Limiting human rights: when can law and policy restrict rights?

Human rights are essential in a democratic and inclusive society that recognises the dignity and worth of all people. Rights are protected in Queensland under the Human Rights Act 2019. These protections apply during a pandemic as they do at other times, and public entities must still act compatibly with human rights when they make decisions.

However, human rights protections are rarely absolute. Laws and policies are able to restrict human rights, but only in a way that is reasonable and justifiable. Legitimate reasons for restricting rights might include protecting life, health and safety.

Below are six important principles that should guide government consideration of whether their legislative and policy responses to the pandemic situation meet their obligations under the Human Rights Act.

- Is the restriction necessary?
- Is the restriction proportionate?
- Does the restriction comply with existing laws, including discrimination laws?
- Is the restriction transparent?
- Is the restriction subject to scrutiny?
- Does the restriction protect the human worth and dignity of communities most at risk?

Necessary

Human rights can only be restricted to achieve an important and legitimate purpose. Protecting the lives and health of people during the COVID-19 pandemic is such a purpose. Decisions to restrict people’s rights should be based on evidence that the restriction is needed to achieve that purpose. If circumstances change, and the restriction is no longer needed to achieve the purpose, it will no longer be justifiable.

Proportionate

Measures that restrict human rights should be the least restrictive possible. Restrictions should be time limited, and could be limited to geographic regions. The means used to enforce these measures (such as fines and ‘move on’ powers) must be proportionate to their purpose. They must also have avenues for review or appeal.

Before implementing restrictions, government agencies should consider alternative measures to limit the impact of those restrictions - for example, making videoconferencing available where face-to-face visits are suspended.

Laws and policies that restrict rights should be regularly reviewed to ensure they remain justified. Such laws and policies should be removed once the need for them has passed.
Lawful and non-discriminatory

During the pandemic, human rights under the Human Rights Act have not been suspended. Restrictions on rights must also be in accordance with the law. For example, a direction by the Chief Health Officer that restricts people’s movement can only be made if it is in accordance with the powers given under the Public Health Act.

In addition, any restrictions on rights must not be discriminatory, a right protected under both the Human Rights Act and the Anti-Discrimination Act.

Transparent

The government should provide accessible, timely, clear, and comprehensive information about any measures that restrict human rights. It should do this in a way that the public can understand, including people with disability and people from linguistically diverse backgrounds.

The information should include the medical evidence or public health modelling which the decision has been based on.

The reasons and justification for any restriction should be recorded and publicly available.

Scrutinised

Supervision and scrutiny of the government’s response to COVID-19, including legislative measures and the exercise of new powers, is key to upholding democracy and the rule of law during this public health crisis.

The Human Rights Act requires a statement of compatibility with human rights to be prepared on any Bill introduced into parliament. New subordinate legislation must also be accompanied by a human rights certificate regarding its compatibility with human rights. These requirements remain in place for any COVID-19 emergency legislation and regulations.

Bypassing usual parliamentary scrutiny processes should only happen in the most urgent and exceptional of circumstances. Consultation, where possible, should still occur with stakeholders.

The public should be able to access information about their rights, including how to report issues with restrictions, and how to appeal or request a review of decisions. The right to freedom of expression and peaceful assembly should be promoted and protected.

Protect human worth and dignity

Restrictions to protect people against COVID-19 must consider the specific needs of vulnerable communities and the consequences of general restrictions for them. They should be consulted on the development of emergency measures. Vulnerable communities include Aboriginal people and Torres Strait Islander people, people with disability, children, older people, people at risk of domestic violence, culturally and linguistically diverse communities, and people in detention.

Wherever possible, safeguards should be built into laws, policies, and practices to prevent abuse of any new powers and to protect people most at risk. These can include public reporting, internal and external review process, significant powers only authorised via court orders, independent oversight of closed environments, and protection against racial vilification in connection with COVID-19.