SUPREME COURT OF QUEENSLAND

REGISTRY: Brisbane
NUMBER: BS11254/21

Applicants:	DYLAN MARK JOHNSTON & ORS
	and
Respondents:	KATRINA RUZH CARROLL APM, COMMISSIONER OF THE QUEENSLAND POLICE SERVICE & ORS

REGISTRY: Brisbane
NUMBER: BS12168/21

Applicants:	SHAUN SUTTON & ORS
	and
Respondents:	KATRINA RUZH CARROLL APM, COMMISSIONER OF THE QUEENSLAND POLICE SERVICE

REGISTRY: Brisbane
NUMBER: B11258/21

Applicants:	BERNARD WITTHAHN & ORS
	and
Respondents:	JOHN WAKEFIELD, CHIEF EXECUTIVE OF HOSPITAL AND HEALTH SERVICES AND DIRECTOR-GENERAL OF QUEENSLAND HEALTH & ANOR

OPENING SUBMISSIONS
QUEENSLAND HUMAN RIGHTS COMMISSION (INTERVENING)

Introduction

1. The Queensland Human Rights Commission (**QHRC**) intervenes in each of these proceedings pursuant to s 51 of the *Human Rights Act 2019* (Qld) (**HR Act**), as to the application and effect of the HR Act.

2. These submissions address:

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(a) the human rights engaged by the directives under challenge and whether they are limited by them;

(b) construction of the statutory powers under which the directives were issued, in accordance with s 48(1) of the HR Act;

(c) the application of s 58 HR Act to the making of the directives;

(d) the operation of s 59 HR Act;

(e) proper consideration under s 58(1)(b) HR Act; and

(f) compatibility under s 58(1)(a) HR Act, including justification under s 13.

3. In summary, the opening submissions on behalf of the QHRC are:

(a) a number of human rights protected by the HR Act are engaged by, and were relevant to, the making of the directives under challenge;

(b) the directives at least limit the right to protection from medical treatment without consent (s 17(c)) and, depending on the evidence, freedom of thought, conscience, religion and belief (s 20). Subject to the resolution of internal limits, the directives also limit the right to property (s 24) and the right to privacy (s 25);

(c) the directives were issued under broad powers pertaining to employment. Properly construed, including as required under s 48(1) HR Act, neither s 4.9 of the *Police Service Administration Act 1990* (Qld) (**PSAA**) nor any of the statutory powers relied upon by the Director-General of Health to issue conditions of employment, speak sufficiently clearly to authorise these limits;

(d) the issuing of the directives, regardless of whether they are categorised as executive or legislative acts, or whether the directives are statutory instruments,[1] were subject to the obligations in s 58(1) HR Act;

(e) proper consideration of human rights is set out in the documentation that accompanied the directives, however, in circumstances where those documents were not authored by the decision-makers, it must still be demonstrated that the decision-makers *themselves* reviewed, identified and then balanced relevant considerations *before* making the decisions;

(f) the question of justification is likely to primarily depend upon the medical evidence that was at hand at the time, to support the measures on public safety (and maintenance of the police and QAS workforce) grounds. However, the Court may consider that circumstances have changed since. The QHRC points to the lack of any temporal limitation placed upon the directives or regular review provided in them,

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[1] Section 7 *Statutory Instruments Act 1992* (Qld) provides an extensive definition of statutory instruments that could capture each. As an instrument made under an Act that is a rule, an ordinance, a standard or guideline of a public nature, or other instrument of a public nature unilaterally affecting a right or liability of another entity. See the liberal approach taken to the issuing of a Police Manual which could be amended, repealed or issued under the power in s 4.9 of the PSAA*: Cuttler v Browe* [2010] QSC 205 (Fryberg J).

and the lack of any analysis of the continued *need* for mandatory vaccines, particularly with respect to the January 2022 QAS directive, as features that the Court may consider deprive the directives of the conclusion that the limits were reasonable and demonstrably justified.

4. These submissions are made in all three proceedings on the assumption that they proceed together and the evidence will be in common as between them. Throughout these submissions, quotations omit citations and any emphasis is made on behalf of the QHRC.

The directives

5. The applications concern decisions of the respective Respondents to require their employees to have COVID-19 vaccinations and boosters within certain timeframes (collectively, **the directives**). They include exemptions for medical contra-indication and religious belief.

6. The QPS Commissioner's power to issue a directive is as she *"considers necessary or convenient for the efficient and proper functioning"* of the service (s 4.9(1) of PSAA).

7. The DG's powers to unilaterally set conditions of employment are not conditioned in any way and said to arise under the *Public Service Act 2008* **(PSA)**, s 13 of the *Queensland Ambulance Service Act 1991* (Qld) **(QASA)** and at common law.

8. The QPS directive[2] applies to all appointed police officers and 'frontline' staff or support staff employed under either the police administration or the public service legislation.[3]

9. The QAS HR Policy[4] applies to all QAS employees, or honorary or student QAS officers.

Relevant human rights

10. Human rights protected by the HR Act are to be construed in the 'broadest possible way' by reference to the fundamental values and interests expressed in them and absent any limitation.[5] This is consistent with a beneficial approach to construction of the HR Act.[6]

11. Human rights may be 'engaged' and therefore relevant to an act or decision if there is *"a potential effect on the rights of a class of persons"* even without any particular individual's interest having being identified. An act or decision will 'limit' a human right if it *"places limitations or restrictions on, or interferes with"* a human right.[7] The onus of showing a limit rests on the applicants.

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[2] *Instrument of Commissioner's Direction No.14.*
[3] Section 8.3(5) of the *Police Service Administration Act 1990* (Qld) **(PSAA)** or ss 110, 119, 147 and 148 of the *Public Service Act 2008* (Qld) **(PSA)**.
[4] *Employee COVID-19 vaccination requirements,* QAS Human Resources Policy, January 2022.
[5] *Owen-D'Arcy v Chief Executive, Queensland Corrective Services* [2021] QSC 273 (Martin J) ***(Owen-D'Arcy)*** at [130], citing *DPP (Vic) v Kaba* (2014) 44 VR 526 ***(Kaba)*** at 556 [105] per Bell J and *Re Kracke and Mental Health Review Board* (2009) 29 VAR 1 (Bell J) ***(Re Kracke)*** at 29 [79].
[6] *Owen D'Arcy* (ibid) at [118]-[120].
[7] *Innes v Electoral Commission of Queensland (No 2)* [2020] QSC 293 (Ryan J) ***(Innes)*** at [291]-[292]; *Owen-D'Arcy* at [130]; *PJB v Melbourne Health (Patrick's case)* (2011) 39 VR 373 (Bell J) ***(Patrick's case)*** at 384 [36].

Section 17(c) – protection from medical treatment without consent

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

13. This right is based upon Article 7 of the *International Covenant on Civil and Political Rights* (**ICCPR**), but, as acknowledged by the Explanatory Note to the HR Act, s 17(c) expands on Article 7 by extending the prohibition from experimentation to treatment and specifying that consent must be full and informed.[8] In this way, like its Victorian counterpart in the *Charter of Human Rights and Responsibilities Act 2006* (Vic) (**Charter**), the right provides *"protection of personal autonomy and integrity of the highest order and addresses... the subject better than the comparable provisions internationally."*[9]

14. Justice Bell in *Re Kracke,*[10] a case concerning involuntary mental health treatment, noted that 'the golden thread' running through this right (and the whole *Charter*), is protecting the right of the individual to personal dignity and integrity:[11]

> **It is an obvious interference with a person's dignity and integrity to give them medical treatment without their consent**. While the ICCPR and ECHR do not have an express prohibition on doing so, it is regarded as implicit. Cases concerning the administration of medical treatment without consent have come to be considered under (respectively) Articles 7 and 3 (inhuman or degrading treatment), Articles 9 and 5 (liberty and security) and Articles 17 and 8 (privacy).
>
> This should not be necessary under s 10(c) of the Charter. It should not be necessary to call involuntary medical treatment inhuman or degrading to address the human rights problems it raises. It should not be necessary to risk mocking the horror of torture by calling it that.

15. In a series of High Court decisions in New Zealand,[12] the government conceded, and the courts accepted, that administration of the COVID-19 vaccine constituted "medical treatment" for the purposes of the equivalent right in the *Bill of Rights Act 1990* (NZ) (**BORA**). Section 11 *BORA* provides *"Everyone has the right to refuse to undergo any medical treatment"*. This right was found to be limited by the imposition of terms of employment requiring vaccination.

16. In two such cases, the vaccine was contended, but not found, to amount to medical 'experimentation', because its provisional approval in New Zealand still required a

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[8] Explanatory Notes, *Human Rights Bill 2018* (Qld), p19.
[9] *Re Kracke* at [545].
[10] *Re Kracke and Mental Health Review Board* (2009) 29 VAR 1 (Bell J).
[11] *Ibid,* at [548]-[549].
[12] *GF v Minister of COVID-19 Response* & Ors [2021] NZHC 2526 (Churchman J) (***GF***) at [70]; *Four Midwives v Minister for COVID-19 Response* [2021] NZHC 3064 (***Four Midwives***) at [38]; and *Four Aviation Employees* [2021] NZHC 3012 (***Four Aviation employees***) at [28].

rigorous assessment of its efficacy and safety and it had a therapeutic, and not experimental, purpose.[13] A similar approach should be taken here.

Full, free and informed consent

17. That s 17(c) is limited by the making of the directives is supported on the New Zealand authorities. In contrast to the recent New South Wales cases, which saw the operation of consent as meaning the common law right to bodily integrity was not infringed,[14] the New Zealand courts took a more nuanced approach to consent which is more in keeping with the framework required under the HR Act. See, for instance per Cooke J in *Four Aviation Security Service Employees v Minister of COVID-19 Response:*[15]

> I agree that the Order limits the applicants' rights under s 11. Vaccination is a medical treatment. Whilst persons in the position of the applicants are not being forcibly treated in the sense that they can decline to be vaccinated, they are required to be vaccinated as a condition of their employment and to decline to do so can, and has, led to termination. **A right does not need to be taken away in its entirety before it is regarded as having been limited. A limitation short of removal is still a limitation**...
>
> It is a matter of degree whether practical pressure to undergo a medical treatment will be taken to have limited the right to refuse that treatment. Here the level of pressure is significant and amounts to coercion. The employees are forced to be vaccinated or potentially lose their jobs. This involves both economic and social pressure. I accept that the right is accordingly engaged, and that it is limited by the Order. The key question in this case is whether this limitation is demonstrably justified.

18. The QHRC submits that a similar approach should be taken here, to the right contained in s 17(c). As stated by Richards J recently in *Harding v Sutton,*[16] it is (at least) arguable that the concept of consent at common law is narrower than the 'full, free and informed consent' to medical treatment that is enshrined in the *Charter* and the HR Act. Further, General Comment No. 20 to Article 7 *ICCPR* acknowledges that freedom of choice can be taken away by circumstance.[17] Such an approach gives consent its full meaning consistent with the statutory recognition and protection of human dignity and bodily integrity, which is not in place in New South Wales.

19. Applying it, there is a clear limit placed on this right by the directives.

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[13] *GF* (ibid) at [42]-[47]; *Four Aviation Employees* (ibid) at [33]-[36].
[14] *Kassam v Hazzard; Henry v Hazzard* (2021) 393 ALR 664 (Beech-Jones CJ at CL) (***Kassam***) at [55]-[63], a decision that was upheld on appeal, see *Kassam v Hazzard; Henry v Hazzard* [2021] NSWCA 299 (***Kassam* CA)** at [95]-[97], [99]. This was also followed in *Larter v Hazzard (No. 2)* [2021] NSWSC 1451 (Adamson J) (***Larter***) at [99].
[15] [2021] NZHC 3012 at [29]-[30].
[16] [2021] VSC 741 at [161].
[17] UN Human Rights Committee, *ICCPR General Comment No 20: Article 7 (Prohibition of Torture, or Other Cruel, Inhuman or Degrading Treatment or Punishment)*, 44th sess, UN Doc CCPR/C/GC/20 (10 March 1992) at [7].

Section 20 – Freedom of religion, thought, conscience and belief

20. Section 20(1) of the HR Act provides for the right to freedom of *"thought, conscience, religion and belief"*. This clause is closely modelled on Article 18 *ICCPR* and a similar right is found in Article 9 ECHR. It recognises the right of everyone to develop autonomous thought and conscience, to think and believe what they want and to have or adopt a religion, free from external influence.[18]

Religion

21. In Australia, the accepted definition of a 'religion' is derived from the judgment of Mason ACJ and Brennan J in *Church of the New Faith v Commissioner of Pay-Roll Tax (Vic):*[19]

> [T]he criteria of religion are twofold: first, belief in a supernatural Being, Thing or Principle; and second, the acceptance of canons of conduct in order to give effect to that belief... Those criteria may vary in comparative importance, and there may be a different intensity of belief or of acceptance of canons of conduct among religions or among the adherents to a religion.

22. Whilst one's internal religious beliefs are not to be abridged – this right is absolute[20] – the freedom does not require that one should be allowed to *manifest* one's religion at any time and place of one's own choosing.[21]

23. Where an act contrary to a belief held is imposed as a requirement of law, this may *"blur the distinction"* between thoughts and acts, but the case law suggests it is the act, rather than the internal holding of the belief, that is affected.[22] Thus, a requirement to take a vaccine contrary to religious belief is a limit upon the freedom to demonstrate belief, rather than the freedom to have or adopt the belief; a limit under s 20(1)(b) rather than 20(2).

24. Further, to be protected, an act of *demonstrating* a person's religion or belief must be "intimately linked to the religion or belief".[23] The examples in s 20(1)(b) HR Act (worship, observance, practice and teaching) are in keeping with this approach.

Thought, conscience or belief

25. The HRC suggests that Article 18 is not limited in its application to traditional religions or to religions and beliefs with institutional characteristics or practices analogous to those

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[18] Explanatory Notes, Human Rights Bill 2018, 20.
[19] (1983) 154 CLR 120, 136.
[20] *General Comment No. 22* (supra) at [3], see also *New Zealand Health Professionals Alliance Inc v Attorney-General* [2021] NZHC 2510 (Ellis J) (***NZ Health Professionals***) at [65]-[66].
[21] *R (Williamson) v Secretary of State for Education* [2005] UKHL 15 at [16]-[17] per Lord Nicholls; *R (Begum) v Governors of Denbigh High School* [2007] 1 AC 100; [2006] UKHL 15 at [50] per Lord Hoffmann; *NZ Health Professionals* at [68]-[70].
[22] *NZ Health Professionals* at [72]-[87], and the authorities there cited.
[23] *Eweida v United Kingdom* (2013) 57 EHRR 8; [2013] ECHR 37 at [82]; *Christian Youth Camps Ltd v Cobaw Community Health Services* (2014) 50 VR 256; [2014] VSCA 75 at [265].

of traditional religions and protects *"theistic, non-theistic and atheistic beliefs, as well as the right not to profess any religion or belief"*.[24] This is made express in s 20 HR Act.

26. However, according to the ECtHR, dealing specifically with a belief about vaccination, to be a thought or belief capable of protection it must reach a *"certain level of cogency, seriousness, cohesion and importance ... worthy of respect in a democratic society"*.[25] The right has been found to extend to pacifism[26] and academic beliefs.[27] The following criteria can be identified from United Kingdom authorities:[28]

    (a) the belief must be consistent with the ideals of a democratic society and basic standards of human dignity or integrity and compatible with other ECHR rights;

    (b) it must relate to matters more than merely trivial and must possess an adequate degree of seriousness and importance;

    (c) it must relate to a fundamental problem or aspect of human life or behaviour of comparable importance to that normally associated with religious beliefs; and

    (d) it must be coherent in the sense of being intelligible and capable of being understood, but not necessarily susceptible to lucid exposition or rational justification.

27. In *R v AM,*[29] Refshauge J of the ACT Supreme Court suggested the equivalent section in the *Human Rights Act 2004* (ACT) made a distinction between "thought and conscience on the one hand" and "religion or belief on the other".[30] In that case Refshauge J doubted that the applicant's asserted belief in that case had the degree of seriousness, cohesion and importance necessary to constitute a 'belief' for the purposes of the right.[31]

The evidence

28. Several applicants raise a relevant religious belief.[32] The beliefs centre around an objection to the vaccines due to the testing or development of the vaccine on aborted foetal material. The supportive materials from religious leaders suggests that the belief, whilst grounded in religious doctrine, is not one adopted by all persons of those faiths.[33]

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[24] HRC, *General Comment No. 22: The right to freedom of thought, conscience and religion* (Art. 18), 48th sess, UN DOC CCPR/C/21/ Rev. 1/Add. 4 (27 September 1993) at [2].
[25] *Campbell and Cosans v the UK* [1982] ECHR 1 at [36].
[26] *Arrowsmith v United Kingdom* [1978] ECHR 7.
[27] *McAdam v Victoria University* [2010] VCAT 1429
[28] *R (Williamson) v Secretary of State for Education and Employment* [2005] 2 AC 246; [2005] UKHL 15 at [23]–[24], [57].
[29] [2010] ACTSC 149; (2010) 5 ACTLR 170.
[30] The same is true of the *Human Rights Act 2019* (Qld), s 20(1)(b)
[31] *R v AM* (supra) at [53]–[54].
[32] In the *Sutton* proceedings, Adrian Knight CF 23, Andrew Marshall CF 28, Mark Carroll-Waldren CF 30, Oliver George CF 31,Jason Mole CF 35, Scott Beveridge CF 44, Darren Buckley CF 60, Brendon Smith CF 63, Vrinda McCauley CF 65, Andrew Cary CF 66. In the *Johnston* proceedings, Kevin Gehringer CF 77, Dylan Johnston CF 73, Benjamine Oakley CF 79,
[33] E.g. In the *Sutton* proceedings see Exhibit AK-5 to the affidavit of Mr Knight CF 23, AM-1 to the affidavit of Andrew Marshall CF 28 and OG-5 to the affidavit of Oliver George CF 31; see also in *Johnston* proceedings Kevin Gehringer CF 77

29. Recently, in *Yardley & Ors v Minister for Workplace Relations and Safety & Ors,* Cooke J of the New Zealand High Court considered that where there are genuine objections to such testing based in faith, a requirement to nevertheless take the vaccine as a condition of continued employment *does* involve a limit on the manifestation of religious belief.[34]

30. A similar approach is open to be taken here, that the objections on religious grounds to vaccines created through the testing of aborted foetuses, to the extent they apply to the available vaccines, provide grounds to find that the right of some applicants to manifest their religious belief, protected by s 20(1)(b), has been limited. Other religious views less connected to the canons of the faith, however,[35] are unlikely to be sufficient.

31. In addition to religious belief, one applicant indicates an 'ethical and moral' objection to the use of kidney cell lines from aborted foetuses being used in the development of vaccines.[36] Further, another applicant identifies as vegan and expresses a moral opposition to any form of animal testing.[37] To the extent these beliefs are relevant to the COVID-19 vaccines in question, noting there appears some uncertainty as to the use of such cells in all presently approved COVID-19 vaccines, they too provide grounds to find that the right in s 20 has been engaged and the right to manifest one's belief, in s 20(1)(b), limited.

32. The remainder of the reasons for objection, based on the affidavit evidence, are unlikely to do so. The applicants in all proceedings otherwise indicate strong personal views objecting to the COVID-19 vaccine direction, either because of its mandatory or coercive nature, because they fear the effects of this particular vaccine or they doubt its effectiveness. These 'beliefs' or thoughts, in the absence of greater coherence or consistency, are unlikely to be sufficient to demonstrate a limit to the rights protected by s 20.

Section 25 – right to privacy

33. Section 25 of the HR Act recognises the right not to have one's privacy unlawfully or arbitrarily interfered with. It is based on Article 17 *ICCPR*.

34. The scope of 'privacy' is broad and extends to a person's private life generally; it protects the individual against interference with their physical and mental integrity. This is reflected in the seminal statement by Bell J in *Re Kracke*:[38]

> The purpose of the right to privacy is to protect people from unjustified **interference with their personal and social individuality and identity.** It protects the individual's interest in the freedom of their personal and social sphere in the broad sense... The fundamental values which the right to privacy expresses are the **physical and psychological integrity, the individual and social identity and the autonomy and inherent dignity of the person.**

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[34] *Yardley* (ibid) at [49]-[52].
[35] E.g. the right to choose; Andrew Cary CF 66 in *Sutton* [13].
[36] In *Johnston,* Kevin Gehringer CF 77 at [8].
[37] In *Johnston,* Tony Payne CF 78 at [20].
[38] At [619]-[620].

35. Victorian courts have recognised the right is enlivened in cases of involuntary medical treatment and will often overlap with the right to consent to medical treatment,[39] drawing on the jurisprudence of the Human Rights Committee **(HRC),** the European Court of Human Rights **(ECtHR)** and the European Commission on Human Rights **(ECommHR).**[40]

36. The reasoning of Bell J in *Re Kracke* and *PBU & NJE v Mental Health Tribunal*[41] describes two related dimensions to the right. Firstly, to self-determination; the universal capacity of persons equally to determine who they are, how they will live their lives and what should be done to them. Secondly, to personal inviolability; the freedom of persons not to be subjected to physical or psychological interference, including medical treatment, without consent.[42]

Arbitrary

37. The approach taken by Bell J in these decisions to the meaning of arbitrary, within the right to privacy, is commended to the Court. As first articulated in *Re Kracke:*[43]

> Some rights are expressed in terms that contain specific limitations. As relevant in the present case, the possibility of imposing lawful and non arbitrary limitations on the right to privacy in s 13(a) of the Charter is one example. The right to be free of arbitrary detention in s 21(2) is another. Where rights are expressed in terms that contain a specific limitation, **the nature and content of the rights in their plain state are not seen to be reduced by the specific limitation.** Rather, the **specific limitation is seen as an indication of what might be considered in determining whether any limitations are reasonable and justified under the general limitations provision in s 7(2).**
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> Thus, when identifying the scope of the right at the engagement stage, this is done broadly and purposively, even where the right contains a specific limitation. **Such a limitation becomes subsumed in the overall justification analysis which is undertaken in the next stage.** That is why the international jurisprudence shows there is **very considerable interplay between the application of specific limitations provisions on the one hand and general limitations provisions on the other.**

38. In *WBM v Chief Commissioner of Police,* Warren CJ, with whom Hansen JA agreed, referred to the United Kingdom precedent as apt, where arbitrariness was described as

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[39] See *PBU & NJE v Mental Health Tribunal* [2018] VSC 564 (Bell J) (***PBU***) at [199]-[201]; *Re Kracke* at [596].

[40] Article 3 of the European Convention on Human Rights (ECHR), which prohibits torture and other like treatment (Article 3) does not include a right against treatment without a person's consent. Therefore, cases concerning involuntary medical treatment have generally been considered in relation to Article 8 (which refers to the right 'to respect for his private and family life'). See for example, *Boffa and Others v. San Marino*, no. 26536/95; *Acmanne and Others v Belgium; Salvetti v Italy* no. 42197/98, 9 July 2002,

[41] [2018] VSC 564 (Bell J).

[42] *Ibid,* at [127] to [128].

[43] *Supra,* at 35 [109]-[110].

encompassing *"**capriciousness, unpredictability, injustice and unreasonableness** — in the sense of **not being proportionate to the legitimate aim sought**".*[44]

39. In *PBU,* Bell J further stated:[45]

> The concept of arbitrariness is the **specialised human rights concept** which **requires consideration of the proportionality** of the interference. The inclusion of internal limitations (lawfulness and arbitrariness) **does not reduce the substantive meaning of the right** in [s 25] but **forms part of analysing whether any interference is justified.**

40. The HRC has generally found that any interference with a person's privacy must be **proportionate** to the end sought **and necessary in the circumstances of the case.**[46] This forms part of the special human rights meaning then adopted by Bell J in *PBU* and *Patrick's case.*[47]

41. At first instance in *Minogue v Thompson*, Richards J put the question of arbitrariness this way:[48]

> ...whether the direction was **arbitrary turns primarily on whether it was proportionate to a legitimate end**. On one view, that is the same question as whether the interference with privacy was reasonable and demonstrably justified under [s 13]. **Even if they are separate questions, the relevant evidence is the same, and it is convenient to consider them together.**

42. However, this decision was overturned on appeal in *Thompson v Minogue*:[49]

> The clear preponderance of authority supports the proposition that 'arbitrary' in s 13(a) of the Charter has the human rights meaning described by Warren CJ in *WBM.* That proposition is supported by authority ... in relation to the adjective 'arbitrary' in the ICCPR and [in the ECHR]. Accordingly, an arbitrary interference with privacy is one which is **capricious, or has resulted from conduct which is unpredictable, unjust or unreasonable in the sense of not being proportionate to the legitimate aim sought.**
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> However, the phrase 'unreasonable in the sense of not being proportionate to the legitimate aim sought' does not mean that, in determining whether an interference with privacy is arbitrary, direct and express consideration must be given to the matters set out in s 7(2) of the Charter. In other words, **the phrase does not incorporate the proportionality analysis in s 7(2).** Rather, the phrase requires **a broad and general assessment of whether, in all the circumstances, the interference extends beyond**

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[44] *WBM v Chief Commissioner of Police* (2012) 43 VR 446 (***WBM***) at [114], [120] (Warren CJ, Hansen JA). See also Bell J in *Patrick's case* at [85]; C.f. *WBM v Chief Commissioner of Police* (2010) 27 VR 469 at [51], [56] (Kaye J).

[45] *PBU* at [124]; *Patrick's Case* at 395. See also *McDonald* [2017] VSC 89, at [31]-[36].

[46] HRC, *Views: Communication No 488/1992 (Toonen v Australia),* 50th sess, UN Doc CCPR/C/50/D/488/1992 (31 March 1994) at [8.3]; *A v Australia* (1997) 4 BHRC 210, cited in *PJU* at 394 [82].

[47] *Patrick's case* (supra) at 393 [77] – 395 [85].

[48] *Minogue v Thompson* [2021] VSC 56 (Richards J) (***Minogue***) at [86].

[49] *Thompson v Minogue* [2021] VCA 358 (***Minogue* VCA**) at [55]-[57].

what is reasonably necessary to achieve the statutory or other lawful purpose being pursued by the public authority.

A person who alleges that the privacy right has been limited **has the onus of** establishing **that there has been an interference with his or her privacy and that the interference was unlawful or arbitrary**... Some of the matters that may inform the question whether an interference is arbitrary – particularly whether the interference extends beyond what is reasonable necessary to achieve the statutory or other lawful purpose being pursued by the public authority – may be in the sole knowledge of the public authority...

43. The Court referred to what it had said earlier in its judgment in this regard:[50]

... The **evidence that will be 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... a person alleging that his or her human right has been limited may be able to discharge the onus by pointing to **objective circumstances which, in the absence of information from the public authority, are capable of giving rise to an inference of limitation.**

44. Thus the VCA in *Thompson* set a relatively low, but nevertheless present, evidentiary burden upon a plaintiff to establish not only a limit to privacy (in its full scope), but to establish an inference of arbitrariness associated with the limit, prior to the onus shifting to a respondent to justify it. Whilst such an approach is understandable, given the unique combination seen in Australian human rights statutes, of both general limitations and internal limitations clauses, it is not the inevitable approach to be taken under the HR Act.

45. The approach taken by Bell J in *Re Kracke* and other cases, in the QHRC's submission, better reflects the standard approach taken to the question of whether human rights are limited internationally, and the reality that evidence going to arbitrariness, or conversely, proportionality, is ordinarily only available to a respondent. In human rights law, considerations of practicality have an important role to play in allocating pleading or evidentiary burdens.[51]

46. On that approach, the applicants need not demonstrate arbitrariness, and the limit to privacy – physical autonomy, professional identity, and in the requirements to produce information about medical procedures – is clear.

Section 24 – Right to property

47. While not raised by the applicants, the right to property is also likely engaged by the directives. Neither 'property' nor 'deprived' is defined in the HR Act.[52]

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[50] Ibid, at [47].
[51] *Re Kracke* at 35 [108], citing South African, Canadian, New Zealand and United Kingdom authority (footnote 127); J Rivers, "The Presumption of Proportionality" (2014) 77 Mod L Rev 409, 419-420. A Barak, *Proportionality: Constitutional Rights and their Limitations* (2012) Camb. U Press, United Kingdom, 447-448.
[52] Property is defined in Sch 1 to the AIA in a broad way which covers both tangible and untangible interests.

48. The right was modelled on article 17 of the *Universal Declaration of Human Rights* but has received the most consideration in the form it appears in Article 1 of the First Protocol to the European Convention on Human Rights (**ECHR**), the right to 'peaceful enjoyment' of 'possessions'. That right has been limited to *existing* possessions and not future acquisitions or income.[53] However, the goodwill associated with a right to practice one's profession is capable of protection[54] so too a licence to trade.[55]

49. In *Patrick's case,* Bell J considered the equivalent right in the *Charter* and held that the words 'property' and 'deprived' would be interpreted liberally and beneficially, to include real and personal property, as well as economic interests (although the latter point was unnecessary to decide).[56]

50. Non-compliance with the directives provides grounds for termination. In those circumstances, the directives have the effect of taking away existing contractual rights and expectations to work and earn an income. Such matters would, it is submitted, fall within the notion of 'property' that is protected from arbitrary deprivation in s 24(2) of the HR Act.

51. Subject to the question of arbitrariness, this right too is limited by the directives.

Section 15 – Right to Equality

52. The rights set out in s 15 HR Act are drawn from Articles 2, 16 and 26 *ICCPR*. The fundamental value behind them is the equal dignity of every person; a natural incident of that dignity being that everyone equally enjoys their human rights, comes before the law equally and is protected by the law without discrimination.[57] The provision contains standalone rights as well as additional protections for other HR Act rights.

53. Of relevance for present purposes, s 15(2) provides the right to the equal enjoyment of human rights 'without discrimination,'[58] reinforcing the protection of the other human rights contained in the HR Act.

54. Sections 15(3) and (4) contain autonomous rights which act independently from the other rights in the HR Act; with two elements, described as 'distinct but overlapping'.[59] The first part of s 15(3) requires *formal* equality before the law; it proscribes arbitrary or discriminatory enforcement of the law. The second part of s 15(3), together with s 15(4), requires *substantive* equality in the content and operation of the law. There is both a negative and positive property to this injunction; a prohibition on discriminatory laws and a requirement for laws to afford equal and effective – even if this means differential treatment of persons whose situations are different – protection against discrimination.[60]

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[53] *Malik v the United Kingdom* (2012) ECtHR, Application no. 23780/08 at [81], [88], [93].
[54] *Malik* (ibid), [81], [89]-[93]; *Holder v Law Society* [2003] 1 WLR 1059.
[55] *Malik* at [91], and the authorities cited there.
[56] *Patrick's case* at 395 [87], 396 [90].
[57] *Re Lifestyle Communities Ltd (No 3)* [2009] VCAT 1869 (***Re Lifestyle***) at [277], also at [107] and [110].
[58] *Re Lifestyle* at [120], [280].
[59] *Re Lifestyle* at [126], [284].
[60] *Re Lifestyle* at [137]-[141], [143], [145], [283]-[288]; *Thlimmenos v Greece* [2000] ECHR 162 at [44].

55. In contrast to s 8 of the *Charter*, discrimination under the HR Act is not limited to what is covered in the *Anti-Discrimination Act 1991* (Qld) (**AD Act**).[61] Discrimination for the purposes of the HR Act will not be defined by the exceptions under the AD Act.[62]

56. Given the uniform application of the directives, indirect discrimination is the most relevant concept for consideration here. It arises where there is a feature to a uniform law or policy that results in a discriminatory impact or differential treatment on a prohibited ground.[63]

Political belief or action

57. The AD Act protects against discrimination on the basis of 'political belief or activity', which is not defined but which has been considered as a belief or activity that bears on governmental matters – on the role, structure, feature, purpose, obligations, duties, or on some other aspect of government – and the relationship between government and the governed.[64]

58. Whilst opposition to the vaccine *may* be characterised as a political belief or activity within this approach, the evidence does not support any limit to that right here.

Religion

59. The AD Act prohibits discrimination on the basis of religious belief or religious activity. 'Religious belief' is defined to mean holding or not holding a religious belief and 'religious activity' is defined to mean engaging in, not engaging in, or refusing to engage in a lawful religious activity,[65] much like these concepts have been discussed in international law.

60. In the New Zealand High Court decision of *Yardley,* Cooke J held that the fact some workers had a religious basis for objection to the vaccine did not go so far as to suggest that a particular group was being disadvantaged disproportionately because of a particular religious belief or practice.[66] For similar reasons, an argument that dismissals due to not complying with a vaccine mandate were disproportionately affecting Maori people contrary to the Treaty of Waitangi, was rejected.[67]

61. Contrary to the approach taken by Cooke J, given the non-exhaustive definition of discrimination under the HR Act, a differential or discriminatory impact *may* in some cases be inferred from evidence led with respect to the experience of one person. However, in this case, there is insufficient evidence to draw an inference that the relevant applicants are being disadvantaged disproportionately *because of* a particular religious belief or practice. Hence, while s 20 may be limited in relation to individual beliefs, indirect discrimination has not been demonstrated for the purposes of s 15.

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[61] The definition of 'discrimination' in Sch 1 HRA is a non-exhaustive definition. However, even under the *Charter,* the right is not limited to discrimination established as unlawful under anti-discrimination law: *Matsoukatidou v Yarra Ranges Council* (2017) 51 VR 624, [2017] VSC 61 at [47].
[62] *DPP v Natale (Ruling)* [2018] VSC 338 at [88].
[63] See e.g. *Ngarona v Attorney-General* [2017] NZCA 351 at [115]-[119].
[64] *Sherman & Grady v Anor* [2008] QADT 7; *Carey v Cairns Regional Council* [2011] QCAT 26.
[65] Schedule to the AD Act.
[66] *Yardley* (supra) at [56].
[67] *Yardley* at [39].

Impairment

62. Being unvaccinated *has* been considered to amount to a 'disability' within the meaning of that term in the *Disability Discrimination Act 1992* (Cth), defined as persons 'in whose bodies there may exist in the future the organisms which cause or which are capable of causing infectious diseases or illnesses which are preventable by vaccination.'[68]

63. The AD Act definition of 'impairment' does not contain the same wording and refers expressly (although not exhaustively) to past and present disease.[69] Also, COVID-19 may still be present in vaccinated persons. It is unlikely, in those circumstances, that being unvaccinated would amount to an impairment under the AD Act.

64. A 'medical contraindication' to the COVID-19 vaccine, as allowed for in the directives would amount to an 'impairment' but the concept of 'impairment' – which is broadly defined to cover loss of bodily functions, malfunction, malformation or disfigurement of body part, a condition, illness or disease that impairs thought processes, perception of reality, emotions or judgment, or the presence in the body of organisms capable or causing illness or disease – would also extend much further.

65. A number of the applicants have sworn to pre-existing medical conditions which they believe may increase the risks for them taking the vaccine or make it difficult to do so.[70] Many of these conditions, if proven, would likely amount to an impairment, but do not fall within the exemptions provided (many of these applicants have had their applications for exemption rejected). A person's right to equality would be limited if they are unable to be vaccinated or there are unacceptable risks associated with being vaccinated because of a disability other than that defined as a medical contraindication. However, it is unclear on the evidence provided whether any of the medical conditions raised by the applicants are of this kind.

Breastfeeding

66. One applicant in the *Sutton* proceeding is a breastfeeding mother.[71] This is a protected attribute under the AD Act. However, the evidence is insufficient to establish whether in fact there is a differential impact on her and others with that characteristic.

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[68] *Beattie (on behalf of Kiro and Lewis Beattie) v Maroochy Shire Council* [1996] HREOCA 40.
[69] Schedule to the AD Act.
[70] In the *Sutton* proceedings, Shaun Sutton CF 14 (anxiety); Malcolm Logue CF 19 (hypertension); Dominic Safi CF 20 (poor blood flow, blood clots) , Christian Har CF 21 (prior adverse reactions to vaccines); Megan Faulks CF 24 (heart issues, diabetes, Raynaud's disease, mental health); Natalie Skennerton CF 38 (anxiety); Sean Blair CF 49 (immune issues/anaphylactic reactions); Stephen Lyttle CF 50 (poss. mental health and chronic health concerns); Wendy Holderness CF 55 (various medical conditions); Kellie Knight CF 59 (family history of heart conditions and blood clots); Adam Green CF 61 (previous anaphylactic reaction); Brendon Smith CF 63 (undiagnosed haematological condition); Erin Michele CF 64 (blood clotting, Parkinsons), Dena Miller CF 68 (mental health/trauma); Karina Ormand CF 69 (complications from previous injury); In *Witthahn;* Simon Morrison CF 66 (Immune Thombocytopenic Purpura); Donna Bowman CF 62 (cancer).
[71] Affidavit of Brittanie Price CF 76.

Other kinds of discrimination

67. The HRC has considered the potential for further grounds of discrimination that are analogous to those already protected in Article 26[72] and which reflect the experience of social groups that are vulnerable and have in the past or present suffered marginalisation.[73] On this basis, the HRC has previously concluded that infection with HIV/AIDS might constitute 'another status'.[74]

68. Under the Canadian *Charter,* it has been considered that the development of additional grounds for discrimination will occur incrementally, by analogy with the grounds that already exist (which reflect the experience of vulnerable groups) and will be limited to such grounds as are either constructively (e.g. religion) or in fact immutable, including where such a characteristic is changeable only at unacceptable cost to personal identity.[75]

69. While the definition of discrimination in the HR Act will likely need to be settled by Queensland courts, and as already outlined a broad interpretation should be adopted for beneficial legislation, it is unlikely that vaccination status would meet any applicable standard.

Section 23 – Right of participation in public life

70. Section 23 is modelled on Article 25 *ICCPR*, and is described as conferring 'a right to a democratic system'.[76] Section 23(2)(b) provides that every eligible person has the right, and is to have the opportunity, without discrimination, to have access on general terms of equality, to the public service.

71. The term public service is not defined in the HR Act. Under the *Acts Interpretation Act 1954* (Qld), alongside s 5 of the *Public Service Act 2008* (Qld), the public service consists of the persons who are employed under the Public Service Act. It appears that some of the applicants would be covered by this right.

72. The protection in s 23(2) is for 'eligible persons', which is not defined. The Explanatory Notes suggest that the limitation of this right to eligible persons allows for limitations to be attached to the right to vote, such as residence and age, as well as specific legislative limitations such as the eligibility of prisoners to vote that is restricted under section 106 of the *Electoral Act 1992*.[77] Whilst the right recognises the setting of eligibility criteria outside of it that might limit the right, such criteria would in turn need to be compatible

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[72] General Comment 18; William A Schabas, *U.N. International Covenant on Civil and Political Rights: Nowak's CCPR Commentary* (N.P. Engel Publisher, 3rd rev ed, 2019) 775 [70].
[73] The grounds in article 2, paragraph 2 of the ICESCR are the same as those listed in article 26 of the ICCPR.
[74] General Comment 20, ICESC (2009); United Nations Human Rights Committee, *Concluding observations of the Human Rights Committee Trinidad and Tobago: Consideration of reports submitted by States parties under Article 40 of the Covenant,* CCPR/CO/70/TTO (10 November 2000) [11]; United Nations Human Rights Committee, *Concluding observations of the Human Rights Committee Republic of Moldova: Consideration of reports submitted by States parties under Article 40 of the Covenant,* CCPR/C/MDA/CO/2 (4 November 2009) [12]; United Nations Human Rights Committee, *Concluding observations of the Human Rights Committee Turkmenistan: Consideration of reports submitted by States parties under Article 40 of the Covenant,* CCPR/C/TKM/CO/1 (19 April 2012) [15].
[75] *Corbiere v Canada* [1999] 2 RCS 203, 219 [13].
[76] Explanatory Notes, Human Rights Bill 2018 (Qld), 21.
[77] Explanatory Notes, Human Rights Bill 2018 (Qld), 21

with human rights. The HRC has suggested that 'to ensure access on general terms of equality, the criteria and processes for appointment, promotion, suspension and dismissal must be objective and reasonable.'[78]

73. The directives may limit this right by preventing the continuing employment of the applicants (or future employees) who are unvaccinated. However, because the particular right engaged under s 23(2)(b) is that of *equal* access to the public service, unless there is a breach of the right to equality under s 15, there will be no limit on this right.

Section 16 – Right to life

74. Section 16 of the HR Act provides that every person has the right to life and the right not to be arbitrarily deprived of life. The Explanatory Notes emphasise that the right is limited to protection against *arbitrary* deprivation of life. Not every action that results in death will be arbitrary.[79]

75. Unlike s 16, both ICCPR Art 6(1) and ECHR Art 2(1) contain a formal statement that the right to life shall be protected by law and this has informed the relevant jurisprudence.[80] The HRC has therefore noted, in relation to Article 6 ICCPR, that this right may encompass both negative and positive duties. The positive aspect may require the state to 'take appropriate measures to address the general conditions in society that may give rise to direct threats to life or prevent individuals from enjoying their right to life with dignity'. The committee has specifically noted that this may include the 'prevalence of life-threatening diseases, such as AIDS, tuberculosis and malaria'.[81] The Explanatory Notes to s 16 expressly discuss the positive obligations in Art 6.[82]

76. In *Larter v Hazzard (No 2)*, the NSW Supreme Court found that Australia's obligations under ICESCR (right to highest attainable standard of health) obliged it to take measures to control COVID-19.[83] In Queensland, the HR Act also protects the right not to be refused emergency treatment, and to access, on an equal basis, health services (s 37)

77. In this context, the QHRC acknowledges that COVID-19 has a more severe impact on particular vulnerable persons such as older people, persons with disability, people in closed environments and First Nations persons and vaccines serve to reduce that impact. Depending on the evidence as to effectiveness, the introduction of mandatory vaccines can be said to promote the right to life.

78. The applicants' right to life is also suggested to be limited by exposure of the applicants to the risks of vaccination, however, that risk is slight.

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[78] UN Human Rights Committee, *CCPR General Comment No 25: Article 25 (Participation in Public Affairs and the Right to Vote)*, 57th sess, 12 July 1996, Un Doc CCPR/C/21/Rev.1/Add.7 [23].
[79] Explanatory Notes, Human Rights Bill 2018 (Qld), 19.
[80] See for example *Osman v United Kingdom* 23452/94 [1998] ECHR 101 [115].
[81] UN HRC, *General comment No 36 – Article 6: right to life,* UN Doc CCPR/C/GC/36 (3 September 2019) 6 [26].
[82] Explanatory Notes, Human Rights Bill 2018 (Qld), 19.
[83] *Larter* at [100].

Section 29(1) – Right to liberty and security

79. Section 29 of the HRA encompasses two types of protection – the right to liberty and the right to security, with the right to security most relevant for these purposes.

80. The right to security of the person is considered broader than the right to life.[84] The equivalent protection in Article 9 *ICCPR* is intended to protect persons against intentional infliction of bodily injury, regardless of whether the person is arrested or detained.[85]

81. Under international law, the right to security is recognised as separate to that of liberty and applies to persons regardless of whether they have been deprived of liberty. The HRC has stated that 'security of person concerns freedom from injury to the body and the mind, or bodily and mental integrity.'[86] It imposes a positive obligation on public authorities to take reasonable and appropriate measures to protect the security of persons from foreseeable threats to life or bodily integrity from any governmental or private actors under their jurisdiction.[87]

82. Generally, the Victorian courts have dealt with the equivalent right in s 21(1) of the *Charter* as a single right to 'liberty and security'.[88] In *RK v Mirik,*[89] the Supreme Court stated that the right to security in s 21(1) is an instance of the human right to personal integrity or inviolability, which in turn is an expression of the bedrock value of human dignity. It was said to have found expression in the civil and common law rules against assault, for example. However, the scope of the right to security, separate from the right to liberty under the *Charter* remains unclear, on current authority.

Conclusion on rights

83. As essayed above, a number human rights protected by the HR Act are engaged by the directives and were relevant to their making.

84. The rights limited by the directions, on the evidence produced in these proceedings, are:

    (a) the right not to be subjected to non-consensual medical treatment (s 17(c));

    (b) freedom of thought, conscience, religion or belief (s 20); and

    depending upon the conclusion reached on arbitrariness:

    (c) the right to property (s 24); and

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[84] UN Human Rights Council, *General Comment No 35: Article 9: Liberty and Security of person,* UNDOC CCPR/C/GC/35, [55]
[85] UN Human Rights Council, *General Comment No 35: Article 9: Liberty and Security of person,* UNDOC CCPR/C/GC/35, [3] and [9].
[86] UN Human Rights Council, *General Comment No 35: Article 9: Liberty and Security of person,* UNDOC CCPR/C/GC/35, [3]
[87] UN Human Rights Committee, *Merits: Communication No. 195/1985 (Delgado Paez v Colombia),* UN Doc. CCPR/C/39/D/195/1985 (23 August 1990) [5.5]; UN Human Rights Council, *General Comment No 35: Article 9: Liberty and Security of person,* UNDOC CCPR/C/GC/35, [9].
[88] E.g. *Re Kracke at* [621] – [628]; *Antunovic v Dawson* (2010) 30 VR 355; *Woods v DPP* (2014) 238 A Crim R 84 at [13]; *Director of Public Prosecutions v Kaba* (2014) 44 VR 526 at [110].
[89] (2009) 21 VR 623 at [5].

(d) the right to privacy (s 25).

85. The right to equality (s 15), the right to participate in public life (s 23), and the right to liberty and security (s 29) are engaged but not limited.

86. The concept of vaccination bears not only on the individual's rights, but also, given its general benefits to the community, in reducing the risk of transmission and infection, and/or severity of the infection, on the life, health and safety of the broader community.[90] Accordingly, the right to life (s 16) and the right to liberty and security (s 29) of others are also affected and must be weighed, in assessing the justification or proportionality of the limit of the applicants' human rights.

87. Having identified these rights as being limited on the evidence, the HR Act then requires consideration of whether these limits are reasonable and demonstrably justified.

Interpretation of statutory provisions

Section 48(1) HR Act

88. Subject to an override declaration,[91] s 48(1) HR Act applies to all statutory provisions – which by definition[92] includes 'statutory instruments'[93] – whenever enacted.[94] Its statutory 'command' has two aspects:[95]

(a) consistency of interpretation with the statutory provision's intended meaning; and

(b) an interpretation which is compatible with human rights.

89. A statutory provision will be 'compatible with human rights' if it (s 8 HR Act):

(a) does not limit a human right; or

(b) limits a human right only to the extent that is reasonable and demonstrably justified in accordance with section 13. This latter aspect calls for proportionality analysis.

90. There are two ways of reaching compatibility; not limiting a human right or if limiting, doing so only in circumstances where this is reasonable and demonstrably justified in a free and democratic society based on human dignity, equality and freedom: s 13(1). Section 48(1) has work to do in either scenario.

91. Consistent with the 'modern approach' to statutory interpretation that is well-established in the courts of this country,[96] Parliament's legislative recognition and protection of people's human rights in the HR Act now forms part of the context within which any

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[90] *Four Aviation Employees (supra)* at [110].
[91] Section 48(5) HR Act.
[92] Sch 1 HR Act.
[93] As document made under an Act that is 'of a public nature by which the entity making the instrument unilaterally affects a right or liability of another entity': *Statutory Instruments Act 1992* (SI Act), s 7(3)
[94] Section 108(1) HR Act.
[95] *Australian Institute for Progress Ltd v Electoral Commission of Queensland* (2020) 4 QR 31, 72 [114].
[96] *K & S Lake City Freighters Pty Ltd v Gordon & Gotch Ltd* (1985) 157 CLR 309 at [19]; *Mills v Meeking* (1990) 169 CLR 214; *The Queen v A2, The Queen v Magennis, The Queen v Vaziri* (2019) 93 ALJR 1106, [2019] HCA 35 at [52]-53].

statutory provision affecting those rights is to be construed, considered at the outset. A clear meaning should not be reached without reference to context. Under this standard approach, the text of a provision might be strained, read down or added to, in order to give effect to the intended purpose of the legislation.[97]

92. Further, subject to there being an incompatible statutory purpose, statutory protection for human rights is now also factored into the purpose or intended operation of the provision. As McGrath J said in *R v Hansen*[98] of s 6 *BORA,*[99] human rights interpretative provisions can be seen to make the State's commitment to human rights *"part of the concept of purposive interpretation."*[100]

93. Particularly where a limit to human rights is not self-evident, human rights under the HR Act at the very least inform the operation of the principle of legality,[101] identifying the specific rights against which only a clearly expressed or necessarily implied intention to abridge will be measured. It is submitted, furthermore, that s 48(1) is not merely a codification of the principle of legality. It aids not only any 'constructional choice' open on conventional methods, but in determining whether there is such a choice. An approach which instead quarantines s 48(1) from conventional approaches to interpretation at the first stage of the inquiry under it risks the development of an artificial and inconsistent approach to statutory interpretation at common law, whereby protections afforded at common law are more or less protected than those under the *HR Act.*

94. The extent of the impact of a legislative contribution to the traditional judicial function of legislative interpretation is a question that may vary by jurisdiction. As concluded by New Zealand academic Professor Geddis:[102]

> The interpretative sections, after all, take the form of a mandatory prescription from the legislature to the judiciary. At the very least, they represent parliamentary recognition of, and blessing upon, the judiciary's application of the principle of legality when interpreting an enactment. Whether they go beyond that point, however, and authorise the courts to adopt an even more explicitly teleological interpretative approach, is a question that each jurisdiction has had to confront...

95. Courts in Australia interpreting under human rights statutes must stay true to the legislative purpose and not stray into legislative activity.[103] As Lord Hoffman in *R (Wilkinson) v Inland Revenue Commissioners*[104] indicated, in a passage noted by French

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[97] *Bermingham v Corrective Services Commission of NSW* (1988) 15 NSWLR 292, 302; *R v Young* (1999) 46 NSWLR 681, 687-688.
[98] *R v Hansen* [2007] 3 NZLR 1.
[99] S 6 of the *New Zealand Bill of Rights Act 1990* ('BORA') provides: "*Wherever an enactment* ***can be given a meaning that is consistent*** *with the rights and freedoms contained in this Bill of Rights, that meaning* ***shall be preferred to any other meaning.***"
[100] *R v Hansen* at [252].
[101] *Electrolux* (2004) 221 CLR 309 at 329, [19], *Momcilovic* at 46 [42].
[102] A Geddis & B Fenton "Which is to be Master: rights friendly interpretation in New Zealand and the United Kingdom (2008) 25:3 Arz J Intl & Comp L 733, 748-749.
[103] *Momcilovic v The Queen* (2011) 245 CLR 1 at [20] (French CJ), at [146](ii), [151] (Gummow J, with whom Hayne J agreed) and [545]-[546] (Crennan and Kiefel JJ).
[104] [2005] 1 WLR 1718 at 1723 [17]; [2006] 1 All ER 529 at 535.

CJ in *Momcilovic v The Queen* as more closely aligned with the interpretative method in Australia than that which now prevails in the UK:

> I do not believe that section 3 of the 1998 Act was intended to have the effect of requiring the courts to give the language of statutes acontextual meanings. That would be playing with words. The important change in the process of interpretation which was made by section 3 **was to deem the Convention to form a significant part of the background against which all statutes, whether passed before or after the 1998 Act came into force, had to be interpreted.** Just as the 'principle of legality' meant that statutes were construed against the background of human rights subsisting at common law, so now, section 3 requires them to be construed against the background of Convention rights. **There is a strong presumption**, arising from the fundamental nature of Convention rights, **that Parliament did not intend a statute to mean something which would be incompatible with those rights.**
>
> ... It may have come as a surprise to the members of the Parliament which in 1988 enacted the statute construed in the Ghaidan case that the relationship to which they were referring could include homosexual relationships. In that sense the construction may have been contrary to the "intention of Parliament". But that is not normally what one means by the intention of Parliament. **One means the interpretation which the reasonable reader would give to the statute read against its background, including, now, an assumption that it was not intended to be incompatible with Convention rights.**

96. As Tate JA reasoned in *Victoria Police Toll Enforcement v Taha,* also considering a statutory discretion, the interpretative provision in the *Charter* is not merely a codification of the principle of legality; it might more stringently require that words be read in a manner that does not correspond with literal or grammatical reason:[105]

> Where the intention to encroach upon rights is not manifest with 'irresistible clearness' a court must interpret the legislation, consistent with the principle of legality, as not abrogating or curtailing the rights in question. **This may be seldom an all-or-nothing matter. Legislation may be enacted which unequivocally interferes with rights; the extent to which it permits such interference may remain a matter of constructional choice.**

Proportionality as part of the interpretative task

97. New Zealand courts have incorporated proportionality analysis as part of the interpretative task for some years. In *Moonen v Film and Literature Board Review,*[106] Tipping J (for the Court of Appeal of New Zealand) indicated the following in respect of the interpretative mandate in s 6 BORA and the justified limits set out in s 5 BORA:[107]

> ... s 6 of the Bill of Rights requires that where an enactment can be given a meaning that is consistent with the rights and freedoms contained in the Bill of Rights, that meaning shall be preferred to any other... Section 5 when read with s 6 fulfils a similar

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[105] *Victoria Police Toll Enforcement v Taha* (2013) 49 VR 1 ('*Taha*') at [189]-[195].
[106] *Moonen v Film and Literature Board of Review* [2000] 2 NZLR 9.
[107] *Moonen* (ibid) at 16 [16].

role. An enactment which limits the rights and freedoms contained in the Bill of Rights should be given such tenable meaning and application as constitutes the least possible limitation.

98. There has been division on the exact approach to be taken, and the sequence of considerations in interpreting statutes under the *BORA.* However, a flexible approach depending upon the nature of the provision at hand, has ultimately been borne out. The majority of the Supreme Court in *R v Hansen*[108] reflected the primacy of consideration of proportionality, particularly where the natural meaning and intent coincided to impose a clear limit on human rights. As to the approach in that case, Tipping J relevantly stated:

> [88] This argument raises, at least implicitly, a question about the correct approach to s 6 of the Bill of Rights in the light of ss 4 and 5. Does the Court look first for the most Bill of Rights-consistent meaning the statutory provision is capable of bearing, or does the Court first identify the meaning which, on ordinary principles of statutory interpretation, the provision should be given? Section 6 is concerned with meanings which are inconsistent with the rights and freedoms contained in the Bill of Rights. It is only when a meaning is inconsistent that the preference for a consistent meaning mandated by s 6 comes into play. **Logically, therefore, the Court's initial task is to identify the meaning which the statutory provision bears without reference to the preference with which s 6 is concerned. The Court then tests that meaning for Bill of Rights consistency along the lines set out below.**
>
> [89] The initial interpretation exercise should proceed according to all relevant construction principles, including the proposition inherent in s 6 that a meaning inconsistent with the rights and freedoms affirmed by the Bill of Rights should not lightly be attributed to Parliament. Once the resulting meaning, which I will call Parliament's intended meaning, has been identified, the next step is to determine whether there is any inconsistency between that meaning and the Bill of Rights. If there is none, the matter rests there. If there is an inconsistency, and this can conveniently be called apparent inconsistency, the question which then arises is whether the Court's next step is to examine whether a consistent or less inconsistent meaning can be given to the statutory language to accord with the s 6 preference; or rather, whether the next step is to examine the apparent inconsistency to see whether it is nevertheless reasonable and a demonstrably justified limit and thus permitted by s 5 of the Bill of Rights. I say "permitted" in the sense that by enacting a provision with that meaning Parliament is not acting inconsistently with the Bill of Rights of which s 5 forms an integral part.

99. Justice Gummow (with whom Hayne J agreed on this point[109]) and Bell J[110] on the High Court in *R v Momcilovic*[111] incorporated justified limits into the interpretative task under the *Charter,* quoting the following part of the decision of McGrath J in *Hansen*:[112]

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[108] *R v Hansen* [2007] 3 NZLR 1 ('*Hansen*') at [57]-[60] (Blanchard J), [88]-[92] (Tipping J), [192] (McGrath J).
[109] *Momcilovic v R* (2011) 245 CLR 1 at [280] (Hayne J).
[110] Ibid, at [678], [681]-[684].
[111] *Momcilovic v R* (2011) 245 CLR 1.
[112] *R v Hansen* [2007] 3 NZLR 1 at 65 [191].

> As between ss 5 and 6 it will **usually be appropriate for a Court first to consider whether under s 5 there is scope for a justified limitation of the right** in issue. The stage is then set for ascertaining if there is scope to read the right, as modified by a justifiable limitation, as consistent with the other enactment.

100. Gummow J then stated:[113]

> Section 32(1) is directed to the interpretation of statutory provisions in a way which is compatible with the human right in question, as identified and described in Pt 2, including, where it has been engaged, s 7(2). This relationship between s 32(1) and s 7(2) is thus similar to that between s 5 and s 6 of the NZ Act.

Construing rule-making powers

101. At common law, discretions are never absolute, regardless of the terms on which they are conferred.[114] The scope of any statutory discretion is a matter of construction of the provision authorising it, in the context of the Act in which it sits. Features such as the nature of the function, who exercises it, for what purposes, and on what criteria, will indicate the relevant considerations and the limits of the power. The power must be exercised reasonably, and in good faith for the purposes for which it has been given. It has also been held that discretionary decisions must pay heed to what is constitutionally permissible.[115]

102. The principle of legality has operated for a long time to confine broad discretions so as not to permit the abrogation of fundamental common law rights unless this is specifically mandated by the statute.[116] The principle has routinely been applied to discretions exercised to promulgate subordinate legislation.[117] There is no reason why s 48(1) would not have a similar effect. The HR Act does not displace the principle: s 12 HR Act.

103. The impact of *Canadian Charter* rights upon broad discretions placed upon executive decision-makers was first considered in *Slaight Communications Inc v Davidson.*[118] Lamer J, writing for the Supreme Court of Canada, indicated that legislation conferring an imprecise discretion does not authorise infringement of human rights unless that power is conferred expressly or by necessary implication:

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[113] *Momcilovic* at [168].
[114] *Lacey v Attorney-General for the State of Queensland* (2011) 242 CLR 573 at [61] per French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ; *Wotton v State of Queensland* (2012) 246 CLR 1, 10 [10].
[115] *Comcare v Banerji* [2019] HCA 23 at [40], [45], [198], [209]-[210]; *Wotton v State of Queensland* (ibid) at 14 [23]-[24] and 16 [31]-[32].
[116] *Coco v The Queen* (1994) 179 CLR 427, 435; *Lacey.*
[117] *Attorney-General (South Australia) v Corporation of the City of Adelaide* (2013) 249 CLR 1, 31-32 [43]-[44], 66-67 [150], *Evans v New South Wales* (2008) 158 FCR 576. See D Meagher and M Groves "The Common Law Principle of Legality and Secondary Legislation" (2016) 39 UNSWLJ 450, at 451 and 469: that the application of the principle of legality to subordinate instruments 'reflect[s] a longstanding tradition by which the courts will declare delegated legislation invalid if, for some reason, it conflicts with the terms of the statute under which it is made'. Pursuant to the principle of legality, 'common law rights and freedoms can only be infringed by secondary legislation if the empowering statute provides that power by express words or necessary implication'. If that is not the case, 'the secondary legislation must be read down to protect the common law right or freedom in play or it will be ultra vires the lawmaking power if that is not interpretatively possible'.
[118] *Slaight Communications v Davidson* [1989] 1 SCR 1038, 1078-79.

> **[I]t is impossible to interpret legislation conferring discretion as conferring a power to infringe the Charter, unless, of course, that power is expressly conferred or necessarily implied.** Such an interpretation would require us to declare the legislation to be of no force or effect, unless it could be justified under s 1. Although this Court must not add anything to legislation or delete anything from it in order to make it consistent with the Charter, there is no doubt in my mind that it should also not interpret legislation that is open to more than one interpretation so as to make it inconsistent with the Charter and hence of no force or effect. Legislation conferring an imprecise discretion must therefore be interpreted as not allowing the Charter rights to be infringed.

104. His Honour went on to indicate that applying this approach will lead to one of two results:[119]

(a) the disputed decision was made pursuant to legislation which confers, either expressly or by necessary implication, the power to infringe a protected right. In this case it is then necessary to subject the legislation to the test set out in s 1 by ascertaining whether it constitutes a reasonable limit that can be demonstrably justified in a free and democratic society; or

(b) the legislation pursuant to which the decision was made confers an imprecise discretion and does not confer, either expressly or by necessary implication, the power to limit the rights guaranteed by the Charter. **It is then necessary to subject the decision to the test in s 1; If it is not justified, the decision-maker has exceeded jurisdiction; If it is justified, on the other hand, then the decision-maker has acted within its jurisdiction.**

105. In *Re Kracke,* Bell J adopted this approach, in respect of a discretion reposed in a statutory body:[120]

> Because s 32(1) requires all legislation to be interpreted compatibly with human rights if possible, it imposes a particular interpretation on provisions which confer open-ended discretions. If possible consistently with their purpose, the provision must be interpreted such that the discretion can only be exercised compatibly with human rights. Therefore, **unless the very purpose of the provision is incompatible with human rights, which will surely be an exceptional case, the solution to legal problems concerning the exercise of an open-ended statutory discretion will depend on whether it has been exercised compatibly with human rights, not the interpretation of the provisions which, under s 32(1), is set.**

106. In *Four Midwives,* Palmer J reviewed a long history of cases in New Zealand where s 6 *BORA* (the equivalent of s 48(1)) had been used to interpret statutory provisions conferring discretionary powers permitting the promulgation of regulations[121] in light of the decision of *Hansen.* His Honour concluded that whatever the methodology, most importantly, a majority of the Supreme Court in *Hansen*[122] held that both the relevant right or freedom

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[119] *Slaight Communications* at 1080.
[120] *Kracke* at [208], [210]-[211]. See also *Re Lifestyle Communities* at [75]-[91].
[121] *Four Midwives* at [41]-[43], [49].
[122] Later confirmed by another majority of the Supreme Court in *New Health* at [145]: *Four Midwives* at [47].

and any reasonable and demonstrable justification for the limit, bear on the interpretative task.[123] Accordingly:

> [50] The s 6 interpretive direction requires, as far as possible, legislation to be interpreted consistently with the Bill of Rights. That requires reference to both the relevant right or freedom and to whether the limit is justified. The right to refuse to undergo medical treatment under s 11 of the Bill of Rights is engaged here. **No order can be made under the empowering provision that limits the right unless it is reasonable, prescribed by law and can be demonstrably justified in a free and democratic society under s 5 of the Bill of Rights. If a limit in an order is so justified, s 6 does not require the usual purposive interpretation of the empowering provision to be narrowed to mean the order is outside its scope. That is the substantive position reached by the Supreme Court in *Hansen* and in *New Health*.** It is not contradicted by the other cases referred to. It is consistent with bringing the full, balanced effect of the Bill of Rights to bear holistically on the interpretation of legislation.

107. His Honour also considered the application of the principle of legality as a freestanding principle of the common law, independent of, and not limited by, s 6 *BORA,* albeit that its application will usually overlap with it.[124] His Honour considered it a "legitimate question" whether the principle of legality had greater reach than s 6 *BORA* but ultimately concluded that it would not operate to require a different interpretation to that required under s 5, where a statute permits limits on rights in a way that is reasonable and demonstrably justified.[125] It should be noted, however, that *Four Midwives* involved consideration of a more specific statutory authority than here. The same 'legitimate question' arises here.

108. A majority of the Supreme Court of New Zealand in *Fitzgerald v R*[126] considered that s 6 *BORA* required courts, at the least, to take the same interpretive approach courts do with the principle of legality. As Winkelman CJ stated:

> Clearly, s 6 incorporates aspects of the principle of legality in relation to the affirmed rights and freedoms, in that courts applying it will proceed on the basis that clear words are needed if legislation is to be construed as abridging fundamental freedoms. **Just as with the principle of legality, it is the language of the statute which must be clear enough to exclude the possibility of a rights-consistent purpose and effect** – it is not enough that parliamentary materials might suggest this.[127]

109. This approach mirrors the view of French CJ in *Momcilovic* with respect to s 32(1) of the *Charter*[128] and also arguably that of the majority in *Hogan v Hinch.*[129]

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[123] Ibid, at [46].
[124] *Four Midwives* at [61]-[62].
[125] Ibid, at [64].
[126] [2021] NZSC 131.
[127] *Fitzgerald v R* [2021] NZSC 131 at [55], see also [56]-[57], see similarly O'Regan and Arnold JJ at [207] and [217].
[128] *Momcilovic v The Queen* (2001) 245 CLR 1 at 50 [51].
[129] *Hogan v Hinch* (2011) 243 CLR 506 at 548 [70].

110. While *Fitzgerald* itself did not concern the interpretation of a statutory power to promulgate rules, the majority's conclusion that the equivalent to s 48 *HR Act* permits statutory provisions to limit human rights only by clear words or necessary implication arguably clarifies what had been stated in previous Supreme Court decisions concerning statutory powers. For instance, in *R v Cropp*, the Supreme Court had earlier stated, as to subordinate legislation:[130]

> Subordinate legislation involving a relevant guaranteed right or freedom **will be invalid when the empowering provision, read in accordance with s 6 of the Bill of Rights, does not authorise its making**. Where the *Bill of Rights* is a relevant consideration, and obviously it will then be an important consideration, the Court gives the generally expressed empowering provision a tenable meaning that is consistent with the right or freedom. 'In accordance with s 6, that meaning is to be preferred to any other meaning.'

111. Achieving a "tenable meaning that is consistent with the right" means that a statutory power will be read not to authorise limitations of that right unless it expressly or by necessary implication authorises such limitation. Following this approach, section 48(1) should similarly be regarded as operating to permit a general statutory power to be exercised in a way that constrains rights contained in the *HR Act* only if such an exercise is permitted by express statutory words or by necessary implication.

112. While the scope of s 48(1) may not be settled, it is hardly so vexed that the Court should eschew dealing with it in this matter. Moreover, it seems unlikely that the Queensland Parliament, in taking the significant step of enacting a statutory human rights instruments to better protect and promote human rights,[131] and expressly include a definition of compatibility that may be met in two separate ways, would have intended s 48(1) be weaker than the pre-existing common law principle of legality.[132] Whilst s 58(6) indicates that an act or decision made is not *invalid merely* because of a breach of s 58(1), that does not speak to the jurisdictional scope of the power set by the legislature as properly construed in accordance with standard interpretative processes informed by the application of s 48.

Interpretation of the powers of direction

113. There is no indication in the applicable statutes of any express consideration by the legislature as to limiting the relevant human rights.

114. As observed by two New Zealand Supreme Court judges in the recent COVID-19 vaccine cases, measures of this kind would be *"better suited to legislation that squarely addresses the issues that arise from the measures"*,[133] to speak with directness to the human rights that might be limited in the emergency circumstances of a pandemic, and to the justified conditions for their limitation. Instead, these are broad powers which are being exercised

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[130] *Cropp v Judicial Committee* [2008] 3 NZLR 774 at 786 [25], citing *Drew v Attorney-General* [2002] 1 NZLR 58 (CA) at [68]. See further *Zaoui v Attorney-General [No 2]* [2006] 1 NZLR 289; *Dotcom v Attorney-General* [2015] 1 NZLR 745, 785 [100].
[131] See *Human Rights Act* (Qld), s 3(a).
[132] Drawing directly on Bruce Chen, 'Section 32(1) of the Charter: Confining Discretions Compatibly with Charter Rights?' (2016) 42 *Monash University Law Review* 608 at 621.
[133] *Four Aviation Employees* at [77]; *Four Midwives* at [74]-[75].

with the effect of curtailing human rights of employees in the interests of the efficient and proper functioning of the services. Public health ramifications are not front and centre to this purpose but should be central to the weighing exercise required by s 58(1)(a) HR Act.

115. In considering the nature of the power, the position of the applicants as police, health workers and public servants must also be considered. It would seem that past exercises of the powers have placed limits upon various human rights of the applicants and others in their position. Queensland Health staff at risk of contracting vaccine preventable disease, have since 2016 been required to be vaccinated for other illnesses.[134] Police have of course been found to enjoy particular powers and privileges that justify other curtailments of their rights.[135]

116. Whilst these features may permit the Court to conclude that the limits were effected by necessary implication from the nature of the particular powers at issue and the purposes for their exercise, this conclusion is not as clear as it might be, for instance, in respect of the CHO's power to issue directives under s 362B of the PH Act.

117. The QHRC contends that s 48(1) HR Act, applying in a similar way as the principle of legality to statutory human rights, requires greater clarity than the present statutes give, to authorise the imposition of conditions of employment that limit these important statutory human rights.

Application of s 58(1) HR Act

118. Whether or not the decisions to issue the directives are of an administrative character and whether the directives comprise subordinate instruments or not, are, it is submitted irrelevant to the question of the application of s 58(1). That is, the distinction drawn in the *Judicial Review Act 1991* (Qld) between 'administrative' and any other kind of public decision is not replicated or required by the terms of the HR Act. In particular, no such specific label or distinction expressly circumscribes the operation of s 58(1).

119. If such distinction is required under the HR Act it must be implied by the nature of the functions reposed in the various public entities by the HR Act, in particular, the interpretative mandate in s 48(1) applying to 'statutory provisions' which, on the expansive meaning of this term adopted in the Schedule, applies not only to the governing statutes, but also the directives.

120. The QHRC submits, however, that just because interpretation of the directions is aided by s 48(1), this does not exclude the application of s 58(1) to the decision to make them, for the reasons that follow.

121. Section 58(1) attaches to an "act" or "decision" of a "public entity", wherever the source of the power to act or decide resides and regardless of the characterisation of the power that is being exercised. There is no recognition of the *"constitutional trichotomy...*

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[134] Queensland Health, 'Vaccination as a condition of employment' (8 November 2021) <https://www.health.qld.gov.au/employment/work-for-us/dept-of-health/pre-employment/vaccinations/conditions>.

[135] *Nugent v Stewart (Commissioner of Police) & Anor* [2016] QCA 223 at [3] per McMurdo P and at [72], [79]-[80] per Morrison JA; *Police Service Board v Morris* (1985) 156 CLR 397, 409.

between the legislative, the administrative and the judicial as an exhaustive description of decision-making"[136] evident in the HR Act.

122. This is primarily because it is the definition of "public entity" provided in s 9 HR Act that makes any necessary, and specific, exclusions. Accordingly, the following entities or functions are excluded:

    (a) the Legislative Assembly or person performing functions in connection with proceedings in the Assembly, except when acting in an administrative capacity – s 9(4)(a);

    (b) a member of a portfolio committee established under the *Parliament of Queensland Act 2001* – s 9(1)(g); and

    (c) courts and tribunals, except when acting in an administrative capacity – s 9(4)(b).

123. Under s 5(2), the HR Act applies to each of the Parliament, courts and tribunals and "public entities" with respect to the functions provided to them under the Act. For courts and tribunals, the functions arise from the nature of particular human rights directly applied in those settings (Part 2), the interpretative and declaration powers granted (Part 3 Division 3) as well as, it must be said, the function under s 59 (Part 3 Division 4). For Parliament, the functions are those contained in Part 3 Divisions 1, 2 and 3, with respect to scrutiny of Bills and 'subordinate legislation' (not statutory instruments) for compatibility with human rights, making override declarations, and responding to any declaration of incompatibility made by a Court.

124. For "public entities" there is the function in s 58 (Part 3 Division 4). Section 58 is the direct manifestation of one of the main aims of the HR Act viz., to build a culture in the Queensland public sector that respects and promotes human rights.[137] It is a key provision to the model adopted in such statutes.[138]

125. It must be acknowledged that the Full Court of the Federal Court, in *Kerrison v Melbourne City Council*[139] held to the contrary of the argument made here, construing the Victorian *Charter* equivalent (s 38(1)) as *not* applying to the making of a subordinate instrument (local by-law) by a public authority, but rather only to action taken under it.[140] Close examination of the reasoning behind the Full Court's decision, however, reveals error.

126. The Full Court started with the text, finding that s 38(1), by using the phrase *"act in a way"* was focussed on conduct. In that respect, s 38(1) of the *Charter* differs from s 58(1),

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[136] *Queensland Medical Laboratory v Blewett* (1988) 84 AR 615, 633 (Gummow J) cited in the preliminary decision at [22].
[137] HRA s 3(b).
[138] *Castles v Secretary to the Department of Justice* [2010] VSC 310 [185].
[139] *Kerrison v Melbourne City Council & Ors* (2014) 314 ALR 241 (***Kerrison***). In contrast, the Victorian Supreme Court and Court of Appeal subsequently found the making of an Order in Council was not compatible with human rights, and by inference subject to the equivalent obligations on public entities in s38(1) of the *Charter of Human Rights And Responsibilities Act 2006*. See *Certain Children v Minister for Families and Children* [2016] VSC 796; 51 VR 473. *Minister for Families and Children v Certain Children* [2016] VSCA 343; 51 VR 597. *Certain Children v Minister for Families and Children (No 2)* [2017] VSC 251; 52 VR 441; 266 A Crim R 152.
[140] *Kerrison* at 281 [182], 283 [189], 285 [198].

which embraces both acts and decisions made. Nevertheless, the Full Court considered that even if *"act"* might be used interchangeably with *"making a decision"*, as appears later in the provision, the concept of a *"decision"* was also not *"apt"* to describe the process of passing a by-law or making another kind of subordinate instrument.[141]

127. Pausing there, it is not at all clear why that might be so. That the provision applies to group decision-making is clear from at least s 58(3) but also from the entities encompassed in the definition of "public entity" in s 9. Further, the making of a statutory instrument, or, as here, the *"giving"* of a direction under s 362B, is easily characterised as either an act or decision.

128. President Kingham in the Land Court, in *Waratah Coal Pty Ltd v Youth Verdict Ltd,* construed the words 'act or make a decision' in s 58(1) HR Act to include the Court's making of a recommendation to the Minister with respect to a mining lease application. Her Honour referred to abundant authority that the word 'decision' has a variety of meanings depending upon its context, and its context within the HR Act favoured a less restrictive interpretation. Further, the two concepts (act or decision made) should not operate disjointly, but rather in a complementary fashion.[142]

129. The Full Court in *Kerrison* next centred on the *Charter* equivalent to s 58(2) as indicating that conduct engaged in pursuant to a local by-law was intended to be caught by sub-s(1) and not the making of the by-law itself, as it would be difficult to conceive of how subs-(2) could apply to that task.[143]

130. Pausing there, again, with respect, it is not clear that s 58(2) must always have potential application. Many decisions – whether they be executive, administrative (quasi-judicial), or more generally prescriptive and therefore legislative in nature (in contradiction to executive or administrative in nature) – will not be directed in the result by the governing statute or other kind of law.

131. Further, s 58(2) operates with the purpose of permitting non-human rights-compatible decision-making where this is authorised by the governing law. By its terms, it provides that s 58(1) does not apply *"if the entity could not reasonably have acted differently or made a different decision" "because of a statutory provision... or otherwise under law"*. It does not speak to the nature of the act or decision under s 58(1), but rather, the source of the power for it (which may be an Act or statutory instrument or other law). It does not exclude from review the issuing of a statutory instrument that might assume the characteristic of a statutory instrument.

132. Ultimately it is submitted that the Full Court's conclusion that the presence of the equivalent of s 58(2) in the *Charter* meant that the equivalent to s 58(1) was not intended to apply to the making of a statutory instrument[144] was not soundly reached.

133. Perhaps most important to the Full Court's decision was the use of the term *"statutory provision"* throughout the *Charter* – which is also used in the same way and with the same meaning in the HR Act – which was defined to mean an Act, a subordinate instrument, or

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[141] *Kerrison* at 282 [187].
[142] *Waratah Coal Pty Ltd v Youth Verdict Ltd & Ors* [2020] QLC 33.
[143] *Kerrison* 283 [189].
[144] *Kerrison* at 283 [189].

a provision in an Act or subordinate instrument.[145] In particular, the Court referred to its use within the interpretative function and the way the *Charter* dealt with statutory provisions in the functions given to Parliament for the scrutiny of new legislation and making override declarations.[146] What seems most crucial to the Court's ultimate finding that s 38(1) *Charter* (s 58(1) HR Act) did *not* apply to the making of subordinate legislation was that on a purposive reading of the *Charter,* the *Charter* was intended to preserve the ability of lawmakers *"at both the primary and subordinate levels"* to make laws which when properly construed were incompatible, and would operate incompatibly with, human rights.[147]

134. However, that conclusion, whilst correct in its description of both the *Charter* and the HR Act, fails to recognise that the mechanisms by which Parliament might do so attaches to the primary Acts and only consequentially – and not solely or directly – at the subordinate legislation level.

135. Section 31(1) of the *Charter* and s 43(1) of the HR Act are the provisions that permit Parliament to expressly override the human rights legislation. They are in the same terms. They permit Parliament to expressly declare *"in an Act"* that *"the Act or another Act, or a provision of the Act or another Act"* has effect despite being incompatible with the human rights and anything in the human rights legislation. Once that declaration is made *"in relation to an Act or a provision of an Act",* it then extends to any *"statutory instrument"* (s 43(1) HR Act) or *"subordinate instrument"* (s 31(1) *Charter*) made under the Act or provision.

136. This is consistent with the ordinary requirement at law that subordinate legislation or, as defined, statutory instruments, be consistent with and not stray outside the authority granted by the governing Act.

137. Similarly, when the HR Act provides that the interpretative function does not operate to invalidate an Act or provision of an Act, or a statutory instrument or provision of a statutory instrument (s 48(4) HR Act/s 32(3) *Charter*), this capacity to legislate incompatibly again attaches to the Act, and only to a statutory instrument where this is authorised by the Act itself. An incompatible statutory instrument will not be valid, consistent with this analysis, unless its incompatibility is authorised by its governing statute.

138. Therefore, whilst a declaration of incompatibility by the Supreme Court may attach to any 'statutory provision' (i.e. an Act or a statutory instrument) (s 53(2) HR Act or s 36(2) *Charter*) the incompatibility itself must still stem from the governing statute.

139. The Full Court in *Kerrison* referred not only to ss 32 and 36 of the *Charter*, but also to s 28 in this context. But that provision merely enables statements of compatibility for 'Bills'. The equivalent provision in the HR Act, s 38, also applies only to 'Bills'.

140. Therefore, none of the provisions referred to as evincing the purpose of permitting incompatible statutory provisions require the exclusion of the making of a statutory

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[145] *Charter,* s 3(1), *Kerrison* at 281 [183].
[146] *Kerrison* at 283 [190]-[191]
[147] *Kerrison* at 285 [198].

instrument from the purview of s 58(1) HR Act/s 38(1) *Charter.* If an incompatible statutory instrument is authorised by the Act under which it is made, s 58(2)/s 38(2) would apply to oust the obligation in sub-s(1).

141. A difference between the two statutes is that the HR Act contains, in s 41, the requirement upon the responsible Minister to prepare a human rights certificate for *"subordinate legislation"* (not *'statutory instruments'*). In Victoria, that requirement is made by the *Subordinate Legislation Act,* outside the *Charter.* But the effect is the same.

142. In neither *Kerrison*[148] nor the current case, does the instrument under consideration fall within those terms. As recognised by the Court in *Kerrison,* this tends in favour of the argument put by the appellant there, as it is put here, that the obligation in s 58(1) HR Act/s 38(1) *Charter* applies to the making of the instrument.[149] However, the Court dismissed this as significant because it *"seemed"* that this was an express legislative choice. With respect that is not at all clear given that the Explanatory Notes to the *Charter* do not deal with the issue at all. The Explanatory notes to the HR Act, in lifting this framework from the *Charter,* also do not make any statements that would suggest this was so.

143. As noted above, simply because the interpretative function applies to all 'statutory instruments' does not mean that the decision to make a statutory instrument is not of itself reviewable within the meaning of s 58(1). Support for that conclusion may also be drawn from the same phrase used in s 59. Section 59(2) makes clear that any person who may seek relief or remedy in relation to "an act or decision of a public entity" on the ground that the act or decision was, other than because of s 58, unlawful, may seek such relief or remedy on the ground of unlawfulness arising under s 58.

144. Here, the applicants have sought relief by way of statutory review and alternatively, in the supervisory jurisdiction of this Court. That relief is not precluded by the legislative nature of the act or the status of the resultant direction as a 'statutory instrument'. In other cases, unlawfulness may be raised in tort (e.g. misfeasance in public office) which can also attend the acts of making delegated legislation.[150]

145. It is respectfully submitted that *Kerrison* should not be followed as it is plainly wrong and this Court would hold that s 58(1) of the HR Act applies to the issuing of both directives.

Supreme Court review under s 59 HR Act

Operation of s 59(2)

146. Sub-sections 59(1) and (2) permit a person who has a cause of action available to them for relief on the grounds of the unlawfulness to seek the same remedy on the ground of unlawfulness under s 58(1).

147. The fact a breach of s 58(1) does not amount to jurisdictional error does not deprive the Court of the jurisdiction to make an order by way of remedy for the breach, regardless of the success or otherwise of the traditional review grounds: s 59(2). The Court has the

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[148] *Kerrison* at 281 [184] and 283 [192].
[149] *Kerrison* at 282 [184].
[150] E.g. *Brett Cattle Company v Minister for Agriculture* [2020] FCA 732 (Rares J).

discretion to grant declaratory and if necessary injunctive relief[151] under Part 5 of the JR Act or in its inherent jurisdiction.

Review of compatibility

148. In undertaking a review of whether the decision complied with s 58(1)(a), the judicial task involves a greater level of intensity than is ordinarily encompassed under traditional judicial review grounds. *R v Home Secretary, Ex parte Daly,* Lord Steyn described the task as follows:[152]

> ... The starting point is that there is an overlap between the traditional grounds of review and the approach of proportionality ... But **the intensity of review is somewhat greater under the proportionality approach ...** I would mention three concrete differences without suggesting that my statement is exhaustive. First, the doctrine of proportionality may require the reviewing court to **assess the balance which the decision maker has struck**, not merely whether it is within the range of rational or reasonable decisions. Secondly, the proportionality test may go further than the traditional grounds of review inasmuch as it may require attention to be **directed to the relative weight accorded to interests and considerations**. Thirdly...**the intensity of the review**...is guaranteed by the twin requirements that the limitation of the right was necessary in a democratic society, in the sense of meeting a pressing social need, and the question whether the interference was really proportionate to the legitimate aim being pursued.
>
> The differences in approach between the traditional grounds of review and the proportionality approach may therefore sometimes yield different results. It is therefore important that cases involving convention rights must be analysed in the correct way. This does not mean that there has been a shift to merits review ... And Laws LJ rightly emphasised in Mahmood, '*that the intensity of review in a public law case will depend on the subject matter in hand*'. That is so even in cases involving Convention rights. In law context is everything.

149. In *Certain Children* and *Certain Children (No. 2)* Garde and John Dixon JJ adopted this approach. These cases indicate:[153]

(a) the determination of human rights unlawfulness requires 'an assessment that is closer to merits review than is usual in judicial review', going further into the facts and reasons than is usually the case. Precisely what intensity is required will vary from case to case;

(b) there is a 'limited' degree of deference to the decision maker (on fact-finding, discretionary considerations and balancing) reflecting the different institutional functions of the court and the executive decision-maker.[154] In conducting the review, the court is engaging in its supervisory jurisdiction. The degree of weight given to the

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[151] As occurred in *Owen-D'Arcy v QCS; Certain Children (No 2)* at [556], citing *Bare v IBAC* at [152], [388] and [624].
[152] *R v Home Secretary, ex parte Daly* [2001] 2 AC 532, 546-548.
[153] *Certain Children* at [212]-[213]; *Certain Children (No. 2)* at [208]-[212], [216]-[218].
[154] This is consistent with what was said in *McCloy* at 220 [91]-[92]. See also per Gageler J at 235 [142], 238-239 [151]-[156] and Nettle J at 269-270 [254]-[255].

original decision-maker's views will vary in accordance with the context, any relevant expertise and experience, and the extent to which the decision is supported and justified by transparent reasoning.

(c) proportionality, however (under s 58(1)(a) and s 13), must be judged objectively by the court.

150. These insights should be remembered, in the context of reference to the 'precautionary principle'. That principle (of health care) does not subsume the requirements of law, including as set out in the HR Act.

151. In *Thompson v Minogue*, the VCA indicated that a public authority's views about compliance with the procedural limb *may* assist a court, particularly where the decision is of a specialised nature with highly developed expertise or is of a recurring nature, refined with the benefit of experience over many years. But this does not mean giving 'deference' or 'latitude' or special weight to the views. There is 'no warrant' for such an approach.[155]

152. The VCA also found such terms 'unhelpful' when applied to assessment of compatibility with the substantive limb. A court may give expertise and experience that attaches to decision-makers appropriate weight as warranted in the particular circumstances of the case, without any preconception that they may be given any particular deference, respect or latitude.[156]

153. In the context of public health decisions made in response to the serious risks inherent in a global pandemic, with developing scientific data and quickly evolving circumstances and associated time pressures, courts are more likely to allow a margin of appreciation.[157] However, the decision-makers here do not have any particular expertise and were not acting in pressingly urgent circumstances.

154. Finally, there is some authority that a court conducting a compatibility review *may,* where appropriate, consider whether a measure implemented by a decision *remains* justified in light of changing circumstances.[158] That approach is not urged by the QHRC here. However, as recognised in these cases, the Court can and should take into account factors and evidence that post-date a decision as part of its inquiry, in light of the onus placed on the respondent to justify the decision and in particular, where the power is of a kind to require regular review due to changing circumstances.

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[155] *Thompson* VCA at [92]-[93], summarised at [183].
[156] *Thompson VCA* at [100].
[157] *GF v Minister of COVID-19 Response* at [83]-[84]; *Four Aviation Employees* at [67], [119], [126]; *Taylor v Newfoundland and Labrador* [2020] NLSC 125 at [60], [467]; *Gateway Bible Baptist Church et al v Manitoba et al* [2021] MBQB 219 at [281]-[284], [202]; *Spencer v Canada (Health)* [2021] FC 621 at [222]-[223]. See also (albeit in a non-human rights context) *Kassam* at [7] and [144].
[158] *Yardley* at [80], *NZDOS v Minister for COVID-19 Response* [2022] NZHC 716 (**NZDOS**) at [61]-[64], [135]-[137].

Compliance with s 58(1) HR Act

Proper Consideration – s 58(1)(b)

The principles

155. Victorian jurisprudence on the *Charter* equivalent to s 58(1) emphasises that the importance of the provision as the manifestation of Parliament's intention that the *Charter* have a normative effect on administrative practice. The same is true of s 58(1) of the HR Act. This gives strength to the procedural requirement to 'give proper consideration':[159]

156. The 'proper' consideration to be given to human rights by those engaged in public administration demands a higher standard of consideration than that generally applicable at common law to the taking into account of relevant consideration. What is required is a weighing up, or balancing, of human rights against countervailing public and private interests. To treat the obligation to give proper consideration to human rights as an obligation of some stringency is consistent with the model of the Charter as intended to have a normative effect on the conduct of public authorities.

157. Section 58(5) of the HR Act provides an inexhaustive list of what proper consideration entails:[160]

    (a) identifying the human rights that may be affected by the decision; and

    (b) considering whether the decision would be compatible with human rights.

158. Accordingly, in *Owen-D'Arcy v Chief Executive, Queensland Corrective Services,* Martin J concluded that proper consideration included, but was not limited to, what was set out in s 58(5) and contrary to under the *Charter* (which does not contain such a provision), s 58(5) has the effect of requiring a decision maker to correctly identify all rights that may be affected by a decision.[161]

159. The addition of s 58(5) in the *HR Act* (in comparison to the *Charter*) also makes clear that proper consideration involves considering compatibility with human rights, which, as defined in s 8, considers whether human rights are limited and if so, whether they are limited only to a reasonable and demonstrably justified extent. Therefore, the VCA's decision in *Thompson v Minogue,* that the procedural limb of the *Charter* equivalent to s 58(1)(b) did not *require* the decision-maker to 'give direct and express consideration to each of the matters' in compliance with the equivalent of s 13,[162] can be distinguished.

160. Martin J referred to and applied the test paraphrased by Tate JA in *Bare v IBAC*:[163]

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[159] *Bare v Independent Broad-Based Anti-Corruption Commission* (2009) 24 VR 415 at 260 [235]. See also to similar effect at [273] [275]-[276], 280 [299] and *Director of Housing v Sudi* (2011) 33 VR 559, [2011] VSCA 226 at [271].

[160] *Owen-D'Arcy v Chief Executive, Queensland Corrective Services* at [134].

[161] At [136]

[162] *Thompson v Minogue* (supra) at [87]-[88].

[163] *Owen-D'Arcy* at [135]-[138]; *Bare v IBAC* (2015) 48 VR 129, 223 [288] and *Castles* (2010) 28 VR 141, 184 [185]-[186].

> .. for a decision-maker to give 'proper' consideration to a relevant human right, he or she must: (1) understand in general terms which of the rights of the person affected by the decision may be relevant and whether, and if so how, those rights will be interfered with by the decision; (2) seriously turn his or her mind to the possible impact of the decision on a person's human rights and the implications thereof for the affected person; (3) identify the countervailing interests or obligations; and (4) balance competing private and public interests as part of the exercise of justification.

161. Nonetheless, it is an exercise that 'must be approached in a common sense and practical manner'. Administrative decision makers are not 'expected to achieve the level of consideration that might be hoped for in a decision given by a judge.[164] On this point, Martin J agreed with what Emerton J said in *Castles:*

> While I accept that the requirement in s 38(1) to give proper consideration to a relevant human right requires a decision-maker to do more than merely invoke the Charter like a mantra, it will be sufficient in most circumstances that there is some evidence that shows the decision-maker seriously turned his or her mind to the possible impact of the decision on a person's human rights and the implications thereof for the affected person, and that the countervailing interests or obligations were identified.

162. Proper consideration cannot be discharged after the decision has been made.[165]

Application – QPS decision

163. The Police Commissioner has produced a document titled 'Human Rights Compatibility Assessment' (HRCA) dated 7 September 2021, that was considered by her in making her decision of that date. That document is comprehensive, but a preliminary question arises whether the considerations contained in that document were actually considered and balanced by her in making the decision, or whether they were reviewed *after* the course had been set.

164. A separate HRCA accompanied the 14 December direction. That document considers human rights implications of the *amendments* rather than the measure itself – earlier dates, broader definition of 'frontline staff member' and requirement for the booster – on the basis that these might reflect *"deeper"* or *"wider"* limit on human rights already reviewed. However, that document does not again consider all of the rights affected by the nature of the direction and depends upon the Police Commissioner's evidence that she took such matters from the first HRCA into account.

165. There was also no updated assessment of alternatives to mandatory vaccination, or to the overall balance to be struck, as at December 2021.

Application – QAS

166. The D-G Health in his Statement of Reasons, indicates that "the human rights impacts of this decision have been assessed" in a HRCA that is in similar terms to that attached to the QPS decision. (6 September 2021). This does not say that he assessed these rights.

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[164] At [137].
[165] *Certain Children* at [190]-[191].

167. Rather, in his statement of reasons, the D-G identified the s 17 right only and indicated his view that the limits upon the right not to be subjected to medical treatment without consent were justified due to 'important purposes' of 'protecting staff and patients from infection with COVID-19 and the maintenance of a proper and efficient health service in a time of a global pandemic.'

168. The HRCA attached to the 31 January 2022 HR Policy decision was again issued, and the HRCA was a document attached to briefing materials to the D-G. There were some amendments to that document, containing additional reasons for justification at that point. But again, a preliminary question arises whether the considerations contained in that document were actually considered and balanced by him in making the decision, or whether they were reviewed *after* the course had been set.

Compatibility with human rights – s 58(1)(a)

The principles

169. A respondent must demonstrate that the limitations to these rights are reasonable and justified within the meaning of s 13.

170. Section 13(1) HR Act provides the overarching test for assessing if a human right may be limited: any such limitation may only be subject under law only to reasonable limits that can be demonstrably justified in a free and democratic society based on human dignity, equality and freedom. Section 13(2) then provides a list of non-exhaustive factors to be considered.

171. The Explanatory Notes to the HR Act indicate that the factors in s 13(2) were intended as a guide only, which 'generally align' with the principle of proportionality observed in other jurisdictions.[166] A 'pressing and substantial' public or social concern is more likely to be capable of justifying a limit placed upon human rights. The more important the right, and the greater the incursion, the more important the purpose will need to be.[167]

172. In so providing, the HR Act recognises that human rights are not absolute; they may be subject to reasonable limits which are justified in a free and democratic society. This may occur in the context of competing rights and interests held by others or countervailing matters of public policy, where these are of significance. The HR Act requires a decision-maker bound by s 58(1), a court reviewing such a decision, or a court construing legislation, to undertake a proportionality analysis.

173. Proportionality reasoning will be familiar to Australian courts in the context of assessing the Constitutional validity of legislation that breaches implied or express Constitutional rights.[168]

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[166] *Kracke v Mental Health Review Board* (2009) 29 VAR 1 at [133]-[134], *Re Lifestyle Communities Ltd (No 3)* [2009] VCAT 1869 at [322]-[334], *Re Application* at [148], *Momcilovic* VCA at [147].
[167] Explanatory Notes, p16-18.
[168] *McCloy & Ors v New South Wales & Anor* (2015) 257 CLR 178 (*'McCloy'*) and *Palmer v Western Australia* [2021] HCA 5

174. In *Re an Application Under the Major Crimes (Investigative Powers) Act 2004*,[169] the Victorian Supreme Court invoked the approach of the Canadian Supreme Court to s 1 of its *Charter of Rights* in *R v Oakes*[170]where it was stated:[171]

> There are three important components of a proportionality test. First, **the measures adopted must be carefully designed to achieve** the objective in question. They must not be arbitrary, unfair or based on irrational consideration. In short, they must be rationally connected to the objective. Second, the means, even if rationally connected to the objective in the first sense, **should impair "as little as possible" the right or freedom in question....** Third, there must be a **proportionality** between the effects of the measures which are responsible for limiting the Charter right or freedom, and the objective which has been identified as of "sufficient importance". (emphasis added)

175. The test espoused in *Oakes* is now summarised as requiring an affirmative answer to each of four questions:[172]

(a) is the objective of the legislation pressing and substantial?

(b) is there a rational connection between the legislation and its objective?

(c) does the government's legislation minimally impair the Charter right or freedom at stake? (within a range of reasonable alternatives[173])

(d) is the deleterious effect of the Charter breach outweighed by the salutary effect of the legislation?

176. In *Owen-D'Arcy,* Martin J cited this analysis and concluded there was no reason not to adopt it.[174] *R v Oakes*[175] has been heavily influential in other cases in Victoria[176] and in New Zealand.[177]

Vaccination cases decided under human rights

177. A series of cases in other jurisdictions throughout 2021 have held that the limits to rights imposed by vaccination requirements were proportionate.

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[169] *Re an Application Under the Major Crimes (Investigative Powers) Act 2004* (2009) 24 VR 415, [2009] VSC 381.
[170] [1986] 1 SCR 103. The approach formulated in *Oakes* was also cited by the Victorian Court of Appeal in *R v Momcilovic* (2010) 25 VR 436, 476 [147] (Maxwell P, Ashley and Neave JJA) and in the High Court by French CJ, *Momcilovic v R* (2011) 245 CLR 1 at [26] (French CJ).
[171] *Re an Application* at 449 [148].
[172] See *Canada (Attorney-General) v Hislop* [2007] 1 SCR 429 at [44].
[173] *R v Chaulk* [1990] 3 SCR 1303, *R v Sharpe* [2001] 1 SCR 45.
[174] *Owen-D'Arcy* at [110].
[175] *R v Oakes* [1986] 1 SCR 103 (*'Oakes'*) at [43], [61]-[64], [69]-[71].
[176] *Momcilovic* VCA at [147], *Re an Application* at [147]-[148], *Certain Children v Minister for Families and Children* (2016) 51 VR 473, [2016] VSC 796 at [208], *Certain Children v Minister for Families and Children (No 2)* (2017) 52 VR 411, [2017] VSC 251 (*'Certain Children (No 2)'*) at [205].
[177] *Hansen* at [42], [64], [103]-[104], [203]-[204].

178. In *Vavřička v Czech Republic Applications,*[178] the ECtHR (Grand Chamber) ruled that 'compulsory vaccination', in the form of sanctions for not having children vaccinated or exclusion from nursery school imposed by primary legislation of the Czech Republic, in conjunction with detailed arrangements made by Ministerial Decree issued by the Ministry of Health,[179] was a reasonable limitation on the right to private life. Critical factual features leading to this conclusion included the wide margin of appreciation given to national authorities, and the measures could be regarded as necessary in a democratic society. [180]

179. In *GF v Minister of COVID-19 Response,* Churchman J in the New Zealand High Court (NZHC) considered a challenge to the lawfulness of the Order by a Minister under the *COVID-19 Public Health Response Act 2020 (NZ)* imposing mandatory vaccine requirements as a condition of employment in the New Zealand Customs Service. In finding the measure valid, his Honour characterised the case as addressing the *"intersection between the legislation designed to achieve the public benefit of preventing or limiting the risk of the spread of the COVID-19 virus and the private interests inherent in an employee relationship".*[181]

180. In *Four Aviation Security Service Employees,*[182] Cooke J concluded, in respect of an Order requiring aviation security service employees to be vaccinated, that it was demonstrably justified under the *BORA* because it contributed to minimising the risk of outbreak or spread. It was the wider public benefit of the vaccine (rather than individual benefit) that justified the limit.[183]

181. In *Lavergne-Poitras v Canada (Attorney-General),*[184] the Federal Court of Canada found a government policy to impose a contractual term for sub-contractors to be vaccinated against COVID-19 was justified, despite its serious consequence of loss of employment on the basis of the material harm that would arise for employees if the injunction sought was granted.

182. In *Loielo v Giles*[185] Ginnane J of the Victorian Supreme Court considered the validity of a legislative powers used to impose a curfew under the *PHW Act.* In considering movement restrictions imposed by the Victorian Government in response to COVID-19, Ginnane J suggested that the mere existence of other options does not mean those measures will be effective: [186]

> [251] But, the existence of other options does not mean that they were 'less restrictive means reasonably available to achieve the purpose' of protecting public health. **In determining what means were 'reasonably available', it was appropriate to consider what means had been tried, what had followed, the urgency of the situation and the risks if infection rates surged again.**

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[178] *Vavřička v Czech Republic* (European Court of Human Rights, Grand Chamber, Application Nos 47621/13, 3867/14, 73094/14, 19298/15, 19306/15 and 43883/15, 8 April 2021).
[179] Ibid, at [267].
[180] At [281]-[284], [288]-[289], [310]. This followed an earlier ECHR decision to the same effect in *Boffa v San Marino* (European Commission of Human Rights, Application No 26536/95, 15 January 1998), see at 33-34.
[181] *GF* at [83]-[86].
[182] [2021] NZHC 3012 (Cooke J).
[183] Ibid, at [124]-[125], [127].
[184] [2021] FC 1232.
[185] [2020] VSC 722.
[186] At [251] – [253].

183. It might also be recalled that in *Palmer v Western Australia,*[187] Kiefel CJ and Keane J held that although provisions of the *Emergency Management Act 2005* (WA) which restricted free movement between states was a burden on the freedom in s 92 of the *Constitution,* the restrictions were justified by the protection of health and life. In doing so, the critical factual features were **the purpose of the restrictions** (to prevent persons infected with COVID-19 from bringing it into the state), **the shortness of the duration**[188] and that there was **no effective alternative** to a general restriction on entry.[189] Further, other members of the court noted that the power could only be exercised for the purpose of managing a designated emergency (plague or epidemic) and the Minister was required periodically to be satisfied the restrictions were still required.[190]

184. In contrast to the above cases, in early 2022, in *Yardley v Minister for Workplace Relations and Safety,* Cooke J concluded that an order made with the purpose of ensuring the continuity of police and defence force services (and not for public safety purposes) was not justified in circumstances where the evidence relied upon by the respondent did not justify that the measure served a sufficiently important purpose to curtail human rights because:[191]

    (a) of the small number remaining of unvaccinated workers to whom the order was addressed (only 164 police out of 11,000 covered by the order, and 115 defence personnel out of 15,000);

    (b) no evidence the mandate would have had any greater effect than more individualised internal vaccination policies; and

    (c) the expert evidence, including from Dr Petrovsky but also from the Minister's expert, was to the effect that vaccination does not prevent transmission although it may reduce it to some extent, but not nearly as much for the prevalent Omicron variant, which significantly changes the benefits that vaccination provides, particularly without a booster.

185. Finally, in *NZDOS v Minister for COVID-19 Response,* Cooke J reviewed vaccine mandate decisions made in October 2021 with respect to health workers and teachers. His Honour found those mandates were justified and that the kinds of steps in *Yardley,* whilst relevant, were not pre-requisites or conditions to justification. This was particularly the case because the reason for these mandates was not only to ensure continuity of services, but also inhibiting the spread of COVID-19 and ensuring public confidence in health services.[192]

Application

(a) The nature of the human right

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[187] [2021] HCA 5; 95 ALJR 229. See also *LibertyWorks Inc v Commonwealth of Australia* [2021] HCA 18.
[188] [2021] HCA 5; 95 ALJR 229 at [74], [77] per Kiefel CJ and Keane J
[189] At [80], [81] per Kiefel CJ and Keane J
[190] At [164] – [166] per Gageler J and [281]-[286], [291] per Edelman J.
[191] *Yardley* questions at [67]-[68], evidence at [73]-[77], [84]-[85], [88], [91], conclusions at [97], [100].
[192] *NZDOS* at [74].

(f) The importance of preserving the human right, taking into account the nature and extent of the limitation on the human right;

186. Several rights are limited by the directions and these are important rights going to the core of protecting the human dignity of persons and their ability to make decisions about their bodies, their work and their movements.

187. It is relevant to note that the measures are not compulsory treatment but that the applicants retain the option to refuse vaccination.[193] Nevertheless, to exercise that option results in harsh social and economic consequences.

(b) The nature of the purpose of the limitation, including whether it is consistent with a free and democratic society based on human dignity, equality and freedom.

(c) The relationship between the limitation and its purpose, including whether the limitation helps to achieve the purpose

(e) The importance of the purpose of the limitation.

188. The evidence already filed on the part of the Respondents suggests:

(a) for QAS employees at least, this is a high-risk workplace, particularly due to the vulnerabilities of clients;

(b) staff/unions were consulted on both proposals; and

(c) exemptions on grounds of medical contra-indication and genuine religious belief are included.

189. The extent of the effectiveness of the vaccine is in dispute. Further submissions about that will be made at the completion of the hearing.

The purpose

190. The primary rationale for the original direction by the QPS[194] appears to have been maintaining the force. More broadly, it was asserted that the nature and frequency of police officers' interactions with members of the community also results in members' increased exposure to COVID-19. Therefore, the vaccination was also said to be aimed at protecting the health of the community by reducing the risk of transmission and outbreak.

191. The primary factors behind the original D-G's HR policy referred to a strong expectation upon employers to protect their workers and the public. Further, that without vaccination of health workers, absenteeism would significantly impact upon ability to maintain delivery of public health services.[195] The subsequent decision with respect to QAS staff referred to the uniquely high risk position their staff are in, with unplanned contacts with vulnerable people.

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[193] *Four Aviation Employees* at [125].
[194] Statement of Reasons.
[195] Statement of Reasons.

192. Clearly public safety, particularly for vulnerable members of society, is an important purpose. However, as indicated on the approach of Cooke J in *Yardley,* the aim of keeping an essential service functioning (avoiding absenteeism) may be less compelling, or less important, and therefore susceptible to closer analysis as to whether the measures adopted will in fact meet that aim.

193. The respondents' material does not currently address the *necessity* for the directives in terms of maintaining the capacity of these services to continue, in light of voluntary vaccination rates within each relevant service at the time. The extent of the evidence on this is:

    (a) the affidavit of Mr Smith with respect to QPS employees indicates that as at April 2022, there are 414 unvaccinated staff (half with exemptions and half going through disciplinary processes), from 17,188 employees; and

    (b) the briefing note to the DG as at 31 January 2022 indicated that of the 5856 QAS employees, 5572 were double-vaccinated (over 95%).

(d) Whether there are any less restrictive and reasonably available ways to achieve the purpose;

194. In considering 'less restrictive and reasonably available ways' to achieve the purpose, a court is to go further than considering whether the chosen measure falls within a range of reasonable alternatives to assess the respondent's explanation for why there was no less restrictive alternative reasonably available.[196]

195. Critically, the respondents' material does not demonstrate that the numbers of unvaccinated staff demonstrated the need for a vaccine mandate. Nor did the January 2022 QAS directive consider the implications of the emergence of Omicron as the primary COVID-19 strain. The following alternatives were available at that point:

    (a) voluntary take up of vaccines;

    (b) more individualised and tailored responses to objections; and

    (c) alternative restrictions such as the wearing of masks, with daily or thrice-weekly RAT testing.

(g) The balance between the importance of the purpose of the limitation and the importance of preserving the human right, taking into account the nature and extent of the limitation on the human right

196. A concerning aspect to both decisions is that whilst the reasons conceded that the nature of the decisions were such to require regular review, this has not occurred. In respect of the QPS decision, it has been in operation since December 2021 and the QAS decision since January 2022. A timeframe for the operation of the decision, or dates for review should have been set by its terms.

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[196] *Owen-D'Arcy* at [249].

197. Subject to the expert evidence to be called, this feature in particular may lead the Court to consider the directives to be unjustified. The QHRC reserves its final submissions on this point until that evidence is heard.

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26 May 2022