

## SUPREME COURT OF QUEENSLAND

REGISTRY: Brisbane  
NUMBER: BS11254/21

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

REGISTRY: Brisbane  
NUMBER: BS12168/21

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

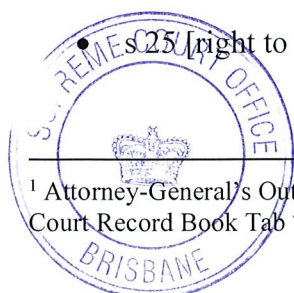
REGISTRY: Brisbane  
NUMBER: B11258/21

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

### CLOSING SUBMISSIONS QUEENSLAND HUMAN RIGHTS COMMISSION (INTERVENING)

#### Human rights engaged & limited

1. The human rights engaged by the directives are wide-ranging:<sup>1</sup>
  - S 15(2) [right to equality]
  - S 15(4) [right to non-discrimination]
  - s 17(c) [freedom from medical treatment without consent]
  - s 20 [freedom to manifest one's conscientious or religious belief]
  - s 23 [right of equal access to the public service]
  - s 24 [right to property]
  - s 25 [right to privacy]



<sup>1</sup> Attorney-General's Outline of Submissions CFI 113 in *Johnston*, CFI 84 in *Witthahn*, CFI 116 in *Sutton* Court Record Book Tab 7 at [3(i)].

- s 29 [right to security of the person]
2. The human rights limited by the directives, on the evidence, are, in the QHRC's submission:
    - s 17(c) [freedom from medical treatment without consent]
    - s 20 [freedom to manifest one's conscientious or religious belief]
    - s 24 [right to property]
    - s 25 [right to privacy]
  3. The evidence indicates that there are more marked impacts of the directives upon particular cohorts, namely,
    - a. those with some form of medical or mental impairment which they might consider makes the vaccination a greater risk, but this is not supported by medical opinion, or where vaccines are more difficult, but not impossible; and
    - b. certain religious or conscientious beliefs against vaccination or aspects of the available vaccines grounding the objection.
  4. Therefore, the directives potentially indirectly discriminate against these groups. In that sense, s 15 arises, at least at the engagement stage.
  5. There are measures in place to exempt those with impairments that amount to a contra-indication on the basis of medical evidence, and for those with religious beliefs which prevent them from taking the vaccine.
  6. Those with conscientious objections to the vaccine, and those whose medical or mental impairments do not meet the level of a medically certified contra-indication, or whose religious belief is not supported by the particular faith, based in doctrine, fall foul of the mandate.<sup>2</sup>
  7. For those who decline to comply with the vaccine requirement on any of these bases, there are severe implications for the person's job, and as a result, their standing in the community and their livelihoods.

---

<sup>2</sup> Transcript of Proceedings, *Johnston and Others v Katarina Ruzh Carroll; Witthahn and Others v Wakefield; Sutton and Others v Commissioner of the Queensland Police Service* (Supreme Court of Queensland, Martin J, 2 June 2022) 4-64 at lines 10-16 indicating no exemptions provided for conscientious objection.

## Section 17(c)

8. The QHRC's outline of opening submissions set out the approach to this right taken in a series of cases by the New Zealand High Court.<sup>3</sup> The Attorney-General submits these ought to be distinguished on the basis that NZ has 'charted its own right' by separating out medical treatment from experimentation into a freestanding right.<sup>4</sup>
9. The QHRC disagrees that these cases may be distinguished on this basis. Both jurisdictions have extended the operation of the internationally recognised right, to medical 'treatment' and not just 'experimentation'. Despite the different wording, the intent behind both s 11 of the New Zealand *Bill of Rights Act 1990* (**BORA**) and the equivalent rights in the HR Act and the *Charter* before it, is exactly the same.<sup>5</sup> Both have been lauded as providing a better level of protection of personal autonomy and integrity.<sup>6</sup>
10. In circumstances where the right encompasses the same elements in both jurisdictions, and in light of the requirement that the 'broadest possible' scope be given to the rights under the HR Act, there is no reason to distinguish the NZ approach.<sup>7</sup>
11. Further, the approach taken by New Zealand courts under the *BORA* is institutionally more akin to that to be taken under human rights statutes in Australia than that taken by Canadian courts to administrative review under the Canadian *Charter of Rights and Freedoms*, where the jurisprudence is progressing down the path of reasonableness review, rather than justification analysis.<sup>8</sup>

## Section 20

12. At the legislative level, these rights are engaged, and, on the evidence, there are a number of religious beliefs attested to (who have not been granted exemptions), and at least one conscientious belief in the form of veganism, which includes opposing animal testing in the vaccines) such that the manifestations of these beliefs are limited by the directives.<sup>9</sup>
13. Information on the Therapeutic Goods Administration, included in the affidavit of Dr Griffin, suggests there has been testing on animals used in the development of all

---

<sup>3</sup> QHRC's Outline of Submissions CFI 115 in Johnston, CFI 85 in Witthahn, CFI 118 in Sutton Court Record Book Tab 6 at [15]-[17]. Also discussed at [179]-[185]

<sup>4</sup> Attorney-General's Outline of Submissions CFI 113 in Johnston, CFI 84 in Witthahn, CFI 116 in Sutton Court Record Book Tab 7 at [115].

<sup>5</sup> See Explanatory Note, Human Rights Bill 2018, 3 and 19, which identifies Article 7 of ICCPR as the source of clause 17 including noting that 'This subclause expands on article 7 of the ICCPR by providing that consent must be given for medical treatment, and that consent must be informed'. Similarly, Explanatory Memorandum, Charter of Human Rights and Responsibilities Bill 2006 (Victoria), 11 states: "This sub-clause is also modelled on article 7 of the Covenant. This clause expands on article 7 of the Covenant as it also includes a prohibition on medical or scientific treatment without consent. In addition it has been modified to provide that consent must be full, free and informed."

<sup>6</sup> *Re Kracke* at [545].

<sup>7</sup> *Owen D'Arcy v Chief Executive, Queensland Corrective Services* [2021] QSC 273 (Martin J) (*Owen-D'Arcy*) at [118]-[120].

<sup>8</sup> *Doré v Barreau du Quebec* [2012] 1 SCR 395.

<sup>9</sup> Affidavit of Tony Payne in *Johnston* (CFI 78) filed 4/3/2022 included Court Book Tab 12, Par 10 (m)

provisionally approved vaccines in Australia.<sup>10</sup> Dr Griffin’s report suggests AstraZeneca potentially used human foetal cells in the manufacture of its vaccine, and Pfizer and Moderna may have used such cells in the ‘proof-of-concept’ phase, although these cells are not included in the vaccines themselves. According to Dr Griffin, the Novavax vaccine did not use human cell lines in making its vaccines.<sup>11</sup> The Novavax vaccine was provisionally approved for use in Australia on 20 January 2022.<sup>12</sup>

## Section 24

14. The Attorney-General and QHRC are in agreement that the right to property arises; there being a present right to income and professional status that was taken away, that could not be taken away on arbitrary grounds.<sup>13</sup>
15. What is lost by a limit to this right, is at the crux of this case.

### Internal limits: Arbitrariness

#### Human rights meaning of arbitrary

16. In *WBM v Chief Commissioner of Police (WBM)*, Warren CJ, with whom Hansen JA agreed, referred to the United Kingdom precedent as apt, where arbitrariness was described as encompassing “*capriciousness, unpredictability, injustice and unreasonableness — in the sense of not being proportionate to the legitimate aim sought*”.<sup>14</sup>
17. The Attorney-General adopts this approach in her submissions.<sup>15</sup>
18. This human rights meaning of arbitrariness rejects the approach taken by Kaye J below in *WBM*, of arbitrariness as limited to the irrational, illogical or unreasonable.
19. It also rejects arbitrariness as limited to what is “manifestly unjust” or “such oppressive or gratuitous interference with human rights as they could find no justification in the reasonable minds of others”.<sup>16</sup>

---

<sup>10</sup> Report of Dr P Griffin of 29/4/2022, CFI 104 in *Johnston* and Court Book Tab 27 provides links at page 14-15 to information from the TGA regarding the approved vaccines in Australia. All brands confirm animal testing.

<sup>11</sup> Report of Dr P Griffin of 29/4/2022, CFI 104 in *Johnston* and Court Book Tab 27, 12-13

<sup>12</sup> <https://www.health.gov.au/initiatives-and-programs/covid-19-vaccines/approved-vaccines/novavax>.

<sup>13</sup> Attorney-General’s Submissions in reply to QHRC CFI 116 in *Johnston*, CFI 87 in *Witthahn*, CFI 120 in *Sutton Court Record Book Tab 8a*, [51]-[52].

<sup>14</sup> *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).

<sup>15</sup> Attorney-General’s Outline of Submissions CFI 113 in *Johnston*, CFI 84 in *Witthahn*, CFI 116 in *Sutton Court Record Book Tab 7* at [150(d)].

<sup>16</sup> *Attorney General (South Australia) v Adelaide City Corporation* (2013) 249 CLR 1 per French CJ at 34 [48] – 35 [52].

20. This human rights meaning therefore also includes, as part of considering proportionality, that the measure is **necessary in the circumstances**, to meet sufficiently important ends. See *Re Kracke*<sup>17</sup> per Bell J. *Re Kracke* was a case concerning involuntary mental health treatment. Justice Bell referred in that case to international authorities on the meaning at the international human rights level. First, relevantly, to the European Court decision of *Handyside v United Kingdom*, that:

the interference complained of corresponded to a pressing social need, whether it was proportionate to the legitimate aim pursued and whether the reasons given to justify it were relevant and sufficient at law<sup>18</sup>

21. Next, in considering *R (Munjaz) v Mersey Care NHS Trust*,<sup>19</sup> a case looking at seclusion in hospital, Justice Bell suggested the critical consideration is whether legitimate objectives implemented by proportionate means *the only means* of protecting others from violence or intimidation and for the shortest period necessary to that end.<sup>20</sup> In particular, in *R (Munjaz)*, Lord Bingham stated that “*properly used, seclusion will not be disproportionate because it will match the necessity giving rise to it.*”<sup>21</sup>

22. In *Patrick’s case*, his Honour drew upon the concept of arbitrariness from the decisions of the UN Human Rights Committee in *Toonen v Australia* and *A v Australia*. In *A v Australia* the Committee said:<sup>22</sup>

the Committee recalls that the notion of ‘arbitrariness’ must not be equated with ‘against the law’ but be interpreted more broadly to include such elements as inappropriateness and injustice, it must be necessary in all the circumstances of the case ... the element of proportionality becomes relevant.

23. In *Re Kracke*, after reviewing these several authorities, Justice Bell concluded that “the presence of safeguards is an important consideration in determining whether an interference is unlawful or arbitrary.” Quoting Beatson et al in a ‘leading text’, his Honour says:<sup>23</sup>

Absence of arbitrariness, in convention law, means that the law contains adequate safeguards, both procedural and substantive, to ensure that the power may be used only for its designated purpose and may not be abused...

The law should not be arbitrary, which means it should accord with the value system of the Charter and be reasonable (proportional to the legitimate end sought and necessary in the circumstances of the given case). Discretionary limitations should have safeguards which give individuals adequate protection from arbitrary

---

<sup>17</sup> *Re Kracke and Mental Health Review Board* (2009) 29 VAR 1 (*Re Kracke*) (Bell J) at [169]-[171].

<sup>18</sup> *Re Kracke* at [113]-[117], [157]

<sup>19</sup> *R (Munjaz) v Mersey Care NHS Trust* [2006] 2 AC 148 (*R (Munjaz)*).

<sup>20</sup> *Re Kracke* at [120]-[123]

<sup>21</sup> *R (Munjaz)* at [32]-[33]

<sup>22</sup> *PJB v Melbourne Health (Patrick’s case)* (2011) 39 VR 373 (Bell J) at 393 [77] – 395 [85].

<sup>23</sup> *Re Kracke* at [187] and [744]. In the first passage quoting Jack Beatson et al, *Human Rights: Judicial Protection in the United Kingdom* (2008) at [3-21] and *Re Kracke*

interference. Specific limitations may be dealt with under the legality requirement or proportionality as appropriate.

### Onus

24. The approach of the VCA in *Thompson v Minogue*<sup>24</sup> places a low level evidentiary onus on an applicant to establish an objecting inference (absent explanation) of arbitrariness.<sup>25</sup>
25. It is the lowest possible onus that might be set, as its application in any case, would need to consider the practicalities behind proving arbitrariness. The Hon Aharon Barak, writing on proportionality, applying principles adopted in human rights judicial determinations worldwide suggests:

practical considerations must inform onus in human rights cases – and practically speaking, any evidence that might indicate either for or against arbitrariness is in the hands of a respondent.<sup>26</sup>

26. There is, however, an alternative approach to internal limits, that does not place *any* requirement upon an applicant to show arbitrariness before a right is seen as limited and therefore justification is engaged. In *Re Kracke*, Bell J suggested:<sup>27</sup>

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).

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.

27. The combination of both internal limits and a general limit provision is a uniquely Australian phenomenon.<sup>28</sup> In *McDonald v Legal Services Commissioner*, Bell J found in considering freedom of expression:

---

<sup>24</sup> *Thompson v Minogue* [2021] VCA 358 [47]

<sup>25</sup> Attorney-General's Outline of Submissions CFI 113 in *Johnston*, CFI 84 in *Witthahn*, CFI 116 in *Sutton* Court Record Book Tab 7 at [150(b)]

<sup>26</sup> A Barak, *Proportionality: Constitutional Rights and their Limitations* (2012) Camb. U Press, United Kingdom, 447-448.

<sup>27</sup> *Re Kracke* at [109]-[110]

<sup>28</sup> *PBU & NJE v Mental Health Tribunal and Ors* (2018) 56 VR 141; *PJB v Melbourne Health (Patrick's Case)* (2011) 39 VR 373; *McDonald v Legal Services Commissioner (No 2)* [2017] VSC 89

- a. both internal and external limitations applied in the sense that they should be applied ‘harmoniously as part of one coherent scheme’. In particular, they should not be applied to result in reducing the substantive scope of the right;
  - b. the preferable reconciliation would be that the internal limit identifies the particular considerations that are relevant to the general limitation inquiry; it identifies that the right might be limited and identifies the purposes for which it might be limited.<sup>29</sup>
28. While this may overlap with the assessment of justification provided for in s 13 of the HR Act, matters of practicality suggest that subjective arbitrariness (discriminatory acts, acts done for improper purposes, acts not done in good faith) may only be raised in evidence available to a respondent. So too will as to evidence going to the proportionate nature of the limit measure.
  29. The QHRC submits for an approach that reflects Bell J’s jurisprudence in the first instance – because it does not require an applicant to prove what is ultimately in the hands of the respondent; that is, an applicant must show only a limit to the broad, unlimited scope of the right.
  30. However, if not, the QHRC submits that the Court endorse the evidentiary onus set by the VCA in *Minogue v Thompson*, which remains a low threshold test. That is, it being sufficient for an applicant to achieve an objective inference of arbitrariness that might objectively, reasonably arguably arise from the nature of the decision, its statutory source, its impact on human rights and any reasons available to an applicant. Relevant factors would include absence of need, disproportion, discriminatory impact, unfairness, lack of legal foundation, failure to comply with the necessary conditions of lawfulness, and lack of proper consideration of human rights etc.

## **Construction under s 48**

---

### **Introductory matters**

31. If the Respondent in *Witthahn* is exercising common law powers, which seems to be the case, then no question of s 48(1) arises in respect of that review.
32. The QHRC’s withdraws its written opening submissions raising the possibility that the QPS Directions are statutory instruments and adopts the AG’s position on that question.<sup>30</sup> These submissions proceed on that basis.

---

<sup>29</sup> at [31]-[33], citing Carolyn Evans and Simon Evans, *Australian Bills of Rights: The Law of the Victorian Charter and ACT Human Rights Act* (LexisNexis Butterworths, 2008) 166 [5.21].

<sup>30</sup> Attorney-General’s Submissions in reply to QHRC CFI 116 in *Johnston*, CFI 87 in *Witthahn*, CFI 120 in *Sutton*; Court Record Book Tab 8a, [3(a)].

## Reply to the AG's submissions

33. The AG submits no recourse to s 48(1) is required in the task of construction raised in this case.<sup>31</sup> On that point, the QHRC disagrees, strongly.
34. The QHRC submits that a human-rights compatible interpretation of s 4.9(1) PSAA is open, and should be adopted by the Court, that the scope of the power is limited to imposing only justified limits upon human rights.
35. This would read into the power, when exercised in emergency circumstances, an implied temporal limit or requirement to reconsider, when the circumstances change and the emergency subsides.
36. Section 48(1) is a statutory command that applies to construction of all statutory provisions in Qld, subject to the presence of an override declaration(s 48(5)).
37. The Explanatory Note to the Human Rights Bill 2018 says:

a court may not depart from the purpose of a provision, but “*may depart from the literal or grammatical meaning of the words used in exceptional circumstances*”.<sup>32</sup>
38. This restates the principles articulated most famously in *Project Blue Sky*,<sup>33</sup> but endorsed in a human rights context by Gummow J (with whom Hayne J agreed) in *Momcilovic*.<sup>34</sup> Referring to s 8, the Explanatory Note concludes ‘this means that it is clear that the court must apply a proportionality analysis when interpreting a statutory provision under cl 13’.<sup>35</sup>
39. The primary reason the AG submits s 48(1) should not be applied, is to avoid the effect of the process of construction, which is to define the lawful scope of the statutory power.
40. She submits that such a result was not intended by the application of s 48(1):
  - a. due to the operation of s 58(6), that a breach of s 58(1) does not affect the validity of the act or decision made<sup>36</sup>; and
  - b. by s 48(4), that s 48(1) does not affect the validity of an Act or the provision or “a statutory instrument” that is not compatible with human rights, where empowered to be so by the Act under which it is made.<sup>37</sup>

---

<sup>31</sup> Attorney-General's Outline of Submissions CFI 113 in *Johnston*, CFI 84 in *Witthahn*, CFI 116 in *Sutton*; Court Record Book Tab 7 at [3(a)], [3(b)], [8]-[37]

<sup>32</sup> Explanatory Note, Human Rights Bill 2018, 30-31.

<sup>33</sup> *Project Blue Sky Inc v Australia Broadcasting Authority* [1998] HCA 28; (1998) 194 CLR 355, 384 [78].

<sup>34</sup> *Momcilovic v R* (2011) 245 CLR 1 at [170]-[171].

<sup>35</sup> Explanatory Note, Human Rights Bill 2018, 31.

<sup>36</sup> Attorney-General's Outline of Submissions CFI 113 in *Johnston*, CFI 84 in *Witthahn*, CFI 116 in *Sutton* Court Record Book Tab 7 at [29]

<sup>37</sup> Attorney-General's Outline of Submissions CFI 113 in *Johnston*, CFI 84 in *Witthahn*, CFI 116 in *Sutton* Court Record Book Tab 7 at [27]

41. However, in relation to AG's first point, the limits of the effect of a breach of s 58(1), on review under s 59 of the HR Act, does not touch upon what is required of a court in construing legislation.
42. In relation to the Attorney-General's second point, section 48(1) must be read on its own terms. It is in mandatory terms with respect to all legislation.
43. Rather, section 48(4) was designed to ensure that even where the Court cannot construe legislation compatibly with human rights, this does not effect the validity of the legislation. See the Explanatory Note to the Human Rights Bill 2018:

This means that legislation will remain valid even if the court or tribunal cannot interpret the Act or provision in a way which is compatible with human rights. Incompatible statutory instruments will also remain valid, provided that the Act under which it was made empowered the making of a statutory instrument which is incompatible with human rights.<sup>38</sup>

44. Section 48(4) was not intended to, nor could it, place limits upon the task of statutory interpretation conducted under the mandate of s 48(1).
45. The AG's submission suppresses the operation of s 48(1) in a way that does not accord with its intended operation. It reduces its application to something less than the principle of legality and only of use when there is a clearer, more directed statutory power that limits human rights. References to concepts of "threshold compatibility" and "the least incompatible" places undue downwards pressure on the provision's application in a way that was not intended.<sup>39</sup> That approach should not be adopted by the Court.
46. The further submission made by the AG is that where there is a broad-based discretion allocated to a public entity, there is no need to engage in an interpretative process, in circumstances where the statute does not on its face engage with human rights, and it is accepted that s 58(1) applies to ensure human-rights-compatible exercises of discretion.<sup>40</sup>
47. The difficulty with that is that s 48(1) applies to *all* statutory provisions, whether or not s 58(1) applies. A carve-out for broad-based discretions suffers from the difficulty in identifying where the cut-off lies, for the application of s 48(1).
48. To the contrary, broad powers are inherently susceptible to misuse. Where there is limited textual direction, this is the natural resting place for human rights-compatible meaning, to ensure that powers are exercised compatibly with human rights unless otherwise authorised by the legislation.

---

<sup>38</sup> Explanatory Note, Human Rights Bill 2018, 31

<sup>39</sup> Attorney-General's Outline of Submissions CFI 113 in *Johnston*, CFI 84 in *Witthahn*, CFI 116 in *Sutton* Court Record Book Tab 7 at [19], [21]-[22]

<sup>40</sup> Attorney-General's Outline of Submissions CFI 113 in *Johnston*, CFI 84 in *Witthahn*, CFI 116 in *Sutton* Court Record Book Tab 7 at [29] ]; Attorney-General's Submissions in reply to QHRC CFI 116 in *Johnston*, CFI 87 in *Witthahn*, CFI 120 in *Sutton*; Court Record Book Tab 8a, [34].

## Approach

49. Rather, it is contended that the *first question of construction* in accordance with s 48(1) is whether the statute limits human rights? Here, that turns on an assessment of any implied authority, by the purpose of the power, in its context in the PSAA, to place limits upon the human rights engaged here, of members of the police force.
50. The Applicants contend that there was no authority extending to the mandated administration of medical treatment, engaging s 17(c) HRA.
51. In that context, the approach of the Queensland Court of Appeal in *Nugent v Commissioner of Police (Qld) and Another* is important.<sup>41</sup> There, attention was focused on the particular right at play: privilege against self-incrimination. The privilege was found to be impliedly abrogated by the PSAA. The question of implied authority must be looked at by reference to the legitimate purpose of the exercise of power being of maintaining the police force and protecting the safety of members of the public with whom it interacts, and as between members.
52. It is likely that Parliament intended that the QPS Commissioner could respond in an emergency scenario to limit the human rights engaged here, by requirements of vaccination for the force where necessary to ensure continued delivery of its services to the State or as necessary to protect the public, or members of the force, from harm.
53. However, the *second question of construction* asked by s 48(1) – and the important one here – is whether, if the statute has impliedly permitted the placing of limits upon the human rights engaged here, has it, by express words or necessary intention, authorised unjustified limits, or exercises of power that are incompatible with human rights?
54. It clearly has not. The scope of the power allocated to the QPS Commissioner by the statute is, in accordance with ordinary public law principles, limited to reasonable and proportionate exercises of the power. Section 48(1) has the effect of setting the scope of decisional freedom under s 4.9 PSAA to decisions which only impose justified limits to members' human rights, as a matter of law.

## Support in the authorities for this approach

55. The one binding authority from the High Court on the interpretative task under the comparative provision in the Victorian *Charter*, *Momcilovic v R*, was divided on the approach to interpretation. The only common approach adopted throughout is a rejection of the UK 'remedial' approach to interpretation.
56. There are therefore three broad approaches taken in the authorities.

---

<sup>41</sup> (2016) 261 A Crim R 383 at [3], [72], [79]-[80].

57. **First**, human rights are considered part of the context. In many ways this is already the case, purely by virtue of the enactment of the HR Act itself. Further, as Crennan and Kiefel JJ said in *Momcilovic*:

The statutory direction in s 32(1), that statutory provisions “must be interpreted in a way that is compatible with human rights”, is qualified by the recognition that such an interpretation is to be effected only “[s]o far as it is possible to do so consistently with their purpose”. This statutory direction seeks to ensure that Charter rights are kept in mind when a statute is construed. The direction is not, strictly speaking, necessary. In the ordinary course of construction regard should be had to other existing laws. The Charter forms part of the context in which a statute is to be construed.<sup>42</sup>

58. This approach has been adopted alongside the second principle discussed next in post-*Momcilovic* caselaw in Victoria.<sup>43</sup>

59. **Second**, human rights interpretation requires a presumption that Parliament does not intend to limit human rights, or if limiting, does not intend to limit rights in an unjustified way, unless this is clearly set out expressly or by necessary implication, in the statute.

60. Akin to the operation of the principle of legality, this principle incorporated by s 48(1) to apply to statutory human rights, operates to the fullest extent upon broadly framed powers and discretions, which can be referred to, in the most open-ended way, as operating on constructional choice. French CJ expanded on what he had previously said in brief terms in *Hogan v Hinch*,<sup>44</sup> placing the interpretative mandate in s 32(1) alongside the principle of legality.<sup>45</sup>

*The subsection limits the interpretation which it directs to that which is consistent with the purpose of the statutory provision under consideration. It **operates upon constructional choices** which the language of the statutory provision permits. Constructional choice subsumes the concept of ambiguity but lacks its negative connotation. It reflects the plasticity and shades of meaning and nuance that are the natural attributes of language and the legal indeterminacy that is avoided only with difficulty in statutory drafting.*

*... It **requires statutes to be construed against the background of human rights and freedoms** set out in the Charter in the same way as the principle of legality requires the same statutes to be construed against the background of common law rights and freedoms. The human rights and freedoms set out in the Charter in significant measure incorporate or enhance rights and freedoms at common law. Section 32(1) applies to the interpretation of statutes in **the same way as the principle of legality but with a wider field of application.**<sup>46</sup>*

---

<sup>42</sup> *Momcilovic v R* (2011) 245 CLR 1 at [565]

<sup>43</sup> For example *Slaveski v Smith* (2012) 34 VR 206 at [23]-[24]; *Nigro & Ors v Secretary to the Department of Justice* at 382-383 [82]-[85].

<sup>44</sup> *Hogan v Hinch* (2011) 243 CLR 506 at [27], [29].

<sup>45</sup> *Momcilovic* at [38]-[40], [50]-[51], [61]-[62] (French CJ).

<sup>46</sup> Further discussed in QHRC’s Outline of Opening Submissions, Court Book Tab 6, [95].

61. The AG submits that if human rights are part of the purpose, then purpose cannot perform its constraining role.<sup>47</sup> However, if seen as the presumption described in the above cases, that is not the case.
62. *Third*, where the statute clearly limits human rights, the question shifts to whether the legislative limit is proportionate.<sup>48</sup>

### Scope of broad-based discretions

63. Discretions are not ever unlimited, under traditional law review principles. They take their scope from the Act and the purpose of the authorising provision. In this way, discretions must be exercised under law – with clarity, transparency, proportionately, and reasonably. The QPS Commissioner’s prescribed responsibility is for the efficient and proper administration, management and functioning of the police service in accordance with law.<sup>49</sup>
64. The law of this State now includes compatibility with human rights at the level of statutory interpretation and at the level of decision-making – either through not limiting human rights, or where limiting, only doing so to the extent justified under the HR Act.
65. Courts have long been asked to construe the scope of broad-based general discretions to do things as considered necessary or convenient. In *Attorney-General (SA) v Adelaide City Corporation* French CJ reviewed authorities up to that point on the validity of delegated legislation,<sup>50</sup> and stated that the principle of legality in its protection of, in that case, the common law right of freedom of speech, and its effect upon statutory construction:
- ... may affect the scope of discretionary powers which involve the imposition of restrictions upon freedom of speech and expression.<sup>51</sup>
66. His Honour was considering the validity of by-laws passed for the *convenience* and *good order* of the locality, which were limited only by the scope of the power within the Act.<sup>52</sup>
67. Meagher and Groves suggest that the application of the principle of legality to subordinate instruments:

---

<sup>47</sup> Attorney-General’s Outline of Submissions CFI 113 in *Johnston*, CFI 84 in *Witthahn*, CFI 116 in *Sutton* Court Record Book Tab 7 at [16]

<sup>48</sup> *R v Hansen* [2007] NZSC 7; [2007] 3 NZLR 1 at [57]-[62] (Blanchard J), [88]-[92] (Tipping J), [191]-[192], [252] (McGrath J); *Momcilovic* at [168] (Gummow J, with whom Hayne J agreed, at [280]); [678], [681]-[684] (Bell J); *Australian Institute for Progress Ltd v Electoral Commission of Queensland* (2020) 4 QR 31 at [114]-[119].

<sup>49</sup> As set out in the affidavit of Katarina Ruzh Carroll APM, CFI 16 in *Johnston* and Court Book tab 16 at [1].

<sup>50</sup> For example *South Australia v Tanner* (1989) 166 CLR 16

<sup>51</sup> *Attorney-General (SA) v Adelaide City Corporation* (2013) 249 CLR 1 [44]

<sup>52</sup> *Attorney-General (SA) v Adelaide City Corporation* (2013) 249 CLR 1 at [25], [29]

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.

68. Further, 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.<sup>53</sup>

69. To similar effect, the scope of administrative discretions is set by only proportionate infringements of Constitutional rights where required by competing public interests.<sup>54</sup>

70. Section 48(1) would act conformably with these principles in its application to discretions of the kind here, in so far as they operate to authorise the imposition on limits to statutory human rights. It would operate to constrain the decisional choice permitted by s 4.9 PSAA, to make decisions that are compatible with human rights (only placing justified limits on human rights), namely:

- a. that the measure is necessary to protect public safety and/or force continuance; and
- b. given that it is an emergency measure imposed in response a pandemic, it is impliedly temporary and subject to review at reasonable intervals.

## Section 59

---

71. The QHRC disagrees with the written submission of the Attorney-General,<sup>55</sup> and supports the applicants, that once the jurisdictional requirement in s 59(1) is met, other traditional law grounds of review may be made out on the breach of the statutory obligation in s 58(1)

72. The QHRC agrees that s 59(1) is intended to deal *exhaustively* with a person's *right* to seek relief or remedy – that is, the person's *entitlement* to bring a case for remedy on the basis of a breach of s 58(1)

73. It does that by requiring a pre-existing ground to bring the proceeding, that has no such reliance. It is a jurisdictional limitation aimed to reduce litigation to those cases where there is already a basis to seek relief or remedy on other grounds of unlawfulness.

---

<sup>53</sup> D Meagher and M Groves "The Common Law Principle of Legality and Secondary Legislation" (2016) 39 UNSWLJ 450, at 451 and 469

<sup>54</sup> See *Comcare v Banerji* (2019) 267 CLR 373; [2019] HCA 23; *Wotton v State of Queensland* [2012] HCA 2; (2012) 246 CLR 1

<sup>55</sup> Attorney-General's Outline of Submissions CFI 113 in *Johnston*, CFI 84 in *Witthahn*, CFI 116 in *Sutton* Court Record Book Tab 7 at [46]-[54].

74. However, s 59 does not require a Court conducting judicial review, to consider the requirements of s 58 as sitting aloof from the requirements of traditional law grounds when such grounds are otherwise raised by virtue of the obligation being found in statute.
75. Such a breach may not alone amount to jurisdictional error. But that does not mean that relief would be refused, if the decision is unlawful in this way. One can consider a number of traditional law grounds may be raised as relevant in any given case (e.g. improper delegation or application of policy without regard to the merits, relevant or irrelevant considerations, failure to observe natural justice obligations etc).

### **Proper consideration – s 58(1)(b)**

---

76. The principles of proper consideration are well-established in light of the decision in *Owen-D’Arcy*<sup>56</sup> and there appears no argument on these as between the AG and the QHRC.
77. To the opening submissions, the QHRC would further note in *Certain Children No 2*, a senior decision-maker, in that case a minister, attempted to give proper consideration to human rights through briefing material prepared by others. The Court found nothing inherently wrong in such a process, but that the resources available to such a decision-maker, including through the Victorian Government Solicitor’s Office, were relevant to the standard of proper consideration as required by the *Castles* test:

The circumstances here are exceptional, however, in that the Minister was guided by the *Certain Children* decision and the Charter compatibility was carried out by, or under the direction of, the VGSO. The standard of the decision-makers’ discharge of responsibility ought to be higher than what was expected of the Secretary in *Castles*.<sup>57</sup>

78. Relevantly, the Court noted that the onus falls on the respondents to show that proper consideration was given to relevant human rights.<sup>58</sup>
79. In relation to the QPS Directives, the QHRC submits that the evidence demonstrates a process-based approach which may not have permitted genuine consideration *in advance of making the decision* to limit human rights, as to whether human rights should, and to what extent, would, be limited in, or otherwise inform, the measure taken. Whether to take the measure and the terms on which it was to be imposed.
80. The QHRC appreciates that a senior decision-maker such as the QPS Commissioner will often engage in an ongoing process of decision-making informed by briefing material from several sources. In this case, the decision was not operationalised until the Commissioner signed the direction.

---

<sup>56</sup> *Owen-D’Arcy* at [134]-[141]

<sup>57</sup> *Certain Children (No 2)* [2017] VSC 251; 52 VR 441; 266 A Crim R 152, [491].

<sup>58</sup> *Ibid*, at [527]

81. Further, the Human Rights Compatibility Assessments (HRCA) for Directions 12, and to a lesser extent for Direction 14, were thorough in the rights identified and discussed.
82. Nonetheless, there is some evidence that consideration of human rights occurred *after* the primary decision to introduce a vaccination requirement on all staff, which was made on or around 23 August 2021.<sup>59</sup>
83. Iterations of draft direction 12 and accompanying HRCAs were developed over time, likely from 27 August to 7 September 2021.<sup>60</sup> The earliest date the Commissioner appeared to consider a HRCA was 30 August 2021 being the Monday following Deputy Commissioner Smith receiving it from Crown Law.<sup>61</sup>
84. There is a real question that the consideration was retrospective only and did not at all inform the primary decision to introduce a mandate at the time that it was made.
85. Decision-makers can of course rely upon briefings to ensure that relevant considerations are identified and weighed as part of consideration with respect to human rights.
86. But the ultimate weighing balance must be in fact done, in order to reach a proportionate result. This can't occur *after* a decision has been made.<sup>62</sup> This gives rise to real concerns if a position has already been reached, and the process of human rights assessment happens *after the fact*, to justify an end result, rather than informing that end result.
87. As indicated in the QPS directive itself (5) – the decision required weighing of important individual human rights against “the interests of the community, including the human rights of others, and the need to ensure the QPS is able to serve the community”.

---

<sup>59</sup> See index of material relied upon by decision maker, DS-02 to Tab 17, Doc #1, Memorandum dated 23/8/21 from D Smith to decision maker which says ‘following our discussions on the developing and growing risks to our workforce, their safety and to our capability to provide services to the community, I have sought and received advice from Crown Law. It recommends that a direction be drafted under Commissioner’s authority to require vaccination’. See also oral evidence of Commissioner indicating discussion and decision made prior to memorandum being prepared: Transcript of Proceedings, *Johnston and Others v Katarina Ruzh Carroll; Witthahn and Others v Wakefield; Sutton and Others v Commissioner of the Queensland Police Service* (Supreme Court of Queensland, Martin J, 1 June 2022) 3-88. See also evidence of D Smith: Transcript of Proceedings, *Johnston and Others v Katarina Ruzh Carroll; Witthahn and Others v Wakefield; Sutton and Others v Commissioner of the Queensland Police Service* (Supreme Court of Queensland, Martin J, 2 June 2022) 4-48 lines 30-37.

<sup>60</sup> See Exhibit 23: Draft Direction 12 prepared on 27 August 2022; Evidence of D Smith: Transcript of Proceedings, *Johnston and Others v Katarina Ruzh Carroll; Witthahn and Others v Wakefield; Sutton and Others v Commissioner of the Queensland Police Service* (Supreme Court of Queensland, Martin J, 2 June 2022) 4-58 lines 4-16.

<sup>61</sup> Evidence of D Smith: Transcript of Proceedings, *Johnston and Others v Katarina Ruzh Carroll; Witthahn and Others v Wakefield; Sutton and Others v Commissioner of the Queensland Police Service* (Supreme Court of Queensland, Martin J, 2 June 2022) 4-56, lines 40-44.

<sup>62</sup> *Certain Children v Minister for Families and Children* [2016] VSC 796; 51 VR 473 at [190]-[191].

88. Stated as such, where a limit on an individual's human rights is said to be *against* the interests of the community, including the HR of others, and the need to ensure the continued availability of the police service, it is clear where the balance lies.<sup>63</sup>
89. A separately flawed process of consideration occurs with regard to direction, no 14. Rather than properly considering if the primary measure remained justified (with reference to factors such as vaccination rates across the community and QPS officers and frontline staff and level of risk), it only sought to justify changes made to the implementation of the decision (eg addition of a booster shot<sup>64</sup>) and was likely in error in how proper consideration proceeded additionally on that basis. It was not the amendments that were the focus, but, due to its nature as an emergency response based upon changing science, and the continued overall effect, in a substantive way, on human rights, whether the measure remained justified at that point in time.
90. It must be said, however, that such a balance of an individual's rights versus community interests are often the subject of judicial and administrative decision-making (sentencing, parole, mental health etc). Proportionate decision making is also integral to the judicial function. It could have been incorporated at this high level of policy decision-making at an early stage to ensure that the decision itself was reached after a process of weighing human rights considerations and not just by the advice that the limits imposed are justified.
91. What the HR At does is provide a structured approach to questions of proportionality, the criteria that is brought to bear, to allow a decision-maker to properly weigh those competing interests in a way that focuses attention on the *need* for the measure, its *effectiveness* to meet its stated aims, and ways that the measure might be implemented in a *less intrusive, of human rights, way*.
92. Many of these same issues arise in relation to the QAS directive, particularly as there does not appear to be evidence in *Witthahn v Wakefield* going to any of these issues.

### **S 58(1)(a) justification**

---

93. The QHRC agrees with the AG's submissions regarding proportionality analysis, including that built into s 13.<sup>65</sup>
94. As foreshadowed above, some aspects of a measure that are not as narrowly tailored may be relevant to an overall assessment of proportionality, and may not alone be sufficient to resist a finding that the measure was justified.
95. Together, different features might indicate a lack of justification.

---

<sup>63</sup> Court Book tab 17: Affidavit of D Smith, 19/11/21, Exhibit DS-02, pages 261-264.

<sup>64</sup> Court Book tab 19: Affidavit of D Smith, Exhibit DS-20, page 105.

<sup>65</sup> Attorney-General's Outline of Submissions CFI 113 in *Johnston*, CFI 84 in *Witthahn*, CFI 116 in *Sutton* Court Record Book Tab 7 at [168]-[170].

96. However, other aspects of a measure will be significant enough to alone have that effect. In *Re Kracke* Bell J suggested that:

There may be cases where **a safeguard is an indispensable ingredient to the proportionality of the limitation. A limitation may so interfere with a human right that, without the proper observance of the safeguard, the limitation becomes a manifestly excessive response to the pressing and substantial social need.** Within a system of limitations, it may be the degree of the limitation must needs vary. The safeguard may be an indispensable ingredient in the mediating principle. In such cases, the proper operation of the safeguard may be critical to the proportionate relationship between the limitation and its purpose. It may also be necessary for the satisfaction of the legality requirement.

**...If the safeguard is indispensable for the proportionality of the limitation, then the limitation will be incompatible with human rights if the safeguard fails.**<sup>66</sup>

97. His Honour quoted Lord Hope from *R (Munjaz)* regarding the importance of a limitation coming to an end:<sup>67</sup>

It shares the aims of the Code in this respect, and its aim is a legitimate one. It also aims to ensure that the procedure is resorted to in a way that is proportionate, as it is designed to avoid harm to the patient and to ensure that, even in long-term cases, **it is brought to an end as early as possible.**

98. Ultimately, whilst accepting the principle, Bell J did not see compliance with required review dates operated as a pre-condition to the validity of the order, in the circumstances of that case. His Honour concluded that unreviewed mental health orders are not incompatible with human rights because the system contains a range of safeguards and checks and balances of which reviews, although of considerable importance, are only one part.<sup>68</sup>
99. Here, however, emergency powers set on particular medical advice, must be considered for revocation, where they limit human rights, and when the necessity for the directives to continued was at question due to several changes including:
- a) medical advice changing regarding the effectiveness of vaccination
  - b) medical advice changing regarding the risk of emerging strains (eg omicron)
  - c) the vaccination levels of the community and these workforces.
100. These kinds of powers must be prompted for revocation, and given a time limitation or set review date, in the circumstances of an epidemic. The QHRC suggests in the

---

<sup>66</sup> *Re Kracke* at [766] – [767].

<sup>67</sup> *Re Kracke* at [124].

<sup>68</sup> *Re Kracke* at [784].

circumstances of COVID-19 this could reasonably be no later than quarterly, or when vaccination levels reach a particular mark.

101. In contrast with the decision in *Re Kracke*, in this case the failure to provide a limit, or date for consideration of revocation/review, is an important matter that will demonstrate proportional response to an emergency threat, that may in some circumstances be of a conditional kind, in so far as justification.
102. In light of the limited evidence provided, and the failure to identify a clear threshold for review in the QAS directive, it appears no meaningful review has taken place since it was made.<sup>69</sup>
103. The evidence of the QPS Commissioner indicated some informal, ongoing reviews may have taken place. The factors considered appear to have been the revocation of a CHO directions requiring vaccination to enter certain hospitality venues and hospitals, ATAGI advice, and decisions of other similar agencies not to introduce a mandate.<sup>70</sup> Nonetheless, this does not appear to have included a consideration of the continued need for the measures based on the vaccination levels, risk and need across QPS and the broader community.
104. Coupled with the failure to set clear review threshold in the Directive itself, the QHRC submits the respondents have not discharged the onus upon them to demonstrate a compatible limitation on rights.

### **Application – QPS directive**

105. The QHRC does not wish to be heard on what will be drawn from the expert evidence.
106. Assuming the weight of medical evidence supports the resort to such measures as necessary for public safety and/or continuance of the relevant workforce, as at 14 December 2021, and as at 31 January 2022, there are nonetheless barriers to the Court concluding there is justification for the limitation on rights arising from the directives.
107. **Firstly**, in relation to s 13(2)(a) there appears to have been an absence of assessment of the *capacity* for vaccines to secure continued service – including analysis of how vaccination, on the basis of the data available at that time, would meet that need. That was a particularly critical factor in the New Zealand High Court’s decision in *Yardley*.
108. **Secondly**, in relation to s 13(2)(b), the aim of the measure is a *sufficiently important* legitimate aim there are community interests and rights to safety and continued provision of services

---

<sup>69</sup> As discussed in QHRC’s Outline of Submissions CFI 115 in *Johnston*, CFI 85 in *Witthahn*, CFI 118 in *Sutton* Court Record Book Tab 6 at [166]-[168]

<sup>70</sup> Transcript of Proceedings, *Johnston and Others v Katarina Ruzh Carroll; Witthahn and Others v Wakefield; Sutton and Others v Commissioner of the Queensland Police Service* (Supreme Court of Queensland, Martin J, 3 June 2022) 5-58 to 5-65.

109. **Thirdly**, regarding section 13(2)(c), the measure must *in fact* meet the aim (is *Rationally connected*)

- by in fact ensuring the continued service of the QPS/QAS including by reducing transmission and duration of sickness, as required to ensure the continued service)
- by in fact protecting the safety of other QPS employees, or others in the community

110. The evidence suggests:

- the current Omicron strain of COVID-19 is much less likely to cause severe illness; and
- the effect of vaccines on reducing transmission is reduced.

111. There is a danger here, of referring to occupational health and safety obligations, in the context of measures designed to counteract an external health threat emergency. Under HR Act focus must instead shift to level of risk presented by virtue of the nature of the employment and the nature of that risk – whether the failure to impose the measure would expose others to an unjustified safety risk

112. On that basis, there is arguably a stronger rationale connection for the QAS directives even to the more recent past, compared to QPS.

113. **Fourthly**, regarding s 13(2)(d), the limits on individual human rights are *necessary* to meet sufficiently important community interests and rights; that is, there is no other reasonably available way to meet the important community interests and rights that would involve no limit or a less intrusive (more narrowly tailored) limit. This requires:

- a. Measure was necessary on the evidence to meet the stated aim
- b. In the emergency context: Limited in time/reviewed regularly
- c. Less intrusive alternatives to vaccination considered and rejected as either inconvenient or less efficacious than the measure

114. Regarding s 13, the Attorney-General submits that a suite of measures which includes vaccination falls within the range of reasonable alternatives in this case.<sup>71</sup> The QHRC submits that the question on review is whether the measure was the least intrusive on human rights of the reasonably available options that are as equally effective; not that the

---

<sup>71</sup> Attorney-General's Outline of Submissions CFI 113 in *Johnston*, CFI 84 in *Witthahn*, CFI 116 in *Sutton* Court Record Book Tab 7 at [203]

selection of the measure need only fall within a group of reasonably available options that are more or less intrusive on human rights.

115. The onus on the respondents is a heavy one, it must be made on sound evidence, giving some allowance for emergency decision-making in quickly shifting circumstances.

116. The features that point to less proportionate aspects to the measure:

- a. The non-inclusion of exemption for genuine conscientious objection –
  - i. Not covered by exceptional circumstances.
  - ii. No reason why that is not the subject of an exemption, in light of the nature of what that is agreed to encompass. A genuine longstanding stance taken about vaccination for instance is likely to be as engaged by the directive as a genuine religious belief.
- b. Importantly, a matter that might sit by itself as a pre-conditional feature to a justified measure, the QHRC contends, the failure in the directive to provide a timeframe for review for continued necessity, and continued operation. Not all measures implemented by QPS directives will require regular review. But the nature of the power here, responding to a pandemic, was of a kind that did.
- c. The non-review of it for now almost 6 months is significant, given the directions' imposition as a result of an emergency situation. Further, a proper, comprehensive review is clearly necessary in light of changing circumstances, which include the prevalence of Omicron variant (and absence of Delta strains), which have made a significant impact in the way COVID-19 is now experienced and managed.). Further, the rising vaccination levels across the community and relevant workforce could, in the QHRC's submission, lead more readily to a conclusion the exercise of power is not justified

### **Application – QAS Directive**

117. The QAS directive, which mandated vaccination in the emergency context of COVID-19 this decision also suffers from the lack of review for necessity in light of current vaccination rates and science

118. It is true that the apparent common law power relied upon by the decision maker is one long exercised to require vaccines of this workforce.

119. This suggests there may be a stronger basis to justify the requirement considering the exposure to health-compromised individuals, so long as the vaccine is rationally connected to meeting that aim.

## Timing

120. Both traditional law grounds of review and review under s 59 HR Act of decisions or acts for non-compliance with s 58(1) deal with justification at the time of the decision.
121. Nevertheless, the continued effect of the decision is relevant to its proportionality, and the failure to provide for or conduct a review may lead the Court to conclude that the measure was not justified on that basis.<sup>72</sup>
122. Timing is also relevant to the remedies that might be most appropriate, if the applicants are successful in any part of the application.

P Morreau

Counsel for QHRC (intervening)

7 June 2022

---

<sup>72</sup> In *Owen D'Arcy* at [253] Martin J noted the failure of the decision maker to consider that the making of the decision would not just be for a period of six months, but was for a *further* six months – on top of more than seven years of orders which preceded the decision.

