



## Limits on Human Rights (s.28)

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Section 28 of the *Human Rights Act 2004* says that:

- (1) Human rights may be subject only to reasonable limits set by laws that can be demonstrably justified in a free and democratic society.
- (2) In deciding whether a limit is reasonable, all relevant factors must be considered, including the following:
  - (a) The nature of the right affected;
  - (b) The importance of the purpose of the limitation;
  - (c) The nature and extent of the limitation;
  - (d) The relationship between the limitation and its purpose;
  - (e) Any less restrictive means reasonable available to achieve the purpose the limitation seeks to achieve.

*This factsheet is not intended to be a substitute for legal advice.*

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### Proportionality

The rights guaranteed under the HR Act can be limited, but the limitation must be in accordance with section 28. This requires undertaking a proportionality test where the relevant human rights are balanced against each other.

The onus of justifying a limitation imposed on a human right, rests with the party or parties seeking to uphold the limitation.

### Applying the proportionality test

In *In the Matter of an Application for Bail by Isa Islam* [2010] ACTSC 147 (19 November 2010), the ACT Supreme Court held that the ordinary processes of statutory interpretation, including that under section 30 of the *HR Act*, should be applied when interpreting Territory legislation, with the aim of finding a provision that is both human rights-compatible and consistent with purpose, before any attempt is made under section 28 to justify a meaning for the provision that is incompatible with human rights. The Court then set out a four-part test for section 28.

In determining whether a limitation is reasonable, the Court will ask these four questions:

- (a) Is the purpose of the limitation of sufficient importance to warrant overriding the recognised human right (see sections 28(2)(a) and (b) of the Human Rights Act)?
- (b) Is the challenged provision rationally connected to its purpose (see sections 28(2)(c) and (d))? That is, does it achieve the relevant purpose without having an arbitrary or unfair operation and without relying on irrational considerations?

(c) Does the challenged provision limit the human right concerned no more than is reasonably necessary (see section 28(2)(e))?

(d) Is the limit imposed on the human right proportional to the importance of the purpose?

If each of the four questions can be answered “yes”, then the limitation may be found to be justified. However, if any of the questions is answered “no”, then the limitation would generally not be justified.

## Examples

### **Bail Conditions – *R v Wayne Michael Connors* [2012] ACTSC 80**

In this case, Mr Connors alleged that the requirement to submit to urinalysis as part of his bail conditions breached his right to privacy under section 12 of the *HR Act*.

The ACT Supreme Court agreed that there is a danger that the imposition of a requirement to submit to urinalysis would limit Mr Connors’ right to privacy, particularly if enforced aggressively. However, the Court held that the condition was reasonable given its purpose was to facilitate compliance with the law and the primary condition of bail – abstinence from the consumption of illicit drugs: “provided the occasion for potential testing is reasonable and well defined, the fact that it is random is not a valid reason to find such a condition outside the legitimate purpose of supporting a primary condition”. Nevertheless the Court did find that the requirement could be abused. Chief Justice Higgins therefore imposed an ancillary condition, “if so directed in the course of supervision by an officer so authorised by the Director-General”.

### **Freedom of information laws – *Allat & ACT Government Health Directorate (Administrative Review)* [2012] ACAT 67**

In this case, the applicant sought documents held by a Mental Health Clinical Review Committee investigating the death of the applicant’s wife while under the psychiatric care of the Woden Mental Health Team, under Freedom of Information laws. The Tribunal noted that the right to freedom of expression under s 16(2) of the *HR Act* includes a right to seek, receive and impart information. As such, the restriction of documents restrained the applicant’s human rights.

Applying section 28 of the *HR Act*, the Tribunal held that documents identifying the names of the members of the Committee should be released. Although the public release of the names of members of the Committee might cause some detriment to the effectiveness of the quality review process in the ACT Public Health system, any such detriment was outweighed by the substantial public interest in ensuring transparency, accountability and public confidence in those review processes.

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