CASE NOTE:

Johnston v Commissioner of Police [2024] QSC 2

Court/tribunal	Supreme Court
Type of proceeding	Judicial review
Application of *Human Rights Act 2019*	Section 59 (piggy-back proceedings)
Rights considered	Right to recognition and equality before the law (section 15) Life (s16) Freedom from medical treatment without consent (s17c) Freedom of thought, conscience, religion and belief (s20) Take part in public life (s23) Privacy and reputation (s25) Liberty and security of person (s29)
Outcome	Decisions under review declared unlawful or declared to have no effect.
Commission intervened?	Yes
Date of decision	7 February 2024

Background

The applicants were members of the Queensland Police Service (**QPS**), who challenged two Directions made by the Police Commissioner that required police officers and QPS staff members to receive doses and boosters of the COVID-19 vaccine by particular dates (**QPS Directions**).

A similar challenge, brought by Queensland Ambulance Service (**QAS**) staff regarding a Direction mandating vaccination made by the Director-General of Queensland Health, was heard at the same time (**QAS Direction**).

The Supreme Court found that the Directions limited the applicants' rights not to be subjected to medical treatment without their full, free and informed consent under section 17(c) of the *Human Rights Act 2019* (**HR Act**). This limitation was held to be demonstrably justified and compatible with human rights.

However, the QPS Directions were declared unlawful because the Police Commissioner did not give proper consideration to human rights before issuing the Directions, as required by section 58(1)(b) of the HR Act.

The QAS Direction was declared to have no effect because, for reasons other than under the HR Act, the Court was not satisfied the decision-maker had the power to issue the Direction.

The Attorney-General and the Queensland Human Rights Commission (**the Commission**) intervened in the proceedings under sections 50 and 51 of the HR Act.

The parts of the judgment that relate to the application of the HR Act have been summarised under the following headings:

Contents

Judicial review and section 58 of the HR Act

Section 58 of the HR Act places obligations on public entities to act and make decisions in a way that is compatible with human rights and to give proper consideration to human rights relevant to the decision. Judicial review involves the scrutiny of an administrative act or decision for an error of law, rather than a review of the merits of the act or decision. This creates a challenge for courts judicially reviewing an administrative decision who, through piggy-back proceedings[1], are asked to examine whether the administrative decision-maker has complied with their obligations under section 58 of the HR Act.

In *Johnston*, the Supreme Court of Queensland described its role when applying section 58 of the HR Act in judicial review proceedings as follows:

[1] Relief or remedy for a breach of section 58 of the HR Act can only be sought from a court or tribunal by attaching or 'piggy-backing' that complaint to an independent cause of action that the act or decision was unlawful, for example, judicial review: *Human Rights Act 2019* (Qld) s 59.

> [8] When a court is judicially reviewing a decision for unlawfulness under the HRA it does not reconsider a primary act or decision on the merits. The jurisdiction of the Court is supervisory, not substitutionary. It is to determine whether the act or decision is unlawful by reference to the human rights standards in the HRA, not to make a determination on the merits of the matter which is in substantive issue. Relief cannot be granted simply because the court takes a different view of the act or decision on the merits.

Despite the Court's role not shifting to a merits review, the Court considered its approach to the issue of proportionality under the HR Act[2] goes beyond what is traditionally adopted by courts for judicial review. The Court said:

- The intensity of the review is greater because of the application of section 13 of the HR Act – it is a 'high standard of review'.
- A degree of deference should be afforded a decision-maker who has a highly developed appreciation of the make-up, structure and operations of a particular workforce. But what constitutes appropriate weight to be afforded to the decision-maker's conclusion remains a matter for the court and 'what matters in any case is the practical outcome, not the quality of the decision-making process that led to it.' [430]-[435]
- The Court's evaluation of proportionality is by reference to the circumstances at the relevant time and should not take into account factors that post-date the decision. [22]-[24], [29], [39], [430]

Proper consideration – section 58(1)(b) of the HR Act

In summarising the test for proper consideration, the Court relied on the four-limb test set out in the Victorian case of *Bare v Independent Broad-Based Anti-Corruption Commission and Others* (2015) 48 VR 129 [288], and derived the following further principles from *Thompson v Minogue* (2021) 64 VR 270:

- The proportionality test in section 13 of the HR Act provides a useful framework for balancing competing private and public interests, but proper consideration does not import the requirements of section 13.
- Proper consideration may be given without giving direct and express consideration to each of the matters set out in section 13.
- The public entity needs to make a 'broad and general assessment' of whether the impact its conduct will have on a relevant human right is appropriate in all the circumstances.
- 'Proper' means that the standard of consideration must be higher than that generally applicable at common law to take relevant considerations into account. [75]-[76]

Commission commentary

> The Court did not comment on how section 58(5) of the HR Act, which defines giving proper consideration as including 'considering whether the decision would be compatible with human rights', may alter the application of *Thompson v Minogue,* given the Victorian *Charter* has neither a provision equivalent to section 58(5) of the HR Act, nor defines

[2] 'Proportionality' refers to the test outlined in section 13 of the HR Act to assess whether the limitation of a right is reasonable and demonstrably justified.

> ‘compatible with human rights’ by reference to factors equivalent to section 13 of the HR Act, as is required by section 8 of the HR Act.

The Court agreed with statements from *Castles v Secretary of Department of Justice* (2010) 28 VR 141 [185] that proper consideration does not involve a sophisticated legal exercise and there is no formula for compliance with it, and that the identification of rights must be approached in a common sense and practical manner. [284]

The Court acknowledged that the Police Commissioner bears a great many responsibilities, and that work can only be done if others provide the Police Commissioner with advice and recommendations. However, proper consideration requires more than just the acceptance of advice. [65] In this case, human rights compatibility assessments had been prepared by QPS staff, however, the Court was not satisfied the Police Commissioner had considered those assessments prior to making the QPS Directions. The Court noted that the Police Commissioner’s ‘recollection was poor’ when giving oral evidence about her consideration of human rights at the time of making the Directions was, at best, inconclusive. The Police Commissioner had failed to demonstrate she had taken the four steps outlined in *Bare* before making either QPS Direction and had not met the requirements of section 58(5) of the HR Act. She had therefore failed to give proper consideration to human rights in making the QPS Directions. [134]-[138]

In contrast, the evidence put forward for the Director-General for Queensland Health was his signature on a ‘briefing note’ which included a human rights compatibility assessment as an attachment. The Court adopted the inference in *Stambe v Minister for Health* (2019) 270 FCR 173 [74] that the Director-General had read the briefing note and associated material, and the reasoning relied on to make the decision was confined to that contained in the briefing note. Having read the briefing note, the Court was satisfied it sufficiently demonstrated proper consideration of human rights in making the QAS Direction. The Director-General did not give oral evidence. [242] – [265]

Limits to broad discretionary powers

The Police Commissioner’s power to issue the QPS Directions came from a broad discretion under section 4.9(1) of the *Police Service Administration Act 1990* to issue directions ‘necessary or convenient for the efficient and proper functioning of the police service’.

A broadly worded power is not unlimited. The Court identified a range of factors relevant to assessing the limits of power, including that statutory power be exercised reasonably. [161]-[165]

If the Direction cannot be justified as a proportionate limitation of human rights, the Direction will be an unreasonable use of the delegated power. [185] – [186]

However, the Court held that section 48 of the HR Act cannot be readily applied to restrict provisions which confer an open-ended discretion of a general nature, as in section 4.9 of the *Police Service Administration Act 1990*. For the Court to construe limits that are absent from the language of section 4.9 invites the Court to stray from its interpretative role and engage in a more legislative task. [199]

Exception to section 58(1) – decisions of a private nature

Section 58(4) of the HR Act excludes an act or decision of a private nature from the obligations imposed on public entities under section 58(1).

The court considered whether this exception applied to the QAS Direction and said:

> [237] The meaning of the word "private" is not defined in the HRA. It is used as a means of distinguishing between acts of a public service employee in the employee's private capacity and those acts which are a part of, or connected with, the work done by that person as a "public entity". How public service employees decide what to do in their personal time are decisions of a private nature. A decision by a public service employee to engage someone to paint that employee's private residence would not come within s 58. A decision by the same person to engage someone to paint a government school building would.

The Court concluded that the QAS Direction, which came about as a result of another public servant preparing a briefing note and directed to all employees regardless of their situation, was not a Direction of 'a private nature'. [239]

Definition of 'engagement' and 'limitation' of human rights

The Court summarised the following principles from other cases [269]:

(a) a human right will be "engaged" if there is "a potential effect on the rights of a class of persons";
(b) there is no need to identify a particular individual as having been affected by a decision concerning human rights in order to trigger the obligations imposed on public entities under the HR Act;
(c) an act or a decision will limit a human right if it "places limitations or restrictions on, or interferes with, the human rights of a person". A limitation short of removal is still a limitation. (footnotes omitted)

Right to equality – section 15 of the HR Act

Section 15 of the HR Act is the right to recognition and equality before the law, and refers to protection from discrimination.

The Court interpreted 'discrimination' under section 15 of the HR Act as being confined to discrimination only on the basis of attributes protected under the *Anti-Discrimination Act 1991*. As conscientious belief is not a protected attribute under the *Anti-Discrimination Act 1991*, limiting it could not engage section 15 under the HR Act. [294]-[298].

Commission commentary

> This interpretation of 'discrimination' under the HR Act differs from an earlier decision of the Queensland Supreme Court in *Austin BMI Pty Ltd v Deputy Premier* [2023] QSC 95 [316]–[320].

> In that case, the Court considered the meaning of the term 'without discrimination' as it appears in the right to take part in public life under section 23 of the HR Act. The Court found that definition of 'discrimination' in Schedule 1 of the HR Act allows for analogous grounds of discrimination beyond what is protected by the *Anti-Discrimination Act 1991*, by applying the ordinary use of the word 'discrimination'. This involves 'making a distinction, as in to discriminate against a minority', and not merely differential treatment. [319]

In relation to allegations of discrimination on the basis of 'political belief or activity', the Court referred to *Ralph M Lee (WA) Pty Ltd v Fort* (1991) 4 WAR 176, which said discrimination on the basis of 'political conviction' must demonstrate a conviction to do with 'the policies of government, the structure, composition, role, obligations, purposes or activities of government'. The beliefs put forward by the applicants in this case were held not to amount 'political belief or activity'. [291] – [293]

Commission commentary

> This is the first consideration of the attribute of 'political belief' under the *Anti-Discrimination Act 1991* (AD Act) by the Queensland Supreme Court.
>
> The Court did not consider discrimination on the basis of religious belief or activity, which is a protected attribute under the AD Act. This could be because it was not raised by the applicants, or because the QPS and QAS Directions both contained exceptions from the Directions on the grounds of genuine religious objection.

Right to life – section 16 of the HR Act

In considering this right, the Court referred to General Comments of the United Nations Human Rights Committee, acknowledging that while the Committee is not a court, it represents an important body of jurisprudence on the interpretation and application of the *International Covenant of Civil and Political Rights.* [302]

The Court concluded that the right to life was not limited. At its highest, the Directions might have created a risk for an individual, however, there was no contention that a vaccination would arbitrarily deprive any particular applicant of his or her life. [306]

Commission commentary

> The Court distinguishes decisions made under Article 2 of the *European Convention on Human Rights* because that provision refers to an obligation on States to take adequate measures to protect life, which is a different concept to that expressed in section 16 of the HR Act. [303]
>
> However, it has been accepted that the right to life under the HR Act 'confers both positive and negative duties', for example, appropriate laws that prohibit arbitrary killing

> and positive measures to address other threats to life such as malnutrition and infant mortality. [3]

Right not to be subject to medical treatment without consent – section 17(c) of the HR Act

Section 17(c) of the HR Act states that a person must not be 'subjected to medical or scientific experimentation or treatment without the person's full, free and informed consent.'

It was not disputed that the administration of a vaccine is 'medical treatment' for the purposes of section 17(c). [309]

Except for New Zealand case law, which was held to be of no assistance because of the wording of the right in the *Bill of Rights Act 1990* (NZ), the Court reviewed domestic and international jurisprudence on the meaning of 'full, free and informed consent' and concluded:

> [332]… While acknowledging that consent is often accompanied by some form of pressure, where a person's livelihood can be put at serious risk if consent is not given, then that is sufficient to peel "free" away from "full, free and informed".

The Court held that section 17(c) had been limited.

Commission commentary

> The discussion in *Johnston* on 'full, free and informed consent' may be of assistance in freedom of religion or belief cases, for example, where a person is required to sign a statement of belief in employment settings.
>
> The prohibition on torture and cruel, inhuman or degrading treatment protected by section 17 of the HR Act is drawn from Article 7 of the *International Covenant on Civil and Political Rights*. Internationally, the right is recognised as an absolute right which cannot be limited for any reason. This was acknowledged by the Court when considering the nature of the right as part of the proportionality analysis. [437] However, unlike in the HR Act, Article 7 only prohibits medical or scientific *experimentation* without free consent, and does not extend to medical *treatment*.

Freedom of thought, conscience, religion and belief – section 20 of the HR Act

The Court considered international case law on what 'beliefs' are protected by section 20 of the HR Act. [340]-[346]

The Court at [343] paraphrasing *Grainger plc v Nicholson* [2010] ICR 360; [2010] 2 All ER 253, said:

> [U]nder the ECHR, the belief had to be genuinely held; it had to be a belief and not an opinion or viewpoint; it had to be a belief as to a weighty and substantial aspect of human life and

[3] *Waratah Coal v Youth Verdict (No 6)* [2022] QLC 21 [1452] (Kingham P), citing Explanatory Notes, Human Rights Bill 2018 (Qld) 19.

> behaviour; it had to attain a certain level of cogency, seriousness, cohesion and importance and had to be worthy of respect in a democratic society, be not incompatible with human dignity and not conflict with the fundamental rights of others. It was necessary for the belief to have a similar cogency to a religious belief but it need not be shared by others. If a person could establish that a philosophical belief was held which was based on science as opposed, for example to religion, there was no reason to disqualify it from protection.

At [344], the Court quotes the following passage from *R v AM* (2010) 245 FLR 410 [46]:

> 'There is a strong sense that freedom of conscience, unlike freedom of religion, is limited to the beliefs and mental processes of an individual and that it does not necessarily protect any action motivated by the conscience of the person.'

In *Johnston*, details of the beliefs and conscience of the applicants were given by way of affidavits.

The Court accepted that objections to the vaccines on religious grounds because the testing or development of the vaccine used foetal material, or the person was a vegan who was opposed to animal testing, were within the protection of section 20 of the HR Act. However, as the Directions contained exceptions for genuine religious objections, the right had not been limited. The applicants' argument that the exceptions were 'utterly ineffective' were about the proper management of the exception, a separate and distinct issue not the subject of this application. [350-351]

The vaccination Directions did not contain any exception for conscientious belief. This could have rendered the Directions in breach of section 20 of the HR Act. However, the Court did not accept that any of the applicants had demonstrated a belief protected by section 20. The expressions of hesitancy or uncertainty about vaccination put forward by the applicants could not be described as being of sufficient 'cogency, seriousness, cohesion or importance'. [348]–[352]

The Court therefore found that the right was not limited.

Right to take part in public life – section 23 of the HR Act

Section 23 of the HR Act provides for the right to take part in public life and public affairs without discrimination and to have access on general terms of equality to the public service.

In relation to this right, the Court said:

> [356] The right in s 23(2)(b) is for access "without discrimination". All persons seeking access (in the sense used in this section) are treated in the same way, that is, vaccination is required. If the requirement for vaccination is otherwise lawful, objective and reasonable then this provision is not breached.

Commission commentary

> The Court did not deal with the possibility for indirect discrimination, that is, a term or condition for all staff to be vaccinated may have disproportionately affected those with a protected attribute. However, given the Court's finding that the right to equality had not been limited, it is likely it would have also found that that the right to access public life 'without discrimination' would not have been limited.

Right to privacy and reputation – section 25 of the HR Act

The Court adopted the meaning of 'privacy' from *Pretty v United Kingdom* (2002) 35 EHRR 1 as including 'physical and psychological integrity of a person' and the notion of 'personal autonomy'. [359]

Drawing from the Victorian Court of Appeal case of *Thompson v Minogue* (2021) 67 VR 301, the Court said:

- 'Unlawful' interference is one which infringes an applicable law. It must be unlawful independent from unlawfulness arising out of a breach of section 58 of the HR Act. [361]-[362]
- 'Arbitrary' does not involve the same analysis necessary under s 13 of the HR Act. It is 'a broad and general assessment of whether any interference extends beyond what is reasonably necessary to achieve the purpose being pursued'. [363]
- The person who alleges a limit on the right to privacy bears the onus of showing the interference was 'unlawful' or 'arbitrary'. The evidence required to discharge the onus will depend upon a number of factors, including the nature and scope of the human right that is said to be limited and the nature and availability of information that may inform that question. In the case of a human right with internal limitations which are informed by matters that are solely in the knowledge of a public authority, the onus might be able to be discharged by pointing to objective circumstances which 'are capable of giving rise to an inference of limitation'.[367]

The Court did not accept that the vaccination Directions were unlawful or arbitrary and therefore the right to privacy was not limited.

Right to liberty and security – section 29 of the HR Act

The Court noted that the connection between this right and the requirements of the vaccination Directions was not obvious. [374]

The Court agreed with the analysis of the right in *Re Kracke* (2009) 29 VAR 1 as constituting a single right to 'liberty and security', protecting 'people from unlawful and arbitrary interference with their physical liberty' but not 'mere restrictions on freedom of movement'. The fundamental value expressed by the right is 'freedom, which is a prerequisite for individual and social actuation and for equal and effective participation in democracy'. [664]-[665]

The Court held that the construction contended for by the applicants would 'unnecessarily multiply the right to bodily integrity already protected by sections 17(c) and 25(a) of the HR Act'. [377]-[378]

The Court decided that the right to liberty and security was not limited.

Commission commentary

> Under international human rights law, the right to security is recognised separately to liberty and regardless of whether the person has been deprived of their liberty. The

> General Comment to Article 9 of the *International Covenant on Civil and Political Rights*, upon which section 29 of the HR Act is based, states that the right to security protects individuals against 'intentional infliction of bodily or mental injury' and obliges State parties to protect individuals from foreseeable threats to life or bodily integrity.[4]
>
> This interpretation may overlap with existing protections under the HR Act, but may impose additional positive obligations on government and does not require demonstration of 'arbitrariness'.

Assessing compatibility – section 58(1)(a) of the HR Act

Finding that only section 17(c) of the HR Act had been limited by the vaccination Directions, the Court then assessed whether the limitation was reasonable and demonstrably justifiable in accordance with section 13 of the HR Act. [429]-[460]

In doing so, the Court's considerations included:

- The purpose of the Directions as provided by the respondents was to minimise the risk of transmission of COVID-19 through the workforce and to the community. In addition to this, QAS staff would be in contact with people more susceptible to suffering harsher symptoms.
- The expert evidence available at the time the Directions were made was that:
    - vaccinations had an effect in protecting against serious infection.
    - alternatives to mandatory vaccination would not achieve the same purpose, despite decision-makers themselves not giving close attention to the possible range of alternatives.
- Employers have a responsibility to consider the occupational health and safety of its employees.
- Non-compliance with Directions could have life-changing consequences for an employee.
- The Directions were given in an emergency, and knowledge about the virus, variants, virulence, and transmissibility was limited and being added to on an almost daily basis.

Acknowledging that there is no formula which can be used to consider the balance between the importance of the purpose of the limitation, and the importance of preserving the human right, and taking into account all the matters argued by the parties, the Court was not satisfied that the balance was in favour of the applicants.

The court concluded that the limit imposed on section 17(c) of the HR Act (right no to be subjected to medical treatment without the person's full, free and informed consent) had been demonstrably justified in terms of section 13 (human rights may be limited).

[4] United Nations Human Rights Committee, *General Comment No 35: Article 9 (Liberty and security of person)* UN Doc CCPR/C/GC/35 (16 December 2014) [9].

Orders

The Court did not hold that the vaccination Directions were invalid, rather that they were unlawful. As each Direction had been revoked, the remedies available were confined. [461]-[468]

The Court declared:

- the QPS Directions were unlawful under section 58 of the HR Act; and
- the QAS Direction has no effect.

The Court ordered that the Police Commissioner and the Director-General of Queensland Health:

- could not take any steps to enforce the Directions;
- could not take disciplinary proceedings against the applicants based on the requirements of the Directions.