

QUEENSLAND INDUSTRIAL RELATIONS COMMISSION

CITATION: *Fletcher v State of Queensland (Queensland Health)* [2023] QIRC 045

PARTIES: **Fletcher, Chrissy**
(Appellant)

v

State of Queensland (Queensland Health)
(Respondent)

CASE NO: PSA/2022/13

PROCEEDING: Public Service Appeal - Appeal against decision under a directive

DELIVERED ON: 14 February 2023

MEMBER: Knight IC

HEARD AT: On the papers

ORDERS: **The decision appealed against is confirmed.**

CATCHWORDS: PUBLIC SERVICE – EMPLOYEES AND SERVANTS OF THE CROWN GENERALLY – PUBLIC SERVICE APPEAL - appeal under s 197 of the *Public Service Act 2008* (Qld) - where *Health Employment Directive No 12/21 - Employee COVID-19 vaccination requirements* required relevant employees to receive COVID-19 vaccination - where appellant requested exemption from compliance on basis of exceptional circumstances - where exemption refused - where internal review confirmed decision to refuse exemption - whether exceptional circumstances meaningfully considered - whether human rights - adequately considered – decision confirmed

LEGISLATION AND
INSTRUMENTS:

COVID-19 Emergency Response Act 2020 (Qld)

Directive No 12/21 - Employee COVID-19 vaccination requirements cls 1, 7, 8, 10

Hospital and Health Boards Act 2011 (Qld) ss 51A, 51B, 51E

Human Rights Act 2019 s 17

Industrial Relations Act 2016 (Qld) ss 562B, 562C

Public Service Act 2008 (Qld) s 197

Work Health and Safety Act 2011 (Qld) ss 19, 47, 48

Work Health and Safety Regulations 2011 (Qld) ss 34, 36(2)

CASES:

Baiada Poultry Pty Ltd v R (2012) 246 CLR 92

Brasell-Dellow v State of Queensland (Queensland Police Service) [2021] QIRC 356

Colebourne v State of Queensland (Queensland Police Service) (No. 2) [2022] QIRC 016

Construction, Forestry, Maritime, Mining and Energy Union, v Mt Arthur Coal Pty Ltd [2021] 310 IR 399

Gilbert v Metro North Hospital and Health Service [2021] QIRC 255

Goodall v State of Queensland & Anor [2018] QSC 319

Graf & Ors v State of Queensland (Department of Education) [2022] QIRC 451

Grundkvist v State of Queensland (Queensland Health) [2022] QIRC 135

Higgins v State of Queensland (Queensland Health)
[2022] QIRC 30

Jennifer Kimber v Sapphire Coast Aged Care Ltd
[2021] FWCFB 6015

Morrissey v State of Queensland (Department of Children, Youth Justice and Multicultural Affairs)
[2022] QIRC 303

Murray v State of Queensland (Department of Education) [2022] QIRC 355

R v Dunlop Rubber Australia Ltd; Ex parte Federated Miscellaneous Workers' Union of Australia (1957) 97 CLR 1

Radev v State of Queensland (Queensland Police Service) [2021] QIRC 414

Regional Express Holdings Ltd v Australian Federation of Air Pilots (2017) 262 CLR 456

Slivak v Lurgi (Australia) Pty Ltd [2001] HCA 6

Tilley v State of Queensland (Queensland Health)
[2022] QIRC 002

Reasons for Decision

- [1] Ms Chrissy Fletcher is employed by the State of Queensland through Queensland Health ('the Department') as a Research Coordinator at the Princess Alexandra Hospital ('PAH') Division of Cancer Services Trial, within Metro South Health Service (MSH). The Applicant works in a facility where clinical care is provided.
- [2] On 10 January 2022, Ms Fletcher filed this appeal pursuant to s 197 of the *Public Service Act 2008* ('the PS Act') in relation to a decision of Dr Michael Cleary, A/Chief Operating Officer, MSH issued on 20 December 2021, not to approve an application for an exemption from the *Health Employment Directive 12/21 - Employee COVID-19 vaccination requirements* ('the Directive').¹
- [3] On 11 September 2021, the Director-General of the Department issued the Directive under s 51A of the *Hospital and Health Boards Act 2011* ('the HHB Act').² Section

¹ The Department's submissions filed 7 February 2022, [1]-[2].

² *Hospital and Health Boards Act 2011* (Qld).

51A of the HHB Act permits the chief executive to issue health employment directives about the conditions of employment for health service employees.³

- [4] Clause 1 of the Directive states that compliance is mandatory. The Directive requires employees identified within certain groups to receive a COVID-19 vaccination on specified dates.⁴ As an employee working in a hospital, the Applicant was in Group 2 for the purposes of the Directive.⁵
- [5] As a Research Coordinator based at the PAH, Ms Fletcher was required under cl 8.1 of the Directive to have her first dose of a COVID-19 vaccine by 30 September 2021 and her second dose by 31 October 2021.
- [6] Clause 10 of the Directive provides that an employee does not have to comply with the Directive where they are granted an exemption. The Directive provides that an application for an exemption will be considered by Queensland Health:
 - (a) where an employee has a recognised medical contraindication;
 - (b) where an employee has a genuinely held religious belief; or
 - (c) where other exceptional circumstance exists.⁶
- [7] On 30 September 2021, Ms Fletcher sought an exemption to the mandatory vaccine requirements citing exceptional circumstances including concerns regarding the lack of consultation, safety and efficacy of the vaccine and her human rights.⁷
- [8] As from 1 November 2021, Ms Fletcher was placed on paid Special Leave until such time as a decision was made in relation to her request for an exemption. Ms Fletcher was unable to attend the PAH during that time while she was unvaccinated.⁸
- [9] Ms Fletcher was advised on 3 November 2021 that the Department's review committee had refused her exemption application. She was directed to comply with the Directive by receiving the required dose and providing confirmation of her compliance within seven days of receiving such advice.⁹
- [10] On 11 November 2021, Ms Fletcher requested an internal review of the decision to refuse her exemption application. On 20 December 2021, Dr Cleary advised the

³ The Department's submissions filed 7 February 2022, [4].

⁴ *Health Employment Directive 12/21 - Employee COVID-19 vaccination requirements*, cls 7, 8.

⁵ The Department's submissions filed 7 February 2022, [9].

⁶ *Health Employment Directive 12/21 - Employee COVID-19 vaccination requirements*, cl 10.2.

⁷ The Department's submissions filed 7 February 2022, [10].

⁸ *Ibid*, [11].

⁹ *Ibid*, [12].

internal review had been completed and the decision to refuse Ms Fletcher's exemption application was confirmed.¹⁰

- [11] A mention of this matter was held in early 2022 in relation to two issues. Firstly, Ms Fletcher had applied for an extension of time on the application form and secondly, the future progress of the matter.
- [12] Upon resolution of those issues, a directions order was subsequently issued and the parties filed submissions.
- [13] This appeal proceeds under ch 11 pt 6 div 4 of the Industrial Relations Act 2016 (Qld).¹¹ It is not by way of rehearing, but rather involves a review of the decision arrived at and the decision-making process therein.¹² Its stated purpose is to decide whether the decision appealed against was fair and reasonable in all the circumstances.¹³

Background

- [14] In her initial application for exemption, which was submitted on the basis of other exceptional circumstances, Ms Fletcher noted:

The lack of consultation makes me concerned this directive is not consistent with health and safety as there does not appear to have completed a risk assessment for COVID-19 and the COVID-19 vaccination. I am concerned, in the absence of a risk assessment and consultation, that it may not be safe for me to obtain the vaccine, which is currently precluding me from getting it. The lack of engagement around the risks of the COVID-19 vaccine also triggers concerns that this process is inconsistent with my human rights. This direction will force me to undergo medical treatment without being provided with the information necessary to give my full, free, and informed consent.¹⁴

- [15] In his decision declining the exemption, Mr Dave Waters, Executive Director, Human Resources, MSH stated:

Queensland Health is of the view that the COVID-19 virus presents significant risk to the health and safety of healthcare workers, support staff, their families and the patients in our care. Evidence from around the world demonstrates not only the safety of the COVID-19 vaccine, but its very high level of efficacy.

Vaccination reduces the risk of hospitalisation and death from COVID-19 by over 90%, when compared to those who are unvaccinated. Vaccination also means staff are much less likely to transmit the virus to others, including importantly to our patients, including those who are immunocompromised.

...

¹⁰ Ibid, [14].

¹¹ *Public Service Act 2008* (Qld) s 197.

¹² *Industrial Relations Act 2016* (Qld) s 562B(2); *Goodall v State of Queensland & Anor* [2018] QSC 319.

¹³ *Industrial Relations Act 2016* (Qld) s 562B(3).

¹⁴ The Department's submissions filed 7 February 2022, Attachment 1.

Queensland Health has undertaken relevant consultation in relation to the COVID-19 vaccination requirements. The decision to require vaccination against COVID-19 was made considering the significant risk to the health and safety of healthcare workers, support staff, their families and the patients in our care. The decision also took into consideration the potential impact of the decision on human rights. The decision does not itself compel a person to be vaccinated, but it does impose consequences upon people who are not vaccinated where there is not good reason not to be vaccinated.

To the extent that decision impacts upon human rights, it is in Queensland Health's policy position justified [sic]. It is justified because the purpose of the requirement to be vaccinated in the Directive and Policy include protecting staff and patients from infection with COVID-19 and the maintenance of a proper and efficient public healthcare system in a time of a global pandemic. It should be noted that there is no other less restrictive yet effective way to achieve this purpose.

...

I am satisfied that my decision to decline your exemption application is compatible with human rights. While this decision engages or limits a number of your human rights including your right to equality and non-discrimination and your right not to receive medical treatment without consent, I am satisfied that those limits on human rights are justified by the need to ensure the readiness of the health system in responding to the COVID-19 pandemic and to protect the lives of employees, patients and the community we serve.¹⁵

The Internal Review Decision

[16] Ms Fletcher's submissions in respect of the request for an internal review of the decision to deny her exemption application fell into three broad categories, namely:

- Inadequate consultation in respect of the Directive;
- A failure to conduct a personalised risk assessment; and
- Incompatibility of the vaccine exemption assessment process with her human rights.

[17] In response to Ms Fletcher's concerns about consultation, Acting Chief Operating Officer, Dr Michael Cleary's internal review decision¹⁶ confirmed:

- Where the Department and/or the Hospital and Health Services ('HHS') and workers have agreed to procedures for consultation, the consultation must be in accordance with those procedures, provided they are not inconsistent with the requirements in section 48 of the *Work Health and Safety Act 2011* (Qld) ('the WHS Act') which requires that:
 - (a) relevant information about the matter is shared with workers;
 - (b) workers be given a reasonable opportunity to express their views and to raise work health or safety issues in relation to the policy and contribute to the decision-making process relating to the matter;
 - (c) the views of workers are taken into account by the Department and/or HHS;

¹⁵ Ibid, Attachment 2.

¹⁶ The Department's submissions filed 7 February 2022, Attachment 3.

- (d) the workers consulted are advised of the outcome of the consultation in a timely way; and
 - (e) if the workers are represented by a health and safety representative, the consultation involves that representative.¹⁷
- Having regard to the number, various locations and working arrangements for the employees to whom the Directive applies and pre-existing consultative forums for these employees, the WHS Act did not require one-on-one or personalised consultation with all workers affected by the Directive and/or a representative of their choosing.
 - Dr Cleary indicated he was satisfied the Department of Health and MSH had satisfied their consultation obligations and otherwise engaged in a reasonable and appropriate level of consultation prior to and subsequent to the Directive being issued, citing examples, which included:
 - (a) Consultation with registered unions covering all of Queensland Health employees on the proposed policy including meetings on COVID-19 related industrial relations topics, including consultation which occurred following the introduction of the Policy.
 - (b) Consideration of union feedback, observing the majority of the feedback was positive regarding the proposed vaccination policy, rollout and the exemption.
 - (c) Before and after the policy was issued, all impacted employees were sent one or more emails outlining the Department's position and the exemption process.
 - (d) Staff forums held in person or via Microsoft Teams where information was provided, and staff were given an opportunity to ask questions relating to the Policy and associated processes.
 - (e) Staff were invited to raise their concerns or enquires with their line manager and human resources MSH Emergency Operations Centre.
 - (f) Additional communications (letters and/or text messages) were sent to staff in relation to the policy.¹⁸

[18] In response to Ms Fletcher's concerns about the failure of the Department to conduct a personalise risk assessment, Dr Cleary's internal review decision confirmed:

¹⁷ Appeal Notice filed 10 January 2022, Attachment 2.

¹⁸ The Department's submissions filed 7 February 2022, Attachment 3.

- Part 3.1 of the *Work Health and Safety Regulations 2011* (Qld) ('the WHS Regulation') imposes obligations to manage risks to health and safety, such as the risks presented by COVID-19, on the Department and MSH.
- Risk assessments were undertaken such that the Department and MSH satisfied their obligations under Part 3.1 of the WHS Regulation, including sections 34 and 36(2).
- In making the Directive, the Director-General received regular briefings from the Chief Health Officer about the general risks of COVID-19, along with specific briefings on Department employees, in particular those working in high-risk roles. Consideration was also had regarding transmission events in New South Wales health facilities.
- The purpose of the Directive is to outline COVID-19 vaccination requirements for existing and prospective employees employed in high-risk groups. The Policy also details the employee risk profiles impacted by the posed risk of COVID-19 on health care workers, support staff, patients and the broader community.¹⁹

[19] Dr Cleary stated that a hierarchy of public health measures and infection control measures were utilised to minimise the impact of COVID-19. Examples of different measures set out in the correspondence, included:

- (a) A declaration of a Public Health Emergency;
- (b) Physical distancing;
- (c) Hand Hygiene and cleaning;
- (d) Public Health Directions restricting the broader community
- (e) Use of infection control measures within the health care environment; and
- (f) Adjusting of models of care.

[20] In response to Ms Fletcher's concerns about the incompatibility between the vaccination exemption application process and human rights, Dr Cleary's internal review decision noted:²⁰

- He was satisfied the vaccination exemption application and assessment process was compatible with human rights and provided for compliance with the HR Act.
- COVID-19 vaccines are not experimental. They have undergone all the usual assessments including peer review and publication of phase one, two and three clinical trials and review by multiple bodies including the Therapeutic Goods Administration. The vaccines are now in routine clinical use to prevent disease.

¹⁹ Ibid, 4.

²⁰ Ibid, 3.

- He was satisfied that the decision to confirm refusal of Ms Fletcher's exemption application was compatible with human rights.
- Although the decision engaged or limited a number of Ms Fletcher's human rights, he was satisfied those limits were justified by the need to ensure the readiness of the health system in responding to the COVID-19 pandemic.
- Protecting colleagues and patients accessing health services through the COVID-19 vaccination promotes their human rights to life and health, as well as Ms Fletcher's own.
- Dr Cleary concludes that he does not consider that there are any less restrictive yet effective ways to achieve these purposes.

Grounds of Appeal

[21] Ms Fletcher set out the basis of her appeal as follows:

On 11 September 2021, the Director-General of Queensland Health, Dr John Wakefield sent an email to all Queensland Health employees Employment Health Directive 12/21 (HED12/21) stating that all staff must take the COVID-19 vaccine. Three exemptions were available for staff to apply if unable to take a COVID-19 vaccine. I applied for an exemption under the heading of "Special Circumstances" whereby I asserted that under the Work Health and Safety Act (Qld) 2011, I had not been advised of a "risk assessment". Queensland Health denied this exemption whereby I requested an internal review of the decision. Under this review, the decision to deny my exemption was upheld as being lawful under WH&S Act Regulations, PCS Directive 11/20 – Individual employee grievances, and HR Act.²¹

The Department's Submissions

- [22] The Department submits that the decision was at all times fair and reasonable, noting that it addressed Ms Fletcher's exemption application in great detail.²²
- [23] Further, the Department maintains it was compliant with its obligations to consult under the WHS Act, noting that there is no obligation, nor would it be reasonably practicable, to consult with individual employees given the size of the Department and MSH.²³
- [24] The Department also observes that although Ms Fletcher raises concerns regarding the efficacy of vaccines, she has not provided any evidence of a medical contraindication that would excuse her compliance with the Directive.²⁴

²¹ Appeal notice filed 10 January 2022.

²² The Department's submissions filed 7 February 2022.

²³ Ibid, [16]; citing *Brasell-Dellow & Ors v State of Queensland (Queensland Police Service) & Ors* [2021] QIRC 356, [124].

²⁴ The Department's submissions filed 7 February 2022, [19]; citing *Radev v State of Queensland (Queensland Police Service)* [2021] QIRC 414, [61].

- [25] In response to her concerns about the vaccine, the Department observes Ms Fletcher's exemption application can be characterised as 'vaccine hesitancy', arguing that vaccine hesitancy does not result in requiring compliance with the Directive as being unreasonable.²⁵
- [26] The Department contends that the importance of mandatory vaccination is outlined in cl 6 of the Directive, arguing the increased potential exposure of COVID-19 for workers within the health care delivery, limiting transmissions will reduce the likelihood of workplace outbreaks and staff shortages.
- [27] The Department maintains Ms Fletcher's role, as a research coordinator, requires her to physically attend the PAH and work amongst colleagues who physically interface with patients daily. As the PAH was at the time of the decision a COVID-19 facility, the risk is exacerbated.

Ms Fletcher submissions

Inadequate Consultation and personalised risk assessments

- [28] Ms Fletcher maintains that neither herself nor the Nurses Professional Association of Queensland ('NPAQ') which she joined on 30 September 2021, were consulted with respect to the implementation of the Directive.²⁶
- [29] Ms Fletcher submits her application for an exemption was based on a lack of valid risk assessment²⁷ and an absence of meaningful consultation as to unknown long-term risks,²⁸ both of which are obligatory requirements under the WHS Act.²⁹
- [30] Ms Fletcher further asserts the Department did not meet the obligations under the WHS Act in other ways, noting:
- i. s 48(1)(b) of WH&S, gives reference to a "meaningful consultation process". Correspondence from Dr Michael Cleary dated 20 December 2021 stated; "*Prior to HED12/21 being issued, all employees to who HED12/21 would apply were sent one or more e-mails in relation to the Department's mandatory vaccination position, foreshadowing the making of HED12/21*", (CF03). The Appellant asserts the regular "Frontline Covid Advice" individual emails did not indicate that a "Directive" would ensure (CF04).
 - ii. WH&S, s49 refers to obligatory requirements of consultation in relation to health and safety matters, in particular "(d) when proposing changes that may affect the health or safety of the workers".
 - iii. There was a lack of consultation with respect to the risks in mandating a Covid vaccine with a novel Liquid Nanoparticle (LNP) agent. Once injected, the substance is permanent.

²⁵ The Department's submissions filed 7 February 2022, [20]; citing *Tilley v State of Queensland (Queensland Health)* [2022] QIRC 002.

²⁶ *Gilbert v Metro North Hospital and Health Service* [2021] QIRC 255, [134], [412], [413].

²⁷ *Work Health and Safety Act 2011* (Qld), s 19(3)(f).

²⁸ *Ibid*, ss 47, 48.

²⁹ Ms Fletcher's reply submissions filed 10 March 2022, [1][u][iii].

As referenced in the TGA website, the efficacy and long-term safety data remain unknown for the COVID-19 vaccine.

- iv. The Respondent failed to provide a Risk Assessment together with consultation which the Appellant requested on the following dates:

- 1. 30 September 2021 (CF05 and CF06)

- 2. 26 October 2021.³⁰

- [31] Ms Fletcher further states that the Department claims that 'the obligation to consult does not impose an obligation to consult with employees on an individual basis' actually contradicts the fact that the 'Employer' has individually emailed Frontline Covid Advice updates regularly since March 2020.³¹

Consent

- [32] Ms Fletcher argues the use of 'mandatory vaccination' contradicts the clinical advice in the Australian Immunisation Handbook (AIH) which provides clinical advice for health professionals on the developments by the Australian Technical Advisory Group on Immunisation (ATAGI) and approved by the National Health and Medical Research Council.³²

- [33] Ms Fletcher maintains the AIH provides that for consent to be legally valid, 'it must be given voluntarily in the absence of undue pressure, coercion or manipulation'. Further, the AIH states:

[v]alid consent is the voluntary agreement by an individual to a proposed procedure, which is given after sufficient, appropriate and reliable information about the procedure, including the potential risks and benefits, has been conveyed to that individual.³³

- [34] Ms Fletcher submits that the use of the word 'mandatory' in the context of a Public Health Order or the Directive, automatically inputs to the reader that voluntary consent and free will are missing from the equation. The Therapeutic Goods Administration (TGA) web page notes that COVID-19 vaccines are provisional and currently undergoing evaluation.³⁴

Exceptional Circumstances

- [35] Ms Fletcher rejects the Department's submissions³⁵ concerning her 'exceptional circumstances' because of the following:

³⁰ Ibid, [1][g].

³¹ Ibid, [1][p][ii].

³² Ibid, [1][e][i].

³³ Ibid, [1][e][iii].

³⁴ Ibid.

³⁵ The Department's submissions filed 7 February 2022, [10].

- i. The Respondent stated in correspondence dated 20 December 2021; "*COVID-19 vaccines are not experimental*" (CF09). The TGA website states; "*Many of the large-scale clinical trials that will provide evidence of safety and effectiveness are still progressing and these results will be provided to the TGA as they become available*".
- ii. Queensland Human Rights Act 2019 s17 ("HR Act") states, "*No one shall be subjected to torture or cruel, inhumane or degrading treatment or punishment. In particular, no one shall be subjected without his free consent to medical experimentation*". This is written into Queensland Law.
- iii. The Australian Public Assessment Report for BNT162b2 (mRNA) states provisional approval has been made, "*on the basis of short-term efficacy and safety from ongoing clinical trials and post-market assessment*".
- iv. The website for the National Institute of Health, ClinicalTrials.Gov provides evidence of ongoing trials of BNT162 with an estimated study completion date of 2023.
- v. The Australian Clinical Trials state, "*Everyone taking part in a clinical trial must give 'informed consent' or have a parent or guardian or other legally authorised person give consent*".
- vi. Administration of a Covid-19 vaccination is administered by forcing a needle through the skin into intramuscular tissue. In a legal sense, the skin is broken, and the continuity of the whole skin is severed. Under Queensland Criminal Code 1899 s245 (1) this is assault causing wounding under law if consent has not been validly obtained. To constitute a wounding the true skin must be broken. Refer to 11 *Halsbury's Laws of England* (4th ed) para 1199 where it is stated: "*In order to constitute a wounding there must be an injury to the person by which the skin is broken; the continuity of the whole skin must be severed, not merely that of cuticle or upper skin*". Also raised in *R v Jervis* [1993] 1 Qd R 643 by McPherson ACJ at [645], "*A wounding is an assault*".³⁶

[36] In addition, Ms Fletcher states she reasonably believes she is unable to determine what harm she may suffer in terms of being administered with a COVID-19 vaccination which has unknown efficacy and long-term safety data.³⁷ Moreover, the label 'Vaccine-Hesitancy' indicates that the individual is reliant on personal views when in fact she is aware of a significant and growing body of scientific data and evidence in relation to the safety and effectiveness of COVID vaccines.³⁸

Human Rights

[37] Relying on s 51B of the HHB, Ms Fletcher maintains the *Human Rights Act 2019* (Qld) ('HR Act') prevails over the Directive.

[38] Ms Fletcher rejects that her Human Rights were considered, referring to HR Act and the *COVID-19 Emergency Response Act 2020* (Qld). Ms Fletcher asserts mandatory vaccinations are a breach of s 17(c) of the HR Act, noting that the Directive by creating a threat to her ability to work, has created coercion and duress which has breached her lawful right to informed consent and the right to choose.

³⁶ Ms Fletcher's reply submissions filed 10 March 2022, [1][e].

³⁷ Ibid, [1][q][vi].

³⁸ Ibid, [1][s].

The internal review decision was fair and reasonable

[39] Ms Fletcher's appeal grounds, in relation to the internal review decision to refuse her application for an exemption, falls into four broad categories, namely:

- Inadequate consultation and personalised risk assessments
- Concerns in relation to consent
- Human rights incursions; and
- An assertion that her circumstances are in fact, exceptional.

Inadequate Risk Assessments

[40] Ms Fletcher raises several concerns about the adequacy of risk assessments and consultation in the development and subsequent implementation of the Directive. For example, it is submitted the Department failed to engage with Ms Fletcher or NPAQ. She also maintains the Department failed to undertake a risk assessment and there was a lack of consultation with respect to the risks in mandating a COVID vaccine.

[41] In its submissions, the Department maintains both the Department and MSH complied with its obligations to consult under the WHS Act, observing that the obligation to consult does not impose an obligation to consult with employees on an individual basis.

[42] It also submitted that consultation on an individual basis was not reasonably practicable for a workforce the size of the Department or MSH.³⁹

[43] In circumstances where the materials before the Commission confirm a risk assessment was undertaken in respect of the broader workforce, it seems to me the Department and MSH has satisfied its obligations in relation to ss 34 and 36(2) of the WHS Regulation.⁴⁰

[44] The absence of an individualised risk assessment, particularly given the size and variable nature of the workforce, in my view, does not lead to a conclusion the internal review decision appealed against was unfair or unreasonable.

Consultation

[45] Although s 48 of the WHS Act describes certain types of consultation which should take place, s 47 provides the obligation to consult need only occur to the extent that it is reasonably practicable.⁴¹

³⁹ The Department's submissions filed 7 February 2022, [16].

⁴⁰ *Work Health and Safety Regulation 2011* (Cth).

⁴¹ *Work Health and Safety Regulation 2011* (Cth), ss 47, 48.

[46] In '*Brassell-Dellow*',⁴² the Full Bench considered the concept of "reasonably practicable", noting:

[124] Section 47 is of general application to all workforces and workplaces. It is easy to imagine that it may be reasonably practicable to consult on a face to face basis and fully in terms of s 48 with each individual member of a small workforce. Here, the workforce is over 17,200 in number.

[125] In *Slivak v Lurgi (Australia) Pty Ltd*, Gaudron J described the notion of "reasonably practicable", in the context of fulfilment of a safety obligation, as follows:

"The words 'reasonably practicable' have, somewhat surprisingly, been the subject of much judicial consideration. It is surprising because the words 'reasonably practicable' are ordinary words bearing their ordinary meaning. And the question whether a measure is or is not reasonably practicable is one which requires no more than the making of a value judgment in the light of all the facts. Nevertheless, three general propositions are to be discerned from the decided cases:

'the phrase 'reasonably practicable' means something narrower than 'physically possible' or 'feasible';

what is 'reasonably practicable' is to be judged on the basis of what was known at the relevant time;

to determine what is 'reasonably practicable' it is necessary to balance the likelihood of the risk occurring against the cost, time and trouble necessary to avert that risk."

[126] In *Baiada Poultry Pty Ltd v R*, the High Court adopted a similar approach concluding:

"All elements of the statutory description of the duty were important. The words 'so far as is reasonably practicable' direct attention to the extent of the duty. The words 'reasonably practicable' indicate that the duty does not require an employer to take every possible step that could be taken. The steps that are to be taken in performance of the duty are those that are reasonably practicable for the employer to take to achieve the identified end of providing and maintaining a safe working environment. Bare demonstration that a step could have been taken and that, if taken, it might have had some effect on the safety of a working environment does not, without more, demonstrate that an employer has broken the duty imposed by s 21(1). The question remains whether the employer has so far as is reasonably practicable provided and maintained a safe working environment."

[127] The evidence shows that each employee received by email various documents over a period of time which explained the Commissioner's intentions. Importantly, each of the applicants who gave evidence were members of a union at the time the direction was given. All the police and other staff were eligible for membership of one of the unions with whom the Deputy Commissioner consulted, and who supported the directive. Those unions, therefore, covered the workforce. It is well-established that trade unions may negotiate with employers, not only on behalf of their members, but also on behalf of workers who are eligible for membership.

[128] When considering in any particular case what consultation is "reasonably practicable", regard must be had not only to the particular circumstances, but also to the legislative intention behind ss 47 and 48. The point of s 47 is to enable workers who may be affected by workplace, health and safety issues to have input into the management of those issues before an employer imposes conditions upon them. Obviously, the desirable outcome is agreement between the employer and employees as to the work, health and safety measures.⁴³

⁴² *Brassell-Dellow & Ors v State of Queensland, (Queensland Police Service) & Ors* [2021] QIRC 356.

⁴³ Ibid [124]-[128]; citing *Slivak v Lurgi (Australia) Pty Ltd* [2001] HCA 6; *Baiada Poultry Pty Ltd v R* (2012) 246 CLR 92; *R v Dunlop Rubber Australia Ltd*; *Ex parte Federated Miscellaneous Workers' Union of*

[47] Although Ms Fletcher maintains neither she, nor NPAQ participated in any direct consultation ahead of the introduction of the vaccine requirements, I am satisfied employees of MSH, including Ms Fletcher, received correspondence and information in relation to the requirement to be vaccinated against COVID-19 and that the Department consulted with relevant unions.

[48] For the above reasons, I am not persuaded this ground of appeal could lead to a conclusion the Internal Review Decision was unfair or unreasonable.

Exceptional Circumstances – Front-line worker / Safety & Efficacy of Vaccine

[49] When considering whether Dr Cleary's internal decision was fair and reasonable, I have had regard to His Honour, DP Merrell's views in *Grundkvist v State of Queensland (Queensland Health)*,⁴⁴ where he observed:

Ms Grundkvist's submissions must, in my view, be considered by having regard to whether the issues to which she refers give rise to an exceptional circumstance of this kind. The basis for such an exemption must concern circumstances that affect or concern her as an individual employee as opposed to a circumstance or circumstances which affect or concern all or a large group of the employees of the Department.⁴⁵

[50] In forming this view, his Honour relied on an earlier decision of *Colebourne v State of Queensland (Queensland Police Service) (No 2)*,⁴⁶ where he stated in respect of a similar exemption regime under a COVID-19 vaccination direction given in the Queensland Police Service:

[53] Therefore, it was clear from Ms Colebourne's application for exemption that she was applying for an exemption, not on medical or genuine religious grounds (as referred to in paragraphs 8 or 9a) of Direction No 12) but '... due to other exceptional circumstances' as contemplated in paragraph 9b) of that document.

[54] It seems to me that construed in context, for an exemption of the kind referred to in paragraphs 8 or 9 of Direction No 12 to be granted, the grounds for the exemption must relate to the employee as an individual. This can be seen in respect of the exemptions that may be granted on medical or religious grounds. Similarly, in my view, the '... other exceptional circumstances' basis for an exemption concern circumstances that affect or concern the individual employee as opposed to general circumstances which may concern all or a large group of the members of the Service.⁴⁷

[51] Therefore, the correct approach, when reviewing the issues Ms Fletcher submits give rise to exceptional circumstances, is to have regard to events or circumstances that impact or concern her as an individual rather than those that impact or effect a broad

Australia (1957) 97 CLR 1; *Regional Express Holdings Ltd v Australian Federation of Air Pilots* (2017) 262 CLR 456; *Work Health and Safety Act 2011* (Cth) ss 47, 48.

⁴⁴ [2022] QIRC 135.

⁴⁵ *Grundkvist v State of Queensland (Queensland Health)* [2022] QIRC 135, [23].

⁴⁶ [2022] QIRC 016, [39] – [42].

⁴⁷ *Colebourne v State of Queensland (Queensland Police Service) (No 2)* [2022] QIRC 016, [53] – [54].

group of employees or sub-groups within a particular workforce, department or cohort.⁴⁸

- [52] In support of the position that her circumstances give rise to exceptional circumstances, Ms Fletcher argues she is not a front-line worker and her interface with other workers is minimal.
- [53] The Department submits Ms Fletcher performs an important role in an area that is covered by the Directive for the safety of not only Ms Fletcher, but also her colleagues, patients of the hospital and the broader community.
- [54] In her role as a Research Co-ordinator based at the PAH, it is not in contention Ms Fletcher falls within Group 2 of the Directive and was therefore required under cl 8.1 of the Directive to receive a COVID-19 vaccination.
- [55] Neither is it in issue, that Ms Fletcher, in her role, ordinarily attends the hospital and works amongst colleagues who physically interface with patients on a regular basis.
- [56] I accept the submissions of the Department that the designation of the PAH as a COVID-19 facility further exacerbates the risk, in circumstances where patients with COVID-19 are preferentially sent to the PAH.
- [57] Although it may be the case that Ms Fletcher is not required to interact with hospital patients to the extent that other employees such as nurses, doctors or allied health employees might, it is clear she would ordinarily attend the hospital, communicate with patients and interact with other colleagues who have contact with patients and other front-line staff.
- [58] In those circumstances, I am not persuaded the reduced nature of her interaction with front-line workers, patients and other colleagues gives rise to a circumstance, that could be characterised as exceptional.
- [59] In her reply submissions, Ms Fletcher also raises concerns around the efficacy and safety of the vaccine, suggesting there is a growing body of scientific data and evidence questioning the effectiveness and safety of the vaccine.
- [60] In response to Ms Fletcher's concerns around the safety and effectiveness of the vaccine, Dr Cleary noted:

COVID-19 vaccines are not experimental. They have undergone all of the usual assessments including peer review and publication of phase one, two and three clinical trials and review by multiple licensing bodies including the Therapeutic Goods Administration. The vaccines are now in routine clinical use to prevent disease. They are not used to treat disease.⁴⁹

⁴⁸ *Grundkvist v State of Queensland (Queensland Health)* [2022] QIRC 135; *Colebourne v State of Queensland (Queensland Police Service) (No 2)* [2022] QIRC 016.

⁴⁹ The Department's submissions filed 7 February 2022, Attachment 3, 6.

- [61] Although I accept Ms Fletcher holds concerns about the vaccine, one of the difficulties with this aspect of her appeal is that it is well established that concerns about the efficacy or safety of the COVID-19 vaccine, on their own, are not considered exceptional circumstances.⁵⁰
- [62] Furthermore, in relation to Ms Fletcher's submissions about emerging scientific evidence in respect of COVID-19 and vaccinations, the Commission is largely confined to considering Ms Fletcher's internal review decision and the processes that were followed at the time of the review.
- [63] In any event, I was unable to identify any other circumstances relevant to Ms Fletcher, within the materials that were filed in support of either her appeal or earlier internal request for review, that meaningfully weighed against other considerations the Department was required to have regard to, for example, the nature and location of Ms Fletcher's role and any potential risk to herself, other employees, patients and the community with respect to COVID-19 transmission.
- [64] Moreover, Ms Fletcher did not provide the Department or the Commission with evidence of a specific medical contraindication that could be characterised as exceptional or exposing her to any higher risk of harm from the vaccine, than her other colleagues.
- [65] For the reasons set out above, I am not persuaded the circumstances relied on by Ms Fletcher, in so far as they relate to the approval, safety or effectiveness of the vaccine, or the nature of her interaction with patients, could be characterised as exceptional. Nor could they lead to a conclusion that Dr Cleary's decision was unreasonable.

Consent

- [66] As best I understand it, Ms Fletcher also raises questions as to whether consent has been freely obtained in circumstances where she appears to consider that she is being coerced into receiving a COVID-19 vaccination.
- [67] In *Graf & Ors v State of Queensland (Department of Education)*,⁵¹ a case where several employees within the Department of Education were subject to a decision of suspension without remuneration after failing to comply with a Direction to receive the COVID-19 vaccination, his Honour, DP Merrell, relevantly stated:

The direction to be vaccinated is no different to any other lawful direction given by an employer to an employee about a matter concerning the employee's health and safety or the health and safety of other employees or persons associated with the employers' undertaking. Some

⁵⁰ Ibid, Attachment 1; *Murray v State of Queensland (Department of Education)* [2022] QIRC 355; *Morrissey v State of Queensland (Department of Children, Youth Justice and Multicultural Affairs)* [2022] QIRC 303; *Higgins v State of Queensland (Queensland Health)* [2022] QIRC 30.

⁵¹ [2022] QIRC 451.

employees may, for a range of reasons, not comply with such a direction. But that is a matter for each employee.

...

The will of each Appellant was not being overborne. Each Appellant had a real choice as to whether they complied with the Direction.⁵²

[68] Similarly, in this matter, Ms Fletcher had a choice as to whether she complied with the Directive.

[69] For these reasons, I am not persuaded Ms Fletcher's submissions in relation to this ground of appeal, result in a conclusion that Dr Cleary's decision was unfair or unreasonable.

Human rights incursions

[70] In his internal review decision letter, Dr Cleary, in response to Ms Fletcher's concerns that the vaccination exemption process was incompatible with her human rights, noted:

I am satisfied that the vaccination exemption application and assessment process is compatible with these human rights and allows for compliance with section 58 of the HR Act for the reasons that follow:

COVID-19 vaccines are not experimental. They have undergone all the usual assessments including peer review and publication of phase one, two and three clinical trials and review by multiple licensing bodies including the Therapeutic Goods Administration. The vaccines are now in routine clinical use to prevent disease. They are not used to treat disease.

I am satisfied that the decision to confirm the refusal of your exemption application is compatible with human rights. While this decision engages or limits a number of your human rights, including your right to freedom of thought, conscience, religion and belief and your right to freedom of expression, I am satisfied that those limits on human rights are justified by the need to ensure the readiness of the health system in responding to the COVID-19 pandemic, and to protect the lives of employees, patients and the community they serve.

The purpose of protecting your colleagues, and people accessing health services from the risk of COVID-19 through vaccination promotes their human rights to life and health, as well as your own. These are important considerations and should be given weight at this particular time. I do not consider that there are no other less restrictive yet effective ways to achieve those purposes.⁵³

[71] In support of her concerns around human rights, Ms Fletcher's submissions refer to ongoing clinical trials, medical experimentation and the wounding that arises during the administration of the COVID-19 vaccination.⁵⁴

[72] The difficulty with this approach, in circumstances where the vaccinations have been approved by the TGA and ATAGI, is that the decision maker was not obliged to reconsider the efficacy of the COVID-19 vaccinations, when determining Ms Fletcher's exemption application or the subsequent internal review of the decision.

[73] In any event, I am satisfied Ms Fletcher's human rights were properly considered during the internal review. Relevantly, Dr Cleary acknowledged the incursion of the

⁵² Ibid [39].

⁵³ The Department's submissions filed 7 February 2022, Attachment 3, 5 – 6.

⁵⁴ Ms Fletcher's reply submissions filed 10 March 2022, 3.

QAS vaccination policy on Ms Fletcher's human rights but determined that any limitation was justified to protect the lives of employees, patients, and the community and to discharge QAS's legislative obligations.

- [74] For these reasons, I am not persuaded Ms Fletcher's submissions in relation to this ground of appeal, lead to a conclusion that Dr Clearly's decision was unfair or unreasonable.

Conclusion

- [75] The Internal Review Decision confirming the refusal of Ms Fletcher's request for an exemption from receiving the COVID-19 vaccine, was fair and reasonable.

- [76] I confirm the Internal Review Decision.

Order

- [77] I make the following order:

The decision appealed against is confirmed pursuant to s 562C(1)(a) of the *Industrial Relations Act 2016* (Qld).