

TASMANIA
LAW REFORM
INSTITUTE

A Charter of Rights for Tasmania

REPORT No 10

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In 2006 the Tasmanian Government asked the Tasmanian Law Reform Institute to investigate whether human rights can be better protected and enhanced in Tasmania and, if so, how this could be done. For three months, from September to December 2006, the Institute explored these issues with and received submissions from the Tasmanian community. The majority of submissions received expressed the view that the protection of human rights should and can be improved in Tasmania. This report details the community response to the issues raised in the consultation process and sets out the recommendations of the Institute concerning the future protection of human rights in Tasmania based on that community response.

This project is the Colin Brown Human Rights Project. It has been partly funded by a special grant from the Tasmanian Government to the Tasmanian Law Reform Institute to commemorate the work of Colin Brown, former Legal Aid Commissioner for Tasmania, a long time supporter of and campaigner for human rights and good governance in Tasmania.

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Information on the Tasmania Law Reform Institute

The Tasmania Law Reform Institute was established on 23 July 2001 by agreement between the Government of the State of Tasmania, the University of Tasmania and The Law Society of Tasmania. The creation of the Institute was part of a Partnership Agreement between the University and the State Government signed in 2000.

The Institute is based at the Sandy Bay campus of the University of Tasmania within the Faculty of Law. The Institute undertakes law reform work and research on topics proposed by the Government, the community, the University or under its own initiative.

The Institute's Director is Professor Kate Warner of the University of Tasmania. The members of the Board of the Institute are Professor Kate Warner (Chair), Professor Don Chalmers (Dean of the Faculty of Law at the University of Tasmania), The Honourable Justice AM Blow OAM (appointed by the Honourable Chief Justice of Tasmania), Ms Lisa Hutton (appointed by the Attorney General), Mr Philip Jackson (appointed by the Law Society), Ms Terese Henning (appointed by the Council of the University) and Mr Mathew Wilkins (nominated by the Tasmanian Bar Association).

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This final report is also available on the Institute's web page at: www.law.utas.edu.au/reform or can be sent to you by mail or email.

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Summary

In 2006 the Tasmanian Government invited the Tasmanian Law Reform Institute to investigate how the fundamental rights Tasmanians hold as significant might be further enhanced and legally secured. Following extensive community consultations and careful consideration the Institute recommends that a Charter of Human Rights and Responsibilities be enacted in Tasmania. A Charter of Human Rights will provide Tasmanians with legal guarantees for rights they desire in a comprehensive and easily accessible format.

The Institute suggests that, at least initially, the most appropriate form for a Tasmanian Charter would be an ordinary piece of legislation. A non-entrenched Charter would promote dialogue across the three branches of government while ultimately maintaining Parliamentary sovereignty. To ensure the maintenance of Parliamentary sovereignty with respect to legislation and to encourage human rights dialogue across all arms of government the Institute recommends that the judiciary should not be able to invalidate primary legislation found to be inconsistent with the Charter.

While the judiciary will still have an important role in examining the compliance of legislation with the Charter, Parliament will determine what, if any, action should be taken to bring legislation into conformity with the Charter. The Institute recommends that the judiciary should be able to invalidate actions of the executive, including delegated legislation, on the proviso that such legislation may be reinstated by the legislature enacting authorising legislation explicitly allowing for the inconsistency.

The Institute recommends the introduction of a Tasmanian Charter of Human Rights that:

- Provides for effective pre-enactment scrutiny of all legislation to ensure compliance with the Charter.
- Requires all Tasmanian laws to be interpreted as far as possible in a way that is compatible with human rights.
- Allows the Tasmanian Supreme Court to make Declarations of Incompatibility with the Charter in relation to primary legislation and to invalidate subordinate legislation that is incompatible with Charter rights.
- Requires Parliament within seven months of the tabling in Parliament of a judicial declaration of incompatibility to respond by amending or repealing the legislation to which it relates or by confirming the operation of the legislation by enacting an override clause in the legislation. Parliament's decision not to respond in the allotted time in the prescribed way should cause the legislation to become inoperative.
- Places limitations on the enactment of override declarations. Override legislation should be enacted only in exceptional circumstances and those exceptional circumstances should be set out in a report to Parliament. The operation of override legislation should be subject to time limitations so that it lapses after a fixed period of time unless renewed following Parliamentary review.
- Initially binds only 'public authorities' and makes it unlawful for public authorities to act in a way or make decisions that are not compliant with Charter rights.
- Applies to all human beings in Tasmania, while expressly excluding corporations as defined by the *Corporations Act 2001* from Charter protections.
- Grants standing to a person who is, or would be, the victim of a breach of Charter rights by a public authority to bring proceedings against that authority in the Tasmanian Supreme Court.
- Allows the Supreme Court to grant such remedy or relief or make such order as it considers just and appropriate in respect of an act found to be unlawful under the Charter.

- Establishes the independent office of Tasmanian Human Rights Commissioner to monitor the operation of the Charter, educate and advise the community about the Charter and be joined as a party in any proceedings involving the interpretation of the Charter.
- Encourages the executive branch of government to take a leading role in ensuring compliance with the Charter. The Institute recommends that the preparation of statements of compatibility and responses to courts' declarations of incompatibility be undertaken by those government departments implementing and administering new legislation. The Institute also encourages the government to develop human rights action plans and human rights impact statements for Cabinet in relation to all policy and proposals for legislation.

The Institute believes that these features are critical to the effective operation of the proposed Tasmanian Charter of Human Rights.

While the *International Covenant on Civil and Political Rights* and the *International Covenant on Economic, Social and Cultural Rights* should provide a foundational starting point in determining what specific rights to include in a Tasmanian Charter, modifications to and extensions of those rights will be necessary to accommodate the Tasmanian legal, political, social and cultural environment.

Based on the submissions received and *the International Covenant on Civil and Political Rights* and the *International Covenant on Economic, Social and Cultural Rights*, the Institute recommends the inclusion of a number of specific rights in the Tasmanian Charter:

- The right to life;
- The protection of the family and children;
- The right to liberty and security of the person;
- The right to humane treatment when detained;
- The right to a fair hearing;
- The right of children to special treatment in the criminal justice process;
- The right to compensation for wrongful conviction;
- The right not to be tried or punished for conduct that was not a criminal offence when it was engaged in (freedom from retrospective criminal punishment);
- The right not to be imprisoned for a contractual debt;
- The right to privacy and reputation;
- Freedom of movement;
- Freedom of conscience, thought, religion and belief;
- Freedom of expression;
- Freedom of association and peaceful assembly and the right to form and join trade unions;
- The right to vote and to participate in public life;
- The right to self-determination;
- The right to recognition as a person before the law;
- The right to equality before the law and to equal protection of the law;
- Freedom from discrimination;
- The right of ethnic, religious and linguistic minorities to enjoy their own culture;
- The right of Indigenous Tasmanians to maintain their distinctive identity, culture, kinship ties and spiritual, material and economic relationship with the land;

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- The right not to be subject to torture or cruel, inhuman or degrading treatment or punishment;
- Freedom from slavery and forced work;
- The right to work and just conditions of work;
- The right of children not to be exploited economically or socially;
- The right to adequate food, clothing and housing;
- The right to the highest attainable standard of physical and mental health;
- The right to education;
- The right not to be deprived of property except on just terms;
- The right to a safe environment and to the protection of the environment from pollution and ecological degradation;
- Freedom from genocide.

It is the Institute's view that a Tasmanian Charter of Human Rights should include a general reasonable limits clause that sets out the factors that should be taken into account in determining whether any legislative limitations upon Charter rights are reasonable and justifiable in a democratic society. Inclusion of such a clause would obviate the need for the inclusion of specific caveats or limitations on individual rights. Accordingly, in translating the rights in international human rights instruments and in other Australian human rights enactments to the Tasmanian context, any specific caveats or limitations they contain should be removed. Their retention will be unnecessary, confusing and cumbersome.

The Institute recommends that the Charter recognise the special nature of and need for protection of certain absolute rights - the right to freedom from torture and cruel, inhuman or degrading treatment or punishment, the right not to be held in slavery, freedom from genocide, freedom from retrospective criminal punishment and the right to be recognised as a person before the law. To prevent encroachment upon those rights they should be subject to special protection, including legislative entrenchment, their exclusion from the operation of the reasonable limitations provision, exclusion from the application of the override provision and by the investment of the judiciary with the power to invalidate legislation that is incompatible with these rights.

The Institute does not consider it necessary to include in a Tasmanian Charter separate provisions relating to responsibilities. Nevertheless the duty to promote and uphold the rights of all other human beings is a founding principle of the Charter and should be recognised in its preamble.

The Tasmanian Charter should reflect the needs, aspirations and values of the Tasmanian community. The Tasmanian Law Reform Institute recommends that the operation of the Tasmanian Charter be comprehensively reviewed after four and then eight years from the date of its commencement. The reviews should involve public consultation and should be conducted by an independent body such as the Tasmanian Human Rights Commissioner.

The primary purpose of the Charter is to engender a human rights conscious culture within the Tasmanian community and across the three branches of government. Where possible the Charter should reflect this aim through the use of plain English, an accessible format and public notification of and education about Charter implementation.

Recommendations

Recommendation 1 – Enhanced protection of human rights

The Tasmanian Law Reform Institute recommends that the law be reformed to provide and promote specific, better and accessible protection for human rights.

Recommendation 2 – A Tasmanian Charter of Human Rights

The Tasmanian Law Reform Institute recommends the enactment of a Tasmanian Charter of Human Rights.

Recommendation 3 – Form of Tasmanian Charter

- The Institute recommends that a Tasmanian Charter of Human Rights should be enacted as an ordinary statute.
- The Institute further recommends that prescribed reviews of the Charter should include an assessment of the success of this model and consideration of whether it should be replaced by an entrenched model or some other model.

Recommendation 4 – Whose rights should be protected?

- The Tasmanian Law Reform Institute recommends that human rights protections in a Tasmanian Charter of Human Rights should apply to all people in Tasmania regardless of their status as Tasmanian citizens and residents. It should also apply to people who are not in Tasmania but who are affected by Tasmanian laws or decisions of Tasmanian public authorities.
- The Tasmanian Charter should contain express provision to the effect that only human beings have human rights.
- The Tasmanian Law Reform Institute recommends that corporations as defined by the *Corporations Act 2001*¹ be expressly excluded from any human rights protection measures in the Tasmanian Charter.

Recommendation 5 – Statement of whom the Charter binds

A Tasmanian Charter of Rights should specify whom it binds.

Recommendation 6 – Application to Parliament

- A Tasmanian Charter of Human Rights should not disturb the sovereignty of Parliament to enact laws that balance, limit or abrogate human rights.
- A Tasmanian Charter of Human Rights should, however, bind Parliament when scrutinising Bills in relation to the production of statements of compatibility and when deciding whether to enact legislation that overrides or encroaches upon human rights.

¹ *Corporations Act 2001* (Cth) ss 9, 57A.

- A Tasmanian Charter of Human Rights should also bind Parliament when it is performing non-legislative functions.

Recommendation 7 – Application to public authorities

- The Tasmanian Law Reform Institute recommends that the Tasmanian Charter of Human Rights initially should bind only ‘public authorities’.
- The Institute further recommends that in prescribed reviews of the Charter, the issue of who should be bound by the Charter should be revisited and consideration given to extending its application to private bodies and individuals. A narrowing of its application should not be an objective of such reviews.

Recommendation 8 – What is a ‘public authority’?

- The definition of ‘public authority’ should include tribunals, the courts, government departments, public officials, statutory authorities, government business enterprises, State owned companies, Tasmania Police, local government, Ministers, members of Parliamentary Committees when acting in an administrative capacity, anyone whom Parliament declares to be a public authority for the purposes of the Charter and an 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).
- As a precautionary measure, the Institute suggests that the Charter should specify that if the extension of the Charter’s obligations to courts and tribunals is judged to be an invalid exercise of the Tasmanian Parliament’s legislative power, it is the intention of Parliament that the remainder of the Charter, including its application to other arms of Government, is to continue to operate.
- Statutory guidance should be provided as to when an entity is performing functions of a public nature. This guidance should be in the same terms as is provided by s 4(2) of the *Victorian Charter of Human Rights and Responsibilities 2006* but should additionally include a non-exhaustive list of functions considered to be of a public nature. This list should include: operation of detention/correctional facilities; provision of essential services, (gas, electricity, water); provision of emergency services; provision of government controlled health care or medical services; provision of government educational services; provision of public transport and provision of public housing.
- Non-government schools and health services should not initially be included in the definition of ‘public authority’, but in reviews of the Charter consideration should be given to extending the definition of ‘public authority’ to include private businesses and enterprises that receive public funding and that carry out functions that have a public benefit including non-government schools and private health services.
- To avoid problems associated with the doctrine of the unity of the common law, and to enable courts to be bound by a Tasmanian Charter, it should contain explicit provision to the effect that all non-statutory law, including the substantive and adjectival (procedural) law, is amended by the Charter so as to conform to human rights as defined and limited in the Charter, and that any conflict with Charter rights is to be resolved in favour of the Charter.
- If the immediately preceding recommendation is not enacted, courts should, nevertheless, be included within the definition of ‘public authority’ and be bound by the Charter except and to the extent that they are exercising their function of developing the common law.

Recommendation 9 – Obligations of public authorities

- All ‘public authorities’ should be required to act in a way that is compatible with human rights and, when making decisions, to give proper consideration to relevant human rights unless otherwise required by particular legislation. The approach of the Victorian *Charter of Human Rights and Responsibilities 2006* in this regard could usefully be adopted in a Tasmanian Charter.
- In this context, ‘to act’ should be defined as including ‘failure to act’.
- The operation of the Charter should be phased in over an 18-month period to enable adequate time for educational programs to be undertaken by public authorities with respect to their human rights obligations and also to provide sufficient opportunity for the review, and adjustment if necessary, of existing practices.

Recommendation 10 – Role of Parliament

- Members of Parliament who propose to introduce new legislation should be required to provide reasoned statements of compatibility to Parliament concerning its compliance with human rights standards. These statements should address the following issues:
 - the purpose of the Bill;
 - the proposed legislation’s effect upon any human rights in the Charter;
 - any limitation placed upon any human right in the Charter by the Bill, the importance and purpose of this limitation, the nature and extent of this limitation, the relation between the limitation and its purpose and whether there is any less restrictive means to achieve that purpose.
- To encourage a whole of legislature approach to human rights protection, responsibility for the provision of statements of compatibility should rest with all Members of Parliament who introduce new legislation.
- Statements of compatibility should accompany all subordinate legislation tabled in Parliament.
- A Parliamentary Joint Standing Committee to be called the Parliamentary Human Rights Scrutiny Committee should be established and charged with responsibility for:
 - Considering and reporting on the human rights compliance of all Bills and subordinate legislation and with responsibility for reporting on human rights issues raised by Bills generally.
 - The Committee may also consider other questions arising under the Tasmanian Charter that are referred to it by either House of Parliament.
 - The Committee should be constituted across party lines and consist of members of both Houses of Parliament. No party should have dominant representation on the Committee.
 - The Committee should also inquire into and report on courts’ declarations of incompatibility within three months of the declaration being laid before Parliament.
 - The Committee should be adequately resourced and supported so that it can effectively perform its functions under the Charter.
- Where courts have issued a declaration of incompatibility in respect of legislation the Minister administering the legislation, having been notified of the declaration by the Registrar of the Supreme Court, should:

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- within six sitting days of receiving the declaration present a copy of it to Parliament;
- within seven days of receiving it refer the declaration to the Parliamentary Human Rights Scrutiny Committee;
- within six months of receiving the declaration, present a written report to Parliament, responding to the declaration. This report should also be provided to the Parliamentary Human Rights Scrutiny Committee.
- Parliament should respond to courts' declarations of incompatibility within seven months of their being tabled in Parliament by amending, repealing or explicitly confirming the legislation.
- If Parliament does not amend, repeal or confirm the legislation within seven months after the tabling of a declaration of incompatibility, the legislation should, as at the date of the expiration of the seven-month period, be inoperative to the extent of its incompatibility with the Charter. The effect of this should be the same as a partial or, where relevant, total repeal of the legislation and its inoperability should not be retrospective.
- Where Parliament wishes to confirm the legislation it should enact an override clause in the legislation.
- Override clauses should be enacted only in response to courts' declarations of incompatibility. There should be no provision for Parliament to enact override legislation/clauses in other situations. Enactment of override clauses should be subject to other strict limitations:
 - Non-derogable rights should be excluded from their operation.
 - The power to enact override declarations should be confined to exceptional circumstances.
 - The Minister who administers the legislation should set down in a statement of incompatibility to Parliament the 'exceptional circumstances' that justify the enactment of the override clause.
 - Legislation containing an override clause should lapse after two years unless Parliament reconfirms its continued operation. All subsequent renewals of the legislation should operate for only 2 years.
 - Subsequent renewal of override legislation must be subject to the same limitations and procedures as the original enactment.

Recommendation 11 – Role of the courts

- Subject to the requirement to interpret statutory provisions consistently with their purpose, all Tasmanian courts and tribunals should be required to interpret all Tasmanian laws, including statutory provisions, as far as it is possible to do so in a way that is compatible with human rights.
- Provision should be included in a Tasmanian Charter for international human rights law and the judgments of foreign and international courts and tribunals relevant to human rights to be considered by Tasmanian courts when interpreting human rights.

Recommendation 12 – Declarations of incompatibility

- Where the Tasmanian Supreme Court is satisfied that an Act or part of an Act cannot be interpreted in a way that complies with Charter rights, it should have the power to make a declaration of incompatibility in respect of that legislation.
- Only the Tasmanian Supreme Court should have power to make declarations of incompatibility.
- Where a question relating to the human rights compatibility of legislation arises in the Magistrates' Courts or in Tribunal proceedings, it should be referred as a question of law to the Supreme Court and the Magistrate or Tribunal should have the power to defer the final determination of the case until the Supreme Court has determined the issue.
- Where the Tasmanian Supreme Court finds that subordinate legislation is not compatible with Charter rights it should have the power to declare the subordinate legislation to be invalid and inoperative unless the applicable primary legislation expressly authorises the subordinate legislation to breach Charter rights. In such a case the Supreme Court should have the power to make a declaration of incompatibility in respect of it.
- Where a declaration of invalidity is made in respect of subordinate legislation its operation should cease, but not retrospectively, and it should no longer be enforceable.
- Where a declaration of incompatibility is made in respect of subordinate legislation the same processes involved in invoking a Government response to declarations about primary legislation should apply.
- The Supreme Court should not make a declaration of incompatibility in respect of primary or subordinate legislation or an order invalidating subordinate legislation unless satisfied that the Tasmanian Attorney General and the Tasmanian Human Rights Commissioner have been given notice that the Court is considering making such an order.
- Where a court makes a declaration of incompatibility or an order invalidating subordinate legislation the Registrar of the Supreme Court should provide a copy of the order to the Attorney General and to the Minister administering the legislation within seven days.
- In periodic reviews of the Charter the Tasmanian Government should assess the extent to which it has generated a genuinely responsive dialogue about human rights between the different arms of Government. If it is found that Parliament does not respond to what the courts say then consideration should be given to enabling courts to invalidate legislation that does not comply with Charter rights.

Recommendation 13 – Role of the Executive

- The Tasmanian Law Reform Institute recognises the central role that the Executive arm of Government plays in the protection and enhancement of human rights. It also recognises the benefits of encouraging a whole of government approach to human rights protection. Accordingly, it recommends that the preparation of statements of compatibility should be undertaken by those government departments that will have responsibility for implementing and administering the new legislation and not by a single government department or unit within government. It also recommends that preparation of responses to courts' declarations of incompatibility should rest with those departments responsible for administering the legislation in question.
- The Tasmanian Law Reform Institute recommends that processes be developed to ensure that all policy formulation is undertaken in a manner that takes account of human rights. Accordingly, the Institute recommends that Human Rights Impact Statements be prepared in relation to all policy and legislation proposals and that these statements be provided to Cabinet to ensure that the Government is aware of the human rights implications of all new proposals.

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- The Institute recommends that all government departments be encouraged to develop human rights action plans referenced against legislation, policy administration and service delivery. Preparation of these plans should be the responsibility of each individual department. The extent to which such plans have been developed and implemented should be considered in the periodic reviews of the Charter's operation. If it is clear after the second review of the Charter that no action has been taken in this regard, then consideration should be given to including the requirement for such plans in the Charter.
- All Tasmanian Government departments should include detailed advice in their annual reports about what they have done to comply with human rights under the Charter.

Recommendation 14 – Limitations on rights

- Subject to the principle that the right to freedom from torture and cruel, inhuman or degrading treatment or punishment, the right not to be held in slavery, freedom from genocide, freedom from retrospective criminal punishment and the right to be recognised as a person before the law are non-derogable rights, the Tasmanian Charter should state that the rights it protects may be subject only to such reasonable limits as can be demonstrably justified in a free and democratic society based on human dignity, equality and freedom, and taking into account all relevant factors including -
 - the nature of the right; and
 - the importance of the purpose of the limitation; and
 - the nature and extent of the limitation; and
 - 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 rights set out in the Tasmanian Charter should not be subject to inbuilt specific limitations, qualifications or caveats. In translating rights in International and other Australian human rights instruments to the Tasmanian context, any specific limitations they contain should be removed as set out at para [4.14.25].
- Freedom from torture and cruel, inhuman or degrading treatment or punishment, the right not to be held in slavery, freedom from genocide, freedom from retrospective criminal punishment and the right to be recognised as a person before the law should be explicitly excluded from the operation of the Tasmanian Charter's reasonable limits clause and from Parliamentary override provisions.
- The immunity of freedom from torture and cruel, inhuman or degrading treatment or punishment, the right not to be held in slavery, freedom from genocide, freedom from retrospective criminal punishment and the right to be recognised as a person before the law to legislative override or limitation should be entrenched in the Charter. Their limitation or override should only be able to be effected with the agreement of the Tasmanian people to be ascertained by referendum.

- The courts should have the power to invalidate legislation that is inconsistent with freedom from torture and cruel, inhuman or degrading treatment or punishment, the right not to be held in slavery, freedom from genocide, freedom from retrospective criminal punishment and the right to be recognised as a person before the law.

Recommendation 15 – What rights?

- The Tasmanian Law Reform Institute recommends that the Tasmanian Charter of Human Rights should protect economic, social and cultural rights as well as civil and political rights.
- If the Tasmanian Charter only covers civil and political rights, then the Tasmanian Law Reform Institute recommends that in prescribed reviews of the Charter further consideration should be given to the inclusion of economic, social and cultural rights.

Recommendation 16 – Specific rights

- The rights in the Tasmanian Charter of Human Rights should be modelled on *the International Covenant on Civil and Political Rights* and the *International Covenant on Economic, Social and Cultural Rights* subject to the modifications recommended at paras [4.14.22]-[4.14.25] and [4.16.4]-[4.16.58] and in Recommendation 17. The specific rights that the Tasmanian Law Reform Institute recommends for inclusion in the Tasmanian Charter are:
 - The right to life;
 - The protection of the family and children;
 - The right to liberty and security of the person;
 - The right to humane treatment when detained;
 - The right to a fair hearing;
 - The right of children to special treatment in the criminal justice process;
 - The right to compensation for wrongful conviction;
 - The right not to be tried or punished for conduct that was not a criminal offence when it was engaged in (freedom from retrospective criminal punishment);
 - The right not to be imprisoned for a contractual debt;
 - The right to privacy and reputation;
 - Freedom of movement;
 - Freedom of conscience, thought, religion and belief;
 - Freedom of expression;
 - Freedom of association and peaceful assembly and the right to form and join trade unions;
 - The right to vote and to participate in public life;
 - The right to self-determination;
 - The right to recognition as a person before the law;
 - The right to equality before the law and to equal protection of the law;
 - Freedom from discrimination;
 - The right of ethnic, religious and linguistic minorities to enjoy their own culture;
 - The right of Indigenous Tasmanians to maintain their distinctive identity, culture, kinship ties and spiritual, material and economic relationship with the land;

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- The right not to be subject to torture or cruel, inhuman or degrading treatment or punishment;
- Freedom from slavery and forced work;
- The right to work and just conditions of work;
- The right of children not to be exploited economically or socially;
- The right to adequate food, clothing and housing;
- The right to the highest attainable standard of physical and mental health;
- The right to education;
- The right not to be deprived of property except on just terms;
- The right to a safe environment and to the protection of the environment from pollution and ecological degradation;
- Freedom from genocide.

Rights whose protection constitutionally falls outside the jurisdiction of the State Government are:

- The right to social security;
- The right to marry;
- The right of foreign nationals not to be expelled from Australia without due process;
- The right to leave and re-enter Australia.

The Tasmanian Law Reform Institute recommends that these rights not be included in a Tasmanian Charter.

Recommendation 17 – Dealing with particular rights

The following rights should be dealt with in a Tasmanian Charter of Human Rights as follows:

- The provision enacting the right to life should specify that every person has the right to life and the right not to be deprived of life and that this right applies to a person from the time of birth.
- The provision relating to freedom from discrimination should conform to s 16 of the *Anti-Discrimination Act* (Tas) and specify as prohibited grounds of discrimination the matters listed in that section. A possible formulation is set out at para [4.16.14]. This provision should also state that measures taken for the purpose of assisting or advancing persons or groups of persons disadvantaged because of discrimination do not constitute discrimination.
- The right of children to special protection by reason of being children and to be free from economic and social exploitation should be enacted as specified in para [4.16.35]. The distinct rights of children in the criminal justice process as set out at para [4.16.35] should be included in the Tasmanian Charter.
- Property rights should be protected by a provision that states that every person has a right not to be deprived of his or her property except on fair and just terms. This right must be expressed in general terms to ensure that it covers deprivations of property by any means and also deprivations of all forms of property including realty, intellectual property and all other forms of personal property.
- The right to a fair hearing should be expressed broadly to encompass the rights of all participants in the process and should state that everyone has the right to have criminal charges, and rights and obligations recognised by law, decided by a competent, independent and impartial court, tribunal or administrative decision-making body after a fair and public hearing.

- There should be provision that everyone charged with a criminal offence shall have the right to be presumed innocent until proven guilty beyond reasonable doubt. The rights of an accused person in criminal trials should include the right to examine or have examined all the evidence against him or her and to adduce evidence on his or her own behalf. This right should not be limited to the examination of witnesses.
- The right to silence and the right not to incriminate oneself should be protected at the pre-trial as well as at the trial stages of the criminal justice process. A recommended formulation is set out at para [4.16.31].
- The right to self-determination modelled on clause 12 of the ACT Bill of Rights Consultation Committee's draft Human Rights Bill appended to the Committee's Report, *Towards an ACT Human Rights Act* should be enacted in the Tasmanian Charter.
- A provision protecting the cultural rights of Indigenous Tasmanians and other minority cultural groups modelled on s 19 of the Victorian Charter should be included in the Tasmanian Charter.
- The right to a clean and safe environment and to the protection of the environment from pollution and ecological degradation modelled on s 24 of the South African *Bill of Rights* should be enacted in the Tasmanian Charter.
- Other civil and political rights and economic, social and cultural rights listed in Recommendation 16 should be included and modified and adapted to the Tasmanian context as recommended at para [4.14.25].

Recommendation 18 – Responsibilities

- It is not necessary to include in a Tasmanian Charter separate provisions relating to responsibilities.
- It is not necessary to include the word 'responsibilities' in the proposed title of the Tasmanian Charter.
- The preamble of a Tasmanian Charter should set down the principles on which it is founded including the principle that human beings are the holders of rights and that they have the duty to promote and uphold the rights of all other human beings.

Recommendation 19 – Enforcement

- The Tasmanian Charter of Human Rights should contain express provision that where a public authority has acted in a way or proposes to act in a way that is made unlawful by the Charter, a person who is or would be the victim of that unlawful act may bring proceedings against the authority in the Supreme Court of Tasmania or may rely on the Charter rights in any legal proceedings.
- The Tasmanian Charter should state that the Supreme Court may grant such remedy or relief or make such order as it considers just and appropriate in the circumstances in relation to any act or proposed act of a public authority which it finds is or would be unlawful under the Tasmanian Charter.

Recommendation 20 – Review of the Charter

- The Tasmanian Law Reform Institute recommends that the operation of the Tasmanian Charter be comprehensively reviewed after four and eight years from the date of its commencement.
- The review should be conducted by an independent body such as the proposed Office of the Tasmanian Human Rights Commissioner and should involve public consultation.
- The review should assess the following matters:
 - Whether the model implemented, (for example, the ‘dialogue model’), is operating to protect human rights and whether it should be amended to enact a different model, (for example, an entrenched model), to strengthen the protection of human rights;
 - Whether additional rights should be included in the Charter;
 - Whether the Charter is fostering the development of a culture of human rights awareness across government and in the community;
 - Whether the different arms of government are implementing and applying the Charter effectively and whether changes need to be made to improve compliance with the Charter;
 - Where the enacted Charter differs from the recommendations made in this report, or where an incremental approach has been adopted in respect of rights protection, whether the full recommendations in this report should be introduced and/or what further steps should be taken to achieve the progressive realisation of rights protection;
 - If a ‘dialogue model’ is enacted, the extent to which the Parliament and executive respond to declarations made by the courts;
 - Whether the definition of ‘public authority’ should include private businesses and enterprises that receive public funding and that carry out functions that have a public benefit including non-government schools and private health services;
 - Whether the Charter should bind not only public authorities but all citizens and entities in the community.

Recommendation 21 – Education programs

The Tasmanian government should implement and support the following education programs:

- Those working for public authorities (government departments, the police, local government and any other body falling within the definition of ‘public authority’ under the Charter) should have access to human rights training and education;
- Judges, magistrates and members of tribunals should have access to human rights training and education programs;
- Members of Parliament and their staff should have access to human rights education programs and to programs relating specifically to the operation of the Charter within the legislative sphere;
- Members of the legal profession should have access to human rights education as part of the continuing education programs conducted within the profession;
- Education programs and strategies should be developed for the community, schools, businesses and community based organisations.

Recommendation 22 – Human rights unit

A Department of Justice Human Rights Unit should be created with responsibility for:

- Guiding public authorities in the implementation of the Charter;
- Conducting human rights training programs for public authorities;
- Assisting the design and implementation of protocols within public authorities to facilitate compliance with the Charter in their decision-making and conduct;
- Devising or revising documentation relevant to the provision of advice to Ministers, Parliament and Cabinet on the human rights implications of policy and other proposals;
- Provision of advice and assistance in the preparation of Statements of Compatibility to accompany new legislation;
- Provision of advice in the preparation of documentation for Cabinet relating to the human rights compatibility of proposed policy.

Recommendation 23 – Human Rights Commissioner

The independent office of Tasmanian Human Rights Commissioner should be established under the Tasmanian Charter of Human Rights. The Commissioner should have the following powers and functions:

- To provide education about human rights;
- To monitor human rights protection under the Charter and advise the government on the operation of the Charter;
- To promote public awareness and understanding of and compliance with the Charter;
- To intervene as amicus curiae or be joined as a party in any proceedings, (court or tribunal), involving interpretation of the Charter;
- To promote awareness and understanding of the Charter across all arms of government;
- To present an annual report to the Attorney General (which should then be tabled in Parliament) which examines the operation of the Charter, all declarations of incompatibility made by the courts and all override declarations made by Parliament;
- To assist the Attorney General in reviews of the Charter;
- To examine the effect of statutory provisions and the common law on human rights and report to the Attorney General on the results of that examination;
- To review the programs and practices of public authorities to determine their compatibility with human rights;
- To make submissions to the Parliamentary Human Rights Scrutiny Committee about the human rights implications of new Bills;
- To undertake research that promotes the objectives of the Charter.

Part 1

Introduction

1.1 Background to this report

1.1.1 In 2006, the Tasmanian Government asked the Tasmanian Law Reform Institute to investigate how human rights are currently protected in Tasmania and whether existing protections of human rights can be enhanced or extended. In particular the Government asked the Institute to determine whether Tasmania should have a Bill or Charter of Rights and if so, what model would best suit the needs of the Tasmanian community. This project was part of the Government's commitment to progressing the then *Tasmania Together* Goal 2: "To have a community where people feel safe and are safe in all aspects of their lives." The Government's terms of reference for this investigation are set out at 1.3.

1.1.2 In determining how human rights can best be protected in Tasmania, the Tasmanian Law Reform Institute undertook a four-month process of discussion and consultation with the community.² A Human Rights Community Consultation Committee was established to assist in the consultation process. It consisted of Terese Henning, Senior Lecturer in Law, (Chair), Mat Rowell, Chief Executive Officer, Tasmanian Council of Social Services, Lisa Hutton, Deputy Secretary, Department of Justice, Julian Eades, Advocate, Advocacy Tasmania, Jamie Cox, former Captain of Tasmanian Tigers, Career Development Co-ordinator, Tasmanian Cricket Association and Tasmanian Institute of Sport and Alan Stevenson, former Managing Director, C6 quadriplegic, disability advisor to the Committee. The role of the Consultation Committee was to provide advice on the project to the Tasmanian Law Reform Institute and to provide points of contact with the community. Details of the consultation process are set out in Appendix A. The Committee had the assistance of Greg Carne who was special advisor to the project.

1.1.3 The Institute received 407 submissions from individual citizens and organisations.³ This is the largest number of original submissions received on any project undertaken to date by the Institute. It exceeds the number of submissions received by the ACT Bill of Rights Consultative Committee⁴ for the Australian Capital Territory human rights consultation and also exceeds, on a per capita basis, the number of submissions received by the Victorian Human Rights Consultation Committee in respect of the Victorian Charter of Human Rights consultation.⁵

1.1.4 The majority of submissions received (94.1%) supported the enactment of a Charter of Human Rights and Responsibilities in Tasmania. The following table enumerates the views expressed in the submissions received.

² Details of the consultation process are set out in Appendix A.

³ For details see Appendix B.

⁴ The ACT Bill of Rights Consultative Committee received 145 written submissions, Australian Capital Territory Bill of Rights Consultative Committee, *Towards an ACT Human Rights Act: Report of the ACT Bill of Rights Consultative Committee* (2003) 13.

⁵ The Victorian Human Rights Consultation Committee received 2524 submissions, Victorian Human Rights Consultation Committee, *Rights, Responsibilities and Respect: The Report of the Human Rights Consultation Committee* (2005) 2.

SUBMISSIONS RECEIVED

Total Submissions Received	No	%
Submissions supporting a charter of rights	383	94.1
Submissions opposing a charter of rights	13	3.1
Submissions neutral as to a charter of rights	3	.73
Not clearly indicated	8	1.9
TOTAL	407	99.8

1.1.5 As part of the community consultation process, the Institute released an Issues Paper in September 2006. This issues paper set out information on twenty four key questions on which the Institute sought the community's views and which focused on the main issues that the Government had asked the Institute to explore with the community. These questions are set out at 1.2. However, the community was not confined to addressing those questions in making submissions to the Institute. The Institute made it clear in the Issues Paper and throughout the consultation process that it wished to learn the community's views on any issues relating to human rights that people felt are important and that in making submissions to the Institute people were not restricted to answering the questions in the Issues Paper.

1.2 Key questions

- Are human rights adequately protected in Tasmania?
- Is change needed to better protect human rights?
- If change is needed to better protect human rights in Tasmania, how should the law be changed to achieve this?
- Would a Charter of Human Rights enhance human rights protection in Tasmania?
- If a Charter of Human Rights were to be enacted in Tasmania, what rights should it include?
- Which of the rights in the International Covenants of Human Rights are most relevant to Tasmania? Do they need to be adapted to the Tasmanian situation? Should any be excluded? Are there any other rights that should be included?
- Should some rights be included at first with other rights being considered for inclusion subsequently after review of the Charter?
- What role is there for responsibilities in the Charter?
- If Tasmania were to enact a Charter of Human Rights, whose rights should it protect?
- Should explicit provision be made for the protection of the rights of particular vulnerable groups?
- If Tasmania were to enact a Charter of Human Rights, should the rights it contains be limited in some way?
- How should any limitation be provided?
- What should be the role of Parliament in relation to human rights? Should there be a Parliamentary Committee with responsibility for scrutinising draft legislation for compliance with human rights standards?

- Where Parliament proposes to enact legislation that explicitly overrides human rights, should the Member of Parliament proposing the legislation be required to explain the necessity for its non-compliance with human rights standards?
- Should Members of Parliament who propose new legislation be required to provide a compatibility statement to Parliament concerning its compliance with human rights standards?
- What should be the role of the courts in protecting human rights? Should courts be able to declare legislation to be incompatible with a Charter of Human Rights? Should courts, as far as possible, interpret laws to be consistent with the rights contained in any Charter of Human Rights?
- If the courts have power to make declarations of incompatibility, should the Government be required to respond to such declarations?
- What should be the role of the Executive in protecting human rights? Should government departments be required to report their compliance with and implementation of human rights in their Annual Reports?
- Should a special body be created with responsibility for reviewing legislation, advising the Government on human rights policy and conducting education programs on human rights? Should such a body have any other functions?
- If there were to be a Charter of Human Rights in Tasmania, should individual citizens be able to enforce their rights under the Charter directly in the courts?
- Should the Charter contain an express remedies clause? Should it confine the availability of compensation in any way?
- What other steps should be taken to enhance the protection of human rights in Tasmania?
- If a Tasmanian Charter of Human Rights is enacted should it be reviewed at fixed intervals to see if any amendment is necessary?
- Are there any other matters relating to the protection of human rights in Tasmania that you would like to draw to the attention of the Tasmanian Law Reform Institute?

1.3 Terms of reference

- Identify current protections for human rights in Tasmania and any need to enhance or extend human rights protections in Tasmania.
- Research models that protect and enhance human rights in other jurisdictions (in Australia and overseas).
- In consultation with key stakeholders identify appropriate models for Tasmania and develop a discussion paper setting out options and their advantages and disadvantages.
- Conduct community consultation on how human rights can best be promoted and protected in Tasmania.
- Provide a recommendation as to an appropriate model for Tasmania to protect and enhance human rights.

1.3.1 There was one limitation on the scope of the terms of reference. The Law Reform Institute was asked to identify how human rights can best be promoted and protected in Tasmania while still preserving the sovereignty of Parliament and the Tasmanian constitutional framework.

Part 2

Is there a need to enhance human rights protections in Tasmania?

2.1 What are human rights?

2.1.1 Charters and Bills of Rights set out the human rights that a community considers to be most important or essential to enabling people to live with dignity⁶ and security. The terms, ‘Bill of Rights’ and ‘Charter of Rights’ do not have any set meaning in law and either they or some other term, (for example, the terms used in International Law are ‘Convention’ and ‘Declaration’), may be used to describe human rights instruments. However, the Tasmanian Law Reform Institute is of the view that the term, ‘Charter of Rights’ is to be preferred because it encapsulates a modern conception of human rights instruments, such as those operating in the Australian Capital Territory, New Zealand and the United Kingdom, whereas the term, ‘Bill of Rights’, is often associated negatively with the United States model.

2.1.2 The notion of human rights is not new. The idea that human beings have inalienable rights that set limits on the powers of Governments and that prescribe standards of behaviour between individuals and groups has deep historical roots.⁷ A useful foundation for discussion is John Galtung’s definition of human rights - ‘the conditions necessary for people to live lives of dignity and value.’⁸ Human rights attach to all human beings. They embody elements of the rule of law and restrain governments in their exercise of power. They have significance in protecting the interests of individuals and groups that might otherwise be sacrificed to short-term political expediency or populism. They provide recognised standards for government conduct in relation to the community. Respect for human rights provides the foundation for peace, harmony, security and liberty in communities. Well known examples of human rights are the right to life, the right to vote, freedom from arbitrary arrest and detention, freedom from being held in slavery, the right to liberty and security of the person, freedom from torture and cruel, inhuman degrading treatment or punishment, the right to a fair trial, equal treatment before the law, freedom from discrimination, freedom of conscience and belief, freedom of association, the right to education and to the promotion of health and the right to privacy and to family life.

2.1.3 Internationally, recognised human rights are well established. They are set down in the ‘International Bill of Rights’ which consists of the *Universal Declaration of Human Rights*, the *International Covenant on Civil and Political Rights* and the *International Covenant on Economic, Social and Cultural Rights*. The *Universal Declaration of Human Rights* was adopted by the General Assembly of the United Nations in 1948. It contains general, basic rights such as the right to life, liberty, freedom from torture and cruel, inhuman or degrading treatment or punishment, freedom from slavery, the right to own property and to enjoy equality before the law, the right to a fair trial and to be

⁶ Johan Galtung, *Human Rights in Another Key* (1994).

⁷ For an overview of the history of human rights see Nick O’Neill, Simon Rice and Roger Douglas, *Retreat from Injustice: Human Rights Law in Australia* (2d ed, 2004); Rhona K M Smith, *Textbook on International Human Rights* (2nd ed, 2005).

⁸ Johan Galtung, *Human Rights in Another Key* (1994). This definition was adopted by the ACT Consultative Committee in its inquiry into the desirability of an Australian Capital Territory Bill of Rights: ACT Bill of Rights Consultative Committee, *Towards an ACT Human Rights Act: Report of the ACT Bill of Rights Consultative Committee* (2003) 17 and is also part of the description of human rights given in the Victorian Human Rights Consultation Committee, *Rights, Responsibilities and Respect: The Report of the Human Rights Consultation Committee* (2005) 3.

presumed innocent until proven guilty and the right to freedom of thought, opinion, conscience and religion (view on the Internet at <http://www.unhchr.ch/udhr/lang/eng.htm>).

2.1.4 The rights in the *Universal Declaration of Human Rights* were expanded and given greater specificity in the *International Covenant on Civil and Political Rights* and the *International Covenant on Economic Social and Cultural Rights*. The rights in the *International Covenant on Civil and Political Rights* include the right to vote, freedom from arbitrary arrest, liberty of movement, the right to privacy, freedom of association and lawful assembly, the right to hold opinions without interference and freedom of expression (view on the Internet at http://www.unhchr.ch/html/menu3/b/a_ccpr.htm). This covenant was adopted by the United Nations in 1966 and ratified by Australia in 1980.

2.1.5 The *International Covenant on Economic Social and Cultural Rights* recognises the right to work and to just, favourable, safe and healthy working conditions, the right to form and join trade unions, the right to adequate food, clothing and housing, the right to the highest attainable standard of physical and mental health, the right to education, the right to social security and that the widest possible protection and assistance should be accorded to the family (view on the Internet at http://www.unhchr.ch/html/menu3/b/a_cescr.htm). This Covenant was adopted by the United Nations in 1966 and ratified by Australia in 1976.

2.1.6 Other international instruments that deal with particular areas of human rights are the *Genocide Convention*, the *Convention on the Elimination of all Forms of Racial Discrimination*, the *Convention Against Torture and Other Cruel, Inhuman and Degrading Treatment or Punishment*, the *Standard of Minimum Treatment of Prisoners*, the *Convention on the Elimination of All Forms of Discrimination Against Women*, the *Convention on the Rights of the Child*, the *Convention Relating to the Status of Refugees* and the *Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families*.

2.2 Views of Tasmanians on current protections of human rights

Current protections are adequate

2.2.1 Four (0.98%) submissions received argued that existing protections of human rights in Tasmania are adequate and that it is unnecessary to enhance or extend those protections. In particular these submissions argued that our democratic system of government, our system of justice, our independent judiciary and the common law have provided adequate guarantees and safeguards of human rights. For example, the Catholic Women's League Tasmania Inc. said,

...the common law can be seen as an all encompassing charter of rights, developed and refined for more than 800 years in the British and Australian traditions. It is a remarkable legacy from many wise and experienced people and brings order and security to Australian life. Elected by the people, Parliament is empowered to change the law where there is seen to be a need and courts, to interpret and judge accordingly.⁹

The Australian Christian Lobby put a similar view, writing:

⁹ Submission 64.

Australia enjoys a degree of freedom that is the envy of nations around the world. One of the reasons for this is the strength and stability provided by our democratic institutions. The Separation of Powers has proved fundamental to the protection of human rights and freedoms in the history of this nation. The separation of the legislature and the executive from the judiciary has played a vital role in the development and health of the communities we now enjoy. Virtually all the fundamental rights addressed by the Universal Declaration of Human Rights, and the International Covenant on Civil and Political Rights are covered by existing common and statute law. While there may be instances in Tasmania of important rights being violated, in virtually all these cases these are the results of failure of existing processes, which should be fixed as necessary.¹⁰

2.2.2 Graeme Thompson said that United Nations Conventions, Commonwealth and State legislation, the courts, particularly by means of the prerogative writs and the common law, and Parliament together provide sufficient protection for human rights.¹¹

Current protections are inadequate

2.2.3 The majority of submissions received (95%, 388), however, said that human rights are not adequately protected by existing Tasmanian laws. Most respondents expressed the view that there are significant deficits in the protection of rights, that rights are not enjoyed equally by all members of the Tasmanian community and that current protections of rights are often uncertain, inaccessible and incomplete. For example, the Human Rights Law Resource Centre wrote:

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. ...

Tasmanians currently enjoy the protection of some of their human rights through specific legislation such as the *Anti-Discrimination Act 1998* (Tas), but there is no comprehensive statement of rights which operates as a minimum standard to which all public authorities must adhere. Such a statement is necessary to prevent the breach of any Tasmanian person's rights from slipping through the gaps that exist in the current patchwork of laws and protections.¹²

2.2.4 A number of submissions said that currently a patchwork of sources provides protection for human rights, including the Australian Constitution, State and Federal legislation and the common law, but that the protections offered by these sources are fragmented and incomplete and leave significant gaps and shortcomings in the protection of rights.¹³

2.2.5 The former Commissioner for Children Tasmania told the Institute:

Australia has ratified many international human rights instruments. Both the Australian and State Governments therefore have an obligation to protect these rights. However, international law does not become Australian domestic law directly upon ratification of international treaties. The protection of rights relies on the Australian and State Governments (in areas within their authority) incorporating human rights protections into law. Few of the rights expressed in important human rights conventions have in fact been implemented into Australian and State law.

Given the current ad hoc and incomplete coverage of human rights protection, change is needed to better protect the human rights of Tasmanians.¹⁴

¹⁰ Submission 22.

¹¹ Submission 376.

¹² Submission 156.

¹³ Submission 10; Submission 402; Submission 17; Submission 97.

¹⁴ Submission 70.

2.2.6 John Cianchi stated,

While many of the human rights expressed by UN charters seem to be accepted by Tasmanian society and government, lawmakers and administrators are not provided with a central framework to decide whether new laws or policies comply with such rights. There seem to be insufficient protections to limit government's and public authorities' powers to violate human rights. There do not appear to be timely processes available that allow people who believe their rights have been violated to seek a hearing or remedy.¹⁵

2.2.7 Todd Ryska said, “[H]uman rights in Tasmania receive only sporadic protection ...which results in no clear human rights statement for Tasmanians, nor a standard against which legislation and governmental actions can be assessed”. He also pointed out that international law, the common law and our Constitutions provide only limited protections for human rights under limited circumstances.¹⁶

2.2.8 A number of people suggested that our system of representative government, constitutional organisation and the common law have not delivered adequate protections of human rights and provide no future guarantee of their protection. For example, Daniel Hulme wrote,

The question of whether human rights are adequately protected in Tasmania leads to the question of whether not just the current parliament, but *every* future parliament can be trusted to adequately protect and uphold human rights. If this is the case then the decisions of voters in a representative democracy would be informed by whether the representatives they vote for are willing to protect human rights. It cannot be assumed that this is always the case. Sometimes a majority are willing to compromise the rights of minorities, or compromise their own rights to make decisions based on other issues. The Federal Government has a record of undermining what are regarded by international institutions and conventions as fundamental human rights. Examples include allowing indefinite detention under law for asylum seekers and removing access to collective workplace bargaining. It would be naïve to think that there is no possibility of a future State government doing the same in its areas of responsibility.¹⁷

2.2.9 Writing of the common law's protection of human rights, the Tasmanian Women's Council said:

Historically, the common law has not always been a great protector of human rights. In relation to women's rights (to vote, to hold public office, to study at university, to be admitted to the bar) a male judiciary sought to actively oppose the granting of equal rights to women, by denying that they were to be included in the definition of “persons”. The *Persons* cases as they were known all revolved around women's civil and political rights, and analysis of these cases reveals how a judiciary which shares a common “weltanschauung” can be oblivious to its own partial and oppressive decision making. This is why diversity is important in all societal institutions- in the judiciary, parliament, businesses and the community.¹⁸

2.2.10 Weaknesses in the common law's protection of human rights were also highlighted by the International Commission of Jurists. They noted in particular the extent to which legislation can be and has been used to override the common law as well as the failure of the common law to protect the rights of women and various minority groups.¹⁹

¹⁵ Submission 67.

¹⁶ Submission 337.

¹⁷ Submission 154.

¹⁸ Submission 371.

¹⁹ Submission 161.

2.2.11 Some submissions were concerned about particular gaps in human rights protection. Adrian Chong Voon Chiang, for instance, identified inadequacies in the protection of the right to privacy and the lack of protection for the right to the greatest possible protection of the family.²⁰ Dai Wai Patricia Wang also alluded to inadequate protection of the right to privacy pinpointing as of particular concern, the lack of adequate safeguards in relation to video surveillance.²¹ Dr Julia Davis similarly expressed concern about the lack of protection for the right to privacy:

The value of privacy has been expressly recognised in the *International Covenant on Civil and Political Rights*. Legislatures, governments and courts in both the common law and civil law world have also moved to recognise the value of individual privacy, however, in Australia there is as yet no widely recognised legal ‘right to privacy’ and it seems that there may be difficulties in ensuring that the privacy of individuals is adequately protected through the law of torts.²²

2.2.12 Amnesty International nominated as an area of concern, the narrow scope of the legislative provisions relating to torture.²³ The Tenants’ Union of Tasmania told the Institute that the right of access to affordable housing either underpins or makes possible every other human right and that this right is insufficiently protected in Tasmania. The Tenants’ Union argued that an increasing expectation that ‘the market’ will solve problems of supply and demand, combined with a declining resource allocation from governments to public housing has produced a housing crisis that appears to be deepening.²⁴

2.2.13 Other submissions focused on the inadequacies of laws that have been enacted to protect rights such as the *Disability Services Act 1992* (Tas) and the *Anti-Discrimination Act 1998* (Tas). For example, ACROD (now National Disability Services Ltd) wrote:

This legislation has at best only limited potential to protect the rights of people with disabilities as neither establishes any absolute rights. Both pieces of legislation rely almost exclusively on the presumed protection of general human rights. For example the ADA prohibits treating people with disabilities less favourably than those in the general community. However, if the norm is to treat people generally in a way that disregards some aspect of their human rights, then people with disabilities will be equally unprotected. Although the DSA does make a positive assertion that people with disabilities have an “inherent right to respect for their human worth and dignity”, this applies only to the area in which the Act operates the administration and operation of specialist disability services.

There are also significant constraints on the effectiveness of these protective mechanisms. Both Acts allow economic considerations to take precedence over the rights they aim to protect. The ADA permits discriminatory actions in relation to employment and access to goods and services when doing otherwise would create ‘unjustifiable hardship’. This effectively protects the community from changes that are costly, which means people with disabilities must continue to bear the cost, in lost opportunities and payment for special facilities, of the status quo. Similarly, the operation of the DSA is at the discretion of the Secretary, who must function within the limits of his/her power. In particular s/he is bound to operate according to budget allocations and priorities. The effect is that the Act only supports the rights of people with disabilities to services that are allowed by the budget, regardless of the level required to offset the effects of disability.²⁵

2.2.14 A.P. Servant submitted that the *Anti-Discrimination Act* is ineffective because it is too limited, often ignored and because much of the discrimination that occurs is outside its confines.²⁶ Ian

²⁰ Submission 65.

²¹ Submission 394.

²² Submission 81.

²³ Submission 12.

²⁴ Submission 373.

²⁵ Submission 4.

²⁶ Submission 1.

Nelson referred the Institute to the recent review of the *Anti-Discrimination Act*, which has disclosed “a significant lack of logic in certain aspects of the Act – issues which arguably compromise the efficiency and effectiveness of the dispute resolution processes.”²⁷ The Justice and International Mission Unit Synod of Victoria and Tasmania Uniting Church in Australia also identified the process for dealing with non-compliance as a weakness of the Act, specifically, the fact that the Anti-Discrimination Commissioner cannot impose sanctions for breach of the legislation.²⁸ The Tasmanian Anti-Discrimination Commissioner noted that while the Act proscribes discrimination in many areas of life and on the basis of many attributes, s 24 permits discrimination if it is necessary to comply with a law of the State or Commonwealth. Accordingly, there is no protection from discrimination if a State law is inherently discriminatory.²⁹ The Tasmanian Gay and Lesbian Rights Group said,

While the Tasmanian Anti-Discrimination Act provides remedies for some human rights breaches, it does not guarantee basic democratic freedoms like free speech and assembly, and the right to vote. Neither does it provide remedies when statutes either breach human rights themselves, or mandate human rights breaches. The Act also has exemptions for a range of organisations on a range of grounds. For all these reasons, the Anti-Discrimination Act does not sufficiently protect human rights.³⁰

2.2.15 The Criminal Law Committee of the Law Society of Tasmania concentrated on issues relating to the right to equality before the law citing situations where an accused is in a position of inequality with the prosecution. An example given was the, effectively, unlimited objections to jurors in a criminal trial the Crown may make while the accused may only peremptorily challenge six jurors.³¹ More generally the Criminal Law Committee referred to the inequality between the resources available to an accused and those available to the Crown in running a case, an inequality that is amplified by the limited availability of legal aid funding for accused persons.³²

2.2.16 Other submissions focused on particular abuses of human rights or the lack of protection for specific, minority and vulnerable groups. Members of the Human Rights Consultation Committee were deeply affected by accounts of the disregard of the basic rights of people with disabilities, the homeless, Indigenous Tasmanians and members of gay, lesbian, bisexual, transgender and intersex communities. People with intellectual disabilities informed the Institute about the lack of dignity and respect with which they are routinely treated even by service providers and those charged with safeguarding their interests. They spoke of disregard for their wishes and their exclusion from decision-making about matters affecting them, such as accommodation and health care provision. They mentioned restrictions on their access to legal services, medical services, entertainment, finance, shopping and employment that have little to do with their needs, capabilities and rights and more to do with the convenience of others. They frequently expressed concerns about personal safety and said that they enjoy a lesser level of protection from physical violence than other members of the community. Consistently they told us of the exploitation of their position of vulnerability.³³

2.2.17 Joy Cairns, Managing Director of Aurora Disability Services, wrote of the humiliation that people with disabilities and their parents often endure as a result of the distrust of decision makers. With respect to access to financial services she said:

²⁷ Submission 293.

²⁸ Submission 385.

²⁹ Submission 299 referring to *Anderson, Grant v Department of Justice and Industrial Relations* [2001] TASADT 3; *Pyrke, John v Minister for Health and Human Services* [2001] TASADT 1.

³⁰ Submission 369.

³¹ Under s 34 of the *Juries Act 2003* (Tas), the number of potential jurors the Crown may require to stand aside is unlimited cf s 35 which gives the accused the right to challenge peremptorily only six jurors. Both the Crown and the accused may challenge for cause an unlimited number of jurors: s 33.

³² Submission 77.

³³ Covehill, Willow Court and Speak Out consultations and Submission 4.

Parents, often aged parents themselves are put in a position where they must reconcile, argue, plead a case for their son or daughter bringing many issues to the surface such as guilt, grief etc about the child's disability, ie lower intellect, cognitive difficulties, dependence on others. The parents are forced to consider/act as guarantor ... even when the financial evidence to support a loan is proven, the person with the intellectual disability can make everyday decisions, knows the difference between right and wrong, understands what buying a house and its obligations mean.³⁴

2.2.18 Disability Services Tasmania referred the Institute to research and literature detailing numerous and complex impediments facing people with disabilities in gaining meaningful recognition for their rights and realisation of their aspirations. It emphasised the social marginalisation of those with disabilities leading to deficiencies in access to services, facilities, programmes, education, health care and employment. Lack of community understanding of, and genuine engagement with, the rights and needs of people with disabilities results in their being excluded from participation in initiatives that are relevant to them, including it was said, the consultation undertaken for this present human rights project. This lack of genuine engagement means that many rights that the majority of citizens take for granted, such as the right to freedom of movement, are illusory for those with disabilities. Because this right is not considered in terms of the varying needs of those with disabilities, at even the most basic level of access to buildings, facilities and the like, it may be denied to them.³⁵

2.2.19 A significant number of submissions received from the gay, lesbian, bisexual, transgender and intersex communities reported high levels of discrimination and denigration. Such discrimination is systemic, deeply entrenched and appears to have a level of wide acceptance within the Tasmanian community. It was suggested that this discrimination is reflected in legislation and policy in, for example, the exclusionary nature of our marriage laws and the exclusion of openly gay men from blood donation.

2.2.20 The Tasmanian Gay and Lesbian Rights Group (TGLRG) and Rodney Croome reminded the Institute that discrimination on the grounds of sexual orientation is not a thing of the past and that very recent history demonstrates how, in the absence of a Tasmanian legislated statement of human rights, public authorities can infringe basic human rights. They pointed to their experience in campaigning for the repeal of discriminatory criminal laws to show how entrenched discrimination is against lesbian, gay, bisexual and transgender people and how lengthy and difficult the process of achieving law reform and redress for infringements of human rights can be under existing State, Federal and International laws.³⁶ Rodney Croome referred to the attempts by the Hobart City Council to prevent members of the gay and lesbian community from setting up a stall at Salamanca Market in 1988 to demonstrate the fragility of rights protection in Tasmania:

There was no State or federal law which protected us from discrimination on the grounds of sexuality, and more pertinently there were no statutory or constitutional guarantees at a State or federal level for the fundamental rights which the Council and the Police were violating, rights to such things as freedom of assembly and freedom of expression. In meeting after meeting Human Rights Commissioners, lawyers and MPs shrugged their shoulders and said "the law is entirely on their side, there's nothing we can do." At the tender age of 23 my introduction to gay and lesbian activism on Hobart's angrily contested streets was also my introduction to the desperate need for a Bill of Rights.³⁷

2.2.21 Reform of the discriminatory laws was only achieved after a complaint to the United Nations Human Rights Committee and subsequent action in the High Court of Australia. The TGLRG described this process as follows:

³⁴ Submission 58.

³⁵ Submission 89.

³⁶ Submission 369.

³⁷ Submission 78.

Is there a need to enhance human rights protections in Tasmania?

...the process was a long and difficult one, and a favourable outcome no guarantee the breach would be remedied...Moreover, it was an indignity and an imposition to appeal to an international tribunal when the matter should have been dealt with locally. The long and bitter debate on gay law reform in Tasmania could have been resolved much earlier and more effectively if there was a local Charter of Rights. It would have been unnecessary for us to appeal to a far away tribunal if a local one had existed which could have judged our former laws against human rights standards. The lives of many people would have been greatly improved if Tasmania had then had the kind of human rights guarantee that is currently proposed.³⁸

2.2.22 The former Tasmanian Commissioner for Children pointed to deficiencies in protections of the rights of children. He noted that the right contained in Article 40 of the *Convention on the Rights of the Child* requiring that where children are accused of committing an offence the matter must be determined without delay, has no explicit and specific protection in Tasmanian law. This absence of protection is also demonstrated by the time spent on remand by juveniles. In 2003-04 nearly two thirds of remandees at Ashley Youth Detention Centre spent more than 30 days on remand and a third spent approximately three months or more on remand.³⁹ Children also have inadequate access to legal advice and representation in the criminal justice process. The *Youth Justice Act 1997* (Tas), requires only that children be informed by the court of their right to legal representation but makes no further provision in this regard. In practice, children are rarely legally represented. Additionally, for those on remand at Ashley Youth Detention Centre access to legal advice and representation is restricted by the remoteness of the location. This means that children's right to legal advice and representation has limited meaningful content in Tasmania.⁴⁰

2.2.23 The Tasmanian Aboriginal Centre advised the Institute that, in respect of all levels of government, the Tasmanian electoral laws operate in a way that excludes Aboriginal people from achieving political representation. Because electoral and municipal boundaries ignore the racial and cultural makeup of those living within them, they effectively exclude Tasmanian Aborigines from representative democracy and ensure that the aspirations of Tasmanian Aboriginal people remain subordinate to those of the majority white population. The Centre said,

[t]o argue Tasmanian electoral rules and laws are non-discriminatory because they make no reference to race is naive. That old policy view also guarantees the interests of the majority white population will prevail over the Aboriginal interest. Failure to take account of the situation of Aborigines in our own country compounds the neglect and discrimination we have endured over the last two centuries. To turn a blind eye to the effect of the domination by white people over Aborigines is to condone the imbalance.⁴¹

2.2.24 Gideon Cordover, co-ordinator of the Tasmanian Youth Consultative Committee's human rights sub-committee, argued that our laws often place outdated and undue restrictions upon young people's participation in the social and political life of the community and that young people desire greater recognition of their capacity to engage responsibly in decision making and in activities to which formal or informal age restrictions currently apply.⁴²

2.2.25 Jennie Herrera, pointed to both continued high levels of sexual harassment suffered by women, particularly those working in rural areas, and to the barriers women still face in obtaining redress.⁴³

³⁸ Submission 369.

³⁹ Commissioner for Children, *Review of Juvenile Remandees in Tasmania* (2006) 6.

⁴⁰ Submission 70.

⁴¹ Submission 366.

⁴² Submission 372.

⁴³ Submission 135.

2.2.26 The Tasmanian Centre for Global Learning listed a number of groups in the Tasmanian community whose rights remain either inadequately recognised or observed, including children, women, people with disabilities, indigenous Tasmanians, immigrants and refugees. The Centre argued that there is a need to address the rights of these groups as “common rights of access” and gave as examples of current deficiencies in this regard, continued failures to accord women equal pay for equal work and persistent deficiencies in the protection of children from family violence.⁴⁴ The Women’s International League for Peace and Friendship observed that the rights of children in care, people subjected to domestic violence and sexual abuse, women in the workplace and minority groups continue to be abused. They also referred to the low representation of women in Parliament as symptomatic of inadequate adherence to human rights standards.⁴⁵

2.2.27 The Community and Public Sector Union expressed great concern about the lack of protection for human rights “that most of us would reel off as core to the Australian experience” and quoted comments of Professor Larissa Behrendt in support of its view that “if the majority of Tasmanians were aware of [the] ...marked lack of protection for their human rights then they too would be as outraged as we became”:

In the 1997 *Kruger* case, our High Court considered a case brought by several members of the ‘Stolen Generation’ and a mother who had lost her child to the policy. The Aboriginal plaintiffs argued that the policy of removing children infringed some of their basic human rights including the right to due process before the law, equality before the law, freedom of religion and freedom of movement.

That the High Court found that Australian law did not protect any of those rights is as instructive as it is sobering. It tells us that many of the rights that Australians would believe are protected by the laws of this country are actually not protected at all. And the decision in the *Kruger* case also tells us that where there are gaps in rights protection in Australia, breaches of human rights are most likely to be experienced by the culturally distinct, socioeconomically disadvantaged and the historically marginalised.⁴⁶

2.2.28 Some submissions pointed to specific incursions on human rights enshrined in legislation. In this regard Benedict Bartl identified discrimination against same sex couples,⁴⁷ reversal of the onus of proof in respect of some offences⁴⁸ and encroachments on the freedom of speech. Chris Franks argued that the bail provisions of the *Family Violence Act 2004* (Tas) operate in breach of human rights and in a manner that is discriminatory for the unemployed, the financially disadvantaged, those with an intellectual disability and those from cultural minorities.⁴⁹ To similar effect AP Servant said,

[t]ake the Safe-at-Home initiative under the *Family Violence Act 2004*, for example. This law provides for the arbitrary arrest and detention of Tasmanians, even though this is against both common law and the *Criminal Law (Detention and Interrogation) Act 1995*. The police describe this (in the best Orwellian tradition) as a “pro-arrest” policy, rather than as a breach of the fundamental human right defined by *habeas corpus*. Tasmanians are in prison at this very moment under this legislation, without proper process and without being given access to a magistrate to consider a bail application. I am sure that this will be changed in due course, but it should not have been able to happen. Perhaps a Charter could have an important and useful role in ensuring that all legislation is properly vetted.⁵⁰

2.2.29 The Criminal Law Committee of the Law Society of Tasmania also doubted whether the *Family Violence Act 2004* (Tas) is human rights compliant.⁵¹

⁴⁴ Submission 367.

⁴⁵ Submission 403.

⁴⁶ Submission 71.

⁴⁷ Specifically s 20(2A) of the *Adoption Act 1988* (Tas).

⁴⁸ Section 12(2) of the *Misuse of Drugs Act 2001* (Tas).

⁴⁹ Submission 107.

⁵⁰ Submission 1.

⁵¹ Submission 77.

2.2.30 The Institute encountered widespread concern about the legislative erosion of basic rights resulting from the enactment of anti-terror and industrial relations laws. Yabbo Thompson and Annette Carosso expressed the views of many when they said that these laws had significantly curtailed hard won rights and freedoms and diminished our quality of life.⁵² Mary Blake and Allan Dickens said that the industrial relations and anti-terrorism laws enacted by the present Federal government demonstrate how easily human rights can be eroded in the absence of a human rights instrument by which to judge legislation and hold the Government accountable.⁵³ Similarly, Noelle Rattray said that in the last decade there has been a slow undermining of individual rights as a result of the introduction of many restrictive laws including industrial relations and anti-terrorism legislation.⁵⁴ All submissions to this effect supported the enactment of additional protection for human rights that would provide a standard by which to assess the reasonableness of any laws diminishing human rights and constitute an agreed 'line in the sand' beyond which governments should not venture.

2.2.31 A number of submissions suggested that the fragmented nature of current human rights protections in Tasmania constitutes a significant impediment to the exercise of rights and the development of a rights conscious community. In this regard, the Tasmanian Women's Council noted that the current web of laws governing citizens' rights is complex, fragmented and obscure rendering it inaccessible to the average citizen and a significant barrier to the effective exercise of rights.⁵⁵ Similarly, Jennie Herrera argued that people do not necessarily know which rights are enshrined in law and which are assumed to exist but actually "have no legal underpinning". She said that confusion about whether certain rights have general application or apply only to certain sectors of the community and about the operation of international human rights instruments in Australia means that people cannot know how to insist on respect for their rights or gain redress if they are breached.⁵⁶ Penny Ikedife and the Hobart Community Legal Service also mentioned as problematic the complexity and uncertainty of current human rights protections in Tasmania.⁵⁷ Clare Wooton said, "a lack of cohesive protections in Australian domestic law ... contributes to a deficit in community awareness of the reality of rights protections. There has been shown to be a significant gulf between reality and community perceptions of rights protections."⁵⁸

2.2.32 Lionel Nichols' submission reads as a representative digest of a range of deficiencies in current human rights protections mentioned in the submissions received:

... the Commonwealth and Tasmania [*sic*] Constitutions provide limited protections.⁵⁹ ... No new rights have ever been included into either Constitution since they were enacted, with the four proposals for amendment of the *Commonwealth Constitution* resoundingly rejected in the 1988 referendum.

The Commonwealth and Tasmanian Parliaments have sought to supplement this lack of protection through legislation, as identified in the Issues Paper.⁶⁰ The residuary of human rights protections have become the responsibility of the common law. ... However, the common law cannot be relied upon to protect the residuary of rights. First, it may only protect to the extent that there is precedent to justify such protections. In the past the rights of Aboriginals, women,⁶¹ homosexuals and prisoners⁶² have been neglected and today the

⁵² Submission 378; Submission 63.

⁵³ Submission 47; Submission 87.

⁵⁴ Submission 296.

⁵⁵ Submission 371.

⁵⁶ Submission 135.

⁵⁷ Submission 139; Submission 158.

⁵⁸ Submission 405.

⁵⁹ Tasmania Law Reform Institute, *A Charter of Rights for Tasmania?* Issues Paper No 11 (2006) 11-13.

⁶⁰ *Ibid* 13-16.

⁶¹ *Bryson v Bryant* (1992) 29 NSWLR 188.

⁶² *Young v Registrar, Court of Appeal & Another [No. 3]* (1993) 32 NSWLR 262.

common law still does not recognise a right to privacy.⁶³ Secondly, as Australia is the only country in the common law world without a Charter of Rights, this isolationism will lead to a gradual reduction in the extent to which overseas jurisdictions may be used as sources of influence and inspiration.⁶⁴ Finally, any protection provided by the common law may be overridden by parliament.

Those who argue our rights are adequately protected often assume that our democratically-elected parliaments may be trusted to protect human rights through the system of representative and responsible government. However, representative governments are responsible for the forcible abduction of Aboriginal children from their families, the mandatory detention of asylum seekers, and, in Tasmania's case, the criminalisation of homosexuality. The suggestion from one Tasmanian Senator that prisoners should lose the right to vote also demonstrates that representative governments cannot be trusted to protect human rights. Further, there are serious doubts as to whether Australian politicians remain 'responsible' in the traditional Westminster sense.⁶⁵ The lack of ministerial responsibility concerning the Australian Wheat Board controversy and the deportation of Vivian Solon demonstrate that the concept of responsible government cannot be relied upon to protect our human rights. Therefore, whilst a limited degree of protection is afforded to human rights, it is submitted that the current 'patchwork quilt'⁶⁶ of guarantees fails to adequately protect human rights in Tasmania.⁶⁷

2.3 How are human rights currently protected in Tasmania?

2.3.1 Tasmanians are not protected by any State or Federal Charter or Bill of Rights. Australia is now the only common law country that does not have a national Bill of Rights. The United Kingdom, New Zealand, Canada, Ireland, the United States and South Africa all have Charters or Bills of Rights. Two jurisdictions in Australia, Victoria and the Australian Capital Territory, have enacted human rights instruments, but these do not form part of Tasmanian law. A chequer board of sources provides protection for human rights in Tasmania: the Tasmanian and Australian Constitutions, State and Federal legislation, the common law and international law. However, the protections offered by these sources are disjointed and incomplete. Even for those with legal expertise, working out what rights are protected in Tasmania, when and how, is a complex task.

International law

2.3.2 While Australia has ratified the major international human rights treaties they do not form part of Australian law. The High Court has held that unless an international instrument is incorporated by Parliament into Australian law it does not affect Australian law.⁶⁸ The Commonwealth Government has enacted legislation to give effect only to some of the international treaties to which it is a party – the *Racial Discrimination Act 1975* (Cth), which implements many of the provisions in the *Convention on the Elimination of All Forms of Racial Discrimination*, the *Sex Discrimination Act 1984* (Cth), which implements some of the provisions in the *Convention on the Elimination of All Forms of Discrimination Against Women*, though it contains a number of significant exemptions, and

⁶³ *Victoria Park Racing & Recreation Grounds Co Ltd v Taylor* (1937) 58 CLR 479; *Giller v Procopets* [2004] VSC 113 (Unreported, Gillard J, 7 April 2004); *Kalaba v Commonwealth of Australia* [2004] FCA 763 (Unreported, Heerey J, 8 June 2004).

⁶⁴ J J Spigelman, 'Access to Justice and Human Rights Treaties' (2000) 22 *Sydney Law Review* 141, 150; 'A Bill of Rights: Why Now? Why in New South Wales?' (2000) 38 *Law Society Journal* 69.

⁶⁵ John Uhr, 'What's so Responsible about Responsible Government?' in David Burchell and Andrew Leigh (eds), *Prince's New Clothes: Why do Australians Dislike Their Politicians?* (2002) 155.

⁶⁶ Catherine Henry and Francesca Dominello, 'The case for an Australian Bill of Rights' (1998) 25 *Plaintiff* 20, 21.

⁶⁷ Submission 295.

⁶⁸ *Kioa v West* (1985) 159 CLR 550, 570.

the *Crimes (Torture) Act 1988* (Cth), which implements, though only in a very limited way, the *Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*. Other federal and State laws enact some aspects of other international treaties.⁶⁹ However, in reality, legislative implementation of international treaties in Australia has been scant and many international treaty obligations remain unincorporated into Australian law, including, the rights set out in the *International Convention on Economic, Social and Cultural Rights* and a number of the rights in the *International Convention on Civil and Political Rights*.

2.3.3 Four international instruments contain mechanisms to allow individuals to take a complaint concerning a human rights breach to the relevant United Nations treaty committee: the *International Convention on Civil and Political Rights*, the *Convention on the Elimination of All Forms of Racial Discrimination*, the *Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* and the *Convention on the Elimination of All Forms of Discrimination Against Women*. Australia has adopted the individual communications procedure in relation only to the first three of these conventions. This means that Australians cannot make a complaint to an international committee in relation to breaches of rights contained in the *Convention on the Elimination of All Forms of Discrimination Against Women*. Even where the complaints procedure is available it only applies after all domestic remedies have been exhausted and any findings and recommendations by an international committee in relation to a complaint are not binding on federal or State governments. The reality is that this process can take years and in the end achieve no practical benefit for complainants. As Rodney Croome wrote of the complaint taken to the United Nations Human Rights Committee in respect of Tasmania's former laws criminalizing consensual sexual conduct between adult males, which was the first complaint taken from Australia to the UNHRC:

It was far from certain that the UN would decide in our favour. Many eminent lawyers believed our appeal was hopeless. The case took two and a half years and absorbed a great deal of our time and resources to compile. The final decision set exciting new precedents, but it also re-enforced old stereotypes and preconceptions by relying heavily on privacy rights. More importantly the decision was not enforceable.⁷⁰

2.3.4 Australian judges have sometimes referred to international human rights instruments in interpreting Australian law. However, to date this has occurred on a largely piecemeal and ad hoc basis. There is as yet no developed body of jurisprudence in this regard that can be reliably resorted to in order to achieve protection of human rights.⁷¹

2.3.5 Clearly international law offers minimal and inadequate protection for human rights in Australia.

Constitutional protection of human rights

2.3.6 The Australian Constitution is not and was not intended by its authors to be a document that broadly embodies or guarantees human rights. Nevertheless, it does contain a number of express although limited rights:

⁶⁹ For a comprehensive consideration of these laws see Nick O'Neill, Simon Rice and Roger Douglas, *Retreat from Injustice: Human Rights Law in Australia* (2004); Rhona K M Smith, *Textbook on International Human Rights* (2nd ed, 2005) ch 7.

⁷⁰ Submission 78.

⁷¹ For discussion of this see Nick O'Neill, Simon Rice and Roger Douglas, *Retreat from Injustice: Human Rights Law in Australia* (2004); Rhona K M Smith, *Textbook on International Human Rights* (2nd ed, 2005) ch 2.

The right to vote – ss 24 and 41. Both these provisions have been interpreted narrowly by the High Court. For example, they provide neither for ‘one vote one value’ nor for the equality of electorates throughout Australia.⁷² Further, the right to vote in s 41 has been interpreted to guarantee the right to vote only of those who could already vote in State elections in 1902.⁷³ This section is thus redundant today. It has also been held that the Commonwealth Constitution does not provide a guarantee of universal adult suffrage.⁷⁴

The acquisition of property on just terms – s 51(xxxi). Section 51(xxxi) requires that laws of the Commonwealth Government providing for the acquisition of property must also provide for payment on just terms for such acquisition. There is no legislative equivalent of this section applicable to acquisitions of property by the Tasmanian Government.

The right to trial by jury – s 80. This provision provides for the right to trial by jury for Commonwealth indictable offences. This right is of limited value because it only applies to Commonwealth indictable offences. It does not apply to crimes constituted by State laws. Further, Federal Parliament may at any time prescribe that an offence or offences need not be tried upon indictment⁷⁵ and in respect of such offences the right to trial by jury disappears. Similarly, under Tasmanian criminal law, the entitlement to trial by jury applies only to indictable and not summary (minor) offences⁷⁶ and it is up to the Tasmanian Parliament to determine which offences will be tried on indictment. Further, the right to trial by jury for Tasmanian indictable offences is not a constitutionally entrenched right. It is contained in an Act of Parliament and so may be amended or even repealed by Parliament.

Freedom of religion – s 116. This section prohibits the Commonwealth Government from establishing any religion, imposing any religious observance or prohibiting the free exercise of any religion. Further, no religious test can be prescribed by the Commonwealth as a qualification for any office or public trust. Accordingly, it entrenches freedom from religious discrimination, but only in relation to Commonwealth offices and positions. Section 46 of the *Constitution Act 1934* (Tas) achieves the same result in respect of State public offices and appointments. Like s 116 it also protects freedom of conscience and religious practice and profession. Unlike s 116, it is not an entrenched guarantee of these rights.

Freedom from discrimination on the basis of State residence – s 117. Section 117 prevents States from placing restrictions on people who reside in other States that they do not place on their own residents. For example, the Tasmanian Government cannot legislate to preclude residents of other States from pursuing actions in Tasmanian courts, which Tasmanians would be entitled to pursue. Similarly the Government cannot legislate to reserve employment opportunities in Tasmania to Tasmanian residents.

Freedom of movement between States – s 92. This section has been applied to strike down legislation that places limits on interstate movement.⁷⁷

Implied rights in the Australian Constitution – The High Court has found that some rights, while not expressly contained in the Constitution, can be implied. These include freedom of political communication⁷⁸ and the inability of Parliament to legislate to bypass the courts in imposing

⁷² *AG (Cth) ex rel McKinlay v Commonwealth* (1975) 135 CLR 1; *McGinty v Western Australia* (1996) 186 CLR 140.

⁷³ *R v Pearson; R v Sipka* (1983) 152 CLR 254.

⁷⁴ *AG (Cth) ex rel McKinlay v Commonwealth* (1975) 135 CLR 1.

⁷⁵ The document used to commence proceedings for indictable offences.

⁷⁶ See s 361 of the *Criminal Code 1924* (Tas).

⁷⁷ *R v Smithers* (1912) 16 CLR 99; *Gratwick v Johnson* (1945) 70 CLR 1.

⁷⁸ *Nationwide News Pty Ltd v Wills* (1992) 177 CLR 1; *Australian Capital Television Pty Ltd v Commonwealth* (1992) 177 CLR 106.

punishment for breaches of the law.⁷⁹ However, the existence of these implied rights remains controversial and the extent of the protection they offer, unclear.

2.3.7 The Tasmanian Constitution (*The Constitution Act 1934* (Tas)) is the foundation of the democratic institutions of the State Government. However, it contains explicit reference to only two specific human rights – freedom of religion in s 46 and the right to vote in State elections in s 28. The Tasmanian Constitution is an Act of Parliament and consequently, the right to freedom of religion it contains is not an entrenched right as is the right to freedom of religion in s 116 of the Australian Constitution. It is therefore susceptible to legislative amendment far more easily than s 116. Protection of other human rights under Tasmanian law is contained in widely diverse and dispersed legislation.

2.3.8 In summary neither the Australian nor the Tasmanian Constitutions represent a comprehensive source of human rights protection for Tasmanians. In fact, they contain few such protections and those protections have generally been narrowly interpreted by the courts. Many basic rights, such as freedom of speech, the right to a fair trial, the right to life, the right to liberty and security of the person and the right to privacy and protection of the family find no mention in our Constitutions.

Commonwealth legislation

2.3.9 A general mechanism for the protection of human rights is provided under the *Human Rights and Equal Opportunities Act 1986* (Cth). By virtue of this Act, the Human Rights and Equal Opportunity Commission (HREOC) has the power to scrutinise Commonwealth legislation to determine its consistency with certain international human rights instruments including the *International Covenant on Civil and Political Rights*. However, while the Commission must report its findings to the federal Attorney General who, in turn, must table his report in Parliament, the federal Government is under no obligation to reform any legislation considered to conflict with international human rights norms.

2.3.10 The most significant raft of legislation enacted by the Commonwealth Government to protect rights is the Anti-Discrimination legislation: the *Racial Discrimination Act 1975* (Cth), the *Sex Discrimination Act 1984* (Cth), the *Disability Discrimination Act 1992* (Cth) and the *Age Discrimination Act 2004* (Cth). These Acts proscribe direct and indirect discrimination in certain areas and establish a system for the resolution of complaints. Commissioners appointed under the *Human Rights and Equal Opportunities Act 1986* (Cth) have responsibility for inquiring into and conciliating complaints made under these Acts but they have no power to impose enforceable remedies for their breach. If conciliation fails, the complaint may be taken to the federal courts, which do have the power to impose enforceable remedies. While these Acts manifest a clear commitment to equality of treatment in Australia, they do not provide comprehensive guarantees in this regard. For example, the *Sex Discrimination Act* contains significant exemptions for charities, religious, voluntary and sporting bodies, for acts performed under statutory authority and for orders of industrial tribunals. Further, the mechanisms they create for obtaining resolution of complaints and remedies are far from satisfactory.

2.3.11 Other federal legislation that is relevant to the protection of human rights includes the *Privacy Act 1988* (Cth), which sets down the principles relating to and places limits on the collection, storage, use and release of information by Government agencies and credit reporting agencies, the *Freedom of Information Act 1982* (Cth), which enacts certain rights to obtain prescribed information from federal agencies, the *Criminal Code Act 1995* (Cth), which outlaws slavery, torture, genocide and other crimes against humanity and the *Human Rights (Sexual Conduct) Act 1994* (Cth) which prohibits laws that arbitrarily interfere with the privacy of sexual conduct between consenting adults and which resulted in the repeal of s 123 of the Tasmanian Criminal Code 1924 (indecent practices between males).

⁷⁹ *Chu Kheng Lim v Minister for Immigration, Local Government and Ethnic Affairs* (1992) 176 CLR 1.

Tasmanian legislation

2.3.12 Various pieces of Tasmanian legislation deal with aspects of human rights. However, there is no single, comprehensive and easily accessible legislative statement of human rights that sets a standard for other enactments impacting on human rights or that provides a guideline for government in enacting, implementing and interpreting legislation.

2.3.13 The primary statute dealing with human rights is the *Anti-Discrimination Act 1988* (Tas). This Act makes unlawful both direct and indirect discrimination on the grounds of race, age, sexual orientation, gender, lawful sexual activity, marital and relationship status, pregnancy, breastfeeding, parental status, family responsibilities, disability, industrial activity, political belief or affiliation, political activity, religious belief or affiliation, religious activity, irrelevant criminal record, irrelevant medical record and association with a person who has any of those attributes. The Act makes discrimination in certain areas only unlawful: employment, education and training, provision of goods, facilities and services, accommodation, membership and activities of clubs, administration of any law of the State or any State program and awards, enterprise and industrial agreements. The Act also makes sexual harassment and inciting hatred unlawful. However, while the Act contains broad protections against discrimination, it also contains a number of significant exemptions. For example, in specified circumstances it permits discrimination in employment, education, accommodation and the provision of facilities and by religious institutions and clubs. Similarly, there are exemptions for sport, insurance and superannuation, for discrimination on the grounds of family responsibilities, parental responsibilities, pregnancy, marital and relationship status, age, race, disability and industrial activity. Significantly, s 24 exempts from the operation of the Act any discrimination that is reasonably necessary to comply with a State or Commonwealth law. This provision potentially enables the government to evade the operation of the Act. A number of submissions received suggested that while anti-discrimination legislation provides significant protection and recognition of certain rights of minority, marginalised and vulnerable groups, the protection it offers is far from comprehensive. (See discussion at paras [2.2.13] - [2.2.14]). Further, anti-discrimination legislation provides only a narrow focus in terms of human rights protection. It does not encompass the range of fundamental rights and freedoms recognised in general human rights instruments and set down in the *International Covenant on Civil and Political Rights* and the *International Covenant on Economic, Social and Cultural Rights*.

2.3.14 Complaints under the Act are made to the Anti-Discrimination Commissioner who investigates and may conciliate them. Where conciliation is not possible the complaint is referred to the Anti-Discrimination Tribunal, which has the power to make binding orders dealing with the discrimination including orders for compensation. The Tribunal may also review decisions of the Commissioner relating to rejections and dismissals of complaints.

2.3.15 The Anti-Discrimination Commissioner has other functions, including reviewing Tasmanian legislation to determine whether or not it is discriminatory, advising the Government on matters relating to discrimination and conducting research and educational programs relating to discrimination and prohibited conduct.

2.3.16 Provisions affecting human rights in the criminal justice sphere are contained in the Criminal Code 1924 (Tas) and the *Police Offences Act 1935* (Tas) whose provisions relating to homicide, assault, and injury to the person give some protection for such rights as the right to life, liberty and security of the person. The Code also contains some protections relating to fair trials and to arrest, as does the *Justices Act 1959* (Tas). Further provisions relevant to the right to liberty and freedom from arbitrary detention and arrest are found in the *Criminal Law (Detention and Interrogation) Act 1995* (Tas) and the *Bail Act 1994* (Tas).

2.3.17 A number of other Acts also have significance for human rights including the *Ombudsman Act 1978* (Tas), the *Youth Justice Act 1997* (Tas), the *Consumer Affairs Act 1988* (Tas), the *Mental Health Act 1996* (Tas), the *Guardianship and Administration Act 1995* (Tas), the *Corrections Act 1997* (Tas), the *Personal Information Protection Act 2004* (Tas), the *Freedom of Information Act 1991*

(Tas), the *Evidence (Children and Special Witnesses) Act 2001* (Tas), the *Children, Young Persons and Their Families Act 1997* (Tas), the *Magistrates Court (Administrative Appeals Division) Act 2001* (Tas), the *Annulled Convictions Act 2003* (Tas), the *Police Powers (Public Safety) Act 2005* (Tas), the *Terrorism (Commonwealth Powers) Act 2002* (Tas), the *Forensic Procedures Act 2000* (Tas), the *Listening Devices Act 1991* (Tas), the *Disability Services Act 1992* (Tas), the *Electoral Act 2004* (Tas), the *Aboriginal Lands Act 1995* (Tas), the *Aboriginal Relics Act 1975* (Tas), the *Museums (Aboriginal Remains) Act 1984* (Tas) and the *Stolen Generations of Aboriginal Children Act 2006* (Tas). This is not a complete list of all the Tasmanian legislation that deals with aspects of, or that has implications for human rights. Nevertheless, it shows that there is a wide variety of legislation of relevance in this regard. A number of these Acts encroach upon rights. Many of them aim to enhance human rights. However, they do not provide comprehensive protection in this regard. For example, there are significant gaps in the protection of the right to privacy provided under both State and federal legislation. In particular, a number of exclusions, such as those for the media, small business and private corporations, in fact leave considerable lacunae in the protection of personal privacy. Further, considerable legal expertise is required to uncover existing protections of rights, to determine their scope and to identify what rights have very limited or no protection. Importantly, none of the existing legislation provides a clear and accessible statement of fundamental rights for Tasmanians. So there is nothing in Tasmania at the moment that defines minimum standards for government.

Scrutiny of draft legislation

2.3.18 In some jurisdictions, Parliamentary Committees have been established to scrutinise draft legislation including subordinate legislation for its compliance with various matters including human rights standards. This is the case in New South Wales and was the case in the ACT and Victoria prior to the enactment of human rights instruments in those jurisdictions. There is no Scrutiny of Bills Committee in Tasmania. While such bodies can serve a valuable function, their protection of human rights is relatively weak and there are significant limitations on their effectiveness. In the absence of any legislated Charter of Rights, their scrutiny of legislation is not guided by any defined or set standards of relevant rights and their processes and reports are not adequately transparent or sufficiently susceptible to public access and comment. Importantly, there is no requirement for Parliament to take account of or act in any way upon their reports. In Victoria and the ACT the processes for scrutiny of draft legislation have now been formalised in human rights enactments. These processes are more comprehensive and attuned to a far greater extent to the protection of rights than was previously the case and than the scrutiny process presently in place in New South Wales, (see further below at paras [3.2.3] and [3.3.2]). Further, the human rights enactments in these jurisdictions provide authoritative guidelines for the deliberations of their respective Parliamentary Scrutiny Committees and assist in the attainment of a human rights aware approach across government.

Common law

2.3.19 The common law is the body of legal principles and rules developed over time by judges in cases that have come before them. Some submissions to the Institute argued that we need look no further than the common law for adequate protection of human rights.⁸⁰ The Institute agrees that the common law has developed some important protections for human rights particularly in the area of criminal justice. These include the right to be presumed innocent until proven guilty, (the assignment of the burden of proof in criminal cases to the prosecution) and the standard of proof, beyond reasonable doubt. Similarly, the right to silence, the requirement that evidence of confessions obtained by force from an accused be excluded at trials and the privilege against self-incrimination derive from the common law. The common law also imposes significant limits on police powers of detention, interrogation and search.

⁸⁰ Submission 64; Submission 376.

2.3.20 Other important common law protective principles are the rules of procedural fairness, which, among other things, require that a person be given a fair hearing before governments make decisions affecting their interests. Additional significant instances of the common law development of rights are the recognition by the High Court of native title in *Mabo v Queensland (no 2)*⁸¹ and the right of an accused to a fair trial in *Dietrich v The Queen*.⁸²

2.3.21 However, the common law has a poor record in recognising and protecting rights in other areas. For example, it does not recognise any general right to privacy and has never contained a fundamental guarantee of religious freedom and expression.⁸³ Further it was responsible for many legal disabilities suffered by women including exclusion from the right to vote, the right to own property, the right to be admitted to educational institutions and the right to enter the professions. Further, the common law has done little to protect women from violence and, in fact, developed doctrines inimical to women's rights in this area such as the denial of the possibility of rape in marriage. The intervention of Parliaments has been necessary to remove these doctrines and to admit women to full rights as citizens.

2.3.22 It is also important to recognise that the common law may be overridden by Parliament. For instance, legislation has been enacted to override common law restraints on police powers of interrogation,⁸⁴ and the presumption of innocence and prosecution's onus of proof has been displaced in respect of some offences.⁸⁵

2.3.23 In his submission to the Institute, Lewis Shillito pointed to other problems in relying on the common law as a safeguard of human rights:

... in the absence of a bill of rights, Australia's common law will become increasingly isolated and consequently ineffective. Indeed '[o]ne of the great strengths of the Australian common law...has been [its ability] to draw on a vast body of experience from other common law jurisdictions. Now both Canada and England, and to a lesser extent New Zealand, will progressively be removed as sources of influence and inspiration.' This 'intellectual isolation' will increasingly shift Australia's common law away from rights based developments.

Further, whilst the common law has demonstrated greater capacity to adapt to social change, the recent interaction between the judiciary and the executive, most particularly the rejection by several federal governments of the High Court's decision in *Teoh's* case, suggests that the common law cannot be exclusively relied upon as a protection for human rights. So, whilst the Australian common law might be heralded by some as having demonstrated capacity to protect human rights and to develop effectively to continue to do so, in reality its isolation on human rights and subjugation to the exercise of legislative power render it an inadequate protection.⁸⁶

2.3.24 The Institute is of the view that the common law does not provide the breadth of human rights protection that is often claimed for it. By its very nature it cannot provide secure, certain or complete protection of human rights. It develops in a piecemeal fashion according to the cases and issues that come before the courts. It does not protect many fundamental rights. Where it has recognised rights, the precise parameters of those rights is often unclear. Therefore, the protection it affords those rights may be uncertain and difficult and costly to enforce.

⁸¹ (1992) 175 CLR 1.

⁸² (1992) 177 CLR 292.

⁸³ *Grace Bible Church v Reedman* (1984) 36 SASR 389, 393.

⁸⁴ *Criminal Law (Detention and Interrogation) Act 1995* (Tas).

⁸⁵ See for example the *Misuse of Drugs Act 2001* (Tas), ss 3(3) and 12(2).

⁸⁶ Submission 343.

Magna Carta and the English Bill of Rights 1689

2.3.25 Both the *Magna Carta* and the English *Bill of Rights 1689* are, by virtue of the *Australian Courts Act 1828* (Imp)⁸⁷ part of the law of Tasmania to the extent that they have not been affected by other Tasmanian laws.

2.3.26 The *Magna Carta* was a treaty between the English King John and his barons. It established that the king, like other citizens, was subject to the rule of law and set some fundamental limits to the exercise of the monarch's power. The English *Bill of Rights 1689* was enacted to deal with excesses in the exercise of power by the Stuart monarchs. It limited the royal prerogative, established the supremacy of Parliament over the executive, provided the basis for freedom of speech in Parliaments operating under the Westminster system and set down a number of important rights and principles which continue to exert at least some rhetorical influence over current law making and interpretation. For example, its provisions relating to trials, including "that excessive baile ought not to be required, nor excessive fines imposed, nor cruel and unusual punishment inflicted"⁸⁸ are occasionally invoked⁸⁸ but, in reality, the *Bill of Rights* has little practical operation today.

2.3.27 Neither the *Magna Carta* nor the English *Bill of Rights* can influence the enactment of laws passed by the Tasmanian Parliament.⁸⁹ Consequently both documents have been described as constituting "political ideals which most citizens would hope that Parliaments would follow",⁹⁰ but as otherwise serving only a symbolic function in the law-making context.

The Tasmanian Law Reform Institute's view

2.3.28 The Tasmanian Law Reform Institute shares the views of the majority of those who made submissions to the Institute that there is currently no systematic, logical or comprehensive protection of human rights in Tasmania. While a number of laws do provide protection for some human rights, there are significant gaps and shortcomings in present protections of rights. Although our present democratic and judicial systems are generally accepted to have delivered a comparatively sound record on human rights, and while Tasmania has enacted a number of laws that have enhanced human rights protections in important areas, violations of human rights do still occur and the rights of many are not always recognised or observed. Significantly, our current law provides no clear statement of fundamental rights and freedoms for Tasmanians and sets no minimum standards for governments and public authorities. Consequently, we have no general gauge by which to judge government legislation or the actions of our public authorities. Additionally, the haphazard and complex nature of rights' protection in Tasmania impedes the exercise and observance of rights and confines genuine knowledge of them to those with specialist legal expertise. This problem was consistently confirmed during the consultation process. Time and again, members of the Human Rights Consultation Committee encountered the belief that Australia and, therefore, Tasmania, already have a Bill or Charter of Rights and met widespread surprise and concern that many of the rights understood to be fundamental to our way of life have minimal or no legal protection.

Recommendation 1 – Enhanced protection of human rights

The Tasmanian Law Reform Institute recommends that the law be reformed to provide and promote specific, better and accessible protection for human rights.

⁸⁷ 9 Geo IV c 83 s xxiv.

⁸⁸ See for example *Smith* (1991) 25 NSWLR 1 (Kirby J); *Sillery v R* (1981) 180 CLR 353 (Murphy J).

⁸⁹ *Australia Act 1986* (Cth) ss 1, 3.

⁹⁰ Transcript of Proceedings, *Essenberg v The Queen* (High Court of Australia, McHugh J, 22 June 2000).

Part 3

How are human rights protected elsewhere?

3.1 How are human rights protected in other jurisdictions?

3.1.1 In its terms of reference, the Tasmanian Government asked the Tasmanian Law Reform Institute to research models that protect and enhance human rights in other jurisdictions, (in Australia and overseas). Although two jurisdictions in Australia have enacted human rights instruments, Australia is the only common law country that does not have some kind of national Charter or Bill of Rights.

3.1.2 When Charters or Bills of Rights are mentioned, it is often the United States Bill of Rights that most readily springs to mind. However, other common law countries have enacted quite different human rights bills and charters. The Australian Capital Territory and Victoria, have also enacted human rights Acts that are very different to the United States model. The essential characteristics of these models and those operating in the United Kingdom, Canada, New Zealand, South Africa and the United States are summarised below. The key features of interest when investigating the potential for such models to enhance human rights protection in Tasmania are:

- How such models are enacted: are they entrenched in a Constitution or are they simply ordinary statutes? Constitutionally entrenched human rights instruments can be difficult to change in comparison to ordinary statutes. Generally, they may only be altered by referenda or by more than a mere majority vote in the relevant legislative body.
- Do they enable individual citizens to enforce their human rights in courts or to obtain damages or some other remedy in the event of their breach?
- Do they preserve the supremacy of Parliament or do they enable the courts to strike down (declare invalid) legislation that is incompatible with human rights norms? If they do not permit courts to invalidate legislation, what powers do the courts have if a finding is made that a legislative provision breaches human rights?
- Do they contain mechanisms for the pre-enactment scrutiny of legislation to ascertain its compliance with human rights? If so, what results from that assessment – how does it impact on the legislative process and how is the public apprised of the assessment?
- How do they operate in the court context? That is, what is the interpretive function of rights charters in the judicial process?
- Can parliaments enact legislation that encroaches on or abrogates human rights and, if so, how and when may this be done?
- What rights do they protect? Do they focus only on civil and political rights or do they incorporate economic, social and cultural rights?
- To whom do they apply and whose rights do they protect?

3.2 The Australian Capital Territory

3.2.1 In 2004, the Australian Capital Territory (ACT) Parliament enacted the *Human Rights Act 2004* (ACT). This is an ordinary statute that can be amended or repealed by the ACT Parliament like any other statute. It does not include a direct right of action for citizens against public authorities or any explicit remedies for its breach. However, ACT courts might in the future adopt the approach of the New Zealand courts and read into the Act rights of action and remedies for breach in the absence of any provision to the contrary.⁹¹ Moreover, the Act can be used as an adjunct to existing causes of action, for example, in a claim for review of administrative action where account was not taken of the *Human Rights Act*.

3.2.2 ACT courts are required to interpret legislation as far as possible in a way that is consistent with the *Human Rights Act 2004*. Where this cannot be done, the ACT Supreme Court may issue a declaration of incompatibility. This declaration does not invalidate the legislation in question but the Attorney General is required to report to the Legislative Assembly on Governmental responses to the declaration. This means that the *Human Rights Act* preserves Parliamentary supremacy because the courts do not have the power to invalidate legislation. Nevertheless, a declaration of incompatibility does exert pressure on Parliament to reconsider and revise legislation to make it human rights compliant. The rights in the Act are not absolute – but they are only limited to the extent that is demonstrably justified in a free and democratic society. Nevertheless, Parliament is not precluded from enacting legislation that does not conform to these limitations and the Courts have no power to invalidate it.

3.2.3 Pre-enactment scrutiny of legislation is provided for: when a new bill is presented to Parliament, the Attorney General is required to present a written statement on its compatibility with the *Human Rights Act*. It is now Government policy that human rights issues be addressed in the explanatory note to the Bill. This is prepared by the department responsible for the proposed legislation. The Legal Affairs Standing Committee of the Legislative Assembly has a duty to scrutinise bills for consistency with human rights and to report its findings to Parliament. The Act also creates the position of Human Rights Commissioner who has responsibility for both reviewing laws to ensure their compliance with human rights and for reporting to the Attorney General on the operation of the Act. Government Departments must include in their Annual Reports information about their implementation of the Act.

3.2.4 The Act protects the rights of human beings but not those of corporations. It does not create an explicit duty on all public officials to act consistently with human rights. However, it may be interpreted as impliedly creating such a duty. The rights protected are civil and political rights. The Act omits economic, social and cultural rights despite the recommendation for their inclusion by the ACT Human Rights Consultative Committee. Provision is made for review of the Act's operation on the first and fifth year from its commencement. The review must incorporate reconsideration by the Attorney General of the desirability of including environmental, economic, social and cultural rights in the Act. Provision is also made in the Act for the Human Rights Commissioner to conduct educational programs about the Act and human rights.

3.2.5 The first review of the Act showed that it has had an impact particularly in such areas as the development and scrutiny of legislation.⁹² Emergency electro-convulsive therapy legislation, the use of children for tobacco test purchases, the wearing of headscarves at ACT schools, the banning of car window washers at traffic lights, sentencing laws, the exclusion from public employment of a person with a criminal record and counter-terrorism legislation have all been considered under the new human rights framework. A human rights audit of the ACT's youth detention facility revealed the existence of many practices inconsistent with human rights including routine strip searches and the use of seclusion and surveillance. In the courts, the Act has not caused a flood of litigation. Nevertheless, it has been cited in a range of cases and has influenced their outcome. Following the first review, the Chief

⁹¹ See discussion of the *Bill of Rights Act 1990* (NZ) at paras [3.5.1] – [3.5.5].

⁹² Hilary Charlesworth and Gabrielle McKinnon, 'Australia's First Bill of Rights: The Australian Capital Territory's Human Rights Act' (Law and Policy Paper 28, Centre for International and Public Law, 2006).

Minister of the ACT, Jon Stanhope foreshadowed amendments to the Act to introduce a direct right of action for breach of human rights and to extend the scope of the rights covered to include economic, social and cultural rights.⁹³

3.3 Victoria

3.3.1 The Victorian *Charter of Human Rights and Responsibilities* was enacted in July 2006 and came into force January 2007. It is a normal statute that may be amended by Parliament like any other Act. The rights contained in the Charter are only subject to such limits as are demonstrably justified in a free and democratic society. The Victorian Government, when it gave the human rights reference to the Victorian Human Rights Consultation Committee, also released a Statement of Intent indicating its preference that any new human rights instrument should not create new causes of action. In line with this preference, the Charter explicitly excludes any separate right to claim damages for breach of human rights obligations. However, it does contain provision for other remedies to be granted for breaches of rights, although the terms of this provision are a little obscure.⁹⁴ It appears to enable existing causes of action to be pleaded on human rights grounds. For example, a citizen may be able to seek an injunction or declaration against a public authority on the basis that the authority is acting in breach of a Charter right. Similarly, a person may bring an action for review of a decision made by a public authority on the basis that it fails to comply with human rights. If the remedies provision means something less than this then it would appear to make the Charter a hollow instrument as far as the direct protection of personal rights is concerned.

3.3.2 With regard to pre-enactment scrutiny of legislation, the Charter requires that Members of Parliament who propose to introduce a Bill into either House ensure that a ‘statement of compatibility’ is presented to the House before the second reading speech. This procedure differs from that prescribed by the ACT *Human Rights Act* in that it requires reasoned statements of compatibility to be given rather than mere assertions of compatibility. This means that the statement must identify how the Bill is compatible with the Charter or, where it is incompatible, the nature and extent of that incompatibility. The aims of this procedure are to ensure that Members of Parliament take responsibility for the human rights impact of their legislation and to assist Parliament in its deliberations on legislation.⁹⁵ Additionally, the Scrutiny of Acts and Regulations Committee is required to consider Bills and subordinate legislation and to report to Parliament on their compatibility with human rights.

3.3.3 As far as possible, Victorian courts are required to interpret legislation in a way that is compatible with the Charter. The Victorian Supreme Court has power to make a declaration that legislation cannot be interpreted consistently with the Charter. But this does not affect the legislation’s validity or continuing operation. Accordingly, the Charter does not impair Parliamentary sovereignty. If a declaration of ‘inconsistent interpretation’⁹⁶ is made the Minister administering the Act in question must provide Parliament with a written response within six months.

3.3.4 The Charter also makes explicit provision for Parliament to declare that legislation explicitly overrides the Charter.⁹⁷ Strictly speaking this provision, which is like the section in the Canadian

⁹³ Evidence to Standing Committee on Legal Affairs, Australian Capital Territory Legislative Assembly, Canberra, 10 November 2005, (Jon Stanthorpe); Chief Minister of the ACT Jon Stanhope, ‘Australian Bill of Rights – the ACT and Beyond’ (Speech delivered at the Australian National University, Canberra, 21 June 2006).

⁹⁴ Section 39.

⁹⁵ 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, 21st June 2006).

⁹⁶ This is the term used in the *Victorian Charter of Rights and Responsibilities 2006* (Vic) s 36.

⁹⁷ Section 31.

Charter of Rights and Freedoms,⁹⁸ is unnecessary given that courts have no power to invalidate legislation, so that the enactment of inconsistent legislation is always a possibility. Nevertheless, it appears to be directed towards serving a number of functions. The legislation containing an override declaration is limited to five years' duration, but its operation may be extended for a further five years. Additionally, it signals Parliament's intention that override declarations are only to be made in exceptional circumstances.⁹⁹ The person proposing the declaration is required to provide Parliament with a statement explaining the exceptional circumstances. This reinforces the Charter's pre-enactment scrutiny provisions and encourages Members of Parliament to take human rights seriously and to provide genuine and considered justification for their reduction.¹⁰⁰ Finally, where legislation contains an override declaration, this necessarily sets aside the requirement that courts interpret legislation in a way that is compatible with the Charter. There is however, no necessity for the override mechanism to be employed when the Government wishes to enact legislation that encroaches on or overrides human rights. Accordingly, in the framework of the Victorian Charter, the override mechanism is likely to have little practical affect in either protecting human rights or preserving Parliamentary sovereignty. Further, given that this mechanism imposes an additional duty to explain the exceptional circumstances justifying the legislation where it is used and also results in the legislation having a limited life, there is also little reason to believe that Parliament will make much use of it.

3.3.5 The Victorian Human Rights and Equal Opportunity Commission has a number of functions in relation to the Charter including, providing annual reviews of its operation to the Attorney General, examining all declarations of inconsistent interpretation made by courts and all override declarations for new legislation, reviewing the programs and practices of public authorities when requested to do so to check their compatibility with human rights, providing education about the Charter and human rights and advising the Attorney General on any matter relevant to the operation of the Charter.

3.3.6 Reviews of the Charter's operation are to occur after four and eight years from its commencement. The first review must consider whether additional rights should be included in the Charter, including economic, social and cultural rights, rights contained in the *Convention on the Rights of the Child*, the *Convention on the Elimination of All Forms of Discrimination Against Women*, and the right to self-determination. The review must also consider whether further provision should be made in relation to proceedings that may be brought and remedies that may be granted under the Charter.

3.3.7 In accordance with the Victorian Government's expressed preference, the Charter deals largely only with civil and political rights. However, it does include protection for cultural rights and makes explicit provision for the protection of Aboriginal identity, culture and language. Economic, social and cultural rights have otherwise been omitted. The desirability for their inclusion is a matter that must be considered in the review undertaken of the Charter's first four years of operation.

3.3.8 In contrast to the ACT *Human Rights Act*, the Victorian Charter expressly requires public authorities to comply with the Charter. The term, 'public authority' is defined to include government departments, statutory authorities, local governments, the police and persons and bodies that perform public functions but does not include Parliament or the courts. Like the ACT *Human Rights Act*, the Charter protects the rights of natural persons, not corporations.

3.4 The United Kingdom

⁹⁸ For further discussion see para [3.6.2].

⁹⁹ Section 31(4).

¹⁰⁰ See further discussion of this provision by 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, 21st June 2006).

3.4.1 Human rights legislation was enacted in the United Kingdom in 1998. The *Human Rights Act 1998* (UK) is an ordinary statute that can be amended or repealed by the British Parliament at any time. Citizens are able to institute court proceedings to enforce human rights and can obtain various remedies for their breach including damages (monetary compensation). However, damages may only be awarded if no other remedy is appropriate.

3.4.2 The United Kingdom Act requires courts to interpret and give effect to legislation in a manner that, as far as possible, is compatible with the European Convention on Human Rights. Courts have the power to declare legislation incompatible with the Convention but they have no power to invalidate primary legislation though they may invalidate subordinate legislation such as regulations. In response to a declaration of incompatibility the government may make a remedial order to amend the legislation. If the Government chooses, however, it may ignore the declaration of incompatibility and the legislation in question will continue to operate.

3.4.3 When legislation is introduced into Parliament, the relevant Minister must make a statement about its compatibility with Convention rights. Reasoned statements of compatibility appear in the Explanatory Notes on Bills.¹⁰¹ Such statements are based on reviews of the proposed legislation with regard to Convention rights undertaken by government departments. Legislation may be enacted that is incompatible with those rights but, if this is done, the relevant Minister must notify Parliament of the incompatibility and state that the Government, nevertheless, intends to enact the law. The aims of this model are to encourage governments to provide thoughtful justification for any encroachments on human rights, to ensure that such encroachments are adequately scrutinised and debated by Parliament and to minimise such encroachments. Statements of incompatibility made by Ministers would necessarily impact upon the subsequent interpretation of the legislation by the courts. Pre-enactment scrutiny of legislation is also provided by the Joint Committee on Human Rights, established by the United Kingdom Parliament. The Committee has been very successful in persuading the government to amend bills to improve human rights protections.¹⁰² The United Kingdom government has now decided to establish a Commission for Equality and Human Rights. The Commission will have research, review, advisory and educational functions in relation to human rights.

3.4.4 The rights protected by the United Kingdom Act are those in the *European Convention on Human Rights*. The focus is on civil and political rights but some economic, social and cultural rights, such as the right to property and the right to education, are also included.

3.4.5 All public authorities, including courts and tribunals but excluding Parliament, must act in a manner that is compatible with the *European Convention*.

3.4.6 Even though the courts have adopted a conservative approach to the interpretation and implementation of the *Human Rights Act*, it has had a considerable impact upon the case law and legal culture of the United Kingdom. Commenting on that impact two years after the Act came into operation the Lord Chancellor said:

¹⁰¹ Department for Constitutional Affairs, *Section 19 Statements: Revised Guidance for Departments*, UK Parliament website <<http://www.publications.parliament.uk/pa/jt200203/jtselect/jtrights/41/4113.htm#a16>> at 3 June 2007.

¹⁰² For details see the Committee's website at Joint Committee on Human Rights, *The Joint Committee on Human Rights Home Page*, United Kingdom Parliament <<http://www.parliament.uk/commons/selcom/hrhome.htm>> at 15 June 2007.

The Act represents one small manageable step for our Courts; but it is a major leap for our constitution and our culture. It has transformed our system of law into one of positive rights, responsibilities and freedoms, where before we had the freedom to do what was not prohibited. ... [I]t has moved public decision-making in this country up a gear, by harnessing it to a set of fundamental standards. And it has breathed new life into the relationship between Parliament, Government and the Judiciary, so that all three are working together to ensure that a culture of respect for human rights becomes embedded across the whole of our society.¹⁰³

3.5 New Zealand

3.5.1 The New Zealand *Bill of Rights Act 1990* is an ordinary Act of Parliament. Even though there are no explicit enforcement provisions for citizens in the Act, the New Zealand Court of Appeal has held that compensation may be obtained from government agencies for any breach of the rights in the Act.¹⁰⁴

3.5.2 In interpreting legislation New Zealand courts are required to favour a meaning that is consistent with the Act. However, courts do not have the power to override inconsistent legislation and there is no express provision in the Act for the courts to declare legislation to be incompatible with it.

3.5.3 The rights covered by the Act are not expressed in absolute terms but are subject ‘only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society’.¹⁰⁵ While the New Zealand government may, therefore, enact legislation that is inconsistent with the Act, the Attorney General is required to inform Parliament of this inconsistency on its introduction. Government procedures now also require that all draft legislation presented to Cabinet be certified as complying with the Act.¹⁰⁶

3.5.4 The New Zealand Human Rights Commission has a number of powers in relation to the administration of the Act, including reporting to the Minister on any matter affecting human rights, initiating educational programs, assessing whether new legislation meets human rights standards, inquiring into alleged breaches of human rights, advising the Prime Minister on human rights matters, initiating programs that foster understanding of human rights and promoting a human rights culture.

3.5.5 Primarily, civil and political rights are protected under the Act. The rights apply to acts done by the legislative, judicial and executive branches of the New Zealand Government and people performing public functions. The Act protects the rights of all legal persons, both corporations and natural persons.

3.6 Canada

3.6.1 The Canadian *Charter of Rights and Freedoms 1982* is entrenched in the Canadian Constitution. This means that it can only be changed by altering the Constitution following a referendum. The Charter was enacted following the failure of an earlier human rights instrument, the *Canadian Bill of Rights 1960*, to achieve any real impact on the courts’ interpretation of legislation or on Parliament’s legislative practices. The 1960 Act is still operative.

¹⁰³ Lord Irving of Lairg, ‘The Human Rights Act Two Years On: An Analysis’ (Speech delivered at the Durham University Irvine Lecture, Durham, 1 November 2002).

¹⁰⁴ *Simpson v Attorney General* [1994] 3 NZLR 667.

¹⁰⁵ Section 5.

¹⁰⁶ Department of the Prime Minister and Cabinet, *Cabinet Office Manual* (1996).

3.6.2 Charter rights are enforceable by the courts, which have power to grant such remedies as they consider appropriate and just. Because the Charter is entrenched in the Canadian Constitution, it operates to override inconsistent legislation. Courts may declare legislation that is inconsistent with Charter rights to be invalid. However, if this occurs, Parliament may subsequently enact an override clause to give affect to the legislation notwithstanding its inconsistency with the Charter. Such legislation endures for only five years, after which it must be reviewed and may be extended for a further five years. The aim of this model is to promote the courts' protection of human rights by giving the Charter controlling status with respect to normal statutes while at the same time preserving the ultimate sovereignty of Parliament. Charter rights are also subject to 'such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society'.¹⁰⁷

3.6.3 There is no formal mechanism in the Charter for pre-enactment review of legislation. However, the Canadian Human Rights Commission can review regulations and by-laws to determine whether they are inconsistent with the anti-discrimination provisions of the *Human Rights Act 1985*.

3.6.4 The Charter covers civil and political rights and additionally protects the language rights and educational rights of minority language groups as well as existing treaty rights of indigenous peoples. It applies to both natural persons and corporations.

3.6.5 In contrast to the previous *Human Rights Act*, the Charter has had a significant impact upon Canadian jurisprudence and human rights culture. It has been applied in numerous cases and is accepted as having a dominant role in Canadian political, legal and cultural spheres.¹⁰⁸

3.7 South Africa

3.7.1 The South African Bill of Rights is entrenched in the South African Constitution of 1996. Any limitations of rights must be reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom. Some rights, such as the right to life and human dignity, are non-derogable. Individuals can take action to enforce their rights through the courts and the courts have power to grant any relief that is appropriate.

3.7.2 The Bill of Rights is interpreted by the South African Constitutional Court, which has the power to invalidate legislation that is inconsistent with the Bill. When interpreting legislation, the common law or customary law, the courts must do so in a way that promotes the objects of the Bill of Rights. The South African Human Rights Commission has research, review and educational functions in relation to human rights. It can also hear complaints about human rights breaches.

3.7.3 The rights covered by the Bill are very broad. They include both civil and political rights and social and economic rights. In regard to the latter, there are unqualified rights to basic education and training and to a healthy environment. Other economic and social rights, such as rights to housing, health care, food, water and social security are limited by the provision that the State must take measures to achieve their realisation within its available resources.

3.7.4 The Bill applies to all laws, all state organisations and to private relations.

3.8 The United States

3.8.1 The United States Bill of Rights was inserted into the United States Constitution in 1791. It is contained in a series of amendments to the Constitution and the rights they set down are expressed

¹⁰⁷ Section 1.

¹⁰⁸ Centre for Research and Information on Canada, *The Charter: Dividing or Uniting Canadians?* (2002) <http://www.cric.ca/pdf/cahiers/cricpapers_aprils00s.pdf> at 5th June 2007.

How are human rights protected elsewhere?

in absolute terms: they are not subject to limitations such as those that apply under the ACT, Victorian, Canadian, New Zealand and South African human rights instruments. The Bill of Rights, being entrenched in the Constitution, can only be altered by amending the Constitution. Individuals can enforce their rights by taking action in the courts. The rights contained in the Bill are primarily civil and political rights.

3.8.2 The Supreme Court of the United States has the power to invalidate any law inconsistent with the Bill. In contrast to the position in Victoria, Canada, the United Kingdom and New Zealand, the legislature has no power to override the Bill of Rights or to enact legislation notwithstanding that it abrogates rights in the Bill of Rights. Accordingly, the United States model does not preserve the supremacy of the legislature in relation to legislation. It is the courts that have the last say on human rights issues.

Part 4

What model of human rights protection should Tasmania adopt?

4.1 Do Tasmanians support the enactment of a Tasmanian Charter of Human Rights?

Arguments in favour of a Charter of Rights

4.1.1 The Tasmanian Law Reform Institute was asked to identify, in consultation with the Tasmanian community, how human rights can best be enhanced, promoted and protected in Tasmania and, in particular, what model of human rights protection would be most appropriate for Tasmania. The overwhelming majority of submissions received by the Institute, (383 - 94%), were of the view that a new law on human rights is needed in Tasmania. They expressed a preference for some form of Charter of Rights that applies to all arms of government, that is, to the legislature, the executive and the courts.¹⁰⁹

4.1.2 It was argued that such a Charter would help remedy the gaps and shortcomings in current human rights protections and provide a unified and systematic approach to human rights across all arms of government. For example, Crystal Garwood suggested that a Charter of Rights would,

...result in principled and reasoned decision making on fundamental issues and also strengthen legal and political systems through checks and balances. [It would] create good governance and strong communities by allowing for greater review mechanisms. A Charter would consolidate the protection that the Parliament provides, such as the *Anti-Discrimination Act 1988* (Tas), by placing all rights in one comprehensive and accessible piece of legislation. ... It would develop a benchmark and a minimum standard of behaviour.¹¹⁰

4.1.3 Amnesty International expressed a similar view stating,

Amnesty International considers that a Charter of Rights would significantly enhance the protection and promotion of human rights in Tasmania. It would provide a single and consolidated statement of the basic human rights for the Tasmanian Government and public authorities to uphold and promote.¹¹¹

4.1.4 The Tasmanian Women's Council wrote,

...while human rights are embodied in various Government statutes ... there is benefit in legislating for an overarching Human Rights Act. The web of laws governing citizens is complex and many individuals may be unaware of their rights because they are contained in numerous pieces of legislation, not widely known by the majority of citizens.

Enumeration of rights in a single document would therefore be of value in promoting civil awareness and debate on human rights and responsibilities at the individual and institutional levels, and in the enactment of new legislation, which would be informed and shaped by a new emerging jurisprudence on human rights.¹¹²

¹⁰⁹ See Submission 161.

¹¹⁰ Submission 115.

¹¹¹ Submission 12.

¹¹² Submission 371.

4.1.5 Clare Wootton submitted,

...to adopt a bill of rights will help to consolidate and better articulate human rights protections in Tasmania, reducing the need for extensive and potentially fruitless searches as to what rights are subject to protections under the existing system of common law and statute. To adopt such a document, in conjunction with processes of education to promote community awareness will raise the idea of human rights friendliness above the level of abstract idealism circulating in academic circles. Parliamentary legitimacy requires the community to have real awareness of what rights it does and does not have. If this is absent public debate and the democratic system cannot be said to be working effectively. To this end human rights protections in Tasmania will be enhanced by the introduction of a Charter of Rights.¹¹³

4.1.6 It was also contended by some that a Charter would constitute a statement of basic human rights that expresses the minimum standards that our government and public authorities should meet. It would, therefore, provide Tasmanians with a generally applicable index by which to judge government legislation and conduct. Consequently, it would improve our democratic processes by providing a vehicle for good governance and for ensuring transparency and accountability in decision-making.¹¹⁴

4.1.7 In this regard, Helen James wrote,

With a Charter that acts as a framework within which government activity is mediated, assisted by recourse to extant international jurisprudence in human rights, the State government would be compelled to give due consideration to the human rights implication of its actions. With a central document to refer to the public are made aware of what their rights are and how they may be secured and become ever more willing to demand the protection of these rights by their elected representatives.¹¹⁵

4.1.8 John Cianchi stated,

Human rights legislation would provide a framework to assist lawmakers and the public to judge whether laws and policies that intend to limit a people's rights provide an appropriate balance and necessary safeguard. ...Change is required to ensure that government agencies that work with and make decisions for disadvantaged people are infused with a human rights culture. This, in my view, will not be achieved without a legal requirement to change. An Act of Parliament should be passed that provides a framework of human rights to which Tasmanians and visitors are entitled, the responsibilities of parliament and government services to comply with and protect them, processes to assess whether legislation, policies and practices are consistent with human rights principles and procedures to enable people who believe their rights have been violated or unreasonably limited to seek remedy.¹¹⁶

4.1.9 The Justice and International Mission Unit Synod of Victoria and Tasmania Uniting Church in Australia said,

A Charter of Human Rights would help provide a minimum benchmark in the setting of human rights in Tasmania and would make it harder for any future government to take action to undermine the human rights of Tasmanians.

A Charter of Human Rights would help to protect human rights in Tasmania by requiring government decision making to respect and consider human rights standards in such processes to a greater degree than currently necessary. Experience in comparable jurisdictions has shown that a Charter of Human Rights, if structured to affect policy making, legislation and administrative decisions by government, can significantly enhance the quality of decision-making within both government and the Parliament.

¹¹³ Submission 405.

¹¹⁴ See Submission 12; Submission 148; Submission 154; Submission 155; Submission 156.

¹¹⁵ Submission 164; Submission 223.

¹¹⁶ Submission 67.

A Charter of Human Rights would also assist in ensuring that where a government sought to restrict human rights, there would be proper debate about whether any proposed action is justified. A Charter of Human Rights provides assistance to both public servants and Parliamentarians about obligations under basic human rights standards.¹¹⁷

4.1.10 A number of submissions suggested that a Charter of Rights would assist in the development of community consciousness and understanding of rights¹¹⁸ and would help ensure that the interests of minority and vulnerable groups are not sacrificed on the altar of political expediency or drowned in the wash of majority rule.¹¹⁹ For example in its submission, TasCOSS said,

One of the major reasons TasCOSS is strongly advocating for a Charter of Human Rights is because we believe it will significantly increase community awareness of human rights and promote a greater culture of respect for rights of all Tasmanians. We believe these are important outcomes in and of themselves.¹²⁰

4.1.11 The Tasmanian Gay and Lesbian Rights Group said,

A Charter of Rights is vitally important for creating a culture of respect for human rights, and one which honours and affirms the human dignity and basic entitlements of all individuals. In this regard we note that previous Tasmanian human rights initiatives, such as the decriminalisation of homosexual sex and the enactment of anti-discrimination laws, have dramatically improved community attitudes to sexual and gender difference. However, national surveys have revealed that prejudice against gender minorities runs more deeply in Tasmania than the other Australian states. A Charter of Human Rights will build on Tasmania's recent human rights achievements by fostering greater respect for minorities and appreciation of diversity.¹²¹

4.1.12 Several submissions expanded upon this position stating that, because in a democratic society the focus is usually upon majority interests, the rights of minorities are often overlooked and can be infringed.¹²² Adoption of a Charter of Rights could provide a framework for avoiding this and for safeguarding minority interests and rights. For example, Anglicare told the Institute,

In considering whether human rights are currently protected adequately, Anglicare believes 'that we should judge societies, institutions, laws and policies not on whether they work for those that are already well off but whether they work for the poor the marginalised and the dispossessed', to quote Professor Larissa Behrendt giving the Dorothy Pearce Memorial Lecture in Hobart this year. ... Tasmania has seen great progress but there is still much we can do to improve outcomes for our most disadvantaged. Adopting human rights standards is a means to assist us in that task, while promoting values that will benefit all Tasmanians.¹²³

4.1.13 To similar affect, Briony Harris wrote:

The claim that human rights are protected merely because a democratic system is in place is misguided. The nature of a democracy is constructed on the rule of [the] majority, while "the very basis of human rights is the protection of minorities against the will of the majority".¹²⁴ A Charter will particularly enhance the protection of human rights for those in "marginalised groups of the community" who currently lack protection under a rule of majority.¹²⁵

¹¹⁷ Submission 385.

¹¹⁸ See Submission 144; Submission 156; Submission 79; Submission 385.

¹¹⁹ See Submission 13; Submission 129.

¹²⁰ Submission 368.

¹²¹ Submission 369.

¹²² For example Submission 204; Submission 218.

¹²³ Submission 13.

¹²⁴ Hilary Charlesworth and Pene Matthew, 'A Response to the Government's Human Rights Treaty Review', *The Age* (Melbourne) 12 September 2000.

¹²⁵ 'Protecting the Inalienable Rights of Citizens', *The Age*, (Melbourne), 24 July 2006.

4.1.14 The Multicultural Council of Tasmania said,

MCoT strongly supports a Charter of Human Rights for Tasmania. At the outset, an important consequence of such a Charter would be that it promotes increased community awareness of human rights and greater understanding for the rights of all Tasmanians, whatever their background and culture. Many migrants and refugees come from backgrounds where not only were their fundamental rights not protected, but they were subject to a complete disregard for their human dignity. For them the protection of human rights is of paramount concern.¹²⁶

4.1.15 The point was expressed succinctly by the Tasmanian Aboriginal Centre: “A human right includes the right to be different without suffering as a consequence.”¹²⁷

4.1.16 Other submissions told the Institute that a Charter of Human Rights would contribute to the attainment of the then *Tasmania Together* Goal 2: “To have a community where people feel safe and are safe in all aspects of their lives”.¹²⁸ Similarly, the Department of Police and Emergency Management told the Institute that a Charter of Rights would contribute to the overall mission of the Department “to make Tasmania safe”.¹²⁹

4.1.17 It was also argued that a basic statement of rights would be particularly useful at the present time when governments, concerned with security issues, are enacting legislation that erodes many of our longstanding rights and freedoms. A Charter of Rights could provide a balance and checkpoint for Parliament when considering such legislation. It would help ensure that we do not sacrifice our democratic liberties in the name of security. In this context, a Charter could provide clear markers for our co-operation with the Commonwealth Government on security matters. For example, The International Commission of Jurists wrote:

It is particularly important that change occurs now because human rights are under threat as a consequence of the ‘War against Terror’. Although the Commonwealth is the main driver of legislation designed to limit human rights in order to defend against terrorist threats, it is important that we ensure that human rights are properly protected at State level because the States are being asked by the Commonwealth to refer matters under s 51(xxxvii) of the Constitution or to legislate to restrict human rights as part of the fight against terror in order to fill gaps in Commonwealth legislative power; see for example the *Terrorism (Commonwealth Powers) Act 2002*, authorising the Commonwealth to impose some restrictions on freedom of speech and freedom of association. These restrictions may be justifiable but some were heavily criticised by the Sheller Report tabled in Federal parliament in June as denying the right of association and as being so broad as to catch quite innocent teaching. Changes are needed to the law to ensure that we have publicly accepted standards by reference to which we can evaluate such laws in order to ensure that we are aware of and have fully considered the extent to which they sacrifice our basic rights.¹³⁰

4.1.18 Some respondents to the Issues Paper supported the enactment of a Tasmanian Charter of Rights because they felt it would enhance the ability of Tasmanians to influence State government decision-making. Specifically, they desired the Tasmanian government to pursue policies that emphasise issues of social justice.¹³¹ These respondents often expressed feelings of frustration and powerlessness in respect of current decision-making processes and suggested that a Tasmanian Charter

¹²⁶ Submission 218.

¹²⁷ Submission 366.

¹²⁸ See Submission 384; Submission 367.

¹²⁹ Submission 365.

¹³⁰ Submission 161.

¹³¹ Submission 385; Submission 60; Submission 125; Submission 126; Submission 113; Submission 114; Submission 328.

would promote the active consideration of human rights values in fund allocation¹³² and of the need to protect the interests of vulnerable members of the community.¹³³

4.1.19 More broadly, it was argued a Charter of Rights would help foster awareness of human rights and dignity. It would help create a human rights culture where people are educated about human rights and alert to the necessity to protect them. ACROD (now National Disability Services Ltd) wrote:

Change is necessary:

- To ensure the protective capacity of existing legislation supporting the human rights of people with disabilities and to extend the scope of protection;
- To protect the rights of the general population and to dispel the belief that only minority groups have legally protected rights;
- To provide a positive direction and impetus for change towards a community that promotes human rights not just the avoidance of identified wrongs like discrimination;
- To provide a moral framework for decision-making in all levels of government;
- To provide a set of values that can be shared by all members of a secular society composed of many multicultural groups.

A Charter of Rights that guides and regulates the conduct of individuals and corporate entities, including government departments and statutory authorities is necessary to bring about this type of change.¹³⁴

4.1.20 Similarly, Advocacy Tasmania said,

We are aware that the experience in other jurisdictions is that a charter of rights has had a positive impact on culture and society. We believe increasing awareness of human rights by way of a Charter would be a positive step for all Tasmanians both now and in the future. We believe that a Charter is necessary to outline the minimum standard for human rights acceptable by our society and provide an avenue for people to pursue any complaints about breaches of their fundamental rights.

Whilst we recognise that passing human rights legislation is not likely to be a cure all for all rights related grievances, we support the proposal to develop a charter to increase public awareness of human rights and offer some safeguards into the future that our society will grow with and into a culture of human rights awareness.¹³⁵

4.1.21 The suggestion was also made that the enactment of a Charter of Human Rights in Tasmania together with the enactment of human rights instruments in the ACT and Victoria would be instrumental in influencing other Australian States and Territories and potentially even the Commonwealth government to tread the same path.¹³⁶

4.1.22 Lionel Nichols set out a number of benefits that would flow from the enactment of a Charter of Rights:

¹³² Submission 307; Submission 125; Submission 126; Submission 385; Submission 113; Submission 114; Submission 328.

¹³³ Submission 66, Submission 125; Submission 126; Submission 385; Submission 113; Submission 114; Submission 328.

¹³⁴ Submission 4.

¹³⁵ Submission 7.

¹³⁶ See Submission 218.

What model of human rights protection should Tasmania adopt?

A Charter of Rights would enhance the protection of human rights in Tasmania. First, human rights issues would be considered by the Tasmanian Parliament when enacting new legislation. Should Tasmania follow New Zealand,¹³⁷ the United Kingdom,¹³⁸ the ACT¹³⁹ and Victoria¹⁴⁰ the Tasmanian Attorney General would be required to issue a statement on the compatibility or otherwise of the legislation. The major benefit of this is that new legislation is more likely to respect and uphold human rights. ...A Charter of Rights in Tasmania would make it more likely that new legislation is enacted in accordance with human rights.

Secondly, a Charter would raise awareness of human rights issues within the Tasmanian Cabinet. When formulating Government policy, Cabinet would be conscious of protecting and promoting human rights. According to the ACT Human Rights Commissioner, the influencing of government policy has been the biggest impact of the HRA.¹⁴¹ For example, the architect employed to design a prison was briefed that the building must allow for freedom of religious worship and provide separate accommodation for adults and children.¹⁴² Increased dialogue within Cabinet on human rights would enhance human rights protection in Tasmania.

A third way in which a Charter would enhance human rights is by promoting a human rights culture in Tasmania. Should the Attorney General be required to issue a statement of incompatibility where legislation infringes upon human rights, this will assist many Tasmanians in understanding what their rights are and the extent to which they are being derogated from. Further, as a consequence of the ACT HRA, non-government organisations and government agencies are now developing their own specific Charters of Rights and initiating educational programmes.¹⁴³ This has resulted in a 'marked increase in the awareness of human rights principles' in the ACT.¹⁴⁴ A greater public awareness of human rights in Tasmania will undoubtedly lead to enhanced human rights protection.¹⁴⁵

4.1.23 The Human Rights Law Resource Centre clearly and forcefully summarised the views of most of those supporting the enactment of a Charter of Rights in Tasmania:

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 ...have a significant impact on public sector culture, improving the way government interfaces with the community. Charters have also proved effective in dissuading governments from unreasonably curtailing human rights. Charters operate to open Parliament's eyes to human rights breaches that may otherwise be overlooked. ...The introduction of a Charter will demonstrate Tasmania's commitment to improving social justice and fairness, particularly for the disadvantaged.

¹³⁷ *Bill of Rights Act 1990* (NZ) s 7.

¹³⁸ *Human Rights Act 1998* (UK) c 42, s 19.

¹³⁹ *Human Rights Act 2004* (ACT) s 37.

¹⁴⁰ *Charter of Human Rights and Responsibilities Act 2006* (Vic) s 28.

¹⁴¹ Department of Justice and Community Safety, Australian Capital Territory, *Human Rights Act 2004 Twelve-Month Review – Report* (2006) 13.

¹⁴² Peter Bayne, 'The Human Rights Act 2004 (ACT) – Developments in 2004' (2005) 8 *Canberra Law Review* 137, 151-153.

¹⁴³ Department of Justice and Community Safety, Australian Capital Territory, *Human Rights Act 2004 Twelve-Month Review – Report* (2006) 34-36.

¹⁴⁴ Helen Watchirs, 'Review of the First Year of Operation of the *Human Rights Act 2004*' (Paper presented at the Accessing the First Year of the Human Rights Act conference, Canberra, 29 June 2005) 5.

¹⁴⁵ Submission 295.

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 that will have been fostered by the Tasmanian Charter.¹⁴⁶

Arguments against a Charter of Rights

4.1.24 Half of those who opposed the enactment of specialist laws to further protect human rights in Tasmania argued that such laws are unnecessary, that existing protections are adequate, (see paras [2.2.1] - [2.2.2]). This contention is disputed by those who made submissions to the Institute pointing to inadequacies in existing protections of human rights, identifying shortcomings in those protections and citing actual failures in human rights protections for both individuals and groups, (see paras [2.2.3] – 2.2.32]).

4.1.25 Most who opposed the enactment of some form of Charter of Rights argued that it would displace the sovereignty of Parliament and deliver too much power to the unelected, non-representative judiciary. For example, Graeme Thompson wrote:

If, as in some existing examples discussed in the [Issues] Paper, the Charter restricts what a parliament elected at the last exercise of the right to vote can do, then it prevents the parliament, whose members represent the up-to-date will and outlook of the electorate, from doing its job, always with one eye on the next election. It also opens the way to add another piece of legislation to the Tasmanian Constitution as a vehicle for allowing the court to overrule the parliament, thus blurring the two organs of government. If a Charter does not stop a parliament from passing a contrary law, then it is to no effect.¹⁴⁷

4.1.26 To similar effect the Australian Christian Lobby told the Institute:

A Charter of Rights would begin to shift more and more policy and legislative decisions out of the hands of the elected representatives of our parliament, and into the hands of the unelected judiciary. All State laws would be subservient to a Charter of Rights, allowing the unelected judiciary to decide whether an Act of Parliament is in contravention of this Bill. This leaves room for activist judges to interpret the intent of a Charter of Rights according to their prejudice. This removes the necessary checks and balances that currently exist. If the Tasmanian public do not like the laws that are being passed by our Parliament, they can take action and make their voice known at the next election. The same check and balance is not available to the judiciary.¹⁴⁸

4.1.27 Geoffrey Hills expanded upon this view:

Proponents usually portray the enactment of a Charter as involving the replacement of one form of decision-making about a particular class of issue (majority decision-making) with an altogether different form. This is incorrect. The reality of rights adjudication before the Australian courts requires judges to make decisions in difficult or marginal cases about which reasonable people may reasonably disagree, rather than about obvious cases such as torture. Because Charters necessarily describe rights in general terms, rather than in application to thousands of specific instances, interpretive disagreement between judges about what the Charter requires in a given instance is the norm. (This is particularly so in the case of models requiring judges to interpret legislation so as to be consistent with enumerated rights.) When interpretive disagreement occurs in a difficult case, appellate judges sitting in multi-member courts use the same method of resolving it as ordinary mortals: majority voting.

¹⁴⁶ Submission 156.

¹⁴⁷ Submission 376.

¹⁴⁸ Submission 22.

The enactment of a Charter does not involve the replacement of majoritarian decision-making with a different form of decision-making. Instead, it involves the replacement of majority decision-making by one group (the community) with majority decision-making by another: a very small group of men and women drawn from the ranks of a particular profession. Therefore, public debate should address the question of whether (and if so, why) a small group of former barristers is capable of making decisions that are greater in objectively measured moral perspicacity than those that would be made by the whole community.

The notion that judges have such special capability is offensive to all those, like Professor Waldron (with whom I respectfully agree), who believe that ‘the right to democracy is a right to participate in equal terms in social decisions on issues of high principle and that it is not to be confined to interstitial matters of social and economic policy’.¹⁴⁹ From this argument, the fallacy that a rights based position in political philosophy necessarily implies support for a Charter of Rights as a political institution should be reasonably stark.¹⁵⁰

4.1.28 Warwick Marshall expressed similar concerns,

In an excellent article Richard Etkins correctly recognises that the belief that ‘the judiciary will somehow find the right set of fundamental principles even when there is on-going disagreement as to which rights are in fact fundamental’ is misplaced.¹⁵¹ Because radically different underlying assumptions are at the core of these disputed issues judicial logic is no more likely to produce correct answers than a straw poll. Unelected, unaccountable judges have fewer resources, information and incentive to reach a decision that is fully considered and attractive to the participants of a political system on the political question of which expression is legitimate.¹⁵²

4.1.29 Some argued that a Charter of Rights would only benefit lawyers, that it would open the floodgates for frivolous court actions and create an individualistic and selfish approach to rights.¹⁵³ In this regard the Catholic Women’s League said,

Experience elsewhere points to increased disputation and disruptive delays. There is evidence from Canada and New Zealand such charters set the stage for increased litigation and lengthy disputation. ...Protracted litigation would disadvantage Tasmanians, burdening them in terms of time, emotional stamina and finance. It would be unfair, unjust and unnecessary to impose these extra burdens.¹⁵⁴

4.1.30 These concerns were rejected by proponents of a Tasmanian Charter who pointed to the ACT, United Kingdom and New Zealand models in support of their contention that modern human rights enactments do not create a litigious society or redistribute legislative power to the judiciary. The human rights regimes in these jurisdictions do not enable the courts to invalidate legislation and consequently do not reduce parliamentary sovereignty. In the United Kingdom, the Department of Constitutional Affairs reported in 2006 that the *Human Rights Act 1998* (UK) has not significantly altered the constitutional balance between Parliament, the Executive and the Judiciary.¹⁵⁵ While, it may be the case that the United States Bill of Rights gives the courts the last say on the validity of legislation, the models enacted in the ACT, New Zealand, Canada, the United Kingdom and Victoria demonstrate that it is possible to enact human rights instruments that preserve Parliament’s ultimate legislative authority.

¹⁴⁹ Jeremy Waldron, ‘A Right-Based Critique of Constitutional Rights’ (1993) 13 *Oxford Journal of Legal Studies* 18, 20.

¹⁵⁰ Submission 136.

¹⁵¹ Richard Etkins, ‘Judicial Supremacy and the Rule of Law’ (2003) 119 *LQR* 127, 140.

¹⁵² Submission 199.

¹⁵³ This concern was expressed not only by those who opposed the enactment of a Charter but also by some who supported its enactment.

¹⁵⁴ Submission 64.

¹⁵⁵ Department of Constitutional Affairs, United Kingdom, *Review of the Implementation of the Human Rights Act* (2006) 10.

4.1.31 However, additional criticism was levelled at these models on the basis that they give the courts a decision-making role in relation to human rights that is considered to be properly the preserve of Parliament. For example Warwick Marshall wrote that the affect of these models,

is to place pressure upon Parliament to make their decisions accountable to a court's interpretation of a set of static principles. This pressure is ill advised, completely unnecessary and possibly harmful to a system of representative government. This is because whether a Tasmanian bill of rights takes the form of an ordinary statute or a statute that requires special procedures to amend, either form of bill will be difficult to alter or ignore in practice because of the pejorative connotations attached to altering, repealing or ignoring 'freedoms' and 'rights'. A bill of rights essentially freezes a conception of rights for an indeterminate time and limits the flexibility that a representative government should have to meet difficult issues, changing circumstances and legitimate differing opinions held by the public. The people directly, not a fixed document, should be the persuasive force behind Parliament's decisions.¹⁵⁶

4.1.32 Experience, however, in those jurisdictions where statutory human rights instruments have been enacted suggests that making human rights a consistent reference point in the legislative process has a beneficial rather than a debilitating effect on that process. For example, the Department of Constitutional Affairs (DCA) in the United Kingdom reported that the *Human Rights Act 1998* (UK) has had a significant but beneficial effect upon the development of policy by the central government; that it has led to better policy outcomes by ensuring that the needs of all members of the UK's increasingly diverse population are appropriately considered and that it has promoted greater personalisation of policy and, therefore, improved legislation. The DCA also noted that the *Human Rights Act* and the associated human rights framework were only one part of other legal and policy considerations that were driving the decision-making process in the same direction.

4.1.33 Further, experience and considered analysis shows that Charters of Rights have not resulted in a tidal wave of frivolous litigation. In fact, the first annual review of the ACT *Human Rights Act 2004* found that the Act had had "only a small impact on a handful of cases".¹⁵⁷ Additionally, the review recommended that, in order to increase the impact of the Act in the courts, it should be amended to include a direct right of action in respect of its breach.¹⁵⁸ Similarly the United Kingdom Department of Constitutional Affairs review of the United Kingdom Human Rights Act found, "the impact of the HRA on private law litigation has been very small."¹⁵⁹ However, cases that have been tried in these jurisdictions have revealed significant deficiencies in human rights practices and have enabled their resolution. Writing of his experience working for the Crown Prosecution Service in England, David Plater, (now resident in Tasmania) said,

... in England the *Human Rights Act* has had an overall positive impact. Despite an initial apprehension that its application would be confined to the criminal law, it is important to appreciate that in England its effects have been manifest in a civil context in a range of areas such as inheritance, adverse possession and mental health. While its impact in the field of criminal law may have been limited, it is significant that the impacts of the *Human Rights Act* in the civil context have been both important and beneficial.

I would submit that the *Human Rights Act* serves a valuable purpose in not only protecting the rights and interests of citizens but in promoting and fostering a climate in which citizens are aware of their rights and are not prepared to tolerate their rights being flouted and ignored by official agencies and bureaucrats. The *Human Rights Act* positively contributes to a culture on the part of official decision makers that they cannot exercise their powers in a bureaucratic vacuum and that they must now take account of the rights of persons potentially affected by their decisions.¹⁶⁰

¹⁵⁶ Submission 199.

¹⁵⁷ Department of Justice and Community Safety, Australian Capital Territory, *Human Rights Act 2004 Twelve-Month Review – Report* (2006) 11.

¹⁵⁸ Ibid 33.

¹⁵⁹ Department of Constitutional Affairs, United Kingdom, *Review of the Implementation of the Human Rights Act* (2006) 12.

¹⁶⁰ Submission 316.

4.1.34 The Human Rights Law Resource Centre also rejected the argument that Charters of Rights inevitably stimulate increased litigation:

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.¹⁶¹

4.1.35 Moreover, if protection of human rights is inadequate, fear of litigation cannot justify refusal to reform the law.¹⁶²

4.1.36 Concerns were also expressed that a Tasmanian Charter would potentially diminish processes of representative democracy. In this regard, the Australian Family Association suggested that a Charter of Rights would favour vocal minority groups at the expense of the majority:

We find it difficult to accept that all groups will be represented by a charter. ... We are also concerned with the over-represented; ... those groups who despite their numbers are able to be highly visible. We do not deny any group rights however we are concerned that some rights will be trampled on to appease the over-represented.¹⁶³

4.1.37 Another concern expressed to the Institute was that setting down our rights in A Charter of Human Rights might actually restrict or reduce them; that the Dicean¹⁶⁴ proposition that the common law permits people to do anything not expressly prohibited by law, could no longer apply.¹⁶⁵ Others were concerned that rights may become 'set in stone' under a Charter in a way that frustrates their development in a rapidly changing world.¹⁶⁶

4.1.38 In relation to such concerns those who support a Charter of Rights argue that where rights are set down in an ordinary statute as has been done in the ACT, Victoria, the United Kingdom and New Zealand, the legislature may amend them to meet the needs of changing times. For example, the Chief Minister of the Australian Capital Territory has foreshadowed amending the *Human Rights Act 2004* to include enforcement provisions.¹⁶⁷ Additionally, the inclusion in both the ACT Act and the Victorian *Charter of Human Rights and Responsibilities 2006* of provision for periodic reviews of their operation is predicated upon the fact that both enactments may be reformed by simple statutory amendment if their performance is found wanting.

4.1.39 In relation to the concern that a Charter may restrict rights, it is also important to note that Charters of Rights are not intended to narrow or remove existing rights. It is usual for Charters to contain an explicit clause to this effect, see, for example section 5 of the Victorian *Charter of Human Rights and Responsibilities 2006* which provides,

A right or freedom not included in this Charter that arises under any other law (including international law, the common law, the Constitution of the Commonwealth and a law of the Commonwealth) must not be taken to be abrogated or limited only because the right or freedom is not included in this Charter or is only partly included.

¹⁶¹ Submission 156.

¹⁶² Hilary Charlesworth, 'Maybe Human Rights Are Not So Well Protected' *Canberra Times* (Canberra), 29th April 2002.

¹⁶³ Submission 23.

¹⁶⁴ A V Dicey, *Introduction to the Study of the Law of the Constitution* (1959).

¹⁶⁵ Submission 64.

¹⁶⁶ Submission 199.

¹⁶⁷ Evidence to Standing Committee on Legal Affairs, Australian Capital Territory Legislative Assembly, Canberra, 10 November 2005. (Jon Stanhope).

4.1.40 The Australian Family Association argued that because Charters of Rights set minimum standards for governments, they in fact legitimate governments' non-engagement with meaningful rights protection:

We struggle with the government being responsible for the codification and placement of rights in a hierarchical order. We believe that acting according to civil laws and or charters is a moral minimum. We also believe that legal standards or charters lag behind societal ethical minimums and are a guide to inaction.¹⁶⁸

4.1.41 There were also concerns that a Charter of Rights might stymie legitimate government business and place an undue burden upon government bureaucracy. In this regard the Australian Christian Lobby wrote:

[A] Charter of Rights may create a burdensome human rights enforcement industry, an extraordinary additional workload upon public servants as well as private organisations to ensure compliance and education as they attempt to carry out all the potential requirements in a Charter of Rights.¹⁶⁹

4.1.42 Similarly, the Catholic Women's League said that a Charter of Rights would deliver an expanded bureaucracy:

Whilst the intention may be to limit the growth and costs of an attendant bureaucracy, inevitably both will escalate. Scrutiny of legislation, taking of submissions, researching for the courts, government reports, the need for decentralisation throughout Tasmania. The demand will come and governments will be pressed to provide.¹⁷⁰

4.1.43 The United Kingdom Department of Constitutional Affairs 2006 review of the operation of the United Kingdom *Human Rights Act 1998* suggests that such fears may be unwarranted. The review found that the Act has not impeded the Government in achieving its objectives and that the impact of the *Human Rights Act* has had a significantly less, and a significantly less negative, as well as a substantially more beneficial impact upon the conduct of Government business than was predicted by its detractors.¹⁷¹

4.1.44 Some submissions suggested that the protection offered by over-arching Charters of Rights is too vague and expressed a preference for subject specific legislation addressing particular human rights issues. In this regard, for example, Rex Stoessiger wrote:

Human rights are only protected by Acts of Parliament rather than nebulous Bills/Charters of Rights. People get the human rights they organise/agitate for, (eg women, Aborigines).¹⁷²

4.1.45 Similarly, DJ LeFevre said,

it is my firm belief that we should not further consider the development of a 'Bill of Rights' in its generally accepted format. Rather we should develop a process where all good things that a charter can give us are enacted into the law of the State and that the political system should then take its hands off the implementation procedures which should be handed to the existing court system.¹⁷³

4.1.46 Warwick Marshall, using the example of freedom of expression argued,

...the best way to deal with rights is in the specific. The Commonwealth's implementation of specific legislation upon racial vilification and sedition is a progressive and

¹⁶⁸ Submission 23.

¹⁶⁹ Submission 22; Submission 348.

¹⁷⁰ Submission 64.

¹⁷¹ Department of Constitutional Affairs, United Kingdom, *Review of the Implementation of the Human Rights Act (2006)* 1-4.

¹⁷² Submission 261.

¹⁷³ Submission 182.

commendable way to address the question of the protection of legitimate speech. ... The content of legitimate freedom in a democracy cannot exist independently from the community. It is for this reason that the best protection is responsible and representative style governance. The answer to the political question concerning the content of legitimate speech requires active citizen participation in deliberation and responsive accountable government to implement the legislation required.¹⁷⁴

4.1.47 The difficulty with this approach is that it maintains the status quo of a piecemeal, fragmented approach to human rights protection, which makes it difficult to identify what and how rights are protected. It also singularly fails to give human rights a consistently applied central role in the conduct of government business.

4.1.48 Geoffrey Hills suggested that the arguments of those who favour the enactment of human rights instruments are often based on faulty reasoning. He particularly rejected the notion that Tasmanian should enact a Charter of Rights to maintain consistency with other jurisdictions:

One of the most common arguments advanced by proponents of a Charter in Tasmania is that because other jurisdictions have one, Tasmania must also have one ('bring ourselves into line with the rest...'). It should be noted that this is a very weak argument because it does not address the substance of Charter rights and their operation. Instead this argument is an appeal to authority – the authority of current practice in other jurisdictions – or alternatively, to the value of uniformity between jurisdictions.

Appeals to the authority of current practice in other jurisdictions are unhelpful in the absence of evidence that the objectively measured performance of jurisdictions with a Charter in protecting or advancing overwhelmingly agreed-upon interests (rights) is superior to that of jurisdictions without a Charter. Whether an empirical audit can ever measure 'rights performance' objectively (to a social scientific standard) or whether there can ever be near-universal agreement as to which interests should be protected or advanced in a Charter is subject to considerable doubt; Jeremy Waldron, *Law and Disagreement* (1999). In the absence of a case for overriding emphasis on the value of uniformity between jurisdictions, this argument – that 'we should have one because others do' – should be accorded very little weight.¹⁷⁵

The Tasmanian Law Reform Institute's view

4.1.49 The Tasmanian Law Reform Institute is of the view that, because the current protections of human rights in Tasmania are partial, disconnected and inaccessible, the enactment of a Charter of Human Rights would enhance human rights' protection in Tasmania. The Institute acknowledges that a Charter of Rights would not be a panacea for all human rights problems or prevent social inequality and injustice in Tasmania. Nevertheless, it would provide a single, comprehensible statement of the fundamental rights applicable in Tasmania, foster community awareness of human rights and encourage the systematic development and observance across all arms of government of processes responsive to human rights.

Recommendation 2 – A Tasmanian Charter of Human Rights

The Tasmanian Law Reform Institute recommends the enactment of a Tasmanian Charter of Human Rights.

¹⁷⁴ Submission 199.

¹⁷⁵ Submission 136.

4.2 What form should a Charter of Human Rights in Tasmania take?

4.2.1 The major options in this regard are:

- An ordinary statute that can be repealed or amended by a simple majority vote in both Houses of Parliament. This is the model that operates in the ACT, Victoria, New Zealand and the United Kingdom.
- An entrenched Charter of Rights that can only be amended by special procedures. This is the model that operates in the United States, South Africa and Canada. In these jurisdictions the relevant human rights instruments are constitutionally entrenched and consequently can only be changed by altering the constitutions. The Tasmanian Constitution is an ordinary statute that can be amended like any other statute. Therefore, in order to entrench any human rights instrument in Tasmania it would not be sufficient simply to include it in the Tasmanian Constitution. It would be necessary to entrench it legislatively by enacting special procedures for its amendment, for example, by providing that its reform must be approved by a referendum of Tasmanian citizens or by requiring for its reform more than a simple majority vote in both Houses of Parliament, for example, two-thirds majority support.
- The Tasmanian Government has indicated to the Tasmanian Law Reform Institute that if it is recommended that a Charter of Rights be enacted, the model recommended should preserve Parliamentary sovereignty. The first option listed above achieves this to the greatest extent because it does not elevate the status of the Charter above other statutes and because it may be reformed, repealed or amended in the same way as other Acts of Parliament.

Submissions

4.2.2 The Institute received widely differing suggestions about the form any Charter of Rights enacted in Tasmania should take. These different views were largely reflective of opposing perspectives on how immutable a Charter of Rights should be.

4.2.3 Those who advocated enacting a Charter as an ordinary Act of Parliament preferred a flexible model of rights protection that could be shaped and developed to meet unforeseen challenges to human rights and to ensure that aspects of the Charter do not become obsolete or unworkable. They also favoured this model because it does not intrude upon parliamentary sovereignty. Those who argued for legislative entrenchment of a Charter expressed a desire for the strongest possible form of human rights protection, one that is not vulnerable to governments' changing political and legislative agenda.¹⁷⁶ A significant number of these submissions were willing to sacrifice parliamentary sovereignty in relation to a Charter in order to limit the opportunity for any legislated diminution of its strength. A number of those who supported the legislative entrenchment of a Charter (and the principle of parliamentary sovereignty) pointed to the Canadian Charter as providing an appropriate model because while it provides strong protection for human rights it does not significantly alter the balance of power between the legislature and the judiciary.¹⁷⁷

4.2.4 Amnesty International encapsulated the views of many of those who advocated the legislative entrenchment of a Charter of human rights to secure it from unwarranted amendment or repeal:

¹⁷⁶ See Submission 10; Submission 17; Submission 373; Submission338; Submission 350; Submission 203; Submission 188; Submission 139; Submission 159.

¹⁷⁷ For examples of this view see paras [4.2.4] – [4.2.11].

What model of human rights protection should Tasmania adopt?

Amnesty International supports change that achieves the strongest possible protection for human rights in Tasmania. We support the introduction of a Charter of Human Rights into Tasmanian law and, to the extent that it is possible, maintain that any such Charter should be constitutionally entrenched. Constitutional entrenchment will ensure that the content of human rights will not be subject to the vagaries of the politics of the day and will also acknowledge the importance of human rights.¹⁷⁸

4.2.5 To similar effect Rights Australia argued:

Rights Australia believes that if Tasmania is to have a Bill or Charter of Rights it must be along the lines of the constitutionally entrenched Canadian model. To simply offer Tasmanians the possibility of a Human Rights Act, and to relegate the role of the courts to that of being inferior to the legislature is to short-change Tasmanians. Tasmanians deserve a 'full blooded' human rights charter. ... If Tasmania merely enacts a Human Rights Act like those now in place in the ACT and Victoria it will have missed the opportunity to push the envelope and deal with the human rights of its citizens in more than a tokenistic fashion. ... The Canadian experience pre and post the 1982 Charter of Rights and Freedoms is instructive, because it emphasises why a constitutionally entrenched model is a political, legal and societal necessity if human rights are to be adequately protected. In 1960 the government of Progressive Conservative Prime Minister John Diefenbaker introduced the Human Rights Act. ... The Human Rights Act 1960 did not substantially enhance human rights protection in Canada – it was ignored in large part by the courts – because it was merely another ordinary statute. ... But whereas the Human Rights Act 1960 was a toothless tiger which did little to fundamentally transform Canada, the impact of the constitutional entrenchment of human rights and freedoms in the 1982 Charter has been tremendously positive.¹⁷⁹

4.2.6 The Community and Public Sector Union (CPSU) also supported the enactment of an entrenched Charter:

The membership group concluded that protection from extremes needs to be an inherent feature of Human Rights legislation. One of those extremes is reactive populist legislation of any persuasion. For that reason the membership group were persuaded of the need to have more than the majority of both Houses of Parliament as a means of protecting the human rights of Tasmanians. Tangentially, we examined the Canadian Constitution Act and the inclusion of a charter of rights and freedoms in that legislation and appreciated the synergy of such an approach. Fundamental to our system of government is our Constitution; equally fundamental to us as individuals are our human rights. For this reason we favour the inclusion of the charter of rights for Tasmanians in the Constitution. Given the fundamental nature of the Australian Constitution the founders enshrined the process of referendum to protect the Commonwealth against excesses of short term Governments, the membership group agrees with the founders and therefore also favours giving the Tasmanian Constitution greater protection. Militating against the referendum protections is the extreme difficulties that now exist in modernising the Australian Constitution. The membership group favours a model such as the two third majority of both Houses of Parliament being required to change the Constitution, which includes the charter of human rights.¹⁸⁰

4.2.7 The Tasmanian Gay and Lesbian Rights Group (TGLRG) argued that an entrenched Charter that could be amended only by referendum would best secure protection of minority rights:

One of the most important roles of a Charter is to protect vulnerable minorities from the fears, prejudices and discriminatory actions of majorities. To do this effectively a Charter of Rights must not be amendable by a simple majority of legislators.¹⁸¹

¹⁷⁸ Submission 12.

¹⁷⁹ Submission 333.

¹⁸⁰ Submission 71; Submission 370.

¹⁸¹ Submission 369.

4.2.8 Julie Debeljak's submission is representative of those that nominated the Canadian Charter as the most appropriate model of human rights protection:

Ideally, a comprehensive statement of rights should be inserted in the *Tasmanian Constitution* and entrenched. If the constitutional route is to be taken, it should be modelled on the *Canadian Charter of Rights and Freedoms* (1982) ... Despite being a constitutional document the *Canadian Charter* has mechanisms that protect the sovereignty of parliament, thus addressing the need to preserve the sovereignty of parliament that concerns most representative arms of government.¹⁸²

4.2.9 The New South Wales Council for Civil Liberties Inc also recommended the enactment of a Canadian style entrenched Charter:

...[A] constitutionally entrenched Bill of Rights is *not* inconsistent with parliamentary sovereignty if it is drafted appropriately. Canada which has a Westminster-style democracy, has a constitutionally entrenched Charter where Parliament maintains sovereignty over the courts. ...CCL notes that the only comprehensive national survey on this topic has found that the vast majority of Australians want a Bill of Rights and they want it constitutionally entrenched. CCL notes the recent trend for statutory Bills of Rights. A Statutory Charter is no better than no Charter.¹⁸³

4.2.10 Others argued that the need to insulate the Charter from changing and temporary political fads and whims could be met by requiring for its amendment a two-thirds majority in both houses of Parliament. In this regard, for instance, Robin Banks submitted:

A mechanism such as requiring a two-thirds majority in both houses would provide protection against amendment by a single political party that holds power in both houses and would require the amendment to have some support from other political parties. This would allow for the addition of new rights or mechanisms or the amendment of existing rights in circumstances where it can be clearly shown that the law is not operating effectively to protect rights. Given the amount of legislation that is passed with support of at least both major parties in parliament, this would not be a mechanism that was unduly unwieldy but would provide for protection against abuse of parliamentary power by a single party.¹⁸⁴

4.2.11 Similarly, Rights Australia argued:

Rights Australia believes that if Tasmania is to adopt a charter or bill of rights then it must be by way of legislation which cannot simply be amended by a simple majority of both houses of the Parliament of Tasmania. In Canada, the Charter of Rights and Freedoms is contained in the Constitution Act 1982. Amending that Act is a cumbersome and difficult process, requiring votes in the Parliament of Canada and the Provincial Parliaments. The hurdles over which a proposed amendment to the Constitution Act 1982 must 'jump' are such that the human rights of Canadians may be said to be well and truly entrenched. In Tasmania, the Constitution Act 1934 is capable of amendment in the same way as say road traffic laws – a simple majority in both houses of Parliament. This would be the case with a proposed Human Rights Act. In short, there would be little to prevent a government from abolishing or curtailing rights and freedoms contained in a Human Rights Act. Rights Australia proposes that a Human Rights Act or charter should only be capable of amendment if a special majority in both houses of Parliament – the House of Assembly and the Legislative Council – is achieved. By this we mean that an amendment to a Human Rights Act or charter would only be passed if two thirds of the members of both the House of Assembly and then two thirds of the members of the Legislative Council voted in favour of such an amendment.

¹⁸² Submission 85.

¹⁸³ Submission 294.

¹⁸⁴ Submission 29.

What model of human rights protection should Tasmania adopt?

In addition, we propose that such an amendment could only be put to a vote in both the House of Assembly and the Legislative Council after it has been referred to a Joint House of Assembly-Legislative Council Committee which holds hearings on the proposed amendment and reports back to the Parliament.¹⁸⁵

4.2.12 Some submissions suggested that a statutory Charter might first be enacted, followed by a process of review that would lead to its eventual entrenchment. For example, the Tasmanian Women Lawyers Association said:

TWL does not accept a model maintaining parliamentary sovereignty over the Charter is the only acceptable model. A Charter of Human Rights is surely concerned with enhancing democracy. We accept that the electorate may require some education and time to observe the benefits of rights protection or in some cases failure to protect. For this reason it may be necessary to work towards a model that entrenches rights, outside parliamentary sovereignty and places the means of amendment in the hands of the electorate by referendum. This could involve an initial act, subject to review and consequent amendment, followed then by a period of time before which the Act then in force and any dissenting proposals were put to referendum. TWL accepts that from time to time a Charter may be perceived to be in need of amendment to take account of changing attitudes. However, the change would be more democratically provided for by way of referendum.¹⁸⁶

4.2.13 AP Servant was of the same view:

If we create this document it should be enacted as a statute for a defined period, after which it should go to a referendum for incorporation into the Constitution and changeable only by a two-thirds majority of both houses. In other words, work out the bugs, then give it unassailable authority.¹⁸⁷

4.2.14 In this regard, Australian Lawyers for Human Rights said,

ALHR considers that constitutional entrenchment of human rights protections along the lines of the Canadian model is of enormous benefit and an ideal to be progressively worked towards. However, in the short to medium term, the statutory model provides an acceptable means of enhancing human rights protections in Tasmania. It will allow for Tasmanians to become conversant with rights issues and understand how the democratic process may continue to effectively function without any real constraint.¹⁸⁸

4.2.15 To like effect the New South Wales Council for Civil Liberties Inc argued:

If the Inquiry is concerned about the perception that a constitutional Charter will have adverse consequences, then it may be that enacting a statutory Charter first is an appropriate way to demonstrate that these fears are unfounded. This is what happened in Canada. The Canadians had a statutory Bill of Rights for twenty years before they constitutionally entrenched the Charter. During that time the concept of a Charter received wide acceptance.¹⁸⁹

4.2.16 The Women's International League for Peace and Friendship advocated a differently staged process of entrenchment suggesting that the basic inalienable rights set out in the *UN Declaration of Human Rights* and the *International Covenant on Civil and Political Rights* should be entrenched in legislation and should only be able to be amended by a two thirds majority of both houses of parliament on a conscience vote with the proviso that other human rights should be able to be amended during a defined trial period by a simple majority vote. At the conclusion of the trial period

¹⁸⁵ Submission 333; Submission 46.

¹⁸⁶ Submission 371.

¹⁸⁷ Submission 1.

¹⁸⁸ Submission 26; Submission 402.

¹⁸⁹ Submission 294.

and following community consultation these rights should be incorporated (in amended form where amendment is desired) into the entrenched model.¹⁹⁰

4.2.17 In contrast, those who favoured enacting a Charter as an ordinary statute were particularly concerned that entrenchment might ossify charter rights and processes in a way that might be potentially inimical to the protection of rights. For example, in expressing support for a non-entrenched Charter, the Launceston Branch of the Australian Labor Party pointed to the need for on-going flexibility in any Charter to ensure its continued societal and political relevance:

A charter of rights is likely to be an evolving document and as such might require amendment, review and up-dating so as to reflect community standards and the political realities of the day. Accordingly any charter of rights should be capable of being amended by legislation and for that matter would be capable of being overridden by the express intention of parliament.¹⁹¹

4.2.18 Similarly, Bev Burgess said,

An ordinary statute that can be repealed or amended by a simple majority vote in both houses of Parliament would seem to be a good model, rather than an entrenched bill of rights. Then we can make sure it works well.¹⁹²

4.2.19 Maureen and Rob Williamson were of the same view:

The charter should be an ordinary statute so that it can be re-examined periodically to ensure that it is meeting the needs of Tasmanian citizens.¹⁹³

4.2.20 Other submissions noted that if a statutory model of rights protection was enacted in Tasmania, this would be consistent with modern instruments enacted in other Australian and international jurisdictions. For example, TasCOSS wrote:

TasCOSS supports the enactment of a human rights instrument as an ordinary statute of Parliament which can be repealed or amended by a simple majority in both houses. We note that this is the model that operates in the ACT, Victoria, New Zealand and the United Kingdom, and believe it is an appropriate mechanism in Tasmania.¹⁹⁴

4.2.21 A number of submissions counselled against entrenchment on the grounds that a Charter enacted as an ordinary statute preserves the current constitutional balance of powers between the legislature and the judiciary, and prevents an escalation of judicial power. In this regard, Lionel Nichols wrote:

As an ordinary Act of Parliament, the Tasmanian Parliament would be free to repeal or amend the Charter at any time, thereby preserving sovereignty and preventing any dramatic shift in power towards the judiciary. Some have argued that a statutory Charter of Rights would quickly acquire the aura of a quasi-constitutional instrument and hence be very difficult to change.¹⁹⁵ However, the significant point is that any pressures would be political in nature rather than legal and hence the doctrine of parliamentary supremacy remains protected.¹⁹⁶

¹⁹⁰ Submission 403.

¹⁹¹ Submission 25.

¹⁹² Submission 56.

¹⁹³ Submission 398; Submission 399.

¹⁹⁴ Submission 368; Submission 156.

¹⁹⁵ Anthony Mason, 'Judges, Values and a Bill of Rights?' (1997) 9 *Judicial Officers Bulletin* 65.

¹⁹⁶ Megan Davis and George Williams, 'A Statutory Bill of Rights for Australia? Lessons from the United Kingdom' (2002) 22 *Queensland Law Journal* 1, 16-17.

4.2.22 For this reason, the Human Rights and Equal Opportunity Commission also recommended that a statutory model of human rights protection be enacted in Tasmania.¹⁹⁷

4.2.23 Clare Wootton suggested that because statutory Charters may be reformed by ordinary parliamentary processes, they not only maintain parliamentary legislative sovereignty but also assist in creating a dialogue between the legislature and the judiciary about human rights protection. Such a dialogue model, she maintained is the most desirable model for Tasmania.¹⁹⁸

4.2.24 This was also the view of the Human Rights and Equal Opportunity Commission, which stated:

The Commission believes a statutory Charter of Rights could significantly improve human rights protection in Tasmania by:

- Creating a dialogue between the three arms of Government – the Courts, the Executive and the Legislature – about human rights protection in Tasmania;
- Fostering a culture of human rights in the law and policy making process and in the broader community;
- Preserving parliamentary sovereignty by making sure that Parliament has the ‘last say’ about whether legislation complies with a Charter of Rights.¹⁹⁹

4.2.25 After reviewing the advantages and disadvantages of the different forms of Charters in western democracies, the Human Rights Law Resource Centre concluded that the most appropriate form for a Tasmanian Charter of Human Rights would be a legislative model similar to that adopted in the ACT, Victoria and the United Kingdom. The Centre stated:

This submission is based on a number of factors including:

- The concern that parliamentary sovereignty be protected;
- 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;
- The desirability of consistency across jurisdiction in which a Charter is in place, facilitating cross-jurisdictional flows of information and promoting the development of a broad, universal jurisprudence.²⁰⁰

The Tasmanian Law Reform Institute’s view

4.2.26 The Tasmanian Law Reform Institute is of the view that, at least initially, the most appropriate form of Charter of Human Rights for Tasmania would be an ordinary Act of Parliament. The advantages of this model are that:

- It preserves the sovereignty of Parliament and so is more likely to gain political support;

¹⁹⁷ Submission 155.

¹⁹⁸ Submission 405.

¹⁹⁹ Submission 155.

²⁰⁰ Submission 156.

- It is comparatively easy to amend. Therefore, it can be adapted to meet changing societal expectations and needs. Accordingly, a legislative model is more likely to deliver a people's Charter, one that reflects the on-going aspirations of the community rather than one that is fixed in the mindset of a previous age. Further, it facilitates genuine review of the Charter which will be particularly important in ensuring that the protective processes it provides are and remain effective;
- It is consistent with other modern models operating in comparable jurisdictions - the ACT, Victoria, the United Kingdom and New Zealand, making the jurisprudence and experience of those jurisdictions available in the interpretation and operation of a Tasmanian Charter. While following models in other jurisdictions solely for the sake of uniformity has little merit, success in other jurisdictions of the legislative model suggests that more than the benefit of compatibility will be derived from following that approach;
- It promotes the development of a dialogue about human rights across the three arms of government and within the community and avoids making discussion and determination of human rights issues the ultimate preserve of the courts.

4.2.27 The Institute is also of the view that entrenchment may sacrifice the possibility of developing the best possible Charter of Human Rights for Tasmania to an undue concern about its vulnerability to inappropriate reform. Experience in other jurisdictions, particularly the United Kingdom, suggests that the very enactment of a Charter coupled with its acceptance by the community provide a non-entrenched Charter with a bulwark against unwarranted amendment or repeal. For a government to scale back a Charter or diminish Charter rights may be politically difficult.²⁰¹

4.2.28 Nevertheless, the Institute acknowledges the strong desire of many for an entrenched Charter. For this reason, the Institute recommends that prescribed reviews of the Charter²⁰² should consider whether the legislative model is working and whether another model would be preferable.

Recommendation 3 – Form of Tasmanian Charter

The Institute recommends that a Tasmanian Charter of Human Rights should be enacted as an ordinary statute.

The Institute further recommends that prescribed reviews of the Charter should include an assessment of the success of this model and consideration of whether it should be replaced by an entrenched model or some other model.

4.3 If Tasmania were to enact a Charter of Rights, whose rights should it protect?

4.3.1 Human rights instruments in some jurisdictions protect the rights of corporations as well as individual citizens.²⁰³ However, the *International Covenant on Civil and Political Rights* and the *International Covenant on Economic, Social and Cultural Rights* apply only to human beings. Similarly, the ACT *Human Rights Act 2004* and the Victorian *Charter of Human Rights and Responsibilities* do not apply to corporations. In contrast the *South African Bill of Rights*²⁰⁴ applies to protect natural and juristic persons, as does the Canadian *Charter of Human Rights and Freedoms*.

²⁰¹ Justice, 'A Bill of Rights for Great Britain? A Justice Discussion Paper' (Justice, London, 2007) 13.

²⁰² The Institute recommends that a requirement for prescribed periodic reviews of the Charter should be written into the legislation creating the Charter – discussed in detail below at para [4.19].

²⁰³ See the *Bill of Rights Act 1990* (NZ) s 29; *Canadian Charter of Rights and Freedoms 1982* (Canada).

²⁰⁴ *The Constitution of the Republic of South Africa 108 of 1996* (South Africa) s 8(2).

4.3.2 A clear majority of those who made a submission on this issue strongly urged that corporations not be protected under any human rights framework in Tasmania.²⁰⁵ They argued that to extend the protections in human rights instruments to corporations would ignore the fact that human rights are concerned critically with the dignity and value of the lives of human beings. For example, Amnesty International told the Institute,

...the Charter should protect the rights of individuals not corporations. This reflects the rationale for human rights protections expressed in various international covenants – that human rights are concerned with the dignity and value of human lives. Corporations could well use human rights protections in ways that undermine individual and community rights.²⁰⁶

4.3.3 The Justice and International Mission Unit Synod of Victoria and Tasmania, Uniting Church in Australia stated:

[The Charter] should not extend additional rights to corporations as human dignity is the source of human rights and is found in human beings not corporations. The unit believes that the Charter should state it only confers human rights on individuals, to avoid corporations being able to claim human rights ... to further commercial interests... [S]uch an approach [does not] detract from collective rights, such as cultural rights, as cultural rights are essentially held collectively, by ‘individual’ people.”²⁰⁷

4.3.4 Similarly, the Human Rights and Equal Opportunity Commission stated:

The Commission believes a Tasmanian Charter of Rights should expressly state that corporations do not have human rights. Conceptually, the ‘rights’ of corporations are distinct from human rights. In principle the purpose of human rights is to protect the inherent dignity of all members of the human family. In practice protecting corporations’ human rights may give corporations a vehicle to advance commercial interests.²⁰⁸

4.3.5 The concern that the extension of human rights protections to corporations might be exploited by them for commercial gain, perhaps at the expense of the rights of individuals, was a theme that emerged from these submissions. This concern is not without foundation. For example, enabling corporations to claim the protection of human rights instruments can impact detrimentally upon legitimate attempts to regulate company activity for the purpose of public health and safety. In Canada where human rights legislation protects the rights of both natural persons and corporations, a tobacco company successfully challenged Canadian legislation that restricted the sale and advertising of tobacco products without health warnings.²⁰⁹ Dr Julie Debeljak pointed to this case in arguing that it is preferable to limit the application of human rights to natural persons:²¹⁰

The obvious argument for limiting the beneficiaries of rights is their link to humans, humanity, the inherent dignity and equality of humans, and so on. Another argument turns on the difficulty of extending protections of human rights to legal persons. The Canadian experience provides some useful lessons. The Canadian Supreme Court has interpreted references to “person” or “everyone” under the *Canadian Charter* to include corporations, so that corporations benefit from human rights. Corporations, having the necessary resources and the commercial incentives to exploit the Charter, have won many rights,

²⁰⁵ 87.1% (27) submissions were opposed to giving human rights protection to corporations. Two supported the extension of human rights to corporations. The International Commission of Jurists and Lynden Griggs favoured giving limited human rights protections to corporations.

²⁰⁶ Submission 12.

²⁰⁷ Submission 385.

²⁰⁸ Submission 155.

²⁰⁹ *McDonald Inc v Canada* [1995] 3 SCR 199.

²¹⁰ Submission 85.

including the right to commercial free speech²¹¹ and essentially the rights to religious freedom which allow them to trade on Sundays.²¹²

4.3.6 In contrast, the International Commission of Jurists (ICJ) suggested that although a corporation does not need protection for certain human rights, such as the right to life,²¹³ it would be inappropriate to exclude corporations from human rights protection in all circumstances.²¹⁴ With respect to the issues exemplified by what occurred in the Canadian tobacco company case, the ICJ argued:

[T]he guarantee of free speech could be subject to the proviso that nothing in the guarantee is designed to prevent the reasonable regulation of commercial advertising in the public interest or to prevent reasonable laws requiring that warnings be attached to dangerous products or to prevent the disclosure of information where that is in the public interest...²¹⁵

4.3.7 Lynden Griggs suggested that if economic rights like the right not to be deprived of property without fair and just compensation were included in a Tasmanian Charter then its protections should extend to corporations. He noted that it is often the case that corporations hold land on behalf of natural persons and in many instances the land is actually the principal asset of the natural person. In such cases, he argued it would be essential to extend the right not to be deprived of property without fair compensation to the legal person.²¹⁶

4.3.8 However, the Institute inclines to the view that while corporations should be afforded a range of economic rights under corporations law or other Tasmanian laws, a Charter of Human Rights does not constitute an appropriate mechanism for the protection of those rights. This is not altered by the fact that some people choose to organise their financial and property affairs to gain benefits achieved through the utilisation of corporate structures.

4.3.9 The submissions that opposed conferring human rights on corporations were also concerned that a Tasmanian Charter should be explicit about the fact that corporations do not have human rights. This would preclude any argument or determination that corporate rights are implied in the Charter.

4.3.10 A number of submissions also expressed a desire that a Tasmanian Charter should cover all people in Tasmania regardless of citizenship status. For instance, the Human Rights and Equal Opportunity Commission said:

The Commission believes that human rights are for everybody, everywhere, all the time. Every human being has human rights. A Charter should protect the human rights of every person in Tasmania's jurisdiction, regardless of their immigration status.²¹⁷

4.3.11 Similarly, Amnesty International told the Institute:

It is also important that the protections provided by a Charter are not limited only to citizens of Tasmania but extend to every person in Tasmania. Amnesty International Australia would be concerned about any definition of "Tasmanian" that could have the effect of excluding certain individuals from protections of the Charter, such as holders of temporary protection visas.²¹⁸

²¹¹ *RJR-MacDonald Inc. v Canada (Attorney General)* [1995] 3 SCR 199.

²¹² *R v Big M Drug Mart Ltd* [1985] 1 SCR 295.

²¹³ Submission 161.

²¹⁴ Submission 161.

²¹⁵ Submission 161.

²¹⁶ Submission 122; Submission 107.

²¹⁷ Submission 155.

²¹⁸ Submission 12 and also see Submission 350.

4.3.12 Of course, the extension of Charter protections to all people in Tasmania will necessarily work in different ways for different people depending upon their residence status and the nature of the right in question. Rights such as the right to life and to security of the person must apply universally. However, the right to vote will not extend to temporary visitors to the State.

The Tasmanian Law Reform Institute's view

4.3.13 The Human Rights Committee established under article 28 of the *International Covenant on Civil and Political Rights* has determined that that Covenant does *not* apply to companies.²¹⁹ The Tasmanian Law Reform Institute endorses this approach and recommends that a Tasmanian Charter should confer rights only on human beings and not on corporations.²²⁰ Where corporations fall within the definition of 'public authority' (see below at paras [4.6.1] – [4.7.21]) their actions and decisions should be required to comply with human rights standards, but a Tasmanian Charter of Human Rights should not protect the rights of a corporation *as if* it were a human being.²²¹

4.3.14 The Tasmanian Law Reform Institute agrees with the view expressed in submissions that, in order to provide certainty and to preclude arguments upon the matter, a Tasmanian Charter should explicitly state that only human beings have human rights. Both the ACT and Victorian human rights instruments contain provision to this effect and might serve as models for a Tasmanian provision.²²²

4.3.15 The Institute also agrees that the protections in a Tasmanian Charter should apply to all people in Tasmania regardless of their status as Tasmanian citizens and residents. Further, the Institute considers that Charter protections should extend to people outside Tasmania who are affected by Tasmanian laws and decisions made by Tasmanian public authorities. Were this not to occur the Charter would operate in an unjustifiably discriminatory manner and in a manner that would be contrary to its own fundamental precepts. Of course, as noted at [4.3.12], not all rights in a Tasmanian Charter would have universal application to non-Tasmanian residents.

Recommendation 4 – Whose rights should be protected?

- The Tasmanian Law Reform Institute recommends that human rights protections in a Tasmanian Charter of Human Rights should apply to all people in Tasmania regardless of their status as Tasmanian citizens and residents. It should also apply to people who are not in Tasmania but who are affected by Tasmanian laws or decisions of Tasmanian public authorities.
- The Tasmanian Charter should contain express provision to the effect that only human beings have human rights.
- The Tasmanian Law Reform Institute recommends that corporations as defined by the *Corporations Act 2001*²²³ be expressly excluded from any human rights protection measures in the Tasmanian Charter.

4.4 If Tasmania were to enact a Charter of Human Rights who should be bound by it?

4.4.1 It is crucial that a Tasmanian Charter of Rights specify who is bound by it. Unlike its counterparts in the United Kingdom, Canada, New Zealand and Victoria, the ACT *Human Rights Act 2004* does not identify whom it binds. Effectively, therefore, determination of its application has been assigned to the judiciary and until there is judicial pronouncement upon this point, its application

²¹⁹ *S.M. v Barbados* (Communication No. 502/1992).

²²⁰ See also Submission 384; Submission 368; Submission 13; Submission 25; Submission 67; Submission 71.

²²¹ Submission 25; Submission 293; Submission 13.

²²² See s 6 of the *Human Rights Act 2004* (ACT); *Charter of Human Rights and Responsibilities 2006* (Vic) ss 6(1), 3(1).

²²³ *Corporations Act 2001* (Cth) ss 9, 57A.

remains uncertain. This is a serious deficiency. There should not be uncertainty about who has obligations to observe and protect human rights under a human rights enactment. Further, allocation of decisions in this regard to the judiciary conflicts with the notion of Parliamentary supremacy. As Carolyn Evans has noted:

If [the *Human Rights Act 2004* (ACT)] was intended to assert the primacy of the legislative authority in rights protection it is hard to understand why such crucial issues were left to the judges. This is particularly so as there is no easy guidance for ACT judges in this regard from other jurisdictions.²²⁴

Recommendation 5 – Statement of whom the Charter binds

A Tasmanian Charter of Rights should specify whom it binds.

Preservation of parliamentary sovereignty

4.4.2 To accord with the Government’s desire that a Tasmanian model of human rights protection not infringe upon Parliamentary sovereignty, any Tasmanian Charter of Human Rights would need to exclude the Tasmanian Parliament from its operation to the extent that is necessary to preserve Parliament’s ability to enact legislation that is not human rights compliant. Nevertheless, it should apply to Parliament when scrutinising Bills, in relation to the production of statements of compatibility and when deciding whether to enact legislation that overrides or encroaches upon human rights. A relevant precedent is provided by s 6 of the Victorian *Charter of Human Rights and Responsibilities 2006*:

This Charter applies to –

(a) the parliament to the extent that the Parliament has functions under Divisions 1²²⁵ and 2²²⁶ of Part 3; ...

4.4.3 Additionally, when performing non-legislative functions, Parliament should be bound by the Charter. For example, if Parliament were judging whether a person was guilty of any of the contempts of Parliament enumerated in s 6 of the *Parliamentary Privilege Act 1858* (Tas), it should be bound by the Charter. Similarly, if the President or Speaker of the Houses of Parliament, were considering whether to issue an order for a person’s arrest under that Act, the Charter should also apply.

The Tasmanian Law Reform Institute’s view

4.4.4 Few rights are absolute. Rights are often required to be balanced against each other. For this reason alone it must be possible for Parliament to enact legislation that encroaches upon, erodes or abrogates human rights. For example, the right to freedom of speech must be balanced against the right to privacy and also, on occasion, against rights relating to health, security of the person and the best possible home life. A well-recognised example of a legitimate, indeed necessary, erosion of the right to freedom of speech is the limitations placed upon the right of tobacco companies to advertise their products. Similarly, a person’s right to liberty must sometimes give way to the right of others to security of the person. Accordingly, the Tasmanian Law Reform Institute is of the view that a Tasmanian Charter of Rights should not operate in a way that abrogates Parliamentary sovereignty in relation to the enactment of laws that balance, remove or encroach upon human rights.

²²⁴ Carolyn Evans, ‘Responsibility for Rights: the ACT Human Rights Act’ (2004) *Federal Law Review* 13.

²²⁵ Division 1 of Part 3 deals with statements of compatibility and the Scrutiny of Acts and Regulations Committee.

²²⁶ Division 2 of Part 3 deals with override declarations made by Parliament.

Recommendation 6 – Application to Parliament

- A Tasmanian Charter of Human Rights should not disturb the sovereignty of Parliament to enact laws that balance, limit or abrogate human rights.
- A Tasmanian Charter of Human Rights should, however, bind Parliament when scrutinising Bills, in relation to the production of statements of compatibility and when deciding whether to enact legislation that overrides or encroaches upon human rights.
- A Tasmanian Charter of Human Rights should also bind Parliament when it is performing non-legislative functions.

4.5 Should the Charter bind all Tasmanians, corporations and community organisations as well as government and its agents?

4.5.1 The majority of submissions received said that a Tasmanian Charter of Human Rights should bind the Government. However, some submissions argued that it should additionally apply between individuals and to the private and corporate sector. For example, TasCOSS said:

While TasCOSS notes that the conventional approach is only to bind governments, we believe it is important for Tasmania to consider adopting a Charter that also binds corporations, community organisations and other relevant bodies. We believe if rights are conceived as ‘indivisible’ in nature they cannot be conceived as ‘divisible’ in application.

Moreover, the way in which community organisations are funded as well as the degree to which they work with government social service systems means binding only public authorities under a Charter is impractical. Likewise corporations need to be covered by any Charter as they often provide essential services either through their own core business or through government outsourcing.

The effect of binding only government but not corporations or community organisations may create perverse incentives for government to shift responsibilities as a means of limiting the application of any Charter. This would be a bad outcome for all Tasmanians and totally undermine the purpose and intent of any Charter. ... In considering the issue we suggest the Institute study how the principles of progressive realisation and non-retrogression could be used as a basis for binding government, corporations and community organisations.²²⁷

4.5.2 Similarly, Dr Ben Saul of the Gilbert and Tobin Centre of Public Law at the University of New South Wales argued:

This submission supports extending the application of a Tasmanian Charter of Rights beyond public authorities to cover private actors (individuals, corporations, and other groups or entities) which infringe human rights. ... If the objective of human rights law is the protection of human dignity, it is logical that remedies be available for violations of human rights whether committed by public or private actors. The criminal law and civil law remedies will not always provide sufficient redress for violation of rights by private actors, and it is vital that Tasmanians can seek remedies against other citizens.²²⁸

²²⁷ Submission 368.

²²⁸ Submission 338.

4.5.3 Such views are prompted in part by growing awareness of the role that individuals and corporations as well as Governments have played in human rights abuses both in Australia and across the globe. Knowledge of human rights infringements by many sectors of society - employers, retailers, service providers and government agencies²²⁹ - has generated a desire to extend a legislated obligation to observe human rights as widely as possible.

4.5.4 Precedent for requiring all sectors and members of the community to comply with a Charter of Human Rights is provided by the South African *Bill of Rights 1996*. However, in requiring such compliance, the South African Bill draws a necessary distinction between organs of state and other entities including individuals and corporations. In respect of individuals and corporations, provisions in the Bill only apply to the extent that they logically can do so taking into account the nature of the rights they contain and the nature of any duties they impose. Accordingly, s 8 of the Bill provides:

- (1) The Bill of Rights applies to all law, and binds the legislature, the executive, the judiciary and all organs of state.
- (2) A provision of the Bill of Rights binds a natural or juristic person if, and to the extent that, it is applicable, taking into account the nature of the right and the nature of any duty imposed by the right.

4.5.5 The ACT *Human Rights Act 2004* is silent on the question of whom it binds. Potentially, therefore, its reach extends to all members of the ACT community. Ultimately, the extent of its application will depend upon how it is construed by the judiciary. Construed broadly, it potentially binds everyone.²³⁰ Construed narrowly, it will only apply to the interpretation of legislation by courts and government officials.²³¹

4.5.6 Some who made submissions to the Tasmanian Law Reform Institute were wary of extending the operation of the Charter into the private sector. In this regard, the Human Rights and Equal Opportunity Commission wrote:

Some commentators have argued that a Charter of Rights should bind corporations and private actors. The Commission notes the enormous resource implications of ensuring that the actions of all corporations and private citizens are in accordance with a Tasmanian Charter of Rights. The Commission believes the Charter should focus on the actions of Governments and public authorities. It may be appropriate to revisit the question of whether a Charter should apply to corporations and private citizens in a review of the Charter's operation.²³²

4.5.7 Even if a Tasmanian Charter were expressly to bind only Governments, it would still have some reach into the private sphere. For instance, a requirement that courts interpret legislation in a manner that is consistent with human rights,²³³ may make the Charter apply to actions between private individuals. This is because such a requirement will necessitate the construction of any applicable legislation in a way that complies with human rights. This is sometimes referred to as a 'horizontal effect'.²³⁴ Additionally, if a Tasmanian Charter were to alter the common law to make it conform to

²²⁹ For example, discriminatory employment practices, infringements of privacy and exploitation of vulnerable workers.

²³⁰ Andrew Butler, 'The ACT Human Rights Act: A New Zealander's View' (2004) *Ethos* No 94. The argument for a broad construction is that all statutes bind everyone except where they expressly or impliedly provide otherwise. There are no exemption provisions in the ACT *Human Rights Act 2004*.

²³¹ Gabrielle McKinnon, 'Strengthening the ACT Human Rights Act 2004' (Paper presented at the Human Rights Commission Office Community Forum, Canberra, 1 July 2005). The narrow construction is imported through s 30 of the *Human Rights Act 2004* (ACT), which is an interpretive provision which requires courts, tribunals and decision makers to interpret ACT legislation, as far as possible in a manner consistent with human rights.

²³² Submission 155.

²³³ Discussed at paras [4.11.2] – [4.11.10].

²³⁴ Paul Rishworth 'Human Rights' [2005] *New Zealand Law Review* 87; Andrew Geddes 'The Horizontal Effects of the New Zealand Bill of Rights Act as Applied in *Hosking v Runting*' [2004] *New Zealand Law Review* 681; Anthony Lester, 'The Magnetism of the *Human Rights Act 1998*' [2002] *Victoria University of Wellington Law Review* 20; Murray Hunt, 'The "Horizontal Effect" of the Human Rights Act' [1998] *PL* 423; Lord Justice Buxton, 'The Human Rights Act and

human rights as defined in the Charter,²³⁵ the courts would be able to apply the Charter when adjudicating common law causes of action between private individuals.

4.5.8 In the United Kingdom, where the *Human Rights Act 1998* binds the courts as public authorities, the courts have developed the common law in private law matters in a manner compatible with human rights. The British Law Lord, Lord Steyn, commenting on what he called “the radiating effect of human rights law on the general law”, noted that it would be surprising if this did not occur, because “it reflects the reality that ultimately common law, statute law and human rights law coalesce in one legal system.”²³⁶ Similarly, in Canada, the Supreme Court has held that although one private litigant does not owe a constitutional duty to another, the courts must nevertheless develop the common law in a manner that is consistent with values in the Canadian *Charter of Rights and Freedoms*.²³⁷ An example of how this works is provided by the United Kingdom case, *Venables & Thompson v News Group Newspapers Ltd and Ors* [2001] 2 WLR 1038. In that case the plaintiffs, two notorious child murderers, instituted proceedings in tort for breach of confidence seeking injunctions to prevent the defendants from disclosing their (the plaintiffs’) whereabouts and identities upon their release from prison. Dame Elizabeth Butler-Sloss held that while the *Human Rights Act 1998* (UK), does not give rise in private law to any freestanding cause of action based on Convention²³⁸ rights, the court, as a public authority, has a duty to act compatibly with Convention rights in adjudicating upon existing common law causes of action.²³⁹ Accordingly, Her Ladyship incorporated into her determination of the applications consideration of the parties’ rights under the Convention. She granted the injunctions on the basis that not to do so would involve serious risk to the plaintiffs’ lives and safety in violation of their rights under Articles 2 and 3 of the Convention.²⁴⁰

4.5.9 Most modern human rights instruments focus upon the conduct of governments and governments’ relationship to the community. To extend the reach of a Tasmanian Charter beyond this ambit from the outset would have extensive educational, resource and enforcement implications, which may render it unacceptable and its implementation unfeasible for the Tasmanian Government.

4.5.10 Nevertheless, the complexity of the organisational arrangements involved in modern governance and the extent to which Governments routinely outsource and delegate their work to community organisations and the corporate sector, mandate that the reach of a Charter should extend well beyond a narrow conception of ‘government’. It should include all delegated and outsourced arrangements and all those who perform public functions or are engaged in government work. It should therefore bind government departments, public officials, statutory agencies, local government, the courts and all private bodies engaged in work or performing functions on behalf of the government. The term, ‘public authority’ is usually used in human rights instruments to encompass all these entities.

4.5.11 To require government departments, those with whom they contract, statutory agencies, the courts, and local government to comply with a Charter of Human Rights will not, in any event, be revolutionary. Many of these bodies already have consistent regard to human rights in carrying out their work. For example, the Department of Health and Human Services operates within the framework of the *Tasmanian Charter of Health Rights and Responsibilities 1999* developed by the Health Complaints Commissioner in accordance with Part 3 of the *Health Complaints Act 1995* (Tas).

Private Law’ (2000) 116 *Law Quarterly Review* 48; Antony Lester and David Pannick, ‘The Impact of the Human Rights Act on Private Law: The Knight’s Move’, (2000) 116 *Law Quarterly Review* 380; AS Butler, ‘The New Zealand Bill of Rights and Private Common Law Litigation’ [1991] *New Zealand Law Journal* 261.

²³⁵ See paras [4.7.8] – [4.7.21].

²³⁶ Lord Steyn, ‘Laying the Foundations of Human Rights Law in the United Kingdom’ (2005) 4 *European Human Rights Law Review* 349, 354.

²³⁷ *Retail, Wholesale and Department Store Union, Local v Dolphin Delivery Ltd* [1986] 2 SCR 573; 33 DLR (4th) 174.

²³⁸ *The European Convention of Human Rights*, opened for signature 4 November 1950, CETS 5 (entered into force 3 September 1953) which is incorporated into the *Human Rights Act 1998* (UK) c 42.

²³⁹ [2001] 2 WLR 1038, 1049.

²⁴⁰ Article 2: the Right to life; Article 3: prohibition of torture.

Local Governments in Tasmania engage in many programs with a human rights agenda and human rights principles are also manifest in the court environment.²⁴¹ The advantage of formalising this process in legislation is that it supplies a consistency and uniformity of approach across all sectors of government and gives formal recognition to processes that, at the moment, have a largely informal, and therefore potentially, variable and sporadic application.

The Tasmanian Law Reform Institute's view

4.5.12 The Institute favours an initially conservative approach to the question of whom a Tasmanian Charter of Human Rights should bind. In the first instance it is recommended that it should bind public authorities but not private individuals, corporations or community organisations that are not engaged in work for the government or the performance of public functions. This would maintain a consistency of approach between Tasmania, Victoria, New Zealand and the United Kingdom. The ACT *Human Rights Act 2004* is silent on the question of whom it binds. However, the ACT Bill of Rights Consultative Committee did recommend that the Act should bind any body that performs a public function, and that it should bind only those private companies that are acting as direct agents of government.²⁴² It did not recommend that the Act apply to private entities. The Act's silence on whom it binds creates uncertainty about the extent of its application. It appears to be generally accepted that the Act does regulate the conduct of government and that it does so through the operation of its interpretive provision in s 30 which stipulates that anyone required to interpret legislation is, as far as possible, to prefer a construction that is human rights compliant. Guidelines issued by the Bill of Rights Unit within the ACT Department of Justice and Community Safety state that this section imposes a new duty on all public officials to act consistently with human rights.²⁴³ However, the extent of the obligations imposed by s 30 remains uncertain. It may simply require courts and government officials to apply human rights principles in their interpretation of legislation rather than to their conduct generally. Accordingly, it has been recommended that the ACT Act be reformed to include provisions like those contained in the Victorian *Charter of Human Rights and Responsibilities 2006*.²⁴⁴

4.5.13 However, the Institute is persuaded by the arguments of TasCOSS and the Human Rights and Equal Opportunity Commission, that the Tasmanian Charter should not necessarily remain static in this regard. This issue should, therefore be revisited during reviews of the Charter and the question should be left open about the further extension of the Charter's application throughout society in a manner consistent with s 8 of the South African *Bill of Rights 1996*. Such a process would enable the Charter to become gradually embedded in the fabric of Tasmanian political, legal and social culture and achieve a measured evolution rather than a revolution in Tasmanian human rights understanding and commitment. It would enable community observation and experience of the more limited application of the Charter to allay fears and concerns about a general application of human rights standards. Such experience would inform public debate about the appropriate scope of the Charter's operation. It is, therefore, recommended that any extension in that operation should only be attempted following community consultation.

²⁴¹ For example, all Tasmanian City Councils have programs for homeless youth such as the Youth ARC programs, which provide alternative education programs, recreational and skills development programs, work skills and transition programs for youth at risk of offending.

²⁴² Australian Capital Territory Bill of Rights Consultative Committee, *Towards an ACT Human Rights Act: Report of the ACT Bill of Rights Consultative Committee* (2003) 73.

²⁴³ Gabrielle McKinnon, 'Giving Meaning to a "Culture of Human Rights"' (Working Paper No 3, Australia National University Reg Net, 2006).

²⁴⁴ 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 Bill of Rights: the ACT and Beyond Conference, Canberra, 21 June 2006); Gabrielle McKinnon, 'Strengthening the ACT Human Rights Act 2004' (Paper presented at the Human Rights Commission Office Community Forum, Canberra, 1 July 2005).

Recommendation 7 – Application to public authorities

- The Tasmanian Law Reform Institute recommends that the Tasmanian Charter of Human Rights initially should bind only ‘public authorities’.
- The Institute further recommends that in prescribed reviews of the Charter, the issue of who should be bound by the Charter should be revisited and consideration given to extending its application to private bodies and individuals. A narrowing of its application should not be an objective of such reviews.

4.6 What is a ‘public authority’?

4.6.1 Recommendation 7 begs the questions – what is a ‘public authority’ and what should be the duties of public authorities in relation to a Tasmanian Charter? In defining ‘public authorities’ the objective is to achieve a comprehensive rather than limited definition that incorporates the wide variety of ways that public functions are performed in Tasmania. As Dr Ben Saul suggested, it should include “those who exercise ‘hybrid’ or devolved public powers, such as corporatised public entities; private contractors performing public functions; or those recognised as performing functions in the public interest.”²⁴⁵ In addition, the definition should have sufficient precision to enable clear identification of whom it includes. Yet, it should be sufficiently flexible to enable it to adapt to new and novel governance arrangements.

4.6.2 The United Kingdom *Human Rights Act 1998*, s 6(3) defines ‘public authority’ as,

- (a) a court or tribunal, and
- (b) any person certain of whose functions are functions of a public nature.

4.6.3 The legislative intent behind this definition was to extend compliance with human rights standards beyond purely State bodies to private and community bodies undertaking functions on behalf of the State.²⁴⁶ To achieve this s 6(3) applies a ‘function test’ to the determination of whether an entity is a ‘public authority. However, application of that test has proved to be problematic. Its interpretation is susceptible to different approaches and, accordingly, to inconsistent outcomes. An inquiry²⁴⁷ undertaken in 2003 and 2004 by the Joint Committee on Human Rights of the British Parliament revealed that the lower courts had taken a different approach in interpreting s 6(3) to that taken in the House of Lords. The lower courts had concentrated on the nature of the relationship between the government and the private entity in question whereas the House of Lords focused on the function being performed by the private entity.²⁴⁸ The Joint Committee preferred the functional to the relational approach because the latter appeared to create a gap in human rights protection. Nevertheless, the Joint Committee did not recommend the amendment of s 6(3) but instead concluded that it should be left to the courts to develop. This is unsatisfactory. The community should not be required to wait upon determinations of the courts to know who is and who is not required to comply with human rights obligations.

4.6.4 For this reason the Victorian *Charter of Human Rights and Responsibilities 2006* provides greater specificity in its definition of ‘public authority’ and also gives guidance in the construction of that definition. The Victorian Human Rights Consultation Committee rejected the option of simply listing in a Schedule to the Charter the organisations and classes of organisations that are ‘public authorities’ on the grounds that this could limit the adaptability of the Charter to changing future

²⁴⁵ Submission 338.

²⁴⁶ Joint Committee on Human Rights, *The Meaning of Public Authority under the Human Rights Act* Seventh Report, House of Commons Paper No 382; House of Lords Paper No 39, Session 2003-04 (2004) 5-7; 9-10.

²⁴⁷ Joint Committee on Human Rights, *The Meaning of Public Authority under the Human Rights Act* Seventh Report, House of Commons Paper No 382; House of Lords Paper No 39, Session 2003-04 (2004) 34, 54.

²⁴⁸ Joint Committee on Human Rights, *The Meaning of Public Authority under the Human Rights Act* Seventh Report, House of Commons Paper No 382; House of Lords Paper No 39, Session 2003-04 (2004) 10-16.

governance arrangements. Nevertheless, the Charter does list in s 4(1) a number of entities that fall within the definition of ‘public authority’. It also applies a modified version of the United Kingdom ‘function test’ to the determination of whether an entity is a ‘public authority’: s 4(1)(c). Some guidance is then provided by s 4(2) in relation to the application of the ‘function test’.²⁴⁹ Section 4 of the Charter provides:

- (1) For the purposes of this charter a public authority is-
 - (a) a public official within the meaning of the *Public Administration Act 2004*; or
 - (b) an entity established by a statutory provision that has functions of a public nature; or
 - (c) an 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); or
 - (d) Victoria Police;
 - (e) a Council within the meaning of the *Local Government Act 1989* and Councillors and members of Council staff within the meaning of that Act; or
 - (f) a Minister; or
 - (g) members of a Parliamentary Committee when the Committee is acting in an administrative capacity; or
 - (h) an entity declared by the Parliament to be a public authority for the purposes of this Charter–

But does not include-

- (i) Parliament or a person exercising functions in connection with proceedings in Parliament; or
- (j) a court or tribunal except when it is acting in an administrative capacity; or
- (k) an entity declared by regulations not to be a public authority for the purposes of this Charter.

4.6.5 How does s 4(1) work in defining ‘public authority’? Both the definition in the Victorian Charter and that in the United Kingdom Act have been described as dividing public authorities into two primary categories.²⁵⁰

- ‘core’ or ‘pure’ public authorities. This category includes public officials, government sector employees, Government departments, judicial employees, parliamentary officers, statutory bodies that have functions of a public nature, Local Councils, Ministers, the police, Parliamentary Committees and bodies declared by regulations to be public authorities. ‘Core’ or ‘pure’ public authorities are required to comply with human rights in all their activities. In the Victorian Charter the bodies that fall within the category of ‘core’ public authorities are listed in s 4(1)(a), (b), (d), (e), (f), (g) and (h);

²⁴⁹ Section 4(3).

²⁵⁰ Joint Committee on Human Rights, *The Meaning of Public Authority under the Human Rights Act* Seventh Report, House of Commons Paper No 382; House of Lords Paper No 39, Session 2003-04 (2004) 5-6.

What model of human rights protection should Tasmania adopt?

- ‘hybrid’ or ‘functional’ public authorities. No list is provided of entities falling within this category. Instead, whether a body qualifies as a ‘hybrid’ or ‘functional’ public authority will depend upon the outcome of the ‘function test’ in s 4(1)(c). If an entity’s functions are or include functions of a public nature, it will be a public authority and bound by the Charter when exercising those functions on behalf of the State or a public authority. Significantly, this means that the Charter only binds ‘hybrid’/‘functional’ public authorities when they are performing functions of a public nature. When engaged in purely private activities they do not fall within the definition of ‘public authority’ and so are not bound by the Charter. Section 4(1)(c) prevents use of outsourcing or downstream delegation to avoid compliance with Charter obligations by providing that a body will qualify as a public authority if it carries out public functions on behalf of another public authority.

4.6.6 While s 4 of the Victorian Charter makes the extent of the Charter’s operation considerably clearer than is the position under the United Kingdom *Human Rights Act*, and vastly more clear than the position under the ACT *Human Rights Act*,²⁵¹ there still remain two areas of uncertainty – what is meant in s 4(1)(c) by ‘function of a public nature’ and when is a function being exercised on behalf of a State or a public authority?²⁵² Assistance is provided in this regard by s 4(2):

In determining if a function is of a public nature the factors that may be taken into account include-

- (a) that the function is conferred on the entity by or under a statutory provision;
- (b) that the function is connected to or generally identified with functions of government;
- (c) that the function is of a regulatory nature;
- (d) that the entity is publicly funded to perform the function;
- (e) that the entity that performs the function is a company (within the meaning of the Corporations Act) all of the shares in which are held by or on behalf of the State.

4.6.7 Dr Simon Evans argues that s 4(2)(b) is unlikely to be particularly helpful, apart from the most obvious cases like privately operated prison systems, in determining whether functions are of a public nature. This is because many of the functions of modern governments are fluid and often strongly contested on political grounds.²⁵³

4.6.8 The Human Rights Law Resource Centre argued in its submission to the Institute that the approach taken in Victoria could be improved upon in a Tasmanian Charter by identifying by way of a non-exhaustive list, the functions considered to be ‘of a public nature’. They should include, operation of detention/correctional facilities; provision of essential services (gas, electricity, water); provision of emergency services; provision of health care or medical services (public and private); provision of all educational services, including private schooling; provision of public transport and provision of public housing.²⁵⁴

4.6.9 Additionally, the definition of ‘public authority’ should explicitly extend to State owned companies and government business enterprises.

²⁵¹ Because the ACT *Human Rights Act*, is silent on the question of who is bound by it, it does not contain any definition of ‘public authority’, see discussion at para [4.4.1].

²⁵² 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, 21st June 2006) 10.

²⁵³ Ibid.

²⁵⁴ Submission 156.

4.7 Should the Tasmanian courts be included in the definition of ‘public authority’?

4.7.1 The majority of submissions to the Institute said that Tasmanian courts should be bound by a Tasmanian Charter of Human Rights and should interpret all Tasmanian laws, as far as possible, in a manner that complies with human rights.

4.7.2 There are three options for the application of a Tasmanian Charter to the courts:

- Include courts within the definition of ‘public authority’ so that they are bound by the Charter like all other public authorities. This is the position under the United Kingdom, New Zealand, Canadian and South African human rights instruments. In order to do this in Tasmania without offending the doctrine of the unity of the common law, it will be necessary for a Tasmanian Charter to effect direct reform of the common law to render it human rights compliant and thus susceptible to interpretation by the courts in a manner consistent with human rights;
- Include courts within the definition of ‘public authority’ so that they are bound by the Charter but with the qualification that this is except and to the extent that the doctrine of the unity of the common law is not thereby abrogated;
- Exclude courts from the definition of ‘public authority’ except when acting in an administrative capacity. This is the approach taken under the Victorian *Charter of Human Rights and Responsibilities 2006*.

4.7.3 The Victorian *Charter of Human Rights and Responsibilities* differs from most other modern human rights instruments in excluding the courts from its definition of ‘public authority’ except when they are performing administrative functions. The United Kingdom *Human Rights Act 1998*, the New Zealand *Bill of Rights Act 1990* and the Canadian *Charter of Rights and Freedoms 1982* apply to courts in the performance of all their functions. The Victorian Human Rights Consultation Committee recommended exclusion of courts from the definition of public authority in the Victorian Charter on the grounds that, in Australia’s federal system it may be unconstitutional for a State legislature to require courts to apply a State Charter of Rights when adjudicating common law causes of action, though it is quite legitimate to require them to do so when interpreting State legislation.²⁵⁵ This possibility arises, it was argued, because of the doctrine of the unity of the common law.

4.7.4 What is the doctrine of the unity of the common law? High Court decisions like *Lipohar v The Queen*²⁵⁶ and *Esso Australia Resources Limited v The Commissioner of Taxation*,²⁵⁷ appear to have established that there is one unified body of common law applicable throughout Australia whose ultimate statement rests with the High Court by virtue of s 73 of the Australian Constitution. Unlike the United States of America where there is a common law of each State, Australia has a unified common law which applies in each State, but is not itself the creature of any State. Because no State can have a separate and unique common law it may not be possible for State legislatures to direct the courts to develop the common law in any one State according to different principles to those that apply elsewhere in Australia. While State Parliaments may directly modify or abrogate the common law, they cannot indirectly influence its development in the courts. Accordingly, it is thought that it might be unconstitutional for State Parliaments to direct State courts to develop the common law in accordance with a State Charter of Human Rights. To do so would be to require the courts to develop a separate common law for a particular State, distinct from that applying elsewhere.

²⁵⁵ Victorian Human Rights Consultation Committee, *Rights, Responsibilities and Respect: The Report of the Human Rights Consultation Committee* (2005) 59.

²⁵⁶ *Lipohar v The Queen; Winfield v The Queen* (1999) 200 CLR 485.

²⁵⁷ (1999) 201 CLR 49.

4.7.5 This proposition has been questioned and criticised as denying the sovereignty of State and Territory Parliaments.²⁵⁸ It has also been argued that there is nothing in either *Lipohar* or *Esso* to suggest that “a broadly cast amendment to the common law having what [is described] as a “horizontal” effect²⁵⁹ may be unconstitutional.”²⁶⁰ In this regard Justice JW Perry has argued:

If a particular State or Territory has the benefit of a Bill of Rights which enables it to condition the application of common law principles by reference to human rights, that process is an example of modification of the common law by statute. I do not accept that the fact that it has been described as a horizontal effect makes any difference.²⁶¹

4.7.6 His Honour was also critical of the Victorian approach because it eliminates from the application of the Victorian Charter a vast body of the law, viz, all non-statutory law. Moreover, the extent to which State and Territory legislatures have modified the common law challenges the notion that Australia has in reality one unified common law. Nevertheless, the Victorian Human Rights Consultation Committee accepted that it is not possible for the courts in any one State to develop the remains of that ‘unified’, unmodified common law in a different direction or according to different principles to those applying elsewhere in Australia. If this is correct, then Tasmanian courts could not apply a Tasmanian Charter of Human Rights when interpreting or applying the common law, unless Parliament has already directly modified the common law to make it human rights compliant. In the absence of such action by Parliament, and assuming that the doctrine of the unity of the common law does prevent courts from applying State human rights precepts in their interpretation of non-statutory law, the protection of rights offered by a Charter will be significantly limited.

4.7.7 Like the Victorian Charter, the ACT *Human Rights Act 2004* does not apply in the interpretation of the common law. The only laws to which the Act applies are Acts and statutory instruments.²⁶² Further the Act is silent on the question of whom it binds. The ACT Bill of Rights Consultative Committee recommended that ACT courts and tribunals be required to interpret all laws, including the common law, consistently with human rights²⁶³ and had included this requirement in the draft Human Rights Bill appended to their Report.²⁶⁴

4.7.8 A solution to the problem posed by the doctrine of the unity of the common law appears to be, as was suggested by Justice Perry, to address the law, rather than to focus on the courts.²⁶⁵ If the Tasmanian Charter makes explicit provision that all *non-statutory law*, including both the substantive and adjectival (procedural) law, is amended by the Charter so as to conform to the human rights as defined and limited in the Charter, and that any conflict with those rights is to be resolved in favour of those rights, the problems posed by the doctrine of the unity of the common law may not arise.²⁶⁶ While such a provision may seem quite broad, its breadth is not without precedent. For example, the Commonwealth *Racial-Discrimination Act 1975* has a similarly broad impact on laws that are inconsistent with its provisions. Section 10(1) of that Act provides,

²⁵⁸ Justice JW Perry, *International Human Rights and Domestic Law and Advocacy* (2006) (Paper presented at the Human Rights Law Resource Centre, Melbourne, 7 August 2006) 13. See also Submission 156; Submission 111.

²⁵⁹ In those jurisdictions where courts are required to interpret all laws including the common law consistently with human rights, the courts are able to apply human rights principles in developing the common law in its application to private litigants. They are not restricted to applying human rights instruments to the interpretation of legislation or to the determination of cases involving public authorities. The process of applying human rights instruments that expressly bind only public authorities, to private law matters, is often described as giving them a ‘horizontal effect’.

²⁶⁰ Justice JW Perry, *International Human Rights and Domestic Law and Advocacy* (2006) (Paper presented at the Human Rights Law Resource Centre, Melbourne, 7 August 2006) 14.

²⁶¹ *Ibid*, 16.

²⁶² *Human Rights Act 2004* (ACT) s 29.

²⁶³ Australian Capital Territory Bill of Rights Consultative Committee, *Towards an ACT Human Rights Act: Report of the ACT Bill of Rights Consultative Committee* (2003) 72.

²⁶⁴ *Ibid*, 4 of Appendix 4..

²⁶⁵ Justice JW Perry, *International Human Rights and Domestic Law and Advocacy* (2006) (Paper presented at the Human Rights Law Resource Centre, Melbourne, 7 August 2006) 17.

²⁶⁶ *Ibid*.

If, by reason of, or of a provision of, a law of the Commonwealth or of a State or Territory, persons of a particular race, colour or national or ethnic origin ... enjoy a right to a more limited extent than persons of another race, colour or national or ethnic origin, then, notwithstanding anything in that law, persons of the first-mentioned race, colour or national or ethnic origin shall, by force of this section, enjoy that right to the same extent as persons of that other race, colour or national or ethnic origin.

4.7.9 One concern with such a broad amendment to the common law is that it may ultimately be judged as, in effect, requiring the courts to recast the common law to accord with human rights, and thus requiring the courts to perform legislative functions in breach of Chapter III of the Constitution.²⁶⁷ This concern may be countered by pointing to other legislative provisions like s 10(1) of the *Racial Discrimination Act 1975*, which similarly cast a broad, and, to a large extent, indeterminate shadow over the common law, and whose ultimate effect on the common law is judicially determined. There is no immediately apparent reason why a human rights provision in the terms suggested here should be judged any differently in constitutional terms to such legislation.

4.7.10 If all non-statutory law is amended in the manner suggested by Justice Perry, the courts might be included in the definition of ‘public authority’ and bound by the Charter to interpret all Tasmanian laws including the common law, consistently with Charter rights without challenging the doctrine of the uniformity of the common law. This would give a Tasmanian Charter a similar breadth of operation in relation to Tasmanian law as the United Kingdom *Human Rights Act 1998*, the New Zealand *Bill of Rights Act 1990* and the *Canadian Charter of Rights and Freedoms 1982*²⁶⁸ have in relation to the law in those jurisdictions.

4.7.11 The beauty of this approach is that it achieves a unity in the application of human rights principles to all Tasmanian laws. This, in turn, achieves greater clarity, certainty and cohesion in the application of Charter rights than would be the case if the Charter were to have a more limited application. It is not the purpose of a Charter to introduce greater complexity into the protection of rights, but to provide over-arching, clearly articulated principles that provide a compass in the interpretation, implementation, formulation and development of all Tasmanian laws.

4.7.12 If a Tasmanian Charter were to have only a partial application to our laws, determining to which laws it is relevant may prove a complex task. For example, although the Victorian *Charter of Human Rights and Responsibilities 2006* does not bind the courts except when acting in an administrative capacity and does not impact on the development of the common law in the way that the Canadian, United Kingdom and New Zealand human rights enactments do, this does not mean that it has no application to the common law. It is just a great deal trickier to make the connection. The difficulty is in working out when and how it is relevant to the common law.²⁶⁹ Key provisions in this regard are ss 38 and 39 of the Charter. Section 38 deals with the obligations of public authorities and makes it unlawful for a public authority to act in a way that is incompatible with a human right. Section 39 deals with legal proceedings and provides that if a person may seek any relief or remedy in respect of an act or decision of a public authority on the ground that the act or decision is unlawful, a breach of s 38 may provide the element of unlawfulness. For instance, individuals have a general law right to seek declarations or injunctions in relation to the unlawful conduct of public authorities. The power to make the declaration or grant the injunction lies within the inherent jurisdiction of the

²⁶⁷ *Western Australia v Commonwealth* (1995) 128 ALR 1; *Kable v The Director of Public Prosecutions for the State of New South Wales* (1996) 189 CLR 51. A critical question here would be whether the court would be “called upon to act and decide, effectively as the alter ego of legislature”: (*Fardon v AG (Qld)* (2004) 210 ALR 50, [110]). However, the risks associated with mixing functions of State courts may be ameliorated to some extent by the dilution of the *Kable* principle in subsequent cases: (*Fardon v AG (Qld)* (2004) 210 ALR 50; *Baker v The Queen* (2004) 210 ALR 1).

²⁶⁸ The problem of the doctrine of the unity of the common law has not arisen in the United Kingdom or New Zealand because they do not have federal systems of government. Further, and this factor applies also to Canada which does have a federal system of government, the human rights enactments in these jurisdictions are national instruments.

²⁶⁹ For detailed consideration of the operation of the remedies provision of the Victorian Charter, see, Simon Evans and Carolyn Evans, ‘Legal redress under the Victorian Charter of Human Rights and Responsibilities’ (2006) 17 *Public Law Review* 264.

Supreme Court. In Victoria, as a result of s 38, the element of unlawfulness to ground the grant of the order sought may be supplied by breach of the s 38 duty to comply with human rights.²⁷⁰ While this example is relatively straightforward, the relationship between the Victorian Charter and the common law is complex, unclear and uncertain. Such complexity is inimical to the effective operation of the Charter. It generates confusion for those bound by the Charter about the extent of their human rights obligations and for the general community about the degree of human rights protection afforded by the Charter.

4.7.13 Jeremy Gans, commenting on the difficulties attendant upon exempting courts and the common law from the operation of the Victorian Charter's obligations suggested,

these various difficulties can only lead to recurrent drawn-out technical arguments, i.e. a lawyers' picnic.²⁷¹ Worse still, the resulting legal effect of the Charter on the conduct of court proceedings would be, at best, a pastiche of weak restraints, waxing and waning as courts drift between their administrative and non-administrative capacities, proceedings pass in and out of the purview of suitably malleable statutory provisions and public authorities enter and leave the courtroom.

What is all this trouble in aid of? A 'unified' common law? Preserving the High Court's position at the apex of Australia's courts? Keeping human rights out of private relationships? What it certainly isn't in aid of is Victorians' rights to the fundamental court-based rights listed in Part Two of the Charter. Surely, leaving those rights to be promoted only by proxy is contrary to the Charter's foundational principles that human rights are 'essential in a democratic and inclusive society', 'belong to all people without discrimination' and 'come with responsibilities.'²⁷² Victoria's courts, in common with all other public authorities, should have the responsibility, rather than the mere discretion, to promote human rights during judicial proceedings whenever non-Charter law (or maybe just non-Charter statutes) permit.²⁷³

4.7.14 Further, if some of Tasmania's laws are insulated from the operation of the Charter, it could not be said that Tasmania had truly embraced the concept of a rights-based democracy. A large gap would remain in the protection of rights provided by the Charter. It is clear from the experience in the United Kingdom, New Zealand and Canada that the sky has not fallen as a result of the application of human rights precepts to the common law. In fact, the development of the common law in accordance with human rights principles has been heralded as both a natural and sound progression that achieves an holistic approach to the application of human rights principles.²⁷⁴

4.7.15 Of course there will be a level of uncertainty while the courts resolve the implications of Charter rights for the common law and exactly which common law doctrines impose reasonable limitations upon human rights. Australian courts, however, would have the benefit of a developed jurisprudence from the United Kingdom, Canada and New Zealand to refer to when dealing with this uncertainty.

4.7.16 If Parliament chooses not to amend the common law in this way, this will not necessarily mean that the courts cannot be bound by the Charter when performing functions other than applying or interpreting the common law. Simply to bind the courts when performing administrative functions, as

²⁷⁰ Simon Evans and Carolyn Evans, 'Legal redress under the Victorian Charter of Human Rights and Responsibilities', (2006) 17 *Public Law Review* 264, 275 – 277.

²⁷¹ Cf Department of Justice and Community Safety, Australian Capital Territory, *Human Rights Act 2004 Twelve-Month Review – Report* (2006) 29 noting that reliance on the 'indirect operation of the interpretative provision is unnecessarily complex and this may have an adverse effect on the growth of a broad rights dialogue.'

²⁷² Preamble of the *Victorian Charter of Human Rights and Responsibilities 2006* (Vic).

²⁷³ Cf *Human Rights Act 1998* (UK) c 42, s 6(3)(a), which expressly includes a 'court or tribunal' in the definition of 'public authority' and s 6(4) excising 'the House of Lords in its judicial capacity' from the exemption for Parliament in s 6(3). See also s 9(1) restricting the proceedings that can be brought 'in respect of a judicial act'.

²⁷⁴ Lord Steyn, 'Laying the Foundations of Human Rights Law in the United Kingdom' (2005) 4 *European Human Rights Law Review* 349, 354.

was suggested by the Victorian Human Rights Consultation Committee,²⁷⁵ may be too restrictive an approach. The Institute found Jeremy Gans' submission very useful on this point:

Developing and applying the common law is only one of many judicial functions that courts and tribunals exercise. Putting aside the function of applying s 32(1)'s rule on the interpretation of legislation,²⁷⁶ (regulated by s 32(1)), courts and tribunals must apply other rules of interpretation²⁷⁷ and make collateral legal and factual findings relevant to determining whether a statute is in force and applicable. More importantly, courts routinely exercise discretions and powers granted by statutes and common law, many of which, on any view, are extremely broad. Moreover, much judicial work is expended in interlocutory or procedural matters, where courts are simply exercising their inherent power to manage their own business.

Why shouldn't a ... court doing these things – none of which impinge on Australia's unified common law – be obliged to act compatibly with and take account of human rights? The exemption of courts from the Charter's obligations regime seems to be a case of an esoteric bit of human rights theory gone awry.

... Indeed, many of the rights in Part Two – notably fair hearings, rights in criminal proceedings, children in criminal process, deprivation of liberty and constraints on punishment²⁷⁸ – are essentially rights to have the courts act or make decisions in a particular way. To oblige other public authorities to conform to these rights²⁷⁹ but to exempt courts in their judicial function from them is simply perverse. In Victoria's first major Charter decision, gangster Carl Williams sought an adjournment of his murder trial to allow him to seek a lawyer of his choice, pursuant to s 25(2)(d)'s guarantee that he could 'defend himself... through legal assistance chosen by him'. The Supreme Court held that, even if the Charter had applied to Williams' trial, the obligations regime did not apply to a court's decision to fix or adjourn a trial date, as such a decision 'is discretionary and... in determining those matters a court must act judicially and balance a number of factors'.²⁸⁰ Whatever else might be said about Williams' claim, this is surely a totally absurd reason to reject any person's appeal to vindication of a human right.²⁸¹

The Tasmanian Law Reform Institute's view

4.7.17 The Institute agrees with Jeremy Gans that to limit the operation of a Tasmanian Charter to a court when it performs administrative functions is a more extreme limitation than any constitutional constraint imposed by the doctrine of the common law demands. Accordingly, if it is decided that the Tasmanian Charter should not bind the court when interpreting the common law, it should, nevertheless, bind the courts in the performance of all other functions, including judicial functions not involving interpretation of the common law. It is the view of the Tasmanian Law Reform Institute that if the common law is not amended to bring it into conformity with a Tasmanian Charter, that courts

²⁷⁵ Victorian Human Rights Consultation Committee, *Rights, Responsibilities and Respect: The Report of the Human Rights Consultation Committee* (2005) 59.

²⁷⁶ Applicable to the Victorian courts via s 6(2)(b) of the *Charter of Human Rights and Responsibilities 2006* (Vic), regardless of the definition of public authority.

²⁷⁷ See *R v YL* [2004] ACTSC 115, [24]-[28], applying the *Acts Interpretation Act 1901* (Cth), s 10A (on references to repealed legislation) in a case where the judge raised concerns that its application to *Evidence Act 1995* (Cth) s 19 (exempting some proceedings from s 18, providing courts with a discretion to permit a relative of the defendant not to testify), could lead to physical harm to a witness, contrary to *Human Rights Act 2004* (ACT) s 11 on the right of children to protection.

²⁷⁸ *Charter of Human Rights and Responsibilities 2006* (Vic) s 23-27.

²⁷⁹ Cf '[T]he presumption of innocence implies a right to be treated in accordance with this principle. It is therefore a duty of all public authorities to refrain from prejudging the outcome of a trial' (emphasis added): Human Rights Committee, General Comment 13 Article 14, 21st sess [7] (1984) in *Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies*, 135, UN Doc HRI/GEN/1/Rev.1 (1994).

²⁸⁰ *R v Williams* [2007] VSC 2, [50] cf the note to s 4(1)(j), asserting that 'listing' is an administrative capacity.

²⁸¹ Submission 111.

should, nevertheless, be included within the definition of ‘public authority’ and be bound by the Charter to the extent that this should not abrogate the principle of the unity of the common law.

4.7.18 The Tasmanian Law Reform Institute is of the view that the widest possible definition should be given in a Tasmanian Charter to ‘public authority’ in order to cover the wide variety of arrangements involved in modern governance. It should be modelled upon the Victorian approach and include, core public authorities and ‘functional’ public authorities. ‘Functional’ public authorities should include all entities whose functions are or include functions of a public nature, when they are exercising those functions on behalf of the State or a public authority. Like the Victorian Charter, guidance should be provided in determining when an entity is performing ‘functions of a public nature’. This guidance should be in similar terms to that contained in s 4(2) of the Victorian Charter. The Institute agrees with The Human Rights Law Resource Centre, that the guidance in the Victorian Charter can be improved upon by including a non-exhaustive list of functions considered to be of a public nature. Such a list would also have the beneficial result of removing areas of uncertainty in relation to particular bodies, such as private enterprises engaged in the provision of essential services. In contrast to the Human Rights Law Resource Centre, the Institute considers that non-government schools and health services should not initially be included in the non-exhaustive list because this may extend the definition of ‘public authority’ too far into the private sphere. Nevertheless, because these bodies receive public funding and because they provide services that can legitimately be regarded as having a public benefit, consideration should be given in reviews of the Charter to including them within the definition of ‘public authority’. To remove any uncertainty as to whether government business enterprises and State owned corporations fall under the rubric of ‘public authority’, they should explicitly be included in the definition of ‘public authority’.

4.7.19 The Institute also considers that Tasmanian courts should be included in the definition of ‘public authority’ and that their inclusion should not be limited to occasions when they are acting in an administrative capacity as is the case under the Victorian Charter. Rather, the extent to which a Charter binds the courts should, as far as possible, be concomitant with the extent to which it binds other core government entities. However, the Institute recognises that the unqualified inclusion of courts in the definition of ‘public authority’ may be problematic in view of the doctrine of the unity of the common law.

4.7.20 This issue may be dealt with in either of two ways. First, Parliament might exclude problems associated with this doctrine by directly amending the common law to render it human rights compliant. Such amendment would make the common law susceptible to the application of human rights precepts by the courts without offending the doctrine of the unity of the common law. This would mean that the Charter could then bind the courts like any other public authority. This is the option preferred by the Institute, because it does not result in a fracturing of the law where human rights are concerned but rather, in the words of Lord Steyn, “reflects the reality that ultimately common law, statute law and human rights law coalesce in one legal system”.²⁸² However, as a precautionary measure, it is also suggested that the Charter should specify that in the event that the extension of the Charter’s obligations to courts and tribunals is judged to be an invalid exercise of the Tasmanian Parliament’s legislative power, it is the intention of Parliament that the remainder of the Charter, including its application to other arms of Government is to continue to operate.

4.7.21 Alternatively, if this option is not adopted, the courts may be included in the definition of ‘public authority’ subject to the qualification that they are exempted from the Charter’s obligations regime to the extent that they are exercising their function of developing the common law of Australia. While this option would mean that the courts are not bound by the Charter to the same extent as would be achieved by the first option, (specifically, they would not be bound to develop the common law in compliance with Charter precepts except where the Charter directly modifies the common law), it will probably nevertheless, allow a greater scope for the operation of the Charter in the courts than the

²⁸² Lord Steyn, ‘Laying the Foundations of Human Rights Law in the United Kingdom’ (2005) 4 *European Human Rights Law Review* 349, 354.

more limited Victorian approach. This option lacks the clarity and consistency of the first option. It introduces complexities and uncertainties into the law and limits the extent to which human rights principles are able to shape our laws and provide the widest possible human rights protection in the interpretation and application of those laws.

Recommendation 8 – What is a ‘public authority’?

- The definition of ‘public authority’ should include tribunals, the courts, government departments, public officials, statutory authorities, government business enterprises, State owned companies, Tasmania Police, local government, Ministers, members of Parliamentary Committees when acting in an administrative capacity, anyone whom Parliament declares to be a public authority for the purposes of the Charter and an 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).
- As a precautionary measure, the Institute suggests that the Charter should specify that if the extension of the Charter’s obligations to courts and tribunals is judged to be an invalid exercise of the Tasmanian Parliament’s legislative power, it is the intention of Parliament that the remainder of the Charter, including its application to other arms of Government is to continue to operate.
- Statutory guidance should be provided as to when an entity is performing functions of a public nature. This guidance should be in the same terms as is provided by s 4(2) of the Victorian *Charter of Human Rights and Responsibilities 2006* but should additionally include a non-exhaustive list of functions considered to be of a public nature. This list should include: operation of detention/correctional facilities; provision of essential services (gas, electricity, water); provision of emergency services; provision of government controlled health care or medical services; provision of government educational services; provision of public transport and provision of public housing.
- Non-government schools and health services should not initially be included in the definition of ‘public authority’, but in reviews of the Charter consideration should be given to extending the definition of ‘public authority’ to include private businesses and enterprises that receive public funding and that carry out functions that have a public benefit including non-government schools and private health services.
- To avoid problems associated with the doctrine of the unity of the common law, and to enable courts to be bound by a Tasmanian Charter, it should contain explicit provision to the effect that all non-statutory law, including the substantive and adjectival (procedural) law, is amended by the Charter so as to conform to human rights as defined and limited in the Charter, and that any conflict with Charter rights is to be resolved in favour of the Charter.
- If the immediately preceding recommendation is not enacted, courts should, nevertheless, be included within the definition of ‘public authority’ and be bound by the Charter except and to the extent that they are exercising their function of developing the common law.

4.8 What should be the obligations of public authorities in relation to a Charter?

4.8.1 A Tasmanian Charter of Human Rights should clearly delineate the obligations of public authorities in relation to human rights. The Charter should make it clear that it is unlawful for a public authority to act in a way that is incompatible with or to make decisions without giving proper consideration to Charter rights unless the incompatible conduct is required by legislation. For example, s 38 of the Victorian *Charter of Human Rights and Responsibilities 2006* provides,

What model of human rights protection should Tasmania adopt?

(1) Subject to this section, it is unlawful for a public authority to act in a way that is incompatible with a human right or, in making a decision, to fail to give proper consideration to a relevant human right.

(2) Sub-section (1) does not apply if, as a result of a statutory provision or a provision made by or under an Act of the Commonwealth or otherwise under law, the public authority could not reasonably have acted differently or made a different decision.

4.8.2 In the absence of such provision, there will inevitably be confusion and conflicting opinions amongst public authorities concerning their human rights obligations. Such provision constitutes a clear message from the legislature about the importance of human rights and the seriousness with which they are regarded by the Parliament. This approach is also consistent with that taken under the United Kingdom *Human Rights Act 1998*, the Victorian *Charter of Human Rights and Responsibilities 2006* and the recommendations made by the ACT Bill of Rights Consultation Committee.²⁸³ Additionally, explicit imposition of such an obligation provides the impetus and framework for all public authorities to engage systematically with human rights in all their activities. To enable this to work effectively, however, public authorities should be allowed adequate time before this obligation comes into effect, to review their practices and processes and to adjust them where necessary to ensure they comply with human rights. In the United Kingdom, a two-year lead-in period was allowed and in Victoria there was an 18-month lead-in period for those provisions of the Charter relating to the obligations of public authorities.

4.8.3 Both the United Kingdom and Victorian enactments also specify that ‘an act’ includes a ‘failure to act’.²⁸⁴ For example, a prison authority that fails to intervene in a violent conflict between prisoners or that fails to act to prevent life threatening drugs being distributed amongst prisoners could be in breach of human rights in the same way as a prison service that directly distributes such drugs to prisoners or subjects them to violence.

Recommendation 9 – Obligations of public authorities

- All ‘public authorities’ should be required to act in a way that is compatible with human rights and, when making decisions, to give proper consideration to relevant human rights unless otherwise required by particular legislation. The approach of the Victorian *Charter of Human Rights and Responsibilities 2006* in this regard could usefully be adopted in a Tasmanian Charter.
- In this context, ‘to act’ should be defined as including ‘failure to act’.
- The operation of the Charter should be phased in over an 18-month period to enable adequate time for educational programs to be undertaken by public authorities with respect to their human rights obligations and also to provide sufficient opportunity for the review, and adjustment if necessary of existing practices.

4.9 If Tasmania were to enact a Charter of Human Rights how should it apply to the different arms of government?

4.9.1 What role should the different arms of Government, the Legislature, the Executive and the Judiciary play in relation to a Charter of Rights? Each of these institutions performs different

²⁸³ Section 38 of the *Charter of Human Rights and Responsibilities 2006* (Vic); *Human Rights Act 1998* (UK) c 42, s 6. Also see Australian Capital Territory Bill of Rights Consultative Committee, *Towards an ACT Human Rights Act: Report of the ACT Bill of Rights Consultative Committee* (2003) 73.

²⁸⁴ *Human Rights Act 1998* (UK) c 42, s 6(6); *Charter of Human Rights and Responsibilities 2006* (Vic) ss 38, 3(1).

governmental functions in a democratic society and their responsibilities are allocated to ensure that no single arm of Government can exercise unchecked power. This organisation of government is referred to as the ‘separation of powers’. Its aim is to provide a system of checks and balances on the exercise of power. The legislature (Parliament) enacts the laws of the State. The Executive (Government Ministers and their Departments) is responsible for formulating and implementing policy. The Judiciary (the Courts) interprets and applies the laws of the State in cases that come before them. All arms of government have an important role to play in protecting human rights.

4.9.2 The majority of submissions received were largely in agreement about the role of the Executive and the Parliament in relation to human rights protection. However, strongly opposing views were expressed about the role of the courts in protecting human rights and about their relationship with Parliament. Despite the fact that the Tasmanian Government has indicated a clear preference for a model that preserves Parliamentary sovereignty in relation to human rights protection, the Institute received a number of submissions that strongly favoured investing courts with the power to strike down legislation considered not to comply with Charter rights. Some of these submissions expressed significant disappointment about the Government’s position. For example, Dr Julie Debeljak told the Institute that it was disappointing and, in fact, unsatisfactory that the Government had apparently pre-determined the role of the courts.²⁸⁵ Other submissions equally strongly supported the Government position. The different views reflect divergent perspectives on where the ultimate authority for determining the legitimacy of legislation should lie. They also reflect opposing opinions on which arm of Government, Parliament or the courts, can be most trusted to protect human rights. All submissions received did agree that consideration of human rights should be an integral part of the processes of all arms of Government.

4.9.3 Those who wish to preserve the sovereignty of Parliament with respect to legislation were unwilling to give the unelected, unrepresentative judiciary the power to invalidate laws enacted by our elected representatives or to countenance a model that concentrated debate about human rights in the judicial arena. Some were also unwilling to see the courts become embroiled in the politics of policy making that is properly the domain of the legislature. Consequently, they supported the maintenance of the present constitutional structures in relation to law and policy making in Tasmania. Those who favoured enabling the courts to invalidate legislation were sceptical about the consistent commitment of all Parliaments to human rights protection.²⁸⁶

4.9.4 Such submissions also favoured arming the courts with the power to invalidate legislation that is not human rights compliant on the basis that not to do so would mean that citizens have little incentive to challenge legislation on human rights grounds. The Charter would, in their view, be a ‘toothless tiger’.²⁸⁷ A number of those who advocated equipping the courts with a strike down power pointed to the Canadian model as providing a workable compromise that enables the courts to quash legislation while also empowering the legislature to re-enact such laws and to override the Charter. Some submissions suggested that the courts power to invalidate legislation should be confined to subordinate or delegated legislation. Others suggested that such power should only be available in respect of non-human rights compliant legislation that does not seek to balance or rebalance competing rights but aims simply to override rights (see below at para [4.11.30]).

The Tasmanian Law Reform Institute’s view

4.9.5 It is the view of the Tasmanian Law Reform Institute that each arm of Government has a significant role to play in the protection of human rights. The responsibility for human rights protection should not become the exclusive preserve of any one Government institution. What is to be preferred is a model that encourages interaction or dialogue between the different arms of Government and creates a culture of human rights awareness across Government. Where there is such interaction,

²⁸⁵ Submission 85.

²⁸⁶ See for example submission 295 and submission 68.

²⁸⁷ Submission 34.

the protection of human rights can evolve and develop responsively as a result of an exchange of views. No single institution is then given a monopoly on human rights protection or excluded from the construction of a human rights sensitive culture. How this is best achieved is considered below in relation to each arm of Government.

4.10 Role of Parliament

4.10.1 The majority of submissions received by the Institute considered Parliament's role to be critical in the protection of human rights. Accordingly, they expressed a desire for the implementation of measures that embed consideration of human rights in the legislative process. The specific measures nominated were thorough, open and genuine pre-enactment scrutiny of all legislation in human rights terms to be achieved first by the provision of statements to Parliament concerning the compatibility of new legislation with human rights and second by the establishment of a Parliamentary Scrutiny Committee charged with the function of vetting all new legislation for its human rights compliance. Encapsulating these points the CPSU said:

Parliament should lead the way in ensuring compliance:

The House where the Bill is introduced should take responsibility for the scrutiny of the Bill. The Minister introducing the Bill should table a Statement of Compliance with the Human Rights Charter at the same time as tabling the Bill. A Parliamentary Standing Committee should scrutinise the legislation for compliance prior to the committee stage.²⁸⁸

4.10.2 Submissions consistently told the Institute that implanting consideration of human rights in the legislative process would be crucial in creating a culture of rights, in limiting occasion for challenges to legislation on human rights grounds and in broadening protection for human rights. So, for example, the Human Rights and Equal Opportunity Commission advised the Institute:

Strengthening the mechanisms of Parliamentary scrutiny will increase Parliamentary accountability and transparency in relation to human rights issues and assist in the development of a strong Parliamentary culture of human rights compliance. It will also contribute to the creation of a robust human rights culture within the broader community.²⁸⁹

4.10.3 Helen Wood, the Chairperson of the Tasmanian Anti-Discrimination Tribunal recognised a number of benefits resulting from pre-enactment scrutiny of legislation:

The benefits of this scrutiny are that it focuses attention on human rights at the law making stage so that reform does not merely occur retrospectively ie as reaction to existing laws but helps shape laws in the first place.

This should prove to be an important tool for social change ensuring that human rights become a fundamental consideration for Parliament. It also gives pre-eminence to those rights and means that they will be debated and discussed as mainstream considerations at a community and political level. It broadens responsibility for protection of human rights so that they are not just the province of lawyers, critics of existing laws and those seeking to invoke human rights.²⁹⁰

4.10.4 The International Commission of Jurists emphasised the importance of pre-legislative review in preventing rights abuses from occurring rather than correcting them after the fact:

Human rights breaches are wrongs which can cause great distress and suffering to victims. Many victims are from poor and disadvantaged sectors of the community who do not have the capacity or resources to access the remedies for breaches of human rights. Therefore it is more important to prevent human rights violation from occurring than to provide remedies for breaches of human rights after they have occurred.²⁹¹

²⁸⁸ Submission 71.

²⁸⁹ Submission 155.

²⁹⁰ Submission 404.

²⁹¹ Submission 161.

4.10.5 Similarly Sarah Holloway said,

[i]t ensures that human rights enter the legal dialogue at the beginning of the process, resulting in laws less likely to be challenged if the Charter is followed correctly. While a government may issue a statement of incompatibility and thus choose to ignore the charter provisions, in doing so it must face the political fall out of that choice. ...it would take a brave government to enact laws which audaciously contravene charter rights, and other jurisdictions have shown that leaving it to politics can be an effective mechanism of protecting rights by ensuring that human rights have a role in political decision-making.²⁹²

a) Statements of compatibility

4.10.6 In a number of jurisdictions, (the ACT, Victoria, the United Kingdom and New Zealand), Members of Parliament, (or in some cases the Attorney General²⁹³) who propose to introduce new legislation are required to provide statements of compatibility to Parliament concerning its compliance with human rights standards. In Victoria such statements are required to set out reasons for their assertions of compatibility and reasoned justifications for non-compatibility where the legislation derogates from human rights.²⁹⁴ This is an improvement on the approach in the ACT, where statements of compatibility may comprise mere assertions of compatibility without explanation. Such assertions are unlikely to provide sufficient information to Parliament to justify the legislation in human rights terms. Like the ACT Act, the United Kingdom *Human Rights Act 1998*, does not require reasoned statements of compatibility to be provided to Parliament. Nevertheless, reasoned statements do now appear in the Explanatory Notes on UK Bills. The United Kingdom Department of Constitutional Affairs has issued revised guidance for departments requiring that the Notes explain how Bills impact on human rights and that, where relevant, reference be made to any policy justification for what is proposed.²⁹⁵

4.10.7 With a view to ensuring that compatibility statements genuinely engage with human rights issues in a detailed manner, the Victorian Human Rights Consultation Committee recommended that statements of compatibility should identify and address particular matters including:

- the purpose of the Bill;
- the effect of the proposed legislation upon any human rights in the Charter;
- any limitation placed upon a Charter right by the Bill, the importance and purpose of this limitation, the nature and extent of this limitation, the relation between the limitation and its purpose and whether there is any less restrictive means to achieve that purpose.²⁹⁶

4.10.8 These matters correspond to those that are to be taken into account under the general limitations clause of the Charter, (s 7), in determining whether a statutory limitation on rights is reasonable and justifiable in a democratic society.²⁹⁷ The recommendation that these matters be alluded to in statements of compatibility was not enacted in the Victorian Charter. Nevertheless, the Law Reform Institute of Tasmania shares the view of the Victorian Human Rights Consultation Committee that the effectiveness of statements of compatibility would be enhanced by the inclusion of reasons and by requiring the statements to address the matters listed in the general limitations clause that guide consideration of the reasonableness of any statutory limitation on rights.

4.10.9 The Law Reform Institute is also of the view that all Members of Parliament should play a role in the advancement of human rights protections. For this reason responsibility for providing statements of compatibility in respect of Bills should rest with all Members of Parliament who

²⁹² Submission 144.

²⁹³ *Human Rights Act 2004* (ACT) s 37; *Bill of Rights Act 1990* (NZ) s 7.

²⁹⁴ Section 28 of the *Charter of Human Rights and Responsibilities 2006* (Vic).

²⁹⁵ Department for Constitutional Affairs, *Section 19 Statements: Revised Guidance for Departments*, UK Parliament website <<http://www.publications.parliament.uk/>> at 3 June 2007.

²⁹⁶ Victorian Human Rights Consultation Committee, *Rights, Responsibilities and Respect: The Report of the Human Rights Consultation Committee* (2005) 71, 73.

²⁹⁷ See discussion at paras [4.14.4] - [4.14.5].

introduce new legislation. This is the approach adopted under the Victorian Charter. This responsibility should not be assigned only to Ministers²⁹⁸ or, as is the case, in the ACT and New Zealand, to the Attorney General. A general allocation of this responsibility will ensure that there is a whole of government approach to human rights protection and will promote awareness of human rights across the entire legislature. For the same reasons, the requirement that statements of compatibility accompany all proposed new legislation should apply equally to government and non-government Bills. This will mean that processes will be required to enable non-government members to obtain advice, preferably from officers within the Executive arm of government, (see below at paras [4.20.6] - [4.20.10]), concerning the human rights compliance of their Bills as well as assistance in preparing statements of compatibility. In New Zealand, the Attorney General is charged with responsibility for bringing to the attention of Parliament, as soon as practicable after the introduction of any non-government Bill, any provision it contains that is inconsistent with human rights.²⁹⁹ The New Zealand Parliamentary Counsel's office provides all Bills to the Ministry of Justice. There they are reviewed by a senior officer who reports to the Attorney General and the Chief Parliamentary counsel. Where the Attorney General reports to Parliament that a non-government Bill does not comply with human rights, the advice supporting this conclusion is made available to the public.³⁰⁰

b) Establishment of a parliamentary Human Rights Scrutiny Committee

4.10.10 An additional pre-enactment scrutiny measure that has been implemented in some jurisdictions is the creation of a Parliamentary Scrutiny Committee that is charged with responsibility for vetting proposed legislation to ensure its compliance with human rights standards and for reporting to Parliament on human rights issues raised by Bills. This has occurred in the ACT,³⁰¹ Victoria³⁰² and the United Kingdom.³⁰³ Such Committees are comprised of members of all political parties and from both Houses of Parliament. Their task is to provide independent scrutiny of all Bills in human rights terms, to seek detailed information from government on human rights issues raised by Bills, to consider declarations of incompatibility made by the courts and to provide a framework for robust parliamentary and public debate on the human rights compatibility of legislation, notwithstanding that a compatibility statement accompanying the Bill declares it to be human rights compliant. As Briony Harris pointed out:

The most significant impact of the Victorian Charter and the ACT Act has been an increased dialogue regarding human rights and the progress towards a human rights culture. The establishment of a Parliamentary committee to scrutinise draft legislation for human rights compliance prior to its enactment, assists in achieving a vigorous dialogue.³⁰⁴

4.10.11 Reports on the operation of the ACT *Human Rights Act 2004* show that the ACT legislature engages in intense 'pre-enactment dialogue' prior to the enactment of Bills and that the Scrutiny Committee (in the ACT, the Standing Committee on Legal Affairs), plays an important role both in assessing human rights issues raised by bills and subordinate legislation and in bringing these issues to the attention of Parliament.³⁰⁵ Up until the end of 2006, the Committee had issued 15 reports in which it raised concerns about possible infringements of human rights and gave detailed consideration to whether limitations on human rights could be demonstrably justified.

²⁹⁸ In the United Kingdom, Ministers in charge of Bills must make statements of compatibility to Parliament: *Human Rights Act 1998* (UK) s 19.

²⁹⁹ Section 7 of the *Bill of Rights Act 1990* (NZ).

³⁰⁰ Michael Taggart, 'Tugging on Superman's Cape: Lessons from Experience with the New Zealand Bill of Rights Act 1990', [1998] *Public Law Review* 266, 271.

³⁰¹ *Human Rights Act 2004* (ACT) s 38.

³⁰² *Charter of Human Rights and Responsibilities 2006* (Vic) s 30.

³⁰³ The United Kingdom legislature has established a Joint Committee on Human Rights which has responsibility for scrutinising all bills to ascertain their compliance with the *Human Rights Act 1998* (UK) c 42.

³⁰⁴ Submission 12; Submission 129; Submission 155; Submission 403; Submission 294; Submission 156.

³⁰⁵ Gabrielle McKinnon, 'The ACT Human Rights Act – The Second Year' (Paper presented at the Australian Bills of Rights: The ACT and Beyond Conference, Canberra, 21st June 2006); Department of Justice and Community Safety, Australian Capital Territory, *Human Rights Act 2004 Twelve-Month Review – Report* (2006) 9.

4.10.12 Parliamentary Human Rights Scrutiny Committees perform the same functions in relation to courts' declarations of incompatibility and the Government's response to them. However, they can only do this if they are provided with copies of court decisions in a timely fashion. The Victorian Human Rights Consultation Committee recommended that the Attorney General should be required to refer declarations made by the courts to the Scrutiny Committee within seven days of receiving them and that the Committee should be required to report on the declaration within three months. The Tasmanian Law Reform Institute agrees with these recommendations.

4.10.13 A number of submissions to the Institute noted that Parliamentary Scrutiny Committees are only able to operate on a genuinely independent basis if their membership is constructed across party and Parliamentary House lines and does not simply reproduce the majority representation in Parliament. In this regard for example, Helen James said:

Tasmania's Upper House is notable for its independence. A joint committee along the lines of the UK Joint Committee on Human Rights would be unlikely, therefore to merely replicate the balance of power in Parliament. The UK model contains six members from each House and two eminent legal advisers. There is also provision for non-governmental organisations and academics. Such arrangements allow for a broad-based consideration of human rights issues.³⁰⁶

4.10.14 The Tasmanian Law Reform Institute agrees that the membership of a Tasmanian Parliamentary Human Rights Scrutiny Committee should be such as to ensure that, as a body, it adopts a genuinely independent approach to human rights issues coming before the Parliament. It should, therefore, be constituted across party lines and consist of members of both Houses of Parliament. No party should have dominant representation on it.

4.10.15 In order to fulfil its functions, the Committee should be adequately resourced and be able to seek independent, expert advice on human rights issues. Its membership should be representative of all parties in Parliament so that it does not operate and is not perceived to operate merely as a rubber stamp of the government of the day.

c) Override declarations

4.10.16 In Victoria³⁰⁷ and Canada,³⁰⁸ specific provision is made for the legislature to enact laws that override human rights. Such laws contain 'override clauses' or 'override declarations' that operate to exclude the courts' power to make declarations of incompatibility in respect of the legislation and obviate the need to interpret it consistently with whatever human rights are overridden. In Victoria, before such override clauses may be enacted, the Member of Parliament who introduces the legislation must explain to Parliament in a statement of incompatibility the 'exceptional circumstances' that justify its enactment in a democratic society. Further, such legislation is subject to 'sunset clauses', so that Parliament has the opportunity to revisit it after a fixed period and allow it to lapse or, after further scrutiny, to continue. The operative period for such legislation in Victoria is five years. The aims of this procedure are to restrain the enactment of legislation that purposefully stands outside human rights standards, to impose exceptional circumstances requirements on its enactment, to maximise the transparency, accountability and debate surrounding its enactment and to provide set time frames for the review and operation of such legislation.

4.10.17 A number of submissions to the Institute doubted the utility of the override provisions in the Victorian Charter. For example, the Human Rights Law Resource Centre strongly opposed the inclusion of provision for an override declaration in a Tasmanian Charter for the following reasons:

- 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.

³⁰⁶ Submission 164. See also Submission 155; Submission 403.

³⁰⁷ Part 3 Division 2 of the Victorian *Charter of Human Rights and Responsibilities 2006* (Vic).

³⁰⁸ *Canadian Charter of Rights and Freedoms 1982* (Canada) s 33.

What model of human rights protection should Tasmania adopt?

- Parliament can pass legislation limiting Charter rights under the limitation provisions, if the limitation can be shown to be demonstrably justified.
- 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.³⁰⁹

4.10.18 The Tasmanian Anti-Discrimination Commissioner said:

If a Tasmanian Charter were to include provision for Parliament to override the Charter, this could potentially be quite restrictive and inconsistent with Human Rights principles. However, concern in this regard may be ameliorated by the requirement that Parliament explain the necessity and that it is only intended that an override declaration will be made in exceptional circumstances as is the case with the Victorian model (s 31(4)). ... The OADC [Office of the Anti-Discrimination Commissioner] supports a model without override declarations, as it is an unnecessary feature to preserve sovereignty and, as previously mentioned, restrictive. While the Victorian and ACT models require that a statement of compatibility be prepared for each bill, if a bill is not compatible, it may still be enacted. Similarly if the relevant court makes a declaration of inconsistent interpretation or incompatibility, it does not affect the validity of the law. Section 31(3) of the Victorian Charter states that a member proposing legislation must make a statement to the Legislative Council and the Legislative Assembly explaining the exceptional circumstances that justify inclusion of the override declaration. However, if the Tasmanian model made provision for override declarations, the OADC would support a model requiring similar safeguards to that found in s 31(3) and 31(4). This would be important in the interests of accountability and transparency, and in keeping with the overriding spirit of a Charter of Rights.³¹⁰

4.10.19 Dr Julie Debeljak also pointed out that if Tasmania adopted a statutory model akin to that in the United Kingdom and the ACT, an override provision would not be necessary. She suggested that the override provision in the Victorian Charter is a curiosity and that it is unclear why it was included. She also pointed to a number of difficulties with the Victorian override provision,

Although it is vital in the *Canadian Charter* to preserve parliamentary sovereignty, it is not necessary in Victoria because of the circumscribed judicial powers. Under the *Victorian Charter*, use of the override provision will *never be necessary* because judicially-assessed s 36 incompatible legislation cannot be invalidated, and unwanted or undesirable s 32 judicial re-interpretations can be altered by ordinary legislation. An override may be used to avoid the controversy of ignoring a judicial declaration which impugns legislative objectives or means; however, surely use of the override itself would cause equal, if not more, controversy than the Parliament simply ignoring the declaration.

Another problem with the override power in the *Victorian Charter* is the supposed safeguards regulating its use. ... Sure, the *Victorian Charter* provides that overrides are temporary, by imposing a 5 year sunset clause – which, mind you, is continuously renewable in any event. However, it fails in three important respects. First, the override provision can operate in relation to all rights. There is no category of non-derogable rights, an outcome that contravenes international human rights obligations.

Secondly, the conditions placed upon its exercise do not reach the high standard set by international human rights law. The circumstances justifying an override in Victoria – “exceptional circumstances” which include “threats to national security or a state of

³⁰⁹ Submission 156.

³¹⁰ Submission 299.

emergency which threatens the safety, security and welfare of the people of Victoria'³¹¹ – fall far short of there being a public emergency that threatens the life of the nation. Indeed, the circumstances identified under the *Victorian Charter* are not “*exceptional*” at all. Factors such as public safety, security and welfare are the grist for the mill for your average limitation on rights. If you consider the types of legislative objectives that justify limitations under the *ICCPR* and the *European Convention on Human Rights*, public safety, security and welfare rate highly.

... if parliament uses the override to achieve what ought to be achieved via a simple limitation, the judiciary is excluded from the picture. An override in effect means that the s 32 interpretation power and the s 36 declaration power do not apply to the overridden legislation for five years. There is no judicial oversight for overrides compared to limitation. ... By setting the standard for overrides and “exceptional circumstances” too low, it places human rights in a precarious position. It becomes too easy to justify an absolute departure from human rights and thus undermines the force of human rights protection.

Thirdly, ...[t]he *Victorian Charter* does not limit the effect of override provisions. There is no measure of proportionality between the exigencies of the situation and the override measure, and nothing preventing the Victorian Parliament utilizing the override power in a way that unjustifiably violates other international law norms, such as, discrimination.³¹²

4.10.20 The Tasmanian Law Reform Institute agrees that provision for override declarations does not sit comfortably in statutory human rights instruments of the kind enacted in the United Kingdom, the ACT and Victoria and that in this context they may be problematic because they isolate laws from the application of human rights principles by all arms of Government. Nevertheless, the Institute considers that over-ride declarations have a potential role in relation to Parliament’s response to courts’ declarations of incompatibility, where Parliament wishes the legislation to continue to operate notwithstanding its non-compliance with human rights.

4.10.21 The use of an override clause was originally conceived and implemented in Canada. In that jurisdiction where the judiciary has the power to invalidate legislation for inconsistency with Charter rights, the power to enact override declarations is necessary to preserve Parliamentary sovereignty. There is no necessity for Parliament to have an override power in a typical statutory human rights model. This is because legislation that a court declares to be inconsistent with human rights is not invalidated by that declaration. It continues to operate unless Parliament amends or repeals it. In fact, simply choosing not to act upon a judicial declaration in any way produces the same result for the operation of the legislation as the use of an override. Of course, in this case the additional level of discussion and dialogue that may be generated by the override process is absent and the legislation is not subject to a ‘sunset’ clause. This begs the question, how can the benefits of the override process be incorporated into a statutory model in a way that gives creates an effective role for that process, one that cannot be disregarded by Parliament? This will only be achieved if the Tasmanian Charter *requires* the override process to be employed in specified situations. The override process in the Victorian Charter is largely irrelevant just because there are no circumstances mandating its use.

³¹¹ Explanatory Memorandum, Charter of Human Rights and Responsibilities Bill 2006 (Vic) 21.

³¹² Submission 85.

4.10.22 The issue is how to create the necessity for resort to an override mechanism in a statutory model without loss of Parliamentary supremacy. The requirement for the use of the override provisions could be created by enhancing the conditions of an acceptable Parliamentary response to courts' declarations of incompatibility. In this regard it is the Tasmanian Law Reform Institute's proposal that when a court issues a declaration of incompatibility in relation to legislation that is not human rights compliant, Parliament must respond within a certain period of time by either amending the legislation to conform to the charter, repealing the legislation or confirming its operation by means of an override declaration (see below at paras [4.10.27] - [4.10.32]).

d) Responding to courts' declarations of incompatibility

4.10.23 In those jurisdictions where courts have the power to make declarations of incompatibility in relation to legislation, human rights instruments may require Ministers responsible for administering such legislation to present a copy of the declaration to Parliament and the Parliamentary Human Rights Scrutiny Committee within a short time of receiving notice of it from the court. This is to enable Parliament to make a timely and considered response. In the ACT, the Attorney General must present a copy of the declaration to Parliament within six sitting days after receiving it.³¹³ This aspect of the response process is not timetabled in Victoria, although the Attorney General must give a copy of the declaration to the Minister administering the legislation in question 'as soon as reasonably practicable'.³¹⁴ The Victorian Human Rights Consultation Committee recommended that the Attorney General be required to present the declaration to Parliament within six sitting days of receiving it and also to provide it to the Parliamentary Human Rights Scrutiny Committee within seven days of receiving it.³¹⁵ The Tasmanian Law Reform Institute favours the approach taken in the ACT and recommended by the Victorian Human Rights Consultation Committee in relation to the prompt notification of Parliament and the Parliamentary Human Rights Scrutiny Committee about declarations of incompatibility. This enables Parliament to respond to the courts' views in a timely manner and indicates the seriousness with which Parliament should treat those views.

4.10.24 Thereafter the Minister administering the legislation in question may be required to furnish Parliament within a specified time with a report that responds to the declaration. The time specified for such responses in the ACT *Human Rights Act 2004* and the Victorian *Charter of Human Rights and Responsibilities 2006* is six months.³¹⁶ These reports explain the Government's proposed response to the declaration - amendment, confirmation or repeal of the offending legislation. They comprise a major element of the Parliamentary component in the dialogue between the courts and the legislature. Furthermore published responses by Ministers increase the accountability and transparency of Government decision-making. In the United Kingdom, up until July 2006, the courts had made declarations of incompatibility in 15 cases.³¹⁷ All of those declarations have been remedied either by primary legislation or by use of Ministers' remedial order power.³¹⁸ This demonstrates Parliament's respect for the courts' views on human rights and the significant role played by Parliament in receiving reports relating to courts' declarations of incompatibility. As Richard Refshauge SC, the ACT Director of Public Prosecutions notes:

³¹³ *Human Rights Act 2004* (UK) c 42, s 33(2).

³¹⁴ *Charter of Human Rights and Responsibilities 2006* (Vic) s 36(7).

³¹⁵ Victorian Human Rights Consultation Committee, *Rights, Responsibilities and Respect: The Report of the Human Rights Consultation Committee* (2005) 88-89 and s 38 of the attached Draft Charter.

³¹⁶ *Human Rights Act 2004* (ACT) s 33; *Charter of Human Rights and Responsibilities 2006* (Vic) s 37.

³¹⁷ Department of Constitutional Affairs, United Kingdom, *Review of the Implementation of the Human Rights Act* (2006).

³¹⁸ Section 10 of the *Human Rights Act 1998* (UK) c 42 permits a Government Minister to amend legislation by remedial order to remove any human rights incompatibility found by the courts. To date this power has been used only once following a declaration of incompatibility. In all other cases the defect in the legislation has been remedied by primary legislation.

In no case was the incompatibility ignored or accepted as one the legislators could tolerate. In this sense, there was dialogue between courts and legislators and the views of the courts heard and respected.³¹⁹ Indeed, the courts were quite effective in the dialogue.³²⁰

4.10.25 A court will only make a declaration of incompatibility where it cannot interpret legislation in a manner that is consistent with human rights and where it determines that the legislation's encroachment upon rights is not reasonably justifiable in a democratic society. A court's declaration of incompatibility is essentially a judicial statement that particular legislation, in its present form, does not represent a reasonable exercise of legislative power where human rights are concerned. One of the major objects of such a statement is to obtain a Parliamentary response which recognises the seriousness of the court's determination. The mechanisms recommended by the Institute for responding to declarations of incompatibility mean that Parliament cannot ignore them, (declarations of incompatibility must be tabled in Parliament within six sitting days of their receipt by Government and the Minister responsible for the legislation must report to Parliament on the Government response within six months). Additionally, a Tasmanian Charter should specify that in responding to declarations of incompatibility Parliament may confirm, amend or repeal the legislation. In keeping with the timing recommended by the Institute for tabling declarations of incompatibility in Parliament and for reporting upon the Government's proposed response to the declaration, it is recommended that the Charter specify that Parliament should respond to the declaration within seven months of its tabling in Parliament.

4.10.26 While an express requirement for the legislature to respond to declarations of incompatibility is not included in other human rights instruments, the Institute considers that such a measure would greatly assist in the creation of a genuine dialogue about human rights between the different arms of Government. If Parliament does not respond to the declaration of incompatibility within seven months of the declaration of incompatibility being tabled by amending, repealing or confirming the legislation to which it relates, then at that point the legislation should become inoperative.

4.10.27 Given the serious nature of a court's declaration of incompatibility, if Parliament wishes the legislation to continue to operate, it should explicitly confirm it and utilise the override mechanism to do so. That is, it should enact an override clause in the legislation. This approach is justified because, as the opinion of the court is that the legislation overrides human rights, it is logical that Parliament should do so explicitly when confirming its operation. Enactment of an override clause is a public acknowledgment and the clearest expression of deference to the fundamental role of the judiciary in a dialogue model. For the public it is a definitive statement by Parliament to rights holders that they recognise that the legislation they desire to be operative was deemed to be incompatible with the Charter by the judicial arm of government.

4.10.28 The use of an override is essentially the strongest possible guarantee of genuine dialogue about human rights that corresponds with Parliamentary sovereignty. This is because it recognises the importance of both the role of the judiciary and judicial opinion on human rights protection; it is a clear and definitive expression by Parliament of their position in response to judicial opinion and on the validity of legislation and it encourages public consideration of both the issue at hand and the dialogue between Parliament and the judiciary.

4.10.29 An integral attribute of notwithstanding (ie override) clauses currently in operation in other jurisdictions, including Victoria, is an incorporated 'sunset' clause for the legislation to which they apply. This gives the legislation a finite life. It also imposes a requirement that Parliament revisit the legislation after a fixed period of time and reconfirm its intention to both the judiciary and the public that in spite of the legislation's incompatibility with human rights, Parliament desires the legislation to

³¹⁹ For the New Zealand experience of dialogue, see Petra and Andrew Butler, '16 Years of the New Zealand Bill of Rights' (Paper presented at the Southern Currents Joint Conference of the Australian Law Librarians Group and the New Zealand Law Librarians Association, Melbourne, 27-29 September 2006).

³²⁰ Richard Refshauge, 'The Human Rights Act 2004 (ACT) and the Criminal Law' (Paper presented at the Law faculty of Tasmania Seminar Series, Hobart, 12 October 2006) 19.

continue to operate. An additional feature of the override process is that it requires Parliament to explain the exceptional circumstances that justify overriding human rights. What will amount to exceptional circumstances and whether they justify overriding human rights is of course a matter for Parliament itself to decide.

4.10.30 The approach recommended here maintains the fundamental characteristics of the statutory model, namely, non-entrenchment, the power of the judiciary to declare legislation incompatible with human rights yet not invalid and the requirement that Parliament respond to the court. It also creates a meaningful role within a statutory model for override legislation. The provision for override clauses under this model is not an ‘oddity’ as it appears to be in the Victorian Charter, but constitutes an acceptable Parliamentary response to courts’ declarations of incompatibility.

4.10.31 The use of override declarations should be subject to a number of limitations. As Dr Debeljak pointed out to the Institute:

Overrides are exceptional tools – overrides allow a government and parliament to temporarily suspend human rights that they otherwise recognise as a vital part of modern democratic polities.³²¹

4.10.32 Accordingly, non-derogable rights should be excluded from their operation. It can never be justified for governments to override freedom from slavery, freedom from torture and cruel, inhuman or degrading treatment or punishment, freedom from retrospective criminal punishment, freedom from genocide and the right to be recognised as a person before the law. Further, the enactment of override declarations should be confined to exceptional circumstances and those exceptional circumstances should be set out in the Government’s report to Parliament which explains the Government’s response to the court’s declaration of incompatibility. Finally the operation of such declarations should be subject to time limitations so that the override legislation lapses after a fixed period of time unless renewed following Parliamentary review. Because such legislation effectively annuls particular rights, either generally or in particular circumstances, and is insulated from subsequent judicial scrutiny in human rights terms, it should have an operative life of no more than 2 years. Its re-enactment must be subject to the same limitations and procedures as the original enactment.

e) Subordinate legislation

4.10.33 Subordinate legislation is made by the Executive arm of government. It is not enacted by Parliament in the same way as primary legislation. Usually subordinate legislation provides much of the ‘machinery’ that makes primary legislation operative. Even though it is not enacted by Parliament, Parliament nevertheless should have a role in scrutinising subordinate legislation in human rights terms. When tabled in Parliament, like principal legislation, it should be accompanied by a compatibility statement and should be subject to consideration by the Scrutiny Committee. This provides the opportunity for Parliament to reject it if it does not meet human rights standards.

4.10.34 The watchdog role of Parliament with respect to subordinate legislation should also apply where courts have issued declarations of incompatibility in respect of it. This may occur where the applicable primary legislation prevents an invalidation order being made because it mandates the breach of Charter rights by the subordinate legislation (see below at para [4.11.35]) In this case the same procedures as are used for primary legislation should apply with respect to laying the declaration of incompatibility before Parliament and responding by way of remedial order and Ministerial report.

³²¹ Submission 85.

Recommendation 10 – Role of Parliament

- Members of Parliament who propose to introduce new legislation should be required to provide reasoned statements of compatibility to Parliament concerning its compliance with human rights standards. These statements should address the following issues:
 - the purpose of the Bill;
 - the proposed legislation's effect upon any human rights in the Charter;
 - any limitation placed upon any human right in the Charter by the Bill, the importance and purpose of this limitation, the nature and extent of this limitation, the relation between the limitation and its purpose and whether there is any less restrictive means to achieve that purpose.
- To encourage a whole of legislature approach to human rights protection, responsibility for the provision of statements of compatibility should rest with all Members of Parliament who introduce new legislation.
- Statements of compatibility should accompany all subordinate legislation tabled in Parliament.
- A Parliamentary Joint Standing Committee to be called the Parliamentary Human Rights Scrutiny Committee should be established and charged with responsibility for:
 - Considering and reporting on the human rights compliance of all Bills and subordinate legislation and with responsibility for reporting on human rights issues raised by Bills generally.
 - The Committee may also consider other questions arising under the Tasmanian Charter that are referred to it by either House of Parliament.
 - The Committee should be constituted across party lines and consist of members of both Houses of Parliament. No party should have dominant representation on the Committee.
 - The Committee should also inquire into and report on courts' declarations of incompatibility within three months of the declaration being laid before Parliament.
 - The Committee should be adequately resourced and supported so that it can effectively perform its functions under the Charter.
- Where courts have issued a declaration of incompatibility in respect of legislation the Minister administering the legislation, having been notified of the declaration by the Registrar of the Supreme Court, should:
 - within six sitting days of receiving the declaration present a copy of it to Parliament;
 - within seven days of receiving it refer the declaration to the Parliamentary Human Rights Scrutiny Committee;
 - within six months of receiving the declaration, present a written report to Parliament, responding to the declaration. This report should also be provided to the Parliamentary Human Rights Scrutiny Committee.
- Parliament should respond to courts' declarations of incompatibility within seven months of their being tabled in Parliament by amending, repealing or explicitly confirming the legislation.

- If Parliament does not repeal, amend or confirm the legislation within seven months after the tabling of a declaration of incompatibility, the legislation should, as at the date of the expiration of the seven-month period, be inoperative to the extent of its incompatibility with the Charter. The affect of this should be the same as a partial or, where relevant, total repeal of the legislation and its inoperability should not be retrospective.
- Where Parliament wishes to confirm the legislation it should enact an override clause in the legislation.
- Override clauses should be enacted only in response to courts' declarations of incompatibility. There should be no provision for Parliament to enact override legislation/clauses in other situations. Enactment of override clauses should be subject to other strict limitations:
 - Non-derogable rights should be excluded from their operation.
 - The power to enact override declarations should be confined to exceptional circumstances.
 - The Minister who administers the legislation should set down in a statement of incompatibility to Parliament the 'exceptional circumstances' that justify the enactment of the override clause.
 - Legislation containing an override clause should lapse after two years unless Parliament reconfirms its continued operation. All subsequent renewals of the legislation should operate for only 2 years.
 - Subsequent renewal of override legislation must be subject to the same limitations and procedures as the original enactment.

4.11 Role of courts

4.11.1 The courts have three primary roles in relation to human rights protection:

- an interpretive role that involves interpreting laws in a manner that is, as far as possible, consistent with human rights;
- dealing, in some manner, with legislation that is found to be inconsistent with human rights, ie that cannot be given effect to in a way that is compatible with human rights;
- hearing and determining claims brought by citizens alleging breaches of their rights and granting remedies in the event of their breach (see paras [4.18.1] - [4.18.10]).

a) Interpretive role

4.11.2 The majority of submissions received said that courts should be required to interpret all Tasmanian laws in a manner that is consistent with Charter rights. It will only be possible to give effect to these submissions as far as the common law is concerned if the Institute's Recommendation 8 dot point 4 is enacted (see paras [4.7.3] - [4.7.21]). Where Parliament enacts a law that expressly overrides Charter rights, the requirement to adopt a human rights interpretation will be abrogated.

4.11.3 The requirement that courts interpret laws in a manner that is consistent with human rights, enables the courts to read rights into existing and future laws. It makes consideration of rights a starting point and an integral part of the interpretation and application of the law.

4.11.4 The courts' interpretive duties have been formulated in slightly varying ways in different jurisdictions. In the United Kingdom, s 3 of the *Human Rights Act 1998* simply provides:

(1) So far as it is possible to do so, primary legislation and subordinate legislation must be read and given effect to in a way which is compatible with the Convention rights.³²²

4.11.5 In both the ACT and Victoria the requirement to interpret laws consistently with human rights is subject to the requirement to prefer an interpretation that best achieves the purpose of the legislation. Section 30 of the ACT *Human Rights Act 2004* provides,

- (1) In working out the meaning of a Territory law, an interpretation that is consistent with human rights is as far as possible to be preferred.
- (2) Subsection (1) is subject to the *Legislation Act*, section 139.

Note *Legislation Act*, s 139 requires the interpretation that would best achieve the purpose of a law to be preferred to any other interpretation (the purposive test).

4.11.6 Similarly, but more simply, s 32 of the Victorian Charter provides,

- (1) 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.

4.11.7 The reasons for subjecting a human rights interpretation to a purposive interpretation are that, first, this is consistent with preserving the sovereignty of Parliament with respect to legislation and second, it discourages judicial interpretation or redrafting of legislation in a manner that undermines its legislative intent or achieves a different balance of rights to that intended by the legislature. Experience with the United Kingdom Act illustrates what can occur where courts do not prefer a purposive approach to one that constructs legislation in terms of their own particular view of human rights compliance. For example, in *R v A (No 2)* [2002] 1 AC 45 the House of Lords applied s 3 of the *Human Rights Act 1998* (UK) to s 41 of the *Youth Justice and Criminal Evidence Act 1999* (UK), which excludes evidence in sexual offences trials of the prior sexual experience of complainants including evidence of prior sexual activity with the accused, to produce a reading of the section which, effectively, rewrote it. Ignoring the clear legislative intent of the provision and in spite of the fact that its terms were unambiguous, their Lordships transformed the section by reading into it an implied provision that evidence required to ensure a fair trial should not be excluded. Accordingly, they permitted evidence of prior sexual experience between the complainant and the accused to be adduced. It was held that the evidence was “so relevant to the issue of consent that to exclude it would endanger the fairness of the trial under article 6 of the Convention.”³²³ This meant that the deliberate decision of Parliament to recast the law’s approach to such evidence, to reformulate conceptions of its relevance and to move thinking about issues of fairness in sexual offences trials beyond a monocular focus on the accused to include other participants in the trial, was aborted by the House of Lords. The House of Lords effectively reinstated the common law approach to evidence of sexual experience between the complainant and the accused, which Parliament through s 41 had sought to revoke. The legislation enacted by Parliament was based on a different conception of fairness and rights in the trial process to that of the courts; Parliament had sought to gain a higher profile for the rights of victims of sexual offences than had previously been accorded by the common law courts.

4.11.8 Reforms of the kind contained in s 41 of the *Youth Justice and Criminal Evidence Act 1999* (UK) often take decades to achieve and follow lengthy consultation, debate and research. They may involve a considered re-conceptualisation and rebalancing of rights. Such reforms should not be subverted by the courts in order to retain the approach Parliament seeks to abrogate. For this reason, it is important that in interpreting legislation, the courts should first look to its purpose and interpret it in conformity with that purpose. If that interpretation, in the court’s view, unavoidably runs counter to human rights, that problem should be dealt with by some means other than abrogating the statute’s legislative intent. For example, the courts could issue a declaration of incompatibility. Human rights

³²² The section does not refer to the common law but, as explained above at point 4.5.8, because United Kingdom courts are bound by the Act, they also interpret the common law in compliance with Convention rights.

³²³ *R v A (No 2)* [2002] 1 AC 45, [46] (Lord Steyn), [110] (Lord Hope of Craighead), [140] (Lord Clyde), [163] (Lord Hutton).

enactments should not be used to preserve impugned orthodoxies, which Parliament has sought to displace.

4.11.9 Consequently, the Tasmanian Law Reform Institute favours the approach to the courts' interpretation of legislation adopted in Victoria and New South Wales. The requirement to interpret legislation consistently with human rights should be subject to the requirement to prefer an interpretation that best achieves the purpose of the legislation. This approach also conforms to recent case law in the United Kingdom. For example in *Re S (Minors) (Care Order: Implementation of Case Plan)* [2002] 2 AC 291, the House of Lords held that the use of s 3 of the *Human Rights Act* to achieve an interpretation that departed from the intention of Parliament was not acceptable. Similarly in the House of Lords decision, *Ghaidan v Godin-Mendoza* it was held that s 3 does not permit the courts to interpret legislation in a manner that is incompatible with its underlying purpose.³²⁴ While some submissions suggested that the protection of rights is more important than up-holding the purpose of legislation,³²⁵ it is important to remember that there can be legitimate disagreements about rights. Where such a disagreement occurs between Parliament and the judiciary, the courts should not use their interpretive powers to trump Parliament's view and supplant it with their own. To do so, subverts parliamentary supremacy with respect to legislation.

4.11.10 The ACT *Human Rights Act* and the Victorian *Charter* expressly point the courts to international law and the judgments of foreign and international courts and tribunals when interpreting human rights.³²⁶ These provisions are permissive and included to remove doubt about the applicability of this interpretive approach.³²⁷ The Tasmanian Law Reform Institute considers that similar provision should be included in a Tasmanian Charter.

Recommendation 11 – Role of the courts

- Subject to the requirement to interpret statutory provisions consistently with their purpose, all Tasmanian courts and tribunals should be required to interpret all Tasmanian laws, including statutory provisions, as far as it is possible to do so in a way that is compatible with human rights.
- Provision should be included in a Tasmanian Charter for international human rights law and the judgments of foreign and international courts and tribunals relevant to human rights to be considered by Tasmanian courts when interpreting human rights.

b) Dealing with legislation considered to be inconsistent with human rights

4.11.11 Polarised views were expressed in submissions received by the Institute about what powers the courts should have with respect to legislation found to be incompatible with human rights, or that cannot be interpreted in a manner that is consistent with human rights. The fundamental difference was in relation to the question whether the courts should be able to strike down non-human rights compliant legislation.

4.11.12 While the Tasmanian Government has expressed a clear preference for a model of human rights protection that does not encroach upon the sovereignty of Parliament it is important to consider the advantages and disadvantages of the various models. Consideration of the different models is included in the Institute's terms of reference. All models have different strengths and weaknesses, and, in the final analysis, the choice made between them will depend upon where the ultimate power with respect to legislation is seen to be most appropriately located and whether a distributive approach to

³²⁴ [2004] UKHL 30, [33] (Lord Nicholls of Birkenhead), [110] (Lord Rodger of Earlesferry).

³²⁵ See for example Submission 304; Submission 111.

³²⁶ *Human Rights Act 2004* (ACT) s 31; *Charter of Human Rights and Responsibilities 2006* (Vic) s 32(1).

³²⁷ Victorian Human Rights Consultation Committee, *Rights, Responsibilities and Respect: The Report of the Human Rights Consultation Committee* (2005) 83.

human rights protection is to be preferred to one that gives ultimate power in that regard to a single arm of government.

ACT, Victorian, United Kingdom and New Zealand Dialogue model

4.11.13 Submissions to the Institute noted that the dialogue model of rights protection ultimately leaves human rights at the mercy of political discretion and chance, that is, to government whims, populist political agendas and to temporary but sometimes extreme events. Submissions also suggested that this model allows Parliament to override human rights with impunity and to ignore courts' declarations of incompatibility, thus reducing the dialogue model to a monologue and the protection of rights to mere lip service. The ACT/Victorian dialogue model was also said to place courts in the invidious position of having to apply legislation considered not to comply with human rights. This may encourage courts to adopt a quasi-legislative interpretive approach to statutory provisions in order to make them comply with human rights and in doing so, may undermine their legislative intent (see discussion on this point above at paras [4.11.7]-[4.11.9]). As Richard Refshauge SC points out:

It is understandable that courts might be reluctant to make declarations of incompatibility. In one sense this is the ultimate expression of powerlessness for an institution that is accustomed to exercising great power (depriving people of liberty or property, overturning legislation). To be relegated to saying that legislation is incompatible with human rights yet is valid, cannot be overturned by the court and has to be enforced by it would, to such an institution, be galling. No wonder that in the United Kingdom, since the *Human Rights Act 1998* came into force on 20 October 2000, until 16 June 2006 only 20 declarations of incompatibility have been made.³²⁸

4.11.14 It was also argued that the fact that courts have no power to invalidate legislation discourages litigants from challenging the legitimacy of legislation on human rights grounds. According to this argument, the ACT/Victorian model provides an impoverished, and ineffectual mechanism for citizens whose rights have been legislatively infringed. Declarations of incompatibility made by the courts do not affect the continuing operation of legislation infringing human rights. Consequently citizens affected by it and seeking remediation, must wait for Parliament's response to courts' declarations and that response may be to do nothing. This means that a litigant may succeed in their action before the court and obtain a ruling that legislation breaches their rights and yet receive no redress. One commentator has called this outcome "a form of booby prize".³²⁹ With that prospect a possibility, only the desperate are likely to institute legal proceedings to challenge the legitimacy of legislation on human rights grounds. The cost of litigation, in both monetary and emotional terms must also be dissuasive. Even in cases where human rights challenges to legislation are mounted as ancillary to other issues, the prospect of no immediate remedy from a favourable court decision must reduce its attraction as a ground of argument. In this regard the International Commission of Jurists said,

³²⁸ Joint Committee on Human Rights, United Kingdom, *Twenty-Third Report* (2006) Appendix 3.

³²⁹ Ian Leigh, 'The UK's Human Rights Act 1998: An Early Assessment' in Grant Huscroft and Paul Rishworth (eds), *Litigating Rights: Perspectives From Domestic and International Law* (2002) 323.

... declarations of inconsistency have not been an effective way of revealing inconsistencies between legislation and charters of rights because litigants have no reason to seek a declaration. A declaration does not affect the validity of the law found to be inconsistent with the charter and does not provide a litigant who obtains one with any remedy. Therefore, they are only of interest to persons who have the resources and the dedication to pursue a matter of principle through the courts. Such persons are likely to be rare in a small jurisdiction like Tasmania.³³⁰

4.11.15 To some extent this criticism is both supported and belied by the United Kingdom experience. In the United Kingdom, there have been very few challenges to the validity of legislation since the inception of the *Human Rights Act*, a fact that arguably reflects the lack of incentive it offers to mount such challenges. However, in all cases where the courts have made declarations of incompatibility, the Government has responded by amending or repealing the offending legislation. Further, declarations of incompatibility issued under the United Kingdom *Human Rights Act 1998* do have potential practical value for litigants. This is because s 10 and Schedule 2 of the Act enable the Government to take speedy remedial action using a ‘fast-track’ legislative procedure called ‘a remedial order’. This procedure does not appear in the New Zealand, ACT or Victorian human rights instruments. It enables Government Ministers to prepare remedial orders that repeal or modify the offending legislation. Drafts of the orders must be approved by Parliament and a sixty-day timetable is set for approval of such drafts. Accordingly, s 10 provides a relatively quick mechanism by which statutory infringements on rights in respect of which declarations of incompatibility have been made by the courts can be remedied.

4.11.16 The problem of Parliament simply ignoring courts’ declarations of incompatibility is dealt with to some extent in the ACT and Victoria by the statutory obligation that the Attorney General present Parliament with a written response to them within a set period of time.³³¹ Proponents of the ACT/Victorian model also argue, that its true focus in safeguarding human rights is in processes outside the courts, in the arenas of government policy-making and legislation. Its aim, it is argued, is to prevent legislative infringements of human rights from occurring in the first place by embedding consideration of human rights and human rights’ sensitive processes in the legislative and policy-making functions of government, so reducing the likelihood of or necessity for court action. If decision makers are actively interpreting and applying the law consistently with human rights, declarations of incompatibility should only rarely be required to be made.³³²

4.11.17 An important advantage of the ACT/Victorian dialogue model is that it does not create a radical shift in the current allocation of power between the legislative and judicial arms of Government. In particular, it does not hand the last say on the validity of legislation to the unelected, unrepresentative judiciary. Critically, it does not enable legislation enacted in accordance with a considered Governmental reform agenda to be overturned by courts. This model also avoids concentration of debate about human rights in the judicial arena. Engagement with human rights in deliberative legislative and policy-making processes is central to the dialogue model. Nevertheless, creation of a healthy human rights culture through this model will ultimately depend upon how the different arms of government respond to each other’s decisions and justifications. This is where the focus should be and upon the dynamic between the different spheres of government. Canadian constitutional commentators, PW Hogg and AR Bushell have pointed out that the legitimacy of judicial power is enhanced when legislatures and courts jointly determine the rights implications of legislative policy.³³³ For this reason it is crucial, if a dialogue model is adopted, that a statutory obligation be placed upon Parliament to receive and respond to courts’ declarations of incompatibility within set times (see discussion above at paras [4.10.23]-[4.10.25] and below at [4.12.2]- [4.12.3]).

³³⁰ Submission 161.

³³¹ *Human Rights Act 2004* (ACT), s 33; *Charter of Human Rights and Responsibilities 2006* (Vic), s 37.

³³² Elizabeth Kelly, ‘Human Rights Act 2004: A New Dawn for Human Rights Protection?’ (Speech delivered at the Australian Institute of Administrative Law Forum, Canberra, 31 March 2004).

³³³ Peter Hogg and Allison Bushell, ‘The Charter Dialogue Between the Courts and Legislature (Or Perhaps the Charter Isn’t Such a Bad Thing After All)’ (1997) 35 *Osgoode Hall Law Journal*, 75.

4.11.18 For Tasmania, adoption of this model would have the advantage of maintaining consistency with the approach taken in Victoria and the Australian Capital Territory. It would also be compatible to a large extent with the New Zealand and United Kingdom models remembering, of course, that neither of those jurisdictions has a federal system of government. Nevertheless, the extensive jurisprudence and experience built up in those two overseas jurisdictions might be referred to as far as it is transferable to a State operating in a federation, to ease the implementation of a Tasmanian Charter.

Judicial model

4.11.19 The principal disadvantage of empowering courts to strike down legislation found not to comply with human rights is that it depletes the authority of our elected institutions and involves a significant transference of power to the unelected judiciary. Further where courts are accorded the final say on the validity of legislation, the legislature is tacitly permitted to abdicate its own responsibility for rights protection. This phenomenon, which has been termed “judicial overhang”,³³⁴ has been a ground for criticism of the invalidation powers of the United States’ courts.³³⁵ Its effect is illustrated by what happened in 1989 when the United States Supreme Court struck down a legislative prohibition on flag burning on the grounds that it was an unconstitutional contravention of freedom of speech.³³⁶ Congress swiftly moved to enact another prohibition on flag burning, even though the members of Congress knew it to be unconstitutional. They chose to abandon their responsibility to uphold the Constitution and to rely instead upon the courts’ power to strike down the legislation and so preserve the rights they knew it undermined.³³⁷

4.11.20 Those who advocate giving the courts the power to strike down legislation that is inconsistent with human rights, essentially believe that the courts are better able to protect and are more committed to the protection of human rights than legislatures. This may be an overly optimistic view of the courts. Courts are generally conservative institutions and while they have a good track record in the protection of some aspects of human rights, their approach in other, often controversial areas of law and law reform has often been directed more towards protection of the status quo than individual rights (see discussion of the common law protection of rights above at paras [2.3.19] - [2.3.24]). As one submission to the Institute noted quoting Dan Meagher, “judges though capable of making an important and valuable contribution ...do not have a mortgage on rights wisdom”.³³⁸ Another submission making a similar point stated:

Courts are just as likely, if not more so to exercise their power as arbitrarily and as ‘undemocratically’ as Parliament. The United States Supreme Court’s chequered history includes decisions that upheld slavery and internment as well as decisions that struck down popular and progressive workers’ rights legislation.³³⁹

4.11.21 So the courts have not necessarily been in the vanguard where protection of human rights is concerned. Moreover, in those jurisdictions where courts do have the power to strike down legislation, they do so only in exceptional circumstances. In the United States, for example, the courts have developed a number of pre-conditions to the exercise of this power that severely restrict its use. Consequently, as Janet McLean points out, in the United States “striking down is a rare, exceptional

³³⁴ See Mark Tushnet, *Taking the Constitution away from the Courts* (1999) 58-60.

³³⁵ See Mark Tushnet, *Taking the Constitution away from the Courts* (1999) 58-60; Mark Tushnet, ‘Evaluating Congressional Constitutional Interpretation: Some Criteria and Two Informal Case Studies’ (2001) 50 *Duke Law Journal* 1395.

³³⁶ *Texas v Johnson* 491 US 397 (1989)

³³⁷ *US v Eichman* 496 US 310 (1990).

³³⁸ Submission 68 quoting Meagher D, ‘Taking Parliamentary Sovereignty Seriously Within Bill of Rights Framework’ (2005) 10 *Deakin Law Review* 686, 690.

³³⁹ Submission 199.

and suspect event”³⁴⁰ Instead the courts make every endeavour to interpret statutes in a manner that complies with the US Bill of Rights in order to avoid intruding upon the legislative sphere. In those jurisdictions where courts do not have an invalidation power, they also make every endeavour to interpret legislation consistently with human rights. The reason that the power to invalidate legislation is withheld from the courts in these jurisdictions is that it inhibits their intrusion upon the legislative sphere. McLean, accordingly, argues that functionally the system that allows for invalidation and the alternative system that does not seem to operate in much the same way.³⁴¹

4.11.22 In addition, focussing on the courts’ power to strike down legislation obscures the point that courts have and are more likely to use other powers in fulfilling their role with respect to the protection of rights. In particular, it ignores the potential potency of courts’ interpretive powers as a means of safeguarding rights. It also accords too much significance to a strike down power as a protection of rights. In practice, as demonstrated by the constraints that the United States’ courts have placed upon the exercise of this power, it is unlikely to deliver the level of protection claimed for it. It may also be used to undermine liberal Government reform agendas. Unfortunately, the experience of those involved in law reform has shown that very often government reforms designed to advance particular rights or to challenge traditional conceptions of rights are not dealt with by the courts according to their legislative intent but rather read in such a way as to maintain the law in its pre-reform position.³⁴² Another disadvantage of the judicial model is that it may result in too much reliance being placed upon the courts to deliver rights protection. In consequence the legislature and executive may see themselves as nonessential participants in that process. The result would be a monologue about human rights rather than a cross-institutional conversation. This would be inimical to the building both of an across government approach to human rights protection and of a human rights culture that is embedded in all governmental processes.

4.11.23 Helen James’ submission to the Institute encapsulates many of the objections to the judicial model expressed in submissions received:

The courts are not political institutions and it is not the role of unelected judicial officers to debate political questions. Even allowing for a degree of judicial activism the role of the courts is to be reactive rather than pro-active. Where the courts have the power to strike down legislation this can have a chilling effect on the legislature and discourage bold and progressive initiatives that might otherwise be beneficial. The Canadian experience where the ‘notwithstanding clause’ is seldom invoked, shows how reluctant governments are to act in defiance of court rulings. The obverse of the coin is that, given the improbability of a challenge proceeding to litigation due to the prohibitive cost and the absence of the availability of personal remedies, the potential for any legislation to be invalidated is actually very slight. Though courts may well possess the authority they can, in fact, wield no real power. Moreover, where courts become the final arbiter of rights compatibility the focus of the human rights debate is narrowed to a purely legal one. Pre-legislative scrutiny of enactments offers a far more effective solution.³⁴³

³⁴⁰ Janet McLean, ‘Legislative Invalidation, Human Rights Protection and s 4 of the New Zealand Bill of Rights Act’ (2001) *New Zealand Law Review* 421, 428.

³⁴¹ *Ibid*, 428.

³⁴² Kate Warner, ‘Sexual Offending: Victim, Gender and Sentencing’ in Duncan Chappell and Paul Wilson (eds), *Issues in Australian Crime and Criminal Justice* (2005) 133; Ngaire Naffine, ‘A Struggle Over Meaning: A Feminist Commentary on Rape Law Reform’ (1994) 27 *The Australian and New Zealand Journal of Criminology* 100; Stanley Cohen ‘Postscript: If Nothing Works, What Is Our Work?’ (1994) 27 *The Australian and New Zealand Journal of Criminology* 104; Sandra Egger, ‘An Examination of Feminist Contributions to Law Reform’ (1994) 27 *The Australian and New Zealand Journal of Criminology* 95.

³⁴³ Submission 164.

Canadian model

4.11.24 A number of those who advocated equipping the courts with a strike down power pointed to the Canadian model as providing a workable compromise that enables the courts to quash legislation while also empowering the legislature to re-enact such laws and to override the Charter. For example, the International Commission of Jurists said:

Another alternative may be to give the courts power to invalidate legislation inconsistent with the Charter subject to an overriding power in the legislature to reinstate the legislation. Such a solution would increase the power of the courts and the status of the Charter while retaining ultimate parliamentary control.³⁴⁴

4.11.25 Even though this model empowers the courts to invalidate legislation, it is still considered to be a dialogue model because Parliament may respond to the courts' decisions, by amending legislation in accordance with the courts' views or it may reassert its sovereignty with respect to legislation and override the courts' decisions. The nature of the dialogue under this model, however, is bound to be qualitatively different to that under the United Kingdom, ACT, Victorian and New Zealand models.

4.11.26 Submissions to the Institute suggested that this model provides particularly strong protection for human rights because the threat of judicial override encourages the legislature to be especially vigilant in ensuring that legislation is human rights compliant. In this regard Rights Australia argued:

Because the courts in Canada have the power to strike down laws as being unconstitutional, if they offend the Charter, it is a fact that governments and parliaments, at the federal and provincial level in Canada tend to ensure that legislation is consistent with and justified under the Charter, so that it will withstand a court challenge.³⁴⁵

4.11.27 An additional attraction of the Canadian model is that it does not appear to involve a significant redistribution of power between the legislature and the court. However, some commentators have suggested that this model does not necessarily maintain a satisfactory distribution of power between the different arms of government. The Canadian experience suggests that Government may adopt a too deferential approach to the courts and be reluctant to exercise their confirmatory or override powers where the courts have struck down legislation.³⁴⁶ This has the potential to stultify Government reformist agendas.³⁴⁷ In Canada, the override power has only been used twice following judicial invalidation of legislation.³⁴⁸ Between 1982 and 2002 the Canadian Supreme Court invalidated legislative provisions in approximately 70 cases. It may be that the political risks of re-enacting legislation in its original terms following court invalidation are perceived to be too great. The extent of the legislative response by means other than use of the override clause (eg by re-enacting the legislation in an amended form) is unclear.³⁴⁹ At the same time, other research shows that the government wins the majority of human rights challenges to legislation. It has been

³⁴⁴ Submission 161.

³⁴⁵ Submission 333.

³⁴⁶ Mark Tushnet, 'Judicial Activism in a Section 33 World' (2002) 53 *U Toronto LJ* 89; Christopher Manfredi, *The Canadian Constitution and the Courts* (2001); F L Morton and Rainer Knopff, *The Charter Revolution and the Court Party* (2000); Jeffrey Goldsworthy 'Judicial Review, Legislative Override, and Democracy' (2003) 38 *Wake Forest Law Review* 451.

³⁴⁷ This problem was acknowledged even in submissions that favoured adoption of the Canadian model, see Submission 71.

³⁴⁸ The first case was *RWDSU v Saskatchewan* (1985) 19 DLR (4th) 609 (Sask CA). The override legislation enacted in response to this case was *The SGEU Dispute Settlement Act*, SS 1984-85-86, c 111. However, on appeal, the Supreme Court ruled the original legislation to be constitutional, thus rendering the override legislation unnecessary: *RWDSU v Saskatchewan* [1987] 1 SCR 460; The second case was *Ford* [1988] 2 SCR 712. The override legislation was used on *An Act to amend the Charter of the French Language*, SQ 1988, c 54.

³⁴⁹ Peter Hogg and Allison Bushell suggest that the legislatures responded to judicial decisions invalidating legislation in two thirds of cases: 'The Charter Dialogue Between Courts and Legislatures (Or Perhaps the Charter Isn't Such a Bad thing After All)' (1997) 35 *Osgoode Hall LJ* 75. This is challenged by other empirical research, eg Christopher Manfredi and James Kelly, 'Six Degrees of Dialogue: A Response to Hogg and Bushell', (1999) 37 *Osgoode Hall LJ* 529.

cautiously suggested that these findings might be relied upon as evidence that the Supreme Court is deferential to governments.³⁵⁰

4.11.28 A further advantage of the Canadian model is that it addresses what has been termed the ‘booby prize’³⁵¹ effect for litigants of the New Zealand, United Kingdom, ACT and Victorian models without violating Parliamentary sovereignty. Because courts can invalidate legislation under the Canadian model, litigants have an immediate remedy to any statutory breach of their rights. Parliament then has the responsibility to respond to the court decision by amending the legislation or confirming its operation in exercise of their override power. In its submission to the Institute, the International Commission of Jurists considered objections to and advantages of this model in this regard:

It has the advantage that if the courts could invalidate laws which they find to be inconsistent with the Charter, private litigants would have a good reason to take alleged violations to court.

There are a number of objections to such a proposal. First, it may be seen as encouraging litigation. However, litigation can be an effective way of policing compliance with human rights because it gives the victim the opportunity to have the issue of a breach determined by an independent third party. By doing so, it encourages the victim to adhere to the point of principle at issue, which is important in cases of violations of rights because rights embody fundamental values which people should not be forced to give up. Other methods of dispute resolution, such as negotiation and mediation, encourage compromises in which the points of principle and issues of fundamental value involved in many rights cases are easily lost or muddled.

Secondly, it may be objected that if the courts have the power to invalidate legislation subject to legislative override, there may be lacunae in which the law does not operate until parliament has the opportunity to reinstate it or to provide another solution. Where that is likely to cause real difficulties, the court could be given power to declare that the judgment of invalidity will not come into effect until some future specified date, in order to give the legislature time to reinstate the law or to enact different legislation dealing with the problem. Where the court adopts this option, the successful complainant should be given the benefit of the court’s judgment, so that the offending legislation does not apply to his or her case.³⁵²

4.11.29 In Canada, the power to invalidate legislation may only be invoked as a last resort where the legislation cannot be read in a human rights compliant manner taking into account the fact that under the Canadian Charter rights may be subject to such reasonable limits as can be demonstrably justified in a free and democratic society.³⁵³ In *R v Oakes*³⁵⁴ a two-step test was devised for determining whether a limitation of rights is reasonable and demonstrably justified. First an assessment of the reasonableness of the limitation is made. This requires determining whether the objective of the legislation is “of sufficient importance to warrant overriding a constitutionally protected right or freedom.”³⁵⁵ At a minimum, the objective must relate to concerns that are pressing and substantial. Second, a determination is made about the demonstrable justifiability of the limitation. This involves assessment of three matters – first the “measures adopted must be carefully designed to achieve the objective in question. They must not be arbitrary, unfair or based upon irrational considerations.”³⁵⁶ Second, the legislation must impair as little as possible the right or freedom in question. Third, there must be proportionality between the deleterious effects of the legislation and the objective identified as

³⁵⁰ Sujit Choudry and Claire Hunter, ‘Measuring Judicial Activism on the Supreme Court of Canada: A Comment on *Newfoundland (Treasury Board) v NAPE*’ (2003) 48 *McGill LJ* 525.

³⁵¹ See above at para [4.11.14].

³⁵² Submission 161.

³⁵³ *Canadian Charter of Rights and Freedoms 1982* (Canada) s 1.

³⁵⁴ [1986] 1 SCR103, 138.

³⁵⁵ *Ibid*, 139 (Dickson CJ).

³⁵⁶ *Ibid*.

being of ‘sufficient importance’.³⁵⁷ This test looks very much like the considerations to be applied in respect of the reasonable limits clauses contained in s 7(2) of the Victorian *Charter of Human Rights and Responsibilities 2006* and s 36(1) of the South African Bill of Rights.

4.11.30 The International Commission of Jurists suggested that any judicial power of invalidation should be subject to two further constraints. First, it should only be exercised where a statutory provision comprises a “gross violation” of rights; second it should not be applied to legislation that seeks to strike a balance between different rights, unless the balance struck limits a right to such an extent that it cannot be said to be justifiable in a free and democratic society:

The power to invalidate legislation subject to legislative override should only be available to protect individuals from gross violations of rights by the state or for state purposes. It should not be available to remedy what is in the opinion of the courts an imbalance between conflicting Charter rights. Hence, courts should only be able to exercise it where the inconsistency is so great that it cannot be justified in a free and democratic society. Limitations should be allowed where they are necessary to protect public safety, order, health or morals, or the fundamental rights and freedoms of others, and to prevent the exploitation of vulnerable groups such as children. Some Charter rights, such as the right to freedom of expression and the right to reputation or to privacy, can conflict. The power to invalidate should not be available in cases where the court is of the opinion that the balance between conflicting rights and freedoms which is set in legislation is wrong because there is no reason to believe that the courts are better in balancing conflicting rights than is the legislature. In these cases, the courts should be able to issue a statement of incompatibility to ensure that the issue is reconsidered by the legislature. However, if the balance is such that it limits a right to an extent which is unjustifiable in a free and democratic society, the court should have the power to invalidate. For example, if the balance between the right of free expression and the right to reputation were struck in such a way as to silence all political dissent, the court should retain the power to invalidate.³⁵⁸

4.11.31 There would be difficulty in applying the additional constraints suggested by the ICJ. In the first place, what will amount to a gross violation of rights may be a matter of considerable disagreement depending upon a person’s particular standpoint. Some violations, such as the legitimising of torture, are gross by any standard, but others may involve matters of judgment and, on occasion, political perspective. Second, determining whether legislation seeks to balance rights or simply override them may also prove difficult in practical terms. The balance to be struck is likely to be considered in most detail at the policy making stage. The courts will not have access to the documentation circulated and discussion that occurs then. In fact, the doctrine of the separation of powers mandates that the courts adopt a ‘hands off’ approach to such material. Accordingly, the only material available to inform the court’s decision may be the second reading speech with respect to the legislation in question and other material to which regard may be had under s 8B of the *Acts Interpretation Act 1931* (Tas). None of this may be particularly elucidatory in relation to the question of the balancing of rights.

4.11.32 To some extent the Canadian model raises similar concerns as the judicial model operating in the United States. Because courts have the power to invalidate legislation, there is the danger that they will be viewed as the real repository of power with respect to human rights issues and protection. This may discourage the other arms of Government from fully engaging with human rights in the performance of their functions. It may also result in the legislature either adopting an overly cautious approach to human rights issues or, conversely, abandoning human rights protection to the guardianship of the courts. A significant concern about the Canadian model is that it may make legislatures wary of implementing a radical reformist agenda. It may also result in the invalidation of reforms that conflict with the courts’ traditional views of rights. A survey of the legislation that has caused the Canadian courts’ invalidation power to be invoked shows that this concern is not without

³⁵⁷ Ibid.

³⁵⁸ Submission 161.

foundation – eg legislation banning tobacco advertising;³⁵⁹ legislation reversing the onus of proof for offences involving narcotics;³⁶⁰ legislation aimed at protecting the public health system by restricting private health insurance;³⁶¹ legislation restricting the availability of the defence of intoxication;³⁶² rape shield legislation³⁶³ and legislation restricting access to bail.³⁶⁴ While it might be argued that Parliament can always re-enact such laws and override the courts' decisions, in reality this is rarely done, with the result that many reforms may be lost. Nevertheless, the Canadian model does solve some problems associated with the purely dialogue model of the ACT, Victoria, the United Kingdom and New Zealand. In particular, it does not make the process of challenging the validity of legislation an essentially empty exercise for litigants. The extent to which this actually serves to protect human rights, however, is open to question, given that litigation is, no matter what the outcome, an expensive and unrewarding undertaking, and so largely reserved to those with financial resources, deep reserves of emotional resilience, unbreakable conviction or simply no choice (eg the accused in a criminal case).

4.11.33 Moreover, of all possible protections of human rights, litigation is perhaps the least effective. It provides a piecemeal, random, unsystematic, uncertain and haphazard mechanism for rights protection. This is because it comes into play only when human rights issues are raised in cases that come before the courts. Genuine and sustained human rights protection requires a systematic approach that is continuous and consistent across public authorities. The model best geared to achieve this is that which promotes the greatest dialogue about rights and the construction of a rights culture throughout government. It is not one that depends upon the courts as the primary institution of rights protection.

4.11.34 It should also be recognised that the Canadian Charter was implemented after the community and government had had the benefit of two decades of experience with a legislative Bill of Rights.³⁶⁵ The Charter came into existence as part of the process of 'patriating' the Canadian Constitution that is, of enabling its alteration without recourse to the British Parliament. At this time the opportunity to produce a progressive and distinct approach to constitutional government, central to which was an authoritative statement of the fundamental rights and freedoms of the Canadian people, was seized by the Canadian government. The adoption of a constitutionally entrenched charter was nevertheless done against a background of familiarity with a legislated framework of rights.

Subordinate legislation

4.11.35 Because subordinate legislation is made by the executive branch of government and is not expressly debated or approved by Parliament, to equip courts with the power to invalidate it does not involve any challenge to the sovereignty of Parliament. Accordingly, the Tasmanian Law Reform Institute is of the view the where subordinate legislation cannot be interpreted in a manner that is consistent with human rights, courts should have the power to invalidate it, unless the applicable primary legislation expressly authorises the subordinate legislation to breach Charter rights. In the latter case, the courts should have the power to make declarations of incompatibility in respect of the legislation and the same processes involved in invoking a Government response to declarations about primary legislation should apply.

³⁵⁹ *RJR-MacDonald v Canada (Attorney-General)* [1995] 3 SCR 199.

³⁶⁰ *R v Oakes* [1986] 1 SCR 103; 26 DLR (4th) 200 [*Oakes*].

³⁶¹ *Chaoulli v Quebec* [2005] SCC 35.

³⁶² *R v Benton* [1999] 28 CR 5th 308 (NWTSC); *R v Dunn* [1999] 28 CR 5th 295 (Ont SCJ).

³⁶³ *R v Seaboyer* [1991] 2 SCR 577. Less restrictive/protective rape shield laws were subsequently enacted and upheld in *R v Darrach* [2000] 2 SCR 433.

³⁶⁴ *R v Hall* [2002] 3 SCR 309; *R v Morales* [1992] 3 SCR 711.

³⁶⁵ *The Canadian Bill of Rights 1960*, c 44.

The Tasmanian Law Reform Institute's view

4.11.36 The Tasmanian Law Reform Institute acknowledges that no model of human rights protection is perfect. Ultimately, the model chosen depends upon where the final power with respect to legislation is considered to be best located – with Parliament or with the judiciary. The Tasmanian Government has expressed a preference for a model that preserves the sovereignty of Parliament. This excludes the judicial model operating in the United States. Given the deficiencies of the United States model, it is not one in any event that the Tasmanian Law Reform Institute would recommend for Tasmania.

4.11.37 The Government stipulation leaves open, however, the possibility of enacting in Tasmania either of the two different dialogue models, the Canadian model or the ACT, Victorian, United Kingdom, New Zealand model. It is the view of the Tasmanian Law Reform Institute that each arm of Government has a significant role to play in the protection of human rights and that responsibility for human rights protection should not become the exclusive preserve of any one Government institution. Accordingly, the model to be preferred is one that encourages maximum interaction or dialogue between the different arms of Government and also creates a culture of human rights awareness across Government. Where there is such interaction, the protection of human rights can evolve and develop from an exchange of views. No single institution then possesses a monopoly on human rights protection or is excluded from the construction of a human rights sensitive culture. Both dialogue models achieve this.

4.11.38 An important factor against the Canadian model is that it involves a greater degree of constitutional change than the ACT/Victorian model. Constitutional change is almost instinctively viewed with suspicion in Australia, at least at the Federal level. It is likely that it would also be seen as contentious at the State level. Accordingly, a dialogue model of the ACT/Victorian kind might usefully be enacted as a means of gaining government acceptance for legislative protection of rights. It would also help to build a rights conscious culture. It might act as a precursor to more substantial protection along the lines of the Canadian model.

4.11.39 Another weakness of the Canadian model is that it may restrain legislative innovation to a greater extent and pose a significantly greater threat to reformist legislative programs than the ACT/Victorian model. The Canadian experience provides some evidence in this respect. The Canadian model may also create the perception that the courts have primary responsibility for the protection of human rights, thereby discouraging ownership of human rights concerns by the other arms of government.

4.11.40 The dialogue model of the ACT, Victoria, the United Kingdom and New Zealand has the deficiency of providing no immediate remedy for litigants who successfully challenge legislation on human rights grounds. The Canadian model avoids this problem. Therefore, the ACT/Victorian dialogue model may discourage human rights challenges to legislation and may also provoke courts to interpret legislation in a manner that clearly conflicts with its legislative intent in an attempt to make it human rights compliant. The latter problem can equally occur, however, under the Canadian model, because courts in that jurisdiction will only resort to their strike down powers where a human rights compliant interpretation of a statutory provision is impossible. In fact, because both models require the courts to focus primarily upon interpreting legislation in a manner that complies with human rights rather than upon denouncing it for non-human rights compliance, there may, in reality, be only minor variations in the way the two models function.

4.11.41 In systemic terms the ACT/Victorian model is capable of rendering significant protection to human rights. It tends to anchor protection of human rights more securely in the legislative and executive processes than other models, by not passing primary responsibility for safeguarding human rights to the judiciary.

4.11.42 In summary the ACT/Victorian model currently has the following advantages for Tasmania over the Canadian model:

- its implementation would have less impact upon current constitutional arrangements than the Canadian model;
- it places the emphasis for human rights protection outside the courts to a greater extent;
- it is capable of encouraging significant conversation about human rights across all arms of Government.

4.11.43 Accordingly, where courts find that legislation is incompatible with human rights, the Tasmanian Law Reform Institute is of the view that courts should have the power to make a declaration of incompatibility in respect of it. This declaration should not have the affect of invalidating the legislation or rendering it inoperative. However, for the reasons set out at [4.11.35], the Institute recommends that where subordinate legislation is found not to comply with Charter rights, courts should have the power to declare it to be invalid and inoperative unless the applicable primary legislation expressly requires the subordinate legislation to breach Charter rights in which case the normal declaration of incompatibility process should apply.

4.11.44 Because the Institute is aware that there are significant strengths in the Canadian model, it is of the view that the Tasmanian government should undertake regular reviews of the extent to which the Tasmanian Charter has generated a genuinely responsive dialogue about rights between the different arms of Government. If upon review this model is found to be ineffective either because Parliament does not respond to what the courts say or because the courts do not give adequate effect to Charter rights when interpreting and applying Tasmanian laws, then a model akin to the Canadian model enabling the courts to invalidate legislation that does not comply with Charter rights should be considered.

4.12 Which court should have the power to make a declaration and what should happen when a declaration is made?

4.12.1 The Tasmanian Law Reform Institute considers that only the Tasmanian Supreme Court, should have the power to make declarations of incompatibility or to declare subordinate legislation to be invalid. The Charter should provide that where a question relating to the human rights compatibility of legislation arises in the Magistrates' Courts or in Tribunal proceedings, it should be referred as a question of law to the Supreme Court and the Magistrate or Tribunal should have the power to defer the final determination of the case until the Supreme Court has determined the issue. In any proceedings where the Supreme Court is considering whether to make a declaration of incompatibility, the Attorney General and the Tasmanian Human Rights Commissioner³⁶⁶ should be notified and have the right to join the proceedings. These measures reflect the seriousness and importance of declarations of incompatibility.

4.12.2 It is desirable that once declarations of incompatibility are made, the Government should be obliged to respond promptly to them. Accordingly, the ACT and Victorian human rights enactments specify that the relevant official of the Supreme Court should forward a copy of the declaration 'promptly'³⁶⁷ in the ACT and within seven days in Victoria, to the Attorney General. The Tasmanian Law Reform Institute is of the view that the Victorian approach should be adopted in Tasmania with the qualification that the Minister responsible for administering the legislation should also be provided with a copy of the declaration. Accordingly, the Registrar of the Supreme Court should provide the Attorney General and the Minister responsible for administering the legislation with a copy of the declaration within seven days of its being made.

³⁶⁶ The creation of the office of Tasmanian Human Rights Commissioner is considered below at paras [4.20.12]-[4.20.20].

³⁶⁷ 'Promptly' is not defined in the *Human Rights Act 2004* (ACT).

4.12.3 Where a court makes an order invalidating subordinate legislation, notice of the order should similarly be provided to the relevant Minister within seven days. The invalidation order may then stand or the relevant Minister may arrange for the legislation to be amended to remedy its human rights defects. However, it cannot be re-instated in its original form.

Recommendation 12 – Declarations of incompatibility

- Where the Tasmanian Supreme Court is satisfied that an Act or part of an Act cannot be interpreted in a way that complies with Charter rights, it should have the power to make a declaration of incompatibility in respect of that legislation.
- Only the Tasmanian Supreme Court should have power to make declarations of incompatibility.
- Where a question relating to the human rights compatibility of legislation arises in the Magistrates' Courts or in Tribunal proceedings, it should be referred as a question of law to the Supreme Court and the Magistrate or Tribunal should have the power to defer the final determination of the case until the Supreme Court has determined the issue.
- Where the Tasmanian Supreme Court finds that subordinate legislation is not compatible with Charter rights it should have the power to declare the subordinate legislation to be invalid and inoperative unless the applicable primary legislation expressly authorises the subordinate legislation to breach Charter rights. In such a case the Supreme Court should have the power to make a declaration of incompatibility in respect of it.
- Where a declaration of invalidity is made in respect of subordinate legislation its operation should cease, but not retrospectively, and it should no longer be enforceable.
- Where a declaration of incompatibility is made in respect of subordinate legislation the same processes involved in invoking a Government response to declarations about primary legislation should apply.
- The Supreme Court should not make a declaration of incompatibility in respect of primary or subordinate legislation or an order invalidating subordinate legislation unless satisfied that the Tasmanian Attorney General and the Tasmanian Human Rights Commissioner have been given notice that the Court is considering making such an order.
- Where a court makes a declaration of incompatibility or an order invalidating subordinate legislation the Registrar of the Supreme Court should provide a copy of the order to the Attorney General and to the Minister administering the legislation within seven days.
- In periodic reviews of the Charter the Tasmanian Government should assess the extent to which it has generated a genuinely responsive dialogue about human rights between the different arms of Government. If it is found that Parliament does not respond to what the courts say then consideration should be given to enabling courts to invalidate legislation that does not comply with Charter rights.

4.13 Role of the Executive

4.13.1 It is clear from experience elsewhere that the Executive arm of Government plays a vital role in the protection of human rights and in the implementation and safeguarding of human rights standards. As the Human Rights Law Resource Centre said in its submission to the Institute:

What model of human rights protection should Tasmania adopt?

The Executive's role in the development and delivery of policy, services and programs makes it the primary point of contact between the 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 the Tasmanian people.³⁶⁸

4.13.2 Human rights instruments can impact strongly upon all functions performed by the Executive arm of Government including their advisory, policy framing and service delivery functions.³⁶⁹ For example, during the first twelve months of the operation of the ACT *Human Rights Act 2004*, the human rights conversation within the ACT Executive included consideration of the necessity to provide segregation for particular prisoners, the necessity to provide voting booths for people with disabilities, whether it is legitimate to exclude someone from public employment on the basis of his or her criminal record, whether road blocks could be set up, whether it would breach human rights to prevent prisoners from voting or to have a blanket strip search policy for all prisoners, whether children could be used for tobacco testing and whether car registration stickers could contain promotional stickers for the Red Cross Blood Donation Service.³⁷⁰ In the United Kingdom, the Department of Constitutional Affairs found that the *Human Rights Act 1998* (UK) has had a significant and beneficial effect upon the development of government policy. It reported that,

[t]he Human Rights Act leads to better policy outcomes, by ensuring that the needs of all members of the UK's increasingly diverse population are appropriately considered. It promotes greater personalisation and therefore better public services.³⁷¹

4.13.3 Nevertheless, while significant, the impact of human rights instruments on the Executive arm of Government is generally not revolutionary. However, human rights enactments do provide a legislative framework for many human rights cognisant practices and processes already in place in Government and help to extend those practices in a systematic manner to all functions of government. As one submission to the Institute noted:

Protecting and promoting human rights is often implicit in government decision-making. Formalising the process will confirm that the Tasmanian Government and the Tasmanian people value human rights highly, and consider compliance with human rights standards important.³⁷²

4.13.4 In the legislative and policy making process, the Executive arm of government is able to support the operation of the Charter in the following ways:

- By ensuring that legislation and policy meet Charter standards;
- In the preparation of statements of compatibility that accompany all proposed new legislation including subordinate legislation;
- By considering and responding to human rights issues raised in relation to Bills by Parliamentary Human Rights Scrutiny Committees;
- In the preparation of Government responses to declarations of incompatibility made by the courts.

4.13.5 Involvement in all the above processes can generate robust human rights dialogue across Government and, additionally, inculcate human rights thinking in the performance of other government functions. As Peter Bayne noted in relation to the ACT *Human Rights Act 2004*:

³⁶⁸ Submission 156.

³⁶⁹ Department of Justice and Community Safety, Australian Capital Territory, *Human Rights Act 2004 Twelve-Month Review – Report* (2006) 9; Department of Constitutional Affairs, United Kingdom, *Review of the Implementation of the Human Rights Act* (2006) 19-35.

³⁷⁰ Elizabeth Kelly, 'Government in the ACT: A Human Rights Dialogue' (Paper presented at the Assessing the First Year of the ACT Human Rights Act Conference, Canberra, 29 June 2005) 2-3.

³⁷¹ Department of Constitutional Affairs, United Kingdom, *Review of the Implementation of the Human Rights Act* (2006) 19.

³⁷² Submission 223.

[A] great deal of debate and talk occurs within government. A legislative proposal might be addressed ... by the proponent government agency, the Parliamentary Counsel's Office, the Department of Justice and Community Safety, and the Human Rights Office. No doubt this debate has an effect on the final form of a Bill, and probably in many cases in a way that enhances an HRA right.³⁷³

4.13.6 Awareness that public authorities are bound by the Charter and may be held accountable for human rights breaches necessarily activates the development of human rights compatible practices that extend beyond policy development and advisory functions to service delivery and administrative decision making.

4.13.7 In the ACT and New Zealand, the office of the Attorney General has primary responsibility for preparing statements of compatibility in relation to Bills and for receiving and responding to declarations of incompatibility made by the courts. In Victoria, responsibility for these matters is not vested solely in the Attorney General. Instead, whichever Member of Parliament proposes to introduce a Bill into Parliament bears the responsibility for causing a statement of compatibility to be made in respect of it. Where court declarations of incompatibility are concerned, the Ministers responsible for administering the relevant legislation must respond to them. The advantage of the Victorian approach is that it does not locate responsibility for human rights protection in one government department. Instead it attempts to build a human rights culture across the entire Government. For this reason, the Tasmanian Law Reform Institute is of the view that, with respect to responsibility for the preparation of statements of compatibility and responses to court declarations of incompatibility, the Victorian model is to be preferred to the ACT and New Zealand model.

4.13.8 The business of government extends well beyond the legislative process. It involves the administration and management of schools, prisons, transport systems, policing, the environment, primary resources, medical facilities, interaction with local government and private industry and the making of policy decisions in relation to all these areas. A question for the Executive will be how consideration and observance of human rights is to be integrated into decision-making and service delivery in these areas. All other democratic nations now include human rights considerations in their policy-making processes.

4.13.9 The Victorian Human Rights Consultation Committee suggested that one way for government departments to incorporate human rights analysis into the policy process would be to prepare Human Rights Impact Statements in relation to all policy proposals. These statements would accompany all submissions to Cabinet. It was recommended that they should address the same matters as are listed in the general limitations clause of the Charter relevant to the determination of the reasonableness and justifiability of any legislative limitation on rights. The Human Rights and Equal Opportunity Commission proposed that the same process should also be implemented in Tasmania so that all submissions to Cabinet that may have 'a direct or significant impact on Human Rights' should be accompanied by a human rights impact statement. The Commission said that responsibility for the preparation of these statements should rest with the department or agency making the submission to Cabinet.³⁷⁴

4.13.10 The Victorian Committee identified a number of advantages of such impact statements – they encourage a whole of government approach to human rights because responsibility for their preparation rests with the department making the proposal; they help ensure that human rights scrutiny “does not become the exclusive domain of the Department of Justice”;³⁷⁵ they are “a logical extension of the existing commitment to evidence based policy making”;³⁷⁶ they are consistent with existing

³⁷³ Peter Bayne, 'Pre-Enactment Dialogue about proposed laws under the influence of the Human Rights Act 2004' (Paper presented at the Assessing the First Year of the ACT Human Rights Act Conference, Canberra, 29 June 2005) 1.

³⁷⁴ Submission 155.

³⁷⁵ Victorian Human Rights Consultation Committee, *Rights, Responsibilities and Respect: The Report of the Human Rights Consultation Committee* (2005) 71.

³⁷⁶ *Ibid*, quoting from the submission of Dr Simon Evans and Dr Carolyn Evans to the Victorian Consultation.

practice in relation to regulatory impact statements; they help identify whether any policy raises human rights concerns and they assist in building human rights standards into policy making process from the outset so promoting a human rights aware culture across the whole of government.³⁷⁷ Preparation of impact statements of various kinds (economic, environmental, social and cultural), are a familiar part of the policy making process. The provision of human rights impact statements is merely an augmentation of this process.

4.13.11 However, there is no requirement in the Victorian Charter for Human Rights Impact Statements to be prepared by government departments, the Victorian Consultation Committee having simply recommended that the provision and details of such statements should be set out in the Cabinet Handbook.³⁷⁸

4.13.12 The Tasmanian Law Reform Institute considers that there is merit in the Victorian Human Rights Consultation Committee's recommendation regarding human rights impact statements and agrees that they provide one possible mechanism for embedding human rights analysis into the policy making process. The Institute also agrees with the Victorian Committee in viewing the decision whether to utilise such statements as properly and ultimately within the domain of the Executive and not something that should be enacted in the Charter.

4.13.13 Another mechanism for building consideration of human rights into government practices is via the development of departmental human rights action plans. The Victorian Human Rights Consultation Committee considered such plans to comprise a "methodical approach to making human rights an intrinsic feature of government in Victoria" and recommended that each government department should be encouraged to develop a human rights action plan and report against it. As with the recommended human rights impact statement, the Committee was of the view that this should be a matter of government policy rather than a statutory requirement. The Tasmanian Law Reform Institute shares the Victorian Committee's views concerning the value of human rights action plans and that departments should be encouraged to develop them as a matter of policy rather than as a legislated requirement. However, the Institute considers that, included in the periodic reviews of a Tasmanian Charter's operation, there should be consideration of the extent to which departments have developed and acted upon human rights action plans and, in the absence of their development, whether they should be made a requirement under the Charter.

4.13.14 In any event the Institute recommends that government departments be required to include in their annual reports detailed information of what they have done to comply with the Charter. This too is aimed at creating a widely placed government responsibility for human rights. This measure will also enable monitoring of the progress of the executive in incorporating human rights awareness into their processes. The Tasmanian Women's Council noted in this regard,

A framework for implementation of the legislation should be developed and form part of the annual reporting framework of Government agencies, alongside the goals and benchmarks of Tasmania's social and economic plan (which currently occurs).³⁷⁹

³⁷⁷ Victorian Human Rights Consultation Committee, *Rights, Responsibilities and Respect: The Report of the Human Rights Consultation Committee* (2005) 70-71.

³⁷⁸ *Ibid.*

³⁷⁹ Submission 371.

Recommendation 13 – Role of the Executive

- The Tasmanian Law Reform Institute recognises the central role that the Executive arm of Government plays in the protection and enhancement of human rights. It also recognises the benefits of encouraging a whole of government approach to human rights protection. Accordingly, it recommends that the preparation of statements of compatibility should be undertaken by those Ministers that will have responsibility for implementing and administering the new legislation and not by a single government department or unit within government. It also recommends that preparation of responses to courts' declarations of incompatibility should rest with those departments responsible for administering the legislation in question.
- The Tasmanian Law Reform Institute recommends that processes be developed to ensure that all policy formulation is undertaken in a manner that takes account of human rights. Accordingly, the Institute recommends that Human Rights Impact Statements be prepared in relation to all policy and legislation proposals and that these statements be provided to Cabinet to ensure that the Government is aware of the human rights implications of all new proposals.
- The Institute recommends that all government departments be encouraged to develop human rights action plans referenced against legislation, policy administration and service delivery. Preparation of these plans should be the responsibility of each individual department. The extent to which such plans have been developed and implemented should be considered in the periodic reviews of the Charter's operation. If it is clear after the second review of the Charter that no action has been taken in this regard, then consideration should be given to including the requirement for such plans in the Charter.
- All Tasmanian Government departments should include detailed advice in their annual reports about what they have done to comply with human rights under the Charter.

4.14 If Tasmania were to enact a Charter of Human Rights, should the rights it contains be subject to limitations?

4.14.1 Few rights are absolute. Examples of rights that are absolute are the right not to be held in slavery and the right to be free from torture and cruel, inhuman or degrading treatment or punishment. Other rights often need to be balanced against each other. Sometimes it is necessary to restrict some rights in order to enhance or protect others. The need to balance human rights is recognised in international conventions such as the *Universal Declaration of Human Rights*:

In the exercise of his rights and freedoms, everyone shall be subject only to such limitations as are determined by law solely for the purpose of securing due recognition and respect for the rights and freedoms of others and of meeting the just requirements of morality, public order and the general welfare in a democratic society.³⁸⁰

4.14.2 The legitimate balancing of rights can be achieved in two main ways, either by placing limits on specific rights on a clause-by-clause basis or by including a general, reasonable limits clause that applies to all rights. The *International Covenant on Civil and Political Rights* and the *International Covenant on Economic, Social and Cultural Rights* contain both general³⁸¹ and specific limiting

³⁸⁰ Article 29.2 of the *Universal Declaration of Human Rights*, GA Res 217 A3 (1948).

³⁸¹ Article 4.1 of the *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976) and Article 4 of the *International Covenant on Economic, Social and Cultural Rights*, opened for signature 16 December 1966, 999 UNTS 3 (entered into force 3 January 1976).

clauses. For example, the right to freedom of thought, conscience and religion in Article 18 of the *International Covenant on Civil and Political Rights* is expressly subject only to ‘such limitations as are necessary to protect public safety, order, health or morals, or the fundamental rights and freedoms of others.’ The ACT *Human Rights Act 2004*, the Victorian *Charter of Human Rights and Responsibilities 2006*, the New Zealand *Bill of Rights Act 1990*, the South African *Bill of Rights 1996* and the Canadian *Charter of Rights and Freedoms 1982* all contain general, reasonable limiting clauses. These clauses justify only such limits being placed on human rights as are ‘prescribed by law and can be demonstrably justified in a free and democratic society.’ For example, Section 28 of the ACT *Human Rights Act 2004* states:

Human rights may be subject only to reasonable limits set by Territory laws that can be demonstrably justified in a free and democratic society.

4.14.3 Such clauses require Parliament to show that any limits imposed by legislation on rights are demonstrably reasonable and justifiable. They also require the courts to gauge the same thing when scrutinising legislation alleged to contravene human rights. If it is shown that the limitation is reasonable, then the reasonable limits clause will protect the legislation.

4.14.4 Specific limitations on rights have the virtue of achieving a degree of certainty not only in terms of how a limitation applies to a particular right, but also in terms of which rights have limitations and which are absolute (discussed at [4.14.12]- 4.14.21]). However, specific limitations clauses may be too rigid and narrow in their operation and do not necessarily achieve the broader balancing process that must often accompany rights interpretation. General, reasonable limits clauses encapsulate this broader balancing process yet they suffer from a degree of uncertainty in their application. To address this, the general, reasonable limits clauses in the Victorian and South African human rights instruments list matters that are to be taken into account in determining whether a limitation on rights is reasonable and justified. These matters include the nature of the right, the purpose, importance, nature and extent of the limitation, the relationship between the limitation and its purpose and any less restrictive means that might reasonably be available to achieve the purpose of the limitation.³⁸² The aim of these provisions is to provide guidance in the application of the general limiting clauses and to reduce their uncertainty.

4.14.5 For example s 7 of the Victorian *Charter of Human Rights and Responsibilities* states,

- (2) A human right may be subject under law only to such reasonable limits as can be demonstrably justified in a free and democratic society based on human dignity, equality and freedom, and taking into account all relevant factors including -
 - (a) the nature of the right; and
 - (b) the importance of the purpose of the limitation; and
 - (c) the nature and extent of the limitation; and
 - (d) the relationship between the limitation and its purpose; and
 - (e) any less restrictive means reasonably available to achieve the purpose that the limitation seeks to achieve.

4.14.6 The ACT, Victorian, New Zealand and South African human rights instruments also impose specific limitations on some rights. For example, in relation to the right to liberty and security of the person, s 18 of the *Human Rights Act 2004* (ACT) provides,

- (2) No-one may be deprived of liberty, except on grounds and in accordance with the procedures established by law.

³⁸² Section 7 of the *Charter of Human Rights and Responsibilities 2006* (Vic); *Constitution of the Republic of South Africa 108 of 1996* (South Africa) s 36.

4.14.7 Section 24 of the Victorian *Charter of Human Rights and Responsibilities 2006* provides in relation to the right to a fair trial by a public hearing,

- (2) Despite sub-section (1), a court or tribunal may exclude members of media organisations or other persons or the general public from all or part of a hearing if permitted to do so by a law other than this Charter.

4.14.8 So in fact, the Victorian and ACT human rights enactments contain both general and specific limitations on human rights. The intention appears to be that the general limitations clause is not to be read as enabling extension of the specific limitations provided but rather that the specific limitations are to be seen as particular examples of the general limitations clause.³⁸³ However, it is both unnecessary and undesirable that there be both general and specific limitations. The general and specific limitations sit uneasily together in the ACT and Victorian enactments. While the specific limitations are probably included to provide immediate notification of the legitimacy of particular existing restraints on human rights for those whose work regularly involves observance of or intrusion upon the rights to which they apply,³⁸⁴ they may also potentially oust the application of the general limitations clause and the factors that are to be taken into account in determining whether those restrictions on rights are reasonable.

4.14.9 As Jeremy Gans has pointed out, potentially the in-built limitations will act as in-built “Parliamentary overrides” of the Charter in respect of some legislation that has already been enacted. These over-rides will apply without the legislation being subjected to the protections that would normally apply to over-ride legislation - Parliamentary appraisal against human rights standards, the application of the ‘exceptional circumstances’ requirement for ‘over-ride’ statutes and the periodic renewal requirement for their continued operation.³⁸⁵ He also argued that in-built limitations are inappropriate because they would, in any event, be incorporated into a general limitations clause. Accordingly, their retention is unnecessary, cumbersome, confusing and repetitive. Further, the general limitations clause provides a “much more nuanced formulation” than specific caveats on rights.³⁸⁶

4.14.10 Of the other submissions received that addressed the issue of limitations upon rights, the preponderance of support was for a general, reasonable limits clause rather than for specific limitations on individual rights. For example, the submission of Adrian Chong Voon Chiang stated, “My preference would be to enact a Charter of Rights that has a general limitation provision as per the South African and Canadian model.”³⁸⁷ Favouring a general limitations clause over specific limitations clauses, the former Tasmanian Commissioner for Children said:

Specific limitations clauses have the advantage of certainty, but they will also tend to make the Charter more cumbersome, complex and therefore a less accessible document. The detailed content of specific limitations is also likely to attract lengthy debate and could potentially undermine consensus on the Charter rights.³⁸⁸

4.14.11 The Human Rights and Equal Opportunity Commission submitted that a reasonable limits clause should require the government to take into account all relevant factors, including a non-exhaustive list similar to the Victorian Charter.³⁸⁹

³⁸³ Australian Capital Territory Bill of Rights Consultative Committee, *Towards an ACT Human Rights Act: Report of the ACT Bill of Rights Consultative Committee* (2003) 71.

³⁸⁴ For example, police officers exercising powers of arrest; courts and tribunals exercising powers to close courts to the public.

³⁸⁵ Submission 111 and see also Jeremy Gans, ‘Evidence Law Under Victoria’s Charter’ (Paper presented at the Evidence, Criminal Justice and Adjudication Colloquium, Sydney, 21st April 2007).

³⁸⁶ Submission 11.

³⁸⁷ Submission 65.

³⁸⁸ Submission 70.

³⁸⁹ Submission 155.

Absolute rights

4.14.12 Under international law certain rights are absolute. For these rights no deviation is allowed and they cannot be subject to qualification or limitation. The *International Covenant on Civil and Political Rights* provides that the following rights are non-derogable:³⁹⁰

- Right to life;³⁹¹
- Right to recognition as a person before the law;³⁹²
- Right not to be imprisoned for a contractual debt;³⁹³
- Freedom from retrospective criminal punishment;³⁹⁴
- Protection from genocide;³⁹⁵
- Freedom from torture and cruel, inhuman or degrading treatment or punishment;³⁹⁶
- Freedom from slavery;³⁹⁷
- Freedom of thought, conscience and religion.³⁹⁸

4.14.13 Some submissions supported excluding the operation of the reasonable limitations clause from absolute rights. For example Dr Julie Debeljak of Monash University stated:

Some rights are absolute, such as, the prohibition on genocide, torture, and slavery, and the right to life, to freedom from racial discrimination, and to be free from punishment without law. Such rights cannot be derogated from and no circumstance justifies a qualification or limitation of such rights under international law. Thus, a generally worded limitation clause should be used, but certain rights must be excluded from its operation.³⁹⁹

4.14.14 Amnesty International submitted that a provision should be included in the Tasmanian Charter that explicitly prohibits derogation from absolute rights.

4.14.15 While the special significance of these absolute rights is undoubted they have not always garnered special protection beyond that afforded to other rights within domestic jurisdictions. The ACT *Human Rights Act 2004*, the Victorian *Charter of Human Rights and Responsibilities 2006*, the Canadian *Charter of Rights and Freedoms 1982* and the New Zealand *Bill of Rights Act 1990* do not differentiate between absolute rights and rights which may be subject to limitations. However, the ACT Bill of Rights Consultative Committee recommended that the non-derogable rights in Article 4.2 of the *International Covenant on Civil and Political Rights* should not be subject to reasonable limits under the proposed ACT *Human Rights Act*.⁴⁰⁰ In contrast to the approach in Victoria and the ACT, The *European Convention on Human Rights* which is incorporated into the *Human Rights Act 1998* (UK) renders the power of derogation from rights in times of war or other public emergency threatening the life of the nation impossible in respect of the right to life (except in cases of deaths resulting from lawful acts of war), the prohibitions on torture, cruel, inhuman or degrading treatment

³⁹⁰ Article 4.2 of the *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976).

³⁹¹ *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171, art 6 (entered into force 23 March 1976).

³⁹² Ibid.

³⁹³ Ibid.

³⁹⁴ Ibid.

³⁹⁵ Ibid.

³⁹⁶ Ibid.

³⁹⁷ Ibid.

³⁹⁸ Ibid.

³⁹⁹ Submission 85.

⁴⁰⁰ Australian Capital Territory Bill of Rights Consultative Committee, *Towards an ACT Human Rights Act: Report of the ACT Bill of Rights Consultative Committee* (2003) 69.

or punishment and slavery and the guarantee against retrospective punishment for criminal offences.⁴⁰¹ The right to life in the Convention is subject to specific limitations for defence against unlawful violence, effecting and preventing escape from a lawful arrest and quelling a riot or insurrection. The South African *Bill of Rights* prohibits derogations from aspects of the right to equality, the right to freedom and security of the person, the rights of children and the rights of arrested, detained and accused persons. No derogation is permitted for the entirety of the right to human dignity and the right to life.

4.14.16 If Tasmania is to exclude absolute rights from the operation of a limitations clause, it must first ascertain which rights are absolute. The issue of which rights are absolute is not settled. This is demonstrated by the different rights recognised as non-derogable in the *European Convention on Human Rights*, the *International Covenant on Civil and Political Rights* and the South African *Bill of Rights*. Moreover, specific limitations are provided for the right to life and for freedom of thought conscience and religion in the *International Covenant on Civil and Political Rights*. In relation to the right to life, Article 6.1 provides that no one may be *arbitrarily* deprived of his or her life. An example of a non-arbitrary deprivation of life would be where a person takes the life of another acting in self-defence or defence of another person. Laws in all Australian jurisdictions make it lawful to kill someone in these circumstances.

4.14.17 Article 6 of the *International Covenant on Civil and Political Rights* recognises the death penalty for serious criminal offences as a lawful limitation on the right to life in countries where such a penalty still exists. For freedom of thought, conscience and religion, Article 18.3 states that freedom to manifest one's religion or beliefs may be subject only to such limitations as are prescribed by law and are necessary to protect public safety, order, health or morals or the fundamental rights and freedoms of others. An example of a reasonable limitation on this right might be a proscription on female genital mutilation. Because these rights may justifiably be subject to lawful limitations, they are not absolute rights in the true sense of the term.

The Tasmanian Law Reform Institute's view

4.14.18 For the purpose of a Tasmanian Charter, the Tasmanian Law Reform Institute is of the view that only those rights that are not subject to limitations or qualifications in the *International Covenant on Civil and Political Rights* should be considered to fall within the concept of truly absolute rights. These rights are the right to recognition as a person before the law, freedom from slavery, genocide, torture and cruel, inhuman or degrading treatment or punishment and retrospective criminal punishment.⁴⁰²

4.14.19 It is recommended that these rights should be afforded special protection within a Tasmanian Charter. That protection should take four forms: the exclusion of those rights from the operation of the general limitations clause; the exclusion of those rights from Parliament's power to enact override provisions in legislation; the entrenchment of those rights to ensure they cannot be limited or overridden by a simple majority vote in Parliament; and the empowering of the judiciary to invalidate legislation inconsistent with those rights.

4.14.20 Genuine recognition of the absolute nature of these rights will only be achieved if they are explicitly excluded from the application of the Charter's general limitations and Parliamentary override provisions. Their exclusion from the limitations and override provisions should be entrenched so that Parliament cannot encroach upon these rights by a simple majority vote in each House of Parliament. This could be achieved by the enactment of a provision to the effect that these rights can only be limited or overridden pursuant to special legislative procedures. The most robust procedural

⁴⁰¹ Article 15(2) of the *Convention for the Protection of Human Rights and Fundamental Freedoms*, opened for signature 4 November 1950, ETS 5 (entered into force 3 September 1953).

⁴⁰² The right to life is not an absolute right because it is subject to limitations in relation to self-defence and defence of another see [4.14.6]-[4.14.17].

protection for these rights would be provided by a requirement that before they can be subject to limitation or override the assent of the Tasmanian people must be obtained by referendum. This would reflect the exceptional significance of these rights and acknowledge that rights holders directly should determine what if any limitations on such rights should exist. It may not be sufficiently protective to enable the limitation of these rights by a two-thirds or larger majority vote in each House of Parliament. This is because, though it is rare, it is possible for a single political party to gain high levels of representation in both Houses and it is also possible that both major political parties may not reflect the wishes of the people on some issues.

4.14.21 The final recommendation is that the judiciary should be given the power to invalidate legislation that cannot be interpreted as compatible with non-derogable rights. This feature is integral to ensuring that these rights cannot be overridden or limited. It provides the mechanism for overturning any legislation that is inconsistent with these rights. While the Tasmanian Government has indicated its preference for a Tasmanian Charter that ultimately maintains Parliamentary sovereignty, the special quality of absolute rights warrants departure from this model where they are concerned. In fact, isolation of absolute rights from the dialogue model will impact very little upon Parliamentary sovereignty. It is extremely unlikely that Parliament would seek to enact legislation that would override or diminish any of these rights.

4.14.22 It is the Institute's view that a Tasmanian Charter of Rights should include a general reasonable limits clause along the lines of that set down in s 7 of the Victorian *Charter of Human Rights and Responsibilities 2006*. Inclusion of such a clause would obviate the need for the inclusion of specific caveats or limitations on individual rights. Accordingly, in translating the rights in International Human Rights Instruments and in other Australian human rights enactments to the Tasmanian context, any specific caveats or limitations they contain should be removed. Their retention will be unnecessary, confusing and cumbersome. For example, Article 17 of the *International Covenant on Civil and Political Rights* provides, "No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honour or reputation."

4.14.23 In a Tasmanian Charter this right should be expressed as follows:

Everyone has the right –

- (a) not to have his or her privacy, family, home or correspondence interfered with;
- (b) not to have his or her reputation attacked.

4.14.24 It may be argued that specific limitations are required to preserve existing Tasmanian laws that impose limits on rights. However, such arguments are misguided because:

- these laws would probably conform, in any event, to the Charter's reasonable limits clause and thus not be inconsistent with Charter rights;
- the Charter does not invalidate laws, so existing laws continue to apply;
- no Tasmanian laws should be exempt from evaluation against Charter principles to determine their consistency with human rights. As Jeremy Gans notes, "Laws should conform to the Charter, not the reverse."⁴⁰³

⁴⁰³ Jeremy Gans, 'Evidence Law Under Victoria's Charter' (Draft paper presented at the *Evidence, Criminal Justice and Adjudication Colloquium*, Sydney, 21 April 2007) 9.

4.14.25 The articles in the *International Covenant on Civil and Political Rights* and the *International Covenant on Economic, Social and Cultural Rights* and the equivalent provisions in the *Human Rights Act 2004* (ACT) and the *Charter of Human Rights and Responsibilities 2006* (Vic) that require modification in this regard are:

International Covenant on Civil and Political Rights

Article 6.1 (ss 9 ACT Act and Vic Charter) – right to life: remove the word ‘arbitrarily’. (Article 6.2-6.3 should not be reproduced in the Tasmanian Charter because they are not relevant to Tasmania, the death penalty having been abolished).

Article 8.3 (s 26 ACT Act and s 11 Vic Charter) – freedom from slavery: remove 8.3(b) and (c).

Article 9 (s 18 ACT Act and s 21 Vic Charter) – right to liberty and security of the person: remove everything in article 9.1 following the first sentence. Retain article 9.2-9.5 but reword as recommended below at para [4.16.30].

Article 10.2 (s 19 ACT Act and s 22 Vic Charter) – right to humane treatment when deprived of liberty: remove the words, “save in exceptional circumstances” from 10.2(a).

Article 12 (s 13 ACT Act and s 12 Vic Charter) – freedom of movement: remove 11.3. This right must be reworded to state that everyone has a right to move freely within Tasmania and to enter and leave Tasmania and has the freedom to choose where to live in Tasmania.

Article 14 (s 21 ACT Act and s 24 Vic Charter) – right to a fair trial: remove the entirety of the qualifications to this right relating to closing proceedings and excluding the public and media except for the following words, “any judgment rendered in a criminal case or in a suit at law shall be made public”.

Article 17 (s12 ACT Act and s13 Vic Charter) – right to privacy: remove the words “arbitrary or unlawful” and “unlawful” (second use) from 17.1.

Article 18 (s14 ACT Act and s 14 Vic Charter) – freedom of thought conscience and religion: remove 18.3 and 18.4.

Article 19 (s 16 ACT Act and s15 Vic Charter) – freedom of expression: remove 19.3.

Article 21 (s 15 ACT Act and s 16 Vic Charter) – right to peaceful assembly: remove the second sentence.

Article 22 (s 15 ACT Act and s 16 Vic Charter - freedom of association: remove 22.2 and 22.3.

Article 25 (s 17 ACT Act and s 18 Vic Charter) – Right to take part in public life: remove the words “without unreasonable restrictions” from the first sentence.

International Covenant on Economic, Social and Cultural Rights

Article 6 – the right to work: delete 6.2.

Article 7 – the right to just and favourable conditions of work: delete 7(a)-(d).

Article 11 – right to an adequate standard of living including the right to adequate food, clothing and housing: delete 11.2.

Article 12 – the right to the highest attainable standard of physical and mental health: delete 12.2.

Article 13 – the right to education: in 13.1 delete everything after the first sentence; delete 13.2.

4.14.26 In order to provide assistance in the operation and interpretation of the reasonable limits clause, the matters that are to be taken into account in determining whether limitations on rights are reasonable and justifiable in a democratic society should be set out in the Charter. The South African and Victorian models provide useful precedents in this regard and it is recommended that their approach be enacted in Tasmania.

4.14.27 The Institute recognises that certain rights –freedom from torture and cruel, inhuman or degrading treatment or punishment, the right not to be held in slavery, freedom from genocide, the right to be recognised as a person before the law and freedom from retrospective criminal punishment cannot be subject to limitations. They are absolute rights in the sense that any encroachment upon them is unreasonable. Accordingly these rights should be expressly stated to stand outside the reasonable limits clause and the Parliamentary override provisions. The immunity of these rights to legislative override or limitation should be entrenched in the Charter. The unique quality of these rights should be recognised by giving the courts the power to invalidate legislation that is inconsistent with them. Their amenability to limitation or override should only be able to be achieved with the agreement of the Tasmanian people to be ascertained by referendum.

Recommendation 14 – Limitations on rights

- Subject to the principle that the right to freedom from torture and cruel, inhuman or degrading treatment or punishment, the right not to be held in slavery, freedom from genocide, freedom from retrospective criminal punishment and the right to be recognised as a person before the law are non-derogable rights, the Tasmanian Charter should state that the rights it protects may be subject only to such reasonable limits as can be demonstrably justified in a free and democratic society based on human dignity, equality and freedom, and taking into account all relevant factors including -
 - the nature of the right; and
 - the importance of the purpose of the limitation; and
 - the nature and extent of the limitation; and
 - 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 rights set out in the Tasmanian Charter should not be subject to inbuilt specific limitations, qualifications or caveats. In translating rights in International and other Australian human rights instruments to the Tasmanian context, any specific limitations they contain should be removed as set out at para [4.14.25] above.
- Freedom from torture and cruel, inhuman or degrading treatment or punishment, the right not to be held in slavery, freedom from genocide, freedom from retrospective criminal punishment and the right to be recognised as a person before the law should be explicitly excluded from the operation of the Tasmanian Charter’s reasonable limits clause and from Parliamentary override provisions.
- The immunity of freedom from torture and cruel, inhuman or degrading treatment or punishment, the right not to be held in slavery, freedom from genocide, freedom from retrospective criminal punishment and the right to be recognised as a person before the law to legislative override or limitation should be entrenched in the Charter. Their limitation or override should only be able to be effected with the agreement of the Tasmanian people to be ascertained by referendum.

- The courts should have the power to invalidate legislation that is inconsistent with the freedom from torture and cruel, inhuman or degrading treatment or punishment, the right not to be held in slavery, freedom from genocide, freedom from retrospective criminal punishment and the right to be recognised as a person before the law.

4.15 If Tasmania Were to Enact a Charter of Rights, What Rights Should it Protect?

4.15.1 A key issue explored by the Tasmanian Law Reform Institute with the community was what rights a Tasmanian Charter of Rights should protect. Should only civil and political rights like those in the *International Covenant on Civil and Political Rights*, (see Appendix D) be included or should more broadly based protection be provided to encompass such rights as those in the *International Covenant on Economic, Social and Cultural Rights* (see Appendix E)? In either case, there would need to be modification of the provisions in these treaties to accommodate Tasmanian needs and the Tasmanian legal, political and social situation.

4.15.2 The dominant approach in other jurisdictions is to focus on a full range of civil and political rights and to protect only selected economic, social and cultural rights. The human rights instruments enacted in the ACT and Victoria focus on civil and political rights. While both enactments include protection for minority and Aboriginal cultural rights, and while the Victorian Charter contains some protection for property rights, other economic, social and cultural rights are excluded. Similarly, the Canadian, New Zealand and United Kingdom human rights instruments do not cover economic, social and cultural rights with the exception in the United Kingdom *Human Rights Act 1998* of the rights to education and the peaceful enjoyment of property. In contrast, the South African *Bill of Rights* covers both civil and political rights and economic, social and cultural rights including freedom of trade, occupation and profession, the right to fair labour practices, the right to a safe environment and environmental protection, freedom from arbitrary deprivation of property, the right to adequate housing the right of access to health care services, food, water and social security, the right to education and cultural and language rights. The ACT Bill of Rights Consultative Committee recommended that economic, social and cultural rights be included in the ACT *Human Rights Act 2004* but this recommendation was rejected by the ACT legislature. However, specific provision has been made in both the ACT and Victoria enactments for review of the issue whether to include economic, civil and political rights and other rights like those in the *Convention on the Rights of the Child* and the *Convention on the Elimination of All Forms of Discrimination Against Women*.

4.15.3 Economic, social and cultural rights were largely omitted from the ACT and Victorian human rights instruments because of the concern that their inclusion would encroach too much upon Parliament's ability to control spending, fiscal policy and resource allocation. However, as pointed out by Dr Ben Saul of the Gilbert and Tobin Centre of Public Law, the basis of this concern disappears if a dialogue model for protecting human rights is enacted. This model does not give the courts powers to strike down legislation that bears on economic, social or cultural rights or to compel legislatures "to allocate resources to remedy violations of economic, social or cultural rights."⁴⁰⁴ This means that the control of fiscal policy and expenditure remains firmly with the Parliamentary and executive arms of government, regardless of whether economic, social and cultural rights are included in the Charter.

4.15.4 Moreover, with the exception of a small number of non-derogable rights,⁴⁰⁵ all rights included in a Tasmanian Charter would be subject to reasonable limitations.⁴⁰⁶ This means that Government obligations with respect to economic, social and cultural rights would only be to take

⁴⁰⁴ Submission 338 and see discussion below at paras [4.15.5] - [4.15.6].

⁴⁰⁵ The prohibitions on torture, cruel, inhuman or degrading treatment or punishment, genocide, slavery, retrospective criminal punishment and the right to be recognised as a person before the law.

⁴⁰⁶ See paras [4.14.1] - [4.14.22].

such measures as are reasonable and within its available resources to protect and observe such rights. Budgetary constraints and governmental priorities will remain, as they always have been, the determining factors in decisions made with respect to the protection of rights. While rights considerations would necessarily inform government policy and decision making, Government would retain its power, authority and discretion with respect to the allocation of resources and the development of fiscal policy. The South African experience clearly demonstrates that fears concerning the erosion of government authority in this regard are unfounded. Notwithstanding that the South African Constitutional Court has the power to strike down legislation, (a power not recommended in respect of the Tasmanian courts), it has consistently declined to do so in protecting economic, social and cultural rights. It has taken the view that a court should be slow to question rational decisions taken in good faith by political and public authorities whose responsibility it is to determine how best to spend public money.⁴⁰⁷ In this regard, Bernadette Davies told the Institute,

...it might be argued that the Government may be forced to allocate resources outside its budget, however, as has been the case in South Africa, no court may order the government to allocate assistance outside its available resources. Also, the very style of Charter Tasmania is seeking to enforce will ensure Parliamentary sovereignty in this and other issues. It would be hoped that the Government would see the benefits in the inclusion of such rights as outweighing the fear of political issues coming to the forefront in a negative way. Arguably the issues are already in the public arena and inclusion of these rights may actually help to improve Government's reputation as well as its ability to better assist these areas.⁴⁰⁸

4.15.5 It was also suggested that economic, social and cultural rights are not amenable to judicial determination because they involve questions of economic policy and the distribution of funding. The courts, it is argued are ill equipped to determine such matters and to require them to do so would extend their jurisdiction into matters more appropriately the preserve of the legislature and the executive. In this regard the former Commissioner for Children said:

The Commissioner for Children recognises the concerns associated with comprehensive inclusion of economic, social and cultural rights in a charter of rights, namely the potential incursion on parliamentary control over financial decisions due to obligations to fulfil positive rights.⁴⁰⁹

4.15.6 In contrast, Dr Ben Saul of the Gilbert and Tobin Centre of Public Law at the University of New South Wales said,

...this objection has always been misleading. The courts already decide questions of resource allocation on a daily basis, as when they: (a) award large compensatory damages against the government, thus depriving it of control over significant resources; (b) prohibit certain governmental action (whether in fields of construction, trade, finance, taxation and so on), possibly resulting in significant economic loss to government; or (c) are faced with ambiguity in the law and decisions must be made between competing policies and public interests, some of which may have starkly different economic consequences for governments.⁴¹⁰

4.15.7 Those who favour inclusion of economic, social and cultural rights argue that rights are indivisible, that political and civil liberties can only be achieved when economic and social rights are also established. For example, access to adequate food, health services and education pre-determine whether the right to life, the right to vote and the right to liberty and security of the person have genuine meaning.⁴¹¹ They point to the fact that the courts in both Canada and the United Kingdom

⁴⁰⁷ *Soobramoney v Minister of Health (Kwazulu-Natal)* 1997 (12) BCLP 1696 (CC); *The Government of South Africa v Grootboom* [2001] 1 SA 46; *Minister of Health v Treatment Action Campaign* [2002] 5 SA 271.

⁴⁰⁸ Submission 380.

⁴⁰⁹ Submission 70.

⁴¹⁰ Submission 338.

⁴¹¹ See Submission 371; Submission 309.

have relied upon civil and political rights to protect economic, social and cultural rights to demonstrate that the distinction between the two categories of rights is not sustainable. For example, in *Adam v Secretary of State for the Home Counties* [2005] UKHL 66, the House of Lords held that legislation denying asylum seekers welfare support, thus rendering them potentially homeless and destitute, amounted to inhuman and degrading treatment contrary to article 3 of the ECHR. In *R (Bernard) v London Borough of Enfield* [2003] HRLR 111 the court ordered a local authority to pay compensation to a disabled woman and her husband because the housing that had been provided to them was clearly inappropriate for the woman's needs. She was wheelchair bound and effectively could not access any part of the accommodation that had been provided other than the lounge. Despite numerous complaints about the accommodation and numerous attempts to encourage the local authority to remedy the situation, nothing was done. The court found that the local authority had breached the woman's rights to privacy and to as normal as possible a family life and awarded her and her husband €10,000 in compensation.

4.15.8 In Canada, the courts have used *The Canadian Charter of Rights and Freedoms* to ensure that disabled and disadvantaged people benefit equally from services offered to the general public. So, for example, in *Eldridge v AG of British Columbia* [1997] 3BHR 137, it was held, in reliance upon s 15(1) of the Canadian Charter, (the right to equality before and under the law), that a failure to provide interpretation services to deaf patients attending health facilities deprived them of the equal benefit of health care. In these cases, civil and political rights were engaged to protect economic, social and cultural rights. This shows that the categorisation of rights as economic, social and cultural or civil and political is artificial and ultimately ineffectual in quarantining them from the courts' protection. In this regard, TasCOSS noted:

The inclusion of economic, cultural and social rights would provide judicial clarity. In other jurisdictions in which only political and civil rights have been included in a Charter of Rights the judges have, in interpreting the law, referred to the indivisible nature of human rights as a way of incorporating economic, social and cultural rights.

TasCOSS believes it is better to have economic, social and cultural rights included within human rights legislation, than to leave them to be read into the legislation by courts in interpreting the meaning of civil and political rights. This ensures the sovereignty of Parliament in relation to the definition of human rights.⁴¹²

4.15.9 Similarly Advocacy Tasmanian said:

In preparing this submission, Advocacy Tasmania Inc consulted with a number of groups of people with disabilities and older people. These groups identified a range of rights that they believe are important to protect. They include the right to be treated with respect and dignity, the right to privacy, the right to be able to make choices, the right to self-determination, the right to information and to be informed, the right to have a say, the right to be free from abuse, the right to independence, the right to sexual expression, the right to complain, the right to have an advocate, the right to work, the right to an adequate income, the right to access the community, the right to freedom of movement and adequate transport. Upholding rights is the core business of Advocacy Tasmanian Inc and as such supporting the individual rights of ATI's consumer groups is essential. It is apparent that the rights identified by people we work with and for cover a wide range of life domains and experiences and to distinguish between civil and political rights on the one hand and economic, social and cultural rights on the other makes no sense. We believe that the rights important to our constituency are adequately covered by the *International Covenant on Civil and Political Rights* and the *International Covenant on Economic, Social and Cultural Rights* to which Australia is a party. We also believe that a Charter of Rights would be in line with the objectives of *Tasmania Together*, particularly Goal 1:

⁴¹² Submission 368.

What model of human rights protection should Tasmania adopt?

Tasmania Together Goal 1: Ensure all Tasmanians have a reasonable standard of living with regard to food, shelter, transport, justice, education, communication, health and community services.

Therefore, there is a congruency between what *Tasmania Together* is endeavouring to achieve and a possible Tasmanian Charter of Rights based on the two UN Conventions....⁴¹³

4.15.10 Another objection made to the inclusion of economic, social and cultural rights in a Tasmanian Charter is that they are qualitatively different to civil and political rights. The latter are considered to be negative rights in that they restrain government action, while the former are positive rights in that they require government action and expenditure. This distinction does not withstand close scrutiny. Civil and political rights are just as implicative for government action as economic, social and cultural rights. The right to vote, for example, requires allocation of government resources to ensure that citizens can exercise that right and the right to a fair trial requires resource allocation to courts, the judiciary and the whole panoply of institutions that support the justice system. The Vienna Declaration on Human Rights in 1993 for which Australia has signalled support,⁴¹⁴ recognises that all human rights are universal, indivisible, interdependent and inter-related.⁴¹⁵

4.15.11 A significant number of submissions received urged the Institute to recommend the inclusion in a Tasmanian Charter of all rights contained in the United Nations Declaration of Human Rights. This document does not draw a distinction between economic, social and cultural rights and civil and political rights. It includes them all.

4.15.12 Some people suggested that rather than try to achieve a very broad based protection of rights from the outset, it may be better to adopt a two stage process by first providing protection for the most widely recognised rights, civil and political rights, and subsequently adding protection for other rights in a staged process of review.⁴¹⁶ This suggestion was generally based upon concern that a recommendation to include all rights initially might fuel opposition to the enactment of a Charter. For example, the former Commissioner for Children noted “the pragmatist argument that if a Charter is made too ambitious it may attract strong community opposition, jeopardising the project in its entirety.”⁴¹⁷ John Cianchi argued that “[he] would rather see the adoption of a Human Rights Act in Tasmania without cultural, social and economic rights, if it means that a Human Rights Act is adopted.”⁴¹⁸ Similarly Clare and John Wiseman said that the inclusion of the *International Covenant on Economic, Social and Cultural Rights* would be the ideal model, however the review in 5 years could implement the *International Covenant on Economic, Social and Cultural Rights*.⁴¹⁹ Alison Wiss also commented that limiting the rights protected in a Tasmanian Charter to civil and political rights might make it more politically palatable.⁴²⁰ The objection to this approach is that Tasmania is well placed to protect all rights. Arguments in favour of the progressive realisation of rights while persuasive where developing countries are concerned are not relevant to wealthy western democracies which can afford to protect all fundamental rights.⁴²¹ Further, as noted in the submission of the Uniting Church, the staged introduction of certain rights may create a perception that the only rights ‘worth’ protecting are those initially included in the Charter.⁴²²

⁴¹³ Submission 7.

⁴¹⁴ Department of Foreign Affairs and Trade, *Human Rights Manual* (2nd ed, 1998) 13.14.

⁴¹⁵ *Vienna Declaration*, [5], [8] UN Doc A/CONF.157/1993/24 (1993).

⁴¹⁶ Submission 101.

⁴¹⁷ Submission 71.

⁴¹⁸ Submission 67.

⁴¹⁹ Submission 400; Submission 401

⁴²⁰ Submission 402.

⁴²¹ See for example, Submission 338.

⁴²² Submission 385.

The Tasmanian Law Reform Institute's view

4.15.13 The Tasmanian Law Reform Institute is of the view that the arguments for limiting rights protection to civil and political rights are not compelling. They speak of timidity rather than rationality. Suggestions that courts are ill-equipped to engage with economic, social and cultural rights show little knowledge of the courts' current decision making responsibilities. Fears that the inclusion of economic, social and cultural rights in a Tasmanian Charter would deprive governments of their control of fiscal policy and resource allocation are unfounded. Under the dialogue model recommended here for the Tasmanian Charter, this cannot occur. The Tasmanian Law Reform Institute recognises that human rights are indivisible and that the separation of rights into civil and political rights on the one hand and economic, social and cultural rights on the other is artificial.

4.15.14 In recent years, Tasmania has taken a strong stand and established a sound record in a number of areas of human rights protection.⁴²³ In significant areas of rights protection it has set the benchmark for world's best practice. The enactment of a Charter that contains both civil and political rights and economic, social and cultural rights would confirm Tasmania's leadership position in this regard. As the Community and Public Sector Union pointed out:

Just as Tasmania eventually led the way with the most comprehensive Anti-Discrimination laws in Australia, the membership group would urge a model which is comprehensive and inclusive of the civil, political, economic, social and cultural rights. The membership group could find no argument for exemptions from the application of these rights.⁴²⁴

4.15.15 Similarly, Susan Lewin argued that because Tasmania already has advanced legislation in other controversial areas of reform, the same progressive stance and vision should be utilised in deciding the type of rights that are to be included in the Tasmanian Charter of Human Rights. She said:

Tasmania is a small State [and] yet it has made something of a positive mark both nationally and internationally with its sexual anti-discrimination laws, and its no smoking laws. Tasmania could be seen as a beacon of fairness and achievability if it had the wherewithal to push the boundaries and take a 'risk' of incorporating economic, social and cultural rights ... rights are indivisible.⁴²⁵

4.15.16 Further, the promotion of economic, social and cultural rights features prominently in *Tasmania Together Goals and Benchmarks*, goals 1, 3-9 and 11-12. Their inclusion in a Tasmanian Charter would be consistent with this approach. As Richard Griggs told the Institute, the success with which the *Tasmania Together* goals have been taken up by the Tasmanian Public Service lends weight to the proposition that its aspirations and objectives should be adhered to in a Tasmanian Charter.⁴²⁶ Accordingly, the Tasmanian Law Reform Institute strongly supports the inclusion of economic, social and cultural rights along with civil and political rights in a Tasmanian Charter.

4.15.17 If this approach is not adopted, and only civil and political rights are included in the Tasmanian Charter, then the Institute recommends that, as has happened in the ACT and Victoria, in prescribed reviews of the Charter this issue should be revisited and further consideration given to the inclusion of economic, social and cultural rights in the Charter.

⁴²³ Its legislation in relation to the Stolen Generations, the return of Aboriginal lands, same sex relationships, and sexual offences laws evidence a burgeoning human rights track record.

⁴²⁴ Submission 71.

⁴²⁵ Submission 183.

⁴²⁶ Submission 123.

Recommendation 15 – What rights?

- The Tasmanian Law Reform Institute recommends that the Tasmanian Charter of Human Rights should protect economic, social and cultural rights as well as civil and political rights.
- If the Tasmanian Charter only covers civil and political rights, then the Tasmanian Law Reform Institute recommends that in prescribed reviews of the Charter further consideration should be given to the inclusion of economic, social and cultural rights.

4.16 Specific rights

4.16.1 Many submissions to the Tasmanian Law Reform Institute nominated specific rights or the rights of specific, vulnerable groups as having particular significance and warranting particular protection under a Tasmanian Charter. For example, a number of responses strenuously urged protection of the right to freedom of speech and peaceful protest,⁴²⁷ the right to privacy,⁴²⁸ the right “to have fresh water and clean air”,⁴²⁹ the right to join trade unions and collectively bargain,⁴³⁰ rights in International Labour Conventions that are not part of the *International Covenant on Economic, Social and Cultural Rights* and the *International Covenant on Civil and Political Rights*⁴³¹ and the right to be free from bullying.⁴³²

4.16.2 Other clear themes that emerged during the consultation were the desire for further protection of the rights of indigenous Tasmanians, cultural minorities and Lesbian, Gay, Bisexual and Transgender (LGBT) Tasmanians. In this regard, mention was made of rights associated with the preservation of ‘individual and community identity’⁴³³ as well as cultural and spiritual identity,⁴³⁴ the preservation of culture⁴³⁵ and the right of people from culturally and linguistically diverse backgrounds to have important information interpreted for them by an accredited interpreter.⁴³⁶ These submissions put forward the view that the right to equality before the law and non-discrimination should be as broadly based as possible and should extend beyond the relevant provisions in the *International Covenant on Economic, Social and Cultural Rights* and the *International Covenant on Civil and Political Rights* which make no explicit reference to the rights of Indigenous people or Lesbian, Gay, Bisexual and Transgender people.

4.16.3 A significant matter highlighted by these submissions is that while the *International Covenant on Civil and Political Rights* and the *International Covenant on Economic, Social and Cultural Rights* should provide a foundational starting point in determining what specific rights to include in a Tasmanian Charter, modifications to and extensions of those rights will be necessary to accommodate the Tasmanian legal, political, social and cultural environment. For example, the United Nations Covenants are expressed in gender specific terms and contain some rights that are only within the jurisdictional ambit of the Federal Government. These matters alone mandate the departure of a Tasmanian Charter from the International instruments. Nevertheless, there are advantages in maintaining as much consistency as possible with those instruments. For instance, general consistency would ensure that the significant body of international human rights jurisprudence remains relevant to the interpretation of a Tasmanian Charter.

⁴²⁷ Submission 215; Submission 375; Submission 390.

⁴²⁸ Submission 82; Submission 215; Submission 84.

⁴²⁹ Submission 103; Submission 3.

⁴³⁰ Submission 103; Submission 215.

⁴³¹ Submission 383.

⁴³² Submission 197; Submission 308.

⁴³³ Submission 91.

⁴³⁴ Submission 91.

⁴³⁵ Submission 109; Submission 103.

⁴³⁶ Submissions 76; Submission 94.

Recommendation 16 – Specific rights

The rights in the Tasmanian Charter of Human Rights should be modelled on the *International Covenant on Civil and Political Rights* and the *International Covenant on Economic, Social and Cultural Rights* subject to the modifications recommended at paras [4.14.22]-[4.14.25] and [4.16.4]-[4.16.58] and in Recommendation 17. The specific rights that the Tasmanian Law Reform Institute recommends for inclusion in the Tasmanian Charter are:⁴³⁷

- *The right to life;
- The protection of the family and children;
- *The right to liberty and security of the person;
- The right to humane treatment when detained;
- *The right to a fair hearing;
- *The right of children to special treatment in the criminal justice process;
- The right to compensation for wrongful conviction;
- The right not to be tried or punished for conduct that was not a criminal offence when it was engaged in (freedom from retrospective criminal punishment);
- The right not to be imprisoned for a contractual debt;
- The right to privacy and reputation;
- Freedom of movement;
- Freedom of conscience, thought, religion and belief;
- Freedom of expression;
- Freedom of association and peaceful assembly and the right to form and join trade unions;
- The right to vote and to participate in public life;
- *The right to self-determination;
- The right to recognition as a person before the law;
- The right to equality before the law and to equal protection of the law;
- *Freedom from discrimination;
- *The right of ethnic, religious and linguistic minorities to enjoy their own culture;
- *The right of Indigenous Tasmanians to maintain their distinctive identity, culture, kinship ties and spiritual, material and economic relationship with the land;
- The right not to be subject to torture or cruel, inhuman or degrading treatment or punishment;
- Freedom from slavery and forced work;
- The right to work and just conditions of work;
- *The right of children not to be exploited economically or socially;
- The right to adequate food, clothing and housing;
- The right to the highest attainable standard of physical and mental health;
- The right to education;
- *The right not to be deprived of property except on just terms;

⁴³⁷ The content and form of the rights which are starred* are discussed further below at [4.16.4]-[4.16.58].

- *The right to a safe environment and to the protection of the environment from pollution and ecological degradation;
- Freedom from genocide.

Rights whose protection Constitutionally falls outside the jurisdiction of the State Government are:

- The right to social security;
- The right to marry;
- The right of foreign nationals not to be expelled from Australia without due process;
- The right to leave and re-enter Australia.

The Tasmanian Law Reform Institute recommends that these rights not be included in a Tasmanian Charter.

4.16.4 A number of the rights recommended for inclusion in the Tasmanian Charter call for specific discussion and recommendations.

The right to life

4.16.5 The right to life is set out in Article 6(1) of the *International Covenant on Civil and Political Rights*. In the ACT *Human Rights Act 2004*, this right is stated to start from birth. In this regard s 9 provides:

- (1) Everyone has the right to life. In particular, no-one may be arbitrarily deprived of life.
- (2) This section applies to a person from the time of birth.

4.16.6 The Victorian Human Rights Consultation Committee recommended that the right to life in the Victorian Charter be couched in the same terms.⁴³⁸ This recommendation was made to address the issue of whether the right to life should extend to the unborn child. This is a controversial issue and there are passionate advocates for and against such extension. However, the Tasmanian Law Reform Institute received only two submissions which argued that the right to life should be defined as commencing at conception. In this regard, the Catholic Women's League of Tasmania said:

The right to life is the condition for the exercise of all other rights. ... A Charter of Rights should affirm the right to life, an integral part of which is the right of the child to develop in the mother's womb from the moment of conception.⁴³⁹

4.16.7 Because the community is divided about the rights of the unborn, the Tasmanian Law Reform Institute is of the view that a Tasmanian Charter should adopt the approach of the ACT *Human Rights Act* and the recommendation of the Victorian Human Rights Consultation Committee and specify that the right to life applies from birth. A Tasmanian Charter should embody the consensus of the Tasmanian community. While there is agreement that all human beings have a right to life from birth, there is disagreement about whether it should extend to the unborn. This remains a matter of significant moral and scientific debate. It is a battleground upon which the Charter should not intrude. The Institute found the comments of the International Commission of Jurists helpful on this point,

... it would be wrong to attempt to use a Charter of Rights as a backdoor method of trying to resolve the abortion and stem cell debates and other similar debates. They should be treated as separate issues.⁴⁴⁰

⁴³⁸ Victorian Human Rights Consultation Committee, *Rights, Responsibilities and Respect: The Report of the Human Rights Consultation Committee* (2005).

⁴³⁹ Submission 64. See also Submission 23.

4.16.8 Inclusion of a provision in the same terms as s 9 of the ACT *Human Rights Act 2004* will ensure that these questions remains matters of community debate and individual conscience and judgment.

4.16.9 However, in contrast to the right set out in s 9 of the ACT Act, s 9 of the Victorian Charter and article 6(1) of the *International Covenant on Civil and Political Rights*, the right to life in a Tasmanian Charter should not be subject to inbuilt qualifications. The word ‘arbitrarily’ should therefore be removed so that the provision reads:

- (1) Every person has the right to life and the right not to be deprived of life.
- (2) This section applies to a person from the time of birth.

Freedom from discrimination

4.16.10 Submissions received by the Tasmanian Law Reform Institute strongly emphasised the need to make explicit the broad application of the right to freedom from discrimination. The *International Covenant on Civil and Political Rights* is felt to be deficient in that it omits mention of a number of groups who are particularly vulnerable to discrimination, including Indigenous peoples and Lesbian, Gay, Bisexual and Transgender people. Accordingly, the TGLRG told the Institute:

In this regard we note many examples of courts not recognising the human rights of LGBT people unless the human rights documents they are interpreting make the application of the documents to LGBT people quite clear.⁴⁴¹

4.16.11 The Tasmanian Anti-Discrimination Commissioner commented that the need for recognition of non-discrimination rights is important in addressing on-going areas of systemic discrimination, such as disability discrimination in employment and discrimination against the Aboriginal people of Tasmania and the need for a strong commitment to overcome this.⁴⁴²

4.16.12 The Tasmanian Law Reform Institute is of the view that a Tasmanian Charter should be consistent with the Tasmanian *Anti-Discrimination Act 1998* and that the grounds of discrimination it should proscribe should include all those listed in s 16 of that Act. This is also the view of the Tasmanian Anti-Discrimination Commissioner. This list is extensive and includes race, age, sexual orientation, lawful sexual activity, gender, marital status, relationship status, pregnancy, breastfeeding, parental status, family responsibilities, disability, industrial activity, political belief or affiliation, political activity, religious belief or affiliation, religious activity, irrelevant criminal record, irrelevant medical record and association with a person who has or is believed to have any of these attributes. The Tasmanian Anti-Discrimination Commissioner also recommended that a Tasmanian Charter should explicitly recognise that measures taken to benefit or promote the equality of disadvantaged groups or groups with special needs, do not constitute discrimination. This is the position taken under the Victorian *Charter of Human Rights and Responsibilities 2006* where s 8(4) states, “Measures taken for the purpose of assisting or advancing persons or groups of persons disadvantaged because of discrimination do not constitute discrimination.”

4.16.13 The Institute agrees that such a provision would provide clarity and certainty concerning the legitimacy of such measures and that it would also constitute an acknowledgment that much remains to be done to advance the interests of vulnerable and disadvantaged groups.

4.16.14 The Institute is mindful that the Tasmanian Government is currently undertaking a review of the *Anti-Discrimination Act*. Accordingly, any formulation of the proscribed grounds of discrimination

⁴⁴⁰ Submission 161.

⁴⁴¹ Submission 369.

⁴⁴² Submission 299.

in a Charter should take account of the outcome of that review. Nevertheless, a possible formulation of the right to equal recognition before the law and to be free from discrimination is:

- (a) Every person has the right to enjoy his or her human rights without discrimination.
- (b) Every person is equal before the law and is entitled to the equal protection of the law without discrimination and has the right to equal and effective protection against discrimination.
- (c) No person may be discriminated against on the ground of race, origin, ethnicity, age, sexual orientation, gender, lawful sexual activity, marital or relationship status, pregnancy, breastfeeding, parental status, family responsibilities, disability, industrial activity, political belief or affiliation, political activity, religious belief or affiliation, religious activity, irrelevant criminal record, irrelevant medical record, association with any person who has any of these attributes.

Property rights

4.16.15 Another concern expressed in submissions to the Institute was that there are currently few protections of property rights in Tasmania. Submissions focused particularly on the absence of any binding obligation for the Tasmanian Government and public authorities to pay just compensation when compulsorily acquiring private property. As noted in Lynden Griggs' submission, while there is a Commonwealth constitutional guarantee (s 51 (xxxix) of the Constitution) that property can only be acquired compulsorily on just terms, there is no equivalent State constitutional provision, although the *Land Acquisition Act 1993* (Tas) does provide for compensation within the context of that legislation. That Act can, of course, be easily overridden.⁴⁴³ Lynden Griggs' submission encapsulated the views of many who supported the inclusion of property rights in a Tasmanian Charter:

...[A] failure to include them will subject any human rights charter ... to a claim that a human rights charter without inclusion of property and other economic rights is nothing more than rhetorical grandstanding and will have little practical input into assisting those dispossessed of their possessions. As Gray and Gray eloquently profess: "Land is elemental: it is where life begins and it is where life ends. Land provides the physical substratum for all human activity; it is the essential base of all social and commercial interaction" (Gray and Gray, *Elements of Land Law* 4th edition, Oxford University Press, Oxford 2005 at 1).

4.16.16 Mr Griggs cautioned that the inclusion of property rights in a Tasmanian Charter should take account of any consequent impact on established land based doctrines built around possession (eg the doctrine of adverse possession) and their interaction with a registration system of land ownership. Having given detailed consideration to this issue he suggested that the most appropriate approach would be to enshrine a right to fair and just compensation for all dispossessions of property including dispossession by way of adverse possession. Such an approach would permit the current interaction between possessory titles and registered titles to continue, but would also ensure that the prevailing of a possessory title over a registered title requires compensation to pass from the possessor to the registered owner. Mr Griggs' approach would ensure "that any person receiving what may be perceived as a windfall benefit, is required to compensate the true owner."⁴⁴⁴

4.16.17 His proposal would also include compulsory acquisitions of property by the State government and apply to them the same principle that applies to the compulsory acquisitions of property by the federal government - that just compensation should be paid.

4.16.18 While the Victorian *Charter of Human Rights and Responsibilities 2006* purports in s 20 to protect property rights, in fact, this section is of little practical significance. It provides, "A person must not be deprived of his or her property other than in accordance with the law."

⁴⁴³ Submission 122.

⁴⁴⁴ Submission 122.

4.16.19 The requirement that deprivations of property be ‘in accordance with the law’ imposes no obligations with respect to payment of compensation, fair or otherwise. To make deprivations of property accord with the law the Victorian Government need only pass legislation authorising the acquisitions. Effectively, this leaves the Victorian Government free to enact legislation for the compulsory acquisition of property unfettered by the Charter or by a foundational right to just compensation for compulsory acquisition. Further, this clause constitutes a specific qualification to the right, which is essentially unnecessary given that the Victorian Charter contains a general reasonable limits clause. The International Commission of Jurists made the following comments on the Victorian provision and how property rights should be couched in a Tasmanian Charter:

Forfeiture of property is becoming a feature of some aspects of the criminal law and we need a provision to ensure that such forfeitures are reasonable. That they be in accordance with law is no guarantee as all criminal forfeiture provisions are provided for by law. The proviso that they be reasonable or just adds an additional guarantee. Besides there is no guarantee that compulsory acquisitions be on just terms under State law. They ought to be unless there are exceptional circumstances which justify acquisitions on terms which are unjust.⁴⁴⁵

4.16.20 A possible reason that a right to fair and just compensation was not included in s 20 of the Victorian Charter is that the Victorian Human Rights Consultation Committee was constrained by the Government’s Statement of Intent to make no recommendations that would entitle people to compensation for any breach of Charter rights.

4.16.21 The Tasmanian Law Reform Institute is of the view that a Tasmanian Charter should enshrine the right not to be deprived of property except on fair and just terms. This right should be expressed in general terms to ensure that it covers deprivations of property by any means and also deprivations of all forms of property including realty, intellectual property and all other forms of personal property. It should not be subject to any inbuilt specific limitations such as that contained in s 20 of the Victorian Charter. The following is a suggested formulation of this right:

Every person has a right not to be deprived of his or her property except on fair and just terms.

Right to a fair hearing

4.16.22 Under the Victorian Charter, the right to a fair trial or hearing is expressed in relatively narrow terms. The right applies only to an accused in criminal proceedings and to parties in civil proceedings. This leaves a range of people with an interest in the fair conduct of proceedings unprotected. As Jeremy Gans points out:

Others, including victims and the wider public have an interest in the correct outcome of such proceedings that ought to be regarded as a human right. (It may be that not all these people will be able to personally enforce this right in a legal proceeding, but that is a separate matter from whether courts and other parts of the Tasmanian government should be promoting or considering their rights).⁴⁴⁶

4.16.23 In contrast, the equivalent right in the ACT *Human Rights Act 2004* recognises that the right to a fair hearing is not isolated to the parties in civil cases or an accused facing criminal charges. Section 21(1) provides:

Everyone has the right to have criminal charges, and rights and obligations recognised by law, decided by a competent, independent and impartial court or tribunal after a fair and public hearing.

⁴⁴⁵ Submission 161.

⁴⁴⁶ Submission 111.

4.16.24 Unfortunately this provision is then made subject to the qualification that the court may exclude members of the public and the media in particular circumstances. As argued elsewhere in this report,⁴⁴⁷ this specific qualification is unnecessary given that the general reasonable limits clause in s 28 would operate in any event to legitimate laws enacted to enable the courts to preserve the anonymity of parties or to exclude the public and media from hearings where privacy and justice considerations so dictate.

4.16.25 Both the ACT and the Victorian provisions apply to hearings conducted by tribunals as well as to court proceedings. This is important because as Dr Ben Saul has pointed out:

In Australia, it is critically important to extend the limited right to a fair hearing in criminal cases or a (civil) suit at law (in Article 14 of the ICCPR) to encompass administrative hearings in which rights or obligations at law are determined. Such an extension would recognise the rapid growth of the modern bureaucratic State has involved increasing regulation of individual rights and obligations by administrative bodies which are not courts. This includes situations where legal rights or obligations are determined by administrative decision-makers or departmental officers outside a tribunal setting.

4.16.26 The Tasmanian Law Reform Institute recommends that the right to a fair hearing in a Tasmanian Charter should be expressed in terms that recognise the interests of all involved, not just the accused and the parties. The approach adopted in s 21(1) of the ACT *Human Rights Act 2004* provides an appropriate template in this regard. However, the inbuilt limitations contained in s 21(2)-(3) of that Act should be omitted from the Tasmanian Charter as being otiose because they are covered by the general reasonable limitations clause. The recommended formulation of this right is:

Everyone has the right to have criminal charges, and rights and obligations recognised by law, decided by a competent, independent and impartial court or tribunal after a fair and public hearing.

4.16.27 The right to a fair hearing in a Tasmanian Charter should be couched in terms that encompass the decision-making of administrative bodies that impacts on or regulates human rights.

4.16.28 The right to a fair hearing should include the minimum guarantees contained in Article 14 of the *International Covenant on Civil and Political Rights*. However, a number of changes with respect to the rights set out in Article 14.2 – 14.9 are recommended. Specifically, article 14.2 should be altered to read, “Everyone charged with a criminal offence shall have the right to be presumed innocent until proven guilty beyond reasonable doubt”. This is recommended because, as Jeremy Gans states, it

expressly identifies the core requirement of criminal proof in Tasmanian law. ...[and] reverse evidential and legal burdens would still be compatible with human rights, so long as they comply with the general limitation clause.⁴⁴⁸

4.16.29 Further, the right in Article 14.2(e) should be altered to enable an accused person to examine all the evidence against him or her and to adduce evidence on his or her own behalf. This right should not be limited, as it currently is, to the examination of witnesses. Accordingly, the word “witnesses” should be replaced in 14.2(e) wherever occurring with the word “evidence”.

⁴⁴⁷ See paras [4.14.6]-[4.14.9].

⁴⁴⁸ Submission 111.

Right to liberty and security of the person, the right to silence and the right against self-incrimination

4.16.30 When dealing with the rights that attach to a person deprived of his or her liberty during the pre-trial stages of the criminal justice process, Article 9 of the *International Covenant on Civil and Political Rights* uses a variety of terms including deprivation of liberty, arrest and detention. Some of these terms are used in relation to some protections under article 9 but not others. This has the potential to be confusing in the Tasmanian context, given the complexity and technicality of the current law relating to arrest. To avoid these technicalities and to ensure that the rights attaching to detained persons apply as widely as possible, the Tasmanian Law Reform Institute recommends that article 9.2 be modified to provide that a person who is deprived of his or her liberty must be told at the time of the arrest or detention of the reason for the arrest or detention and must be told promptly of any proceedings to be taken against him or her.

4.16.31 The rights to remain silent and not to incriminate oneself are recognised in the *International Covenant on Civil and Political Rights* and the ACT and Victorian human rights instruments as rights attached to criminal trials.⁴⁴⁹ These rights, however, are often of most significance in the pre-trial investigative stages of criminal proceedings. This should be recognised in a Tasmanian Charter. Accordingly, article 9.2 should be modified to include the following:

Everyone who is arrested or detained has the right:

- (a) to remain silent;
- (b) to be informed promptly
 - i of the right to remain silent; and
 - ii of the consequences of not remaining silent;⁴⁵⁰
- (c) not to be compelled to make any confession or admission that could be used in evidence against that person;⁴⁵¹
- (d) to communicate with a lawyer without delay and to be informed promptly of this right;⁴⁵²
- (e) to communicate with and be visited by a relative or friend and to be informed promptly of this right.⁴⁵³

Children

4.16.32 Some submissions expressed particular concern about the need to protect the rights of children.⁴⁵⁴ For example, the former Commissioner for Children said,

...the particular vulnerability of children by virtue of their age and lack of life experience warrants special protection for rights most relevant to this group. ...Some of the most significant rights for children are not applicable to others. ...To protect these rights will therefore require explicit provision for children as a discrete group.⁴⁵⁵

⁴⁴⁹ *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171, art 14.2(g) (entered into force 23 March 1976); *Human Rights Act 2004* (ACT) s 22(2)(i); *Charter of Human Rights and Responsibilities 2006* (Vic) s 25(2)(k).

⁴⁵⁰ See s 35(1) of the *Constitution of the Republic of South Africa 108 of 1996* (South Africa).

⁴⁵¹ *Ibid.*

⁴⁵² See s 10(b) of the *Canadian Charter of Rights and Freedoms 1982* (Canada).

⁴⁵³ See s 35(2)(f) of the *Constitution of the Republic of South Africa 108 of 1996* (South Africa).

⁴⁵⁴ Submission 67; Submission 320; Submission 73.

⁴⁵⁵ Submission 70.

4.16.33 Article 24 of the International Covenant on Civil and Political Rights provides:

Every child shall have, without any discrimination as to race, colour, sex, language, religion, national or social origin, property or birth, the right to such measures of protection as are required by his status as a minor, on the part of his family, society and the State.

4.16.34 Other child specific rights recognised in the International Human Rights Instruments are the right not to be exploited economically or socially, (ICESCR article 10.3), the right to healthy development, (ICESCR article 12.2), the right of children accused of committing criminal offences to be held separately from adults and to be brought as speedily as possible to court (ICCPR article 10.2 and 10.3) and the right to special treatment in criminal cases (ICCPR article 14.4).

4.16.35 It is recommended that similar protections specific to children be enacted in the Tasmanian Charter and adapted to the Tasmanian context. Both the ACT and Victorian human rights instruments contain protections of these kinds: s 11 Human Rights Act 2004 (ACT) and s 17 of the Victorian Charter - protection of the family and children; s 20 ACT Act and s 23 of the Victorian Charter – children in the criminal process. The following provisions are suggested for inclusion in a Tasmanian Charter:

Protection of the family and children

- (a) Families are the fundamental group unit of society and are entitled to be protected by society and the State.
- (b) Every child has the right, without distinction or discrimination, to such protection as is needed by him or her by reason of being a child.
- (c) Every child has the right to be protected from economic and social exploitation.

Children in the criminal process

- (a) An accused child who is detained or a child who is detained without charge must be segregated from all detained adults.
- (b) An accused child must be brought to trial as quickly as possible.
- (c) An accused child must be treated in a way that is appropriate for a person of his or her age who has not been convicted.
- (d) A convicted child must be treated in a way that is appropriate for a person of his or her age who has been convicted and that promotes his or her rehabilitation.
- (e) An accused child has the right to procedures that takes account of his or her age and that are appropriate for a person of his or her age.

Rights of indigenous Tasmanians

4.16.36 An additional question of importance is whether the rights of Indigenous Tasmanians should receive separate protection under any Tasmanian Charter of Rights. Proponents of such protection argue that existing laws and political and social structures ignore or diminish the rights of Aboriginal Tasmanians in a way that does not occur with other community groups. Some submissions suggested that a Tasmanian Charter should attempt to offer some amelioration of such problems by explicitly recognising the distinct nature of Indigenous rights and their past and continuing potential abuse. It is suggested that without explicit provision being made in a Tasmanian Charter for the protection of the rights of Aboriginal Tasmanians, their participation, on an equal footing, in the rights enjoyed by the majority may not be realised. Protections that are often mentioned in this regard are of cultural heritage and language, the right to self-determination and the recognition and protection of indigenous people's land rights.

4.16.37 Submissions also said that the history of human rights abuses against Indigenous Tasmanians and a continuing mindset amongst the majority non-Indigenous population which denies the on-going impact of that history, ground the need for a Tasmanian Charter to give particular recognition to the rights of Indigenous Tasmanians. For example, Australian Lawyers for Human Rights⁴⁵⁶ argued that as a result of dispossession of land and years of entrenched discrimination, Indigenous Australians require a separate and tailored human rights response. Dr Julie Debeljak similarly said that a Tasmanian Charter of Human Rights should recognise the special rights of Indigenous Tasmanians and must be broad enough to counter the dispossession, discrimination and inequalities suffered.⁴⁵⁷

4.16.38 In the Charter of Rights Issues Paper, the Tasmanian Law Reform Institute invited submissions on the issue of whether group rights, (those that are extended to an individual because of his or her classification as a member of an identified group), ought to be included in a Tasmanian Charter of Human Rights. Rights that specifically protect Aboriginal Tasmanians fall under the rubric of ‘group rights’.⁴⁵⁸

4.16.39 Although many of the submissions received on the issue of Indigenous rights were written by those who directly represent the views of the Tasmanian Indigenous community, many were not. Submissions from non-indigenous community groups and individuals also supported specific human rights protections for the Indigenous community in the Tasmanian Charter. Tom Baxter, for example, argued that the most disenfranchised groups in society warrant special and strong protection.⁴⁵⁹ Robin Banks adopted a similar argument, suggesting that to enable the protection of minority groups in Tasmania, an ‘equality provision’ or Article should be included in a Tasmanian Charter of Human Rights.⁴⁶⁰ The Justice and International Mission Unit Synod of Victoria and Tasmania, Uniting Church of Australia said that while basic human rights should apply equally to all people, not all people are equally able to defend themselves from infringements of their basic human rights and not all Tasmanians are able to enjoy their human rights equally. Accordingly, the Unit suggested that a Tasmanian Charter should include provisions directed towards protecting the rights of vulnerable groups, including women, children, Indigenous peoples and ethnic minorities.⁴⁶¹

Self-determination

4.16.40 The right to self-determination is one of the foundational rights of the *International Covenant on Civil and Political Rights* and the *International Covenant on Economic, Social and Cultural Rights*. Articles 1.1 of both these instruments provide:

All peoples have the right to self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.

4.16.41 Articles 3 to 5 of the *United Nations Declaration on the Rights of Indigenous Peoples* contain express provisions concerning Indigenous People’s right to self-determination. The Mersey Leven Aboriginal Corporation⁴⁶² urged the Tasmanian Law Reform Institute to recommend the incorporation of the rights set out in the *United Nations Declaration on the Rights of Indigenous Peoples* in a Tasmanian Charter. The Tasmanian Aboriginal Centre also strongly favoured the inclusion of a right to self-determination in a Tasmanian Charter, pointing to a continuing denial of the sovereignty of Aboriginal peoples to justify this recommendation:

⁴⁵⁶ Submission 26.

⁴⁵⁷ Submission 85.

⁴⁵⁸ Rhona Smith, *Textbook on International Human Rights* (2nd ed, 2005).

⁴⁵⁹ Submission 39.

⁴⁶⁰ Submission 29.

⁴⁶¹ Submission 385.

⁴⁶² Submission 208.

Rights within the Australian society (and Tasmanian) are based on the “one people, one nation” slogan. It is a slogan that has driven policy that has been imposed on Aboriginal people and in turn, has justified some wicked atrocities being committed against us. A Tasmanian Human Rights Bill must recognise the Aboriginal right to self-determination and from that foundation, address the political, economic and cultural rights that are denied Aboriginal people.⁴⁶³

4.16.42 The Centre argued that current State electoral and municipal boundaries effectively prevent Tasmanian Aborigines from electing their own representatives to political bodies. This diminishes the possibility of Aboriginal participation in the electoral process and excludes them from representative democracy. This then ensures that Aboriginal aspirations remain subordinate to the will of the majority non-Aboriginal population.

4.16.43 The right to self-determination is a complex right, consisting of both internal self-determination and external self-determination.⁴⁶⁴ As an external right, it has been understood to mean the right of a State to be free from external domination or the right of peoples to alter territorial boundaries and possibly to secede from the dominion of a colonising power.⁴⁶⁵ As an internal right, it has come to mean, the right of peoples within a State to participate fully in the political process.⁴⁶⁶ As noted by the Australian Lawyers for Human Rights,⁴⁶⁷ self-determination or the right of people to determine their own political destinies and to pursue economic, social and cultural development⁴⁶⁸ is of particular significance for Indigenous peoples. John Hughes suggested that it is a specific example of the right to racial equality and that it ought to be included in the Tasmanian Charter on that basis.⁴⁶⁹ Despite any complexity that may arise in the definition and scope of this right, a number of submissions supported its inclusion in a Tasmanian Charter of Human Rights.⁴⁷⁰

4.16.44 The submission of the Australian Lawyers for Human Rights suggested that any uncertainty about what might be encompassed within this right would be avoided through careful drafting, that is, by specifying what matters are to be covered by a right to self-determination, or by drafting a provision that includes an exhaustive definition of self-determination benefits.⁴⁷¹ Their submission pointed to the *United Nations Declaration of the Rights of Indigenous Peoples*, Articles 3, 4 and 5 as providing a useful guide in this regard and concluded that the right should include the right freely to determine political status, the right freely to pursue economic, social and cultural development and the right to autonomy or self-government in matters relating to internal and local affairs, as well as ways and means for financing autonomous functions. The extent to which this removes uncertainty, however, is questionable. The terms used are quite broad.

4.16.45 Although the Victorian Human Rights Consultation Committee recommended against the immediate inclusion of a right to self-determination in the Victorian *Charter of Human Rights and Responsibilities*, this recommendation was made in light of a wide-ranging consultation then occurring between Indigenous communities across Victoria and Aboriginal Affairs Victoria.⁴⁷² The Victorian Committee wished to ensure that any provision for self-determination reflected Indigenous communities’ understanding of the term and it felt that this could not be achieved in a Charter that must be general in its terms and operate across all the varied communities in Victoria. Nevertheless,

⁴⁶³ Submission 366.

⁴⁶⁴ Sarah Joseph, Melissa Castan and Jenny Shultz, *The International Covenant on Civil and Political Rights: Cases Materials and Commentary* (2000) 99.

⁴⁶⁵ Ibid, 101.

⁴⁶⁶ Ibid, 103.

⁴⁶⁷ Submission 26.

⁴⁶⁸ Sarah Joseph, Melissa Castan and Jenny Shultz, *The International Covenant on Civil and Political Rights: Cases Materials and Commentary* (2000) 103.

⁴⁶⁹ Submission 153.

⁴⁷⁰ See for example: Submission 103; Submission 49; Submission 26; Submission 36.

⁴⁷¹ Submission 26.

⁴⁷² Victorian Human Rights Consultation Committee, *Rights, Responsibilities and Respect: The Report of the Human Rights Consultation Committee* (2005) 38.

the Victorian Committee recommended that during the prescribed periodic reviews of the Charter, the issue of the inclusion of a right to self-determination should be revisited, along with the appropriate definition and scope of the right.⁴⁷³

4.16.46 In contrast, the ACT Bill of Rights Consultative Committee appears to have treated the right to self-determination as relatively unproblematic. It included this right in clause 12 of its draft Bill.⁴⁷⁴ This right was drafted to apply to all people in the ACT:

Clause 12 Self-determination

12.1 All peoples have the right to self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.

12.2 All peoples may, for their own ends, freely dispose of their natural wealth and resources without prejudice to any obligations arising out of international economic co-operation, based upon the principle of mutual benefit and international law.

12.3 The human rights set out in this Schedule shall not be interpreted as impairing the inherent right of all peoples to enjoy and freely utilise their natural wealth and resources.

4.16.47 Despite the concerns of the Victorian Human Rights Consultation Committee, the Tasmanian Law Reform Institute agrees with the approach of the ACT Human Rights Consultative Committee and recommends that a right to self-determination be included in a Tasmanian Charter of Human Rights. This right should be of general application. Nevertheless, it will have particular significance and, therefore, particularly strong implications for Tasmanian Indigenous communities.⁴⁷⁵ Consequently, inclusion of this right in a Tasmanian Charter will accord with the aspirations for reconciliation between Aboriginal and non-Aboriginal Tasmanians recently expressed by the Tasmanian Premier. On the night of his re-election, the Premier declared his personal and governmental vision for Tasmania to lead the nation in relation to Aboriginal reconciliation:

I want us to lead the nation economically, I want us to lead the nation socially, I want us to lead the nation with Aboriginal reconciliation... to resolve once and for all the Stolen Generation.... Until we make our final peace with the Aboriginal people, we won't be the culturally confident society that I want Tasmania to be...⁴⁷⁶

4.16.48 Other Tasmanians expressed similar wishes in their submissions to the Institute. For example, Bev Burgess wrote that there should be an acknowledgment of past mistakes and reconciliation with Indigenous Tasmanians, so that we can “deal with the past and get on with the future”.⁴⁷⁷ It is also important to note that the *Tasmania Together: Goals and Benchmarks*, Goal 7, standard 2 recognises the need to promote the rights of Aboriginal Tasmanians to self-determination.

4.16.49 Clause 12 of the ACT Bill of Rights Consultation Committee’s draft Human Rights Bill set out in Appendix 4 of the Committee’s Report, *Towards an ACT Human Rights Act* provides an appropriate model for a Tasmanian provision, (see [4.16.46]).

⁴⁷³ Ibid, 137.

⁴⁷⁴ Australian Capital Territory Bill of Rights Consultative Committee, *Towards an ACT Human Rights Act: Report of the ACT Bill of Rights Consultative Committee* (2003) 22 of Appendix 4.

⁴⁷⁵ Larissa Behrendt, ‘It’s Broke so Fix It: Arguments for a Bill of Rights’ (2003) 9(1) *Australian Journal of Human Rights* 257; Larissa Behrendt ‘Making Human Rights Matter: How Can Rights Frameworks Help Us to Create a Better Community?’ Paper presented at the Tasmanian Law Reform Institute Human Rights Forum, Law Faculty, University of Tasmania, 17th November, 2006, 20.

⁴⁷⁶ ABC News, *Re-elected Lennon Envisages Stronger Tasmania*, ABC News Website <<http://www.abc.net.au/news/newsitems/200603/s1595272.htm>> at 18 March 2006.

⁴⁷⁷ Submission 56.

Cultural rights

4.16.50 Article 27 of the *International Covenant on Civil and Political Rights* provides:

In those States in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practice their own religion, or to use their own language.

4.16.51 The *United Nations Draft Declaration on the Rights of Indigenous Peoples* is permeated with the language of ‘revitalising’ culture, religious practices and histories that are part of indigenous identity.⁴⁷⁸ RKM Smith, in commenting on the significance of cultural rights, argues that the right to physical existence is diminished without the protection of culture.⁴⁷⁹ A number of submissions to the Institute reflected this view. For example, the International Commission of Jurists said:

Tasmania should adopt a cultural rights provision similar to that in s 19 of the Victorian Charter as indigenous and immigrant groups should be guaranteed the right to maintain their own cultural traditions. The practice of a minority culture should not be seen as in any way inconsistent with Australian citizenship or membership of the Tasmanian community.⁴⁸⁰

4.16.52 Section 19 of the Victorian *Charter of Human Rights and Responsibilities 2006* aims to “ensure that mutual respect and understanding is encouraged and that government promotes and preserves diversity and cultural heritage within the context of shared law, values, aspirations and responsibilities.”⁴⁸¹ This provision also specifically recognises the distinct cultural rights of Indigenous peoples. It states:

- (1) All peoples with a particular cultural, religious, racial or linguistic background must not be denied the right, in community with others of that background, to enjoy his or her culture, to declare and practice his or her religion and to use his or her language.
- (2) Aboriginal persons hold distinct cultural rights and must not be denied the rights, with other members of their community –
 - (a) to enjoy their identity and culture; and
 - (b) to maintain and use their language; and
 - (c) to maintain their kinship ties; and
 - (d) to maintain their distinctive spiritual, material and economic relationship with the land and waters and other resources with which they have a connection under traditional laws and customs.

4.16.53 Section 27 of the ACT *Human Rights Act 2004* makes provision to similar effect although it does not give separate recognition to the distinct cultural rights of Indigenous people. Essentially it reproduces Article 27 of the *International Covenant on Civil and Political Rights* by providing:

Anyone who belongs to an ethnic, religious or linguistic minority must not be denied the right, with other members of the minority, to enjoy his or her culture, to declare and practice his or her religion, or to use his or her language.

4.16.54 In the opinion of the Tasmanian Law Reform Institute, specific protection of the cultural rights of Tasmania’s Indigenous community and of other cultural minority groups should be set down in a Tasmanian Charter of Human Rights. Such a provision would sit comfortably with the Premier’s vision of a culturally confident society for Tasmania and would replicate goal 5, standard 6 and goal 7

⁴⁷⁸ *United Nations Draft Declaration on the Rights of Indigenous Peoples*, Articles 12 and 13.

⁴⁷⁹ Rhona Smith, *Textbook on International Human Rights* (2nd ed, 2005) 128.

⁴⁸⁰ Submission 161.

⁴⁸¹ Victorian Human Rights Consultation Committee, *Rights, Responsibilities and Respect: The Report of the Human Rights Consultation Committee* (2005) 40.

of the *Tasmania Together: Goals and Benchmarks*. The Institute considers that s 19 of the Victorian *Charter of Human Rights and Responsibilities 2006* constitutes the most appropriate approach in this regard. This is because it acknowledges the need to protect the distinct identity and culture of Indigenous Australians and does not cast Indigenous cultural rights and the cultural rights of other minority groups in a single mould. RKM Smith argues that because indigenous peoples around the world have been subjected to systemic persecution and alienation and their rights as human beings consistently ignored and abused, those rights must be accorded explicit and particular protection in human rights instruments.⁴⁸² This point was also made by Dr Julie Debeljak in her submission to the Institute. She suggested that the right in Article 27 of the *International Covenant on Civil and Political Rights* be modified when included in a Tasmanian Charter to distinguish between the cultural rights of the Indigenous community and those of other ethnic minorities and to give recognition to the distinct and special position of Indigenous Tasmanians.

4.16.55 Accordingly, the Tasmanian Law Reform Institute recommends that a distinct provision protecting the cultural rights of Indigenous Tasmanians as well as other minority groups, modeled on s 19 of the Victorian Charter be included in the Tasmanian Charter.

The right to a clean and safe environment and to the protection of the environment from pollution and ecological degradation

4.16.56 Section 24 of the South African Bill of Rights states,

Everyone has the right

- (a) to an environment that is not harmful to their health or well-being; and
- (b) to have the environment protected, for the benefit of present and future generations, through reasonable legislative and other measures that
 - (i) prevent pollution and ecological degradation;
 - (ii) promote conservation; and
 - (iii) secure ecologically sustainable development and use of natural resources while promoting justifiable economic and social development.

4.16.57 The right to a clean environment is sometimes referred to as a “third-wave” right.⁴⁸³ It is a right that is particularly apposite to Tasmania, given Tasmania’s history of environmental protection and the jealousy with which Tasmanians guard and promote their ‘clean-green’ image. For example, concern for the protection of Tasmania’s environment, natural resources and natural heritage is strongly represented in *Tasmania Together Goals and Benchmarks*, goals 11 and 12. Tasmania has a reputation for leading Australia on issues of environmental protection. Inclusion of the right to a clean environment would place Tasmania in the vanguard of Australian jurisdictions in recognising the significance of this right. Some submissions to the Tasmanian Law Reform stressed the particular importance of this right to Tasmania and urged that it be included in a Tasmanian Charter.⁴⁸⁴ For example, in a joint submission, Barbara Hocking and Scott Guy told the Institute:

Environmental protection is required in order to ensure reasonable living standards, and is of particular significance to Tasmania. If the Bill or Charter is to embody shared beliefs, goals and values then an explicit commitment to environmental protection is needed. We suggest the inclusion of the principles of “ecological sustainability and bio-diversity” in the document.⁴⁸⁵

⁴⁸² Rhona Smith, *Textbook on International Human Rights* (2nd ed, 2005) 340.

⁴⁸³ Australian Capital Territory Bill of Rights Consultative Committee, *Towards an ACT Human Rights Act: Report of the ACT Bill of Rights Consultative Committee* (2003) 87.

⁴⁸⁴ Submission 133, Submission 134.

⁴⁸⁵ Submission 141.

4.16.58 These submissions argued that there is mounting evidence that degradation of the environment poses the single most significant threat to other fundamental human rights including the right to life, the right to the best attainable standard of health and the right to security of the person. The Tasmanian Law Reform Institute believes that the Tasmanian natural heritage and environment is an indelible part of Tasmanian culture. It is therefore appropriate to include the right to environmental protection in a Tasmanian Charter. A suitable model is provided by s 24 of the South African Bill of Rights (see [4.16.56]).

Recommendation 17 – Dealing with particular rights

The following rights should be dealt with in a Tasmanian Charter of Human Rights as follows:

- The provision enacting the right to life should specify that every person has the right to life and the right not to be deprived of life and that this right applies to a person from the time of birth.
- The provision relating to freedom from discrimination should conform to s 16 of the *Anti-Discrimination Act* (Tas) and specify as prohibited grounds of discrimination the matters listed in that section. A possible formulation is set out at para [4.16.14] above. This provision should also state that measures taken for the purpose of assisting or advancing persons or groups of persons disadvantaged because of discrimination do not constitute discrimination.
- The right of children to special protection by reason of being children and to be free from economic and social exploitation should be enacted as specified in para [4.16.35] above. The distinct rights of children in the criminal justice process as set out at para [4.16.35] above should be included in the Tasmanian Charter.
- Property rights should be protected by a provision that states that every person has a right not to be deprived of his or her property except on fair and just terms. This right must be expressed in general terms to ensure that it covers deprivations of property by any means and also deprivations of all forms of property including realty, intellectual property and all other forms of personal property.
- The right to a fair hearing should be expressed broadly to encompass the rights of all participants in the process and should state that everyone has the right to have criminal charges, and rights and obligations recognised by law, decided by a competent, independent and impartial court, tribunal or administrative decision-making body after a fair and public hearing. Couched in these terms the right also encompasses the decision-making of administrative bodies that impacts on or regulates human rights.
- There should be provision that everyone charged with a criminal offence shall have the right to be presumed innocent until proven guilty beyond reasonable doubt. The rights of an accused person in criminal trials should include the right to examine or have examined all the evidence against him or her and to adduce evidence on his or her own behalf. This right should not be limited to the examination of witnesses.
- The right to silence and the right not to incriminate oneself should be protected at the pre-trial as well as at the trial stages of the criminal justice process. A recommended formulation is set out as para [4.16.31].
- The right to self-determination modelled on clause 12 of the ACT Bill of Rights Consultation Committee's draft Human Rights Bill appended to the Committee's Report, *Towards an ACT Human Rights Act* should be enacted in the Tasmanian Charter.
- A provision protecting the cultural rights of Indigenous Tasmanians and other minority cultural groups, modelled on s 19 of the Victorian Charter should be included in the Tasmanian Charter.

- The right to a clean and safe environment and to the protection of the environment from pollution and ecological degradation modelled on s 24 of the South African *Bill of Rights* should be enacted in the Tasmanian Charter.
- Other civil and political rights and economic, social and cultural rights listed in Recommendation 16 should be included and modified and adapted to the Tasmanian context as recommended at para [4.14.25].

4.17 Rights and responsibilities

4.17.1 A further question concerning the ‘what rights’ issue is what role there is for responsibilities in a Tasmanian Charter of Rights. The existence of rights creates responsibilities in relation to the respect of those rights. Rights necessarily coexist with responsibilities. This begs the question, should a Tasmanian Charter of Rights acknowledge this and, if so, how should it do so? The Victorian *Charter of Human Rights and Responsibilities 2006* recognises that rights cannot exist without responsibilities and so deals with them as ‘two sides of the same coin’.⁴⁸⁶ To give effect to this proposition it emphasises in its preamble that human rights come with responsibilities and that they must be exercised in a way that respects the human rights of others. The ACT *Human Rights Act 2004* also includes specific mention of responsibilities in its preamble and encourages people to see themselves as responsible for upholding the rights of others. Neither instrument contains a separate list of responsibilities.

4.17.2 The Tasmanian Law Reform Institute received a mixed response on this issue. On the one hand there were those who, like the Justice and International Mission Unit, Synod of Victoria and Tasmania, Uniting Church of Australia, rejected the inclusion of a specific statement of responsibilities in a Tasmanian human rights instrument on the basis that the statement of fundamental human rights implicitly imposes an obligation and responsibility to ensure that the rights of all other members of society are recognised and observed.⁴⁸⁷ Dr Julie Debeljak suggested that because there is a power to limit rights, “there is no need to include a statement of responsibilities in any Charter of Human Rights in Tasmania.”⁴⁸⁸ On the other hand, some submissions expressed the desire for responsibilities to be set down and clarified as a separate, formal component of a Tasmanian Charter.⁴⁸⁹ For many proponents of this approach, the concern is that, in the absence of an explicit statement of responsibilities, human rights instruments create a selfish perception of rights with no countervailing sense of responsibilities. They lead to an attitude of ‘entitlement’ with no corresponding sense of obligation.

4.17.3 Others, like Erik Madsen and Dr Debeljak suggested that responsibilities should only apply to particular rights, perhaps in the form of limitations,⁴⁹⁰ such as the right to “freedom of speech *with responsibility*”.⁴⁹¹ The International Commission of Jurists suggested that there might be a limited role for responsibilities in a Tasmanian Charter because citizens do have some fundamental civic responsibilities, such as the responsibility to vote, to serve on juries, to pay taxes and to obey the law. However, the ICJ also said that there should be no attempt to define penalties or create remedies for breaches of these responsibilities. That should be left to more specific legislation. They noted that the responsibilities referred to are owed by the citizen to the State. They are not responsibilities that individuals owe each other. The ICJ said that the Tasmanian Charter should not attempt to set out the basic responsibilities which people owe each other because the relations of persons to each other differ from the relationship between the citizen and the State. The whole of private law deals with relations

⁴⁸⁶ Victorian Human Rights Consultation Committee, *Rights, Responsibilities and Respect: The Report of the Human Rights Consultation Committee* (2005) 30.

⁴⁸⁷ Submission 385.

⁴⁸⁸ Submission 85.

⁴⁸⁹ Submission 197; Submission 121; Submission 67; Submission 383.

⁴⁹⁰ Submission 85.

⁴⁹¹ Submission 101.

between persons and it would be difficult to sum up the essence of that law in a few statements of principle in a Charter.⁴⁹²

The Tasmanian Law Reform Institute's view

4.17.4 The Tasmanian Law Reform Institute agrees that recognition of rights implicitly involves recognition of responsibilities. This does not mean, however, that protection of people's fundamental rights is dependent upon their observance of their responsibilities. For example, the right of people to a fair trial cannot be contingent upon their not having infringed the rights of others. The basis and foundation of a civilised society, is that it accords rights to all. Of course, some rights may be curtailed or limited where particular individuals are concerned because their conduct has infringed the rights of others. But this will occur in a manner that accords with the fundamental principles involved in the balancing of rights and not because of a denial of their human rights.

4.17.5 The Institute believes that because the responsibility to respect the rights of others is inherent in the recognition of rights there is no need to set down in the Charter a separate list of responsibilities. The Institute therefore recommends that, like the *International Covenant on Civil and Political Rights*, the *International Covenant on Economic, Social and Cultural Rights*, the *Human Rights Act 2004* (ACT) and the *Charter of Human Rights and Responsibilities 2006* (Vic), the preamble of a Tasmanian Charter should state the principles on which it is founded including the principle that human beings are the holders of rights and that they have the duty to promote and uphold the rights of all other human beings.

4.17.6 Moreover, it is not necessary to include the word, 'responsibilities' in the title of a Tasmanian human rights instrument. In relation to this matter Jeremy Gans wrote:

Victoria's *Charter of Human Rights and Responsibilities* would have to be the most depressingly named fundamental rights document in history. The reference to responsibilities has a disturbingly Orwellian ring and is misleading, given the limited legal effect of Victoria's Charter. I implore you not to follow this lousy precedent.⁴⁹³

4.17.7 The Tasmanian Law Reform Institute agrees with the sentiment of this submission.

Recommendation 18 – Responsibilities

- It is not necessary to include in a Tasmanian Charter separate provisions relating to responsibilities.
- It is not necessary to include the word 'responsibilities' in the title of the proposed Tasmanian Charter.
- The preamble of a Tasmanian Charter should set down the principles on which it is founded including the principle that human beings are the holders of rights and that they have the duty to promote and uphold the rights of all other human beings.

⁴⁹² Submission 161.

⁴⁹³ Submission 111.

4.18 If Tasmania were to enact a Charter of Rights should citizens be able to enforce their rights under the Charter directly in the courts?

4.18.1 Should individual citizens be able to bring an action in court if their human rights are breached? Most human rights instruments in other jurisdictions allow for this to occur (the United Kingdom, Canada, South Africa and the United States). The United Kingdom model, however, confines awards of compensation to those cases where no other remedies are appropriate. In the ACT and New Zealand there is no express provision for individuals to enforce their rights in court. However, in New Zealand, the Court of Appeal has read individual rights of action and remedies for breach into the *Bill of Rights Act 1990* (NZ).⁴⁹⁴ The ACT Bill of Rights Consultative Committee recommended that the ACT Act should follow the United Kingdom model and make explicit provision for individuals to enforce their rights in the courts and that it should also make express provision for remedies in the event of any breach. Following the first review of the ACT Act, the Chief Minister of the ACT, Jon Stanhope foreshadowed its amendment to implement the Committee's recommendations in this regard.⁴⁹⁵ In the meantime, the position with respect to enforcement in the ACT is uncertain. It may be that ACT courts will, like the New Zealand courts, read individual rights of action and remedies into the Act. However, they may not. It is in the interests of the entire community that the position with regard to the enforceability of rights and the availability of remedies be clear and certain. Consequently, the Tasmanian Law Reform Institute does not consider that the ACT approach to the enforcement of Charter rights provides an appropriate model for Tasmania.

4.18.2 In line with the *Statement of Intent* issued by the Victorian Government, the Victorian *Charter of Human Rights and Responsibilities 2006* does not create any new causes of action and explicitly denies citizens the right to claim compensation for breach of their rights under the Charter. This does not, however, mean that Victorian citizens cannot on occasion enforce their rights under the Charter in court. The difficulty, however, is in identifying when this may be done. Key provisions in this regard are ss 38 and 39. Section 38 of the Victorian Charter deals with the obligations of public authorities and makes it unlawful for a public authority to act in a way that is incompatible with a human right. Section 39 deals with legal proceedings and provides that a person may seek any relief or remedy in respect of an act or decision of a public authority on the ground that the act or decision is unlawful, a breach of s 38 may provide that element of unlawfulness.

4.18.3 This operates as follows: breaches of Charter rights do not give rise to *an independent cause of action*. So, an existing cause of action or basis for seeking relief or remedy from the court must be found which enables breaches of Charter rights to be pleaded as a ground for obtaining relief. This effectively means that the Charter has only a collateral operation in its own enforcement. Section 39 limits the causes of action that enable breaches of Charter rights to be pleaded as a basis of obtaining relief to those actions which provide legal relief for the unlawful conduct of public authorities. Accordingly, in any action against a public authority that involves an element of unlawfulness, whether it arises under statute or the common law, a breach of s 38 may supply the element of unlawfulness. For instance, individuals have a general law right to seek declarations or injunctions in relation to the unlawful conduct of public authorities. The power to make the declaration or grant the injunction lies within the inherent jurisdiction of the Supreme Court. Now, in Victoria, as a result of ss 38 and 39, the element of unlawfulness to ground the grant of the order sought may be supplied by breach of the s 38 duty to comply with human rights.⁴⁹⁶ In any event, damages (compensation) may not be obtained for breach of Charter rights, though other remedies like a declaration or injunction may be.

⁴⁹⁴ *Simpson v Attorney General (Baigent's Case)* [1994] 3 NZLR 667.

⁴⁹⁵ Evidence to Standing Committee on Legal Affairs, Australian Capital Territory Legislative Assembly, Canberra, 10 November 2005, (Jon Stanhope).

⁴⁹⁶ Simon Evans and Carolyn Evans, 'Legal Redress Under the Victorian Charter of Human Rights and Responsibilities' (2006) 17 *Public Law Review* 264, 275-277.

4.18.4 While the example given above seems relatively straightforward, as Simon Evans' and Carolyn Evans' careful analysis of legal redress under the Victorian Charter demonstrates, the relationship between the Victorian Charter and the availability of legal remedies is complex and uncertain.⁴⁹⁷ Such complexity is detrimental to the effective operation of the Charter. It generates confusion both for those bound by it about the extent of their human rights obligations and for the general community about the degree of human rights protection it affords. Accordingly, the Tasmanian Law Reform Institute recommends that the Victorian approach to enforcement of Charter rights not be followed in Tasmania.

4.18.5 A majority of the submissions received by the Institute (248 – 61%) that addressed the issue of enforcement of Charter rights (125 – 29% expressed no position on this issue) supported their direct enforceability by court action. Only a minority of submissions were completely opposed to the enforceability of Charter rights. A small number of submissions suggested that breaches of Charter rights should be dealt with outside the court system preferably through mediation. Some submissions suggested that alternative dispute resolution processes should be exhausted before adversarial litigation might be embarked upon.⁴⁹⁸ Yet others argued that court action and awards of compensation should be reserved for the most abhorrent breaches of fundamental rights.⁴⁹⁹ Other submissions rejected approaches that diluted citizens' opportunities to obtain legal redress. For instance, the Coming Out Proud Program said:

We consider it important to avoid the situation applying in the federal sphere where an individual seeking redress must first request the Human Rights and Equal Opportunity Commission to attempt conciliation before s/he can commence legal action. At the State level an individual should have the right to choose whether to pursue conciliation or legal action.⁵⁰⁰

4.18.6 The primary concerns of those who opposed enabling citizens to enforce Charter rights directly in the courts were that it would open the floodgates to litigation and create a culture of division and complaint. The possibility of financial compensation, some felt, may act as an incentive for unmeritorious litigation.⁵⁰¹ For example, Erik Madsen suggested that, “[w]hen money gets involved, right or wrongs are often the first casualty.”⁵⁰²

4.18.7 Dr Philip Eldridge told the Institute that if court action was premised on an individual perception of the definition of human rights and the singular view that legislation was inconsistent with that perception, individual court action could be counterproductive.⁵⁰³

4.18.8 Those who supported provision for individuals to enforce Charter rights in court argued that rights are not taken seriously if they cannot be enforced directly and their breach redressed by compensation. For example, TasCOSS suggested that in the absence of a mechanism for enforcement, a Tasmanian Human Rights Act would be inadequate,⁵⁰⁴ or in the words of Linley Grant OAM, lacking in “teeth”.⁵⁰⁵ Dr Robin Banks told the Institute that without a mechanism for the enforcement of human rights, the protection of rights would effectively be left to the goodwill of the Parliament and the executive.⁵⁰⁶ Similarly, the Multicultural Council of Tasmania suggested that citizens should be

⁴⁹⁷ Ibid.

⁴⁹⁸ Submission 191; Submission 67; Submission 24; Submission 355; Submission 91.

⁴⁹⁹ Submission 383; Submission 147; Submission 106; Submission 179; Submission 314; Submission 61; Submission 62.

⁵⁰⁰ Submission 69.

⁵⁰¹ Submission 217; Submission 193; Submission 383; Submission 135.

⁵⁰² Submission 193.

⁵⁰³ Submission 96.

⁵⁰⁴ Submission 368.

⁵⁰⁵ Submission 121.

⁵⁰⁶ Submission 29.

able to take direct action in court to ensure that the Human Rights Act is a “vigorous and valid” instrument.⁵⁰⁷ Lionel Nichols summed up the position of many submissions:

The Charter of Rights should include a provision permitting individuals to seek redress in the courts for violations of their rights. Reliance upon existing causes of action and remedies in other legislation or the common law is fraught with danger as it is inevitable that these measures will at times prove inadequate. It would be contrary to the purposes of the Charter for a person to have his or her rights violated but to have no specific cause of action to redress that violation.⁵⁰⁸

4.18.9 Such submissions rejected concerns that enabling citizens to obtain remedies for human rights breaches would promote litigation. For example, Camilla Hughes stated, “[t]he experiences of other jurisdictions show that we need not fear a flood of unmeritorious litigation...”⁵⁰⁹

The Tasmanian Law Reform Institute’s view

4.18.10 The Tasmanian Law Reform Institute shares the view of those who argue that effective remedies should be available for breaches of Charter rights. If citizens are unable to enforce human rights in court, the Charter will be seen as a hollow instrument and as paying no more than lip service to human rights principles. The Institute also believes that the range of remedies available to the court should not be restricted. A court should be able to grant any remedy that is just and equitable in the circumstances. A Tasmanian Charter should not follow either the Victorian or ACT model. The silence of the ACT Act on the enforceability of rights consigns the determination of how rights may be enforced to the judiciary. This is contrary to the sovereignty of Parliament in relation to rights protection. The provisions in the Victorian Charter with regard to the enforceability of rights are complex and uncertain. This is inimical to the protection of rights. The aim of a Charter is to clarify people’s rights and to foster a culture that encourages individuals to see themselves and all other people as the holders of rights. Arming individuals with the ability to enforce human rights is essential to achieving this outcome. This does not preclude the possibility for people to deal with breaches of human rights by other means than court action. Provision should also be made for people to obtain negotiated outcomes through mediation and conciliation. However, people should not be limited to seeking remediation of human rights breaches in this manner. This too would downgrade the significance of human rights.

Recommendation 19 – Enforcement

- The Tasmanian Charter of Human Rights should contain express provision that where a public authority has acted in a way or proposes to act in a way that is made unlawful by the Charter, a person who is or would be the victim of that unlawful act may bring proceedings against the authority in the Supreme Court of Tasmania or may rely on the Charter rights in any legal proceedings.
- The Tasmanian Charter should state that the Supreme Court may grant such remedy or relief or make such order as it considers just and appropriate in the circumstances in relation to any act or proposed act of a public authority which it finds is or would be unlawful under the Tasmanian Charter.

⁵⁰⁷ Submission 218.

⁵⁰⁸ Submission 295.

⁵⁰⁹ Submission 152.

4.19 Review of the Tasmanian Charter of Human Rights

4.19.1 Enactment of a Tasmanian Charter of Human Rights will introduce significant changes in the way the law in Tasmania is enacted, applied and interpreted. It is therefore important that the operation of a Tasmanian Charter be regularly reviewed to ensure that it is operating according to its legislative intent. The reviews should include consideration of whether provisions in the Charter, particularly the rights provisions, enforcement provisions, and provisions relating to the role of the different arms of government, require refinement and if so in what way. The model chosen for the Charter should be subject to evaluation to ensure that it is actually assisting in the creation of a human rights aware culture both in the community and across government. Where the enacted Charter differs from the recommendations made in this report, or where an incremental approach has been adopted in respect of rights protection, the approach adopted should be assessed to determine whether the full recommendations in this report should be introduced. So, for example, if only civil and political rights are initially protected in the Charter, reviews should determine whether it is appropriate to expand the rights included to cover economic, social and cultural rights and environmental rights.

4.19.2 Many submissions received noted the importance of regularly reviewing the Charter to ensure that it does not become obsolete and that it accords with the aspirations and values of the Tasmanian community. For example, the Justice and International Mission Unit Synod of Victoria and Tasmania, Uniting Church of Australia said that Tasmanian Charter should be reviewed after five years, with public consultation, to assess its impact and effectiveness and to see if any amendment should be made to enhance its scope, impact and effectiveness.⁵¹⁰

4.19.3 The Tasmanian Law Reform Institute is of the view that reviews of the Charter should be undertaken by an independent body, funded adequately by the Government and that they should involve widespread community consultation. If the Office of a Human Rights Commissioner is created as recommended below, (see [4.20.12] – [4.20.20]), this office would be the most appropriate body to undertake reviews of the Charter.

4.19.4 In the ACT, reviews of the *Human Rights Act 2004* are legislatively set to occur at one and five year intervals from the commencement of the Act, (ss 43 and 44). In Victoria, reviews are to occur after the *Charter of Human Rights and Responsibilities 2006* has been in operation for four and eight years, (ss 44 and 45). The Tasmanian Law Reform Institute endorses the approach adopted in both jurisdictions for on-going review, but considers that the approach adopted in Victoria may be more appropriate for Tasmania. It provides a longer settling in period for the Charter than was allowed in the ACT before it is first reviewed and sets a more extended period for further reviews. Accordingly, the Tasmanian Law Reform Institute recommends that reviews of the Tasmanian Charter occur at four and eight year intervals after its commencement.

Recommendation 20 – Review of the Charter

- The Tasmanian Law Reform Institute recommends that the operation of the Tasmanian Charter be comprehensively reviewed after four and eight years from the date of its commencement.
- The review should be conducted by an independent body such as the proposed Office of the Tasmanian Human Rights Commissioner and should involve public consultation.
- The review should assess the following matters:
 - Whether the model implemented, (for example, the ‘dialogue model’), is operating to protect human rights and whether it should be amended to enact a different model, (for example, an entrenched model), to strengthen the protection of human rights;
 - Whether additional rights should be included in the Charter;

⁵¹⁰ Submission 385; and see also Submission 398; Submission 399; Submission 403; Submission 367; Submission 85.

- Whether the Charter is fostering the development of a culture of human rights awareness across government and in the community;
- Whether the different arms of government are implementing and applying the Charter effectively and whether changes need to be made to improve compliance with the Charter;
- Where the enacted Charter differs from the recommendations made in this report, or where an incremental approach has been adopted in respect of rights protection, whether the full recommendations in this report should be introduced and/or what further steps should be taken to achieve the progressive realisation of rights protection;
- If a ‘dialogue model’ is enacted, the extent to which the Parliament and executive respond to declarations made by the courts;
- Whether the definition of ‘public authority’ should include private businesses and enterprises that receive public funding and that carry out functions that have a public benefit including non-government schools and private health services;
- Whether the Charter should bind not only public authorities but all citizens and entities in the community.

4.20 If Tasmania were to enact a Charter of Rights what other steps should be taken to enhance the protection of human rights?

Human rights education

4.20.1 Submissions to the Institute stressed that the enactment of a Charter of Human Rights in Tasmania would merely be a starting point in establishing a human rights culture in Tasmania. During the community consultation process, it became apparent that many people in the community have misconceptions about the extent of human rights protection in Tasmania, what rights are protected, how they are protected and how any protections of rights may be activated. This shows that in order to achieve widespread understanding and knowledge of human rights and the way a Tasmanian Charter operates it will be necessary to implement effective education programs both within government and for the general community. As the Coming Out Proud Program told the Institute,

...we feel that education on Human Rights is a necessary adjunct to any Human Rights statute. This is because it is through education that individual citizens become aware of their rights and assert them for their own benefit and the benefit of the community generally.⁵¹¹

4.20.2 Similarly Amnesty International said:

The Tasmanian Charter should include as one of its objects: “the promotion of widespread public education and discussion about people’s human rights and responsibilities”. The importance of a Charter to education and awareness of human rights cannot be overstated. ...Accordingly, it would be important to ensure that provision was made for significant public education on the Charter. There would need to be a proactive campaign of community education explaining the existence of the Charter, the relevance of the Charter and how the Charter can be used by various community groups. It would also be important to ensure education for the public service as to the provisions of the Charter and the requirements that it creates. Training of those involved in enforcing the law, such as police, magistrates and judges is also essential.⁵¹²

⁵¹¹ Submission 69.

⁵¹² Submission 12.

4.20.3 The Justice and International Mission Unit Synod of Victoria and Tasmania, Uniting Church of Australia suggested that the promotion of human rights in Tasmania should involve a Human Rights Education Committee, which should be a collaborative initiative between peak education bodies in Tasmania, community organisations, the Anti-Discrimination and Human Rights Commission and relevant government departments.⁵¹³

4.20.4 As Amnesty International notes, it will be critical to the success of a Tasmanian Charter that those required to work with it on a daily or regular basis are fully conversant with its operation. Accordingly, it will be important that those working for public authorities, all members of the judiciary, magistracy and quasi-judicial tribunals, all members of Parliament and their staff and members of the legal profession have access to adequate training programs before the Charter becomes fully operational. In other jurisdictions such programs have been recognised as fundamental to the successful implementation of human rights instruments. For example, in the United Kingdom, large-scale education and training of public servants, the police, the judiciary and the community occurred prior to the *Human Rights Act 1998* (UK) coming into force. This has also occurred in Victoria.

4.20.5 The Tasmanian Law Reform Institute endorses the approach taken in Victoria and the United Kingdom with respect to the provision of broad-based community, government, judicial and Parliamentary training and education programs and recommends that such programs be similarly instituted in Tasmania prior to the Tasmanian Charter coming into full operation. Tasmania will be in the position of being able to draw on the Victorian experience in designing and implementing such programs.

Recommendation 21 – Education programs

The Tasmanian government should implement and support the following education programs:

- Those working for public authorities (government departments, the police, local government and any other body falling within the definition of ‘public authority’ under the Charter) should have access to human rights training and education;
- Judges, magistrates and members of tribunals should have access to human rights training and education programs;
- Members of Parliament and their staff should have access to human rights education programs and to programs relating specifically to the operation of the Charter within the legislative sphere;
- Members of the legal profession should have access to human rights education as part of the continuing education programs conducted within the profession;
- Education programs and strategies should be developed for the community, schools, businesses and community based organisations.

Within government

4.20.6 Tasmania is well placed to deal with the implementation of a Charter of Human Rights because Tasmanian government departments and agencies have considerable experience of working within a variety of human rights related policy and legislative frameworks like the Anti-Discrimination legislation and the *Tasmania Together Goals and Benchmarks*. In a sense, therefore, a Tasmanian Charter may be seen as lending formal recognition and support to a number of existing practices and as embedding and formalising them within an over-arching, single legislative framework. A Tasmanian Charter will generate significant operational changes within Government. To achieve these changes and to ensure that the Charter operates in accordance with its legislative intent, it will be necessary to institute a number of measures designed to support both the initial and the on-going implementation of the Charter. Experience in Victoria, the ACT and the United Kingdom

⁵¹³ Submission 385.

demonstrates that these measures should include the creation of a Human Rights Unit within the Department of Justice and the establishment of the independent statutory office of a Tasmanian Human Rights Commissioner. Broadly speaking, the functions of these bodies include the monitoring of human rights protections, the provision of advice to governments on human rights policies, the provision of guidance and advice to government departments and public authorities on human rights issues, the promotion of human rights awareness generally, the design and implementation of education and training programs both in the community and throughout government, the auditing of human rights programs and the implementation of phased reviews of the Charter to ensure their on-going effectiveness and relevance to the community. The last activity in particular must entail considerable community consultation.

Human Rights Unit

4.20.7 Both the Victorian and ACT Governments have established Human Rights Units within their Departments of Justice⁵¹⁴ staffed by lawyers with expertise in human rights. These Units have responsibility for overseeing the implementation at the governmental level of the ACT *Human Rights Act* and the Victorian Charter. They provide advice to departments on human rights issues, conduct educational programs within government, draw up guidelines to assist public officers in the development of human rights consistent legislation and policy, prepare documentation (including rewriting of the Cabinet handbook), develop protocols relevant to the government's human rights responsibilities, conduct public consultations and converse with other arms of government in relation to human rights. Their role within government, however, has not been to centralise responsibility for human rights within one department. Elizabeth Kelly, Deputy Chief Executive of the ACT Department of Justice and Community Safety explained the role of the ACT Human Rights Unit as follows:

The HRU does not own human rights within government and it is not the place to drop your human rights concerns at the door and collect the advice two weeks later. The approach of the Unit is to define the questions for agencies to ask themselves, send them away to identify sufficient and relevant reasons for justifying compatibility, and return to the Unit for final clearance, rather than receive the definitive answer to their problem. Each interaction is a tutorial on the particular human right engaged, rather than a conference with a client at which advice is provided. To some extent this approach suits our resource limitations – but we rather think we would proceed this way even if we had unlimited resources. Again this reflects our focus on building a human rights culture, rather than to produce a 'technically pure' model where we have excluded the possibility of any provision in the ACT legislation being held to be inconsistent with the HRA by a Court.⁵¹⁵

4.20.8 Human Rights Units such as those established in Victoria and the ACT, serve valuable functions in achieving the effective operation of human rights enactments, in facilitating their introduction and in inducting public authorities into their application. Such Units also perform a valuable role in encouraging the distribution of responsibility for human rights protection across all government departments and public authorities and in ensuring that that responsibility does not become and is not regarded as being the sole preserve of Justice Departments. Further, as noted by Elizabeth Kelly, devolved responsibility for human rights recognises that the assumption of sole responsibility for human rights would be beyond the resources of any one department.

4.20.9 The Tasmanian Law Reform Institute is of the view that a specialist Human Rights Unit along the lines of those established in Victoria and the ACT should be established within the Department of Justice to assist in the implementation of the Tasmanian Charter across government. A Tasmanian unit would help ensure the smooth introduction of the Charter and shorten the lead-time for its operation. It would provide the necessary leadership, assistance and advice to public authorities so that they are not confronted with the situation of having to comply with a Charter with little or no knowledge of how to do so.

⁵¹⁴ In the ACT, the Department of Justice and Community Safety.

⁵¹⁵ Elizabeth Kelly, 'Government in the ACT: A Human Rights Dialogue' (Paper presented at the Assessing the First Year of the ACT Human Rights Act Conference, Canberra, 29 June 2005) 4.

4.20.10 Another significant process that should be undertaken as part of the process of implementing a Tasmanian Charter of Human Rights is the review of all existing legislation to ensure its compliance with human rights. Existing legislation should not be treated as unproblematic until challenged in court. Rather the effort should be made prior to the commencement of the Charter, as part of the preparation for its implementation, to undertake a wholesale legislative review. In this regard the Human Rights and Equal Opportunity said:

As a first step, ... the executive will also need to undertake an audit of all its legislation, policy and practices before any Charter of Human Rights for Tasmania comes into force. Its approach to this audit could be modelled on the British experience. In Britain, all government departments audited their legislation, policies and practices for human rights compliance before the United Kingdom *Human Rights Act* came into force. They also undertook human rights awareness training within their departments.⁵¹⁶

4.20.11 This task might be undertaken or a least set in train by the Human Rights Unit.

Recommendation 22 – Human Rights Unit

A Department of Justice Human Rights Unit should be created with responsibility for:

- Guiding public authorities in the implementation of the Charter;
- Conducting human rights training programs for public authorities;
- Assisting the design and implementation of protocols within public authorities to facilitate compliance with the Charter in their decision-making and conduct;
- Devising or revising documentation relevant to the provision of advice to Ministers, Parliament and Cabinet on the human rights implications of policy and other proposals;
- Provision of advice and assistance in the preparation of Statements of Compatibility to accompany new legislation;
- Provision of advice in the preparation of documentation for Cabinet relating to the human rights compatibility of proposed policy.

Human Rights Commissioner

4.20.12 In a number of jurisdictions, including the ACT, Victoria, Canada, New Zealand and the United Kingdom, independent human rights bodies have been created with responsibility for reviewing legislation and statements of compatibility, inquiring into alleged breaches of human rights, conducting educational programs, reviewing the operation of human rights instruments and advising on policy relating to human rights.

4.20.13 A number of submissions urged that the independent office of Human Rights Commissioner be established in Tasmania.⁵¹⁷ For instance, Camilla Hughes⁵¹⁸ expressed the view of many when she said that it is essential that Tasmania establishes a Human Rights Commissioner in order to promote human rights, conduct community education programs, participate in training public authorities and monitor government compliance with human rights.⁵¹⁹

⁵¹⁶ Submission 155.

⁵¹⁷ See Submission 403; Submission 101; Submission 104; Submission 69; Submission 65; Submission 77.

⁵¹⁸ Submission 152.

⁵¹⁹ Submission 69; Submission 159; Submission 67; Submission 71; Submission 400; Submission 401; Submission 398; Submission 402.

4.20.14 The former Commissioner for Children provided a comprehensive outline of the potential responsibilities and roles of a Tasmanian Human Rights Commissioner.⁵²⁰ These include reviewing statements of compatibility that accompany bills before Parliament, interpreting legislation, and, upon request, providing advice to any Minister, Member of Parliament or government agency on any human rights matter.⁵²¹ The Commissioner further suggested that a Tasmanian Human Rights Commissioner should be able to intervene as a friend of court (*amicus curiae*) in any proceedings involving alleged breaches of the Charter and in cases where a declaration of incompatibility was sought in respect of legislation. The Human Rights and Equal Opportunity Commission made the same point in its submission.⁵²²

4.20.15 The submission of the Human Rights and Equal Opportunity Commission listed the functions of a Tasmanian Human Rights Commission as including:

- Monitoring human rights protection under the Charter;
- Advising government on compliance with the Charter;
- Promoting public awareness and understanding of the Charter;
- Intervention as *amicus curiae* or intervenor in court proceedings involving application of the Charter;
- Promoting awareness and understanding of the Charter within government and the court system;
- Encouraging government agencies to adopt policies and programs that are compatible with Charter rights;
- Preparing an annual report on the operation of the Charter to be tabled by the Attorney General in Parliament;
- Examining enactments to ensure they are human rights compliant;
- Reviewing practices of public authorities for Charter compatibility;
- Making submissions to the Parliamentary Human Rights Scrutiny Committee about the human rights implications of new Bills;
- Undertaking research to promote the objectives of the Charter.⁵²³

4.20.16 Some submissions suggested that instead of creating a new office of Human Rights Commissioner, the role of the Anti-Discrimination Commissioner might be expanded to include the tasks of a Human Rights Commissioner. In this regard, the Justice and International Mission Unit of the Uniting Church of Australia said:

... [T]he Unit believes that there is an advantage to expanding the existing Anti-Discrimination Commissioner role over establishing a new body, advocate or ombudsman ... in that the Anti-Discrimination Commissioner already has some expertise in the area of human rights, and there should be some cost efficiency in having one body instead of two.⁵²⁴

4.20.17 Other submissions argued that such an approach would limit the effectiveness of both roles.⁵²⁵ It is important that human rights not be seen as simply involving issues of discrimination. The creation of a separate office of Human Rights Commissioner will help establish a broader conception of human rights founded on their recognition as the conditions necessary for lives of dignity and value.

⁵²⁰ Submission 70.

⁵²¹ Submission 70.

⁵²² Submission 155.

⁵²³ Submission 155.

⁵²⁴ Submission 385.

⁵²⁵ See Submission 369.

The Tasmanian Law Reform Institute's view

4.20.18 The view of the Tasmanian Law Reform Institute is that expansion of the role of the Anti-Discrimination Commissioner to include the role of Human Rights Commissioner would inappropriately conflate the concepts of discrimination as a breach of human rights and human rights as a component of social identity. Human Rights and Anti-Discrimination Commissioners have fundamentally different yet necessary roles to play in relation to rights protection. To amalgamate the two offices would potentially devalue both roles. It is the Tasmanian Law Reform Institute's view that the attempt should not be made to encompass both roles within the one position. A separate office of Tasmanian Human Rights Commissioner should be created.

4.20.19 However, as David Fanning pointed out, this does not mean that the office of the Anti-Discrimination Commission and the office of the Human Rights Commission cannot share resources, information technology and secretariat support nor that their work cannot be carried under a single umbrella organisation. Doing so would reduce the initial financial outlay of establishing a separate Human Rights Commission, while maintaining the conceptual independence of each office. The ACT *Human Rights Act 2004* created the office of Human Rights Commissioner and established the Human Rights Office. This office has now merged with the Community and Health Services Commission and new positions of President and Commissioners for Children and Young People and Disability and Community Services have been established. In Victoria, the Equal Opportunity Commission Victoria has become the Victorian Equal Opportunity and Human Rights Commission. In both jurisdictions the Commissions may intervene in and be joined as a party to proceedings in which a question of law arises with respect to the interpretation of the Act and Charter respectively. Additionally, the Human Rights Commissioners in these jurisdictions have the following functions:

- To present an annual report to the Attorney General which examines the operation of the Charter (in Victoria) and the *Human Rights Act* (in the ACT), all declarations of incompatibility made by the courts, and, in Victoria, all override declarations made by Parliament;
- To examine the effect of statutory provisions and the common law on human rights;
- To review the programs and practices of public authorities to determine their compatibility with human rights;
- To provide education about human rights;
- To assist the Attorney General in reviews of the Charter in Victoria and the *Human Rights Act* in the ACT;
- To advise the Attorney General on anything relevant to the operation of the Charter/*Human Rights Act*;
- To perform any other function statutorily conferred on the Commissioner.

4.20.20 The Tasmanian Law Reform Institute endorses the approach in both the ACT and Victoria and recommends that the independent office of Tasmanian Human Rights Commissioner be established under the Charter with functions and powers akin to those granted the ACT and Victorian Human Rights Commissioners under the ACT *Human Rights Act 2004*, ss 40 and 41 and the Victorian *Charter of Human Rights and Responsibilities 2006*, ss40-43.

Recommendation 23 – Human Rights Commissioner

The independent office of Tasmanian Human Rights Commissioner should be established under the Tasmanian Charter of Human Rights. The Commissioner should have the following powers and functions:

- To provide education about human rights;

- To monitor human rights protection under the Charter and advise the government of the operation of the Charter;
- To promote public awareness of and compliance with the Charter;
- To intervene as amicus curiae or be joined as a party in any proceedings (court or tribunal), involving interpretation of the Charter;
- To promote awareness and understanding of the Charter across all arms of government;
- To present an annual report to the Attorney General (which should then be tabled in Parliament) which examines the operation of the Charter, all declarations of incompatibility made by the courts and all override declarations made by Parliament;
- To assist the Attorney General in reviews of the Charter;
- To examine the effect of statutory provisions and the common law on human rights and report to the Attorney General on the results of that examination;
- To review the programs and practices of public authorities to determine their compatibility with human rights;
- To make submissions to the Parliamentary Human Rights Scrutiny Committee about the human rights implications of new Bills;
- To undertake research that promotes the objectives of the Charter.

Appendix A

The Consultation

The first step in the consultation process was the establishment of a Human Rights Consultation Committee. The committee consisted of Terese Henning, Senior Lecturer in Law, (Chair), Mat Rowell, Chief Executive Officer, Tasmanian Council of Social Services, Lisa Hutton, Deputy Secretary, Department of Justice, Julian Eades, Advocate, Advocacy Tasmania, Alan Stevenson, former Managing Director, C6 quadriplegic and disability advisor to the committee and Jamie Cox, former Captain of Tasmanian Tigers, Career Development Co-ordinator, Tasmanian Cricket Association and Tasmanian Institute of Sport. The role of the Consultation Committee was to provide advice on the project to the Tasmanian Law Reform Institute and to provide points of contact with the community.

On 4 September 2006, the community consultation was formally commenced when the Tasmanian Attorney General, the Hon Steven Kons MHA, launched the Tasmanian Law Reform Institute Issues Paper, *A Charter of Rights for Tasmania?* and called for submissions about the project from the Tasmanian community. A pamphlet, *Do We Need a Tasmanian Charter of Human Rights? Have Your Say!* summarising key points in the Issues Paper, was issued shortly thereafter. The Issues Paper provided information on the matters that the Government had asked the Institute to explore with the community including how human rights are currently protected in Tasmania and how they are protected elsewhere including both in Australia and overseas. It also explored issues concerning models of human rights protection for Tasmania including arguments for and against a Charter of Human Rights, the form any Charter of Rights enacted in Tasmania should take, which rights should be protected and whether they should be subject to limitations, whose rights should be protected, what should be the role of the different arms of Government (that is, the courts, Parliament and the executive), in relation to future human rights protection, whether citizens should be able to enforce their rights directly in the courts and what further steps might need to be taken to enhance human rights protection in Tasmania.

Copies of the Issues Paper and/or pamphlet were initially distributed to approximately 800 community organisations and individuals. Both documents were also placed on the Institute web page. During the course of the consultation additional Issues Papers and pamphlets were distributed so that in total, approximately 700 Issues Papers and over 2,500 pamphlets were distributed.

After the launch, all three major Tasmanian newspapers, The Mercury, The Examiner and the Advocate, ran articles on the project and provided information on how people could make submissions to the Institute or find out more about the project. The Sunday Mercury then ran a further major opinion article by Wayne Crawford on the project. Terese Henning participated in a variety of radio interviews around the State and also appeared on the Tasmanian ABC current affairs program, Stateline.

Information about the project with links to the Issues Paper and pamphlet were also posted on the website of a number of key organisations including those of the Tasmanian Anti-Discrimination Commissioner, the Children's Commissioner, the Tasmanian Council of Social Services and Women Tasmania. Other organisations and a number of individuals disseminated information about the project at public meetings and via email and newsletters: Amnesty International, the International Commission of Jurists, Advocacy Tasmania, the Law Society of Tasmania, the Criminal Law Committee of the Law Society of Tasmania, United Nations Tasmania, the Coming Out Proud Program, the Tasmanian Gay and Lesbian Rights Group, the Centre for Global Learning, Unions

Tasmania, the Community and Public Sector Union, Colony 47, Anglicare, the Evatt Foundation, ACROD (now National Disability Services Ltd) and the Human Rights Week Organising Committee.

Large print versions of the Issues Paper and pamphlet and an audio version of the pamphlet were posted on the Institute web page for people with sight impairments. To facilitate the making of a submission, the key questions asked in the Issues Paper were placed on the Institute web page with an email link to the Institute and a Quick Response Sheet containing key questions on which the Institute sought community advice was placed on the Institute website and distributed at public meetings. The questions were a simplified version of those set out at greater length in the Issues Paper. They were open-ended and allowed people to provide concise or lengthy responses. This device was successful in encouraging people who might have been daunted by the prospect of providing a comprehensive response to the Issues Paper to make a submission to the Institute.

A Schools Kit was provided to all secondary schools and matriculation colleges to encourage teachers and students to participate in the consultation. Information about the project and the Schools Kit was placed on Infostream, an electronic service that distributes information by email to all staff of the Education Department of Tasmania and to other select external organisations. In November 2006, an article on human rights and responsibilities and the Institute Human Rights project was written for and published in the education supplement of the Examiner newspaper, "Take A Stand and Make a Difference!"⁵²⁶

4.20.21 To facilitate participation in the consultation, members of the Human Rights Consultation Committee undertook 66 community consultation meetings, briefing sessions and presentations with a wide range of community groups. Details of those meetings are set out in Appendix B. They included meetings with professional organisations to provide detailed information on specific questions in which they were interested, meetings with interest groups and groups representing particular sectors of society to provide general information on the project and to encourage and facilitate their contribution to it, meetings with social groups interested in the project from an educational aspect and meetings with groups of people who might otherwise be excluded or marginalised from the consultation process. The Committee was particularly anxious to include intellectually disabled people in the consultation. In this regard, it was felt that priority should be given to face-to-face meetings with groups of intellectually disabled people, rather than to the production of additional documentation. We are indebted to Chrissie Jamieson and Julian Eades of Advocacy Tasmania for enabling this to occur. We are also indebted to Margaret Reynolds, Chief Executive Officer of ACROD (now National Disability Services Ltd), who conducted workshops in relation to the project for people with disabilities and community groups.

4.20.22 The Institute also organised a number of seminars and presentations given by three Australian human rights experts, Richard Refshauge, the Australian Capital Territory Director of Public Prosecutions who spoke on the impact on the ACT criminal justice process of the ACT *Human Rights Act 2004*, Professor Larissa Behrendt, a member the Australian Capital Territory Human Rights Consultative Committee who spoke about human rights instruments generally and their specific relevance for indigenous communities and Professor George Williams, Chair of the Victorian Human Rights Consultation Committee, who presented information about the Victorian *Charter of Human Rights and Responsibilities 2006*.

4.20.23 People from diverse backgrounds and with a range of interests attended the community meetings, seminars and presentations. They included people from religious organisations, welfare groups, pensioner organisations, youth groups, groups working with the homeless, pensioner groups, women's shelters, indigenous groups, unions, social and educational organisations, multicultural organisations, women's groups, professional organisations, academics, elderly people, people with disabilities and gay/lesbian/transgender and bisexual organisations.

⁵²⁶ 'Take A Stand and Make a Difference!', *The Examiner*, Launceston, 7 November 2006, 23-24.

People were asked to make submissions by the 30th November 2006. However, it was made clear throughout the consultation process that the Institute would accept submissions beyond that date. In fact, the Institute continued to receive and accept submissions in 2007.

407 submissions were received from individuals and organisations. 355 of these submissions were received from individuals and 52 were received from organisations. Many of these organisations represent significant memberships. For example, Unions Tasmania is the peak body of the union movement in Tasmania representing the interests of over fifty thousand working people and their families; ACROD, (now National Disability Services Ltd), is the industry body for non-profit organisations providing specialist disability services. It has 38 member agencies offering a wide range of services to 16,000 Tasmanians affected by disability.

383 (94%) of submissions supported the enactment of a Charter of Human Rights to better protect human rights in Tasmania. A list of the submissions received is set out in Appendix C. Submissions were received from a broad cross-section of the community, including people living in rural areas, family based groups, Indigenous Tasmanians, political and non-political organisations, pensioners' groups, students, professional groups, members of the gay, lesbian, transgender and bisexual community, young people, people with disabilities, people from culturally diverse backgrounds, women's groups and faith based groups. While it is recognised that a process that calls for submissions cannot claim to result in a representative response⁵²⁷ in the way that analyses based on random selection do, the responses received are consistent with findings of an ACP Morgan Opinion Poll conducted in 2006 which showed that 81% of Tasmanians favoured the enactment of a Charter of Human Rights. This was the highest support rate of any Australian jurisdiction.⁵²⁸

The Tasmanian consultation process and response rate compares well with that achieved in other recent human rights consultations conducted elsewhere. In 2002, the community consultation on a Bill of Rights conducted in the Australian Capital Territory involved six town meetings, 49 public consultations, meetings and presentations and a two day deliberative poll involving 200 randomly selected ACT residents. The ACT Human Rights Consultative committee received 145 submissions. The community consultation conducted in Victoria in 2005 on a Charter of Human Rights involved 55 community consultation meetings, 75 focussed consultations with specific stakeholders and 32 devolved consultations. The Victorian Committee received 2524 submissions. On a per capita basis, (Victoria has a population of close to five million; Tasmania has a population of almost 500,000), the number of submissions received by the Tasmanian Law Reform Institute exceeds the number received by the Victorian Consultation Committee. It is the largest number of original submissions received by the Institute on any project it has undertaken to date. Given the very limited funds available to the Tasmanian Law Reform Institute to undertake the consultation in comparison with those available for the ACT and Victorian consultations, the Tasmanian Human Rights Consultation Committee and the Institute are pleased with the level of community response to the Tasmanian project.

This report draws on all submissions received in considering and making its recommendations. The Human Rights Consultation Committee and the Tasmanian Law Reform Institute Board thank all those who so generously and in so many different ways supported the project and they also thank all those who devoted time to making a submission to the Institute.

⁵²⁷ A point that was made by Geoffrey Hills in his submission to the Institute:

Because the topic of a Charter of Rights is politically contested, relative to the issues normally the subject of investigation by the Institute, there is a danger that the Institute's report might be represented by proponents of a Charter as indicative of broad community support for the enactment of legislation. As a measure of public opinion, the Project is subject to significant self-selection sampling (in that proponents of a Charter might reasonably be considered more likely to be aware of and respond to the Institute's call for submissions). Because the Institute's final report may be a catalyst and reference point for subsequent public debate, it is important that it should include a cautionary statement to this effect. Submission 136.

⁵²⁸ Roy Morgan Research, 'Anti-Terrorism Legislation Community Survey' (Paper presented to Amnesty International, Brisbane, 10 August 2006).

Concerns were expressed in some submissions and by some people that the consultation was not sufficiently wide,⁵²⁹ that the documents produced for the consultation were not of a type that enabled everyone in the community to be informed about and participate in the consultation and that the Committee was not adequately representative of the Tasmanian community. We acknowledge this critique and the defects in the consultation process and reiterate our thanks to those who, recognising the financial and time constraints under which we laboured, generously gave their assistance to distributing information about the project and promoting community participation in it. Your support was inestimable.

⁵²⁹ Submission 71; Submission 89.

Appendix B: Community Consultations

No.	Date	Name	Organisation
1	6/9	Terese Henning	International Commission of Jurists
2	13/9	Terese Henning	Hart FM
3	15/9	Julian Eades	Northern Disability Service Providers Forum
4	18/9	Terese Henning	Introduction to Law Class
5	20/9	Julian Eades	Advocacy Tasmania Inc. Board
6	24/9	Terese Henning	UNA
7	26/9	Julian Eades	Home and Community Care (HACC) Forum
8	9/10	Terese Henning	TROGA
9	12/10	Richard Refshauge	Law Society of Tasmania
10	12/10	Richard Refshauge	Seminar for Legal Profession
11	15/10	Rebecca Bradfield/Julian Eades	Family Based Care North
12	15/10	Rebecca Bradfield/Julian Eades	Speak Out Interest Group
13	16/10	Terese Henning	Hobart City Council, Youth ARC
14	16/10	Terese Henning	Community and Public Sector Union
15	17/10	Terese Henning	Huon FM
16	17/10	Rebecca Bradfield	School for Seniors Devonport
17	17/10	Rebecca Bradfield	Seniors Forum, Ulverstone
18	18/10	Terese Henning	School for Seniors, Geeveston
19	23/10	Terese Henning	Snr Executives, Justice Department

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20	23/10	Terese Henning	Tas Centre for Global Learning
21	24/10	Terese Henning	ABC (North) Radio
22	24/10	Terese Henning	RPH Radio
23	24/10	Terese Henning	Women's Council of Tasmania
24	24/10	Terese Henning	AFUW
25	25/10	Terese Henning	Over 50s Club, Bellerive
26	26/10	Terese Henning	Catholic Women's League (Launceston)
27	26/10	Terese Henning	City Park Radio
28	26/10	Terese Henning	Evatt Foundation
29	27/10	Terese Henning	Launceston Women's Shelter
30	31/10	Rebecca Bradfield	Northern Anglicare
31	1/11	Terese Henning	Colony 47
32	1/11	Terese Henning	Catholic Women's League (Hobart)
33	3/11	Terese Henning	TasCOSS
34	7/11	Terese Henning	Covehill
35	7/11	Julian Eades	TAFE Work Education Group
36	8/11	Terese Henning	Amnesty International/UNA
37	9/11	Terese Henning	COPP
38	10/11	Julian Eades	Wattle Group Day Centre
39	14/11	Terese Henning	Anglicare South
40	15/11	Terese Henning	University of the Third Age Taranna
41	15/11	Terese Henning	Family Planning Association of Tasmania
42	15/11	Terese Henning	Multicultural Council of Tasmania
43	16/11	Terese Henning/ Larissa Behrendt	Women Lawyers Association of Tasmania
44	17/11	Larissa Behrendt	Law faculty community seminar
45	17/11	Terese Henning	ABC Stateline
46	20/11	Terese Henning	Willow Court Group

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47	20/11	Terese Henning	Australian Education Union
48	20/11	Terese Henning	Whistleblowers Tasmania
49	21/11	George Williams	Heads of Agencies Meeting
50	21/11	George Williams	State Services Briefing
51	21/11	Terese Henning	Friends of the ABC
52	21/11	George Williams	ALP Party Forum
53	22/11	George Williams	Members of the Legislative Council
54	22/11	George Williams	Briefing of the PLP
55	23/11	Terese Henning	Speak Out
56	23/11	Terese Henning	Young Labour
57	24/11	Terese Henning	TGLRG
58	27/11	Terese Henning	Department of Premier and Cabinet
59	27/11	Terese Henning	Council for Civil Liberties
60	30/11	Terese Henning	COPP, State GLBTI, and TGLRG
61	7/12	Terese Henning / Margaret Reynolds	Insight Forum, Margate
62	12/12	Rebecca Bradfield	Young Women's Shelter, Launceston
63	20/12	Rebecca Bradfield	TGLRG, Launceston
64	20/12	Terese Henning	Senior managers, Health Department
65	19/2/07	Terese Henning	Zonta Club, Hobart
66	26/2/07	Terese Henning	Rotary Club Hobart

Appendix C: Submissions Received

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| <ol style="list-style-type: none"> 1. "A P Servant" 2. "Hermoine" 3. "Ordinary Citizen" 4. ACROD (now National Disability Services Ltd) 5. Adair, David 6. Adams – Fitton, Gail 7. Advocacy Tasmania 8. Aiken, Maureen 9. Albiston, Ros 10. Ali, Fatima 11. Allston, Simon 12. Amnesty International Tasmania 13. Anglicare Tasmania 14. Ansselin, Dr Annick 15. ARAFMI- Ron Cruickshank 16. Archer, Jennifer 17. Armand, Leah 18. Ashford, Anne 19. Ashford, Peter 20. Atkins, Richard 21. Austin, P. C 22. Australian Christian Lobby 23. Australian Family Association- Fritz Shoemaker 24. Australian Federation of University Women 25. Australian Labor Party 26. Australian Lawyers for Human Rights 27. Bange, Jane 28. Banks A.M, Dr 29. Banks, Robin 30. Banks, Victoria 31. Barfield, Michael 32. Barlow, Marena 33. Barnard, P 34. Barns, Greg 35. Bartels, Lorana | <ol style="list-style-type: none"> 36. Bartl, Benedict 37. Bates, Dawn 38. Bates, Jack 39. Baxter, Tom 40. Berry, Patricia 41. Bevan, Jane 42. Bird, Arthur 43. Bird, Pam 44. Blackburn, Dorothy 45. Blackwood, John 46. Blake, Antony B 47. Blake, Mary 48. Bleazby, John 49. Bock, Trish 50. Bowden, Jodie 51. Bowring, Deborah 52. Bradfield, Dr Rebecca 53. Brient, Lexie 54. Brimble, David 55. Brown, Peter 56. Burgess, Bev 57. Butler, Dr Lisa 58. Cairns, Joy - Aurora Disability Services 59. Cameron, Lyn – Family Based Care 60. Canalan, Stephanie 61. Carpenter, Carol 62. Carpenter, John 63. Carvosso, Annette 64. Catholic Women’s League 65. Chiang, Adrian Chong Voon 66. Churchill, Alan 67. Cianchi, John 68. Clifford, Sarah 69. Coming Out Proud Program 70. Commissioner for Children, Tasmania - Mr David Fanning 71. Community and Public Sector Union 72. Cooper, Anne |
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Appendix C

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| 73. Costin, Anne | 113. Garvie, Cyril |
| 74. Courtice, Elizabeth | 114. Garvie, Jeanette |
| 75. Cove Hill Workers Group | 115. Garwood, Crystal |
| 76. Cox, Carolyn | 116. Geoghegan, Greg |
| 77. Criminal Law Committee Tasmania | 117. Gervasoni, Fay |
| 78. Croome, Rodney | 118. Given, Sheila |
| 79. Crouch, Philip | 119. Glynn, Jason |
| 80. Davies, Bernadette | 120. Graham, James |
| 81. Davis, Dr J | 121. Grant, Linley - OAM |
| 82. Davis, Dr Julia | 122. Griggs, Lynden |
| 83. Day, Terence | 123. Griggs, Richard |
| 84. Deavin, James | 124. Guttray, Eva |
| 85. Debeljak, Dr Julie | 125. Hall, Leila |
| 86. Delaney, Leigh | 126. Hall, Sandra |
| 87. Dickins, Allan | 127. Hamilton, Clive |
| 88. Direen, Kelly | 128. Hann, Jenna |
| 89. Disability Services Tasmania | 129. Harris, Briony |
| 90. Dixon, Phillippa | 130. Hartwell, Timothy |
| 91. Doren, Brian | 131. Hayes, Stephen |
| 92. Duggan, Dean | 132. Haywood, Martin |
| 93. Duncanson, Sandy | 133. Henning, Diane |
| 94. Dutkiewicz, Manika | 134. Henning, Peter |
| 95. Eastwood -Sutherland, Caillin | 135. Herrera, Jennie |
| 96. Eldridge, Dr Philip- | 136. Hills, Geoffrey |
| 97. Ellerton, Rachael | 137. His Honour Chief Justice P G
Underwood AO |
| 98. Equal Justice Foundation | 138. Hitchman, A |
| 99. Evatt Foundation | 139. Hobart Community Legal Service |
| 100. Ewington, Douglas | 140. Hobart Quaker Peace and Justice
Committee |
| 101. Fearnley-Sander, Amy | 141. Hocking, Dr Barbara |
| 102. Ferguson, Diana | 142. Hollings, Prudence G |
| 103. Ferguson, Fiona | 143. Hollis, Jean |
| 104. Fernando, Michelle | 144. Holloway, Sarah |
| 105. Flanagan, Kathleen | 145. Hooper, John |
| 106. Fountain, S | 146. Hore, Neil |
| 107. Franks, Chris | 147. Horne, Peter |
| 108. Freeman, Sarah | 148. Hortle, Helen |
| 109. Friends of the ABC | 149. Howlett, Samantha |
| 110. Gale, Naomi | 150. Hughes, Ann |
| 111. Jeremy Gans | |
| 112. Garsed, Jeff | |

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|---|---|
| 151. Hughes, Anne | 190. Lugten, Kees |
| 152. Hughes, Camilla | 191. MacKean, John |
| 153. Hughes, John | 192. Mackie, Ken |
| 154. Hulme, Daniel | 193. Madsen, Erik |
| 155. Human Rights and Equal Opportunity
Commission | 194. Mahony, Moira |
| 156. Human Rights Law Resource Centre | 195. Malaher, Terence |
| 157. Hurburgh, Christine | 196. Marshall, Adam |
| 158. Ikedife, Penny | 197. Marshall, Alan J |
| 159. Ikin – de Brauw, Lucia | 198. Marshall, Heather |
| 160. Iliff, Geoffrey | 199. Marshall, Warwick |
| 161. International Commission of Jurists | 200. Matton – Johnson, Elanor |
| 162. Jacobs, Robert | 201. Maynard, Douglas |
| 163. Jago, Benjamin | 202. McEwine, Ron |
| 164. James, Helen | 203. McIntosh, E S |
| 165. Jarvis, Carolyn | 204. McIntosh, Naida |
| 166. Jefferson, Bev | 205. McIntosh, Peter D |
| 167. Jellinek, Sacha | 206. Mearns, Keith |
| 168. Jessup, Rebekah | 207. Media Student |
| 169. Jones, Peter D | 208. Mersey Leven Aboriginal Corporations |
| 170. Kevin, Jeff | 209. Michalek, Diana |
| 171. King, Andrea | 210. Miller, Hayley |
| 172. King, Campbell | 211. Mills, Audrey |
| 173. Knight, Cynthia | 212. Misrachi, Gemma |
| 174. Knipe, Sophie | 213. Mollineaux, John E |
| 175. Kohlmeyer, D | 214. Moore, Audrey |
| 176. Kosmeyer | 215. Moore, Gerard – Family Based Care
Association |
| 177. Kosmeyer, Helen | 216. Moore, Tom |
| 178. Latona, Margie | 217. Mora, Jennifer |
| 179. Lawrence, Roslyn | 218. Multicultural Council of Tasmania |
| 180. Le Loir, Nicole | 219. Munnings, Josh |
| 181. Lee, Lyn F | 220. Munnings, Rebecca |
| 182. LeFevre, Des | 221. Name Withheld (1) |
| 183. Lewin, Susan | 222. Name Withheld (2) |
| 184. Lewis, Ros | 223. Name Withheld (3) |
| 185. Lickiss, K | 224. Name Withheld (4) |
| 186. Lickiss, Valerie | 225. Name Withheld (5) |
| 187. Lobban, Barbara | 226. Name Withheld (6) |
| 188. Lucas, Jane | 227. Name Withheld (ACROD 1) |
| 189. Lugten, Dr Gail | 228. Name Withheld (ACROD 2) |

Appendix C

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| 229. Name Withheld (ACROD 3) | 269. Name Withheld (ACROD 43) |
| 230. Name Withheld (ACROD 4) | 270. Name Withheld (Anon. 1) |
| 231. Name Withheld (ACROD 5) | 271. Name Withheld (Anon. 2) |
| 232. Name Withheld (ACROD 6) | 272. Name Withheld (Anon. 3) |
| 233. Name Withheld (ACROD 7) | 273. Name Withheld (Anon. 4) |
| 234. Name Withheld (ACROD 8) | 274. Name Withheld (Anon. 5) |
| 235. Name Withheld (ACROD 9) | 275. Name Withheld (Anon. 6) |
| 236. Name Withheld (ACROD 10) | 276. Name Withheld (Anon. 7) |
| 237. Name Withheld (ACROD 11) | 277. Name Withheld (Anon. 8) |
| 238. Name Withheld (ACROD 12) | 278. Name Withheld (Anon. 9) |
| 239. Name Withheld (ACROD 13) | 279. Name Withheld (Anon. 10) |
| 240. Name Withheld (ACROD 14) | 280. Name Withheld (Anon. 11) |
| 241. Name Withheld (ACROD 15) | 281. Name Withheld (Anon. 12) |
| 242. Name Withheld (ACROD 16) | 282. Name Withheld (Anon. 13) |
| 243. Name Withheld (ACROD 17) | 283. Name Withheld (Anon. 14) |
| 244. Name Withheld (ACROD 18) | 284. Name Withheld (Anon. 15) |
| 245. Name Withheld (ACROD 19) | 285. Name Withheld (Anon. 16) |
| 246. Name Withheld (ACROD 20) | 286. Name Withheld (Anon. 17) |
| 247. Name Withheld (ACROD 21) | 287. Name Withheld (Anon. 18) |
| 248. Name Withheld (ACROD 22) | 288. Name Withheld (Anon. 19) |
| 249. Name Withheld (ACROD 23) | 289. Name Withheld (Anon. 20) |
| 250. Name Withheld (ACROD 24) | 290. Name Withheld (Anon. 21) |
| 251. Name Withheld (ACROD 25) | 291. Name Withheld (Anon. 22) |
| 252. Name Withheld (ACROD 26) | 292. Neale, Chris |
| 253. Name Withheld (ACROD 27) | 293. Nelson, Ian |
| 254. Name Withheld (ACROD 28) | 294. New South Wales Council for Civil
Liberties |
| 255. Name Withheld (ACROD 29) | 295. Nichols, Lionel |
| 256. Name Withheld (ACROD 30) | 296. Noelle |
| 257. Name Withheld (ACROD 31) | 297. Northeast, Rebecca |
| 258. Name Withheld (ACROD 32) | 298. Norton, Anna |
| 259. Name Withheld (ACROD 33) | 299. Office of the Anti-Discrimination
Commission - Sarah Bolt |
| 260. Name Withheld (ACROD 34) | 300. O'Halloran, Michael |
| 261. Name Withheld (ACROD 35) | 301. Ormandy, Phillipa |
| 262. Name Withheld (ACROD 36) | 302. Ormandy-Neale, Hadass |
| 263. Name Withheld (ACROD 37) | 303. Ormandy-Neale, Jordan |
| 264. Name Withheld (ACROD 38) | 304. Osborne, Rebecca |
| 265. Name Withheld (ACROD 39) | 305. Otlowski, Dr Margaret |
| 266. Name Withheld (ACROD 40) | 306. Ovenell, William |
| 267. Name Withheld (ACROD 41) | |
| 268. Name Withheld (ACROD 42) | |

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| <p>307. Panton, Betty</p> <p>308. Parker, Robyn</p> <p>309. Paterson, Mary</p> <p>310. Patmore, Dr Peter</p> <p>311. Pemberton, Hannah</p> <p>312. Pemberton, Michael</p> <p>313. Pennington, Adam</p> <p>314. Perrot, Stephanie</p> <p>315. Picone, Jeremy</p> <p>316. Plater, David</p> <p>317. Police Reform Alliance</p> <p>318. Porterhouse, Louise</p> <p>319. Potter, D</p> <p>320. Potuia, Marianne</p> <p>321. Power, Peter</p> <p>322. Prendergast, Bridget</p> <p>323. Preston, Fiona</p> <p>324. Punch, Julian</p> <p>325. Purton, Adam</p> <p>326. Ralph, Fiona</p> <p>327. Rands, Robert</p> <p>328. Reidy, Claudia</p> <p>329. Reidy, Elizabeth</p> <p>330. Reidy, Jessica</p> <p>331. Reidy, Simon</p> <p>332. Reidy, Tony - Royal Hobart Hospital
Research Foundation</p> <p>333. Rights Australia - Howard Glenn</p> <p>334. Roe, Margot</p> <p>335. Roonas, Jenny</p> <p>336. Rundle, Olivia</p> <p>337. Ryska, Todd</p> <p>338. Saul, Dr Ben</p> <p>339. Schroeter, Kerry</p> <p>340. Shaw, Trish</p> <p>341. Shelley, Sam</p> <p>342. Shelter Tasmania</p> <p>343. Shillito, Lewis</p> <p>344. Short, Helayne</p> <p>345. Simpson, Frank</p> | <p>346. Simpson, Jackie</p> <p>347. Smith, Liz</p> <p>348. Smyth, Eris</p> <p>349. Snell, Rick</p> <p>350. Sonntag, Perdita</p> <p>351. Spencer, Elizabeth A</p> <p>352. Sproule, Daryl</p> <p>353. Sproule, Denise</p> <p>354. Squier, Annabel</p> <p>355. Stafford, Helen</p> <p>356. Stevens, Allan</p> <p>357. Stevens, Anita</p> <p>358. Stewart, Natasha</p> <p>359. Stevens, Anne</p> <p>360. Stivicic, Rachel</p> <p>361. Stoessiger, Rex</p> <p>362. Stojcevski, Victor</p> <p>363. Stokes, Michael</p> <p>364. Stringer, Craig</p> <p>365. Tasmania Police - Acting Commissioner
of Police, J Johnston</p> <p>366. Tasmanian Aboriginal Centre Inc.
Michael Mansell</p> <p>367. Tasmanian Centre for Global Learning -</p> <p>368. Tasmanian Council of Social Services -</p> <p>369. Tasmanian Gay and Lesbian Rights
Group</p> <p>370. Tasmanian Women Lawyers</p> <p>371. Tasmanian Women's Council - Wanda
Buza</p> <p>372. Tasmanian Youth Consultative
Committee</p> <p>373. Tenants' Union of Tasmanian Inc</p> <p>374. The Hon. Peg Putt - Greens Opposition
Leader</p> <p>375. Thogersen, Patricia</p> <p>376. Thompson, Graeme</p> <p>377. Thompson, J Allan</p> <p>378. Thompson, Yabbo</p> <p>379. Tilley, Christine</p> |
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|---|---|
| 380. Tilley, Patrick | 394. Wang, Dai Wei Patricia |
| 381. Trembath, Shirley | 395. Wellman, Moira |
| 382. Trueman, Pym | 396. Wen, JIA |
| 383. Unions Tasmania - Simon Cocker | 397. Who, Jackie |
| 384. United Nations Association of Australia
(Tasmania) | 398. Williamson, Maureen |
| 385. Justice and International Mission Unit
Synod of Victoria and Tasmania, Uniting
Church of Australia | 399. Williamson, Rob |
| 386. Upchurch, M | 400. Wiseman, Clare |
| 387. Vincent, Phillip | 401. Wiseman, John |
| 388. Volunteering Tasmania | 402. Wiss, Alison |
| 389. Walker, Dr Karen | 403. Women's International League for Peace
and Friendship |
| 390. Walker, Jean | 404. Wood, Helen – Anti-Discrimination
Tribunal Tasmania. |
| 391. Walker, Katie | 405. Wootton, Clare |
| 392. Wallace – Pannell, Tom | 406. Working It Out Celebrating Diversity in
Tasmania |
| 393. Waller, Tony | 407. Young, John |

Appendix D

International Covenant on Civil and Political Rights

International Covenant on Civil and Political Rights, G.A. res. 2200A (XXI), 21 U.N. GAOR Supp. (No. 16) at 52, U.N. Doc. A/6316 (1966), 999 U.N.T.S. 171, *entered into force* Mar. 23, 1976.

PREAMBLE

The States Parties to the present Covenant,

Considering that, in accordance with the principles proclaimed in the Charter of the United Nations, recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world,

Recognizing that these rights derive from the inherent dignity of the human person,

Recognizing that, in accordance with the Universal Declaration of Human Rights, the ideal of free human beings enjoying civil and political freedom and freedom from fear and want can only be achieved if conditions are created whereby everyone may enjoy his civil and political rights, as well as his economic, social and cultural rights,

Considering the obligation of States under the Charter of the United Nations to promote universal respect for, and observance of, human rights and freedoms,

Realizing that the individual, having duties to other individuals and to the community to which he belongs, is under a responsibility to strive for the promotion and observance of the rights recognized in the present Covenant,

Agree upon the following articles:

PART I

Article I

1. All peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.
2. All peoples may, for their own ends, freely dispose of their natural wealth and resources without prejudice to any obligations arising out of international economic co-operation, based upon the principle of mutual benefit, and international law. In no case may a people be deprived of its own means of subsistence.
3. The States Parties to the present Covenant, including those having responsibility for the administration of Non-Self-Governing and Trust Territories, shall promote the realization of the right of self-determination, and shall respect that right, in conformity with the provisions of the Charter of the United Nations.

PART II

Article 2

1. Each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

2. Where not already provided for by existing legislative or other measures, each State Party to the present Covenant undertakes to take the necessary steps, in accordance with its constitutional processes and with the provisions of the present Covenant, to adopt such legislative or other measures as may be necessary to give effect to the rights recognized in the present Covenant.

3. Each State Party to the present Covenant undertakes:

(a) To ensure that any person whose rights or freedoms as herein recognized are violated shall have an effective remedy, notwithstanding that the violation has been committed by persons acting in an official capacity;

(b) To ensure that any person claiming such a remedy shall have his right thereto determined by competent judicial, administrative or legislative authorities, or by any other competent authority provided for by the legal system of the State, and to develop the possibilities of judicial remedy;

(c) To ensure that the competent authorities shall enforce such remedies when granted.

Article 3

The States Parties to the present Covenant undertake to ensure the equal right of men and women to the enjoyment of all civil and political rights set forth in the present Covenant.

Article 4

1. In time of public emergency which threatens the life of the nation and the existence of which is officially proclaimed, the States Parties to the present Covenant may take measures derogating from their obligations under the present Covenant to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with their other obligations under international law and do not involve discrimination solely on the ground of race, colour, sex, language, religion or social origin.

2. No derogation from articles 6, 7, 8 (paragraphs I and 2), 11, 15, 16 and 18 may be made under this provision.

3. Any State Party to the present Covenant availing itself of the right of derogation shall immediately inform the other States Parties to the present Covenant, through the intermediary of the Secretary-General of the United Nations, of the provisions from which it has derogated and of the reasons by which it was actuated. A further communication shall be made, through the same intermediary, on the date on which it terminates such derogation.

Article 5

1. Nothing in the present Covenant may be interpreted as implying for any State, group or person any right to engage in any activity or perform any act aimed at the destruction of any of the rights and freedoms recognized herein or at their limitation to a greater extent than is provided for in the present Covenant.

2. There shall be no restriction upon or derogation from any of the fundamental human rights recognized or existing in any State Party to the present Covenant pursuant to law, conventions, regulations or custom on the pretext that the present Covenant does not recognize such rights or that it recognizes them to a lesser extent.

PART III

Article 6

1. Every human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life.

2. In countries which have not abolished the death penalty, sentence of death may be imposed only for the most serious crimes in accordance with the law in force at the time of the commission of the crime and not contrary to the provisions of the present Covenant and to the Convention on the Prevention and Punishment of the Crime of Genocide. This penalty can only be carried out pursuant to a final judgement rendered by a competent court.

3. When deprivation of life constitutes the crime of genocide, it is understood that nothing in this article shall authorize any State Party to the present Covenant to derogate in any way from any obligation assumed under the provisions of the Convention on the Prevention and Punishment of the Crime of Genocide.

4. Anyone sentenced to death shall have the right to seek pardon or commutation of the sentence. Amnesty, pardon or commutation of the sentence of death may be granted in all cases.

5. Sentence of death shall not be imposed for crimes committed by persons below eighteen years of age and shall not be carried out on pregnant women.

6. Nothing in this article shall be invoked to delay or to prevent the abolition of capital punishment by any State Party to the present Covenant.

Article 7

No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment. In particular, no one shall be subjected without his free consent to medical or scientific experimentation.

Article 8

1. No one shall be held in slavery; slavery and the slave-trade in all their forms shall be prohibited.

2. No one shall be held in servitude.

3.

(a) No one shall be required to perform forced or compulsory labour;

(b) Paragraph 3 (a) shall not be held to preclude, in countries where imprisonment with hard labour may be imposed as a punishment for a crime, the performance of hard labour in pursuance of a sentence to such punishment by a competent court;

(c) For the purpose of this paragraph the term "forced or compulsory labour" shall not include:

(i) Any work or service, not referred to in subparagraph (b), normally required of a person who is under detention in consequence of a lawful order of a court, or of a person during conditional release from such detention;

(ii) Any service of a military character and, in countries where conscientious objection is recognized, any national service required by law of conscientious objectors;

(iii) Any service exacted in cases of emergency or calamity threatening the life or well-being of the community;

(iv) Any work or service which forms part of normal civil obligations.

Article 9

1. Everyone has the right to liberty and security of person. No one shall be subjected to arbitrary arrest or detention. No one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law.

2. Anyone who is arrested shall be informed, at the time of arrest, of the reasons for his arrest and shall be promptly informed of any charges against him.

3. Anyone arrested or detained on a criminal charge shall be brought promptly before a judge or other officer authorized by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release. It shall not be the general rule that persons awaiting trial shall be detained in custody, but release may be subject to guarantees to appear for trial, at any other stage of the judicial proceedings, and, should occasion arise, for execution of the judgement.

4. Anyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings before a court, in order that that court may decide without delay on the lawfulness of his detention and order his release if the detention is not lawful.

5. Anyone who has been the victim of unlawful arrest or detention shall have an enforceable right to compensation.

Article 10

1. All persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person.

2.

(a) Accused persons shall, save in exceptional circumstances, be segregated from convicted persons and shall be subject to separate treatment appropriate to their status as unconvicted persons;

(b) Accused juvenile persons shall be separated from adults and brought as speedily as possible for adjudication. 3. The penitentiary system shall comprise treatment of prisoners the essential aim of which shall be their reformation and social rehabilitation. Juvenile offenders shall be segregated from adults and be accorded treatment appropriate to their age and legal status.

Article 11

No one shall be imprisoned merely on the ground of inability to fulfil a contractual obligation.

Article 12

1. Everyone lawfully within the territory of a State shall, within that territory, have the right to liberty of movement and freedom to choose his residence.

2. Everyone shall be free to leave any country, including his own.

3. The above-mentioned rights shall not be subject to any restrictions except those which are provided by law, are necessary to protect national security, public order (ordre public), public health or morals or the rights and freedoms of others, and are consistent with the other rights recognized in the present Covenant.

4. No one shall be arbitrarily deprived of the right to enter his own country.

Article 13

An alien lawfully in the territory of a State Party to the present Covenant may be expelled therefrom only in pursuance of a decision reached in accordance with law and shall, except where compelling reasons of national security otherwise require, be allowed to submit the reasons against his expulsion and to have his case reviewed by, and be represented for the purpose before, the competent authority or a person or persons especially designated by the competent authority.

Article 14

1. All persons shall be equal before the courts and tribunals. In the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law. The press and the public may be excluded from all or part of a trial for reasons of morals, public order (ordre public) or national security in a democratic society, or when the interest of the private lives of the parties so requires, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice; but any judgement rendered in a criminal case or in a suit at law shall be made public except where the interest of juvenile persons otherwise requires or the proceedings concern matrimonial disputes or the guardianship of children.

2. Everyone charged with a criminal offence shall have the right to be presumed innocent until proved guilty according to law.

3. In the determination of any criminal charge against him, everyone shall be entitled to the following minimum guarantees, in full equality:

(a) To be informed promptly and in detail in a language which he understands of the nature and cause of the charge against him;

(b) To have adequate time and facilities for the preparation of his defence and to communicate with counsel of his own choosing;

(c) To be tried without undue delay;

(d) To be tried in his presence, and to defend himself in person or through legal assistance of his own choosing; to be informed, if he does not have legal assistance, of this right; and to have legal assistance assigned to him, in any case where the interests of justice so require, and without payment by him in any such case if he does not have sufficient means to pay for it;

(e) To examine, or have examined, the witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him;

(f) To have the free assistance of an interpreter if he cannot understand or speak the language used in court;

(g) Not to be compelled to testify against himself or to confess guilt.

4. In the case of juvenile persons, the procedure shall be such as will take account of their age and the desirability of promoting their rehabilitation.

5. Everyone convicted of a crime shall have the right to his conviction and sentence being reviewed by a higher tribunal according to law.

6. When a person has by a final decision been convicted of a criminal offence and when subsequently his conviction has been reversed or he has been pardoned on the ground that a new or newly discovered fact shows conclusively that there has been a miscarriage of justice, the person who has suffered punishment as a result of such conviction shall be compensated according to law, unless it is proved that the non-disclosure of the unknown fact in time is wholly or partly attributable to him.

7. No one shall be liable to be tried or punished again for an offence for which he has already been finally convicted or acquitted in accordance with the law and penal procedure of each country.

Article 15

1. No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence, under national or international law, at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time when the criminal offence was committed. If, subsequent to the commission of the offence, provision is made by law for the imposition of the lighter penalty, the offender shall benefit thereby.

2. Nothing in this article shall prejudice the trial and punishment of any person for any act or omission which, at the time when it was committed, was criminal according to the general principles of law recognized by the community of nations.

Article 16

Everyone shall have the right to recognition everywhere as a person before the law.

Article 17

1. No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honour and reputation.

2. Everyone has the right to the protection of the law against such interference or attacks.

Article 18

1. Everyone shall have the right to freedom of thought, conscience and religion. This right shall include freedom to have or to adopt a religion or belief of his choice, and freedom, either individually or in community with others and in public or private, to manifest his religion or belief in worship, observance, practice and teaching.

2. No one shall be subject to coercion which would impair his freedom to have or to adopt a religion or belief of his choice.

3. Freedom to manifest one's religion or beliefs may be subject only to such limitations as are prescribed by law and are necessary to protect public safety, order, health, or morals or the fundamental rights and freedoms of others. 4. The States Parties to the present Covenant undertake to have respect for the liberty of parents and, when applicable, legal guardians to ensure the religious and moral education of their children in conformity with their own convictions.

Article 19

1. Everyone shall have the right to hold opinions without interference.
2. Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice.
3. The exercise of the rights provided for in paragraph 2 of this article carries with it special duties and responsibilities. It may therefore be subject to certain restrictions, but these shall only be such as are provided by law and are necessary:
 - (a) For respect of the rights or reputations of others;
 - (b) For the protection of national security or of public order (ordre public), or of public health or morals.

Article 20

1. Any propaganda for war shall be prohibited by law.
2. Any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence shall be prohibited by law.

Article 21

The right of peaceful assembly shall be recognized. No restrictions may be placed on the exercise of this right other than those imposed in conformity with the law and which are necessary in a democratic society in the interests of national security or public safety, public order (ordre public), the protection of public health or morals or the protection of the rights and freedoms of others.

Article 22

1. Everyone shall have the right to freedom of association with others, including the right to form and join trade unions for the protection of his interests.
2. No restrictions may be placed on the exercise of this right other than those which are prescribed by law and which are necessary in a democratic society in the interests of national security or public safety, public order (ordre public), the protection of public health or morals or the protection of the rights and freedoms of others. This article shall not prevent the imposition of lawful restrictions on members of the armed forces and of the police in their exercise of this right.
3. Nothing in this article shall authorize States Parties to the International Labour Organisation Convention of 1948 concerning Freedom of Association and Protection of the Right to Organize to take legislative measures which would prejudice, or to apply the law in such a manner as to prejudice, the guarantees provided for in that Convention.

Article 23

1. The family is the natural and fundamental group unit of society and is entitled to protection by society and the State.
2. The right of men and women of marriageable age to marry and to found a family shall be recognized.

3. No marriage shall be entered into without the free and full consent of the intending spouses.
4. States Parties to the present Covenant shall take appropriate steps to ensure equality of rights and responsibilities of spouses as to marriage, during marriage and at its dissolution. In the case of dissolution, provision shall be made for the necessary protection of any children.

Article 24

1. Every child shall have, without any discrimination as to race, colour, sex, language, religion, national or social origin, property or birth, the right to such measures of protection as are required by his status as a minor, on the part of his family, society and the State.
2. Every child shall be registered immediately after birth and shall have a name.
3. Every child has the right to acquire a nationality.

Article 25

Every citizen shall have the right and the opportunity, without any of the distinctions mentioned in article 2 and without unreasonable restrictions:

- (a) To take part in the conduct of public affairs, directly or through freely chosen representatives;
- (b) To vote and to be elected at genuine periodic elections which shall be by universal and equal suffrage and shall be held by secret ballot, guaranteeing the free expression of the will of the electors;
- (c) To have access, on general terms of equality, to public service in his country.

Article 26

All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

Article 27

In those States in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practise their own religion, or to use their own language.

PART IV

Article 28

1. There shall be established a Human Rights Committee (hereafter referred to in the present Covenant as the Committee). It shall consist of eighteen members and shall carry out the functions hereinafter provided.
2. The Committee shall be composed of nationals of the States Parties to the present Covenant who shall be persons of high moral character and recognized competence in the field of human rights, consideration being given to the usefulness of the participation of some persons having legal experience.
3. The members of the Committee shall be elected and shall serve in their personal capacity.

Article 29

1. The members of the Committee shall be elected by secret ballot from a list of persons possessing the qualifications prescribed in article 28 and nominated for the purpose by the States Parties to the present Covenant.
2. Each State Party to the present Covenant may nominate not more than two persons. These persons shall be nationals of the nominating State.
3. A person shall be eligible for renomination.

Article 30

1. The initial election shall be held no later than six months after the date of the entry into force of the present Covenant.
2. At least four months before the date of each election to the Committee, other than an election to fill a vacancy declared in accordance with article 34, the Secretary-General of the United Nations shall address a written invitation to the States Parties to the present Covenant to submit their nominations for membership of the Committee within three months.
3. The Secretary-General of the United Nations shall prepare a list in alphabetical order of all the persons thus nominated, with an indication of the States Parties which have nominated them, and shall submit it to the States Parties to the present Covenant no later than one month before the date of each election.
4. Elections of the members of the Committee shall be held at a meeting of the States Parties to the present Covenant convened by the Secretary General of the United Nations at the Headquarters of the United Nations. At that meeting, for which two thirds of the States Parties to the present Covenant shall constitute a quorum, the persons elected to the Committee shall be those nominees who obtain the largest number of votes and an absolute majority of the votes of the representatives of States Parties present and voting.

Article 31

1. The Committee may not include more than one national of the same State.
2. In the election of the Committee, consideration shall be given to equitable geographical distribution of membership and to the representation of the different forms of civilization and of the principal legal systems.

Article 32

1. The members of the Committee shall be elected for a term of four years. They shall be eligible for re-election if renominated. However, the terms of nine of the members elected at the first election shall expire at the end of two years; immediately after the first election, the names of these nine members shall be chosen by lot by the Chairman of the meeting referred to in article 30, paragraph 4.
2. Elections at the expiry of office shall be held in accordance with the preceding articles of this part of the present Covenant.

Article 33

1. If, in the unanimous opinion of the other members, a member of the Committee has ceased to carry out his functions for any cause other than absence of a temporary character, the Chairman of the Committee shall notify the Secretary-General of the United Nations, who shall then declare the seat of that member to be vacant.
2. In the event of the death or the resignation of a member of the Committee, the Chairman shall immediately notify the Secretary-General of the United Nations, who shall declare the seat vacant from the date of death or the date on which the resignation takes effect.

Article 34

1. When a vacancy is declared in accordance with article 33 and if the term of office of the member to be replaced does not expire within six months of the declaration of the vacancy, the Secretary-General of the United Nations shall notify each of the States Parties to the present Covenant, which may within two months submit nominations in accordance with article 29 for the purpose of filling the vacancy.
2. The Secretary-General of the United Nations shall prepare a list in alphabetical order of the persons thus nominated and shall submit it to the States Parties to the present Covenant. The election to fill the vacancy shall then take place in accordance with the relevant provisions of this part of the present Covenant.
3. A member of the Committee elected to fill a vacancy declared in accordance with article 33 shall hold office for the remainder of the term of the member who vacated the seat on the Committee under the provisions of that article.

Article 35

The members of the Committee shall, with the approval of the General Assembly of the United Nations, receive emoluments from United Nations resources on such terms and conditions as the General Assembly may decide, having regard to the importance of the Committee's responsibilities.

Article 36

The Secretary-General of the United Nations shall provide the necessary staff and facilities for the effective performance of the functions of the Committee under the present Covenant.

Article 37

1. The Secretary-General of the United Nations shall convene the initial meeting of the Committee at the Headquarters of the United Nations.
2. After its initial meeting, the Committee shall meet at such times as shall be provided in its rules of procedure.
3. The Committee shall normally meet at the Headquarters of the United Nations or at the United Nations Office at Geneva.

Article 38

Every member of the Committee shall, before taking up his duties, make a solemn declaration in open committee that he will perform his functions impartially and conscientiously.

Article 39

1. The Committee shall elect its officers for a term of two years. They may be re-elected.
2. The Committee shall establish its own rules of procedure, but these rules shall provide, inter alia, that:
 - (a) Twelve members shall constitute a quorum;
 - (b) Decisions of the Committee shall be made by a majority vote of the members present.

Article 40

1. The States Parties to the present Covenant undertake to submit reports on the measures they have adopted which give effect to the rights recognized herein and on the progress made in the enjoyment of those rights:
 - (a) Within one year of the entry into force of the present Covenant for the States Parties concerned;
 - (b) Thereafter whenever the Committee so requests.
2. All reports shall be submitted to the Secretary-General of the United Nations, who shall transmit them to the Committee for consideration. Reports shall indicate the factors and difficulties, if any, affecting the implementation of the present Covenant.
3. The Secretary-General of the United Nations may, after consultation with the Committee, transmit to the specialized agencies concerned copies of such parts of the reports as may fall within their field of competence.
4. The Committee shall study the reports submitted by the States Parties to the present Covenant. It shall transmit its reports, and such general comments as it may consider appropriate, to the States Parties. The Committee may also transmit to the Economic and Social Council these comments along with the copies of the reports it has received from States Parties to the present Covenant.
5. The States Parties to the present Covenant may submit to the Committee observations on any comments that may be made in accordance with paragraph 4 of this article.

Article 41

1. A State Party to the present Covenant may at any time declare under this article that it recognizes the competence of the Committee to receive and consider communications to the effect that a State Party claims that another State Party is not fulfilling its obligations under the present Covenant. Communications under this article may be received and considered only if submitted by a State Party which has made a declaration recognizing in regard to itself the competence of the Committee. No communication shall be received by the Committee if it concerns a State Party which has not made such a declaration. Communications received under this article shall be dealt with in accordance with the following procedure:
 - (a) If a State Party to the present Covenant considers that another State Party is not giving effect to the provisions of the present Covenant, it may, by written communication, bring the matter to the attention of that State Party. Within three months after the receipt of the communication the receiving State shall afford the State which sent the communication an explanation, or any other statement in writing clarifying the matter which should include, to the extent possible and pertinent, reference to domestic procedures and remedies taken, pending, or available in the matter;

(b) If the matter is not adjusted to the satisfaction of both States Parties concerned within six months after the receipt by the receiving State of the initial communication, either State shall have the right to refer the matter to the Committee, by notice given to the Committee and to the other State;

(c) The Committee shall deal with a matter referred to it only after it has ascertained that all available domestic remedies have been invoked and exhausted in the matter, in conformity with the generally recognized principles of international law. This shall not be the rule where the application of the remedies is unreasonably prolonged;

(d) The Committee shall hold closed meetings when examining communications under this article;

(e) Subject to the provisions of subparagraph (c), the Committee shall make available its good offices to the States Parties concerned with a view to a friendly solution of the matter on the basis of respect for human rights and fundamental freedoms as recognized in the present Covenant;

(f) In any matter referred to it, the Committee may call upon the States Parties concerned, referred to in subparagraph (b), to supply any relevant information;

(g) The States Parties concerned, referred to in subparagraph (b), shall have the right to be represented when the matter is being considered in the Committee and to make submissions orally and/or in writing;

(h) The Committee shall, within twelve months after the date of receipt of notice under subparagraph (b), submit a report:

(i) If a solution within the terms of subparagraph (e) is reached, the Committee shall confine its report to a brief statement of the facts and of the solution reached;

(ii) If a solution within the terms of subparagraph (e) is not reached, the Committee shall confine its report to a brief statement of the facts; the written submissions and record of the oral submissions made by the States Parties concerned shall be attached to the report. In every matter, the report shall be communicated to the States Parties concerned.

2. The provisions of this article shall come into force when ten States Parties to the present Covenant have made declarations under paragraph I of this article. Such declarations shall be deposited by the States Parties with the Secretary-General of the United Nations, who shall transmit copies thereof to the other States Parties. A declaration may be withdrawn at any time by notification to the Secretary-General. Such a withdrawal shall not prejudice the consideration of any matter which is the subject of a communication already transmitted under this article; no further communication by any State Party shall be received after the notification of withdrawal of the declaration has been received by the Secretary-General, unless the State Party concerned has made a new declaration.

Article 42

1.

(a) If a matter referred to the Committee in accordance with article 41 is not resolved to the satisfaction of the States Parties concerned, the Committee may, with the prior consent of the States Parties concerned, appoint an ad hoc Conciliation Commission (hereinafter referred to as the Commission). The good offices of the Commission shall be made available to the States Parties concerned with a view to an amicable solution of the matter on the basis of respect for the present Covenant;

(b) The Commission shall consist of five persons acceptable to the States Parties concerned. If the States Parties concerned fail to reach agreement within three months on all or part of the composition of the Commission, the members of the Commission concerning whom no agreement has been

reached shall be elected by secret ballot by a two-thirds majority vote of the Committee from among its members.

2. The members of the Commission shall serve in their personal capacity. They shall not be nationals of the States Parties concerned, or of a State not Party to the present Covenant, or of a State Party which has not made a declaration under article 41.

3. The Commission shall elect its own Chairman and adopt its own rules of procedure.

4. The meetings of the Commission shall normally be held at the Headquarters of the United Nations or at the United Nations Office at Geneva. However, they may be held at such other convenient places as the Commission may determine in consultation with the Secretary-General of the United Nations and the States Parties concerned.

5. The secretariat provided in accordance with article 36 shall also service the commissions appointed under this article.

6. The information received and collated by the Committee shall be made available to the Commission and the Commission may call upon the States Parties concerned to supply any other relevant information. 7. When the Commission has fully considered the matter, but in any event not later than twelve months after having been seized of the matter, it shall submit to the Chairman of the Committee a report for communication to the States Parties concerned:

(a) If the Commission is unable to complete its consideration of the matter within twelve months, it shall confine its report to a brief statement of the status of its consideration of the matter;

(b) If an amicable solution to the matter on tie basis of respect for human rights as recognized in the present Covenant is reached, the Commission shall confine its report to a brief statement of the facts and of the solution reached;

(c) If a solution within the terms of subparagraph (b) is not reached, the Commission's report shall embody its findings on all questions of fact relevant to the issues between the States Parties concerned, and its views on the possibilities of an amicable solution of the matter. This report shall also contain the written submissions and a record of the oral submissions made by the States Parties concerned;

(d) If the Commission's report is submitted under subparagraph (c), the States Parties concerned shall, within three months of the receipt of the report, notify the Chairman of the Committee whether or not they accept the contents of the report of the Commission.

8. The provisions of this article are without prejudice to the responsibilities of the Committee under article 41.

9. The States Parties concerned shall share equally all the expenses of the members of the Commission in accordance with estimates to be provided by the Secretary-General of the United Nations.

10. The Secretary-General of the United Nations shall be empowered to pay the expenses of the members of the Commission, if necessary, before reimbursement by the States Parties concerned, in accordance with paragraph 9 of this article.

Article 43

The members of the Committee, and of the ad hoc conciliation commissions which may be appointed under article 42, shall be entitled to the facilities, privileges and immunities of experts on mission for the United Nations as laid down in the relevant sections of the Convention on the Privileges and Immunities of the United Nations.

Article 44

The provisions for the implementation of the present Covenant shall apply without prejudice to the procedures prescribed in the field of human rights by or under the constituent instruments and the conventions of the United Nations and of the specialized agencies and shall not prevent the States Parties to the present Covenant from having recourse to other procedures for settling a dispute in accordance with general or special international agreements in force between them.

Article 45

The Committee shall submit to the General Assembly of the United Nations, through the Economic and Social Council, an annual report on its activities.

PART V

Article 46

Nothing in the present Covenant shall be interpreted as impairing the provisions of the Charter of the United Nations and of the constitutions of the specialized agencies which define the respective responsibilities of the various organs of the United Nations and of the specialized agencies in regard to the matters dealt with in the present Covenant.

Article 47

Nothing in the present Covenant shall be interpreted as impairing the inherent right of all peoples to enjoy and utilize fully and freely their natural wealth and resources.

PART VI

Article 48

1. The present Covenant is open for signature by any State Member of the United Nations or member of any of its specialized agencies, by any State Party to the Statute of the International Court of Justice, and by any other State which has been invited by the General Assembly of the United Nations to become a Party to the present Covenant.
2. The present Covenant is subject to ratification. Instruments of ratification shall be deposited with the Secretary-General of the United Nations.
3. The present Covenant shall be open to accession by any State referred to in paragraph 1 of this article.
4. Accession shall be effected by the deposit of an instrument of accession with the Secretary-General of the United Nations.
5. The Secretary-General of the United Nations shall inform all States which have signed this Covenant or acceded to it of the deposit of each instrument of ratification or accession.

Article 49

1. The present Covenant shall enter into force three months after the date of the deposit with the Secretary-General of the United Nations of the thirty-fifth instrument of ratification or instrument of accession.

2. For each State ratifying the present Covenant or acceding to it after the deposit of the thirty-fifth instrument of ratification or instrument of accession, the present Covenant shall enter into force three months after the date of the deposit of its own instrument of ratification or instrument of accession.

Article 50

The provisions of the present Covenant shall extend to all parts of federal States without any limitations or exceptions.

Article 51

1. Any State Party to the present Covenant may propose an amendment and file it with the Secretary-General of the United Nations. The Secretary-General of the United Nations shall thereupon communicate any proposed amendments to the States Parties to the present Covenant with a request that they notify him whether they favour a conference of States Parties for the purpose of considering and voting upon the proposals. In the event that at least one third of the States Parties favours such a conference, the Secretary-General shall convene the conference under the auspices of the United Nations. Any amendment adopted by a majority of the States Parties present and voting at the conference shall be submitted to the General Assembly of the United Nations for approval.

2. Amendments shall come into force when they have been approved by the General Assembly of the United Nations and accepted by a two-thirds majority of the States Parties to the present Covenant in accordance with their respective constitutional processes. 3. When amendments come into force, they shall be binding on those States Parties which have accepted them, other States Parties still being bound by the provisions of the present Covenant and any earlier amendment which they have accepted.

Article 52

Irrespective of the notifications made under article 48, paragraph 5, the Secretary-General of the United Nations shall inform all States referred to in paragraph I of the same article of the following particulars:

- (a) Signatures, ratifications and accessions under article 48;
- (b) The date of the entry into force of the present Covenant under article 49 and the date of the entry into force of any amendments under article 51.

Article 53

1. The present Covenant, of which the Chinese, English, French, Russian and Spanish texts are equally authentic, shall be deposited in the archives of the United Nations.

2. The Secretary-General of the United Nations shall transmit certified copies of the present Covenant to all States referred to in article 48.

Appendix E

International Covenant on Economic, Social and Cultural Rights

International Covenant on Economic, Social and Cultural Rights, G.A. res. 2200A (XXI), 21 U.N.GAOR Supp. (No. 16) at 49, U.N. Doc. A/6316 (1966), 993 U.N.T.S. 3, *entered into force* Jan. 3, 1976.

PREAMBLE

The States Parties to the present Covenant, Considering that, in accordance with the principles proclaimed in the Charter of the United Nations, recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world,

Recognizing that these rights derive from the inherent dignity of the human person,

Recognizing that, in accordance with the Universal Declaration of Human Rights, the ideal of free human beings enjoying freedom from fear and want can only be achieved if conditions are created whereby everyone may enjoy his economic, social and cultural rights, as well as his civil and political rights,

Considering the obligation of States under the Charter of the United Nations to promote universal respect for, and observance of, human rights and freedoms,

Realizing that the individual, having duties to other individuals and to the community to which he belongs, is under a responsibility to strive for the promotion and observance of the rights recognized in the present Covenant,

Agree upon the following articles:

PART I

Article 1

1. All peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.

2. All peoples may, for their own ends, freely dispose of their natural wealth and resources without prejudice to any obligations arising out of international economic co-operation, based upon the principle of mutual benefit, and international law. In no case may a people be deprived of its own means of subsistence.

3. The States Parties to the present Covenant, including those having responsibility for the administration of Non-Self-Governing and Trust Territories, shall promote the realization of the right of self-determination, and shall respect that right, in conformity with the provisions of the Charter of the United Nations.

PART II

Article 2

1. Each State Party to the present Covenant undertakes to take steps, individually and through international assistance and co-operation, especially economic and technical, to the maximum of its available resources, with a view to achieving progressively the full realization of the rights recognized in the present Covenant by all appropriate means, including particularly the adoption of legislative measures.
2. The States Parties to the present Covenant undertake to guarantee that the rights enunciated in the present Covenant will be exercised without discrimination of any kind as to race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.
3. Developing countries, with due regard to human rights and their national economy, may determine to what extent they would guarantee the economic rights recognized in the present Covenant to non-nationals.

Article 3

The States Parties to the present Covenant undertake to ensure the equal right of men and women to the enjoyment of all economic, social and cultural rights set forth in the present Covenant.

Article 4

The States Parties to the present Covenant recognize that, in the enjoyment of those rights provided by the State in conformity with the present Covenant, the State may subject such rights only to such limitations as are determined by law only in so far as this may be compatible with the nature of these rights and solely for the purpose of promoting the general welfare in a democratic society.

Article 5

1. Nothing in the present Covenant may be interpreted as implying for any State, group or person any right to engage in any activity or to perform any act aimed at the destruction of any of the rights or freedoms recognized herein, or at their limitation to a greater extent than is provided for in the present Covenant.
2. No restriction upon or derogation from any of the fundamental human rights recognized or existing in any country in virtue of law, conventions, regulations or custom shall be admitted on the pretext that the present Covenant does not recognize such rights or that it recognizes them to a lesser extent.

PART III

Article 6

1. The States Parties to the present Covenant recognize the right to work, which includes the right of everyone to the opportunity to gain his living by work which he freely chooses or accepts, and will take appropriate steps to safeguard this right.
2. The steps to be taken by a State Party to the present Covenant to achieve the full realization of this right shall include technical and vocational guidance and training programmes, policies and techniques to achieve steady economic, social and cultural development and full and productive employment under conditions safeguarding fundamental political and economic freedoms to the individual.

Article 7

The States Parties to the present Covenant recognize the right of everyone to the enjoyment of just and favourable conditions of work which ensure, in particular:

- (a) Remuneration which provides all workers, as a minimum, with:
 - (i) Fair wages and equal remuneration for work of equal value without distinction of any kind, in particular women being guaranteed conditions of work not inferior to those enjoyed by men, with equal pay for equal work;
 - (ii) A decent living for themselves and their families in accordance with the provisions of the present Covenant;
- (b) Safe and healthy working conditions;
- (c) Equal opportunity for everyone to be promoted in his employment to an appropriate higher level, subject to no considerations other than those of seniority and competence;
- (d) Rest, leisure and reasonable limitation of working hours and periodic holidays with pay, as well as remuneration for public holidays

Article 8

1. The States Parties to the present Covenant undertake to ensure:

- (a) The right of everyone to form trade unions and join the trade union of his choice, subject only to the rules of the organization concerned, for the promotion and protection of his economic and social interests. No restrictions may be placed on the exercise of this right other than those prescribed by law and which are necessary in a democratic society in the interests of national security or public order or for the protection of the rights and freedoms of others;
- (b) The right of trade unions to establish national federations or confederations and the right of the latter to form or join international trade-union organizations;
- (c) The right of trade unions to function freely subject to no limitations other than those prescribed by law and which are necessary in a democratic society in the interests of national security or public order or for the protection of the rights and freedoms of others;
- (d) The right to strike, provided that it is exercised in conformity with the laws of the particular country.

2. This article shall not prevent the imposition of lawful restrictions on the exercise of these rights by members of the armed forces or of the police or of the administration of the State.

3. Nothing in this article shall authorize States Parties to the International Labour Organisation Convention of 1948 concerning Freedom of Association and Protection of the Right to Organize to take legislative measures which would prejudice, or apply the law in such a manner as would prejudice, the guarantees provided for in that Convention.

Article 9

The States Parties to the present Covenant recognize the right of everyone to social security, including social insurance.

Article 10

The States Parties to the present Covenant recognize that:

1. The widest possible protection and assistance should be accorded to the family, which is the natural and fundamental group unit of society, particularly for its establishment and while it is responsible for the care and education of dependent children. Marriage must be entered into with the free consent of the intending spouses.
2. Special protection should be accorded to mothers during a reasonable period before and after childbirth. During such period working mothers should be accorded paid leave or leave with adequate social security benefits.
3. Special measures of protection and assistance should be taken on behalf of all children and young persons without any discrimination for reasons of parentage or other conditions. Children and young persons should be protected from economic and social exploitation. Their employment in work harmful to their morals or health or dangerous to life or likely to hamper their normal development should be punishable by law. States should also set age limits below which the paid employment of child labour should be prohibited and punishable by law.

Article 11

1. The States Parties to the present Covenant recognize the right of everyone to an adequate standard of living for himself and his family, including adequate food, clothing and housing, and to the continuous improvement of living conditions. The States Parties will take appropriate steps to ensure the realization of this right, recognizing to this effect the essential importance of international co-operation based on free consent.
2. The States Parties to the present Covenant, recognizing the fundamental right of everyone to be free from hunger, shall take, individually and through international co-operation, the measures, including specific programmes, which are needed:
 - (a) To improve methods of production, conservation and distribution of food by making full use of technical and scientific knowledge, by disseminating knowledge of the principles of nutrition and by developing or reforming agrarian systems in such a way as to achieve the most efficient development and utilization of natural resources;
 - (b) Taking into account the problems of both food-importing and food-exporting countries, to ensure an equitable distribution of world food supplies in relation to need.

Article 12

1. The States Parties to the present Covenant recognize the right of everyone to the enjoyment of the highest attainable standard of physical and mental health.
2. The steps to be taken by the States Parties to the present Covenant to achieve the full realization of this right shall include those necessary for:
 - (a) The provision for the reduction of the stillbirth-rate and of infant mortality and for the healthy development of the child;
 - (b) The improvement of all aspects of environmental and industrial hygiene;
 - (c) The prevention, treatment and control of epidemic, endemic, occupational and other diseases;
 - (d) The creation of conditions which would assure to all medical service and medical attention in the event of sickness.

Article 13

1. The States Parties to the present Covenant recognize the right of everyone to education. They agree that education shall be directed to the full development of the human personality and the sense of its dignity, and shall strengthen the respect for human rights and fundamental freedoms. They further agree that education shall enable all persons to participate effectively in a free society, promote understanding, tolerance and friendship among all nations and all racial, ethnic or religious groups, and further the activities of the United Nations for the maintenance of peace.

2. The States Parties to the present Covenant recognize that, with a view to achieving the full realization of this right:

(a) Primary education shall be compulsory and available free to all;

(b) Secondary education in its different forms, including technical and vocational secondary education, shall be made generally available and accessible to all by every appropriate means, and in particular by the progressive introduction of free education;

(c) Higher education shall be made equally accessible to all, on the basis of capacity, by every appropriate means, and in particular by the progressive introduction of free education;

(d) Fundamental education shall be encouraged or intensified as far as possible for those persons who have not received or completed the whole period of their primary education;

(e) The development of a system of schools at all levels shall be actively pursued, an adequate fellowship system shall be established, and the material conditions of teaching staff shall be continuously improved.

3. The States Parties to the present Covenant undertake to have respect for the liberty of parents and, when applicable, legal guardians to choose for their children schools, other than those established by the public authorities, which conform to such minimum educational standards as may be laid down or approved by the State and to ensure the religious and moral education of their children in conformity with their own convictions.

4. No part of this article shall be construed so as to interfere with the liberty of individuals and bodies to establish and direct educational institutions, subject always to the observance of the principles set forth in paragraph 1 of this article and to the requirement that the education given in such institutions shall conform to such minimum standards as may be laid down by the State.

Article 14

Each State Party to the present Covenant which, at the time of becoming a Party, has not been able to secure in its metropolitan territory or other territories under its jurisdiction compulsory primary education, free of charge, undertakes, within two years, to work out and adopt a detailed plan of action for the progressive implementation, within a reasonable number of years, to be fixed in the plan, of the principle of compulsory education free of charge for all.

Article 15

1. The States Parties to the present Covenant recognize the right of everyone:

(a) To take part in cultural life;

(b) To enjoy the benefits of scientific progress and its applications;

(c) To benefit from the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he is the author.

2. The steps to be taken by the States Parties to the present Covenant to achieve the full realization of this right shall include those necessary for the conservation, the development and the diffusion of science and culture.

3. The States Parties to the present Covenant undertake to respect the freedom indispensable for scientific research and creative activity.

4. The States Parties to the present Covenant recognize the benefits to be derived from the encouragement and development of international contacts and co-operation in the scientific and cultural fields.

PART IV

Article 16

1. The States Parties to the present Covenant undertake to submit in conformity with this part of the Covenant reports on the measures which they have adopted and the progress made in achieving the observance of the rights recognized herein.

2.

(a) All reports shall be submitted to the Secretary-General of the United Nations, who shall transmit copies to the Economic and Social Council for consideration in accordance with the provisions of the present Covenant;

(b) The Secretary-General of the United Nations shall also transmit to the specialized agencies copies of the reports, or any relevant parts therefrom, from States Parties to the present Covenant which are also members of these specialized agencies in so far as these reports, or parts therefrom, relate to any matters which fall within the responsibilities of the said agencies in accordance with their constitutional instruments.

Article 17

1. The States Parties to the present Covenant shall furnish their reports in stages, in accordance with a programme to be established by the Economic and Social Council within one year of the entry into force of the present Covenant after consultation with the States Parties and the specialized agencies concerned.

2. Reports may indicate factors and difficulties affecting the degree of fulfilment of obligations under the present Covenant.

3. Where relevant information has previously been furnished to the United Nations or to any specialized agency by any State Party to the present Covenant, it will not be necessary to reproduce that information, but a precise reference to the information so furnished will suffice.

Article 18

Pursuant to its responsibilities under the Charter of the United Nations in the field of human rights and fundamental freedoms, the Economic and Social Council may make arrangements with the specialized agencies in respect of their reporting to it on the progress made in achieving the observance of the provisions of the present Covenant falling within the scope of their activities. These reports may include particulars of decisions and recommendations on such implementation adopted by their competent organs.

Article 19

The Economic and Social Council may transmit to the Commission on Human Rights for study and general recommendation or, as appropriate, for information the reports concerning human rights submitted by States in accordance with articles 16 and 17, and those concerning human rights submitted by the specialized agencies in accordance with article 18.

Article 20

The States Parties to the present Covenant and the specialized agencies concerned may submit comments to the Economic and Social Council on any general recommendation under article 19 or reference to such general recommendation in any report of the Commission on Human Rights or any documentation referred to therein.

Article 21

The Economic and Social Council may submit from time to time to the General Assembly reports with recommendations of a general nature and a summary of the information received from the States Parties to the present Covenant and the specialized agencies on the measures taken and the progress made in achieving general observance of the rights recognized in the present Covenant.

Article 22

The Economic and Social Council may bring to the attention of other organs of the United Nations, their subsidiary organs and specialized agencies concerned with furnishing technical assistance any matters arising out of the reports referred to in this part of the present Covenant which may assist such bodies in deciding, each within its field of competence, on the advisability of international measures likely to contribute to the effective progressive implementation of the present Covenant.

Article 23

The States Parties to the present Covenant agree that international action for the achievement of the rights recognized in the present Covenant includes such methods as the conclusion of conventions, the adoption of recommendations, the furnishing of technical assistance and the holding of regional meetings and technical meetings for the purpose of consultation and study organized in conjunction with the Governments concerned.

Article 24

Nothing in the present Covenant shall be interpreted as impairing the provisions of the Charter of the United Nations and of the constitutions of the specialized agencies which define the respective responsibilities of the various organs of the United Nations and of the specialized agencies in regard to the matters dealt with in the present Covenant.

Article 25

Nothing in the present Covenant shall be interpreted as impairing the inherent right of all peoples to enjoy and utilize fully and freely their natural wealth and resources.

PART V

Article 26

1. The present Covenant is open for signature by any State Member of the United Nations or member of any of its specialized agencies, by any State Party to the Statute of the International Court of

Justice, and by any other State which has been invited by the General Assembly of the United Nations to become a party to the present Covenant.

2. The present Covenant is subject to ratification. Instruments of ratification shall be deposited with the Secretary-General of the United Nations.

3. The present Covenant shall be open to accession by any State referred to in paragraph 1 of this article.

4. Accession shall be effected by the deposit of an instrument of accession with the Secretary-General of the United Nations.

5. The Secretary-General of the United Nations shall inform all States which have signed the present Covenant or acceded to it of the deposit of each instrument of ratification or accession.

Article 27

1. The present Covenant shall enter into force three months after the date of the deposit with the Secretary-General of the United Nations of the thirty-fifth instrument of ratification or instrument of accession.

2. For each State ratifying the present Covenant or acceding to it after the deposit of the thirty-fifth instrument of ratification or instrument of accession, the present Covenant shall enter into force three months after the date of the deposit of its own instrument of ratification or instrument of accession.

Article 28

The provisions of the present Covenant shall extend to all parts of federal States without any limitations or exceptions.

Article 29

1. Any State Party to the present Covenant may propose an amendment and file it with the Secretary-General of the United Nations. The Secretary-General shall thereupon communicate any proposed amendments to the States Parties to the present Covenant with a request that they notify him whether they favour a conference of States Parties for the purpose of considering and voting upon the proposals. In the event that at least one third of the States Parties favours such a conference, the Secretary-General shall convene the conference under the auspices of the United Nations. Any amendment adopted by a majority of the States Parties present and voting at the conference shall be submitted to the General Assembly of the United Nations for approval.

2. Amendments shall come into force when they have been approved by the General Assembly of the United Nations and accepted by a two-thirds majority of the States Parties to the present Covenant in accordance with their respective constitutional processes.

3. When amendments come into force they shall be binding on those States Parties which have accepted them, other States Parties still being bound by the provisions of the present Covenant and any earlier amendment which they have accepted.

Article 30

Irrespective of the notifications made under article 26, paragraph 5, the Secretary-General of the United Nations shall inform all States referred to in paragraph I of the same article of the following particulars:

- (a) Signatures, ratifications and accessions under article 26;
- (b) The date of the entry into force of the present Covenant under article 27 and the date of the entry into force of any amendments under article 29.

Article 31

1. The present Covenant, of which the Chinese, English, French, Russian and Spanish texts are equally authentic, shall be deposited in the archives of the United Nations.
2. The Secretary-General of the United Nations shall transmit certified copies of the present Covenant to all States referred to in article 26.