

Luke Geurtsen

17th April 2016

The Research Director

Legal Affairs and Community Safety Committee
Parliament House Brisbane QLD 4000
lacsc@parliament.qld.gov.au

Human Rights Inquiry

Dear Research Director

Thank you for the opportunity to make a submission to this inquiry. I urge the committee to consider that any interpretation of the rights and liberties of Queenslanders be made by an elected body that is directly accountable to the people of Queensland and for that reason I submit that the current approach in Queensland to protecting the rights and liberties of individuals should be continued and expanded upon. Above all, any changes to the approach of protecting Human Rights in Queensland should not be swept up in an act of conspicuous compassion where moral posturing is mistaken for genuine action.

Human Rights have consequences

The future is inherently uncertain and it is human nature to attempt to avoid or control uncertainty but entrenching Human Rights in law is not a silver bullet to future policy problems or legal debates. The idea of Human Rights being entrenched in law typically conjures ideals that are far removed from the realities with which they must inevitably collide and often ignores the realities of costs and difficulties of application like a celebration where someone else is expected to experience the hangover. Any discussion of Human Rights must not ignore or gloss over the problems attached to defining Human Rights.

Human Rights are a fluid concept. Thirty years ago the majority of Western intellectuals would have claimed that freedom of expression and equality were necessary as a minimum for Human Rights. Today's Western intellectuals are regularly calling for the denial of their opponent's freedom of expression and apparently equal rights are now considered unfair and a root cause of inequity. The idea that a definitive set of Human Rights can be stated now and forever is problematic at best.

Human Rights have limits. What happens when rights collide? Just as no person exists in isolation, nor does anyone's rights. Eventually the rights of two or more people will conflict. A person's rights must be limited to the extent that they would otherwise detract from another person's rights. An effective society requires limits on the freedoms of citizens and a degree of compulsory co-operation. Unlimited rights of a particular group or individual can be expected to have the effect of denying some rights to others and creating second class citizens in the name of protecting Human Rights.

Human Rights are not free. When a State ensures a right, it is the taxpayers that must fund that right and any consequences. Rights enforced or protected by States must face economic realities. The economic resources of the State are not limitless, no matter how great a cause is. A bankrupt State is in no place to protect anyone's rights.

Human Rights are not tangible. In the day to day life of most citizens, a Bill of Rights sits as nothing more than an impotent statement of moral values and high hopes. No victim of assault ever fought off their assailant by insisting on their rights. Rights must be enforceable through some mechanism or by some institution to have any real value. Any such mechanism or institution must be equally accessible to all citizens and have an interest in protecting the rights of all citizens equally.

Entrenching Human Rights in a law that empowers any entity other than Parliament with the ability to define those rights, or modify laws in the name of those rights, shifts the ultimate legal authority away from the citizenry as exercised through their elected representatives. How can Parliament truly know what laws it is passing if another entity will have the power to effectively modify those laws based on how it interprets Human Rights?

Laws should not be ambiguous, least of all laws with the purpose of invalidating, restricting or interpreting other laws. Vague statements have no place in legislation, no matter how well intended. Entrenching Human Rights in law in Queensland will require the full acknowledgment of the limitations of Human Rights and the proper effort to avoid unintended consequences.

An obsession with the big picture can allow the accumulation of damaging detail

In modern democratic countries the rights of citizens are rarely trampled by governments in obvious ways. The rights of individuals are slowly chipped away over time, typically through small increases in government power and the creation of new offences. Whether due to frequency or inattention, it is the minor infringements that are more likely to reduce the rights of individuals over time. The protection of Human Rights must extend to the protection from minor infringements or eventually the major infringements will seem like only one insignificant step too far. Examples of minor infringements would be the ever increasing requirements for approvals and permits and the ever more opaque justifications for the cost of these.

If the debate about Human Rights is focused solely on hypothetical problems and people only as an abstract idea, the actual difficulties endured by ordinary people in everyday life get over-looked. Being obsessed with large but unlikely infringements of Human Rights can have the consequence of missing the small but all too common ones.

Who should determine Human Rights in Queensland

A parliamentary democracy based on the rule of law has, for all its flaws, shown itself to be the best mechanism of addressing issues for which the citizenry can have very different opinions. Parliament is the best placed institution for determining and protecting Human Rights because its members are elected and as such, are accountable to those affected by the decisions they make. Parliament employs a transparent process for debating and deciding matters which would be extended to its consideration of Human Rights. Parliament, through its government members, has the input of a well-resourced professional organisation (government) that understands the practical limitations and economic realities affecting a particular right. Parliament remains the best placed institution to be representative of the community and reflect community opinion. A Bill of Rights or similar mechanism of entrenching Human Rights in law can only really be used to limit or dictate the public policy that gets enacted through laws made by Parliament.

Current Queensland approach to Human Rights

It may surprise many people to know that Queensland already has a mechanism for protecting the rights of people. There is a requirement in Queensland that legislation have sufficient regard to the rights and liberties of individuals and to the institution of Parliament. Enshrined in section 4 of the *Legislative Standards Act 1992* is the concept of fundamental legislative principles. Fundamental legislative principles are principles relating to legislation that underlie a parliamentary democracy based on the rule of law. Sections 23(1)(f) and 24(1)(i) of the *Legislative Standards Act 1992* place a requirement on explanatory notes for Bills and subordinate legislation to give an assessment of the consistency of the instrument with fundamental legislative principles and, if it is inconsistent with the principles, the reasons for the inconsistency.

The current Queensland approach is often overlooked because it doesn't use the term Human Rights. The Queensland approach takes the view that the proper time to consider the rights of citizens is in the development of legislation and the determination of how those rights should be affected by legislation is ultimately the job of the Parliament.

For more information about the application of fundamental legislative principles see chapter 7 of The Queensland Legislation Handbook¹, The OQPC notebook and The Principles of good legislation: OQPC guide to FLPs².

Changes to the Queensland approach

What, if any, changes could be made to the current Queensland approach? As always, any changes that enhance transparency and accountability in government are to be encouraged. I suggest that the current Queensland approach be continued and expanded upon and I make the following suggestions;

¹ www.legislation.qld.gov.au/leg_info/publications/legislation_handbook.pdf

² www.legislation.qld.gov.au/Leg_Info/flp.htm

1. Removing the application of fundamental legislative principles from the *Legislative Standards Act 1992* and creating a stand-alone Act that addresses those matters in an updated form, including by renaming fundamental legislative principles with a more modern and recognisable term to refocus attention on these important principles and their purpose. Rather than creating vague rights that are difficult to translate into real outcomes, the updated form should focus on detailed rights or principles to protect rights.
2. Establishment of a parliamentary committee with the specific purpose of examining all Bills and subordinate legislation for consistency with fundamental legislative principles³. The committee should have the function of examining all legislative instruments, without exception⁴, and any other generally applicable administrative rule or direction that has the purpose of limiting the rights and liberties of individuals. The committee should have the power to require written justification of any inconsistency with fundamental legislative principles the committee believes exist and be able to make and table recommendations. It should be stressed that the purpose of the committee would not be to investigate the merits of a policy by rather the implications of that policy in terms of fundamental legislative principles.
3. Subject to the same question rule, the new parliamentary committee should be able to review any existing legislation for consistency with fundamental legislative principles.
4. The new committee should also be able to review any new offence, penalty or fee imposed by an agency of the State or a local government and require justification or explanation for those matters.
5. Because the rights and liberties of individuals are often affected by the powers of State and local government employees to enter property, seize property or use coercive powers to obtain information (commonly known as inspectors' powers), those powers should all be contained in one Act, similar to the powers of police officers. An exception to that could be powers exercised only in relation to licensees. This would enhance awareness and oversight of such powers by elected representatives, make the public more aware of such powers and bring the benefits of uniformity and predictability to the use of those powers.
6. The power to impose a fee for service be limited to recuperation of the reasonable costs of providing the service for which the fee is imposed and not be expanded by a taxation power.
7. Legislation should be invalid if it is not readily available free of charge. Legislation may incorporate other documents and these other documents are often made by an entity other than the one that made the legislation. Occasionally incorporated documents are only available to a person on payment of a fee effectively meaning that the full details of a law is only knowable by a person if they pay a fee. An example of this issue would be the incorporation of industry standards in a regulation.
8. With the proliferation of internet connected devices it should also be a requirement that all government enforced rules - legislation or otherwise - should be accessible from the internet and not require a person to physically attend a location to view a copy of those rules. While all legislation drafted by the Office of the Queensland Parliamentary Counsel is available from its website⁵, not all government enforced rules applying to Queenslanders are available from that website and some are quite difficult to locate across various websites.
9. Improved consistency of all legislation, including all subordinate instruments. Legislation being drafted in a consistent way is a benefit to the public trying to understand how they are affected by that legislation. Consistent style greatly improves understanding of laws and the speed at which new laws are understood as it draws on familiar terms and interpretations. Consistent style also aids in reducing disputes about legislation as parallels are more easily drawn from other already disputed or well understood legislation. While the Office of the Queensland Parliamentary

³ The former Scrutiny of Legislation Committee was a parliamentary committee that considered the application of fundamental legislative principles to particular Bills and subordinate legislation.

⁴ This should include all regulations, rules, notices and local laws.

⁵ <https://www.legislation.qld.gov.au/OQPChome.htm>

Counsel drafts most legislation in Queensland, it does not draft all legislative instruments such as local laws and other exempt subordinate legislation⁶. Given the functions of that office under section 7(g) and (h) of the *Legislative Standards Act 1992* it is difficult to see who advises on, and to what extent the proper regard is had to, fundamental legislative principles for any local laws and other exempt subordinate legislation.

10. The ability to make a subordinate instrument under the necessary and convenient power⁷ should be abolished. Modern governments are large well-resourced professional organisations and should not require protection from an unforeseen gap in an authorising power. The power to create a subordinate instrument should be explicit, well defined and not be required to be interpreted broadly.
11. That, with the exception of the courts, all statutory entities have a sunset of 10 years after which time new empowering legislation must be enacted. The reason for this would be to address the ever increasing size of government and overlapping regulation. With each new enactment of a statutory entity's functions, those functions would be reviewed for redundancy with other agencies and continued necessity.
12. That entry to private property without a warrant should not be authorised other than an Act of Parliament.
13. That the confiscation of property not be authorised by any law other than an Act of Parliament.
14. That a requirement for a licence, permit or similar authorisation not be imposed without a demonstrated genuine need.

What Human Rights should not enable

The entrenchment of Human Rights in law has a spotted history. All too often a Bill of Rights or similar law are almost exclusively used in the interpretation of an offender's rights, and the limitation of government powers, in the application of criminal law and procedure. Any efforts in protecting Human Rights in Queensland should seek to avoid the perverse outcomes that have occurred in other jurisdictions.

The protection by the State of Human Rights should not result in the creation of classes of persons with different rights. The State's protection of a Human Right should not, by intention or in effect, have the consequence of creating different rights for people based on ancestry, culture, ethnicity, race or religion.

The protection of a person's right should not be afforded if that person has shown an intention to use that right to deny the lawful exercise of a right by another person. A person using the right to freedom of association and freedom of expression to engage in protest activity for the sole purpose of shutting down other people's lawful protests or movements.

There should remain consequences for a person seeking to benefit from a right that they themselves have taken from another person. Human Rights should not create a situation where people only receive the full benefits under those rights when they contravene the law, particularly by taking away the rights of others.

Any mechanism for protecting Human Rights must not enable or encourage an activist judiciary pushing policy from the bench.

⁶ Exempt subordinate legislation is defined under the *Legislative Standards Act 1992*, Schedule 1.

⁷ See section 22(1)(b) of the *Statutory Instruments Act 1992*.

Any entrenchment of Human Rights in law should not encourage the belief that the rights and liberties of people come only from the government or laws, leading to a belief that anything is unlawful unless the State makes it lawful.

Any entrenchment of Human Rights in law or mechanism for protecting those rights should not enrich a professional grievance industry. The protection of Human Rights should benefit society as a whole and not result in a transfer of wealth or authority from citizens to lawyers and advocate groups.

Conclusion

Everyone can think of examples of laws that offend their personal beliefs or moral values, but what can be gained by a society if those against who laws are enacted can simply have them invalidated by making an emotive appeal to a vague set of principles dressed-up as legal rights? Any changes to protecting Human Rights in Queensland should ensure that it is the Queensland public, through their elected representatives, that have the ultimate say on what those rights are and how they should be applied.

Yours sincerely

Luke Geurtsen