

Human Rights

Respect · protect · promote

Human rights guide

Obligations under section 58 of the
Human Rights Act 2019



Queensland
Government

Disclaimer

© The State of Queensland (Department of Justice and Attorney-General) (DJAG) 2023.

The Queensland Government supports and encourages the distribution of its material.

The copyright in this publication is licensed under a Creative Commons Attribution 4.0 International licence (CC BY 4.0). You are free to use copyright material owned by the Department of Justice and Attorney-General in this publication in line with the licence terms. You must keep the copyright notice on the copyright material and attribute the State of Queensland, Department of Justice and Attorney-General as the source of the copyright material.

This document is intended as a guide for information purposes only, and should not be used as a substitute for obtaining appropriate legal advice. All the scenarios used in this guide are hypothetical and are for training purposes only.

In preparing this document, reasonable efforts have been made to use accurate and current information. It should be noted that information may have changed since the publication of this document. Where errors or inaccuracies are brought to the attention of the Department of Justice and Attorney-General, a reasonable effort will be made to correct them. The Department of Justice and Attorney-General disclaims, to the maximum extent permitted by law, all responsibility and all liability (including without limitation, liability in negligence) for all expenses, losses, damages, and costs that any person might incur for any reason including as a result of the information in this document being in any way inaccurate, incomplete, not up to date or unsuitable for any purpose.

What is the purpose of this document?

The Human Rights Unit (HRU), in the Department of Justice and Attorney-General, has developed this document to help you understand the obligations on decision makers under section 58 of the [Human Rights Act 2019](#) (HR Act). It has been designed for:

- **decision makers** to ensure they meet their obligations
- **officers tasked with briefing decision-makers** so they can provide enough information to decision-makers to ensure they fulfil their obligations.

What does section 58 say?

Section 58(1) of the HR Act requires public entities to:

- act and make decisions in a way that is compatible with human rights; and
- properly consider human rights when making a decision.

This means that anyone who has decision-making power under an Act or who has a delegated decision-making power is required to meet these obligations. This could include anyone from a Minister or Director-General to a human-resources or procurement delegate.

What am I required to do?

If you are a **decision-maker**, you must ensure that you meet the obligations under section 58.

If you are **briefing a decision-maker**, you must provide them with sufficient information to enable them to meet these obligations.

In both cases, this means that you need to:

- consider whether the proposed decision or action is compatible with human rights for the purposes of the HR Act
- keep a record of your thought process so that you can prove that proper consideration was

given to human rights in the decision-making process.

This can be done in the form of a **Human Rights Impact Assessment (HRIA)**.

What do I need to turn my mind to?

When determining whether the proposed decision or action is compatible with human rights, ask yourself the following questions in the context of the decision or action that the decision-maker is being asked to do:

1. What human rights are relevant to the decision?
2. Are any human rights being limited by the decision?
3. If human rights are being limited, are the limitations reasonable and justifiable?



Identifying relevant rights

The first step is to identify the rights that are relevant to, or engaged by, the decision.



Think about what the consequences and flow-on effects of the proposed decision or action might be, and how those consequences might interact with the rights protected under the HR Act.

Remember that each of the rights in the HR Act are usually construed broadly. You may wish to consult the following resources for more information about each of the rights:

- [Guide: Nature and Scope of the human rights protected in the *Human Rights Act 2019*](#)
- [Guide to human rights research](#)

Identifying limits on human rights

Section 8 of the HR Act provides that an act or decision is '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.

A limitation on a human right will occur when the act, decision or statutory provision places limitations or restrictions on, or interferes with, the human rights of a person.

Given the nature of public decision making, it is very likely that human rights will be engaged and limited in some way for any given act or decision.

Some rights in the HR Act are articulated in such a way that they will only be limited (within the meaning of section 8) if they are arbitrarily interfered with. An arbitrary limitation is one that is capricious, unpredictable, unjust or unreasonable, in other words, one that is unjustified. This means that if you identify that a proposed act or decision limits one of these rights, you must justify the limit in order to establish whether or not it limits the right.

Justifying a limit on human rights

Section 13 of the HR Act provides the framework for justifying human rights. It requires that any limit on human rights:

- is only permissible if there is a legal basis for the action or decision that limits human rights
- must be justified according to the framework set out in section 13(2).

The framework under section 13(2) requires you to:

- Consider the nature of the right/s being limited.
 - ◇ What does the right protect and how does the proposed act or decision limit this protection?
- State the purpose for limiting the human right/s.
 - ◇ What is the reason for the proposed act or decision?
- Show that limiting the human right will help you achieve your purpose.
 - ◇ Will the proposed act or decision advance the purpose in some way? Is there any evidence to support this?
- Discuss whether there are any less restrictive and reasonably available alternatives.
 - ◇ Are you able to achieve your purpose as effectively without limiting human rights? Or by limiting rights to a lesser extent?
 - ◇ Does the proposed act or decision only limit rights as far as necessary to achieve the purpose?
- Balance the importance of achieving your purpose against the importance of upholding the human right.
 - ◇ On balance, which is more important: achieving your purpose or protecting the limited rights? Why have you come to this conclusion?

You can find more information in our [When human rights may be limited guide](#).

What do I need to include in my brief/memo?

Most whole-of-government brief and memo templates include a HRIA section. If your current agency brief/memo template doesn't include a HRIA, you can access a template on the [Human Rights Portal](#).

How much information you need to include in this section will depend on the nature of the act or decision. For instance, more detailed consideration of human rights will be required where:

- the extent of the impact on human rights is significant
- many people are impacted
- the people impacted are vulnerable e.g. children, migrants, refugees, people in custody, or people with disabilities
- there is adequate time available to give proper consideration
- you have sought and received detailed legal advice about the act or decision's compatibility with human rights.

If no rights are limited

The act or decision being sought via the brief/memo will be compatible with human rights, and you can simply state this.

If human rights will be limited by the act or decision

If you have determined that the proposed action or decision limits human rights, you will need to consider whether the limitation is reasonable and justifiable. If the limitations are justifiable, the act or decision will be compatible with human rights.



Human Rights Impact Assessment wording

The below prompts are designed to help you develop your brief/memo and draft your HRIA.

Prompt: if no rights are being limited

Section 58(1) of the *Human Rights Act 2019* requires you to act and make decisions compatibly with human rights, and when making a decision to properly consider human rights relevant to a decision.

There are no rights limited by the [decision/action] you are being asked to [make/take], and therefore it is compatible with human rights.

Prompt: if no rights are being limited

Section 58(1) of the *Human Rights Act 2019* (HR Act) requires you to act and make decisions compatibly with human rights, and when making a decision to properly consider human rights relevant to a decision.

You are being asked to [take/make decision/action]. This decision engages the following rights protected under the HR Act:

- [list relevant rights]

[For each right limited or interfered with:]

The right to [insert right] protects [provide a summary of the part of the right that will be limited]. The right will be limited by [state how the rights will be limited by the decision].

The purpose of limiting this right is to [state the purpose you are wanting to achieve]. Limiting the right will help achieve this purpose [explain how the limitation helps achieve the purpose, providing evidence where appropriate].

There are no less restrictive and reasonably available ways to achieve the purpose. [Outline any other options considered and why they are not being recommended. Also provide any information about safeguards that are in place to lessen the impact of the proposal].

On one side of the scales is the [explain your purpose and why your purpose is important]. On the other side of the scales is the [identify the limitation, and explain how it could impact an individual].

On balance, the importance of [insert the purpose of the act or decision here] outweighs the limit on [identify the limited right].

Hypothetical scenarios

The following scenarios are designed to help you understand how to conduct a HRIA across a range of government operations. All the scenarios used in this guide are hypothetical and are for training purposes only.

Scenario 1: Recruitment of a new Administration Officer

Your agency is considering recruiting an Ao4 Administration Officer.

The proposed role description includes:

- The location of work is the departmental office in Brisbane.
- The basis of employment is full-time, but flexible working arrangements can be negotiated if required.
- Criminal history checks will be undertaken on shortlisted applicants.

Some of the duties of the Administration Officer will include front desk responsibilities including providing advice and assistance to members of the public and directing inquiries, as well as processing invoices, providing procurement assistance, preparing correspondence, reconciliations, journals and reports, financial management and bookkeeping.

The Administration Officer will be working in a team that often deals with sensitive information, and will have access to government information databases that contain sensitive and/or personal information relating to members of the public.

You need to progress a brief to your Director-General to enable them to decide whether or not to approve the proposed role description and commence the recruitment process. As part of your brief, you should include a human rights impact assessment as to whether the proposed role requirements are compatible with human rights.

Example human rights impact analysis

Section 58(1) of the *Human Rights Act 2019* (HR Act) requires you to act and make decisions compatibly with human rights, and when making a decision to properly consider human rights relevant to a decision.

You are being asked to approve the recruitment of an Ao4 Administration Officer. The role requirements include that the meritorious candidate must undergo a criminal history check and have no relevant criminal convictions. The role is full-time, with the option to negotiate flexible working arrangements. The role involves contact with the public and will have access to government information databases that contain sensitive and/or personal information relating to members of the public. The role also involves procurement and financial-handling responsibilities.

This decision engages the following rights protected under the HR Act:

- The right to privacy and reputation (section 25).
- The right to equality before the law (section 15).
- The right of access, on general terms of equality, to the public service (section 23(2)(b)).

The right to privacy and reputation protects a person's right not to have their privacy, family, home or correspondence unlawfully or arbitrarily interfered with. An arbitrary interference is one that is capricious, unpredictable, unjust or unreasonable.

Example human rights impact analysis — continues

While recent convictions are a matter of public record, warnings and spent convictions may be considered to be private. The proposed recruitment interferes with the right to privacy by requiring shortlisted candidates to provide access to private information in their criminal history. Whether this interference amounts to a 'limit' on the right to privacy within the meaning of section 8 of the HR Act will depend upon whether the interference is justified.

The right to equality before the law protects against discrimination on the basis of a protected attribute under the *Anti-Discrimination Act 1991* (AD Act). As the HR Act does not define 'discrimination' in an exhaustive way, it may also protect against discrimination on the basis of additional characteristics not listed in the AD Act, such as on the basis of an irrelevant criminal history. Similarly, the right to have access, on general terms of equality, to the public service, protects against monopolisation of the composition of the public service through discriminatory hiring practices. These rights are to be construed broadly, and any differential treatment on the basis of a protected attribute amounts to a limit on these rights that must be justified in order to be compatible with human rights. The proposed role requirements limit these rights in the following ways:

- The fact that the role is full-time may exclude candidates with a protected attribute, such as a disability or parental or family and carer responsibilities, who cannot meet this requirement; and
- The fact shortlisted candidates must undergo and pass a criminal history check may amount to discrimination if a candidate is rejected on the basis of a criminal history which is irrelevant to the genuine occupational requirements of the job.

Limitations relating to the criminal history check

The purpose for limiting the right to privacy and the rights to equality before the law and equal access to the public service is to ensure that any prospective candidate is suited to the responsibilities of the role.

The limits help to achieve this purpose by ensuring that candidates who have a history of criminal conduct that may indicate they are not well suited to interacting with members of the public, or are not well suited to be placed in a position of responsibility with respect to private or sensitive information and/or procurement and financial responsibilities can be identified, and any risks associated with that history can be assessed.

While it would be less restrictive on human rights not to require a criminal history check, this would not be as effective at achieving the purpose. Accordingly, there is no less restrictive and reasonably available way to achieve the purpose.

The limit on human rights goes no further than necessary to achieve the purpose. The criminal history check will be undertaken with the consent of shortlisted candidates, and the position description details that successfully undertaking a criminal history check is a requirement to be appointed to the role. Not all offences will preclude a person's ability to be hired into the Queensland public sector, and the final determination about which candidate is successful will be made on the relevance of any criminal history to the ability to undertake the inherent requirements of the role. There is no alternative way of obtaining the information which is relevant to assessing an applicant's suitability without limiting an applicant's right to privacy through the disclosure of their criminal history.

On one side of the scales is the need to ensure that any prospective candidate is suited to the responsibilities of the role. On the other side of the scales is the need to protect an individual's right to privacy, equality before the law and equal access to the public service.

Example human rights impact analysis — continues

On balance, the importance of ensuring that any prospective candidate is suited to the responsibilities of the role outweighs the interference with the applicant's human rights.

Limits relating to the full-time requirements of the role

The purpose of requiring the successful candidate to be able to work full time is to ensure that any prospective candidate is suited to the responsibilities of the role. The limits help to achieve this purpose because the workload associated with the AO4 role and the nature of the work undertaken (such as interacting with the public) necessitate that the successful candidate be available to work on a full-time basis.

While it would be less restrictive on the right equality before the law and the right of equal access to the public service to advertise a part-time position, this would not be as effective at achieving the purpose. Accordingly, there is no less restrictive and reasonably available way to achieve the purpose.

The limit on human rights goes no further than necessary to achieve the purpose. Where a candidate with a protected attribute is able to meet the full-time requirements of the role but requires reasonable accommodations, flexible working arrangements can be negotiated having regard to the occupational requirements of the role.

There is no alternative way of ensuring that the successful candidate is capable of carrying out the requirements of the role without limiting the rights to equality before the law and equal access to the public service by making the role full-time.

On one side of the scales is the need to ensure that any prospective candidate is suited to the responsibilities of the role. On the other side of the scales is the need to protect an individual's rights equality before the law and equal access to the public service.

On balance, the importance of ensuring that any prospective candidate is suited to the responsibilities of the role outweighs the interference with the applicant's human rights.

Example of concise summary of analysis

Section 58(1) of the *Human Rights Act 2019* (HR Act) requires you to act and make decisions compatibly with human rights, and when making a decision to properly consider human rights relevant to a decision.

You are being asked to approve the recruitment of an Ao4 Administration Officer with conditions attached. Shortlisted candidates will be required to undertake a criminal history check to ensure that they do not have a history of criminal offences that may indicate that they are unsuitable for the role. Shortlisted candidates will also be required to be able to work on a full-time basis, though flexible working arrangements can be negotiated having regard to the occupational requirements of the role.

This is required to ensure that a suitable candidate is selected for the role, which involves the handling of confidential materials and/or procurement responsibilities, and which requires the candidate to manage a workload commensurate to a full-time role. The criminal history check will be undertaken with the consent of the shortlisted candidates, and the position description advises prospective candidates that a check is required.

No less restrictive and reasonably available ways to achieve the purpose have been identified. In respect of the criminal history check, there is no other way to obtain the information, which is relevant to assessing shortlisted candidates' suitability for the role. In respect of the full-time role requirement, there is no other way to ensure the successful candidate will be able to manage the workload associated with the role.

Example of concise summary of analysis — continues

Conducting a criminal history check for prospective candidates, and stipulating that the role is full-time is compatible with human rights.

Scenario 2: Decision to provide de-identified case notes to researchers

University researchers are seeking access to case notes to assist them to undertake an evaluation of court service delivery. The purpose of the study is to assess whether the court service is achieving its aim of reducing criminal behaviour and ensuring community safety.

The notes will be de-identified, however because the release of the case notes will include the release of personal information, it will seemingly limit section 25 of the HR Act — Right to privacy and reputation.

Ministerial approval is required to release the de-identified case notes. Accordingly, you have been tasked with briefing the Minister on the implications of this request. As this is a decision, it must satisfy the obligations in section 58(1) of the HR Act. Accordingly, your briefing note should include a human rights impact analysis.

Example human rights impact analysis

Section 58(1) of the *Human Rights Act 2019* (HR Act) requires you to act and make decisions compatibly with human rights, and when making a decision to properly consider human rights relevant to a decision.

You are being asked to provide university researchers with access to case notes about court service users to complete a study about the delivery of the service. This decision to approve this request engages the right to privacy in section 25(1) of the HR Act.

The right to privacy protects an individual's personal life and private sphere from arbitrary interference. An arbitrary interference is one that is capricious, unpredictable, unjust or unreasonable. Providing access to case notes about individual service users interferes with the right to privacy by requiring, gathering, storing, and accessing personal information about individuals who have used court services. Whether this amounts to a 'limit' on the right to privacy within the meaning of section 8 of the HR Act will depend upon whether the interference is justified.

The purpose of the interference is to help determine whether the court service is achieving its aims of reducing anti-social behaviour and keeping the community safe. The information in the case notes is needed to complete an evaluation of the service as they provide direct evidence of whether the service's aims are being achieved. This is a proper purpose for limiting rights because it is consistent with a free and democratic society based on human dignity, equality and freedom.

The disclosure of the case notes will achieve the purpose as it will provide relevant data and information to researchers who are completing an evaluation of the service and provide evidence of whether the service is achieving its aims of reducing anti-social behaviour and keeping the community safe.

No less restrictive and/or reasonably available ways to achieve the purpose have been identified as the evaluation cannot be undertaken without the case note information. The information will be provided to a limited number of researchers and the project is subject to university ethics approvals. The information will be provided in a de-identified format and will only be made available through devices with access to the DJAG network. It will also be provided in accordance with obligations under the *Information Privacy Act 2009*.

Example human rights impact analysis — continues

On one side of the scales is the need to obtain information about court outcomes, and whether the court service is achieving its aims to keep the community safe. On the other side of the scales is the need to promote and protect the privacy of individuals from arbitrary interference.

On balance, the importance of determining whether the court service is achieving its aims outweighs the limit on the right to privacy, which is minimal and is ameliorated by the previously mentioned safeguards.

Accordingly, the limit on the right to privacy is justified, and is therefore not an ‘arbitrary’ interference. The decision does not, therefore, limit human rights and for that reason is compatible with human rights.

Example of concise summary of analysis

Section 58(1) of the *Human Rights Act 2019* (HR Act) requires you to act and make decisions compatibly with human rights, and when making a decision to properly consider human rights relevant to a decision.

You are being asked to provide university researchers with access to case notes about court service users to complete a study to determine whether the service is achieving its aims of reducing anti-social behaviour and keeping the community safe. Providing access to this information interferes with the right to privacy, but does not limit the right because the limitation is justified for the reasons set out below.

The purpose of releasing the case notes is to enable the research to occur — it can only be completed if the information is provided. The information will be provided to a limited number of researchers and the project is subject to university ethics approvals. The information will be provided in a de-identified format and in accordance with obligations under the *Information Privacy Act 2009* and will only be made available through devices with access to the DJAG network. No less restrictive and reasonably available ways to achieve the purpose have been identified. On balance, the importance of determining whether the court service is achieving its aims outweighs the limit on the right to privacy, which is minimal and is ameliorated by the aforementioned safeguards.

Where can I find more information?

The whole-of-government Human Rights Portal offers a wide range of resources to help you navigate and understand our obligations under the HR Act. They include factsheets, guides and videos — you can find out more at www.forgov.qld.gov.au/humanrights.

