SUPREME COURT OF QUEENSLAND

CITATION: *Johnston & Ors v Carroll (Commissioner of the Queensland Police Service) & Anor; Witthahn & Ors v Wakefield (Chief Executive of Hospital and Health Services and Director General of Queensland Health); Sutton & Ors v Carroll (Commissioner of the Queensland Police Service)* [2024] QSC 2

PARTIES: **In Proceeding Number 11254 of 2021**

DYLAN MARK JOHNSTON
(first applicant)
and
BENJAMIN OWEN OAKLEY
(second applicant)
and
KEVIN JOSEPH GHERINGER
(third applicant)
and
TONY ADAM PAYNE
(fourth applicant)
and
CONNAN KEITH BARRELL
(fifth applicant)
and
BENJAMIN SHANAHAN
(sixth applicant)
and
TONIA MARCELLE LANCE
(seventh applicant)
v
KATARINA RUZH CARROLL APM, COMMISSIONER OF THE QUEENSLAND POLICE SERVICE
(first respondent)
and
DR JOHN GERRARD, CHIEF HEALTH OFFICER
(third respondent)
and
ATTORNEY-GENERAL FOR THE STATE OF QUEENSLAND
(first intervenor)
and
QUEENSLAND HUMAN RIGHTS COMMISSIONER
(second intervenor)

In Proceeding Number 11258 of 2021

BERNARD WITTHAHN
(first applicant)
and
SARAH WINDSOR
(second applicant)
and
CAMERON EVERS
(third applicant)
and
BEN NOSOV
(fourth applicant)
and
PETER THOMSON
(fifth applicant)
and
MICHAEL STUTH
(seventh applicant)
and
BRITTANY LEVEN
(eighth applicant)
and
JOSHUA TUNLEY
(ninth applicant)
and
BENJAMIN ELLIOTT VIGNAND BAXTER
(tenth applicant)
and
DAREN LONGOBARDI
(eleventh applicant)
and
SIMON MORRISON
(twelfth applicant)
and
DONNA BOWMAN
(thirteenth applicant)
v
JOHN WAKEFIELD, CHIEF EXECUTIVE OF HOSPITAL AND HEALTH SERVICES AND DIRECTOR GENERAL OF QUEENSLAND HEALTH
(first respondent)
and
ATTORNEY-GENERAL FOR THE STATE OF QUEENSLAND
(first intervenor)
and
QUEENSLAND HUMAN RIGHTS COMMISSIONER
(second intervenor)

In Proceeding Number 12168 of 2021

SHAUN SUTTON
(first applicant)
and
DOMINIC LUIS SAFI
(second applicant)
and
JASON MOLE
(third applicant)
and
ADRIAN KNIGHT
(fourth applicant)
and
STEPHEN LYTTLE
(fifth applicant)
and
WENDY HOLDERNESS
(sixth applicant)
and
ANDREW HOLDERNESS
(seventh applicant)
and
JASDEEP ATWAL
(eighth applicant)
and
LOUISA-JANE LOGUE
(ninth applicant)
and
MALCOLM CAMERON LOGUE
(tenth applicant)
and
OLIVER WILLIAM GEORGE
(eleventh applicant)
and
DAVID WILLIAM MORGAN
(twelfth applicant)
and
BRITAINIE JAY STICKLEY
(thirteenth applicant)
and
SEAN DOUGLAS BLAIR
(fourteenth applicant)
and
DONNA JANELLE MALONE
(fifteenth applicant)
and
LUCAS DEAN MIZZEN
(sixteenth applicant)
and
HAYDEN WAYNE DRINNEN

(seventeenth applicant)
and
KARINA LEE ORMOND
(eighteenth applicant)
and
ADAM GREEN
(nineteenth applicant)
and
NATALIE SKENNERTON
(twentieth applicant)
and
BRONWYN SMITH
(twenty-first applicant)
and
DREW CARMICHAEL
(twenty-second applicant)
and
ANDREW MARSHALL
(twenty-third applicant)
and
TRUDY BORLASE
(twenty-fourth applicant)
and
MATT DOWN
(twenty-fifth applicant)
and
JEAN-LOUIS CARPE
(twenty-sixth applicant)
and
ANDREW CARY
(twenty-seventh applicant)
and
CHRISTIAN HAR
(twenty-eighth applicant)
and
LUIS LARRARTE
(twenty-ninth applicant)
and
NATALIE MAHER
(thirtieth applicant)
and
LYNDELLE GIBBS
(thirty-first applicant)
and
VRINDA MCCAULEY
(thirty-second applicant)
and
BRENDON SMITH
(thirty-third applicant)
and
MARK RIX

(thirty-fourth applicant)
and
MARLON BESSON
(thirty-fifth applicant)
and
SCOTT BEVERIDGE
(thirty-sixth applicant)
and
CANDICE STRAIN
(thirty-seventh applicant)
and
MARK CARROLL-WALDEN
(thirty-eight applicant)
and
MEGAN FAULKS
(thirty-ninth applicant)
and
HAYLEY REID
(fortieth applicant)
and
DAVID BROWN
(forty-first applicant)
and
MATT SHEERS
(forty-second applicant)
and
ANDREW INGRAM
(forty-third applicant)
and
KERRI KNIGHT
(forty-fourth applicant)
and
COURTNEY MITCHELL
(forty-fifth applicant)
and
LORINDA BILLING
(forty-sixth applicant)
and
CAROLE VICKERY
(forty-seventh applicant)
and
KIERAN ROBINSON
(forty-eighth applicant)
and
DARREN BUCKLEY
(forty-ninth applicant)
and
DONNA COLE
(fiftieth applicant)
and
ERIN MICHELLE O'REGAN

(fifty-first applicant)
and
ANDREA KADEN
(fifty-second applicant)
and
KELLIE KNIGHT
(fifty-third applicant)
and
DENA MILLER
(fifty-fourth applicant)
v
KATARINA RUZH CARROLL APM, COMMISSIONER OF THE QUEENSLAND POLICE SERVICE
(respondent)
and
ATTORNEY-GENERAL FOR THE STATE OF QUEENSLAND
(first intervenor)
and
QUEENSLAND HUMAN RIGHTS COMMISSIONER
(second intervenor)

FILE NO/S:	BS 11254 of 2021, BS 11258 of 2021, BS 12168 of 2021
DIVISION:	Trial Division
PROCEEDING:	Trial
ORIGINATING COURT:	Supreme Court of Queensland
DELIVERED ON:	27 February 2024
DELIVERED AT:	Brisbane
HEARING DATE:	30 and 31 May 2022, 1, 2, 3, 6, 9 and 10 June 2022, Further written submissions 5, 7, 14 and 24 April 2023, 24 November 2023, 1, 7, and 14 December 2023
JUDGE:	Martin SJA
ORDERS:	**In the *Johnston* matter (11254/21):**

1. The Court declares that Instrument of Commissioner's Direction No. 12 issued on 7 September 2021 and Instrument of Commissioner's Direction No. 14 issued on 14 December 2021 were unlawful under s 58 of the Human Rights Act 2019.

2. The Commissioner of Police be, and is, restrained from:

(a) taking any steps with respect to enforcement of the QPS Directions; and

(b) taking any disciplinary proceedings against any of the applicants based upon the requirements of the QPS Directions.

In the *Witthahn* matter (11258/21):

1. The Court declares that Employee COVID-19 Vaccination Requirements Human Resources Policy is of no effect.

2. The Director-General of Queensland Health be, and is, restrained from:

(a) taking any steps with respect to enforcement of the QAS Direction; and

(b) taking any disciplinary proceedings against any of the applicants based upon the requirements of the QAS Direction.

In the *Sutton* matter (12168/21):

1. The Court declares that Instrument of Commissioner's Direction No. 12 issued on 7 September 2021 and Instrument of Commissioner's Direction No. 14 issued on 14 December 2021 were unlawful under s 58 of the Human Rights Act 2019.

2. The Commissioner of Police be, and is, restrained from:

(a) taking any steps with respect to enforcement of the QPS Directions; and

(b) taking any disciplinary proceedings against any of the applicants based upon the requirements of the QPS Directions.

CATCHWORDS: ADMINISTRATIVE LAW – JUDICIAL REVIEW – POWERS OF COURTS UNDER JUDICIAL REVIEW LEGISLATION – DECLARATIONS – where directions were made requiring police and ambulance workers to be vaccinated – where the applicants claim the directions were invalid or unlawful – whether directions for mandatory vaccination against COVID-19 should be quashed and set aside – whether declaration should be made that the directions are invalid or unlawful

ADMINISTRATIVE LAW – JUDICIAL REVIEW – GENERALLY – where Police Commissioner empowered to give directions to police officers and staff members "necessary or convenient for the efficient and proper functioning of the police service" - whether the Police Commissioner had the power to make directions requiring vaccination against COVID-19

GENERAL CONRACTUAL PRINCIPLES – CONSTRUCTION AND INTERPRETATION OF CONTRACTS – IMPLIED TERMS – GENERALLY – where the Director General of the Department of Health issued a direction to Queensland Ambulance Service staff to be vaccinated against COVID-19 – where the Director General claims the direction was made under an implied contractual term – whether the direction was able to be made pursuant to the implied term of the contracts of employment

HUMAN RIGHTS – HUMAN RIGHTS LEGISLATION – where directions were made requiring police and ambulance workers to be vaccinated against COVID-19 – where the applicants claim the respondents failed to give proper consideration to human rights relevant to the decision – whether the directions were unlawful and in breach of the *Human Rights Act 2019* (Qld)

HUMAN RIGHTS – HUMAN RIGHTS LEGISLATION – where directions were made requiring police and ambulance workers to be vaccinated – where applicants claim they are being discriminated against due to their political belief or activity – where applicants claim directions not compatible with right to recognition and equality before the law – where applicants claim they are being compelled to be vaccinated with a medicine that has potential life-threatening side effects – where applicants claim directions not compatible with right to life – where applicants claim that full, free and informed consent to medical treatment cannot be given if an individual must choose between vaccination and employment – where applicants claim directions not compatible with right to protection from torture and cruel, inhuman or degrading treatment – where directions included no exception for conscientious beliefs – where applicants claim the directions not compatible with right to freedom of thought, conscience, religion and belief – where applicants claim directions not compatible with right to take part in public life - where applicants claim directions not compatible with right to privacy and reputation – where applicants claim directions not compatible with right to liberty and security of person – whether directions compatible with relevant human rights

Acts Interpretation Act 1954 (Qld), ss 23(1), 24AA
Ambulance Service Act 1991 (Qld), ss 13, 13(1), 13(2)
Anti-Discrimination Act 1991 (Qld), s 7, 7(j)
Canada Act 1982 (UK) c 11, sch B pt I ('*Canadian Charter of Rights and Freedoms*'), s 20
Charter of Human Rights and Responsibilities Act 2006 (Vic), ss 32(1), 38
Civil Proceedings Act 2011 (Qld), s 10
Human Rights Act 1998 (UK)

Human Rights Act 2019 (Qld), ss 8, 13, 15(2), 15(4), 16, 17(c), 20, 23, 23(2)(b), 25, 29, 48, 58, 58(1)(a), 58(1)(b), 58(2), 58(5), 58(6), 59
Judicial Review Act 1991 (Qld), ss 22, 22(1), 30, 43, 47
New Zealand Bill of Rights Act 1990 (NZ), ss 8, 11
Police Service Administration Act 1990 (Qld), ss 2.3, 4.8(1), 4.8(3), 4.9, 4.9(1)
Public Health Act 2005 (Qld), s 362E
Public Service Act 2008 (Qld)

Convention for the Protection of Human Rights and Fundamental Freedoms, opened for signature 4 November 1950, 213 UNTS 221 (entered into force 3 September 1953), arts 2(1), 14, 17
International Covenant on Civil and Political Rights, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976), arts 6(1), 18

UN Human Rights Committee, General comment No. 36 – Article 6: right to life, 124th Session, UN Doc CCPR/C/GC/36

Instrument of Commissioner's Direction No. 12
Instrument of Commissioner's Direction No. 14

Amaca Pty Limited (Under NSW Administered Winding Up) v Roseanne Cleary as the Legal Personal representative of the Estate of the Late Fortunato (aka Frank) Gatt [2022] NSWCA 151, considered
Animals Angels' eV v Secretary, Dept of Agriculture (2014) 228 FCR 35; [2014] FCAFC 173, cited
Association X v The United Kingdom (1978) 14 Eur Comm HR 31, cited
Attorney-General (NSW) v Quin (1990) 170 CLR 1; [1990] HCA 21, cited
Australian Broadcasting Tribunal v Saatchi & Saatchi Compton (Vic) Pty Ltd (1985) 10 FCR 1, not followed
Australian Education Union v Department of Education and Children's Services (2012) 248 CLR 1; [2012] HCA 3, applied
Bare v Independent Broad-Based Anti-Corruption Commission (2015) 48 VR 129; [2015] VSCA 197, cited
Boffa v San Marino (1998) 92 Eur Comm HR 27, considered
British Medical Association v The Commonwealth (1949) 79 CLR 201; [1949] HCA 44, considered
Buonopane v RMIT University (Human Rights) [2022] VCAT 146, considered
Burgess v Director of Housing [2014] VSC 648, considered
Campbell and Cosan v United Kingdom [1982] ECHR 1, considered
Case "Relating to Certain Aspects of the Laws on the use of

Languages in Education in Belgium" v Belgium (1968) 1 EHRR 252, considered
Castles v Secretary of Department of Justice (2010) 28 VR 141; [2010] VSC 310, approved
Certain Children v Minister for Families and Children (No 2) (2017) 52 VR 441; [2017] VSC 251, cited
CFMEU v Mt Arthur Coal Pty Ltd (2021) 310 IR 399; [2021] FWCFB 6059, considered
Four Aviation Security Service Employees v Minister of Covid-19 Response [2022] NZLR 26, considered
Grainger v Nicholson plc [2010] ICR 360; [2010] 2 All ER 253, considered
Griffith University v Tang (2005) 221 CLR 99; [2005] HCA 7, cited
Harding v Sutton [2021] VSC 741, considered
HJ (a pseudonym) v Independent Broad-Based Anti-Corruption Commission (2021) 64 VR 270; [2021] VSCA 200, cited
Hunt & Ors v Gerrard & Ors [2022] QCA 263, cited
Loielo v Giles (2020) 63 VR 1; [2020] VSC 722, cited
Kassam v Hazzard; Henry v Hazzard (2021) 393 ALR 664; [2021] NSWSC 1320, considered
Kassam v Hazzard; Henry v Hazzard (2021) 106 NSWLR 520; [2021] NSWCA 299, cited
Kracke v Mental Health Service Board (2009) 29 VAR 1, considered
Makarov v Minister for Home Affairs (2021) 286 FCR 412; [2021] FCAFC 129, cited
Minister for Home Affairs v DUA16 (2020) 271 CLR 550; [2020] HCA 46, cited
Minister for Immigration and Border Protection v Eden (2016) 240 FCR 158; [2016] FCAFC 28, considered
Minister of Immigration and Citizenship v Li (2013) 249 CLR 332; [2013] HCA 18, considered
Momcilovic v R (2011) 245 CLR 1, considered
Morton v Union Steamship Co of New Zealand Ltd (1951) 83 CLR 402, considered
Nugent v Commissioner of Police (Qld) and Anor (2016) 261 A Crim R 383; [2016] QCA 223, cited
NZDSOS Inc v Minister for the COVID-19 Response [2022] NZHC 716, cited
O'Brien v Cunard SS Co Limited 28 NE 266 (Mass. 1891), considered
Owen-D-Arcy v Chief Executive, Queensland Corrective Services (2021) 9 QR 250; [2021] QSC 273, applied
PJB v Melbourne Health (Patrick's Case) (2011) 39 VR 373; [2011] VSC 327, applied
Pretty v United Kingdom (2002) 35 EHRR 1, considered
Probuild Constructions (Aust) Pty Ltd v Shade Systems Pty Ltd (2018) 264 CLR 1; [2018] HCA 4, cited
Project Blue Sky v Australian Broadcasting Authority (1998)

194 CLR 355, cited
R (Peters) v Secretary of State for Health and Social Care [2021] EWHC 3182, considered
R (SB) v Governors of Denbigh High School [2007] 1 AC 100, cited
R (Williamson) v Secretary of State for Education and Employment [2005] 2 AC 246, considered
R v AM (2010) 245 FLR 410; [2010] ACTSC 149, considered
R v Darling Island Stevedoring & Lighterage Co Ltd; ex parte Sullivan (1938) 60 CLR 601; [1938] HCA 44, considered
Ralph M Lee (WA) Pty Ltd v Fort (1991) 4 WAR 176, approved
Roach v Canada (Minister of State for Multiculturalism and Culture) [1994] 2 F.C. 406, considered
Roads and Maritime Services v Desane Properties Pty Ltd (2018) 98 NSWLR 820; [2018] NSWCA 196, cited
Secretary, Department of Health and Community Services v JWB and SMB (1992) 175 CLR 218; [1992] HCA 15, cited
Shanahan v Scott (1957) 96 CLR 245; [1957] HCA 4, considered
Stambe v Minister for Health (2019) 270 FCR 173; [2019] FCA 43, considered
Stewart v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs (2020) 281 FCR 578; [2020] FCAFC 196, considered
Thompson v Minogue (2021) 67 VR 301; [2021] VSCA 358, cited
Ulrica Library Systems NV v Sanderson Computers Pty Ltd [1997] NSWSC 454, considered
United States v Davis 482 F 2d 893 (1973), considered
Vavřička and Others v. The Czech Republic, applications 47621/13, 3867/14, 73094/14, 19306/15, 19298/15, and 43883/15 (ECtHR 8 April 2021), considered
VAW (Kurri Kurri) Pty Ltd v Scientific Committee (2003) 58 NSWLR 631; [2003] NSWCA 297, applied
Wingfoot Australia Partners Pty Ltd v Kocak (2013) 252 CLR 480; [2013] HCA 43, cited
Yardley v Minister for Workplace Relations and Safety [2022] NZHC 291, distinguished
Yasmin v Attorney-General of the Commonwealth (2015) 236 FCR 169; [2015] FCAFC 145, cited

Beyleveld, Deryck and Roger Brownsword, *Consent in Law* (Hart Publishing, 2007)

COUNSEL: In the *Johnston* matter (11254/21):
DF Villa SC with PF Santucci and W Liu for the applicants
MR Hodge KC with SA McLeod KC, BI McMillan, RH Berry and PH Nevard for the first respondent

In the *Witthahn* matter (11258/21):

CS Ward SC with PF Santucci and KA Morris for the applicants
MR Hodge KC with SA McLeod KC, BI McMillan, RH Berry and PH Nevard for the respondent

In the *Sutton* matter (12168/21):
D O'Gorman SC with B Coyne for the applicants
MR Hodge KC with SA McLeod KC, BI McMillan, RH Berry and PH Nevard for the respondent

The Attorney-General for the State of Queensland intervening in each matter:
N Kidson KC with FJ Nagorcka and KJE Blore

The Queensland Human Rights Commission intervening in each matter:
P Morreau

SOLICITORS: In the *Johnston* (11254/21) and *Witthahn* (11258/21) matters:
Alexander Law for the applicants
GR Cooper, Crown Solicitor for the respondents
GR Cooper, Crown Solicitor for the first intervenor
Queensland Human Rights Commission for the second intervenor

In the *Sutton* matter (12168/21):
Sibley Lawyers for the applicants
GR Cooper, Crown Solicitor for the respondents
GR Cooper, Crown Solicitor for the first intervenor
Queensland Human Rights Commission for the second intervenor

A pandemic is declared

[1] In March 2020, the World Health Organisation (WHO) declared a pandemic based upon the extensive spread of a novel coronavirus disease called COVID-19.

[2] Following that declaration, the Commonwealth, State and Territory governments began taking measures designed to prevent the spread of the disease. Australia's borders were closed to non-residents. Internal borders were closed to varying extents. Social distancing rules were introduced. People were required to wear masks in particular circumstances. Lock downs of varying lengths and intensity were applied.

[3] In February 2021, the first doses of a COVID-19 vaccine were administered in Australia. A "roll-out" of vaccines followed that. Some private and government employers required their employees to receive an identified number of doses of a recognised vaccine. An employee's failure to comply with such a requirement could put that employee at risk of termination of employment or other disciplinary action.

The applications

[4] There are three applications before the court. Two concern directions given by the Commissioner of Police that each police officer or staff member had to receive doses of a COVID-19 vaccine (the *Sutton* and *Johnston* matters). The third case concerns a similar direction given to the employees of the Queensland Ambulance Service (the *Witthahn* matter) by the Director General of Queensland Health.

[5] In each matter:

(a) The broad decision to be made is whether the particular directions were lawful.[1]

(b) The essential relief sought is an order that the directions should be set aside. The applicants rely on various grounds available under the *Judicial Review Act* 1991 (JRA) and other legislation, in particular, the *Human Rights Act* 2019 (HRA).

[6] While it is asserted by each applicant that the relevant decision-maker acted unreasonably or contrary to statutory obligations by failing to revoke the relevant direction and that the directions (if otherwise valid) became invalid at some time before this matter was heard, the only relief sought is with respect to the directions which were made.

The nature of this type of application

[7] Where an application of this kind is made, which does not involve the HRA, then there are well established principles to be observed. It is a judicial review not a merits review. As Brennan J put it in *Attorney-General (NSW) v Quin*:[2] " … the scope of judicial review must be defined not in terms of the protection of individual interests but in terms of the extent of power and the legality of its exercise."

[8] When a court is judicially reviewing a decision for unlawfulness under the HRA it does not reconsider a primary act or decision on the merits. The jurisdiction of the Court is supervisory, not substitutionary. It is to determine whether the act or decision is unlawful by reference to the human rights standards in the HRA, not to make a determination on the merits of the matter which is in substantive issue. Relief cannot be granted simply because the court takes a different view of the act or decision on the merits.[3] There are, though, differences in approach due to the test of proportionality evident in s 13 of the HRA – that is dealt with later in these reasons.

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1 In the *Johnston* matter, relief sought against the Chief Health Officer (the third respondent) was not pressed in light of an appeal relating to the status of the directions he had made. See *Hunt & Ors v Gerrard & Ors* (2022) 13 QR 1; [2022] QCA 263.

2 (1990) 170 CLR 1 at 36.

3 *PJB v Melbourne Health; Patrick's Case* (2011) 39 VR 327; *Gardiner v Attorney-General (Vic) (No 3)* [2020] VSC 516; *Certain Children (No 2)* (2017) 52 VR 441; *Owen-D'Arcy v Chief Executive, Queensland Corrective Services* (2021) 9 QR 250.

What were the directions?

Johnston and *Sutton* matters

[9] On 7 September 2021 the Commissioner of Police issued a direction pursuant to ss 4.8 and 4.9 of the *Police Service Administration Act* 1990 (PSAA) – the Instrument of Commissioner's Direction No. 12 (Direction No. 12). It was revoked and replaced by Instrument of Commissioner's Direction No. 14 of 14 December 2021 (Direction No. 14). The two directions (the QPS Directions) applied to all police officers appointed pursuant to s 2.2 of the PSAA and all staff members appointed under other sections of the PSAA and the *Public Service Act* 2008.

[10] Direction No. 14 required that all police officers and staff members were, subject to certain exemptions, to:

(a) receive at least one dose of a COVID-19 vaccine by 4 October 2021;

(b) receive a second dose of the COVID-19 vaccine by 17 December 2021;

(c) receive a booster dose of a COVID-19 vaccine no more than one month after they become eligible to do so, in accordance with the advice of the Australian Technical Advisory Group on Immunisation (ATAGI) on the use of a booster dose of COVID-19 vaccine at that time, or if already eligible to do so at the time of the direction, no more than one month after the date of the direction; and

(d) provide evidence of receiving the COVID-19 vaccine if required by the Commissioner of Police (or delegate) to their direct report and record the information on Employee Self Service within two days of receiving the vaccine unless otherwise agreed with their direct report.

[11] The Direction provided for exemptions from the requirements for vaccination. Those exemptions could be granted:

(a) if the employee was unable to be vaccinated "due to a medical contraindication" – the employee had to provide evidence of the condition and whether it was temporary in nature; or

(b) if the employee had a genuine religious objection or there were other exceptional circumstances.

The *Witthahn* matter

[12] Dr Wakefield, the respondent, was at the relevant time the Director General of the Department of Health. He issued a number of directions to Queensland Ambulance Service (QAS) staff. The direction the subject of these proceedings was made on 31 January 2022. It required that employees must, subject to certain exemptions:

(a) receive both the first and second dose of a COVID-19 vaccine by 27 February 2022;

(b) maintain vaccine protection; and

(c) provide evidence of receiving the COVID-19 vaccine confirming that they have received the prescribed number of doses of the vaccine to their line manager or other designated person no later than seven days after receiving each dose of the vaccine (the QAS direction).

[13] An employee, if unable to be vaccinated, had to complete an exemption application form. Exemptions would be considered in the following circumstances:

(a) where an existing employee had a recognised medical contraindication;

(b) where an existing employee had a genuinely held religious belief; and

(c) where another exceptional circumstance existed.

The various cases

[14] The evidence in each matter was evidence in the other matters. The applicants contributed to an efficient use of time by each set of counsel concentrating on different matters of common concern and, thus, avoiding duplication of evidence and argument. The respondent in each matter did likewise.

Johnston – what relief is sought?

[15] The Johnston applicants seek a declaration or declarations that the QPS Directions are invalid pursuant to:

(a) section 30 of the JRA; or

(b) sections 43 and 47 of the JRA; or

(c) section 10 of the *Civil Proceedings Act* 2011; or

(d) the inherent jurisdiction of the Court.

[16] In the alternative, they seek an order

(a) pursuant to s 30 of the JRA that the QPS Directions be set aside; or

(b) pursuant to ss 43 and 47 of the JRA that the QPS Directions be quashed; or

(c) pursuant to ss 43 and 47 of the JRA or the inherent jurisdiction of the Court, restraining the First Respondent from acting in respect of the QPS Directions.

Sutton – what relief is sought?

[17] The Sutton applicants seek the same relief with respect to both Direction No. 12 and Direction No. 14, namely:

(a) declarations that pursuant to s 43 and s 47 of the JRA or, alternatively, s 10 of the *Civil Procedure Act* 2011 or, alternatively, s 58 or s 59 of the HRA or, alternatively, the Court's inherent jurisdiction that the First Respondent's decision to make Direction No. 12 was made in a way:

(i) which was not compatible with human rights (ss 8, 17(c) and 58(1)(a) of the HRA); or

(ii) that failed to give proper consideration to human rights relevant to the decision within the meaning of s 58(1)(b) of the HRA; or

(iii) contravened s 20 of the HRA; and

(b) a declaration that Direction No. 12 is invalid and that it be quashed or set aside.

[18] Similar relief is sought with respect to Direction No. 14.

Witthahn – what relief is sought?

[19] The Witthahn applicants seek identical relief to that claimed by the Johnston applicants save that it refers to the decision made by Dr Wakefield on 31 January 2022 (the QAS Decision) to approve the *Employee COVID-19 Vaccination Requirements: Human Resources Policy*.

What is the relevant time period?

[20] Each of the parties seek relief based – broadly – upon alleged failures to take into account relevant matters. Whether the relief concerns the JRA, the HRA or the inherent jurisdiction of this Court, the application concerns the lawfulness or validity of a particular decision. That is to be assessed by reference to the circumstances at the time the relevant decisions were made.

[21] The issue of the relevant time was considered by the High Court in *Minister for Home Affairs v DUA16*:[4]

> "[26] A requirement of legal reasonableness in the exercise of a decision-maker's power is derived by implication from the statute, including an implication of the required threshold of unreasonableness, which is usually high. **Any legal unreasonableness is to be judged at the time the power is exercised or should have been exercised**. It is not to be assessed through the lens of procedural fairness to the applicant. Instead, **whether the implied requirements of legal reasonableness have been satisfied requires a close focus upon the particular circumstances of exercise of the statutory power: the conclusion is drawn "from the facts and from the matters falling for**

4 (2020) 271 CLR 550.

> **consideration in the exercise of the statutory power"**." (emphasis added, citations omitted)

[22] If legal reasonableness is to be assessed at the time the relevant decision was made, then there are strong grounds for applying the same reasoning to consideration of matters under the HRA. Whether, for example, an action can be demonstrably justified in the sense used in s 13 HRA, will depend upon the circumstances at the time of making the decision.

[23] It is also consistent with general principles that a finding that a person has committed an unlawful act or made a decision that was unlawful (under s 58 HRA) should not be made on the basis of facts which have become known or events which have occurred after the act or decision.

[24] That conclusion is fortified by consideration of s58(1)(b) which makes it unlawful "in making a decision, to fail to give proper consideration to a human right relevant to the decision." That failure can only occur at or before the time of making the decision.

[25] Section 58(2) provides that s 58(1) does not apply if the public entity could not reasonably have acted differently or made a different decision because of a statutory provision, or a Commonwealth or State law, or otherwise under law. That provision could only apply to a law which existed at the relevant time, that is, when the decision was made.

[26] Section 58(5) also anchors any "unlawfulness" to the time of making the decision. It provides that "proper consideration" includes identifying the human rights that may be affected and considering whether the decision would be compatible with human rights. Those are actions which can only be taken in the time leading up to the making of the decision and not afterwards.

[27] A consistent, but not explicit, approach was taken by Ginnane J in *Loielo v Giles*[5] where his Honour considered whether the decision to implement a curfew during the pandemic was justified under the *Charter of Human Rights and Responsibilities Act* 2006 (Vic) (the Charter). The curfew was revoked the day before the hearing began. Ginnane J said that he did not consider that he could take the timing of the revocation of the curfew as undermining the decision as to the reasonableness necessity of the curfew. Similarly, in an interlocutory decision,[6] Richards J "considered that the prospect of the expert witnesses being able to give relevant and useful evidence would be improved if they were instructed to base their opinions on assumptions that reflected the situation in Victoria at the time each of the Vaccination Directions was given."[7]

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5 (2020) 63 VR 1.

6 *Harding v Sutton (No 2)* [2021] VSC 789.

7 Ibid at [24].

[28] This approach is also consistent with Lord Bingham's statement in *Regina (SB)* v *Governors of Denbigh High School*[8] where he said that the court "must now make a value judgement, an evaluation, by reference to the circumstances prevailing at the relevant time".

[29] The approach taken in New Zealand can be distinguished. In *Yardley v Minister for Workplace Relations and Safety*[9] the Minister had made an order that work carried out by certain police and defence force personnel could only be undertaken by workers who had been vaccinated. Cooke J said that the Court could not be confined to the evidence that was before the Minister when the order was made.[10] He said the court should take into account factors in evidence that post-date the decision implementing the measure. There are a number of reasons why that approach does not apply in this jurisdiction. First, the *New Zealand Bill of Rights Act* 1990 does not contain an equivalent of s 58 and s 59 of the HRA. It follows that there is no need to ensure that the act or decision impugned on independent grounds is the same act or decision impugned on human rights grounds. Secondly, the relevance of subsequent developments is "a consequence of the constitutional nature of review" under the NZ BOR Act.[11] Thirdly, the relevant statute imposed a duty on the Minister to keep the orders he had decided to implement under review. "That", Cooke J said, "reflects a legislative intention to monitor the justifications for orders in light of changing circumstances." As is discussed later in these reasons, the legislation relevant to these matters (and the common law of implied duties on Dr Wakefield's argument) does not contain any such obligation.

Unlawfulness and invalidity

[30] An act or decision which is found to be unlawful under s 58(1) is not, merely because of that finding, invalid – s 58(6). The Attorney-General submits, and I agree, that s 58(6) is the answer to the question posed in *Project Blue Sky v Australian Broadcasting Authority*,[12] that is, "[a] better test for determining the issue of validity is to ask whether it was a purpose of the legislation that an act done in breach of the provision should be invalid."[13] Although s 58(6) makes it clear that a breach of s 58(1) does not amount to jurisdictional error and, therefore, a declaration of invalidity is not available, it does not prevent the making of a declaration of an unlawful act or decision, if that is otherwise appropriate.

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8 [2007] 1 AC 100 at [30].
9 [2022] NZHC 291.
10 Ibid at [80].
11 *NZDSOS Inc v Minister for COVID-19 Response* [2022] NZHC 716 at [63].
12 (1998) 194 CLR 355.
13 At [93].

The alleged failure by each respondent to revoke the directions

[31] Each set of applicants sought, and was granted leave, to amend their respective applications to include a new ground in support of their claims. There were slight differences in the way in which they were worded.

[32] In the application by the Johnston applicants, the additional ground was included in support of the assertions that the making of the QPS Directions was an improper exercise of the power conferred by the PSAA:

> "15A Further, or alternatively, pursuant to section 22 and/or Part 5 of the JRA, and/or the Court's inherent jurisdiction, from on or about the time of making the No 14 Direction, the First Respondent has acted unreasonably and/or contrary to her statutory obligations pursuant [to] s 4.9 of the PSAA, by failing to make a direction to revoke the No 14 Direction as the No 14 Direction is no longer necessary to assist in containing or responding to the spread of COVID-19."

[33] In the application by the Sutton applicants, the additional ground was included in support of the assertion that the QPS Directions constituted an error of law:

> "12 Further, or alternatively, pursuant to section 22 and/or Part 5 of the JRA, and/or the Court's inherent jurisdiction, from on or about the time of making the Second Direction, the First Respondent has acted contrary to her statutory obligations pursuant to s 4.9 of the PSAA, by failing to make a direction to revoke the Second Direction as the Second Direction is no longer necessary to assist in containing or responding to the spread of COVID-19 and was therefore not required for the efficient and proper functioning of the police service."

[34] In the application by the Witthahn applicants, the additional ground was included in support of the assertion that the making of the QAS Direction was an improper exercise of power:

> "15A Further, or alternatively, pursuant to section 22 and/or Part 5 of the JRA, and/or the Court's inherent jurisdiction, from on or about the time of making the Second QAS Direction, the Respondent has acted unreasonably and/or contrary to his statutory obligations by failing to make a direction to revoke the Second QAS Direction as the Second QAS Direction is no longer necessary to assist in containing or responding to the spread of COVID-19."

[35] Section 22 of the JRA provides:

> "(1) If—
>
> (a) a person has a duty to make a decision to which this Act applies; and
>
> (b) there is no law that fixes a period within which the person is required to make the decision; and
>
> (c) the person has failed to make the decision;
>
> a person who is aggrieved by the failure of the person to make the decision may apply to the court for a statutory order of review in relation to the

failure to make the decision on the ground that there has been unreasonable delay in making the decision.

(2) If—

(a) a person has a duty to make a decision to which this Act applies; and

(b) a law fixes a period within which the person is required to make the decision; and

(c) the person failed to make the decision before the end of the period;

a person who is aggrieved by the failure of the person to make the decision within the period may apply to the court for a statutory order of review in relation to the failure to make the decision within the period on the ground that the person has a duty to make the decision despite the end of the period.

…"

[36] Section 22(2) is irrelevant as there is no law that fixes a period within which either the Commissioner or Dr Wakefield was required to make a decision to review of revoke any of the directions. The respective applicants accepted that, but argued that s 22(1) applied because the relevant respondents had a duty to review the directions and make a decision.

[37] Section 22 allows an order for review to be made about a failure to make a decision. None of the applicants sought any such order. Rather, each of them introduced these "new" claims as a ground in support of another allegation. The introduction of this extra "ground" in each application was misconceived. Section 22 of the JRA does not create a duty, but it can act upon a duty. Similarly, neither Part 5 of the JRA nor the Court's inherent jurisdiction create a duty for the purposes of s 22.

[38] The Johnston applicants, in their opening submissions in reply, claimed that they did seek such an order but that was not reflected in the relief sought in the amended originating application and was inconsistent with the relief they claimed in their opening submissions. In the latter document they only sought orders with respect to Direction No. 14. During argument the Johnston/Sutton applicants identified alternative dates on which they argued the Commissioner should have revoked Direction No. 14 but, apart from the omission to seek relief, given my conclusion about s 58(1) there is no need to pursue this point.

[39] If it were assumed, in favour of the applicants, that the relevant Directions should have been revoked that does not say anything about the validity of the Directions at the time they were made. That assessment is made in the light of the conduct and knowledge of the decision-maker at the time of making the decision, not by reference to conduct after the decision or facts which arise or become known after the decision was made. In other words, even if there were a duty to review, a failure to do so does not affect the validity of the original decision.

The alleged failure to revoke the directions – the Johnston argument

[40] Johnston submitted that the direction made under s 4.9 of the PSAA cannot be necessary or convenient for the efficient and proper functioning of the police service for an indefinite period of time. Because what is "necessary or convenient" may change over time, the Commissioner has a duty to review the need for the Direction over time. In the oral submissions at the beginning of the hearing, Mr Villa SC identified four dates upon which the Commissioner was or ought to have been on notice of the need to review. They were confirmed in the final written submissions as being:

(a) 9 February 2022 – when Professor Petrovsky's report was served;

(b) 25 March 2022 – when the ATAGI released advice that no longer recommended booster shots for healthy members of the population;

(c) 9 May 2022 – when Professor Petrovsky's supplementary report was served; or

(d) 20 May 2022 – when Professor Petrovsky's report of 29 March 2022 was served in these proceedings.

[41] In their written opening submission the Johnston applicants contended that the basis upon which they made their case was not confined to the circumstances at the time that each decision was made. Rather, they argued, where the subject matter of a decision is the imposition of onerous requirements on employment, justified by reason of specific circumstances occurring at specific times, once the justification for the decision has subsided, the Commissioner can no longer be satisfied of the necessity for the condition, or will act unreasonably in failing to revoke the Direction. For that reason, it was argued, the evidence as to the "ongoing evolution of the SARS-COV-2 continues to be relevant to the issues in the present case."

[42] That contention is the basis upon which the Johnston applicants argue that evidence from experts about what became known after Direction No. 14 is relevant.

[43] In an application for judicial review of a decision to which the JRA applies, the identification of the particular decision or decisions is necessary. The type of relief sought with respect to such a decision will dictate the boundaries of relevance in the evidence which may be adduced. It follows, then, that it is the relief to which one looks in order to determine relevance. In the closing written submissions by Johnston the orders sought were:

(a) if the applicants succeed on any of the Part 3 grounds then an order should be made quashing the decision to issue Direction No. 14 and setting aside the whole of that Direction (apart from the clause revoking Direction No. 12);

(b) if the applicants succeed only in respect of jurisdictional errors then a declaration should be made that the QPS Directions are invalid or unlawful and

that an order quashing them and setting aside the QPS Directions should be made; and

(c) in any event, the Commissioner should be restrained from acting in reliance upon the QPS Directions.

[44] The reference to "Part 3 grounds" in those submissions is a reference to the arguments advanced with respect to the "jurisdictional error" and misconstruing the nature content and scope of the rights provided for under the HRA and the absence of evidence to justify the making of the Direction.

[45] In Johnston's Opening Written Submission it is contended that: "the Applicants by their further amended application at [15A] and [15B] do seek statutory review pursuant to s 22 of the JRA of the First Respondent's failure to make a decision to revoke the QPS decision. Therefore, matters arising after the QPS Direction was given are relevant for the Court's consideration."

[46] It is then put that the justification process in respect of which the Commissioner bears the onus (s 58(1)(a) of the HRA – dealt with later) justifies examination of matters which occur after the making of the relevant decision.

[47] In addition, it is argued that s 23 and s 24AA of the *Acts Interpretation Act* 1954 are relevant.

[48] So far as is relevant, s 23(1) provides: "If an Act confers a function or power on a person or body, the function may be performed, or the power may be exercised, as occasion requires."

[49] Section 24AA provides:

> "If an Act authorises or requires the making of an instrument or decision—
>
> (a) the power includes power to amend or repeal the instrument or decision; and
>
> (b) the power to amend or repeal the instrument or decision is exercisable in the same way, and subject to the same conditions, as the power to make the instrument or decision."

[50] The power exercised by the Commissioner in revoking Direction No. 12 is found in s 24AA.

[51] The Johnston applicants argue that, given the limits imposed on the applicants' human rights by the QPS Direction, it must follow that, to the extent that the decision is valid and the Commissioner was empowered to make it, then as an incident of such power the Commissioner must also be subject to a duty to review the decision once made, and to revoke it once it was no longer necessary. The Direction was no longer necessary when any interference with human rights would no longer be reasonable,

proportionate or otherwise justified and "less restrictive and reasonably available" measures would be available – see s 13(2)(d) HRA.

[52] Section 4.9 of the PSAA does not, on its face, impose a duty to reconsider. Whether a particular discretionary power carries with it a duty to consider its exercise, is a question of construction and is heavily dependent upon the context in which that duty is expressed.

[53] A helpful analysis of this type of situation can be found in *Animals Angels' eV v Secretary, Dept of Agriculture*.[14] In that case, it was held that the "permissive" language of the statute which conferred a power with regard to enforcing and varying licences was neither to be coupled with a duty to exercise it nor with a duty to consider its exercise. Edmonds J relied upon the reasoning of four members of the High Court in *Minister for Immigration and Citizenship v SZGUR*[15] who held that there could be no duty to consider whether to exercise a power if there were no duty to exercise the power.[16]

[54] In *Yasmin v Attorney-General of the Commonwealth*[17] a Full Court of the Federal Court said:

> "[113] … it is a matter of statutory construction and as we have noted above, fixing on an approach that begins with a "presumption", or a starting point, may be unhelpful and apt to mislead. It is also unnecessary. The question whether when Parliament reposes a discretionary power in a person, it intends to repose with it a duty to consider and determine whether to exercise the power (favourably or unfavourably) is not to be resolved by reference to any rule courts can assume Parliament and its legislative drafters are constructively, or actually, aware of, such as the proposition that in the absence of some clear contrary intention, a legislative provision will not be construed so as to have a retrospective operation (see Maxwell v Murphy (1957) 96 CLR 261 at 267; [1957] ALR 231 at 232–3).

[55] The power in s 4.9 is exercisable by the Commissioner from time to time when the Commissioner considers it "necessary or convenient for the efficient and proper functioning of the police service". There is no statutory mechanism by which somebody might apply to the Commissioner for the making of such a direction or its revocation. But, there is no prohibition on anyone affected by a Direction requesting that the Commissioner reconsider, vary, or revoke a direction. An application of this kind can be construed as such a request.

[56] Notwithstanding the assertion that the Commissioner had a duty to revoke, no relief was sought in the amended application in terms of s 22 of the JRA, that is, there was no application for a statutory order of review in relation to the failure to make a

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14 (2014) 228 FCR 35.
15 (2011) 241 CLR 594.
16 Ibid at [22] (French CJ and Kiefel J), [91] (Heydon J), [92] (Crennan J).
17 *Yasmin v Attorney-General of the Commonwealth* (2015) 236 FCR 169.

decision covered by s 22(1). It follows that the usual situation applies – only the facts and circumstances which obtained up to the making of Direction No. 14 are relevant.

The alleged failure to revoke the directions – the Sutton argument

[57] The relief sought in the amended application by the Sutton applicants is set out above. The response to that, so far as this point is concerned, is the same as that given to the Johnston argument on this point. The Sutton applicants, though, did nominate nearly two dozen dates upon which they contended the Commissioner should have conducted reviews of the Directions. They did not seek that the Commissioner be ordered to revoke the QPS Directions.

[58] I reject their arguments about the duty to review for the reasons I gave in the Johnston matter.

[59] The Sutton applicants did seek an order in the alternative. If it were to be held that Direction No. 14 was valid, then they sought an order that the Commissioner be required to consider whether Direction No. 14 should be revoked under s 362E of the *Public Health Act* 2005. That is not available because the section (which has since expired) only applied to "public health directions" given by the Chief Health Officer and only that officer could revoke such a direction.

The alleged failure to revoke the directions – the Witthahn argument

[60] The Witthahn applicants sought orders in terms similar to those sought by Johnson.[18] The considerations given to the Johnston submission on this point apply equally.

The directions have been revoked – what is the effect?

[61] On 12 December 2022 the Commissioner revoked Direction No. 14 with effect from that date.

[62] On 21 September 2023 the Acting Director-General of Queensland Health approved the repeal of the QAS Direction with effect from 25 September 2023.

[63] I received further submissions from the parties about the effect of these revocations. The parties in each matter agree that the revocation or repeal of the respective directions confines the relief which is available but that otherwise the applicants retain their standing.

[64] The extent to which relief may be confined is considered below.

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[18] The first order sought by Witthahn is one quashing the directions made by the Commissioner of Police. I have read that as intending to refer to Dr Wakefield.

The requirements of s 58 HRA

[65] The Commissioner of Police bears great responsibilities for a police service charged with the prevention of crime, the apprehension of those who break the law, and the general safety of the people of Queensland. The QPS has a large workforce spread across a large State and the Commissioner must take into account their welfare in the exercise of her powers. It was not challenged by any of the parties that the requirements of the job mean that the Commissioner cannot be aware of or familiar with every detail of the work done by the QPS. As with anybody with such broad duties, the work can only be done if others provide the Commissioner – as a decision-maker – with advice and recommendations. And that is how the Commissioner, as the embodiment of the QPS (a public entity for the purposes of s 58 of the HRA), ordinarily works. But the proper exercise of some responsibilities requires more than just the acceptance of advice. And, in this case, that responsibility is contained in s 58(1) and s 58 (5) of the HRA.

[66] Section 58 relevantly provides:

> "**58 Conduct of public entities**
>
> (1) It is unlawful for a public entity—
>
> (a) to act or make a decision in a way that is not compatible with human rights; or
>
> (b) in making a decision, to fail to give proper consideration to a human right relevant to the decision.
>
> (2) Subsection (1) does not apply to a public entity if the entity could not reasonably have acted differently or made a different decision because of a statutory provision, a law of the Commonwealth or another State or otherwise under law.
>
> *Example—*
>
> A public entity is acting to give effect to a statutory provision that is not compatible with human rights.
>
> …
>
> (4) This section does not apply to an act or decision of a private nature.
>
> (5) For subsection (1)(b), giving proper consideration to a human right in making a decision includes, but is not limited to—
>
> (a) identifying the human rights that may be affected by the decision; and
>
> (b) considering whether the decision would be compatible with human rights.
>
> (6) To remove any doubt, it is declared that—
>
> (a) an act or decision of a public entity is not invalid merely because, by doing the act or making the decision, the entity contravenes subsection (1); and

(b) a person does not commit an offence against this Act or another Act merely because the person acts or makes a decision in contravention of subsection (1)."

The obligations imposed by s 58

[67] Section 58(1) imposes two obligations on the respondent:

(a) Substantive: not to make a decision in a way that is incompatible with human rights: s 58(1)(a); and

(b) Procedural: not to fail to give proper consideration to a relevant human right in making a decision: s 58(1)(b).

The Substantive limb

[68] The phrase "compatible with human rights" is defined in s 8 and involves a "two-stage" inquiry:[19]

(a) whether the relevant act or decision placed a limit on the human right: s 8(a),

(b) if there is a limit, whether the limit is justified under the test of proportionality set out in s 13: s 8(b).

[69] Section 8 of the HRA defines what is required for a decision to be compatible with human rights:

"**8 Meaning of compatible with human rights**
An act, decision or statutory provision is compatible with human rights if the act, decision or provision—

(a) does not limit a human right; or

(b) limits a human right only to the extent that is reasonable and demonstrably justifiable in accordance with section 13."

[70] The applicant bears the onus of establishing that the decision imposes a limit on human rights.[20]

[71] If that is established, the respondent bears the onus of justifying the limit.[21]

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19 See *Re Kracke and Mental Health Review Board* (2009) 29 VAR 1 at 31 [88], 33 [96]-[97] per Bell J ("*Re Kracke*").

20 Ibid at [108].

21 Explanatory Note, Human Rights Bill 2018 at 16; *R v Oakes* [1986] 1 SCR 103 at 136-137 per Dickson CJ; *Multani v Commission Scolaire Marguerite-Bourgeoys* [2006] 1 SCR 256 at 282 [43] per Charron J; *R v Hansen* [2007] 3 NZLR 1 at 42 [108] per Tipping J; *Re Application under the Major Crime (Investigative Powers) Act 2004* (2009) 24 VR 415 at 448-449 [147] per Warren CJ; *PJB v Melbourne*

[72] 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."[22] This inquiry involves considering the scope of the right. The scope of the right should be "construed in the broadest possible way"[23] by reference to the right's "purpose and underlying values".[24]

[73] In *Certain Children (No 2)* Dixon J suggested a two-step process for assessing incompatibility:[25]

(a) The plaintiff/applicant for human rights relief need only establish prima facie incompatibility before the burden shifts to the defendant public entity to justify the limitations caused by their action/decision.

(b) 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.

[74] Victorian authorities[26] suggests that that an allegation of incompatibility under the Victorian equivalent of s 58(1)(a) of the HRA should be considered in the following way:

(a) First, identify whether any human right is relevant to or engaged by the impugned decision or action of the public authority (the engagement question). A human right will be engaged if that right is apparently limited. A right may be engaged but not limited.

(b) Secondly, determine whether the decision or action has limited that right (the limitation question). A right will be limited (for the purposes of s 8 of the *HRA*) if it is restricted or interfered with.

Health; Patrick's Case (2011) 39 VR 373 at 441-442 [310] per Bell J ("Patrick's Case").

22 *Innes v Electoral Commission of Queensland [No 2]* (2020) 5 QR 623 at [290]; *Patrick's Case* at 384 [36] per Bell J.

23 *Re Application under the Major Crime (Investigative Powers) Act 2004* (2009) 24 VR 415 at 434 [80] per Warren CJ; *Re Kracke* [97] per Bell J; *Re Director of Housing and Sudi* [2010] VCAT 328 at [93] per Bell J; *Castles v Secretary, Department of Justice* (2010) 28 VR 141 at 157-158 [55] per Emerton J ("Castles"); *De Bruyn v Victorian Institute of Forensic Mental Health* (2016) 48 VR 647 at 691 [126] per Riordan J; *Certain Children by their Litigation Guardian Sister Marie Brigid Arthur v Minister for Families and Children (No 1)* (2016) 51 VR 473 at 496 [143] per Garde J; *Islam v Director-General, Department of Justice and Community Safety Directorate* [2018] ACTSC 322 at [67]-[68] per McWilliam AsJ.

24 *DPP (Vic) v Kaba* (2014) 44 VR 526 at 556 [108] per Bell J; *Re Kracke* at 29 [79].

25 *Certain Children (No 2)* at [203].

26 *Sabet v Medical Practitioners Board (Vic)* (2008) 20 VR 414 at [108]-[109], *Baker v DPP (Vic)* (2017) A Crim R 318 at [56], *Thompson v Minogue* (2021) 67 VR 301 at [96].

(c) Thirdly, consider whether the limit is under law, reasonable and demonstrably justified having regard to the matters set out in s 13(2) of the *HRA* (the proportionality or justification question).

The Procedural limb

[75] The test for a similar provision under the *Charter* was paraphrased by Tate JA in *Bare*[27] in this way:

> "… 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."

[76] Section 58(5) of the *HRA* imposes a more detailed requirement than does the *Charter* — proper consideration includes identification of the human rights that may be affected by the decision.

[77] The test in *Bare* was considered by the Victorian Court of Appeal in *Thompson v Minogue*[28] and, subject to the need to identify the affected human rights, it provides guidance in considering whether s 58(5) has been satisfied. A unanimous court[29] added this to the process of analysis:

(a) the factors in [s 13 HRA] may provide a useful framework or reference point for the balancing of competing private and public interests which limb 4 of the *HJ* test requires;

(b) the phrase 'as part of the exercise of justification' in element 4 of the *HJ* test does not import into the procedural limb of [s 58(1)(b) HRA] the requirements of [s 13 HRA];

(c) a public authority may give proper consideration to a relevant human right without giving direct and express consideration to each of the matters set out in [s 13]. A construction that required such consideration would be contrary to the principle derived from *Castles* that the procedural limb does not involve a sophisticated legal exercise and that there is no formula for compliance with it;

(d) in giving proper consideration to a relevant human right in the manner required by the *HJ* test, a public authority will need to make a broad and general assessment of whether the impact that its conduct will have upon a relevant human right is appropriate in all the circumstances. That broad and general assessment is 'the exercise of justification' in element 4 of the *HJ* test. The

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27 (2015) 48 VR 129 at [288]; *HJ v Independent Broad-based Anti-corruption Commission* (2021) 64 VR 270.

28 (2021) 67 VR 301.

29 Kyrou, McLeish and Niall JJA.

matters in [s 13] may, in appropriate cases, assist a public authority in making that broad and general assessment; and

(e) the adjective 'proper' means that the standard of consideration must be higher than that generally applicable at common law to taking into account relevant considerations.

The making of the QPS Directions

[78] I turn now to the evidence relating to the making of the Directions.

[79] Deputy Commissioner Smith prepared a memorandum for the Commissioner – dated 23 August 2021 – on the subject of "Workforce risks and vaccination of our workforce". In that memorandum he provided a brief historical overview of the pandemic and set out excerpts from reports by the Queensland Chief Health Officer, the World Health Organisation and the Commonwealth Department of Health among others. He made the following points:

(a) that it was necessary to assess the current risk and potential impacts of Covid-19 on the QPS especially the increase in threat caused by the Delta variant;

(b) that the US National Center for Immunization and Respiratory Diseases had said that:

(i) the Delta variant is more contagious;

(ii) it might cause more severe illness;

(iii) the vast majority of hospitalisation and death caused by Covid-19 are in unvaccinated people;

(iv) unvaccinated people remain the greatest concern; and

(v) fully vaccinated people can spread the virus to others but appear to spread it for a shorter time;

(c) he summarised the effect of the information in this way:

(i) the risks to the workforce from Covid-19 and the Delta strain in particular are quite significant and would have a devastating impact on police personnel;

(ii) the risks can be significantly mitigated by the use of approved vaccines;

(d) he summarised his advice and recommendations in this way:

(i) the Commissioner of Police has the power to direct mandatory vaccination (dependent on the facts and circumstances at the time of giving the direction);

(ii) the Commissioner of Police must ensure as far as practicable the health and safety of the QPS workforce;

(iii) a mandatory direction by the Commissioner of police with exceptions for contraindications and genuine religious objections would not amount to unlawful discrimination;

(iv) a mandatory direction by the Commissioner of Police would fall within the scope of powers under the Police Service Administration Act;

(v) a mandatory direction by the Commissioner of Police would be compatible with human rights under the *Human Rights Act*;

(vi) such a direction can be an obligation in contracts for police recruits;

(vii) such an obligation can be made a condition of entry for police workplaces for non-police personnel such as contractors; and

(viii) a requirement can be made for all police personnel to provide proof of vaccination to ensure compliance with a mandatory direction.

[80] In his memorandum he made the following statements:

(a) "The risks to the workforce from Covid 19 and the Delta strain in particular are quite significant and would have a devastating impact on our police personnel".

(b) "The risks can be significantly mitigated by the use of approved vaccines".

(c) "Evidence from other jurisdictions indicates that police officers in particular, but also front-line support staff who interact with and have contact with, or who are mission critical to the QPS, are very much at risk from the virus".

(d) "Modelling indicates that QPS personnel have over 2 million contacts … With the community every year – not all of these in controlled circumstances with any degree of certainty around the health status of the people we are coming into contact with".

[81] Although the memorandum referred to "evidence from other jurisdictions" no such evidence was provided. Further, the "modelling" referred to was just a document created for the financial year 2019/20 entitled Queensland Police Service Daily Policing Demands. It did not provide any predictions of the effect of the pandemic on the QPS.

[82] Deputy Commissioner Smith advised the Commissioner that:

(a) a mandatory direction by her (with exceptions for contraindications and genuine religious objections) would not amount to unlawful discrimination;

(b) a mandatory direction by her would fall within the scope of powers under the PSAA; and

(c) a mandatory direction by her would be compatible with human rights under the HRA.

[83] He recommended that "a direction be drafted under your authority pursuant to section 4.8 and 4.9 of the Police Service Administration Act directing all police personnel to be vaccinated with an approved Covid – 19 vaccine with exemptions for those with medical contraindications, genuine religious objections or other exceptional circumstances."

[84] The Commissioner's evidence was that she relied upon Deputy Commissioner Smith to assist her in making her decision with respect to the Directions.

[85] The Commissioner accepted that, at the time of issuing Direction No. 12, the pandemic had been in existence for some 18 months. In her evidence, she was uncertain about how many QPS officers had contracted Covid-19 at that time. The only figure she could offer, and about which she remained uncertain, was that there may have been 15 to 20 QPS employees who had contracted Covid-19.

[86] I find that the Commissioner made her decision to issue Direction No. 12 by no later than 1 September 2021. On that date Deputy Commissioner Smith informed members of a strategy steering committee that the Commissioner "has determined due to the risks we are potentially facing, the Commissioner will be giving a directive immediately for our people effective from Monday, 6 September 2021 [which will require vaccination]". The Commissioner accepted that, at least as at the date of that meeting, she had communicated to Deputy Commissioner Smith that she had made a decision to issue a direction requiring vaccination for police officers and staff members.

[87] Deputy Commissioner Smith agreed that he had reported to the members of the strategy steering committee that the Commissioner had determined that she was going to give a directive that would require:

(a) all serving sworn police officers to be vaccinated;

(b) all serving sworn police officers to receive a first dose of a COVID vaccine in October 2021; and

(c) all serving sworn police officers to receive a second dose by 24 January 2022.

and that there would be some limited exceptions to the requirements which would be dealt with on a case-by-case basis.

[88] He was asked:

> "And can you tell his Honour when, prior to the meeting, the Commissioner conveyed to you that she had made a decision to issue a direction requiring sworn police officers to be vaccinated in the terms that we have just discussed? – – – Yeah, she gave that indication that it was her intent on or about 23rd of August, after I delivered that report to the Commissioner."

[89] That her decision had been made by about that time was confirmed in a letter of 3 September from the Commissioner (drafted by Deputy Commissioner Smith) to the Director-General of Queensland Health informing him of her intention to issue a Direction.

[90] The Commissioner was cross-examined in detail about the process which led to her making the decision to issue Direction No. 12. Unfortunately, she did not appear to have given her evidence much thought before she entered the witness box. Her recollection was poor and she seemed to be unfamiliar with some of the documents which were at the heart of the case. She frequently had to peruse documents, sometimes at length, and sometimes when she was being asked questions unrelated to any documents. At one point, she was asked:

> "Can you tell his Honour which human rights you considered would be limited by the issuing of direction number 12?---There's actually a number of human rights. There's a right to life, there's discrimination, there's interference to your body. And there's a number of others. But when I get briefed, I get briefed by others and they take me through it. To sit here and remember exactly the minute detail of a briefing at that time, I can't do it."

[91] That answer was given immediately after the Commissioner had been shown the Human Rights Compatibility Assessment prepared by officers of the Crown Solicitor (HRCA No. 1) and after she was asked to close the folder in front of her.

[92] On 30 September 2021 Boddice J ordered that the Commissioner provide a Statement of Reasons for the making of Direction No. 12. Those reasons were provided on 7 October in a document signed by the Commissioner. Although the Statement of Reasons concerned Direction No. 12 I have taken it to also record at least some of the reasons for making Direction No. 14 because of the Commissioner's view (referred to below) that Direction No. 14 was an extension of Direction No. 12. That conclusion may be drawn because the latter direction reimposed the requirements of the earlier direction and added to them.

[93] In the Statement of Reasons the Commissioner records the material which she had considered in arriving at her decision. It included the memorandum from Deputy Commissioner Smith. The memorandum had eight other documents attached to it. The Commissioner was cross-examined about which, if any, of those documents she had read. In her answers she said: "I would have either read those documents or been briefed on those documents" and "I would have either read part of them, skimmed part of them, read some of them and been briefed on them."

[94] The Statement of Reasons also included, strangely, her own letter to the Director-General of Queensland Health created after she made the decision. It was said to have been a document she considered in arriving at her decision.

[95] The final document listed as having been considered is HRCA No 1. It is dated 7 September 2021which is the date that Direction No. 12 was issued but after the date on which the decision to issue was made

[96] The Commissioner's evidence in chief consisted of a two-page affidavit. In it she says:

> "6. I confirm that in making my decision to issue Direction No. 12, I considered and adopted the human rights compatibility statement exhibited at pages 256 to 264 to exhibit DS-02 to the First Smith Affidavit.[30]
>
> 7. Similarly, I confirm that in making my decision to issue Direction No. 14, I considered and adopted the human rights compatibility statement exhibited at pages 105 to 110 to exhibit DS-20 to the Third Smith Affidavit.[31]
>
> 8. In making my decision to issue Direction No. 14, I also considered and adopted the human rights compatibility statement for Direction No. 12, to the extent its contents remainder relevant to my decision to issue Direction No. 14."

[97] In cross-examination she was asked:

> All right. Now, can I ask you, then, please, to turn to page 256, which is the Human Rights Compatibility Assessment?---Yes.
>
> Now, do you recall when you first were provided with this document? It's not dated, I can - - -?---Yeah.
>
> - - - indicate?---It would have been at the time that we were having the discussion to make the direction.
>
> All right. Well, do I take it from that answer that you can't recall when you first were provided with this document?---Not the exact date.
>
> All right?---Yeah.
>
> Was it the day that you made the direction?---The document may have – I can't recall. You know, the – it was – this was part of many discussions, many briefings, and I can't recall the exact date.
>
> All right. But you tell his Honour, do you, that you had firstly received this document before you made the decision to issue Direction No. 12?---Yes.
>
> And do you tell his Honour that you read this document before you made your decision to issue direction number 12?---Sorry, I'm just trying to think, because so much was happening. So whether I received the document. But I would have

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30 The affidavit of Deputy Commissioner Smith of 16 November 2021.

31 The affidavit of Deputy Commissioner Smith of 10 March 2022.

> been briefed several times throughout this entire period. So there's a lot of difference between actually, your Honour, receiving the document but getting constantly briefed about what's occurring. So the exact date of receiving the document would be a very different date to all of the information and the discussion and the briefings that I was having leading up to actually signing the document. So from August onwards, when we became well aware of vaccines and the protection of vaccines, a lot of information was brought to me. A lot of briefings took place, and a lot of – obviously, you know, documentation was prepared. Conversations happened often. So it wasn't a case, your Honour, where I would get a document and there were not any briefings beforehand. In fact, briefings were quite – quite extensive. They commenced with, you know, briefing the executive leadership team. And then I would see my deputies two, three times a week on many issues, but this as well. So the conversation was constant, but the signing of the documentation doesn't necessarily take place when the conversation does.
>
> Commissioner, I'm going to ask the question again, and I'll ask you to direct yourself to answering the question - - -?---Yep.
>
> - - - and not make speeches. Is it the case that you, firstly, received this document before you made the decision to issue direction number 12?---I can't answer that because I don't know the date I signed this document.
>
> Well, you didn't sign this document, Commissioner?---Well, the date I received the document, sorry, in – in document format.

[98] The Commissioner was asked whether she intended to convey by saying that she had adopted the human rights compatibility statement that she had adopted it as her own. She rejected that and said that she "actually considered what's in it and then I will adopt it if I am satisfied with it". She said that, independently of that compatibility statement, she had turned her mind as to whether or not her decision would limit the human rights of her officers.

[99] The Commissioner also accepted that "to the extent that the Human Rights Compatibility Statement [did] not identify a right as being limited, that [was] not a right that [she had] considered in issuing direction number 12." Later, she agreed that she didn't identify the human rights herself – that had been done by Crown Law for her.

[100] The Commissioner then agreed to the following propositions:

(a) to the extent that there was an identification of the human rights that might have been limited by Direction No 12, that identification occurred by her being provided with HRCA No. 1;

(b) to the extent that there was consideration of the kind required by the HRA as to whether or not the limits were justified, that consideration was provided to her in HRCA No. 1;

(c) that she considered HRCA No. 1 and agreed with its contents; and

(d) that she understood that that was a process that had to be undertaken before making a decision to issue Direction No. 12.

[101] It was then put to her that she had not received HRCA No. 1 until after she had made the decision which led to Direction No. 12. Her response was:

> "The documentation is a formality".

[102] In an exchange concerning HRCA No 1, the Commissioner gave an answer which was typical of much of her evidence:

> "I do not know the exact date I received the document. The document is a formality at the end result of a – a large amount of conversations. So if I was briefed extensively by Deputy [Commissioner] Smith that this was compatible and that was in a conversation, the conversation might be that, "I will bring you the document". Then there's another conversation. The conversations are numerous, the conversations are extensive, and many of them over many periods of time."

[103] It was suggested to her that, before receiving HRCA No. 1, she had not given any independent consideration to the extent to which proposed Direction No. 12 would limit or impact upon the human rights of police officers or staff members. The Commissioner rejected that, she said: "I definitely did". There was then this exchange:

> "All right?---I knew from the very beginning that it would limit their rights. Definitely."

[104] I find that the Commissioner is mistaken in her recollection and that she could not have considered HRCA No.1 before she made the decision to issue Direction No. 12 because she could not have received it before then. HRCA No. 1 contains a footnote referring to a document which was published by the Therapeutic Goods Administration on 2 September 2021. I draw from that that HRCA No. 1 could not have been created until, at the earliest, 2 September 2021. It follows, then, that she could not have complied with s 58(1)(b) with respect to Direction No. 12.

[105] Deputy Commissioner Smith gave evidence which was unsatisfactory in many respects. He was cross-examined about HRCA No. 1. He said that the document was provided to the Commissioner on two different occasions. He said that he received HRCA No. 1 on the last Friday in August, that is, 27 August and that he provided to the Commissioner on the following Monday, that is, 30 August. After some prevarication, he said that there must be more than one version of HRCA No. 1. He said that other versions of the document would be in the files in his office but, despite a call being made, no other version was produced.

[106] In the final written submissions for the Commissioner it is contended that he prepared the memorandum for the Commissioner dated 23 August 2021. It is then submitted:

> "12. Subsequently, he provided the memorandum, supporting materials and other documents, including the Human Rights Compatibility Assessment …, to the QPS Commissioner. That occurred on 7 September 2021."

[107] The Commissioner was asked whether the material listed in the Statement of Reasons was the "entirety of the material that you relied on in making your decision" to issue Direction No. 12. She answered: "So that would be yes, but I'm also party to many other discussions that happen either at the leadership board or directly with the CHO …". Soon after that, she was asked:

> "You tell his Honour now that, apart from this material, you also relied on the contents of discussions that you had with other people in making your decision to issue direction 12? – – – I relied on this material. Your Honour, I sit around the table with the CHO for many, many months, and whilst I depended on this, in the back of my mind I am always exposed to other information. This material is brought in front of me and I rely on it, but to think that I've had all of this information, it probably affirms what I'm relying on. So it's a very difficult thing for me to just say I depended on this when I know I'm exposed to so much information on a daily basis over an extended period of time."

[108] There were then further exchanges which led to the Commissioner agreeing that conversations that she had had with the Chief Health Officer "influenced my decision and affirmed what was already in the information that I had." This exchange then took place:

> "Do you now tell his Honour that some of the evidence that you based your findings of fact on may have included discussions with the Chief Health Officer? – – – So I depended on the Chief Health Officer's report, but in addition to that, I had many discussions with the Chief Health Officer."

[109] The Commissioner was then asked questions about the Chief Health Officer's report. She agreed that:

(a) the report was for the year 2019/2020;

(b) it said nothing about the health status of anyone in September 2021;

(c) it said nothing about vaccinations relating to COVID; and

(d) to the extent that it said anything about COVID, it related to an earlier variant than the one affecting Queensland in September 2021.

[110] Soon after those answers were given, this exchange took place:

> " … There is nothing in that document that is remotely relevant to your consideration of issuing Direction No. 12, is there? – – – It may have been, because … of the conversations and the briefings and the information that I got from my Deputy and we may have had a conversation about this and the relevance of it."

[111] A fair reading of the Chief Health Officer's report leads to the conclusion that there is nothing in it which could inform the making of Direction No. 12. It was for the year 2019/2020. The declaration of the COVID pandemic did not take place until March 2020. In the introduction to the report, the then Chief Health Officer did refer to COVID-19 but in very general terms as might be expected given the nature of the document. There is nothing else in it of relevance to Direction No.12.

[112] At the time of making Direction No. 12 the pandemic had been in existence for more than 18 months. The Commissioner did not have any information about:

(a) whether any police officer who had contracted COVID-19 had transmitted the virus to another police officer;

(b) the numbers of police officers who had contracted COVID-19 and transmitted it to members of the community; and

(c) the numbers of police officers who had contracted COVID-19 from members of the community in the course of their duties.

[113] In the Statement of Reasons (at paragraph 18), the Commissioner states:

> "The nature and frequency of police officers' interactions with members of the community, particularly vulnerable members of the community, results in a significantly increased risk of police officers contracting or transmitting COVID-19".

[114] There was no evidence before the Commissioner to support that statement. The QPS had not experienced significant numbers of police officers contracting COVID-19 during the first 18 months of the pandemic. The memorandum from Deputy Commissioner Smith – which had formed the basis of the Commissioner's decision to issue Direction No. 12 – did not contain any statement to that effect.

[115] Another document said to have been relied upon by the Commissioner was the "QPS Daily Policing Demands". It was described by Deputy Commissioner Smith as "modelling", but it was nothing of the sort. In any event, it said nothing about the risk of police officers contracting or transmitting COVID-19.

[116] The Commissioner was taken to HRCA No. 1 and the section of it concerning whether the limits imposed struck a fair balance between the rights of the individual and the interests of the community. One of the benefits proposed was that there would be: "savings in indirect costs, such as loss of productivity and economic loss suffered as a result of police officers and staff members contracting the virus and developing COVID-19". She was asked whether any attempt had been made to quantify those savings and she answered that it would have been very difficult to do that but that "we were comfortable … that there would be a loss of productivity and economic loss". This exchange then took place:

> "And you understood that your task in undertaking your compatibility assessment was to weigh the imposition on human rights against the potential benefits? – – – Yes.
>
> … and it was important for you, wasn't it, to ensure that whatever the benefits were, were accurately quantified to enable that balancing to occur; correct? – – – Quantified as accurately as possible."

[117] The Commissioner was then asked some questions about whether anybody had been asked to determine the extent to which there might be a loss of productivity and the Commissioner said that " … we knew there would be productivity loss and economic loss."

[118] This exchange then took place:

> "Well, that would depend, wouldn't it, on how many police officers contracted COVID-19? – – – Yes.
>
> And for the purposes of your exercise, you have to consider how many police officers would contract COVID-19 if you did not impose the vaccine mandate; correct? – – – Yes.
>
> All right. And you didn't attempt to quantify how many police officers that would affect, did you? – – – No."

[119] So far as the making of Direction No. 14 was concerned she said that she had:

(a) relied upon the material given to her by Deputy Commissioner Smith (which is listed in Ex DC 20 to his third affidavit);

(b) read and considered each of the Human Rights Compatibility Assessments provided for each of the QPS Directions; and

(c) made her own decision that the proposed directions were compatible with human rights.

[120] With respect to Direction No. 14, Deputy Commissioner Smith did not prepare any form of written memorandum for the Commissioner's consideration. Nor, to his knowledge, did anyone else. He did, though, identify the material which he said the Commissioner relied upon in making Direction No. 14. But there was no evidence from the Commissioner as to the evidence upon which she relied. She was asked in cross-examination:

> "Commissioner, you can't provide his Honour with any reason why you did not think it appropriate to provide your evidence as to the material upon which you relied in Direction No. 14?---It was an oversight.
>
> Is the reason, in fact, because you didn't know what material it was that you had relied on in making Direction No. 14?---I had an extensive amount of material in front of me constantly.

> Is the reason you didn't identify the material upon which you relied in making Direction No. 14 in your affidavit because you did not know what that material is?---That's not correct."

[121] One of the documents briefed to the Commissioner for consideration was the "Queensland Police Service Daily Policing Demands". It was the same document which had been briefed to her with respect to Direction No. 12. The Commissioner agreed that the document did not relate to any change that occurred between September and December 2021. It says nothing about the scenario that the QPS was facing in dealing with the Delta strain and it said nothing about the situation with respect to the Omicron strain. It was as pointless for Direction No. 14 as it had been for Direction No. 12.

[122] The Commissioner agreed that it would be "fair to say that [the decision to issue Direction No. 14 was] was likely to be somewhere between the 7th and 10th of December." The Commissioner was uncertain as to the way the material listed by Deputy Commissioner Smith was delivered to her – she said that there would have been some in hard copy and some might have been delivered electronically. She was reluctant to accept that all the material that she received on this issue was provided to her by Deputy Commissioner Smith. She made frequent reference to material in "executive briefings" and said that other material may have come through that channel as well.

[123] A further Human Rights Compatibility Assessment (HRCA No. 2) was prepared by officers of Crown Law. It contained a summary of Direction No. 12, noted that the proposed direction would maintain the requirements of Direction No. 12 and make four changes which related to: second doses, booster doses, the definition of "front-line staff member", and the requirement to take a PCR test in certain circumstances. It then purports to record what the Commissioner considered when making Direction No. 12 and her conclusion that any limits on the human rights referred to were reasonable and justified by the need to ensure QPS officers and staff are "frontline ready" and to reduce the risk of COVID-19 transmission from and to QPS officers and staff.

[124] HRCA No. 2 only considered the additional impact on human rights made by the four changes referred to above and says that it "should be read in conjunction with the human rights compatibility assessment for the Previous Direction."

[125] The Commissioner said that she recalled receiving HRCA No. 2 on 14 December 2021. She was in Weipa and the document was sent to her by email. It was one of the few documents about which she expressed certainty about the way in which it was received. The Commissioner said she "had spoken about the document prior to that." But she couldn't recall whether she had seen any previous version of HRCA No. 2. In cross-examination, this exchange took place:

> " … In undertaking the human rights assessment that you were required to undertake in issuing Direction No. 14, you did not revisit any of the factors that you had taken into consideration in deciding to issue Direction No. 12; correct?---I already knew what – you know? I already knew what the compatibility statement said in 12 and, to me, this was an extension of that.
>
> Now, is the answer to my question - - -?---I think - - -
>
> - - - "yes"?---I think that's – I'm – I think that's answering your question.
>
> I will try again. Is it fair to say that the only things that you considered in undertaking the human rights assessment in issuing Direction No. 14 was the four changes identified at the bottom of page 1?---I'm just trying to get across it, but at the end of the day, I was satisfied with the one in 12 and for me, this was an extension of that."

[126] I have taken from that exchange, and from other answers she gave, that in making Direction No. 14 the Commissioner did not consider the matters raised in HRCA No. 1 and, if she considered anything, it would only have been the four changes made by Direction No. 14. But she gave this evidence about the timing of her decision to make, and the signing of, Direction No. 14:

> "Now, the direction was signed by you, as I understand your evidence, on the 14th of December 2021?---Yes.
>
> Are you able to tell his Honour when, prior to you signing that document, you made the decision that you would require Queensland Police officers and the staff 5 members described in the direction to obtain a booster dose?---It would be very difficult to give an exact date because it was a period of an extraordinary amount of information coming in in terms of the effectiveness of the booster dose. It may well have been a few days, a week before. I cannot give an exact answer on that.
>
> All right. Is it fair to say that it is likely to be somewhere between the 7th and 10th of December?---Yes, yeah."

[127] Her evidence was that it was fair to say that she made her decision to issue Direction No. 14 somewhere between 7th and 10th December. That is, her decision was made at least four days before she received HRCA No. 2. It is more likely than not that the Commissioner did not consider the human rights ramifications of Direction No. 14.

[128] The Commissioner agreed that, as of 6 September 2021, the vaccination uptake in Queensland (16 years and above, single-dose) was about 53%. She also agreed that she understood that as of 13 December 2021 the vaccination uptake for the same cohort had increased to over 88%. She did not doubt that the double dose uptake when she signed Direction No. 12 was about 35% and that it had increased to 81.29% by 14 December.

[129] She agreed that she did not, when considering the matters in Direction No. 14, have regard to either the increased uptake of vaccination in the community or that the

vaccination uptake for police officers and frontline staff had increased to the "high 90% range".

[130] The Commissioner was cross-examined about whether she had read an advice from Crown Law. She said she could not recall. As she often did, she reiterated that she was "exposed to so much information, in hard copy, electronically" and she relied on others to brief her. She accepted that Deputy Commissioner Smith had given her Crown Law advice about the proposed direction and that she expected that he would have briefed her on that advice.

[131] The only identification of documents said to have been provided to the Commissioner before Direction No. 14 was made is contained in Deputy Commissioner Smith's third affidavit in which he says: "[8] On 14 December 2021, the Commissioner approved Direction No. 14, which repealed and replaced Direction No. 12 from that date. Exhibited … to this affidavit is … the material the Commissioner relied upon in making the direction."

[132] The documents said to have been relied upon by the Commissioner include the following: "COVID-19 vaccinations: workplace rights & obligations – Fair Work Ombudsman", two advice documents from ATAGI, HRCA No. 2, several Queensland government documents, a Queensland Police Service diagram showing daily policing demands for 1 July 2019 to 30 June 2020, a United States Food and Drug Administration briefing document for a meeting held on 17 September 2021, and a WHO "Update on Omicron".

[133] The Commissioner agreed that, at the time Direction No. 14 was issued, she was aware that:

(a) the previously dominant Delta strain was being replaced by the Omicron strain;

(b) Omicron was highly transmissible; and

(c) the vaccines that had been mandated for members of the QPS had limited utility in preventing transmission of the Omicron variant.

[134] The Commissioner's evidence about whether she gave "proper consideration to a relevant human right in making [the] decision" to issue Direction No 14 was vague and inconclusive. Her evidence about the decision-making processes which led to Direction No 14 was consistent – she was reluctant to commit to having read particular documents, she frequently could not recall how she received information or what the information was, and she frequently evaded these issues by referring in a vague way to briefings, discussions, summaries and the like.

[135] I am not satisfied that the Commissioner has demonstrated that she gave proper consideration to the human rights that might have been affected by her decisions. She could not have seen HRCA No. 1 before making the decision to issue Direction No. 12 and it is more likely than not that she did not receive HRCA No. 2 until after

deciding to issue Direction No. 14. Her evidence about considering either HRCA No. 1 or HRCA No. 2 was, at best, inconclusive and, at worst, unreliable.

[136] The Commissioner has failed to demonstrate that, before making either Direction No. 12 or Direction No. 14, she:

(a) understood in general terms which of the rights of the persons affected by the decisions might be relevant and how those rights would be interfered with by the decision;

(b) had seriously turned her mind to the possible impact of the decision on a person's human rights;

(c) had identified the countervailing interests and obligations; and

(d) had balanced competing private and public interests as part of the exercise.

[137] Further, I do not accept that the Commissioner had:

(a) either identified the human rights that might be affected by the decision; or

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

[138] The "proper consideration" that needs to be given under s 58(1)(b) or s 58(5) engages a standard of consideration higher than that generally applicable at common law to taking into account relevant considerations.[32] That consideration was not given.

[139] It follows that, by failing to give proper consideration, the making of each of those decisions was unlawful.

[140] Despite the revocation of the QPS Directions, a finding of unlawfulness is still available.

The Johnston and Sutton matters – what are the issues?

[141] The approach taken by each of these sets of parties was broadly similar. There were, though, some areas which were pursued more vigorously by one set of parties than the other. Rather than deal with each set of submissions separately, I will deal with them together as each set adopted the other's submissions.

Are the QPS Directions statutory provisions?

[142] The Sutton applicants contend that the QPS Directions are statutory provisions as defined in schedule 1 of the HRA:

> "***statutory provision*** means an Act or statutory instrument or a provision of an Act or statutory instrument."

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32 *Thompson v Minogue* (2021) 67 VR 270 at [91].

[143] If the QPS Directions are statutory instruments, then they are subject to s 48 of the HRA, which provides:

"**Interpretation**

(1) All statutory provisions must, to the extent possible that is consistent with their purpose, be interpreted in a way that is compatible with human rights.

(2) If a statutory provision can not be interpreted in a way that is compatible with human rights, the provision must, to the extent possible that is consistent with its purpose, be interpreted in a way that is most compatible with human rights.

(3) International law and the judgments of domestic, foreign and international courts and tribunals relevant to a human right may be considered in interpreting a statutory provision.

(4) This section does not affect the validity of—

(a) an Act or provision of an Act that is not compatible with human rights; or

(b) a statutory instrument or provision of a statutory instrument that is not compatible with human rights and is empowered to be so by the Act under which it is made.

(5) This section does not apply to a statutory provision the subject of an override declaration that is in force."

[144] If s 48 applies, then the court is empowered to make a declaration of incompatibility under s 53:

"Declaration of incompatibility

(1) This section applies if—

(a) in a proceeding in the Supreme Court a question of law arises that relates to the application of this Act or a question arises in relation to the interpretation of a statutory provision in accordance with this Act; or

(b) a question is referred to the Supreme Court under section 49; or

(c) an appeal before the Court of Appeal relates to a question mentioned in paragraph (a).

(2) The Supreme Court may, in a proceeding, make a declaration (a ***declaration of incompatibility***) to the effect that the court is of the opinion that a statutory provision can not be interpreted in a way compatible with human rights.

(3) However, the Supreme Court can not make a declaration of incompatibility about a statutory provision if an override declaration is in force in relation to the provision.

(4) If the Supreme Court is considering making a declaration of incompatibility, the court must give notice of that fact in the approved form to the Attorney-General and the commission.

(5) The Supreme Court must not make a declaration of incompatibility unless the court is satisfied—

(a) a notice has been given to the Attorney-General and the commission under subsection (4); and

(b) a reasonable opportunity has been given to the Attorney-General and the commission to intervene in the proceeding or to make submissions about the proposed declaration.

(6) For the *Supreme Court of Queensland Act* 1991, section 62, a declaration of incompatibility is taken to be an order of the court in the Trial Division."

[145] The Sutton applicants, in their written submissions, say that the Court should make a declaration of incompatibility under s 53. That was the only reason for raising the question of whether the QPS Directions were statutory provisions. But no amendment to claim such a declaration in their originating application was sought.

[146] Ms Nagorcka, in her oral submissions, began to address this matter. In an exchange with her about the necessity to deal with it I observed that none of the parties had sought such a declaration. Nobody demurred to that statement. Mr Ward SC made it clear, in his oral submissions, that that relief was not pressed by him.

[147] In the submissions filed by the QHRC and the Attorney-General there was a brief but feisty disagreement about whether the QPS directions and the QAS Direction were statutory instruments. The QHRC submission that they were was not pursued.

[148] It is unnecessary, in the absence of a declaration of incompatibility being sought, for me to consider whether the QPS Directions (not being an Act or Acts) were "statutory instruments" as defined in s 7 of the *Statutory Instruments Act* 1992.

Did the Commissioner have the power to make the QPS directions?

[149] In the Johnston matter the applicants argued that the PSAA did not authorise the making of the QPS Directions.

[150] The Commissioner is responsible, under s 4.8(1) of the PSAA, for:

> "… the efficient and proper administration, management and functioning of the police service in accordance with law."

[151] Further, the Commissioner is, under s 4.8(3) of the PSAA:

> "… authorised to do, or cause to be done, all such lawful acts and things as the Commissioner considers to be necessary or convenient for the efficient and proper discharge of the prescribed responsibility."

[152] The "prescribed responsibility" is defined as the responsibility set out in s 4.8(1).

[153] The power to make directions is given by s 4.9:

"**4.9 Commissioner's directions**

(1) In discharging the prescribed responsibility, the commissioner may give, and cause to be issued, to officers, staff members or police recruits, such directions, written or oral, general or particular as the commissioner considers necessary or convenient for the efficient and proper functioning of the police service.

(2) A direction of the commissioner is of no effect to the extent that it is inconsistent with this Act.

(3) Subject to subsection (2), every officer or staff member to whom a direction of the commissioner is addressed is to comply in all respects with the direction.

(4) A direction issued under subsection (1) to officers about functions, powers or responsibilities that are also functions, powers or responsibilities of watch-house officers is taken to be also issued to watch-house officers.

(5) In all proceedings—

(a) a document purporting to be certified by the commissioner to be a true copy of a direction under subsection (1) is admissible as evidence of the direction; and

(b) a direction under subsection (1) is to be taken as effectual until the contrary is proved.

(6) In this section—

watch-house officer means a staff member who is appointed by the commissioner to be a watch-house officer."

[154] When a direction is made under s 4.9(1), then:

> "[unless it is inconsistent with the PSAA] every officer or staff member to whom a direction of the Commissioner is addressed is to comply in all respects with the direction."

[155] It was submitted for the Johnston applicants that the "proper functioning of the police service" as set out in s 4.9(1) is confined by reference to the "functions of service" set out in s 2.3:

"**2.3 Functions of service**

The functions of the police service are the following—

(a) the preservation of peace and good order—

(i) in all areas of the State; and

(ii) in all areas outside the State where the laws of the State may lawfully be applied, when occasion demands;

(b) the protection of all communities in the State and all members thereof—

(i) from unlawful disruption of peace and good order that results, or is likely to result, from—

(A) actions of criminal offenders;

(B) actions or omissions of other persons;

(ii) from commission of offences against the law generally;

(c) the prevention of crime;

(d) the detection of offenders and bringing of offenders to justice;

(e) the upholding of the law generally;

(f) the administration, in a responsible, fair and efficient manner and subject to due process of law and directions of the commissioner, of—

(i) the provisions of the Criminal Code;

(ii) the provisions of all other Acts or laws for the time being committed to the responsibility of the service;

(iii) the powers, duties and discretions prescribed for officers by any Act;

(g) the provision of the services, and the rendering of help reasonably sought, in an emergency or otherwise, as are—

(i) required of officers under any Act or law or the reasonable expectations of the community; or

(ii) reasonably sought of officers by members of the community."

[156] It follows, it was argued, that:

(a) the QPS directions do not relate to any of those defined functions; and

(b) the requirement that police officers be vaccinated is a matter that sits entirely outside the remit of a police officer's function in crime prevention and law enforcement.

[157] The argument misconstrues the meaning of the term "functioning of the police service". Those words are part of the broader description of the task imposed on the Commissioner by s 4.8(1). The Commissioner is given the responsibility "for the efficient and proper administration, management and functioning of the police service in accordance with law". The word "functioning" is not used to reflect the tasks set out in s 2.3. It is used as a present participle and means little more than "working" in the sense that a functioning clock is a clock that works.

[158] The word "functioning" has the same meaning when used in s 4.9(1). It does not have the meaning ascribed to it by *Johnston*.

[159] The breadth of the power available to the Commissioner is made clear by s 4.9(1):

"**4.9 Commissioner's directions**

(1) In discharging the prescribed responsibility, the commissioner may give, and cause to be issued, to officers, staff members or police recruits, such directions, written or oral, general or particular as **the commissioner considers necessary or convenient for the efficient and proper functioning of the police service.** …" (emphasis added)

[160] It is accepted by *Johnston* that the power to make directions which the Commissioner considers to be "necessary or convenient for the efficient and proper functioning of the police service" is a broad statutory power. That leads to the next argument about the limits of that power.

Is the power to make directions limited and, if so, in what way?

[161] A broadly worded power, such as the power in this case, to do that which is necessary or convenient is not unlimited. For example, under the *Excise Act* 1901 (Cth) regulations could be made which were "necessary or convenient … for giving effect" to that Act. The High Court of Australia said that the power enabled the making of regulations "incidental to the administration of the Act … but not regulations which vary or depart from the positive provisions made by the Act or regulations which go outside the field of operation which the Act marks out for itself".[33]

[162] To similar effect was the High Court's decision in *Shanahan v Scott*[34] which dealt with a statutory power authorising the Governor in Council to make regulations "necessary or expedient for the administration of the Act". The Court said that such a power did not enable the authority, by regulations, to extend the scope or general operation of the enactment but is strictly ancillary.[35] The power authorised a subsidiary means of carrying into effect what is enacted in the statute itself.[36]

[163] The Commissioner has the power to make a direction but the exercise of that power must be assessed in the light of other factors:

(a) whether the direction is proportional to the problem it is intended to deal with;

(b) whether it offends the principle of legality by interfering with fundamental common law rights and freedoms;[37] and

(c) whether it needs to be considered in accordance with the provisions of the HRA.[38]

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33 *Morton v Union Steamship Co of New Zealand Ltd* (1951) 83 CLR 402 at 410.
34 (1957) 96 CLR 245.
35 Ibid at 250.
36 *Northern Land Council v Quall* (2020) 271 CLR 394 at [33].
37 *North Australian Aboriginal Justice Agency Ltd v Northern Territory* (2015) 256 CLR 569.
38 *Momcilovic v R* (2011) 245 CLR 1.

[164] Another matter for consideration arises from the nature of the emergency giving rise to the making of the directions like these. What is "necessary or convenient" depends upon the nature, extent and timing of the particular emergency. Where an emergency ceases to be a problem, or the nature of the emergency changes so much that it is of a substantially different character, then what might have been regarded as "necessary or convenient" can no longer properly be regarded as such. At that point, the applicants say that the power to make the direction comes to an end because the circumstances of the emergency necessarily created a temporal limitation upon the proper exercise of the power. I consider that below.

[165] Any direction of this type must satisfy the test of legal reasonableness. In *Minister of Immigration and Citizenship v Li*[39] the High Court said that the touchstone of judicial review for legal unreasonableness in decision-making is that Parliament is taken to intend that statutory power will be exercised reasonably.

[166] In *Minister for Immigration and Border Protection v Eden*[40] the Full Court of the Federal Court explained the principles to be derived from *Li* and other authorities in this way:

> "[57] For the purposes of this appeal, it is sufficient to reduce the relevant principles into a few short propositions. This short summary is not intended to supplant or derogate from the detailed analysis and explication of the relevant principles in *Li*, *Singh* and *Stretton.*
>
> [58] First, the concept of legal unreasonableness concerns the lawful exercise of power. **Legal reasonableness, or an absence of legal unreasonableness, is an essential element in the lawfulness of decision-making**: *Li* at 350[26] and 351[29] (French CJ), 362[63] (Hayne, Kiefel and Bell JJ) and 370[88] (Gageler J); *Singh* at 445[43]; *Stretton* at [4] (Allsop CJ) and [53] (Griffiths J).
>
> [59] Second, **the Court's task in determining whether a decision is vitiated for legal unreasonableness is strictly supervisory** (*Li* at 363[66]). **It does not involve the Court reviewing the merits of the decision under the guise of an evaluation of the decision's reasonableness, or the Court substituting its own view as to how the decision should be exercised for that of the decision maker**: *Li* at 363[66] (Hayne, Kiefel and Bell JJ); *Stretton* at [12] (Allsop CJ) and [58] (Griffiths J); see also *M64/2015 v Minister for Immigration and Border Protection* [2015] HCA 50; (2015) 90 ALJR 197at 203[23]. Nor does it involve the Court remaking the decision according to its own view of reasonableness: *Stretton* at [8] (Allsop CJ).
>
> [60] Third, there are **two contexts in which the concept of legal unreasonableness may be employed**. The **first involves a conclusion after the identification of a recognised species of jurisdictional error in the decision making process, such as failing to have regard to a mandatory consideration, or having regard to an irrelevant consideration.** The **second**

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39 (2013) 249 CLR 332.

40 (2016) 240 FCR 158.

> **involves an "outcome focused" conclusion without any specific jurisdictional error being identified**: *Li* at 350[27]–351[28] (French CJ), [72] (Hayne, Kiefel and Bell JJ); *Singh* at [44]; *Stretton* at [6] (Allsop CJ)." (emphasis added)

[167] *Li* is also authority for the proposition that a lack of "proportionality" can give rise to a finding of "unreasonableness". French CJ observed that:

> "[30] … a disproportionate exercise of an administrative discretion, taking a sledgehammer to crack a nut, may be characterised as irrational and also as unreasonable simply on the basis that it exceeds what, on any view, is necessary for the purpose it serves. …" (citations omitted)

[168] That approach was supported by the observations of Hayne, Kiefel and Bell JJ when they said that "an obviously disproportionate response is one path by which a conclusion of unreasonableness may be reached."[41]

[169] In *Johnston* the applicant submitted that "the same matters that mean the Directions cannot be justified as a proportionate limitation on human rights, will also render the Direction an unreasonable use of the delegated power."

[170] Where full reasons have been given for a decision, error, if it exists, can usually be identified without the need to draw inferences from an allegedly unreasonable result. Where there are no reasons or the reasons are limited, it is still possible to argue unreasonableness.[42]

[171] I agree with the submission made by Johnston that in these circumstances:

(a) if the court is satisfied that a human right has been engaged and limited, and

(b) it is necessary to undertake the proportionality review in s 13 HRA, then

(c) that review may constitute (or go a long way towards constituting) consideration of the reasonableness of the QPS Directions as a reasonable way of attaining the proposed aims.

Is there a temporal limit on directions under s 4.9 of the PSAA?

[172] In Mr Villa SC's opening he argued that, as a matter of construction, in accordance with general law principles or aided by the interpretive requirements imposed by s 48 of the HRA itself, a temporal limit is imposed upon the Commissioner's authority to give the direction. He said that that temporal limitation arises because of the changing nature of the pandemic and, therefore, what might properly have been regarded as legally reasonable and compatible with human rights itself must change throughout the course of the pandemic. In other words, making an employment direction which was unlimited in time and which does not have "in-built" provisions for review is legally unreasonable.

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41 *Li* at [74]

42 *Li* at [85].

[173] The case for both the Johnston and Sutton applicants is that the QPS directions were legally unreasonable at the time they were made and, if not, Direction No. 14 was not "necessary or convenient for the efficient and proper functioning of the police service" at some later time.

[174] It was argued that, to the extent that the Johnston and Sutton applicants contended that the exercise of the power to make an employment direction was legally unreasonable because it was unlimited as to time and did not in terms require periodic review, a question of materiality arises which falls to be determined by reference not just to the material that was available to the Commissioner in December 2021 but also the subsequently available material referred to by the expert witnesses.

[175] The answer to this argument is brief – so far as the JRA is concerned, the question of the validity of a decision is determined at the time the power is exercised.

[176] So far as any review of the Directions was concerned, the Commissioner gave evidence that there was no formal process for reviewing the directions to ensure that the limits imposed on human rights remain. She did give some evidence of what seemed to be little more than brief discussions with Deputy Commissioner Smith about changes of circumstances. There was no record of any discussions or decisions on this topic.

Were the decisions to make the Directions affected by an error of law?

[177] The Sutton applicants submit that the QPS Directions were affected by errors of law because:

(a) they were not authorised by the enactment under which they were purported to be made (s 20(2)(d) JRA);

(b) they involved an error of law (whether or not it appears on the record of the decision) (s 20(2)(f) JRA); or

(c) were otherwise contrary to law (s 20(2)(i) JRA).

[178] The first argument concerns the construction of s 4.9 and the meaning of the word "functioning". I have dealt with that above.

[179] It was then argued that a direction compelling a police officer to submit to a COVID vaccination was not a direction "for the efficient and proper functioning of the police service" because, on the expert evidence, a "COVID vaccine mandate was unable to stop the transmission of COVID within the QPS and unable to stop the infection of police officers and staff members regardless of whether or not they were vaccinated."

[180] It was not the case that the Commissioner proposed these directions on the basis that vaccination would "stop the transmission of COVID" or "stop the infection of police officers". In the reasons she gave for making Direction No. 12 the Commissioner said that:

> "The currently available scientific evidence is that vaccination against COVID-19 helps to significantly reduce the risk of being infected and transmitting the virus to others."

Whether vaccination could achieve a significant reduction in risk was a matter for debate among the experts, but the Commissioner did not make the Directions on the basis that vaccination would stop transmission or infection.

[181] The other errors of law identified by the Sutton applicants were concerned mainly with the consideration needed to be given by the Commissioner to her decisions under s 58 of the HRA. They are dealt with below.

[182] In addition to the grounds advanced by the Johnston applicants with respect to the requirements of the HRA, they argued that the QPS Directions were unreasonable in the sense that they lay outside the decisional freedom afforded to the Commissioner.

[183] The High Court has considered the principles applicable to the idea of "legal unreasonableness" in cases such as *ABT v Minister for Immigration and Border Protection*,[43] *Minister for Immigration and Citizenship v Li*,[44] and *Minister for Immigration and Border Protection v SZVFW*.[45] They were usefully summarised by Rares, Anastassiou and Stewart JJ in *Stewart v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs*.[46] I gratefully adopt what they said in these paragraphs:

> "[65] The ground of judicial review known as 'legal reasonableness' derives from a statutory implication. The implication that a statutory power be exercised within the bounds of (legal) reasonableness arises through a common law presumption: *ABT17* at [19]; *Li* at [29] per French CJ, [63] per Hayne, Kiefel and Bell JJ and [88] per Gageler JJ; *SZVFW* at [53] per Gageler J, [80] per Nettle and Gordon JJ and [131] per Edelman J. **Where a statutory power is exercised in a manner that is legally unreasonable, the exercise of the power is beyond the jurisdiction conferred upon the repository of that power; that is, the repository committed a jurisdictional error**: *SZVFW* at [51] per Gageler J and [80] per Nettle and Gordon JJ. There are different ways of formulating the expression of legal reasonableness. These include that unreasonableness is a conclusion which may be applied to a decision which lacks an evident and intelligible justification (*Li* at [76]), and that reasonableness is the minimum to be expected of any reasonable repository of the power (*SZVFW* at [52] and [134]). It has been repeatedly emphasised that **the test for unreasonableness is necessarily stringent** (*Li* at [108]; *SZVFW* at [108]). In *ABT17* at [19] Kiefel CJ, Bell, Gageler and Keane JJ said:
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> > '[t]he implied condition of reasonableness is not confined to why a statutory decision is made; it extends to how a statutory decision is made [quoting *Li* at [91]] such that [j]ust as a power is exercised in an improper manner if it is, upon the material before the decision-maker, a decision to

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43 (2020) 269 CLR 439.
44 (2013) 249 CLR 332.
45 (2018) 264 CLR 541.
46 (2020) 281 FCR 578.

> which no reasonable person could come, so it is exercised in an improper manner if the decision-maker makes his or her decision in a manner so devoid of plausible justification that no reasonable person could have taken that course [*Minister for Immigration & Ethnic Affairs v Teoh* [1995] HCA 20; 183 CLR 273 at 290, citing *Prasad v Minister for Immigration & Ethnic Affairs* [1985] FCA 46; 6 FCR 155 at 169–170, cf *Minister for Immigration & Citizenship v SZIAI* [2009] HCA 39; 83 ALJR 1123 at [20]–[25]].'

[66] Importantly for present purposes, French CJ held in *Li* as follows (at [30]):

> '**The requirement of reasonableness is not a vehicle for challenging a decision on the basis that the decision-maker has given insufficient or excessive consideration to some matters or has made an evaluative judgment with which a court disagrees even though that judgment is rationally open to the decision-maker**.'" (emphasis added)

[184] The test has been frequently described as "stringent" and so much can be seen that it must be demonstrated that either the decision was one which no reasonable person could come to, or that the manner of making it was so devoid of plausible justification that no reasonable person could have made it. The state of mind of a decision-maker can be assessed by drawing inferences based upon the material before the decision-maker.

[185] The Johnston applicants conclude their submission on this area in this way:

> "In short form, the applicant submits that the same matters that mean the Direction cannot be justified as a proportionate limitation on human rights, will also render the Direction an unreasonable use of the delegated power."

[186] That is a conclusion which I also draw on the basis of the manner in which the hearing was conducted by all parties. I acknowledge that the test for proportionality and the test for unreasonableness are not the same, but there is an overlap and it is upon that overlap that the parties conducted their arguments.

Does s 4.9 of the PSAA allow for the making of directions which limit fundamental freedoms etc?

[187] Consideration must also be given to the principle of legality – an accepted method of interpretation to the effect that legislation is not to be construed in a way that allows it to interfere with fundamental common law rights, freedoms, immunities and associated principles in the absence of unmistakable and unambiguous language.[47]

[188] Johnston argues that the QPS Directions are not directed towards the maintenance of discipline and are not directed towards the general functioning of the police service. Therefore, it is argued, s 4.9 does not confer a power to make a direction that limits

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47 *Lacey v Attorney-General (Qld)* (2011) 242 CLR 573 at [43].

fundamental common law rights, or the human rights protected by the HRA, as is done by the QPS Directions.

[189] The Commissioner argues that s 4.9 is very broad and "plainly authorises directions that limit human rights" and relies on the decision in *Nugent v Commissioner of Police (Qld)*.[48] There is no discussion in *Nugent* of the HRA or whether s 4.9 should be interpreted in a way which would allow the limitation of human rights. Morrison JA identified the issue raised on appeal as being whether the PSAA and Regulations impliedly (rather than expressly) abrogated the privilege against self-incrimination in a police disciplinary inquiry. The Court of Appeal held that it did. The court had to consider the effect of the statute and its regulations on a common law right. It did not consider anything beyond that.

[190] The nature of the powers exercised by police and the balance which that requires was referred to by McMurdo P in *Nugent* where she said:

> "[3] … In exchange for exercising these extraordinary powers, QPS members voluntarily accept the curtailment of some freedoms enjoyed by the general public, for example, **the regulatory scheme requires that QPS members obey lawful orders and be disciplined if those orders are disobeyed.** This is an essential aspect of an efficient, effective police service in which the public can have confidence." (emphasis added)

[191] While the power bestowed by s 4.9 is undoubtedly broad it must be considered in light of the interpretive provisions in the HRA. Section 48 of the HRA provides:

"**48 Interpretation**

(1) All statutory provisions must, to the extent possible that is consistent with their purpose, be interpreted in a way that is compatible with human rights.

(2) If a statutory provision can not be interpreted in a way that is compatible with human rights, the provision must, to the extent possible that is consistent with its purpose, be interpreted in a way that is most compatible with human rights.

(3) International law and the judgments of domestic, foreign and international courts and tribunals relevant to a human right may be considered in interpreting a statutory provision.

(4) This section does not affect the validity of—

(a) an Act or provision of an Act that is not compatible with human rights; or

(b) a statutory instrument or provision of a statutory instrument that is not compatible with human rights and is empowered to be so by the Act under which it is made.

(5) This section does not apply to a statutory provision the subject of an override declaration that is in force."

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48 (2016) 261 A Crim R 383 at [49].

[192] The *Johnston* applicants argue that the Court must adopt a constructional choice of s 4.9 that is compatible with human rights.

[193] The Commissioner contends that the ordinary principles of statutory construction continue to apply to the interpretive exercise. And that it is only if there is ambiguity in the interpretation of the provision does a need arise to refer to s 48 of the HRA and, even then, the permissible constructional choices are still subject to the constraint that they be consistent with the purpose of the provision.

[194] It is, argues the Commissioner, only where a provision cannot be interpreted in a way that is compatible with human rights that it must, to the extent that is possible consistent with its purpose, be interpreted in a way that is "most" compatible with human rights. No interpretive exercise is required, and s 48 has no operation, where the meaning of a statutory provision is clear.

[195] In *Momcilovic v The Queen*[49] the High Court had to consider the operation of s 32(1) of the *Charter of Human Rights and Responsibilities Act* 2006 (Vic) (the Charter) which provided that: "So far as it is possible to do so consistently with their purpose, all statutory provisions must be interpreted in a way that is compatible with human rights." The term "human rights" was defined elsewhere in the Charter. The argument before the court was whether s 5 of the *Drugs, Poisons and Controlled Substances Act* 1981 (Vic) should be construed on ordinary principles or, by reference to the Charter, as imposing only an evidential burden on an accused, rather than the legal burden of disproving possession on the balance of probabilities.

[196] The Court gave a restricted interpretation to s 32(1) of the Victorian Charter. Section 32(1), the Court held, does not allow for "judicial rewriting" of another provision, rather it applies when different constructions are open on the language of provision interpreted having regard to its purpose.[50]

[197] I bear in mind the warning given in that decision that care must be taken when using authorities from other jurisdictions. Although s 48(3) provides that "[i]nternational law and the judgments of domestic, foreign and international courts and tribunals relevant to a human right may be considered in interpreting a statutory provision", it does not follow that those judgments can be applied without a critical eye. As French CJ said in *Momcilovic* courts should use international and foreign domestic judgments with "discrimination and care" because they are made in a variety of legal systems and constitutional settings.[51]

[198] Section 4.9 is not ambiguous and there is nothing in it which is demonstrative of inconsistency with the HRA. Many statutes contain provisions like s 4.9 which

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49 (2011) 245 CLR 1.

50 Ibid at [49]–[51] per French CJ, [169]–[171] per Gummow J, [565]–[566] per Crennan and Kiefel JJ, and [684] per Bell J.

51 (2011) 245 CLR 1 at [18].

empower a person to make directions which must be followed by others. In this case, the true issue is not whether s 4.9 is consistent with the HRA. It is not the source of the power which needs to be considered, it is the way in which it is exercised. It is whether a decision made pursuant to that provision is one which complies with the requirements of the HRA. That, in turn, requires consideration of whether the Directions comply with s 58 of the HRA. This process can be drawn from the terms of s 58 which refer to the acts or decisions of a public entity and the consideration which is to be given to human rights when making a decision.

[199] Section 48 of the HRA cannot readily be applied to restrict provisions which confer an open-ended discretion of a general nature, as in s 4.9. Section 48 operates upon constructional choices which are permitted by the language of the provision being interpreted. Seeking that the Court construe limits which are absent from the language of s 4.9 invites the Court to stray from its interpretive role and engage in a more legislative task. This was made clear in the Explanatory Notes, Human Rights Bill 2018 – "the provision does not authorise a court to depart from Parliament's intention." And this legislation was drawn after the High Court's firm rejection in *Momcilovic* of a remedial approach to interpretation.

The Witthahn matter – a preliminary issue

[200] A preliminary issue was raised by the respondent, namely, was the direction issued by Dr Wakefield liable to review under the JRA? The position of Dr Wakefield fluctuated. It will help if I briefly outline the series of submissions made by the parties:

(a) Witthahn Opening Submission – It is unclear what source of statutory power the respondent relies upon to justify the imposition of the employment declarations on the applicants and, in the absence of the respondent identifying a power for making the QAS Direction, the court would conclude it was beyond the power of the respondent and is invalid.

(b) Respondent's Opening Submission –

(i) The material before the respondent expressly identified his authority to make the QAS Direction by reference to the power (at common law) of an employer to give lawful and reasonable directions to employees; and to his authority under s 13 of the *Ambulance Service Act* 1991 (ASA) to impose conditions of employment for staff employed under that Act.

(ii) In respect of QAS employees employed under the ASA, the respondent was empowered to issue directions at common law and authorised by s 13 of the ASA to determine the conditions of employment of staff engaged under that statute.

(iii) Even if the applicants were to contend that the QAS Direction was outside the permissible limits of s 13(2), which is not conceded, the QAS Decision was nevertheless permitted at common law.

(iv) The QAS Decision does not satisfy the first limb of the test in *Griffith University v Tang*[52] and, therefore, is not a decision "under an enactment" and is not amenable to judicial review under the JRA.

(c) Witthahn Closing Submission – Section 13 of the ASA does not provide a source of power to make the QAS Direction.

(d) Respondent's Closing Submission – The QAS Direction was a decision to exercise a power under contract and thus not a decision under an enactment, nor an exercise of public power, and consequently: (a) is not amenable to judicial review, and (b) is not subject to s 58 of the HRA.

[201] Before turning to the question of the possible source of the power to make the direction, the form of the direction should be considered. The QAS Direction has, on its cover sheet, the title "Employee COVID-19 Vaccination Requirements". It describes the document's purpose as: "To outline COVID-19 vaccination requirements for existing employees and prospective employees employed to work in the identified high risks groups designated in this policy."

[202] The cover sheet contains, under the heading "Legislative or other authority", a list of Queensland statutes including the *Ambulance Service Act* 1991, the *Human Rights Act* 2019, and the *Public Service Act* 2008. The document does not refer to contracts of employment, rather it says that the policy "applies to all existing and prospective employees working for the Queensland Ambulance Service".

[203] The QAS Direction is the product of the apparent approval by Dr Wakefield of a policy position paper (Policy Document) which articulated a proposal to mandate COVID-19 vaccinations for all Queensland Ambulance Service employees. In the Executive Summary of the Policy Document the means by which mandatory vaccination can be achieved are described this way:

> "In acknowledgement of the connection between the risks posed by the virus and the work performed by the employees, it is appropriate that a reasonable and lawful direction be given to require vaccination. This will be achieved through the introduction of QAS policy requiring existing and prospective employees working in or entering a healthcare facility or healthcare setting to be vaccinated against COVID-19."

[204] The Policy Document does not specifically identify the policy as only being achieved by virtue of the implied term discussed above. The second half of the Policy Document is devoted to a human rights compatibility assessment and one of the matters considered is whether the limits proposed are imposed "under law (s 13(1))". The reference to "s 13(1)" is a reference to that section in the HRA.

[205] The note in the Policy Document on this point is:

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52 (2005) 221 CLR 99.

"The Chief Executive is authorised to give lawful and reasonable directions to QAS employees under the common law and s 13 of the *Ambulance Service Act* 1991."

[206] Section 13 of the *Ambulance Service Act* provides:

"(1) The chief executive may appoint and employ on salary or wages or engage and employ under contracts such persons—

(a) as ambulance officers; and

(b) as medical officers; and

(c) as other staff members;

as are necessary for the effectual administration of this Act.

(2) Subject to any applicable decision within the meaning of the Industrial Relations Act 2016, **persons employed under subsection (1)** (other than on contract) are to be paid salaries, wages and allowances at such rates and **are to be employed under such conditions of employment** (including conditions as to occupational superannuation and leave entitlements) **as the chief executive determines**." (emphasis added)

[207] The respondent refers to the High Court decision in *Griffith University v Tang*[53] where the dual requirements necessary to demonstrate that a decision is a decision "under an enactment" are set out in the joint judgment of Gummow, Callinan and Heydon JJ:

"[89] The determination of whether a decision is "made … under an enactment" involves two criteria: **first, the decision must be expressly or impliedly required or authorised by the enactment; and, secondly, the decision must itself confer, alter or otherwise affect legal rights or obligations, and in that sense the decision must derive from the enactment**. A decision will only be "made … under an enactment" if both these criteria are met. It should be emphasised that this construction of the statutory definition does not require the relevant decision to affect or alter existing rights or obligations, and it will be sufficient that the enactment requires or authorises decisions from which new rights or obligations arise. Similarly, it is not necessary that the relevantly affected legal rights owe their existence to the enactment in question. Affection of rights or obligations derived from the general law or statute will suffice." (emphasis added)

[208] Dr Wakefield argues that the decision made to issue the QAS Direction does not satisfy the first limb of the test as explained in *Tang* because it is not a decision required or authorised by an enactment.

[209] In Witthahn's oral submissions it was argued that courts will be likely to exercise powers of review in relation to decisions on the basis upon which the decision was purported to have been made – not on a later assertion of an alternative source of

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53 (2005) 221 CLR 99.

power. The argument advanced was that the true basis for the Direction was statutory. Reliance was placed on the reasons of Bowen CJ in *Australian Broadcasting Tribunal v Saatchi & Saatchi Compton Pty Ltd*,[54] in particular, this statement:

> "In my opinion, where an administrative body which states it is exercising a particular power in laying down a general rule lacks power on the stated ground, but could have laid down the rule validly under another head of power, it would generally be wrong for a court to uphold the rule as if it had been made under the unstated head of power, particularly where the consequences for the citizen of each exercise of power are different."

[210] Witthahn argues that the respondent should have been taken to have based his decision on a statutory power because the QAS Direction published to employees does not present as a direction pursuant to an implied contractual term but as relying solely on the "shopping list of statutes" which appears on the Direction's cover sheet. Applying Bowen CJ's reasoning would mean that if, in fact, the respondent made the QAS Direction on the basis of some statutory power, then he cannot now rely upon a different power to make the Direction.

[211] Before turning to the respondent's claim that the QAS Direction was made pursuant to an implied term in the contract of employment, the principle enunciated by Bowen CJ should be considered. It was applied by Young J in *LS v Director-General of Family and Community Services*[55] but it has been the subject of criticism in other cases. It was not followed in *VAW (Kurri Kurri) Pty Ltd v Scientific Committee (Established under s 127 of the Threatened Species Conservation Act 1995)*.[56] In that case, Spigelman CJ said:

> "[20] The reasoning of Bowen CJ in the *Australian Broadcasting Tribunal v Saatchi & Saatchi*, and the reasoning to similar effect of Fox J in that case, has been treated with considerable reserve in subsequent authorities. (See *Mercantile Mutual Life Insurance Co Ltd v Australian Securities Commission* (1993) 40 FCR 409 especially at 412, 424–425 and 435–437; *Amalgamated Television Services Pty Ltd v Australian Broadcasting Tribunal* (1989) 88 ALR 287 at 303–304; *Canwest Global Communications Corporation v Treasurer of the Commonwealth of Australia* (1997) 147 ALR 509 at 530–531; *Harris v Great Barrier Reef Marine Park Authority* (1999) 162 ALR 651 at 654 [8]–[18].) **In my opinion, the reasoning of Bowen CJ in the passage on which the appellant relies is stated too widely and should not be followed**.
>
> [21] The reasoning of Bowen CJ and Fox J in the *Australian Broadcasting Tribunal v Saatchi & Saatchi* stands in marked contrast to a number of other statements of a contrary principle." (emphasis added)

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54 (1985) 10 FCR 1.

55 (1989) 18 NSWLR 481 at 489.

56 (2003) 58 NSWLR 631.

[212] I respectfully agree with Spigelman CJ. *Saatchi* was not mentioned in *Australian Education Union v Department of Education and Children's Services*[57] but the joint judgment of French CJ, Hayne, Kiefel and Bell JJ makes the applicable law clear:

> "[34] … **A mistake by an administrative decision-maker as to the source of his or her power to make a decision does not necessarily invalidate the decision if it is able to be supported by another source of power**. Whether it can be supported by the other source of power will depend upon whether that power is subject to requirements which the decision-maker has failed to meet because of his or her belief as to the source of the power or for some other reason. As Heydon J said in Eastman v Director of Public Prosecutions (ACT):
>
> > If the maker of an administrative decision purports to act under one head of power which does not exist, but there is another head of power available and all conditions antecedent to its valid exercise have been satisfied, the decision is valid despite purported reliance on the unavailable head of power." (emphasis added, footnote omitted)

[213] Dr Wakefield submitted that the QAS Direction was given in the exercise of the common law power of an employer to give lawful and reasonable directions to employees. Thus, he argued, it was not "a decision of an administrative character under an enactment" or an exercise of public power and, therefore, it was argued, it was neither a decision to which the JRA applied nor was it subject to s 58 of the HRA.

[214] The capacity to give the direction was said to arise out of a term implied into all employment contracts at common law – that an employer may give lawful and reasonable directions to employees. It assists the consideration of that broad proposal to return to its origins. The description of the implied term most commonly used and accepted is the statement by Dixon J in *R v Darling Island Stevedoring & Lighterage Co Ltd; ex parte Sullivan*:[58]

> "If a command relates to the subject matter of the employment and involves no illegality, the obligation of the servant to obey it depends at common law upon its being reasonable. In other words, **the lawful commands of an employer which an employee must obey are those which fall within the scope of the contract of service and are reasonable**. Accordingly, when the award was framed, the expression "reasonable instructions" was adopted in describing the employees' duty to obey. **But what is reasonable is not to be determined, so to speak, *in vacuo*. The nature of the employment, the established usages affecting it, the common practices which exist and the general provisions of the instrument, in this case an award, governing the relationship, supply considerations by which the determination of what is reasonable must be controlled.** When an employee objects that an order, if fulfilled, would expose him to risk, he must establish a case of substantial danger outside the

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57 (2012) 248 CLR 1.

58 (1938) 60 CLR 601.

> contemplation of the contract of service (*Bouzourou v. Ottoman Bank; Ottoman Bank v. Chakarian*)."[59] (emphasis added, citations omitted)

[215] While that term will ordinarily be implied into a contract of employment, there are two matters which are ordinarily considered – was the direction lawful and was the direction reasonable? A lawful command is one which is within the scope of the contract and is reasonable.

[216] The respondent called evidence from Theresa Hodges – the Chief Human Resources Officer, Corporate Services Division, Queensland Health. Her affidavit evidence was confined to describing the way material was provided to Dr Wakefield.

[217] In his first affidavit, Raymond Clarke (Executive Director, Workforce, Queensland Ambulance Service) gives a very general description of the employment relationships which concern the employees the subject of the QAS Direction. He explains that QAS employs persons who broadly fall within one of the following categories: (a) operational employees (paramedics, emergency medical dispatchers, patient transport officers and so on) who are employed under the ASA, and (b) public servants employed under the *Public Service Act* 2008 (PSA).

[218] Mr Clarke summarises some of the statutory arrangements. This description was uncontroversial. He says that the Chief Executive is the statutory employer of all persons employed within the QAS and that the Chief Executive has the power to set employment conditions for all QAS employees and exercise employment powers under the ASA and the PSA. The respondent, of course, does not contend otherwise, but he says that the power was not exercised under any of the statutory provisions.

[219] The question of "reasonableness" arises in circumstances where I was not directed to any evidence which touched upon:

(a) any established usages affecting the nature of the employment;

(b) what, if any, common practices exist; or

(c) the general provisions of the instrument governing the relationship of the employees covered.

[220] The absence of evidence on this point was emphasised in Mr Ward SC's closing submissions where he noted that the employment contract or contracts had not been put in evidence, there was nothing about the express terms of the contracts, nor whether they existed individually between applicants or were subsumed into award provisions. It may be that the employment of the employees covered by the QAS Direction would have been subject to "industrial instruments" under the *Industrial Relations Act* 2016. But there no evidence on that point.

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59 At 621-622.

[221] The respondent relies upon a decision of the Fair Work Commission in *CFMEU v Mt Arthur Coal Pty Ltd*.[60] In that case, the employer had issued a direction that all workers at the Mt Arthur mine must be vaccinated against COVID-19 as a condition of site entry. The parties came before the Fair Work Commission to have the following question arbitrated: "Whether the direction … is a lawful and reasonable direction in respect to employees at the Mt Arthur mine who are covered by the Mt Arthur Coal Enterprise Agreement 2019." The Full Bench ruled against the employer on the basis that it had not complied with the consultation obligations under the *Work Health and Safety Act* 2011 (NSW).

[222] The respondent relied upon some of the obiter comments made by the Full Bench – they were obiter because the matter was decided on the failure to consult properly. At [179] of its reasons the Full Bench said:

> "If the object and purpose of such a direction is to protect the health and safety at work of employees and other persons frequenting the premises then such a direction is **likely** to be lawful. This is so because it falls within the scope of the employment and there is nothing illegal or unlawful about becoming vaccinated." (emphasis added)

[223] That statement must be read in the light of the case before the Full Bench. It is not, as the respondent submits, a finding that the direction was lawful and reasonable but rather that such a direction was "likely to be lawful". As a general proposition the Full Bench's statement may be unexceptional, but lawfulness will always depend on the particular circumstances of each case. It should also be noted that in those proceedings the Full Bench had before it the *Mt Arthur Coal Enterprise Agreement* 2019, the instrument which set out the terms and conditions of employment of the production and engineering employees who worked at the mine. The Fair Work Commission had a complete picture of the relevant employment conditions.

[224] In the absence of any evidence about the nature and scope of the employment contract, the respondent cannot establish that the QAS Direction was reasonable.

[225] As the respondent has not demonstrated that the QAS Direction was reasonable in the sense used in *Darling Island Stevedoring* it follows that the Direction did not fall within the category of directions able to be made pursuant to the implied term in the contracts of employment. It has no force and the applicants are entitled to an injunction restraining the respondent from seeking to take any action upon any alleged contravention of the Direction.

[226] The Witthahn applicants say, in the alternative, that the QAS Direction must have been made under a statutory power and the respondent should not be allowed to rely upon a common law source of power. The second part of the applicants' case is that whatever source of power is relied upon the Direction was not authorised because no

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60 (2021) 310 IR 399.

power identified by the respondent has the necessary clear words or necessary intendment that would authorise the imposition of the vaccine mandate.

[227] The first part of that submission needs to be considered together with what was contended on Dr Wakefield's behalf when his case was opened. At that point, it was argued that "section 13 [of the ASA] is a prospective provision dealing with the terms on which prospective employees may be employed, and the terms which may be included in contracts of employment at that time. It is not a source of power to deal with existing employees by imposing upon them a mandate which has the effect of terminating or suspending their rights to work."

[228] Section 13 is not confined to the terms on which prospective employees may be employed. If that were the case, then the chief executive could not change any condition of employment including the wages of current employees. The section should not be read as operating only in prospect. It is declaratory of the powers of the chief executive and equips the office holder (subject to any applicable decision under the *Industrial Relations Act* 2016) with the capacity to change the conditions of employment.

[229] The respondent eschews reliance on s 13 of the ASA or any other statutory source of power. How the respondent can rely upon the implied term for prospective employees was not explained. What the respondent must have been proposing is that he can give a direction under a contract which is not yet in existence so far as prospective employees are concerned. Any such direction would need to be incorporated into future contracts for it to be effective.

[230] Dr Wakefield argues that the power he exercised had no statutory basis but was drawn from the ordinary use of the implied term allowing for lawful and reasonable directions. The applicants argue that the implied term path is blocked because of the nature of the Direction and that the nature of the Direction means that it could not be supported by any statutory power. The parties appear to be in agreement on one thing – the QAS Direction was not made pursuant to any statutory power.

[231] Where the parties both seek the same result, namely that there was no legislative basis for the QAS Direction – either because it was made pursuant to an implied term or it was beyond any statutory power – it is not for the court to search for some saving statute.

If the Direction is a product of the implied term, does s 58(4) apply?

[232] If the QAS Direction was, contrary to my findings above, a product of the implied term as described in *Darling Island Stevedores* then does the HRA have any effect?

[233] The respondent conceded at the beginning of the trial that "[in] exercising the power to make the QAS decision, the respondent was subject to both the substantive and procedural limbs of s 58(1) of the HRA". That concession was abandoned and the

position was reversed at the end of the trial by the respondent contending that "[t]he QAS Decision was a decision to exercise a power under a contract, and … is not subject to s 58 of the *Human Rights Act* 2011." But, in the same submission, the respondent accepts that he was, when making the QAS Direction, subject to the requirements of the HRA generally.[61]

[234] Dr Wakefield, as the chief executive, is a public service employee in accordance with the PSA (ss 8 and 9). A public service employee is a public entity pursuant to s 9 of the HRA. Section 58 of the HRA obliges a public entity to consider human rights, and make decisions that are compatible with human rights. Its full terms are set out above. The section provides that it is unlawful for a public entity:

(a) to act or make a decision in a way that is not compatible with human rights; or

(b) in making a decision, to fail to give proper consideration to a human right relevant to the decision.

[235] Dr Wakefield argues that s 58(4) is engaged because his conduct was "an act or decision of a private nature" and that, therefore, s 58 does not apply. He uses, as an example, the decision in *Buonopane v RMIT University (Human Rights)*.[62] Mr Buonopane relied upon the *Equal Opportunity Act* 2010 (Vic) and alleged that he had been discriminated against by RMIT by, essentially, banning him from applying for any vacant positions in the future. That part of his claim was dismissed. He further claimed that, in making the decision to "disenfranchise" him from the respondent's recruitment process by blocking his emails, refusing to further correspond with him and refusing to consider him for future vacant positions, the respondent had contravened s 15 of the *Charter of Human Rights and Responsibilities* 2006 (Vic) by denying his right to freedom of expression. The VCAT Member found against him on the *Charter* claim. The Member went on to consider the *Charter* equivalent of s 58(4) and said:

> "42 The meaning of the word "private" is not defined by the Charter. The Macquarie Australian dictionary relevantly defines the word "private" to mean "relating to or affecting a particular person or small group of persons; individual; personal... confined to or intended only for the person or persons immediately concerned." As a result, **given the Decision only relates to the Applicant as an individual and not to the general public or any other persons** and the Applicant has not alleged that the Decision was made under any statute or policy or the like, I am satisfied that, if the Respondent was a "public authority" that the Charter would not apply to the Decision because it is "of a private nature." (emphasis added)

[236] *Buonopane* is not an example which supports Dr Wakefield's argument. That case concerned one person, the applicant, and not, as the Member observed, "the general

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61 Ibid at [185].

62 [2022] VCAT 146.

public or any other persons". The decision by Dr Wakefield affected all QAS employees.

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

[238] Dr Wakefield's submissions are inconsistent with a document prepared for him, and upon which he submits he relied in making the QAS Direction. Later in these reasons I deal with the Briefing Note he received. One of the documents[63] contains the following:

> "3. Background
>
> …
>
> The chief executive of Queensland Health is the employer of all persons employed within the QAS, under either the employment provisions contained in the *Ambulance Service Act* 1991 or the *Public Service Act* 2008 with the exception of honorary ambulance officers engaged by the QAS Commissioner under section 14 of the *Ambulance Service Act* 1991, however, are subject to the policies established by the Chief Executive in accordance with section 3E(2)(a) of the *Ambulance Service Act* 1991."

[239] Even if Dr Wakefield were correct in his argument that the direction was made pursuant to an implied term in the contracts of employment of QAS employees, that direction was not of a "private nature". It came about as a result of another public servant (Ms Hodges) preparing a briefing note. It was directed to all employees regardless of their situation. It was not formulated with any particular employee in mind. It had a general application.

[240] Dr Wakefield, in his submissions, did not explain why, if s 58(4) applied, he had apparently taken into account human rights considerations. Perhaps that was a consequence of the change of direction which his submissions took during the proceedings.

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63 "COVID-19 Vaccination Requirements for Queensland Ambulance Service (QAS) Employees".

The decision-maker did not give evidence

[241] Dr Wakefield, the first respondent in this matter, made the decision the subject of this application. He did not give evidence. No attempt was made to demonstrate that he was unavailable to be called.

[242] The only evidence connecting Dr Wakefield with the decision is his signature on a "Briefing Note" provided to him by Ms Hodges.

[243] The Briefing Note comprised three pages and five attachments. At the head of the first page of the Briefing Note the following appears:

> "SUBJECT: Approve a policy position requiring Queensland Ambulance Service employees (and honorary ambulance officers and work experience students/students undertaking clinical placements) identified as working in high-risk roles to be vaccinated against COVID-19."

[244] Beneath that introduction is a signature block in which a cross has been placed in the square next to the word "Approved" and, next to that, a signature above the words "Dr John Wakefield, Director-General, Queensland Health" and the date "31/01/2022".

[245] Witthahn argued that there was:

(a) no evidence that Dr Wakefield considered the briefing note;

(b) no evidence that he read any of the documents referred to in the footnotes;

(c) no evidence that he undertook for himself the human rights compatibility assessment contained within the attachments; and

(d) no evidence that he was aware of any material other than what was put before him.

[246] Witthahn submitted that it was appropriate to "draw a *Jones v Dunkel*[64] inference against the Respondent, and the Court should be slow to draw favourable inferences for the Respondent where it was open to the Respondent to call direct evidence of those matters." The content of such an inference was not exposed but it seems to have been suggested that the Court should not readily infer that Dr Wakefield made his decision on the basis of the material provided to him and after considering that material.

[247] The nature of a *Jones v Dunkel* inference was explored by Beech-Jones JA in *Amaca Pty Ltd v Cleary*[65] where he said:

> "[46] ... *Jones v Dunkel* ("*Jones v Dunkel* ") is authority for the proposition that two possible consequences may follow from a party's failure to call a

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64 (1959) 101 CLR 298.

65 [2022] NSWCA 151.

> witness whom they might be expected to call. The first is that the Court may infer that the evidence of the witness who was not called would not have assisted that party's case (a "*Jones v Dunkel* inference"). The other consequence is that the Court may have greater confidence in drawing an inference unfavourable to that party (*Jones v Dunkel* at 308 per Kitto J; *Kuhl v Zurich Financial Services Australia Ltd ; ASIC v Hellicar* at [232] per Heydon J; "*Hellicar*"). This latter consequence can be put aside as no inference unfavourable to the Respondent was contended for by Amaca in this case.
>
> [47] **A *Jones v Dunkel* inference has relatively weak evidentiary value. It does not enable the trier of fact to infer that the absent evidence would have been positively adverse to the party** (*Hellicar* at [168] per French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ and at [232] per Heydon J), and it does not enable a court to discount or diminish the value of the evidence that a party adduced (*Hellicar* at [164] to [170] and [233]). …" (emphasis added, citations omitted)

[248] For Dr Wakefield it was submitted that it was appropriate to infer, in the conventional way, that he had read and considered the material briefed to him and decided in accordance with the recommendations by indicating his approval, and signing the briefing note accordingly. In the absence of any evidence to the contrary, that is an inference I am prepared to draw.

[249] In *Stambe v Minister for Health*[66] Mortimer J considered this point in these circumstances:

> "[66] The evidence is scant about how the Minister approached his decision-making task. The Minister gave no evidence. An officer of the Department swore two "institutional" affidavits, to which I refer below and which were taken as read in the proceeding. No-one who might have been present when the Minister made his decision gave any evidence about what the Minister said, or did, or how he approached his task. There was no evidence about how long the Minister took to make his decision (apart from that in the "institutional" affidavits referred to below at [140]). The evidence is that the Minister signed the briefing note and dated it "1 November 2017". I infer the date was entered by the Minister as it appears to be in the same handwriting as the signature. In the rest of the material this date is nominated as the date the power was exercised."

[250] In *Stambe* the reasons given by the Minister for having made his decision were the subject of criticism. The Minister's reasons had been drafted and settled by departmental officers and lawyers well after the exercise of power and were simply adopted by the decision-maker. Her Honour said:

> "[74] As a general principle, I consider it reliable and appropriate to infer, consistently with the purpose and practice of ministerial briefing notes, that a Minister reads a briefing note with which she or he is provided, where that briefing note is intended to provide the Minister with sufficient information to make a decision about whether or how to exercise a statutory power. Sometimes there may be evidence which assists the drawing of such an inference, such as

66 (2019) 270 FCR 173.

> handwriting, or marks such as circles or underlining, by the Minister on the contents of a briefing note itself. Such evidence is not necessary for the inference to be available and drawn, but it may be persuasive.
> [75] Of course, the drawing of such an inference may be actively contested by admissible evidence. If it is not, then it would tend to undermine the practice of executive decision-making at ministerial level if supervising Courts were to require direct evidence that the contents of each briefing note were read by a Minister. Whether an inference should be drawn in an individual case will remain a matter for each judge in the circumstances, but for my own part I consider this an appropriate general approach."

[251] That approach, with which I respectfully agree, has been endorsed by the Full Court of the Federal Court of Australia in *Makarov v Minister for Home Affairs*.[67] I see no reason for that inference not to apply to persons in the position of Director-General. There is no evidence to suggest that the Director-General did not read or consider the material.[68]

[252] If the decision-maker is not called and, as here, the *Stambe* inference is relied upon, then the material and the reasoning relied on to make the decision is confined to that which is contained in the Briefing Note.

The contents of the Briefing Note

[253] Ms Hodges says that, on 21 January 2022, she received a bundle of material from QAS seeking the Director-General's approval of the "QAS Covid-19 Vaccine Requirement" after which she prepared the Briefing Note with attachments.

[254] The Briefing Note contains material under the following headings: the Recommendation, Issues, Background, Results of Consultation, Resource/Financial Implications, Sensitivities/Risks, and Attachments.

[255] The only direct reference to COVID-19 is in the Background section:

> "18. Taking into account consideration of the daily transmission events occurring in health facilities in States, as well as other transmission events linked to Health Care Workers, there is a demonstrable level of risk associated with the work performed by QAS employees (and honorary ambulance officers engaged under section 14 of the *Ambulance Service Act* 1991 and work experience students/students undertaking clinical placements.)
>
> 19. Due to the highly transmissible and increasingly virulent nature of COVID-19, particularly the Omicron and Delta variants, increasing numbers of employers have announced policies requiring employee vaccination, including QANTAS, SPC and New South Wales, Tasmania and Western Australian Health departments."

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67 (2021) 286 FCR 412 at [66] and [88].

68 See also *CEU22 v Minister for Home Affairs (No 2)* [2023] FCA 867 at [96].

[256] In the first attachment – "COVID-19 Vaccination Requirements for Queensland Ambulance Service (QAS) Employees" – the only substantial reference to risk appears in "5.1 The impact of COVID-19 on Queensland Ambulance Service". It says, without any supporting material, that:

> " Health and aged care workers have been identified as being of particularly high risk due to the nature of their work, which involves the provision of care to unwell persons as well as an inability to practice [sic] public health prevention measures due to this work (e.g. inability to physically distance). In fact, research indicates that patient-facing health and aged care workers are at three times the risk of contracting COVID-19 when compared with the general population."

[257] There is a footnote to the last sentence of that statement which cites, in support, an article in the British Medical Journal.[69] It was published on 28 October 2020 – before Omicron arose. It was based on the entire Scottish healthcare workforce. The authors compared the risk of COVID-19 related hospital admissions between patient facing and non-patient facing workers, their household members, and the general population. They found that absolute risks were low, but during the first three months of the pandemic patient facing healthcare workers were three times more likely to be admitted with COVID-19 than non-patient facing healthcare workers. Risk was doubled among household members of front facing workers, in analyses adjusted for sex, age, ethnicity, socioeconomic status, and comorbidity.

[258] The article is concerned with what had occurred in the first wave of the pandemic in Scotland. The authors do not purport to apply their findings to other cohorts but they do say:

> "Most studies to date, including Shah and colleagues' study, have evaluated risks to healthcare workers during the early phases of the pandemic. Advances since then may have reduced the risks, although further confirmatory studies are needed."

[259] That article does not support the broad statement made in the attachment.

[260] The first attachment also contains a human rights compatibility assessment. It identifies the following as rights "that may potentially be limited by the proposed direction":

- the right to enjoy human rights without discrimination (s 15(2)) and the right to non-discrimination (s15(4))
- the right to life – s 16
- the right not to be subjected to medical treatment without full, free and informed consent – s 17

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69 U. Karlsson and C J Fraenkel"Covid-19: risks to healthcare workers and their families" *BMJ* 2020; 371.

- freedom of thought, conscience, religion and belief – s 20
- the right of access to the public service – s 23(2)(b)
- the right to privacy – s 25(a)

[261] As part of the consideration of whether the limits were necessary or whether there were other ways to achieve the purpose (s 13(2)(d)) the use of alternative control measures were discussed. For reasons which are not apparent, except perhaps to make the proposed direction more palatable, the Briefing Note contains the following statement:

> "Further, earlier this year, a recent Journal paper suggested that "the addition of routine asymptomatic surveillance to decrease transmission in healthcare facilities should not be pursued as a primary infection prevention strategy"."

[262] That statement was supported by a footnote to an article which appeared in *Infection Control & Hospital Epidemiology*.[70] The statement is taken out of context. The article is a review of seven other studies and considers the benefits and disadvantages of asymptomatic screening for healthcare personnel. It is also substantially confined to infections originating in or taking place in or acquired in the hospital.

[263] The significance of the finding that asymptomatic surveillance should not be pursued as a primary infection prevention strategy is that it is based upon healthcare settings when there is adherence to infection prevention protocols. The findings suggest that the risk of transmission to patients and other healthcare personnel appears low in those circumstances. Importantly, the authors say: "The HCP[71] infection risk is likely higher in community and household settings than in healthcare settings; thus, the identification of asymptomatic HCP may have its greatest effect in limiting transmission in the household setting."

[264] Witthahn argues that the article provides clear evidence against the proposition that QAS employees and health workers were at increased risk of infection and points to this statement: "… the most likely source of infection in all HCP is community exposure." That, like the use of the article by the author of the policy paper, does not tell the full story. The article concerns HCP in acute-care facilities and the reported risk of acquisition of infection after HCP exposure to occultly infected (i.e. the infection was not apparent) patients. QAS employees do enter hospitals as part of their job but this article is focussed on a different cohort of workers and direct comparisons cannot be drawn without further information.

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70 Shenoy ES and Weber DJ (2021) Routine surveillance of asymptomatic healthcare personnel for severe acute respiratory corona virus 2 (SARS-CoV-2): Not a prevention strategy. https://doi.org/10.1017/ice.2020.1429

71 Health Care Personnel.

[265] The Briefing Note contains a detailed Human Rights Compatibility Assessment. That assessment addresses both of the requirements of s 58(1). It sufficiently demonstrates that proper consideration was given to the relevant human rights affected by the decision. It identifies them. And, it considers whether the decision would be compatible with human rights.

Did the directions limit any of the rights identified in the HRA?

[266] I have held that the Commissioner, in making the decisions the subject of contention, failed to give proper consideration to human rights relevant to those decisions. As a result, those decisions were unlawful. As discussed above, it does not follow from that finding that the directions were invalid. A finding of unlawfulness (coupled with an appropriate injunction) will have the same practical effect as a finding of invalidity.

[267] Similarly, I have held that Dr Wakefield has not established that the direction he made is a term of the employment of the Witthahn applicants.

[268] The analysis of this topic in the Johnston/Sutton matters is applicable to the QAS Direction. While there are some minor differences in the Directions, they are very similar and the same issues arise.

[269] The HRA is beneficial or remedial legislation and so its provisions which bestow, protect or enforce rights should be construed as widely as their terms permit.[72] The principles relating to the engagement of human rights may be summarised as follows:

(a) a human right will be "engaged" if there is "a potential effect on the rights of a class of persons";[73]

(b) there is no need to identify a particular individual as having been affected by a decision concerning human rights in order to trigger the obligations imposed on public entities under the HRA;[74] and

(c) an act or a decision will limit a human right if it "places limitations or restrictions on, or interferes with, the human rights of a person".[75] A limitation short of removal is still a limitation.[76]

[270] The Johnston and Sutton applicants' argument on this point may be summarised as follows:

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72 *Owen-D'Arcy v Chief Executive, Queensland Corrective Services* (2021) 9 QR 250 at [130].

73 *Innes v Electoral Commission of Queensland (No 2)* (2020) 5 QR 623 at [291]-[292].

74 Ibid.

75 *Owen-D'Arcy* at [130]; *PJB v Melbourne Health* (2011) 39 VR 373 at [36].

76 *Four Aviation Security Service Employees v Minister of Covid 19 Response* [2022] 2 NZLR 26 at [29]; *New Health New Zealand Inc v South Taranaki District Council* [2018] 1 NZLR 948.

(a) the QPS Directions engage with and limits a number of rights protected under the HRA;

(b) the limitation of these rights is not reasonable nor demonstrably justified; and accordingly

(c) pursuant to s 58 of the HRA, it was unlawful for the Commissioner to make a decision to issue the QPS Directions.

[271] The Commissioner was provided with a memorandum from Deputy Commissioner Smith containing information relevant to the proposed direction. There was a memorandum from Deputy Commissioner Smith and eight other documents attached to it. The Commissioner was cross-examined about which, if any, of those documents she had read. In her answers she said: "I would have either read those documents or been briefed on those documents" and "I would have either read part of them, skimmed part of them, read some of them and been briefed on them."

[272] That the QPS Directions would limit the human rights of those whom it covered was not in doubt.

[273] In cross-examination, the Commissioner was asked:

> "And to the extent that there was consideration of the kind required by the Human Rights Act as to whether or not the limits were justified, that consideration was provided to you by Crown Law in this document; correct? – Yes.
>
> And you then considered this document and agreed with that consideration? – – – Yes."

[274] It can be accepted that the rights to which the Commissioner was referring were only those which were considered in the HRCA. In cross-examination there was this exchange:

> "And is it fair to say then that to the extent that the Human Rights Compatibility Statement does not identify a right as being limited, that is not a right that you have considered in issuing direction number 12?---That would be fair to say that, because I depend on other people to obviously do that and come to me with that."

[275] The Johnston applicants say that the effect of that concession is that they have discharged their onus of demonstrating that Direction No. 12 did limit those human rights. They also rely on the admission by the Commissioner that she "knew from the very beginning that it would limit their rights."

[276] Further, they say that because Direction No. 14 introduced more onerous requirements then the limitation on human rights must have increased and, therefore, the Commissioner's concession applies at least as much to that Direction as the earlier one. The change in requirements was recognised in HRCA No 2.

[277] Section 13 of the HRA provides that human rights may be limited in certain conditions:

> "**13 Human rights may be limited**
>
> (1) A human right may 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.
>
> (2) In deciding whether a limit on a human right is reasonable and justifiable as mentioned in subsection (1), the following factors may be relevant—
>
> (a) the nature of the human right;
>
> (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;
>
> (d) whether there are any less restrictive and reasonably available ways to achieve the purpose;
>
> (e) the importance of the purpose of the limitation;
>
> (f) the importance of preserving the human right, taking into account the nature and extent of the limitation on the human right;
>
> (g) the balance between the matters mentioned in paragraphs (e) and (f)."

[278] Notwithstanding the concession made by the Commissioner, the test in s 13 requires determination of the rights which have been limited and the extent of any limitation. The applicants have been generous and imaginative in their assessment of the number of rights said to have been limited.

[279] In the *Sutton* matter the following rights are identified by the applicants as having been engaged and limited:

(a) the right to enjoy human rights without discrimination (s 15(2));

(b) the right to equal and effective protection against discrimination (s 15(4));

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

(d) the right to freedom of thought, conscience, religion and belief (s 20); and

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

[280] To that list, the *Johnston* applicants add:

(a) the right to life (s 16);

(b) the right to take part in public life (s 23); and

(c) the right to liberty and security (s 29).

[281] The Witthahn applicants contend that all of the rights identified by Johnston and Sutton are limited by the QAS Direction.

[282] In HRCA No. 1 six rights were identified as being potentially limited:

(a) the right to enjoy human rights without discrimination (s 15(2));

(b) the right to equal and effective protection against discrimination (s 15(4));

(c) the right to life (s 16);

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

(e) the right to freedom of thought, conscience, religion and belief (s 20); and

(f) the right of access to the public service (s 23(2)(b)).

[283] That identification, upon which the Commissioner relied, is important because "proper consideration" under s 58(2) requires "identifying the human rights that may be affected by the decision".

[284] The identification of the relevant human rights is an exercise that must be approached in a common sense and practical manner. Decisionmakers like the Commissioner are not expected to achieve the level of consideration that might be hoped for in a decision given by a judge. On this point, I agree with what Emerton J said in Castles *v Secretary of Department of Justice*:[77]

> "[185] … Proper consideration need not involve formally identifying the 'correct' rights or explaining their content by reference to legal principles or jurisprudence. Rather, proper consideration will involve understanding 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 that is made. As part of the exercise of justification, proper consideration will involve balancing competing private and public interests. There is no formula for such an exercise, and it should not be scrutinised over-zealously by the courts.
> [186] 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." (emphasis added)

[285] That analysis was endorsed by the Victorian Court of Appeal in *Bare v IBAC*.[78]

[286] I now turn to the specific rights identified by the parties.

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77 (2010) 28 VR 141.
78 (2015) 48 VR 129 at [221], [288], and [535]-[538].

Recognition and equality before the law – s 15

[287] Section 15(2) and (4) of the HRA provides:

> "**15 Recognition and equality before the law**
>
> …
>
> (2) Every person has the right to enjoy the person's human rights without discrimination.
>
> …
>
> (4) Every person has the right to equal and effective protection against discrimination.
>
> …"

[288] The right in s 15(2) can be described as supplementing all the other rights protected by the HRA. The cognate provision in the *Convention for the Protection of Human Rights and Fundamental Freedoms* is Article 14. Of that provision, the European Court of Human Rights said: "In such cases [where a State debarred persons from remedies without a legitimate reason] there would be a violation of a guaranteed right or freedom as it is proclaimed by the relevant Article read in conjunction with Article 14 (art. 14). It is as though the latter formed an integral part of each of the Articles laying down rights and freedoms."[79]

[289] "Discrimination" is defined in the dictionary of the HRA in this way:

> *"**discrimination**, in relation to a person, includes direct discrimination or indirect discrimination, within the meaning of the Anti-Discrimination Act 1991, on the basis of an attribute stated in section 7 of that Act.*
>
> *Note—*
>
> The Anti-Discrimination Act 1991, section 7, lists attributes in relation to which discrimination is prohibited, including, for example, age, impairment, political belief or activity, race, religious belief or religious activity, sex and sexuality."

[290] Section 7 of the *Anti-Discrimination Act* lists the following attributes:

(a) sex;

(b) relationship status;

(c) pregnancy;

(d) parental status;

(e) breastfeeding;

(f) age;

(g) race;

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79 Case "Relating to Certain Aspects of the Laws on the use of Languages in Education in Belgium" v Belgium (1968) 1 EHRR 252 at 278

(h) impairment;

(i) religious belief or religious activity;

(j) political belief or activity;

(k) trade union activity;

(l) lawful sexual activity;

(m) gender identity;

(n) sexuality;

(o) family responsibilities;

(p) association with, or relation to, a person identified on the basis of any of the above attributes.

[291] It was contended that the attribute described in s 7(j) of the AD Act was relevant, namely, "political belief or activity". That term is not otherwise defined. Reasons given by some of the applicants for their refusal to vaccinate included:

(a) the "haste" with which vaccines have been developed;

(b) concerns over the safety of the vaccine;

(c) doubts over the effectiveness of the vaccine;

(d) concerns over adverse reactions to the vaccine; and

(e) personal "research" and beliefs as to the severity of Covid 19.

[292] I do not accept that any of the reasons given by the applicants amount to "political belief or activity". In *Ralph M Lee (WA) Pty Ltd v Fort*[80] Anderson J dealt with an appeal from the Equal Opportunity Tribunal where the President of that Tribunal considered whether the respondent had been denied employment on the basis of his political convictions. For the purposes of this analysis there is no relevant difference between the term "political belief or activity" and "political convictions". I agree with what his Honour said:[81]

> "In my opinion a complainant alleging discrimination on the ground of his political conviction is required to show that the conviction possessed by him and shown to have been the ground for his disadvantageous treatment by the respondent, was a conviction which had to do with government — **the policies of government, the structure, composition, role, obligations, purposes or activities of government.** Convictions about these things and other things of that kind relating to government or the relationship between citizens and government may be properly described as political convictions." (Emphasis added)

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80 (1991) 4 WAR 176.

81 At 183.

[293] The belief or activity held or exercised by some of the applicants concerned the Directions given by the Commissioner. That was not an act of government. The applicants have not attempted to connect anything done by the Commissioner to something that might ordinarily be regarded as "political". The term "political belief or activity" is, necessarily, broad and somewhat vague. It does not, though, extend to every decision made by a person employed by the State.

[294] The applicants also sought to incorporate "conscientious belief" in to the definition of "discrimination". Section 7 of the *Anti-Discrimination Act* 1991 (AD Act) does not refer to conscientious belief. But the definition in the HRA of "discrimination" says that the word discrimination "includes" direct discrimination or indirect discrimination and so on. The word "includes" is usually non-exhaustive.[82] In this definition, it should be read in a different way. The word "includes" can be construed as being equivalent to "means and includes". In *Ulrica Library Systems NV v Sanderson Computers Pty Ltd*[83] Sheller JA (with whom Mason P and Meagher JA agreed) said:

> "It is well recognised that in legal documents "include" may be used to extend the meaning of the word defined beyond its ordinary meaning. Alternatively, "include" may be used not merely to add to the natural significance of the word defined, but to afford an exhaustive explanation of the meaning to be attached to that word in the particular document; see generally *Dilworth v Commissioner of Stamps* [1899] AC 99 at 105-6 per Lord Watson. Again, in a given context, "the craftsman may have used 'include' not so much to extend the ordinary meaning of the defined term as to specify as falling within the definition that which might otherwise have been in doubt: *Lillyman v Pinkerton (No 2)* (1982) 71 FLR 135 at 138"; per Gummow J in *Hepples v Federal Commissioner of Taxation* (1990) 94 ALR 81 at 101."

[295] In the definition in the AD Act the word "includes" is used to signify that both direct and indirect discrimination are included in the general definition of "discrimination". It is that exhaustive explanation which is intended by "includes".

[296] In HRCA No. 1 the discrimination (explicit in Direction No. 12) against those with a conscientious objection was identified in the following way:

> "Under s 15(2) of the *Human Rights Act*, police officers and staff members have a right to enjoy their human rights without discrimination. As will be seen below, discrimination may include discrimination on the basis of conscientious belief. The direction distinguishes between people with a religious objection and people with a conscientious objection in the context of vaccination, by providing an exemption for religious objection only. This involves providing discriminatory enjoyment of the freedom of thought, conscience, religion and belief in s 20 of the *Human Rights Act*."

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82 *Horsell International Pty Ltd v Divetwo Pty Ltd* [2013] NSWCA 368 at [166].

83 [1997] NSWSC 454.

[297] Further advice was given to the Commissioner in an opinion from the Crown Solicitor of 16 August 2021. I ruled that privilege had been waived with respect to that document. In relation to the right referred to in s 15(4), the Commissioner was advised:

> "Under s 15(4), QPS personnel have a right to equal and effective protection against discrimination. Under sch 1 of the HRA, "discrimination" is defined inclusively, as including the attributes listed in s 7 of the AD Act. As indicated above, the attributes of impairment, religious belief and political belief in s 7 of the AD Act are unlikely to include a conscientious belief about vaccines or vaccination status. However, because the definition of "discrimination" in the HRA is inclusive, it may protect additional grounds that are analogous to those listed in s 7 of the AD Act. We consider that a "conscientious" belief will likely be sufficiently analogous to qualify as a ground of discrimination under the HRA, but vaccination status will not (because that status is not sufficiently "immutable")"

[298] The reasoning employed by Johnston and Sutton and in the advice given to the Commissioner cannot be accepted. The definition of "discrimination" which is imported into the HRA is, for the purposes of s 15, confined to the attributes referred to in s 7 of the AD Act. Conscientious belief is not one of those attributes.

[299] This right was not limited.

Right to life – s 16

[300] Section 16 of the HRA provides:

> "**16 Right to life**
>
> Every person has the right to life and has the right not to be arbitrarily deprived of life."

[301] The applicants argue that the Directions engage this right on the basis that the Directions compel an individual to be vaccinated with a medicine that has the potential for life-threatening side effects and, therefore, it is sufficient to limit the right to life. They go on to say that a balancing exercise may need to be undertaken between the risks of vaccination against the benefits of vaccination and that that should be done on a case-by-case basis. The real point made is that the individual risks associated with vaccination are not required to be considered under the Directions.

[302] Section 16 is modelled on Article 6(1) of the International Covenant on Civil and Political Rights. The United Nation's Human Rights Committee has described the right to life as concerning "the entitlement of individuals to be free from acts and omissions that are intended or may be expected to cause their unnatural or premature

death, as well as to enjoy a life with dignity".[84] The UNHRC is not a court, but I adopt what Bell J said in *PJB v Melbourne Health (Patrick's Case)*[85] where he said that the Human Rights Committee's opinions

> "… represent an important body of jurisprudence on the interpretation and application of the [ICCPR]. Australian courts of high authority have referred to and relied on the opinions and general comments of the committee when interpreting the provisions of the covenant or domestic legislation to which it is relevant."

[303] The First Respondent refers in her written submissions to decisions of the European Commission about vaccination schemes. Those decisions do not assist. The first refers to Article 2, paragraph 1 of the European Human Rights Convention which speaks of states being obliged to take adequate measures to protect life which is a different concept to that expressed in s 16.[86] In the second case, only one of the applicants was able to proceed because all the others were held not to be "victims" as required by the case law of the Commission. The one applicant who could proceed was denied relief because:

> "The Commission recalls that this Article primarily provides protection against deprivation of life. Even assuming that it may be seen as providing protection against physical injury, and intervention such as a vaccination does not, in itself, amount to an interference prohibited by it. Moreover, the applicant has not submitted any evidence that, in the particular case of his child, vaccination would create a real medical danger to life".[87]

[304] The legality of vaccination orders in New Zealand was considered by Cooke J in *Four Aviation Security Service Employees v Minister of Covid 19 Response*.[88] The relevant order required aviation security workers who interacted with arriving or transiting international travellers to be fully vaccinated. The applicants did not want to be vaccinated and were dismissed from their employment. Section 8 of the *New Zealand Bill of Rights Act* 1990 (NZBORA) provides that: "No one shall be deprived of life except on such grounds as are established by law and are consistent with the principles of fundamental justice."

[305] The argument that s 8 of the NZBORA was infringed by the relevant order was "rejected out of hand".[89] That conclusion, while attractively concise, does not disclose the reasoning which led to it.

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84 UN Human Rights Committee, General comment No. 36 – Article 6: right to life, 124th Session, UN Doc CCPR/C/GC/36, 1[3].

85 (2011) 39 VR 373 at [72].

86 *Association X v The United Kingdom* (1978) 14 Eur Comm HR 31.

87 *Boffa v San Marino* (1998) 92 Eur Comm HR 27 at 33.

88 [2022] 2 NZLR 26.

89 At [31].

[306] So far as this application is concerned, the underlying argument for the applicants is not that s 16 has been breached, rather that the Directions should have contained a provision which required that each individual's circumstances be considered. Whether a particular person's circumstances were such that the application of the Direction might create a risk was the highest that the applicants could argue on this point. There was no contention that a vaccination would arbitrarily deprive any particular applicant of his or her life.

[307] This right was not limited.

Protection from torture and cruel, inhuman or degrading treatment – s 17

[308] Section 17 provides:

> "**17 Protection from torture and cruel, inhuman or degrading treatment**
>
> A person must not be—
>
> (a) subjected to torture; or
>
> (b) treated or punished in a cruel, inhuman or degrading way; or
>
> (c) subjected to medical or scientific experimentation or treatment without the person's full, free and informed consent."

[309] It was not in contest that the administration of any vaccine is "medical treatment" within the meaning of s 17(c).

[310] The applicants argued that s 17(c) is engaged by the Directions. In pursuing that argument, the applicants refer to and rely upon New Zealand decisions which deal with s 11 of the NZBORA. That section provides: " Everyone has the right to refuse to undergo any medical treatment".

[311] The gist of the applicants' submissions on this point was that a person cannot give full, free and informed consent to medical treatment if the effect of a mandatory vaccination direction is to force a person to choose between vaccination and employment. In the New Zealand setting Cooke J observed in *Four Aviation Security Services Employees*[90] that:

> "[29] … 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.** …
>
> [30] **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.**

90 [2022] 2 NZLR 26.

> **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." (emphasis added)

[312] The New Zealand legislation provides the citizens with the right to refuse medical treatment – it differs from the HRA right and the New Zealand cases are not of assistance in this area.

[313] The HRA approaches the right from a different angle by saying that a person must not be subjected to medical treatment without that person's full, free and informed consent. The question to be asked in this case is whether the consequences of non-compliance with the Directions can affect a person's decision. Does the possibility of termination of employment mean that any consent given is "full, free and informed"?

[314] The consequence of not complying with the Directions is that an employee is rendered liable to disciplinary action including termination of employment. Thus, a police officer who declines to be vaccinated as required by the Directions risks being dismissed.

[315] The First Respondent seeks assistance from the decision of Beech-Jones CJ at CL (as he then was) in *Kassam v Hazzard; Henry v Hazzard* (Kassam).[91] As the First Respondent correctly noted, that judgment was not with respect to any human rights legislation but was based on the common law principles concerning consent to a trespass to the person. In *Kassam* there were two judicial review proceedings concerning a Public Health Order which operated to:

(a) prevent "authorised workers" (a person who had had a Covid 19 vaccination) from leaving an affected "area of concern" in which they resided; and

(b) prevent some people from working in the construction, aged care and education sectors unless they had been vaccinated with an approved Covid 19 vaccine.

[316] In the second part of those proceeding the plaintiffs (the Henry plaintiffs) had chosen not to be vaccinated and sought declarations that the order was invalid. They contended that because of its effect on their rights and freedoms, the order was beyond the scope of the particular statute. They failed in that submission.

[317] The basis for the argument advanced was that the Public Health Order violated a person's right to bodily integrity. This was a right identified in *Secretary, Department of Health and Community Services v JWB and SMB*.[92] The Henry plaintiffs invoked various provisions of the ICCPR, in particular, those dealing with being subjected to "medical or scientific experimentation" without free consent. It was not, as the Commissioner described it in her submissions, a "human right equivalent to s 17(c) of the HRA". His Honour held that neither of the orders "authorised the vaccination

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91 (2021) 393 ALR 664.

92 (1992) 175 CLR 218 at 233.

of persons without their consent. Neither provision imposed a sanction for being unvaccinated per se. On its face these provisions impaired freedom of movement and not a person's autonomy over their own body."[93]

[318] His Honour then considered an argument to the effect that there were persons who had been vaccinated because of the orders. He said he would "proceed on that hypothesis and otherwise accepted that the orders have either an encouraging effect or even a coercive effect so far as vaccination is concerned."[94] Upon that basis, his Honour proceeded to consider the extent to which consent is necessary to negative the offence of battery and said:

> "[63] … People may choose to be vaccinated or undertake some other form of medical procedure in response to various forms of societal pressure including a law or a rule, an employment condition or to avoid familial or social resentment, even scorn. However, if they do so, that does not mean their consent is vitiated or make the doctor who performed the vaccination liable for assault. So far as this case is concerned, a consent to a vaccination is not vitiated and a person's right to bodily integrity is not violated just because a person agrees to be vaccinated to avoid a general prohibition on movement or to obtain entry onto a construction site. Clauses 4.3 and 5.8 of Order (No 2) do not violate any person's right to bodily integrity any more than a provision requiring a person undergo a medical examination before commencing employment does."

[319] I do not disagree with that analysis, but it does relate to the common law principles concerning the offence of battery and the common law approach to consent. The test in s 17(c) is full and free, as well as informed, consent.

[320] The difference between these two concepts was touched upon by Richards J in *Harding v Sutton*[95] in which the applicants challenged the lawfulness of a number of directions made concerning mandatory vaccination against the Covid-19 virus. Her Honour had to deal with an application for the trial of a separate question namely whether s 38(1) of the Charter applied to the act of making or the decision to make the vaccination directions. Richards J dismissed that summons, but in doing so considered *Kassam* and said:

> [161] … it is clear from the plaintiffs' affidavits that most if not all of them feel that the effect of the Vaccination Directions is to coerce them to consent to being vaccinated in order to be able to continue earning a living and keep their jobs, in circumstances where they would not otherwise consent to the treatment. On that basis I consider there to be an arguable case that the right in s 10(c) of the Charter is limited by the Vaccination Directions. Justice Beech-Jones' rejection of a similar argument in Kassam was based on the common law concerning consent to a trespass to the person. It is arguable that the concept of consent at common law is narrower than the 'full, free and informed consent' to medical treatment that is contemplated by s 10(c) of the Charter."

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93 *Kassam v Hazzard; Henry v Hazzard* (2021) 393 ALR 664 at [58].

94 Ibid at [59].

95 [2021] VSC 741.

[321] The giving of consent will ordinarily occur as the result of being presented with a choice. And that choice will often be accompanied with some form of pressure, for example, moral, family obligations, or a time limit.

[322] The problems associated with determining whether consent has been freely given were considered by Beyleveld and Brownsword in *Consent in the Law.*[96] After dealing with the voluntary assumption of obligation by a party which leads to that party being bound, they said:

> " … determination of whether 'consent' has been given 'freely' is doubly complex: first, we need a stable and defensible conception of 'free' action; and, secondly, employing this conception, we need to be able to interpret actions with some confidence as 'free' or otherwise.
>
> With regard to the first of these puzzles, we can probably agree that the more egregious forms of coercion, undue pressure, and influence are inconsistent with any plausible conception of *free* consent. There might also be support for the view (although perhaps less clearly so) that inducements and incentives can tell against free consent. Beyond such a core of minimal agreement, however, as Duncan Kennedy has argued, the concept of voluntariness is elastic, prey to ideological manipulation, and intrinsically unstable."[97]

[323] The Commissioner refers to Canadian authorities which suggest that the relevant right was not limited despite the consequence of loss of employment if a person chose not to be vaccinated. I was also referred to an English decision – *R (Peters) v Secretary of State for Health and Social Care*.[98] It was not a decision concerned with human rights legislation, rather it dealt with part of a statute which provided that regulations could not include a provision requiring that a person undergo medical treatment. The argument was that the particular regulation would force care workers to undergo vaccination in order to keep their jobs. Whipple J held that the regulations did not mandate vaccination and that the individual retained the autonomy to decide whether to be vaccinated or not – the regulations merely imposed a consequence, depending on the choice made. That consequence was, in the case of someone who declines vaccination, an inability to work as a care worker.

[324] The ultimate submission made on this point by the First Respondent was that, in the light of *Kassam* and the English and Canadian authorities, the Direction did not limit s 17(c) "because it does not forcibly compel a person to be vaccinated". I reject that submission.

[325] There are no bright lines demarking where consent is and is not free. It will often relate to the consequences of the choice made. Sometimes the nature of consent is determined by the collateral consequences of a decision. For example, Ms Hodges (the chief human resources officer for Queensland Health) agreed that imposing a

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96 Oxford and Portland, Hart Publishing, 2007.

97 Op cit at 8.

98 [2021] EWHC 3182.

mandatory vaccine requirement on ambulance service officers "would put pressure on those officers to get vaccinated".

[326] An old example involving vaccination can be found in *O'Brien v Cunard SS Co Limited*.[99] Miss O'Brien sued Cunard Steam Ship Company in trespass and negligence. She was required to be vaccinated against smallpox in order that she might land in Boston which had strict quarantine regulations regarding the examination of emigrants. Notices of those regulations were displayed and were obvious to all. Before disembarkation, she joined a line of some 200 women passengers each of whom was waiting to be either passed as having previously been vaccinated or to be vaccinated. Her behaviour (joining the queue), in light of the quarantine regulations, was held to demonstrate consent.

[327] A common example experienced by many is the requirement to pass through some form of metal detector and to have luggage examined before entry into an airport or onto an airplane. An early instance of that can be found in *United States v Davis*[100] where it was held that a prospective passenger will be taken to consent to a security search at an airport if, after being given the choice of either (a) not flying or (b) flying and submitting to a search, the passenger chooses to fly. Thus, the mere fact that pressure is put on a person does not necessarily vitiate consent.[101]

[328] Pressure can take many forms. In *Kassam v Hazzard*[102] Leeming JA (who agreed with Bell P) said that public health directions which required vaccination as a condition to do certain things did not violate any person's right of bodily integrity. They did not purport to confer authority on anybody (including a medical practitioner) to perform a medical procedure on anyone. His Honour considered the complexity of consent as a legal concept and gave examples of where many choices can be required to be made by people who are influenced by incentives and burdens specifically designed to alter behaviour. He gave examples of a congestion charge designed to reduce the use of private motor vehicles, an additional tax on high income earners who do not have private health insurance (the Medicare Levy Surcharge), and a prohibition on enrolling children at child care facilities unless proof of vaccination for measles and whooping cough is first shown. He asked, rhetorically, "Does the fact that their decision is economically rational mean that high income earners who take out private health insurance or have their children vaccinated for measles are not making a "free choice"?"[103]

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99 28 NE 266 (Mass. 1891).

100 482 F 2d 893 (1973) at 913.

101 These impositions on travellers are now founded in legislation, regulations and the contracts with carriers.

102 (2021) 106 NSWLR 520.

103 Ibid at [171].

[329] In *British Medical Association v The Commonwealth*[104] the High Court considered whether the *Pharmaceutical Benefits Act* 1947 imposed a form of civil conscription by requiring that a medical practitioner could not write a prescription in respect of certain medicines otherwise than on a prescription form supplied by the Commonwealth and imposing a penalty for non-compliance. The Commonwealth has the power, under s 51(xxiiiA) of the *Constitution*, with respect to: " … the provision of … medical and dental services (but not so as to authorise any form of civil conscription) …". The case was not concerned, directly, with consent, but it did deal with the concept of compulsion and compulsion is the antithesis of consent.

[330] On the hearing of the demurrer, the allegation that a doctor could not carry on practice without writing many prescriptions for the identified medicines was taken to be true. Latham CJ said: "Accordingly, the doctor is not given any live option. He must, in the absence of a request from the patient or other person (which, as already stated, he has no power or right to procure or control), either use the Commonwealth forms or go out of practice. This is a very real power of compulsion. There are various ways of compelling people to a course of action. The imposition of a penalty or imprisonment is a common form of compulsion."[105] His Honour went on to say: "There could in my opinion be no more effective means of compulsion than is to be found in a legal provision that unless a person acts in a particular way he shall not be allowed to earn his living in the way, and possibly in the only way, in which he is qualified to earn a living."[106] To similar effect Webb J said: "To require a person to do something which he may lawfully decline to do but only at the sacrifice of the whole or a substantial part of the means of his livelihood would, I think, be to subject him to practical compulsion amounting to conscription in the case of services required by Parliament to be rendered to the people."[107]

[331] The decision in British Medical Association has been the subject of consideration in *General Practitioners Society in Australia v Commonwealth*[108] and *Wong v Commonwealth*[109] where the meaning of "civil conscription" was reconsidered. While the views expressed by Latham CJ on that point were rejected, the general principle enunciated by Latham CJ (set out above) was not disturbed. These cases are concerned with the prohibition in s 51(xxiiiA) of the Constitution against civil conscription. The plurality in *Wong* said (of the Medicare scheme):

> "[207] It may be accepted that an inevitable consequence of these provisions for payment of Medicare benefits is that it is very unlikely that a medical practitioner could establish or maintain practice as a general practitioner in a way that did not give patients any access to those benefits. Whether a

104 (1949) 79 CLR 201.
105 Ibid at 252.
106 Ibid at 253.
107 Ibid at 292-293.
108 (1980) 145 CLR 532.
109 (2009) 236 CLR 573.

> practitioner could establish or maintain a practice without agreeing to accept assignments of the Medicare benefits in full payment for some or all of the services the practitioner renders to patients would be determined by many considerations. But even if it is possible to practise as a general practitioner without bulk-billing at least some patients, it may be accepted that there is little if any practical alternative to practising in a way that gives most patients the right to claim whatever Medicare benefits are lawfully available. In that sense there is **practical** compulsion to participate in the Medicare scheme.

[332] The majority's decision is well summarised in the headnote to the reported decision: "There was no compulsion, legal or practical, under the scheme to perform a professional service. There was only a practical compulsion to conform to professional standards in respect of any services provided." In this case there was, similarly, a practical compulsion to comply with the directions. The legislature has, by inserting the words "full, free and informed" before "consent", stripped away as many burdens as possible from the meaning of "consent". While acknowledging that consent is often accompanied by some form of pressure, where a person's livelihood can be put at serious risk if consent is not given then that is sufficient to peel "free" away from "full, free and informed".

[333] The right in s 17(c) is limited.

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

[334] Section 20 provides:

> "**20 Freedom of thought, conscience, religion and belief**
>
> (1) Every person has the right to freedom of thought, conscience, religion and belief, including—
>
> (a) the freedom to have or to adopt a religion or belief of the person's choice; and
>
> (b) the freedom to demonstrate the person's religion or belief in worship, observance, practice and teaching, either individually or as part of a community, in public or in private.
>
> (2) A person must not be coerced or restrained in a way that limits the person's freedom to have or adopt a religion or belief."

[335] The evidence of the beliefs and conscience of many of the applicants was given by way of affidavits from those applicants. None of them were called for cross-examination. I am content, then, to accept that they held the beliefs which they claimed to hold. It does not necessarily follow, though, that each of the applicants has established that their beliefs bring them within s 20.

[336] This section is drawn from Article 18 of the ICCPR which protects "theistic, non-theistic and atheistic beliefs, as well as the right not to profess any religion or belief".

[337] Some of the applicants who have objected to taking a Covid 19 vaccine have done so on the basis that the vaccines have been developed with the use of foetal cells. This, they say, is contrary to their religious beliefs.

[338] The Commissioner appears to accept that these beliefs are held and that they amount to a genuine religious objection but says that, because the Directions expressly contain an exception for genuine religious objections, the Directions do not limit a person's rights under this section of the HRA.

[339] While there is an exception for religious beliefs, there is no exception for conscientious belief notwithstanding the recognition in HRCA No. 1 that this means that "freedom of conscience will be limited".

[340] The Johnston applicants submitted that the European Court of Human Rights had observed in *Campbell and Cosan v United Kingdom*[110] that a belief about vaccination is capable of protection if it reaches a "certain level of cogency, seriousness, cohesion and importance … worthy of respect in a democratic society". That does not accurately summarise what was said by the majority in that decision. The case was not concerned with vaccination but with corporal punishment in Scottish State schools. The majority did say that the meaning of the word "convictions", taken on its own, is not synonymous with the words "opinions" and "ideas". It is, they said, more akin to the term "beliefs" which, in Article 9 ECHR, guarantees freedom of thought, conscience and religion and denotes views that attain a certain level of cogency, seriousness, cohesion and importance. The reference to "worthy of respect in a democratic society" was with respect to the expression "philosophical convictions". On this point, the majority concluded: "The applicants' views relate to a weighty and substantial aspect of human life and behaviour, namely the integrity of the person, the propriety or otherwise of the infliction of corporal punishment and the exclusion of the distress which the risk of such punishment entails. They are views which satisfy each of the various criteria listed above; it is this that distinguishes them from opinions that might be held on other methods of discipline or on discipline in general."

[341] A conscientious belief encompasses views based on strongly held moral ideas of right and wrong. In *Roach v Canada (Minister of State for Multiculturalism and Culture)*[111] Linden JA said:

> "[45] There is little authoritative jurisprudence on freedom of conscience under para. 2(a) of the Charter. However, the concurring reasons of Madame Justice Wilson in *R. v. Morgentaler*, [1988] 1 S.C.R. 30, at p. 179, are instructive in their approach to freedom of conscience. She stated:
>
> > It seems to me, therefore, that in a free and democratic society "freedom of conscience and religion" should be broadly construed to extend to

110 [1982] ECHR 1.

111 113 D.L.R. (4th) 67; [1994] 2 F.C. 406.

> conscientiously-held beliefs, whether grounded in religion or in a secular morality. Indeed, as a matter of statutory interpretation, "conscience" and "religion" should not be treated as tautologous if capable of independent, although related, meaning.
>
> It seems, therefore, that freedom of conscience is broader than freedom of religion. The latter relates more to religious views derived from established religious institutions, whereas the former is aimed at protecting views based on strongly held moral ideas of right and wrong, not necessarily founded on any organized religious principles. These are serious matters of conscience. Consequently the appellant is not limited to challenging the oath or affirmation on the basis of a belief grounded in religion in order to rely on freedom of conscience under para. 2(a) of the Charter. For example, a secular conscientious objection to service in the military might well fall within the ambit of freedom of conscience, though not religion. However, as Madame Justice Wilson indicated, "conscience" and "religion" have related meanings in that they both describe the location of profound moral and ethical beliefs, as distinguished from political or other beliefs which are protected by para. 2(b)."

[342] The delineation between protected belief and belief which falls outside s 20 is not sharp. In *R (Williamson) v Secretary of State for Education and Employment*[112] the House of Lords affirmed the decision in *Campbell and Cosan v United Kingdom* but went on to decide that a person's strong belief in the corporal punishment of children is not protected under Article 9 of the *Convention for the Protection of Human Rights and Fundamental Freedoms*, as scheduled to the Human Rights Act 1998 (UK) and the right to freedom of thought, conscience and religion. This was a case involving a legislative ban on corporal punishment and, although some parents claimed that the ban interfered with their rights to freedom of thought, conscience and religion, the House of Lords held that the ban pursued a legitimate aim of protecting vulnerable children and that the means used were appropriate and not disproportionate. Lord Nicholls said that while people may hold whatever belief they wish, the manifestation of the belief must satisfy some "modest, objective minimum requirements" which are implicit in the ECHR. The belief must relate to matters that are more than merely trivial, possess an adequate degree of seriousness and importance, be on a fundamental problem, and must also be coherent in the sense of being intelligible and capable of being understood.[113]

[343] That reasoning was followed in *Grainger v Nicholson plc*[114] by Burton J who said that, under the ECHR, the belief had to be genuinely held; it had to be a belief and not an opinion or viewpoint; it had to be a belief as to a weighty and substantial aspect of human life and behaviour; it had to attain a certain level of cogency, seriousness, cohesion and importance and had to be worthy of respect in a democratic society, be not incompatible with human dignity and not conflict with the fundamental rights of

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112 [2005] 2 AC 246.

113 At [23]-[24], [31].

114 [2010] ICR 360; [2010] 2 All ER 253.

others.[115] It was necessary for the belief to have a similar cogency to a religious belief but it need not be shared by others.[116] If a person could establish that a philosophical belief was held which was based on science as opposed, for example to religion, there was no reason to disqualify it from protection.

[344] Both *Williamson* and *Grainger* were considered by Refshauge J in *R v AM*[117] where he said:

> "There is a strong sense that freedom of conscience, unlike freedom of religion, is limited to the beliefs and mental processes of an individual and that it does not necessarily protect any action motivated by the conscience of the person."[118]

[345] The Commissioner referred to and relies upon *Vavřička and Others v. The Czech Republic*[119] a decision of the Grand Chamber of the European Court of Human Rights. The case concerned the Czech Republic's regime for the mandatory vaccination of children against diseases such as tuberculosis, poliomyelitis and hepatitis B. In that case, the applicant argued that the regime breached Article 8 of the ECHR (the right to respect for a person's private life). The Court held that compulsory vaccination represented an "interference" with the right to respect for private life within the meaning of Article 8 but that the interference pursued a legitimate aim, being to protect the health and rights of others. The vaccinations could not be administered forcibly but the refusal to be vaccinated exposed a person to a small fine and the exclusion of unvaccinated children from pre-school.

[346] Mr Vavřička submitted that his main motivation had been to protect the health of his children. Being convinced that vaccination caused health damage, his conscience had not allowed him to have them vaccinated. Mr Vavřička had conducted his claim, the Czech Constitutional Court had observed, on the basis that his objection to vaccination was primarily health-related; philosophical or religious aspects were secondary. It was found that the reasons of conscience given by Mr Vavřička had been put forward only at a late stage and that he had failed to advance any concrete argument concerning his beliefs and the intensity of the interference with them caused by vaccination. The Court found that "his critical opinion on vaccination [was] not such as to constitute a conviction or belief of sufficient cogency, seriousness, cohesion and importance to attract the guarantees of Article 9".

[347] The Johnston applicants argue that the Directions have an impact on their conscientious beliefs but I am not satisfied that they have demonstrated how that impact has occurred.

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115 Ibid at [24].
116 Ibid at [27].
117 (2010) 245 FLR 410.
118 At [46].
119 (Applications nos. 47621/13 and 5 others) 8 April 2021.

[348] None of the Sutton applicants described their basis for refusing the vaccination as being grounded in thought, conscience or belief. Some of them referred to religious beliefs but nearly all of them rely upon what are called "medical" reasons. Some of them might be regarded as reasonable concerns about medical conditions but the majority are summarised by those applicants as "fears" or "concerns", such as, the fear of an adverse reaction, the fear of long-term effects, that others had been seen to suffer side effects, anxiety towards injections in general, lack of knowledge about contents of vaccines, that the applicant "knows people who have been injured and died after taking the vaccine", that the vaccine does not prevent the catching or transmitting virus, and so on. Apart from the objections taken on religious grounds, none of the other objections put forward could be described as being of sufficient cogency, seriousness, cohesion and importance.

[349] The Commissioner argues that, contrary to the contention that the Directions limit "a person's freedom of thought, conscience and belief by compelling a person to take the vaccine even if it is contrary to that person's thought, conscience or belief" there is nothing in the Direction which prevents a person from having or adopting a thought or conscientious belief about vaccines.

[350] There is unchallenged evidence from several applicants raising a relevant religious belief. Some of those beliefs found the objection to the vaccines because the creation of some of them came about after testing or development of the vaccine on aborted foetal material. Other objections are taken on the basis that the applicant has an "ethical and moral" objection to the use of kidney cell lines from aborted foetuses, and another is from an applicant who is a vegan and expresses a moral opposition to any form of animal testing. These are sufficient to bring those applicants within the right expressed in s 20. Other applicants who base their objection on the mandatory or coercive nature of the Directions are in a different category. They do not seem to express the same level of coherence of consistency which brings those with conscientious objections within the protection of s 20.

[351] The Witthahn applicants accepted that the exemptions "on face value appear to address some of the legitimate concerns with this policy". Those applicants complain, though, that the exemptions provided have been "utterly ineffective". That may be the case. But the test is whether or not an exemption is provided. If the exemption is not properly managed then that is a separate and distinct issue which is not the subject of this application.

[352] The warning in HRCA No. 1 was correct. The absence of an exception for conscientious belief could render a direction in breach of s 20. But the applicants have not shown that they come within the protection of s 20. They have expressed hesitancy or uncertainty about vaccination but that is not a belief which is sufficiently cogent, serious, cohesive and important to attract s 20.

[353] The applicants have not demonstrated that this right is limited.

Right to take part in public life – s 23

[354] Section 23 of the HRA provides:

> "**23 Taking part in public life**
>
> (1) Every person in Queensland has the right, and is to have the opportunity, without discrimination to participate in the conduct of public affairs, directly or through freely chosen representatives.
>
> (2) Every eligible person has the right, and is to have the opportunity, without discrimination—
>
> (a) to vote and be elected at periodic State and local government elections that guarantee the free expression of the will of the electors; and
>
> (b) to have access, on general terms of equality, to the public service and to public office."

[355] The applicants refer, fleetingly, to s 23(2)(b) and say that the Directions limit that right in that they impose an arbitrary condition on access to public office within the Queensland Police Service based on vaccination status. Thus, it is argued, the condition imposes unequal treatment between vaccinated and unvaccinated QPS personnel.

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

Right to privacy and reputation – s 25

[357] Section 25 of the HRA provides:

> "**25 Privacy and reputation**
>
> A person has the right—
>
> (a) not to have the person's privacy, family, home or correspondence unlawfully or arbitrarily interfered with; and
>
> (b) not to have the person's reputation unlawfully attacked."

[358] In *Kracke v Mental Health Service Board*[120] Bell J considered the cognate section in the *Charter* and noted that it (like s 25 HRA) is modelled on Article 17 of the ICCPR and is similar to Article 8 of the ECHR.

[359] Article 17 was considered by the European Court of Human Rights in *Pretty v United Kingdom.*[121] Mrs Pretty suffered from motor neurone disease. She wanted her husband to assist her in her suicide but the United Kingdom authorities declined to

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120 (2009) 29 VAR 1.

121 (2002) 35 EHRR 1.

grant him immunity from prosecution. That decision was upheld, but the court described the scope of the right to private life in these terms:

> "As the court has had previous occasion to remark, the concept of 'private life' is a broad term not susceptible to exhaustive definition. **It covers the physical and psychological integrity of a person.** It can sometimes embrace aspects of an individual's physical and social identity. Elements such as, for example, gender identification, name and sexual orientation and sexual life fall within the personal sphere protected by art 8. Article 8 also protects a right to personal development, and the right to establish and develop relationships with other human beings and the outside world. Although no previous case has established as such any right to self-determination as being contained in art 8 of the Convention, **the Court considers that the notion of personal autonomy is an important principle underlying the interpretation of its guarantees**."[122] (emphasis added, citations omitted)

[360] The interference referred to in s 25(a) must be neither unlawful nor arbitrary. The word "unlawful" refers to an interference which infringes an applicable law.[123]

[361] In *Burgess v Director of Housing*[124] Macaulay J said:

> "[219] It is unnecessary for me to decide whether the rights set out in s 13[125] are also engaged. I note that the interference with a person's family or home has to be unlawful or arbitrary in order to infringe the right. It is not enough, it appears, that it is unlawful only because of s 38 – that is, it has to be unlawful independently of the Charter."

[362] That view is consistent with two unanimous decisions of the Victorian Court of Appeal. In *HJ (a pseudonym) v Independent Broad-Based Anti-Corruption Commission*[126] the Court said that "An 'unlawful' interference with a person's privacy for the purposes of s 13(a) of the Charter is one which infringes an applicable law."[127] That was repeated in *Thompson v Minogue*.[128] I respectfully agree with that. The HRA sets its face against the Act being the source of a cause of action or similar. To rely upon unlawfulness arising out of a breach of s 58 would be contrary to that intention.

[363] A consideration of whether a requirement is not arbitrary – because it is proportionate – does not involve the same analysis necessary under s 13. It is, instead, a broad and

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122 At [61].
123 *Thompson v Minogue* (2021) 67 VR 301 at [49].
124 [2014] VSC 648.
125 The cognate provision to s 25 HRA.
126 (2021) 64 VR 270.
127 At [152].
128 *Thompson v Minogue* at [49].

general assessment of whether any interference extends beyond what is reasonably necessary to achieve the purpose being pursued.[129]

[364] The requirement that a person who seeks to be excused from complying with the QPS Direction provide some information which demonstrates that they fall within a category does not, at first sight, appear to be arbitrary. The information needed for a medical exemption is not unduly detailed. It requires a letter from a treating doctor or specialist "outlining … the condition which makes it unsafe" and "whether the condition is temporary in nature". But clause 12(b) of the Direction requires an applicant for exemption to provide "any other supporting evidence requested".

[365] Clauses 13 and 14 provide that an applicant for exemption on the basis of a "genuine religious objection" or "exceptional circumstances" must "provide any supporting evidence requested". These are requirements which may appear to be ill-defined but for an employer to respect an employee's religious beliefs, the employer must be entitled to know what those beliefs are – at least at a level of generality which is sufficient to alert the employer.

[366] The Attorney-General submits that the value underlying the right to privacy is personal autonomy and agency and that they are respected where a measure involves a choice. For the reasons I have given above, that choice is illusory. The Attorney-General submits, in the alternative, that because the Directions do not involve forcibly vaccinating people against their will that the interference with privacy is greatly reduced. It is correct, as was observed in *Borrowdale v Director-General of Health*,[130] that there is a material difference between voluntary compliance with an instruction and enforced compliance. But, that difference depends upon the content of the term "enforced compliance".

[367] The *Charter* provides for the same right in s 13. Its meaning was considered by the Victorian Court of Appeal in *Thompson v Minogue*.[131] Given the provenance of the decision, it is one from which I would only depart if I thought there was a compelling reason to do so[132] and I do not think there is such a reason. It is authority for the following propositions:

(a) the privacy right is expressed with the internal limitation that only interferences with privacy that are unlawful or arbitrary are protected;

(b) a person who alleges a limit on the right to privacy bears the onus of showing that the interference with their privacy was either "unlawful" or "arbitrary";

(c) 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

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129 *Thompson v Minogue* at [56].

130 [2020] NZHC 2090.

131 (2021) 67 VR 301.

132 *Farah Constructions Pty Ltd v Say-Dee Pty Ltd* (2007) 230 CLR 89 at [135].

that question. In the case of a human right with internal limitations which are informed by matters that are solely in the knowledge of a public authority, 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;

(d) an "unlawful" interference is "one which infringes an applicable law";

(e) an "arbitrary" interference 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;[133] and

(f) the proportionality that inheres in non-arbitrariness is not the same thing as proportionality for the purposes of s 13 of the HRA.

[368] The Johnston applicants argue that because an employee must disclose matters concerning their religious belief or medical condition in order to seek (and not necessarily obtain) an exemption then that employee's right to informational privacy is limited.

[369] The Johnston applicants submit that the Directions arbitrarily limit the right to privacy in that:

(a) the requirement to take a vaccine is unrelated to the capacity of a QPS employee to carry out his or her duty;

(b) for that reason, the making of the Directions were disproportionate and unjustified in circumstances where the vaccines had little to no effect on reducing transmission of the Omicron variant; and

(c) the continued enforcement of the Directions without a proper review having been undertaken renders the Directions disproportionate to the risk and therefore unjustifiable.

[370] The Sutton applicants submit that the QPS Directions limit "a person's right to privacy by unjustifiably interfering in a person's right to choose whether or not to undergo a medical treatment which is sufficient to constitute an unjustified interference in that person's personal and social individuality and identity".

[371] The Witthahn applicants make the same argument as the Sutton applicants.

Both the Commissioner and Dr Wakefield argue that as the term "unlawful" requires infringement of an applicable law and an infringement which arises independently of the HRA, that limb of the requirement has not been demonstrated. I agree.

[372] This right is not limited.

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133 See also Explanatory Note, Human Rights Bill 2018, s 22.

Right to liberty and security – s 29

[373] Section 29 provides:

> "**29 Right to liberty and security of person**
>
> (1) Every person has the right to liberty and security.
>
> (2) A person must not be subjected to arbitrary arrest or detention.
>
> (3) A person must not be deprived of the person's liberty except on grounds, and in accordance with procedures, established by law.
>
> (4) A person who is arrested or detained must be informed at the time of arrest or detention of the reason for the arrest or detention and must be promptly informed about any proceedings to be brought against the person.
>
> (5) A person who is arrested or detained on a criminal charge—
>
> (a) must be promptly brought before a court; and
>
> (b) has the right to be brought to trial without unreasonable delay; and
>
> (c) must be released if paragraph (a) or (b) is not complied with.
>
> (6) A person awaiting trial must not be automatically detained in custody, but the person's release may be subject to guarantees to appear—
>
> (a) for trial; and
>
> (b) at any other stage of the judicial proceeding; and
>
> (c) if appropriate, for execution of judgment.
>
> (7) A person deprived of liberty by arrest or detention is entitled to apply to a court for a declaration or order regarding the lawfulness of the person's detention, and the court must—
>
> (a) make a decision without delay; and
>
> (b) order the release of the person if it finds the detention is unlawful.
>
> (8) A person must not be imprisoned only because of the person's inability to perform a contractual obligation."

[374] The reliance on this section by the various applicants was, at best, tentative. The connection between this section and the requirements of the Directions is not obvious.

[375] The "right to liberty and security" in s 29(1) is within a section dealing with, in the first three sub-sections, the over-arching pronouncement of the right to liberty, the proscription of arbitrary arrest or detention, and that a process in accordance with law being a pre-requisite to detention. The balance of the section concerns rights after arrest or detention, apart from s 29(8) which proscribes debtors' prisons.

[376] Johnston submits that the right to security is distinct from the right to liberty and that the Directions deprive the applicants of the right to be free from injury as it coerces them to undertake medical treatment against their will.

[377] The cognate provision in the Victorian Charter was considered by Bell J to constitute a single right to "liberty and security".[134] He said:

> "[664] The purpose of the right to liberty and security is to protect people from unlawful and arbitrary interference with their physical liberty, that is, deprivation of liberty in the classic sense. It is directed at all deprivations of liberty, but not mere restrictions on freedom of movement. It encompasses deprivations in criminal cases but also in cases of vagrancy, drug addiction, entry control, mental illness etc. The difference between a deprivation of liberty and a restriction on freedom movement is one of degree or intensity, not one of nature and substance.
>
> [665] The fundamental value which the right to liberty and security expresses is freedom, which is a prerequisite for individual and social actuation and for equal and effective participation in democracy."

[378] I respectfully agree with that analysis. It is consistent with the balance of s 29. To extend it as is sought by Johnston would be to unnecessarily multiply the right to bodily integrity already protected by s 17(c) and s 25(a) of the HRA.

[379] This right is not limited.

The expert evidence

[380] Expert evidence was given about various studies and surveys concerning the transmissibility of COVID-19 and its variants, and the use and efficacy of various vaccines.

[381] It is neither necessary nor appropriate to attempt to make a decision about the actual transmissibility of a particular variant or the actual efficacy of a particular vaccine. The question to be considered is what was the state of knowledge at the relevant time? That is, at or about the time each decision was made. It is not the case that the true state of affairs need be determined.

[382] Each of the experts referred to the numerous surveys and studies which had been conducted both in Australia and overseas and identified the literature which would have been, in their respective opinions, relevant to the making of the QPS and QAS directions. The expert evidence was, in effect, a review of the available literature. They then applied their own expertise to assist the court in interpreting those technical documents and identifying the conclusions made or theories proposed in those documents.

[383] The experts did express some opinions about those matters, but the relevant issue was when certain evidence was known or otherwise available. A Commissioner of Police or a Director-General of a department is not expected to resolve questions of transmissibility and the like. But they are expected to receive, consider and weigh

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134 *Re Kracke* (2009) 29 VAR 1 at [621]-[628].

relevant evidence as it becomes available so that it may inform their decision making. This was a trial about the lawfulness of certain directions not about the effectiveness of vaccines against COVID-19 and its variants.

[384] As I set out above, the evidence which will be relevant is that which existed at, or leading up to, the time the relevant decisions were made. Thus, for the Johnston and Sutton matters that is 14 December 2021 and for Witthahn it is 31 January 2022. These dates refer to the dates upon which Direction No. 14 and the QAS Direction were issued. They are unrelated to any scientific milestone. It is difficult to identify with any precision the state of knowledge between 14 December 2021 and 31 January 2022.

[385] Reports were provided, and oral evidence was given, by:

(a) Professor Nikolai Petrovsky – called by the applicants; and

(b) Associate Professor Holly Seale and Associate Professor Dr Paul Griffin – called by the respondents.

[386] Professor Nikolai Petrovsky gave evidence in the Witthahn proceedings, but his evidence was evidence in each of the applications. That evidence was subject to a sustained attack by the respondent in the Witthahn matter. It was submitted that he ought not be accepted as an independent expert witness upon whose evidence the Court could rely and that his evidence should be rejected in its entirety or given no weight.

[387] The bases upon which that submission is made is that:

(a) the Court cannot be satisfied that the opinions that Professor Petrovsky expressed were based on the application of his expertise and experience; and

(b) the Court cannot be satisfied that he has acted as an independent expert who has complied with his duty to the Court.

[388] In his first report, Professor Petrovsky set out his long involvement in vaccine research and his interest in research related to the development of novel vaccines and vaccine adjuvants,[135] including protein vaccines, DNA vaccines, mRNA vaccines and polysaccharide vaccines. He described how he had founded Vaxine Pty Ltd in 2002 and how it specialised in vaccine development and formulation, vaccine adjuvants, vaccine clinical trials and immunology. He described how he had been involved in the development and formulation of various vaccines for a range of pathogens. He also disclosed that he was leading "a team of scientists at Vaxine Pty Ltd that has successfully developed a vaccine against COVID-19." He went on to say:

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135 An adjuvant is a substance which enhances the body's immune response to an antigen.

> "Leveraging my prior experience in developing SARS and MERS coronavirus vaccines as well as pandemic influenza vaccines, my team designed and formulated a recombinant protein-based vaccine incorporating our Advax adjuvant technology to create a COVID-19 vaccine known as Covax-19 or Spikogen. This vaccine was shown to be highly protective and prevent transmission in relevant animal models of infection. It has subsequently successfully completed Phase 1, 2 and 3 clinical trials where it demonstrated protection against symptomatic infection with the SARS-CoV-2 delta variant and on this basis the vaccine I developed has received emergency use authorisation from the Iranian FDA."

[389] During his cross-examination, other information emerged which he had not disclosed. The respondents identify the following as relevant to the admissibility or weight of his evidence:

(a) he believed that there was a conspiracy which led to the South Australian Government changing their vaccination mandate exemptions to "deliberately sabotage" his own vaccine trials;

(b) he believed that there was a conspiracy involving CSL Limited, an Australian company engaged in the production of the AstraZeneca vaccine, and companies which Professor Petrovsky described as "potential competitors" which have lobbied against him with the federal government – this was not disclosed in his reports;

(c) he believes that influential millionaires in Sydney and Melbourne (who accumulated wealth by reason of the privatisation of CSL in the 1990s) are working against him and, by virtue of their influence, have been preventing his company getting "traction" in Australia;

(d) he makes comments about the provisional approval processes of the Therapeutic Goods Administration but does not disclose that he had received an infringement notice from the TGA;

(e) he believes that the TGA (the organisation responsible for approving vaccines for use in Australia) which had provisionally approved vaccines developed by his "potential competitors":

  (i) had unjustifiably targeted to him, possibly at the behest of his potential competitors;

  (ii) is unaccountable; and

  (iii) is operating outside the rule of law; and

(f) he believes in the possibility of a conspiracy between the manufacturers of provisionally approved vaccines in Australia (being vaccines about which he expresses views in his reports) and the TGA, which has led to the TGA targeting him.

[390] Professor Petrovsky has also taken part in filmed interviews of himself making statements about the TGA and other matters in which he expressed the beliefs which are set out in the preceding paragraph. With respect to one of those films he was asked:

> "And do you believe that some connection between the manufacturers of approved vaccines in Australia and the TGA led the TGA to targeting you? – – – Again, I was raising that as possibilities. I wasn't saying that, you know, we had strict evidence of that. I was just saying you have to ask the question, given those relationships, of whether that might be the case.
>
> Do you believe that both of the major political parties in Australia are acting to advantage the vaccines that've already been approved in Australia because of money flowing back to them from the international companies that manufacture those vaccines? – – – Do I believe that?
>
> Yes? – – – I believe that, you know, obviously, there's a large amount of money that's being spent by the government on – on those vaccines and we know that, you know, the companies that are – are receiving that money employ large numbers of lobbyists. And, obviously, the role of those lobbyists is to influence government to ensure that those funds continue to flow. So in – in that sense of a loop, yes, I – I do believe that …"

[391] Professor Petrovsky was asked questions about the Twitter[136] account with the Twitter handle @vaxine_news. He agreed that he was "primarily … the person who administers that account, but people under my direction also can access that account." He was asked:

> "And is it also your view, Professor Petrovsky, that:
>
> 'mRNA vaccines are the new opioids'?
>
> --- No, I don't [sub]scribe to that.
>
> I see. Let me hand you a document. See, this is another tweet from your Twitter account, Professor Petrovsky? – – – Yes.
>
> And you see it says:
>
> 'mRNA vaccines are the new opioids'?
>
> --- Yes.
>
> Did you post this tweet? – – – Again, I don't recall posting this. It – it appears to be from, as I say, my Twitter account and again, linking to another article.
>
> And you see it goes on to say:

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136 Now "X".

> ‘Once hooked, you will find it very hard to get off without severe consequences. The indirect evidence of vaccine-enhanced infection with these types of vaccines is increasing’?
>
> --- Yes.
>
> And is that a view you hold? – – – It’s certainly a concern of mine that we – we have seen evidence of, you know, increased infection in people who have had these vaccines, and we have also seen a need to keep administering them, I think, when they are in many jurisdictions, up to 5 or 6 booster doses, so that – it indirectly, does look to be a problem if – if the only way to keep being protected is to have to have something on a very regular basis, so – so that could be a concern, if you were at high risk, if you stopped, then if you had to keep going.”

[392] That type of exchange was not unusual in Professor Petrovsky’s cross-examination. He demonstrated a reluctance on several occasions to accept that he had made comments showing that he held a particular view and he attempted to evade accepting that he held the views presented.

[393] Many of the “conspiracy” statements were made to what were described by Mr Ward SC as “late-night television journalists” and, thus, were given without the formality of a courtroom setting. Statements made on television are, of course, made without the formality of a courtroom setting, but the films reveal that these were not “off the cuff” remarks. They were considered expressions by Professor Petrovsky of the views which he held.

[394] The differences between Professor Petrovsky on the one hand, and Associate Professor Seale and Professor Griffin on the other, are, in some instances, at the margins. There are points at which greater emphasis is placed on a matter by Professor Petrovsky than the other witnesses and vice versa. Professor Petrovsky’s somewhat curious conspiracy theories might be damaging to his credibility in other areas of discourse but his expertise was not seriously questioned in this case and, upon a consideration of the gist of each expert’s evidence, there is more upon which the experts agree than disagree.

[395] Mr Ward SC rejected the attacks on Professor Petrovsky and, in his oral submissions, invited the Court to make a finding that there is no difference, in substance, between Professor Petrovsky’s view of the benefits of the mRNA vaccines and AstraZeneca with the views of the experts called for the respondents. On that basis, I am content to consider the views expressed by Associate Professor Seale and Professor Griffin.

[396] Professor Griffin agreed that Professor Petrovsky was “an accomplished clinician scientist with extensive experience relating to vaccination.” He was, though, critical of the report from Professor Petrovsky because there were few references in the report and so a number of claims were not appropriately substantiated. That is a convenient point to turn to the evidence of those witnesses.

[397] As I have set out above, the evidence which is relevant is that which concerns the state of available knowledge at the times when the QPS Directions and the QAS Direction were issued.

[398] There are some basic matters which were not in contention and which underly some of the other evidence. They are:

(a) There are two commonly used measures or "metrics" used to describe a virus:

(i) transmissibility – the ability of pathogens to pass from one person to another; and

(ii) virulence – the likelihood of disease caused by the passing of that pathogen. It is also used as a simple measure of the likely severity of a case.

(b) Since the initial identification and classification of COVID–19 in early 2020, numerous variants had emerged and circulated globally.

(c) A "variant of concern" is a variant of COVID–19 which demonstrates an increase in transmissibility, or more severe disease (for example, increased hospitalisations or deaths), or a significant reduction in neutralisation by antibodies generated during a previous infection or vaccination, or any combination of those matters.

(d) Professor Griffin described (in his report) the means of transmission in this way:

> "7. Transmission occurs via small particles containing the virus that can be expelled from an infected person's mouth and/or nose when they cough, sneeze, speak, sing or even breathe. Another person can contract the virus when particles containing the virus that travel through the air are inhaled (or come into direct contact with the eyes, nose or mouth). These particles can only typically travel relatively short distances hence this process is referred to as short-range aerosol or short-range airborne transmission and why the virus spreads mainly between people who are in close contact with each other, for example at conversational distance.
>
> 8. In poorly ventilated and/or crowded indoor settings these particles can remain suspended in the air and/or travel farther than the typical conversational distance. This is often called long range aerosol or long-range airborne transmission.
>
> 10. Hence the setting most conducive to transmission is prolonged indoor close contact in poorly ventilated spaces."

(e) A person infected with COVID–19 may (for differing periods of time) exhale those particles which may then be inhaled by another person and, potentially, lead to transmission.

(f) One of the most important factors influencing transmissibility is the person's "peak viral load" and level of "viral shed". The term "viral load" refers to the amount of virus detectable in an individual's test samples – they being the samples obtained by tests such as the PCR and RAT tests. The term "viral shed" refers to the amount of virus that is being disbursed by an infected person, that

is, the shedding of the aerosolised particles that may transmit the disease to another person.

(g) A person with COVID-19 can shed the virus, for a short period of time (that period can differ from person to person) usually at about the time of the onset of symptoms but it is also possible for asymptomatic people to shed the virus and, thus, transmit the disease. It is only while people are "shedding" that they can transmit the disease to others. The likelihood that a particular person will transmit the disease to another person depends on several factors and is highly variable – those factors include the particular variant and any protective measures taken by those persons.

(h) The Delta strain was classified as a variant of concern by WHO on 11 May 2021 and became the dominant strain of COVID-19 by mid-2021. It became the dominant strain because it had a higher transmissibility than earlier variants. It was also a highly virulent strain.

(i) The Omicron strain was first reported on 24 November 2021 and was declared by WHO to be a variant of concern on 26 November 2021. The variant was present in Australia from about that time and became the dominant strain in mid-December 2021. It was the dominant global strain by the end of January 2022. Omicron peaked in Queensland on 18 January 2022 and began to decline from that time but was still circulating widely in the community.

Omicron – the severity of illness

[399] In early December 2021 the literature supported the view that Omicron might only lead to milder systems. Its symptoms were being monitored to see if it led to more severe illness than earlier variants.

[400] By the second half of December 2021 various reports supported a conclusion that, when compared to the Delta variant, Omicron showed a reduced virulence, leading to a reduction in hospitalisation rates, mortality rates and an overall milder case severity. Some studies indicated that the overall mortality risk following a SARS-CoV-2 infection was reduced by 80% in patients with Omicron as compared to Delta. Both Associate Professor Seale and Professor Griffin were of the view that reduced disease might also have come about as a result of higher levels of vaccination and the increased levels of vaccine effectiveness against severe outcomes.

[401] Each of Associate Professor Seale and Professor Griffin accepted that the studies conducted in respect of variants before Omicron were not reflective of the characteristics of all the risks associated with Omicron.

[402] Professor Griffin put it this way in his report:

> "It is important to point out that while Omicron may be relatively more mild than Delta, it is by no means a mild infection, and many have contended that the reduced disease we are now seeing is also largely contributed to by increased rates of vaccination. Further, even though it is less severe, with the magnitude

of increased cases the burden is actually greatest with Omicron as evident by the following table:

Australia COVID	2020	2021	2022
Total Cases	28,407	367,097	5,299,914
Reported Deaths	909	1,331	4,738
Number of Days	340	365	113
Cases Per Day	84	1,006	46,902
Deaths Per Day	2.7	3.6	41.93

[403] He went on to say that:

> "While the majority of cases recover without clinical intervention, approximately 20% of global cases result in more severe outcomes, including shortness of breath and pneumonia that require hospital admission, oxygen therapy and possibly even mechanical ventilation … . Risk factors for more severe disease include increasing age and comorbid conditions however this does [not] mean those who do not possess these risk factors are free of the possibility of severe disease, it is just less likely in this group."

[404] In support of that conclusion, Professor Griffin refers to two reports only one of which could have been available at the relevant times.

Vaccine effectiveness

[405] Much of the evidence on this topic came from studies and reviews which occurred or were published after 31 January 2022.

[406] An example can be found in Associate Professor Seale's report of 7 April 2022 where she refers to a study entitled **"**Duration of effectiveness of vaccines against SARS-CoV-2 infection and COVID-19 disease: results of a systematic review and meta-regression". It appeared in the issue of the journal *The Lancet* published on 5 March 2022. So far as the efficacy of booster shots was concerned, reference was made to one of ATAGI's recommendations – but that was published on 25 March 2022.

[407] This material could not have been available to either the Commissioner or Dr Wakefield, but this is not a criticism of the experts. They were briefed to provide this kind of evidence.

[408] The experts agreed, in general, that vaccination provided the greatest protection against serious infection but that that protection waned after a period which could be measured in weeks. While booster shots might temporarily improve protection that also waned rapidly. Studies conducted after the dates relevant to this application suggested that the problem of diminishing effectiveness of vaccination was greater

for the Omicron variant. Data which became available after the relevant period suggested that a booster dose of mRNA vaccine restored the effectiveness against symptomatic disease to 50 – 75% for the first three months and then 40 – 50% between four and six months after the booster dose.

[409] It was accepted by Associate Professor Seale that one study had demonstrated that, for AstraZeneca, there was no protective effect beyond 15 weeks after two doses. Professor Griffin was also prepared to accept that the AstraZeneca vaccine had reduced efficacy against symptomatic infection of the Omicron strain.

[410] At the time the Commissioner and Dr Wakefield made their decisions the kind of information referred to above was simply not available.

[411] The Commissioner refers to studies showing that vaccines had an effectiveness rate ranging from between 60 – 95% for reducing infection with COVID-19. But, once again, that is based upon the Delta variant. After these decisions were made studies showed that the effectiveness for reducing any infection with the Omicron variant for Pfizer was 55% (with a booster) and for Moderna was 64% (with a booster).

[412] So far as the effectiveness of vaccines on symptomatic infection and severity of illness is concerned, the evidence from Associate Professor Seale concerned reports relating to the effectiveness of AstraZeneca, Pfizer and Moderna against the Delta variant. That could have been the only material available to either decision-maker.

Community transmission

[413] Professor Griffin agreed that community transmission of Omicron was extremely high and accepted that there had been reports suggesting that household or private setting exposure was a stronger risk factor than work exposure.

[414] Factors relating to the infected person or persons include how infectious they are, in other words, how much virus they are shedding as well as what activities they are undertaking, as certain activities can increase the ability to infect others.

Vaccination – risks and alternatives

[415] The expert witnesses agreed that there were risks associated with the administration of COVID-19 vaccines. They did not agree about the relative likelihood of such risks. Some of the risks, such as myocarditis or thrombosis, were more likely to occur in persons under the age of 45.

[416] The risk of COVID-19 related serious illness or death increased with age.

[417] Associate Professor Seale referred to a hierarchy of controls to achieve practical and effective control of workplace hazards such as COVID-19. The hierarchy listed different risk avoidance or mitigation strategies in decreasing order of effectiveness. In her example the most effective means of control was elimination which could be

achieved through vaccination or isolation of patients, and the least effective was the use of personal protective equipment. She said it was essential that a range of measures be implemented to reduce the risk of transmission and that should include vaccination.

[418] Both Associate Professor Seale and Professor Griffin agreed that a particular individual who wished to provide informed consent to the taking of a vaccine would weigh the benefit of the vaccine against the risk of illness and the risks of any side effects, large or small.

[419] So far as risk was concerned, Professor Griffin agreed that, in the first half of 2021, the recommended use of AstraZeneca was progressively restricted to people over 50 years then, later, to people over 60 years due to TGA recognition of relatively higher risk in younger recipients – in particular a higher risk of vaccine-induced clotting and thrombosis. It was also recognised that there was an increased risk of pericarditis/myocarditis for those under 50 and, in particular, males between 18 and 39 years old.

[420] At the time of the making of the QAS Direction, the vaccinated population of QAS employees exceeded the target set for the general population, that is, 95.2% of the QAS workforce had been double dosed.

[421] Professor Griffin considered (in his report) the control measures, other than vaccination, which might reasonably be applied to reduce the risks of being exposed to COVID-19 in healthcare settings. His report was confined to those settings because it was provided in relation to the circumstances of different actions concerning different directions which had been given by the then Chief Health Officer. It was, though, subject to that proviso, relevant to these cases.

[422] He considered other control measures such as:

- social distancing;
- hand hygiene;
- mask wearing - noting the different levels of protections from different masks;
- other personal protective equipment including gloves, gowns etc;
- ventilation - being outdoors or opening windows, through to HEPA filtration;
- physical barriers - such as “sneeze guards”;
- cleaning - a large spectrum of cleaning practices is available, often with a focus on “high touch surfaces”;
- isolating of cases based on symptoms or confirmation with PCR or RAT;

- active screening of asymptomatic individuals (typically with RAT where sensitivity is very poor, or temperature screening, often considered ineffective);

- other public health measures such as: contact tracing to isolate close contacts, lockdowns, curfews, border and other travel restrictions and a quarantine.

[423] He said:

> "These measures are typically viewed as complementary with no one single method having 100% efficacy and the extent to which they are applied needs to consider the epidemiological risk at the time with the unintended consequences of the intervention. Unfortunately to achieve a sufficient level of risk reduction, typically a number of the above strategies would need to be applied in parallel and relatively rigorously enforced to ensure they are done at a sufficient level such that the unintended consequences of such a strategy are likely to be prohibitive. Particularly when this is considered in relation to vaccination which has been proven safe and effective."

[424] Professor Griffin went on to note that many of these are not able to be applied in the healthcare settings because social distancing and physical barriers are not possible when providing patient care.

[425] It should be noted, though, that "healthcare settings" can vary substantially in the extent to which there is a need to have physical contact with a patient. It should also be noted that the police find themselves in circumstances which can involve physical contact with persons who, for example, need to be detained.

[426] Professor Griffin was of the view that there were no reasonably available alternatives to vaccination.

Conclusions about the expert evidence

[427] Although COVID-19 had been present in one form or another for about 18 months before these directions were made, the state of knowledge, even at an expert level, was fluid. The scientists engaged in dealing with the pandemic were having to deal with frequently changing variants which had different levels of virulence and transmissibility, and which responded to vaccines in different ways. Information was being generated across the world and being analysed by thousands of scientists and other experts.

[428] The expert witnesses encapsulated a huge amount of material in their reports and a large part of it would not be able to be understood by a person without their level of expertise. Much of it concerned studies undertaken or concluded after the relevant times.

When human rights may be limited – s 13 HRA

[429] As I have found that Direction No. 14 and the QAS Direction limited the human rights referred to in s 17(c) of the HRA, I must consider whether that limitation is reasonable and can be demonstrably justified. Section 13 of the HRA sets out what has been referred to as the justification or proportionality test. It provides:

> **13 Human rights may be limited**
>
> (1) A human right may 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.
>
> (2) In deciding whether a limit on a human right is reasonable and justifiable as mentioned in subsection (1), the following factors may be relevant—
>
> (a) the nature of the human right;
>
> (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;
>
> (d) whether there are any less restrictive and reasonably available ways to achieve the purpose;
>
> (e) the importance of the purpose of the limitation;
>
> (f) the importance of preserving the human right, taking into account the nature and extent of the limitation on the human right;
>
> (g) the balance between the matters mentioned in paragraphs (e) and (f).

[430] Section 13 of the HRA introduces a test of proportionality which obliges the court to go further than it ordinarily would in a judicial review hearing. The approach taken in the United Kingdom has been adopted in Australia and is, in my respectful opinion, consonant with both the requirements of the HRA and the restrictions referred to above. Lord Bingham reviewed the authorities in *R (SB) v Governors of Denbigh High School*.[137] The following may be drawn from his analysis:

(a) the court's approach to an issue of proportionality under the HRA goes beyond that traditionally adopted for judicial review;

(b) but there is no shift to a merits review;

(c) the intensity of review is greater than applies in the absence of the application of s 13; and

(d) the court must make an evaluation by reference to the circumstances prevailing at the relevant time.

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137 [2007] 1 AC 100 at 116.

[431] In *Patrick's Case*[138] Bell J said that a court, when judicially reviewing a decision for unlawfulness under the Victorian equivalent of the HRA, does not reconsider a primary act or decision on the merits. The jurisdiction of the Court is supervisory, not substitutionary. It is to determine whether the act or decision is unlawful by reference to the human rights standards in the HRA, not to make a determination on the merits of the matter which are in substantive issue. Relief cannot be granted simply because the court takes a different view of the act or decision on the merits. That exposition of the role of the Court has been accepted on a number of occasions[139] and it is one which I respectfully adopt.

[432] A question which has arisen in the consideration of similar statutes and the role of the Court concerns the nature of the review undertaken by the Court. In *Patrick's Case*, Bell J said that the judicial review of decisions or actions for unlawfulness under the equivalent of the HRA was a more intensive standard of judicial review than traditional judicial review on, say, *Wednesbury* unreasonableness grounds. It is, as Emerton J said in *Castles*,[140] a "high standard of review".

[433] I adopt what was said by Bell J in *Patrick's Case* on this point:

> "[316] The difference between judicial reviewing for unlawfulness against applicable human rights standards and doing so for unlawfulness against the *Wednesbury* unreasonableness standard was explained by Lord Steyn in his "justly-celebrated and much-quoted" judgment in *R (Daly) v Secretary of State for the Home Dept* . In his Lordship's view, the proportionality criteria "are more precise and more sophisticated than the traditional grounds of review". Lord Steyn went on to identify certain differences between the two standards of review, of which these are relevant to us:
>
> > **'First, the doctrine of proportionality may require the reviewing court to assess the balance which the decision-maker has struck, not merely whether it is within the range of rational or reasonable decisions. Secondly, the proportionality test may go further than the traditional grounds of review in as much as it may require attention to be directed to the relevant weight accorded to interests and considerations**.'
>
> [317] It can be seen that, by its very nature as a standard of review, proportionality draws the court more deeply into the facts, the balance which has been struck and the resolution of the competing interests than traditional judicial review. This gives rise to the issue of how the court is to provide effective judicial protection for human rights while at the same time respecting the administrative function of the public authority under its legislation and not drifting into merits review. One important way of addressing that issue is by

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138 (2011) 39 VR 373.

139 See *Thompson v Minogue* at [98]*; Gardiner v A-G (No 3)* [2020] VSC 516 at [48] per Richards J; *Certain Children (No 2)* at [211].

140 (2010) 28 VR 141 at [145].

affording weight and latitude to the acts and decisions of primary decision-makers." (emphasis added, citations omitted)

[434] This was also considered in *Thompson v Minogue*[141] where the Court of Appeal said this about the Victorian equivalent of s 13 and s 58 of the HRA:

> "[98] It is sometimes said that, even though a greater degree of scrutiny is involved in assessing whether a public authority has acted compatibly with a human right, because the Court is undertaking its judicial review function, it is not entitled to enter upon the merits of the public authority's decision-making and second-guess it: **the Court's jurisdiction is supervisory, not substitutionary. The task of the Court is to determine whether the impugned conduct of the public authority is unlawful because it did not comply with its human rights obligations under the Charter**.
> [99] In the context of the procedural limb, that observation is self-evident. **The substantive limb is more complex because the Court is determining the issue whether the impugned action was, or was not, compatible with human rights**. It decides that question on the basis of evidence, which is not necessarily confined to that which the public authority may have relied upon in its own evaluation of whether the proposed action would be compatible with human rights. **In a sense, the Court's task is neither judicial review nor merits review, but the determination of a question of mixed law and fact. The distinction between judicial review and merits review in this context is therefore not necessarily helpful.**
> [100] Some authorities also suggest that, in order to apply the correct degree of scrutiny without encroaching into the merits of the impugned decision, the Court should give 'deference', 'respect' or 'latitude' to the decision-maker. It will be apparent from our discussion of the procedural limb that we do not find these concepts helpful. As we have already stated in that context, **the decision-maker's expertise and experience may be taken into account in the Court's assessment of whether the impugned decision is compatible with an applicable human right.** The Court can give that expertise and experience such weight as is warranted in the particular circumstances of the case, without any preconception that they are to be given any particular deference, respect or latitude. But, **in the end, the Court must decide for itself whether the public authority has acted incompatibly with human rights, and therefore unlawfully**.
> [101] To state the obvious, **conduct of a public authority can be declared to be unlawful if it is incompatible with a human right — contrary to the substantive limb of s 38(1) of the Charter — even if the public authority gave proper consideration to that right in accordance with the procedural limb**. It is not necessary for us to consider the circumstances in which conduct which is found to be compatible with a human right will be declared to be unlawful due to noncompliance with the procedural limb." (emphasis added, citations omitted)

[435] In both Johnston/Sutton and Witthahn it was submitted that the relevant decision-maker had carefully weighed the competing considerations and, particularly in the

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141 (2021) 67 VR 301.

case of the Commissioner, concluded that some interference with rights was justified. It is sometimes contended that a degree of deference should be afforded a decision-maker who has a highly developed appreciation of the make-up, structure and operations of a particular workforce. Both the Commissioner and Dr Wakefield would fall into that category. But what constitutes the appropriate weight to be afforded the decision-maker's conclusion remains a matter for the court and "what matters in any case is the practical outcome, not the quality of the decision-making process that led to it."[142]

[436] The factors set out in s 13(2) are examples of what may be relevant but they do cover a large part of the consideration necessary for assessment.

Section 13(2)(a) – nature of the human right.

[437] Not all rights are equally important. Some, though, are recognised as absolute rights under the ICCPR. The right not to be subjected to medical treatment without full, free and informed consent is one of those.

Section 13(2)(b) – nature of the purpose of the limitation.

[438] The Commissioner contended that the purpose of the requirement was to minimise the risks of transmission of COVID-19 throughout the QPS and between police staff and members of the community and to ensure that QPS employees were "frontline-ready and available for deployment". It was also said that Direction No. 14 was to combat waning immunity through the use of booster doses and thus serve the same purpose as in Direction No. 12.

[439] Dr Wakefield argued that the purpose of the QAS Direction was similar to that of the Commissioner but with the addition that many of the persons with whom QAS staff would be in contact were "vulnerable" and, therefore, more susceptible to suffering harsher symptoms.

Section 13(2)(c) – relationship between the limitation and its purpose and whether it helps to achieve the purpose.

[440] This requires consideration of whether the limitation is rationally capable of achieving its intended purpose. Johnston/Sutton and Witthahn contended that the limitation cannot rationally achieve its intended purpose because, among other things, the protection afforded by vaccination wanes so quickly and to such an extent. The difficulty with that submission is that none of the directions purported to be designed for any long-term or permanent protection. The fact that Direction No. 14 was issued following the publication of ATAGI advice about the utility of booster shots demonstrates that, at least at that stage, changes in the COVID-19 environment were

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142 *R (SB) v Governors of Denbigh High School* [2007] 1 AC 100 at [31] per Lord Bingham.

recognised. There was evidence that the vaccinations had an effect in protecting against serious infection. The necessary relationship has been demonstrated.

Section 13(2)(d) – whether there are any less restrictive and reasonably available ways to achieve the purpose.

[441] This consideration requires that thought be given to other potential ways in which the purpose of the limitation could be achieved. If the purpose can be achieved by the use of other measures or if less restrictive means can be adopted then the limitation contained within the Directions will not be proportionate. This was the subject of considerable disagreement. The first thing that must be recognised is that Johnston/Sutton and Witthahn did not argue that vaccination could play no part in a program designed to reduce or avoid infection. It was not a binary choice. The argument was put by Mr Villa SC in this way: "vaccination does not need to be mandatory and so the comparison is between mandatory vaccination on the one hand and voluntary vaccination with other measures on the other hand. So our point is not that vaccination does not need to be mandatory. The point is that for the very small number of persons who object to mandatory vaccination, alternative measures will achieve materially the same benefit. And this is especially so in circumstances where direction 14 was being made with high rates of community vaccination uptake and even higher rates of vaccination uptake amongst QPS personnel."

[442] The alternative suggested by Mr Villa SC was that the purpose of the QPS Directions could be achieved by a regime of voluntary vaccination (which had already resulted in very high levels of vaccination in the QPS workforce) combined with requirements that those who are not vaccinated must comply with mask requirements. This, he said, was already recognised in Direction No 12 which provided that where a police officer or staff member who was exempt from the requirement for vaccination (due to a medical contraindication, or a genuine religious objection or an exceptional circumstance) would be required to comply with all public health directions made under the *Public Health Act* 2005 and carry a face mask at all times, wear a face mask when on duty and in an indoor space, and wear a face mask when on duty in an outdoor space where it is not possible to practise physical distancing. That demonstrated that the Commissioner regarded those as an adequate means of minimising transmission by and to those persons despite them not being vaccinated.

[443] The QAS Direction also provided an exemption for medical contraindications, genuinely held religious beliefs, or exceptional circumstances. If an employee was granted an exemption they did not have to comply with the requirements for vaccination. There was no specific requirement in such a case for face masks, but there was no need as many of the employees were otherwise covered by public health directions under other legislation.

[444] Associate Professor Seale gave evidence that managing the risk of COVID-19 in the workplace involved engaging with a hierarchy of different avoidance or mitigation

strategies. She said that multiple control strategies should be implemented at the same time and follow on from each other. In her opinion, based upon the reports to which she referred, vaccination ranked as the most effective control measure to prevent transmission of COVID-19 and the use of personal protective equipment ranked as the least effective measure. The studies upon which she relied emphasised the problems with personal protective equipment. They were almost entirely concerned with a failure to use the equipment in the proper way rather than the equipment itself being inadequate.

[445] Professor Griffin was of the same mind. He said that risk control measures were typically viewed as complementary with no single method having 100% efficacy. He recognised that many of the "non-vaccination" strategies could not be applied in all settings within the QAS workforce. And I draw from that that a similar concern would exist with QPS staff in some of the situations in which they find themselves. The matter that was not adequately addressed though was whether it was possible to organise the workforce in such a way that those who had voluntarily been vaccinated worked in areas where protective equipment might not be as effective and those who had not been vaccinated were required to work in different areas.

[446] In their reports, both Associate Professor Seale and Professor Griffin were of the view that the various prevention strategies work best when they were used in bundles, given the difficulties associated with ensuring compliance with personal protective equipment and of the limited capacity for tests (such as RAT tests) to achieve a meaningful sensitivity. Professor Griffin considered that the nature of the healthcare environment, and the interactions that took place in such an environment, meant that there were no reasonably available alternatives to vaccination.

[447] In cross-examination Associate Professor Seale did accept that personal protective equipment which was used properly and the use of RATs were means by which risks could be avoided. She also accepted that the correct use of personal protective equipment would minimise risk provided that the appropriate product was used in the appropriate way.

[448] The impositions of the QPS Directions and the QAS Direction were, largely, inflexible. While each of them provided for exemptions on the ground of medical contraindication or genuine religious belief or some other exceptional circumstance they imposed a regime which was not capable of taking into account any other circumstance which might be relevant to the issue of mandatory vaccination. The material which was before each decision-maker did not afford either of them the type of information which has been provided in this hearing.

[449] The mandatory requirement that all employees be vaccinated (subject to the exceptions referred to above) did not recognise the high level of voluntary vaccination already apparent within the workforces. The requirement, then, was effectively directed to those who had declined vaccination or were yet to be vaccinated.

[450] This criterion should be dealt with by, first, establishing the purpose sought to be achieved. The proposal to achieve that purpose should then be considered. Will it work as hoped? Then the alternatives, if any, should be identified. The manner in which the purpose might be achieved is not confined to, for example, employing one type of vaccine over another. The whole employment environment should be considered and the ways in which employees might be deployed should form part of the consideration.

[451] Neither the Commissioner nor Dr Wakefield gave close attention to the possible range of solutions. Each was presented with a proposal for mandatory vaccination with little in the way of well-developed critiques of alternative means of reducing illness and infection.

[452] While there were differences in expression by Associate Professor Seale and Professor Griffin on this topic, the balance of their evidence (which on this point I prefer) was that the alternatives to mandatory vaccination would not achieve the same purpose.

Section 13(2)(e)-(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.

[453] There are a number of factors which have already been referred to and some which need consideration under this heading.

[454] Direction No. 14 was not confined to QPS staff who fell into high risk categories. It applied to all QPS officers appointed under s 2.2 of the PSAA. It only exempted those with a medical contraindication, a genuine religious objection, or some other exceptional circumstances.

[455] The rights identified under the HRA must always be considered in light of the words used in s 13(1) – right subject to limits which can "be demonstrably justified in a free and democratic society based on human dignity, equality and freedom." Those rights are held by all persons and, so, the right of one person should be viewed in the light of the same right or rights held by others in a free and democratic society. The responsibility of an employer to consider the occupational health and safety of its employees is one of the responsibilities which must be taken into account in these circumstances. It follows, then, that actions taken which are designed to protect employees if not from actual infection, but at least from serious illness, also need to be taken into account.

[456] Against that set of considerations is the fundamental right not to be subjected to medical treatment without full, free and informed consent which has been impeded by these directions. They were made unlawfully or ineffectively. Non-compliance with those directions could have had life-changing consequences for an employee who declined to comply with the direction.

[457] The balancing which needs to be undertaken with respect to those and the other matters referred to above is complicated by the fact that these directions were given in what was, by any measure, an emergency. It was further complicated by the fact that, at the time of giving the directions, the knowledge available about the virus, its variants, its virulence, and its transmissibility was limited and being added to on an almost daily basis.

[458] Another feature which should be considered is what was not done in the directions. In this case it was not allowing an exception for conscientious objection - notwithstanding an advice (to the Commissioner from the Crown Solicitor) "that a "conscientious" belief will likely be sufficiently analogous to qualify as a ground of discrimination under the HRA".

[459] There is no formula which can be used to consider this balance. But, having taken into account the matters argued by the parties, I am not satisfied that the balance is in favour of the applicants and so I conclude that the limit imposed on s 17(c) has been demonstrably justified in the terms of s 13.

[460] It also follows from that that the applicants have not established any ground under the JRA of unreasonableness.

What orders should be made?

[461] I have not held that the QPS Directions and the QAS Direction were invalid, rather I have held that they were unlawful. As each direction has been revoked, the remedies available are confined.

[462] An order setting aside or quashing the legal effects of the directions is not appropriate. As was said in *Probuild Constructions (Aust) Pty Ltd v Shade Systems Pty Ltd*:[143]

> "[28] The function of an order in the nature of certiorari is to remove the legal consequences, or purported legal consequences, of an exercise or purported exercise of power which has, at the date of the order, a discernible or apparent legal effect upon rights." (citation omitted)

[463] In *Wingfoot Australia Partners Pty Ltd v Kocak*[144] the utility of an order in the nature of certiorari was considered:

> "[25] The function of an order in the nature of certiorari is to remove the legal consequences or purported legal consequences of an exercise or purported exercise of power. Thus, an order in the nature of certiorari is available only in respect of an exercise or purported exercise of power which has, at the date of order, an "apparent legal effect". An order in the nature of certiorari is not available in respect of an exercise or purported exercise of power the legal effect or purported legal effect of which is moot or spent. An order in the nature of

143 (2018) 264 CLR 1 at [28] per Kiefel CJ, Bell, Keane, Nettle and Gordon JJ.

144 *Wingfoot Australia Partners Pty Ltd v Kocak* (2013) 252 CLR 480.

> certiorari in those circumstances would be not simply inutile; it would be unavailable." (citation omitted)

[464] That is the position in which the applicants find themselves. As I have held in other proceedings[145] disciplinary action may still be taken by the Commissioner and Director-General. While it would be unusual for such action to be taken on the basis of an alleged breach of a direction found to have been made unlawfully, that remains a possibility and the appropriate way of proceeding is that taken by Dixon J in *Certain Children v Minister for Families and Children (No. 2)*.[146] In that case his Honour was satisfied that breaches of the Charter equivalent of s 58 had been established, but not jurisdictional error. He made declarations that particular acts were unlawful and then made orders restraining the decision-makers from acting on them.

[465] That course of conduct is supported by the principles considered in *Project Blue Sky Inc v Australian Broadcasting Corporation*:[147]

> "[100] … Although an act done in contravention of s 160 **is not invalid, it is a breach of the Act and therefore unlawful**. Failure to comply with a directory provision "may in particular cases be punishable". That being so, a person with sufficient interest is entitled to sue for a declaration that the ABA has acted in breach of the Act and, **in an appropriate case, obtain an injunction restraining that body from taking any further action based on its unlawful action**." (citation omitted, emphasis added)

[466] In *Roads and Maritime Services v Desane Properties Pty Ltd*[148] a unanimous Court of Appeal (NSW) said that: "we do not accept that the High Court was intending to limit the occasions where an injunction may be granted to prevent conduct consequent upon a breach of an Act to occasions where the relevant breach constituted an offence".

[467] In each of the Johnston, Sutton and Witthahn groups of applicants there were employees who were required by the directions to be vaccinated. Those applicants declined to comply with the directions. They are entitled to an order protecting them from any liability which might have arisen under those directions.

[468] Other issues arise with respect to particular employees who have been disadvantaged in some way. Agreements were reached with the Commissioner and the representatives of Dr Wakefield that the directions were, in effect, stayed with the result that no action would be taken with respect to them until judgement was given. The success of the various applicants and the decision I have reached with respect to the unlawfulness of the QPS Directions or the ineffectiveness of the QAS Direction

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145 *Johnston & Ors v Carroll (APM, Commissioner of the Queensland Police Service) & Anor; Ishiyama & Ors v Aitken & Ors; Hunt & Ors v Gerrard & Anor* [2024] QSC 6.

146 (2017) 52 VR 441.

147 (1998) 194 CLR 355.

148 (2018) 98 NSWLR 820 at [289].

and the entitlement of the applicants not to be subjected to or concerned about proceedings related to alleged breaches of the directions can best be recognised by making the following orders.

[469] I make the following orders:

(a) In Matter 11254/21

(i) The Court declares that Instrument of Commissioner's Direction No. 12 issued on 7 September 2021 and Instrument of Commissioner's Direction No. 14 issued on 14 December 2021 were unlawful under s 58 of the Human Rights Act 2019.

(ii) The Commissioner of Police be, and is, restrained from:

(A) taking any steps with respect to enforcement of the QPS Directions, and

(B) taking any disciplinary proceedings against any of the applicants based upon the requirements of the QPS Directions.

(b) In Matter 12168/21

(i) The Court declares that Instrument of Commissioner's Direction No. 12 issued on 7 September 2021 and Instrument of Commissioner's Direction No. 14 issued on 14 December 2021 were unlawful under s 58 of the Human Rights Act 2019.

(ii) The Commissioner of Police be, and is, restrained from:

(A) taking any steps with respect to enforcement of the QPS Directions, and

(B) taking any disciplinary proceedings against any of the applicants based upon the requirements of the QPS Directions.

(c) In Matter 11258/21

(i) The Court declares that Employee COVID-19 Vaccination Requirements Human Resources Policy is of no effect.

(ii) The Director-General of Queensland Health be, and is, restrained from:

(A) taking any steps with respect to enforcement of the QAS Direction, and

(B) taking any disciplinary proceedings against any of the applicants based upon the requirements of the QAS Direction.

[470] I will hear the parties on costs.