SUPREME COURT OF QUEENSLAND

REGISTRY: Brisbane
NUMBER: 11254/21

Applicants:	DYLAN MARK JOHNSTON & ORS
	and
Respondents:	KATARINA RUZH CARROLL APM, COMMISSIONER OF THE QUEENSLAND POLICE SERVICES & ANOR

REGISTRY: Brisbane
NUMBER: 11258/21

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

AMENDED OUTLINE OF OPENING SUBMISSIONS
QUEENSLAND HUMAN RIGHTS COMMISSION (INTERVENING)
(amended 7/2/2022)

Introduction

1. The Queensland Human Rights Commission (**QHRC**) intervenes in these proceedings pursuant to s 51 of the *Human Rights Act 2019* (**HR Act**). In doing so, the QHRC confines its intervention to the application and effect of the HR Act upon the decisions.

2. These submissions therefore address:

   (a) the human rights engaged by the directives in issue 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 and the principle of legality;

   (c) the operation of s 59 HR Act;

   (d) review of compliance with s 58(1)(b) HR Act; and

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(e) review of compliance with s 58(1)(a) HR Act, including justification under s 13.

3. In summary, the QHRC's opening submissions are as follows.

4. A number of human rights protected by the HR Act are limited by the directives, principally the right not to be subjected to non-consensual medical treatment (s 17(c)), freedom of belief – religious or otherwise (s 20) and, depending upon the conclusion reached on arbitrariness, including the application of proportionality analysis, the right to privacy (s 25). The right to participate in public life (s 23) and the right to non-discrimination (s 15) are engaged but not limited. Some of these rights overlap with common law rights – to bodily integrity, to freedom of religion, to freedom of expression, and the yet to be conclusively established rights to privacy and to work.

5. The provisions under which the directives were issued are general powers to issue binding directions to employees in public agencies. Such powers are designed to facilitate the efficient management and provision of essential health and police services. More specific powers exercised with respect to COVID-19 measures appear under the *Public Health Act 2005* (Qld) (**PH Act**) exercisable by the Chief Health Officer (**CHO**). As remarked by New Zealand judges considering legislation similar to the PH Act, such powers are *"better suited to legislation that squarely addresses the issues that arise from the measures"*,[1] 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.

6. The approach to interpretation under a provision like s 48(1) of the HR Act, particularly as it applies to general rule-making powers, is not well-settled. As open-textured discretions, consistent with s 48(1) HR Act, Parliament can be taken to have imbued these discretions with a requirement that they be exercised compatibly with human rights. It is uncontentious that the scope of the discretion set in this way in that rights may only be limited where this is reasonable and demonstrably justified, within the meaning of ss 8 and 13 HR Act. On this approach the focus shifts to an assessment of compatibility of the decision.

7. However, the common law principle of legality would also inform the question of the scope of the discretion, at least in its impact upon common law rights. In the QHRC's submission, the operation and protections of this principle will develop over time to operate in a companion fashion with the interpretative function under the HR Act. The HR Act does not disturb or limit the common law protections.

7A. Additionally, the QHRC contends that s 48(1) of the HR Act, due to its interaction with s 8, which sets a two-fold test for compatibility with human rights, does not only operate, where consistent with the provision's purpose, to allow justified limits to human rights in the exercise of discretion, but to apply, in appropriate cases, to the question of whether the statutory power was intended to (expressly, or by necessary implication) impose any limit upon human rights, in the same way as, and compatibly with the principle of legality in its protection of common law rights, but with a wider field of application to the human rights recognised in the HR Act. Therefore, the first step in construing the statutory powers under

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[1] *Four Aviation Security Service Employees v Minister of COVID-19 Response & Ors* [2021] NZHC 3012 (Cooke J) (***Four Aviation Employees***) at [77]; *Four Midwives v Minister for COVID-19 Response & Anor* [2021] NZHC 3064 (Palmer J) (***Four Midwives***) at [74]-[75].

which the directives were issued here, in accordance with s 48(1) HR Act, is to consider whether limits to human rights of the kind engaged here have been authorised by the governing statute either expressly or by necessary implication.

7B. Here, there is no express limitation of the right to protection from medical treatment without full, free and informed consent (s 17(c) HR Act), or freedom to manifest one's belief (s 20), or privacy (s 25). However, it is conceded that such powers, whether viewed as employment-related, or as permitting the issue of regulations (conditions of employment for the purpose of the provision of essential public services), have historically been understood to permit limits upon the human rights of health service providers, police officers and public servants more broadly by virtue of the nature of their appointment or employment. Rights of movement, association, freedom of expression etc., are routinely limited by the exercise of such employment-related powers in the past. It is understood that vaccinations have been required of at least some of the Applicants under similar arrangements in the past. Whilst this 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.

7C. Vaccination requirements as conditions of employment (limiting at least the right to protection against medical treatment without full, free and informed consent, the right to manifest one's conscientious belief, and, depending upon proportionality, the right to privacy) have not previously been challenged in the human rights framework now in place in Queensland. The QHRC contends that s 48(1) *HR Act*, applying in the same way as the principle of legality to statutory human rights, would require greater specificity than the present statutes give, to authorise the imposition of conditions of employment that limit these statutory human rights.

8. It is uncontroversial that s 58(1) HR Act applied to these decisions.

9. A failure to comply with the requirements of s 58(1) does not give rise to jurisdictional error, but these complaints 'piggy-back' on the traditional review grounds raised by the Applicants that, if made out, amount to jurisdictional error. Success on human rights grounds does not depend upon success on non-human rights grounds: s 59(2) HR Act. The fact that the human rights grounds do not give rise to a jurisdictional error does not limit the Court's powers to grant remedies under either Part 5 (or Part 3) as considered appropriate on the basis of any non-compliance with s 58(1).

10. Subject to the evidence satisfying the Court that each of the relevant decision-makers themselves genuinely considered and balanced the matters set out in the human rights compatibility document, the procedural obligation in s 58(1)(b) HR Act has been complied with.

11. In assessing the balance struck under s 58(1)(a) and s 13 HR Act, courts will give appropriate weight and latitude to decisions made on scientific advice, even if prepared on the basis of incomplete and shifting data, particularly when the decisions are made quickly in response to a pressing threat such as the COVID-19 pandemic. However, there are limits to the operation of this principle. The timing, the state of the evidence and circumstances at the time of the decision, the extent to which the decisions are dependent upon scientific expertise, and the identity of the particular decision-maker are all relevant

factors that may increase or decrease its utility or appropriateness. In particular, the precautionary principle, recognised as a public health policy, is not a principle of law that applies to sanction *"all that can be done"*[2] in protection against the pandemic. That principle should not subsume the requirements of law set out in the HR Act to assess the proportionality of such steps where they limit human rights.

12. Ultimately, the Court may well see fit to conclude that the limits effected by the directives upon the Applicants *were* justified. If Associate Professor Searles' evidence is accepted, then the Court would so conclude. However, the QHRC wishes to reserve its ultimate submission about that until after ~~careful review of~~ the expert evidence has been heard. ~~that has recently been filed~~.

13. On the evidence provided to date, however, the Respondents' reasons do not explain:

    (a) the necessity for the directives, in light of voluntary vaccination rates within each relevant service at the time i.e. an assessment of whether the opportunity for voluntary vaccination was sufficient to achieve the same end. The affidavit of McGill indicates that prior to the directive, 87% of Queensland Health's employees had received at least one dose;[3]

    (b) why (if Professor Petrovsky's opinions are accepted and Associate Professor Searles' rejected) protection against COVID-19 transmission could not have been equally achieved by instead requiring those individuals who object to taking the vaccine (on any ground) to use PPE and undertake rapid-antigen testing;

    (c) why re-deployment to less exposed positions for those individuals who object to taking the vaccine (on any ground) is not a reasonably available alternative to dismissal; and

    (d) whilst the reasons indicate the plan to conduct "regular reviews", why the directives themselves do not provide an end date for their operation or a date for review.

14. Throughout these submissions, quotations omit citations and any emphasis is made on behalf of the QHRC.

The decisions under review

15. The applications concern decisions of the First Respondent in 11254/21 and Second and Third Respondents in BS11258/21 to issue directives pursuant to discretionary statutory powers to issue directions and promulgate a Code of Conduct requiring certain employees of the Queensland Police Service (**QPS**), the Health Department (**the Department**) and the Queensland Ambulance Service (**QAS**) respectively, to have COVID vaccinations within certain timeframes (collectively, **the directives**).

16. The powers under which they were made are:

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[2] Submissions of the Attorney-General 2d).
[3] Affidavit of McGill 4, [13] (court doc no 40 in 11258/21).

(a) to do things as *"necessary or convenient for the efficient and proper functioning"* of the service (s 4.9(1) of the Police Services Administration Act 1990 (Qld) (**PSAA**));

(b) to *"establish the conditions of employment"* for service employees (s 45(g) and 51A of the Hospital and Health Boards Act 2011 (Qld) (**HHBA**); and

(c) to "issue codes of practice ... relating to the functions, powers, conduct, discipline and appearance of service officers" (s 41 of the Queensland Ambulance Services Act 1991 (Qld) (**QASA**).

17. The QPS directive[4] applies to all appointed police officers and 'frontline' staff or support staff employed under either the police administration or the public service legislation.[5]

18. The Health directive[6] applies to all health service employees, being those appointed under s 67 HHBA. It would also appear to apply to all QAS employees.[7]

19. The QAS COVID-19 Vaccine Requirements, Human Resources Procedure (Version 1.1) (the **QAS Code**) applies to all QAS employees.[8]

20. While not the subject of challenge in the application, the QHRC notes that at various times, Public Health Directions made by the CHO under s 362B PH Act have placed obligations on the applicants and respondents regarding vaccination. Most particularly for the parties in BS 11258/21, the *Workers in a healthcare setting (COVID-19 Vaccination Requirements) Direction* ~~requires~~ required that a 'worker in healthcare' must not enter, work in or provide services in a health care setting unless the person has received the prescribed number of doses of a COVD-19 vaccine by 15 December 2021. Some of the applicants in 11254/21 may also have been affected by other Public Health Directions made under s 362B, particularly those working on or over the New South Wales border.[9]

Relevant human rights

Approach

21. In assessing whether any decision limits human rights, the scope of each right must first be identified. In doing so, rights are to be construed in the 'broadest possible way' by reference to the fundamental values and interests expressed in them and absent any limitation.[10] This is consistent with a beneficial approach to construction of the HR Act.[11]

22. The human rights listed in the HR Act that are engaged by the directives are:

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[4] *Instrument of Commissioner's Direction No.12.*
[5] 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**).
[6] The *Instrument of Chief Executive's Health Employment Directive No. 12/21.*
[7] Affidavit of Clarke at [12]
[8] *COVID-19 Vaccine Requirements: Human Resource Procedure Version 1.1.*
[9] For example, *Border Restrictions Direction (No. 55)* and subsequent directions (now revoked)
[10] *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 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].
[11] *Owen D'Arcy* (ibid) at [118]-[120].

(a) the protection from medical treatment without consent – s 17(c);

(b) the right to privacy – s 25(a);

(c) the right to participation in public life – s 23(2)(b);

(d) freedom of thought, conscience or belief – s 20(1)(a) and (b);

(e) the right to equality – s 15(2) and (4);

(f) the right to life – s 16; and

(g) the right to liberty and security – s 29(1).

23. An act or decision will limit a human right if it "places limitations or restrictions on, or interferes with, the human rights of a person".[12]

24. In the QHRC's submission, the right not to be subjected to non-consensual medical treatment (s 17(c)), freedom of belief – religious or otherwise (s 20) and, depending upon the conclusion reached on arbitrariness, including the application of proportionality analysis, the right to privacy (s 25) are limited by the directives. The right to participate in public life (s 23) and the right to non-discrimination (s 15) are engaged but not limited.

25. The concept of vaccination bears not only on the individual's rights, but also, given its general benefits to the community, by way of 'herd immunity' or more generally reducing the risk of transmission and infection, and/or severity of the infection, on the life, health and safety of the broader community.[13] 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.

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

26. 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".

27. 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.[14] 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*

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[12] *Innes v Electoral Commission of Queensland (No 2)* [2020] QSC 293 (Ryan J) (***Innes***) at [291]; *Owen-D'Arcy* at [130]; *PJB v Melbourne Health (Patrick's case)* (2011) 39 VR 373 (Bell J) (***Patrick's case***) at 384 [36].
[13] *Four Aviation Employees (supra)* at [110].
[14] Explanatory Notes, *Human Rights Bill 2018* (Qld), p19.

highest order and addresses... the subject better than the comparable provisions internationally."[15]

28. Justice Bell in *Re Kracke,*[16] 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:[17]

> 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).
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> 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.

29. In a series of recent decisions in New Zealand,[18] the government conceded, and the New Zealand High Court 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 including vaccination.

30. 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 rigorous assessment of its efficacy and safety and it had a therapeutic, and not experimental, purpose.[19] A similar approach should be taken here.

Full, free and informed consent

31. 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,[20] 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:*[21]

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[15] *Re Kracke* at [545].
[16] *Re Kracke and Mental Health Review Board* (2009) 29 VAR 1 (Bell J).
[17] *Ibid,* at [548]-[549].
[18] *GF v Minister of COVID-19 Response* & Ors [2021] NZHC 2526 (Churchman J) (***GF***) at [70]; *Four Midwives* (supra) at [38]; and *Four Aviation Employees* at [28].
[19] *GF* (ibid) at [42]-[47]; *Four Aviation Employees* (ibid) at [33]-[36].
[20] *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].
[21] [2021] NZHC 3012 at [29]-[30].

> 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.

32. 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,*[22] 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.[23] 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. Applying it, there is a clear limit placed on the right by the directives.

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*:[24]

> 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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[22] [2021] VSC 741 at [161].
[23] UN Human Rights Committee, *CCPR 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].
[24] 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,[25] 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).**[26] The reasoning of Bell J in *Re Kracke* and *PBU & NJE v Mental Health Tribunal*[27] 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.[28]

Arbitrary

36. The approach taken by Bell J in these decisions to the meaning of arbitrary, within the right to privacy, is commended to the Court:[29]

> 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.**

37. This approach has largely been followed in other Victorian decisions. In *WBM v Chief Commissioner of Police* Warren CJ, with whom Hansen JA agreed, cited the United Kingdom approach as a useful precedent, where arbitrariness was described as encompassing *"**capriciousness, unpredictability, injustice and unreasonableness** — in the sense of **not being proportionate to the legitimate aim sought**".*[30] Most recently, in *Minogue v Thompson*, Richards J put it this way:[31]

> ...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.**

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

[26] 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,

[27] [2018] VSC 564 (Bell J).

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

[29] *PBU* at [124]; *Patrick's Case* at 395.

[30] *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).

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

38. 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.**[32] This forms part of the special human rights meaning adopted by Bell J in *Patrick's case* to arbitrariness under the *Charter.*[33]

38A. Richards J's decision was recently overturned on appeal to the Victorian Court of Appeal (**VCA**). In *Thompson v Minogue,* as to arbitrariness, the VCA stated:[34]

> 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 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…

The Court referred to what it had said earlier in its judgment in this regard:[35]

> … 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.**

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[32] 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].
[33] *Patrick's case* (supra) at 393 [77] – 395 [85].
[34] *Thompson v Minogue* [2021] VCA 358 (***Minogue*** VCA) at [55]-[57].
[35] Ibid, at [47].

39. To this description of arbitrariness in the human rights sense, and its incorporation of proportionality, should be added the component also derived by Bell J from international law, that the limit **be necessary in the circumstances of the case**. Bias, unlawful discrimination, injustice, bad faith, unreasonableness, unnecessary and ~~or~~ disproportionate limits upon human rights; all of these concepts may, either alone or in combination, be encompassed within arbitrariness. The human rights compatible meaning of arbitrary, in its use throughout the HR Act, therefore embraces the concept of proportionality ~~set out in s 13~~. Support for this approach is given in the Explanatory Notes:[36]

> This provision contains internal limitations. The protection against interference with privacy, family, home or correspondence is limited to unlawful or arbitrary interference. The notion of arbitrary interference extends to those interferences which may be lawful, but **are unreasonable, unnecessary and disproportionate**.

39A. The VCA in *Thompson* was correct to identify the question of determining a limitation before proceeding to consider justification. However, it should be noted that the obligation placed upon an applicant is described as sufficient evidence **capable of giving rise to an inference of limitation**. This is a lower, evidentiary onus, in the context of the ordinary civil standard. That there is an internal limitation to the right should not add to this burden. It should instead be seen as complimentary with the general limitation provision, with each limitation being seen through the lens of proportionality, in the human rights setting. See per Bell J in *Re Kracke:*[37]

> 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**.

39B. To the extent *Thompson v Minogue* (VCA) is taken to indicate to the contrary, it should not be followed as it is not the approach to be taken under the HR Act, and is clearly wrong.

39C. The context in which arbitrariness or proportionality falls to be considered often extends past the interests of the parties before the court. There is therefore some utility in

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[36] Explanatory Notes, Human Rights Bill 2018 (Qld), 22.
[37] *Supra*, at 35 [109]-[110].

conceiving of any evidentiary burden on that issue as resting with the party that is in the best position to assist the court to reach its determination.[38] Ordinarily, this will be the respondent, as a matter of practical reality. Onus, in human rights cases, is aided by considerations of practicality.[39]

39D. Any consideration of proportionality of the limit – whether as a matter of principle incorporated within the notion of arbitrariness in an internal limitations clause, or as made more structured within the HR Act in the general limitations clause contained in s 13 (which, it should be remembered, in sub-s(2) sets out relevant, but not exhaustive, considerations that provide a structured approach to the principle of proportionality which is encompassed in s 13(1), for ease of application by executive servants[40]) – will encompass overlapping considerations. Whether at a lesser civil standard with respect to proof of a limitation or at the more exacting standard of justification of the limit – the considerations, the ultimate weight to be afforded to them, and the evidence – will overlap, and in some cases, completely so.

40. If the directives are not justified, within the meaning of s 13 HR Act, then this right too is limited.

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

41. 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 of the European Convention on Human Rights (**ECHR**).

42. This right recognises the right of everyone to develop autonomous thoughts and conscience, to think and believe what they want and to have or adopt a religion, free from external influence.[41]

43. The HRC has also noted that the application of this right is likely to overlap with the right to equality.[42]

Religion

44. 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):*[43]

> [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, though canons of conduct which offend against the ordinary laws are outside

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[38] 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.
[39] *Re Kracke* at 35 [108], citing South African, Canadian, New Zealand and United Kingdom authority for the proposition (footnote 127).
[40] *Re Kracke* at 36 [112], citing the Human Rights Consultation Committee Report produced for the purposes of the *Charter* (2005) at [47] (footnote 134).
[41] Explanatory Notes, Human Rights Bill 2018, 20.
[42] 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).
[43] (1983) 154 CLR 120, 136.

the area of any immunity, privilege or right conferred on the grounds of religion. 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.

45. Whilst one's internal religious beliefs are not to be abridged, 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.[44] Further, to be protected, an act of *demonstrating* a person's religion or belief must be "intimately linked to the religion or belief".[45] The examples in s 20(1)(b) HR Act are in keeping with this approach.

Belief

46. 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 of traditional religions and protects *"theistic, non-theistic and atheistic beliefs, as well as the right not to profess any religion or belief"*.[46]

47. However, according to the ECtHR, dealing specifically with a belief about vaccination, to be a belief capable of protection it must reach a *"certain level of cogency, seriousness, cohesion and importance ... worthy of respect in a democratic society"*.[47] The right has been found to extend to pacifism[48] and academic beliefs.[49] The following criteria can be identified from United Kingdom authorities:[50]

    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.

48. In *R v AM,*[51] 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

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[44] *R (Begum) v Governors of Denbigh High School* [2007] 1 AC 100; [2006] UKHL 15 at [50] per Lord Hoffmann.
[45] *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].
[46] 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].
[47] *Campbell and Cosans v the UK (*1982) 4 EHRR 293; [1982] ECHR 1 at [36];
[48] *Arrowsmith v United Kingdom* (1978) 3 EHRR 218; [1978] ECHR 7
[49] *McAdam v Victoria University* [2010] VCAT 1429
[50] *R (Williamson) v Secretary of State for Education and Employment* [2005] 2 AC 246; [2005] UKHL 15 at [23]–[24], [57].
[51] [2010] ACTSC 149; (2010) 5 ACTLR 170.

on the one hand" and "religion or belief on the other".[52] 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 because the belief seemed entirely directed to her relationship with her parents and conflicted with their human rights under other sections of the Act.[53]

The evidence

49. Of the Applicants who raise the possibility of a relevant religious belief,[54] no evidence has been provided to demonstrate that the belief prevents the individual applicant being vaccinated. Nor has any evidence been provided about the canons of belief of the particular religions mentioned. If anything, it is unlikely that the applicable spiritual leader agrees with the opposition.[55] Accordingly, the religious belief aspect to s 20 is not likely engaged here.

50. One applicant indicates an 'ethical and moral' objection to the use of kidney cell lines from aborted foetus being used in the development of vaccines.[56] Further, another applicant identifies as vegan and expresses a moral opposition to any form of animal testing.[57] To the extent these beliefs are relevant to the COVID-19 vaccines in question, they 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), is limited.

51. The remainder of the reasons for objection, based on the affidavit evidence, are unlikely to do so. Those reasons may be summarised as:

    a) a mistrust over the safety and efficacy of the vaccine in light of the haste in which it was developed, including questioning if it will prevent an individual from contracting or spreading COVID-19 to others;[58]

    b) concerns about the risk to a person's fertility;[59]

    c) a belief that the vaccine is unnecessary;[60]

    d) concern about how the vaccine will interact with existing medical conditions;[61]

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[52] The same is true of the *Human Rights Act 2019* (Qld), s 20(1)(b)
[53] *R v AM* (supra) at [53]–[54].
[54] In BS 11254/21: Affidavits of KJ Gehringer (court doc no 8) and BO Oakley (court doc no 9).
[55] Affidavit of Oakley at [47] to [48]. (court doc no 9). The applicant notes that their Church does not have an 'official stance in relation to the vaccines, but support the individual's right to choose'. See also the discussion of this in *Larter* at [64].
[56] In BS 11254/21: Affidavit of KJ Gehringer (court doc no 8) at [26].
[57] Affidavit of Payne at [24] (court doc no 17).
[58] In BS 11254/21: Affidavit of Lance at [24] (court doc no 4), Affidavit of Barrell at [25] , Affidavit of Gehringer at [26], Affidavit of Oakley at[28], Affidavit of TD Payne at [24] (court doc no 17).
[59] In BS 11254/21: Affidavit of BJ Shanahan at [24] (court doc no 6) , Affidavit of TD Payne at [24] (court doc no 17).
[60] In BS 11254/21: Affidavit of BJ Shanahan at [24] (court doc no 6).
[61] In BS 11254/21: Affidavit of CK Barrell at [25], [26] (court doc no 5).

e) witnessing adverse reactions in others;[62]

f) the vaccine is only provisionally approved;[63] and

g) a 'professional belief' that an individual's medial history, current illnesses and medication regime must be considered by a medical practitioner prior to vaccination, based on personal experience as a nurse of potential adverse reactions to vaccination.[64]

52. This evidence does not suggest a long-standing or consistent belief or matter of conscience that would fall within the meaning of s 20 HR Act.

Section 15 – Right to Equality

53. Section 15 of the HR Act enshrines the right to equality, and in particular s 15(2) provides that every person has the right to enjoy their human rights without discrimination and section 15(4) provides for equal protection against discrimination. This is modelled on Article 26 *ICCPR*, which provides no definition of discrimination.

54. The HR Act defines discrimination inclusively, referring to discrimination under the *Anti-Discrimination Act 1991* (Qld) (**AD Act**), but is not limited to that.[65] Given the uniform application of the directives, indirect discrimination is the most relevant concept for consideration here.

Political belief or action

55. 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.[66]

56. Whilst opposition to the vaccine *may* be characterised as a political belief or activity within this approach, the evidence does not support it here.

Religion

57. 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.[67]

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[62] In BS 11254/21: Affidavit of Johnston at [27], Affidavit of Payne at [24]
[63] In BS 11254/21: Affidavit of Johnston at [27] (court doc no 7), Affidavit of KJ Gehringer at [26] (court doc no 8).
[64] In BS 11254/21: Affidavit of Trakosas at [6] to [9] (court doc no 27).
[65] Schedule to the HR Act.
[66] *Sherman & Grady v Anor* [2008] QADT 7; *Carey v Cairns Regional Council* [2011] QCAT 26.
[67] Schedule to the AD Act.

58. For the reasons discussed above, there is unlikely to be any discrimination on the basis of religious belief or activity.

Impairment

59. 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]

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

61. A 'medical contraindication' to the COVID-19 vaccine would amount to an 'impairment'. The directives all provide an exemption on this basis (as well as on religious grounds or other exceptional circumstances). The QPS directive requires the police or staff member to provide a letter from a treating doctor or specialist outlining the condition which makes it unsafe for the police officer or staff member to receive all available COVID-19 vaccines and whether the condition is temporary in nature, and if so, the duration. The QH and QAS directives do not provide further guidance about how a medical contraindication exemption is sought. The QPS approach should accommodate all impairments that might be raised, however it is premature to predict how the exemptions will operate in practice.

Other kinds of discrimination

62. Unlike in Victoria and New Zealand, the definition of discrimination in the HR Act is not limited to the meaning of discrimination under the AD Act.

63. The HRC has considered the potential for further grounds of discrimination that are analogous to those already protected in Article 26[70] and which reflect the experience of social groups that are vulnerable and have in the past or present suffered marginalisation.[71] On this basis, the HRC has previously concluded that infection with HIV/AIDS might constitute 'another status'.[72]

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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] 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].
[71] The grounds in article 2, paragraph 2 of the ICESCR are the same as those listed in article 26 of the ICCPR.
[72] 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].

64. 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.[73]

65. It is unlikely that vaccination status would meet this standard.

Exemptions

66. In assessing inconsistency between the directives and the AD Act, relevant exemptions must also be taken into account. Section 107 provides a person may do an act that is reasonably necessary to protect public health. Similarly, s 108 of the ADA provides a person may do an act that is 'reasonably necessary' to protect the health and safety of people at work. Further, an indirect discrimination claim must establish the term or condition imposed was not reasonable: s 11(1)(c). In the context of the HR Act, these considerations overlap with proportionality and necessity.

67. Ultimately, this right is not limited by the directives.

Section 23 – Right of participation in public life

68. Section 23 is modelled on Article 25 *ICCPR*, and is described as conferring 'a right to a democratic system'.[74] 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.

69. The term public service is not defined in the HR Act. Under the *Acts Interpretation Act 1954,* via s 5 of the *Public Service Act 2008,* the public service consists of the persons who are employed under the Public Service Act. It appears accepted that some (if not all) of the employees of the Respondents would be covered by this right.[75]

70. 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.*[76] Whilst the right recognises the setting of eligibility criteria outside of it that might limit the right, such criterial would in turn need to be compatible 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.'[77]

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[73] *Corbiere v Canada* [1999] 2 RCS 203, 219 [13].
[74] Explanatory Notes, Human Rights Bill 2018 (Qld), 21.
[75] For example, staff members of QPS appointed under s 2.5(b)(ii) of the *Police Service Administration Act 1990,* which refers to appointments under chapter 5, part 5 of the *Public Service Act 2008.* See also page 246 of the Queensland Police Service Statement of Reasons, Queensland Health Statement of Reasons page 28 and Affidavit of Clarke at [4].
[76] Explanatory Notes, Human Rights Bill 2018 (Qld), 21
[77] 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].

71. The directives may limit this right by preventing the continuing employment of the Applicants (or future employees) who are unvaccinated and cannot be redeployed. However, because the particular right engaged under s 23(2)(b) is that equal access to the public service, in circumstances where there is no limitation on the right in s 15 in the case of the Applicants, there will likewise be no limitation on the s 23 right.

Section 16 – Right to life

72. 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 this is limited to arbitrary deprivation of life. Not every action that results in death will be arbitrary[78] and as discussed earlier the term arbitrary is likely to encompass a consideration of proportionality. 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.[79]

73. The HRC has noted, in relation to the equivalent right in 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 enjoy 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'.[80] The Explanatory Notes to s 16 expressly discuss the positive obligation in Art 6.[81]

74. The Respondents also likely hold relevant obligations under other laws. For example, under s 19 of the *Work Health and Safety Act 2011* (Qld), a person conducting a business or undertaking must ensure, so far as is reasonably practicable, the health and safety of workers while the workers are at work in the business or undertaking.[82] 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]

75. In this context, the QHRC acknowledges that human rights are designed to protect the most vulnerable, and in Queensland it is clear that an outbreak of COVID-19 would impact most on communities such as older people, persons with disability, people in closed environments and First Nations persons. The Court may consider that, on the balance of the expert evidence, the directives promote the right to life.

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[78] Explanatory Notes, Human Rights Bill 2018 (Qld), 19.
[79] See for example *Osman v United Kingdom* 23452/94 [1998] ECHR 101 [115].
[80] UN HRC, *General comment No 36 – Article 6: right to life,* UN Doc CCPR/C/GC/36 (3 September 2019) 6 [26].
[81] Explanatory Notes, Human Rights Bill 2018 (Qld), 19.
[82] See Worksafe Queensland 'prosecution summary' for case no. E184384. In this context, the QIRC has recently found mandatory vaccination as a term of employment to be necessary, fair and reasonable: *Radev v State of Queensland* [2021] QIRC 414 and the FWC has similarly found the vaccine requirement for access to coal mine sites to be reasonable, despite the limits placed upon common law rights, subject to consultation requirements: *CFMMEU v Mt Archer* [2021] FWCFB 6059; *CFMMEU v BHP Coal* [2022] FWC 81.
[83] *Larter* at [100].

76. While the QHRC acknowledges that risks to the personal health of the Applicants must be considered, on the balance of the evidence, these risks are *de minimus*. Further, the Applicants' contention that the right to life of others is not a relevant consideration[84] should not be accepted.

Section 29(1) – Right to liberty and security

77. 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.

78. The right to security of the person is considered broader than the right to life.[85] 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.[86]

79. 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.'[87] 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.[88]

80. 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'.[89] In *RK v Mirik,*[90] 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.

81. In any event, the rights to life and security of other staff and the broader community will inform the justification of any limitation on rights arising from the directives.

Interpretation of statutory powers

Section 48(1) HR Act

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[84] Applicants' submissions at [93].
[85] UN Human Rights Council, *General Comment No 35: Article 9: Liberty and Security of person,* UNDOC CCPR/C/GC/35, [55]
[86] UN Human Rights Council, *General Comment No 35: Article 9: Liberty and Security of person,* UNDOC CCPR/C/GC/35, [3] and [9].
[87] UN Human Rights Council, *General Comment No 35: Article 9: Liberty and Security of person,* UNDOC CCPR/C/GC/35, [3]
[88] 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].
[89] 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].
[90] (2009) 21 VR 623 at [5].

82. Subject to an override declaration,[91] s 48(1) HR Act applies to all statutory provisions, whenever enacted.[92] Its statutory 'command' has two aspects:[93]

- consistency of interpretation with the statutory provision's intended meaning; and
- an interpretation which is compatible with human rights.

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

- does not limit a human right; or
- 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.

83A. 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.

84. Consistent with the 'modern approach' to statutory interpretation that is well-established in the courts of this country,[94] the Parliament's legislative recognition and protection of people's human rights in the HR Act now forms part of the context within which any statute 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 [with a presumed intention with respect to human rights], at least when the words used are open to such a construction.[95]

85. 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*[96] of s 6 *BORA*,[97] such provisions can be seen to make the State's commitment to human rights *"part of the concept of purposive interpretation."*[98]

85A. 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,[99] identifying the

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[91] Section 48(5) of the *Human Rights Act 2019* (Qld) ('HR Act').
[92] Section 108(1) HR Act.
[93] *Australian Institute for Progress Ltd v Electoral Commission of Queensland* (2020) 4 QR 31, 72 [114].
[94] *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].
[95] *Bermingham v Corrective Services Commission of NSW* (1988) 15 NSWLR 292, 302; *R v Young* (1999) 46 NSWLR 681, 687-688.
[96] *R v Hansen* [2007] 3 NZLR 1.
[97] 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.***"
[98] *R v Hansen* at [252].
[99] *Electrolux* (2004) 221 CLR 309 at 329, [19], *Momcilovic* at 46 [42].

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.

85B. 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*.

85C. 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:[100]

> 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...

85D. Courts in Australia interpreting under human rights statutes must stay true to the legislative purpose and not stray into legislative activity.[101] As Lord Hoffman in *R (Wilkinson) v Inland Revenue Commissioners*[102] indicated, in a passage noted by French 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.**
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> ... 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**

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[100] 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.

[101] *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).

[102] [2005] 1 WLR 1718 at 1723 [17]; [2006] 1 All ER 529 at 535.

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.

Proportionality as part of the interpretative task

86. New Zealand courts have incorporated proportionality analysis as part of the interpretative task for some years. In *Moonen v Film and Literature Board Review,*[103] 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:[104]

> ... 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 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.

87. 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*[105] 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

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[103] *Moonen v Film and Literature Board of Review* [2000] 2 NZLR 9.
[104] *Moonen* (ibid) at 16 [16].
[105] *R v Hansen* [2007] 3 NZLR 1 ('*Hansen*') at [57]-[60] (Blanchard J), [88]-[92] (Tipping J), [192] (McGrath J).

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.

88. Justice Gummow (with whom Hayne J agreed on this point[106]) and Bell J[107] on the High Court in *R v Momcilovic*[108] incorporated justified limits into the interpretative task under the *Charter,* quoting the following part of the decision of McGrath J in *Hansen*:[109]

> 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.

89. Gummow J then stated:[110]

> 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.

90. In an early case under the *Charter, RJE v Secretary to the Department of Justice,*[111] Nettle J adopted this kind of approach.[112] In that case, the then Solicitor-General (later Tate JA) posed the interpretative question in that case, where the statute clearly did limit human rights, as follows:[113]

> On the ordinary principles of statutory interpretation, does the statutory provision limit a Charter right in a manner that is unjustifiable?

Construing broad discretions

91. 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

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[106] *Momcilovic v R* (2011) 245 CLR 1 at [280] (Hayne J).
[107] Ibid, at [678], [681]-[684].
[108] *Momcilovic v R* (2011) 245 CLR 1.
[109] *R v Hansen* [2007] 3 NZLR 1 at 65 [191].
[110] *Momcilovic* at [168].
[111] [2008] VSCA 265; 192 A Crim R 156.
[112] At [54]-[55].
[113] Tate JA, "Statutory Interpretive Techniques under the Charter: Three stages of the Charter – Has the original conception and early technique survived the twists of the High Court's reasoning in Momcilovic?" (Human rights under the Charter: The development of human rights law in Victoria Melbourne conference, 8 August 2014).
[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].

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]

92. 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]

93. There is no reason why s 48(1) would not have a similar effect. 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,[118] identifying the specific rights against which only a clearly expressed or necessarily implied intention to abridge will be measured. 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:[119]

> 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.

94. The impact of *Canadian Charter* rights upon broad discretions placed upon executive decision-makers was first considered in *Slaight Communications Inc v Davidson.*[120] 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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[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] *Electrolux* (2004) 221 CLR 309 at 329, [19], *Momcilovic* at 46 [42].
[119] *Victoria Police Toll Enforcement v Taha* (2013) 49 VR 1 (*'Taha'*) at [189]-[195].
[120] *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.**

95. His Honour went on to indicate that applying this approach will lead to one of two results:[121]

(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.**

96. In *Re Kracke v Mental Health Board,* Bell J adopted this approach, in respect of a discretion reposed in a statutory body:[122]

> 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.

(His Honour referred to the passage from *Slaight Communications Inc,* quoted above, before continuing.)

> The consequence of this principle is that, in such a case, it is not the interpretation and compatibility with human rights of the authorising discretion that is in issue; **it is the compatibility with human rights of the exercise of the discretion.**

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[121] *Slaight Communications* at 1080.
[122] *Kracke* at [208], [210]-[211].

> In Victoria, it is perhaps more accurate to say that, under s 32(1), legislation conferring an open-ended discretion must be interpreted as allowing the discretion to be exercised only in a manner which is compatible with human rights, assuming that is not inconsistent with its purpose. The solution to a human rights problem of this nature therefore turns on engagement and justification. **Generally speaking, if a right is engaged, resolving the problem will depend on the proportionality of the exercise of the discretion.**

97. His Honour reiterated these views in *Re Lifestyle Communities Ltd (No 3).*[123]

98. 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[124] in light of the decision of *Hansen.* His Honour concluded that whatever the methodology, most importantly, a majority of the Supreme Court in *Hansen*[125] held that both the relevant right or freedom *and* any reasonable and demonstrable justification for the limit, bear on the interpretative task.[126] 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.

99. His Honour also considered the application of the principle of legality, which is apparently not as well entrenched in New Zealand as it is in Australia. His Honour described the principle 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.[127] 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 limits rights in a way that is reasonable and demonstrably justified.[128] It should be noted, however, that *Four Midwives*

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[123] [2009] VCAT 1859, [75]-[91].
[124] *Four Midwives* at [41]-[43], [49].
[125] Later confirmed by another majority of the Supreme Court in *New Health* at [145]: *Four Midwives* at [47].
[126] Ibid, at [46].
[127] *Four Midwives* at [61]-[62].
[128] Ibid, at [64].

involved consideration of a more specific statutory authority than here. The same 'legitimate question' arises here.

99A. It should be noted that a majority of the Supreme Court of New Zealand in *Fitzgerald v R*[129] 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.[130]

99B. This approach mirrors the view of French CJ in *Momcilovic* with respect to s 32(1) of the *Charter*.[131] 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 stated:

> **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.'[132]

99C. 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 the statutory power expressly or by necessary implication authorises such limitation. Following this approach, section 48(1) should similarly be regarded as operating to permit a general

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[129] [2021] NZSC 131.

[130] *Fitzgerald v R* [2021] NZSC 131 at [55], see also [56]-[57], see similarly O'Regan and Arnold JJ at [207] ("While there remains some dispute about the precise scope and meaning of s 6 of the Bill of Rights, there seems little doubt that it at least requires the courts to take a similar approach to that adopted under the common law 'principle of legality'. ...") and [217] ("But just as the principle of legality means that Parliament must use explicit language to override fundamental values protected by the common law, so too must it use explicit language where it seeks to override an absolute right protected by the Bill of Rights, such as the right protected by s 9 [BORA]. ...").

[131] *Momcilovic v The Queen* (2001) 245 CLR 1 at 50 [51].

[132] *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]. Moreover, this is arguably similar to the approach of the majority in *Hogan v Hinch* (2011) 243 CLR 506 at 548 [70], who stated, in respect of a statutory power of a judge to make certain orders if it is in the public interest to do so, that "the Act [containing the statutory power] '[s]o far as it is possible to do so consistently with [its] purpose]', must be interpreted in a way that is compatible with the civil and political rights set out in Pt 2 [of the Victorian Charter]. This method of interpretation is enjoined by s 32(1) of the [Charter]."

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.

Interpretation of the powers of direction

100. There is no indication in the applicable statutes of any express consideration by the legislature as to limiting the relevant human rights or abrogating relevant common law rights.

101. 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 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.

102. 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 apparently been required to be vaccinated for other illnesses prior to COVID-19.[134] Police have of course been found to enjoy particular powers and privileges that may justify other curtailments of their rights.[135]

103. The question of the scope of the power as determined under s 48(1) HR Act therefore turns upon ensuring that the governing statute has spoken sufficiently clearly – expressly or by necessary implication – to authorise limits being placed on human rights through the exercise of the power and if so, any limits imposed by decision-makers under it are reasonable and demonstrably justified. The power would be construed, consistent with this purpose, to be exercised in a human rights compatible manner, as defined in s 8. Where limits to human rights are authorised by the statute, the enquiry focuses upon compatibility of the decision itself, rather than the scope of the power.

103A. Due to their general rule-making nature, the discretions here are akin to, though not formally involving, regulation or subordinate legislation-making powers. They operate in the area of employment of essential services public servants. Whether those powers may be exercised to limit the human rights engaged here (protection from medical treatment without full, free and informed consent, and potentially privacy, freedom of religion and freedom of conscientious belief and expression) depend upon this authority being granted, by necessary implication from the purpose of the grant of power.

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[133] *Four Aviation Employees* at [77]; *Four Midwives* at [74]-[75].
[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.

103B. While the scope of s 48(1) may not be settled, it is hardly so vexed that a court should eschew dealing with it in this matter. The Attorney-General relies on *Nigro v Secretary to the Department of Justice*[136] as contrary to the QHRC's contended interpretation of s 48(1), but that case is arguably not to the point: the Court did not consider whether s 32(1) of the *Charter* operated similarly to the principle of legality, and the Court's finding turned on the particular statutory scheme pursuant to which the judicial discretion was exercised. It was a clearly expressed discretion with clear objectives and checks placed upon its exercise in limitation of human rights, expressly encompassed within it.[137] Recent New Zealand authorities deal directly with the issue of the principle of legality and its relation to the s 48 *HR Act* equivalent. Moreover, the submission of the QHRC, supported by those authorities, is a more logical reading of the *HR Act*: 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,[138] 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.[139]

103C. The second and third arguments of the Attorney-General[140] misconceive the QHRC's contentions. Section 48(1), properly understood, applies equivalently to the principle of legality such that a limitation of an enumerated human right, by the exercise of a statutory power, is valid only if the statutory power, expressly or by necessary implication, permits limitations of that right. If it does not permit such limitations, then the exercise of power in so limiting the right is invalid. If it does permit such limitations, the next stage of inquiry for a court is to determine whether the limitation (which is made by a decision) is only to the extent that is reasonable and demonstrably justifiable[141] - this inquiry is required by the terms of s 58 of the HR Act, but may be implied, in terms of the scope of the power granted, under s 48(1). It is submitted that s 48(1) and s 58 therefore work in tandem, rather than creating unnecessary duplication or incompatibility. Contrary to the third argument of the Attorney-General, if a court, pursuant to s 58(1), simply looked at whether a decision to limit a right was justified and determined that it was, it does not necessarily follow that the decision fell within the statutory power, as that statutory power, interpreted in accordance with s 48(1), may not have authorised such a limitation.

103D. Here, there is no express limitation of the right to protection from medical treatment without full, free and informed consent (s 17(c) HR Act), or freedom to manifest one's belief (s 20), or privacy (s 25). However, it is conceded that such powers, whether viewed as employment-related, or as permitting the issue of regulations (conditions of employment for the purpose of the provision of essential public services), have historically been understood to permit limits upon the human rights of health service providers, police officers and public servants more broadly by virtue of the nature of their appointment or employment. Rights of movement, association, freedom of expression etc., are routinely

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[136] *Nigro v Secretary to the Department of Justice* (2013) 41 VR 359; Amended Outline of Opening Submissions on behalf of the Attorney-General, Intervening at [5D] – [5E].
[137] See *Nigro v Secretary to the Department of Justice* (2013) 41 VR 359 at 407 [179] – 412 [204].
[138] See *Human Rights Act* (Qld), s 3(a).
[139] 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.
[140] See Amended Outline of Opening Submissions on behalf of the Attorney-General, Intervening at [5G], [5H].
[141] As understood by s 13 of the HR Act.

limited by the exercise of such employment-related powers in the past. It is understood that vaccinations have been required of at least some of the Applicants under similar arrangements in the past. Whilst this 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.

103E. Vaccination requirements as conditions of employment (limiting at least the right to protection against medical treatment without full, free and informed consent, the right to manifest one's conscientious belief, and, depending upon proportionality, the right to privacy) have not previously been challenged in the human rights framework now in place in Queensland. The QHRC contends that s 48(1) *HR Act*, applying in the same way as the principle of legality to statutory human rights, would require greater specificity than the present statutes give, to authorise the imposition of conditions of employment that limit these statutory human rights.

104. ~~However~~, Further, the principle of legality is not displaced by the HR Act: s 12 HR Act. The principles first articulated in *Coco v The Queen*[142] as to the requirement for express or necessarily implied abrogation of common law rights by statute arises due to the broad discretionary nature of the statutory directive powers that were exercised and the absence of any express or implied statutory authority to limit them.

105. The scope of the common law rights would, over time, be developed consistently with statutory human rights and the principle of legality should, in the QHRC's submission, develop to provide a similar level of protection for statutory rights that are not irresistibly abridged by statute.

Supreme Court review under s 59(2) HR Act

Operation of s 59(2)

106. 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).

107. In the present case, the Court's power under s 59 'piggy-backs' on the jurisdictional error claimed to be established under the traditional review grounds. Section 59(2) therefore permits review on the grounds of unlawfulness arising under s 58(1).

Jurisdictional error

108. This Court in reviewing compatibility with s 58(1) HR Act need not consider whether or not those obligations are of a jurisdictional kind. It is likely they are not, given the express terms of s 58(6)(a) of the HR Act.

109. However, this does not deprive the Court of the jurisdiction to make an order by way of remedy for any non-compliance with s 58(1), regardless of the success or otherwise of the traditional review grounds: s 59(2). The Court has the discretion to grant declaratory and

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[142] *Coco v The Queen* (1994) 179 CLR 427, 435.

if necessary injunctive relief.[143] A breach of s 58(1) may ground relief under either Parts 3 or Part 5 of the *Judicial Review Act 1991* (Qld).

Traditional grounds of review

110. The QHRC does not make any submissions about the traditional grounds of review raised by the Applicants (relating to the scope of the power and any jurisdictional facts unrelated to the HR Act grounds).

111. However, it should be noted that the QHRC contends that HR Act obligations *may* be relevant to traditional law grounds and *may* give rise to traditional law grounds in the way Martin J in *Owen-D'Arcy* saw a failure to properly consider human rights under s 58(1)(b) as a mandatory consideration in the circumstances of the decision-making power there under consideration. That decision was not appealed. His Honour declared the decision invalid on that basis, but this was not an order that the decision was *void ab initio.* His Honour did not order a remedy suggestive of a conclusion as to jurisdictional error.

112. Therefore, the Attorney-General's contention[144] as to why his Honour's approach to this ground ought not be followed, that his Honour did not consider the effect of s 58(6)(a), is not to the point. As to the effect of s 59(5), that provision relates only to the cause of action raised, which piggybacks on a traditional review ground. It does not deny the Court from making relief within its supervisory powers, once the jurisdictional hurdles are overcome by the nature of the application or claim brought.

113. The development of administrative law principles in the context of the existence of statutory protections for human rights, should occur. In addition to the ground of a failure to take into account relevant considerations, another traditional law ground of review that may be relevant where s 58(1) obligations exist is an exercise of discretionary power where the decision-maker has failed to personally consider the merits of a matter (the person's human rights) either through automatic application of a rule or policy or an unauthorised delegation of the decision (an improper exercise of power).

Review of compatibility

114. It is uncontroversial that s 58(1) HR Act applied to these decisions.[145]

115. 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:[146]

> ... 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

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[143] As occurred in *Owen-D'Arcy v QCS; Certain Children (No 2)* at [556], citing *Bare v IBAC* at [152], [388] and [624].
[144] Outline of Attorney-General [13].
[145] By operation of s 9(1) HR Act.
[146] *R v Home Secretary, ex parte Daly* [2001] 2 AC 532, 546-548.

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.

116. In *Certain Children* and *Certain Children (No. 2)* Garde and John Dixon JJ adopted this approach. These cases indicate:[147]

- 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.

- 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.[148] In conducting the review, the court is engaging in its supervisory jurisdiction. The degree of weight given to the 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.

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

117. These insights should be remembered, in the context of an urged adoption of the precautionary principle from health care policy to principle of law.

118. In *Owen-D'Arcy* Martin J affirmed that the jurisdiction of the Supreme Court on review is supervisory (not substitutionary) and unaffected by the merits of the case, but accepted that the Court's role under s 59 HR Act, like that provided for in its *Charter* counterpart, is a more intensive or higher standard of review than traditional judicial review.

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[147] *Certain Children* at [212]-[213]; *Certain Children (No. 2)* at [208]-[212], [216]-[218].
[148] 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].

119. In adopting the principles from the above authorities, Martin J also cited the following principles adopted by Richard J in *Minogue v Thompson*:[149]

> (a) No latitude is to be given to a decision-maker in determining whether the decision-maker gave proper consideration to relevant human rights in making a decision. It is primarily a question of fact whether, in a given case, a decision-maker has given proper consideration to relevant rights, as required by the procedural limb of [s 58(1)(b) HRA]. This is a different exercise from proportionality review of a decision for compatibility with human rights.
>
> (b) While some deference might be given to a decision-maker's assessment that a limit on human rights is justifiable – that will depend on the context in the circumstances including the extent to which the decision is supported and objectively justified by a transparent process of reasoning.
>
> (c) There is no place for deference in determining whether a decision-maker has given proper consideration to relevant human rights.
>
> (d) Proper consideration requires more than simply balancing the impact of the decision on a prisoner's human rights against the countervailing considerations of a prison administration. It requires both the identification of the human rights impacts of a decision on those it may affect, and, where a right may be limited, assessing whether the limit is justifiable in accordance with [s 13(2) HRA].

119A. On appeal, 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, or 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.[150]

119B. Indeed, the VCA also found such terms unhelpful when applied to assessment of compatibility with the substantive limb. The Court may give expertise and experience that attaches to decision-makers appropriate weight as warranted in the particular circumstnaces of the case, without any preconception that they may be given any particular deference, respect or latitude.[151]

120. Therefore~~, deference *may* be given to~~ decision-makers' views may be relevant and given appropriate weight on fact-finding, discretionary considerations and balancing depending upon the subject-area, the relevant (and relative) expertise of the decision-maker, the time within which such decisions were made, and the adequacy and transparency of the consideration of human rights that is demonstrated. But the principle should not lose sight of its institutional nature. The notion of deference is designed to ensure judicial decision-making does not stray into executive functions.

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[149] *Owen-D'Arcy* at [140] citing *Minogue* [2021] VSC 56 at [49] to [51].
[150] *Thompson* VCA at [92]-[93], summarised at [183].
[151] *Thompson VCA* at [100].

121. In the context of public health decisions made, particularly by CHOs and Health Ministers responding to the serious risks inherent in a global pandemic, with developing scientific data and evolving circumstances and associated time pressures, courts are more likely to allow a margin of appreciation.[152] See per Cooke J in *Four Aviation Employees:*

> [67] I accept, for reasons that I will explain in greater detail below, that there is a degree of evidential uncertainty as to the effectiveness of vaccination in reducing the likelihood of transmission of the Delta variant of COVID-19. The evidence establishes that it clearly does reduce the transmissibility of the earlier variants of COVID-19. But at the time that the Order was made, evidence in the form of scientific studies proving that it also reduced the transmissibility of the more contagious Delta variant was not yet available. However, neither the Minister nor the Court are obliged to confine their consideration on the potential for vaccination to inhibit transmission to what can be established by way of scientific proof. Any such limitation would likely lead to measures being taken too late. For the reasons I explain below I am satisfied that vaccination is likely to contribute to reducing the risk of transmission of the Delta variant. The Minister explained in his evidence that he was of this view when the Order was made, and I accept there was a proper evidential foundation for that conclusion...
>
> [119] Moreover, even if it were true that there was some underreporting of adverse events from the virus it would still not alter the essential balance of considerations that are key to determining whether the measures here are demonstrably justified. I am satisfied that the benefits of the vaccine are demonstrably high, with there being a need to take a risk minimisation approach to stop an outbreak or spread of the virus at the potential entry point of the virus into New Zealand. Employees in the position of the applicants are not being literally forced to vaccinate. They have lost their job as a consequence of choosing not to, but they still retain ultimate personal autonomy. They are not obliged to take the risks referred to in their argument...
>
> [126] I accept that the evidence that the vaccine materially reduces transmission of the Delta variant is uncertain. This has not been proved in a scientific sense. I conclude that it does contribute to reducing transmissibility, and that it accordingly contributes to minimising the risk of the outbreak or spread of COVID-19. But it is an open question that may be more readily demonstrated as further evidence comes to light. On the scientific evidence as it currently stands the measure can be justified on a risk minimisation basis given the implications of an outbreak, or the spread of COVID-19.

122. However, deference will not be as useful or appropriate where there is no health expertise or political accountability resting with the decision-maker.

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[152] *GF v Minister of COVID-19 response* at [83]-[84]; *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].

Compliance with s 58(1) HR Act

Proper Consideration – s 58(1)(b)

The principles

123. 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':[153]

> 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.

124. Section 58(5) of the HR Act provides an inexhaustive list of what proper consideration ~~might~~ entails:[154]

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

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

125. 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.[155]

125A. The addition of s 58(5) in the *HR Act* 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,[156] can be distinguished.

126. Martin J referred to and applied the test paraphrased by Tate JA in *Bare v IBAC*:[157]

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[153] *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].

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

[155] At [136]

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

[157] *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.

127. 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.[158] 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.

128. Proper consideration cannot be discharged after the decision has been made.[159]

Application

129. A preliminary question is whether the human rights considerations included in the statements of reasons constitute proper consideration by the relevant decision-makers themselves (the QPS Commissioner and the Health Chief Executive). This depends upon the evidence that each decision-maker in fact turned his or her mind to, and genuinely considered, those matters. The following observations may be made about that:

130. the human rights assessment attached to both statements of reasons appear similar, suggesting they were prepared by a third party. It is noted, however, that the QPS reasons added considerations applicable to the additional requirement of PPE and greater clarity in the exemptions; and

131. it is unclear how long each decision-maker had access to the human rights reasoning for review and consideration before issuing the directives.[160]

132. Subject to the evidence satisfying the Court that each of the decision-makers themselves genuinely considered and balanced the matters set out in the human rights compatibility documents, the procedural obligation in s 58(1)(b) HR Act has been complied with in respect of the Health directive and the QPS directive. The human rights considerations attached to both statements of reasons satisfy the requirements of s 58(5) as they consider all rights that are affected as well as the compatibility of the directives with human rights in detail.[161]

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[158] At [137].
[159] *Certain Children* at [190]-[191].
[160] Page 26 of the Queensland Health Statement of Reasons.
[161] See also affidavit of McGill at [22] to [26], [38] to [52] (court doc no 40 in 11258/21).

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

The principles

133. In *Certain Children v Minister for Families and Children (No 2)* John Dixon J suggested a two-step process for assessing incompatibility:[162] [163]

- The plaintiff/applicant for human rights relief need only establish prima facie incompatibility, before the burden would shift to the defendant public entity to justify the limitations caused by their action/decision.

- The burden on the public entity to justify limitations is high, requiring a degree of probability commensurate with the occasion, and must be strictly imposed in circumstances where the individual concerned is particularly vulnerable.

Justification

134. The Respondent must demonstrate that the limitations to these rights are reasonable and justified within the meaning of s 13.

135. 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.

136. 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.[164] 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.[165]

137. 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.

138. 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.[166] With the High Court's reference in *McCloy,* and later also *Palmer,* to the Hon.

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[162] *Certain Children (No 2)* at [203]; *Owen-D'Arcy* at [131]-[132].
[163] *Owen-D'Arcy* at [132] citing *Minogue* at [180].
[164] *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].
[165] Explanatory Notes, p16-18.
[166] *McCloy & Ors v New South Wales & Anor* (2015) 257 CLR 178 (*'McCloy'*) and *Palmer v Western Australia* [2021] HCA 5

Aharon Barak's academic treatise on *Proportionality,*[167] the approach sanctioned by the High Court can be seen to align with Mr Barak's 'structured' approach to proportionality in the context of limits to constitutional rights, which sees the issue to be determined by reference to:[168]

a) *A means-end analysis:* a proper purpose, a rational connection between the purpose and the means used (probability of fulfilment of purpose) and the least restrictive (on rights) means of still achieving the proper purpose is adopted; and

b) *A balancing of the right with the restriction*: comparing the benefit to the harm; a proportional response or proportionality *stricto sensu.* **This requires consideration of the importance of the right, the intensity of the limitation of the right and the probability of the right's limitation, the weighing of importance of satisfying one principle and the non-satisfaction of the other. Even where proportional alternatives were rejected as not as effective in attaining the legitimate purpose, they may be considered at this stage.**

139. 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)

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

- Is the objective of the legislation pressing and substantial?
- Is there a rational connection between the legislation and its objective?

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[167] A Barak, *Proportionality: Constitutional Rights and their Limitations* (2012) Camb. U Press, United Kingdom.
[168] Ibid, at 340-366.
[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].

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

- Is the deleterious effect of the Charter breach outweighed by the salutary effect of the legislation?

141. In *Owen-D'Arcy,* Martin J cited much of 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

142. A series of cases in other jurisdictions have held that limits imposed by vaccination requirements have been proportionate.

143. 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 were:

(a) the question was 'not whether there was a different, less prescriptive policy might have been adopted' but whether 'in striking the balance that they did, the Czech authorities remained within their wide margin of appreciation in this area'. There is a particularly wide margin of appreciation given by the institutions of the ECHR to State entities;[180]

(b) in view of the expert material and the importance of children being immunised from an early age, the Court accepted the approach of compulsory vaccination of children adopted by the Czech legislature was the answer to the pressing social need to protect individual and public health and to guard against decreasing rates of vaccination among children;[181]

(c) the choice of the Czech legislature to adopt a mandatory approach to vaccination was supported by relevant and sufficient reasons, including the paramount importance of

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[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] *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 [310]
[181] At [281]-[284]

the best interests of the child and the view that voluntary vaccination is not sufficient to achieve and maintain herd immunity;[182]

(d) consideration of proportionality of the interferences, including: the effectiveness and safety of the vaccinations, the availability of exemptions from the duty in certain cases, that there was no provision allowing for the vaccination to be forcibly administered, and the non-admission to nursery school was protective rather than punitive; and

(e) accordingly, the Court concluded that the Czech authorities did not exceed their margin of appreciation, and the measures could be regarded as 'necessary in a democratic society'.[183]

144. Similarly, in *Boffa and Others v. San Marino,*[184] the EComHR found that a requirement imposed by the San Marino health-care agency pursuant to a Decree, for the applicant to have his children vaccinated was a legitimate interference with the right to respect private life. This was because as *"a vaccination campaign...which obliges the individual to defer to the general interest and not to engage the health of others where his own life is not in danger, does not go beyond the margin of appreciation left to the State".*[185] In protecting the personal sphere, the right *"does not always guarantee the right to behave in the public sphere in a way which is dictated by such a belief".*[186] This was particularly so in circumstances where a requirement to be vaccinated applied universally.[187]

145. In *GF v Minister of COVID-19 Response,* Churchman J in the New Zealand High Court 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. The applicant's employment had been terminated as a result of the Order. 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".* It was ultimately held that the infringement of rights under ss 11 (right to refuse to undergo medical treatment) and 19 (freedom from discrimination) were no more than was justified in a free and democratic society. His Honour also observed it was not for the Court in judicial review proceedings to second-guess policy decisions made by the government where, even if involving incomplete scientific evidence, economic and social factors had clearly been considered.[188] Thus, the Order was not *ultra vires* the Act, nor irrational.

146. In *Four Aviation Security Service Employees*,[189] Cooke J in the New Zealand High Court 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

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[182] At [288]-[289]
[183] At [310]
[184] *Boffa v San Marino* (European Commission of Human Rights, Application No 26536/95, 15 January 1998).
[185] At 34.
[186] At 33.
[187] At 34.
[188] *GF* at [83]-[86].
[189] [2021] NZHC 3012 (Cooke J).

minimising the risk of outbreak or spread. It is the wider public benefit of the vaccine (rather than individual benefit) that justifies the limit:

> In the fluoride debate addressed in *New Health*, the public benefit was derived from the benefit to the community overall in addressing bad oral health. Here, the workers at the border are not being required to be vaccinated because of the benefit of the health system that may follow from avoiding the demands on the system from their own COVID-19 infection. **The measure is only justified if it provides a wider public benefit. And in the end that comes down to a single issue — whether the vaccine contributes to suppressing the transmission of the Delta variant of COVID-19.**

147. In such circumstances, the limit was justified:

> [124] Given the above findings I return to the ultimate question — whether the limit upon the s 11 right prescribed by law is demonstrably justified in a free and democratic society. I apply the steps from *R v Oakes* adopted in New Zealand in *R v Hansen* to do so. My conclusions are that:
>
> (a) The compulsory vaccination of these workers serves a purpose sufficiently important to justify curtailment of the right.
>
> (b) The means chosen to achieve the objective of minimising the risk of an outbreak of, or spread of COVID-19 in New Zealand is proportionate as:
>
> (i) the measure is rationally connected with its purpose;
> (ii) the measure impairs the right of freedom no more than is reasonably necessary for the sufficient achievement of that purpose; and
> (iii) the limitation is in due proportion to the importance of the objective.
>
> [125] Apart from the factors I have already addressed it is also important to note that those in the position of the applicants are not actually compelled to be treated. They retain the option to refuse vaccination. The implication is that, if they are unable to be redeployed by their employer, their employment may be terminated. That has happened for the applicants. But what they have lost is their job, rather than their right to refuse to be vaccinated. That is relevant to assessing the proportionality of the measures imposed here. The Act is not being used to literally compel vaccination for anybody.
>
> [127] I accordingly conclude that the measure is demonstrably justified, and the Order is accordingly not invalid for being inconsistent with the Bill of Rights.

148. In *Lavergne-Poitras v Canada (Attorney-General),*[190] the Federal Court of Canada found a government policy to impose a contractual term of requiring contractors to be vaccinated against COVID-19 was justified, despite its serious consequence of loss of employment. The Court found that material harm to the public interest would arise if the injunction was issued, by way of increased health risks to employees.

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[190] [2021] FC 1232.

149. In *Loielo v Giles*[191] 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:

> [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.**

150. Critical factual features leading to the conclusion of justification were the purpose of protecting public health, and the lack of other reasonably available means to achieve the purpose of reducing infections, particularly considering what had been tried, what had followed, the urgency of the situation and the risks if infection rates surged again.[192]

151. It might also be recalled that in *Palmer v Western Australia,*[193] 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[194] and that there was no effective alternative to a general restriction on entry.[195] 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.[196]

Application

152. This matter involves a balancing of the rights of the Applicants against the rights and safety of other workers, clients and the broader community. Other courts to date have generally found vaccination requirements imposed by government with respect to frontline employment in response to COVID-19 to be a proportionate limitation on rights.

153. Subject to a review of all of the expert evidence, the QHRC is likely to concede that the same result would follow here.

154. However, the proportionality assessment of the directives under consideration must take into account their operation and statutory setting, the urgency of the decisions, the available scientific advice and data, and if it can be demonstrated that the Respondent considered, tried or rejected as untenable, less restrictive reasonably available means to meet the risks. An assessment of proportionality in these circumstances would not

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[191] [2020] VSC 722.
[192] At [251] – [253].
[193] [2021] HCA 5; 95 ALJR 229. See also *LibertyWorks Inc v Commonwealth of Australia* [2021] HCA 18.
[194] [2021] HCA 5; 95 ALJR 229 at [74], [77] per Kiefel CJ and Keane J
[195] At [80], [81] per Kiefel CJ and Keane J
[196] At [164] – [166] per Gageler J and [281]-[286], [291] per Edelman J.

necessarily be transferable to a different requirement imposed on a different group in the community.

(a) The nature of the human right

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

155. Several rights are limited by the directives 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 and medial treatment.

156. It is relevant to note that the measures are not compulsory treatment but that the Applicants retain the option to refuse vaccination.[197] Nevertheless, there is a significant degree of intrusion of these rights, with 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.

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

- These are high risk workplaces for infection of COVID-19.
- Both policies attempt to only mandate the vaccine for the higher risk categories within those workplaces (and in the case of QH, stagger the cohorts within that based on further risk assessment). This is discussed in the context of positive WHS duties placed on employers.[198]
- The impact of absenteeism due to COVID-19 illness or quarantining could significantly impact on their ability to deliver core services, which are critically important to the community (and responding to COVID)-19.
- Both sets of employees also have a high risk of spreading the virus to vulnerable members of the community.
- Staff/unions were consulted on proposal.
- Exemptions on grounds of religious belief/observance and medical contra-indication are included, although not entirely clearly defined.
- As at 19 November 2021, 2602 applications for exemptions had been received for QH employees. Of these, 359 have been approved, 509 refused and 1734 still under

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[197] *Four Aviation Employees* at [125].
[198] See for example affidavit of McGill, [9] to [10].

consideration. As at 19 November, all but one applicant in these proceedings have applied for an exemption. These applications have not yet been determined.[199]

158. The extent of the effectiveness of the vaccine is in dispute. However, the Applicants concede that vaccination offers partial protection against the virus albeit that it diminishes in effectiveness over time'. [200] On any case, the measures will clearly help achieve the purpose of public safety and protecting human life.

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

159. On the evidence provided to date, the Respondents' reasons do not explain:

(a) the necessity for the directives, in light of voluntary vaccination rates within each relevant service at the time i.e. an assessment of whether the opportunity for voluntary vaccination was sufficient to achieve the same end. The affidavit of McGill indicates that prior to the directive, 87% of Queensland Health's employees had received at least one dose;[201]

(b) why (if Professor Petrovsky's opinions are accepted and Associate Professor Searles' rejected) protection against COVID-19 transmission could not have been equally achieved by instead requiring those individuals who object to taking the vaccine (on any ground) to use PPE and undertake rapid-antigen testing;

(c) why re-deployment away from the frontline to alternative positions, for those individuals who object to taking the vaccine (on any ground), is not a reasonably available alternative to dismissal; and

(d) whilst the reasons indicate the plan to conduct "regular reviews", why the directives themselves do not provide an end date for their operation or a date for review.

160. In considering 'less restrictive and reasonably ways' to achieve the purpose, the Court goes further than considering whether the chosen measure falls within a range of reasonable alternatives. The Court is required to assess the Respondent's explanation for why there was no reasonable less restrictive alternative available.[202]

(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

161. Without effective protective measures, the rights of the vulnerable people will be far more impacted. Their health and safety is a very important purpose, as are community-wide protections.

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[199] Affidavit of McGill at [53] – [54]
[200] Applicants' submissions at [92]
[201] Affidavit of McGill 4, [13].
[202] *Owen-D'Arcy* at [249]. C.f. Attorney-General's submission at [143].

162. On balance, the QHRC expects the directives requiring vaccination for these kinds of public service workers was justified, subject to careful review of the totality of the expert evidence.

163. Whilst the decisions may be justified on that basis, the explanation for not taking any reasonably available less restrictive alternative ways to protect the functioning of the services and the greater public must be clearly shown by the Respondents.

P Morreau
Counsel for the QHRC (intervening)
~~8 December 2020~~ 7 February 2022