

Crown Law
QUEENSLAND

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

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Overview

- Introduction: the s 58 obligations
- Recent cases
- Conclusion: lessons learnt

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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 17)
- 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)

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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.

Substantive limb

Procedural limb

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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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Section 13 – justifying 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?

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13 Human rights may be limited

(1) A human right may be subject under law only to reasonable limits that can be demonstrably justified in a free and democratic society based on human dignity, equality and freedom. ← **Lawfulness**

(2) In deciding whether a limit on a human right is reasonable and justifiable as mentioned in subsection (1), the following factors may be relevant—

- (a) the nature of the human right; ← **Proper purpose**
- (b) the nature of the purpose of the limitation, including whether it is consistent with a free and democratic society based on human dignity, equality and freedom; ← **Suitability**
- (c) the relationship between the limitation and its purpose, including whether the limitation helps to achieve the purpose; ← **Necessity**
- (d) whether there are any less restrictive and reasonably available ways to achieve the purpose;
- (e) the importance of the purpose of the limitation;
- (f) the importance of preserving the human right, taking into account the nature and extent of the limitation on the human right;
- (g) the balance between the matters mentioned in paragraphs (e) and (f). ← **Fair balance**

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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.

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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)).

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Recent cases

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Austin BMI Pty Ltd v Deputy Premier [2023] QSC 95



Representation of a landfill facility

- 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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Austin BMI Pty Ltd—substantive limb

- Freeburn J - compatibility should be considered in 3 stages:
 - Engagement:** A right is 'engaged' if it is relevant – potentially interfered with or promoted.
 - Limitation:** A right is limited if it is restricted or interfered with.
 - Justification:** Limits are justified in accordance with proportionality test in s 13

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***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.

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***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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***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:
 - (a) 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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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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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.

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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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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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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.'

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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.



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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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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'.

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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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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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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.

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Questions?

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