



**Castan Centre for Human Rights Law
Monash University
Melbourne**

**Submission to the Tasmanian community consultation into
a charter of human rights and responsibilities for
Tasmania**

Prepared by Erica Contini and Professor Sarah Joseph

Castan Centre Submission to the Tasmanian Community Consultation on a Charter of Human Rights and responsibilities for Tasmania.

Who we are

The Castan Centre for Human Rights Law is a research, education and policy centre within the Law Faculty at Monash University. It seeks to promote and protect human rights through the generation and dissemination of public scholarship in international and domestic human rights law.

We welcome the proposal to establish a human rights Charter for Tasmania. Our submission will address some of the areas for comments set out on the Directions Paper in the numerical order set out in that paper. Nothing can be read into our failure to comment on particular questions.

Responses to Specific Questions

1. The Rights set out in Table 1 are appropriate for Tasmania, however they are not sufficient. We do later recommend inclusion of the right to an adequate standard of living (question 19). We were, however, particularly happy to see that the right to self-determination has been included.
2. As an initial step, we believe that it is sufficient to incorporate the ICCPR and the ICESCR into Tasmanian law (though see below on disability rights).
3. There is no need to specify human responsibilities in detail alongside the human rights in the Charter. Such a list risks implying that a person only enjoys his or her human rights if he or she fulfils his or her responsibilities. A failure to fulfil one's responsibilities can lead to the legitimate limiting of a person's rights (see question 4). However, a failure to fulfil responsibilities never leads to the negation of one's human rights.
- 4 Yes, such a clause is appropriate. We also endorse the non-application of such a clause to those rights which are absolute in international law. (therefore we endorse 8.1.5.2 of the report at p. 42)
5. Under the proposed model, the Tasmanian Parliament would not be required to comply with a declaration of incompatibility (nor is this the case in Victoria or the ACT). While an override power may add to the transparency of parliament's view of the Court's declaration, it is legally unnecessary for Parliament to pass an overriding declaration when it disagrees

with a court's declaration of incompatibility. As such, the conferral of a right to pass an overriding declaration would unnecessarily complicate the process. Rather, we would recommend that the Tasmanian government simply be required to make an explicit and clear response to a declaration of incompatibility within the recommended time period of 30 sitting days of receiving the declaration (whether that response be negative or positive).

6- As recommended by the Tasmanian Law Reform Institute, if the Supreme Court finds subordinate legislation to be incompatible with the Charter, that legislation should be invalid unless Parliament changes the Act of Parliament to make them valid, unless the relevant primary legislation expressly authorises subordinate legislation that breaches the Charter. Subordinate legislation such as local government by-laws is often passed without parliamentary scrutiny. If such legislation is found to be incompatible with the Charter, we believe that Parliament should be required to validate that legislation via a change in the primary legislation (if it wishes to preserve that subordinate legislation) as that will ensure that Parliament turns its collective mind to the matter.

7. The Charter should expressly point the courts and government to international law and the jurisprudence of foreign and international courts and tribunals in interpreting human rights in Tasmania. The rights in the Tasmanian Charter will be based on those set out in key international human rights treaties, such as the International Covenant on Civil and Political Rights. The treaty bodies created for each treaty consist of human rights experts from around the globe and their decisions are highly authoritative in determining the meaning of international human rights. Foreign and international tribunals also have a long history of working with similar human rights documents and have consequently established an extensive jurisprudence on human rights law. Tasmania's cases on this issue should be guided by and should contribute to this corpus of international and comparative law, rather than be divorced from it.

8 – Issues regarding interpretive provisions have recently come to light in Victoria in the recent Court of Appeal decision in *R v Momcilovic* [2010] VSCA 50. The Castan Centre does not agree with the interpretation given to the relevant Victorian provision (section 32). The case is currently before the High Court and constitutional issues have arisen in that case. As such, we await the High Court's decision before commenting further on this issue.

9 –We support a model whereby declarations of incapability are made solely by the Tasmanian Supreme Court. While, in principle, it is plausible for lower courts to make such declarations, we believe that the referral to the Supreme Court of such issues would ensure against the possible proliferation of inconsistent interpretations between Tasmanian courts, and would cut down appeals on this issue to the Supreme Court.

10 – The proposed model does not provide an appropriate level of protection. In addition to allowing individuals to raise the rights as part of another action in court, it should enable

individuals who only have a human rights action bring their claims before a court. A provision for independent causes of action should be modelled on the UK HRA, including access to damages, after a “cooling off” period. The period would give public authorities time to adjust to the Bill of Rights, and could be as long as two years. The Victorian approach of limiting causes of action to those which can be “piggybacked” on another claim generates unwieldy, and as yet unresolved, issues, such as how strong the other claim has to be, or whether an administrative law action based solely on a public body’s failure to comply with the Charter is allowed. An independent cause of action is necessary to ensure that victims of breaches of human rights are able to access effective local remedies to redress human rights abuses.

11. An individual should be able to bring a human rights cause of action directly to the court and should not need to take the issue first to the Human Rights Commission. Adding another step to the process will delay remedies for breaches of rights and has proven unnecessary in other jurisdictions, as seen by the abolition of the European Commission of Human Rights and the implementation of a direct avenue for individuals to bring cases before the European Court of Human Rights (under the European Convention on Human Rights). Courts have long been able to deal with frivolous or otherwise inappropriate cases, so there is no need for a ‘gate-keeping’ organisation to vet human rights cases before the courts.

12 – Subject to our answer to question 11 above, we support the proposal to create and independent Human Rights Commission that can inquire into services and programs and make recommendations for great compliance with the human rights in the Charter. Such an organisation is necessary in Tasmania to ensure government accountability. We support the proposed inquiry functions to be given to the Human Rights Commission in particular its ability to initiate an inquiry on its own motion.

14- The creation of a single independent commission to combine the roles of the Anti-Discrimination Commissioner and the proposed Human Rights Commission appears to be an appropriate change. Such a change, for example, has taken place in Victoria. However the Anti-Discrimination Commission is a Tasmanian body that the Centre is not intimately familiar with, so we will not comment further on this issue.

15. All parts of government should have to comply with the Charter obligations. All ‘public authorities’ should be bound to abide by human rights, as well as private bodies acting in a public capacity. While there are strong arguments that private bodies, especially powerful bodies such as corporations and/or the media, should also have duties to respect human rights, we believe that such issues should be dealt with in separate legislation.¹ However, we endorse the ACT approach of allowing such bodies to opt in and undertake the same human rights duties as public bodies, as in s 40D of the ACT Human Rights Act. Private bodies may

¹ The Castan Centre would strongly support separate legislation in that regard.

wish to do so, for example, to demonstrate their bona fides in the arena of corporate social responsibility.

A question arises as to whether courts should be required to abide by human rights when making decisions. If so, this can lead to human rights influencing the development of the common law, as has occurred in the UK,² a desirable outcome in our view. Likewise there is no logical reason to exclude courts from being bound to abide by human rights. We therefore recommend that courts in exercising their state jurisdiction, or that are making decisions under common law, be classified as 'public authorities' for the purposes of obligations under the Tasmanian Charter.

16. State and Council owned companies should be treated as any other part of government and should always have to comply with Charter obligations. Otherwise there is a danger that the government could reduce some of its obligations by handing control over relevant activities to incorporated bodies.

17. Non-government service providers that provide services funded or controlled by the Government should have to comply with Charter obligations. It would not be acceptable for protection to be compromised by the privatisation of services that are essentially governmental (eg private prisons).

18 We generally agree with the details of the proposed rights in the Charter. However, we make the following specific comments:

(a) The discrimination provision lists the grounds of non-discrimination whereas the comparable international provisions leave those grounds open-ended: that is they prohibit discrimination on enumerated grounds and "any other status". Whilst the list of enumerated grounds in the Tasmanian proposal looks comprehensive, we suggest that "any other status" be retained after that long list. For example, "nationality" is missing from the list. Given distinctions are allowed on reasonable and objective grounds, we believe that the addition of "any other status" will not be overly onerous for the government.

(b) We would prefer that the right to silence be absolute, rather than qualified, as is implied by the right to be informed promptly of "the consequences of not remaining silent".

² *Campbell v Mirror Group Newspapers Ltd* [2004] UKHL 22.

19. The right to an adequate standard of living should be included in a Tasmanian Charter, and it should be made justiciable alongside the other proposed rights.

The right to environmental sustainability is not guaranteed in any international human rights treaty so it lacks a jurisprudential background in human rights. As a human rights Centre without direct expertise in environmental law, we will not comment further on the inclusion of environmental sustainability in the Charter. We add, however, that there are environmental aspects to some of the other listed rights, such as the right to a reasonable standard of physical and mental health, and the right to privacy.

20 – The inclusion of the right to an adequate standard of living should not be delayed until it is recognised by other States and territories. That may be tantamount to “waiting for Godot”. One State has to be first: why not Tasmania?

21. The addition of a right to an adequate standard of living would necessitate the inclusion of its own limitations clause, modelled on Article 2(1) of the ICESCR (ie with its references to the progressive nature of the obligation and that it is limited by “maximum available resources”).

22. The authors are not experts on disability rights, but we agree in principle that such specific rights for persons living with a disability be included in the Tasmanian Charter.