

Human Rights

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Guide: Developing policy and
legislation that is compatible
with human rights

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Queensland
Government

Guide: Developing legislation that is compatible with human rights

Purpose of this guide

This guide helps policy and legislation officers develop policy and legislation that is compatible with human rights by using a human rights impact assessment framework.

All Government departments and agencies need to consider compatibility with human rights at all stages in the policy and legislation process—from development, through to drafting and introduction, and as part of the Parliamentary process.

If the Government wants to limit human rights, there must be proper consideration and debate at the policy development stage about whether a proposal strikes the right balance between individual rights and the objective the Government is seeking to achieve. A proposal must also strike the right balance between competing rights held by different groups of people.

At the earliest opportunity, any policy and legislative proposals should consider human rights implications. This means considering whether it is likely that one or more of the human rights protected by the *Human Rights Act 2019* (the Act) will be engaged by the proposal; the extent to which those human rights may be limited; and if limited, whether the limitation is reasonable and demonstrably justifiable in a free and democratic society based on human dignity, equality and freedom.

Broadly, this means thinking about:

- how people, including people with different attributes and abilities, will be affected by the proposed legislation;
- whether there are different options for how the law can be drafted (so as to have the least impact on human rights); and
- whether any limitation on the human right is proportionate and reasonable and likely to work (including whether there is any evidence to support this view).

More information about human rights and meeting the obligations under the Act is available at www.forgov.qld.gov.au/humanrights:

- *Guide: Nature and scope of the human rights protected in the Human Rights Act 2019*—this guide provides detailed information about each of the protected human rights.
- *Guide: When human rights may be limited*—this guide provides a list of questions to ask when considering limiting rights under section 13 of the Act.

Background

When the Government is developing policy and legislation, human rights must be actively considered and taken into account. This is about developing fairer policy and legislation that respects rights, and embeds a human rights focus into the core business of government. The purpose of integrating a human rights framework into policy development is to improve government decision-making by ensuring that policy outcomes meet the standards set out in the Act. A human rights impact assessment should be included throughout policy process in, for example, discussion papers, cabinet submissions, and regulatory impact statements.

Section 48 of the Act requires statutory provisions, to the extent possible that is consistent with their purpose, to be interpreted in a way that is compatible with human rights (or in a way that is most compatible with human rights). This applies to all Queensland statutory provisions (including those enacted prior to the commencement of the Act).

The term ‘compatible with human rights’ is defined in section 8 of the Act. A statutory provision will be compatible with human rights if:

- it does not limit a human right; or
- it limits a human right only to the extent that is reasonable and demonstrably justifiable in accordance with section 13 of the Act.

Section 13 of the Act recognises that human rights 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.

All Bills introduced into Parliament must be accompanied by a Statement of Compatibility (SoC) (as per section 38 of the Act). This applies to government Bills and to Private Members’ Bills. Similarly, subordinate legislation must be accompanied by a Human Rights Certificate (HRC) (under section 41 of the Act). Statements and certificates must set out whether the Bill or subordinate legislation is compatible with human rights. It must be a reasoned justification with sufficient detail to demonstrate how any limitation of human rights is proportionate, according to the factors set out in section 13(2) of the Act. These factors are set out in the template for SoC and HRCs (published in the Queensland Cabinet Handbook). **The templates are available at www.forgov.qld.gov.au/human-rights-resources. All statements and certificates must be prepared using the template, including the headings provided.**

The existing Parliamentary Portfolio Committee requirements in respect of scrutiny of legislation are complemented by the Act. In its examination of a Bill, a Parliamentary Portfolio Committee must consider whether the Bill is compatible with human rights and report its findings to Parliament (section 39(a) of the Act). The Parliamentary Portfolio Committee also considers and reports on the SoC (section 39(b) of the Act).

This provides a balanced and transparent mechanism for assessing the human rights impacts of proposed laws, informing parliamentary debate, and facilitating broader public debate about human rights.

Human rights impact assessment

1. Consider whether the proposal engages one or more of the protected human rights

The first step is to consider whether any aspect of the policy or legislative proposal engages any of the human rights protected under the Act.

You should think about whether the proposal impacts or interferes in *some* way on a human right protected by the Act—think about the policy or legislative proposal as a whole, and also about all of the discrete aspects or elements of it. Remember: the impact on a human right does not need to be negative or significant. This is about identifying whether there are any human rights engaged by the statutory provision. A human right might be engaged if it is limited by a proposal, or alternatively if it is protected or promoted by a statutory provision.

The *Guide: Nature and scope of the human rights protected in the Human Rights Act 2019* provides some examples of policy triggers for each of the human rights under the Act.

2. Consider whether the proposal limits any of the identified human rights

The next step is to consider whether the policy or legislative proposal limits, or potentially limits, any of the human rights that you have identified.

You should consider all of the possible impacts of the proposal on the human rights (not only those impacts that are most likely). You should also think about how, and to what extent, the limitation might interfere with the exercise of the right.

Again, the *Guide: Nature and scope of the human rights protected in the Human Rights Act 2019* provides some example policy triggers for each of the human rights under the Act.

If the proposal does not limit a human right, then no further analysis is required.

3. Consider whether the limitation is reasonable and demonstrably justified

The third step is to consider whether the limitation you have identified in step 2 is reasonable and demonstrably justifiable, using section 13 of the Act.

This part of your assessment should be quite rigorous, because this is ultimately what you will use in your SoC (if your proposal involves primary legislation) or HRC (if your proposal involves subordinate

legislation) to explain why your legislation is compatible with human rights (or, why it is not compatible with human rights).

Section 13 of the Act provides a roadmap for determining whether or not a human right is 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.

Section 13 of the Act sets out the factors that may be relevant in deciding whether a limit is reasonable and justifiable. The factors are not exhaustive and are intended to be used as a guide. You should also think about what other factors might be relevant to the assessment of the particular policy or legislative proposal.

You should work through the *Guide: When human rights may be limited* to form a view on whether the limit imposed by the proposal is reasonable and justifiable.

Again, it is important that you identify all of the reasons why the limitation on the human right is justified. These may be extensive.

Are you authorised to limit a human right?

What law or regulation allows you to limit a human right? Section 13 states that a human right *may be subject under law* to reasonable limits that can be demonstrably justified. If you cannot identify a law or regulation, then you may not be able to limit rights.

Be justified and proportionate

Consider the nature and scope of each human right that is engaged by the proposal

This step (set out in section 13(2)(a) of the Act) requires understanding what the right protects, including its underlying values. Copying the text from the relevant section of the Act is insufficient to demonstrate this understanding. Further discussion is required to understand the nature and scope of the right in the specific context of the proposal. Refer to the guide *Nature and scope of the human rights protected in the Human Rights Act 2019* for more information and resources (available at www.forgov.qld.gov.au/humanrights).

What is the purpose of the right and what does it seek to protect? What are the values that underpin it? Is the right broad and overarching (such as the right to recognition and equality before the law under section 15 of the Act, which permeates across all other human rights) or narrow and specific (such as the rights in criminal proceedings under section 32 of the Act)?

What is the right's status at international law? For example, is it an absolute or non-derogable right? Generally, international human rights law recognises that few rights are absolute and reasonable limits may be placed on most rights and freedoms. Certain rights, however, are considered absolute, meaning they cannot be limited for any reason. Under international law, non-derogable rights cannot be suspended or restricted, even during a declared state of emergency.

Are there any internal limitations or qualifications that appear in the section providing for the right? Some of the rights as they appear in the Act are limited by certain words or phrases. Internal qualifiers (or modifiers) help us understand when a human right is engaged. They make up part of the scope or definition of the right. For example, s18(3)—*the right to freedom from forced work*—includes examples of things that are not forced or compulsory labour when you are thinking about the right to freedom from forced work.

In contrast, internal limitations help us to understand when it is justifiable to limit a human right. For example, s30(2)—*the right to humane treatment when deprived of liberty*—gives a detained person who has been charged but not convicted a right to be separated from a detained person who has been convicted unless “reasonably necessary”. The internal limitation in s30(2) provides some criteria for deciding whether the limitation can be justified (when it is “reasonably necessary”).

The concept of arbitrariness is also an internal limitation. For example, s16—*the right to life*—says that every person has the right not to be *arbitrarily* deprived of life. Case authority suggests that ‘arbitrary’ in the human rights context refers to conduct that is capricious, unpredictable or unjust, and also refers to interferences which are unreasonable in the sense of not being proportionate to a legitimate aim that is sought.

If a right is particularly strong (for example, a non-derogable right under international law), then limiting the right will require strong justification, following the steps outlined below.

The *Guide: Nature and scope of the human rights protected in the Human Rights Act 2019* provides some further information and guidance about the nature of the human rights protected under the Act and also indicates whether there is any inbuilt, internal limitation that confines the right in some way.

Is the purpose of imposing the limitation consistent with the values of a free and democratic society?

What is the purpose of the limit? Is the purpose consistent with the values of a free and democratic society? For example, does it address a specific area of public or social concern that is pressing and substantial? Is it sufficiently important to justify the limit? Does the purpose protect other rights? For example, sometimes one person’s right to freedom of expression may be limited to protect another person from experiencing discrimination (protecting their right to recognition and equality before the law).

Limiting some rights will require more justification than others. For example, limitations on freedom of expression will be easier to justify than limitations on the right to be free from torture, which is an absolute right under international law.

Is there a relationship between the law imposing the limit on the human right and the purpose of the limit? If so, does the limit help achieve the purpose?

Is what you are proposing to do tailored to achieve your purpose? The limit does not need to completely achieve its purpose or be the best way of achieving its purpose.

For example, a prohibition on the right to peaceful assembly where the peaceful assembly is in a duck shooting area would have a rational relationship/connection with, and advance the purpose of, public safety.

If relevant, is there any research or evidence to support limiting the right? For example, have these measures been trialled in other jurisdictions and shown to achieve the purpose?

Is there a less restrictive and reasonably available way to achieve the purpose?

Is the limitation necessary? Is there any obvious and compelling alternative way to achieve the same purpose and which impacts less on the right?

Is there material/evidence available to support this? You should identify material that demonstrates this, such as research findings, consultation findings, reviews and empirical data.

Can you achieve the same purpose in more than one way? If so, do other options have less impact on human rights?

Are there any safeguards that could be included to minimise the limitation on rights? For example, a law that collects personal information for a specific purpose will limit a person's right to privacy. Safeguards could include ensuring the law does not allow the information to be used for any other purposes, or by other people or organisations.

If there is another available way that the purpose of the limitation can be achieved that would have a lesser (negative) impact on the human right, then the limit is likely to be deemed to be unreasonable. Only a measure that would achieve the same purpose as effectively as the proposal will qualify as a true alternative.

The balancing exercise

This involves **weighing up the benefits gained from achieving your proper purpose against the harm caused to the human right** from achieving that purpose.

Does the measure strike a fair balance between the benefits gained by the public and the harm caused to the right through the use of the means selected by law to achieve the proper purpose?

This is a value judgment which needs to be guided by a balancing of the considerations in sections 13(e) and (f) of the Act:

First: consider the positive aspects of the limitation: what is the social importance of achieving the purpose of the limitation?

Second: consider the negative aspects of the limitation: what is the nature and extent of the limitation on the human right? What is the social importance of preserving the human right?

Third: weigh up the positive and negative aspects. Does the importance of achieving the purpose outweigh the harm it does to the human right?

The more important the right and the greater the incursion on the right, the more important the purpose will need to be to justify the limitation. For example, limitations upon very strong human rights that have non-derogable status under international law, like the freedom from torture, will be very difficult, if not impossible, to justify.

4. Conclude whether or not the proposal is compatible with human rights

If the limitation is reasonable and demonstrably justifiable in accordance with section 13 of the Act, then the proposal is compatible with human rights.

If the limitation or restriction is not reasonable and demonstrably justifiable under section 13 of the Act, then you should consider how you might modify the proposal so that it is compatible with human rights.

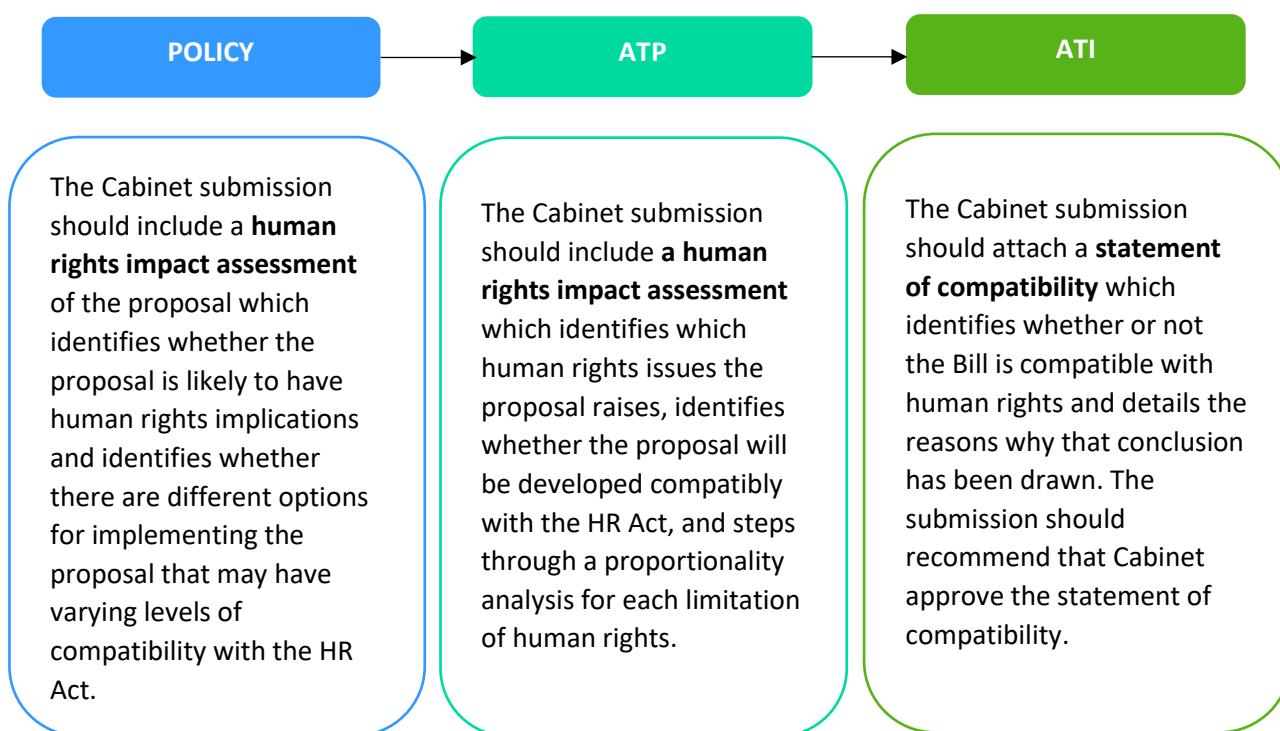
Templates and guides

The Cabinet Handbook notes that Cabinet submissions must include an assessment of the effect of the proposal on human rights. These are known as a Human Rights Impact Assessment and they provide a common framework in the policy development process to ensure that human rights are considered and assessed.

The diagram below includes some information as to what each submission, depending on its stage in the Cabinet cycle, requires.

There is a suggested template for a **Human Rights Impact Assessment** at **Appendix 1**. It is also available as an editable MS Word document under the heading 'Templates' on the [Resources page on the Human Rights Portal](#).

The templates that must be used for a **Statement of Compatibility** or a **Human Rights Certificate** are contained in the **Cabinet Handbook** and also are available at <https://www.forgov.qld.gov.au/human-rights-resources#templates>



Appendix 1: Human Rights Impact Assessment template

Below is a **standard template** that may be used for Human Rights Impact Assessments for Cabinet submissions. This is also available as an editable MS Word document under the heading ‘Templates’ on the [Resources page on the Human Rights Portal](#).

The **green** text should be adapted/alterd as necessary to suit the type of submission you are preparing (ie, a policy submission, an Authority to Prepare [ATP] submission, or a combined policy/ATP submission). You may need more or less ‘Proposal’ headings depending on how many discrete elements of your proposal there are.

HUMAN RIGHTS IMPACT ASSESSMENT

Overview

Cabinet is being asked to give [policy OR ATP or policy/ATP] approval for [insert detail/snapshot of proposal/s]. [DEPARTMENT NAME] has considered whether or not these proposals are anticipated to be compatible with the *Human Rights At 2019* (HR Act).

If policy submission: [DEPARTMENT NAME] notes that this assessment is based on the current policy that underpins the proposal, and that as the policy develops human rights limitations may become clearer or further limitations may arise. Cabinet will be provided with a more detailed and fulsome human rights impact assessment at ATP [include this only for legislative proposals].

If policy/ATP or ATP submission: [DEPARTMENT NAME] notes that this assessment is based on the current drafting instructions for the proposed amendments, and that there may be variations or changes to the proposals that occur between [policy/ATP or ATP] and ATI. Cabinet will be updated on any changes and the impact of those on the compatibility of the proposals with the HR Act, and a Statement of Compatibility will accompany the ATI submission.

Proposal 1: heading

[Insert brief overview of proposal].

Human rights that are limited by the proposal

[List the human rights under the HR Act that are limited by the proposal, including a brief discussion of the nature and scope of each of the protected rights and a clear explanation of how they are impacted by the proposal. It is important to begin the analysis by considering the nature of the human right at the outset because it helps to identify what it is that is being limited.

An example of how this can be set out is:

The right to privacy and reputation protects [summary of the relevant scope/part of the right]. The measure/provision/Bill limits this right by [describe how the right is being limited].]

It is not appropriate to equivocate about whether or not there is a limit on a right, unless there is a reasonable debate that the right is not limited by a measure, provision or Bill. An example of this reasonable debate is in relation to whether or not voluntary assisted dying measures limit the right to life. If there is some doubt about whether a measure limits a human right or not, it should be assumed that there is a limit and you should proceed to the justification stage of the analysis below.]

Whether or not the limitation on human rights is reasonable and demonstrably justifiable

The purpose of the limitation

[Outline the purpose of the proposal and the limitation on human rights. The purpose is a statement of why you are wanting to legislate the measure/provision/Bill in a way that will limit human rights.

Attention must be directed to the nature of the relevant purpose, not the limitation. As with the nature of the right, it is the underlying values and interests of the purpose that are the focus. Do not simply state what the proposed amendment will do, explain why it needs to do that and what it is intended to achieve.

Importantly, the purpose must be a proper purpose. A purpose will only be a proper purpose if it is consistent with a free and democratic society based on human dignity, equality and freedom. That is, a purpose will be proper if it accords with the basic values of society.

This means that not every purpose can justify a limitation on a human right. You need to consider whether the purpose of the limitation is sufficiently important to justify limiting a right.

Examples of proper purposes include: the protection of the human rights of others; and general public interest considerations (such as the protection of the democratic nature of the society, or the protection of community safety). Examples of improper purposes, that will not justify limiting a human right, might include: where the only purpose of a measure is to limit a human right; or discrimination for the sake of discrimination.]

Whether the limitation will achieve the purpose

[Does the limitation help to achieve the purpose and does the limitation fit or suit the purpose it is designed to achieve? That is, do the means further the proper purpose in some way, or does it go some way towards realising or advancing the proper purpose? Explain this, using evidence or empirical data to demonstrate to support the conclusion where possible (for example, have these measures been trialled in other jurisdictions and shown to achieve the purpose?).]

If there is competing, unclear or inconclusive evidence, this should be explicitly discussed and accompanied by a justification for why the limitation should still be pursued.]

Less restrictive, reasonably available alternatives

[Is this the only way to achieve the purpose of the limitation? Are there other ways of achieving the proper purpose just as effectively, but in a way that limits human rights to a lesser degree (ie, the measure is less restrictive)?

Is the limitation necessary? Is there any obvious and compelling alternative way to achieve the same purpose and which impacts less on the right? If such an alternative exists, then it cannot be said that the means selected are necessary.

Importantly, an alternative measure will only ‘achieve the purpose’ if it does so ‘as effectively’ and to the same extent. If a measure achieves the proper purpose to a lesser extent, it will not qualify as a true alternative.

Explain alternatives that have been considered and why those alternatives:

- would not achieve the purpose identified above; and/or
- are not reasonably available; and/or
- are not a less restrictive (on human rights) way to achieve the purpose identified.

Discuss any safeguards that have been included to ameliorate the impact of the limitation on the human right/s. For example, safeguards might include (depending on the nature of the measure): narrowing the scope of the measure so that it is tailored; ensuring that only appropriately qualified persons are able to make decisions or exercise powers; restricting access to information or data; ensuring appropriate record keeping mechanisms; and ensuring proper oversight, accountability or review mechanisms.

If the purpose of the limitation can be achieved in another way, that is reasonably available and which would result in a lesser negative impact on the human right, then the limit is likely to be disproportionate and incompatible with the Human Rights Act 2019. It is important to discuss why the alternatives are either not reasonably available or would not achieve the purpose as effectively as the proposal.]

Fair balance

[Weigh up the benefits gained by the public from the proposal against the harm that is caused to the human rights. Consider whether the measure strikes a fair balance between the benefits gained by the public by fulfilling the purpose of the limitation, and the harm caused to the human right through the use of the means selected to achieve that purpose.

This comparison considers whether the limiting law strikes a fair balance. The more important the right and the greater the incursion on the right, the more important the purpose of the law will need to be to justify the limitation.]

Proposal 2: heading

[Insert brief overview of proposal].

Human rights that are limited by the proposal

[List the human rights under the HR Act that are limited by the proposal, including a brief discussion of the nature and scope of each of the protected rights and a clear explanation of how they are impacted by the proposal. It is important to begin the analysis by considering the nature of the human right at the outset because it helps to identify what it is that is being limited.

An example of how this can be set out is:

The right to privacy and reputation protects [summary of the relevant scope/part of the right]. The measure/provision/Bill limits this right by [describe how the right is being limited].]

It is not appropriate to equivocate about whether or not there is a limit on a right, unless there is a reasonable debate that the right is not limited by a measure, provision or Bill. An example of this reasonable debate is in relation to whether or not voluntary assisted dying measures limit the right to life. If there is some doubt about whether a measure limits a human right or not, it should be assumed that there is a limit and you should proceed to the justification stage of the analysis below.]

Whether or not the limitation on human rights is reasonable and demonstrably justifiable

The purpose of the limitation

[Outline the purpose of the proposal and the limitation on human rights. The purpose is a statement of why you are wanting to legislate the measure/provision/Bill in a way that will limit human rights.

Attention must be directed to the nature of the relevant purpose, not the limitation. As with the nature of the right, it is the underlying values and interests of the purpose that are the focus. Do not simply state what the proposed amendment will do, explain why it needs to do that and what it is intended to achieve.

Importantly, the purpose must be a proper purpose. A purpose will only be a proper purpose if it is consistent with a free and democratic society based on human dignity, equality and freedom. That is, a purpose will be proper if it accords with the basic values of society.

This means that not every purpose can justify a limitation on a human right. You need to consider whether the purpose of the limitation is sufficiently important to justify limiting a right.

Examples of proper purposes include: the protection of the human rights of others; and general public interest considerations (such as the protection of the democratic nature of the society, or the protection of community safety). Examples of improper purposes, that will not justify limiting a human right, might include: where the only purpose of a measure is to limit a human right; or discrimination for the sake of discrimination.]

Whether the limitation will achieve the purpose

[Does the limitation help to achieve the purpose and does the limitation fit or suit the purpose it is designed to achieve? That is, do the means further the proper purpose in some way, or does

it go some way towards realising or advancing the proper purpose? Explain this, using evidence or empirical data to demonstrate to support the conclusion where possible (for example, have these measures been trialled in other jurisdictions and shown to achieve the purpose?).

If there is competing, unclear or inconclusive evidence, this should be explicitly discussed and accompanied by a justification for why the limitation should still be pursued.]

Less restrictive, reasonably available alternatives

[Is this the only way to achieve the purpose of the limitation? Are there other ways of achieving the proper purpose just as effectively, but in a way that limits human rights to a lesser degree (ie, the measure is less restrictive)?

Is the limitation necessary? Is there any obvious and compelling alternative way to achieve the same purpose and which impacts less on the right? If such an alternative exists, then it cannot be said that the means selected are necessary.

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Explain alternatives that have been considered and why those alternatives:

- would not achieve the purpose identified above; and/or
- are not reasonably available; and/or
- are not a less restrictive (on human rights) way to achieve the purpose identified.

Discuss any safeguards that have been included to ameliorate the impact of the limitation on the human right/s. For example, safeguards might include (depending on the nature of the measure): narrowing the scope of the measure so that it is tailored; ensuring that only appropriately qualified persons are able to make decisions or exercise powers; restricting access to information or data; ensuring appropriate record keeping mechanisms; and ensuring proper oversight, accountability or review mechanisms.

If the purpose of the limitation can be achieved in another way, that is reasonably available and which would result in a lesser negative impact on the human right, then the limit is likely to be disproportionate and incompatible with the Human Rights Act 2019. It is important to discuss why the alternatives are either not reasonably available or would not achieve the purpose as effectively as the proposal.]

Fair balance

[Weigh up the benefits gained by the public from the proposal against the harm that is caused to the human rights. Consider whether the measure strikes a fair balance between the benefits gained by the public by fulfilling the purpose of the limitation, and the harm caused to the human right through the use of the means selected to achieve that purpose.

This comparison considers whether the limiting law strikes a fair balance. The more important the right and the greater the incursion on the right, the more important the purpose of the law will need to be to justify the limitation.]