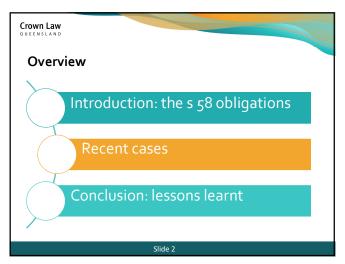
What is required to comply with s 58 of the Human Rights Act?

Felicity Nagorcka

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Crown Law

Rights protected by the Human Rights Act

- Recognition and equality before the law (s 15)
 Right to life (s 16)
- Protection from torture and cruel, inhuman or degrading treatment (s
- Freedom from forced work (s 18)
- Freedom of movement (s 19)
 Freedom of thought, conscience, religion and relief (s 20)
- Freedom of expression (s 21)
 Peaceful assembly and freedom of association (s 22)
 Taking part in public life (s 23)
- Property rights (s 24)
- Privacy and reputation (s 25)
- Protection of families and children (s 26)

- Cultural rights generally (s 27)
- Cultural rights Aboriginal peoples and Torres Strait Islander peoples (s 28)
- Right to liberty and security of person (s 29) Humane treatment when deprived of liberty (s 30)

- Fair hearing (s 31) Rights in criminal proceedings (s 32)
- Children in the criminal process (s 33)
- Right not to be tried or punished more than once (s 34) Retrospective criminal laws (s 35)
- Right to education (s 36)
- Right to health services (s 37)

Slide 3

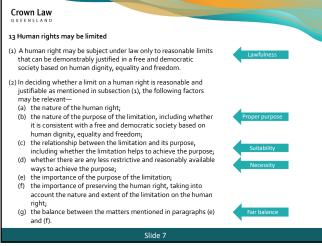
Public entities must comply with s 58 It is unlawful for a public entity: (a) to act or make a decision in a way that is not compatible with human rights; and (b) in making a decision, fail to give proper consideration to a human right relevant to the decision. Slide 4

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Crown Law QUEENSLAND Section 8 – compatible with human rights • An act, decision or statutory provision is 'compatible' if it: – does not limit a human right; or – limits a human right only to an extent that is justified under s 13.

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Crown Law QUEENSLAND	
Section 13 — justify	ing limits on human rights
legitimate purpose	What is the reason for imposing the limit?
suitability	Will the measure help to achieve that purpose?
necessity	Is there a way of achieving the same purpose with less impact on human rights?
fair balance	Does the positive outweigh the negative?
	Slide 6



Crown Law OUTERNSLAND The procedural limb – s 58(1)(b) Public entities must give proper consideration to a human right in making a decision. Section 58(5) provides that giving proper consideration to a human right includes, but is not limited to: identifying the human rights that may be affected by the decision; and considering whether the decision would be compatible with human rights.

Exceptions to s 58(1) • Neither limb of s 58(1) applies: - if the entity could not reasonably have acted differently because of another law (s 58(2)) - to religious bodies, in some circumstances (s 58(3)) - to an act or decision of a private nature (s 58(4)).

Recent cases

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Crown Law

Austin BMI Pty Ltd v Deputy Premier [2023] QSC



- Council refused Wanless's development application.
- Wanless appealed P&E Court.
- Deputy Premier 'called-in' the application
- Residents challenged the call-in decision (Ashworth applicants).

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Crown Law

Austin BMI Pty Ltd-substantive limb

- Freeburn J compatibility should be considered in 3 stages:
 - A right is 'engaged' if it is relevant potentially interfered with or **Engagement:**

promoted.

A right is limited if it is restricted or Limitation:

interfered with.

Limits are justified in accordance with Justification:

proportionality test in s 13

Crown Law QUEENSLAND	
Austin BMI Pty Ltd-substantive limb	
 Onus: on applicant to demonstrate rights are limited. 	
 if a right is limited, onus is on the public entity to show the limit is justified. 	
Slide 13	
13	
	•
Crown Law QUEENSLAND	
Austin BMI Pty Ltd-substantive limb	
 Ashworth applicants had been parties to the P&E Court appeal. Call-in ended that appeal 	
 Argued that call-in was incompatible with rights: to take part in public life without discrimination (s 23) 	
 not to be arbitrarily deprived of property (s 24) to a fair hearing (s 31) 	
 Applicants failed to discharge the onus. 	-
	-
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Crawalaw	
Crown Law QUEENSLAND	
Austin BMI Pty Ltd-procedural limb	
 Victorian authority on the procedural limb: (1) understand in general terms which rights are 	
 relevant and how they may be interfered with (2) seriously turn mind to the possible impact of the decision on human rights 	
(3) identify any countervailing interests or obligations; and	
(4) balance competing private and public interests.	

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Austin BMI Pty Ltd-procedural limb

- Section 58(5):
 - ... giving proper consideration to a human right in making a decision includes, but is not limited to:
 - identifying the human rights that may be affected by the decision; and
 - (b) considering whether the decision would be compatible with human rights.

Does this mean Qld decision-makers must identify the correct rights?

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Crown Law

Austin BMI Pty Ltd-procedural limb

- Deputy Premier's statement of reasons:
 - human rights assessment prepared by the department; and
 - on this basis, determined decision was compatible.
- The human rights assessment did not identify the right to participate in public life, or the right to a fair hearing
- That didn't matter because these rights were not limited.

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Crown Law

Wallace v Tannock [2023] QSC 122

- Mr Wallace supervision order under the Dangerous Prisoner (Sexual Offenders) Act 2003
- QCS staff had concerns about his interactions with female NDIS workers
- Gave Mr Wallace a direction that he:
 - was to have only male NDIS/support workers
 - was to obtain approval for any visitors, including family members.

Slide 18

Wallace v Tannock - substantive limb

- Callaghan J held:
 - 1. Only male support workers: justified
 - designed to mitigate the risk of offending against a female support worker
 - 2. Approval for any visitor: not justified
 - no rational basis to impose this direction when the reason for the direction was a concern about potential offending against women

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Crown Law

BZN v Chief Executive, DCYJMA [2023] QSC 266

- BZN was a social worker
- Allegations of sexual assault were substantiated
- BZN argued decision unlawful under both limbs of s 58
- Rights:
 - informational privacy and mental integrity
 - engaged but not limited.

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Crown Law

BZN v Chief Executive-procedural limb

- File note listed several rights, including privacy, and a gave a brief comment in relation to each right
- As to privacy: 'I have handled all information sensitively and respectfully to the best of my ability'
- As to justification: 'In balancing human rights owed, I have given proper consideration to s 58...and have...made every effort to afford human rights considerations to both parties.

Slide 21

Johnston v Carroll; Witthahn v Wakefield; Sutton v Commissioner of Police

- Directions making COVID-19 vaccinations mandatory
- Police officers challenged decisions of the Commissioner of Police to issue two vaccination directions
- Ambulance officers challenged the decision of the DG of QH to issue a vaccination direction.



Slide 2

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Crown Law

Johnston v Carroll; Witthahn v Wakefield; Sutton v Commissioner of Police

The substantive limb



- Decisions were compatible with human rights
- Only one right was limited:
 - freedom from medical treatment without the person's full, free and informed consent in s 17(c)
- That limit was justified under s 13
 - expert medical evidence no reasonably available alternatives to a mandatory vaccination policy.

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Crown Law

Witthahn - procedural limb for QAS direction

- Proper consideration was given:
 - Dr Wakefield did not give evidence
 - Martin SJA inferred that Dr Wakefield read and considered the material briefed to him and decided in accordance with the recommendations in the brief
 - Briefing note contained a detailed human rights compatibility assessment.

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Johnston - procedural limb for QPS direction

- Failure to give proper consideration to human rights
 - The Commissioner also relied upon human rights compatibility assessments prepared by others
 - The Commissioner gave evidence at the trial
 - Martin SJA held that evidence showed the Commissioner did not receive compatibility statement before she made each 'decision'.

Slide 2

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Crown Law

Johnston - procedural limb for QPS direction

"Direction No 12"

- 1 September 2021 Decision to issue direction "made"
- 2 September 2021 HRCA updated
- 7 September 2021 Vaccination direction issued.

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Crown Law

Johnston - procedural limb for QPS direction

- The Commissioner's evidence about considering those compatibility statements was inconclusive
- Hence the Commissioner failed to:
 - take four steps outlined in Victorian authorities,
 - take either step required under s 58(5).

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Crown Law	
Lessons learnt	
 Level of proper consideration required must consider at time of making decision, not after decision maker must turn mind to human rights, 	
even if relying on briefing note/legal advice – procedural limb is applied in 'common sense and practical' way	
• But cf s 58(5)	
 Proving proper consideration in court proceedings Briefing notes Decision maker giving evidence. 	
Slide 28	
Crown Law	
Questions?	