

Human Rights

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Guide: Reviewing
legislation for compatibility
with human rights

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Queensland
Government

Guide: Reviewing existing legislation for compatibility with human rights

Background

Section 48 of the *Human Rights Act 2019* (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).

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 are not absolute, and they 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.

Section 13 sets out the factors (in a non-exhaustive list) that may be relevant in deciding whether a limit on a human right is reasonable and justified. The factors include the nature of the human right, the purpose of the limitation, and whether there is a less restrictive and reasonably available way to achieve the purpose of the limitation.

Where a statutory provision is considered likely to be interpreted as incompatible with human rights, consideration will need to be given to the risk of that incompatibility and whether the provision should be amended to increase compatibility with human rights.

Importantly, section 48 of the Act does not affect the validity of a statutory provision that is not compatible with human rights. This means that even if a provision is determined by a court or tribunal to be incompatible with human rights, the provision is not invalidated. Ultimately, if the matter is before the Supreme Court, or is referred to the Supreme Court, the Supreme Court may exercise its discretion to issue a declaration of incompatibility.

Purpose of this guide

All Government departments and agencies will need to examine the existing legislation within their portfolios (including primary and subordinate legislation) and assess their compatibility with human rights under the Act.

This guide is intended to assist policy and legislation officers in undertaking this process.

Broadly, it is recommended that the legislative review is conducted as a three stage process:

Stage 1: Identification

Identify statutory provisions within the legislation that engage or limit human rights

Stage 2: Legislative analysis

Assess the compatibility of those provisions with human rights under the Act

Stage 3: Policy analysis

Consider competing policy issues and categorise any provisions that are potentially incompatible with human rights as high, medium or low priority for amendment

Appendix A provides a table that can guide the process for working through each stage of the review. It is very important to ensure that your justification and reasoning is documented through this process.

Associated guides available at www.forgov.qld.gov.au/humanrights:

- *Guide: Nature and scope of the protected rights*
- *Guide: Section 13 analysis*

How to review legislation

Stage 1: Identification of statutory provisions and relevant human rights

This is the beginning of your review process. This is where you will do your preliminary analysis of a piece of legislation, and pick out what might be the ‘problem provisions’ that require further analysis.

Consider the Act or Regulation as a whole

Look at the legislation holistically. Think about the purpose or objectives of the legislation and what it is trying to achieve.

Ask:

- What is the purpose of the legislation?
- What do the Explanatory Notes say (pay particular attention to the fundamental legislative principle section)?
- Does Victoria have equivalent legislation?
 - If so, have any amendments been made to increase compatibility with human rights?
 - If the Victorian legislation was passed after 2007 (commencement of the Victorian Charter), is there a statement of compatibility that can be considered?
- Is there any relevant case law?

Identify statutory provisions that engage a human right

Review each of the statutory provisions and identify the ones that engage a human right.

Ask:

- Does the provision impact in some way on a human right protected by the Act?
- Remember: the impact does not need to be negative or significant. This is about identifying whether there are any human rights impacted by the statutory provision.

The *Guide: Nature and scope of the protected rights* sets out some examples of when each human right in the Act may be engaged by a statutory provision.

A human right might be engaged if it is limited by a statutory provision, or alternatively if it is protected or promoted by a statutory provision.

Identify the human rights engaged and whether or not they are limited

For the statutory provisions you have identified as engaging human rights, you now need to consider exactly which human right/s are engaged and whether or not the statutory provision is limiting those right/s.

This step requires an understanding of the nature and scope of the right in order to assess whether there is potential for the right to be limited. The *Guide: Nature and scope of the protected rights* provides some guidance about the human rights protected under the Act.

Ask:

- Does the statutory provision limit or potentially limit the human right? If so, in what way is the human right limited or potentially limited?

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

Stage 2: Legislative analysis

This part of the review process should be quite rigorous. It is where you will apply the test set out in section 13 of the Act to determine whether a limitation on a human right imposed by a statutory provision is reasonable and demonstrably justifiable.

You might find it useful to look at the Explanatory Notes that were prepared for the statutory provision. If there was consideration of possible breaches of fundamental legislative principles, the same or similar considerations can be used to determine whether a limit on a human right is reasonable and demonstrably justifiable.

Section 13 analysis

Section 13 of the Act provides that 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.

Section 13 of the Act also 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 be thinking about what other factors might be relevant to the assessment of a particular statutory provision.

You should work through the *Guide: Section 13 analysis* to form a view on whether the limit imposed by the statutory provision is likely to be considered reasonable and justifiable, and therefore compatible with human rights.

If there is a limit on a human right imposed by a statutory provision, but the limit is considered reasonable and demonstrably justified, the rationale should be documented.

Stage 3: Policy analysis

If you have found a statutory provision and the outcome of your legislative analysis in stage 2 is that the provision limits a human right/s, and the limit is not reasonable and demonstrably justifiable, then the next thing you need to consider is your policy analysis.

It is important to remember that even where a statutory provision is incompatible with human rights, there may be competing policy interests that impact on whether any legislative amendment should be made to the provision.

For example, you might consider whether there is a strong policy justification for progressing or not progressing an amendment. You might also consider the history of the statutory provision – was there a recent inquiry or review of the legislation, or is it part of an Act that has been sitting on the statute books for a long period of time without review?

You should also consider the *Our Future State: Advancing Queensland's Priorities* plan and consider how an amendment would meet the government's objectives for the community. Objectives of particular relevance might be:

- *Give all our children a great start* (increase the number of babies born healthier, increase childhood immunisation rates, improve wellbeing prior to school)
- *Keep Queenslanders healthy* (increase the number of Queenslanders with a healthy body weight, reduce suicides)
- *Keep communities safe* (reduce the rate of crime victims, reduce rates of youth reoffending)
- *Be a responsive government* (make Queensland Government services easy to use)

At this stage you are asked to categorise the legislative provision as either high, medium or low priority, using a priority assessment table tool (provided below).

The priority assessment table tool provides some examples of factors to consider in prioritising the provision. You are encouraged to consider any other factors that are specific to your agency (something that might be a high priority factor for one agency, might be a medium or low priority factor for another, depending on the nature of the legislation and other circumstances).

PRIORITY	RELEVANT FACTORS
High	<ul style="list-style-type: none"> • Significant impact on personal rights that are non-derogable at international law (such as the protection from torture) • Provision is the subject of significant litigation already (and human rights incompatibility may increase this) • Provision has already been identified by the courts as incompatible with human rights (either common law rights or human rights legislation in other jurisdictions such as Victoria and the ACT) • Provision is not clear in its effect • Significant impact on the individuals impacted by the functions of the agency/legislation • No safeguards built into the provision (explicit criteria, procedural fairness, merits-based appeal rights) • Provision is already the subject of significant stakeholder concern • Provision contains a power that is frequently exercised
Medium	<ul style="list-style-type: none"> • Provision is likely to give rise to litigation, but it is more likely than not that the limits on the right will be considered reasonable and justifiable

	<ul style="list-style-type: none">• Amendments to the provision to ensure compatibility with human rights are relatively minor• Moderate impact on the individuals impacted by the functions of the agency/legislation
Low	<ul style="list-style-type: none">• Strong policy justification for the potentially incompatible provision• Safeguards are built into the provision (explicit criteria, procedural fairness, merits-based appeal rights)• Provision is clear in its effect• Appropriately robust policy and procedures that relate to the provision (internal operational safeguards)• Provision has a minimal impact on the individuals impacted by the functions of the agency/legislation• Provision contains a power that is rarely exercised• Provision is not the subject of significant litigation

Again, documenting your findings and reasoning is critical.

Outcome: Does the statutory provision require amendment?

If the limit on the human right is not reasonable and demonstrably justifiable (stage 2) and there is a strong policy justification for progressing a statutory amendment to address compatibility issues (stage 3), document this finding.

Refer consideration of possible amendments to the provision to the Human Rights Unit (DJAG) for consultation and discussion.

Appendix A: Legislation review assessment table

Legislation				
Purpose				
Provision	Stage 1: Identification	Stage 2: Legislative Analysis	Stage 3: Policy Analysis	Outcome
Section	Is a human right engaged or limited by the section? How?	Is any limit reasonable and demonstrably justifiable? How?	Is an amendment a high, medium or low priority?	Is an amendment to the provision required and desirable? If so, how should the provision be amended?

For more human rights information and employee resources visit www.forgov.qld.gov.au/humanrights