is procedural: the respondents did not give notice of intention to support the judgment on other grounds. The correctness of the Judge's finding that s 15 was engaged was not identified as an issue in the parties' agreed list of issues. In those circumstances, it was not open to the respondents to challenge this aspect of the Judge's reasoning.

[129] The second is substantive. The respondents did not provide any admissible evidence on this point before the High Court. The evidence of Colonel Tate relied on by the respondents read as follows:

> Of relevance to the current proceedings, unlike the Pfizer and AstraZeneca vaccines, according to Novavax, no human foetal-derived cell lines or tissue are used in any way in the development, manufacture or production of the Novavax vaccine.[7]
>
> 7 https://www.pbs.org/newshour/nation/novavax-vaccine-may-be-an-option-for-service-members-who-sought-religious-exemptions

[130] Although Colonel Tate is a medical practitioner, she does not suggest in her evidence that she has any particular expertise in relation to the development of vaccines. We doubt she is qualified to express an expert opinion on whether foetal cell lines are used in the development, manufacture or production of the various different COVID-19 vaccines. And she does not purport to do so: she simply records a statement that Novavax is reported in a media article as having made. That is not admissible evidence of a kind on which a court can properly rely.

[131] We think the Judge was right to proceed on the basis that it was at least possible that the Novavax vaccine was tested using cell lines descended from cells taken from aborted foetuses, on the basis of the limited evidence before him on that issue.[74]

[132] We accept Mr Hague's submission that it is difficult to reconcile the Judge's statement about the basis on which he was proceeding in relation to this issue with his subsequent observation that the concern raised by the appellants about intrusion on s 15 rights is reduced because "the Novavax vaccine remains available to those members who object to the vaccine on religious grounds".[75] The Judge may have intended to suggest that the concern was less acute in relation to the Novavax vaccine, but that does not exclude the possibility expressly accepted by the Judge that the Novavax vaccine was tested using such cell lines. That finding better reflects the state of the evidence before the High Court.

[133] We therefore proceed on the basis that the s 15 right is also engaged.

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74 High Court judgment, above n 30, at [80].
75 At [132].

[134] Mr Hague submitted that the right to be free from discrimination on the grounds of disability was also engaged. He submitted that the Judge erred in characterising this argument as founded on indirect discrimination. Rather the appellants argued that the instruments directly discriminate because the prohibited ground — disability — is used as a basis for differentiating between two groups.[76]

[135] Mr Hague's argument, which he acknowledged was novel, is best put in his own words:

> 79. Disability is defined in the Human Rights Act 1993 (**Human Rights Act**) as any loss or abnormality of a physiological function and separately in the body the presence of organisms capable of causing illness.
>
> 80. The benefit of the vaccine claimed by the respondents is that it causes the immune system to respond to the COVID-19 virus in a way that reduces the chances of infection or reduces the severity of symptoms. NZDF therefore proceeded on the basis that there is a difference in immune response, which in the case of unvaccinated persons amounts to a loss or abnormality of a physiological function compared to vaccinated persons. This meets the definition of discrimination for the purposes of the Human Rights Act.
>
> 81. Because the objective of the CDF is to prevent the presence in the body of organisms that can cause disease this also meets the separate part of the definition of disability which is the presence in the body of organisms capable of causing disease.
>
> 82. CDF's claim that there was a heightened risk of those organisms being present in the body of someone who is unvaccinated is the reason CDF imposed the relevant Instruments and that is enough to engage the right of the presence of organisms in one's body.
>
> (Footnotes omitted)

[136] We struggle to follow the logic of this argument. We do not consider that the difference in immune response achieved by vaccination means that an unvaccinated person can be regarded as suffering from a loss or abnormality of a physiological function. The fact that the vaccine may enhance a physiological function does not mean that those who do not have the benefit of the vaccine have *lost* a physiological function, or suffer from an *abnormal* physiological function. Nor is the definition of disability based on presence in the body of organisms capable of causing disease triggered by the fact that one of the objectives of vaccination is to prevent the (future)

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[76] *Higgs v Minister of Immigration* [2022] NZHC 1333 at [172].

presence in a vaccinated person's body of the COVID-19 virus. The requirement for vaccination and the TDFO apply to all Armed Forces members: no distinction is drawn based on whether or not the person has a particular organism capable of causing disease in their body at, or prior to, the time of any relevant vaccination.

[137] The appellants' attempt to rely on the right protected by s 19 of NZBORA involves a tortured application of the statutory provision. It is in our view misconceived. The Judge was right to reject it.

[138] We therefore proceed on the basis that the TDFO and related instruments limit the rights protected by ss 11 and 15 of NZBORA, but not the right protected by s 19 of NZBORA.

[139] It is important to be clear about the nature and extent of the relevant limits, as the starting point for assessment of whether those limits are reasonable and demonstrably justified. That is especially important in this case as what is challenged is not, as we have already noted, the imposition of a requirement to be vaccinated by including the COVID-19 vaccinations on the NZDF Vaccination Schedule. The relevant limits here are those introduced by the TDFO and CPO Administrative Instruction: in particular, the blanket exclusion of unvaccinated members from all NZDF bases and facilities, and the more prescriptive and more stringent consequences of failure to be vaccinated — or, put another way, the reduction in flexibility of response to a failure to meet this particular readiness requirement, as compared with other similar requirements, and the corresponding increase in pressure to be vaccinated.

[140] We read the TDFO and CPO Administrative Instruction as providing a strong steer that discharge would be the likely consequence of a failure to be vaccinated against COVID-19. The evidence provided by the respondents supports this reading of the TDFO: the *consistent* response envisaged by the CDF and CPO in their evidence was discharge, absent clear reasons accepted by the Service Chief for retention, with that retention to be further reviewed not more than 12 months out.

Are the limitations justified?

[141] It was common ground before us that the burden was on the respondents to satisfy the Court that the challenged limitations on the ss 11 and 15 rights were demonstrably justified in a free and democratic society.

[142] As Mr Hague emphasised, the proceedings do not challenge the addition of the COVID-19 vaccinations to the NZDF Vaccination Schedule. Nor do they challenge the consequences that would have followed from adding the COVID-19 vaccinations to the baseline schedule. Rather, they challenge the additional pressure to accept vaccination against COVID-19, and the more severe consequences of failure to be vaccinated, that are provided for in the TDFO, the amendments the TDFO made to DFO 3 and DFO 4, and the CPO Administrative Instruction. In summary, Mr Hague submitted that:

(a) The additional COVID-19 specific amendments significantly increased the likelihood of dismissal, compared with failure to meet other individual readiness requirements including other vaccination requirements.

(b) The additional severity of the response was an incremental limit on the ss 11 and 15 rights, which required justification.

(c) The additional coercion that resulted from those measures was also an incremental limit on the relevant rights, which required justification.

(d) The High Court had failed to place the burden on the respondents to justify those incremental limitations on the relevant rights. It was not sufficient to show that requiring vaccination was justified. The respondents needed to demonstrate that the more severe consequences prescribed by the instruments for failure to obtain COVID-19 vaccination were reasonable and proportionate, and that no practicable alternatives were available that would achieve the benefits sought in a way that interfered less with the relevant rights.

(e) No justification had been provided by the respondents for the different approach adopted to retention reviews in relation to the COVID-19 vaccine, as compared with other vaccinations on the NZDF Vaccination Schedule.

[143] Framed in this way, the present challenge follows closely in the footsteps of the *Yardley* proceeding. In that case the High Court held that the NZDF had not demonstrated that the less flexible approach to failure to be vaccinated that was provided for in the relevant Order was justified, as compared with a more flexible and individualised approach. That is precisely the complaint made here about the TDFO, and the "consistency" that it sought to achieve following *Yardley*. It should have been very clear to the NZDF, following the *Yardley* decision, that any materially less-flexible response to a failure to be vaccinated would require clear justification.

[144] The reduction in flexibility brought about by the TDFO is not as absolute as was the case under the regime in issue in *Yardley*. But the same questions arise: has it been demonstrated that the reduction in flexibility, and associated increase in pressure to be vaccinated, is justified in order to achieve sufficiently important objectives?[77]

[145] Mr Hague also submitted, and Ms McKechnie for the respondents accepted, that the Judge had erred in proceeding on the basis that the appellants had not identified an alternative method of addressing the need to maintain the efficacy of the Armed Forces during the pandemic that they claimed would be equally effective.[78] The appellants had identified the following alternative measures which they said would have adequately achieved the benefit sought, while limiting the affected rights less:

(a) The COVID-19 vaccine could have been added to the enhanced schedule, but not the baseline schedule.

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77 *R v Hansen* [2007] NZSC 7, [2007] 3 NZLR 1 at [104], [123] and [126] per Tipping J; and *D (SC 31/2019) v New Zealand Police* [2021] NZSC 2, [2021] 1 NZLR 213 at [100]–[101] and [108] per O'Regan J.

78 High Court judgment, above n 30, at [133].

(b) The vaccination requirements could be applied to people joining the Armed Forces, but the small number of unvaccinated existing members could be permitted to continue serving.

(c) The NZDF could initiate retention reviews on a case-by-case basis when the individual circumstances justify doing so. The appellants gave evidence that the British Armed Forces consider whether COVID-19 vaccination is required for specific activities, and this is managed by individuals' chain of command. The appellants submitted that the same could be done in New Zealand.

[146] We understood Mr Hague to emphasise the second and third of these limbs. The first limb has been partly overtaken by the Surgeon General's decision to move the booster doses to the enhanced programme.

[147] Mr Hague submitted that once the appellants had identified these alternatives, it was incumbent on the respondents to show that they would not be equally effective. He said that no evidence to that effect was provided.

[148] We asked Ms McKechnie to identify any evidence provided by the respondents that engaged with the provision in the TDFO for mandatory retention review, and for the more prescriptive approach required by the TDFO by:

(a) identifying the likely consequences of not adopting these measures; and

(b) explaining why they would materially imperil the stated objectives of those measures: maintaining/maximising the operational readiness and effectiveness of the Armed Forces.

[149] Ms McKechnie referred us to para 76 of Brigadier Weston's affidavit, which is set out above at [59]. In particular, she relied on para 76.3 which explains that the NZDF wanted to ensure consistency of decision making, and the importance the NZDF placed on ensuring all members of the Armed Forces were fully vaccinated against COVID-19.

[150] Ms McKechnie accepted that there was no evidence that engaged with the appellants' argument that a different, less rights-limiting approach had been adopted by the British Armed Forces, and that there was no reason why the same could not be done in New Zealand.

[151] Ms McKechnie submitted that there was abundant evidence to justify the importance of having NZDF personnel vaccinated, and there was no evidence that outcomes would have been different on a case-by-case basis by comparison with a mandatory basis. We accept the first limb of this submission: but that was not the issue here. We think the second limb of this submission misconceives where the burden lies under s 5 of NZBORA: it was for the respondents to show that the outcome would be materially different in terms of the overall effectiveness and deployability of the Armed Forces with the additional measures.

[152] Ms McKechnie also submitted that the Court should not be overly granular in its assessment of what type of review the CDF should adopt in this context. That would be an unjustified level of involvement on the part of the Court in decision-making about the NZDF. We return to this point below.

[153] We consider that the TDFO was a material additional limit on the rights protected by ss 11 and 15 of NZBORA. It was for the respondents to show why the flexibility reflected in the NZDF's normal practice in relation to failure to comply with individual readiness requirements would be inconsistent with the public interest objectives sought to be advanced by the TDFO. We agree with Cooke J in *Yardley* that administrative convenience is not a sufficient justification. Nor do we consider that the emphasis on consistency in Brigadier Weston's affidavit meets this requirement. In circumstances where the question is whether consistency is justified, or whether a more flexible and tailored approach could achieve the same objectives, it is circular to advance consistency as the rationale for a challenged measure.

[154] The relevant objectives identified by the respondents are maintaining the efficacy of the Armed Forces during the pandemic, including maximising the number of members who are deployable. We agree with the Judge that maintaining the ongoing efficacy of the Armed Forces is sufficiently important to justify certain

limitations on the rights contained in ss 11 and 15. The question that remains is whether it justifies these particular limits. That requires a focus on whether the right was restricted no more than reasonably necessary, and whether the restriction was proportionate to the objective.

[155] The incremental limits on rights effected by the TDFO required justification by evidence drawing on something more than simple assertion: for example, data-based analysis of different scenarios, or comparisons with the measures taken by the Armed Forces of other countries, and their relative effectiveness.[79] The justification needed to explain why the approach provided for in DFO 3 and DFO 4, without the TDFO, would be insufficient to achieve the relevant objectives. It needed to engage with the likely time frame for which any additional restrictions would be justified, and whether permanent discharge of unvaccinated members was necessary to achieve the objectives given that time frame. It also needed to engage with the question of why these measures should apply to members who are already, for other reasons, not deployable (as noted above, a very significant proportion of the Regular Force): it is difficult to see how retaining those members would affect the deployability of the Armed Forces.

[156] Similarly, although the evidence about the approach adopted in the United Kingdom provided by the appellants was not extensive, it was sufficient to put the respondents squarely on notice that they needed to explain why more intrusive measures were justified in the New Zealand context. There might well be relevant differences: but it was incumbent on the respondents to identify these, and to provide evidence sufficient to demonstrate that adopting a more restrictive approach was justified in this country.

[157] The evidence filed by the deponents provided a clear explanation of the desirability of COVID-19 vaccination for members of the Armed Forces. But it did not provide focused justifications for the incremental limits on rights effected by the TDFO. Their evidence did not address the specific questions identified in the

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[79] Compare *Hudson v Attorney-General* [2023] NZCA 653 at [71].

preceding paragraphs. It fell well short of providing justifications for the relevant measures that are sufficient to meet the s 5 NZBORA burden.

[158] We emphasise that we are not saying that the measures adopted were not justified. It is possible that they were. But the evidence placed before the Courts is not sufficient to demonstrate that those measures are justified, as s 5 of NZBORA requires where a measure limits rights.

Post-hearing memoranda

[159] Mr Hague's explanation of the limited scope of the challenge to the TDFO and related instruments appeared to take the respondents by surprise at the hearing before us. At Ms McKechnie's request we adjourned briefly during the hearing to permit counsel to discuss the relief sought in light of that clarification. Following that adjournment Mr Hague accepted that the relief sought in the notice of appeal, which sought orders setting aside DFO 3, DFO 4, the TDFO and the CPO Administrative Instruction, was overly broadly expressed. Rather, what was sought was an order setting aside the TDFO, the amendments made by the TDFO to DFO 3 and DFO 4, and the CPO Administrative Instruction.

[160] On 24 April 2023, shortly after the hearing before us, counsel for the respondents filed a memorandum arguing that the appellants' case had materially changed to focus on the limitations on rights in the adapted retention review process. The memorandum requested that if the Court was minded to address whether the mandatory review process is an unjustified limitation on rights, that matter should be remitted to the High Court for further evidence and submissions. Leave was sought "to the extent that leave is necessary to file this memorandum".

[161] Counsel for the appellants filed a memorandum objecting to receipt of further submissions from the appellants, and disagreeing that there had been any material change in the case presented in this Court. At most, they said, any change in the appellants' case involved narrowing it. That had not prejudiced the respondents in any way. The appellants' challenge had always focussed on the TDFO and the changes to DFO 3 and DFO 4 made by the TDFO. There was never a challenge to the inclusion of the vaccines in the NZDF Vaccination Schedule.

[162] It is exceptional for further submissions to be filed following the hearing of an appeal. Leave is required to do so. In the present case, leave should have been sought at the hearing or following the hearing before filing a memorandum that contained further submissions that counsel for the respondents wished to make. However we have been assisted by both parties' further memoranda, so we will (exceptionally) grant leave for those memoranda to be filed.

[163] We accept the appellants' submission that any change in their case was confined to a narrowing of the focus of their challenge. They did not challenge any additional instrument or provision, or advance any additional ground of challenge. Rather, Mr Hague's approach at the hearing brought into sharper focus the particular aspect of the TDFO that was challenged — the mandatory (and more prescriptive) nature of the retention review that was prescribed for failure to meet COVID-19 vaccination requirements. We consider that this challenge was squarely raised by the pleadings, and was in issue before the High Court. In particular, the appellants put forward alternative measures which they said would be equally effective to achieve the objectives of the challenged instruments. The Judge erred in suggesting that the appellants had failed to do so. It was then necessary for the respondents to explain why those less rights-limiting measures would not effectively achieve the relevant objectives, in order to discharge the burden imposed on them by s 5 of NZBORA.

The consequences of the failure to demonstrate consistency with NZBORA

[164] The consequences of the respondents' failure to provide evidence to support the more prescriptive and less flexible approach provided for in the TDFO can be framed in a number of ways. The respondents have not discharged the burden of showing that the measures imposed by the instruments were demonstrably justified. Put another way, the appellants identified alternative approaches which would be less limiting of the relevant rights, and the respondents failed to show that those alternatives would not be equally effective to achieve the objectives of the relevant instruments.

[165] It follows that the TDFO, at least insofar as it provides for mandatory retention reviews, has not been shown to be a reasonable limit on the appellants' rights that can

be demonstrably justified in a free and democratic society. It is, to that extent, inconsistent with NZBORA and unlawful.

[166] However we are not persuaded that all six of the key elements of the TDFO limit rights protected by NZBORA, so require justification under s 5 if they are to be lawful. We did not have the benefit of submissions from either party on whether some provisions of the TDFO were unobjectionable in terms of NZBORA, and severable. We would have thought, for example, that the provision cancelling CDF Directive 31/2021 and CPO Administrative Instruction 05/2021 was rights-enhancing, and that the appellants would not wish to see those instruments revived. We also doubt that the amendments to DFO 3 and DFO 4 limit any relevant rights: they seem to us to do no more than spell out what was already provided for more generally in the amended provisions. We very much doubt that those changes, standing alone, would raise any NZBORA concerns.

[167] In these circumstances, it seems to us that it would be excessive to set aside the entire TDFO, the amendments to DFO 3 and DFO 4, and the entire CPO Administrative Instruction. Nor are we well placed to set aside specific parts of the TDFO, absent submissions on that point. And there is force in Ms McKechnie's submission that an overly granular approach on the part of the Court risks intruding on the role and responsibilities of the CDF.

[168] We are also conscious that circumstances have changed materially in relation to the COVID-19 pandemic since the TDFO was issued in May 2022. Indeed circumstances have changed even since the hearing of the appeal. In August 2023 the New Zealand Government removed all remaining restrictions in relation to COVID-19, including mandatory isolation requirements for those infected. That change led the courts, for example, to issue new protocols in relation to COVID-19 removing many of the restrictions on attendance at court hearings that had previously been imposed. Most countries have removed travel restrictions relating to COVID-19 vaccination. A review of the TDFO and related instruments in light of these developments is timely, if not overdue.

[169] We have therefore concluded that the appropriate course of action is to make an order under s 17(3) of the Judicial Review Procedure Act directing the CDF to reconsider the TDFO in light of this judgment. That will enable him to take account of changed circumstances, and will necessarily require reconsideration of related aspects of other instruments (including the CPO Administrative Instruction, which stemmed from the TDFO).

[170] It would be unfair for any action to be taken against the appellants pending that reconsideration. Section 17(5) of the Judicial Review Procedure Act provides that where the court directs reconsideration of a decision, it may make an interim order under s 15, which applies with all necessary modifications. As contemplated by s 17(5), we make an interim order under s 15 of the Judicial Review Procedure Act prohibiting the CDF from taking any further action against the appellants consequential on the TDFO pending reconsideration of the TDFO.

[171] We consider that these orders, taken together, should ensure that the rights of the appellants are protected without this Court attempting to rewrite the TDFO or to engage in an inappropriately granular way with the performance by the CDF of his responsibilities in relation to the Armed Forces.

Costs

[172] Costs should follow the event in the ordinary way. The appellants sought costs for a complex appeal, on the basis that it raised complex issues of public law. We consider the issues raised were reasonably complex. However r 53B of the Court of Appeal (Civil) Rules 2005 provides that complex appeals are appeals "that because of their complexity or significance require senior counsel". Neither the appellants nor the respondents engaged senior counsel in this case, so an award of costs predicated on a need for senior counsel would not be justified.

[173] The appellants also sought an uplift of 50 per cent on public interest grounds under r 53E. The respondents oppose an uplift, submitting that this appeal was pursued for the benefit of the appellants rather than in the interests of the public generally or a section of the public. We consider that an uplift at this level is justified: the proceedings benefit a wider group than just the four appellants, and serve the

important public interest of ensuring the lawful exercise of a statutory power to make secondary legislation.

[174] We set aside any order as to costs that may have been made in the High Court. Costs in the High Court will be determined by that Court in light of the result in this judgment.

Result

[175] The appeal is allowed.

[176] The CDF is directed to reconsider the TDFO in light of this judgment.

[177] The Court makes an interim order under s 15 of the Judicial Review Procedure Act prohibiting the CDF from taking any further action pursuant to the TDFO and related instruments until such time as the reconsideration of the TDFO is complete.

[178] We set aside any order as to costs that was made in the High Court. Costs in the High Court are to be determined by that Court in light of this judgment.

[179] The respondent must pay costs to the appellants for a standard appeal on a band A basis with an uplift of 50 per cent, with usual disbursements.

Solicitors:
Frontline Law, Wellington for Appellants
Simpson Grierson, Wellington for Respondents