



# FLOWCHART FOR ASSESSING THE HUMAN RIGHTS COMPATIBILITY OF BILLS AND LEGISLATIVE INSTRUMENTS

**What is the objective of the proposed Bill or Legislative Instrument (LI)?**

Describe the policy problem that the Bill/LI is seeking to address.

**Is the Bill/LI likely to engage a human right recognised in one of the seven treaties?**

Refer to the POLICY TRIGGERS DOCUMENT and HUMAN RIGHTS GUIDANCE SHEETS.

YES

**Does the Bill/LI promote a human right?**

Describe how the Bill promotes the human right.

Even if the Bill/LI promotes a human right, it will still be necessary to consider whether it limits other human rights.

Y/N

**Does the Bill/LI limit a human right?**

Identify which rights are being limited.

It will not always be easy to tell if rights are being interfered with in a restrictive manner – seek advice if you are unsure.

YES

**Can the right be limited?**

**Remember:** Absolute rights cannot be limited – see information sheet on ABSOLUTE RIGHTS.

**Note:** Not all rights have express limitation clauses. Even if there is no specific limitation set out in the text of the article itself, some limitation may still be legally permissible – see information sheet on PERMISSIBLE LIMITATIONS.

YES

**What is the reason for the limitation – does it aim to achieve a legitimate objective?**

**Remember:** The objective must be shown to be a pressing and substantial concern.

**Note:** Some rights can only be limited for certain prescribed purposes – see information sheet on PERMISSIBLE LIMITATIONS

YES

**Is there a rational connection between the limitation and the objective?**

Consider whether the limitation is likely to achieve the objective.

YES

**Is the limitation reasonable, necessary and proportionate?**

Limitations on rights must go only as far as necessary to achieve a legitimate aim. Consider if the limitation is reasonable and proportionate – is it sufficiently precise to ensure that it addresses only those matters that it is intended to capture? Are there options for giving effect to the objective which are less restrictive on the right concerned?

**CAUTION:** Even if the limitation is aimed at a legitimate objective and has been designed to limit the right as little as possible, it may still not be proportionate if its impact on particular individuals or groups is too severe, or if it destroys the 'very essence' of the right concerned. Consider whether the Bill/LI includes appropriate safeguards to provide effective guarantees of human rights in practice.

NO

NO

NO

NO

NO

NO

YES

**THE BILL/LI IS LIKELY TO BE COMPATIBLE WITH HUMAN RIGHTS.**

DRAFT THE STATEMENT OF COMPATIBILITY [See Templates 1 & 2].

BUT SEEK ADVICE IF YOU ARE UNSURE.

**CONTACT:** Human Rights Unit at [humanrights@ag.gov.au](mailto:humanrights@ag.gov.au) or (02) 6141 6666.

**THE BILL/LI IS UNLIKELY TO BE COMPATIBLE WITH HUMAN RIGHTS.**

SEEK ADVICE.

**CONTACT:** Human Rights Unit at [humanrights@ag.gov.au](mailto:humanrights@ag.gov.au) or (02) 6141 6666.



# ADDITIONAL NOTES<sup>1</sup>

## 1. What is the objective of the proposed Bill or Legislative Instrument (LI)?

Here you should set out the basic objective of the Bill/LI. You should cover the following points, as appropriate:

- Why is the Bill/LI being developed?
- Why is it needed?
- What is its purpose?

**It will be useful to also consider who will be affected by the Bill/LI:** You should look at the objective you are trying to achieve and think about what groups of people are most likely to be affected by it. Answering this question at this stage is important because it will help you at the next step when you will be asked to decide whether or not the Bill/LI has anything to do with human rights. Knowing who is affected by the Bill/LI will help you answer this question.

## 2. Is the Bill/LI likely to engage a human right recognised in one of the seven treaties?

Here you should refer to the [Policy Triggers document](#) and the [Guidance Sheets](#) and to look through all the rights and consider whether or not the Bill/LI falls into any of the areas that are covered by the seven human rights treaties. It will not always be easy to tell if this is the case. You will need to familiarise yourself with the rights contained in the treaties to know when they might come into play. If you are unsure, you should seek advice.

**FLOWCHART EXIT:** If you decide that no human rights are engaged, there is no need to continue along the flowchart. You should refer to [Template 1](#) to draft your statement of compatibility.

---

<sup>1</sup> Adapted from guidance materials from the UK, NZ, Victoria and the ACT. See **UK:** [Human Rights, Human Lives: A Handbook for Public Authorities \(Oct 2006\)](#) and [A Guide to the Human Rights Act 1998 \(Oct 2006\)](#); **NZ:** [The Guidelines on the New Zealand Bill of Rights Act 1990: A Guide to the Rights and Freedoms in the Bill of Rights Act for the Public Sector \(Nov 2004\)](#); **VIC:** [Charter of Human Rights and Responsibilities: Guidelines for Legislation and Policy Officers in Victoria \(July 2008\)](#); and **ACT:** [Guidelines for ACT Departments: Developing Legislation and Policy](#).

**CAUTION:** Note that although the flowchart is designed to help you identify any potential human rights impact and make a preliminary assessment about the human rights compatibility of the Bill/LI, it may still be necessary to seek advice. For example, the Bill/LI may be particularly complex or you may not be certain about whether or not particular rights have been engaged. You should also be aware that rights travel together with obligations: therefore a right will only be engaged in those circumstances where an individual is subject to Australia's jurisdiction.

If you decide that the Bill/LI might engage a human right, the next step is to look at the nature of this engagement. Reading through the relevant guidance sheets will help you to answer the following questions.

### 3. Does the Bill/LI promote a human right?

At this step, if you decide that the Bill/LI promotes a human right, you should identify and explain how the Bill/LI promotes any of the human rights it engages. For example:

- Does it protect particular human rights? Whose rights are being protected?
- Does it contribute towards the realisation of an economic, social or cultural right? Whose economic, social or cultural rights are being advanced? [For further information, see [Guidance Sheets](#) and [Policy Triggers document](#)]

Even if there is a positive impact on particular human rights, you must go on to consider whether other human rights may be limited by the Bill/LI.

### 4. Does the Bill/LI limit a human right?

At this step, you should think about whether the Bill/LI might limit any of the human rights that it engages.

**FLOWCHART EXIT:** If you decide that although a right is engaged, the Bill/LI will not result in any limitation of that right, then you may exit the flowchart. You should refer to [Template 2](#) to draft your statement of compatibility.

**CAUTION:** Note that although the flowchart is designed to help you identify any potential human rights impact and make a preliminary assessment about the human rights compatibility of the Bill/LI, it may still be necessary to seek advice. For example, the Bill/LI may be particularly complex or you may not be fully certain about whether or not particular rights have been limited.

If, however, you do decide that there is a possibility of rights being limited, you will need to identify which rights these are and then proceed to the next section.

### 5. Can the right be limited?

Here you should refer to the [information sheet on Absolute Rights](#) and make an assessment whether the right you are proposing to limit is absolute. If so, it may not be limited, and any attempt to do so will be incompatible with human rights.

**FLOWCHART EXIT:** If you decide that the right that you are seeking to limit is absolute, you must exit the flowchart AND seek advice as soon as possible. Your Bill/LI is likely to be incompatible with human rights and it will be important to take action quickly to resolve the incompatibility.

If the right you are proposing to limit is not absolute, it may be permissible to limit it. Some rights have express limitation clauses. However, even if there is no specific limitation set out in the text of the article itself, some limitation may still be legally permissible. You should refer to the [information sheet on Permissible Limitations](#) to familiarise yourself with the general principles for lawfully limiting rights and then proceed to the next step.

## 6. What is the reason for the limitation – does it aim to achieve a legitimate objective?

If the Bill/LI proposes to limit a human right, you will need to:

- First, identify a legitimate objective that you are trying to achieve by limiting the right.
  - For some human rights, the text of the right itself may specify the grounds on which that right can be limited, such as public safety, the protection of public order, national security or protection of the rights or freedoms of others. You will find permitted purposes for restricting particular rights listed in the table attached to the [information sheet on Permissible Limitations](#). If the objective that you want to achieve does not fall within one of the expressly stated purposes listed in the text of the article, it is likely that the limitation will not be permissible. Refer to the flowchart exit below.
  - Other human rights may not have express limitation clauses but it may still be possible to limit the right to achieve an objective that is a pressing and substantial concern. It should not just be useful or desirable to limit the right. The existence of a pressing and substantial concern goes beyond preventing outcomes that are simply undesirable, offensive or inconvenient. For example, mere administrative convenience is unlikely to be considered a sufficiently pressing and substantial concern for limiting rights.
- Second, explain why, in the particular circumstances, limiting the right is important and why there is a real need for the limitation being proposed. Look at the objective(s) you identified at in Question 1 of this flowchart, and consider whether it addresses an area of public or social concern that is pressing and substantial enough to warrant limiting the right. Your explanation should provide relevant and sufficient reasons, including empirical evidence such as research or consultation findings, reviews, or statistical data. You should also briefly describe the consequences of not implementing the Bill/LI.

**FLOWCHART EXIT:** If you decide that the objective for limiting the right does not seem to be important or significant, or falls outside one of the expressly stated purposes for limiting the right, you must exit the flowchart AND seek advice as soon as possible. Your Bill/LI is likely to be incompatible with human rights and it will be important to take action quickly to resolve the incompatibility. You will need to think about whether there are other ways to achieve the objective without limiting the right.

If the objective for the limitation does appear to be important and significant, and falls within one of the expressly stated purposes for limiting the right, you can proceed to the next question.

## 7. Is there a rational connection between the limitation and the objective?

Here you should describe the effect of the limitation of the right and whether it is likely to be effective in achieving the objective being sought. Refer back to your answers to Questions 1 and 6 – think about the problem that the limitation is seeking to address and consider whether the limitation will in fact result in a reduction of that problem. You must be able to show a rational connection between the legitimate aim to be achieved and the measure limiting the right. It is not sufficient to put forward a legitimate objective if, in fact, the measure limiting the right will not make a real difference in achieving that aim. In other words, the objective might be legitimate but unless the proposed measure will actually achieve that objective, the limitation of the right is likely to be impermissible.

**FLOWCHART EXIT:** If you decide that the limitation is not rationally connected to the objective, you must exit the flowchart AND seek advice as soon as possible. Your Bill/LI is likely to be incompatible with human rights and it will be important to take action quickly to resolve the incompatibility. You will need to think about whether there are other ways to achieve the objective without limiting the right.

If you decide that the limitation is likely to be effective in achieving the objective being sought, you can move on to the next step.

## 8. Is the limitation reasonable, necessary and proportionate?

Here you should assess whether the limitation of the right is no more restrictive than it needs to be in order to achieve its objective. Answering the following questions will help you to assess whether the limitation of the right is reasonable, necessary and proportionate:

- Are there less restrictive alternatives for achieving the objective, and have they been tried? Look at the objectives you identified at Questions 1 and 6 of this flowchart, and consider whether these outcomes can be achieved only by the proposed limitation of the right. If there is another less restrictive way of achieving the desired outcome, you must explain why that option was not taken. Your reasons will have to be good ones.
- Does the limitation involve a blanket restriction or does it allow for different cases to be treated differently? Blanket restrictions will often be considered disproportionate, as it has the effect of imposing limitations in circumstances where they are not really needed.
- Has sufficient regard been paid to the rights and interests of those affected? Proportionality requires that even if the objective of the limitation is of sufficient importance and it has been carefully designed to limit the right as little as possible, it may still not be justified, because of the severity of the effects of the measure on individuals or groups.
- Do safeguards exist to ensure effective guarantees of human rights in practice? For example, does the limiting measure make appropriate provision for procedural fairness and/or effective judicial oversight? Have any discretionary powers been appropriately circumscribed to prevent the risk of abuse or arbitrary exercise of the discretion?
- Does the limitation destroy the very essence of the right? Think about the right being limited and consider whether there will be anything left of the right after the restrictions are put in place. Remember that no restriction is ever justified if it impairs the very essence of a right.

**FLOWCHART EXIT:** If you decide that the effect of the limitation is likely to be disproportionate to the objective being sought, you must exit the flowchart AND seek advice as soon as possible. Your Bill/LI is likely to be incompatible with human rights and it will be important to take action quickly to resolve the incompatibility. You will need to think about whether there are other ways to achieve the objective without limiting the right.

If your assessment concludes that the limitation is proportionate, the Bill/LI is likely to be compatible with human rights. You should refer to [Template 2](#) to draft your statement of compatibility.

This material is provided to persons who have a role in Commonwealth legislation, policy and programs as general guidance only and is not to be relied upon as legal advice. Commonwealth agencies subject to the *Legal Services Directions 2017* requiring legal advice in relation to matters raised in this Guidance Sheet must seek that advice in accordance with the *Directions*.