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# **Towards a Tasmanian Charter of Human Rights**

**December 2010**



**Human Rights Law Resource Centre Ltd**

**Level 17, 461 Bourke Street**

**Melbourne VIC 3000**

**Australia**

**[www.hrlrc.org.au](http://www.hrlrc.org.au)**

Emily Howie, Ben Schokman and Philip Lynch  
Human Rights Law Resource Centre Ltd  
Level 17, 461 Bourke Street  
Melbourne VIC 3000

T: + 61 3 8636 4450  
F: + 61 3 8636 4455  
W: [www.hrlrc.org.au](http://www.hrlrc.org.au)

### **About the Human Rights Law Resource Centre**

The Human Rights Law Resource Centre is a non-profit community legal centre that promotes and protects human rights and, in so doing, seeks to alleviate poverty and disadvantage, ensure equality and fair treatment, and enable full participation in society. The Centre also aims to build the capacity of the legal and community sectors to use human rights in their casework, advocacy and service delivery.

The Centre achieves these aims through human rights litigation, education, training, research, policy analysis and advocacy. The Centre undertakes these activities through partnerships which coordinate and leverage the capacity, expertise and networks of pro bono law firms and barristers, university law schools, community legal centres, and other community and human rights organisations.

The Centre works in four priority areas: first, the effective implementation and operation of state, territory and national human rights instruments, such as the *Victorian Charter of Human Rights and Responsibilities*; second, socio-economic rights, particularly the rights to health and adequate housing; third, equality rights, particularly the rights of people with disabilities, people with mental illness and Indigenous peoples; and, fourth, the rights of people in all forms of detention, including prisoners, involuntary patients, asylum seekers and persons deprived of liberty by operation of counter-terrorism laws and measures.

The Centre has been endorsed by the Australian Taxation Office as a public benefit institution attracting deductible gift recipient status.

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## 1. Introduction

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1. The Human Rights Law Resource Centre (**HRLRC**) welcomes this community consultation by the Tasmanian Department of Justice on the proposed model for a legislative charter of human rights for Tasmania (**Tasmanian Charter**) and is pleased to provide this submission.
2. The HRLRC has significant expertise and experience in the content and operation of legislative charters of human rights in Australia and overseas and has been actively involved in the development, implementation and construction of the *Charter of Human Rights and Responsibilities Act 2006 (Vic)* (**Victorian Charter**).
3. This submission aims to provide technical assistance on the content and operation of the proposed Tasmanian Charter as well as the benefits that have accrued from the enactment of similar instruments in other Australian jurisdictions and overseas. The submission draws primarily on evidence and experience of Charters of Rights in Victoria, the ACT, the United Kingdom and New Zealand. Whilst we would encourage the development of the Tasmanian Charter to be broadly in accordance with Charters in comparable jurisdictions, the Tasmanian Charter need not be confined to those models. Importantly, the adoption of a Charter by Tasmania at this stage should be seen as an opportunity to improve upon the models for protection of human rights elsewhere.
4. The submission has an executive summary, followed by a section on the benefits of enacting a Tasmanian Charter. The rest of the submission follows the headings for Consultation Points in the Directions Paper, and under each part seeks to answer the questions put in the Directions Paper as well as set out any further relevant matters.

## 2. Executive Summary

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5. The position of the HRLRC in relation to each of the Consultation Points raised in the Directions Paper can be summarised as follows:

### 2.1 Table of Responses to the Consultation Points

Question in Discussion Paper	HRLRC Answer
<i>1. Are the rights recommended by the Institute and listed in table 4 appropriate to Tasmania, and are they sufficient?</i>	The list of rights protected in the Proposed Model for the Tasmanian Charter is not currently sufficient.
<i>2. What rights from the International human rights treaties, not listed here, would you like to see included, if any?</i>	The Tasmanian Charter should include all human rights recognised in the ICCPR and ICESCR.
<i>3. Is there a need to specify human responsibilities in detail alongside the human rights and freedoms, or is it sufficient to have an overview statement that the rights and freedoms impose responsibilities? If so, what, if any, consequences should flow from a failure to fulfil responsibilities?</i>	Human responsibilities should not be specified in the Tasmanian Charter. Recognition of human responsibilities in the preamble, in a manner similar to the Victorian Charter, is sufficient.
<i>4. Is having only a general limitation clause that applies to all but a small number of rights appropriate?</i>	Yes, the general limitation clause should apply to all rights except absolute rights. The Charter should expressly state which rights are absolute.
<i>5. Should the Tasmanian Parliament have the right to pass overriding declaration where the Parliament disagrees with a declaration of incompatibility by the Supreme Court?</i>	No, override declarations are not necessary in a legislative model of human rights.
<i>6. Is it appropriate that after the Supreme Court declares subordinate legislation (eg regulations) and Council by-laws to be incompatible with the Charter they become invalid, unless Parliament changes the Act of Parliament to make them valid?</i>	Yes.
<i>7. Should the Charter expressly point the courts and other branches of government to international law and the judgments of foreign and international courts and tribunals when interpreting human rights as is the case in the ACT and Victoria in relation to the interpretation by courts and tribunals?</i>	Yes.

Question in Discussion Paper	HRLRC Answer
<i>8. The Charter requires courts and tribunals to interpret laws consistent with human rights, should that be subject to the requirement that Courts and Tribunals ensure an interpretation that best achieves the purpose of the legislation, as is the case in the ACT and Victoria?</i>	Yes.
<i>9. Is it appropriate to limit the power to make a declaration of incompatibility to the Supreme Court and only the Supreme Court?</i>	Yes.
<i>10. The model in this paper allows individuals to raise the rights in the Charter as part of another action in a court or tribunal or in judicial review of administrative decisions. Is this level of protection for human rights appropriate in Tasmania?</i>	A Tasmanian Charter should provide a free-standing cause of action for breaches of the protected human rights. This is necessary to ensure that there is an effective remedy available for any breach of a human right.
<i>11. The model allows for an individual who only has a human rights action caused by incompatible provisions in an Act to take that issue to the proposed Human Rights Commission, who can then take it to the Supreme Court. Is this sufficient protection?</i>	The proposed Human Rights Commission should be empowered to issue proceedings in the Supreme Court on behalf of an aggrieved individual. However, this avenue should be in addition to, and not in place of, a free-standing cause of action being available for any aggrieved individual.
<i>12. The model allows for the proposed Human Rights Commission to inquire into services and programs and to make recommendations for greater compliance with the human rights in the Charter, is this necessary in Tasmania and if so, is this a sufficient protection in ensuring programs and services are delivered which are consistent with human rights?</i>	The proposed Human Rights Commission should be empowered to inquire into services and programs and to make recommendations for greater compliance with protected human rights. However, this power should be in addition to, and not in place of, a free-standing cause of action being available for any aggrieved individual.
<i>13. A number of mechanisms are suggested in this paper to encourage community engagement in human rights. Do you support these mechanisms? Are there other things that would be effective in this regard?</i>	The HRLRC supports the establishment of the proposed Human Rights Commission to, among other functions, engage in community education and engagement with human rights. The HRLRC does not support the establishment of the Human Rights Advisory Council in its proposed form but does recommend a number of further measures to ensure effective community engagement and education.

Question in Discussion Paper	HRLRC Answer
<i>14. Do you support a single independent Commission that would combine the roles of the Anti-Discrimination Commissioner and the proposed Human Rights Commission suggested in this paper?</i>	Yes. The HRLRC considers that the roles of the Anti-Discrimination Commissioner and proposed Human Rights Commission should be combined.
<i>15. Should all parts of government have to comply with the Charter obligations?</i>	Yes, all "core" public authorities should have to comply with Charter obligations.
<i>16. Should State and Council-owned companies only have to comply with the Charter obligations if and when their competitors are subject to similar obligations or should they be treated as any other part of government?</i>	State and Council-owned companies should always have to comply with Charter obligations if they meet the definition of a "functional" public authority.
<i>17. Should non-government service providers who provide services funded or controlled by Government have to comply with the Charter obligations?</i>	Non-government service providers that meet the definition of a "functional" public authority should have to comply with Charter obligations in their discharge of public functions.
<i>18. Do you agree with the detail outlined for each of the ten categories of rights in this paper? If not, what detail do you suggest should be incorporated for each?</i>	No, we do not think the ten categories of rights is useful. Instead each right should be given a heading similarly to the Victorian Charter and the ACT Human Rights Act.
<i>19. Should a right to adequate standard of living and environmental sustainability be included in a Tasmanian Charter?</i>	Yes
<i>20. Should a right to adequate standard of living and environmental sustainability be included now or should their inclusion be delayed until they are also included in the Charters of other Australian states or territories?</i>	They should be included now.
<i>21. Is the detail provided for these two categories adequate for Tasmania?</i>	No, the detail for the right to adequate standard of living needs to be amended and improved.
<i>22. Are the rights listed in the paper for persons living with disability necessary and if so are there any others you would include?</i>	Although not strictly necessary, the rights relevant to persons living with disability are a helpful articulation of human rights as they apply to those people.



## 2.2 List of Recommendations

<b><i>Recommendation 1: Adopt a Charter of Human Rights</i></b>
The Tasmanian Government should introduce a Charter of Rights for Tasmania.
<b><i>Recommendation 2: Include all Rights in the ICCPR and ICESCR</i></b>
The Tasmanian Charter should protect all the rights contained in the International Covenant on Civil and Political Rights ( <b>ICCPR</b> ) and the International Covenant on Economic, Social and Cultural Rights ( <b>ICESCR</b> ).
<b><i>Recommendation 3: Expand upon the Rights Protection in the Proposed Model</i></b>
The Proposed Model in Table 3 should be expanded to enshrine all the fundamental civil, political, economic, social and cultural rights that are necessary for all people to live with dignity and participate fully and equally in our community. This means that the Tasmanian Charter should protect all the rights protected in the ICCPR and ICESCR. The right to property should also be included.
<b><i>Recommendation 4: The Rights in the Proposed Model Need to be Amended</i></b>
<p>The following human rights in the Proposed Model should be reconsidered and amended to more consistently reflect the rights as articulated in the ACT Human Rights Act, Victorian Charter or ICCPR:</p> <ul style="list-style-type: none"><li>• The right to liberty and security of the person</li><li>• The right to humane treatment while in detention</li><li>• The right to a fair hearing</li><li>• The rights in criminal proceedings</li><li>• The protection against retrospective criminal laws</li><li>• The freedom of thought, conscience, religion and belief</li><li>• The freedom of movement</li><li>• The freedom to take part in public life</li><li>• The rights of people with a particular cultural, religious, racial or linguistic background</li></ul>
<b><i>Recommendation 5: Don't Use Ten Categories of Human Rights</i></b>
The ten categories of rights used in part 8.1.4.1 are unnecessary. Instead, a heading should be inserted for each right listed in the Tasmanian Charter.
<b><i>Recommendation 6: Articulate Human Rights Consistently with Other Charters</i></b>
To the extent possible, human rights in the Tasmanian Charter should be expressed consistently with rights in the Victorian Charter, the ACT Human Rights Act and international law.

***Recommendation 7: Articulate the Additional Rights More Broadly***

The Additional Rights listed in Table 4 should be included in the Tasmanian Charter, however:

- (a) the articulation of some of those rights should be amended to reflect the definition of rights in international law; and
- (b) the list as currently conceived is incomplete and should include all ESC rights.

***Recommendation 8: Include ESC Rights Immediately***

Economic, social and cultural rights should be included in the Tasmanian Charter immediately.

***Recommendation 9: Responsibilities can be Included in the Preamble***

The Tasmanian Charter should include a statement in the Preamble that human rights should be exercised responsibly and in a way that respects the human rights of others. The Tasmanian Charter should not specify human responsibilities in detail alongside the human rights and freedoms.

***Recommendation 10: Include a General Clause that Limits Rights***

A Tasmanian Charter should include a general limitations clause that applies to all rights, except absolute rights. The limitations clause should be in much the same terms as section 7(2) of the Victorian Charter. The limitations clause should expressly state that it applies to the role of legislators.

***Recommendation 11 : Absolute Rights Cannot Be Limited***

The Tasmanian Charter should:

- (a) set out the rights that are absolute and the rights that are not absolute;
- (b) state that no limitation of absolute rights is allowed; and
- (c) provide a framework for determining whether and how limitations of non-absolute rights will be allowed.

Non-derogable rights should not be subject to a limitations clause, unless non-derogable rights are also absolute rights.

***Recommendation 12: No Override Declaration***

A Tasmanian Charter should not contain an override declaration.

***Recommendation 13: Proper Protection for Non-Derogable Rights***

If a Tasmanian Charter allows for the Tasmanian Government to make derogations from rights, it must only be in respect of non-derogable rights, in exceptional circumstances, for limited periods of time and subject to proper accountability mechanisms.

***Recommendation 14: Incompatible Subordinate Instruments Invalid***

For the sake of clarity, the Tasmanian Charter should clearly and expressly state that subordinate instruments are invalid if they are incompatible with human rights, unless the empowering Act provides for the making of incompatible instruments.

***Recommendation 15: Statements of Compatibility***

The Tasmanian Charter should require Statements of Compatibility to be tabled by the parliamentarian introducing a Bill. Further, the HRLRC states that a Statement of Compatibility should state:

- (a) whether the Bill is compatible with human rights, and if so, how it is compatible; and
- (b) if the Bill is inconsistent, the nature and extent of the incompatibility and why the Bill should nevertheless be considered by the Parliament.

***Recommendation 16: Establish a Joint Parliamentary Committee***

The Tasmanian Charter should establish a Joint Parliamentary Human Rights Committee to:

- (a) scrutinise all Bills and subordinate legislation for compatibility with protected rights;
- (b) conduct thematic inquiries into human rights issues; and
- (c) assist in government responses to Declarations of Incompatibility and other court and tribunal decisions and judgments such as those of the UN Human Rights Committee that concern Australia.

***Recommendation 17: Require a Response to Declarations of Incompatibility***

The Tasmanian Charter should require, in accordance with the Proposed Model, that within a specified timeframe (between 30 days and 6 months) of receipt of a Declaration of Incompatibility the Minister responsible for legislation must either:

- (a) amend the legislation to ensure it is consistent with human rights; or
- (b) table a written declaration and response in each house of Parliament.

***Recommendation 18: Use International Law***

The Tasmanian Charter should expressly empower courts to have regard to international and comparative human rights instruments and jurisprudence when interpreting and applying the Tasmanian Charter and any other laws that impact on human rights.

***Recommendation 19: Interpret Legislation Consistently With Human Rights***

The Tasmanian Charter should require that all Tasmanian legislation be interpreted and applied (and, if necessary, read up or down) in a manner compatible with human rights.

***Recommendation 20: All Persons have the Interpretive Obligation***

All persons, not just courts and tribunals, should be required by the Human Rights Act to interpret Commonwealth legislation and subordinate legislation according to the Interpretive Principle.

***Recommendation 21: Supreme Court to Make Declarations of Incompatibility***

The power to make Declarations of Incompatibility (sometimes also known as declarations of inconsistent interpretation) should be limited to the Supreme Court.

***Recommendation 22: Referrals to the Supreme Court***

The Tasmanian Charter should include a provision similar to section 33 of the Victorian Charter which provides for referral to the Supreme Court of questions of law that arise in relation to the application of the Charter or the interpretation of statutory provisions in accordance with the Charter.

***Recommendation 23: Causes of Action under the Charter***

- (a) A Tasmanian Charter should contain a free-standing cause of action for breaches of all rights protected by the Act. However, an application for a Declaration of Incompatibility should be required to be brought with another cause of action to minimise the chances of it being considered to be a request for an advisory opinion of the court.
- (b) All persons whose human rights are directly breached should be able to bring a claim under the Act. The Act should also allow third parties to have standing and act on behalf of aggrieved persons who are unable to bring a complaint on their own behalf.
- (c) A Tasmanian Charter should allow a full range of judicial remedies to be available for breaches of all rights under the Act, including damages.

***Recommendation 24: Non-judicial Remedies***

In addition to the availability of judicial remedies, a Tasmanian Charter should provide a full range of non-judicial remedies for breaches of all rights under the Act, including powers of a Human Rights Commission to receive complaints and inquire into matters.

***Recommendation 25: Funding Access to Justice***

State government funding for community legal centres and legal aid should be increased to enable them to better provide access to justice for those who are unable to afford private legal assistance. In particular, specific funding should be provided for human rights related litigation, advocacy, education and training so as to ensure that the benefits of the Tasmanian Charter are realised for marginalised and disadvantaged individuals and groups.

***Recommendation 26: Human Rights Commission to Educate***

In place of a Human Rights Advisory Council, powers and functions should be granted to the Human Rights Commission to engage with the community and to provide community education about human rights.

***Recommendation 27: Human Rights Education***

The Tasmanian Government should:

- (a) provide clear directives that human rights education is an essential component of the school curriculum;
- (b) clearly state where human rights education fits within the school curriculum; and
- (c) provide human rights education training for all school teachers.

***Recommendation 28: Funding the Human Rights Commission***

Adequate funding and resources should be provided to the proposed Human Rights Commissioner for the continuing development of human rights education materials and for the systematic distribution of this material to schools.

**Recommendation 29: Establish a Leadership Group**

A Human Rights Leadership Group comprising key government decision makers, local government representatives, peak human rights NGOs, human rights experts and human rights advocacy organisations should be established to provide leadership and support for the promotion of a human rights culture throughout the community, including by way of successful implementation of a federal Human Rights Act.

**Recommendation 30: Hold Annual Conversations between government and human rights organisations**

An Annual Conversation should be held between the Tasmanian Government (relevant minister or parliamentary secretary) and human rights organisations.

**Recommendation 31: Increase funding for human rights organisations**

- (a) Funding for human rights organisations should be reviewed and increased in light of the government's commitment to human rights and the crucial role human rights organisations play in achieving a human rights culture.
- (b) Specific human rights grants should be made available for organisations that aim to protect and promote human rights to engage with the Tasmanian Charter.

**Recommendation 32: Combining Commissions**

The roles of the Anti-Discrimination Commissioner and proposed Human Rights Commission should be combined and should encompass the current functions of the Anti-Discrimination Commissioner together with the roles, functions and powers outlined in section 8.2.1.2 of the Directions Paper.

**Recommendation 33: Core and Functional Public Authorities**

The definition of "public authority" in the Tasmanian Charter should include:

- (a) an express list of "core" public authorities;
- (b) "functional" public authorities, which encompasses entities that exercise functions of a public nature;
- (c) courts and tribunals when acting in administrative capacity or exercising functions that relate to ensuring that a particular right is upheld.

**Recommendation 34: Obligations on Public Authorities**

"Public authorities" should be required:

- (a) to act compatibly with human rights (a *substantive* obligation); and
- (b) to give proper consideration to human rights when making decisions and implementing legislation (a *procedural* obligation).

**Recommendation 35: Business Obligations**

Whether or not the private sector should have to comply with a Tasmanian Charter could be a subject of the Charter review after 4 years.

***Recommendation 36: Preambular Recognition of Aboriginal Peoples***

The Tasmanian Charter should contain a preamble acknowledging the special importance that human rights have for Indigenous peoples of Australia as the descendants of Australia's First Peoples. Any decisions about the protection of the human rights of Aboriginal peoples should be made in consultation with Aboriginal peoples.

***Recommendation 37: Advisory Council May Not Be Necessary***

Further consideration should be given to the need for the Advisory Council given that the roles proposed for it overlap with the functions of the Human Rights Commission and that there would be great benefit in establishing a Joint Parliamentary Committee on Human Rights and the Human Rights Leadership Group.

***Recommendation 38: Monitoring and Reviewing the Tasmanian Charter***

The Tasmanian Charter should include statutory requirements for monitoring and periodic reviews of the Charter. The Tasmanian Charter should have two main reporting and review mechanisms:

- (a) annual reporting from the Human Rights Commission on the implementation and operation of the Charter; and
- (b) periodic reviews on the operation of the Charter, conducted every four years, including whether any amendments are required to the provisions of the Charter.

### 3. The Benefits of a Tasmanian Charter

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6. A Tasmanian Charter would strengthen Tasmania's democracy and contribute to a stronger, healthier, fairer, more inclusive and more resilient community.
7. While Tasmania has strong democratic and legal institutions, they do not provide comprehensive or even adequate protection of human rights. As the National Human Rights Consultation Committee found in its recent report, the patchwork quilt of human rights protection is missing pieces and these "inadequacies are felt most keenly by the marginalised and the vulnerable".<sup>1</sup>
8. Human rights are fragile. While many Tasmanians may believe that formal equality is afforded to each citizen, the reality for many disadvantaged and vulnerable groups and individuals is very different. The introduction of a Tasmanian Charter will be a big step toward reconciling the reality and the ideal.
9. Tasmanians currently enjoy the protection of some of their human rights through specific legislation such as the *Anti-Discrimination Act 1999* (Tas), but there is no comprehensive statement of rights which operates as a minimum standard to which all public authorities must adhere. Such a statement is necessary to prevent the breach of any Tasmanian person's rights from slipping through the gaps that exist in the current patchwork of laws and protections.
10. The HRLRC submits that as well as enshrining peoples' rights in law and providing redress for the existing gaps in human rights protection, a Tasmanian Charter would provide important social, economic and cultural benefits. There are a number of key benefits set out below.

#### **(a) Improving law-making and government policy**

11. According to former High Court Chief Justice Brennan:

The exigencies of modern politics have sometimes led Governments to ignore human rights in order to achieve objectives which are said to be for the common good.<sup>2</sup>
12. A Tasmanian Charter could improve the quality of all laws by making the consideration of human rights part of all law-making and policy development processes, in particular by:

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<sup>1</sup> National Human Rights Consultation Committee, *Report of the National Human Rights Consultation Committee* (2009) 127-8.

<sup>2</sup> Sir Gerard Brennan, 'The Constitution, Good Government and Human Rights' (Paper presented at the Human Rights Law Resource Centre seminar, Melbourne, 12 March 2008), available at <http://www.hrlrc.org.au/content/topics/national-human-rights-consultation/sir-gerard-brennan/>.

- (a) requiring Parliament to scrutinise new laws and consider whether the law infringes peoples' human rights;
  - (b) requiring the executive arm of government (ie, ministers and their departments) to respect human rights when developing policy, implementing laws and otherwise making decisions;
  - (c) requiring government agencies, instrumentalities and public authorities to act compatibly with human rights; and
  - (d) requiring courts to interpret all legislation, as far as is possible, in accordance with the Tasmanian Charter.
13. Although a Tasmanian Charter may not go so far as *preventing* Government and courts from acting contrary to human rights in all circumstances, it would require human rights to be *appropriately considered*. In this way a Tasmanian Charter would make it 'more difficult for Parliament to compromise those rights unreasonably',<sup>3</sup> whether deliberately or inadvertently.
- (b) Improving public service delivery**
14. Case studies and evidence from Victoria and the UK demonstrate that Charters of Rights improve public service delivery and outcomes, as well as contribute to consumer satisfaction. In particular, Charters of Rights can:
- (a) provide a legal and ethical framework for developing and reviewing policies, programs and practices;<sup>4</sup>
  - (b) help decision-makers and others see seemingly intractable problems in a new light;
  - (c) empower people to take action;<sup>5</sup>
  - (d) 'be used to negotiate win-win solutions' for service users and providers;<sup>6</sup>
  - (e) 'enhance the accountability of public institutions to the community';<sup>7</sup>
  - (f) 'encourage respect for diversity';<sup>8</sup> and

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<sup>3</sup> Julian Burnside, 'Justice will prevail', *The Sunday Age* (Melbourne), 18 May 2008, 21.

<sup>4</sup> Victorian Equal Opportunity and Human Rights Commission (VEOHRC), *Emerging Change: The 2008 report on the operation of the Charter of Human Rights and Responsibilities* (27 February 2009) 16, available at <http://www.humanrightscommission.vic.gov.au/pdf/2008charterreport.pdf>.

<sup>5</sup> British Institute of Human Rights, *The Human Rights Act: Changing Lives* (2007) 5, available at <http://www.bihr.co.uk/sites/default/files/The%20Human%20Rights%20Act%20-%20Changing%20Lives.pdf>.

<sup>6</sup> Victorian Government, 'Charter of Human Rights and Responsibilities: Working for Victorians' (2010).

<sup>7</sup> Ibid.

<sup>8</sup> Ibid.



- (g) 'provide a framework to promote public participation and fairness in government service-delivery'.<sup>9</sup>
15. According to a formal review of the implementation of the UK Human Rights Act, 'the Human Rights Act has led to a shift away from inflexible or blanket policies towards those which recognise the circumstances and characteristics of individuals'.<sup>10</sup> The Victorian Equal Opportunity and Human Rights Commission's (VEOHRC) 2009 report on the operation of the Victorian Charter (the **VEOHRC 2009 Report**) details clear evidence about the practical benefits that are provided by the Victorian Charter. It states:
- Significant improvements have been made to the support provided to marginalised and vulnerable Victorians, including Indigenous Victorians, people with a disability and those with a mental illness. Consumers are being engaged more often and more effectively in designing and planning services. Human rights considerations are being used in diverse areas, from reviewing taxation policies for people affected by the February 2009 bushfires to improving pay equity in local councils and providing better protection for international students. Changes are being made to the daily operations and processes of many organisations that are making it easier for people to access information and services, and ensuring that services are fair and effective.<sup>11</sup>
- (c) **Protecting marginalised Australians by addressing disadvantage**
16. Australia's most socially and economically marginalised and disadvantaged people are the most likely to come into contact with government services.<sup>12</sup> Given their high level of interaction with public services, such vulnerable people are also more likely to suffer violations of their human rights than people in majority groups or people with the means to protect their own interests.
17. There is strong evidence that a human rights approach can:<sup>13</sup>
- (a) empower marginalised and vulnerable individuals, communities and groups;
  - (b) provide a framework for the development of more effective, efficient and holistic public and social policy;

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<sup>9</sup> Ibid.

<sup>10</sup> UK Department for Constitutional Affairs, *Review of the Implementation of the Human Rights Act* (2006).

<sup>11</sup> VEOHRC, *Making Progress: The 2009 Report on the operation of the Charter of Human Rights and Responsibilities* (April 2010), 13.

<sup>12</sup> Fred Chaney, Former National Native Title Tribunal Deputy President, 'Conflict Over Aim of Human Rights Legislation', *The West Australian* (Perth), 4 May 2007, 6.

<sup>13</sup> See, eg, British Institute of Human Rights, above n 5; UK Department for Constitutional Affairs, above n 10; Ministry of Justice (UK), *Human Rights Insights Report* (2008); Audit Commission (UK), *Human Rights Act: Improving Public Services* (2003); OHCHR, *Guidelines on a Human Rights Approach to Poverty Reduction Strategies* (2002).

- (c) promote more flexible, responsive, individualised and 'consumer friendly' public and social services;
- (d) challenge 'poor treatment' and thereby 'improve the quality of life' of marginalised and disadvantaged individuals and groups; and
- (e) assist in the development of more effective social inclusion and poverty reduction strategies.

**(d) *Cultural change – towards a human rights culture***

18. A Tasmanian Charter would be a clear statement of Tasmania's human rights responsibilities, contributing to a culture with a greater awareness of, and respect for, human rights, within government and throughout the community. A Tasmanian Charter would serve an important educative function, articulating those standards, rights and responsibilities that are necessary in a free, democratic and inclusive society.
19. A Tasmanian Charter could also promote a culture of human rights at a very local level. Although the full operation of the Victorian Charter is only relatively recent, there is growing evidence of cultural change in Victoria under the Act. The VEOHRC 2009 Report on the operation of the Victorian Charter records some of that change within government:
- Bearing in mind that Victoria is only three years into a process of extensive cultural change around human rights, progress has been considerable... Importantly, the Charter is contributing to enriched public discourse around a range of issues. In some instances, the Charter assists in illuminating success and progress, helping to identify why certain initiatives work particularly well and providing guidance for emulating these initiatives. In other cases, evaluation against the Charter may be a source of discomfort and raise difficult questions, but this is one of the strengths of the Charter and the human rights dialogue model – with debate around "difficult" issues identifying more effective responses to these issues and encouraging improvements in services and practices across government.<sup>14</sup>
20. The VEOHRC 2009 Report also sets out many initiatives from across the Victorian Government, including case studies of how a human rights framework is being incorporated into departmental systems. For example, the State Revenue Office's integrated human rights considerations in its review of taxation policies for Victorians affected by the February 2009 bushfires and the Global Financial Crisis. The SRO sought to "balance our responsibility to collect tax with an approach that is fair and equitable." The right to privacy, family and home, and the protection of families and children were cited by the SRO as particularly relevant.<sup>15</sup>

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<sup>14</sup> Victorian Equal Opportunity and Human Rights Commission, above n 11, 13.

<sup>15</sup> Ibid, 42.

21. There is also a growing body of case studies from Victoria of how human rights are being used outside of courtrooms to change not only the culture of government action and decision making, but also the approach of service users and their advocates.<sup>16</sup>
22. However, creating a culture of respect for human rights is not simply a matter of enacting a law. Much would depend on how public bodies, under a Tasmanian Charter, responded to their obligations, whether people were educated about their rights, and whether sufficiently-funded public bodies existed to promote the aims of the Charter and respect for human rights generally.

**(e) Economic value add**

23. There is clearly an economic cost associated with policies that do not effectively protect the lives and safety of citizens. Access Economics conducted a study of the costs of domestic violence to the Australian economy. It estimated that in 2002-2003, the total cost of domestic violence was \$8.1 billion.<sup>17</sup>
24. However, there is an increasing body of economic research which demonstrates that there is a strong correlation between effective and equitable social policy on the one hand, and economic development and growth on the other.<sup>18</sup>
25. For example, when the Productivity Commission conducted a review of the *Disability Discrimination Act 1992* (Cth) (**DDA**), it found that the benefits of the Act in the community fell into two broad categories, one of which was the productive capacity of the economy. It stated:<sup>19</sup>

First, reductions in discrimination can lead to an increase in the productive capacity of the economy. For example, reducing discrimination can enhance the participation and employment of people with disabilities in the workforce. In turn, better employment prospects can provide incentives to students with disabilities to improve their educational outcomes, making them more productive members of the community.

Second, an effective DDA that improved the acceptance and integration of people with disabilities in society would benefit the community in less tangible but not less significant ways, by promoting greater trust and mutual cooperation.

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<sup>16</sup> See HRLRC, *Case Studies: How a Human Rights Act Can Promote Dignity and Address Disadvantage* (2009), available at <http://www.hrlrc.org.au/content/topics/national-human-rights-consultation/case-studies/>.

<sup>17</sup> Access Economics, *The Cost of Domestic Violence to the Australian Economy* (October 2004), available at <http://www.accesseconomics.com.au/publicationsreports/showreport.php?id=23&searchfor=2004&searchby=>, Parts 1 and 3.

<sup>18</sup> See, eg, Thandika Mkandawire (ed), *Social Policy in a Development Context* (2004); Amartya Sen, *Development as Freedom* (1999); Nick Pearce and Will Paxton (eds), *Social Justice: Building a Fairer Britain* (2005).

<sup>19</sup> Productivity Commission, *Review of the Disability Discrimination Act 1992*, Productivity Commission Inquiry Report Vol 1, Report No 30, (30 April 2004) 134.

26. Indeed, although difficult to quantify, the Productivity Commission found that the impact of the DDA had been to produce a net benefit to the community. It stated:<sup>20</sup>
- ...taking a broad view of all costs and benefits flowing from the Act, the Productivity Commission considers that the DDA is very likely to have produced a net community benefit in the period since its introduction.
27. The economic benefits of closing the gap in life expectancy between Indigenous and non-Indigenous Australians have also been confirmed by a study. An Access Economics report states that there is clear economic justification for reducing Indigenous disadvantage, including improving government budgets by \$8.3 billion per year and boosting national income by \$10 billion.<sup>21</sup>
28. The effective implementation of a Tasmanian Charter may yield substantial economic benefit.
- (f) Implementing Australia's international obligations**
29. Australia is already a party to many human rights treaties. A Tasmanian Charter would have significant symbolic value in affirming that Tasmania is committed to providing its own people with human rights standards, in accordance with Australia's obligations in the international community. The UN Human Rights Committee (**HRC**) recently called upon Australia to enact comprehensive legislation to give effect to human rights across all states and territories to ensure that Australia's domestic system is compatible with international standards.<sup>22</sup>

**Recommendation 1: Adopt a Charter of Human Rights**

The Tasmanian Government should introduce a Charter of Rights for Tasmania.

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<sup>20</sup> Ibid, 152.

<sup>21</sup> Access Economics and Reconciliation Australia, *An overview of the economic impact of Indigenous disadvantage* (30 September 2008). 'The report estimates government revenue would be \$4.6 billion higher than otherwise in 2029, including a \$1.7 billion increase in the income tax take and \$530 million extra from the GST, which goes to the states. Government spending would be \$3.7 billion lower, saving \$1.3 billion in health, \$1.2 billion in welfare and \$850 million on the justice system.' See also Mike Sketekee, 'Closing prosperity gap a \$10bn gain', *The Australian*, 30 September 2008, available at <http://www.theaustralian.news.com.au/story/0,,24423119-25072,00.html>.

<sup>22</sup> Human Rights Committee, *Concluding Observations: Australia*, UN Doc CCPR/C/AUS/CO/5, 2 April 2009, [23].

#### 4. The Human Rights to be Protected

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30. This section discusses the human rights proposed to be protected in the Tasmanian Charter, incorporating a discussion of 'Rights in Detail' and 'Additional Rights' proposed in the Directions Paper. The section sets out the following:
- (a) the human rights that should be protected in the Tasmanian Charter;
  - (b) a critique of the human rights currently proposed to be protected;
  - (c) the manner and content of 'Additional Rights', including economic, social and cultural rights (**ESC rights**) in the Tasmanian Charter;
  - (d) the need to remove the ten categories of human rights in the Proposed Model; and
  - (e) the need to protect all human rights in the Tasmanian Charter, effective immediately.
31. The answer to the relevant questions in the Directions Paper are as follows:

Question in Discussion Paper	HRLRC Answer
<i>1. Are the rights recommended by the Institute and listed in table 4 appropriate to Tasmania, and are they sufficient?</i>	The list of rights protected in the Proposed Model for the Tasmanian Charter is not currently sufficient.
<i>2. What rights from the International human rights treaties, not listed here, would you like to see included, if any?</i>	The Tasmanian Charter should include all human rights recognised in the ICCPR and ICESCR.
<i>18. Do you agree with the detail outlined for each of the ten categories of rights in this paper? If not, what detail do you suggest should be incorporated for each?</i>	No, we do not think the ten categories of rights is useful. Instead each right should be given a heading similarly to the Victorian Charter and the ACT Human Rights Act.
<i>19. Should a right to adequate standard of living and environmental sustainability be included in a Tasmanian Charter?</i>	Yes
<i>20. Should a right to adequate standard of living and environmental sustainability be included now or should their inclusion be delayed until they are also included in the Charters of other Australian states or territories?</i>	They should be included now.
<i>21. Is the detail provided for these two categories adequate for Tasmania?</i>	No, the detail for the right to adequate standard of living needs to be amended and improved.

Question in Discussion Paper	HRLRC Answer
22. Are the rights listed in the paper for persons living with disability necessary and if so are there any others you would include?	Although not strictly necessary, the rights relevant to persons living with disability are a helpful articulation of human rights as they apply to those people.

#### 4.1 The Tasmanian Charter Should Protect All Human Rights in the ICCPR and ICESCR

32. The human rights recommended by the Institute and set out in Table 3 represent some, but not all, of the rights that should be protected in a Tasmanian Charter.<sup>23</sup>
33. A Tasmanian Charter should enshrine all the fundamental civil, political, economic, social and cultural rights that are necessary for all people to live with dignity and participate fully and equally in our community. This means that the Tasmanian Charter should protect all the rights protected in the International Covenant on Civil and Political Rights (**ICCPR**) and the International Covenant on Economic, Social and Cultural Rights (**ICESCR**). These are international treaties to which Australia is a party and in respect of which legal obligations to respect, protect and promote human rights have been created for Australian governments.<sup>24</sup>
34. The comprehensive recognition and protection of rights is vital because human rights are interdependent and indivisible. The enjoyment of many rights is contingent on, and contributes to, the enjoyment and reinforcement of other human rights.<sup>25</sup> Piecemeal recognition of human rights is inconsistent with basic human rights principles and threatens their effective implementation.

#### **Recommendation 2: Include all Rights in the ICCPR and ICESCR**

The Tasmanian Charter should protect all the rights contained in the International Covenant on Civil and Political Rights (**ICCPR**) and the International Covenant on Economic, Social and Cultural Rights (**ICESCR**).

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<sup>23</sup> We presume that question 1 in the Directions Paper is intended to be addressed at table 3, rather than table 4, the latter which only sets out 'additional rights'.

<sup>24</sup> For example, article 50 of the ICCPR states that the provisions of the Covenant 'shall extend to all parts of federal States without any limitation or exception'.

<sup>25</sup> United Nations, *Vienna Declaration and Programme of Action: Report of the World Conference on Human Rights*, UN A/CONF.157/23 (1993). See also Office of the High Commissioner for Human Rights, *Guidelines on a Human Rights Approach to Poverty Reduction Strategies* (2002), 2–3.

## **4.2 Rights in Detail: Critique of the Human Rights Proposed to be Protected**

35. The HRLRC supports the inclusion in the Tasmanian Charter of the human rights listed in Table 3 of the Directions Paper.<sup>26</sup> Table 3 includes all the rights in the ICCPR and some of the human rights in ICESCR (such as the right to form and join trade unions). It also includes the right to property, which is not included in the ICCPR or ICESCR. However, the right to property is protected in the UDHR (article 17), the First Protocol to the European Convention (article 1) and also the Victorian Charter (section 20), and it is appropriate that it also be included in the Tasmanian Charter.
36. It is common for some human rights to be modified when they are included in a domestic human rights instrument so that they match contemporary aspirations of the domestic community and only contain those rights that have broad community acceptance. For example, the Victorian Charter refers to the distinct position of Aboriginal cultural rights when expressing the right to culture.<sup>27</sup>
37. However, to the extent possible, it is beneficial for the articulation of human rights in the Tasmanian Charter to be consistent with the rights as articulated in the Victorian and ACT legislation, and also international law. This will allow for the development of human rights jurisprudence in Tasmania to be informed and guided by the experience of other jurisdictions to the extent necessary, and in turn for Tasmanian jurisprudence to be influential and meaningful in jurisdictions outside of Tasmania. (See also section 8.1 of this submission which discusses the ability of courts to refer to overseas and international human rights law in construing Tasmanian laws.)
38. Generally, the articulation of the rights to be included in the Proposed Model at 8.1.4.1 reflects the articulation of those rights in the Victorian Charter, the *Human Rights Act* 2004 (ACT) (**ACT Human Rights Act**) and international human rights law. However, a preliminary analysis reveals the following deficiencies in the rights of the Proposed Model which do not accord with the human rights as set out in other state, territory and international instruments.

### **(a) The right to equality and non-discrimination**

39. The right to non-discrimination does not include social status and gender identity as protected attributes, and they should be included.

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<sup>26</sup> The human rights to be protected in the Tasmanian Charter are listed in Table 3 and set out in greater detail in part 8.1.4.1. The HRLRC supports the inclusion of these rights, but also the inclusion of all ESC rights, which are only partially included in the table of Additional Rights.

<sup>27</sup> Section 19.

**(b) The right to liberty and security of the person**

40. The right to liberty and security of the person as expressed in the Proposed Model fails to articulate the full range of rights of detained persons. While the Proposed Model does set out a number of procedural safeguards upon arrest, it does not explicitly provide that no one may be deprived of his or her liberty except on grounds and in accordance with procedures established by law.<sup>28</sup> Nor does it specifically include: the right to be told at the time of the arrest of the reasons for the arrest; the right to be promptly brought before a judge or magistrate; the right to be tried within a reasonable time or released; the right to be released from custody while awaiting trial; and the right to apply to a court for an order regarding the lawfulness of the detention.<sup>29</sup>

**(c) The right to human treatment when deprived of liberty**

41. The right to humane treatment when deprived of liberty as expressed in the Proposed Model does not reflect that the essential aim of the treatment of prisoners in the penitentiary system must be reformation and social rehabilitation as required by the ICCPR.<sup>30</sup>

**(d) The right to a fair hearing**

42. The fair hearing right set forth in the Proposed Model protects the right to a public hearing but does not provide that the press or public may be excluded from all or part of a trial to protect morals, public order, or national security; in the interest of the private lives of the parties; or if publicity would prejudice the interests of justice.<sup>31</sup> It also fails to express that each judgement in a criminal or civil proceeding must be made public unless the interest of a child otherwise requires.<sup>32</sup>

**(e) Minimum guarantees when charged with a criminal offence**

43. The Proposed Model fails to specifically articulate the minimum guarantees to which a person charged with a criminal offence is entitled without discrimination. These include: the right to be told promptly and in detail in a language he or she understands of the nature and cause of the charge against him or her; the right to have adequate time and facilities to prepare a defence and communicate with counsel of his or her own choosing; the right to be tried without unreasonable delay; the right to be tried in person and to defend him or herself personally or through legal assistance of his or her own choosing; the right to have legal assistance provided if the interests of justice so require and without cost if he or she cannot afford

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<sup>28</sup> ACT Human Rights Act section 18(2); Victorian Charter section 21(3); ICCPR, art. 9(1).

<sup>29</sup> ACT Human Rights Act sections 8(3-6); Victorian Charter sections 21(4-7), ICCPR, art. 9(2-4).

<sup>30</sup> ICCPR, art. 10(3).

<sup>31</sup> ACT Human Rights Act section 21(2); Victorian Charter section 24(2); ICCPR, art. 14(1).

<sup>32</sup> ACT Human Rights Act section 21(3); Victorian Charter section 24(3); ICCPR, art. 14(1).



assistance; the right to obtain the attendance and examination of witnesses under the same conditions as prosecution witnesses; the right to have the free assistance of an interpreter if he or she cannot understand or speak the language used in court; and the right not to be compelled to testify against him or herself or to confess guilt.<sup>33</sup> Further, the Proposed Model does not provide the right of anyone convicted of a crime to have the conviction and sentence reviewed by a higher court.<sup>34</sup>

**(f) Protection from retrospective laws**

44. Additionally, the Proposed Model fails to fully protect against retrospective criminal laws. Specifically, it does not prohibit a heavier penalty imposed than the one that was applicable at the time the criminal offence was committed.<sup>35</sup>

**(g) Freedom of thought, conscience and religion**

45. The freedom of thought, conscience, religion and belief protected by the Proposed Model does not reflect the ICCPR obligation that states undertake to respect the liberty of parents and legal guardians to ensure the religious and moral education of their children in conformity with their own convictions.<sup>36</sup>

**(h) Freedom of movement**

46. The Proposed Model does not protect the freedom to choose one's residence.<sup>37</sup>

**(i) The right to take part in public life**

47. The Proposed Model fails to adequately protect the right to take part in public life in the capacity of public service or public office. It frames this right as a right of every person to the opportunity to have access to employment in a public authority and to a public office. However, this right is not simply a right to an opportunity to have access. Rather, it is a right to access on general terms of equality and without discrimination. This equality element is absent from the right as expressed in the Proposed Model.<sup>38</sup>

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<sup>33</sup> ACT Human Rights Act, section 22(2); Victorian Charter, section 25(2); ICCPR, art. 14(3).

<sup>34</sup> ACT Human Rights Act, section 22(4); Victorian Charter, section 25(4); ICCPR, art. 14(5).

<sup>35</sup> ACT Human Rights Act, section 25(2); Victorian Charter, section 27(2); ICCPR, art. 15(1).

<sup>36</sup> ICCPR, art. 18(4).

<sup>37</sup> ACT Human Rights Act, section 13; Victorian Charter, section 12; ICCPR, art. 12(1).

<sup>38</sup> ACT Human Rights Act, 14(c); Victorian Charter, section 18(2)(b); ICCPR, art. 25(2)(c).

**(j) Cultural rights**

48. The Proposed Model protects the rights of people with a particular cultural, religious, racial or linguistic background to enjoy their culture. However, it fails to specifically protect their right to maintain their kinship ties and their right to maintain their distinctive spiritual, material and economic relationship with the land, waters and other resources with which they have a connection under traditional laws and customs.<sup>39</sup>

***Recommendation 3: Expand upon the Rights Protection in the Proposed Model***

The Proposed Model in Table 3 should be expanded to enshrine all the fundamental civil, political, economic, social and cultural rights that are necessary for all people to live with dignity and participate fully and equally in our community. This means that the Tasmanian Charter should protect all the rights protected in the ICCPR and ICESCR. The right to property should also be included.

***Recommendation 4: The Rights in the Proposed Model Need to be Amended***

The following human rights in the Proposed Model should be reconsidered and amended to more consistently reflect the rights as articulated in the ACT Human Rights Act, Victorian Charter or ICCPR:

- The right to liberty and security of the person
- The right to humane treatment while in detention
- The right to a fair hearing
- The rights in criminal proceedings
- The protection against retrospective criminal laws
- The freedom of thought, conscience, religion and belief
- The freedom of movement
- The freedom to take part in public life
- The rights of people with a particular cultural, religious, racial or linguistic background

**4.3 The Ten Categories of Rights Should be Removed**

49. The Proposed Model currently categorises human rights in ten categories. The ten categories of rights are on the whole unnecessary, unhelpful and do not reflect any accepted categorisation of human rights in international or comparative law. Further, although there may be some logical connection between a human right and category in which it is put, the risk is that human rights violations that are seen as belonging to a particular category of rights

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<sup>39</sup> Victorian Charter, section 19(2)(c)(d).

are treated in a confined way and that other rights are not also identified as being relevant the violation.

50. Instead of grouping rights under those ten headings, it would be more helpful to provide headings for each of the human rights that are enumerated in the Tasmanian Charter. The approach taken in the Victorian Charter should be adopted.

***Recommendation 5: Don't Use Ten Categories of Human Rights***

The ten categories of rights used in part 8.1.4.1 are unnecessary. Instead, a heading should be inserted for each right listed in the Tasmanian Charter.

**4.4 The Inclusion of 'Additional Rights'**

51. Table 4, Additional Rights, sets out some but not all ESC rights in the ICESCR, some disability rights and environmental rights. The Additional Rights are not directly recommended in the Proposed Model for a Tasmanian Charter (in 8.1.4.1), but instead feedback is sought on whether or not they should be formally adopted in the Proposed Model (see 8.6).
52. The human rights in Table 4 and described as 'Additional Rights' fall into three categories:
- (a) economic, social and cultural rights;
  - (b) environmental rights; and
  - (c) disability rights.
53. Tasmania should include all the Additional Rights in Table 4 in the Tasmanian Charter, although not in the form proposed. HRLRC submits that:
- (a) Even with the Additional Rights, the Tasmanian Charter would not protect all the rights in the ICESCR.
  - (b) The ESC rights contained in the Additional Rights list should be articulated in accordance with international law.
  - (c) There should be no delay in providing protection for ESC rights.
54. Each of these points is discussed further below.

**(a) All ESC rights must be included**

55. As stated above at part 4.1, the Tasmanian Charter should protect all ESC rights. Currently, the proposed protection of ESC rights in the Directions Paper is incomplete. Even if the Additional Rights are included in the Tasmanian Charter, there would be no right to social security (article 9 of ICESCR) or the right of everyone to participate in cultural life and to enjoy the benefits of scientific progress and its applications (article 15 of ICESCR).<sup>40</sup>

**(b) ESC rights should reflect the definition in international law**

56. As stated in paragraph 36 above, it is crucial that the articulation of rights reflect, to the extent relevant and possible, their articulation in international law. The Proposed Model's current articulation of ESC rights is confusing and conflates a number of rights that should be recognised as separate.
57. First, in the discussion of Additional Rights in the Proposed Model (8.6), the characterisation of ESC rights is incorrect and does not reflect the human rights in international and comparative law. All ESC rights are characterised as aspects of the right to an adequate standard of living. Under ICESCR, the right to work is separately protected (article 6), as is the right to health (article 12) and the right to education (article 13). Those rights should also be separately protected under the Tasmanian Charter. The right to an adequate standard of living under ICESCR includes the right to food, clothing and housing (article 11).
58. Secondly, the right to an adequate standard of living and the right to health are expressed more narrowly than in international law, limited to a right to equal access to services to support those rights. All ESC rights articulated in the Tasmanian Charter should reflect the nature and content of ESC rights at international law.
59. For example, under international law the right to adequate housing is much broader than access to services. The right to adequate housing includes obligations on the state to establish a housing system:
- (a) that provides legal security of tenure;
  - (b) where services, materials and infrastructure are available;
  - (c) in which housing is affordable, habitable, accessible, located near amenities and culturally appropriate;
  - (d) with proper protection against forced or arbitrary evictions; and
  - (e) that prohibits of all forms of discrimination in access to housing.

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<sup>40</sup> NB: The right to form and join trade unions, protected in ICESCR Article 8, is contained in Table 3.

60. The right to housing as currently articulated in Table 4 deals only with the final point; that is discrimination in access to services.

**(c) Disability Rights in Table 4**

61. If the Tasmanian Charter protects the human rights contained in the ICCPR and ICESCR, then it is strictly unnecessary for the Charter to specifically articulate the additional disability rights included in Table 4. This is because the expression of disability rights is taken from the CRPD, which does not create new rights but articulates existing rights as they relate to people with disabilities. Therefore, ICCPR and ICESCR rights, together with an interpretive clause that allows reference to international instruments such as the CRPD, should provide for the protection of those rights.
62. However, we do not oppose the inclusion of the disability rights suggested in Table 4 as an articulation of how specific rights apply to people with disabilities.

***Recommendation 6: Articulate Human Rights Consistently with Other Charters***

To the extent possible, human rights in the Tasmanian Charter should be expressed consistently with rights in the Victorian Charter, the ACT Human Rights Act and international law.

***Recommendation 7: Articulate the Additional Rights More Broadly***

The Additional Rights listed in Table 4 should be included in the Tasmanian Charter, however:

- (a) the articulation of some of those rights should be amended to reflect the definition of rights in international law; and
- (b) the list as currently conceived is incomplete and should include all ESC rights.

**4.5 No Delay Necessary in Including ESC Rights**

63. The Directions Paper asks whether the rights to an adequate standard of living and environmental sustainability should be included now or if their inclusion should be delayed until they are also included in the Charters of other Australian States or Territories. As stated above, although it is preferable for the Tasmanian Charter to broadly reflect the models for rights protections in other jurisdictions, this should not prevent the Tasmanian Charter from being innovative and improving on the Charter models in other jurisdictions.
64. The Report of the National Human Rights Consultation in 2009 confirmed that 'for most Australians the main concern is the realisation of primary economic and social rights, such as the rights to education, housing and the highest attainable standard of health.'<sup>41</sup>

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<sup>41</sup> National Human Rights Consultation, above n 1, 365.

65. The Tasmanian Charter should include the protection and promotion of all ESC rights. There is no need to delay that protection until other states have already done so.

***Recommendation 8: Include ESC Rights Immediately***

Economic, social and cultural rights should be included in the Tasmanian Charter immediately.

## 5. Human Responsibilities

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Question in Discussion Paper	HRLRC Answer
<i>3. Is there a need to specify human responsibilities in detail alongside the human rights and freedoms, or is it sufficient to have an overview statement that the rights and freedoms impose responsibilities? If so, what, if any, consequences should flow from a failure to fulfil responsibilities?</i>	Human responsibilities should not be specified in the Tasmanian Charter. Recognition of human responsibilities in the preamble, in a manner similar to the Victorian Charter, is sufficient.

66. In our view, it is not necessary or appropriate for a Tasmanian Charter to detail human responsibilities alongside rights and freedoms.
67. The Proposed Model currently deals with responsibilities in two ways. First, it includes in the 'Principles' of the operation of the Charter 'the recognition that human rights and corresponding responsibilities, exist in a democratic society in a way that respects the diversity of the people of Tasmania and which is free of discrimination' (8.1.2.1). Secondly, the Proposed Model states that human rights and freedoms should clearly indicate that each right may create a corresponding responsibility (8.1.4). The Victorian Charter contains a statement in the preamble that states: '...human rights come with responsibilities and must be exercised in a way that respects the human rights of others'.
68. There are three reasons why human responsibilities should not be specified in the Tasmanian Charter in the manner outlined in the Proposed Model or as stated in the Victorian Charter.
69. First, human rights stem from the inherent dignity of the human person. Although human rights should be exercised in a way that respects the human rights of others, the enjoyment of human rights is not contingent upon the social contract or the discharge of human responsibilities. Put another way, a person's failure to discharge their human responsibilities does not mean that they thereby relinquish or forgo their human rights.
70. Secondly, there is a risk that if human responsibilities were to be included in a Charter that a failure by a person to discharge their human responsibilities may become a rationale for limiting that person's human rights. International human rights law does not articulate the limitation of human rights in this way. Instead, human rights are only subject to limitations for

the purpose of respecting the rights and freedoms of others or as required in the pursuance of other compelling and pressing social needs. This was expressed in the UDHR as follows:

In the exercise of his rights and freedoms, everyone shall be subject only to such **limitations as are determined by law solely for the purpose of securing due recognition and respect for the rights and freedoms of others and of meeting the just requirements of morality, public order and the general welfare in a democratic society.**<sup>42</sup> [emphasis added]

71. Finally, international human rights law does not articulate human rights as being subject to responsibilities. Instead, the ICCPR and ICESCR articulate the legal obligations of states, as duty-bearers, and the human rights of human persons, as rights-holders or 'beneficiaries'.<sup>43</sup> Human rights and the limitations of those rights in the Tasmanian Charter should reflect international human rights law, for the reasons discussed in paragraph 36 above.
72. Instead, the Tasmanian Charter should include a statement in the Preamble that human rights should be exercised responsibly and in a way that respects the human rights of others.

***Recommendation 9: Responsibilities can be Included in the Preamble***

The Tasmanian Charter should include a statement in the Preamble that human rights should be exercised responsibly and in a way that respects the human rights of others. The Tasmanian Charter should not specify human responsibilities in detail alongside the human rights and freedoms.

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<sup>42</sup> Universal Declaration of Human Rights, article 29(2).

<sup>43</sup> See, eg, Human Rights Committee, *General Comment No 31: The Nature of the Legal Obligation Imposed on States Parties to the Covenant*, UN Doc CCPR/C/21/Rev.1/Add.13 (2004), [3], [9].



## 6. Reasonable Limitations on Human Rights

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73. This section sets out:

- (a) the rationale for a limitations clause;
- (b) the model for a limitations clause;
- (c) the rights that are absolute;
- (d) the proper treatment of 'derogable' rights; and
- (e) the internal or 'specific' limitation of rights.

74. The answer to the relevant question in the Directions Paper is as follows:

Question in Discussion Paper	HRLRC Answer
4. <i>Is having only a general limitation clause that applies to all but a small number of rights appropriate?</i>	Yes, the general limitation clause should apply to all rights except absolute rights. The Charter should expressly state which rights are absolute.

### 6.1 The Need for a Limitations Clause

75. A Tasmanian Charter should include a general limitations clause that applies to all rights, except absolute rights.
76. Although expressed in broad, general terms, human rights are generally not enjoyed at the expense of all other considerations. Most rights can be 'limited', meaning that the enjoyment of a right will be reduced to allow for other concerns to take precedence, such as the enjoyment of other protected rights or competing communal concerns such as public health and safety. The limitation on human rights recognises that a balance is required between protecting individual rights and liberties on the one hand and other collective community values on the other.
77. For example, the right to freedom of expression would not extend to the right of a person to engage in hate speech or speech which incites racial or religious vilification. The right to freedom of speech would need to be weighed against other peoples' rights to practice their religion, to non-discrimination and to liberty and security of the person, as well as the broader issues of public security and public order. On balance, freedom of expression is unlikely to be considered a reasonable justification for limiting those rights and public interest concerns. Similarly, the criminalisation of ownership of child pornography can be seen as a reasonable

- and justified limitation on peoples' rights to expression, given the competing rights of children and serious public safety concerns.
78. A limitations analysis allows for broader public interests to be taken into account and weighed against rights. For example, laws which are necessary to protect security, public order, public safety or public health which limit human rights can often be demonstrably justified in a free and democratic society.<sup>44</sup> Similarly, reasonable limitations provisions would also apply in situations where 'full, free and informed consent to medical treatment might not be possible because of an emergency or because the person is incapable of giving consent'.<sup>45</sup>
79. However, certain rights, such as freedom from torture or slavery, are considered to be 'absolute', which means that no limitation of those rights is allowable.

## **6.2 An Appropriate Model for a Limitations Analysis**

80. The Tasmanian Charter should:
- (a) set out the rights that are absolute and the rights that are not absolute;
  - (b) state that no limitation of absolute rights is allowed; and
  - (c) provide a framework for determining whether and how limitations of non-absolute rights will be allowed.
81. For the limitations clause, the HRLRC supports the Proposed Model for a limitations analysis set out in 8.1.5. This is very similar to the wording used in the Victorian legislation, which works well. The Victorian limitation provision, section 7, states:
- (1) This Part sets out the human rights that Parliament specifically seeks to protect and promote.
  - (2) A human right may be subject under law only to such reasonable limits as can be demonstrably justified in a free and democratic society based on human dignity, equality and freedom, and taking into account all relevant factors including -
    - (a) the nature of the right; and
    - (b) the importance of the purpose of the limitation; and
    - (c) the nature and extent of the limitation; and
    - (d) the relationship between the limitation and its purpose; and
    - (e) any less restrictive means reasonably available to achieve the purpose that the limitation seeks to achieve.
  - (3) Nothing in this Charter gives a person, entity or public authority a right to limit (to a greater extent than is provided for in this Charter) or destroy the human rights of any person.

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<sup>44</sup> See The Hon Rob Hulls, Attorney-General, 'Second Reading Speech, Charter of Human Rights and Responsibilities Bill 2006', *Hansard*, Legislative Assembly, 4 May 2006.

<sup>45</sup> *Ibid.*

82. The Tasmanian Charter should also clearly state that the limitations clause is relevant only to the task of legislators. A limitations clause such as section 7(2) has no role to play in relation to either interpreting the Charter consistently with human rights or in the actions of public authorities under the Charter. That is because a limitations clause such as section 7(2) speaks to legislators. It does not purport to permit interpretations of legislation pursuant to section 32 that would be compatible with rights as limited. Nor does it purport to authorise executive action pursuant to section 38 that is compatible with rights as limited.
83. This fact should be expressly provided in the Tasmanian Charter, as it has been the subject of litigation, some ongoing, in relation to the interpretation of the Victorian provision.<sup>46</sup>

***Recommendation 10: Include a General Clause that Limits Rights***

A Tasmanian Charter should include a general limitations clause that applies to all rights, except absolute rights. The limitations clause should be in much the same terms as section 7(2) of the Victorian Charter. The limitations clause should expressly state that it applies to the role of legislators.

**6.3 Treatment of Absolute Rights**

84. The Tasmanian Charter should recognise that certain rights are absolute. Absolute rights cannot be limited in any way, at any time, for any reason. They are not subject to the limitations analysis above.
85. The list of human rights suggested in the Proposed Model as not being suitable for limitation (Proposed Model 8.1.5.2) does not reflect all the absolute rights in international law. The Tasmanian Charter should include all absolute rights in the ICCPR, namely:
- (a) the right to be free from torture and other cruel, inhuman or degrading treatment or punishment (Article 7);
  - (b) the right to be free from slavery and servitude (Articles 8(1) and (2));
  - (c) the prohibition on genocide (Article 6(3));
  - (d) the prohibition on prolonged arbitrary detention (elements of Article 9(1));
  - (e) the prohibition on imprisonment for failure to fulfil a contractual obligation (Article 11);
  - (f) the prohibition on the retrospective operation of criminal laws (Article 15);

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<sup>46</sup> See *R v Momcilovic* [2010] VSCA 50 (17 March 2010), currently on appeal to the High Court; and *Director of Housing v Sudi* [2010] VCAT 328 (31 March 2010), currently on appeal to the Court of Appeal of the Supreme Court of Victoria.

- (g) the right of everyone to recognition everywhere as a person before the law (Article 16); and
  - (h) the right to freedom from systematic racial discrimination (elements of Articles 2(1) and 26).
86. The Tasmanian Charter should expressly state that the above rights are absolute, and also that no limitation of, or derogation from, these rights is lawful. The Victorian Charter does not provide a distinct scheme for treatment of absolute rights, which is a weakness in the human rights protection provided by that instrument.<sup>47</sup> Instead, the Victorian Charter inserts a general limitations provision that states that *all* rights, including absolute rights, are subject to such reasonable limitations as can be demonstrably justified in a free and democratic society.<sup>48</sup>
87. As Julie Debeljak, Senior Lecturer with the Faculty of Law at Monash University, explains, 'Under international law, absolute rights cannot be derogated from (or overridden) and no circumstance justifies a qualification or limitation of such rights.'<sup>49</sup> Although some may argue that the courts will take into account the status of rights at international law when interpreting Charter rights, Julie Debeljak clearly articulates the problems with human rights legislation that does not acknowledge the absolute nature of certain rights. She sets out five problems with applying the general limitations provision to absolute rights:

First, this argument incorrectly suggests that absolute rights are negotiable – that there will be instances, albeit rare, in which an absolute right can be limited. Secondly it introduces the relatively subjective assessment of proportionality into an area where proportionality assessments are usually excluded. Thirdly, it means that the representative arms will be encouraged to enact laws that violate absolute rights and 'argue the toss' if they are challenged, rather than recognise that certain rights are non-negotiable. Fourthly, this is relatively uncharted territory. There is no international or regional guidance, and little domestic guidance, on how to assess the reasonableness and demonstrable justifiability of a limitation placed on an absolute right. Finally, assessing whether a limitation should be placed on an absolute right via the general limitations power in s 7(2) is therefore unsatisfactory and will amount to a violation of international human rights law.<sup>50</sup>

#### **6.4 The Distinction Between Absolute and Non-Derogable Rights**

88. As stated above, absolute rights cannot be limited in any way, at any time, for any reason. It is therefore appropriate that they are not subject to the general limitations clause discussed above.

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<sup>47</sup> See the in depth analysis in Julie Debeljak, 'Balancing Rights in a Democracy: The Problems with Limitations and Overrides of Rights under the Victorian Charter of Human Rights and Responsibilities Act 2006' (2008) 32 *Melbourne University Law Review* 422, 435.

<sup>48</sup> See s 7(2) of the Victorian Charter.

<sup>49</sup> Julie Debeljak, above n 47, 435.

<sup>50</sup> *Ibid.*

89. Rights may also be characterised as derogable or non-derogable. “Non-derogable” rights cannot be suspended or restricted by derogation. Derogations allow a government, in extraordinary circumstances such as a state of emergency, to temporarily suspend human rights guarantees that it would otherwise recognise. This is consistent with international law, in which states are permitted to ‘suspend part of their legal obligations, and thus restrict some rights, under certain circumstances’.<sup>51</sup> Derogation is used to enable a state to respond to a serious public emergency.<sup>52</sup> However, given that grave human rights violations can occur during public emergencies, derogations must be subject to a specific regime of safeguards (discussed in detail in part 7.1(b) below).<sup>53</sup>
90. The Directions Paper states that the Institute also favoured the exclusion of non-derogable rights from the limitations clause. This is not necessary and is an incorrect conflation of absolute and non-derogable rights. Non-derogable rights may be absolute or non-absolute, and if they are non-absolute, then they are properly subject to limitation. Only non-derogable rights that are also absolute rights should be exempt from the limitations clause.
91. The following is a list of non-derogable rights, with an indication of which rights are absolute:
- (a) the right to life;<sup>54</sup>
  - (b) freedom from torture or cruel, inhuman and degrading treatment or punishment (also an absolute right);<sup>55</sup>
  - (c) freedom from slavery and servitude (also an absolute right);<sup>56</sup>
  - (d) freedom from medical or scientific experimentation without consent;<sup>57</sup>
  - (e) the right not to be imprisoned for failure to fulfil a contractual obligation (also an absolute right);<sup>58</sup>

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<sup>51</sup> Henry J Steiner, Philip Alston and Ryan Goodman, *International Human Rights in Context* (3<sup>rd</sup> ed, 2008) 385. In accordance with that principle, art 4 of the ICCPR allows States that are party to the Covenant to temporarily derogate from their Covenant obligations in exceptional circumstances.

<sup>52</sup> See, eg, ICCPR, art 4, which states ‘In times of public emergency which threatens the life of the nation and the existence of which is officially proclaimed, the States Parties to the present Covenant may take measures derogating from their obligations under the present Covenant to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with their other obligations under international law and do not involve discrimination solely on the ground of race, colour, sex, language, religion or social origin.’

<sup>53</sup> There is detailed discussion of the rationale and extent of safeguards in Human Rights Committee, *General Comment 29: States of Emergency (Article 4)*, UN Doc CCPR/C/21/Rev.1/Add.11 (2001).

<sup>54</sup> See art 4(2) of the ICCPR.

<sup>55</sup> Ibid.

<sup>56</sup> Ibid.

<sup>57</sup> Ibid.

<sup>58</sup> Ibid.

- (f) the right of everyone to recognition everywhere as a person before the law (also an absolute right);<sup>59</sup>
  - (g) the prohibition on retrospective criminal laws (also an absolute right);<sup>60</sup>
  - (h) freedom of thought, conscience and religion;<sup>61</sup>
  - (i) the right of all persons deprived of their liberty to be treated with humanity and respect for the inherent dignity of the human person;<sup>62</sup>
  - (j) some elements of the rights of persons belonging to ethnic, religious or linguistic minorities;<sup>63</sup>
  - (k) the prohibition against taking hostages, abductions or unacknowledged detention;<sup>64</sup>
  - (l) the prohibition on propaganda for war and advocacy of national, racial or religious hatred that constituted incitement to discrimination, hostility or violence;<sup>65</sup> and
  - (m) abolition of the death penalty.<sup>66</sup>
92. Currently, there is no provision in the Proposed Model for Parliament to pass overriding legislation to allow for derogations, either in response to a Declaration of Incompatibility or otherwise. For the reason given in part 7.1 below, there is no need in a legislative model for a derogations or override provision.

## **6.5 Specific Limitations**

93. As stated above, because the general limitations clause speaks to legislators, it also has no role to play in defining the scope or ambit of the human rights in the Charter. The scope of those rights is to be determined broadly, purposively and by reference to the terms in which they have been enacted.<sup>67</sup>

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<sup>59</sup> Ibid.

<sup>60</sup> Ibid.

<sup>61</sup> Ibid.

<sup>62</sup> Human Rights Committee, *General Comment 29*, above n 53, [13(a)].

<sup>63</sup> Ibid, [13(c)].

<sup>64</sup> Ibid, [13(b)].

<sup>65</sup> Ibid, [13(e)].

<sup>66</sup> See Second Optional Protocol to the ICCPR, art 6 and discussion of same in HRC, *General Comment 29*, above n 71, [7].

<sup>67</sup> *DAS v Victorian Human Rights & Equal Opportunity Commission* [2009] VSC 381 at [80] per Warren CJ.

94. The scope of some of the rights will be subject to an 'internal' limitation; that is a limitation provided in the articulation of the provision. For example, the right to privacy in Victoria provides the right 'not to have his or her privacy, family, home or correspondence unlawfully or arbitrarily interfered with...' (section 13). Section 13 has been expressly qualified in the terms in which the right was enacted. Thus, the scope of the right extends only to interferences that are unlawful or arbitrary.<sup>68</sup>

***Recommendation 11 : Absolute Rights Cannot Be Limited***

The Tasmanian Charter should:

- (a) set out the rights that are absolute and the rights that are not absolute;
- (b) state that no limitation of absolute rights is allowed; and
- (c) provide a framework for determining whether and how limitations of non-absolute rights will be allowed.

Non-derogable rights should not be subject to a limitations clause, unless non-derogable rights are also absolute rights.

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<sup>68</sup> The meaning of "unlawful" or "arbitrary" does not fall for determination in this case but those terms are construed in comparative foreign and international jurisdictions in a way that is broader than was accepted by Kaye J in *WBM v Chief Commissioner of Police* [2010] VSC 219 at [51]ff. See, eg, *Castles v Secretary to the Department of Justice* [2010] VSC 310 at [70] per Emerton J; *Kracke v Mental Health Review Board* [2009] VCAT 646 at [201]-[202].

## 7. The Role of the Parliament: Scrutiny of Acts, Subordinate Legislation and By-Laws

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95. This section first responds to the two questions in the Directions Paper in relation to:
- (a) the rationale and utility of override declarations; and
  - (b) the treatment of subordinate legislation that is inconsistent with human rights.
96. Under the model for a Tasmanian Charter proposed in the Directions Paper, laws that breach human rights are not invalidated. Rather, law-makers are encouraged, or required, to take protected human rights into account in the course of the law-making process. This part of the submission then sets out HRLRC's position on:
- (a) preparation and tabling of Statements of Compatibility;
  - (b) the establishment of a specialist joint Parliamentary Human Rights Scrutiny Committee; and
  - (c) government responses to Declarations of Incompatibility.
97. The answers to the relevant questions in the Directions Paper are as follows:

Question in Discussion Paper	HRLRC Answer
<i>5. Should the Tasmanian Parliament have the right to pass overriding declaration where the Parliament disagrees with a declaration of incompatibility by the Supreme Court?</i>	No, override declarations are not necessary in a legislative model of human rights.
<i>6. Is it appropriate that after the Supreme Court declares subordinate legislation (eg regulations) and Council by-laws to be incompatible with the Charter they become invalid, unless Parliament changes the Act of Parliament to make them valid?</i>	Yes.

### 7.1 Override Declarations

98. Override declarations are, in theory, the mechanism by which governments, in extraordinary circumstances, are able to pass laws that derogate from (meaning to temporarily suspend) human rights guarantees that it would otherwise recognise. A Tasmania Charter should not provide Parliament with the power to pass an override declaration. Parliamentary overrides are unnecessary in a legislative dialogue model of rights, such as in the Proposed Model, that allows Parliament to pass laws that are inconsistent with the Charter. Override provisions are



necessary to allow Parliaments to deal with states of emergency. Currently, there is no override provision in the Proposed Model.

**(a) The rationale for override declarations**

99. Override provisions allow States to 'suspend part of their legal obligations, and thus restrict some rights, under certain circumstances'.<sup>69</sup> Derogation is used to enable a state to respond to a serious public emergency.<sup>70</sup> However, given that grave human rights violations can occur during public emergencies, derogations must be subject to a specific regime of safeguards.<sup>71</sup>
100. In the Victorian Charter and the Canadian Charter, the 'override' provisions are intended to perform the domestic function of allowing derogations of rights in extraordinary circumstances. For example, the override provision in the Victorian Charter allows Parliament to expressly declare that an Act or a provision of an Act has effect despite being incompatible with the Charter (an **override declaration**).<sup>72</sup> The effect of such a declaration is that the Charter will not apply to the Act or provision for 5 years.<sup>73</sup> Override declarations are only to be made in 'exceptional circumstances'.<sup>74</sup>
101. A derogation or override provision has relevance in a Constitutional Charter model, such as in Canada, where the Charter *prevents* Parliament from passing laws that are incompatible with human rights.<sup>75</sup> The override declaration allows Parliament to declare that a law will operate notwithstanding the Charter, so that Parliament can declare that a law is not subject to interpretation in accordance with Charter rights. In times of national emergency, Parliament may therefore require the power to derogate from certain rights in order to regain control.
102. However, override provisions are not at all necessary in the legislative dialogue model for a Tasmanian Charter proposed by the Discussion Paper. A legislative dialogue model preserves parliamentary sovereignty at all times by:
- (a) allowing Parliament to pass laws that are inconsistent with human rights (subject to certain other procedural requirements to consider human rights); and

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<sup>69</sup> Steiner, Alston and Goodman, above n 51, 385.

<sup>70</sup> See, eg, ICCPR, art 4, which states 'In times of public emergency which threatens the life of the nation and the existence of which is officially proclaimed, the States Parties to the present Covenant may take measures derogating from their obligations under the present Covenant to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with their other obligations under international law and do not involve discrimination solely on the ground of race, colour, sex, language, religion or social origin.'

<sup>71</sup> See detailed discussion of the rationale and extent of safeguards in HRC, *General Comment 29*, above n 53.

<sup>72</sup> Victorian Charter, s 31(1).

<sup>73</sup> *Ibid*, s 31(6).

<sup>74</sup> *Ibid*, s 31(4).

<sup>75</sup> For further discussion and analysis of the necessity and difficulty of override provisions in legislative Charters, see Debeljak, above n 47.

- (b) not empowering the judiciary to strike down a law that is inconsistent with the human rights in the Act.
103. Further, override provisions are not necessary where there is a general limitations provision and where the Tasmanian Charter allows the consideration of international and comparative human rights law to inform its interpretation. If there is a genuine state of emergency that threatens the life of the nation, then the performance of a limitations analysis would allow for the proper restriction of rights, taking into account the gravity of the situation the state faced.
- (b) Safeguards if an Override Declaration is Included in the Tasmanian Charter**
104. Although an override provision is strictly unnecessary, there may be some political will or necessity to include one in the Tasmanian Charter. If that is the case, the Tasmanian Charter should contain provisions to ensure that any override provision is subject to the following safeguards.
- (a) **The existence of a serious and properly declared public emergency:** Derogations should only be allowed in 'a time of public emergency which threatens the life of the nation and the existence of which is officially proclaimed'.<sup>76</sup>
- (b) **A limited period of time:** Any derogation should be temporary, prospective and usually limited in duration to the period of the state of emergency.<sup>77</sup>
- (c) **Proportionality:** Any legislation enacted in consequence of a declaration of a state of emergency may only derogate from human rights to the extent that the derogation is *strictly required by the emergency*.<sup>78</sup>
- (d) **Protection of absolute and non-derogable rights:** As stated above, absolute rights cannot be limited in any circumstances, including a declared state of emergency. Certain rights are also non-derogable, meaning that they cannot be suspended or restricted by derogation. While non-derogable rights cannot be suspended by derogation, if they are non-absolute rights then their enjoyment may be limited in circumstances where it is reasonable and proportionate.<sup>79</sup>

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<sup>76</sup> This is consistent with the duty under art 4 of the ICCPR. The South African Bill of Rights (s 37) states that 'A state of emergency may be declared only in terms of an Act of Parliament, and only when: (a) the life of the nation is threatened by war, invasion, general insurrection, disorder, natural disaster or other public emergency; and (b) the declaration is necessary to restore peace and order.'

<sup>77</sup> See, eg, the South African Bill of Rights, which states that a declaration of a state of emergency and any laws passed during the time of that declaration will only be valid prospectively, and only for 21 days from the date of the declaration, subject to further approval from the National Assembly: s 37(2).

<sup>78</sup> This is the wording from the South African Bill of Rights, s 37(4). Under the ICCPR, States must only take derogating measures under the ICCPR 'to the extent strictly required by the exigencies of the situation', art 4.

<sup>79</sup> See HRC, *General Comment 29*, above n 53.

- (e) **Non-discrimination:** The measures taken must not be inconsistent with other international law obligations and must 'not involve discrimination solely on the ground of race, colour, sex, language, religion or social origin'.<sup>80</sup>

***Recommendation 12: No Override Declaration***

A Tasmanian Charter should not contain an override declaration.

***Recommendation 13: Proper Protection for Non-Derogable Rights***

If a Tasmanian Charter allows for the Tasmanian Government to make derogations from rights, it must only be in respect of non-derogable rights, in exceptional circumstances, for limited periods of time and subject to proper accountability mechanisms.

## **7.2 Invalidation of Subordinate Legislation by the Supreme Court**

105. It is appropriate that the Tasmanian Charter expressly state that subordinated legislation and Council by-laws that are incompatible with the Tasmanian Charter are invalid, unless Parliament later validates the incompatible instrument. This is consistent with the doctrine of ultra vires and the requirement for public authorities to act consistently with the Charter.
106. The Victorian Charter presumes that subordinate instruments that are incompatible with the Charter will be invalid unless the empowering Act provides for the instrument to be incompatible with Charter rights. Section 32(3) of the Victorian Charter provides that subordinate legislation is valid, but only if it is incompatible '*and is empowered to be so by the Act under which it is made*' [emphasis added].
107. For the sake of clarity, the Tasmanian Charter should clearly and expressly state that subordinate instruments are invalid if they are incompatible with human rights, unless the empowering Act expressly and specifically provides for the making of incompatible instruments.
108. The ability of Parliament to empower the making of incompatible instruments and also to take action to validate regulations that are incompatible with human rights is consistent with the dialogue model that preserves the sovereignty of Parliament.

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<sup>80</sup> ICCPR, art 4.

**Recommendation 14: Incompatible Subordinate Instruments Invalid**

For the sake of clarity, the Tasmanian Charter should clearly and expressly state that subordinate instruments are invalid if they are incompatible with human rights, unless the empowering Act provides for the making of incompatible instruments.

**7.3 Statements of Compatibility**

109. The HRLRC supports the Proposed Model's requirement for a statement of compatibility to be tabled by the member introducing a Bill into Parliament (Part 8.4.2). The Tasmanian Charter should require the parliamentarian responsible for a Bill to table a Statement of Compatibility at the time that the new Bill is introduced into Parliament.

110. Statements of Compatibility have the potential to enhance transparency and accountability in policy making and legislative development<sup>81</sup> and to improve legislative and administrative protection and realisation of human rights. As the Victorian Scrutiny of Acts and Regulations Committee has stated:<sup>82</sup>

The requirement that all Bills be accompanied by a statement explaining whether and how they are compatible with human rights has the purpose of both informing parliamentary debate and ensuring that human rights are properly considered when Bills are developed.

111. The Tasmanian Charter should require Statements of Compatibility to be properly reasoned, so as to avoid the situation where Statements of Compatibility simply assert that provisions of an Act are human rights compliant, without giving any justification for that point of view. This very problem has caused delays in the scrutiny process in the UK, where the UK Joint Committee on Human Rights has been delayed in its scrutiny of Acts by the need to write to Ministers to ask for proper reasons for their assertions of rights compliance in Statements of Compatibility.<sup>83</sup>

112. The HRLRC considers that a Statement of Compatibility should state:

- (a) whether the Bill is compatible with human rights, and if so, how it is compatible;<sup>84</sup> and
- (b) if the Bill is inconsistent, the nature and extent of the incompatibility and why the Bill should nevertheless be considered by the Parliament.<sup>85</sup>

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<sup>81</sup> Victorian Equal Opportunity and Human Rights Commission, above n 11, 97-9.

<sup>82</sup> Scrutiny of Acts and Regulations Committee, *Alert Digest* 11 (14 September 2009) 3.

<sup>83</sup> See Joint Committee on Human Rights, *The Work of the Committee in 2007-08, Second Report of Session 2008-09*, HL Paper 10/HC 92, (26 January 2009), 18, available at <http://www.publications.parliament.uk/pa/jt/jtrights.htm>.

113. The HRLRC also supports the Proposed Model insofar as it requires subordinate legislation to be accompanied by a statement of compatibility when it is tabled (see part 8.4.2.2 of the Proposed Model).
114. Requiring the member or Minister responsible for a Bill to provide a Statement of Compatibility increases transparency and accountability in law-making. Even one of the most passionate critics of human rights law concedes that the provision in the Victorian Charter 'does seem to...make the elected legislature think more about rights before enacting laws'.<sup>86</sup> Although Australia's system of responsible government ostensibly means that parliamentarians are accountable to the electorate for their decision-making, requiring parliamentarians to consider rights and to make a public statement as to the likely impact a proposed law will have on human rights, reduces the likelihood of rights being inadvertently infringed. As the National Human Rights Consultation Committee stated in its 2009 report:<sup>87</sup>
- Greater consideration of human rights is needed in the development of legislation and policy and in the parliamentary process in general. The primary aim of such consideration is to ensure that human rights concerns are identified early, so that policy and legislation can be developed in ways that do not impinge on human rights or, in circumstances where limitations on rights are necessary, those limitations can be justified to parliament and the community.
115. The Human Rights Advisory Council is empowered under the Proposed Model to provide advice to Parliament on the compatibility of legislation or subordinated legislation (see 8.2.2.2). It is not clear what the purpose of this advice will be and how it will operate alongside Statements of Compatibility, which also provide the advice of departments on compatibility. The work of the Advisory Council should be clarified in this regard, so as to avoid duplication with the work of departments.

***Recommendation 15: Statements of Compatibility***

The Tasmanian Charter should require Statements of Compatibility to be tabled by the parliamentarian introducing a Bill. Further, the HRLRC states that a Statement of Compatibility should state:

- (a) whether the Bill is compatible with human rights, and if so, how it is compatible; and
- (b) if the Bill is inconsistent, the nature and extent of the incompatibility and why the Bill should nevertheless be considered by the Parliament.

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<sup>84</sup> The Victorian Charter, ACT Human Rights Act and UK Human Rights Act each require law-makers to issue a 'Statement of Compatibility' at the time a law is introduced, indicating whether the law is consistent with protected rights.

<sup>85</sup> If the law is not consistent with protected rights, the Victorian Charter and ACT Human Rights Act require the statement to include details of the nature and extent of the inconsistency.

<sup>86</sup> James Allan, 'The Victorian Charter of Human Rights and Responsibilities: Exegesis and Criticism' (2006) 30 *Melbourne University Law Review* 906, 920.

<sup>87</sup> National Human Rights Consultation Committee, above n 1, 174.

#### **7.4 Joint Parliamentary Human Rights Committee**

116. Parliaments, including through the work of parliamentary committees, have a critical role to play in promoting and protecting human rights<sup>88</sup> and discharging a state's legal obligation to respect, protect and fulfil human rights.<sup>89</sup>
117. Recognising and reflecting this, the Tasmanian Charter should establish a Joint Parliamentary Human Rights Committee to:
- (a) scrutinise all Bills and subordinate legislation for compatibility with protected rights;
  - (b) conduct thematic inquiries into human rights issues; and
  - (c) assist in government responses to Declarations of Incompatibility and other court and tribunal decisions and judgments such as those of the UN Human Rights Committee that concern Tasmania.
118. The UK Joint Committee on Human Rights is the most appropriate and effective model, has similar functions to those listed in paragraph 115 above, and is an example of an effective parliamentary committee.<sup>90</sup> It has been described as 'one notable way in which parliamentary accountability is being enhanced.'<sup>91</sup>
119. The scrutiny of new and existing legislation for compatibility with protected rights is an important preventative measure that can reduce the risk of legislation infringing human rights. The Committee should be given the power to review all legislation – proposed or existing, primary or subordinate – of its own motion in response to a report from an independent body such as the Tasmanian Human Rights Commission or following referral from either House of Parliament. The Committee should have the usual powers of parliamentary committees, including receiving submissions from relevant stakeholders and reporting back to Parliament with findings and recommendations.
120. Currently there is no suggestion in the Proposed Model that a Parliamentary Committee will be established. However, the Advisory Council established by the Proposed Model (8.2.2) has some similar, but not overlapping roles such as advising Parliament on the compatibility of legislation and reviewing the effect of statutory provisions on human rights.

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<sup>88</sup> Commonwealth Human Rights Initiative, *The Parliamentary Committee as Promoter of Human Rights* (2007) 3.

<sup>89</sup> Human Rights Committee, *General Comment 31: Nature of the General Legal Obligation Imposed on States Parties to the Covenant*, UN Doc CCPR/C/21/Rev.1/Add.13 (2004), [4].

<sup>90</sup> See Joint Committee on Human Rights, *The Work of the Committee in 2007-08, Second Report of Session 2008-09*, HL Paper 10/HC 92, (26 January 2009), 18, available at <http://www.publications.parliament.uk/pa/jt/jtrights.htm>.

<sup>91</sup> Anthony Lester, 'Parliamentary Scrutiny of Legislation under the Human Rights Act 1998' (2002) 33 *Victoria University of Wellington Law Review* 1, 2.

121. The Advisory Council's roles do not seem to adequately cover the intended role of a Parliamentary Scrutiny Committee. Further, the Advisory Council is not a parliamentary body and the roles set out in paragraph 115 above would be better performed by a Joint Parliamentary Committee, which is expert, resourced and empowered in conducting reviews and examining legislation.

***Recommendation 16: Establish a Joint Parliamentary Committee***

The Tasmanian Charter should establish a Joint Parliamentary Human Rights Committee to:

- (a) scrutinise all Bills and subordinate legislation for compatibility with protected rights;
- (b) conduct thematic inquiries into human rights issues; and
- (c) assist in government responses to Declarations of Incompatibility and other court and tribunal decisions and judgments such as those of the UN Human Rights Committee that concern Australia.

**7.5 Responding to Declarations of Incompatibility**

122. The Proposed Model (Part 8.5.2.3) requires that within 30 days of receipt of a Declaration of Incompatibility the Minister responsible for legislation must either:
- (a) amend the legislation to ensure it is consistent with human rights; or
  - (b) table a written declaration and response in each house of Parliament.
123. This Proposed Model is appropriate for the dialogue between government and the preservation of parliamentary sovereignty. However, we note that in Victoria, the government is required to respond to Declarations within six months (section 37). It may be that a period of time somewhere between 30 days and six months is appropriate in order to allow the government to determine and craft its response, whether it be amending the legislation or the tabling of a declaration.

***Recommendation 17: Require a Response to Declarations of Incompatibility***

The Tasmanian Charter should require, in accordance with the Proposed Model, that within a specified timeframe (between 30 days and 6 months) of receipt of a Declaration of Incompatibility the Minister responsible for legislation must either:

- (a) amend the legislation to ensure it is consistent with human rights; or
- (b) table a written declaration and response in each house of Parliament.

## 8. The Role of the Courts

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124. This section discusses the role of the Courts, including:

- (a) the power of courts to use international law and judgements;
- (b) the appropriate wording for an interpretative clause;
- (c) the role of making Declarations of incompatibility being limited to the Supreme Court;  
and
- (d) the referral of questions of law on interpretation to the Supreme Court.

125. The answers to relevant questions is as follows:

Question in Discussion Paper	HRLRC Answer
<i>7. Should the Charter expressly point the courts and other branches of government to international law and the judgments of foreign and international courts and tribunals when interpreting human rights as is the case in the ACT and Victoria in relation to the interpretation by courts and tribunals?</i>	Yes.
<i>8. The Charter requires courts and tribunals to interpret laws consistent with human rights, should that be subject to the requirement that Courts and Tribunals ensure an interpretation that best achieves the purpose of the legislation, as is the case in the ACT and Victoria?</i>	Yes.
<i>9. Is it appropriate to limit the power to make a declaration of incompatibility to the Supreme Court and only the Supreme Court?</i>	Yes.

### 8.1 Using Judgments of Foreign and International Courts

126. The Tasmanian Charter should expressly empower courts to have regard to international and comparative human rights jurisprudence when interpreting and applying the Tasmanian Charter and any other laws that impact on human rights. The Proposed Model does not currently include this provision.

127. A provision such as section 32(2) of the Victorian Charter would be appropriate. It provides:

International law and the judgments of domestic, foreign and international courts and tribunals relevant to a human right may be considered in interpreting a statutory provision.



128. There are at least three reasons why courts should consider international and comparative jurisprudence:
- (a) Common jurisprudence reduces the extent to which courts will be required to 'reinvent the wheel' and will better equip decision makers and courts to determine the substantive rights and issues that arise under the Tasmanian Charter by providing them with the opportunity to consider relevant international and comparative law jurisprudence.<sup>92</sup>
  - (b) Utilising international and comparative human rights jurisprudence is particularly important as it enables the courts to have regard to the instruments and bodies from which the rights in the Tasmanian Charter are derived.<sup>93</sup> International experience in the implementation of human rights laws is therefore likely to inform the mechanical provisions of a Tasmanian Charter.
  - (c) Human rights are universal, so the development of human rights jurisprudence should be as consistent across all jurisdictions as is possible.<sup>94</sup>
129. Further, given the limited extent to which courts currently use international or domestic overseas jurisprudence in statutory or constitutional interpretation and in the development of the common law,<sup>95</sup> a Tasmanian Charter should expressly provide for courts to have regard to those sources.
130. The provision should clearly allow for the use of international law that will aid in interpreting the application of ICCPR and ICESCR rights to different groups. For example, the CRPD will assist in interpreting the application of human rights to people with disability, and the Charter should clearly refer to those other instruments as a source of interpretation.

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<sup>92</sup> *Kracke v Mental Health Review Board & Ors* [2009] VCAT 646, paras 201-2 (Bell J).

<sup>93</sup> The rights protected in a Human Rights Act would be likely to be drawn from international law, especially the human rights treaties to which Australia is a signatory, such as the ICCPR and ICESCR. For example the jurisprudence of the HRC, which issues General Comments that elucidate the meaning of particular rights under the ICCPR and hears individual complaints under the First Optional Protocol to the ICCPR.

<sup>94</sup> In any event it is well established that it is desirable, as far as possible, that expressions used in international agreements be construed in a uniform and consistent manner by both municipal courts and international courts and panels: See, eg, *Rocklea Spinning Mills Pty Ltd v Anti Dumping Authority* (1995) 56 FCR 406, 421E; *Povey v Qantas Airways Ltd* (2005) 216 ALR 427, 433 per Gleeson CJ, Gummow, Hayne and Heydon JJ; *R v Asfaw* [2008] UKHL 31 (21 May 2008) [55]; *R v Immigration Appeal Tribunal, Ex p Shah* [1999] 2 AC 629, 657B.

<sup>95</sup> International human rights law is not directly applicable in Australia unless it is given domestic legislative effect. However, it can still be persuasive in domestic proceedings, in the following ways: as a tool for statutory interpretation; to influence the development of the common law; as a basis of judicial review in administrative law; in the exercise of judicial discretion; and as an indicia of contemporary standards and values and therefore relevant to the context in which the federal Constitution should be interpreted and applied.

**Recommendation 18: Use International Law**

The Tasmanian Charter should expressly empower courts to have regard to international and comparative human rights instruments and jurisprudence when interpreting and applying the Tasmanian Charter and any other laws that impact on human rights.

## **8.2 Interpretation of Laws Consistently with Human Rights**

131. One of the core tasks of courts is to interpret the meaning of the laws that are passed by Parliament and to apply those laws in specific situations. The Tasmanian Charter should require that all Tasmanian legislation be interpreted and applied (and, if necessary, read up or down) in a manner that is most compatible with human rights (the **Interpretive Principle**). This is a codification and extension of the well established common law principles that any ambiguity in legislation should be construed in favour of human rights and that legislation should not be deemed to abrogate fundamental rights without clear and express words evincing that intention.
132. The form of words in the Proposed Model (8.4.4) is appropriate for the statutory interpretation provision. That wording is similar to section 32 of the Victorian Charter, which requires that 'so far as it is possible to do so consistently with their purpose, all statutory provisions must be interpreted in a way that is compatible with human rights'.
133. Section 32 of the Victorian Charter does not 'create a "special" rule of interpretation, but rather forms part of the body of interpretive rules to be applied at the outset, in ascertaining the meaning of the provision in question'.<sup>96</sup>
134. The Victorian Court of Appeal has characterised section 32(1) as a 'statutory directive' that requires all persons engaged in the task of statutory interpretation to 'explore all possible interpretations of the provision(s) in question, and adopt that interpretation which least infringes *Charter* rights'.<sup>97</sup> Either a note in the legislation or remarks in the Second Reading Speech or Explanatory memorandum should expressly support the approach to interpretation adopted in *Momcilovic* (and subsequently endorsed by the ACT Supreme Court).<sup>98</sup>
135. The success of the Interpretative Principle is dependent upon the judiciary deploying it robustly, so that remedial action is encouraged. Human rights should be interpreted and applied in a manner which renders them 'practical and effective, not theoretical and illusory'.<sup>99</sup>

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<sup>96</sup> *R v Momcilovic* [2010] VSCA 50 (17 March 2010).

<sup>97</sup> *Ibid*, [103].

<sup>98</sup> See *In the Matter of an Application for Bail by Isa Islam* [2010] ACTSC 147 (19 November 2010).

<sup>99</sup> *Goodwin v United Kingdom* (2002) 35 EHRR 447, [73]-[74]. See also *Airey v Ireland* (1979) 2 EHRR 305, 314.

Further, the Tasmanian Charter should be a 'living document' to be interpreted and applied in the context of contemporary and evolving values and standards.<sup>100</sup>

136. Importantly, it is not only the courts who must use the Interpretive Principle. All persons should be required by the Human Rights Act to interpret Commonwealth legislation and subordinate legislation according to the Interpretive Principle.

***Recommendation 19: Interpret Legislation Consistently With Human Rights***

The Tasmanian Charter should require that all Tasmanian legislation be interpreted and applied (and, if necessary, read up or down) in a manner compatible with human rights.

***Recommendation 20: All Persons have the Interpretive Obligation***

All persons, not just courts and tribunals, should be required by the Human Rights Act to interpret Commonwealth legislation and subordinate legislation according to the Interpretive Principle.

### **8.3 Limiting Declarations of Incompatibility to the Supreme Court**

137. It is appropriate to limit the power to make Declarations of Incompatibility (sometimes also known as declarations of inconsistent interpretation) to the Supreme Court. This is the system adopted in Victoria and in ACT.<sup>101</sup>
138. The legislative model of human rights proposed for the Tasmanian Charter is based on a dialogue about human rights between the courts, the Parliament and the executive. It is most workable and efficient for that dialogue to occur from a single court, and also that the Supreme Court as the highest in the State be entrusted with that duty.

***Recommendation 21: Supreme Court to Make Declarations of Incompatibility***

The power to make Declarations of Incompatibility (sometimes also known as declarations of inconsistent interpretation) should be limited to the Supreme Court.

### **8.4 Referral of Questions of Law on Interpretation to the Supreme Court**

139. The HRLRC supports the Proposed Model insofar as it provides for a referral of questions of law on interpretation of either the Charter or of other statutory provisions in accordance with the Charter to be referred to the Supreme Court (8.4.4.1).

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<sup>100</sup> *Tyrer v United Kingdom* (1978) 2 EHRR 1, 10; *Selmouni v France* (2000) 29 EHRR 403, [101].

<sup>101</sup> See Victorian Charter, section 36 and ACT Human Rights Act, section 32.

140. We support a provision similar to section 33 of the Victorian Charter, which allows for a referral upon application and where the court or tribunal sees that referral is appropriate.

***Recommendation 22: Referrals to the Supreme Court***

The Tasmanian Charter should include a provision similar to section 33 of the Victorian Charter which provides for referral to the Supreme Court of questions of law that arise in relation to the application of the Charter or the interpretation of statutory provisions in accordance with the Charter.

## 9. Monitoring and Enforcement of Rights

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Question in Discussion Paper	HRLRC Answer
<i>10. The model in this paper allows individuals to raise the rights in the Charter as part of another action in a court or tribunal or in judicial review of administrative decisions. Is this level of protection for human rights appropriate in Tasmania?</i>	A Tasmanian Charter should provide a free-standing cause of action for breaches of the protected human rights. This is necessary to ensure that there is an effective remedy available for any breach of a human right.
<i>11. The model allows for an individual who only has a human rights action caused by incompatible provisions in an Act to take that issue to the proposed Human Rights Commission, who can then take it to the Supreme Court. Is this sufficient protection?</i>	The proposed Human Rights Commission should be empowered to issue proceedings in the Supreme Court on behalf of an aggrieved individual. However, this avenue should be in addition to, and not in place of, a free-standing cause of action being available for any aggrieved individual.
<i>12. The model allows for the proposed Human Rights Commission to inquire into services and programs and to make recommendations for greater compliance with the human rights in the Charter, is this necessary in Tasmania and if so, is this a sufficient protection in ensuring programs and services are delivered which are consistent with human rights?</i>	The proposed Human Rights Commission should be empowered to inquire into services and programs and to make recommendations for greater compliance with protected human rights. However, this power should be in addition to, and not in place of, a free-standing cause of action being available for any aggrieved individual.

### 9.1 Introduction

141. Effective monitoring and enforcement systems are required in order to ensure that individuals are able to access a remedy for a breach of their human rights. This section of our submission examines mechanisms that should be established to monitor implementation of and enforce compliance with a Tasmanian Charter. The HRLRC considers that a range of judicial and non-judicial remedies are necessary in order to ensure the effective operation of a Tasmanian Charter.

142. In this section, we consider:

- (a) the obligation to ensure an effective remedy for a breach of human rights;
- (b) judicial remedies, including a separate cause of action and a broad remedies provision including damages;

- (c) non-judicial remedies, including the role and functions of the proposed Human Rights Commission; and
  - (d) other access to justice measures required to ensure that effective remedies can be accessed by all aggrieved persons.
143. Section 7.3.3 of the Directions Paper (p 34) indicates that the following monitoring and enforcement mechanisms should be established:
- (a) based on the Victorian approach, individuals should be able to raise protected human rights as part of another cause of action in a court or tribunal or in judicial review of administrative decisions;
  - (b) provision for the proposed Human Rights Commission to take a Charter only action to the Supreme Court to seek a declaration of incompatibility; and
  - (c) provision for the proposed Human Rights Commission to undertake a compliance audit of programs and services.
144. However, Section 8.5 of the Proposed Model, which deals with Remedies, seems to contemplate a Declaration of Incompatibility as being the only available remedy that can be obtained from the Supreme Court.<sup>102</sup>
145. The HRLRC considers that the Proposed Model does not provide sufficient protection for breaches of human rights. A Tasmanian Charter should ensure that:
- (a) people whose rights are violated have an "effective remedy";
  - (b) people claiming a remedy should have their rights to the remedy determined by a competent authority; and
  - (c) remedies should be enforced where granted.<sup>103</sup>
146. This is consistent with Australia's legal obligations under the ICCPR and the ICESCR.

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<sup>102</sup> The proposed model outlined in Section 8 of the Directions Paper does not explicitly provide that an individual is able to raise protected human rights as part of another cause of action. While Section 8.4.1.5 seems to contemplate "unlawfulness" for a public authority failing to act compatibly with the Tasmanian Charter, there does not appear to be any provision for what is the consequence of such unlawfulness, other than an application for judicial review considered in Section 8.4.1.6. Section 8.4.5 then outlines that individuals can make a complaint to the proposed Human Rights Commission if they believe that a decision, service or program is inconsistent with the Tasmanian Charter, and that any complaint deemed to be successful by the Commission would be reported to the relevant Minister and to the Attorney-General.

<sup>103</sup> See, eg, ICCPR art 2(3); CERD art 6; CAT art 14; CROC art 39.

## 9.2 The Right to an Effective Remedy

147. "Effective remedies" is a broad term, encapsulating a range of reparations that can be made to individuals whose rights have been violated. Such reparations may include:<sup>104</sup>

restitution, rehabilitation and measures of satisfaction, such as public apologies, public memorials, guarantees of non-repetition and changes in relevant laws and practices, as well as bringing to justice the perpetrators of human rights violations.

148. In general, the availability of an effective remedy requires that 'individuals be able to seek enforcement of their rights before national courts and tribunals'.<sup>105</sup> However, in some circumstances, an effective remedy may be administrative in nature.

149. A Tasmanian Charter should provide for a range of judicial and non-judicial remedies for breaches of the rights under the Act. Potential remedies for a person whose human rights have been infringed range from:

- (a) seeking redress in the courts; to
- (b) engaging in dispute resolution processes such as conciliation and mediation;<sup>106</sup> to
- (c) lodging a complaint with a Human Rights Commissioner or Ombudsman;<sup>107</sup> to
- (d) seeking redress with the violating public authority (for example, by requesting an internal review where appropriate).

## 9.3 Judicial Remedies – The Role of Courts and Tribunals

150. The HRLRC considers that the Proposed Model would provide insufficient protection for human rights in Tasmania as it would only allow individuals to raise the Charter issues as part of another action or through the proposed Human Rights Commission.

### **(a) The need for a free-standing cause of action**

151. A Tasmanian Charter should provide a free-standing cause of action for breaches of the rights protected by the legislation. An independent cause of action is necessary in order to provide effective remedies for human rights breaches. (One exception to the free-standing cause of action is an action for a Declaration of Incompatibility. The HRLRC considers that an application for a Declaration of Incompatibility should be required to be brought with another

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<sup>104</sup> Human Rights Committee, *General Comment 31*, above n 89, [6].

<sup>105</sup> See, eg, CESCR, *General Comment 9: The Domestic Application of the Covenant*, [10], UN E/C.12.1998/24 (1998).

<sup>106</sup> Victorian Human Rights Consultation Committee, State Government of Victoria, *Report of the Human Rights Consultation Committee: Rights, Responsibilities and Respect* (November 2005), ch 6, 120.

<sup>107</sup> *Ibid*, 122.

- cause of action to minimise the chances of it being considered to be a request for an advisory opinion of the court.)
152. Only allowing an aggrieved person to seek relief for a human rights breach if that person already has a cause of action other than under a Tasmanian Charter would not provide an effective remedy. Under such a model, there would be no ability to commence court proceedings solely on the ground that there has been a breach of human rights. If there is no free-standing cause of action, it would be necessary to establish another cause of action and find a way of linking human rights arguments to that other cause of action.<sup>108</sup> This would increase the difficulty of bringing court proceedings where human rights have been breached and is likely to prevent certain individuals from being able to bring proceedings at all. This limits the effectiveness of a Tasmanian Charter in addressing human rights breaches and enforcing human rights obligations and may create the impression that human rights will not be treated with the seriousness and importance that they deserve.<sup>109</sup>
153. The HRLRC also observes that the Victorian model, where individuals must have an existing cause of action in order to bring a complaint, has led to much confusion and unnecessary complication. The complexity of establishing a cause of action for a breach of the Victorian Charter, particularly for individuals who may not be able to access legal advice or representation, often causes a barrier to such individuals being able to access an effective remedy for a breach of their rights. The HRLRC submits a separate cause of action would avoid such complexity and create a simpler way for aggrieved individuals to be able to access a court or tribunal.
154. The HRLRC acknowledges the concern that a free-standing cause of action could “open the floodgates” of litigation and could be costly for the government and public authorities as a result of awards of compensation against them.<sup>110</sup> However, in reality the “floodgates” argument is simply not borne out by the evidence and experience in other jurisdictions with independent causes of action. Neither outcome has eventuated in either the UK or the ACT, where the respective Human Rights Acts provide for a free-standing cause of action for a breach of human rights, or in New Zealand, where courts have implied a right of action and entitlement to a remedy for a breach of human rights.<sup>111</sup> Although the UK did experience an increase in the number of human rights cases immediately after the introduction of the Human

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<sup>108</sup> Carolyn Evans, 'Responsibility For Rights: The ACT Human Rights Act' (2004) *Federal Law Review* 291.

<sup>109</sup> *Ibid* 300, 302.

<sup>110</sup> Gabrielle McKinnon, *Strengthening the ACT Human Rights Act 2004* (2005) Australian National University, 2, available at <http://acthra.anu.edu.au/publications/index.html>.

<sup>111</sup> *Ibid*.



Rights Act in 2000 until 2002-2003, there has since been a gradual and steady decline.<sup>112</sup> Courts report that the UK Human Rights Act has not resulted in an overall increase in the length or cost of litigation.<sup>113</sup> On the contrary, the number of human rights cases before the courts has halved in the last eight years.<sup>114</sup>

**(b) Who should be able to bring human rights claims?**

155. A Tasmanian Charter should allow for persons whose human rights are directly breached to bring claims. However, the Charter should also allow third parties to have standing and act on behalf of aggrieved persons who are unable to bring a complaint on their own behalf. As with habeas corpus,<sup>115</sup> such a right may be necessary because a person whose rights to liberty have been infringed may be unable to seek redress in person.
156. While the HRLRC supports the Model's proposal to empower a new Human Rights Commission to bring claims on behalf of aggrieved persons, we consider that this is an insufficient level of protection on its own in the absence of a separate cause of action. The HRLRC submits that the Human Rights Commission should be given the power to bring claims on behalf of aggrieved persons in circumstances where that person may be unable to bring a complaint on their own behalf, but that individuals must also be able to bring a claim on their own via a free-standing cause of action.
157. The HRLRC suggests that a Tasmanian Charter could adopt a provision similar to section 38 of South Africa's Bill of Rights, which provides:

Anyone listed in this section has the right to approach a competent court, alleging that a right in the Bill of Rights has been infringed or threatened, and the court may grant appropriate relief, including a declaration of rights. The persons who may approach a court are:

- (a) anyone acting in their own interest;
- (b) anyone acting on behalf of another person who cannot act in their own name;
- (c) anyone acting as a member of, or in the interest of, a group or class of persons;

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<sup>112</sup> See Sweet and Maxwell, '[UK courts see further decline in the use of Human Rights arguments](https://www.smlawpub.co.uk/pressroom/2007/190207.html#table)' (Press Release, 19 February 2007), available at <https://www.smlawpub.co.uk/pressroom/2007/190207.html#table>. It states: 'The number of reported cases on Sweet & Maxwell's Lawtel & Westlaw service employing Human Rights arguments peaked during 2002-2003 with 541 cases making use of the Act, but over the past three years there has been a gradual decline.'

<sup>113</sup> Lord Thomas Bingham, 'Dignity, Fairness and Good Government: The Role of a Human Rights Act' (Speech delivered to the Human Rights Law Resource Centre, Melbourne, 9 December 2008), available at <http://www.hrlrc.org.au/content/topics/national-human-rights-consultation/lord-bingham/>. See also Administrative Court of England and Wales, *Report for the Period April 2001 to March 2002* (2003). The report found no evidence of an increase in the volume, length or costs of litigation.

<sup>114</sup> Robert Verkaik, 'Lawsuits on human rights halve despite European Act', *The Independent Online*, 20 April 2009.

<sup>115</sup> Habeas corpus is a legal action requiring a detained person to be brought before the court and for the State to show that its detention of the person is lawful.

- (d) anyone acting in the public interest; and
- (e) an association acting in the interest of its members.

**(c) Breaches of economic, social and cultural rights**

158. The HRLRC acknowledges that there are concerns as to how economic, social and cultural rights might be interpreted by the courts, should a Tasmanian Charter provide for such rights to be directly enforceable.<sup>116</sup> Consistent with the international human rights framework, a Tasmanian Charter should provide “appropriate means of redress...to any aggrieved individual or group”, whether the redress is for a breach of economic, social or cultural rights or civil and political rights.<sup>117</sup>
159. The HRLRC's strongly preferred position would be for the Tasmanian Charter to provide for directly enforceable economic, social and cultural rights protections, in accordance with internationally accepted principles of the interdependence and indivisibility of human rights. However, judicial enforcement is not the only important aspect of human rights protection. Ensuring that policy makers and law makers integrate a human rights-based approach in their work should be a very high priority. The creation of a rights-compliant culture is possible through education and does not always require legal enforcement. We also note that judicial challenges to economic, social and cultural rights are more likely to result in the courts providing government with a range of reasonable options that are considered to be rights-compliant (and findings of breach will be largely left to the starkest factual circumstances).
160. Further, the HRLRC is aware that, in light of concerns expressed in relation to economic, social and cultural rights, the Tasmanian Government may be reluctant to go down the path of direct enforceability – at least not initially. The HRLRC therefore puts forward, as an alternative, a model which provides judicial and non-judicial remedies for breaches of civil and political rights, and, at first instance, only non-judicial remedies for breaches of economic, social and cultural rights.
161. The HRLRC submits that, as an alternative to providing, from the outset, for judicial remedies for breaches of economic, social and cultural rights, a Tasmanian Charter could provide for the proposed Human Rights Commissioner to receive complaints from individuals who allege a breach of their economic, social and cultural rights.<sup>118</sup> The Commissioner could consider all complaints received (using policies, guidelines or regulations made for the purpose) to determine whether the complaint raises any issues which, in the Commissioner's opinion, should be addressed by the relevant public authority.

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<sup>116</sup> See eg, ACT Department of Justice and Community Safety, *Human Rights Act 2004: Twelve-Month Review - Report* (2006), available at [http://www.jcs.act.gov.au/HumanRightsAct/Publications/twelve\\_month\\_review.pdf](http://www.jcs.act.gov.au/HumanRightsAct/Publications/twelve_month_review.pdf).

<sup>117</sup> CESCR, *General Comment 9*, above n 105, [2].

162. All complaints would be required to be referred, within a specified period, to the public authority (or public authorities) which the Commissioner considers the most appropriate in the circumstances. The Commissioner must include with the referred complaint his or her conclusions as to the action that should be taken by the public authority. The HRLRC envisages that the Commissioner would have available three alternative recommendations (but this does not preclude the possibility that more options may become apparent with further consideration):
- (a) the complaint does not disclose a shortcoming in the conduct, policies or procedures of the public authority or an officer thereof, and no remedial action by the public authority is recommended;
  - (b) the complaint does disclose a failure of conduct, policy or procedure by a public authority or officer thereof, and the Commissioner recommends that action be taken to remedy the shortcoming(s), in which case the public authority must either:
    - (i) take action to remedy the shortcoming; or
    - (ii) if, after giving the complaint and recommendation due consideration, it decides not to take action, publish its reasons for making that decision; or
  - (c) the complaint does not give rise to a need for corrective actions by the public authority, but the Commissioner is of the opinion that the person's complaint may be resolved by arbitration or conciliation (leading to potential results such as an apology).
163. All public authorities should be required to publish the details of all complaints received, the Commissioner's recommendations, and any actions taken in response or the reasons for not taking remedial action in their annual audit reports. The Commission, in its annual report, should also publish details of all complaints received, including referral and recommendation details, actions taken by the public authorities and any reasons given by the public authorities for actions not being taken. The information gained by this process would be extremely useful in allowing public authorities and the Tasmanian Government to target policy areas that are in need of urgent attention and will provide a basis for future reviews of the Tasmanian Charter to determine how and when to bolster the protection of economic, social and cultural rights.
- (d) Available remedies for breaches of human rights**
164. As stated above, section 8.5 of the Directions Paper seems to contemplate that only a declaration of incompatibility would be available under the Proposed Model. Section 8.5.1 also envisages that it should be clearly stated that damages would not be available for a

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<sup>118</sup> An important related issue will be the implementation of a public education program to ensure that people are made aware of the distinction between their civil and political rights and economic, social and cultural rights.

- breach of the Tasmanian Charter. This approach fails to ensure that aggrieved individuals are able to access an appropriate remedy for a breach of their human rights.
165. The HRLRC submits that a Tasmanian Charter should provide for the following judicial remedies to be available for breaches of all human rights:
- (a) a declaration that a law is incompatible with human rights (ie a Declaration of Incompatibility) and requiring the government to respond to this incompatibility;<sup>119</sup>
  - (b) an order that a law, policy or program be implemented in accordance with human rights;
  - (c) an injunction, declaration or order that conduct or activity amounting to a breach of human rights be stopped;<sup>120</sup>
  - (d) compensation and reparations;<sup>121</sup> and
  - (e) such remedies as are “just and appropriate”.<sup>122</sup>
166. The HRLRC notes that these judicial remedies are available under domestic human rights frameworks in South Africa, Canada, New Zealand, the United States and the United Kingdom.
167. Judicial remedies should include damages or compensation (where there is no effective or appropriate alternative remedy). While some may be concerned about allowing for a breach of the Tasmanian Charter to sound in damages, that concern is unfounded. The UK Human Rights Act extends the power to award damages for a breach to any court that has the power to order payment of damages or compensation in a civil case.<sup>123</sup> However, damages are rarely awarded under the UK Act, with judicial review and declaratory and injunctive relief more often providing effective remediation of breaches or proposed breaches of human rights. Nevertheless, the UK courts do retain the discretion to award damages where it is just and

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<sup>119</sup> See, eg, ACT Human Rights Act s 32; UK Human Rights Act s 4; Victorian Charter s 36.

<sup>120</sup> Human Rights Committee, *General Comment 31*, above n 89, [17], [19], and remedy available under the Victorian Charter, if the action for breach of a Charter Right is brought in conjunction with another cause of action for that relief; s 39.

<sup>121</sup> See, eg, *Simpson v Attorney General (NZ)* [1994] 3 NZLR 667; UK Human Rights Act, s 8. The UNHRC has stated that 'States Parties [are required to] make reparation to individuals whose ... rights have been violated. Without reparation to individuals whose ... rights have been violated, the obligation to provide an effective remedy, which is central to efficacy of art 2, paragraph 3 is not discharged': UNHRC, *General Comment 31*, above n 89, [16]. Note that in the 10 years since the passage of the UK Human Rights Act, only three cases have resulted in compensatory orders: UK Department for Constitutional Affairs, above n 10; UK Ministry of Justice, above n 13, 18.

<sup>122</sup> See, eg, UK Human Rights Act s 8.

<sup>123</sup> UK Human Rights Act s 8.

appropriate to do so. In the UK, there were only three cases under the Human Rights Act between 2000 and 2006 which resulted in the payment of compensation.<sup>124</sup>

168. The HRLRC submits that a Tasmanian Charter should adopt the UK approach. Where damages are awarded, they should be available to cover actual financial loss, for example loss of earnings, loss in the value of property or loss of employment prospects. Damages should also be available for non-pecuniary loss such as anxiety or distress.

***Recommendation 23: Causes of Action under the Charter***

- (a) A Tasmanian Charter should contain a free-standing cause of action for breaches of all rights protected by the Act. However, an application for a Declaration of Incompatibility should be required to be brought with another cause of action to minimise the chances of it being considered to be a request for an advisory opinion of the court.
- (b) All persons whose human rights are directly breached should be able to bring a claim under the Act. The Act should also allow third parties to have standing and act on behalf of aggrieved persons who are unable to bring a complaint on their own behalf.
- (c) A Tasmanian Charter should allow a full range of judicial remedies to be available for breaches of all rights under the Act, including damages.

**9.4 Non-Judicial Remedies – The Role of the Proposed Human Rights Commission**

169. Although judicial remedies are essential, in some cases, a non-judicial response (eg, engaging in a dispute resolution process or lodging a complaint with a Human Rights Commission or Ombudsman) is appropriate and sufficient. For example, an aggrieved person may be satisfied with a formal apology.
170. The Proposed Model outlined in the Directions Paper allows:
- (a) individuals to take an issue to the proposed Human Rights Commission (which can then take it to the Supreme Court); and
  - (b) the proposed Human Rights Commission to inquire into services and programs and to make recommendations for greater compliance with a Tasmanian Charter.
171. The HRLRC supports the establishment of these roles and functions of the proposed Human Rights Commission and considers that they are important non-judicial remedies that should be available to aggrieved individuals and also, where appropriate, to address systemic human

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<sup>124</sup> According to the UK Department for Constitutional Affairs, there were only three reported cases by 2006 (6 years after the implementation of the UK Human Rights Act) that awarded damages under the UK Human Rights Act: *R (Bernard) v Enfield Borough Council* [2003] HRLR 111; *R(KB) v Mental Health Review Tribunal* [2004] QB 936; and *Van Colle v Chief Constable of Hertfordshire* [2006] EWHC 360; UK Department for Constitutional Affairs, above n 10; UK Ministry of Justice, above n 13, 18.

rights issues. However, these non-judicial remedies must operate *in addition to* the judicial remedies outlined in section 9.3 above. Both judicial and non-judicial remedies for alleged human rights breaches must be available in order to ensure the right to an effective remedy.

**(a) Complaints to the proposed Human Rights Commission**

172. Section 8.4.5 of the Directions Paper provides that a Tasmanian Charter should allow for individuals to make a complaint to the proposed Human Rights Commission if they believe that a decision, service or program is inconsistent with the Charter. Section 8.2.1.2 of the Directions Paper provides that the proposed Human Rights Commission would have the same functions as the Anti-Discrimination Commissioner, which includes the power to receive and conciliate complaints.
173. The HRLRC supports a Tasmanian Charter which empowers the proposed Human Rights Commission to handle and conciliate allegations of breaches of all civil, political, economic, social and cultural rights. However, the power to receive individual complaints should not be a pre-condition, or operate to the exclusion of, an individual being able to access a judicial remedy.

**(b) Inquiry function of the proposed Human Rights Commission**

174. The Directions Paper also envisages that the proposed Human Rights Commission may take a 'Charter only' action to the Supreme Court to seek a Declaration of Incompatibility and also to undertake a compliance audit of programs and services. The powers may be instigated by individuals through a complaint to the Commission but are also available to the Commission on its own motion.
175. The HRLRC supports the functions and powers of the proposed Human Rights Commission envisaged by Question 12 in the Directions Paper. These are essential functions to be undertaken by the Commission and would play an important role in identifying and addressing systemic human rights issues.
176. However, once again, the HRLRC considers that these functions of the proposed Human Rights Commission should operate *in addition to* an aggrieved individual being able to assert their rights for a breach of the Tasmanian Charter via an independent cause of action, as discussed above. The functions of the proposed Human Rights Commission to receive complaints and to investigate into systemic issues should not be the only remedy available to an individual affected by the provision of services and programs by a public authority, nor should they exclude an individual from being able to access a judicial remedy themselves.

**(c) Additional non-judicial monitoring and compliance measures**

177. In addition to the measures discussed above, the HRLRC also suggests that the following additional measures may be useful monitoring and compliance mechanisms:
- (a) A Tasmanian Charter should require all public authorities to publish in their annual audit reports the details of all complaints received, the Commissioner's recommendations, as well as any actions taken or, alternatively, the reasons for not taking remedial action.
  - (b) Additionally, the Commission may publish in its annual report details of all complaints received, including referral and recommendation details, actions taken by the public authorities and any reasons given by the public authorities for actions not being taken.
  - (c) A Joint Parliamentary Committee on Human Rights should be established to monitor and take responsibility for the role of the legislature in protecting and promoting human rights. The role and function of a Joint Parliamentary Committee is discussed in further detail in section 7.4.

**Recommendation 24: Non-judicial Remedies**

In addition to the availability of judicial remedies, a Tasmanian Charter should provide a full range of non-judicial remedies for breaches of all rights under the Act, including powers of a Human Rights Commission to receive complaints and inquire into matters.

**9.5 Ensuring Access to Justice**

178. In addition to the judicial and non-judicial measures discussed above, effective protection of human rights requires that all people know their rights and have the capacity to enforce those rights. Access to justice is a human right in itself and a critical element of the promotion, protection and fulfilment of other human rights. Accordingly, various practical resources are required to give individuals knowledge of, and the ability to enforce, their legal rights. Access to justice necessarily requires such practical facilities as "access to lawyers, access to courts, litigation processes which produce justice... and laws which are just".<sup>125</sup>
179. In Victoria, in recognition of the importance of access to legal and human rights advocacy services to make the Charter accessible and 'real' to the community, the Department of Justice provided the HRLRC with funding 'to promote human rights through legal services, education, training, research, policy analysis and advocacy'. The Department subsequently

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<sup>125</sup> Julian Burnside QC, 'Access to Justice', (speech delivered at the 2006 National Access to Justice and Pro Bono Conference, Melbourne, 11 August 2006), available at: <http://www.nationalprobono.org.au/page.asp?from=5&id=123>.

provided a further grant to enable the HRLRC to intervene as amicus in legal proceedings implicating the Charter to ensure the robust and progressive development of human rights jurisprudence in the state. In its submission to the five year review of the ACT Human Rights Act, the ACT Human Rights Commission stated:<sup>126</sup>

In Victoria the implementation of the Charter has been greatly assisted by a dedicated legal centre focusing on human rights law. The Human Rights Law Resource Centre has played a very important role in providing legal resources for practitioners on human rights, contributing to debates on policy issues and conducting major test case litigation under the Charter.

***Recommendation 25: Funding Access to Justice***

State government funding for community legal centres and legal aid should be increased to enable them to better provide access to justice for those who are unable to afford private legal assistance. In particular, specific funding should be provided for human rights related litigation, advocacy, education and training so as to ensure that the benefits of the Tasmanian Charter are realised for marginalised and disadvantaged individuals and groups.

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<sup>126</sup> ACT Human Rights Commission, *Submission to the Five Year Review of the Human Rights Act 2004* (ACT) (Nov 2009), 28.



## 10. Community Engagement

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Question in Discussion Paper	HRLRC Answer
<i>13. A number of mechanisms are suggested in this paper to encourage community engagement in human rights. Do you support these mechanisms? Are there other things that would be effective in this regard?</i>	The HRLRC supports the establishment of the proposed Human Rights Commission to, among other functions, engage in community education and engagement with human rights. The HRLRC does not support the establishment of the Human Rights Advisory Council in its proposed form but does recommend a number of further measures to ensure effective community engagement and education.

### 10.1 Introduction

180. The HRLRC considers that, in addition to a legislative instrument, a range of measures and initiatives are necessary in order to strengthen the protection and promotion of human rights through engaging, educating and empowering the community. Section 7.4 of the Directions Paper addresses the role of the community in protecting and promoting human rights and considers the establishment of two mechanisms to ensure community engagement, namely:
- (a) a Human Rights Commission (discussed above in section 9.4 and further below in section 11); and
  - (b) a Human Rights Advisory Council, to be set up as a means of gaining increased community engagement and including the community in the "dialogue" around rights protection.
181. As identified in the Directions Paper, these mechanisms would operate in addition to a broad range of advisory bodies that already exist, such as the Children's Consultative Committee and Sentencing Advisory Council.
182. The HRLRC largely supports the mechanisms proposed in the Directions Paper, with the exception of the Human Rights Advisory Council (as explained further below). In addition to these mechanisms, the HRLRC recommends a number of additional measures to engage with community organisations, which are discussed in section 10.4 below.

## **10.2 Ensuring Community Involvement**

183. Among other measures, the Directions Paper proposes the establishment of a Human Rights Advisory Council to provide advice to Government on how to consult effectively with the community. Section 8.2.2.2 also envisages that the Human Rights Advisory Council will undertake a number of other functions, including:

- (a) providing advice to Parliament on the compatibility of legislation;
- (b) advising the Attorney-General on matters relevant to the Tasmanian Charter, including reviewing the effect of the Charter on statutory provisions and the common law; and
- (c) participating in 4-yearly reviews of the Charter.

184. The HRLRC does not support the establishment of a Human Rights Advisory Council, at least in the form that is proposed in the Directions Paper. The Advisory Council's proposed functions would more appropriately be undertaken by other mechanisms as follows:

- (a) a Joint Parliamentary Committee on Human Rights (as discussed in section 7.4 above) should undertake the role of providing advice to Parliament on the compatibility of legislation; and
- (b) the proposed Human Rights Commission should undertake the functions of:
  - (i) advising and making recommendations to the Attorney-General on matters relating to the Tasmanian Charter;
  - (ii) consulting and engaging with the community; and
  - (iii) participating in the 4-yearly reviews of the Charter.<sup>127</sup>

185. In place of the advisory role to be played by the Human Rights Advisory Council on engagement with the community, the HRLRC suggests a number of alternative measures in section 10.4 below.

## **10.3 Community Education**

186. Section 7.4.3 of the Discussion Paper addresses the importance of raising awareness and understanding of human rights in the community. The Paper correctly identifies that a strong focus on education and training is required in order for all of the other proposed mechanisms to function effectively. Such education and training includes:

- (a) community awareness campaigns with the general community;
- (b) targeted training to advocates and support workers; and

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<sup>127</sup> We note that some of these functions are imposed on the Victorian Equal Opportunity and Human Rights Commission: section 41 of the Victorian Charter.

- (c) primary and secondary school education.
187. Education is an integral component of building a culture that understands, respects and is committed to upholding human rights for all members of society.<sup>128</sup> The HRLRC also notes that providing human rights education is an obligation that Australia has under international law.<sup>129</sup>
188. The Tasmanian Government should ensure that all primary and secondary school students receive education about human rights. The HRLRC recommends that the following initiatives be implemented in order to ensure such compliance:
- (a) the Tasmanian Government must provide clear directives that human rights education is an essential component of the school curriculum, and also state where human rights education fits within the curriculum;
  - (b) all pre-service and in-service teachers should be provided with human rights education training; and
  - (c) human rights education materials should be developed by government departments and agencies, including the proposed Human Rights Commissioner.

***Recommendation 26: Human Rights Commission to Educate***

In place of a Human Rights Advisory Council, powers and functions should be granted to the Human Rights Commission to engage with the community and to provide community education about human rights.

***Recommendation 27: Human Rights Education***

The Tasmanian Government should:

- (a) provide clear directives that human rights education is an essential component of the school curriculum;
- (b) clearly state where human rights education fits within the school curriculum; and
- (c) provide human rights education training for all school teachers.

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<sup>128</sup> Office of the United Nations High Commissioner for Human Rights and United Nations Educational, Scientific and Cultural Organisation, 'Plan of Action: World Programme for Human Rights Education First Phase', 2006, available at: [http://www2.ohchr.org/english/issues/education/training/docs/PlanofActioninbrief\\_en.pdf](http://www2.ohchr.org/english/issues/education/training/docs/PlanofActioninbrief_en.pdf).

<sup>129</sup> This duty is set out in several conventions to which Australia is a signatory, including article 13 of the *International Covenant on Economic, Social and Cultural Rights*, article 29 of the *Convention on the Rights of the Child*, article 7 of the *International Convention on the Elimination of All Forms of Racial Discrimination*, and article 10 of the *Convention on the Elimination of All Forms of Discrimination against Women*.

***Recommendation 28: Funding the Human Rights Commission***

Adequate funding and resources should be provided to the proposed Human Rights Commissioner for the continuing development of human rights education materials and for the systematic distribution of this material to schools.

**10.4 Government Engagement with Tasmanian Civil Society**

189. A strong civil society requires meaningful engagement and dialogue between government and human rights organisations. Engagement between human rights organisations and government, and among human rights organisations themselves, could be achieved by implementing the following initiatives. Such measures will assist to ensure the development of a strong human rights culture in Tasmania.

***(a) Human Rights Leadership Group***

190. When the Victorian Charter was enacted, the Victorian Attorney-General, Rob Hulls, established a Human Rights Leadership Forum (**Forum**) to provide leadership and support for the promotion of a human rights culture throughout the community, including by way of successful implementation of the Victorian Charter. The Forum comprises key government decision makers, local government representatives, peak non-governmental organisations whose clients would be affected by the Charter, human rights experts and human rights advocacy organisations.

191. Participants in the Forum consider it to be an exceptionally positive and beneficial experience, which contributed greatly to the successful launch and implementation of the Charter.

192. In order to support a Tasmanian Charter, a Tasmanian equivalent of the Forum should be implemented. The HRLRC considers that this body would be preferable to the proposed Human Rights Advisory Council.

***(b) An 'Annual Conversation' with human rights NGOs***

193. It is critically important for government to engage proactively and positively with community organisations that will be involved in the operation of any Tasmanian Charter. Civil society must also be supported to allow human rights-focused community sector organisations throughout Tasmania to come together to discuss current issues and approaches.

194. Civil society is strengthened (along with all the benefits that entails) when community organisations and government work together. Human rights organisations can play an integral part in delivering human rights objectives to the community by working with government to foster a society that recognises and acts in congruence with the key principles of freedom, equality, dignity and respect for all.

195. The HRLRC proposes an 'Annual Conversation' between the Tasmanian Government and Tasmanian community organisations in order to facilitate understanding of human rights challenges and how best to address them. The HRLRC recommends that an Annual Conversation could take as its model the human rights dialogues that already take place between the Commonwealth Department of Foreign Affairs and Trade and NGOs and also between the Commonwealth Attorney-General and NGOs. These consultations have proved to be valuable forums for exchanging information, insights and advice on human rights issues.<sup>130</sup> State-wide communication and coordination would strengthen the ability of human rights organisations to provide guidance and assistance to the Tasmanian Government in the implementation of a human rights culture.

**(c) Resourcing Human Rights NGOs**

196. As discussed above, the HRLRC considers that a strong civil society, and consequently strong protection and promotion of human rights, is not possible without further resourcing for civil society. The HRLRC would warmly welcome any commitment by the Tasmanian Government to build the capacity and resources of human rights NGOs as a very concrete and local aspect of its commitment to better promote and protect human rights.

***Recommendation 29: Establish a Leadership Group***

A Human Rights Leadership Group comprising key government decision makers, local government representatives, peak human rights NGOs, human rights experts and human rights advocacy organisations should be established to provide leadership and support for the promotion of a human rights culture throughout the community, including by way of successful implementation of a federal Human Rights Act.

***Recommendation 30: Hold Annual Conversations between government and human rights organisations***

An Annual Conversation should be held between the Tasmanian Government (relevant minister or parliamentary secretary) and human rights organisations.

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<sup>130</sup> See, for example, Department of Foreign Affairs and Trade, *Annual Report 2007 - 2008* (2008), available at: [http://www.dfat.gov.au/dept/annual\\_reports/07\\_08/performance/1/1.1.9.html#human-rights](http://www.dfat.gov.au/dept/annual_reports/07_08/performance/1/1.1.9.html#human-rights).

***Recommendation 31: Increase funding for human rights organisations***

- (a) Funding for human rights organisations should be reviewed and increased in light of the government's commitment to human rights, and the crucial role human rights organisations play in achieving a human rights culture.
- (b) Specific human rights grants should be made available for organisations that aim to protect and promote human rights to engage with the Tasmanian Charter.

## 11. Human Rights Commission

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Question in Discussion Paper	HRLRC Answer
14. Do you support a single independent Commission that would combine the roles of the Anti-Discrimination Commissioner and the proposed Human Rights Commission suggested in this paper?	Yes. The HRLRC considers that the roles of the Anti-Discrimination Commissioner and proposed Human Rights Commission should be combined.

197. Section 7.5 of the Directions Paper considers the role of the proposed Human Rights Commission as an independent office. The Directions Paper provides that the proposed Human Rights Commission will have all the functions currently given to the Anti-Discrimination Commissioner, as well as the additional functions and powers listed in section 8.2.1.2.
198. Rather than two independent offices, the HRLRC supports a single independent Commission that would combine the roles of the current Anti-Discrimination Commissioner and the proposed Human Rights Commission. The HRLRC considers that the roles of the current Anti-Discrimination Commissioner and the proposed Human Rights Commission contain a number of common roles and functions and overlapping themes and issues. Accordingly, combining the roles would avoid unnecessarily duplication, provide clarity of responsibility and make the system more accessible for both government and community members.
199. As a preliminary matter, the HRLRC notes that equality and non-discrimination is a basic right in and of itself, but that the principle of equality and non-discrimination is also a fundamental tenet of all human rights. Accordingly, rather than sitting alongside other human rights mechanisms, the HRLRC considers that equality and non-discrimination should form an integral component of the role, functions and responsibilities of the proposed Human Rights Commission.
200. Currently, the Anti-Discrimination Commissioner has the following functions relating to discrimination and prohibited conduct under the *Anti-Discrimination Act 1998* (Tas):
- (a) to advise and make recommendations to the Minister of Justice;
  - (b) to promote the recognition and approval of acceptable attitudes, acts and practices;
  - (c) to consult and inquire into discrimination and prohibited conduct and its effects;
  - (d) to disseminate information;
  - (e) to undertake research and educational programs;

- (f) to prepare and publish guidelines;
  - (g) to examine any legislation and report to the Minister; and
  - (h) to investigate and seek to conciliate complaints.
201. Many of the additional functions listed in section 8.2.1.2 that are proposed for the Human Rights Commission would also be appropriate functions for the Anti-Discrimination Commissioner and would assist to further enhance the power and effectiveness of that role. Particularly given the conclusion of the Institute that there would not be a devaluation of either role, the HRLRC consider that it would enhance the effectiveness and efficiency of both offices if there was a harmonisation of roles, functions and powers.

***Recommendation 32: Combining Commissions***

The roles of the Anti-Discrimination Commissioner and proposed Human Rights Commission should be combined and should encompass the current functions of the Anti-Discrimination Commissioner together with the roles, functions and powers outlined in section 8.2.1.2 of the Directions Paper.



## 12. Who must comply? Obligations under the Charter

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Question in Discussion Paper	HRLRC Answer
15. Should all parts of government have to comply with the Charter obligations?	Yes, all "core" public authorities should have to comply with Charter obligations.
16. Should State and Council-owned companies only have to comply with the Charter obligations if and when their competitors are subject to similar obligations or should they be treated as any other part of government?	State and Council-owned companies should always have to comply with Charter obligations if they meet the definition of a "functional" public authority.
17. Should non-government service providers who provide services funded or controlled by Government have to comply with the Charter obligations?	Non-government service providers that meet the definition of a "functional" public authority should have to comply with Charter obligations in their discharge of public functions.

### 12.1 Introduction

202. Section 7.6 of the Directions Paper considers which organisations must comply with the Charter. The Paper states that the definition of "public authority" should extend broadly, including all government entities, government-controlled entities and should also extend to entities delivering a service or program which is funded or controlled by a government entity. The HRLRC considers, however, that this definition focuses too much on the nature of the *institution* and that the definition should instead focus more on the nature of the *function* being undertaken by the institution.
203. This section considers the human rights obligations that should be imposed on policy makers and public service providers by a Tasmanian Charter. The HRLRC submits that:
- (a) all parts of government should have to comply with a Tasmanian Charter, except courts and tribunals (unless they are acting in an administrative capacity);
  - (b) the definition of "public authority" should also include a functional definition that encompasses entities that exercise functions of a public nature;
  - (c) "public authorities" should be required to act compatibly with human rights (a *substantive* obligation) and to give proper consideration to human rights when making decisions and implementing legislation (a *procedural* obligation); and
  - (d) whether or not the private sector should have to comply with a Tasmanian Charter could be a subject of the Charter review after 4 years.

## 12.2 Definition of “Public Authority”?

204. Questions 15, 16 and 17 of the Directions Paper consider which parts of government and government owned or controlled entities should have to comply with obligations under a Tasmanian Charter. The definition of “public authority” under a Tasmanian Charter is a crucial question. The definition of “public authority” would play a pivotal role in determining which governmental arms, organisations and authorities have human rights obligations, which is in turn fundamental to the effectiveness of the legislation as a means of protecting human rights.

205. In this respect, the HRLRC notes that the United Nations Office of the High Commissioner for Human Rights has stated that:

Perhaps the most important source of added value in the human rights approach is the emphasis it places on the accountability of policy makers and other actors whose actions have an impact on the rights of people. Rights imply duties, and duties demand accountability.<sup>131</sup>

206. The extensive and ongoing privatisation and outsourcing of traditional public functions (such as the delivery of employment services) means that many traditional public services are no longer being performed purely by government agencies, but rather by private entities contracted or overseen by the government. In addition to binding the executive government, it is vital that a Tasmanian Charter also binds those private entities in circumstances where those entities are exercising public functions. As Justice Bell stated in respect of the ‘public authority’ provision of the Victorian Charter:

The state cannot shirk its human rights responsibilities by implementing its programs and policies through private entities acting on its behalf. Where private entities exercise public functions of a public nature on behalf of the State or a public authority, the functions come with unavoidable human rights responsibilities for the entity itself.<sup>132</sup>

207. The test of ‘funded and controlled’ by government for determining whether an entity is a public authority is too narrow and a similar test in the UK has proven to be detrimental to human rights. Instead the HRLRC considers that it is useful to characterise two types of “public authorities”:

- (a) “core” public authorities (that is, the executive government itself); and
- (b) “functional” public authorities (that is, entities exercising public functions).

208. These characterisations are explored further below.

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<sup>131</sup> OHCHR, *Guidelines on a Human Rights Approach to Poverty Reduction Strategies* (2002), 5.

<sup>132</sup> See *Metro West v Sudi* [2009] VCAT 2025 (9 October 2009).

**(a) The 'funded and controlled' test is flawed**

209. The proposed test of 'funded and controlled by government' should not be adopted. The test is extremely similar, if not narrower, than the 'institutional' test adopted in the UK, which has proved to be detrimental to the enjoyment of human rights. This is because the focus of the test is on the nature of the institution providing the service rather than whether the function being performed is public in nature. It enables commercial entities to deliver public services but to be exempt from Charter obligations.
210. A good example of why the test is too narrow is shown in the case of *YL v City of Birmingham*. In that case, an aged care facility that provided accommodation, health and social care was found not to be a public authority.<sup>133</sup> The majority of the House of Lords based its decision largely on the fact that the entity providing the service was commercial and for-profit, and that the care home was not directly publicly funded to provide the service to YL. However, the minority noted that the state paid the fees of many of the residents. It found that an aged care home that was run pursuant to statutory arrangements, at public expense and in the public interest should be considered a public authority. It should be noted that even the Secretary of State intervened in this case to argue for the test adopted by the minority.
211. The UK approach has been criticised by the UK's Joint Committee on Human Rights for depriving vulnerable people of their human rights:<sup>134</sup>
- ...our domestic courts have adopted a more restrictive interpretation of the meaning of public authority, potentially depriving numerous, often vulnerable people...from the human rights protection afforded by the Act. We consider that this is a problem of great importance, which is seriously at odds with the express intention that the Act would help to establish a widespread and deeply rooted culture of human rights in the UK.
212. The Joint Committee continues,
- In an environment where many services previously delivered by public authorities are being privatised or contracted out to private suppliers, the law is out of step with reality. The implications of the narrow interpretation...are particularly acute for a range of particularly vulnerable people in society, including elderly people in private care homes, people in housing association accommodation, and children outside the maintained education sector, or in receipt of children's services provided by private or voluntary sector bodies.
213. Effectively, the protection of human rights under a 'funded and controlled' test is problematic for the same reasons that the 'institutional' test in the UK. That is, it is dependent not on the type of power being exercised, nor on its capacity to interfere with human rights, but on the relatively arbitrary criterion of the body's administrative links with institutions of State.

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<sup>133</sup> *YL v Birmingham City Council* [2008] 1 AC 95. For a summary of the case, go to <http://www.hrlrc.org.au/files/PHWSH44W2W/HRLRC%20Bulletin%20-%202005.07.pdf>.

<sup>134</sup> The full text of the Report is available at <http://www.publications.parliament.uk/pa/jt/jtrights.htm>.

**(b) Core public authorities**

214. Any definition of “public authority” in a Tasmanian Charter should include an express list of core public authorities. Such a list would remove any doubt about whether those authorities were bound by the legislation. For example, the definition contained in the Victorian Charter lists the following as public authorities:
- (a) public officials, such as public sector employees, certain judicial employees and parliamentary officers;
  - (b) government departments and entities established by statutory provisions exercising functions of a public nature;
  - (c) Victoria Police (the Australian Federal Police should be bound in a Commonwealth Human Rights Act);
  - (d) Ministers;
  - (e) Parliamentary Committees; and
  - (f) other entities declared under the regulations to be 'core' public authorities.<sup>135</sup>
215. This list is just an example of the types of bodies that may be viewed as core public authorities – a Tasmanian Charter could include different bodies.

**(c) Functional public authorities**

216. The Directions Paper provides that the definition of a public authority should extend to entities delivering a service or program which is “funded or controlled by a government entity”. The definition of “public authority” should be extended to include “functional” public authorities. The HRLRC considers that the threshold contained in Question 17 of the Directions Paper – non-government service providers who are “funded or controlled by Government” – is too high and that a definition that focuses on the public functions of organisations should be included in a Tasmanian Charter. The HRLRC considers that this is necessary to reflect “the reality that modern governments utilise diverse organisational arrangements to manage and deliver government services”<sup>136</sup> and, importantly, to ensure that the protection given to human rights cannot be undermined by the outsourcing of governmental functions to private entities.
217. The Victorian Charter, the NZ Bill of Rights and the UK Human Rights Act all apply to functional public authorities.

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<sup>135</sup> The Victorian Charter also lists 'local councils' as core public authorities, however such an inclusion would not be necessary in a Federal Human Rights Act.

<sup>136</sup> Explanatory Memorandum, Charter of Human Rights and Responsibilities Bill 2006 (Vic) 6, 4.

218. A Tasmanian Charter should include a functional public authority definition similar to the one contained in the Victorian Charter. Section 4(1)(c) of the Victorian Charter states that a public authority is:
- any entity whose functions are or include functions of a public nature, when it is exercising those functions on behalf of the State or a public authority (whether under contract or otherwise).<sup>137</sup>
219. Section 4(2) of the Victorian Charter then provides a non-exhaustive list of factors that courts may take into account in determining whether a function is of a public nature:
- (a) that the function is conferred on the entity by or under a statutory provision;
  - (b) that the function is connected to or generally identified with functions of government;
  - (c) that the function is of a regulatory nature;
  - (d) that the entity is publicly funded to perform the function; and
  - (e) that the entity that performs the function is a company (within the meaning of the Corporations Act) all of the shares in which are held by or on behalf of the State.
220. The fact that one or more of these factors is present does not necessarily establish that a particular function is of a public nature.<sup>138</sup> In particular, the fact that an entity receives public funding to perform a function does not necessarily mean that it is acting on behalf of the State or public authority.<sup>139</sup>
221. Further, to ensure clarity and consistency, a Tasmanian Charter would be enhanced by specifying certain functions that “are taken to be of a public nature”, as has been done in the ACT Human Rights Act. These functions are:<sup>140</sup>
- (a) the operation of detention places and correctional centres;
  - (b) the provision of any of the following services:
    - (i) gas, electricity and water supply;
    - (ii) emergency services;
    - (iii) public health services;
    - (iv) public education;
    - (v) public transport;
    - (vi) public housing.

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<sup>137</sup> By contrast, the relevant section of the UK Human Rights Act does not include a list of factors to be taken into account when deciding whether a body is performing such functions. It simply provides that a ‘public authority’ includes ‘any person certain of whose functions are functions of a public nature’: UK Human Rights Act s 6(3)(b).

<sup>138</sup> Victorian Charter s 4(3)(b).

<sup>139</sup> Victorian Charter s 4(5).

<sup>140</sup> *Human Rights Amendment Act 2008* (ACT) s 7. See, eg, ACT Human Rights Act s 40A(3).

222. Given the extent of private and community sector involvement in public services, together with the diversity of organisational arrangements and structures to manage and deliver those services, a Tasmanian Charter must take a broad view of public authority to ensure that it has a broad application to government services. A broad interpretation of what constitutes a public authority is important to the achievement of the underlying purpose of a Tasmanian Charter. As Lord Nicholls observed in *Aston Cantlow Parochial Church Council v Wallbank*<sup>141</sup> in relation to the comparable provision of the UK Human Rights Act, “[g]iving a generously wide scope to the expression ‘public function’ in section 6(3)(b) will further the statutory aim of promoting the observance of human rights values...”.<sup>142</sup> Similarly, in Victoria, Justice Bell has stated that the matter of determining whether an entity is exercising a ‘public function’ should be ‘approached as a matter of substance and not form or legal technicality’.<sup>143</sup> Particular responsibility should be imputed to those entities which provide services to or for people who are vulnerable or disadvantaged, such as people with disability and people experiencing or at risk of homelessness.<sup>144</sup>
223. Additionally, if a Tasmanian Charter applies to functional public authorities, it should specify that when an entity combines public functions with those of a private nature, the entity is *only* considered to be a public authority when it is exercising its public functions and is a private entity in respect of all its other functions and activities.<sup>145</sup> For example, a security firm that carried out work for a government prison and for a supermarket should be classified as a functional public authority when working for the government prison but not when working for the supermarket.<sup>146</sup> This would prevent excessive restrictions being placed on entities that carry out work, typically as contractors, for both public and private clients.

**(d) Application to courts and tribunals**

224. The Directions Paper provides that all parts of government should have to comply with a Tasmanian Charter except courts and tribunals other than when they are acting in an administrative capacity. The HRLRC agrees with the position, although makes the following comments based on experience with the operation of the Victorian Charter to date.
225. Section 4(1)(j) of the Victorian Charter states that the definition of a public authority does not include a court or tribunal “except when it is acting in an administrative capacity”.

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<sup>141</sup> [2004] 1 AC 546.

<sup>142</sup> [2004] 1 AC 546 at [11]. See also *Poplar Housing and Regeneration Community Association Ltd v Donoghue* [2002] QB 48; [2001] EWCA Civ 595 at [58] per Lord Woolf CJ (for the Court of Appeal); and *YL v Birmingham City Council* [2008] 1 AC 95 at [4] per Lord Bingham.

<sup>143</sup> See *Metro West v Sudi* [2009] VCAT 2025 (9 October 2009).

<sup>144</sup> *Ibid.*

<sup>145</sup> See, eg, Victorian Charter.

<sup>146</sup> Victorian Human Rights Consultation Committee, above n 106, 58.

Section 6(2)(b) also provides that the Charter applies to courts and tribunals to the extent that they have the “function” of protecting and promoting all of the human rights contained in the Victorian Charter (which are set out in Part 2).

226. The operation of these provisions has been the subject of some discussion in Victoria. The HRLRC considers that the operation of section 6(2)(b) is important and that a broad construction of this provision should be adopted. This is because in some circumstances, certain rights protected in the Victorian Charter impose a duty on an entity (including courts and tribunals) whose actions would interfere with the right, not to so interfere. This is most relevant in the context of the right to a fair hearing where it is clear that courts and tribunals play an important role in ensuring that the right is upheld. Accordingly, the HRLRC considers that courts and tribunals in exercising judicial power should also be bound by a Tasmanian Charter and be required to give full effect to the protected human rights when the right is engaged in a matter before the court or tribunal.

***Recommendation 33: Core and Functional Public Authorities***

The definition of “public authority” in the Tasmanian Charter should include:

- (a) an express list of “core” public authorities;
- (b) “functional” public authorities, which encompasses entities that exercise functions of a public nature;
- (c) courts and tribunals when acting in administrative capacity or exercising functions that relate to ensuring that a particular right is upheld.

**12.3 What Obligations Should Public Authorities Have?**

227. Section 8.3.1 of the Directions Paper states that public authorities should be required to comply with the obligations in the Charter and section 8.4.1 provides that decisions should be made and services and programs should be delivered so that they are consistent with the Charter. Section 8.4.1.5 provides that the Act should explicitly make it unlawful for a public authority to act in a way that it is incompatible with the Charter.
228. The HRLRC strongly submits that a Tasmanian Charter should bind all aspects of the executive arm of government and government service delivery. To this end, all aspects of the executive that are bound (in this submission referred to as “public authorities”) should be required:
- (a) to act compatibly with human rights (a *substantive* obligation); and
  - (b) to give proper consideration to human rights when making decisions and implementing legislation (a *procedural* obligation).

229. This is consistent with both section 38(1) of the Victorian Charter and section 40B(1) of the ACT Human Rights Act, which impose both procedural and substantive obligations on public authorities and make it unlawful for a public authority to fail to comply with either obligation.
230. It is preferable for a Tasmanian Charter to be as explicit as possible in setting out the duties to be imposed on public authorities. This would avoid ambiguity, assist public authorities to comply with their obligations and promote a culture of human rights.<sup>147</sup>

**(a) Substantive obligation**

231. A Tasmanian Charter should include a substantive obligation on public authorities to act compatibly with human rights. The substantive obligation, which requires public authorities to act in a way that is compatible with human rights, does not always prevent public authorities from acting in a way which limits or restricts a human right.<sup>148</sup> For example, an action will not be “incompatible” with a human right if a public authority could not reasonably have acted differently or made a different decision because of a statutory provision or otherwise under law.<sup>149</sup> Further, these obligations generally do not apply to acts or decisions of a private nature (section 38(3) of the Victorian Charter and sections 6(3) and (5) of the UK Human Rights Act).
232. It has been noted that while administrative law traditionally focuses on decisions and the procedures by which decisions are made, this obligation focuses on the *actions* of public authorities, departing from the traditional administrative law approach.<sup>150</sup> A Tasmanian Charter should provide that a failure to act compatibly with human rights is, on its face, unlawful and beyond power, entitling an affected person to seek injunctive and declaratory relief.

**(b) Procedural obligation**

233. As discussed above, the procedural obligation should require a public authority to give “proper consideration” to relevant human rights when making decisions. This means that public authorities must give real and genuine consideration to human rights, where relevant. The use of the word ‘proper’ indicates a higher standard than the usual administrative law standard for relevant considerations. The concept is likely to imply notions of proportionality and require

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<sup>147</sup> Victorian Human Rights Consultation Committee, above n 106, 63.

<sup>148</sup> It should be noted that ‘act’ includes not only a positive act, but also a failure to act and a proposal to act (see s 3(1) of the Victorian Charter and the Dictionary in the ACT Human Rights Act).

<sup>149</sup> See s 38(2) of the Victorian Charter, s 40B(2) of the ACT Human Rights Act, and s 6(2) of the UK Human Rights Act.

<sup>150</sup> Alistair Pound and Kylie Evans, *An Annotated Guide to the Victorian Charter of Human Rights and Responsibilities* (2008), 243-4.



- that appropriate weight be given to human rights issues (which will vary according to the circumstances).
234. This is in contrast to the traditional approach to relevant considerations which does not entitle courts to consider the weight given to a particular consideration unless it is so unreasonable that no reasonable decision-maker could have acted that way.<sup>151</sup> Therefore, a 'tick the box' approach (ie, merely examining whether or not a human rights issue was considered by a public authority) is unlikely to be sufficient to satisfy this obligation.
235. The intention of the procedural requirement is to promote human rights compliance, not to impose complex procedures on public authorities. UK case law has indicated that the issue for the court to consider is whether in the specific circumstances a person's human rights have been violated, not whether the public authority's decision was the product of a defective decision-making process.<sup>152</sup>
236. It should be noted that a court will not be able to substitute its own decision for that of the decision-maker.<sup>153</sup>
237. While a substantive obligation is important for the enforcement and enjoyment of human rights, the value of a procedural obligation should not be underestimated. A procedural requirement will assist in establishing a human rights culture in Tasmania because it will encourage proper consideration and integration of human rights in government administration. Merely being conscious of human rights and the effect of conduct and decisions on human rights should assist in protecting and upholding these rights.

***Recommendation 34: Obligations on Public Authorities***

"Public authorities" should be required:

- (a) to act compatibly with human rights (a *substantive* obligation); and
- (b) to give proper consideration to human rights when making decisions and implementing legislation (a *procedural* obligation).

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<sup>151</sup> Carolyn Evans and Simon Evans, *Australian Bills of Rights: The Law of the Victorian Charter and ACT Human Rights Act* (2008) 1, 137.

<sup>152</sup> *R (Begum) v Denbeigh High School* [2006] 2 WLR 719.

<sup>153</sup> Evans and Evans, above n 151, 37–8.

## 12.4 Benefits of Human Rights Compliance

238. Question 16 of the Directions Paper contemplates whether State and Council owned companies should have to comply with a Tasmanian Charter only when their competitors are subject to similar obligations. The HRLRC is concerned that this question presupposes that entities may be faced with some sort of disadvantage in having to comply with human rights obligations.
239. Part 3 above sets out the broad range of benefits of human rights protection, including the economic value add in the form of economic growth and development. There is clearly an economic cost associated with policies that do not effectively protect the lives and safety of citizens.<sup>154</sup> Further, there is an extensive body of research which demonstrates the strong correlation between effective and equitable social policy, on the one hand, and economic development and growth on the other.<sup>155</sup>
240. The Allen Consulting Group cost-benefit analysis, commissioned by the National Human Rights Consultation Committee, found that a Human Rights Act would provide high benefits to stakeholders at moderate risk. Although there would be implementation costs associated with a Human Rights Act, the Allen Consulting Group noted that there are ongoing detrimental costs associated with maintaining current human rights arrangements.<sup>156</sup>
241. There may be some concern that incorporating human rights obligations into the process of policy creation and the delivery of public services could result in delay and the adoption of a risk-averse approach to these tasks. However, the HRLRC notes that many countries already require public authorities to comply with human rights obligations when carrying out public functions without causing any disadvantage or adverse consequences. Indeed, it has been said that where human rights obligations have been imposed on public authorities in other jurisdictions, this has actually *improved* the services of those public authorities. This is because the public authorities are given a clear set of fundamental standards with which they must comply, which provides guidance and creates certainty.<sup>157</sup>

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<sup>154</sup> See, eg, Access Economics, *The Cost of Domestic Violence to the Australian Economy* (October 2004), Parts 1, 3.

<sup>155</sup> See, eg, Thandika Mkandawire (ed), *Social Policy in a Development Context* (2004); Amartya Sen, *Development as Freedom* (1999); Nick Pearce and Will Paxton (eds), *Social Justice: Building a Fairer Britain* (2005).

<sup>156</sup> Report of the National Human Rights Consultation, above n 1, 351-352.

<sup>157</sup> Victorian Human Rights Consultation Committee, above n 106, 62; UK Department for Constitutional Affairs, above n 10.

242. Placing these procedural and substantive obligations on public authorities would impose another level of checks and balances on them to help improve the standard of public service delivery.<sup>158</sup>
243. The HRLRC also notes that including a functional definition of public authority in a Tasmanian Charter would generally mean that any competitors undertaking similar obligations to that of state and council owned companies are also likely to be undertaking functions of a public nature. Accordingly, such entities would also likely to be required to comply with the human rights obligations contained in a Tasmanian Charter and therefore not be “disadvantaged” vis-à-vis a company that is not state or council-owned.

## **12.5 Other Matters**

### ***(a) Public authorities will have a ‘margin of appreciation’***

244. Considering the complexities involved in reviewing a public authority's compliance with the procedural and substantive obligations and the expertise of public authorities, it is likely that courts will give them a “margin of appreciation” in carrying out their public functions and recognise that there is a “discretionary area of judgment” for public authorities. Therefore, as long as there is evidence that a public authority has given serious consideration to relevant human rights and the decision is considered to be within the authority's “discretionary area of judgment”, courts may decline to find that the public authority has acted unlawfully.<sup>159</sup> Courts may also defer to the opinion of the legislature, executive or public authority when particularly sensitive issues, such as national security, criminal justice and economic policy, are involved.

### ***(b) Commencement and transitional provisions***

245. The Directions Paper provides that a Tasmanian Charter should allow for a phased introduction of particular provisions as follows:
- (a) the Act should commence no later than 12 months after it is passed by Parliament;
  - (b) the Act should apply to all services and programs delivered by a public authority from 12 months after commencement (section 8.4.1.2);
  - (c) the Act should apply to all services and programs controlled or funded by a public authority from 3 years after commencement (section 8.4.1.3).
246. The HRLRC considers that a phased introduction is important in order to allow a reasonable time for education and training about the Charter and transition period. However, we are concerned about the proposal that “functional” public authorities would not have to comply with

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<sup>158</sup> Victorian Human Rights Consultation Committee, above n 106, 63.

<sup>159</sup> Pound and Evans, above n 150, 245.

the Charter for 2 years after “core” public authorities. Particularly given that the concept of “functional” public authorities is designed to capture entities that are “standing in the shoes” of government, they too should be required to comply with the obligations contained in the Tasmanian Charter at the same time. It would seem anomalous during the transitional period to have some government operated or controlled services to be required to comply with obligations while others would not. Further, a person’s human rights should not be contingent upon whether government has opted to provide services itself or to provide services through some other entity or authority.

**(c) Should a Tasmanian Charter bind the private sector?**

247. Section 8.4.1.4 of the Directions Paper provides that whether a Tasmanian Charter should also apply to the private sector should be considered as part of each review of the Act. The HRLRC supports this approach.
248. Given that a Tasmanian Charter is directed at government action, private actors should only have direct obligations under a Tasmanian Charter where they are functional public authorities. That is, as stated above, the Act should bind the private sector in so far as private entities are performing functions of a public nature on behalf of the state or a public authority. This reflects and enhances the dialogical model of human rights protection, being a dialogue between the three arms of government. Given the increased outsourcing of government functions, it is vital that the definition of public authorities is broad enough to ensure that private entities performing outsourced public functions are part of that dialogue (as discussed above).
249. The HRLRC notes that the ACT Human Rights Act has a provision allowing entities that are not public authorities under that Act to *opt-in* to the obligations on public authorities (ie obligations to give proper consideration to human rights and to act in accordance with human rights).<sup>160</sup> The opt-in procedure came into force on 1 January 2009 and is intended to promote a meaningful dialogue within the community about human rights, engender cultural change by developing a rights-consciousness in the ACT and recognise the contribution of the private sector to the well-being of society.<sup>161</sup>
250. The HRLRC recognises that business and private entities acting in a private capacity can (and already do) make important contributions to the enjoyment of human rights and, conversely, can have a significant detrimental impact on the enjoyment of human rights. The HRLRC supports the purpose of the ACT opt-in provision. A meaningful dialogue between business, government and non-government sectors of the community should be created or, where it

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<sup>160</sup> See s 40D of the ACT Human Rights Act.

<sup>161</sup> See Explanatory Statement to Human Rights Amendment Bill 2007, Presented by Mr Simon Corbell MLA, Attorney General.

- exists, enhanced to aid the development of rights-consciousness across the community. However at this stage it is not clear that an opt-in clause for business is the most effective means by which to achieve this dialogue.
251. There is a risk that creating an opt-in process:
- (a) will not effectively create a meaningful cross-sectoral dialogue if only the “usual suspects” choose to opt-in;
  - (b) will create an often false perception that organisations that do not opt-in will not have any human rights obligations under a Tasmanian Charter or otherwise; and
  - (c) will diminish the inherent value of human rights by inferring that human rights do not inhere in human persons and do not apply in certain circumstances.
252. To some extent, the aims of an opt-in process are already promoted through existing laws and mechanisms. Business and private actors are already subject to legislative human rights obligations (such as Occupational Health and Safety laws and anti-discrimination laws) and other non-legislative, non-judicial human rights complaints mechanisms (such as the OECD National Contact Point ‘Specific Instance’ procedure). Indeed, the very existence of a Tasmanian Charter will increase awareness of rights across the community. Even a Charter that does not bind business directly will lead to increased awareness in the business community about the content and role of human rights, particularly where business is contracting with government or performing public functions.
253. Further, many multi-nationals are already engaged with international voluntary programmes such as the UN Global Compact and are developing a rights-consciousness within their businesses. Through these mechanisms there has been meaningful communication and development of rights-consciousness in the private sector. However, there is clearly more work that can be done to develop that understanding.
254. The HRLRC submits that there are existing human rights laws as well as many other non-legislative means, including non-judicial complaint and dispute resolution processes, by which a meaningful dialogue on human rights with the private sector can be enhanced. The effectiveness of these existing means deserves proper consideration and may be better adapted to developing right-consciousness and dialogues throughout the community, including the private sector. The HRLRC notes in particular the UN Special Representative for Business and Human Rights, Professor John Ruggie, and the important work he is doing to understand how best to bring business in to the human rights dialogue.

***Recommendation 35: Business Obligations***

Whether or not the private sector should have to comply with a Tasmanian Charter could be a subject of the Charter review after 4 years.

**(d) Action plans, audits and reporting mechanisms**

255. Under a Tasmanian Charter, accountability of policy-makers and public service delivery could be enhanced through audits and reports, as well as action plans. If public authorities do not have adequate auditing and reporting procedures, the implementation and incorporation of human rights requirements into policy development and service delivery stalls.
256. In the UK, the Audit Commission (an independent watchdog) found that “[o]ne local authority, where a number of unsuccessful human rights complaints had been brought, saw this as evidence of complying with the Act”.<sup>162</sup>
257. It is critical to the effective implementation of a Tasmanian Charter that any shortcomings in public authorities’ understanding of their human rights obligations are quickly identified. Further training, education and assistance can then be provided when necessary.
258. A Tasmanian Charter should require that:
- (a) all public authorities undertake an annual audit of their human rights compliance;
  - (b) all public authorities submit a detailed annual report to the authority responsible for the oversight and enforcement of the Tasmanian Charter (**responsible body**);
  - (c) each public authority include all complaints referred to the authority by the responsible body in its annual audit report;
  - (d) each public authority disclose any recommendations made by the responsible body and its response – if the authority decided against taking action in response to such a recommendation, the Tasmanian Charter might also require the report to include the reasons for that decision;
  - (e) external reviews be conducted of each authority’s compliance with the Tasmanian Charter, with the results reported to the responsible body;
  - (f) appropriate senior ministers monitor the implementation and progress of the Tasmanian Charter; and
  - (g) public authorities develop a plan for the protection and promotion of human rights.

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<sup>162</sup> Audit Commission, above n 13, 13.

### **13. Further Matters for Inclusion in the Tasmanian Charter**

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#### **13.1 Recognition of Aboriginal Peoples in the Preamble**

259. The HRLRC strongly supports the inclusion of specific Aboriginal cultural rights, the right to self-determination and the protection of equality and non-discrimination on the basis of race in the Proposed Model for the Tasmanian Charter. These features will greatly enhance the protection of the human rights of Aboriginal peoples.
260. The Tasmanian Charter should also contain a preamble acknowledging the special importance that human rights have for Indigenous peoples of Australia as the descendants of Australia's first peoples. This could mirror the preamble to the Victorian Charter and would provide an important symbolic acknowledgment of the human rights issues facing Aboriginal people.
261. Finally, of course, it is essential that any decisions about the protection of the human rights of Aboriginal people are made in consultation with Aboriginal people, including as to the mode and means of any protections sought to be included.

#### ***Recommendation 36: Preambular Recognition of Aboriginal Peoples***

The Tasmanian Charter should contain a preamble acknowledging the special importance that human rights have for Indigenous peoples of Australia as the descendants of Australia's First Peoples. Any decisions about the protection of the human rights of Aboriginal peoples should be made in consultation with Aboriginal peoples.

#### **13.2 Human Rights Advisory Council**

262. The Proposed Model establishes a Human Rights Advisory Council (part 8.2.2). A body such as the Human Rights Advisory Council is not created under either the Victorian Charter or the ACT Human Rights Act. The Human Rights Advisory Council is proposed to be comprised of 12 individuals representative of the diverse Tasmanian community, appointed by government, and chaired by a senior lawyer.
263. The functions of the Advisory Council are:
- (a) to provide advice to Parliament as to the compatibility of legislation;
  - (b) to provide advice to Government on how to effectively consult with particular communities likely to be affected by legislative or policy proposals;
  - (c) to advise the Attorney-General on matters relevant to the Charter;

- (d) on request of the Attorney-General, to review the effect of statutory provisions and the common law on human rights; and
  - (e) to participate in the 4-yearly reviews of the Act as a key stakeholder group.
264. The role and functions of the Advisory Council seem to largely overlap with the work of the Joint Parliamentary Scrutiny Committee, the Human Rights Commission and the Human Rights Leadership Group recommended in these submissions (see discussion in parts 7.3, 7.4 and 10). For that reason, we do not think that a Human Rights Advisory Group is necessary.

***Recommendation 37: Advisory Council May Not Be Necessary***

Further consideration should be given to the need for the Advisory Council given that the roles proposed for it overlap with the functions of the Human Rights Commission and that there would be great benefit in establishing a Joint Parliamentary Committee on Human Rights and the Human Rights Leadership Group.

**13.3 Monitoring and Reviewing the Tasmanian Charter**

265. The Tasmanian Charter should include statutory requirements for monitoring and periodic reviews of the Charter. The Proposed Model suggests that there will be 'independent review of and public reporting on the operation of the Act at least every 4 years' (8.1.1.2). The Proposed Model also suggests that the Human Rights Commission will be given the power to monitor human rights protection under the Charter, and will also prepare an annual report to the Attorney-General (8.2.1.2). It is unclear who will conduct the 'reviews', for what purpose and how that will differ from the annual reporting function of the Commission.
266. The Tasmanian Charter should have two main reporting and review mechanisms:
- (a) annual reporting from the Human Rights Commission on the implementation and operation of the Charter; and
  - (b) periodic reviews on the operation of the Charter, including whether any amendments are required to the provisions of the Charter.

***(a) Annual reporting***

267. The Tasmanian Charter should require the Human Rights Commission to present the Tasmanian Attorney-General with an annual report that examines the operation of the Charter, any declarations of inconsistent interpretation and all override declarations made during the year.<sup>163</sup>

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<sup>163</sup> See Victorian Charter s 41.



268. The Proposed Model suggests that the Commission will be given the power to monitor human rights protection under the Charter and will also prepare an annual report to the Attorney-General (8.2.1.2). The HRLRC supports these functions and submits that they should be a statutory requirement for the Commission.

**(b) Periodic reviews**

269. The Victorian Charter has a requirement for a four year review and an eight year review. These are appropriate and workable timeframes, giving the opportunity for a passage of time in which the government can seek to embed consideration of human rights into government culture and for some early jurisprudence to emerge. The Proposed Model suggests that reviews will be conducted every four years. It may be worth having a statutory requirement for the first two reviews and for one of the considerations of the second review to be whether further reviews are required.<sup>164</sup>
270. The Tasmanian Charter should also include particular considerations to be taken into account in the periodic reviews. For example, the four year review of the Victorian Charter includes requirements for consideration the inclusion of economic, social and cultural rights in the Charter and the possibility of requiring auditing of public authorities for their compliance with human rights (section 44).
271. The content of the reviews of the Tasmanian Charter will vary depending on the final content of the document. However, on the basis of the Proposed Model, the review should at least include:
- (a) the question of if and how business should have responsibilities under the Charter; and
  - (b) the improvement of the operation of the Charter with the purpose of better protecting and promoting human rights.

***Recommendation 38: Monitoring and Reviewing the Tasmanian Charter***

The Tasmanian Charter should include statutory requirements for monitoring and periodic reviews of the Charter. The Tasmanian Charter should have two main reporting and review mechanisms:

- (a) annual reporting from the Human Rights Commission on the implementation and operation of the Charter; and
- (b) periodic reviews on the operation of the Charter, conducted every four years, including whether any amendments are required to the provisions of the Charter.

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<sup>164</sup> See Victorian Charter s 45, which provides for this type of consideration during the 8 year review.