Human Rights

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Guide: Human rights in decision making

A guide for Justices of the Peace

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Queensland Government

Guide: Human rights in decision making

This short guide is for Justices of the Peace (JPs). It explains how to think about human rights when you make decisions as part of delivering JP services. Making decisions under a human rights framework—in conjunction with existing frameworks—helps decision makers think about the individual's rights before making a decision that limits their rights. You can find more detailed information about human rights at www.forgov.qld.gov.au/humanrights.

Key messages

- The *Human Rights Act 2019* creates a decision-making framework that protects the human rights of individuals when they interact with the Queensland Government.
- When you provide services to the community as a JP, you must consider how the human rights of individuals are affected by your actions or decisions.
- There are no personal charges or fines for JPs who make decisions that aren't compatible with human rights. However, there may be consequences for the people trying to access services provided by JPs. For example, if a decision to issue a search warrant is incompatible with human rights, a court could say the evidence is inadmissible.

Obligations under the *Human Rights Act 2019*

The *Human Rights Act 2019* (the Act) is a law that applies to anyone doing work for the Queensland Government. JPs are **functional public entities**[1] under the Act because they provide services on behalf of government for the community. This means that as a JP, you have obligations to consider human rights when you provide services.

Under the Act, you have obligations to:

1. **think about human rights when you make decisions.** This is known as a procedural obligation—it is about the process you follow to make a decision. This means that you have to think about human rights *before* you make a decision that might impact people's rights. You must consider human rights even if you can't identify a particular person who will be affected by the act or decision, as long as that impact is foreseeable. It is enough for there to be a potential impact on the human rights of an individual or for a group of people. We have provided some case studies to help you; for example, if a search warrant for an individual's home is issued and the application states that there are children living in the property, a JP would need to think about the potential impact on the children's rights as well as the individual who is named on the warrant.

[1] A functional public entity is a type of entity that has obligations under the *Human Rights Act 2019.* See section 9(1)(h) of the Act.

2. **act and make decisions in a way that is consistent with human rights law.**[2] This is known as a substantive obligation—it is about the actual decision or action. This means that your behaviour—the way you act and the decision you make—has to be compatible with human rights.[3] This is particularly relevant if the decision or action limits a person's human rights.

The human rights roadmap

The Act provides a roadmap for making fair and balanced decisions about limiting human rights (set out in section 13 of the Act). Follow these steps to help you think about human rights and understand whether your decision is compatible with the Act.

Step 1: What human rights are affected?

What human rights are affected by the decision? Include rights that you are protecting, promoting, or limiting. If no human rights are affected, you don't have to go through the rest of the steps. You can visit the Queensland Human Rights Commission website or see our guide *Nature and scope of the protected human rights* for more information about each right.

Step 2: Will human rights be limited by this decision?

How will your decision limit a human right? To understand this question, it will help to know what the right protects. An action or decision limits a human right if it stops a person from enjoying their rights or changes the way a person enjoys their rights. If you aren't limiting any human rights, you don't need to go through the rest of the steps.

Step 3: Does the law let me limit human rights?

There has to be a law or regulation that allows you to limit human rights. If there is no law or regulation that says you can make this decision, you may not be able to limit human rights.

Step 4: Can I show that there is a good reason for the limitation? Can I show that the limitation is fair and reasonable?

If we limit human rights, we have to show that there was a good reason, and that it was fair and reasonable. When your actions or decisions will limit an individual's human rights, think about these questions to decide if the limitation is fair and for a good reason:

a) What is the human right trying to protect?
b) Why do we need to limit the right?

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[2] You can find this in section 58 of the Act.
[3] *Compatible with human rights* are words used throughout the Act that have a special legal meaning. This guide explains that meaning. You can also find the meaning in section 8 of the Act, which also refers to section 13.

c) What is the purpose of this action, decision, or policy?
d) Is there a connection between the limitation and the purpose? I.e. will what I am doing actually achieve what I am trying to do?
e) Can I achieve the purpose in a less restrictive way? Is there another option available to me?
f) Is there a fair balance between the reason for limiting the right and the importance of protecting the right?

Step 5: Is the decision consistent with human rights law?

If you can show that your decision limits rights in a way that is fair and reasonable, then your decision **is consistent with human rights law**.

If you can't show that your decision limits rights in a way that is fair and reasonable, then your decision **is not consistent with human rights law**. You will need to go back and see if you can make the decision differently. Is there another way to achieve your purpose?

What happens if I don't think about human rights or make a decision that isn't compatible with human rights?

Acting and making decisions in a way that is not compatible with human rights is unlawful. There are no personal charges or fines for JPs who make a decision that isn't compatible with human rights. However, existing disciplinary actions will apply (for example, disciplinary actions that apply for breaches of the JP *Code of Conduct*). Making a decision that is incompatible with human rights can also have consequences for the people using JP services. For example, a court could say that evidence is inadmissible if it is gathered inappropriately.[4] Your decisions can also affect the human rights of individuals. If someone thinks their human rights have been breached, they can make a complaint under existing complaints processes.

Individuals can also complain to the Queensland Human Rights Commission. They provide an accessible and independent avenue for members of the community to raise human rights concerns and reach a practical resolution. Someone with a human rights complaint can't go to a court or tribunal unless they have another claim (e.g. an anti-discrimination claim). They can attach a human rights complaint to that claim and go to a court or tribunal. There is no compensation available for human rights complaints through any complaints or court process.

You can find more information about human rights in Queensland at www.forgov.qld.gov.au/humanrights or www.qhrc.qld.gov.au.

[4] See *DPP V Natale (Ruling)* [2018] VSC 339

Case studies

Case study 1: Oaths and affirmations

A JP, because of their own religious beliefs, insists that clients must take an oath using a bible, regardless of the client's preference. John wants to take an affirmation, in line with his own beliefs.

Step 1: What human rights could be affected by the decision?

The scenario could engage the following rights:

- recognition and equality before the law—including the right to not be treated differently or have unequal access to services because of religious beliefs or activity, political beliefs or activity, gender identity, sex, or sexuality.
- freedom of thought, conscience, religion and belief—a person can think and believe whatever they choose, and can show their beliefs in private or public, on their own or in a group.
- freedom of expression—a person can have their own opinion and express information and ideas.
- cultural rights—generally—a person can enjoy their culture and follow their religion.
- privacy and reputation—everyone has the right to keep their life, body, family, home, correspondence, and information private.

Step 2: Are human rights limited?

The right to freedom of thought, conscience, religion and belief includes the right for people to think and believe what they want and to demonstrate their beliefs. The right also includes the right to choose not to have or practice any religion or belief. Cultural rights affirm the right of all people to practise and declare their religion. If the JP forces John to take an oath, this forces him to practice a belief that is contrary to his own, and limits John's right to freedom of thought, conscience, religion and belief. It could also limit his cultural rights.

Step 3: Is there a law allowing the JP to make a decision that might limit human rights?

There are laws in Queensland that give powers to JPs and Cdecs to make decisions and provide services. For example, section 29(1) of the *Justices of the Peace and Commissioners for Declarations Act 1991* sets out the powers of Justices of the Peace. They also have powers under sections 24 to 26 of the *Justices Act 1886.*

Step 4: Can the JP show that there is a good reason for limiting John's rights? Is the limitation reasonable?

The purpose for limiting John's rights is to allow the JP to have their right to freedom of thought, conscience, religion and belief. However, in this situation the JP is acting as an entity providing a service on behalf of government, and not as a private individual. People have a right to access services without discrimination, so in this context limiting John's rights for the purpose of protecting the JP's rights is not a fair limitation. The importance of protecting John's rights outweighs the importance of protecting the JP's rights.

Step 5: Is the decision consistent with human rights law?

The decision to limit John's rights by forcing him to take an oath is not compatible with human rights. The JP must go back and consider how to make a different decision that is compatible with human rights.

Case study 2: Issuing a search warrant for a drugs offence (for JP qualified)

Senior Constable James asks a JP to issue a search warrant. He wants to search an apartment in a public housing block for evidence of illegal drug use. The property manager has contacted the police after seeing needles and syringes in the apartment during a recent scheduled inspection. Olivia, the current resident, has a criminal history including drug offences. Her son, Cam, also lives in the apartment and attends the local high school. Senior Constable James's application provides information that strongly supports the need for a search warrant and the likelihood evidence being found. The JP decides to issue a search warrant.

Step 1: What human rights could be affected by the decision?

The scenario could engage the following rights:

- privacy and reputation—everyone has the right to keep their life, body, family, home, correspondence, and information private
- protection of families and children—families are important and entitled to protection by the government. Children have a right to the protection needed (including what is in their best interests) because they are children.

Step 2: Are human rights limited?

The JP must consider human rights when her decision will have a foreseeable impact on an individual. The decision to issue a search warrant will allow the police to conduct a search at Olivia's home, limiting Olivia's right to privacy. The right to privacy includes geographical and spatial privacy. In this case, Olivia and Cam have the right to enjoy their home in private. By issuing a search warrant, the police will be able to disrupt their enjoyment to their home. Further, the right to privacy also includes protecting a person's bodily integrity. This would be limited if police were to conduct a body search on Olivia in order to search for evidence of drugs or paraphernalia.

Step 3: Is there a law allowing the JP to make a decision that might limit human rights?

There are laws in Queensland that give powers to JPs and Cdecs to make decisions and provide services. For example, section 29(1) of the *Justices of the Peace and Commissioners for Declarations Act 1991* sets out the powers of Justices of the Peace. They also have powers under sections 24 to 26 of the *Justices Act 1886.*

Step 4: Can the JP show that there is a good reason for limiting Olivia's rights? Is the limitation reasonable?

For example, think about the right to privacy and reputation. The right to privacy means that Olivia has the right to keep her life, body, family, home, correspondence, and information private. If the JP issues a search warrant, the police will enter Olivia's home and inspect her belongings, limiting her right to privacy.

The purpose for limiting her right to privacy is to allow the police to investigate suspected criminal activity. The police work to enforce the law and protect people from harm; this is a proper purpose for limiting an individuals' human rights. Drug offences can endanger safety, so being able to search property can protect people from harm (protecting the right to life and the right to liberty and security). Additionally, the right to protection of families and children provides for the protection needed by children, and in their best interests, because they are children. It is also important to protect Cam from the harmful effect of having drugs in the home. Limiting Olivia's rights will allow the police to achieve their purpose.

The JP will have to think about the balance between the purpose for limiting rights (to enforce the law and protect people from harm, including the need to protect Cam as he is a child) and the importance of protecting Olivia's right to privacy (issuing a search warrant is a significant limitation on her right). Every decision to issue a warrant will have a different context, but JPs will have to think about how a person's human rights will be affected by the decision, and how to balance competing rights and other considerations.

Step 5: Is the decision consistent with human rights law?

In this case study, the JP's decision is likely to be compatible with human rights because the importance of the purpose for limiting Olivia's rights outweighs the importance of protecting Olivia's rights.

Case study 3: Issuing a search warrant for a theft offence (for JP qualified)

Senior Constable James asks a JP to issue a search warrant. He wants to search an apartment in a public housing block for evidence of suspected theft. The application alleges that Harry, the current resident, has stolen an electric scooter. It does not contain information about any evidence to support the alleged offence. Harry has no criminal history. He lives in the apartment with his partner and two children. Senior Constable James has requested a warrant for a night time search to be conducted at 2am. The JP decides to issue a search warrant. (*Please note—while the decision may also not meet JP guidelines, this case study will consider the human rights impacts of the decision.*)

Step 1: What human rights could be affected by the decision?

The scenario could engage the following rights:

- privacy and reputation—everyone has the right to keep their life, body, family, home, correspondence, and information private
- protection of families and children—families are important and entitled to protection by the government. Children have a right to the protection needed (including what is in their best interests) because they are children.

Step 2: Are human rights limited?

The JP must consider human rights when his decision will have a foreseeable impact on an individual. His decision to issue a search warrant will allow the police to conduct a search at Harry's home, limiting Harry's (and his family's) right to privacy. The right to privacy includes geographical and spatial privacy. In this case, Harry and his family have the right to enjoy their home in private. By issuing a search warrant, the police will be able to disrupt their enjoyment to their home.

Step 3: Is there a law allowing the JP to make a decision that might limit human rights?

There are laws in Queensland that give powers to JPs and Cdecs to make decisions and provide services. For example, section 29(1) of the *Justices of the Peace and Commissioners for Declarations Act 1991* sets out the powers of Justices of the Peace. They also have powers under sections 24 to 26 of the *Justices Act 1886.*

Step 4: Can the JP show that there is a good reason for limiting Harry's rights? Is the limitation reasonable?

For example, think about the right to privacy and reputation. The right to privacy means that Harry has the right to keep his life, body, family, home, correspondence, and information private. If the JP issues a search warrant, the police will enter his home and inspect his belongings, limiting his right to privacy.

The purpose for limiting his right to privacy is to allow the police to investigate suspected criminal activity. The police work to enforce the law and protect people from harm; this is a proper purpose for limiting an individuals' human rights. Some offences can endanger safety, so being able to search property can protect people from harm (protecting the right to life and the right to liberty and security). Additionally, the right to protection of families and children provides for the protection needed by children, and in their best interests, because they are children.

However, in this case, if there is no evidence to suggest that Harry has committed the crime, there is no proper purpose for limiting his rights. If there was a proper purpose, it could be achieved in a way that doesn't impact rights as much. For example, an application for a daytime warrant to search Harry's home restricts his right to privacy less. There is also no evidence that limiting his rights in this way will protect people from harm (or that harm is likely), or that the search is in the best interests of the children at the property.

The JP will have to think about the balance between the purpose for limiting rights (to enforce the law and protect people from harm) and the importance of protecting Harry's right to privacy (issuing a night time search warrant is a significant limitation on his right). Every decision to issue a warrant will have a different context, but JPs will have to think about how a person's human rights will be affected by the decision, and how to balance competing rights and other considerations.

Step 5: Is the decision consistent with human rights law?

In this case study, the JP's decision to issue a warrant is likely to be incompatible with human rights because there is no proper purpose for limiting Harry's rights. If there is a proper purpose, the decision is likely to be incompatible because the limitation isn't reasonable—there are less restrictive ways to achieve the purpose. The importance of protecting Harry's rights, and the rights of his partner and children, outweighs the purpose for limiting Harry's rights.

Quick human rights checklist

- Can you identify what human rights are affected by your action or decision?
- Does your action or decision limit human rights?
- Is there a purpose for limiting human rights?
- Will limiting a human right achieve that purpose?
- Is there something less restrictive that you can do?
- Is there a fair balance?