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A critique of *Goulden v Wellington City Council:* Evaluating the effect of the New Zealand Bill of Rights on Judicial Review.

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I INTRODUCTION

In 2006 Goddard J handed down her decision in *Goulden v Wellington City Council*,[1] a judicial review case brought by Wellington City Councillor Robin Goulden following his censure for breaching the Councils Code of Conduct. Goddard J found in favour of the Council and upheld the censure, an important decision for local councils as it affirmed the importance of their Codes of Conduct. However the decision did not adequately address the role that the New Zealand Bill of Rights 1990 (NZBORA) plays in judicial review proceedings. This paper will critique Goddard Js treatment of the role of the NZBORA in *Goulden*[2] by highlighting the developments in the illegality and unreasonableness heads of review. The developments under the illegality head of review will be analysed and the relevant case law will be applied and the advancements in the unreasonableness head of review will be considered including an assessment of the emerging doctrine of proportionality. These developments will be compared with Goddard Js approach to outline the appropriate use of the NZBORA in the *Goulden*[3] case.

II FACTS OF THE CASE

On 20 September 2004 Goulden made a statement to the Cook Strait News in an article profiling him as one of the nominated mayoral candidates in the 2004 local government elections. The article outlined that he was standing on a platform of controlling city debt, greater public consultation and a fairer distribution of Council spending across the city. He went on to state:[4]

> There's a lot of confusion in the community about the level of debt.... The figures seem wrong. Kerry Prendergast and financial officer Andrew McKenzie have now produced a different set of figures, which puts debt at currently $70 million, with another $55 million approved in the Annual Plan. But the public is concerned about the debt, which is planned to hit $360 million or

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[1] *Goulden v Wellington City Council* [2006] 3 NZLR 244, (HC) Goddard J.
[2] Ibid.
[3] Ibid.
[4] "Rob Goulden for Mayor and Council"(20 September 2004) Cook Strait News.

> $390 million by 2013. The public is also concerned about wasteful spending like on the stock exchange sign; it's reckless.

The issue of Council debt had been an ongoing and topical subject in the months leading up to the article. In March 2004 a Wellington resident had written to a local paper expressing his concern over the city debt figures and further discussion was generated in the media by Councillors about the Councils debt levels in June and July of 2004.[5] Following the release of the 2003/2004 Annual Report in August Goulden highlighted at a council meeting that the numbers in the report were different to those in the annual plan, and it was explained to him that the difference was centred on different financial years, budget figures as opposed to actual figures and gross debt as opposed to net debt.[6] Goulden was not satisfied with this explanation of the inconsistent debt figures and this lead to the content in the Cook Strait News article at issue.

Following the Cook Strait News article Councillor Alick Shaw wrote to the Mayor alleging that Goulden had breached the Councils Code of Conduct in two respects; firstly Goulden's behaviour at a Finance and Corporate meeting which was an issue that was later dropped and will not be discussed further, and secondly Goulden's Cook Strait News election advertisement.[7] Councillor Shaw claimed that the public statements made by Goulden in respect of debt were clear breaches of two provisions in the Wellington City Councils Code of Conduct.[8] Firstly the code states that councillors may not do anything which compromises or could be seen as compromising the impartiality of an employee and secondly councillors should avoid publicly criticising any employee in any way, but especially in ways that reflect on the competence and integrity of the employee.[9] Shaw believed Goulden should have reported his issues regarding Mr McKenzie's integrity, impartiality and competence in respect of his representation of the Councils debt position to the Chief Executive and that his failure to do so was an 'utterly

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[5] Chronology prepared by Counsel for Goulden and Counsel for Wellington City Council.
[6] Chronology prepared by Counsel for Goulden and Counsel for Wellington City Council;*Goulden v Wellington City Council*, above n 1, para 7, (HC) Goddard J.
[7] Deputy Mayor Alick Shaws letter to Mayor Kerry Prendergast (30 September 2004)
[8] Ibid
[9] Wellington City Council Code of Conduct, 11.

reprehensible and extremely serious breach of his obligations under the code and that it has brought the council into disrepute.'[10]

This complaint initiated a lengthy process of communication between the Mayor, the Chief Executive and Councillor Goulden on how the complaint was to be dealt with which resulted in an extraordinary meeting being called to hear the complaint and the recommendation for Goulden's censure on 15 December 2004.[11] At the extraordinary meeting the Council resolved that Goulden's comments in the Cook Strait News article had breached the Councils Codes of Conduct and that the appropriate response to the breach was to censure the Councillor.[12]

Goulden brought judicial review proceedings against the Council in which he made arguments about various breaches of natural justice and the councils absence of jurisdiction that were unsuccessful, however they do not form the focus of this paper. Goulden also argued that under section 14 of the NZBORA he had the right to freedom of expression however this argument did not form an integral part of his submissions as the natural justice issues took a much larger focus.[13] As a result of this Goddard J dealt with the NZBORA, in particular section 14, very briefly and chose not to deal with it under the illegality, procedural unfairness or unreasonableness heads of review. Her Honour held that Goulden's right to freely express his opinion was subject to the limitation in the codes of conduct that media comments must observe the other rules in the code.[14] Her Honour also held that the limits placed on freedom of expression by the code of conduct are a justified and reasonable limit.[15] In my view this treatment of the NZBORA falls incredibly short of what is required under the NZBORA, as a NZBORA analysis should have been considered in much more detail under the illegality and unreasonableness

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[10] Deputy Mayor Alick Shaws letter to Mayor Kerry Prendergast (30 September 2004).
[11] *Goulden v Wellington City Council,* above n 1, 248-252 (HC) Goddard J; Chronology prepared by Counsel for Goulden and Counsel for Wellington City Council ; Submissions of Counsel for Applicant in *Goulden v Wellington City Council* CIV 2005/485/001, 13-15.
[12] Minutes of the Wellington City Council Extraordinary Meeting (15 December 2004); *Goulden v Wellington City Council,* above n 1, 252-253 (HC) Goddard J.
[13] Submissions of Counsel for the Applicant in *Goulden v Wellington City Council* CIV 2005/485/001, 13, 16-22; *Goulden v Wellington City Council*, above n 1, para 32-35 (HC) Goddard J.
[14] *Goulden v Wellington City Council,* above n 1, para 73 (HC) Goddard J.
[15] Ibid

heads of review. Goddard J did not address the NZBORA under either of these heads of review. Instead her Honour focussed on issues of jurisdiction under the illegality head of review, and applying the strict Wednesbury unreasonable test under the unreasonableness head of review which does not take into consideration competing human rights interests.[16] I will address the areas in which the NZBORA affects judicial review and out line the appropriate use of the NZBORA in this case.

Codes of Conduct- An Overview

Under Schedule 7 clause 15(1) of the Local Government Act 2002 [LGA], a local authority must adopt a code of conduct for members of the local authority as soon as practicable after the commencement of the LGA.[17] Codes of conduct for local authorities were previously not in existence in New Zealand before the LGA, however they have been part of the local authority obligations in the United Kingdom for some time.[18] The LGA stipulates that the first code should be adopted by resolution but a subsequent amendment requires a vote of not less than 75 percent of the members present.[19] The code governs elected members relationships with other members, council staff and the public.[20] Therefore it does not operate solely in the political arena.[21] Schedule 7 Clause 15(2) of the LGA outlines that a code of conduct must set out: [22]

a) Understandings and expectations adopted by the local authority about the manner in which members may conduct themselves while acting in their capacity as members, including-

(i) Behaviour toward one another, staff, and the public

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[16] Goulden v Wellington City Council, above n 1, para 36-49, 59-61 (HC) Goddard J.
[17] Local Government Act 2002, Schedule 7,Clause 15(1).
[18] Brookers Online Commentary http://www.brookersonline.co.nz.helicon.vuw.ac.nz/databases/modus/lawpart/statutes/ACT-NZL-PUB-Y.200284~END~SCHG~SCH.7~PT.1~CLG.!221~CL.15?sid=uk1rtxsrvjncx1ch5xephan072ml4wc4&hli=4&sp=statutes&si=57359(last accessed 28 August 2007).
[19] Local Government Act 2002, Schedule 7, Clause 15(6).
[20] Ibid, Schedule 7 Clause 15(2)(a)(i).
[21] Office of Controller and Auditor General, *Local Authority Codes of Conduct*, (2006) 13.
[22] Local Government Act 2002 Schedule 7, Clause 15(1).

The councillors are bound by the LGA but the Act does not specify the consequences of breaching the codes of conduct, and a breach of the code does not constitute an offence under the Act.[23] Instead this is left up to the individual councils to outline when they create their code. Each council has considerable discretion in how it designs and uses these codes for example it can be simply used as a statement of aspiration similar to a mission statement, or an informal rule book and some councils have chosen not to provide for any enforcement of their code.[24]

Wellington City Councils Code of Conduct

On 1 October 2003 Wellington City Council adopted their code of conduct. The code set out standards of behaviour expected from individual elected members in the exercise of their duties. It aims to promote effective local governance by helping elected members establish and maintain working relationships based on trust and respect.[25] The Wellington City Council Code of Conduct states that elected members have to conduct their dealings with each other in ways that are open and honest, that uphold the credibility and public confidence of their office, and that avoid aggressive, offensive or abusive conduct. Councillors have to also maintain the level or cooperation and respect between themselves and staff members by acting respectfully towards staff and recognising that the Chief Executive is responsible for the employment of staff. They must be aware of the obligations the council has to its staff.[26] At issue in *Goulden*[27] is the provision that advocates that Councillors must not do anything that compromises the impartiality of an employee and that they must 'avoid publicly criticising any employee in any way, but especially in ways that reflect on the competence and integrity of the employee.'[28] Councillors can only raise concerns about employees directly with the Chief Executive.[29] These provisions are in place to enforce the Council's obligations to act as a

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[23] Ibid, Schedule 7, Clause 15(7)(4).
[24] Office of Controller and Auditor General, *Local Authority Codes of Conduct*, (2006) 5-8.
[25] Wellington City Council Code of Conduct, 5.
[26] Ibid, 11.
[27] *Goulden v Wellington City Council,* above n 1 (HC) Goddard J.
[28] Wellington City Council Code of Conduct, 11.
[29] Ibid, 11.

good employer so that they are not exposed to civil litigation or audit sanctions.[30] The code also states that councillors are free to express a personal view in the media, at any time, however any media comments must observe the other requirements of the code.[31]

Members of the Wellington City Council are required under the LGA to comply with the Code of Conduct.[32] If the code is breached the Mayor and the CEO consider each allegation and if the alleged breach is serious enough the Mayor will refer the matter to council. The council will decide if a breach has occurred and what consequences for the Councillor should arise, such as censure.[33] Censure involves the council expressing disapproval or condemnation of a councillor, and this is the sanction Goulden received.[34] It is not a statutory concept but is based on practise and standing orders.[35]

III APPLICATION OF THE NZBORA

Section 3 analysis

The first issue to resolve is whether the censure of Goulden under the Council Codes of Conduct is included in the ambit of Section 3 of the NZBORA and therefore subject to the NZBORA. Section 3 states that:[36]

This Bill of Rights applies only to acts done-

(a) by the legislative, executive, or judicial branches of the government of New Zealand; or

(b) By any person or body in the performance of any public function, power, or duty conferred or imposed on that person or body by or pursuant to law.

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[30] Ibid, 11; Local Government Act 2002 Schedule 7,Clause 36.
[31] Wellington City Council Code of Conduct, 12.
[32] Local Government Act 2002 Schedule 7,Clause 15(4).
[33] Wellington City Council Code of Conduct, 15.
[34] Oxford dictionary meaning, http://dictionary.oed.com.helicon.vuw.ac.nz/cgi/entry/50035538?query_type=word&queryword=censure&first=1&max_to_show=10&sort_type=alpha&result_place=1&search_id=EVPw-16yYHy-7371&hilite=50035538(july 21 2007)
[35] Office of Controller and Auditor General, *Local Authority Codes of Conduct*, (2006), 21.
[36] New Zealand Bill of Rights 1990, s 3.

It can be argued that Local Government comes under the executive branch of government and is therefore caught under Section 3(a) of the NZBORA. The scope of the executive branch is not limited to the Governor General, ministers and their departments.[37] If something is considered 'governmental' in nature and is controlled by the executive it will fall within the broader interpretation of Section 3a of the NZBORA.[38] Although local authorities have a lot of self autonomy, they are controlled by the executive to the extent that they are governed by the LGA, and that there is a local government Minister appointed as an overseer.[39] In *Waitakere City Council v Lovelock*[40] Thomas J stated that a local authority was a governmental institution, that exercises a constitutional role in the structure of the countries governance and that they are an important tier of government.[41]

Alternatively if Goulden's censure doesn't fall within Section 3(a) it falls within Section 3(b) as it is an act done by a body performing a public function imposed on it by the LGA. In *Ransfield v The Radio Network Ltd (Ransfield)*[42] Randerson J stipulated that the primary focus in a Section 3(b) inquiry is on the relevant function, power or duty rather than the nature of the entity at issue.[43] Counsel for Wellington City Council in *Goulden*[44] argued that because this matter related to a political function of a councillor being censured by his peers it doesn't fall within the definition of public function.[45] However imposing sanctions on councillors in order to maintain the good governance of a council is inherently connected with the council's public role, in particular their ability to efficiently perform their public function.

The fact that parliament has been motivated to enact Schedule 7 Clause 15 of the LGA indicates that acts done in the course of pursuing the function imposed by this

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[37] Paul Rishworth, Grant Huscroft, Scott Optican, Richard Mahoney *The New Zealand Bill of Rights* (Oxford University Press, Auckland, 2003) 82.
[38] Ibid, 84.
[39] Local Government Act s 3, 18, 31, 253-258, Schedule 1.
[40] *Waitakere City Council v Lovelock* [1997] 2 NZLR 385 (CA).
[41] Ibid, 413-414 (CA) Thomas J.
[42] *Ransfield v The Radio Network Ltd.* [2005] 1 NZLR 233 (HC)
[43] Ibid, para 69 (HC) Randerson J.
[44] *Goulden v Wellington City Council*, above n 1.
[45] Submissions for counsel for Respondent in *Goulden v Wellington City Council,* CIV 2005/485/001 45.

enactment such as sanctioning councillors under the codes of conduct are likely to be of public character.[46] This was articulated in *Mercury Energy Ltd v Electricity Corp. of NZ Ltd*[47] a judicial review case that addresses issues that can be considered in an analysis of Section 3(b)of the NZBORA. The House of Lords held that because ECNZs overall functions, which were deemed to be public in nature, were conferred by statute their contract making powers could also be considered public even though they weren't deemed to be a direct exercise of that public function.[48]

Goulden's censure satisfies the *Ransfield*[49] indicia outlined by Randerson J which is a non exclusive list used as a guideline to establish whether an action falls under Section 3(b).[50] Whether the source of the function, power, or duty is statutory, the extent and nature of any governmental control of the entity, whether the entity is exercising functions, powers of duties which affect the rights, powers, privileges, immunities, duties or liabilities of any person, or whether the entity is democratically accountable through the ballot box or in other ways are the indicia that are applicable in the case of the censure.[51] Therefore Goulden's censure can be considered an act done under Section 3 and the NZBORA will apply.

A Illegality

Illegality is the first head of review that I will address and I will assess whether Goulden's censure can be stuck down under this head. A decision or act by a person or body that is susceptible to judicial review, will be reviewable for any breach of the law including a breach of the NZBORA.[52] Decisions can be protected from a NZBORA dispute if the empowering statute that has conferred the power or imposed the function on

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[46] Rishworth, above n 37, 80.

[47] *Mercury Energy Ltd. v Electricity Corp of NZ Ltd* [1994] 2 NZLR 385 (PC)

[48] Ibid, 388, Lord Templeman.

[49] *Ransfield v The Radio Network Ltd,* above n 42.

[50] Ibid, para 69 (HC) Randerson J.

[51] Ibid.

[52] Philip Joseph *Constitutional and Administrative Law in New Zealand* (2 ed, Brookers, Wellington, 2001) 921,778, 784-785.

the body, indicates a clear parliamentary intention to breach the NZBORA pursuant to Section 4 of the NZBORA.[53] However it will be rare that an empowering statute will be found to authorise a breach of the NZBORA, and a statutory scheme would have to be deemed completely unworkable before the courts would interpret an enactment as an intentional override of the NZBORA.[54] Because the codes of conduct are a type of delegated legislation the principle of illegality that will be most relevant is the doctrine of ultra vires. If the council has acted outside of its jurisdiction in implementing the codes of conduct that include a breach of the NZBORA, without authorisation from the LGA then the courts can deem the codes of conduct to be ultra vires and of no legal affect.[55] This concept will be explored further with the discussion and application of *Drew v Attorney General (Drew)*.[56]

1 Drew v Attorney General

Drew[57] is the leading authority on how to treat delegated legislation that breaches the NZBORA. In *Drew*[58] the regulation at issue was held to be ultra vires because it exceeded the powers conferred on it by the empowering act.[59] The regulation denied prisoners rights to natural justice, and in accordance with section 6 of the NZBORA the empowering legislation had to be read consistently with the NZBORA.[60] Unless the words of the empowering act explicitly intend to confer a power that breaches the NZBORA, whereby Section 4 of the NZBORA will apply, any regulation that does exceed its regulation making powers will be deemed ultra vires.[61]

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[53] New Zealand Bill of Rights Act 1990, s 4; Joseph, above n 52, 922,785.
[54] New Zealand Bill of Rights Act 1990, s 6; Joseph, above n 52, 785, 922.
[55] *Drew v Attorney General* [2002] 1 NZLR 58, 920 (CA) Blanchard J.
[56] *Drew v Attorney General* [2002] 1 NZLR 58 (CA).
[57] Ibid.
[58] Ibid.
[59] Ibid, para 66 (CA)Blanchard J.
[60] Ibid, para 68 (CA) Blanchard J.
[61] Rishworth above n 37, 157.

There is an issue as to whether the rule in *Drew*[62] can apply to the Codes of Conduct as they are a unique set of rules, created by councils under their statutory obligations conferred by Schedule 7 of the LGA. A large amount of discretion is left to the councils in deciding what form their codes will take. Some councils have implemented a code that is merely an unenforceable statement about the type of conduct the council wants to aspire to, while others have implemented codes similar to that of the Wellington City Councils that treat the code as an enforceable governance instrument similar to a Standing Order.[63] This illustrates that Schedule 7 Clause 15 of the LGA has authorised various types of codes of conduct, and the inconsistent implementation of the codes across the country raises issues about what type of status the codes hold at law. They cannot be classified as an 'enactment' which is defined as 'whole or part of an Act or a Regulation' as per Section 29 of the Interpretation Act 1999 as they are not an Act or a regulation as they are not a 'regulation or rule made under an Act by the Governor-General, a Minister of the Crown, or an order in council.'[64] Anything deemed to be a regulation in the Regulations Act 1936 is also included in the Sec 29(e) Interpretation Act definition. The Regulations Act 1936 states that the definition of regulation does not include regulations made by any local authority.[65] Therefore the codes of conduct do not hold the status of regulations at law.

This has two consequences, firstly Sections 4 and 6 of the NZBORA which deal with 'enactments' do not directly apply to the codes of conduct and secondly their unclear status at law leaves open the question about whether *Drew*[66] is applicable. Because the censure of a councillor under the codes falls under sec 3, the NZBORA would still be applicable, however the way in which the NZBORA is applied is affected by whether or not the codes can be considered an enactment or another form of delegated legislation.

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[62] Ibid.
[63] Office of Controller and Auditor General, *Local Authority Codes of Conduct*, (2006), l; John Sheppard, "Codes of Conduct- Ongoing Education" in *Conference Papers - LexisNexis Professional Development 3rd Annual Local Government Legal Forum 2004*, 1.
[64] Interpretation Act 1999, s 29.
[65] Regulations Act 1936, s 2(1).
[66] *Drew v Attorney General*, above n 55.

Because the codes are still a form of delegated legislation, as they are 'rules of law promulgated by a delegate of parliament entrusted with specific powers of legislation,'[67] *Drew*[68] will be applicable.

(a) Applying Drew v Attorney General

(i) Empowering provision

To determine the validity of the code of conduct, the words of Schedule 7 clause 15 of the LGA, must be interpreted to establish whether they can be read consistently with the NZBORA in accordance with sec 6 of NZBORA.[69] The words of Schedule 7 of the LGA do not import any prima facie inconsistency with the NZBORA either implicitly or explicitly. Clause 15(1)(a) outlines a broad direction about what should be included in the codes of conduct, but nothing in the general wording of Clause 15(a)(i) contradicts the NZBORA. For the court to infer from Clause 15 any authorisation for a local council to create a code of conduct that had provisions that breached the NZBORA there would have to be a much clearer parliamentary intent.[70]

(ii) Wellington City Council Code of Conduct

The Wellington City Council Code of Conduct however, contains an inconsistency with Section 14 of the NZBORA. The provisions of the code at issue in Gouldens censure, which state that a councillor cannot do anything which compromises the impartiality of an employee, and that they cannot publicly criticise an employee in any way especially in ways that reflect on the competence and integrity of the employee, impinge on a councillors ability to impart information or express their opinions.

2 Freedom of Expression

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[67] Joseph, above n 51, 890.
[68] Drew v Attorney General, above n 55.
[69] New Zealand Bill of Rights Act 1990, s 6; *Drew v Attorney General*, above n 55, para 68 Blanchard J.
[70] Joseph, above n 52, 922,785.

Section 14 of the NZBORA states that:[71]

> Everyone has the right to freedom of expression, including the freedom to seek, receive, and impart information and opinions of any kind.

In *Moonen v Film and Literature Board of Review*[72] freedom of expression was declared to be 'as wide as human thoughts and imagination"[73] and it is a central fundamental democratic right which has a long history in New Zealand legal tradition.[74] One of the main principles behind the right is that it is intrinsically connected with a democratic government and that it is an essential tool in maintaining an effective democracy.[75] This is a long established principle promulgated by John Milton,[76] John Stuart Milton,[77] and Sir James Fitzjames Stephen.[78] When freedom of expression is put into the wider New Zealand political and social context, the importance of the right as a democratic imperative is better understood. The principle of democracy underlies New Zealand's constitutional and political system because we are a constitutional monarchy with a democratically elected government who are responsible to parliament and who are accountable to New Zealand citizens.[79] Sustaining democracy is important in maintaining this political and constitutional structure and the first example of this is the enactment of the NZBORA. Its focus on political and civil rights and protecting political processes illustrate the weight given to democratic rights in this country.[80]

The important role freedom of expression plays in maintaining democracy is evident with the enactment of legislation such as the Official Information Act 1982 [OIA]

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[71] New Zealand Bill of Rights Act 1990, s 14.
[72] Moonen v Film and Literature Board of Review [2000] 2 NZLR 9 (CA).
[73] Ibid, para 14 (CA) Tipping J.
[74] Andrew and Petra Butler *The New Zealand Bill of Rights Act; a commentary* (LexisNexis, Wellington, 2005) 303.
[75] *Television New Zealand v R* [1996] 3 NZLR 393, 396 – 397(CA) Keith J; Rishworth, above n 36, 310; Butler, above n 74, 308-309.
[76] John Milton *Areopagitica* (1644) 18, 51-52 cited in *Lange v Atkinson* [1998] 3 NZLR 424,460-461 (CA) Blanchard J.
[77] John Stuart Mill, *On Liberty* (1859) cited in *Lange v Atkinson*, above n 76, 460-461 (CA) Blanchard J.
[78] Sir James Fitzjames Stephen, *A history of the criminal law in England vol ii* (1883) 229-300 cited in *Lange v Atkinson*, above n 76, 460-461 (CA) Blanchard J.
[79] *Lange v Atkinson*, above n 76, 463 (CA) Blanchard J.
[80] New Zealand Bill of Rights Act 1990, s 12, 13, 14, 15, 16, 17, 18.

which allows for the free flow of official information to the public. The principles underlying the OIA highlight the right New Zealanders have to participate in the process of policy and decision making and their ability to hold the government accountable.[81] The removal of the offence of criminal libel, and the offences of publishing untrue matters calculated to influence votes during an election campaign in the Defamation Act 1992 are further indications of a move towards engaging public debate on political matters.[82] The defence of qualified privilege in defamation which is available to litigants when the subject matter of the defamation concerns actions or qualities that affect the capacity of MPs to meet their public responsibilities is another example of the importance placed on freedom of expression in sustaining democracy through political debate.[83]

Therefore the importance of the right to freely express an opinion as a democratic tool is especially relevant in this situation as the Councillors are an elected representation of Wellington City and are accountable and responsible for monitoring the performance and resources of the council.[84] The right to freely express an opinion relating to these principles is directly in line with the roles and responsibilities of a councillor.

3 Section 5 and Deference

In accordance with section 5, if the limit placed on a councillor's ability to express their opinion is prescribed by law and is demonstrably justified in a free and democratic society the obligations in the Code will no longer be at issue with the NZBORA.[85] If the inconsistent meaning is justified pursuant to section 5, the inconsistency is overtaken by the justification and in effect sec 5 legitimises the inconsistency.[86] Establishing whether the codes of conduct are prescribed by law is the first element of sec 5 that can be satisfied. The limits on the right have to be 'prescribed'

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[81] *Lange v Atkinson*, above n 76, 463-464 (CA) Blanchard J.
[82] Ibid, 464 (CA) Blanchard J.
[83] *Lange v Atkinson* [2000] 3 NZLR 385 (CA).

[84] Wellington City Council Code of Conduct, 9; Office of controller and Auditor General, *Managing the relationship between a local authorities Elected Members and its Chief Executive*, (2002) Part 4 4.5 4.6.
[85] *R v Hansen* [2007] NZSC SC 58/2005 7, para 90 (SC) Tipping J.
[86] Ibid.

meaning they have to be ascertainable by the public and able to be understood.[87] The code of conduct is accessible and understandable to the public and the councillors. The limits on the right have to also be a legally authorised and have the force of law. The codes of conduct have been authorised by legislation and therefore they are prescribed by law.[88]

The recent 2007 Supreme Court decision in *R v Hansen*[89] has provided a strong direction in how to construct a Section 5 analysis. The court adopted the Canadian test from *R v Oakes,*[90] and the majority held that a section 5 analysis should take place straight after an inconsistency is found so as not to subvert any deliberate policy choice parliament may have intended when enacting a limit.[91] Tipping J held that a level of deference should be given to Parliament and that section 5 is an instruction to the courts not only to review Parliament's legislation but also to respect parliament's appreciation of the limit they have placed on the right.[92] He used the analogy of a shooting target to illustrate the varying levels of deference that are required. The courts view on what a justified limit is represents the bull's eye and the surrounding target area represents the amount of deference the courts can allow.[93] If the legislation being reviewed is a substantive political, social or economic issue the target area is larger, whereas if the issue was a matter of substantial legal content the target area would be smaller. Therefore the courts appreciate that in areas where they have a level of competence and expertise their appraisal of the quality of the legislation is warranted, but in areas that have a heavy policy content Parliament is best suited to make the decisions.[94]

In the Goulden situation where local authorities regulate the expression of councillors the courts will be mindful that councils are a democratically elected body, as

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[87] *Sunday Times v United Kingdom* (1979) 2 EHRR 245 adopted by New Zealand courts in *Minister of Transport v Noort* [1992] 3 NZLR 260 (CA); *Solicitor General v Radio New Zealand Ltd* [1994] 1 NZLR 48.
[88] Authorised by Local Government Act 2002, Schedule 7 Clause 15.
[89] *R v Hansen*, above n 85.
[90] *R v Oakes* [1986] 1 SCR 103
[91] *R v Hansen*, above n 83, para 90-92 (SC) Tipping J.
[92] Ibid, para 105-111 (SC) Tipping J.
[93] Ibid, para 119 (SC) Tipping J.
[94] Ibid, para 116 (SC) Tipping J.

elected councils are usually afforded a high level of deference.[95] Goddard J recognised this when she cited *Wellington City Council v Woolworths (No 2)*[96] as authority that courts will not interfere into areas that are clearly within the council's jurisdiction. Underlying this is the principle that unelected judges should be weary of substituting their decisions with those of the democratically elected representatives.[97] Goddard J categorised the Codes of Conduct as an internal regulatory tool and too political an issue for a court to interfere with.[98] However the Codes of Conduct can be viewed as a regulatory tool that is more disciplinary in nature than political, and therefore there is scope for more judicial scrutiny.[99] The effect of the limit on the councillors must be taken into consideration when determining how deferential the court should be, because the courts feel it is their role to protect individuals rights.[100] The relevant provisions impact on the councillor's ability to exercise core political speech which is an area that the courts are more prepared to scrutinise.[101] The court will also take into consideration the consequences of the limit on the individuals effected, for example the consequences for the councillors if they breach the code of conduct.[102] Although the appropriate sanction is left up to the council's discretion there are no boundaries in place restricting a council from imposing more serious penalties such as removing a councillor from their positions on committees or other bodies, or dismissal from chairing boards.[103] However Councils do not have authority to remove or suspend a member from council or to enforce a fine or suspension of remuneration.[104] Tipping J stated that the level of deference may vary in each limb of the sec 5 test; therefore a uniform standard of deference is not necessary.[105]

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[95] See for example Wellington City Council v Woolworths New Zealand Ltd (No 2) [1996] 2 NZLR 537, *Waitakere City Council v Lovelock*, above n 39.
[96] *Wellington City Council v Woolworths New Zealand Ltd (No2)*, above n 95.
[97] *R v Hansen*, above n 85, para 124 (SC) Tipping J.
[98] *Goulden v Wellington City Council*, above n 1.
[99] Joseph, above n 52, 838.
[100] *Pharmaceutical Management Agency Ltd v Roussel Uclaf Australia Pty Ltd* [1998] NZAR 58, 66 (CA) Blanchard J; *Thames Valley Electric Power Board v NZ Forest Products Pulp & Paper Ltd* [1994] 2 NZLR 641, 653 (CA) Cooke P.
[101] See Part III A 2 Freedom of Expression.; *Lange v Atkinson*, above n 76.
[102] This is linked with protecting human rights. See *Pharmaceutical Management Agency Ltd v Roussel Uclaf Australia Pty Ltd*, above n 100, 66 (CA) Blanchard J; *Thames Valley Electric Power Board v NZ Forest Products Pulp & Paper Ltd*, above n 100, 653 (CA) Cooke P; Joseph, above n 52, 838.
[103] Office of Controller and Auditor General, *Local Authority Codes of Conduct*, (2006) 45.
[104] Ibid, 45.
[105] *R v Hansen*, above n 85 Tipping J.

4 Applying the Oakes test

The two requirements of the test which must be satisfied are firstly whether the objective is sufficiently important and secondly the proportionality of the means chosen to achieve the objective.[106]

The first question in the test is whether the objectives of the two provisions of the code of conduct at issue are pressing and substantial.[107] The objective is to protect council staff from being criticised by councillors in order to protect them from attacks on their impartiality or integrity.[108] The overall aim of these provisions is to promote a healthy working relationship in the council, and for the council to avoid being subject to employment litigation for not fulfilling their obligations to be good employers.[109] The court held in *Oakes*[110] that the standard for assessing whether a legislative objective is pressing and substantial has to be high and trivial objectives or those discordant with a free and democratic society will not be protected.[111] It is not disputed that the protection of staff from attacks on their competence and integrity is an important objective for local authorities. Protecting the impartiality and credibility of the council staff is important not only for the purposes of avoiding employment litigation but also to promote good working relations between councillors and staff members. The structure of local government is such that the Chief Executive Officer is the only council employee that is accountable to the elected members and therefore council staff should be afforded the same protection from criticism that is afforded to any employee.[112] Ensuring that council staff are kept impartial and are not involved unnecessarily in the political arena of local government are all important goals of a council.

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[106] Ibid, para 120-121, Tipping J citing *Multani v Commission scolaire Marguerite-Bourgeyo* [2006] 1 SCR 256.
[107] Ibid; *R v Oakes*, above n 90, 138.
[108] Wellington City Council Code of Conduct 11.
[109] Ibid, 5,11.
[110] *R v Oakes*, above n 90.
[111] *R v Hansen*, above n 85 (SC) Tipping J citing *R v Oakes*, above n 90, 138.
[112] Office of Controller and Auditor General, *Local Authority Codes of Conduct*, (2006), 24.

It is helpful to address the wider context of the two relevant provisions and look at the Auditor Generals assessment of the codes of conduct in general. He found that there did not seem to be any mischief that the Government was trying to address in enacting Schedule 7 clause 15 which applies directly to the two provisions at issue because they emanate from clause 15(2)(a)(i). Instead Schedule 7 was enacted because of a unanimous agreement between local body organisations, in addition to the codes receiving support from submitters at the Local Government reform consultation stage[113] and because of an interest in keeping New Zealand in line with local government reforms in the United Kingdom that had recently adopted a Code of Conduct.[114] This suggests that there was not a pressing or substantial objective that the legislature was trying to remedy by enacting clause 15. However the report outlines the amount of support clause 15 had from those involved in local government, illustrating the obvious need for a provision that implemented a standard of conduct.[115] Regardless of the seemingly high threshold in *Oakes*[116] the Courts have rarely held that an objective isn't pressing and substantial and most courts are deferential to parliament when this limb of the test is applied.[117] It is highly probable that a court would hold the objectives of the code of conduct to be pressing and substantial.

The second limb of the test which assesses whether the means used to achieve this objective are reasonably and demonstrably justified has been split into three subparts.

a) Are the means used to achieve the objective rationally connected to the objective?[118]

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[113] Department of Internal Affairs, 2001. Review of Local Government Act 1974; Synopsis of submissions; Leyland, Tim *The Design and Implementation of Codes of Conduct in New Zealand Local Government 2003-2004* (MMPM Research paper, Victoria University of Wellington, 2005); Affidavit of Basil James Morrison President of Local Government New Zealand in *Goulden v Wellington City Council,* above n 1 CIV 2005-485-001,2-3

[114] Leyland, above n 111; Office of Controller and Auditor General, *Local Authority Codes of Conduct*, (2006)

[115] Affidavit of Basil James Morrison President of Local Government New Zealand in *Goulden v Wellington City Council,* above n 1 CIV 2005-485-001,2-3, 5-6.

[116] *R v Oakes*, above n 90.

[117] Rishworth, above n 37, 177; Butler, above n 74, 143, Only one case *R v Zundel* [1992] 2 SCR 731 has failed at this limb of the test; *R v Hansen*, above n 85, para 207 (SC) McGrath.

[118] *R v Hansen*, above n 85, para 212 (SC) McGrath. *R v Oakes,* above n 90, 139.

The methods used to achieve the objective of the code must be carefully designed and 'must not be arbitrary, unfair or based on irrational considerations.'[119] The means used are the restrictions placed on an elected member to express any view or opinion about the performance of a staff member that criticises them or affects their impartiality to anyone other than the chief executive. Therefore the means used are rationally connected to the objective because preventing councillors from communicating their opinions about a staff member directly relates to protecting staff members from having their integrity or competence criticised, and avoids any interference with their impartiality.

b) Is the impairment on the right to freedom of expression greater than reasonably necessary to achieve the objective?[120]

The impairment on the right to freely express an opinion or viewpoint is substantially impaired by the code of conduct, because councillors are restricted in expressing any view on a staff member that is critical or affects their impartiality. In *Livingstone v The Adjudication Panel for England*[121] Collins J held that while the restraints on the right to freedom of expression in a code of conduct is likely to be within article 10 (UK equivalent of NZBORA Section 14), it is important that the restraints should not go further than is necessary to maintain the standards set out in the code.[122] It may be acceptable to limit a councillors freedom of expression in matters that do not relate to their democratic duties to act as a representative of the ratepayers and as an overseer of the council resources.[123] For example the codes of conduct could restrict councillors expressing there opinions about council staff about matters that doesn't directly relate to their responsibilities as councillors to monitor and develop council policies and resources. Council staff should be afforded a level of protection that ensures they are not subject to personal abuse or insults about their character or personal life. However this alternative will not achieve the objective properly because councillors would still be able to criticise staff members in situations where they deem the councils

[119] *R v Oakes*, above n 90, 139.
[120] *R v Hansen*, above n 85, para 126 Tipping J, para 79 Blanchard J.
[121] *Livingstone v The Adjudication Panel for England* [2006] EWHC 2533 (admin)
[122] Ibid, para 33 Collins J.
[123] The role of the councillors is outlined in Wellington City Code of Conduct, 9.

performance to be inadequate or where council resources are being misused, which would still result in a staff members competence and integrity being criticised and their impartiality impaired. So while the impact on the right is substantial their does not seem to be any other way in which the objective can be achieved without using the means employed.

c) Are the effects on the right proportionate to the objective?[124]

Is the impairment on the right justifiable in light of the objective of protecting the credibility and impartiality of staff? As established above the objective of protecting council staff is an important objective. However the means used to achieve this objective are not proportionate to the objective. To limit the councillor's rights to express any opinion about a staff member that relates to their competence or integrity undermines one of the fundamental principles of the right, which is to promote and maintain democracy.[125] One of council's main functions is to act as an elected overseer of the performance and management of the council which is a principle that is also included in the Code of Conduct.[126] This role is intrinsically connected with their right to freedom of expression, and a limit placed on the ability of the Councillors to perform this role is objectionable. "Freedom of expression is subject to only clearly defined exceptions laid down by statute or the common law, it cannot be too strongly emphasised that outside the established exceptions there is no question of balancing freedom of expression against other interests, it is a trump card that always wins."[127] Limits have been placed on freedom of expression by the laws of defamation, confidentiality and privacy which demonstrates that in certain situations opposing rights and interests do take precedence over the sec 14 right.[128] There is a possibility that if the Code only limited the rights of the councillors when they express a view that is personal in nature the effects on the right would be proportionate to the objective. However because of the democratic nature of local authorities, the protection of staff members may need to be compromised in order

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[124] *R v Oakes*, above n 90, 139; *R v Hansen*, above n 85, para 132 (SC) Tipping J.
[125] See Part III A 2 Freedom of Expression.
[126] Wellington City Council Code of Conduct, 9.
[127] *Livingstone v The Adjudication Panel for England,* above n 121, para 35 Collins J citing Hoffman LJ in *R v Central Television Plc* [1994] 3 All E.R 641 at 652.
[128] *R v Hansen*, above n 85, para 263 (SC) Anderson J.

for the councillors to remain accountable to the ratepayers. The importance placed on freedom of expression and democracy in New Zealand makes it highly unlikely that any court will compromise the right.[129] Therefore the protection of the staff members credibility, impartiality and integrity is not a justifiable impairment on the councillors right to freedom of expression.

The *Oakes*[130] test set out in *Hansen*[131] has not been satisfied and therefore the breach of Section 14 of NZBORA contained in the code of conduct is not demonstrably justified in a free and democratic society as per Section 5 of the NZBORA.

Because the codes of conduct are not 'enactments,' section 6 does not apply to them directly. However it is at this step in the analysis that a section 6 type construction would take place to construe the provisions in the codes of conduct to have a NZBORA consistent meaning. If it is possible to read the Code in a way that didn't impinge on the right to freedom of expression then the codes would no longer be considered ultra vires.[132] This is because if the codes have a NZBORA consistent meaning then they are in line with their empowering provision and are no longer exceeding the authority imposed by the statute.[133]

The words in the code of conduct explicitly illustrate the intention of the code of conduct to restrict all acts that could compromise or criticise a staff members integrity, impartiality or integrity. It states that councillors '*must not do anything* which compromises their impartiality' and that they 'must avoid publicly criticising any employee *in any way, but especially in ways* that reflect on the competence and integrity of the employee.'[134] A more limited meaning of these provisions and a more NZBORA consistent meaning as propounded above can not be construed from these words. The

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[129] See Part III A 2 Freedom of Expression.
[130] *R v Oakes*, above n 90.
[131] *R v Hansen*, above n 85.
[132] Rishworth, above n 37, 160 footnote 228.
[133] Joseph, above n 52, 919, 921-923. Delegated legislation that permits what the enabling statute prohibits will be considered repugnant so if the delegated legislation can be construed as in line with its enabling statute then it will no longer be ultra vires or repugnant.
[134] (Emphasis added) Wellington City Council Code of Conduct, 11.

Code was clearly intended to inhibit councillors speaking on any matters relating to staff members especially those related to their abilities and performances in their jobs and limiting the provisions so that they only apply to councillors compromising or criticising staff members on personal matters such as their character or personal lives would be unquestionably stretching the language of the Code. It is not necessary to discuss whether the use of normal statutory interpretation methods used in a section 6 analysis apply, and what level of deference should be given to local authorities in assessing their intentions when drafting these provisions. This is because the wording of the provisions is incapable of being construed in any other way.

5 Conclusion on Illegality

Applying *Drew*[135], Clause 15 (1)(i) of Schedule 7 of the LGA cannot authorize a code of conduct to be adopted that breaches the NZBORA. Pursuant to Section 6 of the NZBORA these provisions cannot be interpreted as authorising individual councils to enact codes of conduct that include provisions such as the offending provisions in the Wellington City Councils code which unjustifiably breach the NZBORA. The words are too general to import any express intention by parliament to authorise a breach of any rights. Because the limit on the right to freedom of expression in the codes of conduct is not justifiable pursuant to law in a free and democratic society and cannot be construed in way that is consistent with the empowering act and the NZBORA it is invalid and has no effect. Therefore the Wellington City Council do not have jurisdiction to use it to censure councillors and Goulden's censure can be deemed invalid.

Although it is not necessary to analyse Goulden's statement in the Cook Strait News in terms of whether it was in fact a breach of the code of conduct, I will address it in case I am incorrect about the codes being ultra vires. It is arguable that the statement made by Goulden could not be deemed to be in breach of the two provisions at issue because there was no undertone of criticism, and the content was more a statement of the

[135] *Drew v Attorney General*, above n 55.

facts.[136] However the financial officer is singled out in the statement and the words 'it's reckless' do imply an element of criticism towards him and although I believe this statement is not a gross breach of the Code these two factors have caused the statement to be construed as a breach by the Councillors.

B Unreasonableness

Unreasonableness is the second head of review that this paper will address. It will consider Goddard Js approach to unreasonableness in *Goulden*[137] and then go on to outline the developments that have occurred in this head of review due to the enactment of the NZBORA by outlining the case law in New Zealand and England. The purpose of this overview is firstly to illustrate the way in which the NZBORA and the English equivalent the Human Rights Act (UK) 1998 [HRA] has influenced a change in how this head of review is assessed by the courts when a decision involves a human rights issue. The second purpose of the overview is to demonstrate how erroneous Goddard Js approach was in *Goulden.*[138]

The first two heads of review look at the processes by which a decision was made but the unreasonableness head requires the court to look into the merits of the decision, bearing in mind that they are exercising a review function and are not acting as an appeal court.[139] The courts are very wary of demonstrating deference to the primary decision maker, and they must display respect for the decision by not delving unnecessarily into the substance of the decision and evaluating the quality of it. Unreasonableness however requires the court to step in when a decision made is considered so unreasonable that it cannot be upheld.[140] The outcome relies on what unreasonableness test the courts apply.

1 Goddard Js findings

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[136] *Goulden v Wellington City Council*, above n 1, para 6 (HC) Goddard J.
[137] *Goulden v Wellington City Council*, above n 1.
[138] Ibid
[139] Joseph, above n 52,830.
[140] Ibid.

Goddard J held that because the Council's Code of conduct is an internal regulatory manual it is up to the council to decide on any matters that affect it and any transgression of its code of conduct is up to the council to assess.[141] She stated that the courts will only intervene when the decision is unreasonable and she applied the unreasonable test from *Associated Provisional Houses Ltd v Wednesbury Corp*.[142] This test known as Wednesbury unreasonableness sets the standard for courts to determine whether a decision is unreasonable if it is 'so unreasonable that no reasonable authority would ever have come to it.'[143] She supports her highly deferential approach with the statements from Lord Diplock in *CCSU*[144] that the decision must be "So outrageous in its defiance of logic that no reasonable person who had applied his mind to the question could have arrived at it,"[145] and Lord Scarman in *Nottingham County Council v Secretary of State for the Environment*[146] who held that the decision must be "so absurd the decision maker must have taken leave of their senses."[147] She also applied *Wellington City Council v Woolworths* (No2)[148] to illustrate that New Zealand courts are reluctant to interfere with matters that are within the special province of a council.[149] Her Honour's use of case authorities that strongly advocate a deferential approach when assessing the merits of its decision illustrate her viewpoint about the extent to which a court should interfere with the substance of a decision. She held that there was no reasonable basis to find that the majority vote for censure was Wednesbury unreasonable and that the courts should not intervene on such a political decision unless such a basis presented itself.[150]

2 New Zealand Developments

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[141] *Goulden v Wellington City Council*, above n 1 para 59 (HC) Goddard J.
[142] *Associated Provincial Picture Houses Ltd v Wednesbury Corp* [1948] 1 KB 223.
[143] Ibid, Lord Greene.
[144] *Council of Civil Service Unions v Minister for the Civil Service* [1985] AC 374 (HL)
[145] Ibid, 410 Lord Diplock.
[146] *Nottingham County Council v Secretary of State for the Environment* [1986] AC 240
[147] Ibid, 247 Lord Scarman
[148] *Wellington City Council v Woolworths New Zealand Ltd,* above n 95 (CA) Richardson P.
[149] *Goulden v Wellington City Council*, above n1, para 59-60 (HC) Goddard J.
[150] *Goulden v Wellington City Council*, above n 1, para 60 (CA) Goddard J.

However New Zealand's case law has developed in this area and it has moved on from the strict Wednesbury test applied by Goddard J.[151] The courts now take the approach that unreasonableness can be determined using a variety of methods ranging in their intensity of review depending on the context of the situation and other relevant factors.[152] Context has in fact become a central element in administrative law[153] and long established principles have been eroded or challenged by new concepts including this new approach of a "sliding scale" or "rainbow of standards of review."[154] One of the main reasons behind this shift is the integration of administrative law with constitutional law under the title of public law.[155] This shift has been sparked by the developments in the area of human rights and their incorporation into the review process with concepts such as anxious scrutiny review, proportionality review and 'hard look' review entering the field.[156] This new approach can be seen in cases such as *Discount Brands*[157] where the New Zealand Supreme Court quashed the Court of Appeals decision to apply Wednesbury unreasonableness, because important legal values such as natural justice and public participation had been encroached upon. The court held that any decision made under a statute that abridged those rights had to be cautiously exercised and would be carefully scrutinised by the courts.[158] New Zealand's position on when and under what circumstances a decision will be more carefully scrutinised has not been settled by the courts as yet, and it is still a developing area of the law.[159]

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[151] *Ports of Auckland ltd v Auckland City Council* [1999] 1 NZLR 601 606 (HC); *Progressive Enterprises Ltd v North Shore City Council* [2006] NZRMA 72 (HC) para 70-72; *Wolf v Minister of Immigration* [2004] NZAR 414 (HC) *Discount Brands Ltd v Westfield* (NZ) Ltd [2005] 2 NZLR 597 (SC); *Powerco v Commerce commission: Vector Ltd v Commerce Commission* (9 June 2006) HC WN CIV-2005-485-1220; CIV-2005-485-1220 Wild J.

[152] Michael Taggart "Administrative Law" [2006] 1 NZ L Rev 75, 83; *Ports of Auckland ltd v Auckland City Council*, above n 151; *Progressive Enterprises Ltd v North Shore City Council*, above n 151,para 70-72 (HC); *Wolf v Minister of Immigration*, above n 151, para 25-48 (HC) *Pharmaceutical Management Agency Ltd v Roussel Uclaf Australia Pty Ltd,* above n 100.

[153] *R(Daly) v Secretary of State for the Home Department* [2001] 2 AC 532, para 28 (HL) Lord Steyn; Taggart, above n 152, 83.

[154] Taggart, above n 152, 83, *Progressive Enterprises Ltd v North Shore City Council*, above n 151, para 70 (HC) Baragwanath J.

[155] Taggart, above n 152, 83.

[156] Anxious Scrutiny- *R v Secretary of State for the Home department, ex p Bugdaycay* [1987] AC 514; Proportionality review *Powerco v Commerce commission: Vector Ltd v Commerce Commission, above n 151*; Hard look review cited with approval but not applied *in Pharmaceutical Management Agency Ltd v Roussel Uclaf Australia Pty Ltd*, above n 100; *Shaw v Attorney- General (no2)* [2003] NZAR 216, 239 (HC) per Wild J.

[157] *Discount Brands Ltd v Westfield,* above n 151.

[158] Ibid, para 22-23, 25, Elias CJ, para 115 Blanchard J.

[159] Taggart, above n 152, 83-39.

3 *Englands influence*

The developments in this area in England have had an influence on New Zealand's approach to incorporating the NZBORA into judicial review, particularly since the enactment of their HRA. Before the HRA was enacted claimants could incorporate complaints of breaches of the European Convention on Human Rights (ECHR) rights under this heads of review, and they continue to do so.[160] However the repatriation of the ECHR into domestic law has seen an increase in the rate of judicial review claims in the domestic courts which incorporate claims of an ECHR breach.[161] The courts have since adapted the Wednesbury test to make it more flexible in light of their new responsibilities brought about by the HRA.[162] Wednesbury unreasonableness had in fact been applied in a less stringent way even before the enactment of the HRA, and various courts had quashed decisions claiming they were Wednesbury unreasonable even where there were arguments in there favour.[163] However in cases where rights have been affected the courts have varied in there approach, and ultimately the English courts are in as much of a quandary as the New Zealand courts.[164]

The scale of intensity of review in England is as varied as New Zealand's scale.[165] The English courts express their concerns about entering too far into a decision with a high policy context and restraining there scrutiny in areas that are not in line with there judicial experience.[166] "Where decisions of a policy-laden, esoteric or security-based nature are in issue, even greater caution than normal must be shown."[167] Such cases require a light touch review, which is a lower level of scrutiny, demonstrating more

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[160] Andrew Le Sueur "The Rise and Ruin of Unreasonableness?" [2005] JR, 34.
[161] Ibid.
[162] See *Wolf v Minister of Immigration,* above n 152, para 26 (HC) Wild J.
[163] See *R v Cornwall CC, ex p. Cornwall and Isles of Scilly Guardians ad Litem and reporting Officers Panel* [1992] 2 ALL ER 471; *West Glamorgan CC v Rafferty* [1987] 1 WLR 457, 477 Ralph Gibson LJ; Peter Cane, *Administrative Law,(*4 ed, Oxford University Press, 2004)250.
[164] Compare *R(Daly) v Secretary of State for the Home Department,* above n 153; *R (Association of British Civilian Internees (Far East Region) v Secretary of State for Defence* [2003] EWCA Civ 473 [2003]QB 1397 Dyson LJ; *R(Pro-life Alliance) v BBC* [2003] UKHL 23 Lord Walker.
[165] See Le Sueur, above n 160, 39.
[166] *R v Ministry of Defence ex p. Smith* [1996] QB 517, 556 Sir Thomas Bingham.
[167] Ibid.

deference to parliament.[168] The decision will have to 'so absurd that the decision maker must have taken leave of his senses."[169] Goddard J cited this test in her judgement, illustrating her intent to restrict the level of scrutiny she was going to allow into the Councils decisions especially because this test is considered even more deferential than 'ordinary Wednesbury' the next category on the scale. This test has been outlined above. The next category and the category that best illustrates the developments in the unreasonableness test is the 'anxious scrutiny' or 'super Wednesbury' category.[170] The test is 'whether a reasonable person on the material in front of him, could reasonably conclude that the interference with the right was justifiable."[171] This lowers the threshold of unreasonableness and it has been held that decisions infringing on rights should receive anxious scrutiny from the courts.[172] In *R v Ministry of Defence ex p. Smith*[173] Sir Thomas Bingham held:[174]

> "In judging whether the decision-maker has exceeded this margin of appreciation the human rights context is important. The more substantial the interference with human rights the more the courts will require by way of justification before it is satisfied that the decision is reasonable …."

However it has been increasingly argued that the various levels of intensity of review are inadequate tests to use to address cases that involve human rights. Andrew Le Sueur argues that the concept of unreasonableness in English law is a simple one. It establishes that the courts are to make a secondary decision, with the primary decision about the merits of the matter being left to public authorities.[175] However he claims that the unreasonableness test has taken on too much with the latest developments and that "Wednesbury unreasonableness is in danger of imploding under the weight of expectations."[176] This is a reference to the way the courts have attempted to incorporate

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[168] *Nottinghamshire County Council v Secretary of State for the Environment,* above n 146; *R v Ministry of Defence ex p. v Smith*, above n 166.
[169] *Nottinghamshire County Council v Secretary of State for the Environment,* above n 146,247 Lord Scarman.
[170] Le Sueur, above n 160, 39.
[171] *Brind v Secretary of State for the Home department* [1991] 1 All ER 720 (HL).
[172] See *R v Saville Inquiry ex p. A and others* [1999] EWHC Admin 556, Roch LJ.
[173] *R v Ministry of Defence ex p. v Smith*, above n 166.
[174] Ibid, 556 Lord Bingham.
[175] Le Sueur, above n 160, 32.
[176] Ibid.

human rights into the unreasonable test, something Le Sueur believes unreasonableness was never designed to do.[177] Therefore the fate of unreasonableness is still undetermined and the courts have been open to new approaches.

4 Proportionality- a new approach

The doctrine of proportionality has emerged as a solution for English and New Zealand Courts as some judges believe it is the appropriate standard of review when human rights are at issue.[178] The principle underlying proportionality is that a burden imposed by a decision must not be a disproportionate method of achieving the desired purposes.[179] Essentially it is an adoption of a type of *Oakes*[180] test similar to that required by sec 5 of the NZBORA.[181] The scope and extent of the role of proportionality review in both countries is still undefined but New Zealand has being influenced by the advancement of this test in England.[182] The HRA was a catalyst for the courts to consider proportionality as a separate head of review, primarily because the courts could no longer ignore their role in protecting rights[183] and they had the added pressure of being susceptible to European Court of Human Rights scrutiny.[184] The European Court also ruled that the traditional heads of review were no longer adequate to assess judicial review cases where rights were involved.[185] *R (Alconbury Ltd) v Secretary of State for the Environment, Transport and the Regions*[186] and R *(Daly) v Secretary of State for the Home Department*[187] were the first post- HRA decisions that introduced the notion of

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[177] Ibid.
[178] *R(Daly) v Secretary of State for the Home Department,* above n 153, para 21,27 and 30 (HL) Lord Bingham, Steyn, and Cooke; *R(Alconbury Ltd) v Secretary of State for the Environment, Transport and the Regions* [2001] 2 WLR 1389 (HL).
[179] Joseph, above n 52, 841.
[180] *R v Oakes*, above 90.
[181] Michael Taggart, "Administrative Law" [2003] NZ L Rev 99, 115.
[182] Jason Varuhas, "Powerco v Commerce Commission: Developing Trends of Proportionality in New Zealand Administrative Law" (2006) 4 NZJPIL 339, 344.
[183] *R (Alconbury Ltd) v Secretary of State for the Environment, Transport and the Regions,* above n 178, para 51 Lord Slynn.
[184] Jason Varuhas, *Keeping things in proportion: The judiciary, executive action and human rights* (LLB(Hons) Research Paper, Victoria University of Wellington, 2003) 19.
[185] See for example *Smith and Grady v United Kingdom* (2000) 29 EHRR 493; *Weeks v United Kingdom* (1987) 10 EHRR 293; *Kingsley v United Kingdom* (2002) 35 EHRR.
[186] *R(Alconbury Ltd) v Secretary of State for the Environment, Transport and the Regions*, above n 178.
[187] *R(Daly) v Secretary of State for the Home Department,* above n 153.

proportionality and its merits as a separate head of review. In *Alconbury*[188] Lord Slynn stated that this level of review was necessary since the enactment of the HRA.[189] In *Daly*[190] Lord Steyn outlined that a proportionality test might be a 'more precise and sophisticated' test to use in cases involving human rights because it could require the court to assess the balance which the decision maker has struck, not merely whether it is within the range of rational or reasonable decisions. Secondly a proportionality test 'may go further than the traditional grounds of review inasmuch as it may require attention to be directed to the relative weight accorded to interests and considerations.'[191] Thirdly the alternative tests such as 'heightened scrutiny' may not be appropriate in the protection of human rights.[192]

However the courts since *Daly*[193] and *Alconbury*[194] have not consistently adopted this approach or attempted to articulate it further, preferring to retain the traditional deferential approach.[195]

5 *Proportionality in New Zealand*

In a 2006 decision of *Powerco Ltd v Commerce Commission*[196] Wild J stated that while the three grounds of review in New Zealand were still illegality, unreasonableness and procedural impropriety, New Zealand courts have moved on from the single Wednesbury standard to an intensity of review appropriate to the subject matter. He also reiterated that proportionality might be a stand alone head of review but did not elaborate or confirm this position.[197] Proportionality has been considered by New Zealand courts

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[188] *R(Alconbury Ltd) v Secretary of State for the Environment, Transport and the Regions*, above n 178.
[189] Ibid, para51 Lord Slynn of Hadley.
[190] *R(Daly) v Secretary of State for the Home Department*, above n 153.
[191] *Daly,* above n 153, para 27 Steyn.
[192] Ibid.
[193] *Daly*, above n 153.
[194] *Alconbury,* above n 178.
[195] Tom Hickman, "Proportionality: Comparative Law Lessons," [2007] JR, 33. See for example *R v BBC, ex parte Profile Alliance* [2003]UKHL 23, para 75 (HL) Lord Hoffman; *Secretary of State for the Home Department v Rehan* [2001] UKHL 47, para 62 (HL) Lord Hoffman; *A,X,Y v Secretary of State for the Home Department* [2003] HRLR 3, para 40 (CA) Lord Woolfe CJ.
[196] *Powerco ltd v Commerce Commission*, above n 151
[197] Ibid.

for the past fifteen years as an increasingly attractive concept that can act as an important consideration when determining the reasonableness of a decision; however it has not been officially adopted as a separate head of review as yet.[198] Therefore the situation in both New Zealand and England is uncertain, and although this area of law has progressed it is still a developing area of law. The purpose of this section of the paper is not to resolve this uncertainty but merely to outline how much the law has adapted from the strict Wednesbury approach adopted by Goddard J. Whether proportionality has a role as a separate head of review is not the focus of this paper and furthermore because Section 5 of the NZBORA requires a proportionality analysis which has been undertaken in this paper under the illegality head of review, it is arguable whether a separate proportionality head of review is necessary.

6 *Goddard Js Approach*

With the developments in the law set out it is now appropriate to further analyse Goddard Js approach to this head of review. Goddard Js approach to unreasonableness in *Goulden*[199] is an inadequate analysis of the situation in New Zealand, and it did not take into account that when human rights have been impinged upon a more intense scrutiny of the decision is required by the courts. Her Honour adopts the outdated, arguably overruled strict Wednesbury approach without any justification for her decision. Goddard J was heavily influenced by the fact that the decision maker in this case was a local council who are a democratically elected body and therefore she believed it was necessary to be highly deferential and respect their decision making ability.[200] This is line with *Wellington WCC v Woolworths No2*[201] and *Waitakere City Council v Lovelock*,[202] two judicial review cases where the council's rates policies were being disputed. Both courts held that in areas such as rates which an area that councils have the highest level of

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[198] See *Waitakere City Council v Lovelock*, above n 40; *Wolf v Minister of Immigration*, above n 151; *Refugee Council of New Zealand v Attorney-General (No 1)* [2002] NZAR 717; *Thompson v Treaty of Waitangi Fisheries Commission* [2005] 2 NZLR 9.
[199] *Goulden v Wellington City Council*, above n 1.
[200] Cane, above n 163, 252.
[201] *Wellington City Council v Woolworths New Zealand Ltd (No 2)*, above n 95.
[202] *Waitakere City Council v Lovelock*, above n 40.

expertise the courts will be highly deferential.[203] These cases are not strong authorities to support Goddard Js application of strict Wednesbury unreasonableness in *Goulden*[204] however because they apply only to there specific fact situations and the court in *Lovelock*[205] observed that cases in which civil and political rights are infringed a court can more intensely scrutinise a council's decision.[206] Furthermore in *Sanders v Kingston*[207] which was affirmed in *Livingstone v The Adjudication Panel for England*,[208] Wilkie J held that political expression, because of its fundamental importance for the maintenance of a democratic society, is afforded an extremely high level of protection.[209] This case involved a Councillor who was sanctioned using the local authority's code of conduct because of offensive comments he had made about the numerous deaths of soldiers in local army camps. Wilkie J stated that while the Councillor was not entitled to this high level of protection of his rights in this particular case, he did recognise that where codes of conduct are used against a councillor who did give expression to political opinion of an offensive nature, then there might be circumstances in which local authorities could not find a breach of the code of conduct without unlawfully infringing on the rights protected in Article 10 (freedom of expression provision.)[210]

The outcome in *Goulden*[211] would inevitably have been affected if Goddard J had adopted any of the more appropriate approaches outlined above. Regardless of what standard of review was applied, a more careful consideration of Goulden's right to freedom of expression would have occurred and the decision would have been more likely to have been struck down for being unreasonable or a disproportionate response.

IV CONCLUSION

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[203] Ibid, 395-397.
[204] *Goulden v Wellington City Council*, above n 1.
[205] *Waitakere City Council v Lovelock*, above n 40.
[206] Ibid, 403.
[207] *Sanders v Kingston* [2005]EWHC 1145 (Admin).
[208] *Livingstone v The Adjudication Panel for England*, above 121.
[209] *Sanders v Kingston*, above n 206, 76-78, 85 Wilkie J.
[210] Ibid
[211] *Goulden v Wellington City Council* ,above n 1.

This paper has outlined the role the NZBORA plays in judicial review proceedings. In outlining the developments that have occurred under the illegality and unreasonableness heads of review the inadequate approach adopted by Goddard J can be further understood. Goddard Js treatment of the NZBORA in *Goulden*[212] has been contrasted throughout the paper with the appropriate treatment of the NZBORA. If the NZBORA and *Drew*[213] had been applied under the illegality head of review then Goulden's censure would have been struck down under this head. It is likely that Goulden's censure would also have been struck down under the unreasonableness or proportionality head of review. After evaluating the effect of the NZBORA on judicial review it is evident that had the NZBORA been applied properly in *Goulden,*[214] the outcome would have been entirely different.

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[212] *Ibid*
[213] *Drew v Attorney General*, above n 55.
[214] *Goulden v Wellington City Council*, above n 1.

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