



## ***Human Rights Act 2019***

# **Decision-Making Framework for the performance of the Public Guardian's functions and powers**



<b>Policy</b>	Human Rights Decision Making Framework for the performance of the Public Guardian's functions and powers	
<b>Approved by:</b>	<i>Acting Public Guardian</i>	<b>Name:</b> Shayna Smith
<b>Date Effective</b>	January 2020	<i>Version 1</i>
<b>Application</b>	All OPG staff	
<b>Related</b>	Human Rights Decision-Making Framework for OPG internal decisions Complaints Management Policy (external complaints)	

## Table of Contents

1) Relevant Legislation .....	<a href="#">3</a>
2) Purpose .....	<a href="#">3</a>
3) The Public Guardian's policy and approach to human rights .....	<a href="#">3</a>
4) Roles and responsibilities .....	<a href="#">4</a>
5) Definitions .....	<a href="#">4</a>
6) The Human Rights Act 2019 .....	<a href="#">5</a>
<b>Part A</b> .....	<a href="#">6</a>
Step 1 .....	<a href="#">6</a>
Step 2 .....	<a href="#">6</a>
Step 3 .....	<a href="#">6</a>
Step 4 .....	<a href="#">9</a>
<b>Part B</b> .....	<a href="#">10</a>
Step 1 .....	<a href="#">10</a>
Step 2 .....	<a href="#">10</a>
Step 3 .....	<a href="#">11</a>
Step 4 .....	<a href="#">12</a>

## 1) Relevant Legislation

- a. [Human Rights Act 2019](#)
- b. [Anti- Discrimination Act 1991](#);
- c. [Judicial Review Act 1991](#);
- d. [Ombudsman Act 2001](#);
- e. [Crime and Corruption Act 2001](#);
- f. [Right to Information Act 2009](#);
- g. [Information Privacy Act 2009](#).
- h. [Public Service Act 2008](#)
- i. [Public Guardian Act 2014](#)

## 2) Purpose

- a. The purpose of this decision-making framework is to assist Office of the Public Guardian (OPG) staff to consider, understand and recognise a person's human rights in every decision they make as a delegate of the Public Guardian.
- b. All decisions made by OPG staff in relation to the performance of the Public Guardian's functions and powers must comply with the obligations placed upon public entities under the *Human Rights Act 2019* (the HRA).

## 3) The Public Guardian's policy and approach to human rights

- a. The Public Guardian is an independent statutory officer with specific legislative powers and responsibilities to promote and protect the rights and interests of adults with impaired capacity, and children and young people in the child protection system, or staying at a visitable site.
- b. In accordance with the Universal Declaration of Human Rights "all human beings are born free and equal in dignity and rights" (Article 1).
- c. With respect to OPG's clients with a disability, the OPG is committed to upholding and recognising the rights of our clients enshrined in the United Nations' Convention on the Rights of Persons with Disabilities (CRPD) and has developed this framework to reflect OPG's commitment to 'promote and ensure the full and equal enjoyment of all human rights and fundamental freedoms by all persons with disabilities, and to promote respect for their inherent dignity' (Article 1, CRPD).
- d. The OPG is also committed to upholding the rights of all our adult and child clients under the Convention on the Rights of the Child (CRC), and recognising the 'inherent dignity' and 'equal and inalienable rights of all members of the human family [as] the foundation of freedom, justice and peace in the world' (Preamble, CRC).
- e. OPG human rights advocacy means understanding the lives and views of the people OPG serves, whether they are children, young people or adults, with the aim of

promoting and protecting their human rights. This can include working to prevent or address discrimination, abuse or neglect. Advocacy does not mean taking over their life or problems, nor taking over the roles and responsibilities of other government agencies or service providers.

- f. This decision making framework underpins OPG's commitment to the protection of the human rights of our clients by ensuring that our clients' rights under the HRA are respected and recognised in the performance of the Public Guardian's legislative functions and powers.
- g. This provides certainty that when decisions are made by OPG staff as delegates performing the Public Guardian's functions and powers, the public and in particular, the people in direct receipt of OPG's services, can be assured that their human rights have been appropriately considered. Further, where decisions are made that limit theirs, and/or other person's rights, they are made lawfully; are not arbitrary; and are exercised in a way that is transparent and accountable.

#### 4) Roles and Responsibilities

- a. All OPG staff are responsible for adhering to the human rights decision-making framework in the course of their duties where they are required to make decisions as delegates of the Public Guardian.

#### 5) Definitions

- a. A "decision" for the purposes of the application of the HRA refers to decisions that impact external clients of the OPG. A decision not to make a decision, is also a decision for the purpose of this framework.
  - i. For investigations decisions this can include decisions such as protective action taken to suspend an attorney's powers.
  - ii. For guardianship decisions this can include decisions for personal matters, for example, in relation to: the use of restrictive practices; accommodation; service delivery; health care or legal matters (not relating to financial or property).
  - iii. For community visiting and advocacy, this can include decisions regarding: visiting frequency, whether an issue raised on behalf of a child has been satisfactorily resolved or whether to make a formal complaint on behalf of a child.
  - iv. For child advocate legal officers, this can include decisions regarding: whether to accept a referral for services in relation to a child, or how to advocate to protect a child's rights and interests.
- b. A "public entity" entity is defined under [section 9 of the HRA](#), and includes the OPG as a government entity under [s 24\(1\)\(c\) of the Public Service Act 2008](#). A public entity includes any body providing services to the public on behalf of the government or another public entity, and therefore extends also to community visitors appointed under the *Public Guardian Act 2014*.

- c. A reference to “*OPG staff*” includes the Public Guardian, OPG employees, and community visitors appointed under the *Public Guardian Act 2014*.

## 6) The Human Rights Act 2019

- a. Human rights are based on the principles of freedom, respect, equality and dignity. Human rights recognise the inherent value of each person, regardless of background, where we live, what we look like, what we think or what we believe. Human rights belong to all people by virtue of being human.
- b. The HRA commences in Queensland from January 1, 2020 and protects [23 specific human rights](#). The HRA obligates public entities to uphold these rights when they make decisions, create laws, set policies and provide services ([s 4 HRA](#)).
- c. The main objects of the HRA are to:
  - i. protect and promote human rights;
  - ii. help build a culture in the Queensland public sector that respects and promotes human rights; and
  - iii. help promote a dialogue about the nature, meaning and scope of human rights.
- e. The HRA aims to ensure that public powers and functions are exercised in a principled way and that public power is not misused. The Act complements a number of other pieces of legislation that are aimed at regulating the relationship between individuals and the state, such as the *Anti-Discrimination Act 1991*; the *Judicial Review Act 1991*; the *Ombudsman Act 2001*; the *Crime and Corruption Act 2001*; the *Right to Information Act 2009*; and the *Information Privacy Act 2009*.
- f. However, there are some **exceptions** in applying human rights for public entities. Under [s 58\(2\) of the HRA](#) the obligation to give proper consideration to, and act compatibly with, human rights does not apply where:
  - i. under another law you could not reasonably have acted differently or made a different decision;
  - ii. the act or decision is of a private nature (**note:** the meaning *private nature* is not defined in the HRA and may have to be ultimately determined by a Court);
  - iii. the act or decision would impede or prevent a religious body complying with religious doctrines, beliefs or principles.
- g. To meet its obligations under the HRA, the OPG has established a **two part** decision-making framework, which are set out under the following [Part A](#) and [Part B](#).
  - i. **Part A** must be undertaken in every decision-making process and appropriately documented or evidenced.
  - ii. **Part B** is only required to be undertaken where an identified right has been limited under Part A.



## Part A

### STEPS UNDER PART A:

- 1) Identify the decision required to be made
- 2) Identify whose rights could be limited by the decision
- 3) Identify the relevant human rights involved
- 4) Identify whether any of the human rights might be limited by the decision

#### Step 1

- a. Identify the decision that is required to be made.

#### Step 2

- a. Identify those persons whose rights could be limited by the decision. This includes the person who is the subject of the decision, as well as any other interested parties, for example: children, family, kin.
- b. Under section 58(1)(a) of the HRA it is unlawful for a public entity to act or make a decision in a way that is incompatible with a human right. Under section 58(1)(b) it is unlawful for a public entity to fail to give proper consideration to a relevant human right. The human rights recognised under the HRA are for all Queenslanders, not only our clients. Therefore, we need to clearly identify who, other than our client, might have their human rights impacted by the decision that is required to be made.

#### Step 3

- a. Identify the relevant human rights involved in the decision.
- b. Look through the following list of the [23 rights](#) protected under the HRA and determine which rights are relevant to your situation.
- c. Click on the relevant hyperlink to the Queensland Human Rights Commission to explore examples and further explanation regarding the scope of each right, and when it might be engaged.

*\*\*Note: The information below is a summary of the 23 rights protected under the HRA. It is strongly recommended that all staff consult the full sections of legislation when giving consideration to a decision to ensure compliance with the HRA.*

<b>Human Rights Act 2019</b>	<b>Content of the right</b>
<b>S.15 <a href="#">Recognition and equality before the law</a></b>	Every person has the right to recognition as a person before the law and the right to enjoy their human rights without discrimination. Every person is equal before the law and is entitled to equal protection of the law without discrimination. Every person is entitled to equal and effective protection against discrimination.
<b>S.16 <a href="#">Right to life</a></b>	Every person has the right to life and the right not to be deprived of life. The right not to be deprived of life is limited to arbitrary deprivation of life.
<b>S.17 <a href="#">Protection from, torture and cruel, inhuman or degrading treatment</a></b>	A person must not be tortured or treated in a way that is cruel, inhuman or degrading. This includes that a person must not be subjected to medical or scientific experimentation or treatment unless they have given their full, free and informed consent.
<b>S.18 <a href="#">Freedom from forced work</a></b>	A person must not be made a slave or forced to work. Forced work does not include certain forms of work or service required of a person who is detained because of a lawful court order.
<b>S.19 <a href="#">Freedom of movement</a></b>	Every person lawfully within Queensland has the right to move freely within Queensland, enter or leave Queensland, and choose where they live.
<b>S.20 <a href="#">Freedom of thought, conscience, religion and belief</a></b>	Every person has the right to think and believe what they want and to have or adopt a religion, free from external influence. This includes the freedom to demonstrate a religion individually or as part of a group, in public or in private.
<b>S.21 <a href="#">Freedom of expression</a></b>	Every person has the right to hold and express an opinion, through speech, art, and writing (or other forms of expression) and to seek out and receive the expression of others' opinions.
<b>S.22 <a href="#">Peaceful assembly and freedom of association</a></b>	Every person has the right to join or form a group and to assemble. The right to assembly is limited to peaceful assemblies.
<b>S.23 <a href="#">Taking part in public life</a></b>	Every person in Queensland has the right and opportunity without discrimination to take part in public life. Every eligible person has the right to vote, be elected, and have access on general terms of equality to the public service and public office.
<b>S.24 <a href="#">Property rights</a></b>	All person have the right to own property alone or in association with others. A person must not be arbitrarily deprived of their property.

<b>S.25 <a href="#">Privacy and reputation</a></b>	A person's privacy, family, home and correspondence must not be unlawfully or arbitrarily interfered with. A person has the right not to have their reputation unlawfully attacked.
<b>S.26 <a href="#">Right to protection of families and children</a></b>	Families are recognised as the fundamental unit of society and are entitled to protection. Every child has the right, without discrimination, to the protection that is in their best interest as a child. Every person born in Queensland has the right to a name and to registration of birth.
<b>S.27 <a href="#">Cultural rights - generally</a></b>	All persons with a particular cultural, religious, racial or linguistic background must not be denied the right, in community with other persons of that background, to enjoy their culture, to declare and practise their religion and to use their language.
<b>S.28 <a href="#">Cultural rights – Aboriginal peoples and Torres Strait Islander peoples</a></b>	Aboriginal peoples and Torres Strait Islander peoples hold distinct cultural rights as Australia's first people. They must not be denied the right, with other members of their community, to live life as an Aboriginal or Torres Strait Islander person who is free to practice their culture.
<b>S.29 <a href="#">Right to liberty and security of person</a></b>	Every person has the right to liberty and security. This right protects against the unlawful or arbitrary deprivation of liberty. If a person is arrested or detained, they are entitled to certain minimum rights, including the right to be brought to trial without reasonable delay.
<b>S.30 <a href="#">Right to humane treatment when deprived of liberty</a></b>	A person must be treated with humanity and respect when deprived of liberty. An accused person who is detained must not be detained with convicted persons unless reasonably necessary, and must be treated in a way that is appropriate for a person who has been convicted.
<b>S.31 <a href="#">Right to fair hearing</a></b>	A person has the right to have criminal charges or civil proceedings decided by a competent, independent and impartial court or tribunal after a fair and public hearing. There is an exception to the right to a public hearing, whereby a court or tribunal may exclude certain people from a hearing if it is in the public interest or the interests of justice.
<b>S.32 <a href="#">Rights in criminal proceedings</a></b>	A person charged with a criminal offence has the right to be presumed innocent until proven guilty according to law, and is entitled without discrimination to receive certain minimum guarantees. A person has the right to appeal a conviction in accordance with law. A child charged with a criminal offence has the right to a procedure that takes into account their age and the desirability of promoting rehabilitation.
<b>S.33 <a href="#">Rights of children in the criminal process</a></b>	Children in the criminal process are entitled to special protections on the basis of their age. An accused child must not be detained with adults and must be brought to trial as quickly as possible. A convicted child must be treated in a way that is appropriate for their age.



<b>S.34 <a href="#">Right not to be punished more than once</a></b>	A person must not be tried or punished more than once for an offence in relation to which they have already been finally acquitted or convicted according to law.
<b>S.35 <a href="#">Protection from retrospective criminal laws</a></b>	A person must not be prosecuted or punished for conduct that was not a criminal offence at the time the conduct was engaged in. A person must not receive a penalty that is greater than the penalty that applied at the time they committed the offence.
<b>S.36 <a href="#">Right to education</a></b>	Every child has the right to have access to primary and secondary education appropriate to their needs. Every person has the right to have access, based on their abilities, to further vocational education and training that is equally accessible to all.
<b>S.37 <a href="#">Right to health services</a></b>	Every person has the right to access health services without discrimination. A person must not be refused necessary emergency medical treatment.

## Step 4

- a. Identify whether any of the human rights identified above, might be limited by the decision.
- b. It is unlawful for a public entity to act or make a decision in a way that is incompatible with a human right (s 58(1)(a)), or for a public entity to fail to give proper consideration to a relevant human right (s 58(1)(b)).
- c. When making a decision, the OPG staff member must consider whether any of the human rights identified under Step 3 are impacted, whether in relation to our client, or other interested parties. In considering the rights of other interested parties, the rights of our client/s must be the overriding consideration.
- d. The aim of this step is to identify where rights might be limited, and where the decision-maker may need to balance the rights of one person against others, or the broader community. Should a right be limited, this should be identified, so that the test of proportionality can be applied under Part B to ensure that the restriction is no greater than that required to achieve the desired goal, and to ensure that any limitation is demonstrably justifiable.
- e. For further guidance on the nature of rights under the HRA, and explore case examples for each right, see the Human Rights Unit, DJAG document [Nature and Scope of HRA rights](#).
- f. **If No**— rights are *not being limited*, you are acting compatibly with the HRA. **Records are to be made by the decision maker in a manner appropriate to the policies and procedures**

followed by the relevant business area. The significance of the decision and service delivery obligations should drive the standard of consideration of this process and also the degree of detail in the decision record. No further action is required.

- g. If yes – rights *are* being limited, then you must also complete **Part B** of this process.

## Part B

### STEPS UNDER PART B:

- 1) Identify whose human rights are being limited by the decision
- 2) Identify the law/regulation by which you can lawfully limit the person's human rights
- 3) Determine whether the limitation is justified and proportionate
- 4) Employ safeguards to ensure:
  - i. Limitations are not arbitrary, and
  - ii. Actions and decisions are transparent and accountable and properly recorded

### Step 1

- a. Identify whose rights are being limited by the decision. Identify whether it is the rights of the client, and/or other interested parties are being limited. In considering the rights of other interested parties, the rights of our client/s must be the overriding consideration.

### Step 2

- a. Identify the provision under the law (legislation or case law) or regulation by which you can **lawfully limit the person's rights**.
- b. Under [s 13\(1\) of the HRA](#) human rights may be limited but these limits must be both **authorised** as well as **justified and proportionate**.
- c. An example of a relevant law or regulation might include:  
*Guardianship and Administration Act 2000*

*Public Guardian Act 2014*  
*Public Guardian Regulation 2014*  
*Powers of Attorney Act 1998*  
*Child Protection Act 1999*  
*Mental Health Act 2016*  
*Forensic Disability Act 2011*  
*Disability Services Act 2006*

- d. If you cannot identify a law or regulation, or any case law then you may not be able to limit rights, and you should seek legal advice to confirm whether limitation of this right is lawful.
- e. Possible legal authorisations might include provisions that:
  - a. a statutory provision that allows for a warrant to be issued under section 148 of the *Guardianship and Administration Act 2000* to enter a place and remove an adult where there are reasonable grounds for suspecting an immediate risk of harm to an adult with impaired capacity.
  - b. Consenting to treatment for mental illness under the less restrictive way under s 13 of the *Mental Health Act 2016*.

### Step 3

- a. Determine whether the limitation is **justified and proportionate**.
- b. For case examples regarding limitations that can be imposed on various HRA rights, see the DJAG document [Nature and Scope of HRA rights](#). For example, section 17 of the HRA provides for the protection from torture and cruel, inhuman or degrading treatment. Where a person is placed under a treatment authority, or treated involuntarily, where that treatment is provided subject to an order made under legislation, this may amount to a reasonable and justifiable limit on the person's right to protection from medical treatment without consent, provided there are sufficient safeguards in the legislation. Safeguards may include the provision of strict criteria for the imposition of the orders, inherent requirements of proportionality of treatment in relation to the medical need, and appeal and review processes available regarding the decision to make the involuntary treatment order (*Kracke v Mental Health Review Board* [2009] VCAT 646).
- c. The following are considerations for OPG staff in determining whether a limitation is **justified and proportionate** in the circumstances, taking into account all the relevant factors. These factors include, but are not limited to:
  - i. the nature of the rights/s:
    - a. What does the human right/s protect?
    - b. What are the values that underpin the right?
  - ii. the importance of the purpose for the limitation:
    - a. What is your purpose for limiting a human right?
    - b. What are you trying to achieve by your action?



- iii. the nature and extent of the limitation:
  - a. How are you limiting a human right?
  - b. What are the consequences for the person whose right/s you are limiting?
- iv. is there a relationship between the limitation and your purpose?
  - a. Is your action or inaction tailored to achieve your purpose?
  - b. Is it proportionate?
  - c. If so, you may be lawfully limiting a human right.
  - d. If not, you may be breaching the HRA.
- v. are there less restrictive means reasonably available to achieve your purpose?
  - a. Is there another way to achieve your purpose that won't limit a person's human right as much?
  - b. If so, you should take the least restrictive option.

*\*\*Further detail on these factors can be found at pp 17 and 18 in the [Explanatory Notes](#) to the Human Rights Bill 2018.*

## Step 4

- a. Employ safeguards to ensure **limitations are not arbitrary**; and that actions and decisions taken within this process are both **transparent and accountable, and recorded by the decision-maker in a manner appropriate to the policies and procedures followed by the relevant business area. The significance of the decision and service delivery obligations should drive the degree of consideration of this process and detail in the decision record.**
- b. Safeguards should be undertaken to ensure that limitations placed upon a person's human rights are not arbitrary.
- c. Whether something is 'arbitrary' in the human rights context means that the conduct is capricious, unpredictable or unjust, or can refer to circumstances where interference with the person's rights are unreasonable in the sense of not proportionate to the legitimate aim that is being sought.
- d. For example, the right to non-arbitrary intrusions is closely connected to the protection of the right to privacy and reputation (s 25 HRA). This right to privacy protects the individual from all interferences and attacks upon their privacy, family, home, correspondence (written and verbal) and reputation.
- e. Decision-making and actions taken should be **transparent and accountable and recorded by the decision-maker in a manner appropriate to the policies and procedures followed by the relevant business area. The significance of the decision and service delivery obligations should drive the degree of consideration of this process and detail in the decision record.**
- f. Following the making of a decision the following steps should be taken:
  - i. communicate the decision verbally and/or in writing as appropriate to all interested parties;

- ii. provide factual and meaningful reasons for the decision;
- iii. advise if/when the outcome or decision will be reviewed;
- iv. advise interested parties of their appeal rights and options; and
- v. document the decision-making process for **Parts A and B in a manner appropriate to the policies and procedures followed by the relevant business area. The significance of the decision and service delivery obligations should drive the degree of consideration of this process and detail in the decision record.**
- vi.

Version #	Approved By and Role	Date	Changes from Last Version	E-docs #
3				
2				
1	Shayna Smith	09/12/19		#5012340 v7