

Human Rights

Respect · protect · promote

Hypothetical case study
scenarios – human
resources

Version: February 2021



Queensland
Government

Hypothetical case study scenarios – human resources

Thinking about human rights and applying human rights at work can be difficult. This document provides hypothetical case studies that show how human rights can apply in everyday work situations. It provides worked scenarios considering human resources and industrial relations issues in a human rights framework.

Other guides that may be helpful:

- *Nature and scope of the protected human rights*—this guide provides detailed information about each of the protected human rights. Learning more about the rights will help you identify where they are engaged in your work.
- *When human rights may be limited*—this guide provides a list of questions to ask if you are thinking about limiting someone’s human rights.
- *Human rights in decision making*—this guide explains how to think about human rights when you make decisions at work.

You can find these guides at www.forgov.qld.gov.au/humanrights.

These scenarios are hypothetical and are not prescriptive. They provide guidance only. Decision makers need to consider the context of each decision they make.

Human rights considerations

The *Human Rights Act 2019* (the Act) aims to build a culture in the Queensland Government that respects, protects, and promotes human rights. It does this by requiring public entities to consider human rights when they take actions or make decisions. Sometimes the work of government protects or promotes human rights; sometimes it limits human rights. The Act states that a human right may only be limited when there is a lawful reason and the limitation is reasonable and demonstrably justified.

Section 58(1) of the Act sets out what is required of public entities.

58 Conduct of public entities

- (1) It is unlawful for a public entity—
- a) to act or make a decision in a way that is not **compatible with human rights**; or
 - b) in making a decision, to fail to give proper consideration to a human right relevant to the decision.

Section 8 of the Act defines the term ‘**compatible with human rights**’.

8 Meaning of *compatible with human rights*

- An act, decision or statutory provision is **compatible with human rights** if the act, decision or provision—
- a) does not limit a human right; or
 - b) limits a human right only to the extent that is reasonable and demonstrably justifiable in accordance with section 13.



Section 13 provides the basis on which human rights may be limited.

13 Human rights may be limited

- (1) 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.
- (2) In deciding whether a limit on a human right is reasonable and justifiable as mentioned in subsection (1), the following factors may be relevant—
 - a) the nature of the human right;
 - b) the nature of the purpose of the limitation, including whether it is consistent with a free and democratic society based on human dignity, equality and freedom;
 - c) the relationship between the limitation and its purpose, including whether the limitation helps to achieve the purpose;
 - d) whether there are any less restrictive and reasonably available ways to achieve the purpose;
 - e) the importance of the purpose of the limitation;
 - f) the importance of preserving the human right, taking into account the nature and extent of the limitation on the human right;
 - g) the balance between the matters mentioned in paragraphs (e) and (f).

How to make decisions compatible with the *Human Rights Act 2019*

The *Human Rights Act 2019* (the Act) requires all public entities in Queensland to give proper consideration to, and act compatibly with, human rights when making decisions. To carry out these obligations, public entities should consider the following 5 questions:

- 1: Does the proposed decision place a limit on a human right?
- 2: Is there a legitimate aim or a proper purpose to the limitation?
- 3: Is there a relationship between imposing the limit on the human right and the purpose of the limit? If so, does the limitation help to achieve the purpose?
- 4: Are there any less restrictive and reasonably available ways to achieve the purpose?
- 5: Is the importance of the purpose of the requirement limiting the human right greater than the importance of preserving the human right, taking into account the nature and extent of the limitation on the human right?

To be compatible with human rights, the benefits gained by limiting a human right must outweigh the harm caused to the human right.



Scenario 1: Recruitment and selection

A government agency is about to advertise an AO4 Administration Officer within a Queensland department. The role description includes the following information for applicants:

- The location of work is the departmental office, Brisbane.
- The basis of employment is full time.
- The successful applicant is expected to work between 9am and 5pm.
- Applicants are required to hold a current driver's licence.
- Criminal history checks will be undertaken on shortlisted applicants.

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

The employee who recently worked in this position had not been required to travel in the 12 months they were employed in the role.

Proposed decision: place conditional limitations on position.

Step 1: Identify whether the proposed decision places a limit on a human right [Section 13(2)(a)]

Which human rights protected by the Act will be, or are, subject to limits in the scenario? What is the nature of the human rights? What are the values that underpin the human rights?

Right to equality and non-discrimination—s15(3) and (4)

15 Recognition and equality before the law

- (1) Every person has the right to recognition as a person before the law.
- (2) Every person has the right to enjoy the person's human rights without discrimination.
- (3) Every person is equal before the law and is entitled to the equal protection of the law without discrimination.
- (4) Every person has the right to equal and effective protection against discrimination.
- (5) Measures taken for the purpose of assisting or advancing persons or groups of persons disadvantaged because of discrimination do not constitute discrimination.

Discrimination is defined in the *Human Rights Act 2019* (the Act) as including the definition of discrimination in the *Anti-Discrimination Act 1991* (Qld) (AD Act). The protected attributes in the AD Act include 'impairment', 'parental status' and 'family responsibilities'.

The requirement to hold a current driver's licence will restrict people who are unable to drive due to disability or other reasons from being eligible for this government role.



The inflexible working hours and location could indirectly discriminate against parents and carers as it could affect their ability to look after school-aged children or elderly parents.

Further, the location of the work in Brisbane city may indirectly discriminate against people who reside in a regional or remote area. While residence is not a protected attribute under the AD Act, it is possible that discrimination under the Act extends to discrimination on the basis of residence.

Taking part in public life—s23

23 Taking part in public life

- (1) Every person in Queensland has the right, and is to have the opportunity, without discrimination to participate in the conduct of public affairs, directly or through freely chosen representatives.
- (2) Every eligible person has the right, and is to have the opportunity, without discrimination—
 - (a) to vote and be elected at periodic State and local government elections that guarantee the free expression of the will of the electors; and
 - (b) to have access, on general terms of equality, to the public service and to public office.

Each of the discriminatory aspects identified above may limit the right of access to employment in the public service on general terms of equality. Those who are unable to drive due to a disability; parents or carers; and those who live in a remote area will not have equal access to the position.

Privacy and reputation—s25

25 Privacy and reputation

- A person has the right—
- a) not to have the person's privacy, family, home or correspondence unlawfully or arbitrarily interfered with; and
 - b) not to have the person's reputation unlawfully attacked.

The requirement to undergo a criminal history check will impact on a person's privacy and potentially reputation.

Conducting a criminal history check may limit an applicant's right to privacy. While recent convictions are a matter of public record, warnings and spent convictions may be considered to be private. If the criminal history check is consistent with the spent conviction regime under the *Criminal Law (Rehabilitation of Offenders) Act 1986*, it is likely that the right to privacy will not be engaged.

Protection of families and children—s26

26 Protection of families and children

- (1) Families are the fundamental group unit of society and are entitled to be protected by society and the State.
- (2) Every child has the right, without discrimination, to the protection that is needed by the child, and is in the child's best interests, because of being a child.
- (3) Every person born in Queensland has the right to a name and to be registered, as having been born, under a law of the State as soon as practicable after being born.

The requirement to work full time in Brisbane city between 9am and 5pm may impact an individual's ability to care for children or family members.

The right to protection of the family in section 26(1) could be said to place a positive obligation on public entities to provide flexible working arrangements, where possible. This can be limited where the inherent requirements of the role require a staff member to be present at work at certain times.

Step 2: Is there a legitimate aim/proper purpose to the limitation? [Section 13(2)(b)]

What is the purpose of the limitation? Is it consistent with a free and democratic society based on human dignity, equality and freedom? Does the limitation have public interest considerations or preserve the rights of others?

The purpose of the role description is to describe the requirements of the role and ensure that applicants who apply meet those requirements.

The place of work is specified as applicants will be required to physically attend the workplace to perform front desk duties. The hours of work are specified on the basis of the common practice of the team so that the successful applicant will be physically present at the same time as other members of the team, and so that the employee can perform the front of desk at standard office hours when members of the public are most likely to visit the department.

The requirement to hold a driver's licence is so the successful applicant may be able to drive if required for the purposes of work. Given the employee who previously held the role was not required to drive to fulfil the requirements of the role and there is no indication this would be a future requirement, there is not a proper purpose to this limitation.

Finally, the purpose of a criminal history check is to ensure that an unsuitable person is not selected for the role (e.g. a record of theft and fraud may indicate that someone is unsuitable for a role with confidential and/or procurement responsibilities).

Other than the driver's licence, those purposes mentioned above are proper purposes. Although the role description may have the effect of discriminating, that is not its purpose.



Step 3: Is there a relationship between imposing the limit on the human right and the purpose of the limit? Does the limitation help to achieve the purpose? [Section 13(2)(c)]

Does the limit advance the purpose it is designed to achieve? (For example, a prohibition on the right to peaceful assembly where the peaceful assembly is in a duck shooting area would have a rational relationship/connection with, and advance the purpose of, public safety.)

Location of work

Specifying the location of work will help to achieve the purpose of ensuring that the successful applicant will be able to physically work at the office when it is necessary to meet business needs such as performing front desk duties.

Hours of work

Specifying the hours of work will help to achieve the purpose of ensuring that the person recruited will work similar hours to the team and will be present to perform front desk duties during standard office hours when members of the public are most likely to visit the agency to make enquiries.

Driver's licence

The requirement to hold a current driver's licence is to help to ensure that the successful applicant will be able to travel for the purposes of work. Given the need to travel is unlikely, and it has not been identified as an inherent requirement of the role, this indirect discrimination would not be a reasonable limitation of human rights.

Criminal history

Disclosing an applicant's criminal history to the agency will provide the information required to determine whether the applicant is suitable for the role. However, the agency will need to ensure that it only takes into account aspects of the criminal history that are relevant to the applicant's suitability. Otherwise, the limits on the applicant's right to privacy will not help to achieve the purpose. For example, it may be that certain offences (e.g. one offence of public drunkenness several years prior) would not impact someone's eligibility for the role. However, a record of theft and fraud may indicate that someone is unsuitable for a role with confidential and/or financial responsibilities.

Limiting an applicant's right to privacy by undertaking a criminal history check is rationally connected to the purpose of ensuring appropriate persons are recruited. Depending on the history and relevance of any prior convictions to the requirement of the role, limiting a person's access, on general terms of equality, to the public service may also be rationally connected to the purpose of ensuring the employee is suitable to undertake confidential and procurement duties.

Step 4: Are there any less restrictive and reasonably available ways to achieve the purpose? [Section 13(2)(d)]

Is the limitation necessary? Can you achieve the same purpose in more than one way? If so, what is the option that has the least impact on human rights while achieving the same purpose?

Location of work

Although some responsibilities of the role will be able to be performed remotely, there is no alternative way of ensuring that the successful applicant will be able to be physically present at the office to perform certain duties, such as the front of desk duties described above. Where it is an inherent requirement of the role, specifying the location of work, with the attendant impacts on people in regional areas, is necessary.

Hours of work

Before advertising the role, the agency should consider whether flexible work options would be available which would allow flexibility to meet agency requirements, as well as personal family commitments where possible. This decision should take into account factors such as the availability of technology to work remotely, any requirements for face to face client liaison and the likelihood of routinely accessing confidential information such as Cabinet material. In this scenario, the applicant is required to work the hours between 9am-5pm so that they can perform the front desk duties as described above. However, an alternative option could be finding people within the agency to cover certain time periods so that a parent or carer could care for children or family members.

Driver's licence

The requirement to hold a current driver's licence is not likely within the inherent requirements of the role of an AO4 Administrative Officer. Any travel required would likely be minimal and alternative travel arrangements such as taxis or public transport would be available.

Accordingly, there are alternative ways of ensuring that the successful applicant will be able to travel for the purposes of work. The requirement of a driver's licence is not necessary. The impact that the requirement imposes on the rights to equality and access to the public service is not justified.

Criminal history

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.

It would also be relevant to include in the advertisement for the role and in the role description that appointment to the role is conditional on the outcome of a criminal history check.



Step 5: Is the importance of the purpose of the requirement limiting the human right greater than the importance of preserving the human right, taking into account the nature and extent of the limitation on the human right? [Section 13(2)(e) – (f)]

Consider whether the benefits gained by fulfilling the purpose of the limitation outweigh the harm caused to the human right. This is a balancing exercise that involves comparing the importance of the purpose of limiting the human right with the importance of the human right and the extent of the limitation to be imposed. The more important the human right and the greater the limitation of it, the more important the purpose of the limit will need to be to show that it is reasonable and demonstrably justified.

Location of work

There are a number of inherent requirements of the Administrative Officer role which on occasion require the employee to be physically present in the office (such as front desk duties). Any limitation on potential regional employees who are unable or unwilling to travel would be reasonably and demonstrably justified.

Hours of work

While it may be necessary for the agency to have someone work front desk duties during standard hours, five days a week, it is not necessary for one person to perform those duties. For example, it could be that front desk duties are shared or someone else from the department can cover certain periods during the day so that a parent or carer can care for children or members of their family. Given that the requirement to work standard hours, five days a week, is unlikely to be an inherent requirement of the role, the importance of preserving the human rights to equality, access to the public service and families and children is paramount (for people with family commitments).

Driver's licence

Given the requirement to hold a driver's licence is not necessary to perform the functions of this job, the importance of preserving the human rights to equality and access to the public service is paramount (for people who do not have a licence).

Criminal history

It is reasonable to undertake a criminal history check on applicants for a public sector finance role to identify and reduce the risk of crimes being committed and to maintain public confidence in and the integrity of the public sector.

When determining whether it is appropriate to exclude someone from the role based on their criminal history, the agency will need to consider the nature of the role and the specifics of the criminal history. The more serious the offence and the more closely it relates to the role, the more justifiable it will be to exclude someone on the basis of their criminal history.



Scenario 2: Requirements for dress and personal appearance

Adrian, Rick and Janet are registered nurses who work together in the same hospital. Recently, the hospital's *Uniform and Appearance Policy* (the policy) was amended to ban male nurses from growing beards, goatees, and other forms of facial hair other than neatly trimmed sideburns and moustaches. Neatly trimmed beards had previously been allowed. The policy also states that hospital staff are not allowed to wear any form of jewellery below the elbow.

The Hospital stated the purpose of the change to the policy prohibiting facial hair is to “reduce the risk of infection as studies have shown that facial hair can harbour bacteria that could potentially pose an increased risk of infection”. The requirement to remove all jewellery below the elbow has been enforced for a number of years as bacteria can accumulate and be transmitted to the patient through the contamination of wounds or sterile equipment. Hospital employees were advised that they may be disciplined if they do not comply with the policy.

Adrian has had his beard for several years. He says it improves his appearance and provides protection from the sun when he is working outdoors.

Rick is an Orthodox Jew. He says he needs to retain his beard as a sign of piety deriving from an instruction in the Torah.

Janet recently commenced work at the hospital and has always worn bangles as part of her Indian culture.

Adrian, Rick and Janet have complained that the policy breaches their human rights.

Proposed decision: to enforce the policy.

Step 1: Identify whether the proposed decision places a limit on a human right [Section 13(2)(a)]

Which human rights protected by the Act will be, or are, subject to limits in the scenario? What is the nature of the human rights? What are the values that underpin the human rights?

Right to equality and non-discrimination—s15(3) and (4)

15 Recognition and equality before the law

- (1) Every person has the right to recognition as a person before the law.
- (2) Every person has the right to enjoy the person's human rights without discrimination.
- (3) Every person is equal before the law and is entitled to the equal protection of the law without discrimination.
- (4) Every person has the right to equal and effective protection against discrimination.
- (5) Measures taken for the purpose of assisting or advancing persons or groups of persons disadvantaged because of discrimination do not constitute discrimination.

Adrian: Discrimination is defined in the *Human Rights Act 2019* as including the definition of discrimination in the *Anti-Discrimination Act 1991* (AD Act). This includes a list of protected attributes such as race, age, sex, impairment etc. However, it is possible that it extends to discrimination on the basis of attributes that are not included in the AD Act but which are found in discrimination legislation in other jurisdictions. One such attribute could be ‘physical features’ which is included in the Victorian *Equal Opportunity Act 2010*. Requiring **Adrian** to shave his beard will treat him differently on the basis of a physical feature, such that enforcement of the policy may limit his right to equality.

Rick: Discrimination is defined in the *Human Rights Act 2019* as including the definition of discrimination in the AD Act. The protected attributes in the AD Act include ‘religious belief or religious activity’. Requiring **Rick** to shave his beard will impact on his ability to comply with his religious beliefs. Enforcing the policy against **Rick** will amount to discrimination against him on the basis of his religious beliefs, and therefore limit his right to equality.

Janet: Discrimination is defined in the *Human Rights Act 2019* as including the definition of discrimination in the AD Act. The protected attributes in the AD Act include ‘race’. **Janet** may assert that she has been discriminated against on the basis of her race/culture by being required to remove her bangles.

Freedom of thought, conscience, religion and belief—s20

20 Freedom of thought, conscience, religion and belief

- (1) Every person has the right to freedom of thought, conscience, religion and belief, including—
 - (a) the freedom to have or to adopt a religion or belief of the person’s choice; and
 - (b) the freedom to demonstrate the person’s religion or belief in worship, observance, practice and teaching, either individually or as part of a community, in public or in private.
- (2) A person must not be coerced or restrained in a way that limits the person’s freedom to have or adopt a religion or belief. Every person has the right to hold an opinion without interference.

Rick: Requiring **Rick** to shave his beard will impact on his ability to demonstrate his religious beliefs, and to follow the observances and practices of his religion.

Freedom of expression—s21

21 Freedom of expression

- (1) Every person has the right to hold an opinion without interference.
- (2) Every person has the right to freedom of expression which includes the freedom to seek, receive and impart information and ideas of all kinds, whether within or outside Queensland and whether—
 - (a) orally; or
 - (b) in writing; or
 - (c) in print; or
 - (d) by way of art; or
 - (e) in another medium chosen by the person.

Adrian argues that the requirement to remove his beard has impacted his ability to express himself through his physical appearance. The *Human Rights Act 2019* defines freedom of expression to include “the freedom to seek, receive and impart information and ideas of all kinds”. A beard in itself is not considered by the courts to be able to impart any information or an idea, and therefore Adrian's freedom of expression would not be limited in this scenario.

Rick may argue that requiring him to shave his beard limits his right to express his religion. While, as noted above, the courts do not consider a beard of itself being able to express an idea, it is possible that, combined with other facial hair which is unique to Orthodox Jews such as payot (sidelocks), Rick's beard may be part of his way of expressing his religion.

Janet: This right is central to the fulfillment of other rights such as cultural rights and freedom of thought, conscience and religion. The wearing of bangles may constitute a form of expressing Indian culture. Janet's freedom of expression is also limited.

Right to liberty and security of person—s29(1)

29 Liberty and security of person

- (1) Every person has the right to liberty and security.
- (2) A person must not be subjected to arbitrary arrest or detention
- (3) A person must not be deprived of the person's liberty except on grounds, and in accordance with procedures, established by law
- (4) A person who is arrested or detained must be informed at the time of arrest or detention of the reason for the arrest or detention and must be promptly informed about any proceedings to be brought against the person.
- (5) A person who is arrested or detained on a criminal charge -
 - a. must be promptly brought before a court; and
 - b. has the right to be brought to trial without reasonable delay; and
 - c. must be released if paragraph (a) or (b) is not complied with.
- (6) A person awaiting trial must not be automatically detained in custody, but the person's release may be subject to guarantees to appear -
 - a. for trial; and
 - b. at any other stage of the judicial proceeding; and
 - c. if appropriate, for execution of judgement.
- (7) A person deprived of liberty by arrest or detention is entitled to apply to a court for a declaration or order regarding the lawfulness of the person's detention, and the court must -
 - a. Make a decision without delay; and
 - b. order the release of the person if it finds the detention is unlawful.
- (8) A person must not be imprisoned only because of the person's inability to perform a contractual obligation.

Adrian claims that his beard also offers protection from the sun and requiring him to shave it may impact his safety by increasing his risk of sunburn. It is possible that the right to security of the person extends to bodily integrity, though the primary focus of the right is protecting against the infliction of bodily or mental harm while a person is detained or arrested. Even if the right is engaged, the limit is minimal.

Taking part in public life—s23

23 Taking part in public life

- (1) Every person in Queensland has the right, and is to have the opportunity, without discrimination to participate in the conduct of public affairs, directly or through freely chosen representatives.
- (2) Every eligible person has the right, and is to have the opportunity, without discrimination—
 - (a) to vote and be elected at periodic State and local government elections that guarantee the free expression of the will of the electors; and
 - (b) to have access, on general terms of equality, to the public service and to public office.



Adrian: Should he be unable to continue working because of his beard, Adrian's right of access to employment with the public service will be limited. As his access will depend upon his physical appearance, he will not have access on general terms of equality.

Rick: Should he be unable to continue working because of his beard, Rick's right of access to employment with the public service will be limited. As his access will depend on compromising his religious beliefs, he will not have access to the public service on general terms of equality.

Cultural rights—generally—s27

27 Cultural rights—generally

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 practice their religion and to use their language.

Rick: Requiring Rick to shave his beard will impact on his ability to practise his religion in community with other Orthodox Jews.

Janet: Requiring Janet to remove her bangles will impact on her ability to wear bangles in accordance with her Indian culture.

Step 2: Is there a legitimate aim/proper purpose to the limitation? [Section 13(2)(b)]

What is the purpose of the limitation? Is it consistent with a free and democratic society based on human dignity, equality and freedom? Does the limitation have public interest considerations or preserve the rights of others?

The purpose of the policy is to reduce the risk of infection. Enforcing dress standards to minimise health risks supports the hospital's goal of providing the best possible health care to patients. Reducing health risks ultimately serves to protect the right to life in section 16 of the *Human Rights Act*, as well as security of the person in section 29. It is clearly a proper purpose.

Step 3: Is there a relationship between imposing the limit on the human right and the purpose of the limit? Does the limitation help to achieve the purpose? [Section 13(2)(c)]

Does the limit advance the purpose it is designed to achieve? (For example, a prohibition on the right to peaceful assembly where the peaceful assembly is in a duck shooting area would have a rational relationship/connection with, and advance the purpose of, public safety.)

In order to show that the hospital's *Uniform and Appearance Policy* regarding the prohibition of beards and wearing jewellery below the elbow will achieve the hospital's aims, supporting evidence will be required—for example, scientific research demonstrating the increased contamination risk of staff who wear beards and certain jewellery. If there is no evidence that facial hair or jewellery



increases health risks, then the policy will not help to achieve its purpose. In that case, the limits on human rights would not be justified.

Step 4: Are there any less restrictive and reasonably available ways to achieve the purpose? [Section 13(2)(d)]

Is the limitation necessary? Can you achieve the same purpose in more than one way? If so, what is the option that has the least impact on human rights while achieving the same purpose?

When considering the complaints, the Hospital should consider whether other options could also achieve the same purpose.

For Adrian and Rick, an option could be to allow beards that are short and neatly trimmed or wearing surgical masks.

In Janet's case, an option could be to cover the bangles with a bandage so they were no longer at risk of direct contact with patients or equipment.

However, the hospital must consider whether these other options would sufficiently address the contamination concerns.

If these other options do not adequately reduce the risk of infection, there will be no reasonably available alternative way of achieving the purpose, but which impacts on the human rights of Adrian, Rick and Janet to a lesser extent. The limits would be necessary.

If these other options do adequately address the risk of infection, then the limits on the human rights of Adrian, Rick and Janet will not be justified. The limits would not be necessary to achieve the purpose of reducing the risk of infection.

Step 5: Is the importance of the purpose of the requirement limiting the human right greater than the importance of preserving the human right, taking into account the nature and extent of the limitation on the human right? [Section 13(2)(e) – (f)]

Consider whether the benefits gained by fulfilling the purpose of the limitation outweigh the harm caused to the human right. This is a balancing exercise that involves comparing the importance of the purpose of limiting the human right with the importance of the human right and the extent of the limitation to be imposed. The more important the human right and the greater the limitation of it, the more important the purpose of the limit will need to be to show that it is reasonable and demonstrably justified.

The purpose of limiting Adrian, Rick and Janet's rights in this scenario is to reduce the risk of infection and contamination in the hospital by ensuring staff take precautionary measures. The purpose of reducing the risk of patient infection is ultimately to protect the right to life and security of patients, and should be given significant weight in the balancing exercise.



Human Rights

Respect · protect · promote

Prior to making an informed assessment as to whether the importance of the policy's health objective outweighs the human rights of Adrian, Rick and Janet the agency should ensure its policy is based on reliable evidence about the health and safety risks.

For example, if the evidence is that facial hair only very marginally increases the risk to health (with or without a surgical mask), it is likely that Rick's religious rights will outweigh the importance of the policy's objectives. The evidence may also be that the risk to health is associated with a critical mass of employees with facial hair, so that allowing an exception for people with genuine religious beliefs will not dramatically increase the risk to health.

On the other hand, if facial hair increases the risk to health and safety, even marginally, the importance of reducing that risk is likely to outweigh Adrian's human rights. The possible right engaged for Adrian is the right not to be discriminated against on the basis of physical appearance. Wearing a beard for stylistic reasons is not an immutable characteristic like race or religion, and therefore carries less weight in the balancing exercise.

As another example, further information is required to ascertain the cultural significance of wearing bangles, and whether removal of them during the work day would have a significant impact on Janet's ability to enjoy and practise her culture. If not, the importance of the policy will likely outweigh Janet's cultural rights, especially if there is evidence that bangles increase the risk to health and safety.



Scenario 3: Social media

Andy is a public service executive in a community engagement role who, while travelling between work meetings, was in a car accident that was caused by a young driver who was allegedly texting whilst driving. After emergency services extracted the driver from the vehicle, Andy took a photo of the driver's injured face and posted it to his Instagram account with commentary around texting while driving causing the accident, the risk to children who were passengers in the car and critiquing the action of public service emergency responders on the scene.

Andy has over 150 followers on his Instagram account. It shows many photos of him referencing his work role and attending business and community functions in that context and a member of the public writes to the Commissioner alerting him to this post. The driver of the vehicle has also been made aware of the post and has lodged a complaint.

Andy has previously posted inappropriate photos of himself and others at functions he had attended in his role, and received a reprimand following a discipline process and additional training on the department's Social Media policy.

The Chief Executive considers that Andy has breached the department's Social Media policy and the Code of Conduct.

The Chief Executive placed Andy on paid suspension and sent correspondence asking him to show cause why he should not be disciplined. Following receipt of Andy's response, the Chief Executive considers that the allegations against Andy are substantiated and proposes to terminate Andy's employment.

Proposed decision: to terminate Andy's employment on disciplinary grounds.

Step 1: Identify whether the proposed decision places a limit on a human right [Section 13(2)(a)]

Which human rights protected by the Act will be, or are, subject to limits in the scenario? What is the nature of the human rights? What are the values that underpin the human rights?

Freedom of expression—s21

21 Freedom of expression

- (1) Every person has the right to hold an opinion without interference.
- (2) Every person has the right to freedom of expression which includes the freedom to seek, receive and impart information and ideas of all kinds, whether within or outside Queensland and whether—
 - (a) orally; or
 - (b) in writing; or
 - (c) in print; or
 - (d) by way of art; or
 - (e) in another medium chosen by the person.



Every person has the right to freedom of expression which includes the freedom to seek, receive and impart information and ideas of all kinds, whether within or outside Queensland and whether— orally; in writing; in print; by way of art; or in another medium chosen by the person.

This right is considered to be central to the fulfilment of other rights such as cultural rights and freedom of thought, conscience and religion.

This right protects not only favourable information or ideas but also criticism and unpopular ideas, including those that ‘offend, shock or disturb’.

A decision to terminate Andy’s employment on the basis that he expressed his thoughts on his private social media account will place a limit on his freedom of expression.

Taking part in public life—s23

23 Taking part in public life

- (1) Every person in Queensland has the right, and is to have the opportunity, without discrimination to participate in the conduct of public affairs, directly or through freely chosen representatives.
- (2) Every eligible person has the right, and is to have the opportunity, without discrimination—
 - (a) to vote and be elected at periodic State and local government elections that guarantee the free expression of the will of the electors; and
 - (b) to have access, on general terms of equality, to the public service and to public office.

Andy will be unable to continue to work in his public service role while he is suspended and may lose his employment if a decision is made to terminate his employment. However, the right of access to the public service guarantees access on general terms of equality. The application of the *Public Service Act 2008* and Code of Conduct will not directly or indirectly discriminate against Andy on the basis of an attribute, but rather on the basis of his conduct. Accordingly, he still has access, on general terms of equality, to employment with the public service. Therefore, the right is not limited.

Privacy and reputation—s25

25 Privacy and reputation

- A person has the right—
- (a) not to have the person’s privacy, family, home or correspondence unlawfully or arbitrarily interfered with; and
 - (b) not to have the person’s reputation unlawfully attacked.

Andy’s online commentary about his personal views on the driver’s actions which caused the collision are accusatory and have not been substantiated. These comments will affect the privacy and reputation of the driver.



Andy's comments about the actions of other public service employees at the scene impact on their privacy and reputation.

Protection of families and children—s26(2)

26 Protection of families and children

- (1) Families are the fundamental group unit of society and are entitled to be protected by society and the State.
- (2) Every child has the right, without discrimination, to the protection that is needed by the child, and is in the child's best interests, because of being a child.
- (3) Every person born in Queensland has the right to a name and to be registered, as having been born, under a law of the State as soon as practicable after being born.

The photograph Andy posted on his social media account identified the person driving the vehicle, and referred to the children as passengers. The child passengers in the car could potentially be identified through the photo of the driver thereby opening up to the possibility of public scrutiny.

Step 2: Is there a legitimate aim/proper purpose to the limitation? [Section 13(2)(b)]

What is the purpose of the limitation? Is it consistent with a free and democratic society based on human dignity, equality and freedom? Does the limitation have public interest considerations or preserve the rights of others?

The purpose of terminating Andy's employment is to discipline him for his wilful failure to comply with the department's social media policy and Code of Conduct. The purpose of discipline is to ensure the integrity of the public service and to maintain public confidence in it. Where discipline is based on a failure to maintain the confidentiality of information, a further purpose is to protect the rights to privacy of others. Those are proper purposes.

Step 3: Is there a relationship between imposing the limit on the human right and the purpose of the limit? Does the limitation help to achieve the purpose? [Section 13(2)(c)]

Does the limit advance the purpose it is designed to achieve? (For example, a prohibition on the right to peaceful assembly where the peaceful assembly is in a duck shooting area would have a rational relationship/connection with, and advance the purpose of, public safety.)

Terminating Andy's employment will help to achieve the purposes of discipline: maintaining public confidence in the public service and protecting the right to privacy of others. As Andy would no longer be a public servant, his adverse actions would no longer be reflective of the public service.

Further, disciplining Andy will serve as an example to other public servants of the conduct expected of them. The limit is rationally connected to its purposes.



Step 4: Are there any less restrictive and reasonably available ways to achieve the purpose? [Section 13(2)(d)]

Is the limitation necessary? Can you achieve the same purpose in more than one way? If so, what is the option that has the least impact on human rights while achieving the same purpose?

Minor or less serious breaches of the Code of Conduct or an agency's policy or procedure may be dealt with through measures such as training or disciplinary action that does not restrict an employee's access to the public service.

In this scenario, the department could consider removing Andy from performing any public facing duties; however, it is unlikely to align with his skills and abilities which are focused on community engagement.

Given the nature of Andy's offence and the fact that he has previously been disciplined for similar conduct and received training to reinforce the expected requirements of his role, including complying with relevant policies, there are no less restrictive options that could achieve the same purpose.

Step 5: Is the importance of the purpose of the requirement limiting the human right greater than the importance of preserving the human right, taking into account the nature and extent of the limitation on the human right? [Section 13(2)(e) – (f)]

Consider whether the benefits gained by fulfilling the purpose of the limitation outweigh the harm caused to the human right. This is a balancing exercise that involves comparing the importance of the purpose of limiting the human right with the importance of the human right and the extent of the limitation to be imposed. The more important the human right and the greater the limitation of it, the more important the purpose of the limit will need to be to show that it is reasonable and demonstrably justified.

Andy performs an important public service role as a senior executive and undertaking community engagement. It is important that he does this professionally and that his private and public conduct does not reflect badly on his ability to perform his role, or the public service in general.

Disciplining Andy serves the important objective of ensuring the integrity of the public service and maintaining public confidence in it. Ensuring that the public service lives up to the trust reposed in it by the public is indispensable to the functioning of government.

Disciplining Andy may also serve the purpose of vindicating the human rights of others (in particular, their right to privacy). Protecting the human rights of others is a weighty consideration.

On the other hand, Andy's freedom of expression is also important as one of the indispensable conditions for the full development of the person.



Human Rights

Respect · protect · promote

However, Andy has exercised his freedom of expression in a way that impacts on the rights of others. He has also not exercised his freedom of expression as a means of fulfilling other rights, such as the right to take part in public life, by communicating about political matters.

On balance, it is more important to protect the integrity of the public service and the rights of the other individuals (the driver and emergency officers) than to preserve Andy's right to freedom of expression and to take part in public life, particularly where those rights have only been narrowly limited.



Queensland
Government