

FACT SHEET:

Conduct of public entities: Proper consideration

Public entities must give proper consideration to relevant human rights when making decisions.¹

The Human Rights Act 2019 says that proper consideration 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.²

Proper consideration requires a decision maker to:

- adopt a common sense and practical approach;
- identify which rights of the person may be affected by the decision;
- seriously consider the impact of the decision on human rights;
- identify countervailing interests or obligations;
- balance competing private and public interests;
- assess compatibility with human rights in accordance with the test under section 13 of the Human Rights Act.

Evidence of proper consideration:

- The public entity must be able to demonstrate proper consideration was given to human rights at the time of making the decision. If written reasons for the decision are given, this might be most easily demonstrated in the reasons for the decision. A person has a right to know what consideration has been given to human rights, both under right to information and information privacy laws, and the right to freedom of expression.
- The standard of consideration required will differ depending on the circumstances. For example, a ministerial decision that will significantly impact a number of people would be expected to be held to a higher standard of consideration than a routine public service officer level decision.
- If human rights were properly considered when a policy or procedure was made, it may be sufficient to properly apply the policy or procedure.

Example: *Owen-D’Arcy v Chief Executive, Queensland Corrective Services* [2021] QCS 273

Mr Owen-D’Arcy was serving life imprisonment. For the past seven years, he had been subject to six-monthly orders which required that he be held in solitary confinement. In making the most recent decision, the decision-maker only referred to Mr OwenD’Arcy’s right to peaceful assembly

and freedom of association. By failing to identify Mr Owen-D'Arcy's right to humane treatment when deprived of liberty, the public entity had failed to properly consider human rights when making the decision.

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

Three groups applied for judicial review of a decision made by Queensland's Deputy Premier to 'call-in' a development application, which meant the Deputy Premier would decide whether to approve the development, instead of going through the usual development application process.

The Deputy Premier expressly referred to a human rights assessment prepared by the department to assist with his proper consideration of human rights. The human rights assessment identified a number of rights that might be affected (but not the right to take part in public life or the right to a fair hearing) and whether the decision would be compatible with those human rights. The Court held that proper consideration had been given by the Deputy Premier because the rights not considered had not been affected by the call-in decision.

Example: *Johnston v Commissioner of Police* [2024] QSC 2

During the COVID-19 pandemic the Queensland Police Service (along with several other agencies and departments) issued directions requiring their staff to receive vaccinations against the virus or risk disciplinary action. Members of the QPS requested the Supreme Court to review the legality of these directions, arguing their human rights had been unreasonably limited by the directions.

The court found that although human rights had not been unjustifiably limited by the directions, the QPS directions were nevertheless unlawful because the Police Commissioner did not give proper consideration to human rights before issuing the directions.

The court was not satisfied the Police Commissioner had considered the human rights compatibility assessments prepared by staff prior to making the Directions, and her oral evidence about her consideration of human rights was, at best, inconclusive.

1. *Human Rights Act 2019* (Qld) s 58(1)(b).

2. *Human Rights Act 2019* s 58(5).