TREADING THE LINE BETWEEN CONSENT AND COERCION: THE LEGAL TREATMENT OF THE RIGHT TO BODILY INTEGRITY IN THE CONTEXT OF COVID-19 VACCINE MANDATES IN AUSTRALIA

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Superior courts were required to consider what it means to consent to vaccination in the face of mandatory vaccination requirements introduced by Australian states and territories during the COVID-19 pandemic. The concern commonly raised by applicants in these cases was that such policies may be so coercive — given the attendant pressure of making a "choice" that may result in the loss of one's job, and therefore livelihood — as to undermine consent, or at least limit a person's right to bodily integrity. In determining such cases, superior courts provided different reasoning as to what it means to consent to vaccination across jurisdictions and legal frameworks in Australia — but is this difference in reasoning justified? Should we not have a common understanding of, or at least a consistent frame of reference for, what it means to consent to vaccination in the face of coercive policies like mandates? This article argues for internal logic and consistency in how the right to bodily integrity in its various legal forms is understood and treated by the law, particularly in the context of mandates and any future public health emergency. This is best achieved in Australia through (1) the introduction of legislation protecting human rights (either at a federal or state and territory level), that provides: (a) a right to refuse medical treatment, rather than a requirement that a person not to be subject to medical treatment without full, free and informed consent; and (b) a direct cause of action for an alleged breach of human rights; and (2) amendments to public health legislation in each state and territory to provide a mandate-specific decision-making framework.

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I INTRODUCTION

Decision-makers are required to govern differently during public health emergencies.[1] Public health emergencies demand speed and agility of decision-makers,[2] a characteristic usually associated with the executive branch of government. There are increasing calls among human rights commentators and academics for accountability and scrutiny of the executive's exercise of power during the COVID-19 pandemic.[3] The law is one mechanism through which this can be achieved. Superior courts were required to consider what it means to consent to vaccination in the face of 'mandatory'[4] vaccination requirements

[1] Eric L Windholz, 'Governing in a Pandemic: From Parliamentary Sovereignty to Autocratic Technocracy' (2020) 8(1–2) *The Theory and Practice of Legislation* 93, 93.

[2] 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.

[3] Ibid; Rosalind Croucher, 'Executive Discretion in a Time of COVID-19: Promoting, Protecting and Fulfilling Human Rights in the Contemporary Public Health Context' (Speech, 11th Austin Asche Oration in Law and Governance, Australian Academy of Law and Charles Darwin University, 17 November 2022); Lorraine Finlay and Rosalind Croucher, 'Limiting Rights and Freedoms in the Name of Public Health: Ensuring Accountability During the COVID-19 Pandemic Response' in Belinda Bennett and Ian Freckelton (eds), *Australian Public Health Law: Contemporary Issues and Challenges* (Federation Press, 2023) 120.

[4] Gabrielle Wolf, Jason Taliadoros and Penny Gleeson, 'A Panacea for Australia's COVID-19 Crisis? Weighing Some Legal Implications of Mandatory Vaccination' (2021) 28 *Journal of Law and Medicine* 993; Kay Wilson and Christopher Rudge, 'COVID-19 Vaccine Mandates: A Coercive but Justified Public Health Necessity' (2023) 46(2) *UNSW Law Journal* 381; Madeline Rohini Fisher, 'Chasing Immunity: How Viable Is a Mandatory COVID-19 Vaccination Scheme for Australia?' (2021) 28 *Journal of Law and Medicine* 718.

introduced by Australian states and territories during the COVID-19 pandemic.[5] For the purpose of this paper, mandatory vaccination refers to any policy or directive that imposes meaningful consequences for non-vaccination,[6] or makes vaccination a condition of being able to participate in a particular activity or receive a particular benefit.[7] The concern commonly raised by applicants in the cases challenging mandates was that such policies may be so coercive — given the attendant pressure of making a 'choice' that may result in the loss of one's livelihood — as to undermine consent, or at least limit a person's right to bodily integrity. In determining such cases, superior courts provided different reasoning as to what it means to consent to vaccination across jurisdictions and legal frameworks in Australia — but is this difference in reasoning justified? Should we not have a common understanding of, or at least a consistent frame of reference for, what it means to consent to vaccination in the face of coercive policies like mandates? While courts are not necessarily best placed to address these largely ethical concerns, the law still needs an 'appropriate framework and workable guidelines in order to function with internal logic and consistency'.[8]

As explored in Part II, one of the reasons courts were unable to properly interrogate the decision to introduce mandates is because Australia's public health legislation is broadly worded — generally the relevant decision-maker can do whatever they deem 'necessary' or 'reasonably necessary' in response to a threat to public health.[9] Such broad discretionary power does not require consideration of the specific aspects of public interest relevant to mandatory vaccination during a pandemic. Section 11AA(2) of the *COVID-19 Public Health Response Act 2020* (NZ) (now repealed) required the Minister to consider a particularised definition of the public interest before a vaccine mandate could be introduced.[10] This article takes pause to consider the introduction of a similar framework in Australia with the benefit of hindsight. To lay the groundwork for

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[5] This article uses the phrases 'vaccine direction' and 'vaccine mandate' interchangeably.

[6] Katie Attwell and Mark C Navin, 'Childhood Vaccination Mandates: Scope, Sanctions, Severity, Selectivity, and Salience' (2019) 97(4) *The Milbank Quarterly* 978, 980; Katie Attwell et al, 'COVID-19 Vaccine Mandates: An Australian Attitudinal Study' (2022) 40 *Vaccine* 7360, 7361–2.

[7] WHO COVID-19 Ethics and Governance Working Group, 'COVID-19 and Mandatory Vaccination: Ethical Considerations' (Policy Brief, 30 May 2022) <https://iris.who.int/bitstream/handle/10665/354585/WHO-2019-nCoV-Policy-brief-Mandatory-vaccination-2022.1-eng.pdf?sequence=1>.

[8] Sheila A M McLean, *Autonomy, Consent and the Law* (Taylor & Francis Group, 2009) 69.

[9] See, eg, *Public Health Act 2010* (NSW) s 7(2); *Public Health and Wellbeing Act 2008* (Vic) s 165AI; *Public Health Act 2016* (WA) s 202A(3)(a); *Public Health and Other Legislation (COVID-19 Management) Amendment Act 2022* (Qld) s 142E(3)(a).

[10] Namely, '(a) ensuring continuity of services that are essential for public safety, national defence, or crisis response: (b) supporting the continued provision of lifeline utilities or other essential services: (c) maintaining trust in public services: (d) maintaining access to overseas markets.'

this, comprehensive consideration must be given to the rights that were limited during the COVID-19 pandemic in the name of public health.[11] Should we fail to scrutinise government decision-making and the performance of legal tools during emergencies, we risk permanently undermining trust in government,[12] public health,[13] the rule of law, and even democracy itself.[14] As argued by Nicholas J McBride, 'the health of a legal system can only be judged when it comes under strain';[15] there is no better recent example of such strain than the COVID-19 pandemic.

Of the cases challenging vaccine mandates that have resulted from the COVID-19 pandemic to date in Australia, three dealt with the issue of what it means to consent to vaccination in the face of variously coercive policies in detail.[16] In *Kassam v Hazzard; Henry v Hazzard* ('*Kassam*')[17] and *Falconer v Commissioner of Police* ('*Falconer*'),[18] the question was — relevantly — whether the vaccine mandate impermissibly limited the applicant's common law right to bodily integrity (and was therefore a battery) in violation of the principle of legality, whereas in *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)* ('*Johnston*'),[19] the question was whether the applicants' statutory right under human rights legislation not to be subject to medical treatment without 'full, free and informed' consent was impermissibly infringed.[20]

Only the applicants in *Johnston* were successful, and on a different basis to their consent argument, although Martin SJA found that the applicants' human rights

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[11] Finlay and Croucher (n 3) 137.
[12] Commonwealth of Australia Department of the Prime Minister and Cabinet, *COVID-19 Response Inquiry Report* (Report, 2024) 126.
[13] Wendy E Parmet, 'Informed Consent and Public Health: Are They Compatible When It Comes to Vaccines?' (2005) 8(1) *Journal of Health Care Law and Policy* 71, 100.
[14] Croucher (n 3); Finlay and Croucher (n 3) 137.
[15] Nicholas J McBride, 'Ill Fares the Land: Has COVID-19 Killed the Principle of Legality?' (2022) *SSRN Electronic Journal* 1, 24.
[16] *Dunn v Director of Public Health* [2021] TASFC 16 ('*Dunn*') and *Larter v Hazzard* [2022] NSWCA 238 ('*Larter*') also dealt with the issue. However, *Dunn* was a short judgment on an interlocutory application for an injunction, referring to *Kassam* and finding there was no serious question to be tried. *Larter* was also decided after *Kassam* (in the same state), so although the factual matrix was different, the legislation empowering the Minister to mandate vaccination was the same.
[17] (2021) 106 NSWLR 520 ('*Kassam*').
[18] [2024] WASCA 47 ('*Falconer*').
[19] [2024] QSC 2 ('*Johnston*').
[20] *Human Rights Act 2019* (Qld) s 17(c) ('*HRA* (Qld)').

were limited, just not impermissibly.[21] Similarly, on appeal in *Falconer*, Buss P and Vaughan JA found that the right to bodily integrity of one of the applicants was infringed by the vaccine direction, but that such infringement was within power. This reasoning differs from *Kassam*, one of the first superior court cases to emerge from the pandemic, where the New South Wales ('NSW') Court of Appeal found that the right to bodily integrity was not infringed by the mandate. This article analyses the legislative settings giving rise to this difference in reasoning and considers how Australia's legal frameworks responded to the inherent tension between individual rights and the collective interest in public health. This case law also provides a unique opportunity to consider how the law understands what it means to consent to vaccination, both in the context of the right to bodily integrity and the closest expression of that right in human rights legislation, in the face of coercion.

As will become clear in this article, current legal accountability tools do not adequately address the problems that can arise when decisions that exist to serve collective interests do so to the detriment of individual rights, in particular the right to bodily integrity. Part of the problem is that the law does not distinguish between preventative medicine and medical 'treatment' in the strict sense of the word — vaccines are considered under the broad umbrella of 'medical treatment' without regard for the nuances associated with this term in medical, ethical, and social sciences literature.[22] This nuance needs to be acknowledged in the law given that vaccination is both an individual clinical intervention and a public health tool.[23]

The puzzle becomes further complicated when a public health emergency is added to the mix. The COVID-19 pandemic saw the emergence of an intractable clash between these interests, and 'dissonance between the aims of respect for autonomy on the one hand and the law of consent on the other'.[24] There is some scholarship about the meaning of the right to bodily integrity in the context of consent to medical treatment as it is traditionally understood,[25] although some still argue that the right to bodily integrity is 'seriously under analysed' in the

[21] *Johnston* (n 19) [440].
[22] Angus Dawson, 'Vaccination and the Prevention Problem' (2004) 18(6) *Bioethics* 515, 516–7.
[23] Parmet (n 13) 75.
[24] McLean (n 8) 4.
[25] See, eg, Jonathan Herring and Jesse Wall, 'The Nature and Significance of the Right to Bodily Integrity' (2017) 76(3) *Cambridge Law Journal* 566; Elizabeth Wicks, *The State and the Body* (Hart Publishing, 2019) ch 1; Jesse Wall, *Being and Owning: The Body, Bodily Material and the Law* (Oxford, 2015).

literature.[26] This is surprising given that bodily integrity is a fundamental right, one that is not only 'at the heart of the relationship between the state and the individual, but also the concept of informed consent that is deeply embedded in the principles of medical ethics and practice'.[27] The notion that courts vacillate between 'the individualistic and the relational models of autonomy … to achieve policy-based objectives'[28] is particularly evident in judgments about vaccine mandates. There is little legal scholarship analysing this reasoning and what it means to consent to vaccination specifically in the face of coercive policies made in the context of a public health emergency. This article focuses on the right to bodily integrity given its prominence in the cases challenging COVID-19 vaccine mandates and the comparative lack of consideration in the literature, but other individual rights are of course engaged by mandates.[29] The language of medical treatment is also used in this article to refer to vaccination given its treatment as such in the relevant case law.

This article is part of a broader project that aims to better understand the impact of mandatory vaccination policies on the legal meaning and understanding of consent, and whether there are ways to improve decision-making in responding to the tension between collective and individual interests during a public health emergency. Indeed, some public health policymakers have suggested that we do away with informed consent during public health emergencies, it being seen as 'cumbersome' in situations where 'time is of the essence'.[30] In the context of school-based vaccine mandates in the United States, others have observed that the idea of informed consent is paradoxical.[31]

Mandatory vaccination may be justified to some degree in both emergency and non-emergency settings,[32] but the scale to which such policies were introduced during the pandemic warrants consideration. A vaccine mandate may be more or less justified depending on its effectiveness in preventing transmission and

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[26] Herring and Wall (n 25) 566.
[27] *NZDSOS Inc v Minister for COVID-19 Response* [2022] NZHC 716 [53] ('*NZDSOS*').
[28] McLean (n 8) ii.
[29] For example, freedom of movement, as argued in *Kassam and Others v Hazzard and Others* (2021) 393 ALR 664 [9].
[30] Parmet (n 13) 72, citing The Center for Law and the Public's Health at Georgetown and Johns Hopkins Universities, 'The Model State Emergency Health Powers Act' (Discussion Paper, Georgetown University, 21 December 2001) 26–7 <https://publichealth.jhu.edu/sites/default/files/2023-06/msehpa.pdf>.
[31] *Allison v Merck*, 878 P 2d 948, 954–5 (Nev, 1994).
[32] For example, many government and private employers of healthcare and early education workers require vaccination against influenza: see, eg, *Barber v Goodstart Early Learning* [2021] FWC 2156.

severe disease.[33] More broadly, mandates need to be justified against specific criteria and understood in their relevant context — indeed the term 'mandate' has been criticised for its failure to distinguish between diverse policies.[34] For example, school-based mandates in the United States aim to shift norms around childhood vaccination and shape the context in which decisions about vaccination are made.[35] Conversely, a vaccine mandate in an emergency 'cannot work by shifting customs and creating an alternative environment in which vaccination becomes normalized'.[36]

The reliance on compulsion in an emergency, rather than building legitimacy over time, can be more readily perceived as coercive, eroding trust in public health at the very moment that trust is needed to encourage vaccination to the requisite level.[37] There is some emerging research that attempts to reconcile the tension between mandatory vaccination policies and informed consent from an ethical perspective, arguing that consent may be valid if *motivated* by coercion, as opposed to being *obtained* by coercion.[38] In the context of mandatory vaccination, the person administering the vaccine (ie, the consent-receiver) is not exerting coercion, a third party is — for example, an employer where vaccination is a condition of employment.[39] In this scenario, the consent-receiver has not wronged the consent-giver in any way and accordingly consent is not invalidated (as 'third parties cannot directly negate the voluntariness of consent'), argue Maxwell Smith and Evan Mackie.[40] While I do not intend to interrogate the validity of Smith and Mackie's argument from a legal perspective in this article, it perhaps unduly focuses on the individual who is administering the vaccine and ignores the broader coercive context in which the vaccination takes place. For the purpose of this article, it remains necessary to consider the legal status of vaccine mandates in the context of a public health emergency, and whether there are opportunities to create an improved and more transparent decision-making process that enhances legitimacy and public trust.

This article begins in Part II and Part III with a detailed consideration of the different courts' reasoning regarding the interaction between coercive

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[33] Alberto Giubilini, 'Vaccination Ethics' (2021) 137(1) *British Medical Bulletin* 4, 10.
[34] Attwell and Navin (n 6) 980.
[35] Parmet (n 13) 104.
[36] Ibid 105.
[37] Ibid.
[38] See, eg, Maxwell J Smith and Evan Mackie, 'Do Vaccine Mandates Impair the Voluntariness of Informed Consent?' (2025) *Journal of Medical Ethics* 0:1–5, 3.
[39] Ibid.
[40] Ibid 4.

vaccination requirements and consent in *Kassam, Falconer*, and *Johnston*. This will necessarily involve an explanation of the different legal rules as they relate to consent to medical treatment. Part II focuses on the right to bodily integrity and its lacklustre protection through the principle of legality. Part III considers the closest expression of the right to bodily integrity in human rights legislation — the right not to be subject to medical treatment without consent.[41] Part IV examines the legal status of a person's so-called right to consent to medical treatment in its various forms, and argues for internal logic and consistency in how it is understood and treated by the law, particularly in the context of a future public health emergency. This is best achieved in Australia through (1) the introduction of legislation protecting human rights (either at a federal or state and territory level) that provides: (a) a right to refuse medical treatment (similar to s 11 of the *New Zealand Bill of Rights Act 1990* (NZ) ('*NZBORA*')), rather than a requirement that a person not to be subject to medical treatment without full, free and informed consent; and (b) a direct cause of action for an alleged breach of human rights; and (2) amendments to public health legislation in each state and territory to provide a mandate-specific decision-making framework.

Elsewhere, the introduction of legislation protecting human rights has caused 'shifts in the methodology and intensity of judicial review of administrative action, largely focusing on the apparent shift from the unreasonableness standard to proportionality'.[42] Given Australia's constitutional settings and specifically the lack of a federal or constitutionally entrenched bill of rights, it is more appropriate to legislate human rights, and provide for a direct right of action, than to try to work protections into existing legal frameworks. It is hoped that these changes would better embed human rights in decision-making processes, even in emergency settings; provide consistent and transparent criteria for making a mandate; and ensure adequate scrutiny of decision-making after the fact.

II The Right to Bodily Integrity, Battery, and the Principle of Legality

The principle of legality is an interpretative tool that 'favours a construction, if one be available, which avoids or minimises the statute's encroachment upon fundamental principles, rights and freedoms at common law'.[43] When expressed

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[41] *HRA* (Qld) (n 20) s 17(c).
[42] Janina Boughey, *Human Rights and Judicial Review in Australia and Canada: The Newest Despotism?* (Bloomsbury Publishing, 2017) 2.
[43] *North Australian Aboriginal Justice Agency Limited v Northern Territory* (2015) 256 CLR 569, 581 [11].

as a presumption, it is that parliament does not intend to infringe on fundamental common law rights. The principle of legality is in part codified in human rights legislation[44] and was historically considered by some scholars to be a 'quasi-constitutional common law bill of rights',[45] improving transparency and promoting democracy and the rule of law.[46] The principle has also been criticised for its elusive scope and variable formulation.[47] It must be borne in mind that the principle of legality will never be the sole basis for a finding of invalidity, or even the only applicable interpretative tool. The principle of legality exists within a broader body of statutory interpretation law and is subject to the overarching requirement to consider legislative text, context and purpose.[48] Accordingly, while the principle of legality may help determine the meaning of an empowering provision, and in turn whether delegated legislation is within the scope of the empowering provision, it is not a basis for determining the validity of delegated legislation. Many applicants in court challenges to vaccine mandates called the principle of legality to their aid, exposing the variability and 'methodological problems that arise with the application of the principle of legality as clear statement rule' in the process.[49] Most relevantly, and as will become evident in the ensuing discussion, reasoning in vaccine mandate challenges made clear the problems that can arise when 'the 'content' of a right (ie, what it guarantees in the relevant context) is determined or divined by judges at the point of legislative application'.[50] In the context of the court challenges discussed below, the principle of legality has not operated 'coherently or legitimately as a clear statement rule'.[51]

In this part, I adopt McBride's categorisation of the principle of legality.[52] Having analysed cases emerging from the COVID-19 pandemic in England, Australia and New Zealand, McBride finds that courts have used four techniques to limit the utility of the principle of legality in challenges to governmental decisions aimed at addressing COVID-19.[53] These techniques are: (1) reading down fundamental

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[44] *Human Rights Act 2004* (ACT) s 30 ('*HRA* (ACT)'); *Charter of Human Rights and Responsibilities Act 2006* (Vic) s 32; *HRA* (Qld) (n 20) s 48.
[45] Dan Meagher, 'The Principle of Legality as Clear Statement Rule: Significance and Problems' (2014) 36(3) *Sydney Law Review* 413, 442 ('Clear Statement Rule').
[46] Ibid 437–8.
[47] Ibid 414; Dan Meagher, 'The Common Law Principle of Legality in the Age of Rights' (2011) 35 *Melbourne University Law Review* 449, 456–64; Sir Philip Sales, 'Judges and Legislature: Values into Law' (2012) 71 *Cambridge Law Journal* 287, 294–5.
[48] *Falconer* (n 18) [202].
[49] Meagher, 'Clear Statement Rule' (n 45) 415.
[50] Ibid 430.
[51] Ibid 438–9.
[52] McBride (n 15).
[53] Ibid 20.

common law rights such as to deny that a measure had any impact on them, meaning that the principle of legality was not engaged at all;[54] (2) inverting the test such that only if the interference with a particular right was disproportionate was it necessary to determine whether it was authorised by express words;[55] (3) treating general words as 'express words indicating that the government has been empowered to act in ways that abridge people's fundamental rights';[56] and (4) sidelining the issue of whether the government 'has used its powers disproportionately'[57] or, put another way, whether the common law right identified has been impermissibly infringed. In the specific context of vaccine mandates, all but (2) were present in the reasoning of Australian superior courts.

Having analysed the case law challenging vaccine mandates specifically,[58] a fifth technique emerges; courts have limited the utility of the principle of legality as an interpretative tool by finding no ambiguity as to the meaning or breadth of the empowering provision in question. Accordingly, the principle of legality had no work to do as there was no constructional choice to be made, there being no ambiguity in the requirement that a measure be 'necessary' or 'reasonably necessary'. This is in some ways a particularisation of the third technique identified by McBride. While it has long been the case that the principle of legality is a tool in the interpretative task rather than determinative of the 'correct' interpretation, the type of reasoning described above as the fifth technique for limiting the usefulness of the principle renders it defunct, despite the modern approach to statutory interpretation not requiring any ambiguity to consider context.[59] The principle appears ever-weakening — at first, common law rights could only be abrogated by express words of 'irresistible clearness'.[60] Abrogation 'by necessary intendment' or 'necessary implication' is now permissible,[61] although, in theory:[62]

> General words will rarely be sufficient for that purpose. What courts will look for is a clear indication that the legislature has directed its

[54] Ibid.
[55] Ibid 21.
[56] Ibid 22.
[57] Ibid 23.
[58] McBride having looked at COVID-19 measures more generally, not just vaccine mandates.
[59] *CIC Insurance Ltd v Bankstown Football Club Ltd* (1997) 187 CLR 384, 408 affirmed in *SZTAL v Minister for Immigration and Border Protection* (2017) 262 CLR 362, 368 [14].
[60] *X7 v Australian Crime Commission* (2013) 248 CLR 92, 153.
[61] *Coco v The Queen* (1994) 179 CLR 427, 438 ('*Coco*'); *Bropho v Western Australia* (1990) 171 CLR 1, 16–17 ('*Bropho*').
[62] *Plaintiff S157/2002 v Commonwealth* (2003) 211 CLR 476 [30] ('*Plantiff S157*').

> attention to the rights or freedoms in question, and has consciously decided upon abrogation or curtailment.

As argued by McBride, it appears that despite such judicial statements, the principle of legality is in practice and application so weak that 'it might as well not exist'.[63] Rather than suggesting ways the principle of legality may be saved from obscurity — and accordingly better protect the right to bodily integrity — I instead argue that a different decision-making framework is required for vaccine mandates made during a pandemic, one modelled on s 11AA of the *COVID-19 Public Health Response Act 2020* (NZ). This should be complemented by the introduction of human rights legislation in each state and territory to provide a better path 'when dealing with future challenges to the lawfulness of government actions'.[64] First, however, it is necessary to explore how the courts have applied the principle of legality in the context of cases challenging COVID-19 vaccine mandates to establish the shortfalls of the current approach.

A *Kassam*

Kassam is a prime example of the limited utility of the principle of legality. In *Kassam*, ten applicants challenged 'public health orders' ('PHO') made by the Minister for Health and Medical Research in NSW requiring vaccination for those working in healthcare, aged care and education.[65] The applicants' primary argument was that the PHOs went beyond the scope of the empowering provision, being s 7(2) of the *Public Health Act 2010* (NSW).[66] President Bell's leading judgment in *Kassam* is replete with statements limiting the relevance of the principle of legality, including describing the principle as an 'occasionally useful, context-dependent'[67] adjunct to the interpretative task. In another part of his Honour's reasons, Bell P states that the function of the principle is limited where the interference with the fundamental right in question is 'slight or indirect or temporary'.[68] The empowering provision under challenge permits the Minister for Health and Medical Research to give any direction they consider necessary to deal with a public health risk.[69] This is undoubtedly a broadly worded provision. However, to use the language of authoritative cases establishing the nature and parameters of the principle, does that wording limit the right to bodily integrity

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[63] McBride (n 15) 24.
[64] Ibid.
[65] *Kassam* (n 17) [2].
[66] Ibid [99], [108], [110], [113], [138], [139].
[67] Ibid [86].
[68] Ibid [87].
[69] *Public Health Act 2010* (NSW) s 7(2)(b).

'by necessary implication',[70] or show 'a clear indication that the legislature has … consciously decided upon abrogation or curtailment'?[71] Suffice to say for the purpose of this article, the Court did not even reach this stage of inquiry, finding that 'nothing in any of … [the mandates] *required*, still less coerced, aged care workers or educational professionals, authorised workers or workers in the construction industry, to be vaccinated'.[72] In separate reasons, Leeming JA criticised the appellants' conception of consent and free choice, stating that 'people are influenced by incentives and burdens, which are not uncommonly put in place for the express purpose of altering behaviour',[73] but this does not mean the decision to be vaccinated was coerced or impugned free choice. Accordingly, the Court determined that the right to bodily integrity was not limited by the mandates in question, and therefore the principle of legality was not engaged.[74]

B *Applying Kassam: Dunn v Director of Public Health*

The applicant in *Dunn v Veitch*[75] sought judicial review of a PHO which required state service employees working for or on behalf of the Department of Health to be sufficiently vaccinated against COVID-19, and prohibited a person who was not sufficiently vaccinated from providing health and medical services.[76] The applicant argued, among other things but relevantly for the purpose of this article, that the administration of a vaccine in those circumstances would amount to battery at common law, as the coercive nature of the requirement and the prospect of job loss for failure to comply would undermine consent.[77] The applicant also argued that the principle of legality was infringed as the requirement limited a person's 'freedom of movement and ability to work'.[78]

The matter came before the court on an interlocutory basis, the applicant having sought an injunction suspending the operation of the PHO until his substantive application was heard.[79] Blow CJ dismissed both these contentions, in reasons that were affirmed on appeal, based on the breadth of the empowering provision

[70] *Coco* (n 61) 438; *Bropho* (n 61) 16–17.
[71] *Plaintiff S157/2002* (n 62) [30].
[72] *Kassam* (n 17) [97], [99] (emphasis in original).
[73] Ibid [170].
[74] Ibid [99].
[75] [2021] TASSC 56 ('*Dunn First Instance*').
[76] Tasmania, *Tasmanian Government Gazette*, No 22138, 12 November 2021, 1094.
[77] *Dunn First Instance* (n 75) [10]; *Dunn v Director of Public Health* [2021] TASFC 16 [14] ('*Dunn Appeal*').
[78] *Dunn Appeal* (n 77) [14].
[79] *Dunn First Instance* (n 75) [2].

in the *Public Health Act 1997* (Tas).[80] Section 16 of the *Public Health Act 1997* (Tas) permitted the Director of Public Health to 'take any action or give any directions' to manage a threat to public health while an emergency declaration was in force. The Full Court agreed with Blow CJ that there was no ambiguity as to the meaning and breadth of s 16 and accordingly the principle of legality did not arise,[81] there being no 'constructional choice' to be made.[82] The Full Court further referred to *Kassam*, noting that 'restricting the free movement of persons and free association of persons are the very type of restrictions that [s 16] authorises', similarly to the relevant directions in *Kassam*.[83] *Dunn* is therefore a further example of the first and proposed fifth technique — reading down the right to bodily integrity such that the vaccine mandate had no impact on it, and finding no ambiguity and therefore no work for the principle of legality to do.

C *Distinguishing Kassam?: Falconer v Commissioner of Police*

The mandate challenged in *Falconer* was enacted by the Commissioner of Police under the *Police Act 1892* (WA) ('*Police Act*') and required Western Australian ('WA') police officers and employees to be vaccinated as a condition of employment.[84] Conversely, the mandate challenged in *Kassam* is better characterised as a site access requirement — it did not require vaccination, but an 'authorised worker' living in an 'area of concern' could not leave their residence to attend work without having been vaccinated.[85] Further, potential disciplinary proceedings or dismissal from employment were not an explicit consequence of non-compliance with the mandate challenged in *Kassam,* whereas under the empowering statute in *Falconer* a member of the police force could be disciplined (including dismissed) for non-compliance with a direction issued by the Commissioner of Police.[86] While in practice the result of both is the same — it was necessary for the applicants in *Kassam* to attend their place of work to do their job, and they could rightly be dismissed for repeatedly failing to show up to work — the potential consequence of dismissal in *Falconer* was ultimately a significant factor in favour of finding that Mr Falconer's bodily integrity was limited by the mandate. Another key reason for this finding was that Mr Falconer did not technically have the option to resign and remain unvaccinated due to

[80] Ibid [10]; *Dunn Appeal* (n 77) [15].
[81] *Dunn Appeal* (n 77) [15]–[18].
[82] Ibid [15].
[83] Ibid [18].
[84] *Falconer* (n 18) [2].
[85] *Kassam v Hazzard; Henry v Hazzard* (2021) 393 ALR 664 [45] ('*Kassam First Instance*').
[86] *Police Act 1892* (WA) ss 9, 23(1) ('*Police Act*').

notice requirements in the *Police Act*.[87] A constable in Mr Falconer's position is required to give one month's notice of resignation, absent which they incur a penalty — the vaccine mandate to which Mr Falconer was subject required compliance in less than a week.[88]

Further, Mr Falconer made a promise in joining the police force to discharge his duties to the best of his skill and knowledge,[89] including complying with lawful orders.[90] Any member of the police force who fails to comply with a lawful order 'commits an offence against the discipline of the Force'.[91] President Buss and Vaughan JA reasoned that honouring this duty is a matter of 'conscience and personal integrity'[92] for each police officer and a 'norm of conduct' making the direction 'objectively more likely to have a compulsive effect than might otherwise be the case'.[93] Based on this, and the threat of disciplinary action for non-compliance,[94] ranging from reprimand to dismissal,[95] Buss P and Vaughan JA found that choosing — and more importantly in the context of this case, having the *ability* to choose — to resign and being dismissed for non-compliance were 'qualitatively different'.[96] Their Honours stated in this regard that dismissal 'has an adverse connotation that is likely to be detrimental … to the prospects of a police officer in the position of Mr Falconer obtaining alternate gainful employment outside of the Police Force'.[97] Each of these factors would, according to Buss P and Vaughan JA, 'naturally and probably have the effect of deterring disobedience' with the direction.[98] President Buss and Vaughan JA concluded that the effect of the direction on Mr Falconer 'went beyond mere pressure or an element of coercion'[99] and amounted 'in effect to compulsion'[100] by depriving Mr Falconer of 'a real or genuine choice as to whether to become vaccinated'.[101] The direction in question, in the view of Buss P and Vaughan JA, operated 'in effect

[87] Ibid s 12; *Falconer* (n 18) [147]–[153].
[88] *Police Act* (n 86) s 12; *Falconer* (n 18) [150], [153].
[89] *Police Act* (n 86) s 10.
[90] Christopher Taylor-Burch, 'WA Case Notes Upholding Mandatory Vaccinations for the Police Force: *Falconer v Commissioner of Police [No 2]* [2024] WASCA 47' (June 2024) *Brief* 34, 34–5.
[91] *Falconer* (n 18) [155].
[92] Ibid [157].
[93] Ibid [156].
[94] Ibid [159].
[95] Ibid [163]; *Police Act* (n 86) s 23.
[96] *Falconer* (n 18) [163].
[97] Ibid.
[98] Ibid [164].
[99] Ibid [152].
[100] Ibid [162].
[101] Ibid [152].

by way of compulsion in a manner that is incompatible with the right to bodily integrity'.[102]

This finding was prefaced by a general discussion of what 'coercion' means in the context of a mandate to vaccinate.[103] Of course, any form of vaccine mandate is directed at inducing 'action or conduct by one person that is considered desirable by another'.[104] However, the penalty for non-compliance may on some occasions move along the spectrum from pressure to coercion; even where the subject of the mandate technically has 'a choice as a matter of form', that choice may in substance be nominal.[105] In those circumstances, '[a] person may be so constrained by the possibility of the imposition of a burden that he or she becomes compelled to do what his or her free will would otherwise refuse',[106] depending on the magnitude of the burden and likelihood the burden will be imposed. President Buss and Vaughan JA considered the ultimate question to be whether the mandate infringed the right to bodily integrity in its practical operation,[107] rather than beginning with an analysis of whether any infringement was authorised by the empowering statute (as was the case in *Kassam*).

Their Honours were however careful to demonstrate that the findings and reasoning in *Kassam* were not directly applicable to *Falconer.* Having given meaning to 'coercion' in the context of vaccination, Buss P and Vaughan JA then asserted that the orders in *Kassam* operated differently from those under challenge in *Falconer*. The orders in *Kassam* limited the movement of unvaccinated people who lived in certain areas. The orders in *Falconer* 'unequivocally compelled'[108] vaccination of police officers and employees. President Buss and Vaughan JA seemingly agreed with the reasoning in *Kassam* that consent is not vitiated because a person complies with a direction 'to avoid a general prohibition on movement or to obtain entry onto a construction site'.[109] It seems the consequences of a decision not to be vaccinated, in the context of a mandate that has only the practical effect of limiting a person's movement, are, as far as their Honours are concerned, too far removed to infringe the right to bodily integrity. Their Honours concluded that only '[a]bsent a real or genuine choice as

[102] Ibid [165].
[103] Ibid [128]–[143].
[104] Ibid [131].
[105] Ibid.
[106] Ibid [132].
[107] Ibid.
[108] Ibid [141].
[109] *Kassam First Instance* (n 85) [63].

to whether to vaccinate' is the right to bodily integrity infringed.[110] This assertion was based on the individualised nature of the right itself, and its close relationship with the concept of individual autonomy.[111] Interestingly, this formulation of the right to bodily integrity bears close similarity to the concept of 'full, free and informed' consent in s 17(c) of the *Human Rights Act 2019* (Qld) ('*HRA* (Qld)') — absent a 'real or genuine choice', it is easy to see how consent would not be 'free'.

President Buss and Vaughan JA then come to make a distinction between compulsion and 'mere coercion',[112] the implicit suggestion being that the latter is permissible where the former is not. In *Kassam*, the practical implications of the mandate were largely ignored by the Court, whereas they were clearly front of mind in *Falconer*. The effect of the mandate on the individual applicants in *Kassam* was not considered in any detail, other than in establishing that they each had standing.[113] It might be thought that individual circumstances are not relevant to determining whether the principle of legality affords protection from infringement of a fundamental right — a legislative provision either infringes the bodily integrity of everyone to which it applies, or does not infringe the right for anyone. However, that ultimately depends on the starting point of the analysis, which may itself send a powerful message to claimants and the broader community. While Buss P and Vaughan JA considered the coercive effect of the mandate on each claimant first, before turning to whether the direction was beyond the authority conferred on the Commissioner of Police because it infringed on the right to bodily integrity, the Court in *Kassam* began its analysis by considering the proper construction of the empowering provision in that case, being s 7(2) of the *Public Health Act 2010* (NSW).

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[110] *Falconer* (n 18) [133].
[111] Ibid [134].
[112] Ibid [164].
[113] *Kassam First Instance* (n 85) [105]–[109].

Their Honours' reasoning did not however go without criticism from Hall JA, who wrote separate reasons.[114] While agreeing that the appeals should be dismissed,[115] Hall JA took a different view as to whether the direction infringed the right to bodily integrity.[116] Speaking to the meaning of 'real or genuine', his Honour questioned what gives a choice that character.[117] Justice Hall commented that '[a] person may still be free to make a choice even if one option is made less attractive by the imposition of consequences … the effect of the burden [on that choice] can rarely be objectively determined'.[118] His Honour then went on to refer to s 12 of the *Police Act*, which provides that the Commissioner can waive or reduce the required notice period.[119] In Hall JA's view, that was a power the Commissioner was likely to have exercised in this case, had Mr Falconer sought that the Commissioner do so.[120] Mr Falconer could have avoided breaching any lawful obligations had he sought that the Commissioner exercise this power,[121] and accordingly this meant Mr Falconer had a 'viable choice', negating the conclusion that the mandate infringed on his right to bodily integrity.[122] Justice Hall further concluded that, even if s 12 did not apply, the consequences of non-compliance did not deprive Mr Falconer of a real or genuine choice, but were 'entirely disciplinary in nature'.[123] While the consequences of non-compliance were 'undoubtedly coercive', Mr Falconer retained the ability to make a choice according to Hall JA, who cited the fact that Mr Falconer chose not to comply and did not get vaccinated (demonstrating therein that he retained a real or genuine choice).[124] This reasoning is somewhat cyclical, but it does lend support to the idea that it is difficult to describe the parameters of the right to bodily integrity, particularly in the context of a coercive instrument that is intended to exert pressure on those who may otherwise choose not to get vaccinated.

The differing approaches to the principle of legality exhibited in *Kassam* and *Falconer* (per Buss P and Vaughan JA), together with McBride's analysis, suggest that the principle of legality may in some ways be beyond redemption when it comes to rights protection in Australia. When operating in the context of vaccine

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[114] *Falconer* (n 18) [299]–[308].
[115] Ibid [299].
[116] Ibid [300].
[117] Ibid [302].
[118] Ibid.
[119] Ibid [304].
[120] Ibid [305].
[121] Ibid [306].
[122] Ibid.
[123] Ibid [307].
[124] Ibid.

mandates, the right to bodily integrity has too many imperceptible shades of grey. Manoeuvring around the margins of the principle by using variable language like 'real or genuine choice', 'pressure', 'coercion', and 'compulsion' serves to confuse and obfuscate rather than give meaning to the principle of legality in the context of the right to bodily integrity. But is the closest legislative relative of the right to bodily integrity any more capable of being defined and understood?

III THE RIGHT NOT TO BE SUBJECT TO MEDICAL TREATMENT WITHOUT CONSENT

In the absence of any meaningful protection of the common law right to bodily integrity (or a common understanding of when that right is limited) via the principle of legality, legislating human rights may be the only way to ensure consistent legal protection. While Queensland passed the *HRA* (Qld) in 2019, *Johnston* was the first time a superior court gave detailed consideration to the meaning of the right not to be subject to medical treatment without 'full, free and informed' consent.[125] This right is based on art 7 of the *International Covenant on Civil and Political Rights* ('*ICCPR*').[126] There is little scholarship on the interpretation of the prohibition on medical or scientific experimentation without free consent in art 7 of the *ICCPR*.[127] The inclusion of treatment (not just experimentation) in human rights legislation expands the scope of the right, where art 7 of the *ICCPR* was originally 'intended to prevent the recurrence of atrocities such as those committed in concentration camps during World War II'.[128] The interpretation of equivalent rights in Victoria and the Australian Capital Territory ('the ACT') has not reached a superior court.[129]

The question of whether the right not to be subject to medical treatment without full, free and informed consent was in some way different to the right to bodily integrity, or consent to common law battery, squarely arose in *Johnston* given the

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[125] *HRA* (Qld) (n 20) s 17(c); Amy Thomasson, 'Learnings from *Johnston v Carroll*: The Place of Human Rights in Legal Challenges to COVID-19 Vaccine Directions' [2025] (1) *UNSW Law Journal Forum* 1, 13.

[126] Explanatory Note, Human Rights Bill 2018 (Qld) 3.

[127] Paul M Taylor, *A Commentary on the International Covenant on Civil and Political* Rights (Cambridge University Press, 2020) 177.

[128] Secretary-General, *Draft International Covenants on Human Rights: Annotation,* UN Doc A/2929 (1 July 1955) 87 [14].

[129] The right differs in the *HRA* (ACT) where it is only qualified by the word 'free': see s 10(2). The formulation of the right in Queensland is identical to that in Victoria. While some cases have reached the Victorian Supreme Court, none have given detailed consideration to the meaning of 'full, free and informed' consent. See, eg, *PBU and NJE v Mental Health Tribunal* (2018) 56 VR 141; *JL v Mental Health Tribunal* (2021) 67 VR 426; *De Bruyn (by his litigation guardian De Bruyn) v Victorian Institute of Forensic Mental Health* (2016) 48 VR 647.

reasoning in *Kassam*. The claimants in *Kassam* argued that a person's consent to a battery in the context of medical treatment could be vitiated by 'external factors'.[130] 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 such external factors did not include 'forms of societal pressure including a law or a rule, an employment condition' or a decision made 'to avoid familial or social resentment, even scorn'.[131] Accordingly, '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'.[132] In *Johnston*, Martin SJA did not disagree with this reasoning[133] but found, based on Richards J's observation in *Harding v Sutton* ('*Harding*'),[134] that the common law's idea of consent to medical treatment (and the right to bodily integrity more broadly) is narrower than the formulation of the right in the *HRA* (Qld).[135]

There are many different formulations of consent in the law. Consent to sexual contact must be 'freely and voluntarily given' in Western Australia;[136] in the context of battery, a person's consent is invalid if they lack capacity,[137] do not understand what they are consenting to,[138] or their consent is not voluntary (because it was obtained by fraud, undue influence, the use or threat of physical force, or economic duress).[139] The phrase 'full, free and informed' is not defined in the *HRA* (Qld). While it imports much of the terminology familiar to the common law, particularly free and informed,[140] working out the metes and bounds of these phrases in the context of legislation protecting human rights is an invidious task. After first noting that '[t]here are no bright lines demarking where consent is and is not free',[141] Martin SJA in *Johnston* went on to find that the consequences of this particular choice — between becoming vaccinated or being dismissed from employment — were sufficient to 'peel "free" away from "full, free and informed"'.[142] This finding was largely based on legal authorities decided in

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[130] *Kassam First Instance* (n 85) [60].
[131] Ibid [63].
[132] Ibid.
[133] *Johnston* (n 19) [319].
[134] [2021] VSC 741 [161] ('*Harding*').
[135] *Johnston* (n 19) [320].
[136] *Criminal Code 1913* (WA) s 221BB(1).
[137] See generally *Re C* [1994] 1 WLR 290.
[138] See generally *R v Williams* [1923] 1 KB 340.
[139] Deryck Beyleveld and Roger Brownsword, *Consent in the Law* (Hart Publishing, 2007) 8, 158.
[140] Ibid 7.
[141] *Johnston* (n 19) [325].
[142] Ibid [332].

the context of s 51(xxiiiA) of the *Constitution* and the extent to which 'practical compulsion' could amount to 'civil conscription'.[143] I have elsewhere summarised Martin SJA's reasoning in this regard.[144] His Honour found that there was 'practical compulsion' — being the threat of someone losing their livelihood if they did not comply with the mandate — involved in the 'decision' as to whether to consent to vaccination. Such compulsion, being 'the antithesis of consent',[145] meant that the applicants' consent was not 'free', and therefore their human rights were infringed by the mandate.

This stands in stark contrast to authority in the Queensland Industrial Relations Commission ('QIRC') finding that vaccine mandates did not infringe the right in s 17(c) of the *HRA* (Qld), largely on the basis that there may well be consequences attached to a decision not to be vaccinated, including dismissal from employment, but that does not remove the freedom to refuse vaccination.[146] The QIRC is the only body that has engaged substantively with the meaning of s 17(c) of the *HRA* (Qld) in the context of vaccine mandates. For example, Industrial Commissioner Power in *Donnelly v State of Queensland (Queensland Health)*[147] seems to import and apply the standards of employment law — that employees must comply with lawful and reasonable directions — in determining whether the right in s 17(c) of the *HRA* (Qld) was infringed. There, Industrial Commissioner Power found that the vaccine mandate in question was not coercive as the applicant had a choice as to whether to comply, and a decision not to do so 'will generally have employment consequences, as with any other decision to not follow a lawful and reasonable direction of an employer'.[148] However, Martin SJA did not engage with QIRC authorities in *Johnston.*

Mandatory vaccination policies have also been broadly accepted as lawful and reasonable directions by the Fair Work Commission in an employment law context, both before and in the context of the COVID-19 pandemic.[149] However, because reasonableness is assessed on a case-by-case basis and is therefore a question of fact, it is 'difficult to predict what will be considered reasonable

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[143] *British Medical Association v Commonwealth (No 2)* (1949) 79 CLR 201, 252–3, 292–3; *Wong v Commonwealth* (2009) 236 CLR 573, 633 [207].
[144] Thomasson (n 125) 12–13.
[145] *Johnston* (n 19) [329].
[146] See, eg, *Cervenjak v State of Queensland (Department of Children, Youth Justice & Multicultural Affairs*) [2022] QIRC 363 [29]; *Donnelly v State of Queensland (Queensland Health)* [2022] QIRC 149 [33].
[147] [2022] QIRC 149.
[148] Ibid [33].
[149] *Barber v Goodstart Early Learning* [2021] FWC 2156 [303]–[359] ('*Barber*').

en masse'.[150] The Fair Work Ombudsman also provided little guidance regarding the lawfulness of mandatory COVID-19 vaccination policies, other than suggesting that a tiered approach categorising workers according to risk of transmission may be appropriate (rather than a blanket mandate that applied to all roles regardless of the associated risk of transmission).[151] The coercive nature of the policy is not therefore particularly relevant to its lawfulness or reasonableness — if an employee breaches a lawful and reasonable direction, it is grounds for disciplinary action, as with any breach of the employment contract.[152] Provided the employer has complied with their consultation obligations and the direction falls within the nature and scope of employment, it is likely to be reasonable.[153] The primary reason the direction to ambulance service employees was found unlawful in *Johnston* was that Martin SJA had no reference point against which to measure reasonableness, having been given no evidence as to the nature and scope of the applicants' employment.[154] This might explain the dearth of academic commentary in the employment law space considering the intersection between coercive policies, like mandatory vaccination requirements, and the ability of an employer to give lawful and reasonable directions.

Conflating s 17(c) of the *HRA* (Qld) — the intention of which is to protect individual rights — with the ability of employers to give lawful and reasonable directions to their employees — which protects the right of an employer to 'exert control'[155] over their employees — is therefore inconsistent with the beneficial purpose of human rights legislation. It is important that human rights legislation is interpreted in accordance with its specific context and purpose in mind, where such beneficial or remedial legislation is to be 'given a "fair, large and liberal" interpretation'.[156] Both the QIRC authorities and Martin SJA's reasoning fail to engage with the specific wording of s 17(c), where his Honour was more focussed

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[150] Ibid [309].
[151] 'COVID-19 Vaccinations: Workplace Rights and Obligations', *Fair Work Ombudsman* (Web Page, 29 June 2023) <https://www.fairwork.gov.au/find-help-for/covid-19-and-workplace-laws/covid-19-vaccinations>; Wolf, Taliadoros and Gleeson (n 4) 1011.
[152] John Wilson and Kieran Pender, 'Vaccine Mandates and "Lawful and Reasonable" Directions: What Can an Employee Be Made to Do?' [2021] (Winter) *Ethos: Law Society of the Australian Capital Territory Journal* 28, 28.
[153] Giuseppe Carabetta, 'Vaccination Mandates and the Employee's Duty to Obey Lawful and Reasonable Directions' (2023) 50(3) *Australian Business Law Review* 1, 6.
[154] *Johnston* (n 19) [220]–[225]; Thomasson (n 125) 8.
[155] *Barber* (n 149) [303]; *R v Darling Island Stevedoring and Lighterage Co Ltd; Ex parte Halliday; Ex parte Sullivan* (1938) 60 CLR 601, 621.
[156] *AB v Western Australia* (2011) 244 CLR 390, 402 [24] citing *IW v City of Perth* (1997) 191 CLR 1, 12 (Brennan CJ and McHugh J), 39 (Gummow J).

on the meaning of 'compulsion', being the 'antithesis of consent',[157] than 'full, free and informed'.

Justice Martin resorted to authorities about the meaning of practical compulsion in the context of s 51(xxiiiA) of the *Constitution* rather than engaging with *Four Aviation Security Services Employees v Minister of Covid 19 Response* ('*Four Aviation*'),[158] a case decided by the New Zealand High Court. Similar findings were made regarding the degree of 'practical pressure' involved when non-compliance with a vaccine order meant being dismissed from employment.[159] Justice Martin found that the approach in New Zealand was irrelevant, citing differences between the *NZBORA* and the *HRA* (Qld), including the 'constitutional nature of review' under the *NZBORA*.[160] The formulation of the right is, granted, different to that in the *HRA* (Qld) — s 11 of the *NZBORA* provides that '[e]veryone has the right to refuse to undergo any medical treatment'. There is no equivalent right in the *ICCPR*, or any other international human rights instrument.[161] It is also separate from the right not to be subjected to medical or scientific experimentation without consent,[162] on which s 17(c) of the *HRA* (Qld) is based.[163] Indeed, as acknowledged by Panckhurst J of the New Zealand High Court, 'New Zealand has plotted its own course, at least in terms of the emphasis it has accorded to informed consent. Counsel's researchers revealed no other country which has a provision equivalent to [s] 11, enshrining the right to refuse medical treatment'.[164] However, the difference in origin and wording does not mean that *Four Aviation* is not of *any* assistance in interpreting s 17(c) of the *HRA* (Qld) — as Martin SJA concluded[165] — particularly when the case concerned orders requiring aviation security workers interacting with international travellers to be fully vaccinated.[166] It may be, at least on face value, more persuasive than the cases relied upon by his Honour to give meaning to 'full, free and informed' consent. This is particularly the case given that the phrase 'civil

[157] *Johnston* (n 19) [329].
[158] [2022] 2 NZLR 26 ('*Four Aviation*').
[159] Ibid [30].
[160] *Johnston* (n 19) [29].
[161] New Zealand Ministry of Justice, *A Bill of Rights for New Zealand,* White Paper (1985) 109 [10.166] <https://www.austlii.edu.au/nz/other/NZAHGovRp/1985/1.pdf >.
[162] *New Zealand Bill of Rights Act 1990* (NZ) s 10.
[163] Explanatory Note, Human Rights Bill 2018 (Qld) 3.
[164] *Department of Corrections v All Means All* [2014] 3 NZLR 404 [46] ('*All Means All*').
[165] *Johnston* (n 19) [312].
[166] *Four Aviation* (n 158) [1].

conscription' has a unique meaning that is specific to s 51(xxiiiA) of the *Constitution*.[167]

That said, the respondents in *Four Aviation* conceded that the applicants' rights under s 11 of the *NZBORA* were limited by the vaccine mandate,[168] whereas this issue was contentious in *Johnston*.[169] Section 11 of the *NZBORA* is also more straightforward than s 17(c) of the *HRA* (Qld), despite the relevance of similar considerations. Section 11 simply gives a right to refuse medical treatment, whereas s 17(c) states that a person must not be subjected to medical treatment unless certain conditions are met. In that sense, the right in s 11 of the *NZBORA* is unqualified, although still 'subject to demonstrably justified limits'.[170] The interpretative process is therefore not as complex with respect to s 11. In *Four Aviation* at least, there was an acceptance that the right is limited when the 'practical pressure' applied to a person is such that they feel unable to exercise their right to refuse vaccination.[171] This shifts the focus of the inquiry to the arguably more substantive (and consequential) question of whether the limit is reasonable and demonstrably justified. Deciding whether a person has given 'full, free and informed' consent is trickier.

For the above reasons, human rights legislation should enshrine a separate right to refuse medical treatment, similar to s 11 of the *NZBORA*. In fact, the New Zealand Parliament deliberately separated out this right from 'other more generally expressed rights' such as the right not to be subjected to medical or scientific experimentation without consent.[172] This establishes a clean interpretative slate and avoids the issues associated with giving meaning to both the right to bodily integrity and 'full, free and informed' consent. Absent such an independent right to refuse medical treatment, 'full, free and informed' consent will continue to be interpreted by reference to other more general fundamental rights[173] and even unrelated employment law rules. To defer to employment law principles or apply constitution-specific interpretations is to fall short of the interpretative task. This is particularly the case when there is already a vast amount of different terminology being used — from coercion to compulsion to

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[167] *British Medical Association in Australia v Commonwealth* (1949) 79 CLR 201, 255 (Rich J) ('*British Medical Association*').
[168] *Four Aviation* (n 158) [28].
[169] The Crown also accepted that the applicants' s 11 right was limited in *Yardley v Minister for Workplace Relations and Safety* [2022] NZHC 291, a subsequent case of the High Court of New Zealand in which Cooke J found that the limitation on that right *was not* demonstrably justified.
[170] *NZDSOS* (n 27) [46].
[171] *Four Aviation* (n 158) [30].
[172] *NZDSOS* (n 27) [48].
[173] *All Means All* (n 164) [46].

'real or genuine choice'.[174] I acknowledge that the introduction of a right to refuse medical treatment may have implications beyond vaccination.[175] This, together with careful consideration of what constitutes medical treatment, should be explored in future scholarship.

IV Is There a Way to Better Ensure Legal Consistency and Coherence in Response to this Issue?

It is clear from the foregoing that attempts to mould the principle of legality into a 'quasi-constitutional' bill of rights have been unsuccessful. Given the strict separation of powers in Australia,[176] that seems appropriate. Left without recourse to the principle of legality, this article suggests that the best way to scrutinise decision-making in the Australian context is through human rights legislation that provides a direct right of action. Further, an improved, mandate-specific decision-making framework is needed to complement these enhanced human rights protections. At a point in time where only three Australian jurisdictions have passed legislation protecting human rights — Victoria, Queensland and the ACT — analysing its application to the COVID-19 pandemic provides a unique opportunity to consider how legislative settings could be maximised to ensure consistency and better protect human rights. This could also provide a clearer framework for policymakers in setting expectations about the consideration of human rights in decision-making.

A *The Waning Significance of the Principle of Legality in Rights-Based Challenges*

While the principle of legality had a role to play in protecting the right to bodily integrity in *Falconer*, the subject of the inquiry was not the decision to impose the mandate, or the relevant decision-making process. The focus was on the 'legal and practical operation'[177] of the direction in the context of the empowering statute — it is clear from this that something more than the principle of legality is needed to ensure adequate scrutiny of decisions and decision-making processes. Further, the power of the executive in particular has grown, meaning we can no longer rely on the safeguards of responsible government to protect rights in the way we have historically.[178] This is particularly evident in the fact that the relevant

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[174] *Falconer* (n 18) [133].
[175] For example, mental health law, the fluoridation of water, and drug testing in sport.
[176] Meagher, 'Clear Statement Rule' (n 45) 442.
[177] *Falconer* (n 18) [133].
[178] Brian Galligan, Rainer Knopff and John Uhr, 'Australian Federalism and the Debate Over a Bill of Rights' (1990) 20(4) *Publius* 53, 54.

decision-maker did not give oral evidence in either *Kassam*[179] or *Falconer*[180] but did in *Johnston*.[181] In *Kassam*, the primary judge acknowledged that this 'left the Court with an incomplete set of materials to establish what was and was not considered by the Minister in making the impugned orders'.[182] Conversely, the evidence of the Commissioner of Police was scrutinised in detail over the course of almost 60 paragraphs in *Johnston*.

In any event, it is inappropriate to expand judicial review to address the deficits in accountability and decision-making identified in this article.[183] This is the vacuum, or, as Beech-Jones CJ referred to it in *Kassam,* the 'evidentiary lacuna',[184] that only a specific decision-making framework complemented by human rights legislation can fill.[185] Human rights legislation acknowledges and partly codifies the principle of legality[186] but provides a separate pathway of challenge, suggesting that primacy should be given to the active and participatory aspects of human rights protections rather than trying to make the principle of legality something that it is not. Broadly speaking, two questions need to be answered in a human rights claim: (1) is a protected right 'limited' by the provision under challenge; and (2) if a right is limited, is that limitation 'reasonable and demonstrably justifiable' in a free and democratic society?[187] The latter stage is essentially a proportionality test where courts are required to balance competing interests, something which 'lies at the very heart of human rights law'.[188] The application of the proportionality test is the closest courts have come to evaluating the policy choices that underpinned vaccine mandates — it requires close attention to the limitation imposed and the object or purpose sought to be achieved.[189] As argued by Janina Boughey, '[i]f the legislature expressly required decision-makers to exercise their statutory discretions in a manner that only

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[179] *Kassam First Instance* (n 85) [110], [129]. The Minister did not even provide affidavit evidence in *Kassam.*

[180] *Falconer v Commissioner of Police [No 4]* [2022] WASC 271 [40]; *Falconer v Chief Health Officer [No 3]* [2022] WASC 270 [32].

[181] *Johnston* (n 19) [84]–[140]. The Commissioner for Police gave evidence but the Director-General of Queensland Health did not, although the Director-General's material and reasoning relied on to make the decision to implement a vaccine mandate was scrutinised (see [241]–[265]).

[182] *Kassam First Instance* (n 85) [129].

[183] Boughey (n 42) 224–5, 230.

[184] *Kassam First Instance* (n 85) [130].

[185] Boughey (n 42) 230.

[186] See above n 30.

[187] *HRA* (Qld) (n 20) ss 8(b), 13.

[188] Kylie Evans and Nicholas Petrie, 'COVID-19 and the Australian Human Rights Acts' (2020) 45(3) *Alternative Law Journal* 175, 176.

[189] Ibid; John Mark Keyes, 'Judicial Review of COVID-19 Legislation: How Have the Courts Performed?' (2023) 30(2) *Australian Journal of Administrative Law* 115, 137.

imposed proportionate limits on rights, then proportionality arguably becomes a question of law rather than one of merits'.[190] This approach negates the argument that engaging in an assessment of proportionality necessarily usurps parliamentary supremacy.[191]

Even if a right is found to be limited justifiably, the two-pronged test is much clearer and more appropriate than how the principle of legality was applied in *Kassam,* for example. In *Kassam*, the Court found that the measures under challenge did not limit the right to bodily integrity,[192] and that freedom of movement 'is not necessarily some form of positive right' at common law.[193] Under human rights legislation, this limitation may at the very least be acknowledged, if not interrogated. There remains much debate about the nature of the proportionality test set out in the human rights legislation in Victoria, the ACT and Queensland,[194] as well as the role such legislation has to play in scrutinising laws implemented during a public health emergency.[195] It is clear however that when operating in the sphere of human rights legislation, courts are not 'confined to questions of power and the legality of its exercise'[196] in the same way they are when exercising powers of judicial review and applying the principle of legality.

While it is not the purpose of this article to examine how human rights protections should be legislated (ie, by which level of government), this could be an opportunity to legislate rights at a federal level. There have long been calls for, and even failed attempts to,[197] legislate nationalised standards for the protection of human rights.[198] Debate remains around whether those rights should apply only to federal public authorities or be imposed on states and territories as

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[190] Boughey (n 42) 230.
[191] Ibid 231.
[192] *Kassam* (n 17) [97], [99].
[193] *Kassam First Instance* (n 85) [70].
[194] See, eg, Kent Blore, 'Six Unexplored Aspects of Proportionality under Human Rights Legislation in Australia' [2022] (105) *Australian Institute of Administrative Law Forum* 42.
[195] See, eg, Evans and Petrie (n 188) 175.
[196] Christopher Taylor-Burch, 'Upholding Mandatory Vaccinations for the Police Force: *Falconer v Commissioner of Police [No 2]* [2024] WASCA 47' (June 2024) *Brief* 34, 35.
[197] Galligan, Knopff and Uhr (n 178).
[198] See, eg, National Human Rights Consultation Committee, *National Human Rights Consultation Report* (September 2009) <https://alhr.org.au/wp/wp-content/uploads/2018/02/National-Human-Rights-Consultation-Report-2009-copy.pdf>; Australian Human Rights Commission, *Free & Equal: A Human Rights Act for Australia* (Position Paper, 2022) <https://humanrights.gov.au/sites/default/files/free_equal_hra_2022_-_main_report_rgb_0_0.pdf>.

well.[199] If the framework proposed in Part IV(C) regarding pandemic management was implemented at a federal level, then it may make most sense to implement federal human rights protections. On the other hand, if pandemic management remains within the purview of the states and territories, then human rights protections should be legislated at a state and territory level. Perhaps ultimately the preferable approach is that recommended by Anne Twomey, an 'entrenched but non-constitutional'[200] model where the federal and all state and territory parliaments legislate a uniform set of rights protections.[201] This is a model that may also work for the reforms suggested in Part IV(C). It goes without saying that the matters discussed in this article will require governmental 'bravery and ambition'.[202]

B *Amendments to Human Rights Legislation*

This section considers the amendments necessary to bolster existing human rights legislation. It seems unnecessary to tie human rights challenges to another ground of review as is currently required in Queensland and Victoria. The ACT is currently the only Australian jurisdiction where a person can bring proceedings for an alleged contravention of the *Human Rights Act 2004* (ACT) ('*HRA* (ACT)') without needing to 'piggy back' another cause of action.[203] Further, even in Queensland and Victoria where such piggy backing is necessary, the human rights ground can succeed even if the primary cause of action fails,[204] as was the case in *Johnston*.[205] The concern that providing a direct right of action might lead to opening the floodgate of litigation has proven unfounded in other jurisdictions.[206]

It should also be noted that a direct right of action, as it is often referred to, was not included in the *HRA* (ACT) until 2008.[207] A direct right of action was not

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[199] National Human Rights Consultation Committee (n 198); Justin Gleeson, 'A Federal Human Rights Act: What Implications for the States and Territories?' (2010) 33(1) *UNSW Law Journal* 110.
[200] Anne Twomey, Submission to the National Human Rights Consultation Committee, *National Human Rights Consultation*, 5 May 2009, 20–1.
[201] Gleeson (n 199) 111.
[202] Ibid 112.
[203] Where the proposed legal proceedings are in relation to an act or decision of a public authority, as defined in the *HRA* (ACT). See s 40C(2)(a).
[204] *HRA* (Qld) (n 20) s 59(1), (2).
[205] Where the judicial review grounds (including unreasonableness) and the argument that the relevant decision-makers did not have the power to make the directions failed, but the argument based on s 58(1)(b) of the *HRA* (Qld) was successful.
[206] Rosalind Croucher, 'A New National Human Rights Framework for Australia' (Speech, Annual Castan Centre for Human Rights Law Conference, 21 July 2023) <https://humanrights.gov.au/about/news/speeches/new-national-human-rights-framework-australia>.
[207] Effective from 1 January 2009.

included when the legislation was first introduced in 2004, despite being included in the ACT Bill of Rights Consultative Committee's model bill (which itself was based on legislative models in New Zealand and the United Kingdom). The decision to omit a direct right of action was made to give government decision-makers time to adapt their policies and processes.[208] This is consistent with the historically cautious approach to human rights protection in Australia.[209] As a compromise, a provision requiring courts and other decision-making bodies to interpret laws consistently with human rights was included.[210] As mentioned earlier, this interpretative provision is essentially a codification of the principle of legality in its strongest form.

Public authorities in both Victoria and Queensland have now had time to implement the necessary policies and processes to safeguard human rights. Accordingly, consideration is now being given to the introduction of a direct right of action in those jurisdictions. As observed by Rosalind Croucher in her former role as President of the Australian Human Rights Commission, the inclusion of a direct right of action is becoming best practice.[211] The importance of such a right is hopefully evident from the foregoing analysis — where other legal tools have failed to provide scrutiny and accountability, human rights legislation may be the best way to ensure that decision-makers have seriously turned their minds to the potential impact their decision will have on human rights.

If human rights legislation is to be the way forward, thought should be given to the addition of a right to refuse medical treatment in line with s 11 of the *NZBORA*. The interpretation of the phrase 'full, free and informed' consent is a difficult judicial exercise. The only word in the phrase in s 17(c) of the *HRA* (Qld) that appears in art 7 of the *ICCPR* is 'free'; 'full' and 'informed' (as well as the addition of treatment, not just experimentation) were added by the Queensland Parliament. The Explanatory Note that accompanied the Human Rights Bill 2018 does not shed light on the reason for their addition. Framing s 17(c) as a positive right, or including a separate right to refuse medical treatment in the same way as s 11 of the *NZBORA,* simplifies the interpretative task. This is particularly the case given that reasonable minds may always differ as to where on the spectrum the 'burden of non-compliance is such as to deprive a person of a real or genuine choice',[212] to use the words of Buss P and Vaughan JA in *Falconer*.

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[208] Australian Capital Territory, *Parliamentary Debates*, Legislative Council, 6 December 2007, 4028 (Simon Corbell, Attorney-General).
[209] Gleeson (n 199) 111.
[210] Ibid; *HRA* (ACT) (n 44) s 30.
[211] Croucher (n 206).
[212] *Falconer* (n 18) [301].

However, there may be some issues with this approach. Noting the concession made by the respondents in *Four Aviation* and *Yardley v Minister for Workplace Relations and Safety* ('*Yardley*')[213] that the right in s 11 was limited by the relevant mandates, it may be the case that awareness of, and judicial discourse about, human rights is better embedded in New Zealand. Indeed, Cooke J acknowledged in *NZDSOS Inc v Minister for COVID-19 Response*[214] that the fundamental nature of the right in s 11 of the *NZBORA* meant that there was a 'very significant evidential burden' on the respondent to demonstrate that the mandate was reasonable, and demonstrably justified.[215] There are no statements made to this effect in Australian superior court decisions, particularly where the relevant jurisdiction did not have human rights protections. The *NZBORA* was passed in 1990 — conversations about human rights in a political and legal sense long pre-date the introduction of human rights legislation in Australia. The *NZBORA* is also considered to be one of New Zealand's constitutional documents,[216] whereas human rights legislation in Australia does not have constitutional footing. Further, New Zealand does not need to contend with the issues Australia's federal structure poses for consistency in legislation across states and territories. It is clear, however, that consistency and coherency in how the right is interpreted and applied is beneficial to everyone, the public and decision-makers alike. As more Australian jurisdictions consider the introduction of legislation protecting human rights, this will be all the more critical.[217]

C *Reconsidering Australia's Legal Approach to Public Health and Pandemic Management*

As noted in the introduction, public health legislation has in recent times been used to respond to threats posed by individuals or small groups rather than a pandemic.[218] The COVID-19 Response Inquiry found that a not insignificant portion of the public felt there was a lack of transparency from government, and

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[213] Above n 169.
[214] [2022] NZHC 716.
[215] Ibid [54].
[216] New Zealand's constitution is not made up of one document but several, including the NZBORA: *NZDSOS* (n 27) [63]; 'New Zealand's Constitution', *Office of the Governor-General* (Web Page) <https://gg.govt.nz/office-governor-general/roles-and-functions-governor-general/constitutional-role/constitution/constitution>; '30th Anniversary of the NZ Bill of Rights Act', *New Zealand Parliament* (Web Page, 28 August 2020) <https://www3.parliament.nz/en/get-involved/features/30th-anniversary-of-the-nz-bill-of-rights-act>.
[217] Taylor-Burch (n 90); Zak Vidor Staub, 'Human Rights Acts around Australia', *UNSW Australian Human Rights Institute* (Web Page) <https://www.humanrights.unsw.edu.au/news/human-rights-acts-around-australia>.
[218] David J Carter, 'The Use of Coercive Public Health and Human Biosecurity Law in Australia: An Empirical Analysis' (2020) 43(1) *UNSW Law Journal* 117, 117–8, 123.

limited supporting evidence for the decisions being made.[219] In relation to vaccine mandates specifically,

> [f]ocus groups revealed that many people had strong negative feelings about vaccine mandates and that these feelings had a strong correlation to mistrust in government and medical science. In a community input survey conducted for the Inquiry in 2024, 21 per cent of respondents said they would not get a vaccine offered by the government in a future public health emergency, and 17 per cent said they might or might not.[220]

Research is emerging as to the reasons for such mistrust.[221] In such research, consideration should be given to the role played by the exercise of broad-ranging powers with no specific reference point or the application of clear and consistent criteria. Public health is 'created, defined and re-shaped by law'.[222] It is therefore important to heed the lessons of the pandemic and devise a clear framework for future pandemic management, one that helps not only the public but also decision-makers understand the legality of vaccine mandates, with one pre-pandemic study finding that a 'substantial number' of public health respondents perceived laws as 'unclear'.[223] In the same study, the author called for 'legal amendments … to clarify the extent, scope and context of legal authority' held by public decision-makers.[224] Indeed even in superior court cases, the purpose of mandates was described variously as:

- 'to minimise the risks of transmission of COVID-19 throughout the [Queensland Police Service] and between police staff and members of the community and to ensure that [Queensland Police Service] employees were "frontline- ready and available for deployment"',[225]
- to protect the vulnerable;[226] and

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[219] Commonwealth of Australia (n 12) 116.
[220] Ibid 117.
[221] See, eg, Thomas Aechtner, *Antivaccination and Vaccine Hesitancy: A Professional Guide to Foster Trust and Tackle Misinformation* (Routledge, 2024); Hibah Khan, 'Who Doesn't Want to be Vaccinated? Determinants of Vaccine Hesitancy During COVID-19' [2021] (130) *IMF Working Papers* 1.
[222] Anda Botoseneanu et al, 'Achieving Public Health Legal Preparedness: How Dissonant Views on Public Health Law Threaten Emergency Preparedness and Response' (2011) 33(3) *Journal of Public Health* 361, 361.
[223] Ibid 363.
[224] Ibid 366.
[225] Regarding the police service mandate challenged in *Johnston* (n 19) [438].
[226] With respect to the ambulance service mandate challenged in *Johnston* (n 19) [439].

- 'to put in place some measures to address the unique risks posed by COVID-19 from the WA Police workforce for the purpose of preventing the spread of COVID-19 to vulnerable groups and the general community in Western Australia and to ensure that the WA Police Force can continue to provide critical services to the community'.[227]

This speaks to the need for a clear, mandate-specific lawmaking framework. The New Zealand Parliament recognised this need and introduced amendments to existing COVID-19 response legislation in November 2021 to create a mandate-specific framework. Now repealed, s 11AA of the *COVID-19 Public Health Response Act 2020* (NZ) set out the prerequisites for the making of a vaccine mandate under s 11AB. This framework had four key elements. Firstly, the Minister was responsible for making the mandate.[228] To ensure democratic legitimacy and maintain parliamentary sovereignty, it is important that decision-makers who are accountable to parliament, rather than unelected officials, are making these decisions (which may of course be on the advice of the relevant technocrat — for example, the Chief Health Officer).[229] Secondly, the *NZBORA* was foregrounded — the Minister had to be satisfied the order either did not limit or justifiably limited human rights.[230]

Thirdly, the Minister was expressly required to consider the public interest (as defined) and had to be satisfied that the mandate was 'appropriate to achieve the purpose' of the Act.[231] The 'public interest' was then given a multi-factorial definition, with the requirement that the Minister consider not only the importance of supporting essential services, but also 'maintaining trust in public services', among other matters.[232] It goes without saying that the public interest includes protecting the public from preventable disease, but that is not the only relevant factor in making the decision to implement a vaccine mandate. Providing a multi-factorial definition makes it clear that making decisions in the public interest is a balancing exercise, where the calculus may change depending on how effective a vaccine is in preventing transmission or reducing the severity of the disease.[233] The aim is not necessarily to change the considerations that are

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[227] The preamble to the police force direction challenged in *Falconer* (n 18) [13].
[228] *COVID-19 Public Health Response Act 2020* (NZ) s 11AA(1).
[229] Eric L Windholz, 'Governing in a Pandemic: From Parliamentary Sovereignty to Autocratic Technocracy' (2020) 8(1) *The Theory and Practice of Legislation* 93, 94.
[230] *COVID-19 Public Health Response Act 2020* (NZ) s 11AA(1)(a).
[231] Ibid s 11AA(1)(c)(ii).
[232] Ibid s 11AA(2).
[233] Anja Krasser, 'Compulsory Vaccination in a Fundamental Rights Perspective: Lessons from the ECtHr' (2021) 15(2) *Vienna Journal on International Constitutional Law* 207, 232.

relevant when deciding whether to implement a mandate, but to make them explicit from the outset and at least somewhat consistent across jurisdictions. This provides a set of reference criteria against which the public and ultimately courts can evaluate vaccine mandates — it must be remembered that transparency and accountability are also in the public interest.[234]

Finally, the Minister was required to keep the orders under review.[235] This was ultimately one of the primary reasons the vaccine mandate challenged in *Yardley*[236] was found by the New Zealand High Court not to be a reasonable and demonstrably justified limit on the applicants' human rights and therefore held to be unlawful.[237] Justice Cooke essentially reasoned that the rapid spread of the Omicron variant throughout the community meant that there was no real threat to the continuity of essential services that the mandate materially addressed.[238] If we are to work within the bounds of Australia's current state-based approach to public health, this framework could be introduced in Australia either as separate uniform legislation (repealing the existing legislation) or in the form of amendments to existing public health legislation in each state and territory. Some scholars have argued that the federal government could, if it chose, make laws with respect to public health using various heads of power in the *Constitution*.[239] It may be that a federal public health or pandemic management act could be supported by the external affairs power, in the same way as some have suggested a federal human rights act could be supported.[240] If this is correct, the suggested framework could be implemented at a Commonwealth level. On the face of it, this would certainly make sense when the risk posed is a national pandemic where states and territories are similarly impacted. Indeed, in a similar way to rights protection,[241] pandemic management and public health 'lie at the heart of arrangements for the governance of the federation' and therefore should be dealt

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[234] Carter (n 218) 117.
[235] *COVID-19 Public Health Response Act 2020* (NZ) s 14(5).
[236] [2022] NZHC 291.
[237] Ibid [80], [104]–[108].
[238] Ibid [97].
[239] Christopher Reynolds, 'Public Health and the Australian Constitution' (1995) 19(3) *Australian Journal of Public Health* 225, 225, 248–9.
[240] Gleeson (n 199) 115 citing Stephen Gageler and Henry Burmester, *In the Matter of Constitutional Issues Concerning a Charter of Rights: Supplementary Opinion*, Solicitor-General Opinion Nos 40, 68 (2009).
[241] Cheryl Saunders, 'Protecting Rights in the Australian Federation' (2004) 25 *Adelaide Law Review* 177, 183–93.

with according to a national uniform standard.[242] The appropriateness and feasibility of such an approach is a matter for future research.

V CONCLUSION

This article has developed an argument for some drastic changes to both public health law and the protection of human rights in Australia, having identified deficiencies in the current legal treatment of the right to bodily integrity. In doing so, it demonstrated that coercion in pursuit of the collective interest in public health can be acknowledged without consent necessarily being undermined. The superior court cases emerging from the pandemic have made clear that the principle of legality does not now (if it ever did) provide sufficient or consistent protection of human rights in Australia. There is a need to better embed human rights in emergency decision-making in Australia through a transparent, mandate-specific decision-making framework supplemented by human rights legislation providing a direct right of action. Absent the *HRA* (Qld), the Commissioner of Police's decision to implement a mandate would not have been scrutinised and the ultimate finding of unlawfulness in *Johnston* would not have been made. A more transparent and consistent decision-making framework would not only promote accountability but also guide decision-makers attempting to address the inherent tension between individual rights and public health in emergency settings. Such a framework acknowledges the uniqueness of vaccination as a medical treatment that serves a collective interest. It is also important, as a corollary, that those who feel aggrieved by a decision are given the opportunity to understand the reasoning process and take direct action to determine whether there were deficiencies in that process. The public has a right to understand why decisions that so intimately impact their lives were made and on what basis. Human rights legislation provides access to that information, and the proposed framework ensures consistency in decision-making, with a view to enhancing trust in government and, where a pandemic is concerned, public health.

[242] Gleeson (n 199) 111.