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PROVING JUSTIFIED LIMITATIONS: EVALUATING JUDICIAL NOTICE OF LEGISLATIVE FACT EVIDENCE IN *CHIEF EXECUTIVE OF THE DEPARTMENT OF CORRECTIONS V CHISNALL*

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Abstract

In *Chief Executive of the Department of Corrections v Chisnall* the New Zealand High Court found that even though a form of extended supervision order breached offenders' rights under the New Zealand Bill of Rights, this was a justified limitation. To come to this conclusion, the judge used common sense rather than referring to the evidence put forward by the Crown. This paper critiques this reliance on common sense by looking to New Zealand and international case law. The author proposes that the test from the Canadian case *R v Spence* should be used by judges to determine where a finding may be made on the basis of common sense and where judges should instead rely on evidence. The *Spence* approach suggests that the judge in *Chisnall* should not have relied upon his common sense. Finally, the author canvasses the contrasting approaches towards evidence used to justify legislative breaches of rights, concluding that a flexible approach to admissibility is best.

Keywords: "*Chief Executive of the Department of Corrections v Chisnall*", "legislative fact evidence", "judicial notice", "New Zealand Bill of Rights Act 1990"

Contents

I Introduction

The trajectory of rights litigation in New Zealand shifted dramatically when the Supreme Court granted the first declaration of legislative inconsistency with the New Zealand Bill of Rights Act 1990 (the Bill of Rights) in *Attorney-General v Taylor*.[1] As these declarations of inconsistency are a new development, there are several related areas that have yet to be explored.

One such area is the evidence needed to determine if a legislative breach of the Bill of Rights is justified under s 5. The issue of when, if ever, judges may use common sense findings in their s 5 analysis has not yet been comprehensively addressed in New Zealand. This underdeveloped jurisprudence arises from a lack of cases on the application of s 5 to legislative breaches of rights. Now that declarations of inconsistency are a part of Bill of Rights law,[2] the surrounding jurisprudence will need to grow. This need for development was made clear by the second New Zealand judgment to grant a declaration of inconsistency: *Chief Executive of the Department of Corrections v Chisnall*,[3] where the issue of what evidence was required to justify legislative breaches was central to the result.

This paper will focus on legislative fact evidence: the economic, social, cultural, administrative and moral factors which lead to the development of law and policy, or justify it remaining.[4] This evidence can be used to support Crown arguments that legislation breaching the Bill of Rights is justified according to s 5.[5] In *Chisnall*, the Crown pointed to legislative fact evidence to show that legislative breaches of rights were justified. To come to one of his conclusions the judge accepted the Crown's arguments, but did so by

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[1] *Attorney-General v Taylor* [2018] NZSC 104, [2019] 1 NZLR 213.

[2] See *R v Fitzgerald* [2020] NZCA 292.

[3] *Chief Executive of the Department of Corrections v Chisnall* [2019] NZHC 3126 [*Chisnall* (HC)].

[4] Peter Hogg (ed) *Constitutional Law of Canada* (online ed, Thomson Reuters) at [60.2(a)]; and *Attorney-General v Taylor* [2017] NZCA 215, [2017] 3 NZLR 24 at [128].

[5] Hogg, above n 4, at [60.2(a)]; and Jula Hughes and Vanessa MacDonnell "Social Science Evidence in Constitutional Rights Cases in Germany and Canada: Some Comparative Observations" 32 NJCL 23 at 24.

use of judicial notice, rather than legislative fact evidence. Judicial notice allows judges to classify facts as common sense, thereby removing the requirement to rely on evidence.[6]

This paper suggests that the use of judicial notice in this context was inappropriate. Part II will introduce the case of *Chisnall*, discussing the background to the case as well as the evidential issue addressed in this paper.

Part III places *Chisnall* in the context of judicial notice, assessing the issues with judicial notice as well as when it may be appropriate. The paper then proposes a test from the Canadian case *R v Spence* to determine when judges should use judicial notice. Applying *Spence* to *Chisnall* indicates that judicial notice was not correctly used in *Chisnall.*

Finally, Part IV compares the strict and more flexible evidential approaches to legislative facts. It concludes that the flexible standard is the correct approach, due to the nature of legislative fact. Part IV will also consider whether the result of *Chisnall* would have differed if the flexible standard allowed the introduction of legislative fact evidence, and the judge had used this evidence in his s 5 analysis.

II Chief Executive of the Department of Corrections v Chisnall

A How the Evidential Issue Arose

Chisnall, like many Bill of Rights cases, is concerned with the state infringing a prisoner's rights. The plaintiff, Mr Chisnall, was at the end of an 11-year prison sentence for serious sexual offending.[7] The Department of Corrections concluded that if Mr Chisnall were released, there was a high risk he would go on to imminent and serious sexual reoffending.[8]

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[6] "Judicial Notice" Oxford Reference <www.oxfordreference.com>.

[7] *Chisnall* (HC), above n 3, at [6].

[8] *Chisnall v Chief Executive of the Department of Corrections* [2017] NZCA 248 at [3].

Mr Chisnall, therefore, fell into the category of offenders who had served their sentence but were still considered dangerous. There is global debate over what should happen to these offenders: where they should stay, what care they should receive and how long they should remain supervised or detained.[9] There has recently been an increase in detaining offenders in custody due to their perceived risk to the wider community.[10] This tendency towards higher restrictions can be partly explained by political factors: releasing an offender who went on to serious offending would reflect poorly on all involved in the decision to release them.[11]

New Zealand has a suite of regimes to respond to this "high-risk" group of offenders. In the case of Mr Chisnall, the Chief Executive of the Department of Corrections applied for a public protection order (PPO), or an extended supervision order (ESO) in the alternative.[12] Both orders are intended for offenders that are still dangerous. The orders aim to improve public safety by monitoring offenders or restricting what they can do after their sentence finishes.

ESOs are the less restrictive of the two orders and mainly focus on monitoring the offender while they are back in the community. To be eligible, offenders must have been sentenced to imprisonment for a relevant sexual or violent offence.[13] Examples of relevant offences include sexual violation, sexual conduct with minors and wounding with intent.[14] An ESO may only be granted if the court finds a pervasive pattern of sexual or violent offending,

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[9] See, for example, Karen Harrison "Dangerous offenders, indeterminate sentencing, and the rehabilitation revolution" (2010) 32 JSWFL 423; Matt Ford "America's Largest Mental Hospital Is a Jail" *The Atlantic* (online ed, Boston, 8 June 2015); and Bernd-Dieter Meier "Legal Constraints on the Indeterminate Control of 'Dangerous' Sex Offenders in the Community: The German Perspective" (2016) 9 Erasmus Law Review 83.

[10] See John Pratt and Jordan Anderson "'The Beast of Blenheim', risk and the rise of the security sanction" (2016) 49 Australian and New Zealand Journal of Criminology 528 at 530; and Colin Gavaghan, Jeanne Snelling and John McMillan *Better and Better and Better? A Legal and Ethical Analysis of Preventative Detention in New Zealand* (The New Zealand Law Foundation, 7 November 2014) at 6.

[11] Gavaghan, Snelling and McMillan, above n 11, at 91.

[12] *Chisnall* (HC), above n 3, at [6].

[13] Parole Act 2002, s 107C(a).

[14] Section 107B(2)–(2A).

combined with either a high risk the offender will reoffend for sexual offences, or a very high risk of violent reoffending.[15] The offender is deemed to pose a high risk if they fulfil specific statutory criteria.[16] In determining the offender's risk, the court considers a health assessor's report.[17] Standard ESO conditions include a requirement to give biometric information, report to a probation officer and not leave New Zealand.[18] The Parole Board also has the discretion to impose "special conditions".[19] Special conditions may require the offender to submit to electronic monitoring or prohibit the offender from going to particular places.[20] The most restrictive special condition is "intensive monitoring", which requires offenders to be accompanied and monitored for up to 24 hours a day.[21] ESOs may last for up to 10 years, but may also be renewed.[22]

PPOs are more restrictive than ESOs and closely resemble imprisonment. Eligible offenders must have a "severe disturbance in behavioural functioning" and a "very high risk of imminent serious sexual or violent offending".[23] Both a health assessor and a psychologist report on the offender's characteristics and their opinion of the offender's risk.[24] PPO subjects are detained in a nominated residence on prison grounds.[25] If the court is satisfied an offender cannot be safely managed in a residence, and all less restrictive options have been considered, the offender may be detained in prison instead.[26] The offenders' communications are monitored, and they may be drug tested, kept in a room by themselves, searched, and restrained.[27] While the court regularly reviews PPOs,[28] there

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[15] Section 107I(2).
[16] Section 107IAA.
[17] Section 107F(2)–(2A).
[18] Section 107JA.
[19] Section 107K.
[20] Section 15(3)(e)–(f).
[21] Sections 15(3)(g) and 107IAC.
[22] Section 107A(b).
[23] Public Safety (Public Protection Orders) Act 2014, s 13.
[24] Section 9.
[25] Sections 20 and 114(1).
[26] Section 85.
[27] Sections 63–73.
[28] Sections 16–19.

are no limits on the length of the order. It is therefore possible that some offenders may never be released.[29]

After the Department of Corrections' initial applications to the High Court for a PPO or an ESO in the alternative, the Department also sought an interim detention order relating to the PPO application.[30] The judge granted the detention order, and Mr Chisnall was required to stay in prison pending the applications. Mr Chisnall appealed, but this order was finally upheld by the Supreme Court.[31] Wylie J granted a PPO in 2017,[32] which was then quashed by the Court of Appeal in October 2019.[33] A PPO cannot be justified unless the court has considered whether the lesser controls of an ESO could instead manage the offender's risk.[34] The likely conditions of an ESO in Mr Chisnall's case had not been determined when Wylie J granted the PPO, meaning the Court had not properly considered the possibility of an ESO.[35] Therefore, although the PPO risk threshold was met, the order was quashed and the matter was remitted to the High Court for reconsideration.[36] Mr Chisnall's interim detention order remained in force.[37]

Mr Chisnall then sought declarations of inconsistency in respect of s 13(1) of the Public Safety (Public Protection Orders) Act and s 107I(2) of the Parole Act.[38] These sections allow for PPOs and ESOs, respectively. The key argument for Mr Chisnall as it developed in the High Court was that the ESO and PPO regimes unjustifiably infringed the rights affirmed by ss 25(g) and 26(2) of the Bill of Rights.[39] Section 25(g) affirms the right for those convicted of an offence to benefit from the lesser penalty if the penalty varies between

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[29] See Public Safety (Public Protection Orders) Bill 2012 (68-1), at 1.

[30] *Chief Executive of the Department of Corrections v Chisnall* [2016] NZHC 784; and *Chief Executive of the Department of Corrections v Chisnall* [2016] NZHC 796.

[31] *Chisnall v Chief Executive of the Department of Corrections* [2017] NZSC 114, [2018] 1 NZLR 83.

[32] *Chief Executive of the Department of Corrections v Chisnall* [2017] NZHC 3120 at [126].

[33] *Chisnall v Chief Executive of the Department of Corrections* [2019] NZCA 510 at [70].

[34] At [42] and [64]–[65].

[35] At [64]–[68].

[36] At [68]–[71].

[37] At [72].

[38] *Chisnall* (HC), above n 3, at [4].

[39] At[13].

the offence and sentencing. Section 26(2) affirms the right for people acquitted or convicted of, or pardoned for, an offence to be free from being tried or punished for it again. The judge in *Chisnall* referred to these rights as the immunity from increased penalty (s 25(g)) and the immunity from second penalty (s 26(2)).[40]

The Bill of Rights is applied in two stages, meaning the judge in *Chisnall* needed firstly to determine whether the regimes were inconsistent with rights, and then whether any inconsistencies were justified in terms of s 5.[41] In substance, Whata J analysed three types of regimes: PPOs, prospective ESOs and retrospective ESOs. Prospective ESOs apply to offenders who offended after the amended ESO regime came into force in 2014.[42] Retrospective ESOs refer to orders made concerning offenders who committed their qualifying offence before the regime came into force. Courts tend to disapprove of retrospective penalties as they subject people to punishments that were not knowable at the time of offending.[43]

Both rights at issue concerned immunity from penalties. Therefore, for the regimes to be prima facie inconsistent with ss 25(g) and 26(2) they must have been penalties. The judge held that the PPO regime was not a penalty. Several factors led him to this conclusion, including the non-punitive nature of the relevant statute, the expressly affirmed rights of offenders subject to the order and the high level of judicial oversight in the PPO regime.[44] The judge held the PPO regime therefore did not breach the Bill of Rights.[45]

On the other hand, Whata J concluded that the ESO regime, both prospective and retrospective, was a penalty.[46] He found the Court of Appeal case *Belcher v Chief*

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[40] At [17].

[41] Andrew Butler and Petra Butler *The New Zealand Bill of Rights Act: A Commentary* (2nd ed, LexisNexis, Wellington, 2015) at [6.6].

[42] *Chisnall* (HC), above n 3, at [89].

[43] Butler and Butler, above n 41, at [24.2.6].

[44] *Chisnall* (HC), above n 3, at [140]–[141].

[45] At [149] and [160].

[46] At [90].

Executive of the Department of Corrections.[47] highly persuasive, where the Court held the ESO regime was a penalty..[48] As the judge found that the penalty imposed was both a second penalty and increased penalty, he consequently held that the ESO regime was a prima facie breach of ss 26(2) and 25(g) of the Bill of Rights..[49]

After a prima facie breach has been made out, the second step of the Bill of Rights approach is to determine if the breach is a justified limit in terms of s 5 of the Bill of Rights. To demonstrate this, the Crown must show that the limit was reasonable, prescribed by law, and can be "demonstrably justified in a free and democratic society"..[50] The judge therefore had to consider whether detaining certain "high risk" prisoners after their sentences had finished was justified, to prevent harm to the general population..[51]

As the PPO regime did not breach the Bill of Rights prima facie, a s 5 analysis was unnecessary. However, as the ESO regimes had been found to breach rights, the s 5 analysis was crucial to determine if those breaches were justified. The judge ultimately held that the retrospective ESO regime was not justified..[52] He found the right to be free from retrospective penalty was so constitutionally significant and non-derogable that even the "legitimate objective" of public protection was not sufficiently important to justify the inconsistency..[53] The judge therefore made a declaration, finding the retrospective application of s 107I(2) of the Parole Act 2002 inconsistent with s 26(2) of the Bill of Rights..[54]

On the other hand, the judge found that prospective ESOs were justified. As will be discussed in the next section, the judge only briefly addressed the s 5 analysis and relied heavily on common sense. The judge ultimately concluded that while the prospect of

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[47] *Belcher v Chief Executive of the Department of Corrections* [2007] 1 NZLR 507 (CA).
[48] At [47]–[49].
[49] *Chisnall* (HC), above n 3, at [85]–[90].
[50] New Zealand Bill of Rights Act 1990, s 5; and *R v Hansen* [2007] NZSC 7, [2007] 3 NZLR 1 at [108].
[51] *Chisnall* (HC), above n 3, at [92]–[99].
[52] At [96].
[53] At [94] and [96].
[54] At [161].

indefinite ESOs did seem "unfair", whether an ESO was justified would depend on the facts of the case.[55]

The question of what evidence is required to justify legislative breaches of the Bill of Rights therefore only arose in a part of the judgment. The issue did not arise in relation to PPOs, as that regime was found not to prima facie breach the Bill of Rights. The question was also not addressed in relation to retrospective ESOs, as the judge's conclusions instead hinged on the significance of the right to be free of retrospective penalty. The question of what evidence is needed, if any, to prove that a legislative breach of the Bill of Rights is justified was therefore only addressed in relation to one regime: the prospective ESO regime.

B The Evidential Issue

The focus of this paper is evaluating the judge's approach to legislative fact evidence in *Chisnall*, in relation to justifying the prima facie breach of the prospective ESO regime. Legislative fact evidence is particularly relevant to the s 5 inquiry as legislative facts often explain the purpose and consequences of limiting rights.[56] To support their position, the Crown in *Chisnall* put large amounts of legislative fact evidence before the court relating to the ESO regime.[57]

Both Mr Chisnall[58] and the Crown[59] agreed that s 5 of the Bill of Rights should be approached in the form expressed by Tipping J in the Supreme Court case *R v Hansen*.[60] This approach was also followed by O'Regan and Ellen France JJ in the Supreme Court

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[55] At [99]

[56] Hogg, above n 4, at [60.2(a)].

[57] Submissions for Mr Chisnall in *Chief Executive of the Department of Corrections v Chisnall* [2019] NZHC 3126 (31 May 2019) at [61].

[58] At [5.3].

[59] Submissions for the Attorney-General in *Chief Executive of the Department of Corrections v Chisnall* [2019] NZHC 3126 (19 June 2019) at [115].

[60] *R v Hansen,* above n 50, at [103]–[104].

case *New Health New Zealand Inc v South Taranaki District Council*[61] and has become widely used.[62] Tipping J drew on a modified version of the formulaic "*Oakes* test", from the foundational Canadian Supreme Court case *R v Oakes*.[63] Tipping J held that the following questions should be asked:[64]

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

While the original *Oakes* approach requires that the right be limited "as little as possible",[65] Tipping J followed the trend in subsequent Canadian cases[66] and allowed more latitude to Parliament. He therefore softened the stringency of *Oakes* by holding the impairment must be "no more than is reasonably necessary" at (b)(ii).

The first step of the modified *Oakes* test at (a) is determining the importance of the purpose of the legislation. The Crown argued that the purpose of the ESO legislation was to protect the public,[67] and this was not refuted in the submissions for Mr Chisnall. The judge agreed,

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[61] *New Health New Zealand Inc v South Taranaki District Council* [2018] NZSC 59, [2018] 1 NZLR 948 at [112] and [123]–[144] per O'Regan and Ellen France JJ.

[62] See *Commerce Commission v Air New Zealand Ltd* [2011] NZCA 64, [2011] 2 NZLR 194 at [66]; *Ministry of Health v Atkinson* [2012] NZCA 184, [2012] 3 NZLR 456 at [143]; *Child Poverty Action Group Inc v Attorney-General* [2013] NZCA 402, [2013] 3 NZLR 729 at [76]–[77]; and *Arps v Police* [2019] NZCA 592, [2020] 2 NZLR 94 at [46].

[63] *R v Oakes* [1986] 1 SCR 103.

[64] *R v Hansen,* above n 50, at [104] per Tipping J.

[65] *Oakes,* above n 63, at [70].

[66] See *R v Edwards Books and Art Ltd* [1986] 2 SCR 713 at [142]; and *Irwin Toy Ltd v Quebec (Attorney General)* [1989] 1 SCR 927 at [74].

[67] Submissions for the Attorney-General, above n 59, at [143]–[146].

stating that the purpose of managing the risk of sexual or violent offending was "legitimate".[68]

The subsequent steps of the *Oakes* test at (b) were more contentious. This analysis concerned the proportionality of the ESO regime. The Crown's arguments hinged on the assumption that the offenders eligible for ESOs would almost certainly reoffend seriously.[69] The court ultimately makes the final decision on risk based on factors in s 107IAA of the Parole Act 2002.[70] The contention that these offenders pose a high risk assumes that these behavioural characteristics are accurate indicators for when an offender is likely to reoffend. For sexual reoffending, these characteristics include having limited self-regulatory capacity, a drive to offend and a "predilection or proclivity for serious sexual offending".[71] The health assessor also considers the same factors in their report.[72]

This assumption that these offenders posed a high risk allowed the Crown to claim that the rational connection requirement in (b)(i) of the modified *Oakes* test was satisfied. If the offenders eligible for an ESO posed a high risk, supervising this population would promote public safety by managing that risk and preventing further offences.[73]

The high risk posed by these offenders was also relevant to the discussion of (b)(ii): whether the infringements of rights caused by the ESO regime were reasonably necessary.[74] The Crown argued that the offenders' risk meant that there were no reasonable alternatives to the ESO regime.[75] The Crown also argued that ESOs were tailored to individual offenders, which meant that the orders would only infringe as little as necessary.[76] Mr Chisnall submitted that other, more therapeutic regimes would have

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[68] Chisnall (HC), above n 3, at [94].

[69] See Submissions for the Attorney-General, above n 59, at [254], [262] and [265].

[70] Parole Act 2002, s 107I(2).

[71] Section 107IAA(1).

[72] Sections 107F(2A).

[73] Submissions for the Attorney-General, above n 59, at [151]–[152].

[74] At [155].

[75] At [156]–[163] and [171].

[76] Submissions for the Attorney-General, above n 59, at [167]–[169].

achieved the purpose of the legislation without infringing on offenders' rights so significantly.[77]

Finally, under (b)(iii), the Crown submitted that the limitations on rights imposed by the ESO regime were proportionate to the importance of the regime's objective. Once more, this relies on the high risk of offenders –the significant limitations imposed by the ESO regime could only be proportionate if the offenders posed a sufficiently high risk.

The Crown's overall case for proportionality under (b) of the *Oakes* test therefore depended on the high risk of the offenders eligible for ESOs. The Crown did not present any evidence from psychiatrists or scientific studies. They also did not present any evidence demonstrating that the statutory criteria in the Parole Act 2002 used to determine risk were correlated with actual risk of recidivism.

The Crown instead relied on legislative fact evidence. The Crown put forward an abundance of legislative fact evidence to support their claims of proportionality, including: the Parole (Extended Supervision) Amendment Bill at all stages,[78] its s 7 report, the relevant regulatory impact statement,[79] an affidavit from Ms Leota, the National Commissioner of the Department of Corrections[80] and Select Committee materials.[81] Mr Chisnall did not bring any evidence. This is not unusual, as the onus is on the Crown to show that legislation is demonstrably justified if it is found to be inconsistent with the Bill of Rights.[82]

Despite the importance to the Crown's case, the legislative fact evidence only indirectly mentioned the risk posed by offenders eligible for ESOs. There were only three direct references to this risk in the Crown's written submissions. Firstly, the Crown cited a 2004

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[77] Submissions for Mr Chisnall, above n 57, at [63.1]–[63.1.4].

[78] See Submissions for the Attorney-General, above n 59, at [145], n 195.

[79] At [143], n 190.

[80] At [50].

[81] At [253], n 296, [256.4], and [263], n 301.

[82] Butler and Butler, above n 41, at [6.7.1].

regulatory impact statement, which they submitted included research that child sex offenders have "a high risk of reoffending".[83] Secondly, the Crown cited a 2013 Cabinet paper, which stated "high risk child sex offenders are four times more likely to sexually re-offend against children than lower risk child sex offenders".[84] Thirdly, Ms Leota's affidavit mentioned the low reoffending rate of those released from ESOs.[85] The Crown used this reoffending rate as evidence of the ESO regime's effectiveness, despite there being no evidence of the counterfactual: the reoffending rate had the offenders not been subject to an ESO.[86] While the Crown presented other legislative fact evidence, this assumed the risk of these offenders.[87]

The judge in *Chisnall* observed these evidential gaps, commenting that the risk of recidivism was "largely assumed" by the Crown.[88] Mr Chisnall also pointed to the 2014 Regulatory Impact Statement from the Crown's legislative fact bundle, which discussed the lower rate of reoffending by sex offenders, the difficulty of drawing definite conclusions and the lack of research in the area of long-term monitoring.[89]

Whata J did not discuss the Crown's evidence in depth. He undertook a condensed version of the *Oakes* analysis in one paragraph, stating:[90]

> … no legislative fact or scientific evidence is necessary to prove the rational connection to and the reasonableness of this impairment and/or the proportionality of the impairment to the importance of the objective.

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[83] Submissions for Mr Chisnall, above n 57, at [143].

[84] At [143].

[85] Affidavit of Rachel Leota for *Chief Executive of the Department of Corrections v Chisnall* [2019] NZHC 3126 (Affirmed 1 March 2019) at [17].

[86] Submissions for the Attorney-General, above n 59, at [174].

[87] See, for example, at [152] and [176].

[88] *Chisnall* (HC), above n 3, at [72].

[89] Submissions for Mr Chisnall, above n 57, at [63.2]

[90] *Chisnall* (HC), above n 3, at [94].

The judge then described the health assessor's report as a "reasonable method" to weigh the offender's rights with the risk they may pose to the community.[91] Under this logic, if a health assessor has determined an offender to be at a sufficient risk level for an ESO, the limitations of a prospective ESO must therefore be rationally connected, reasonable and proportionate. In this way, the judge placed the question of justifiability in the hands of individual health assessors. The judge's reasoning will be assessed at the end of this paper, but it is important to note that the health assessor's conclusions may still be prone to errors[92] and that ultimately it is the court, not the health assessor, who determines whether an offender's risk is sufficiently high for an ESO.[93]

Finally, the judge noted that his conclusion was also influenced by the fact that the availability of ESOs would prevent preventative detention from being imposed in some cases.[94] Preventative detention is an indeterminate sentence imposed at the point of sentencing.[95] As it is not a finite sentence, it is arguably more severe than an ESO.

III Critique of the Use of Judicial Notice in Chisnall

Whata J resolved the questions of recidivism and risk quite simply, using his personal understanding of the matter. This section will first explain the benefits and detriments of judicial notice and then suggest that the test from *R v Spence* should be used to determine where judicial notice is appropriate. Applying this test, the author argues the judge should not have concluded that the s 5 analysis was self-evident, and should have instead engaged with the legislative fact material produced by the Crown.

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[91] At [94].

[92] See *R v Peta* [2007] NZCA 28, [2007] 2 NZLR 627 at [63]–[67].

[93] Parole Act 2002, s 107I(2).

[94] *Chisnall* (HC), above n 3, at [98].

[95] Gavaghan, Snelling and McMillan, above n 11, at 25–26.

A Legislative Fact Evidence

To understand the judge's decision to undertake the s 5 analysis without referring to evidence, a more comprehensive understanding of the general legislative fact debate is required. Evidence can be divided roughly into two categories: adjudicative fact and legislative fact.[96] While adjudicative facts are facts at issue in a particular case,[97] legislative facts speak to the broader context of the development of law and policy.[98] Expert opinions, studies and reports can be introduced as legislative fact evidence.[99] Legislative fact evidence often draws on social science: the scientific discipline of human behaviour and experience.[100] In *Chisnall* the relevant legislative fact related to social science. The legislative fact at issue was risk of recidivism posed by offenders who were eligible for ESOs.

Legislative facts are essential in ensuring judges understand important information, trends and social science evidence of which they otherwise would be unaware. Some overseas examples of legislative fact evidence include evidence informing the Court of battered woman syndrome[101] and the feminisation of poverty.[102] The New Zealand courts have recognised the role of legislative fact evidence in the s 5 analysis – for example, both McGrath J and Elias CJ in *Hansen* recognised the utility of legislative fact in the s 5 inquiry to prevent reliance on intuitive judgment.[103]

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[96] See Kenneth Davis "An Approach to Problems of Evidence in the Administrative Process" (1942) 55 Harv L Rev 364 at 402.

[97] John Hagan "Can Social Science Save Us? The Problems and Prospects of Social Science Evidence in Constitutional Litigation" in Robert Sharpe (ed) *Charter Litigation* (Butterworths, Toronto, 1987) 215 at 215.

[98] Hogg, above n 4, at [60.2(a)]; and *Attorney-General v Taylor*, above n 4, at [128].

[99] Hogg, above n 4, at [60.2(a)].

[100] Benjamin Perryman "Adducing Social Science Evidence in Constitutional Cases" (2018) 44 QLJ 121 at 126.

[101] *R v Lavallee* [1990] 1 SCR 852, cited by *R v Spence* 2005 SCC 71, [2005] 3 SCR 458 at [57].

[102] *Moge v Moge* [1992] 3 SCR 813, cited by *R v Spence*, above n 101, at [57].

[103] *R v Hansen,* above n 50, at [9], n 9 per CJ Elias and [230]–[232] per McGrath J.

However, unique evidential issues are thrown up by legislative facts. Firstly, legislative fact evidence is often competing and inconclusive: different experts may hold conflicting views or studies may come to different conclusions.[104] Legislative fact evidence tends to be normative – there may not be "one truth" to the matter. Finally, due to the precautionary nature of policy, legislative fact evidence may not be comprehensive. For example, the policy materials related to a piece of legislation may show the expectation that a problem would arise in the future, rather than evidence of an existing issue.[105]

Due to these issues, there is a conundrum as to what sort of evidence is required to prove legislative facts. As a general rule, courts make findings on the basis of sworn evidence.[106] However, the nature of legislative fact evidence means that subjecting it to the same standard of adjudicative facts would result in useful material not being accepted by the court.[107] Legislative fact evidence is therefore often not subjected to the same standard of proof as adjudicative facts.[108]

B Judicial Notice

In *Chisnall*, the judge noted he found that prospective ESOs were justified under s 5 of the Bill of Rights without relying on any "legislative fact or scientific evidence".[109] As mentioned earlier, this statement assumes the risk of the offenders eligible for ESOs, as without that risk the ESO regime would not be proportionate under (b) of the modified *Oakes* test. The judge's approach to the offenders' risk is an example of judicial notice. Judicial notice is where a judge classifies a fact as "self-evident", or a matter of common sense, and so does not require any evidence to support it.[110]

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[104] Hogg, above n 4, at [60.2(a)].

[105] See Katie Steele "The precautionary principle: a new approach to public decision-making?" (2006) 5 Law, Probability and Risk 19.

[106] Hogg, above n 4, at [60.2(a)].

[107] Butler and Butler, above n 41, at [6.7.5].

[108] *Ministry of Health v Atkinson*, above n 62, at [166], citing *RJR-MacDonald Inc v Canada (Attorney General)* [1995] 3 SCR 199 at [137].

[109] *Chisnall* (HC), above n 3, at [94].

[110] "Judicial Notice", above n 6; and Hogg, above n 4, at [38.4], n 38.

1 Benefits of judicial notice

There are many advantages to taking judicial notice of facts. Firstly, judicial notice avoids the unnecessary time and cost associated with strict evidential requirements. Requiring all facts to be proven by evidence could risk a "battle of the experts", where each side brings masses of evidence contradicting the other, not helping the court in coming to a conclusion.[111] Although the Crown bears the main cost in adducing evidence to show justifiability, the plaintiff inevitably would be expected to rebut some of the Crown's evidence, meaning both parties would bear this cost.[112] Requiring expert evidence for background or uncontroversial matters would also slow down proceedings, due to the time taken to compile evidence.

Secondly, judicial notice also avoids situations where laws are deemed inconsistent with rights due to an insufficient evidentiary record, but where the justification for the breach was easily understandable.[113] McGrath J's judgment in *Hansen* is an example of judicial notice being used to overcome procedural barriers.[114] In that case, the Crown attempted to submit evidence on the complexity of drug dealing in New Zealand, but submitted too late.[115] In his judgment, McGrath J described this legislative fact evidence from the Crown as "self-evident" and therefore took judicial notice of it, allowing him to still consider the evidence.[116]

Both Canadian courts and the European Court of Human Rights have tended to take judicial notice of facts while justifying breaches of human rights. Even within the strict *Oakes* test, the Canadian Supreme Court carved out an exception: no evidence needed to be provided

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[111] "Battle of the Experts" APA Dictionary of Psychology <http://dictionary.apa.org>.
[112] Butler and Butler, above n 41, at [6.7.5]. See also Peter Hogg, above n 4, at [38.4].
[113] Hogg, above n 4, at [38.4]; and Alan Young "Proving a Violation: Rhetoric, Research and Remedy" (2014) 67 SCLR 617 at 630.
[114] *R v Hansen,* above n 50.
[115] At [231].
[116] At [232] per McGrath J.

when justifications were "obvious or self-evident".[117] In *Oakes*, Dickson CJ held that the importance of the legislative objective was "to a large extent, self-evident".[118] Similarly, in *RJR-MacDonald Inc v Canada (Attorney General)* although Supreme Court judge La Forest J referred to legislative fact when undertaking the rational connection inquiry, he ultimately found the connection between advertising and consumption of tobacco was so "common-sense" that it did not require evidence to be shown.[119]

The European Court of Human Rights is an example of a court that relies on a mixture of evidence and judicial notice. Its unique approach to evidence is due to the unique nature of the Court. The Court is not intended to be a fact-finding body,[120] and there are loose procedural requirements for any evidence that is brought by counsel.[121] In assessing the proportionality of limitations on rights, the Court tends to prefer logic over evidence.[122] The preference for formal reasoning and judicial experience means that evidence is often not filed by parties to show possible alternative measures available to the government or the impact of the government's scheme.[123] The Court does not usually invite submissions from experts or hear expert witnesses.[124] This "free-form" approach allows the Court to review the balance of interests in particular cases, without being constrained by procedural rules.[125]

2 Problems with judicial notice

Despite the useful role that judicial notice plays, this evidential approach can also result in serious issues. When judges can come to conclusions without any evidence, procedural

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[117] *Oakes,* above n 63, at [68].
[118] At [76].
[119] *RJR-MacDonald Inc v Canada (Attorney-General)*, above n 108, at [86].
[120] *Max Planck Encyclopedias of International Law* (2018, online ed) Evidence: European Court of Human Rights (ECtHR) at [2].
[121] At [3] and [46].
[122] Butler and Butler, above n 41, at [6.7.4], n 122.
[123] At [6.7.4], n 122.
[124] *Max Planck Encyclopedias of International Law*, above n 120, at [72].
[125] Janneke Gerards "How to improve the necessity test of the European Court of Human Rights" (2013) 11 ICON 466 at 468–469.

safeguards are lost. For that reason, judges should only make influential factual decisions on the foundation of common sense where the matter is self-evident.

The Victorian case of *RJE v Secretary to the Department of Justice* demonstrates one of the issues with a system that prioritises judicial views over expert evidence.[126] In *RJE*, the judge in the court of first instance found that, despite expert evidence that the offender would not commit a relevant offence if released, the offender should still have been subject to a supervision order.[127] This supervision order was revoked on appeal due to this flawed evidential approach.[128] It is important to note that the error made in *Chisnall* was not as egregious as that made in the first instance court in *RJE*. While in *RJE* the judge disregarded expert opinion, in *Chisnall* the judge instead blindly accepted the mechanisms in the statute used to determine risk, without looking to the broader context.

C When Is Judicial Notice Appropriate?

In light of the benefits and detriments of judicial notice, a key point at issue is where judicial notice will be appropriate. While judicial notice is essential in some situations, an overuse could lead to judges assuming dispositive or controversial facts.

There is no clear case law in New Zealand to determine where judges may take judicial notice of legislative facts. This paper therefore advocates for the adoption of the test from the 2005 Supreme Court of Canada case *R v Spence*.[129] *Spence* is the best approach as it allows for judicial notice, especially for well-known facts, while also restricting its use in cases where legislative facts are dispositive. The *Spence* test provides an easily recognisable standard to regulate judicial notice, while not limiting judicial notice unduly.

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[126] *RJE v Secretary to the Department of Justice* [2008] VSCA 265, (2008) 21 VR 526.

[127] At [1]–[2] per Maxwell P and Weinberg JA.

[128] At [93–[95] per Maxwell P and Weinberg JA.

[129] *R v Spence*, above n 101.

Spence has been cited favourably in Canada, in judgments[130] as well as academic fields.[131] The Supreme Court of Canada restated the *Spence* test in 2014,[132] and the majority of the Court recently applied the test in 2019 in *R v Le.*[133]

1 The Spence *test*

For legislative facts, the *Spence* test asks first whether the fact is dispositive. If the fact is dispositive it will need to adhere to the "gold standard",[134] which is determined using a test from the case *R v Find*.[135] The *Find* test requires the fact to be either "so notorious or generally accepted as not to be the subject of debate among reasonable persons" or "capable of immediate and accurate demonstration by resort to readily accessible sources of indisputable accuracy".[136] That is, the fact must be generally accepted, or easily shown to be true. For example, in the case of *Spence*, the Court found that legislative fact evidence at issue – whether a juror was likely to favour a complainant of the same race – did not meet the *Find* standard.[137] The Court therefore found it could not take judicial notice of that fact.[138] As noted by La Forest J in the Supreme Court of Canada case *RJR-MacDonald Inc,* legislative facts are normative and often the subject of dispute,[139] meaning they are unlikely to satisfy this "gold standard".

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[130] See *R v Le* 2019 SCC 34, 375 CCC (3d) 431 at [83]–[88]; *Canadian Broadcasting Corp v Ontario (Attorney General)* 2015 ONSC 3131, 127 OR (3d) 268 at [161]–[164]; *R v Lacasse* 2014 SCC 64, [2015] 3 SCR 1089 at [156]; *R v Petro-Canada* 2008 ONCJ 558, [2008] OJ No 4396; and *Penland v Lofting* 2008 BCSC 507, [2008] BCJ No 713 at [84]–[90].

[131] See Jeff Berryman "Challenging Shibboleths: Evidence Based Policy Making, the Supreme Court of Canada and Anton Piller Orders" (2010) 36 Advoc Q 509 at 514–515; David Stack "The First Decade of RCAP's Influence on Aboriginal Law" (2007) 70 Sask L Rev 123 at 140–142; and Young, above n 113, at 633–634.

[132] *R v Lacasse*, above n 130, at [156].

[133] *R v Le*, above n 130, at [83]–[88] per Brown and Martin JJ and [260] per Moldayer J.

[134] *R v Spence*, above n 101, at [61].

[135] *R v Find* 2001 SCC 32, [2001] 1 SCR 863.

[136] *R v Spence*, above n 101, at [53], quoting *R v Find*, above n 135, at [48].

[137] *R v Spence*, above n 101, at [54].

[138] At [67].

[139] *RJR-MacDonald Inc v Canada (Attorney-General)*, above n 108, at [79].

If the legislative fact is not dispositive, then the *Find* criteria are still relevant, but not necessarily conclusive.[140] If the legislative fact is considered background context, then the court will take judicial notice of it without any further criteria needing to be satisfied.[141] If the legislative fact is not strictly background material, but also is not dispositive, then the Court in *Spence* found the test was whether the reasonable, informed person would accept that the fact was not the subject of reasonable dispute, for the purpose for which it was going to be used.[142] The more dispositive the fact, the more reliable and trustworthy it must be, to be the subject of judicial notice.[143]

2 *Applying* Spence *to* Chisnall

In *Chisnall*, the judge relied on the fact that those eligible for ESOs would be dangerous to the public if they were not subject to the supervision of an ESO. The legislative fact at issue concerns what level of risk these offenders pose to the public. The question is therefore whether this legislative fact satisfies the *R v Spence* test for where judicial notice is warranted.

The first question under *Spence* is whether the legislative fact was dispositive. The level of the risk posed by the offenders eligible for ESOs was dispositive, as the legislative fact clearly impacted both (b)(i) and (b)(iii) of the modified *Oakes* approach to s 5. Firstly, as mentioned earlier, there would be no rational connection ((b)(i)) between stringently supervising offenders and public safety if the offenders did not pose a sufficient risk to the public. Secondly, applying (b)(iii), if the eligible offenders did not pose a high risk, then the breach of offenders' rights imposed by the ESO regime would be disproportionate. The risk the offenders posed was therefore central to the decision of whether prospective ESOs were justified, and therefore whether a declaration of inconsistency would be appropriate.

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[140] *R v Spence*, above n 101, at [63].

[141] At [65].

[142] At [65].

[143] At [65].

As the legislative fact at issue is dispositive, the next question under *Spence* is whether the *Find* test is satisfied – whether the fact is either notorious or generally accepted, or capable of immediate demonstration.[144] To determine whether the risk of these offenders was notorious, this section will canvas the evidential challenges in proving risk.

Firstly, assessing risk requires applying group statistics to the individual. While it is possible to assign an offender into a "high risk" category, it is not possible to determine the exact risk that an individual poses.[145] In addition to this imprecision, statistical or human errors are also possible in the process of risk assessment. For example, in the case of *R v Peta*, an offender's ESO was quashed by the Court of Appeal after the Court found the health assessor made four material errors in the original risk assessment for the offender's ESO application.[146]

Risk assessments of offenders are also subject to statistical limitations. While these are inherent in any determination of risk, these limitations are exacerbated by the relative rarity of the serious violent or sexual offending addressed by ESOs.[147] Finally, discrimination arises in the context of risk assessment.[148] The Waitangi Tribunal has demonstrated this, in finding bias against Māori inherent in measures used to determine offenders' risk of conviction and incarceration.[149] The data used by tools to assess risk does not correct systemic biases caused by police institutional racism, which means that assessment tools will be biased against Māori whether or not ethnicity is an explicit variable used to determine risk.[150]

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[144] *R v Find*, above n 135, at [48].

[145] Bernadette McSherry "Risk Assessment, Predictive Algorithms and Preventive Justice" in John Pratt and Jordan Anderson (eds) *Criminal Justice, Risk and the Revolt against Uncertainty* (Springer Nature Switzerland AG, Cham, 2020) 17 at 25–27.

[146] *R v Peta*, above n 92, at [63]–[67].

[147] Susan Glazebrook "Risky Business: Predicting Recidivism" (2010) 17 Psychiatry, Psychology and Law 88 at 94. See also Submissions for Mr Chisnall, above n 57, at [63.2].

[148] Glazebrook, above n 147, at 95.

[149] Waitangi Tribunal *The Offender Assessment Policies Report* (Wai 1024, 2005).

[150] At 41.

In addition to these limitations, there is also conflicting evidence on the recidivism of sexual and violent offenders. In a meta-analysis of 95 studies (over 31,000 sexual offenders), the sexual reoffence rate was found to be 13.7 per cent after five years, which is relatively low compared to other reoffending rates.[151] Notably, the 2014 Regulatory Impact Statement on ESOs in the Crown's legislative fact evidence in *Chisnall* also raised this low rate of reoffending.[152] Although child sex offenders do have a higher reoffending rate compared to other offending,[153] a recent Finnish study of 361 child sex offenders found that while 34 per cent reoffended within seven years, only 1 per cent *sexually* reoffended.[154] While the exact prevalence of reoffending is outside the scope of this paper, it is clear that reoffending is not assured.

The preceding analysis demonstrates that the legislative fact at issue – whether these offenders posed a high risk of recidivism – would not be classified as "notorious" or "generally accepted" by a court. Similarly, offenders' risk would not be capable of immediate demonstration, as unpicking the issue of recidivism would require evidence – which judicial notice seeks to avoid. Following *Spence*, as the "gold standard" from *Find* was not satisfied, the judge in *Chisnall* should not have taken judicial notice of the risk that ESO-eligible offenders posed. While judicial notice should be available for self-evident "notorious" facts, the legislative fact at issue in *Chisnall* does not satisfy that test.

Advocates for judicial notice may argue that the *Spence* approach is inflexible, as it does not allow for a precautionary approach to judicial notice. In the Canadian case of *R v Sharpe*, the majority of the Supreme Court adopted a precautionary approach, using judicial notice to find that child pornography normalised sexualising children, and created cognitive distortions, even though the "scientific evidence [was] not strong".[155] Arguably both the

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[151] Robert Karl Hanson and Kelly Morton-Bourgon *Predictors of Sexual Recidivism: An Updated Meta-Analysis 2004-02* (Public Works and Government Services Canada, 2004) at 8; and Taina Laajasalo and others "Low recidivism rates of child sex offenders in a Finnish 7-year follow-up" (2020) 21 Nordic Journal of Criminology 103 at 103.

[152] Submissions for Mr Chisnall, above n 57, at [63.2].

[153] Glazebrook, above n 147, at 101.

[154] Laajasalo and others, above n 151, at 103.

[155] *R v Sharpe* 2001 SCC 2, [2001] 1 SCR 45 at [87]–[89].

position in *Sharpe* and *Chisnall* could be rationalised by the precautionary principle. Even though the legislative fact justifying the legislation was not "notorious", the difficulty in proving this evidence arguably means the judge should take action to protect the vulnerable party: the children in *Sharpe* and the public in *Chisnall*.

However, erring too far on the side of caution can lead to an asymmetrical approach.[156] Both the *Sharpe* and *Chisnall* judgments centre around infringing rights of deeply unpopular parties: consumers of child pornography, and serious sexual and violent offenders. In both cases evidence and studies did not necessarily support the legislative facts, and the judge may instead have been fuelled by hunches, popular assumptions and biases. Bastarache J articulated the possible issue with using common sense in this way in the Canadian Supreme Court case *M v H*.[157] He argued that courts should be "cautious not to adopt conclusions that may … [be] influenced by, the very discrimination that the courts are bound to eradicate."[158] Although it may seem odd to describe sexual offenders as the subject of prejudice, they are an extremely unpopular group in society. It is therefore crucial that judges cannot rely solely on popular assumptions to infringe their rights.

Spence provides a useful test for where judicial notice is appropriate. It allows for judicial notice of self-evident facts, or those that are used as background, while also providing strict criteria the evidence must satisfy if the evidence is dispositive. In *Chisnall*, the issue of whether the offenders eligible for ESOs would pose a high risk to the public if unsupervised was not "notorious", shown by the problems associated with assessing risk. Because this "fact" was material to whether prospective ESOs were justified under s 5 of the Bill of Rights, judicial notice was not appropriate.

IV Evidential Approaches to Legislative Facts

As judicial notice was not appropriate in *Chisnall*, the judge should have used some form of legislative fact evidence to conclude on the risk the ESO-eligible offenders posed. In

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[156] Gavaghan, Snelling and McMillan, above n 11, at 91.

[157] *M v H* [1999] 2 SCR 3.

[158] At [296].

deciding no such evidence was required, the judge did not engage in the more complex issues around legislative fact evidence, for example how the Crown should adduce this evidence. This section will consider how legislative fact should become available to judges, to aid them in the s 5 test. The following section will canvas two different approaches of adducing legislative fact evidence: labelled in this paper the "strict approach" and the "flexible approach".

A Strict Approach

The strict approach to legislative fact evidence requires evidence to be subjected to the same procedural requirements as adjudicative fact. While legislative facts are unable to be proved by eyewitnesses, they can be proved by experts in the relevant field.[159] This approach essentially requires researchers, scientists and other experts to be cross-examined, instead of allowing counsel to submit the relevant reports as evidence.

The Canadian courts have traditionally erred towards the strict approach of adducing legislative fact evidence, where judicial notice is not appropriate. This approach was particularly evident in the 1980s, where the Supreme Court of Canada stated their support of the "careful preparation and presentation of a factual basis in most Charter cases".[160] In *R v Oakes*, the foundational Canadian case on justification, the Supreme Court found that the party seeking to uphold the law needed to justify it to a civil standard of proof, to a "very high degree of probability".[161] More recently, Canadian scholar Professor Hogg and Justice Ian Binnie have suggested that social science evidence should be adduced through expert witnesses if possible, as this allows for better testing of the information through the likes of cross-examination.[162]

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[159] Hogg, above n 4, at [60.2(a)].

[160] *MacKay v Manitoba* [1989] 2 SCR 357 at [8].

[161] *Oakes,* above n 63, at [68].

[162] Hogg, above n 4, at [60.2(e)]. See also Mahmud Jamal "Legislative Facts in Charter Litigation: Where Are We Now?" (2005) 17 NJCL 1 at 17, citing Ian Binnie "Judicial Notice: How Much Is Too Much" in Law Society of Upper Canada (ed) *Special Lectures 2003* (Irwin Law, Canada, 2004) 543 at 565.

This stricter approach is not desirable due to the extra time and cost associated with subjecting legislative fact evidence to the same standard as adjudicative fact. In the case of *Chisnall*, for example, the strict approach would have required the risk of the offenders eligible for ESOs to have been demonstrated in court by health assessors, policy experts and other experts on recidivism. While legislative fact evidence should have played a more significant role in *Chisnall*, subjecting this type of evidence to the same evidential requirements as adjudicative fact is not practical or necessary.

B Flexible Approach

As legislative fact evidence is mainly incompatible with the stricter standards of evidence, a more flexible method is required. The flexible approach still requires evidence to be adduced, but without the rigid procedural rules mandated by the strict approach. This approach therefore saves money and time, compared with the strict approach. Under the more flexible approach, papers, reports and policy material may be put before the court without the authors being required to give oral evidence or be cross-examined.[163] Counsel may therefore submit evidence found in documents easily.[164]

The flexible approach to legislative fact evidence originated in the United States, in the early 20th century Supreme Court case of *Muller v Oregon*.[165] In *Muller*, two pages of legal submissions with over 100 pages of factual material were filed as evidence. This factual material, later named a "Brandeis brief", included social-science data from books, articles and reports to support the constitutionality of a state law.[166] The Court considered the evidence even though it was not proven conventionally. Modern United States courts therefore can acknowledge expert social science evidence without the stringent admissibility requirements of traditional forms of evidence.[167] However, despite these

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[163] Young, above n 113, at 634.

[164] At 634.

[165] *Muller v Oregon* 208 US 412 (1908). See generally Hogg, above n 4, at [60.2(b)].

[166] *Muller v Oregon*, above n 165, at 419.

[167] Hogg, above n 4, at [60.2(b)]. See also Michael Walsh "The Brandeis Brief" (2008) 54 The Practical Lawyer 5.

developments, aspects of the procedural rules are still contested. For example, there is still uncertainty around the weight given to Brandeis briefs and the opposing party's ability to rebut the evidence.[168]

The flexible approach to legislative fact evidence arose in *Hansen*.[169] In *Hansen*, McGrath J accepted that the Court should be able to receive legislative fact material without subjecting it to usual evidential rules.[170] He proposed that counsel respond to the evidence by way of submission, rather than cross-examination.[171] This approach accords with that raised by the constitutional case *Thomas v Mowbray* from the High Court of Australia.[172] The case concerned "constitutional facts" to determine if legislation was constitutionally valid, which are similar to legislative facts. In *Thomas*, Heydon J found evidence of constitutional facts was able to be introduced if the evidence was exchanged between parties and was able to be disputed by the other side.[173]

The case of *New Health* demonstrates the extent of legislative fact material that the court may allow. O'Regan and Ellen France JJ in *New Health* engaged with contested legislative fact evidence in their s 5 analysis on the issue of fluoridation.[174] The Court allowed a large amount of legislative fact material to be admitted, including expert evidence adduced in the High Court,[175] a Ministry of Health report,[176] overseas data[177] and scientific reports.[178]

If judicial notice is unable to be taken of legislative facts, the more flexible approaches illustrated in these cases offer an alternative that is fit for purpose. However, moving forward, more will need to be done to ensure that the court does not turn into a "commission

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[168] Hogg, above n 4, at [60.2(b)].
[169] *R v Hansen,* above n 50.
[170] At [230].
[171] At [231].
[172] *Thomas v Mowbray* [2007] HCA 33, (2007) 233 CLR 307.
[173] At [636].
[174] *New Health*, above n 61, at [113]–[144].
[175] At [126], n 121.
[176] At [126], n 120.
[177] At [135].
[178] At [138].

of inquiry",[179] with overwhelming amounts of evidence.[180] Too much legislative fact evidence may waste time and money, and mean that the evidence is unable to be sufficiently tested.[181]

C Applying the Flexible Approach to Chisnall

In *Chisnall,* the Crown drew on a more flexible approach and put bundles of legislative fact evidence in the form of documents before the court.[182] However, it is not clear from the judgment to what extent the judge in *Chisnall* allowed this evidence to be admitted. As the judge stated he did not find it necessary to rely on this evidence,[183] it appears that he deemed the evidence unnecessary rather than inadmissible.

If the judge had relied on legislative fact evidence to determine the offenders' risk, it is likely he would have looked to some of the Crown's evidence which tangentially mentioned the risk of offenders. For example, both the 2004 Regulatory Impact Statement on ESOs and the 2013 Cabinet paper in the Crown's evidence mentioned the high risk of reoffending posed by child sex offenders.[184]

However, the judge could have equally drawn on the legislative fact evidence indicated by Mr Chisnall. Although Mr Chisnall did not bring any legislative fact evidence himself, his submissions pointed to a piece of legislative fact evidence put forward by the Crown that discussed the "low rate of re-offending by sex offenders" and the lack of research in the realm of long-term supervision of offenders.[185]

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[179] Young, above n 113, at 622.

[180] At 622; and Bailey Fox, "Smoothing the Road to Reforming Solitary Confinement: Access to Justice and Law Reform" (2020) 41 WRLSI 81 at 95. See also Perryman, above n 100, at 122–124.

[181] Young, above n 113, at 641.

[182] Submissions for the Attorney-General, above n 59, at [125]; and Submissions for Mr Chisnall, above n 57, at [61].

[183] *Chisnall* (HC), above n 3, at [94].

[184] Submissions for the Attorney-General, above n 59, at [143].

[185] Submissions for Mr Chisnall, above n 57, at [63.2].

As mentioned in *Hansen*, under the flexible approach, legislative fact material is best rebutted through submissions and opposing material.[186] If the judge were to have relied on legislative fact evidence, Mr Chisnall would have therefore been disadvantaged by not putting legislative fact material before the Court himself. Mr Chisnall would have benefitted from bringing opposing legislative fact evidence, for example the material discussed earlier in this paper concerning the difficulty of ascertaining risk.

Even without Mr Chisnall adducing opposing legislative fact material, this paper submits that the Crown's evidence would not be sufficient to show that ESO-eligible offenders posed a sufficiently high risk to their communities. Ultimately the Crown bears the burden of showing the limitation on rights is demonstrably justified.[187] Despite the large volume of legislative fact evidence adduced, the Crown did not bring any legislative fact evidence directly pertaining to the offenders' risk. Additionally, some of the Crown's evidence suggested that the offenders did not pose such a high risk, or that the research was not conclusive.[188]

D The Health Assessor's Report

Finally, there is a question as to whether the health assessor's report means that prospective ESOs would be justified despite the preceding analysis. In concluding that the ESO regime was justified under s 5, Whata J pointed to the fact that a personalised health assessor's report was required to be considered by the court before an ESO could be granted.[189] This report includes the health assessor's view of the offender's characteristics and the assessor's perception of the offender's risk.[190] The judge seemed to view this personalised report as a form of safeguard, ensuring that only offenders who truly posed a risk to the public would become subject to an ESO.[191]

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[186] *R v Hansen,* above n 50, at [231].

[187] Butler and Butler, above n 41, at [6.7.1]; and *R v Hansen,* above n 50, at [108].

[188] Submissions for Mr Chisnall, above n 57, at [63.2].

[189] Parole Act 2002, ss 107F(2) and 107I(2).

[190] Section 107F(2A).

[191] *Chisnall* (HC), above n 3, at [94].

There are two reasons that the requirement of a health assessor's report is not sufficient to overcome the issues in the s 5 analysis in *Chisnall*. Firstly, the health assessor is required to report on the same statutory criteria as the court,[192] which again raises the question of whether these criteria are actually correlated with offenders' risk. For example, health assessors will still rely on risk-assessment tools that are prone to bias.[193]

Secondly, even though the court considers the health assessor's report, the court ultimately comes to its own conclusion.[194] The health assessor does not make the final decision on whether the offender poses a risk, and the court is not bound to follow the health assessor's recommendations. For these two reasons, the judge was not able to rely on the health assessor's report to conclude that the ESO regime always breached offenders' rights in a proportionate manner.

V Conclusion

Legislative fact evidence places judges in a better place to make decisions. This evidence is likely to arise more often in Bill of Rights litigation given the recent finding in favour of declarations of inconsistency in *Taylor*.[195] This paper addressed when judicial notice of legislative fact evidence is appropriate to justify breaches of rights under s 5 of the Bill of Rights.

Judicial notice should be carefully confined to ensure that judges do not rely on their own biases or assumptions to justify breaches of the Bill of Rights. In *Chisnall*, though the Crown never pointed to any evidence directly supporting the risk of offenders eligible for ESOs, the judge was able to find this risk existed. The author suggests that instead the *Spence* test should have been applied, which only allows judges to take judicial notice of

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[192] Parole Act 2002, ss 107F(2A) and 107IAA.

[193] See Glazebrook, above n 147.

[194] Parole Act 2002, s 107I(2).

[195] *Attorney-General v Taylor*, above n 1.

dispositive legislative facts if they are "notorious". In *Chisnall*, as the legislative fact in question was dispositive and not notorious, judicial notice was not appropriate. The judge should have instead relied on legislative fact evidence.

The final question addressed by this paper concerned how the Court should permit legislative fact evidence to be adduced, for it to be used in the s 5 analysis. The recent tendency towards the flexible approach allows counsel to put legislative fact evidence such as studies and reports before the court in writing. This approach subjects the evidence to some procedural requirements, while still accommodating the unique nature of legislative fact evidence.

Even if the judge had taken a flexible approach, and subsequently relied on the legislative fact evidence submitted by the Crown, the author suggests that the offenders' risk would still not have been evident to a sufficient degree. The judge should have therefore found that the prospective ESO regime was not justified under s 5.

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