LEARNINGS FROM *JOHNSTON V CARROLL*: THE PLACE OF HUMAN RIGHTS IN LEGAL CHALLENGES TO COVID-19 VACCINE DIRECTIONS

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Both public and private employers introduced vaccine directions during the COVID-19 pandemic. Such directions either actively required employees to be vaccinated or provide proof that they had been vaccinated by a certain date in order to attend their place of work. In some instances, the employee could be subject to disciplinary action, including dismissal, if they did not comply with the directions. In a decision the first of its kind, Justice Martin of the Queensland Supreme Court decided in Johnston v Carroll ('Johnston')[1] that certain of the state's COVID-19 vaccine directions for police force and ambulance service employees were unlawful.

I INTRODUCTION

Both public and private employers introduced vaccine directions during the COVID-19 pandemic. Such directions either: (1) required employees to be vaccinated as a condition of employment; or (2) required employees to provide proof that they had been vaccinated as a condition of access to their workplace (commonly referred to as a 'Site Access Requirement').[2] In some instances, the employee could be subject to disciplinary action, including dismissal,[3] for non-compliance. In a decision the first of its kind, Justice Martin of the Queensland Supreme Court decided in *Johnston v Carroll* ('*Johnston*')[4] that some of the State's COVID-19 vaccine directions for police force and ambulance service employees were unlawful.

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1 (2024) 329 IR 365 ('*Johnston*').

2 *Construction, Forestry, Maritime, Mining and Energy Union v Mt Arthur Coal Pty Ltd* (2021) 310 IR 399, 407 [5] (Ross P, Catanzariti V-P, Saunders DP, Commissioners O'Neill and Matheson) ('*CFMEU*').

3 See, eg, *Falconer v Commissioner of Police [No 2]* [2024] WASCA 47 ('*Falconer*').

4 *Johnston* (n 1).

The proceedings have a long and complex history.[5] Part II provides a case summary, outlining the arguments made by each group of claimants. Part III considers Justice Martin's reasoning regarding unlawfulness and his Honour's finding that the directions in question limited (albeit permissibly) the right not to be subjected to medical treatment without 'full, free and informed consent'.[6] In Part IV, this case note explores the implications of Justice Martin's decision for human rights jurisprudence, future proceedings challenging COVID-19 vaccine directions and pandemic management more generally.

Contrary to much of the media coverage of Justice Martin's decision,[7] *Johnston* does not mean Australia is on the precipice of an avalanche of successful legal challenges to vaccine directions across the country. However, there are some interesting implications for the meaning of consent in medical treatment in jurisdictions that have human rights legislation. *Johnston* is also a compelling example of the need for human rights legislation in all Australian states and territories.[8] Human rights legislation provides an additional legal framework through which courts can examine the lawfulness of government action (when 'piggybacked' onto another cause of action),[9] and therein better perform their accountability function as a 'check' on the executive.[10]

II CASE SUMMARY

Johnston comprised three separate matters heard at the same time – Dylan Johnston and Shaun Sutton were the lead applicants in matters brought against the

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5 See interlocutory proceedings: *Witthahn v Chief Executive, Hospital and Health Services (Qld)* [2022] QSC 95; *Johnston v Commissioner of Police (Qld)* [2021] QSC 275; *Witthahn v Chief Executive, Hospital and Health Services (Qld)* (2021) 312 IR 315.

6 *Human Rights Act 2019* (Qld) s 17(c) ('*HRA*').

7 Vanda Carson and Shaye Windsor, 'Anti-Vaxxer Cops, Ambos in COVID Win', *The Courier Mail* (Brisbane, 28 February 2024) 17; Ellie Dudley and Lydia Lynch, 'Vaccine Ruling "Just Tip of the Iceberg"', *The Australian* (online, 28 February 2024) <https://infowebnewsbank-com.eu1.proxy.openathens.net/apps/news/document-view?p=AWNB&docref=news/1977A39F27C2E0F8>; Andrew Messenger, 'Clive Palmer Claims "Great Victory" in Funding Challenge to Queensland's Covid Vaccine Mandate', *The Guardian* (online, 28 February 2024) < https://www.theguardian.com/australia-news/2024/feb/27/clive-palmer-claims-great-victory-in-funding-challenge-to-queenslands-covid-vaccine-mandate>.

8 Christopher Taylor-Burch, 'WA Case Notes: Upholding Mandatory Vaccinations for the Police Force – *Falconer v Commissioner of Police [No 2]* [2024] WASCA 47' (2024) 51(3) *Brief* 34, 35; Chloe Wood, 'Human Rights for Everyone: Why We Need a Human Rights Act for Western Australia Now' (2024) 51(4) *Brief* 20.

9 Belinda Bennett et al, 'Australian Law during COVID-19: Meeting the Needs of Older Australians?' (2022) 41(2) *University of Queensland Law Journal* 127, 140 <https://doi.org/10.38127/uqlj.v41i2.5943>; Taylor-Burch (n 8) 35.

10 Elizabeth Hicks, 'Proportionality and Protracted Emergencies: Australia's COVID-19 Restrictions on Repatriation Rights Compared' (2023) 45(1) *Sydney Law Review* 77, 77.

Commissioner of the Queensland Police Service ('Commissioner')[11] and Bernard Witthahn was the lead applicant in the proceedings against the Chief Executive of Hospital and Health Services and Director General of Queensland Health ('Director General') brought by Queensland Ambulance Service employees.[12] The three matters were heard together as the vaccine directions, the subject of the applicants' challenges, were substantively similar, as was the factual context in which they were made.

A Queensland Police Service Directions

The Johnston and Sutton applicants sought declarations that two directions ('*QPS directions*')[13] made by the Commissioner were invalid pursuant to either the *Judicial Review Act 1991* (Qld) ('*JRA*'), the *Civil Proceedings Act 2011* (Qld) or in the inherent jurisdiction of the Queensland Supreme Court.[14] In the alternative, the applicants sought that the *QPS directions* be set aside, quashed, or the Commissioner be restrained from acting on the directions (i.e., prevented from taking any steps to enforce the directions, including the commencement or continuance of any disciplinary proceedings).[15] In addition, the Sutton applicants argued that the directions were not compatible with, or failed to give proper consideration to, certain human rights as required by section 58(1)(b) of the *Human Rights Act 2019* (Qld) ('*HRA*').[16]

The *QPS directions* applied to all police officers and staff members appointed under either the *Police Service Administration Act 1990* (Qld) ('*PSAA*') or the *Public Service Act 2008* (Qld).[17] In substance, the directions required employees of Queensland Police, subject to certain exemptions, to receive two doses of a COVID-19 vaccine plus a booster dose on a particular timeline and provide evidence that they had done so.[18] The consequence of non-compliance with the directions was potential disciplinary action, including dismissal.[19]

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11 Johnston and the six other applicants were all police officers, whereas Sutton and the other 53 applicants in that matter worked for Queensland Police in capacities other than as police officers: *Johnston v Police Commissioner (Qld)* [2024] QSC 2, 1, 3–6; *Johnston* (n 1) 373 [4].

12 Together with 12 other applicants, all of whom worked for the Queensland Ambulance Service: *Johnston v Police Commissioner (Qld)* [2024] QSC 2, 2; *Johnston* (n 1) 373 [4].

13 Commissioner of the Queensland Police Service, *Instrument of Commissioner's Direction No 12* (7 September 2021); Commissioner of the Queensland Police Service, *Instrument of Commissioner's Direction No 14* (14 December 2021). Direction No 14 reimposed the requirements of Direction No 12 as well as adding some requirements, but was essentially an extension of Direction No 12: *Johnston* (n 1) 389 [92].

14 *Johnston* (n 1) 375–6 [15].

15 Ibid 376 [16].

16 Ibid 376 [17].

17 Ibid 374 [9].

18 Ibid 374–5 [9]–[11].

19 Ibid 429 [314].

B Queensland Ambulance Service Directions

The Witthahn applicants challenged the decision of the Director General to apply the *Employee COVID-19 Vaccination Requirements: Human Resources Policy* ('*QAS direction*') to Queensland Ambulance Service Staff.[20] The *QAS direction* required employees to again receive, subject to certain exemptions, a first and second dose of a COVID-19 vaccine on a particular timeline, keep up to date with any required booster doses and provide evidence confirming they had complied with these requirements.[21] If employees did not comply with the direction, they could be subject to disciplinary proceedings. The parties agreed that there was no statutory basis for the *QAS direction* (unlike the *QPS directions*).[22] The Witthahn applicants sought identical relief to the Johnston applicants.[23]

As it was put by Justice Martin, the broad decision to be made in each of the three matters was 'whether the particular directions were lawful'.[24] The applicants in each of the matters alleged that the relevant decision-maker had failed to take into account relevant matters and as such had acted unreasonably in making the directions.[25] Ultimately the questions for determination were: (1) did the relevant decision-maker have the power to make the directions?; and (2) if the directions were within power, did they represent a reasonable and demonstrably justified limit on human rights (within which the test of legal unreasonableness was subsumed)? The essential relief sought by all applicants in each of the matters was an order that the directions be set aside,[26] with the effect that they could no longer be subject to disciplinary action for their failure to comply with them.

III THE DECISION AND RELEVANT LAW

A The QPS Directions

1 Findings as to Unlawfulness in the Context of the HRA

Section 58 of the *HRA* makes it unlawful for public entities (including their officers) to:

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20 Queensland Ambulance Service, *Employee COVID-19 Vaccination Requirements: Human Resources Policy* (31 January 2022) ('*QAS direction*').

21 *Johnston* (n 1) 375 [12].

22 *Johnston* (n 1) 415 [230]–[231].

23 Ibid 376 [19].

24 Ibid 374 [5].

25 Ibid 374 [6], 376 [20].

26 Ibid 374 [5].

1. Make a decision in a way that is not compatible with human rights,[27] also referred to as the 'substantive' limb.[28] In accordance with section 13 of the *HRA,* to be 'compatible with human rights', a decision must either not limit a human right,[29] or limit a human right only to the extent that it is 'reasonable and demonstrably justifiable' (ie, proportionate).[30]
2. In making a decision, fail to give proper consideration to a human right relevant to that decision,[31] which is referred to as the 'procedural' limb.[32] 'Proper consideration' includes but is not limited to:
    a. Identifying the human right(s) that may be affected by the decision;[33] and
    b. Considering whether the decision would be 'compatible' with those human rights.[34]

The process therefore requires a decision-maker to: (1) identify whether any human right is relevant to the impugned decision; (2) determine whether the impugned decision would limit (ie, restrict or interfere with) that right; and (3) consider whether the limit is reasonable and demonstrably justified having regard to section 13(2) of the *HRA*.[35] The latter aspect of the applicants' argument is dealt with in Part III(C).

Justice Martin observed that the Commissioner 'did not appear to have given her evidence much thought before she entered the witness box'.[36] Crucial to his ultimate conclusion that the *QPS directions* were unlawful was the finding that two Human Rights Compatibility Statements likely were not provided to the Commissioner until after she had made the decision to issue the directions.[37] The Commissioner therefore could not have read them,[38] much less 'seriously turned her mind to the possible impact of the decision on a person's human rights'[39] or identified and balanced countervailing interests (both public and private) as required before making her decision.[40] In support of this conclusion, Justice Martin also found that the Commissioner, when making the first direction, did not have any information about the level of transmission between police officers, and

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27 *HRA* (n 6) s 58(1)(a).
28 *Johnston* (n 1) 384 [67].
29 *HRA* (n 6) s 8(a).
30 Ibid ss 8(b), 13.
31 Ibid s 58(1)(b).
32 *Johnston* (n 1) 384 [67].
33 *HRA* (n 6) s 58(5)(a).
34 Ibid s 58(5)(b).
35 *Johnston* (n 1) 385–6 [74], referring to Victorian authorities on the issue of incompatibility.
36 Ibid 389 [90].
37 Ibid 397 [135].
38 Ibid.
39 Ibid 397 [136]; *Bare v Independent Broad-Based Anti-Corruption Commission* (2015) 48 VR 129, 223 [288] (Tate JA) ('*Bare*').
40 *Bare* (n 39) 223 [288] (Tate JA); *Johnston* (n 1) 392 [104], 397 [136].

between police officers and the community.[41] The Commissioner admitted that she did not have regard to increased rates of vaccine uptake in the community or among employees in making the decision to issue the second direction.[42] In fact, the Commissioner did not lead any evidence as to the information upon which she relied in issuing the second direction.[43]

As such, Justice Martin found that the Commissioner had not identified the human rights that might be affected by the decision to issue the directions or considered whether the decision would be compatible with human rights.[44] Accordingly, the directions were unlawful.[45] A finding of unlawfulness does not automatically render a decision, or in this case directions, invalid.[46] Further, a breach of section 58(1) 'does not amount to jurisdictional error and, therefore, a declaration of invalidity is not available'.[47] However, a finding of unlawfulness, together with an appropriate injunction, has 'the same practical effect as a finding of invalidity'.[48] This is discussed in further detail in Part III(D).

2 The Commissioner's Power to Make the Directions, Proportionality and Unreasonableness

The Johnston applicants also argued that the *PSAA* did not empower the Commissioner to make the *QPS directions*[49], and on that basis they were unlawful. The power to make directions under section 4.9 of the *PSAA* is broad – the Commissioner can give any direction the Commissioner 'considers necessary or convenient for the efficient and proper functioning of the police service'.[50] However, the power is limited by legal reasonableness,[51] the principle of legality[52] and the provisions of the *HRA*.[53] What is 'necessary or convenient' also depends on the context in which the power is exercised, including where it is exercised in response to an emergency.[54] The Johnston and Sutton applicants both argued that the *QPS directions* were legally unreasonable at the time they were made, or alternatively the second direction was beyond the power conferred by the *PSAA* at

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41 *Johnston* (n 1) 393 [112].
42 Ibid 396 [129].
43 Ibid 394 [120].
44 Ibid 397 [138]–[139].
45 Ibid 397 [139].
46 Ibid 421 [266]; *HRA* (n 6) s 58(6); *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355, 390–1 [93] (McHugh, Gummow, Kirby and Hayne JJ) ('*Project Blue Sky*').
47 *Johnston* (n 1) 378 [30].
48 Ibid 421 [266].
49 Ibid 378 [32].
50 *Police Service Administration Act 1990* (Qld) s 4.9(1); ibid 401 [106].
51 *Minister of Immigration and Citizenship v Li* (2013) 249 CLR 332, 351–2 [30] (French CJ).
52 *Johnston* (n 1) 402 [163], 406 [187]; *Lacey v A-G (Qld)* (2011) 242 CLR 573, 591–2 [43] (French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ); Nicholas J McBride, 'Ill Fares the Land: Has COVID-19 Killed the Principle of Legality?' (Research Paper, 29 September 2022) 17, 22–4 <http://dx.doi.org/10.2139/ssrn.4023242>.
53 *Johnston* (n 1) 402 [163].
54 Ibid 402 [164].

some later time.[55] This appears to have been argued as an independent ground by the applicants but was dealt with by Justice Martin in the context of the proportionality test imposed by section 13 of the *HRA*. In this regard, his Honour reasoned that if a human right was engaged and limited by the *QPS directions*, and it was therefore necessary to determine whether that limitation was proportionate,[56] then that review may constitute consideration of the legal reasonableness of the directions.[57] This issue is dealt with in Part III(C) below as the analysis and issues were largely the same for both the *QPS directions* and *QAS direction*.[58]

The Sutton applicants argued that the *QPS directions* were affected by errors of law because they were unauthorised,[59] involved an error of law,[60] or were otherwise contrary to law.[61] The first argument that the directions were unauthorised was rejected by Justice Martin on the basis of the broad meaning of the word 'functioning' in the context of section 4.9 of the *PSAA*.[62] His Honour also held that nothing about section 4.9 was inconsistent with the *HRA*.[63] The issue in this case was not therefore the empowering provision, but the way the power was exercised to make the directions.[64] That issue fell for determination in the context of the proportionality test imposed by section 13 of the *HRA* and legal unreasonableness.[65] As referred to above, Justice Martin accepted the submission 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'.[66] Again, this matter is dealt with in Part III(C).

B The *QAS Direction*

The Director-General argued that the *QAS direction* was made pursuant to an implied term in the contract of employment that an employer can give lawful and reasonable directions to their employees.[67] The common law implies a term into employment contracts that an employee comply with lawful and reasonable commands that fall within the scope of their contract.[68] The reasonableness of a direction is not considered '*in vacuo*' but with regard to the 'nature of the employment, the established usages affecting it, the common practices which exist

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55 Ibid 404 [173].
56 Ibid 403 [171]; *HRA* (n 6) s 13.
57 *Johnston* (n 1) 403 [171].
58 Ibid 421 [268].
59 Ibid 404 [177]; *Judicial Review Act 1991* (Qld) s 20(2)(d) ('*JRA*').
60 *Johnston* (n 1) 404 [177] (Martin SJA); *JRA* (n 59) s 20(2)(f).
61 *Johnston* (n 1) 404 [177] (Martin SJA); *JRA* (n 59) s 20(2)(i).
62 *Johnston* (n 1), 380 [40], 382 [55], 401 [157]–[158], 404 [178].
63 Ibid 408 [198].
64 Ibid.
65 Ibid 406 [185]–[186].
66 Ibid.
67 Ibid 411 [210]–[211], 412 [213].
68 *R v The Darling Island Stevedoring and Lighterage Co Ltd; Ex parte Halliday; Ex parte Sullivan* (1938) 60 CLR 601, 621 (Dixon J).

and the general provisions of the instrument … governing the relationship'.[69] Justice Martin observed that he was not directed to any evidence that went to any of these factors.[70] The Director-General did not seek to admit the applicants' employment contracts or lead evidence that his employees were the subject of an industrial instrument or award.[71]

The Director-General relied on obiter of the Full Bench of the Fair Work Commission to the effect that if the purpose of an employer's direction is to protect the health and safety of employees and patrons, it is likely to be lawful because it 'falls within the scope of the employment' and 'there is nothing "illegal" or unlawful about becoming vaccinated'.[72] In that case however, the Full Bench had before it the industrial instrument which governed the terms and conditions of the applicants' employment.[73] This was not the case in *Johnston*; as noted above, there was a complete absence of any evidence as to the nature and scope of the Witthahn applicants' employment contract, applicable industrial instrument or conditions. This meant that the Director-General could not show that the *QAS direction* fell within 'the category of directions able to be made pursuant to the implied term in the contracts of employment'[74] (ie, that it was reasonable).[75] Accordingly, the *QAS direction* was made without power and therefore unlawful.

C Infringement on Human Rights

Despite having already found that the *QPS directions* and *QAS direction* were unlawful, Justice Martin went on to consider whether the directions were unlawful under section 58(1)(a) of the *HRA* because they were not compatible with human rights within the meaning of section 13 of the *HRA*.[76] A human right may only be subject to 'reasonable limits that can be demonstrably justified in a free and democratic society based on human dignity, equality and freedom'.[77] Section 13(2) of the *HRA* then lists factors relevant to the determination of whether a limit is reasonable and demonstrably justified.[78]

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69 Ibid 621–2.
70 *Johnston* (n 1) 413 [219].
71 Ibid 413 [220].
72 *CFMEU* (n 2) 448 [179] (Ross P, Catanzariti V-P, Saunders DP, Commissioners O'Neill and Matheson).
73 *Johnston* (n 1) 414 [223].
74 Ibid 414 [225].
75 Ibid 414 [224].
76 Ibid 422 [270].
77 *HRA* (n 6) s 13(1).
78 Those factors being:

> the nature of the human right;
> 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;
> the relationship between the limitation and its purpose, including whether the limitation helps to achieve the purpose;
> whether there are any less restrictive and reasonably available ways to achieve the purpose;

Justice Martin found that, of the rights the applicants identified as effected by the directions, only one was limited: the right not to be subjected to medical treatment without 'full, free and informed consent'.[79] In doing so, his Honour distinguished *Johnston* from *Kassam v Hazzard* ('*Kassam*'),[80] where it was said that the common law right to bodily integrity[81] was not affected by public health orders requiring health care, aged care and education workers in New South Wales to be vaccinated in order to attend their workplace.[82] The claimants in *Kassam* also argued that a person's consent to a battery in the context of medical treatment could be vitiated by 'external factors'.[83] This argument was based on case law finding to the effect that a valid consent may be ineffective if 'the person's will has been overborne or the decision is the result of undue influence, or of some other vitiating circumstance'.[84] While accepting that 'there is room for debate at the boundaries of what external factors might vitiate a consent' in this context, the primary judge in *Kassam* reasoned that a person's consent was not vitiated if their decision to be vaccinated was made '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'.[85] Future research might consider in more depth the emerging body of case law regarding consent to a battery and how it might be relevant in the context of human rights legislation.

Justice Martin did not disagree with the analysis in *Kassam* but distinguished the common law right to bodily integrity from section 17(c) of the *HRA*. In doing so, his Honour picked up on and seemingly applied Justice Richard's observation in *Harding v Sutton* ('*Harding*')[86] that '[i]t is arguable that the concept of consent at common law is narrower than the "full, free and informed consent" to medical treatment'.[87] Justice Martin ultimately found that a person cannot give 'free' consent to medical treatment if a person is forced to choose between being vaccinated and losing their livelihood.[88] This was the invidious choice presented to the applicants in *Johnston* given that non-compliance with the directions could

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the importance of the purpose of the limitation;

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

the balance between the matters mentioned in paragraphs (e) and (f).

Ibid s 13(2)(a)–(g).

79 *HRA* (n 6) s 17(c); *Johnston* (n 1) 434 [333]. The other rights identified by the applicants were found to not be limited – recognition of equality before the law: at 427 [299]; right to life: at 428 [307]; right to privacy and reputation: at 441 [372]; right to liberty and security: at 442 [379].

80 (2021) 393 ALR 664 ('*Kassam*'), affirmed on appeal: *Kassam v Hazzard* (2021) 106 NSWLR 520.

81 Which was originally identified in *Secretary, Department of Health and Community Services v JWB* (1992) 175 CLR 218, 233 (Mason CJ, Dawson, Toohey and Gaudron JJ) ('*Marion's Case*').

82 *Kassam* (n 80) 681 [58] (Beech-Jones CJ at CL).

83 Ibid 681 [60].

84 *Hunter and New England Area Health Service v A* (2009) 74 NSWLR 88, 97 [40] (McDougall J).

85 *Kassam* (n 80) 628 [63] (Beech-Jones CJ at CL).

86 [2021] VSC 741 ('*Harding*').

87 Ibid 51 [161].

88 *Johnston* (n 1) 429 [311], 433–4 [332].

result in dismissal.[89] His Honour came to the conclusion that this amounted to 'practical compulsion',[90] a phrase used in the context of several High Court cases regarding the meaning of 'civil conscription' in section 51(xxiiiA) of the *Constitution*.[91] As such, Justice Martin found that the right in section 17(c) of the *HRA* was limited.[92] Justice Martin's reasoning process in this regard is considered in Part IV(A).

Justice Martin then considered whether the limitation was reasonable and could be demonstrably justified[93] based on the expert evidence led regarding the COVID-19 pandemic.[94] As previously stated, section 13 of the *HRA* introduces a proportionality test. This requires courts to go further than they otherwise would in a judicial review hearing, although there was no scope for merits review.[95] His Honour noted in this context that the relevant question was not 'the actual efficacy of a particular vaccine' but the 'state of knowledge' at the time the directions were made.[96] Justice Martin was at pains to emphasise that it was 'difficult to identify with any precision the state of knowledge between 14 December 2021 and 31 January 2022'.[97]

His Honour concluded that much of the evidence on the topic of vaccine effectiveness (both in preventing serious infection and transmission) came from studies published after 31 January 2022.[98] The experts agreed that 'vaccination provided the greatest protection against serious infection'.[99] In relation to transmission, the Commissioner referred to studies showing that vaccines were between 60% and 95% effective in reducing infection.[100] While his Honour noted that those studies were based upon the Delta variant (with subsequent studies showing reduced effectiveness in relation to infection with the Omicron variant), he concluded that the material regarding the Delta variant was, at the time the relevant decisions were made, the 'only material available to either decision-maker'.[101] Associate Professor Seale opined that 'it was essential that a range of measures be implemented to reduce the risk of transmission and that should

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89 Ibid 429 [314].

90 *Johnston* (n 1) 434–4 [332]].

91 See, eg, *Federal Council of the British Medical Association in Australia v Commonwealth* (1949) 79 CLR 201, 252–3 (Latham CJ), 292–3 (Webb J) ('*British Medical Association*'); *The General Practitioners Society in Australia v Commonwealth* (1980) 145 CLR 532 ('*General Practitioners*'); *Wong v Commonwealth* (2009) 236 CLR 573, 633 [207] (Hayne, Crennan and Kiefel JJ) ('*Wong*').

92 *Johnston* (n 1) 434 [333].

93 *HRA* (n 6) s 13.

94 *Johnston* (n 1) 442–51 [380]–[428].

95 Ibid 451–2 [430]–[433] referring to and adopting *PJB v Melbourne Health* (2011) 39 VR 373, 444 [316]–[317] (Bell J).

96 *Johnston* (n 1) 442 [381]. For the Johnston and Sutton applicants, the relevant time was 14 December 2021 and for the Witthahn applicants it was 31 January 2022. Accordingly, the state of knowledge was to be assessed at each of those points in time.

97 Ibid 443 [384].

98 Ibid 448 [405].

99 Ibid 448 [408].

100 Ibid 449 [411].

101 Ibid 449 [412].

include vaccination'.[102] However, Associate Professor Seale also identified vaccination as 'the most effective control measure to prevent transmission of COVID-19'.[103] This appears to have been the only concrete evidence on the issue of vaccine efficacy in reducing transmission. His Honour also noted the view that 'household or private setting exposure was a stronger risk factor than work exposure'[104] in the context of community transmission of the Omicron variant. Professor Griffin was of the view that while 'no one single method'[105] has 100% efficacy in reducing the risk of being exposed to COVID-19 in healthcare settings, 'there were no reasonably available alternatives to vaccination'.[106]

Despite noting that 'the state of knowledge, even at an expert level, was fluid' some 18 months into the pandemic when the directions were made,[107] his Honour found that alternatives to vaccine directions would not have achieved the same purpose: to ensure that frontline workers were available for deployment and minimise the risks of transmission of COVID-19 to both other employees and the vulnerable people with whom the employees interacted.[108] On this basis, Justice Martin concluded that the limitation on the right to refuse medical treatment without full, free and informed consent was reasonable and demonstrably justified.[109] Had the directions been found lawful on other grounds, the applicants would not have been able to establish that they were unlawful either under this aspect of the *HRA* or unreasonableness as per the *JRA* (the former involving a less demanding test than the latter) based on this reasoning.[110]

His Honour engaged in very little analysis of whether the limitation on the right was rationally capable of achieving its intended purpose.[111] Justice Martin's reasoning in this regard represents a level of deference to public officers managing the COVID-19 pandemic, largely on the basis that such officers were acting in an emergency in the context of limited and constantly changing scientific advice.[112] While the judiciary often defers to the public decision-makers and the executive in this way when they respond to emergencies[113] – on the basis that the executive is best placed to make decisions about emergency management given the demands of 'speed and agility'[114] – scrutiny of such deferential reasoning in the context of

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102 Ibid 449 [417].
103 Ibid 455 [444].
104 Ibid 449 [413].
105 Ibid 450 [423].
106 Ibid 450 [426].
107 Ibid 450–1 [427].
108 Ibid 454 [438]–[439], 457 [457], [459]; *HRA* (n 6) s 13(2)(b)–(d).
109 *Johnston* (n 1) 457 [459].
110 Ibid 457 [460].
111 Ibid 454 [440].
112 Ibid 457 [457].
113 John Mark Keyes, 'Judicial Review of COVID-19 Legislation: How Have the Courts Performed?' (2023) 30(2) *Australian Journal of Administrative Law* 115, 119 <https://doi.org/10.2139/ssrn.4170180>; Sarah Moulds and Anja Pich, 'Reviewing Executive Decision-Making in Emergencies: Time to Consider a More Systematic Approach to Post Legislative Scrutiny in Australia' (2022) 41(2) *University of Tasmania Law Review* 43, 43–4.
114 Moulds and Pich (n 110) 43.

public health emergencies is fertile ground for further research. This level of deference coupled with the increasing power of the executive again speaks to the importance of human rights legislation as a mechanism to protect the separation of powers and the 'legally and politically entrenched promise of accountability and review'.[115]

D Remedy

At the time of the decision, the *QPS directions* and *QAS direction* had already been revoked. The remedies available to the applicants for the finding of unlawfulness (rather than invalidity) were therefore limited.[116] An order for certiorari was not appropriate given, at the date of the decision, the exercise of power under the directions no longer had apparent legal effect.[117] However, the applicants were still at risk of dismissal for their failure to comply with the directions. As such, Justice Martin thought it appropriate to make declarations that the directions were unlawful and grant an injunction restraining the Commissioner and the Director-General from acting on them.[118]

IV IMPLICATIONS FOR HUMAN RIGHTS JURISPRUDENCE, FUTURE LEGAL CHALLENGES AND PANDEMIC MANAGEMENT

A The Meaning of 'Free' in 'Full, Free and Informed Consent'

Perhaps the most legally significant aspect of Justice Martin's decision was his Honour's construction of the meaning of 'full, free and informed' consent in section 17(c) of the *HRA*. In deciding that the consequences of a choice could 'peel "free" away from "full, free and informed"',[119] relying largely on legal authorities decided in the context of section 51(xxiiiA) of the *Constitution* and the extent to which 'practical compulsion' could amount to 'civil conscription',[120] his Honour turned what was said to be 'arguable' in *Harding* into a finding.[121] On the face of

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115 Ibid 43–4.

116 *Johnston* (n 1) 457 [461].

117 Ibid 457–8 [462]–[464], referring to *Probuild Constructions (Aust) Pty Ltd v Shade Systems Pty Ltd* (2018) 264 CLR 1, 13 [28] (Kiefel CJ, Bell, Keane, Nettle and Gordon JJ) and *Wingfoot Australia Partners Pty Ltd v Kocak* (2013) 252 CLR 480, 492 [25] (French CJ, Crennan, Bell, Gageler and Keane JJ).

118 *Johnston* (n 1) 458–9 [464]–[468], referring to *Project Blue Sky* (n 46) 393 [100] (McHugh, Gummow, Kirby and Hayne JJ).

119 *Johnston* (n 1) 433–4 [332].

120 *British Medical Association* (n 91) 252–3 (Latham CJ), 292–3 (Webb J); *Wong* (n 91) 633 [207] (Hayne, Crennan and Kiefel JJ).

121 *Harding* (n 86) 51 [161] (Richards J).

the judgment, the origin of the references to cases regarding civil conscription is unclear. Of relevance is the following passage from Justice Webb's reasons in *British Medical Association v The Commonwealth*:[122]

> 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 … If Parliament cannot lawfully do this directly by legal means it cannot lawfully do it indirectly by creating a situation, as distinct from merely taking advantage of one, in which the individual is left no real choice but compliance.

His Honour stated that while these authorities did not deal with the meaning of consent directly, they dealt with compulsion and 'compulsion is the antithesis of consent'.[123] Justice Martin then commented that, as was the case in *Wong v Commonwealth* ('*Wong*'),[124] there was 'practical compulsion' to comply with the directions. On this basis, Justice Martin reasoned that such practical compulsion, being the threat of someone losing their livelihood if they did not comply with the directions, was sufficient to mean a person's consent was not freely given.[125]

As is evident from the above passage, the question in the cases Justice Martin referred to was not whether practical compulsion undermined consent, but whether it amounted to civil conscription (ie, requiring a person to do something they are not otherwise legally obliged to do). While there may be some analogy between the extent to which consent is undermined when social and economic pressures operate on a choice and when practical compulsion becomes conscription, it is a somewhat novel comparison in the judicial context.[126] It should be noted that this is a developing area of law in which the precise phrase 'full, free and informed consent' has not been subject to sustained judicial consideration. However, the phrase 'civil conscription' itself has been referred to as 'somewhat of a novelty'[127] as it is only found (at least in the Australian legal context) in section 51(xxiiiA) of the *Constitution*. Its interpretation is therefore specific to that section of the *Constitution* and refers to 'any sort of compulsion to engage in practice as a doctor or a dentist or to perform particular medical or dental services'.[128]

Further, the meaning of consent to vaccination in medico-legal jurisprudence and scholarship is nuanced and varied.[129] *Four Aviation Security Service*

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122 *British Medical Association* (n 91) 292–3 (Webb J) (emphasis added).

123 *Johnston* (n 1) 432–3 [329].

124 *Wong* (n 91).

125 *Johnston* (n 1) 433–4 [332].

126 There is however some academic consideration of the interaction between compulsion and consent. See, eg, A John Simmons, 'Political Obligation and Consent' in Franklin Miller and Alan Wertheimer (eds), *The Ethics of Consent: Theory and Practice* (Oxford University Press, 2009) 305, 305–6 <https://doi.org/10.1093/acprof:oso/9780195335149.003.0012>.

127 *British Medical Association* (n 91) 255 (Rich J).

128 *General Practitioners* (n 91) 557 (Gibbs J).

129 See, eg, Juana Ines Acosta López, 'Vaccines, Informed Consent, Effective Remedy and Integral Reparation: An International Human Rights Perspective' (2015) 64(131) *Vniversitas* 19, 23 <https://doi.org/10.11144/Javeriana.vj131.vier >; Evelien De Sutter et al, 'Rethinking Informed Consent

Employees v Minister of COVID-19 Response,[130] a case referred to by the applicants that interpreted section 11 of the *New Zealand Bill of Rights Act 1990* (NZ)[131] in the context of vaccine directions, was perhaps more directly relevant to the interpretive task. However, Justice Martin stated that such cases were 'not of assistance',[132] because the right to refuse medical treatment in New Zealand (a positive right) is different to the right not to be subjected to medical treatment without full, free and informed consent (a negative right).[133] While this is a valid distinction, it might be thought a more analogous case given the similarity in legislative context compared to cases concerning civil conscription.

As referred to above, Australian courts are yet to consider in any depth the meaning of 'full, free and informed consent', although the term 'informed' has been the subject of judicial comment.[134] For example, in *Donnelly v Department of Health (Qld)*[135] Industrial Commissioner Power (in considering an appeal from a decision to refuse a medical exemption) simply stated in the context of section 17(c) of the *HRA* that:

> The determination that the requirements of the Directive do not involve coercive medical treatment was, in my view, reasonable on the basis that it is ultimately a decision for the Appellant whether he chooses to comply with the requirements of the Directive regarding vaccination. A decision to not comply with those requirements will generally have employment consequences, as with any other decision to not follow a lawful and reasonable direction of an employer.[136]

Similarly in *Cervenjak v Department of Children, Youth Justice & Multicultural Affairs (Qld)*,[137] Industrial Commissioner Power stated 'the Appellant remains free to not receive the COVID-19 vaccinations. There may well be consequences for the Appellant's employment, however this does not remove the Appellant's freedom to refuse vaccinations'.[138] There are multiple other cases to this effect, primarily decided by the Queensland Industrial Relations Commission.[139]

Until *Johnston*, decision-makers faced with legal challenges to vaccine directions based on human rights legislation relied on *Kassam* in finding that the various applicants were not subjected to 'undue pressure, coercion or manipulation' in consenting to vaccination against COVID-19.[140] There is no

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in the Time of COVID-19: An Exploratory Survey' (2022) 9 *Frontiers in Medicine* 995688:1–14, 11 <https://doi.org/10.3389/fmed.2022.995688>.

130 [2022] 2 NZLR 26.

131 Which states '[e]veryone has the right to refuse to undergo any medical treatment'.

132 *Johnston* (n 1) 429 [312]–[313].

133 Ibid.

134 See, eg, *PBU v Mental Health Tribunal* (2018) 56 VR 141.

135 [2022] QIRC 149.

136 Ibid 12 [33].

137 [2022] QIRC 363.

138 Ibid 8 [29].

139 See, eg, *Elsworthy v Ambulance Service (Qld)* [2022] QIRC 412, 13 [48]–[49] (Hartigan IC) ('*Elsworthy*'); *Edwards v Department of Health (Qld)* [2022] QIRC 091, 11 [42] (Power IC).

140 *Elsworthy* (n 139) 13 [49] (Hartigan IC).

doubt that beneficial or remedial legislation like the *HRA* is to be 'given a "fair, large and liberal" interpretation'.[141] This principle of statutory construction does not apply to the common law concepts considered in *Kassam*. However, that rule alone may not be sufficient to justify Justice Martin's approach in *Johnston*.[142] While the common law right to bodily integrity and what it means to consent to a battery are legally distinct from the meaning of consent in human rights legislation, they arguably provide a more accurate starting point than cases about civil conscription. Ultimately, Justice Martin's reasoning regarding the meaning of 'full, free and informed consent' did not make a substantive difference to the outcome in *Johnston*; his Honour determined that the right in section 17(c) of the *HRA* was limited but not impermissibly so. His Honour's reasoning has however taken the jurisprudence around the meaning of consent in human rights legislation down a novel and perhaps not uncontroversial path.

B Future Legal Challenges

Johnston was the first successful superior court challenge to vaccine mandate directions to emerge from the pandemic. In this context, the media frenzy around the decision is understandable, particularly given Clive Palmer's commitment to funding future class actions challenging COVID-19 vaccine directions.[143] However, Justice Martin's decision is based on procedural failings and therefore largely confined to its facts.[144] The decision may therefore turn out to be an outlier, although the position of any such challenge in Victoria warrants further consideration.[145] If any subsequent cases were to be brought on similar grounds, the applicants would need to be employed in a jurisdiction with human rights legislation, where 'free' is included as a condition in the phrase 'consent'.[146] It is also far from guaranteed that the judicial officer hearing the matter would either be bound by Justice Martin's decision, or find his Honour's reasoning persuasive for the reasons outlined in Part IV(A). To obtain a similar remedy, the applicants would need to still be employed by the relevant public entity (ie, not yet dismissed based on non-compliance with the relevant vaccine directions). As time goes on, there will be fewer applicants who meet the latter criterion. Even if such conditions were satisfied, the applicant(s) would need to successfully apply for an

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141 *AB v Western Australia* (2011) 244 CLR 390, 402 [24] (French CJ, Gummow, Hayne, Kiefel and Bell JJ), citing *IW v City of Perth* (1997) 191 CLR 1, 12 (Brennan CJ and McHugh J), 39 (Gummow J).

142 Noting that at no stage did his Honour refer to this principle of statutory construction.

143 Messenger (n 7).

144 Currently in Australia only Queensland, Victoria and the Australian Capital Territory have specific human rights legislation.

145 Justice Martin referred to Victorian authorities in assessing whether the directions were incompatible with human rights: see *Johnston* (n 1) 385–6 [74]. Section 10(c) of the *Charter of Human Rights and Responsibilities Act 2006* (Vic) also uses the phrase 'full, free and informed consent'.

146 As noted above, the same phrase is used in section 10(c) of the *Charter of Human Rights and Responsibilities Act 2006* (Vic). Section 10(2) of the *Human Rights Act 2004* (ACT) simply requires 'free' consent to medical treatment.

interlocutory injunction restraining the public entity from either instituting or progressing any disciplinary proceedings against them for the duration of the court proceedings. These are sizeable hurdles for any future legal challenges to overcome.

C Lessons for Future Pandemic Management

While *Johnston* largely turns on its facts, there are learnings for future pandemic management, in particular decision-makers charged with governing public entities like the police force and ambulance service. In jurisdictions that have human rights legislation in particular, it is important that public officers actively identify and consider human rights in making decisions around pandemic management measures. Public officers must show that they have not merely paid lip service to human rights, but that they have seriously turned their mind to the 'possible impact of the decision on a person's human rights'.[147] The public will no doubt benefit from a more careful consideration of human rights in any future pandemic.

V CONCLUSION

The factual matrix of *Johnston* created the ideal conditions for a successful vaccine direction challenge. Absent a similar set of facts and legislative context, it is unlikely that future challenges to vaccine directions will be successful given Justice Martin's decision was based primarily on procedural failings. *Johnston* has however contributed to human rights discourse in an unexpected way, moving it away from common law concepts of the right to bodily integrity and consent to a battery. Time will tell whether Justice Martin's reasoning in this regard proves persuasive. All that can be said for now is that *Johnston* is unlikely to spell the end for vaccine directions in future pandemics.

147 *Johnston* (n 1) 397 [136]; *Bare* (n 39) 223 [288] (Tate JA).