human rights law resource centre

Respecting, Protecting and Fulfilling Human Rights in Tasmania

Submission to the
Tasmanian Law Reform Institute

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1. Summary and Recommendations

1.1 Introduction

The Human Rights Law Resource Centre Ltd (***HRLRC***) aims to bring the influence of international human rights norms and principles to bear on domestic law and policy. This submission is made by the HRLRC in response to the questions raised by the Tasmanian Law Reform Institute (the ***Institute***) in its August 2006 issues paper, *A Charter of Rights for Tasmania?* (***Issues Paper***). The structure of this submission corresponds with the principal questions raised in Part 5 of the Issues Paper.

1.2 Why a Charter of Rights?

The HRLRC strongly supports the introduction of a Charter of Human Rights for Tasmania (the ***Tasmanian Charter***). In the absence of a Commonwealth instrument for the protection of human rights, it falls to State Governments to bring their own human rights protections into line with those of other democracies.

Introducing the Tasmanian Charter will enhance Tasmania's democracy. It will provide a yardstick for Government, the courts and the community. New laws, policies and public programs will be measured against the Tasmanian Charter to ensure that human rights are safeguarded. Government departments and agencies will have to consider the impact that their day-to-day operations are likely to have on human rights.

The experience elsewhere is that human rights charters (***Charters***) have a significant impact on public sector culture, improving the way government interfaces with the community. Charters have also proven effective in dissuading governments from unreasonably curtailing human rights. Charters operate to open Parliament's eyes to human rights breaches that may be otherwise overlooked.

The introduction of a Tasmanian Charter would be an historic leap forward for the protection of human rights and democracy in Tasmania. It will demonstrate Tasmania's commitment to improving social justice and fairness, particularly for the disadvantaged.

The HRLRC recognises that there are some statutory and common law protections which operate to protect human rights in Tasmania, and that the Tasmanian Government has shown some commitment to improving rights protection. However, current legal protection of human rights in Tasmania and throughout most of Australia is patchy. Many basic rights remain unprotected or are haphazardly covered by a hotchpotch of laws.

The Tasmanian Charter will be a unified, clear and unambiguous statement of Tasmania's commitment to the protection of human rights. It will encourage a new 'rights aware' way of doing things, creating a culture of respect for human rights.

Future generations will inherit a society that values and respects human rights and social justice - a society which will have been fostered by the Tasmanian Charter.

1.3 Which rights should be protected?

Human rights are interdependent. Their recognition and protection should not be artificially separated. For example, realisation of the right to education (a social right) is essential for the meaningful exercise of the right to participate in public affairs (a political right). It is difficult to enjoy one without the other.

The HRLRC urges the inclusion of all fundamental human rights into the Tasmanian Charter – all civil and political rights as well as economic, social and cultural rights. The protection of the rights contained in the International Covenant on Economic, Social and Cultural Rights (***ICESCR***) (***ESC Rights***) can be incorporated into the Charter in a workable way and could operate comfortably alongside the protection of the civil and political rights contained in the International Covenant on Civil and Political Rights (***ICCPR***) (***CP Rights***).

1.4 A workable model

The model proposed by HRLRC is workable. It incorporates all of the fundamental human rights, but does not detract from the democratic role of Parliament. Policy and budget decisions remain the domain of Tasmania's elected representatives. The floodgates of resource-allocation litigation will not be flung open. Public authorities will not be liable for their resource allocation decisions.

The HRLRC does not advocate a model which empowers courts to either strike down laws validly made by Parliament or make decisions as to the proper allocation of resources by public authorities. The proposed model will introduce processes designed to ensure that human rights are given the fullest possible consideration in the development and implementation of legislation and policy. The Tasmanian Parliament will make the final call on any transgression of rights protected by a charter (***Charter Rights***) and will be responsible for ensuring that the Charter reflects contemporary needs and values.

It is important for the Tasmanian Charter to provide individuals with direct means of redress for overt breaches of CP Rights. The HRLRC considers that the respect, protection and fulfilment of ESC Rights can be pursued without exposing Government to liability for its allocation of scarce resources. However, a Charter will also lay the foundations for a culture in which all the human rights of Tasmanians are taken into account as a matter of course.

It is not necessarily the case that a Tasmanian Charter will create a torrent of human rights litigation. A Charter can instil a broad understanding of the effects of Government actions upon the rights of individuals through education rather than coercion. The early anti-litter campaigns of the 1970s and the present-day water conservation campaigns have contributed to the broad understanding across Australian society that it is in our own best interests to dispose of our litter properly and to use water carefully. Similar progress can be made in the field of human rights through concerted education and training efforts, underwritten by positive, enforceable obligations in a Tasmanian Charter.

The resources and commitment given to training, education and the dissemination of accurate human rights information will also determine the extent to which any

misperceptions in the media and the general public impede the successful implementation of the Tasmanian Charter.[1]

Australia's ratification of the ICCPR and the ICESR has created international law obligations that require all arms of the federal system - including Tasmania's Government (Legislature, Executive and Judiciary) - to act to respect, protect and fulfil human rights.

The introduction of a Tasmanian Charter is an opportunity to breathe local life into the realisation of Australia's international human rights obligations.

1.5 Protecting and promoting ESC Rights

Tasmania has the opportunity to introduce Australia's most comprehensive and progressive Charter - providing a model for others to adopt. Simply replicating the Charters passed elsewhere would be an opportunity lost. Tasmania has an opportunity to learn from and build upon the work done elsewhere and should seize the opportunity to lead the world in pioneering a practical way of incorporating ESC Rights into domestic Charters.

Victoria and the ACT have both expressed the intention to consider the inclusion of ESC Rights in their respective human rights instruments, but one of the main concerns expressed has been the lack of 'mature domestic jurisprudence on [ESC Rights]' and 'no objective indicator of when they are achieved'.[2] The procedures proposed by the HRLRC are a moderate step that will create a body of knowledge on which to base future reviews of ESC Rights in domestic Charters.

1.6 Recommendations

Recommendation 1

Tasmania should enact a Charter of Human Rights.

Recommendation 2

The Tasmanian Charter should be in a legislative form.

Recommendation 3

The Tasmanian Charter should provide for the protection of all rights included in the ICCPR and ICESCR.

Recommendation 4

The Tasmanian Charter should protect the human rights of individuals, not corporations, save for the right to self-determination, which protects peoples.

[1] In July 2006, the UK Department of Constitutional Affairs released its *Review of the implementation of the Human Rights Act* (***DCA Review***), which includes good examples of the sorts of myths and misperceptions which have surrounded the UK Act. The DCA Review is available at www.dca.gov.uk/peoples-rights/human-rights/pdf/full_review.pdf.

[2] ACT Department of Justice and Community Services, *Human Rights Act 2004 – 12-Month Review - Report*, 40.

Recommendation 5

(a) The Tasmanian Charter should provide that certain rights are absolute and not subject to derogation, restriction or limitation. Absolute rights should include (without limitation):

- the right to life;
- the right to freedom from torture and other cruel, inhuman or degrading treatment or punishment;
- the right to freedom from slavery or forced labour;
- the right not to be imprisoned for a contractual debt;
- freedom from retrospective criminal punishment;
- the right to recognition as a person before the law;
- freedom of thought, conscience and religion;
- the right of persons deprived of liberty to be treated with humanity and with respect for the inherent dignity of the human person;
- the prohibition against taking of hostages, abductions or unacknowledged detention;
- the prohibition against incitement to discrimination, hostility or violence; and
- the obligation to provide access to effective remedies for breaches of human rights.

(b) The Tasmanian Charter should provide that any limitations on human rights must be:

- compatible with the objects and purposes of the Charter;
- provided for by law;
- not arbitrary or unreasonable;
- compatible with the right to non-discrimination;
- necessary and demonstrably justifiable, which requires that it:
  - is based on one of the grounds which permit limitations (namely, public order, public health, public morals, national security, public safety or the rights and freedoms of others);
  - responds to a pressing need;
  - pursues a legitimate aim;
  - is proportionate and reasonably adapted to that aim; and
  - is the least restrictive means reasonably available to achieve the purpose that the limitation seeks to achieve.

Recommendation 6

The Tasmanian Charter should adopt a dialogical model.

Recommendation 7

The Tasmanian Charter should provide, in relation to Parliament:

(a) Members introducing bills into Parliament should provide *reasoned* statements as to the compatibility of the legislation with Charter Rights.

(b) An independent parliamentary committee, properly resourced, should be responsible for reviewing all bills for compatibility with Charter Rights.

(c) The Minister responsible for legislation must respond to any Declarations of Incompatibility issued by the Supreme Court within 6 months.

(d) A writ of mandamus should be available against a Minister where Parliament has failed to respond to a Declaration of Incompatibility within 6 months.

(e) Parliament should not be given the ability to expressly override Charter Rights in later legislation.

Recommendation 8

The Tasmanian Charter should provide, in relation to the role of the Courts:

(a) All legislation should be interpreted and applied, including if necessary read down, in a manner compatible with Charter Rights.

(b) The Tasmanian Charter should provide for the Tasmanian courts to refer to international and comparative jurisprudence when interpreting Charter Rights.

(c) Where a human rights compatible interpretation is not possible, the Tasmanian Supreme Court should be empowered to make Declarations of Incompatibility.

Recommendation 9

(a) All public authorities should be required to:

- act in a manner that is compatible with a Charter Right; and
- give proper consideration to Charter Rights when making decisions.

(b) The definition of public authorities should be broad and include all bodies who exercise functions of a public nature, insofar as they are exercising those functions.

(c) The Tasmanian Charter should require the development of Executive policies and practises that promote protection of Charter Rights, including human right audits, reporting and action plans.

Recommendation 10

(a) The Tasmanian Charter should provide the following remedies for breaches of CP Rights:

- A declaration or 'statement' that a law, policy or program is incompatible with human rights and requiring government to respond to this incompatibility;

- A declaration or order that a law, policy or program be implemented in accordance with human rights;
- An injunction, declaration or order that the conduct or activity amounting to a breach of human rights be stopped;
- Damages, compensation and reparations; and
- Such other remedies as are just, appropriate and equitable.

(b) A complaints procedure should be implemented to respond to allegations of breach of ESC Rights.

(c) The Tasmanian Government should create a Human Rights Commission, or confer the role of oversight of the Charter to a body such as the *Tasmanian Anti-discrimination Commission.* This body should have broad powers under the Tasmanian Charter for conciliation and the handling of complaints and claims.

(d) The Tasmanian Charter should confer standing on the following individuals and groups:

- any person or organisation aggrieved or directly affected by the matter;
- any person or organisation with a 'special interest' in the matter;
- any person or organisation intervening in the public interest; and
- any person or organisation acting for or on behalf of an individual or group that is unable to bring proceedings on their own behalf.

Recommendation 11

The Tasmanian Government should ensure that adequate resources are provided to:

- the Anti-discrimination Commission (or other similar body);
- the Tasmanian Legal Aid Commission;
- community legal centres; and
- other human rights and community organizations

to enable them to provide targeted, accessible and adequate human rights education, information and legal services.

Recommendation 12

The Tasmanian Charter should be reviewed after two years and thereafter at 5 year intervals. The review should be conducted with the active and resourced participation of all stakeholders and should consider:

- the effectiveness of the Charter in respecting, protecting and fulfilling human rights;
- whether further rights need to be included in the Charter; and
- any special measures or strategies to promote and protect the human rights of vulnerable groups.

1.7 About the Human Rights Law Resource Centre Ltd

The HRLRC is the first specialist human rights law resource centre in Australia. It aims to promote, through the practice of law, human rights in Australia - particularly the human rights of people who are disadvantaged or living in poverty. In partnership and collaboration with the community legal sector, legal aid, human rights organisations, pro bono lawyers, legal professional associations and university law schools, the HRLRC seeks to achieve its aims by facilitating and enhancing the provision of human rights legal services, education, training and research.

The HRLRC was formally incorporated in January 2006 with the Public Interest Law Clearing House (Vic) Inc (***PILCH***) and the Victorian Council for Civil Liberties Inc (***Liberty Victoria***) as its initial members. PILCH is an independent community legal centre that facilitates the provision of pro bono legal services to marginalised and disadvantaged individuals, groups and communities, and Liberty Victoria is an incorporated association whose activities include human rights-focused community and professional legal education, law reform, lobbying and advocacy.

2. Should Tasmania have a Charter of Rights?

2.1 Tasmania should have a Charter of Rights

The HRLRC considers that a Tasmanian Charter is essential to the continuation and improvement of Tasmania's healthy democracy.

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.

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.[3] 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.

2.2 Value of human rights

The benefits of introducing a Tasmanian Charter can be seen from the experience of the UK following the implementation of the *Human Rights Act 1998* (UK) (the ***UK Act***). In July 2006, the UK Department for Constitutional Affairs (***DCA***) released its *Review of the Implementation of the Human Rights Act* 2006 (***DCA Review***). According to the DCA Review, the UK Act has had significant influence and resulted in a range of benefits including the following:

[3] Tasmanian Law Reform Institute, *A Charter of Rights for Tasmania?*, Issue Paper No 11, August 2006, 10.

(a) The process for ensuring compatibility with human rights has been formalised and clarified, improving transparency and Parliamentary accountability, and establishing a dialogue between the Judiciary and Parliament.

(b) By requiring that policy makers consider the needs of all members of the population, the UK Act has led to better policy outcomes and the better provision of public services.

(c) Breaches of human rights can now be more formally litigated, in turn gives rise to changes in policy formulation and delivery.

(d) Public authorities have undergone a change in culture and behaviour to take account of the impact on human rights of their actions, particularly in the shift away from inflexible or blanket policies.

It is also noteworthy that the DCA expressed the conclusion that the UK Act has had 'no significant impact' on the UK Government's ability to fight crime, and that difficulties experienced in relation to anti-terrorism legislation stem from decisions not of the UK courts under the UK Act, but of the European Court of Human Rights.[4]

A Tasmanian Charter would promote public debate about the meaning of human rights and their application to public authorities, and enhance better government decision making by providing a defined set of rights as a point of reference.[5]

In the absence of a dedicated human rights instrument, the public is less able to clearly understand their rights and how those rights should be applied, and public authorities are not provided with clear guidance as to how to cohesively deliver their services in compliance with international norms of human rights protection.[6]

A Charter enshrines the core standards of fairness which Government should meet. A Tasmanian Charter would not create private human rights obligations between individuals - the human rights that it will protect are those of individual citizens in their relationship with the State. Perhaps more than anything else, a Charter creates a foundation on which Tasmania can build a human rights culture.

2.3 Recommendation

Tasmania should enact a Charter of Human Rights.

[4] See DCA Review, 10-11.

[5] See, eg: Human Rights Consultation Committee (***HRCC***), 'Human Rights Consultation Committee: Rights, Responsibilities and Respect' Department of Justice, Melbourne, November 2005, 10.

[6] See, eg: Frances Butler (Institute for Public Policy Research), *Human Rights: Who needs them? Using human rights in the voluntary sector* (2004).

3. What Form should the Tasmanian Charter Take?

Charters of rights have taken a number of forms around the world. These can be characterised as constitutional, legislative and 'hybrid' models.

This section briefly summarises the advantages and disadvantages of each of these Charter models.

3.1 Constitutional model

The constitutional model has been adopted in South Africa and the United States. Under this model, the Charter is 'entrenched' in the Constitution and can therefore only be amended in the manner provided for in the Constitution, such as by referendum or by special parliamentary majority.

The main advantages of the constitutional model are:

- The Charter can only be amended as provided for in the Constitution making human rights protection less vulnerable to the prevailing political climate.[7]
- An independent judiciary is empowered to invalidate legislative and executive actions where those actions are held to be in violation of the rights entrenched in the Constitution.[8]
- There is important symbolic value in demonstrating the depth of Government's commitment to upholding and enforcing human rights.[9]

The main disadvantages of the constitutional model are:

- Both the limit placed by the Charter on Parliament's power to pass laws that contravene Charter rights and the ability of the judiciary to invalidate laws can be perceived as an erosion of Parliamentary sovereignty, and the placement of excessive power in the hands of an 'unrepresentative judiciary'.[10]
- A constitutionally entrenched Charter may be difficult to amend (depending on the nature of any entrenching provisions) and may become, over time, less well adapted to changed societal values and developments in the human rights dialogue (although this is counter-balanced by the principle that constitutions should be interpreted according to prevailing community standards).
- Empowering judges to strike down incompatible legislation may increase the politicisation of the judiciary and the judicial appointment process.[11]

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[7] For example, s 128 of the Australian Constitution requires a referendum to be held.

[8] Julie Debeljak, 'Submission on how best to protect and promote human rights in Victoria', 1 August 2005, www.law.monash.edu.au/castancentre/publications/submissions.html, 7.

[9] HRCC, above n 5, 20.

[10] See, eg: HRCC, above n 5, 15 and 20; John Howard, Australia Day address to the National Press Club, Great Hall, Parliament House, Canberra (25 January 2006): http://www.pm.gov.au/News/Speeches/speech1754.html.

[11] ACT Bill of Rights Consultative Committee, *Towards an ACT Human Rights Act* May 2003, Canberra, Publishing Services, 43.

3.2 Legislative model

Under the legislative model, adopted in various forms by the UK, New Zealand, the ACT and Victoria, a Charter is enacted into law as an ordinary piece of legislation.[12] Subsequent legislation that breaches the rights set out in the Charter is not invalidated, and the Charter itself can be amended by the passing of ordinary amending legislation.

The main advantages of the legislative model are:

- Parliamentary sovereignty is preserved because:
    - Parliament retains the power to pass laws that contravene Charter rights; and
    - Even where a court declares a law to be inconsistent with the Charter Rights, such a declaration does not invalidate the law in question.[13]
- It is flexible, in that Parliament can amend the Charter by passing amending legislation, adapting it to changes in societal values and the development of the human rights dialogue.[14]
- A finding by a court that legislation is inconsistent with the Charter presents a strong *political* incentive for Parliament to review the inconsistent legislation in question and make changes where the legislature and executive consider it appropriate.[15]

The main disadvantages of a legislative model are:

- The ease with which the Charter can be amended means that Charter Rights are less well protected than would be the case if they were constitutionally entrenched.[16] Because later legislation overrides prior legislation to the extent of any inconsistency, and Charter Rights can therefore be amended or repealed by simple parliamentary majority.
- As courts are unable to strike down inconsistent legislation, laws, once passed, are effectively subject only to declaratory relief in the courts. This model relies on the political will of the legislature to either ensure that laws are consistent with the Charter, or to otherwise justify any incompatibility.[17]

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[12] Julie Debeljak, above n 8, 9.

[13] Kate Beattie, *How the UK brought rights home* 22 March 2006 www.humanrightsact.com.au/index2.php?option=com_content&task=view&id.

[14] HRCC, above n 5, 21.

[15] According to the DCA Review, as at July 2006, 15 Declarations of Incompatibility had been made. Of those, five Declarations were overturned on appeal (and two remain subject to appeal).

[16] HRCC, above n 5, 22.

[17] Julie Debeljak, 'The Human Rights Act 1998 (UK): the preservation of parliamentary supremacy in the context of rights protection' (2003) 9(1) *Australian Journal of Human Rights* 183, 226-227.

The effectiveness of a legislative Charter is therefore dependent upon political factors, such as the willingness and capacity of the State opposition and media to place political pressure on a Government whose actions contravene Charter Rights.

3.3 Constitutional – legislative hybrid

Canada has instituted a model which is a combination of the constitutional and legislative models. The *Canadian Charter of Rights and Freedoms* (***Canadian Charter***)[18] empowers the judiciary to invalidate legislation that breaches the rights on the basis that it is unconstitutional.[19] The Canadian Charter can only be amended by the process of amendment provided for in the Canadian Constitution.[20] However, parliamentary sovereignty is ultimately preserved by an 'override provision', which allows Parliament to enact contravening laws where the legislation expressly declares that the it will operate notwithstanding a provision of the Canadian Charter.[21]

The main advantage of the hybrid model is the ability of the judiciary to invalidate legislation on the basis that it breaches the rights set out in the Canadian Charter, while preserving parliamentary sovereignty. Parliament is obliged to act to preserve the validity of legislation by either amending it to make it consistent with the Canadian Charter, or by using the 'override' provision.[22]

The main disadvantages of the hybrid model are:

- Override provisions enable Parliament to pass laws that contravene Charter rights.[23]
- Where a constitution does not contain restrictive procedures for its amendment, the Charter can be amended by an Act of Parliament, and is therefore subject to the prevailing political climate.
- Where a constitution does contain restrictive procedures, the Charter may be more difficult to amend, and become, over time, less well adapted to contemporary circumstances and values (although this is counterbalanced by the principle that constitutions should be interpreted according to prevailing community standards).

3.4 Application to the Tasmanian Charter

The HRLRC submits that the most appropriate form for the Tasmanian Charter is a legislative model, similar to that adopted in the UK, the ACT and Victoria. This submission is based on a number of factors, including:

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[18] The statutory *Canadian Bill of Rights* (1960) was inserted into the Canadian Constitution by operation of the *Constitution Act* 1982.

[19] Julie Debeljak, above n 8, 8.

[20] The procedure for amending the Canadian Constitution is set out in s 39 of the *Constitution Act 1982* (Can).

[21] Section 33(1) of the Canadian Charter.

[22] Julie Debeljak, above n 8, 11.

[23] Cheryl Saunders, 'Protecting Rights in Common Law Constitutional Systems: A Framework for a Comparative Study' [2002] VUWLRev 21, [57]-[58] <http://www.nzlii.org/nz/journals/VUWLRev/2002/21.html>

- the concern that Parliamentary sovereignty be protected;[24]
- the limited additional protections which may be afforded under the Tasmanian Constitution, due to the purely legislative character of the Tasmanian Constitution and the complexity of amending it to entrench the Charter;[25] and
- the desirability of consistency across jurisdictions in which a Charter is in place, facilitating cross-jurisdictional flows of information and promoting the development of a broad, universal jurisprudence.

The legislative model affords practical protection of human rights, while preserving Parliamentary sovereignty. However, as a legislative Charter is susceptible to amendment by ordinary majority, it should be carefully drafted to ensure that Charter Rights are given the fullest protection afforded by that model.

3.5 Recommendation

The Tasmanian Charter should be in a legislative form.

4. What Rights should the Tasmanian Charter Protect?

4.1 The international human rights framework

Australia has ratified and accepted obligations in relation to a number of international human rights treaties, including:

- the International Covenant on Civil and Political Rights (**ICCPR**);[26]
- the International Covenant on Economic, Social and Cultural Rights (**ICESCR**);[27]
- the Convention on the Elimination of All Forms of Discrimination Against Women (**CEDAW**);[28]
- the Convention on the Elimination of All Forms of Racial Discrimination (**CERD**);[29]

[24] Tasmania Law Reform Institute, "A Charter of Rights for Tasmania?", Issue Paper No 11, August 2006, 23.

[25] The *Constitution Act 1934* (Tas) can be amended by legislation passed by the Tasmanian parliament in the usual way. Constitutional protection of a Tasmanian Charter is likely to require that a restrictive provision be inserted into the *Constitution Act*. Depending on the content of such a provision, there may be a question of the extent to which any such a restriction would be one in relation to the 'constitution, powers or procedure of the Parliament', and therefore valid (see ss 2(2) and 6 *Australia Act 1986* (Cth and UK)), and the extent to which it purports to bind later parliaments on other topics, which is probably not allowed: see generally P Hanks *Constitutional Law in Australia* (2nd ed: Butterworths) 1996, pp 133-138, *Attorney-General (NSW) v Trethowan* (1931) 44 CLR 394 and *Attorney-General (WA) v Marquet* (2003) 217 CLR 545 at 568-576.

[26] Opened for signature 19 December 1966, 999 UNTS 171 (entered into force generally 23 March 1976 and for Australia 13 August 1980).

[27] Opened for signature 16 December 1966, 993 UNTS 2 (entered into force generally 3 January 1976 and for Australia 10 March 1976).

[28] Opened for signature 18 December 1979, 1249 UNTS 13 (entered into force 3 September 1981 and for Australia 28 July 1983).

- the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (**CAT**);[30] and
- the Convention on the Rights of the Child (**CROC**).[31]

Human rights obligations also arise from customary international law.

4.2 Responsibility for implementation of human rights obligations

In addition to enshrining human rights, each of these instruments imposes responsibilities in relation to those rights; namely obligations to *respect*, *protect* and *fulfil* human rights.[32]

The obligation to *respect* human rights requires that State parties refrain from interfering, directly or indirectly, with enjoyment of human rights.

The obligation to *protect* human rights requires that State parties prevent third parties, including organisations and individuals, from interfering in any way with the enjoyment of human rights.

The obligation to *fulfil* human rights requires that State parties take positive steps to promote and support the realisation of human rights and, where necessary, to provide for the realisation of human rights for marginalised or disadvantaged groups. In relation to the fulfilment of civil and political rights, such as the right to vote or the right to privacy, the positive action required pursuant to art 2(2) of the ICCPR is that Australian governments take all necessary steps to immediately implement such rights. In relation to economic, social and cultural rights, such as the right to adequate housing and the right to health, the positive action required pursuant to art 2(1) of the ICESCR is that Australian governments take concrete steps, using the maximum available resources, to progressively realise such rights. The steps taken must be targeted and directed towards the most expeditious, effective and full realisation of human rights possible. They should include legislative, financial, social, educational and administrative measures. Further, even while Australian governments are developing and implementing measures and progressing towards full realisation of economic, social and cultural rights, they are under a 'core obligation' to ensure that certain non-derogable 'minimum essential standards' relating to fundamental human rights are met, including in relation to the provision of basic housing, nutrition and health care for marginalised or disadvantaged people.[33]

[29] Opened for signature 21 December 1965, 660 UNTS 195 (entered into force generally 4 January 1969 and for Australia 30 September 1975).

[30] Opened for signature 10 December 1984, 1465 UNTS 85 (entered into force generally 26 June 1987 and for Australia 8 July 1989).

[31] Opened for signature 20 November 1989, 1577 UNTS 3 (entered into force generally 2 September 1990 and for Australia 17 December 1990).

[32] See, eg, United Nations Committee on Economic Social and Cultural Rights (***CESCR***), *General Comment 15: The Right to Water*, UN Doc E/C.12/2002/11 (2002) [17]–[29]. See also *South African Bill of Rights 1996* s 7(2), which provides that 'the state must respect, protect, promote and fulfil the rights in the Bill of Rights.'

[33] CESCR, *General Comment 3: The Nature of States Parties' Obligations*, UN Doc HRI/GEN/1/Rev.5 (2001) 18; CESCR, *Substantive Issues Arising in the Implementation of the International Covenant in Economic, Social and Cultural Rights: Poverty and the International Covenant on Economic, Social and Cultural Rights*, UN Doc E/C.12/2001/10 (2001) [15]–[18].

4.3 Tasmania's human rights implementation obligations

Each of the treaties referred to at 4.1 above has been ratified by the Federal Government. However, the international human rights framework makes it explicitly clear that federal *and* state governments have responsibilities in relation to the realisation of human rights.

Article 28 of the ICESCR and art 50 of the ICCPR expressly provide that, in federations such as Australia, the obligations of the Covenants are binding on the federation as a whole and must extend across all parts of that federation, without any limitations or exceptions. This means that, in Australia, all branches of government (legislative, executive and judicial) and other public or governmental authorities, at state or federal level, must act to respect, protect and fulfil human rights.[34]

4.4 Inclusion of economic social and cultural rights

The HRLRC strongly considers that all of the rights enshrined in the ICCPR and the ICESCR should be enshrined in the Tasmanian Charter.

The ACT Department of Justice and Community Services (***DJCS***) recently undertook a review of the first 12 months of operation of the ACT Act, and in June 2006 published its *Human Rights Act 2004: Twelve-Month Review –Report* (***DJCS Report***).[35] The DJCS Report provides an excellent analysis of the issues surrounding the inclusion of ESC Rights in a domestic Charter.

The ACT Government accepted that, in principle, ESC Rights should have the same status as CP Rights,[36] but it decided not to incorporate them at the time of the review. The principal concerns expressed in the DJCS Report were the following:[37]

- Including ESC Rights might require a high level of government resource commitment and entail resource allocation judgments.[38] The DJCS expressed the view that it is unclear how courts would deal with resource implications of their decisions.[39]
- Although ESC Rights are 'easily compatible with general common law principles, there [is] no mature comparative domestic jurisprudence ... and no objective indicator of when they are achieved'.[40]

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[34] UNHRC, *General Comment 31: Nature of the General Legal Obligation Imposed on States Parties to the Covenant*, UN Doc CCPR/C/21/Rev.1/Add13 (2004) [4]. See also art 27 of the *Vienna Convention on the Law of Treaties* which provides that a State party 'may not invoke the provisions of its internal law as justification for its failure to perform a treaty': *Vienna Convention on the Law of Treaties*, GA Res A/41, UN GAOR, 41st sess, 95th plen mtg, Supp 53, art 27, UN Doc A/DEC/41/420 (1986).

[35] www.jcs.act.gov.au/HumanRightsAct/Publications/twelve_month_review.pdf.

[36] DJCS Report, 40.

[37] The DJCS Report considered a number of other issues on which it did not appear to come to any clear conclusion.

[38] Ibid n 36, 40.

[39] Ibid, 46.

[40] Ibid. The DJCS Report (at 42) considered that South African jurisprudence is of limited application to the ACT situation because 'the South African Constitution is a self-consciously transformative document' motivated by 'historical content' and the desire to address 'deep social inequalities' in South Africa.

- In respect of their justiciability, ESC Rights are

  > not so easily adapted as the civil and political rights to protection through the court process and are better recognised and protected through inclusion in a foundation planning document.[41]

The DJCS Report continues:

> The reality is that there may be little guarantee as to how the courts would deal with economic, social and cultural rights if they were to be expressly included in the [ACT Act].
>
> Even the sceptics have difficulty. Professor Campbell has long argued that a bill of rights "allows an open-ended amount of judicial activism that has the potential to remove control over a broad range of issues from the domain of ordinary, non-legal politics".[42]

However, the DJCS Report does not reject the inclusion of ESC Rights, noting that the ACT Chief Minister had expressed the view that the decision not to include ESC Rights in the ACT Act at the time of the Act's 12-month review, 'does not mean that [the ACT Government does] not consider these rights to be just as important as [CP Rights] and that he was committed to their inclusion in Government policy and planning and would 'explore ways in which this can be achieved.'[43] The DJCS Report later cites Professor Tom Campbell, who 'suggested that ESC Rights be partially incorporated, so as to engage "mechanisms that place obligations on the actions of the ACT government",' and Professor Bayne, who 'suggested that economic, social and cultural rights be 'brought into focus through the scrutiny process'.[44] Further, the Report says of the Indian model, which employs non-justiciable 'directive principles', that its 'focus has been on ensuring that due process is followed before [ESC Rights] can be denied.'[45]

It seems apparent, therefore, that the DJCS might have considered introducing some form of ESC Rights protection had a submission been received which proposed a viable alternative –perhaps one picking up on Campbell's comments and aspects of the 'due process' focus of the Indian model. In the absence of applicable jurisprudence indicating the likely treatment of these rights by the courts,[46] the 'all or nothing' suggestions received by the DJCS left it with little alternative but to opt for 'nothing' – or at any rate, nothing until it completes its 5-year review. However, the HRLRC considers that it is unlikely that any comparative jurisprudence will have been created for the DJCS to consider in its 5-year review while the only options considered by governments are either fully enforceable ESC Rights, or no inclusion of ESC Rights at all.

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[41] Ibid, 45; quoting the *Submission 4* received by the DJCS from Professor Peter Bayne of the Australian Catholic University.

[42] Ibid, 46; quoting Tom Campbell, 'Incorporation through interpretation', in T Campbell, K D Ewing and A Tomkins (eds), *Sceptical essays on human rights* (2001), 81.

[43] DJCS Report, above n 35, 41.

[44] Ibid, 47.

[45] DJCS Report, 43.

[46] Leaving aside the South African experience on the grounds that the powers of the courts under a constitutional Bill of Rights are far greater than would be the case under a legislative Charter.

The HRLRC submits that a plunge into the deep end of full enforceability is unnecessary - the Tasmanian Government need only dip a toe in the water.

The HRLRC's proposed solution is for the Tasmanian Charter to protect both CP Rights and ESC Rights but to create a two-tiered remedial regime. Breaches of rights by public authorities can be treated differently depending on whether the right is a CP Right or an ESC Right.[47] The HRLRC proposal provides for a free standing cause of action allowing individuals to commence proceedings for breaches of CP Rights, with the full range of remedies available. However, breaches of ESC Rights may only be the subject of complaints. The complaints process ensures that public authorities are made aware of policies or procedures which are not compatible with ESC Rights. While the HRLRC has suggested that complaints handling be the responsibility of a Human Rights Commissioner, the role of the Commissioner in respect of ESC Rights is similar to that of an Ombudsman.

This model provides for ESC Rights to form a part of the Tasmanian human rights structure from the outset, while avoiding the risks identified in the DJCS Report. It will promote accountability and transparency in public authorities without creating liabilities, thus encouraging a culture in which ESC Rights will be taken into account. Just as importantly, however, the complaints process for ESC Rights will make a significant contribution to supplying the information, which is currently lacking, to determine how and when to take additional steps for the positive enforcement of ESC Rights.

The HRLRC has prepared simplified draft examples of how some of the relevant provisions might appear. These simple examples are included in Annexure 1 of this submission.

4.5 Recommendation

The Tasmanian Charter should provide for the protection of all rights included in the ICCPR and ICESCR.

5. Whose Rights should a Tasmanian Charter Protect?

5.1 Rights of individuals

The HRLRC considers that a Tasmanian Charter should protect the rights of human beings and not corporations. The exclusion of corporations is a reflection of the fact that human rights jurisprudence is concerned with the dignity and value of the lives of human beings. The ICCPR, the ICESR, the *Human Rights Act 2004* (ACT) (***ACT Act***) and the Victorian Charter are all limited in their application to the rights of human beings.

The Canadian experience has shown that where human rights legislation protects the rights of both human beings and corporations, there can be detrimental effects on public health and safety. For example, a tobacco company was able to successfully challenge

[47] The Declaration of Incompatibility provision (such as under s 33 of the Victorian Charter , s 32 of the ACT Act or s 4 of the UK Act) should apply equally to ESC Rights and CP Rights.

Canadian legislation that restricted the sale and advertising of tobacco products without a health warning using human rights legislation.[48]

One exception to the application of rights to individuals is the right to the self-determination. The HRLRC submits that the Tasmanian Charter should include a right to self determination, which should apply to peoples, rather than individuals.

5.2 Recommendation

The Tasmanian Charter should protect the human rights of individuals, not corporations, save for the right to self-determination, which protects peoples.

6. Should the Rights be Subject to Limitations?

6.1 Overview

At international law, it is well established that some human rights are absolute while other human rights may be limited in certain circumstances and subject to certain conditions.

6.2 Absolute rights

Article 4(2) of the ICCPR provides that the following human rights are absolute and must not be subject to limitation or derogation:

- the right to life (art 6);
- the right to freedom from torture and other cruel, inhuman or degrading treatment or punishment (art 7);
- the right to freedom from slavery or forced labour (art 8);
- the right not to be imprisoned for a contractual debt (art 11);
- freedom from retrospective criminal punishment (art 15);
- the right to recognition as a person before the law (art 16); and
- freedom of thought, conscience and religion (art 18).

In *General Comment 29*, the UNHRC posited that, in addition to those rights identified in art 4(2), the following further rights may not be lawfully derogated because to do so would be inherently inconsistent with the ICCPR or because they have attained the status of peremptory norms of customary international law:

- the right of persons deprived of liberty to be treated with humanity and with respect for the inherent dignity of the human person (art 10);
- the prohibition against taking of hostages, abductions or unacknowledged detention;

[48] *McDonald Inc v Canada* [1995] 3 SCR 199.

- the prohibition against incitement to discrimination, hostility or violence (art 20); and
- the obligation to provide 'effective remedies' for breaches of human rights (art 2(3)).[49]

Similarly to the ICCPR, art 37(5) of the South African Bill of Rights provides that components of particular human rights are non-derogable, including in relation to:

- the right to equality;
- the right to human dignity;
- the right to life;
- the right to freedom and security of the person;
- certain children's rights; and
- certain rights of arrested, detained and accused persons.

6.3 Permissible limitations

International human rights law provides that, in respect of rights that are not absolute, limitations are only permissible in certain circumstances and subject to particular conditions.

(a) Permissible limitations under International Human Rights Law

In *General Comment 31*, the UNHRC stated that, where limitations or restrictions are made to rights under the ICCPR,

> States must demonstrate their necessity and only take such measures as are proportionate to the pursuance of legitimate aims in order to ensure continuous and effective protection of Covenant rights. In no case may the restrictions be applied or invoked in a manner that would impair the essence of a Covenant right.[50]

The general principles relating to the justification and extent of limitations have been further developed by the UN Economic and Social Council in the *Siracusa Principles on the Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights*. Those principles include that:

- no limitations or grounds for applying them may be inconsistent with the essence of the ICCPR or the particular right concerned;
- all limitation clauses should be interpreted strictly and in favour of the rights at issue;
- any limitation must be provided for by law and be compatible with the objects and purposes of the ICCPR;

[49] UNHRC, *General Comment 29: States of Emergency (Article 4)*, UN Doc CCPR/C/21/Rev.1/Add.11 (2001) [14]–[16].

[50] UNHRC, *General Comment 31: Nature of the General Legal Obligation Imposed on States Parties to the Covenant*, UN Doc CCPR/C/21/Rev.1/Add13 (2004) [6].

- limitations must not be arbitrary or unreasonable;
- limitations must be subject to challenge and review;
- limitations must not discriminate on a prohibited ground;
- any limitation must be 'necessary', which requires that it:
    - is based on one of the grounds which permit limitations (namely, public order, public health, public morals, national security, public safety or the rights and freedoms of others);
    - responds to a pressing need;
    - pursues a legitimate aim; and
    - is proportionate to that aim.[51]

(b) Permissible limitations under comparative domestic human rights law

A number of domestic human rights instruments contain limitation provisions which are broadly consistent with these principles.[52] The HRLRC submits that the Victorian Charter has an appropriate limitation clause, providing at s 7 that:

> 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.

Section 7 of the Victorian Charter sets out the following non-exhaustive list of relevant factors:

- the nature of the right;
- the importance of the purpose of the limitation;
- the nature and extent of the limitation;
- the relationship between the limitation and its purpose; and
- any less restrictive means reasonably available to achieve the purpose that the limitation seeks to achieve.

The section 'reflects Parliament's intention that human rights are, in general, not absolute rights, but must be balanced against each other and against other competing public interests'.[53] For example, laws which are necessary to protect security, public order or public safety may justifiably limit human rights in a free and democratic society. On the other hand, s 7 includes a safeguard against misuse of the Charter to destroy or limit human rights,[54] in that it should not be interpreted as giving a person, entity or public authority a right to limit or to destroy

[51] UN Economic and Social Council, *Siracusa Principles on the Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights*, UN Doc E/CN.4/1985/4, Annex (1985).

[52] See, eg: *New Zealand Bill of Rights Act 1990* (NZ) s 5 and South African Bill of Rights contained in the *Constitution of the Republic of South Africa 1996* s 36.

[53] Explanatory Memorandum, Charter of Human Rights and Responsibilities Bill 2006 (Vic) 8.

[54] Ibid.

the human rights of any person. For example, the right to freedom of expression should not be used to destroy the right to privacy. Rather, a balancing exercise is envisaged.

The meaning of 'demonstrably justified in a free and democratic society' has been the subject of judicial scrutiny in Canada, where this limitation provision forms part of s 1 of the Canadian Charter. In *Singh v Minister of Employment & Immigration*[55] it was stated that the courts conduct the inquiry as to what is justified 'in light of a commitment to uphold the rights and freedoms set out in the other sections of the Charter'.[56] The landmark judgment in respect of the interpretation of the phrase has been acknowledged[57] to be that of Dickson CJ of the Canadian Supreme Court, writing for the majority, in *R v Oakes*.[58] His Honour held that two key criteria must be satisfied to establish that a limitation meets the test:

- The objective, which the measures responsible for a limitation on a Charter right are designed to serve, must be of sufficient importance to warrant overriding a constitutionally protected[59] right or freedom.[60]
- If a sufficiently significant objective has been identified, it is for the party invoking the limitation provision to show that the means chosen are reasonably and demonstrably justified.[61]

Chief Justice Dickson concurred with the judgement in *R v Big M Drug Mart Ltd*[62] and supported the adoption of a form of proportionality test.[63] In applying this test, the courts are to balance the interests of society with those of individuals and groups.[64] Three important components to the test were recognised by Chief Justice Dickson:[65]

1. The measures adopted must be carefully designed to achieve the objective in question. They must not be arbitrary, unfair or based on irrational considerations.

[55] [1985] 1 SCR 177.

[56] Ibid, 218.

[57] *Unger v Ontario (Ministry of Municipal Affairs)* [1997] 34 OMBR 439, [66].

[58] [1986] 1 SCR 103.

[59] The HRLRC supports the adoption of a legislative model for the Tasmanian Charter, but submits that Dickson CJ's first criterion is still applicable to any right or freedom that the Tasmanian Government has sought to protect by the enactment of legislation.

[60] [1986] 1 SCR 103, [73].

[61] Ibid, [74].

[62] [1985] 1 SCR 295, 352.

[63] [1986] 1 SCR 103, [74].

[64] Ibid.

[65] Ibid. A similar test has been adopted in New Zealand as established in the leading decision of *Moonen v Film and Literature Board of Review* [2000] 2 NZLR 9, 16-17; see also *Drew v Attorney-General* [2000] 3 NZLR 750, 763.

2. The means, even if rationally connected to the objective, should impair as little as possible the right or freedom in question.
3. There must be proportionality between the effects of the measures which are responsible for limiting the Charter right or freedom and the objective which has been identified as of sufficient importance. The more severe the deleterious effects of a measure on individuals or groups, the more important the objective must be if the measure is to be reasonable and demonstrably justified.[66]

6.4 Recommendations

(a) The Tasmanian Charter should provide that certain rights are absolute and not subject to derogation, restriction or limitation. Absolute rights should include:

- the right to life;
- the right to freedom from torture and other cruel, inhuman or degrading treatment or punishment;
- the right to freedom from slavery or forced labour;
- the right not to be imprisoned for a contractual debt;
- freedom from retrospective criminal punishment;
- the right to recognition as a person before the law;
- freedom of thought, conscience and religion;
- the right of persons deprived of liberty to be treated with humanity and with respect for the inherent dignity of the human person;
- the prohibition against taking of hostages, abductions or unacknowledged detention;
- the prohibition against incitement to discrimination, hostility or violence; and
- the obligation to provide access to effective remedies for breaches of human rights.

(b) The Tasmanian Charter should provide that any limitations on human rights must be:

- compatible with the objects and purposes of the Charter;
- provided for by law;
- not arbitrary or unreasonable;
- compatible with the right to non-discrimination;
- necessary and demonstrably justifiable, which requires that it:

[66] Ibid, [75].

- is based on one of the grounds which permit limitations (namely, public order, public health, public morals, national security, public safety or the rights and freedoms of others);
- responds to a pressing need;
- pursues a legitimate aim;
- is proportionate and reasonably adapted to that aim; and
- is the least restrictive means reasonably available to achieve the purpose that the limitation seeks to achieve.

7. How should the Human Rights Contained in the Tasmanian Charter be Protected?

7.1 Overview of operation

As stated above, the HRLRC supports a legislative model for the proposed Tasmanian Charter (see section 3 above). The legislative model should be 'dialogical' in nature, meaning that it requires that human rights are explicitly taken into account when developing, interpreting and applying Tasmanian law and policy, and thereby protect human rights without significantly altering the constitutional balance between Parliament, the Executive and the Judiciary.[67]

7.2 The 'dialogical' model

The 'dialogical' model proposed by the HRLRC is so called because it creates a dialogue between the three arms of government – the Legislature, the Executive, and the Judiciary – and has the following key characteristics:

- Each Bill tabled in Parliament must be accompanied by a *reasoned* Statement of Compatibility setting out whether the Bill contravenes any of the Charter rights (see section 7.3(a) below).
- All legislation, including subordinate legislation, must be considered by a parliamentary Committee for the purpose of reporting to Parliament whether the legislation is compatible with human rights (see section 7.3(b) below).
- 'Public authorities' must act compatibly with human rights and also give proper consideration to human rights in any decision-making process (see section 7.4(a) below).
- As far as possible, courts and tribunals must interpret and apply legislation consistently with human rights (see section 7.4(a) below).

[67] In relation to the experience in the UK, see: Department for Constitutional Affairs, *Review of the Implementation of the Human Rights Act – Executive Summary*, page 1, www.dca.gov.uk.

- Courts may have regard to relevant international, regional and comparative domestic human rights law and jurisprudence in the interpretation and application of human rights (see section 7.4(b) below).
- The Supreme Court has the power to declare that a law cannot be interpreted and applied consistently with human rights and to issue a Declaration of Incompatibility (see section 7.4(c) below).
- The Government must respond to a Declaration of Incompatibility within six months (see section 7.3(c) below).
- A government body (such as the Tasmanian Anti-discrimination Commission) is given responsibility for monitoring and reporting on the implementation and operation of the Charter and for community education on Charter rights and responsibilities (see sections 7.5(b) and (c), 8.2(b) and 9.1 below).

7.3 Role of Parliament

The HRLRC submits that the proper role of Parliament under the proposed Tasmanian Charter has four key attributes:

- Statements of Compatibility;
- Human Rights Scrutiny Committee; and
- Response to Declarations of Incompatibility.
- No override provision

(a) Statements of Compatibility

A Tasmanian Charter should require that the Member of Parliament who introduces, or proposes to introduce, a bill into Parliament must table a Statement of Compatibility to the House of Parliament into which the bill is introduced.[68] The provision for a Statement of Compatibility could be drawn from the Victorian Charter and should require statements to include:

- whether, in the member's opinion, the bill is compatible with the rights set out in the Charter, and if so, how it is compatible;[69] and
- if, in the member's opinion, any part of the bill is incompatible with any of the rights set out in the Charter, the nature and extent of the incompatibility.[70]

However the HRLRC submits that Statements of Compatibility must be reasoned. Where a Statement of Compatibility states that a bill is incompatible with particular Charter rights, the Statement must also include an explanation as to why the

[68] This reflects sections 28(1) and (2) of the *Charter of Human Rights and Responsibilities Act 2006* (Vic) (the ***Victorian Charter***).

[69] See s 28(3)(a) of the Victorian Charter.

[70] See s 28(3)(b) of the Victorian Charter.

proposed legislation is a reasonable limitation on those rights.[71] Such a requirement is necessary as the integrity of the protection of human rights under a legislative Charter depends upon Parliamentary responsibility and accountability for any limitation of Charter rights. The experience of the UK and ACT has been that without a requirement for *reasoned* Statements of Compatibility, the likely or potential human rights repercussions of proposed legislation may receive inadequate consideration.[72]

The Tasmanian Charter should expressly state that a Statement of Compatibility will not bind any court or tribunal.[73] This makes it clear that the role of the Supreme Court in determining questions of law involving the interpretation and application of the Charter remains independent.[74]

(b) Human Rights Scrutiny Committee

It is essential, in ensuring that new legislation does not contravene Charter rights, that an independent parliamentary committee has a role in scrutinising Bills for compliance with Charter rights. The UK experience shows that the combination of formal procedures such as Statements of Compatibility and scrutiny by the Parliamentary Joint Committee on Human Rights has improved 'transparency and Parliamentary accountability'.[75]

The HRLRC recognises that the size of the Tasmanian jurisdiction may not warrant the creation of a new independent committee for the role of scrutinising legislative compliance with human rights. However, there is no existing Scrutiny of Bills committee in Tasmania that has the objective of scrutinising draft legislation for compliance with various matters, and which might be in a position to assume responsibility for monitoring of compliance with Charter Rights.[76] The HRLRC does not have a view whether it is preferable that scrutiny of legislation be undertaken by an existing committee or a new committee. However, in either case, it is essential that any such committee be a properly resourced and independent parliamentary committee. If an existing committee is ultimately given this task, it must be given additional resources to enable it to meet its increased responsibilities under the Charter, including, among other things, recruiting people with human rights expertise to the secretariat that supports the committee.

[71] The requirement is now included in the UK's *Human Rights Act Guidance for Departments,* but is not part of the Victorian Charter.

[72] See Dr Simon Evans, 'What difference will the Charter of Rights and Responsibilities make to the Victorian Public Service?', talk presented at Clayton Utz, Melbourne, 13 June 2006, http://cccs.law.unimelb.edu.au/go/research-and-publications/legislatures-and-human-rights-project/publications-and-working-papers/index.cfm.

[73] See eg: s 28(4) of the Victorian Charter.

[74] See Explanatory Memorandum, Charter of Human Rights and Responsibilities Bill 2006 (Vic) 21.

[75] Review of the Implementation of the Human Rights Act – Executive Summary, page 1.

[76] See, eg: the Scrutiny of Acts and Regulations Committee which is given responsibility for considering any Bill introduced into the Victorian Parliament and reporting to Parliament whether the Bill is incompatible with human rights: Victorian Charter s 30.

(c) Response to Declarations of Incompatibility

The HRLRC submits that where the Supreme Court makes a Declaration of Incompatibility (see section 7.4(c) below), the Minister administering the statutory provision (which has been declared inconsistent) must be required, within 6 months of the declaration, to:

(a) prepare a written response to the declaration; and

(b) cause a copy of the declaration and of his or her response to it to be –

(i) laid before each House of Parliament; and

(ii) published in the Government Gazette.[77]

The HRLRC submits that requiring a response within a given time period enhances the likelihood that Parliament will take appropriate action in response to any Declarations of Incompatibility made by the Supreme Court.[78]

The HRLRC considers that the integrity of the dialogical process would be afforded significant protection by the availability of a writ of mandamus against the Minister responsible for legislation the subject of a Declaration of Incompatibility, in the event that Parliament has not responded to the Declaration within 6 months of issue.

The UK experience offers insight into the effectiveness of this mechanism. As at July 2006, there had been 15 Declarations of Incompatibility made by UK Courts and remitted to Parliament. Parliament's response has generally been to remedy the legislative breach of human rights using amending legislation.[79]

(d) Absence of an Override Declaration

An Override Declaration allows Parliament to expressly declare that an Act or a provision of an Act has effect despite being incompatible with Charter rights.[80] The HRLRC strongly opposes the inclusion of an Override Declaration in the proposed Tasmanian Charter, for a number of reasons, including:

- An Override Declaration is unnecessary in a purely legislative (ie not entrenched) Charter in which parliamentary sovereignty is retained as any subsequent legislation that is inconsistent with the Charter will prevail.
- Parliament can pass legislation limiting Charter Rights under the limitation provisions, if the limitation can be shown to be demonstrably justified.

[77] This approach is consistent with the approach in the Victorian Charter, see s 37.

[78] Explanatory Memorandum, Charter of Human Rights and Responsibilities Bill 2006 (Vic) 27.

[79] Although a number of Declarations of Incompatibility were 'still under consideration with a view to remediation': Department for Constitutional Affairs (UK), Review of the Implementation of the Human Rights Act (2006) 17, available at http://www.dca.gov.uk/peoples-rights/pdf/full review.pdf. As cited in HRLRC Human Rights Law Resource Manual, September 2006, Chapter 5, page 50.

[80] See Victorian Charter, s 31.

- Where the Charter requires Statements of Compatibility to be tabled that set out any infringing provisions contained in a Bill, Override Declarations do not increase transparency in terms of understanding the human rights that a bill may infringe.
- Override Declarations may have the effect of suspending the Charter's requirement that legislation be interpreted consistently with human rights. This would unduly limit the application of the Charter provisions, including the power of the Courts to issue Declarations of Incompatibility.

7.4 Role of the courts

The HRLRC submits that the role of the Courts in a Tasmanian Charter should incorporate the following key attributes:

- the application of the 'interpretative principle';
- the use of international and comparative human rights jurisprudence; and
- Declarations of Incompatibility.

(a) Interpretative Principle

The HRLRC submits that any Tasmanian Charter should require that legislation be interpreted and applied (and if necessary, read down) in a manner compatible with human rights (***Interpretive Principle***).

The Interpretive Principle binds not only the Tasmanian Courts in their interpretation of legislative provisions, but applies to *any* person or entity that interprets and applies legislation, including tribunals and 'public authorities'.

The HRLRC submits that the Interpretive Principle should be expressed in a Tasmanian Charter to enable a similar interpretative process by Tasmanian Courts. The HRLRC submits that the wording of the Interpretive Principle used in the UK Act[81] and Victorian Charter[82] are appropriate to meet such a purpose.[83] A provision adopting the Interpretive Principle requires, as a matter of law, that an interpretation consistent with human rights be adopted whenever it is possible to

[81] Section 3 of the UK Act provides:

(1) So far as it is possible to do so, primary legislation and subordinate legislation must be read and given effect in a way which is compatible with the Convention rights.

(2) This section –

(a) applies to primary legislation and subordinate legislation whenever enacted;

(b) does not affect the validity, continuing operation or enforcement of any incompatible primary legislation; and

(c) does not affect the validity, continuing operation or enforcement of any incompatible subordinate legislation if (disregarding any possibility of revocation) primary legislation prevents removal of the incompatibility.

[82] Section 32(1) of the Victorian Charter provides: '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.'

[83] [2001] 2 All ER 154. It was held that a decision made a year prior to the enactment of the UK Act, in relation to the interpretation and application of a provision of the *Criminal (Sentences) Act 1977,* was no longer good law in light of the interpretative requirement under the UK Act.

do so, regardless of whether there is any ambiguity in the meaning of a provision, and regardless of how the provision in question may have been previously interpreted and applied.[84] For example, the House of Lords, in *Ghaidan v Godin-Mendoza,*[85] applied the interpretive principle to give a construction to a provision that was contrary to an earlier decision which pre-dated the commencement of the UK Act.[86] According to Lord Nicholls of Birkenhead:

> [T]he intention of Parliament in enacting section 3 [the interpretive provision in the UK Act] was that, to an extent bounded only by what is 'possible', a court can modify the meaning, and hence the effect, of primary and secondary legislation.
>
> Parliament, however, cannot have intended that in the discharge of this extended interpretative function the courts should adopt a meaning inconsistent with a fundamental feature of legislation. That would be to cross the constitutional boundary section 3 seeks to demarcate and preserve. Parliament has retained the right to enact legislation in terms which are not Convention-compliant. … There may be several ways of making a provision Convention-compliant, and the choice may involve issues calling for legislative deliberation.[87]

An illustration of the limits of judicial interpretation for human rights consistency is *R (Anderson) v Secretary of State for the Home Department.*[88] In this case, the House of Lords held that an interpretation which was consistent with the UK Act was not possible with regard to an express legislative power of the Home Secretary to essentially extend or release a prisoner's sentence. Lord Bingham said that to read the relevant section as precluding participation by the Home Secretary, if it were possible to do so, would not be 'judicial interpretation but judicial vandalism', giving the section an effect quite different from that which Parliament intended and going beyond the Interpretive Principle in the UK Human Rights Act.

The HRLRC acknowledges that the success of the Interpretative Principle is dependent upon the judiciary deploying it robustly to enable remedial action. Human rights should be interpreted and applied in a manner which renders them 'practical and effective, not theoretical and illusory'.[89] Further, a Tasmanian Charter should be a 'living document' to be interpreted and applied in the context of contemporary and evolving values and standards.[90]

(b) Role of international and comparative human rights jurisprudence

The HRLRC submits that the Tasmanian Charter should expressly provide for Tasmanian Courts to have recourse to international and comparative human rights

[84] HRLRC, *Human Rights Law Resource Manual*, September 2006, Chapter 5, 45.

[85] [2004] AC 557.

[86] *Fitzpatrick v Sterling Housing Association Ltd* [2001] 1 AC 27.

[87] *Ghaidan v Godin-Mendoza*, above n 85, [32] – [33].

[88] [2003] 1 AC 837.

[89] *Goodwin v United Kingdom* (2002) 35 EHRR 447 [73]-[74].

[90] HRLRC Human Rights Law Resource Manual, September 2006, Chapter 5, page 6.

jurisprudence when construing a statutory provision. The HRLRC submits that the wording used in section 32(2) of the Victorian Charter be implemented in a Tasmanian Charter.[91]

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 have been derived.[92] There is also a dearth of human rights jurisprudence in Australia. Finally, it is desirable that human rights jurisprudence be developed consistently across all jurisdictions.

(c) Declarations of Incompatibility

The HRLRC submits that in the event that a court is unable to interpret and apply legislation consistently with human rights, the Tasmanian Supreme Court should be empowered to issue a Declaration of Incompatibility. This is a remedy of last resort to be deployed only in circumstances where a human rights-compatible interpretation of legislation is not possible.[93]

Declarations of Incompatibility should be available for breaches of CP Rights and ESC Rights.

Under the Victorian Charter, a Declaration of Inconsistent Interpretation does not affect the validity, operation or enforcement of the provision or create any legal right or give rise to any civil cause of action.[94] The HRLRC supports the implementation of a similar provision into the Tasmanian Charter.

As stated earlier, once a Declaration of Incompatibility is made, a Tasmanian Charter should require Parliament to formally respond within six months (see section 7.3(c) above).

7.5 Role of the Executive

The Executive's role in the development and delivery of policy, services and programs makes it the primary point of contact between Government and the public. For this reason the obligations imposed on the Executive by the proposed Tasmanian Charter will be fundamental to the enjoyment of Charter rights by Tasmanian people.

The HRLRC submits that the proposed Tasmanian Charter should make it unlawful for the Executive to either:

- act in a manner that is incompatible with a Charter Right; or

[91] Section 32(2) of the Victorian Charter states: 'International law and the judgements of domestic, foreign and international courts and tribunals relevant to a human right may be considered in interpreting a statutory provision.'

[92] For example the jurisprudence of the UNHRC, 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.

[93] HRLRC Human Rights Law Resource Manual, September 2006, Chapter 5, page 48.

[94] Section 36(5) of the Victorian Charter.

- to fail to give proper consideration to a relevant Charter Right in making decisions.[95]

For the Tasmanian Charter to be most effective, it must encourage a culture within the Executive whereby human rights are taken into account from the earliest stages of policy-making through to the day-to-day interactions between public authority staff and the public. The HRLRC submits that the Charter should therefore *require* the development of policies and programs by public authorities which:[96]

- target the alleviation of disadvantage and the elimination of discrimination,[97]
- are informed by active participation of key stakeholders and expand people's choices and freedoms;[98]
- have regard to civil, political, economic, social and cultural determinants of the wellbeing of affected persons;[99] and
- identify the persons or entities responsible for implementation, set targets and indicators to measure progress, and establish mechanisms to ensure accountability.[100]

The development of these policies and programs is desirable to promote the continued improvements to the provision of public services.

To achieve this cultural change, the Tasmanian Charter should impose enforceable obligations on the Executive in its conduct and in the exercise of its functions. In relation to CP Rights, the obligations on the Executive should be made enforceable by including provisions similar to ss 6, 7 and 8 of the UK Act, and in relation to ESC Rights, a complaints process should be introduced. Remedies are considered further in section 8 below.

(a) Definition of 'public authority'

A key area for consideration in drafting a Tasmanian Charter is in defining the extent to which the Executive government (also known as public authorities), is bound. As the Executive is the primary point of contact between Government and the public, the definition of what constitutes a 'public authority' for Charter purposes is fundamental to the practical effect of a Charter on the rights of Tasmanians. Due to the extensive and ongoing privatisation and outsourcing of traditional public functions (such as the delivery of utilities and public transport), the HRLRC considers that it is extremely important that any definition of public authority in the Tasmanian Charter includes a 'catch-all' component whereby persons, bodies and

[95] See the Victorian Charter, s38.

[96] Philip Lynch (Public Interest Law Clearing House [vic] Inc) *Homelessness and Human Rights in Victoria: Submission to the Human Rights Consultation Committee*, 2005, 60-61.

[97] OHCHR Draft Guidelines, 2.

[98] Ibid.

[99] OHCHR Draft Guidelines, 2-3.

[100] Ibid, 4-5.

corporations who exercise functions of a public nature are given obligations as 'public authorities' for the purpose of the Charter. This will also ensure that the government does not outsource its functions as a way of avoiding its statutory duties.

Broadly the HRLRC submits that 'public authorities' should be defined similarly to the definition provided in the Victorian Charter.[101] That definition divides public authorities into two categories:

- 'core' public authorities; and
- 'functional' public authorities, which are entities 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.

'Core' public authorities

The core public authorities are those parts of the Government that are fundamentally bound by the Charter. These should be expressly listed in the proposed Tasmanian Charter, to avoid any doubt as to the application of Charter obligations to particular parts of Government. The HRLRC supports the definition of core public authorities contained in the Victorian Charter and therefore submits that the proposed Tasmanian Charter should bind the following as 'core' public authorities:

- public officials, such as public sector employees, certain judicial employees and parliamentary officers;
- Government departments and entities established by a statutory provision that have functions of a public nature;
- the Tasmanian Police;
- Local Councils;
- Ministers;
- Parliamentary Committees; and
- other entities declared under regulation to be 'core' public authorities.

However the HRLRC submits that the proposed Tasmanian Charter should expand the definition of 'core' public authorities to include the Tasmanian Courts. Such a definition would bind the Tasmanian courts to act consistently with Charter rights and to take them into account in decision making. It has been suggested that

> the inclusion of the courts as a 'public authority' may create challenges in Australia's federal system which, according to the High Court, has one unified common law.[102]

[101] See s 4.

[102] HRCC, above n 5, quoted in Justice John Perry, 'International human rights and domestic law and advocacy', paper presented to HRLRC seminar, Melbourne, 7 August 2006, www.hrlrc.org.au/html/s09_search/default.asp?s=perry&dsa=232, 12.

This issue is said to arise from *Lipohar v The Queen*[103] and *Esso Australia v The Commissioner of Taxation*[104] supporting the proposition that there is 'one unified common law of Australia which is not susceptible to direct influence by legislation in any one State.'[105] However, the HRLRC submits that the view expressed by Justice John Perry is preferable. His Honour has said, extra-curially, that:

> The fact that there is one body of common law applicable throughout Australia does not mean that the individual States may not modify or displace the common law applicable in a particular State or Territory. To deny that obvious fact is to deny the sovereignty of State and Territory parliaments.[106]

'Functional' public authorities

This second category of public authorities is an important one in the context of modern government practice. Its inclusion was recommended by the Human Rights Consultation Committee in Victoria on the basis of similar practice in New Zealand and the United Kingdom. It also reflects the reality that modern governments use numerous organisational structures and arrangements to deliver public services and ensures that the duty to respect Charter Rights is not avoided by the 'outsourcing' of government functions.

The HRLRC broadly supports the adoption of the following definition of 'functional' public authorities that is provided in s4(1)(c) of the Victorian Charter:

> 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)

It is worth noting that functional public authorities are only public authorities where they are exercising functions of a public nature. For example, a security firm which carries out work for a government prison and for a supermarket would be a public authority in respect of the first function and not for the latter.[107]

Identifying 'functions of a public nature' is then a matter of construction, in which the court may take into account the following factors:[108]

(a) that the function is conferred on the entity by or under a statutory provision (eg, where legislation confers powers of arrest on authorised officers, such as public transport inspectors);

(b) that the function is connected to or generally identified with functions of government (eg, a private company may have the function of providing correctional

[103] (1999) 200 CLR 485.

[104] (1999) 183 CLR 10.

[105] Australian Human Rights Centre at the University of New South Wales, submission to HRCC, quoted in Perry, above n 102, 13.

[106] Perry, above n 102, 13.

[107] HRCC, above n 5, 57.

[108] See Victorian Charter, s4(2).

services (such as managing a prison), which is a function generally identified as being a function of government);

(c) that the function is of a regulatory nature (eg, a professional association which has statutory disciplinary, ethical or qualification powers is likely to be exercising public functions);

(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 2001* (Cth)) all of the shares in which are held by or on behalf of the State.

The 'functional' approach is similar to that adopted by the New Zealand and UK legislatures. The above factors to be taken into account in determining if a function is of a public nature were derived from jurisprudence and commentary relating to like provisions in the UK Act and the New Zealand *Bill of Rights Act 1990*.[109] This approach is intended to avoid the hit-and-miss nature of a list of entities attached to the Charter as a schedule,[110] and to provide relative certainty as to who will be considered to be a public authority, or in what circumstances (in the case of entities which combine public functions with those of a private nature).[111]

The HRLRC submits that, as the House of Lords found in *Aston Cantlow*,[112] 'public function' should be given a 'generously wide' interpretation so as to further the statutory aim of promoting human rights protection.[113] There should be 'no single test of universal application…given the diverse nature of governmental function and the variety of means by which these functions are discharged today'.[114]

The HRLRC also submits that, for the avoidance of doubt, and in light of the trend towards privatisation of public functions, it would be preferable to identify in the proposed Tasmanian Charter, by way of a non-exhaustive list, those functions that are considered to be 'of a public nature'. The appropriate functions to be identified in the list would include:

- operation of correctional/detention facilities;
- provision of essential services (gas, electricity, water);
- provision of emergency services;
- provision of all healthcare or medical services (public and private);
- provision of all educational services, including private schooling;
- provision of public transport; and

[109] Explanatory Memorandum, Charter of Human Rights and Responsibilities Bill 2006 (Vic) 6, 4.

[110] This approach was considered by the Committee (see HRCC, above n 5, 55).

[111] An example given by the Committee is that of a security firm which carries out security work for a Victorian prison as well as for a supermarket. It would be a public authority for the purposes of the former function but not the latter: HRCC, above n 5, 57.

[112] Appellate Committee of the House of Lords [2003] UKHL 37.

[113] *Aston Cantlow*, 11.

[114] *Aston Cantlow,* 12.

- provision of public housing.

Further, the proposed Tasmanian Charter should state that where a government outsources its public functions it is not relieved of its obligations under the proposed Tasmanian Charter. That is, where a public authority delegates its functions to another entity, by contract or otherwise, the public authority will retain its obligations, regardless of whether the delegate is also conferred with those obligations.[115]

(b) Human rights audits/reports

The Tasmanian Charter should mandate that all public authorities (as defined) undertake an annual audit of their human rights compliance and submit a detailed annual report to the authority responsible for oversight and enforcement of the Charter.

In the UK, in circumstances where public authorities have had inadequate auditing procedures in place, if any, the implementation and incorporation of human rights into policy and service delivery has stalled.[116] Particularly significant was the finding by the Audit Commission that where human rights complaints were unsuccessful, the relevant public authority tended to conclude that they were complying with the UK Act.[117]

It is critical to the effective implementation of a Tasmanian Charter that any shortcomings in public authorities' compliance with and understanding of their Charter obligations are quickly identified. Further training, education and assistance can then be provided where necessary.

Human rights audits and reports are central to the HRLRC's proposal for the effective inclusion of ESC Rights in the Tasmanian Charter. Under this proposal, public authorities are required to include in their annual audit reports figures for all complaints referred to the authority by the Human Rights Commissioner (or equivalent body), along with any recommendations made by the Commissioner, the authority's response to those complaints, and if the authority decides against taking action in response to any Commission recommendation, the report must include reasons for that decision (see also section 8 below).

(c) Human rights actions plans

The OHCHR has stated:

> 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. It is therefore an intrinsic feature of the human rights

[115] So much has been held in the UK, see *Callin, Heather and Ward v Leonard Cheshire Foundation* [2002] EWCA Civ 366.

[116] Audit Commission, *Human Rights: Improving Public Service Delivery* (2003) 13.

[117] Ibid.

> approach that institutions and legal/administrative arrangements for ensuring accountability are built into any…strategy.[118]

The HRLRC supports the inclusion of a mandatory provision in the Tasmanian Charter requiring public authorities to develop a plan for the implementation, measurement, progress and accountability of human rights.[119] This approach has been effective in New Zealand, where the New Zealand Human Rights Commission has developed the New Zealand Action Plan for Human Rights. Its success can be attributed, in part, to the fact that it is well developed and resourced.[120] A lack of resources within a public authority could inhibit the authority's ability to develop an appropriate and effective action plan. Government should ensure that public authorities are adequately resourced for this purpose.

The OHCHR has identified a number of conditions that are important to an effective human rights action plan.[121] The plan should:[122]

- clearly state what people's rights are;
- state the authority's human right's responsibilities;
- state the authority's commitment to the realisation of the human rights enumerated within the plan;
- include time frames for the realisation of human rights;
- include, at the very least, annual targets;
- include indicators of how targets are set and their success measured; and
- include strategies to promote and protect human rights, particularly amongst the target section of the public the authority deals with.

7.6 Recommendations

Dialogical model

The Tasmanian Charter should adopt a dialogical model.

Role of Parliament

(a) Members introducing bills into Parliament should provide *reasoned* statements as to the compatibility of the legislation with Charter Rights.

(b) An independent parliamentary committee, properly resourced, should be responsible for reviewing all bills for compatibility with Charter Rights.

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[118] OHCHR Draft Guidelines, 5.

[119] Philip Lynch (PILCH), *Homelessness and Human Rights in Victoria: Submission to the Human Rights Consultation Committee*, 2005, 74.

[120] Human Rights Commission (NZ), *New Zealand Action Plan for Human Rights* (2005) http://www.hrc.co.nz/report/actionplan/0foreword.html.

[121] OHCHR Draft Guidelines, 15-17.

[122] Ibid; Philip Lynch (PILCH) *Homelessness and Human Rights in Victoria: Submission to the Human Rights Consultation Committee*, 2005, 74.

(c) The Minister responsible for legislation must respond to any Declarations of Incompatibility issued by the Supreme Court within 6 months.

(d) A writ of mandamus should be available against a Minister where Parliament has failed to respond to a Declaration of Incompatibility within 6 months.

(e) Parliament should not be given the ability to expressly override Charter Rights in later legislation.

Role of the courts

(a) All legislation should be interpreted and applied, including if necessary read down, in a manner compatible with Charter Rights.

(b) The Tasmanian Charter should provide for the Tasmanian courts to refer to international and comparative jurisprudence when interpreting Charter Rights.

(c) Where a human rights compatible interpretation is not possible, the Tasmanian Supreme Court should be empowered to make Declarations of Incompatibility.

Role of the executive

(a) All public authorities should be required to:

- act in a manner that is compatible with a Charter Right; and
- give proper consideration to Charter Rights when making decisions.

(b) The definition of public authorities should be broad and include all bodies who exercise functions of a public nature, insofar as they are exercising those functions.

(c) The Tasmanian Charter should require the development of Executive policies and practises that promote protection of Charter Rights, including human right audits, reporting and action plans.

8. Should People be able to Enforce their Rights under the Tasmanian Charter Directly in the Courts?

8.1 Obligation to ensure effective remedies in international law

Australia is obliged under its international law commitments to provide 'effective remedies' in relation to particular human rights.[123] According to the OHCHR:

> Rights and obligations demand accountability; unless supported by a system of accountability, they can become no more than window-dressing. Accordingly, the human rights approach … emphasises obligations and requires that all duty-holders, including States, be held to account for their conduct in relation to international human rights.[124]

Providing for effective mechanisms for seeking redress is critical to ensuring the successful enjoyment of the Charter by the community. The ICCPR requires States parties to ensure

[123] See, eg: ICCPR, art 2(3); CERD, art 6; CAT, art 14; CROC, art 39.

[124] OHCHR, *Human Rights and Poverty Reduction: A Conceptual Framework* (2004) 15-16.

that people whose rights are violated have an 'effective remedy'. While an effective remedy may be administrative in nature, the HRLRC submits that, in general, the availability of an effective remedy requires that 'individuals be able to seek enforcement of their rights before national courts and tribunals.'[125] Further, a remedy, if granted, should be enforced. However, the HRLRC acknowledges that there are concerns as to how ESC Rights might be interpreted by the courts should a Tasmanian Charter provide for such rights to be directly enforceable,[126] and therefore proposes that a model be adopted which provides different remedies for breaches of CP Rights and ESC Rights, limiting the availability of judicial remedies (including damages) to CP Rights.

While certain international tribunals and bodies can hear complaints regarding breaches of various human rights conventions,[127] the primary responsibility for compliance with human rights treaties lies within the domestic legal systems of the States parties.[128] For instance, the CESCR has stated that international procedures for the pursuit of individual claims are 'only supplementary to effective national remedies.'[129]

8.2 Effective remedies

The UNHRC has defined the right to an 'effective remedy' as requiring 'reparations' to be made to individuals whose rights have been violated. Such reparations may include:

> 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 perpetration of human rights violations.[130]

Accordingly, an effective remedy may require measures beyond a victim-specific remedy such as compensation.[131]

The CESCR has also stated that '[t]he right to an effective remedy need not be interpreted as always requiring a judicial remedy. Administrative remedies will, in many cases, be adequate'.[132] Nevertheless, some ICESCR obligations, such as those concerning non-discrimination, cannot be made fully effective without recourse to a judicial remedy.[133]

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[125] See CESCR, *General Comment 9: The Domestic Application of the Covenant*, [4], UN Doc E/C.12.1998/24 (1998).

[126] See eg, DJCS Report, above n 35.

[127] See, eg: the UNHRC in relation to the ICCPR, and the Committee on Torture in relation to the *CAT*. The monitoring by international treaty committees is discussed at Chapter 6.

[128] The First Optional Protocol to the ICCPR, for example, requires that individuals must have exhausted all domestic remedies before they can bring a case before the UNHRC: *Optional Protocol to the International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 302, art 5(2)(b) (entered into force 23 March 1976).

[129] CESCR, *General Comment 9*, 4.

[130] Ibid, 16. UNHRC, *General Comment No 31: The Nature of the Legal Obligation Imposed on States Parties to the Covenant,* [16], UN Doc CCPR/C/21/Rev.1/Add.13 (2004).

[131] Ibid, 17.

[132] Ibid, 9.

[133] Ibid.

8.3 Remedies in the Tasmanian Charter

The HRLRC considers that, consistent with the international human rights framework, the Tasmanian Charter would ideally provide 'appropriate means of redress … to any aggrieved individual or group,'[134] whether the redress is for a breach of an ESC Right or a CP Right. In light of the concerns previously noted in relation to ESC Rights, the HRLRC proposes a two-tiered remedial system. The Tasmanian Charter should provide for the full range of judicial and non-judicial remedies for breaches of CP Rights, including damages and injunctions, but purely non-judicial administrative remedies for breaches of ESC Rights.

(a) Remedies for breaches of CP Rights

For breaches of CP Rights, the HRLRC submits that the Tasmanian Charter should adopt the following remedies available under domestic human rights frameworks in South Africa, Canada, New Zealand, the United States and the United Kingdom:

- A declaration or 'statement' that a law, policy or program is incompatible with human rights and requiring government to respond to this incompatibility.[135]
- A declaration or order that a law, policy or program be implemented in accordance with human rights.[136]
- An injunction, declaration or order that the conduct or activity amounting to a breach of human rights be stopped.[137]
- Compensation and reparations.[138]
- Such remedies as are 'just and appropriate'.[139]

The Tasmanian Charter should provide for a range of remedies, both judicial and non-judicial. Judicial remedies should include damages or compensation (where there is no effective or appropriate alternative remedy), and non-judicial remedies should include the complaints, claims and conciliation processes through a Human Rights Commissioner (or an equivalent body).

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[134] CESCR, *General Comment 9: The Domestic Application of the Covenant*, 2] UN Doc E/C.12.1998/24 (1998).

[135] See, eg: ACT Act, s 32; UK Act, s 4.

[136] See, eg: UK Act, s 7.

[137] UNHRC, *General Comment No 31: The Nature of the Legal Obligation Imposed on States Parties to the Covenant,* 17, 19, UN Doc CCPR/C/21/Rev.1/Add.13 (2004).

[138] See, eg: *Simpson v Attorney General (NZ)* [1994] 3 NZLR 667; UK Act, s 8. The UN Human Rights Committee 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 article 2, paragraph 3 is not discharged': UNHRC, *General Comment No 31: The Nature of the Legal Obligation Imposed on States Parties to the Covenant*, 16, UN Doc CCPR/C/21/Rev.1/Add.13(2004).

[139] See eg: UK Act, s 7.

Damages or compensation

Under the Victorian Charter there is no entitlement to damages or compensation.[140] It is likely that the Victorian Charter also prevents any payment of exemplary or punitive damages.[141] The UK Act, however, 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.[142]

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.

Non-judicial remedies

The HRLRC strongly supports the creation of an independent Human Rights Commission.[143]

While it would be desirable for Tasmania to have an independent, dedicated Human Rights Commission, the size of the jurisdiction may dictate that the role is incorporated into an existing body, such as the Anti-discrimination Commission. As in the ACT, the Commissioner's role should predominantly be to review Tasmanian law for compliance with the rights protected under the Charter, and to report to the Attorney-General on a regular basis.[144] Such a role will also assist in promoting education about human rights.

The Victorian Charter provides for the pursuit of a breach through the Ombudsman, but not the Victorian Equal Opportunity and Human Rights Commission. The HRLRC submits that a Tasmanian Charter should give a body, such as the Tasmanian Anti-Discrimination Commission, powers of complaints handling and conciliation. This would serve to mitigate any risk that frivolous or unnecessary human rights litigation might be encouraged by a free-standing cause of action under the Tasmanian Charter (see section 8.4 below) as complainants would have ready access to an inexpensive alternative to litigation as a means of addressing the non-pecuniary aspects of their complaint.

(b) Remedies for breaches of ESC Rights

The HRLRC's preferred position would be for the Tasmanian Charter to provide for directly enforceable ESC Rights protections, in accordance with internationally accepted principles of the interdependence and indivisibility of human rights.

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[140] Section 39(3).

[141] Simon Evans, 'The Victorian Charter of Rights and Responsibilities and the ACT Human Rights Act: Four Key Differences and their Implications for Victoria' (Paper presented at the Australian Bills of Rights: The ACT and Beyond Conference, Australian National University, 21 June 2006).

[142] UK Act, s 8.

[143] See ACT Act, Part 6.

[144] Julie Debeljak, above n 8.

However, the HRLRC is aware that, in light of concerns expressed in relation to ESC Rights by the DJSC in its review of the ACT Act, the Tasmanian Government is unlikely to go down the path of direct enforceability – at least not initially.

The HRLRC submits that, as an alternative to providing from the outset for judicial remedies for breaches of ESC Rights, the Tasmanian Charter should provide for a Human Rights Commissioner (or existing body such as the Anti-discrimination Commission) to receive complaints from individuals who allege a breach of their ESC Rights.[145] The Commissioner should 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.

All complaints must 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 will have available three alternative recommendations (but this does not preclude the possibility that more options may become apparent with further consideration):

- 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; or
- 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:
    - take action to remedy the shortcoming; or
    - if, after giving the complaint and recommendation due consideration, decides not to take action, publish its reasons for making that decision; or
- 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).

All public authorities should be required to publish the details of all complaints received, the Commissioner's recommendations, 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

[145] An important related issue will be the implementation of a public education programme to ensure that people are made aware of the distinction between their CP Rights and ESC Rights: see section 9.

public authorities and any reasons given by the public authorities for actions not being taken.

The information gained by this process will be extremely useful in allowing public authorities and 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 ESC Rights.

A summary of suggested provisions for the incorporation of the ESC Rights procedure is attached to this Submission as Annexure 1.

8.4 Free-standing cause of action for a breach of a CP Right

In Victoria and the ACT there is no direct right of action for breach of Charter Rights. In Victoria, human rights breaches may be incorporated within existing causes of action against public authorities, by providing an additional ground of unlawfulness, rather than creating a freestanding cause of action.[146] While it is desirable that breaches of Charter Rights be available as additional bases for non-Charter causes of action, the HRLRC submits that the Tasmanian Charter cannot adequately protect substantive human rights without freestanding recourse to the courts.[147] The Tasmanian Charter should follow the UK Act in this regard, albeit restricting the availability of the freestanding cause of action to breaches of CP Rights. Under the UK Act, it is unlawful for a public authority to 'act in a way which is incompatible with a Convention right,'[148] and a person claiming a breach (or proposed breach) by a public authority may bring proceedings or rely on rights under the European Convention in any legal proceedings.[149]

The UK experience suggests that concerns about the existence of a free-standing cause of action are, to a large extent, unfounded. The DCA Review considered the impact of the UK Act on the development of the substantive law, noting that:[150]

- Decisions of the UK courts under the Human Rights Act have had no significant impact on criminal law, or on the Government's ability to fight crime.
- The Human Rights Act has had an impact upon the Government's counter-terrorism legislation, - the main difficulties in this area arise not from the Human Rights Act, but from decisions of the European Court of Human Rights.
- In other areas the impact of the Human Rights Act upon UK law has been beneficial, and has led to a positive dialogue between UK judges and those at the European Court of Human Rights.
- The Human Rights Act has not significantly altered the constitutional balance between Parliament, the Executive and the Judiciary.[151]

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[146] Victorian Charter, s39. See also Julie Debeljak, above n 8.

[147] Julie Debeljak, 'Access to Civil Justice: Can a Bill of Rights Deliver?' [2001] *Tort Law Review* March 32, 50.

[148] UK Act, s 6(1).

[149] UK Act, s 7(1). Section 7(1) concludes 'but only if he is (or would be) a victim of the unlawful act.' The HRLRC is strongly of the view that standing under the Tasmanian Charter should be broad and permissive – see section 8.6 below.

[150] DCA Review, Part 2.

8.5 Remedies should be expressly articulated in the Charter

The HRLRC submits that the remedies for breach of the Tasmanian Charter should be clearly articulated.

The New Zealand Bill of Rights does not include such an express remedy clause and the courts have had to *imply* a right to remedies,[152] namely, a judicial discretion to exclude evidence obtained in violation of rights; and a right to compensation.[153]

In relation to judicial remedies for breaches of CP Rights, the HRLRC submits that the Tasmanian Charter should adopt a provision similar to s 8 of the UK Act, which provides for a court to make such orders as are within its jurisdiction and are just and appropriate, including damages.[154] The UK experience is that this has not resulted in an explosion in the number of awards of damages. According to the DCA Review, damages under the UK Act have only been awarded in three reported cases.[155] Further, the DCA Review points out that an impression exists 'in the public mind that a wide range of claims are successful when in fact they are not – and have often been effectively laughed out of court.'[156] The most prominent example given is that of Dennis Nilsen, who was sentenced to life imprisonment in 1983 for multiple murders. Nilsen sought judicial review of a decision of the Prisoner Governor to deny him access to pornography, but his application was refused by the single judge at the permission stage. Not only was Nilsen's failure at the outset not widely reported, but as the DCA Review points out

> the case is now often cited as the leading example of a bad decision made as a result of the [UK Act], with the Shadow Home Secretary himself asserting that Dennis Nilsen had been able to obtain hard-core pornography in prison by citing his “right to information and freedom of expression” under the Act.[157]

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[151] Ibid, 10.

[152] See *Simpson v Attorney-General* [1994] 3 NZLR 667, particularly the judgment of Cooke P.

[153] ACT Bill of Rights Consultative Committee, ACT Legislative Assembly, *Towards an ACT Human Rights Act,* 2003.

[154] Section 8 relevantly provides:

(1) In relation to any act (or proposed act) of a public authority which the court finds is (or would be) unlawful, it may grant such relief or remedy, or make such order, within its powers as it considers just and appropriate.

(2) But damages may be awarded only by a court which has power to award damages, or to order the payment of compensation, in civil proceedings.

(3) No award of damages is to be made unless, taking account of all the circumstances of the case, including:

(a) any other relief or remedy granted, or order made, in relation to the act in question (by that or any other court); and
(b) the consequences of any decision (of that or any other court) in respect of that act,

the court is satisfied that the award is necessary to afford just satisfaction to the person in whose favour it is made.

[155] *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; see DCA Review, 18.

[156] DCA Review, 30.

[157] Ibid, quoting 'Tories target human rights', *Daily Telegraph*, (London) 17 August 2004 (pinpoint reference not provided).

8.6 Standing

The HRLRC is strongly of the view that standing under the Tasmanian Charter should be broad and permissive to ensure that the interests of the most vulnerable Tasmanians can be protected by enabling third parties to initiate or intervene in proceedings under the Charter. Where a person or group, whose human rights have been breached or are at risk of being breached, but who is unable to bring a complaint on their own behalf, third parties should have standing to act on their behalf. Section 38 of the *South African Bill of Rights 1996* is a useful guide in this regard, providing as follows:

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

8.7 Recommendations

(a) The Tasmanian Charter should provide for the following remedies for breaches of CP Rights:

- A declaration or 'statement' that a law, policy or program is incompatible with human rights and requiring government to respond to this incompatibility;
- A declaration or order that a law, policy or program be implemented in accordance with human rights;
- An injunction, declaration or order that the conduct or activity amounting to a breach of human rights be stopped;
- Damages, compensation and reparations; and
- Such other remedies as are just, appropriate and equitable.

(b) A complaints procedure should be implemented to respond to allegations of breach of ESC Rights.

(c) The Tasmanian Government should create a Human Rights Commission, or confer the role of oversight of the Charter to a body such as the *Tasmanian Anti-discrimination Commission.* This body should have broad powers under the Tasmanian Charter for conciliation and the handling of complaints and claims.

(d) The Tasmanian Charter should confer standing on the following individuals and groups:

- any person or organisation aggrieved or directly affected by the matter;
- any person or organisation with a ‘special interest’ in the matter;

- any person or organisation intervening in the public interest; and
- any person or organisation acting for or on behalf of an individual or group that is unable to bring proceedings on their own behalf.

9. What Other Steps should be Taken to Enhance the Protection of Human Rights?

9.1 Overview

One of the most critical factors to consider when initiating a Charter is how that Charter will be integrated into the fabric of society. The underlying long-term goal of any Charter must be to foster a culture respectful of human rights.

Awareness of a Charter needs to permeate beyond the legal community and public institutions into the broader community. The establishment of a human rights culture is absolutely key to the enhancement of the protection of human rights, and education is key to the establishment of such a culture.

According to the DJCS, the first objective of a Charter must be to promote cultural change within the Executive by ensuring that decision makers work within the internationally agreed framework of human rights standards.[158] The second objective must be to promote awareness of human rights and how they are used within the legal profession, community sector and the wider community.[159]

In the UK, the DCA has indicated that significant barriers to effective implementation of the UK Act have arisen from:

- myths, misperceptions and misrepresentations as to the role and effect of the UK Act;[160]
- deficiencies in training and guidance of public servants;[161] and
- a general lack of education among the public sector and the general public.[162]

The HRLRC submits that the success of the Tasmanian Charter will depend to a very great extent upon the priority given to human rights education strategies by the Tasmanian Government. The HRLRC submits that responsibility for human rights education should be given to either a new, dedicated Tasmanian Human Rights Commission, or to an existing body such as the Tasmanian Anti-discrimination Commission. In the latter case, additional resources must be provided to the Commission to enable it to fulfil its human rights roles.

[158] Renee Leon, Chief Executive, DJCS, *Human Rights Act 2004 Twelve-Month Review – Discussion Paper*, March 2006.

[159] Ibid. See also a review completed by the ACT Council of Social Service Inc (***ACTCOSS***) - *Review of the Human Rights Act 2004: Submission to the Department of Justice and Community Safety's Discussion Paper*, May 2006.

[160] DCA Review, Part 4.

[161] Ibid, 41.

[162] Ibid, 42.

If the HRLRC's proposed model is adopted, it will be especially important for the general public to be made aware of which of their rights are CP Rights, and therefore directly enforceable, and which are ESC Rights for which redress is limited to the complaints process.

9.2 Examples of strategies and programs adopted by the UK and ACT

The community can be divided into three broad categories for the purposes of developing a human rights education strategy: the judiciary and legal profession; community groups; and the broader community.[163]

(a) Education of the judiciary and legal profession

In the UK, the following groups provide training or materials targeted at the judiciary or legal profession:

- the Human Rights Lawyers Association (which runs seminars and workshops for lawyers);[164]
- the Bar Council (which provides CPD events and on-line training for barristers);[165]
- the DCA (which publishes a Study Guide to the UK Act and provides academic and governmental information about human rights litigation);[166] and
- the Judicial Studies Board (which runs seminars and provides material for judicial officers, magistrates and law schools).[167]

In the ACT, there is the ACT Human Rights Office (***ACTHRO***) (offering free in-house training programs and newsletters),[168] and the Australian National University's Human Rights Research Project website.[169]

(b) Education of community groups

In the UK, the British Institute of Human Rights delivers training sessions to various organisations including the police and social services departments. The DCA compiled an Audit Commission Report[170] which was sent to all public bodies to

[163] For the organisations listed as examples below, further information regarding their programs and materials can be found on the websites listed.

[164] www.hrla.org.uk

[165] www.legaleduation.org.uk

[166] www.dca.gov.uk

[167] www.isboard.co.uk

[168] www.hro.act.gov.au

[169] acthra.anu.edu.au/

[170] DCA, *Departmental Report 2003/2004,* (www.dca.gov.uk/dept/report/2004/03.htm)

assist them with their response to the UK Act. The Institute for Public Policy Research[171] is also involved with educating public bodies and community groups.

In the ACT, various public events, training sessions and workshops, forums and materials have been organised by ACTHRO.

(c) Education of the broader community

In both the UK and the ACT telephone helpdesks operate to assist with human rights queries from the general public, and various websites and publications by different organisations are also provided for the public. The UK has developed youth education and consultation initiatives[172] and ACTHRO has programs tailored for schools. The DJCS[173] has the Bill of Rights Unit, which is responsible for providing advice to the Attorney-General regarding human rights.

9.3 Funding and resources

According to the ACTCOSS, the successful implementation and protection of human rights has been hindered by limited funds and resources in the ACT.[174] Adequate funding and resources by the government must be made available and allocated as necessary to organisations working in the area of human rights protection and education. The availability of legal and advocacy services is critical, and adequate funding for relevant providers must be provided to ensure that the Tasmanian Charter is as effective as possible in protecting the rights of Tasmanians most in need of its protection.

9.4 Availability of legal and advocacy services

The rights to legal representation, equality before the law and a fair hearing are human rights in and of themselves, and are critical aspects of the promotion, protection, fulfilment and enforcement of other human rights. Recognising this, the availability of advice, assistance and advocacy about human rights must be an integral component of the strategy for the implementation of the Tasmanian Charter.

It is particularly important that human rights advocacy and legal services be available to marginalised and disadvantaged individuals and groups, many of whose human rights are particularly vulnerable to violation and for whom legal services are often largely inaccessible. According to the OHCHR, the availability and accessibility of human rights legal services and the justiciability of human rights are among the 'most important tools' to prevent or seek redress for rights violations. The UN High Commissioner considers that the following measures should constitute key features of an effective human rights promotion and protection strategy:

- access to human rights legal services and clinics for poor and disadvantaged people;

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[171] www.ippr.org.uk

[172] See DCA, *Action Plan: Involving Children and Young People,* 2006, p. 7: www.dca.gov.uk/family/cap/cypactplan0206.pdf

[173] www.jcs.act.gov.au/main/htm

[174] ACTCOSS, *Review of the Human Rights Act 2004: Submission to the Department of Justice and Community Safety's Discussion Paper*, May 2006.

- human rights information and education campaigns targeting marginalised and disadvantaged communities; and
- training programs for lawyers and judges about the content and use of human rights.

This is consistent with research conducted by the UK Institute for Public Policy Research regarding factors that have contributed to implementation successes and failures in respect of the UK Act.[175]

9.5 Review of Charter provisions

It is important that the implementation of the Tasmanian Charter is well monitored and understood. In particular, where ESC Rights are protected, it will be important to understand the types of complaints that are made in relation to breach of ESC Rights, so as to build a base of knowledge in relation to future litigation that might arise if ESC Rights are made enforceable in courts. Review procedures have been included in the ACT Act and the Victorian Charter and, as discussed, the UK Act has recently been the subject of a significant review by the DCA.[176]

9.6 Recommendation

(a) The Tasmanian Government should ensure that adequate resources are provided to:

- the Anti-discrimination Commission (or other similar body);
- the Tasmanian Legal Aid Commission;
- community legal centres; and
- and other human rights and community organizations,

to enable them to provide targeted, accessible and adequate human rights education, information and legal services.

(b) The Tasmanian Charter should be reviewed after two years and thereafter at 5 year intervals. The review should be conducted with the active and resourced participation of all stakeholders and should consider:

- The effectiveness of the Charter in respecting, protecting and fulfilling Charter Rights;
- Whether further rights need to be included in the Charter;
- Whether judicial remedies should be available for breach of ESC Rights; and

[175] Frances Butler (IPPR): *Improving Public Services: Using a Human Rights Approach – Strategies for Implementation of the Human Rights Act within Public Authorities* (2005); and *Human Rights: Who Needs Them? Using Human Rights in the Voluntary Sector* (2005).

[176] Reviews are to be conducted after one year and a subsequent review after four years in the ACT (see ss 43 and 44 ACT Act) and after 4 and 8 years of operation in Victoria (s 44 and 45 Victorian Charter).

- Any special measures or strategies to promote and protect the human rights of vulnerable groups.

Annexure 1 - Examples of ESC Rights provisions

This section provides guidance as to how the Tasmanian Charter might incorporate the protection of ESC Rights. This section is intended as a suggestion only, and does not represent a submission by the HRLRC as to the precise wording of the relevant sections of the Tasmanian Charter. If it would assist the Institute, the HRLRC would be pleased to elaborate further on the manner of implementing ESC Rights contained in this submission.

1.1 Preamble

The Tasmanian Charter should include a Preamble like the Victorian Charter Preamble, but with the addition of the following bullet point:

- human rights, whether civil, political, economic, social or cultural in nature are universal, interdependent, interrelated and indivisible.

1.2 Purpose

The preliminary, purpose provision (the equivalent of s 1 of the Victorian Charter) should include words to the effect of either:

[The main purpose of this Charter is to protect and promote human rights by –]

(#) creating the role of Tasmanian Human Rights Commissioner and conferring upon that Commissioner the jurisdiction to receive from individuals complaints related to human rights, and to refer those complaints to the relevant public authority with such recommendation as he or she considers appropriate.

or

(#) renaming the Tasmanian Anti-discrimination Commission the [Tasmanian Anti-discrimination and Human Rights Commission] and conferring upon that Commissioner the jurisdiction to receive from individuals complaints related to human rights, and to refer those complaints to the relevant public authority with such recommendation as he or she considers appropriate.

1.3 Definitions and Schedules

The definitions should include:

Charter Right means a right set out in either Schedule 1 or Schedule 2 of this Act.

Schedule 1 Right means a right set out in Schedule 1 of this Act.

Schedule 2 Right means a right set out in Schedule 2 of this Act.

Subject to further consideration as to precisely which rights are to be included and how those rights are to be expressed, Schedule 1 should include the rights in the ICCPR, and Schedule 2 should include the rights in the ICESCR. (Alternatively, the ICCPR could be included as Schedule 1 and the ICESCR as Schedule 2.)

1.4 Remedies

The Tasmanian Charter should include provisions similar to ss 6, 7 and 8 of the UK Act, but should distinguish between breaches of CP and ESC Rights:

[X] Acts of public authorities

(1) It is unlawful for a public authority to act in a way which is incompatible with a Charter Right.

(2) Subsection (1) does not apply to an act if-

(a) as the result of one or more provisions of primary legislation, the authority could not have acted differently; or

(b) in the case of one or more provisions of, or made under, primary legislation which cannot be read or given effect in a way which is compatible with the Charter Rights, the authority was acting so as to give effect to or enforce those provisions.

(3) 'An act' includes a failure to act.

[XX] No criminal offence

Nothing in this Act creates a criminal offence.

[Y] Proceedings

A person who claims that a public authority has acted (or proposes to act) in a way which is made unlawful by section [X](1) may, if the Charter Right that has been breached by the act of the public authority (or is likely to be breached by the proposed act of the public authority) is a Schedule 1 Right:

(1) bring proceedings against the authority under this Act in the appropriate court or tribunal; or

(2) rely on the Charter Right or Charter Rights concerned in any legal proceedings.

[YY] Remedies

(1) In relation to any act (or proposed act) of a public authority which the court finds is (or would be) unlawful, and where the Charter Right that has been breached by the act of the public authority (or is likely to be breached by the proposed act of the public authority) is a Schedule 1 Right, the court may grant such relief or remedy, or make such order, within its powers as it considers just and appropriate.

(2) Damages may be awarded only by a court which has power to award damages, or to order the payment of compensation, in civil proceedings.

(3) No award of damages is to be made unless, taking account of all the circumstances of the case, including-

(a) any other relief or remedy granted, or order made, in relation to the act in question (by that or any other court), and

(b) the consequences of any decision (of that or any other court) in respect of that act,

the court is satisfied that the award is necessary to afford just satisfaction to the person in whose favour it is made.

[Z] Complaints

(1) A person who claims that a public authority has acted (or proposes to act) in a way which is made unlawful by section [X](1) may lodge a complaint in writing with the [Commissioner].

(2) A complaint lodged under sub-section (1) in relation to breach (or proposed breach) of a Schedule 1 Right does not preclude the commencement of proceedings under section [Y].

(3) The Commissioner must forward the complaint to the [chief executive] of any public authority that the Commissioner considers appropriate within [#] days of receipt of the complaint.

(4) At the time the Commissioner forwards the complaint to a public authority, the Commissioner must include with the complaint his or her conclusion, based upon the Commissioner's consideration of the complaint in accordance with any guidelines, policy or regulations made for that purpose, that:

(a) the complaint does not require action to be taken by the public authority; or

(b) the complaint discloses a deficiency in the public authority's policy or procedure and that the public authority must either:

(i) amend its policies or procedures to make them compatible with this Charter; or

(ii) cause to be published in the Gazette a statement providing reasons why the public authority is unable to amend its policy or procedures to make them compatible with the relevant Charter rights; or

(c) the complaint does not disclose a deficiency in the public authority's policy or procedure, but the Commissioner is of the opinion that the parties should seek to resolve the complaint by mediation or conciliation.

(5) All complaints received by a public authority under this section, the Commissioner's recommendations in relation to those complaints and the public authority's responses to those complaints and recommendations must be reported in the public authority's annual human rights audit report.